

## CHAPTER TWO – THE INSTITUTIONAL

The purpose of this chapter is to provide a brief history of the development of the doctrine of state action up to *West v. Atkins* (1988); and, to describe the institutional setting, contemporary values and the legal, social, and medical contexts in which *West* was granted certiorari and heard by the United States Supreme Court. In order to understand the history of the doctrine of state action it is necessary to look at the Fourteenth Amendment to the Constitution of the United States.

### **The Doctrine of State Action and the Fourteenth Amendment**

The Court's understanding of state action has been evolving as its "dialogue with itself" continues (Rohr, 1989). This evolving dialogue has produced insights as changing circumstances have challenged earlier interpretations, as the court's membership has changed, and as the political and external environments have prompted reviews and reinterpretations. In Chapter One, I quoted Jethro Lieberman's definition of state action as "... the rule that constitutional restraints and limitations may be applied only to things that the government does, not to actions of private individuals" (Lieberman, 1999) and Maimon Schwarzschild's efforts to encapsulate the concept:

The state action doctrine ... is the principle that the laws and policies of government must respect due process, equal protection, and free speech, but that there is no constitutional obligation on the private citizen or private organization to do likewise (Schwarzschild, 1989).

The principal issue for the Anti-Federalists in the Federalist/Anti-Federalist debates that preceded the ratification of the Constitution of the United States was one of protecting individuals from the extensive powers that were proposed for the new centralized federal government. The compromise forged to allay these concerns and gain adequate support for the proposed new constitution was an understanding that upon adoption the document would be

amended to incorporate a “Bill of Rights” to protect individuals from the potentially invasive powers of the new central authority. Ten of the proposed twelve “Bill of Rights” amendments were added to the U.S. Constitution on December 15, 1791.<sup>1</sup> The two amendments not ratified concerned the number of representatives in Congress and payments for their services. The 27<sup>th</sup> Amendment, ratified on May 7, 1992, was the salary amendment—which, having passed both houses of Congress by the constitutionally required extraordinary majority, remained dormant for over two hundred years (Lieberman, 1999, p. 68).

The resulting amended Constitution protected citizens from federal actions ranging from federal laws “abridging the freedom of speech, or of the press,” or “limiting the right of the people peaceably to assemble”<sup>2</sup> to protections against quartering soldiers in private homes without the consent of the owner.<sup>3</sup> The amendments included requiring probable cause for the issuance of search warrants,<sup>4</sup> and protected individuals from cruel and unusual punishment,<sup>5</sup> etc. However, the states were not similarly constrained. Justice Harry A. Blackmun, who served on the Supreme Court from 1970 to 1994, described the limited protections from state action afforded to individuals prior to the Civil War:

“...[T]he federal Constitution provides few substantive protections against oppressive state laws. Apart from section 10 of Article I, which forbids states from, among other things, passing any *ex post facto* law, bill of attainder, or law impairing the obligation of contracts, and apart from the developed application of the Bill of Rights to the states, the Constitution does not directly impose any barrier between the citizen and coercive state power. And even the protections guaranteed by the Bill of Rights, in their literal language, run against only the

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<sup>1</sup> Eleven states were required to ratify the Bill of Rights. On December 15, 1791, Virginia became the eleventh state. In honor of the Constitution’s sesquicentennial, Connecticut, Georgia, and Massachusetts symbolically ratified the Bill of Rights in 1939 (Lieberman, 1999, p. 68).

<sup>2</sup> First Amendment.

<sup>3</sup> Third Amendment.

<sup>4</sup> Fifth Amendment.

<sup>5</sup> Eighth Amendment.

federal government (*Barron v. Mayor of Baltimore*, 1833). ... [F]ederal law provided no affirmative remedy for the vindication of those constitutional rights that were specifically expressed and as to which state action was limited. To borrow a well-worn metaphor, the Constitution, as amended by the Bill of Rights, provided a shield rather than a sword. ... [F]ederal courts had no general jurisdiction over federal claims, constitutional or otherwise. As a result, a litigant who wanted to challenge the constitutionality of state action was remitted to the state courts, unless the happenstance of diversity of citizenship allowed him to place his suit on the federal side.<sup>6</sup> Almost without exception, the Supreme Court's most significant constitutional holdings in the years before the Civil War were reached in cases that came up through the state-court systems (Blackmun, 1989, pp. 229-230).

Examples of such cases include *Calder v. Bull* (1789), *McCullough v. Maryland* (1819), *Dartmouth College v. Woodward* (1819), and *Cooley v. Board of Wardens* (1852).

Writing in the 1960s, Robert McCloskey (2000) identified three periods in American constitutional development. Those periods were: "1789 to the close of the Civil War, 1865 to the "Court Revolution" of 1937; and 1937 to the present." He reported that the dominant interest of the Court in the earliest period was "all the questions left unsolved by the founders—the nation-state relationship." Describing the Court's major interest in the period between the Civil War and 1937 he opined "That [the] nation-state relationship ... was now subordinate; the fear that the states would wound or destroy the nation was replaced by the fear that government, state or national, would unduly hinder business in its mission to make America wealthy and wise" (McCloskey, 2000, p. 15, 17, 69).

Following the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted in 1865, 1868, and 1870 respectively. The Thirteenth Amendment abolishing slavery was followed

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<sup>6</sup> Blackmun referenced the Judiciary Act of 1789, § 12, 1 Stat. 79; and, P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's *The Federal Courts and the Federal System* 845, 1192-1193.

by several civil rights acts. The Act of April 9, 1866<sup>7</sup> was a statutory precursor to the Fourteenth Amendment. Blackmun tells us that section one of the act provided citizenship and its related rights to all persons born in the United States and conferred certain rights on all citizens “without regard to color.” Rights enumerated in this section included “the equal benefit of the laws, including the rights to make and enforce contracts, sue, give evidence, and purchase and own property” Section two imposed criminal sanctions on individuals who, while acting “under color of any law,” deprived any citizen of any state or territory of any of the rights enumerated in section one; and section three gave authority to the federal courts to hear cases related to the denial or lack of enforcement of these rights (Blackmun, 1989, p. 230).

An undergraduate pre-law student is expected to know that the Fourteenth Amendment is the vehicle by which most of the protections of the Bill of Rights are extended to protect the citizen from actions of the states and their subdivisions. However, the path to becoming an operational vehicle for that purpose was a tortuous one.

Section One of the Fourteenth Amendment states, in terms more general in nature than those of the Act of 1866, that,

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Several additional pieces of civil rights legislation were enacted by Congress to protect emancipated slaves following the Act of 1866. Among these was the Civil Rights Act of 1871, also called the Ku Klux Klan Act. Intended to support the Fourteenth Amendment, this act was aimed at the activities of the Ku Klux Klan. The intent of the act was to reach the activities of persons who, while not necessarily having the formally delegated authority of the state, deprived or conspired to deprive any citizen of his or her constitutional rights when the state either was

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<sup>7</sup> Now codified as 42 U.S.C. §§ 1981 and 1982.

unwilling or unable to provide a recourse or remedy. Section 1 of the act “provided a civil remedy for deprivations, under color of state law, of any of the rights, privileges, and immunities secured by the Constitution.” Civil and criminal penalties for conspiracy to deprive citizens of their constitutional rights were included in sections 2 and 3 of the act (Blackmun, 1989, p. 230-231).

The provisions in the act related to criminal conspiracy were struck down in 1883 in *U.S. v. Harris* (1883) on the grounds that Congress could legislate against *state* action only and therefore could not reach conspirators unaffiliated with the state. (Blackmun, 1989; Lieberman, 1999, p. 274). The general nature of the language of the Fourteenth Amendment made it vulnerable to attacks by the courts. Had the amendment had the specificity of the language in its precursor, the Act of April 9, 1866, it would have been less vulnerable to attacks on congressional implementation such as those found in *Harris*.

While the Court had found that Congress had no authority to reach *private* actions under the Fourteenth Amendment, the civil provisions of the act controlling state actions remained intact. Today these provisions are found in Title 42 U.S.C. §§ 1983 and 1985.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any Citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress (42 U.S.C. § 1983).

Section 1983 was to remain dormant until the latter half of the twentieth century when it became the principal vehicle for suits against state officials in federal courts (Blackmun, 1989; Kelly, Harbison, & Belz, 1991; Lieberman, 1999; Rosenbloom & O'Leary, 1997).

Because of the relationship of state action, as articulated in § 1983, as a byproduct of the Fourteenth Amendment, many of the cases discussed in the following are civil rights cases. However, they are included as part of a discussion of state action.

In 1873 the Supreme Court of the United States heard the *Slaughter-House Cases*. These cases evolved from an 1869 Louisiana legislative act giving Crescent City Live-Stock Landing and Slaughter-House Company the exclusive rights to slaughter animals in New Orleans—a monopoly granted as the result of bribery. Approximately one thousand butchers were disadvantaged by the granting of this monopoly. The butchers sued on the basis that the monopoly violated the Privileges and Immunities Clause of the new Fourteenth Amendment. They contended that the Louisiana act deprived them of the right “to purchase products, or to carry on trade, or to maintain [themselves and their families] by free industry” (*Slaughter-House Cases*, 1873; Lieberman, 1999). The Louisiana Supreme Court had “held that the law constituted a legitimate exercise of the police power of the state and thus upheld the constitutionality of the act” (Kelly et al., 1991, p. 388). The Supreme Court of the United States was split in its decision on the *Slaughter-House Cases*. The majority rejected the butchers’ arguments that the actions of the state deprived them of their livelihood and therefore violated the Privileges and Immunities Clause of the Fourteenth Amendment or that the Amendment had anything to do with economic matters beyond those related to the protection of individuals who had once been slaves. However, four justices dissented. Three justices held that the Fourteenth Amendment, especially the Due Process Clause, *was* applicable to economic issues and Justice Joseph P. Bradley, the fourth, objected to legislation benefiting a single corporation and to legislation depriving a large class of citizens of their liberty and property interests without due process of law (*Slaughter-House Cases*, 1873; Kelly et al., 1991, pp. 388-389).<sup>8</sup>

Justice Samuel F. Miller, writing for the majority of the Court reduced the question under consideration to “Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?” (83 U.S. 36, 65) and answered that question in the

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<sup>8</sup> “Ten years after the *Slaughter-House Cases* the Louisiana state legislature repealed the monopoly law. Crescent City sued on the basis that they had been deprived of due process in the rescission of their exclusive right to slaughtering in New Orleans. The Court upheld the law’s repeal in 1884 (*Butcher’s Union Slaughter-House v. Crescent City Live-Stock Landing Co.*, 1884; Lieberman, 1999).

affirmative. Addressing the constitutional issues raised by the plaintiffs, the Court pointed out that plaintiffs' argument rested on the assumption that being a citizen of the United States and being a citizen of a state are the same and that the privileges and immunities guaranteed were one and the same. Citing "fundamental" Article IV privileges and immunities<sup>9</sup> identified by Mr. Justice Bushrod Washington<sup>10</sup> in a case he heard in the Circuit Court for the District of Pennsylvania in 1823, (*Corfield v. Coryell*, 1823), the *Slaughter-House* Court interpreted the privileges and immunities of citizens of the states to be those falling under the headings of "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole" (83 U.S. 36, 76; *Corfield v. Coryell*, C.C.E.D.Pa. 1823). In contradiction to the most enthusiastic sponsors of the new clause who had intended to convert the rights of state citizens into privileges and immunities of United States citizenship, the *Slaughter-House* majority reasoned that the evil intended to be remedied by the Privileges and Immunities Clause of the Fourteenth Amendment was the "gross injustice and hardship" that had been imposed upon negroes as a class; and, it denied that "any action of a State not directed by way of discrimination against the negroes ... will ever be held to come within the purview of this provision" (83 U.S. 36 at 81; Congressional Research Service, 1992, p. 1568). Justice Miller concluded his opinion that the early passage of the first eleven amendments to the Constitution showed "a prevailing sense of danger at that time from the Federal power..." Reasoning that to find for the plaintiffs would upset the delicate balance between state and federal powers, the Court held that the Fourteenth Amendment framers still believed that the regulation of civil rights, the rights of persons and of property, were intended to remain within the purview of the states.

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<sup>9</sup> Alexander Hamilton, in *The Federalist* No. 80, spoke of the Privileges and Immunities Clause in the proposed Constitution serving as a vehicle for the resolution, by a national judiciary, of disputes between a state or its citizens and another state and its citizens (Cooke, 1961, p. 537). *Coryell* (1823) dealt with such a dispute between New Jersey and a Pennsylvania resident whose fishing vessel was seized for gathering oysters in violation of New Jersey law.

<sup>10</sup> Bushrod Washington, a nephew of George Washington, served as an associate justice on the Supreme Court from 1789 to 1829, a period of 31 years. The Judiciary Act of 1789 required Supreme Court justices also to serve as judges of the circuit courts—a responsibility that required substantial travel twice a year. Justice Washington heard *Corfield v. Coryell* in 1823 while "riding circuit."

Rosenbloom and O’Leary describe the *Slaughter-House* decision as “One of the most devastating decisions [of the U.S. Supreme Court] in terms of protecting individuals from state governments...” (Rosenbloom & O’Leary, 1997, p. 267). In one decision, the Court had effectively excluded almost all civil rights issues from the purview of the federal courts (*Harvard Law Review*, 1977).

The Court’s decision in the *Civil Rights Cases* (1883) was consistent with its decision in *U.S. v. Harris* (1883). The issues in the *Civil Rights Cases* were the Equal Protections Clause of the Fourteenth Amendment and the prohibition of racial discrimination in public accommodations and conveyances protected by the Civil Rights Act of 1875. Several cases from California, Kansas, Missouri, New York and Tennessee on this issue reached the Supreme Court. The lead case came from New York. The facts of this case were that the doorkeeper of the Grand Opera House had refused admittance to William R. Davis, Jr. and his companion. Both Davis and his companion were black.<sup>11</sup> Other cases dealt with hotel lodging, refusals to provide food, admission to the dress circle of a theater, and seating in the ladies car of a railroad (Lieberman, 1999, p. 92).

In a 9-1 decision the Court found for the owners of public accommodations. Justice Joseph P. Bradley, writing for the Court, found that neither the Thirteenth nor Fourteenth Amendments had granted Congress the power to prohibit such *private* racial discrimination in instances where the discrimination in question was neither incident to nor a badge of slavery. Justice Bradley acknowledged that actions incident to or found to be badges of slavery, although private action, would have fallen within the reach of the legislative powers of Congress. While the Thirteenth Amendment could reach private actions, the denial of admission to public accommodations was deemed neither incident to nor a badge of slavery and was thus deemed outside of the reach of Congress.

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<sup>11</sup> For a detailed description of the events that led up to this case, see Alan F. Westin, “The Case of the Prejudiced Doorkeeper” in Garraty, ed. (1988).

The first Justice John Marshall Harlan<sup>12</sup> was the lone dissenting voice. Harlan found sufficient nexus to state action in that the accommodations in question were licensed by the state. His dissent points out a difference of opinion between the Court and Congress:

I may be permitted to say that if the recent amendments are so construed that Congress may not, in its own discretion, and independent of the action or non-action of the States, provide by legislation of a direct character, for the security of rights created by the national Constitution; if it be adjudged that the obligation to protect the fundamental privileges and immunities granted by the Fourteenth Amendment to citizens residing in the several States, rests primarily, not on the nation, but on the States; if it be further adjudged that individuals and corporations, may, without liability to direct primary legislation on the part of Congress, make the race of citizens the ground for denying them that equality of civil rights which the Constitution ordains as a principle of republican citizenship; then, not only the foundations upon which the national supremacy has always securely rested will be materially disturbed, but we shall enter upon an era of constitutional law, when the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master (Harlan's dissent in the *Civil Rights Cases*, 1883 at 57; Blackmun, 1989).

In speaking about the *Slaughter-House Cases* and the *Civil Rights Cases*, Justice Blackmun (1989) contended that, "with a few quick thrusts, the Court cut the heart out of the Civil Rights Acts ..." (p. 234). The Court's narrow reading of the Fourteenth Amendments' Equal Protection Clause and the Privileges and Immunities Clause removed fundamental rights of citizenship from the reach of Congress and the federal courts and, because private abuses did not fall under the rubric of state action, they too were beyond reach (Blackmun, 1989, pp. 234-235).

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<sup>12</sup> There was a second Justice John Marshall Harlan who served on the Supreme Court from 1955 to 1971. However, the first Justice John Marshall Harlan served from 1877 to 1911. Appointed by President Hayes, the first Justice Harlan was a Republican who had served on the Louisiana Reconstruction Commission. Justice Harlan would again dissent in *Plessy v. Ferguson* (1896) asserting that "the Constitution is color-blind." (Kelly et al., 1991, p. 291, 583; Lieberman, 1999, p. 623).

The Fourteenth Amendment offered little constitutional protections against state actions for individuals at the end of the nineteenth century and the beginning of the twentieth. Following Florida's 1887 enactment of the first "Jim Crow"<sup>13</sup> laws establishing "separate-but-equal" railway cars for whites and blacks, such legislation spread quickly through the South. In 1891 the Citizen's Committee to Test the Constitutionality of the Separate Car Law was established by a group of black citizens. Homer Plessy, who was one-eighth black and could pass for white, took a seat in a white-only car and was asked to move to a black car by the conductor who was alerted to the plan. Plessy refused and was arrested—initiating the intended legal challenge to the Louisiana statute prohibiting blacks from riding in railroad cars reserved for whites (Lieberman, 1999, pp. 352-353).

The Court addressed the Equal Protection Clause of the Fourteenth Amendment in *Plessy v. Ferguson* (1896).<sup>14</sup> *Plessy* was a test of the Louisiana statute that prohibited blacks from riding in railroad cars reserved for whites. The Court's decision was 7-1 in favor of the respondents—with Justice Harlan again dissenting eloquently in what would become one of the most famous opinions in American constitutional history. However, the majority opinion, written by Justice Henry B. Brown, held that the Equal Protection Clause of the Fourteenth Amendment allowed states to make classifications, as long as they were reasonable. "Reasonable classifications" were those considered to be consistent with "established usages, customs, and the traditions of the people, and with a view to the ... preservation of the public peace and good order." The Court found that the Louisiana statute requiring separate-but-equal railway accommodations was reasonable and consistent with common usage, customs and traditions; furthermore, it preserved the public peace and good order. The majority held that laws may permit or require separate places to reduce contact of the races, but such laws do not imply a badge of inferiority or an inequity. In addressing the Fourteenth Amendment challenge, Brown reasoned that the amendment was intended to enforce the absolute equality of the two races before the law...but

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<sup>13</sup> "Jim Crow" was the title of a minstrel song from 1829. It offered a crude negative stereotype of a crippled old black man. The term would subsequently be used as a euphemism for segregation (*Encarta*, 2001).

<sup>14</sup> A description of events leading up to *Plessy v. Ferguson* and the plaintiff's consideration of potential constitutional challenges can be found in Garraty (1988).

that in the true nature of things, it could not have been intended to abolish racial distinctions, to enforce social equality, or to commingle the races.

Blackmun described the first forty years of the twentieth century as the Dark Age of Civil Rights. It was during this period that a group of sixty black and white leaders organized and held the first meeting of the National Association for the Advancement of Colored People (NAACP) on the anniversary of Abraham Lincoln's birthday, February 12, 1909.<sup>15</sup>

In response to the Court's decision in *Missouri ex rel. Gaines v. Canada* (1938) the NAACP moved to establish its Legal Defense and Education Fund and appointed Thurgood Marshall as its general counsel.<sup>16</sup> The case was an early attack on the separate-but-equal doctrine for failing to provide true equality for blacks and whites in state-sponsored legal education. Utilizing the separate-but-equal approach, Missouri had attempted to pay black students' tuition in adjacent states rather than admit them to the University of Missouri law school. The Supreme Court (divided 7-2) held that the policy violated the Equal Protection Clause by creating a privilege for white students which was denied to blacks—inasmuch as no out-of-state school taught Missouri law (Fisher, 2001, p. 852; Lieberman, 1999, p. 451).

However, *Missouri ex rel. Gaines v. Canada* (1938) was decided on the basis that the legal education offered to blacks was not equal and therefore left undisturbed the fundamental principle of separate-but-equal announced in *Plessy* (Blackmun, 1989; Kelley, 1988; Lieberman, 1999). There were other higher education cases (*Sweatt v. Painter*, 1950; *McLaurin v. Oklahoma State Regents*, 1950) in which black plaintiffs prevailed, but always on the grounds

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<sup>15</sup> The group included W. E. B. Du Bois who founded *The Crisis*, the principal publication of the NAACP, in 1910.

<sup>16</sup> The NAACP's role in initiating and supporting civil rights cases in the past century is enormous. It should also be noted that a number of attorneys who served that organization in some capacity, or the Civil Rights Division of the Justice Department, have become Supreme Court Judges, for example, Thurgood Marshall, Pierce Butler, and Felix Frankfurter. Frankfurter's inclusion on the list is somewhat surprising because of his conservative position on civil rights cases during his term on the Court.

that the legal education offered was not equal to that provided to white students.<sup>17</sup> It was not until 1954 that *Plessy* was finally overturned in *Brown v. Board of Education*.

Justice Blackmun asserted that *Monroe v. Pape* (1961) “although later overruled in part, is correctly credited [in *Monell v. New York City Department of Social Services*, 1978, 436 U.S. 658 at 663] as being a watershed in the development of section 1983” (Blackmun, 1989, p. 243). The facts of the case were that thirteen Chicago police officers broke into the Monroe apartment, awakened this black family and forced the couple to stand naked in the center of the living room while herding their six children into the same room. The Monroes were both physically assaulted and verbally abused by the officers who then ransacked their apartment. Mr. Monroe was taken into custody on “open” charges, interrogated about a murder, exhibited in a line-up, not brought before a magistrate, not advised of his procedural rights, not allowed to call his family or attorney, and—finally—released (Blackmun, 1989).

Justice Blackmun also drew attention to the resemblance of the circumstances of the Monroes to those of Joshua Wardlaw, a South Carolina black man whose story was read into the record of the 42<sup>nd</sup> Congress in 1871 while legislators were debating the Ku Klux Klan Act. Wardlaw testified that,

Pres. [sic.] Blackwell kicked one of my little children that was in bed. They took my brother-in-law’s gun and broke it against a tree in the yard. They laid me down on the ground, after stripping me as naked as when I came into the world, and struck me five times with a strap before I got away from them. After escaping they fired four shots at me, but did not hit me. I was so frightened I laid out in the woods all night, naked as I was, and suffered from the exposure. Mr. Richardson afterwards told me he was very sorry that I had escaped from them.

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<sup>17</sup> Texas attempted to establish a law school for African Americans after the plaintiff in *Sweatt v. Painter* (1950) had been denied admission to the law school for whites. The Court found the separate school denied black students the associations that are an essential element of law school education. In *McLaurin* (1950), Oklahoma admitted a black student to its only law school, but required him to remain apart from other students, similarly denying an opportunity for the associations that are a valuable element of legal education (*Annotated Constitution*, 1992, pp. 1841-42).

My brother-in-law died from the beating he got that same night (Blackmun, 1989, p. 242).<sup>18</sup>

This resemblance between the Wardlaw and the Monroe circumstances may well have influenced the majority of the Court who found that the 1871 Congress had intended to reach the type of conduct described in *Monroe*. They held it to be ...

... abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies (*Monroe v. Pape*, 1961, at 242).

Following *Monroe* the number of cases citing section 1983 increased substantially. While section 1983 was not used in *Brown v. Board of Education* (1954), it has been used to challenge state laws requiring loyalty oaths (*Keyishian v. Board of Regents*, 1967) and laws intended to prevent school children from wearing armbands protesting Vietnam War policies (*Tinker v. Des Moines School Dist.*, 1969). It was used as a vehicle to establish significant due process claims in *Supreme Court of Virginia v. Consumers Union of United States, Inc.* (1980) and in *Goldberg v. Kelly* (1979) a landmark case establishing the rights of welfare recipients to notice and hearing before termination of their benefits. It was also used by prisoners to obtain (minimal) due process rights in *Wolff v. McDonnell* (1974) and medical care in *Estelle v. Gamble* (1976) (Blackmun, 1989, pp. 244-245; Fisher, 2001; Lieberman, 1999).

### **Institutional Setting, Contemporary Values and Legal, Social, and Medical Contexts**

The post-World War II setting was one in which human rights again played a key role. The United Nations (U.N.) was established in San Francisco on June 26, 1945. The preamble to its

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<sup>18</sup> Blackmun citing Cong. Globe, 42d Cong., 1<sup>st</sup> Sess., 390 (1891) quoted Shapo, Constitutional Tort: *Monroe v. Pape* and the Frontiers Beyond, 60 *Nw. U.L. Rev.* 277 (1965).

charter proclaimed that the organization was determined to “save succeeding generations from the scourge of war,...” and “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ...” On December 10, 1948 the U.N. General Assembly adopted and proclaimed the Universal Declaration of Human Rights which started with the words, “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...”

The Nuremberg trials of German war criminals in the late 1940s had highlighted the dangers of bigotry and the slippery slope that is embarked upon when one singles out individuals as “different” or as lesser beings. The climate of the period following World War II was one of soul searching and of asking questions such as, “How did it happen?” and “Could it happen here?”

Elie Wiesel, a student of the human condition and former concentration camp inmate, has reflected on such questions for half a century. In a foreword to *The Nazi Doctors and the Nuremberg Code* (1992), Wiesel shared some of his musings:

I once read a dissertation—from the University of California, I think—by a psychiatrist who maintains that the sense of morality was not impaired in these killers [the Nuremberg defendants]. They knew how to differentiate between good and evil. Their sense of *reality* was impaired. Human beings were not human beings in their eyes. They were abstractions. This is the legacy of the Nuremberg Tribunal and the Nuremberg Code. The respect for human rights in human experimentation demands that we see persons as unique, as ends in themselves.

So maybe this is a lesson, a fragment, a part, a spark of a lesson that we could learn: When we teach, we must not see any person as an abstraction. Instead, we must see in every person a universe with its own secrets, with its own treasures,

with its own sources of anguish, and with some measure of triumph (Annas & Grodin, 1992, p. ix).

Immanuel Kant would agree—man should be “ends” rather than merely as a “means.”

While the most famous of the Nuremberg trials were those of officers of the Third Reich, the less well known Doctors’ Trial<sup>19</sup> may well have been one of the most disturbing as the world discovered that physicians—who had sworn to uphold the Hippocratic oath—had become murderers. Charges against the 23 Nuremberg physician-defendants were brought in the name of the United States of America. The military government in the U.S. zone of Germany organized the tribunal consisting of four judges<sup>20</sup> and an American prosecutor.<sup>21</sup> The trials produced the first in a series of international statements on human rights: the Nuremberg Code (Annas & Grodin, 1992, p. 4). Following the adoption of the Nuremberg Code, rights documents and international agreements proliferated in the area of medical experimentation.

The World Medical Association adopted the Declaration of Geneva and the International Code of Medical Ethics, followed by the first Declaration of Helsinki at the 18<sup>th</sup> World Medical Assembly in Helsinki, Finland in June 1964. The Declaration of Helsinki guided physicians involved in clinical practice and research. It was followed by three more declarations: in Tokyo (1975), Venice (1983), and in Hong Kong (1989).

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<sup>19</sup> The Doctors’ Trial was also known as the “Medical Case” or *United States of America v. Karl Brandt et al.*” Tried at Nuremberg, Germany in the Palace of Justice, the trial was Case No. 1 of Military Tribunal One. The authority for the tribunal was: (1) the November 1, 1943 Moscow Declaration of Atrocities, signed by Roosevelt, Churchill and Stalin; (2) Executive Order 9547, signed by Truman; (3) the London Agreement of August 8, 1945, signed by the United States, the United Kingdom, France, and the U.S.S.R.; and (4) the Charter of the International Military Tribunal and Control Council Law Number Ten, establishing a uniform legal basis for the prosecution of war criminals and similar defendants, signed on December 20, 1945. There were 23 physician-defendants and the tribunal convened 139 times, starting December 9, 1946 and ending August 19, 1947. The judgment concluded with the ten-point code that would become known as the “Nuremberg Code” (Annas & Grodin, 1992, p. 4).

<sup>20</sup> Walter Beals, Harold Sebring, Johnson Crawford, and Victor Swearingen (Annas & Grodin, 1992, p. 4).

<sup>21</sup> The chief prosecutor was James McHaney and Brigadier General Telford Taylor was chief counsel for the prosecution (Annas & Grodin, 1992, p. 4).

Karl Mannheim in *Ideology and Utopia* pointed out the need for an observer to be fundamentally interested in the roots of ethical change in the era in which he lives; and, to think through the problems of social life in terms of the tensions between social strata (Mannheim, 1936). In the United States, the 1978 Belmont Report, a report by the National Commission for the Protection of Human Subjects, attempted this task. The Belmont Report is credited with establishing a framework for the consideration of patient's rights and responsibilities in the United States. The ethical principles selected by that commission to underpin medical care as well as research were autonomy, beneficence, and justice. Focusing on the institutional setting, values, and context, the Commission's report spoke to social and institutional tensions as the inevitable consequences of the tensions between "freedom and social responsibility, privacy and the public need for information, and the degree to which citizens should be protected by government." These concerns reflect a broad spectrum of views about the human condition, the degree of authority that should be granted to the state, and what constitutes the general good. An examination of the ethical issues generated by these tensions and advancements in technology exposes unresolved social tensions and the diversity of our values. The Commission emphasized that democratic processes—processes protecting individuals and communities—must be employed to resolve such value conflicts (Commission, 1978, p. 7). Additional rights documents proclaimed the Rights of Mental Patients, the Rights of Hospital Patients, the Rights of Prisoners, and so forth. Could the courts be far behind?

Nancy Neveloff Dubler speculated about the tenor of the times and changing attitudes in an article in the October 1979 *Hastings Center Report*. She pointed out that attitudes toward prisoners and their attitudes about themselves were affected by social movements of the late 1960s and early 1970s. Specifically, the civil rights movement and the antiwar efforts and their progeny resulted in changes in the prison population. Numbers of well-educated, middle-class people were incarcerated as a result of participation in protest activities. A byproduct of their incarceration was a new awareness of prisoner rights. This new prison population raised both legislative and general awareness of prison conditions and initiated media revelations of treatment and conditions.

During the same period, a “new breed” of attorneys emerged in government funded legal services projects. These new projects provided pro-bono representation for inmates who, up until that time, had lacked access to such services. These attorneys initiated new legal challenges to previously uncontested prison policies—challenges to administrators to demonstrate that questioned regulations or practices furthered important or substantive governmental interests. (*Procurier v. Martinez*, 1973; Dubler, 1979).

North Carolina Prisoner Legal Services, Inc., established in 1978, was one of the publicly funded legal projects that Dubler referenced. It was this organization that agreed to represent Quincy West as his suit advanced to the Fourth Circuit Court of Appeals and the U.S. Supreme Court.

Lieberman (1999) tells us that in 1871 the Virginia Supreme Court had proclaimed that a prisoner had no constitutional rights but was “for the time being a slave of the state.” Generally speaking, the courts have deferred to the judgment of prison officials in matters of prison routine and discipline (*Cruz v. Bento*, 1972). Prison authorities may conduct shakedown searches for weapons and drugs whenever they choose without regard to Fourth Amendment rights related to unreasonable search and seizures (*Hudson v. Palmer*, 1984). Inmates may be transferred from one prison facility to another in another state or to one where conditions are worse without due process (*Meacham v. Fano*, 1976; *Olim v. Wakinekona*, 1983). However, prison officials may not maintain conditions that “involve the wanton and unnecessary infliction of pain” without running afoul of the Eighth Amendment’s ban on cruel and unusual punishment in the courts (*Hutto v. Finney*, 1978).

The number of section 1983 suits from incarcerated individuals grew substantially in the 1970s and 1980s leading to concerns that the statute was being overused. According to Roger Hanson and Henry Daley, in a January 1995 U.S. Department of Justice Bureau of Justice Statistics publication, *Challenging the Conditions of Prisons and Jails, A Report on Section 1983 Litigation*, the Court’s 1964 decision in *Cooper v. Pate* established that prisoners have constitutional rights. In 1966 the Administrative Office of the U.S. Courts first counted section 1983 cases filed in federal courts by prisoners. There were 218 cases. By 1986 the number had

reached approximately 17,000 cases filed by prisoners. The total was to climb to 26,824 by 1992 (Hanson & Daley, 1995).

Opinions differed as to whether the volume of cases was a problem for the courts. Harry Blackmun in a 1985 *New York University Law Review* article held that most section 1983 cases are disposed of at an early stage and that, as a result, the workload demands are overstated.<sup>22</sup> Warren E. Burger, former Chief Justice of the United States,<sup>23</sup> chaired the Federal Courts Study Committee. The 1990 report of that committee contended that prisoner suits are a waste of scarce court resources, that it is difficult to determine the merit of such cases, and that many are matters that should be handled in a small claims court. That report proposed the transfer of such cases to state courts or that prisoners exhaust remedies provided under the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA)<sup>24</sup> (Federal Courts Study Committee, 1990).

*Estelle v. Gamble* (1976) preceded *West v. Atkins* and other Eighth Amendment prisoner suits. Gamble was a prisoner in a Texas state prison who had been injured when a bale of cotton fell on him while he was loading a truck. Gamble claimed to have severe back pain that was not adequately treated—although he received exemptions from work and had been treated on 17 occasions within a three-month period following his injury. Originally heard at the district court level, the complaint, based on section 1983 and the Eighth Amendment, contended that the prisoner was subjected to cruel and unusual punishment because of inadequate treatment of a back injury sustained while he was engaged in prison work. Gamble contended that his treatment was inadequate because of the prison physician’s failure to perform x-ray and additional diagnostic techniques. The district court dismissed the suit for failure to state a claim upon which relief could be granted. The Fifth Circuit Court of Appeals reversed and remanded, instructing the lower court to reinstate the case.

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<sup>22</sup> This article was reprinted in Dorsen (1987, 1989).

<sup>23</sup> Judicial historian Peter G. Fish notes that,

Commissions issued to John Jay through Morrison Waite denoted each as “chief justice of the Supreme Court of the United States.” But Fuller, commissioned in 1888, became the first “chief justice of the United States,” a title given significance by Taft (Hall, ed., 1992, p. 141).

<sup>24</sup> 42 U.S.C. § 1997e.

The Supreme Court reversed the Court of Appeals judgment and remanded while providing a standard for the determination of “deliberate indifference” to prisoners’ medical needs. The Court held that,

... deliberate indifference to a prisoner’s serious medical needs constituted cruel and unusual punishment under the Eighth Amendment and gave rise to a civil rights cause of action under 42 USCS 1983, regardless of whether the indifference was manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed (*Gamble*, 1976, 104-105 & nn.10 & 11).

Gamble did not claim that he was denied care. He claimed that the care he received was inadequate. The Court held that in this instance, the “inadvertent failure to provide adequate medical care,” does not support a claim of medical mistreatment (*Gamble*, 1976, 105-106). The Court found that the issue was a disagreement about what constituted appropriate treatment. However, while Gamble did not prevail in his suit, his efforts were a step forward in providing inmates of correctional institutions with a legal vehicle for federal medical mistreatment claims.

The Fourth Circuit Court of Appeals addressed the thorny issue of medical services provided in a prison setting by a contract physician in *Calvert v. Sharp* (1984). In this case, Charles Calvert, an inmate at the Maryland Penitentiary, sued Dr. Nathaniel Sharp, a private physician, alleging that the physician had failed to provide him with medical treatment. Dr. Sharp requested dismissal and summary judgment of the case on the grounds that he had not acted under color of state law.

Dr. Sharp was an orthopaedic specialist in the employ of Chesapeake Physicians, P.A., a Maryland non-profit corporation that employed physicians and other health personnel and provided medical services throughout the Baltimore Area. In addition, the corporation also provided services to inmates in correctional facilities through a contract with the state of

Maryland. Dr. Sharp treated inmate patients at these facilities upon referral by other physicians. Calvert, who had numerous medical problems, was referred to Sharp on five different occasions between July 1980 and December 1981. While there were no allegations that Dr. Sharp had refused to see the inmate, the physician did not see him during that period. Calvert claimed that this lack of treatment violated his Eighth Amendment rights.

The issue for the Court of Appeals was a jurisdictional one. Its controlling precedent was *Polk County v. Dodson* (1981), wherein the Supreme Court had held that,

To maintain a § 1983 action a plaintiff must establish as a jurisdictional requisite that the defendant acted under color of state law. ... A person acts under color of state law “only when exercising ‘power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” ... The ultimate issue in determining if a person is subject to suit under § 1983 is whether the alleged infringement of federal rights is fairly attributable to the state.

Because Calvert is an inmate we have liberally construed his *pro se*<sup>25</sup> complaint and his response to Dr. Sharp’s motions in making this inquiry. ... We have also examined the evidence submitted to us in the record in determining that subject matter jurisdiction does not exist (Calvert, 748 F.2d at 862).

Upon appeal the Supreme Court denied certiorari.

Heard by the Supreme Court in 1981 and cited in *Calvert v. Sharp*, *Polk County v. Dodson* also dealt with a subtlety of state action. Russell R. Dodson, convicted for robbery in a state court, brought a *pro se* complaint in the federal District Court for the Southern District of Iowa under section 1983 alleging that a public defender who was employed by the county had not adequately represented him. He asserted that the public defender assigned to represent him in his appeal to the Iowa Supreme Court had moved for withdrawal as counsel on the grounds that his claims

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<sup>25</sup> A *pro se* complaint is one brought by an individual in his own behalf—that is, one filed without the services of an attorney.

were legally frivolous. The court granted her motion. Dodson brought suit in district court claiming that the public defender's action had deprived him of the right to counsel, subjected him to cruel and unusual punishment, and denied him due process of law. As in *Sharp*, the issue was one of jurisdiction. The claim was based on the public defender's employment relationship with the county. The district court dismissed the claim on the grounds that the public defender had not acted under color of state law. The Eighth Circuit Court of Appeals reversed.

The Supreme Court, examining the functions of public defenders, reversed the appellate court and held that a "public defender does not act 'under color of state law' when performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding." The opinion, delivered by Justice Lewis F. Powell, Jr., explained that the relationship of a public defender to a client is the same as any other lawyer, that is, to advance the "undivided interest of his client,"<sup>26</sup> except for the source of payment, and that the nature of that relationship is assumed to be one of "adversarial testing [that] will ultimately advance the public interest in truth and fairness" (*Polk County*, 1981, at 318). However, the Court held that it was also an attorney's ethical obligation not to clog the courts with frivolous motions or appeals.

Melvin Eisenberg pointed out that the common law has traditionally been concerned with the entwined relationships between values, rights, and injuries. He linked changes in the common law to changes in community norms and asked rhetorically:

... What criteria should a moral norm satisfy if it is to figure in common law reasoning? The answer is that when moral norms are relevant to establishing, applying, or changing common law rules, the courts should employ social morality, by which I mean moral standards that claim to be rooted in aspirations

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<sup>26</sup> Justice Powell cited *Ferri v. Ackerman* (1979) in which the Court held:

[T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendant, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation (*Ferri v. Ackerman*, 1979, at 204).

for the community as a whole, and that, on the basis of an appropriate methodology, can fairly be said to have substantial support in the community, can be derived from norms that have such support, or appear as if they would have such support (Eisenberg, 1988, p. 15).

Changing norms were evidenced in early patients' rights documents emerging after World War II. These new documents appeared in a context of concern about informed consent and the protection of institutionalized individuals or those otherwise unable to protect themselves. Ruth Faden and Tom Beauchamp, in *A History of Informed Consent* (1986), assert that the legal perspective on informed consent was beginning to be presented to medical students in the 1970s, that eleven biomedical ethics texts were published during the decade, and that most of these new texts had sections on informed consent (Faden, 1986, p. 95). *The Journal of the American Medical Association* (JAMA) printed a series of articles on informed consent in November 1970. Written by Angela Roddey Holder of the Office of the General Counsel of the American Medical Association (AMA), these articles described the legal precedent of informed consent, outlined its evolution, its obligation, and its limitations (Holder, 1970a; Holder, 1970b; Holder, 1970c).

Early case law in informed consent includes *Schloendorff v. Society of New York Hospital* (1914), a case often cited in the area of medical consent. The case emphasized the right of an individual to decide what shall or shall not be done to his or her body.<sup>27</sup> Judge Benjamin N. Cardozo, writing for the Court stated,

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages (211 N.Y. 125, 126; 105 N.E. 92, 93, 1914).

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<sup>27</sup> The substance of the case was the removal of a fibroid tumor from a patient who had consented to an abdominal examination under anesthesia and specifically stated "no operation..."

The right of a patient to consent to medical treatment became “informed” in the landmark decision of *Salgado v. Leland Stanford Jr. University Board of Trustees* (1957).<sup>28</sup> The court’s decision in *Salgado* challenged earlier interpretations of the physician’s duty of beneficence<sup>29</sup> and established a new standard for consent—a standard that acknowledged the individual’s autonomy and an associated right to adequate information to make informed decisions about what could or could not be done to his/her body. Because it dealt with the tension between paternalistic medicine which used the physician’s duty of beneficence as an overriding value and a newly emerging understanding of patient autonomy, the *Salgado* decision was central to, or indicative of, a paradigm shift from a paternalism model of healthcare to a patient autonomy model.

The patient autonomy concept was reiterated in 1960 in *Natanson v. Kline*. *Natanson* also specifically restrained the physician from assuming the traditional paternalistic approach and doing what he or she thought best for the patient. That court stated:

A man is the master of his own body and he may expressly prohibit the performance of life-saving surgery or other medical treatment. A doctor may well believe that an operation or other form of treatment is desirable or necessary, but *the law does not permit him to substitute his own judgment for that of the patient* by any form of artifice or deception [Emphasis added] (186 Kan. at 406-407, 350 P.2d at 1104).<sup>30</sup>

Although Mrs. Natanson had consented to cobalt radiation therapy following a mastectomy, she brought her malpractice claim on the basis that she had not been adequately warned of the risks associated with the treatment. The court agreed and established the duty of disclosure—

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<sup>28</sup> Salgado sued his physicians for negligence after he was permanently paralyzed following a diagnostic procedure (a translumbar aortography); and, because the physician failed to inform him that there was a risk of paralysis associated with the procedure.

<sup>29</sup> The duty, or obligation, of beneficence was discussed in Chapter One, page 7, footnote 4.

<sup>30</sup> “[Q]uoted without attribution Hubert Winston Smith, “therapeutic Privileges to Withhold Specific Diagnosis From Patient Sick With Serious or Fatal Illness,” *Tennessee Law Review* 19 (1946): 349f” (Faden, 1986).

to disclose and explain to the patient in language as simple as necessary the nature of the ailment, the nature of the proposed treatment, the probability of success or of alternatives, and perhaps the risks of unfortunate results and unforeseen conditions within the body (Faden, 1986, p. 130).

Holder pointed to 1960 case law which started with what she called “the premise that self-determination is a basic right of free men.” In the ensuing discussion she defined the doctrine of informed consent as “the duty to warn a patient of the hazards of new and experimental or unusual therapy as well as the possible complications or expected results of more standard treatment” (Holder, 1970a, p. 1181).

Refinement of the concept of informed consent continued in the courts. In 1972, the year the American Hospital Association (AHA) adopted its *Patient’s Bill of Rights* (Countryman & Gekas, 1980), there were three landmark decisions related to physician negligence: *Canterbury v. Spence* (D.C. Cir. 1972), *Cobbs v. Grant* (1972), and *Wilkinson v. Vesey* (R.I. 1972).<sup>31</sup>

In the 1970s, news reports of horrific medical experimentation on vulnerable subjects fueled public concerns and led to the institution of oversight mechanisms to control medical research at a community or organizational level. Experimentation drawing media attention included the

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<sup>31</sup> *Canterbury*, the most significant of the three, was an action brought by a patient who had undergone a procedure to surgically remove the posterior arch of a vertebra (laminectomy). After the surgery the patient fell out of bed and not long after the fall he became paralyzed. The patient had not been warned that there was a one percent chance of paralysis associated with the procedure. The court’s decision focused on the patient’s right to self-determination:

True consent to what happens to one’s self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible (464 F.2d at 780).

... This disclosure requirement, on analysis, reflects much more of a change in doctrinal emphasis than a substantive addition to malpractice law. ... [I]t is evident that it is normally impossible to obtain a consent worthy of the name unless the physician first elucidates the opinions and the perils for the patient’s edification... (464 F.2d at 781).

Tuskegee Syphilis Study, the Willowbrook Studies, and the Jewish Chronic Disease Hospital Study. In each instance, the research undertaken was cloaked in an aura of scientific respectability, i.e., learning more about disease processes. However, the rights and the welfare of the particularly vulnerable individuals used as research subjects were seriously compromised.

The Tuskegee Syphilis Study, initiated by the United States Public Health Service in 1932 in Macon County, Alabama, was intended to determine the course of untreated latent syphilis in black males. The test involved 400 black males with syphilis and 200 uninfected controls. When penicillin became the accepted treatment for syphilis in the 1950s, treatment was not only withheld from the infected study participants, but active steps were taken to prevent their treatment. The study was ended in 1972 when the first accounts of the Tuskegee Syphilis Study appeared in the national press. Seventy-four of the participants remained alive and an estimated twenty-eight to one hundred participants had died from advanced syphilis at a time when penicillin was available for effective treatment of the disease (Faden, 1986, pp. 165-167).

The Willowbrook Studies, an examination of the history of infectious hepatitis, were designed as a study in nature.<sup>32</sup> The second portion of this study included a test of the effectiveness of gamma globulin in prevention and amelioration of the disease. The studies were conducted at the Willowbrook State School, a New York State school for the developmentally disabled. The children who served as research subjects were infected with hepatitis A as part of the study. Investigators justified their actions by stating that the children probably would have gotten the disease anyway as a result of the over crowded nature of the institution (Faden, 1986, pp. 163-164; Levine, 1986, pp. 70-71).

In the Jewish Chronic Disease Hospital Study, an experiment by a Sloan-Kettering Cancer Research Institute, an investigator injected live cancer cells into elderly patients hospitalized with chronic debilitating diseases. The intent of the study was to develop information about the nature of human transplant rejection processes (Faden, 1986, pp. 161-164; Hamilton, 1980; Katz, 1972, pp. 9-65; Levine, 1986, 71).

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<sup>32</sup> A *study in nature* is an uncontrolled study of a disease occurrence absent intervention or treatment.

Public exposés heightened public concerns for vulnerable persons such as those who were institutionalized, children, minorities, the disabled, and prison inmates. At the time of his injury, Quincy West was incarcerated and his rights to medical care were circumscribed by the state. Had he been treated outside of a prison-based system, he should have been afforded the level of physician-patient communication prescribed by the courts in *Natanson* and the level of care prescribed by the AHA in their Patients' Bill of Rights. For reasons that will be discussed in later chapters, West elected to file his suit in federal courts rather than pursue state judicial avenues.

The broader context in which West brought his complaint to the federal courts in the 1980s was one in which: (1) the rights of prisoners and other vulnerable persons were being highlighted; (2) there was a paradigm shift in health care practice from paternalistic medicine to an emerging model based on patient autonomy; (3) there was a growing trend to privatize public services; (4) there were ongoing debates about the “overuse” of section 1983; and, (5) the courts were refining their jurisprudence about what constitutes state action. Section 1983, in conjunction with the Eighth Amendment, was used by West to sue officials acting under color of state law. The principal issue addressed by the Court in *West* (1988) was whether or not respondent Atkins, a private contractor, was a state actor for the purposes of section 1983.

In this chapter I have offered a brief and selective description of the development of the doctrine of state action up to *West*; discussed the institutional setting in which *West v. Atkins* was heard by the courts; and, described the contemporary values and the legal, social, and medical contexts in which West was granted certiorari by the United States Supreme Court. The following chapter will detail West's complaint regarding his medical treatment, the initiation of his complaint in the courts, and that complaint's progress through the federal court system.