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Service without a Smile: Proprietors of Gas Stations Must Serve without Discrimination

Mark C. Clements

mal injustice of retroactively applying article 7519a to existing appropriative rights.

IV. CONCLUSION

Wright attempts to reconcile the contradictory nature of an appropriative water right. An appropriative right is a limited vested right because it is merely the vested right to use the water of the state for beneficial purposes. In the past if an appropriator had initially applied his water to beneficial uses, he had perfected a vested right that could be lost only by willful abandonment. But *Wright* holds that an appropriator never perfects his water right beyond the power of the state to enforce the duty of beneficial use. A water right carries with it an implied promise to continue to put the water to beneficial use, and failure to fulfill this promise is a "breach" justifying revocation of the right. Thus, in the future the state can enforce the condition of beneficial use without impairing vested water rights.

The Nevada Supreme Court in *Manse Springs* did not deem the public interest sufficient to justify forfeiture of a vested right. The Texas court recognized the advantages of a mandatory forfeiture statute[76] and the importance of putting water to beneficial use in light of the scarcity of water in Texas. However, both courts assumed that the rights involved were "vested rights" without analyzing the particular circumstances involved. The Nevada court looked for a compelling state interest to justify impairing a vested right, and the Texas court implied an existing wrong in order to retroactively supply a remedy. Instead, "vested right" should be a label attached *after* weighing of public and private interest. Considering the public interest in water conservation and the protection afforded individual rights by article 7519a, the permittee's appropriative rights were not "vested rights." Proper use of the term "vested rights" in future decisions would avoid resort to the distinction between rights and remedies.

Emily Parker

Service Without a Smile: Proprietors of Gas Stations Must Serve Without Discrimination

Fourteen persons in several cars drove into a gas station operated by the defendant Brogan. Brogan refused to sell gasoline to these persons because they displayed the peace symbol, a practice Brogan believed to be antichristian and

in Texas had not been used by the appropriators for 15 years. Forfeiture of these unused water rights would make these waters available for appropriation by beneficial users. C. JOHNSON, CASES AND MATERIALS ON TEXAS WATER LAW 74 (1949).

[76] Although unused water rights can be lost by abandonment, forfeiture provides a much more efficient remedy because intent to abandon need not be proved. J. SAX, *supra* note 73, at 286. Forfeiture statutes usually operate after only a few years of nonuse, while most abandonment statutes require nonuse for a great many years. Although art. 7519a requires 10 years of nonuse, proof of abandonment often requires well over 10 years. *See, e.g.*, Knapp v. Colorado River Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

atheistic.[1] Plaintiffs were members of the Middlesex County College Students for Peace, and stated that they exhibited the peace symbol to show their opposition to the continuing war in Southeast Asia. Under threat of arrest, the plaintiffs left the station. They brought a class action seeking to enjoin Brogan from refusing to serve or sell products to anyone displaying the peace symbol. *Held, injunction granted*: Gasoline station operators come within the common-law rule requiring innkeepers, farriers, carriers, and the like to serve the public without discrimination. *Streeter v. Brogan*, 113 N.J. Super. 486, 274 A.2d 312 (1971).

I. SERVICE WITHOUT DISCRIMINATION: AT COMMON LAW AND UNDER THE CIVIL RIGHTS ACTS

The Common-Law Rule. The common-law duty of those tradesmen involved in a public calling to serve the public without discrimination is an old and well-established rule. The first reported case of a tradesman refusing to serve the public occurred in 1450,[2] and an action was held to lie for the refusal.[3] The rationale for this rule encompassing public callings was initially one of necessity.[4] The medieval Englishman required the services of bakers, millers, tailors, doctors, and innkeepers. All these services amounted to monopolies, because generally there was only one practitioner of each trade within walking distance of the public.

Under the common-law rule it was the duty of innkeepers and carriers to accept all who applied, with reasonable exceptions. Presumably these excepted classes were defined by what was reasonable under existing circumstances.[5]

Recent applications of the rule to tailors, millers, bakers, and smiths are not to be found, for obvious reasons.[6] The rule is still applied to innkeepers and carriers, as their calling is still said to be "common" and hence affected with a public interest.[7] But today no innkeeper or carrier can maintain the monopoly

[1] Brogan had previously put up a sign on his lot stating that he believed the peace symbol to be the symbol of hate and capitulation as well as antichristian and atheistic. Streeter v. Brogan, 113 N.J. Super. 486, 274 A.2d 312, 313 (1971).

[2] Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 424 (1927) (citing 72 Eng. Rep. 208 (K.B. 1450)).

[3] "Where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case . . . ." *Id.* at 424.

[4] Quindry, *Airline Passenger Discrimination*, 3 J. AIR L. 479, 484 (1932).

[5] Brown v. Memphis, & C.R.R., 5 F. 499 (C.C.W.D. Tenn. 1880) (immoral persons); Hines v. Miniard, 208 Ala. 176, 94 So. 302 (1922) (insane persons); Casteel v. American Airways, Inc., 261 Ky. 819, 88 S.W.2d 976 (1935) (diseased persons); Coquelet v. Union Hotel, 129 Md. 544, 115 A. 813 (Ct. App. 1921) (couples without luggage); Yazoo & M.N.R.R. v. O'Keefe, 125 Miss. 536, 88 So. 1 (1922) (infants); Edgerly v. Union St. R.R., 67 N.H. 312, 36 A. 558 (1893) (disorderly or insulting persons); Parks v. Delaware, L. & W.R.R., 85 N.J.L. 577, 89 A. 983 (Sup. Ct. 1914) (intoxicated persons); Daniel v. North Jersey St. Ry., 64 N.J.L. 60, 46 A. 625 (Ct. App. 1900) (persons carrying small animals); Ray v. United Traction, 96 N.Y. App. 48, 89 N.Y.S. 49 (Sup. Ct. 1904) (persons carrying large packages); Dowd v. Albany Ry., 47 App. Div. 202, 62 N.Y.S. 179 (Sup. Ct. 1900) (persons carrying dangerous items); The Queen v. Rymer, 2 Q.B.D. 138 (1877) (persons with large dogs); Lane v. Cotton, 88 Eng. Rep. 1458 (K.B. 1701) (inn being full).

[6] The common-law rule has not been applied to tailors, bakers, millers, or smiths for quite some time. Tailors and bakers would be business enterprises covered sufficiently by appropriate statutory authority, whereas smiths and millers would be modern day anachronisms, thereby making cases applying a common-law rule to them rare.

[7] Munn v. Illinois, 94 U.S. 113, 126 (1896); Salisbury v. Borough of Ridgefield, 137 N.J.L. 515, 60 A.2d 877, 878 (Sup. Ct. 1948); Holly v. Meyers Hotel & Tavern, Inc., 15

enjoyed by his medieval brethren. The original policy rationale, therefore, no longer pertains.[8]

The New Jersey Civil Rights Act.[9] The New Jersey Act was originally passed in 1884[10] and was patterned after the Federal Civil Rights Act of 1875.[11] The legislative trend since that time has been to bring more classes of persons within the Act. In 1917 the Act was amended to include a definition of a "public accommodation, resort, or amusement."[12] This comprehensive definition was widened in 1921 when the Act was again amended to include additional places of public accommodation.[13] That amendment also prohibited publishing any advertisement indicating that accommodations would be denied any person because of his race, color, or creed. The Legislature of New Jersey included discrimination based on national origin and ancestry in 1945 along with the already provided classes of race, color, and creed.[14] Discrimination based on marital status, age, and sex was eventually proscribed.[15]

The Supreme Court of New Jersey has construed the New Jersey Civil Rights Act in a strict manner. In *Garifine v. Monmouth Park Jockey Club*[16] the court held the Act to prohibit discrimination only against those classes of persons expressly set forth in the statute, so that any discrimination not based on the classes provided in the Act is not proscribed.

The Federal Civil Rights Act. The first federal statutory attempt to curtail discrimination was the Civil Rights Act of 1866.[17] In 1875 a new civil rights act became law.[18] The 1875 act was declared unconstitutional in 1883 in the *Civil*

N.J. Super. 381, 83 A.2d 460, 461 (1951); Arterburn, *supra* note 2, at 420.

Carriers may now be sued under one of several statutes for the wrongful refusal to serve. *See generally* the Interstate Commerce Act, § 3(1), 49 U.S.C. § 3(1) (1964); or with respect to airline carriers, the Federal Aviation Program, § 404(b), 49 U.S.C. § 1374(b) (1964).

[8] *See, e.g.*, Crapo v. Rockwell, 48 Misc. 1, 94 N.Y.S. 1122, 1123 (Sup. Ct. 1905), in which it was stated: "With the march of civilization and the progress of commercial development, the conditions in which the common law liability of the innkeeper to his guest originated have passed away."

[9] N.J. REV. STAT. §§ 10:1-1 to 10:5-28 (1970).

[10] Ch. 219, § 1, [1884] N.J. Acts 339.

[11] Act of March 1, 1875, ch. 114, 18 Stat. 335.

[12] Ch. 106, § 1, [1917] N.J. Acts 220.

[13] Ch. 174, § 1, [1921] N.J. Acts 468.

[14] Ch. 169, § 4, [1945] N.J. Acts 589.

[15] Ch. 80, § 1, [1970] N.J. Acts 1; ch. 37, § 4, [1962] N.J. Acts 158.

[16] 29 N.J. 47, 148 A.2d 1 (1959). The Supreme Court of New Jersey stated several times that the New Jersey Civil Rights Act "was obviously aimed at discrimination based on color and left unimpaired the *right of exclusion for unrelated reasons.*" 148 A.2d at 7 (emphasis added). Though later amended to include discrimination based on national origin, ancestry, and creed, "it is clear from the terms of the statute that it did not in any wise bear upon the right of exclusion for other reasons." *Id.*

[17] Act of April 9, 1866, ch. 31, 14 Stat. 27. The purpose of the Act was to put the thirteenth amendment into effect by the elimination of discrimination that existed against the Negro, by providing that citizens of every race and color shall have the same right to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property; and to enjoy equal benefit of all laws enjoyed by white citizens.

[18] Act of March 1, 1875, ch. 114, 18 Stat. 335. This Act was intended to obtain equality for the Negro in the area of public accommodations. All persons were to be entitled to enjoy the accommodations and advantages of inns, public conveyances, theaters, and places of public amusement without regard to race, color, or previous condition of servitude.

Rights Cases[19] because of limitations it imposed upon private behavior purportedly by the authority of the fourteenth amendment, which reaches only state action. The Civil Rights Act of 1964 achieved the same goals set forth in 1875 by use of the commerce clause.[20]

Title II of the Civil Rights Act of 1964[21] is designed to prohibit discrimination or segregation in places of public accommodation. It is to be "liberally construed and broadly read."[22] Title II expressly sets forth what establishments are included as public accommodations.[23] Gasoline stations are expressly included in the Act,[24] and have been defined as a public accommodation in *Presley v. City of Monticello.*[25] Although the Act requires a "substantial portion" of the products sold to have travelled in interstate commerce,[26] it is difficult to imagine a business which fails to come within the ambit of the Act.[27]

Section 1983 and State Action. In 1871 the Ku Klux Klan Act was passed.[28] The first section of that Act became the present section 1983.[29] This section was spared the same fate as the 1875 Civil Rights Act because of its reference to action taken "under color of" state law. From comments made during the debate on the Civil Rights Act of 1871, it can be seen that the first section was intended to be directed at conduct supported by state action.[30]

In the landmark case of *Monroe v. Pape*[31] the Supreme Court of the United

[19] 109 U.S. 3 (1883).

[20] U.S. CONST. art. I, § 8.

[21] Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447(d), 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000d-4, 2000e to 2000h-6 (1964)).

[22] Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 349 (5th Cir. 1968). The constitutionality of Title II has been upheld by the United States Supreme Court. The Court ruled that Congress had the power under the commerce clause to control the "disruptive effect that racial discrimination has had on commercial intercourse." Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964). That Congress deemed racial discrimination a social or moral wrong, the Court stated, did not restrict the exercise of the power. *Id.*

[23] 42 U.S.C. §§ 2000b(1)-(4) (1964).

[24] *Id.* § 2000b(2).

[25] 395 F.2d 675 (5th Cir. 1968).

[26] 42 U.S.C. § 2000c(2) (1964).

[27] The Supreme Court held the Act to apply to a restaurant that bought 46% of its food from out of state. Katzenbach v. McClung, 379 U.S. 294 (1964). Subsequently, the Court stated the sale of "three or four food items" which contained ingredients which had travelled in interstate commerce met the substantial portion requirement. Daniel v. Paul, 395 U.S. 298, 305 (1968). "The snack bar's status as a covered establishment automatically brings the entire . . . facility within the ambit of Title II." *Id.* Thus, the lower limit of the substantial portion requirement used to invoke Title II is substantially lower than the 46% level which invoked the Act in *McClung.*

[28] Act of April 20, 1871, ch. 22, 17 Stat. 13.

[29] 42 U.S.C. § 1983 (1964).

[30] Representative Shellabarger, Chairman of the House Select Committee which drafted the Act, commented: "Section 1 in its terms was carefully confined to giving a civil action for such wrongs against citizenship as are done under color of state laws which abridge these rights." CONG. GLOBE, 42d Cong., 1st Sess. 317 (1871).

For many years after its enactment, the first section of the Civil Rights Act of 1871 was narrowly construed. *See, e.g.*, Brawner v. Irvin, 169 F. 964 (C.C.N.D. Ga. 1909); Wadleigh v. Newhall, 136 F. 941 (C.C.N.D. Cal. 1905); Isaacs v. McNeil, 44 F. 32 (C.C.S.D. Wash. 1890). *See also* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969). In 1891 a federal district court in Kansas described the section as "declaratory" and stated that the section created no new rights. Hemsley v. Myers, 45 F. 283, 290 (C.C.D. Kan. 1891). As of 1936 only nineteen decisions had been recorded under the section. *See, e.g.*, Myers v. Anderson, 238 U.S. 368 (1915); Giles v. Harris, 189 U.S. 475 (1903); California Oil & Gas Co. v. Miller, 96 F. 12 (C.C.S.D. Cal. 1899). *See also* Note, *supra.*

[31] 365 U.S. 167 (1961); *see* Note, *Civil Rights—School Officials Not Persons for Purposes of Section 1983 Regardless of Relief Sought*, 24 SW. L.J. 360 (1970).

States made previous interpretations of the criminal counterpart sections applible to section 1983.[32] The Court set forth in *Monroe* the "three main aims" of section 1983.[33] The first aim was to override certain types of state laws; the second was to provide a remedy when state law was inadequate; and the third aim was to provide a remedy when state law was inadequate in practice although available in theory. In *McNeese v. Board of Education*[34] Justice Douglas added the fourth aim of providing a remedy in federal court supplementary to any state remedy, adequate or otherwise.[35]

II. THE COMMON-LAW RULE APPLIED TO GAS STATION PROPRIETORS: STREETER V. BROGAN

The Court's Analysis. In *Streeter v. Brogan*[36] the court dealt briefly with Brogan's reason for refusing to serve the plaintiffs. The court was not of the opinion that the alleged pacificism of the plaintiffs was a "creed" that would bring the refusal to serve within the New Jersey civil rights statute dealing with public accommodations. Nor was the court of the opinion that Brogan refused to serve the plaintiffs for religious reasons, which would invoke the Civil Rights Act of 1964. In the court's words, "Brogan refused service to the plaintiffs because they displayed the peace symbol . . . ."[37] The court stated: "No reported opinion has construed 'creed' in [the New Jersey Civil Rights statute] or 'religion' in [the Civil Act of 1964] as encompassing a moral or ethical creed apart from a formal religious creed."[38] It would seem that Brogan's reason was based, at least partially, on religious grounds. He disliked the display of the peace symbol because in his mind it was antichristian and atheistic. To this contention the court stated that, in light of its widespread use, Brogan had no reasonable grounds to suppose that all who displayed the peace symbol were

[32] In United States v. Classic, 313 U.S. 299 (1941), the Court interpreted the criminal counterparts of section 1983, 42 U.S.C. §§ 241, 242 (1964). The Court held the right to vote, and have the votes counted, to be secured by the Constitution against acts by individuals clothed with state authority even when these individuals act outside the scope of their authority. Acts by such individuals are within the state action limitation of section 1983. In Screws v. United States, 325 U.S. 91 (1945), this notion was again stated. In *Screws* the Court extended color of law to include "pretense" of law. *Id.* at 111.

[33] 365 U.S. 167, 173 (1961).

[34] 373 U.S. 668 (1963).

[35] However lax the "under color of" state law requirement may seem to have become, there is an almost unlimited amount of case authority for the proposition that individual, private acts are not within the purview of section 1983. *See, e.g.*, Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); Duzynski v. Nosal, 324 F.2d 924 (7th Cir. 1963); Williams v. Yellow Cab Co., 200 F.2d 302 (3d Cir. 1952); Shematis v. Froemke, 189 F.2d 963 (7th Cir. 1951); Watkins v. Oaklawn Jockey Club, 183 F.2d 440 (8th Cir. 1950); Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948), *cert. denied*, 336 U.S. 944 (1949). In Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), several individuals disrupted the plaintiffs in church, and even though this was a private act of disruption, it was held that an action under section 1983 was proper. The court stated that the defendants had "deprived the plaintiffs of their constitutional rights of freedom of assembly, speech, and worship . . . ." *Id.* at 1245. The court reasoned that the constitution of Missouri grants to every man the right to worship God and that the defendants entered the church of the plaintiffs under that right. The defendants then disrupted the service. Consequently, the defendants acted under color of a state constitutional right, which was sufficient to satisfy the section 1983 state action requirement. The Supreme Court has described *Gannon* as "an exceedingly opaque disrict court ruling." Adickes v. Kress & Co., 398 U.S. 144, 166 (1969).

[36] 113 N.J. Super. 486, 274 A.2d 312 (1971).

[37] *Id.* at 315.

[38] *Id.*

atheistic. Consequently, in the court's view Brogan's refusal was not based on religious grounds, and neither the New Jersey Act nor Title II of the Civil Rights Act of 1964 applied.

The court then considered the common-law duty of innkeepers and carriers to serve the public without discrimination. In holding this duty applicable to proprietors of gas stations for the first time, the court used an analogy. At common law the rule required that farriers shoe horses and innkeepers provide stabling on a nondiscriminatory basis. What could be more analogous to the services of such tradesmen than those of gas station proprietors who service our modern day mode of transportation?[39] The fact that at least a portion of the policy behind the rule at common law was the monopoly aspect did not deter the court. The court reasoned that if Brogan could avoid service of the plaintiffs, then so could all other gas station proprietors. Finally, the plaintiffs did not come within any of the groups who could properly be refused service, therefore, the rule applied.[40]

An Alternative View. The common-law rule was based on public policy.[41] There were several reasons for the rule, but the single most important justification behind it was commercial necessity. That justification cannot be said to exist in the present situation. The application of this common-law rule to a group as vast in numbers as gas station proprietors would seem to be an anachronism.[42]

The legislative intent in New Jersey has been to prohibit discrimination based on the classes set forth in the statute.[43] This ruling prohibits discrimination for any reason except the proper exclusions at common law. However laudable that result might be, it should have been achieved by a more direct means.

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[39] For a similar application of the horse-to-car analogy, see TEX. REV. CIV. STAT. ANN. art. 3832 (1966). That statute provides: "The following property shall be reserved to every family, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: . . . 9. Two horses and one wagon. 10. One carriage or buggy . . . ." Paragraphs 9 and 10 have been interpreted by Texas courts to be a pick-up truck and an automobile, respectively, using the horse-to-car analogy. For cases using the analogy, see *In re* Thompson, 103 F. Supp. 942 (S.D. Tex. 1952); McMillan v. Dean, 174 S.W.2d 737 (Tex. Civ. App.—Austin 1943), *error ref. w.o.m.*; Stichter v. Southwestern Nat'l Bank, 258 S.W. 223 (Tex. Civ. App.—Dallas 1924); Parker v. Sweet, 60 Tex. Civ. App. 10, 127 S.W. 881 (1910).

[40] *See* note 5 *supra.*

[41] Griesman v. Newcomb Hospital, 40 N.J.L. 389, 192 A.2d 817, 821 (Sup. Ct. 1963). "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy." Holmes, *Common Carriers and the Common Law*, 13 AM. L. REP. 609, 631 (1879).

[42] In New Jersey, and elsewhere, courts have been aware of the problem of applying common-law rules to modern-day circumstances. In State v. Culver, 23 N.J. 495, 129 A.2d 715, 721 (1957), the New Jersey Supreme Court said: "The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and the needs of the times have not so changed as to make further application of it an instrument of injustice." The same court in Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791, 795 (1961), stated that public policy reasons were behind the applications of common-law principles: "[I]n recent decisions our courts have repeatedly acknowledged that public policy is the dominant factor in the molding and remolding of common law principles to the high end that they may soundly serve the public welfare . . . ."

[43] This section is applicable to "any garage." N.J. REV. STAT. § 10:1-3 (1960).

Garifine v. Monmouth Park Jockey Club[44] obstructs any broadened interpretation of the Civil Rights Act of New Jersey. Arbitrary discrimination in New Jersey for reasons other than race, color, creed, national origin, ancestry, marital status, age, or sex is not proscribed by the Act. The Supreme Court of California, on the other hand, has interpreted statutory language similar to that used in the New Jersey Act in a liberal manner.[45] Instead of a technical interpretation, the California Supreme Court interpreted the Unruh Civil Rights Act[46] to prohibit all arbitrary discrimination, and not just that based on the classes provided in that statute. This kind of interpretation should prevail in New Jersey courts. But as long as *Garifine* is the interpretation given to the New Jersey Act, a broadened application is not likely.

Although not mentioned in the court's opinion, could section 1983 have provided a proper remedy? The obvious restriction on using section 1983 in this situation is the lack of state action. Even though conspiracies between private individuals and police officers have been held to be under color of state authority,[47] the present case does not meet the state action requirement. The plaintiffs did not allege a conspiracy although they did voluntarily leave the station when police officers were present. In *Nanez v. Ritger*[48] the mere *presence* of police officers was not sufficient to constitute state action. But in *Nanez* the plaintiffs were ejected from a tavern by police officers with the help of the defendant. The court held these circumstances were sufficient to withstand the defendant's motion for dismissal.[49] However, such was not the case in *Brogan*. The plaintiffs in *Brogan* argued that had they stood their ground they surely would have been arrested or ejected, which would constitute state action. If that had been the situation, *Nanez* would possibly be analogous. But in *Brogan* the defendant pri-

[44] 29 N.J. 47, 148 A.2d 1 (1959).

[45] 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970). The Supreme Court of California stated:

> [T]hat statute, although primarily invoked in recent years to prohibit racial discrimination, does not limit itself to racial discrimination; both its history and its language disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise. That the act specifies particular kinds of discrimination—color, race, religion, ancestry, and national origin—serves as illustrative, rather than restrictive, indicia of the type of conduct condemned.

474 P.2d at 995. Also, "In holding that the Civil Rights Act forbids a business establishment generally open to the public from arbitrarily excluding a prospective customer, we do not imply that the establishment may never insist that a patron leave the premises. Clearly, an entrepreneur need not tolerate customers who damage property, injure others, or otherwise disrupt his business." *Id.* at 999. The Supreme Court of California has broadly interpreted the California Civil Rights Act in a way which makes it applicable to trades involving a public interest so that they cannot arbitrarily discriminate for any reason, making the common-law rule unnecessary.

[46] CAL. CIV. CODE § 51 (West 1971). New York has a civil rights act with an expressed purpose of affording every person in New York "an opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance, or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state . . . ." N.Y. EXEC. LAW § 290 (McKinney 1970). This expansive language has not been operative, however, in the courts of New York. *See* State Comm'n for Human Rights v. Callan, 57 Misc. 2d 504, 293 N.Y.S.2d 249, 252 (Sup. Ct. 1968); New York State Comm'n Against Discrimination v. Pelham Hall Apts., Inc., 10 Misc. 2d 334, 170 N.Y.S.2d 750, 761 (Sup. Ct. 1958).

[47] Adickes v. Kress & Co., 398 U.S. 144 (1970); Nanez v. Ritger, 304 F. Supp. 354 (E.D. Wis. 1969).

[48] 304 F. Supp. 354 (E.D. Wis. 1969).

[49] *Nanez* was a denial of a motion for dismissal for failure to state a claim upon which relief can be granted, pursuant to FED. R. CIV. P. 12(b)(6).

vately and individually refused to serve the plaintiffs unaided by police officers or anyone clothed with state authority. Thus, because of the lack of state action, the court would have been hard pressed to invoke section 1983.

Unlike section 1983, the 1964 Civil Rights Act was "directed at the failure of existing laws, including section 1983, to deal adequately with the problem of *private discrimination, particularly in the areas of public services.*"[50] The 1964 Act was not intended to supplant section 1983, but instead to provide an alternative remedy.[51] The 1964 Act would seem to encompass the act of discrimination in question here. It was designed to eliminate discrimination and should be given a broad interpretation to achieve that result.[52] The station operated by Brogan affects interstate commerce because a substantial portion of the products it sells have travelled in interstate commerce, and consequently, it falls within the purview of Title II. The court was sufficiently determined to issue an injunction that it based the issuance on a common-law rule of questionable current policy justification. Since it was so determined, it could easily have utilized the 1964 Act, which was directed at the kinds of private discrimination exemplified by this case. The problem the court found with this analysis was that the plaintiffs alleged no religious beliefs against which Brogan could discriminate. Brogan believed the plaintiffs were antichristian and atheistic because of their display of the peace symbol. Thus, it would appear that he determined he was going to refuse service to the plaintiffs on the basis of religion.

The court dismissed this contention with the comment that Brogan had no reasonable grounds to suppose the plaintiffs were atheists merely because they displayed the peace symbol, in light of its widespread use. Here lies the weakest link in the court's reasoning. The 1964 Act does not exempt "reasonable" discrimination. Whether Brogan's views were reasonable should not be of any interest to the court. By casually tossing aside Brogan's stated view of the plaintiffs, the court eliminated the most direct means of reaching the proper result. The fact remains that the symbol was the nexus between the plaintiffs and Brogan's refusal to serve. Nothing else stood between Brogan's serving them as he would anyone. The purpose of Title II is to remove the "affront and humiliation involved in discriminatory denials of facilities ostensibly open to the general public."[53] Its application in *Brogan* would not fall outside the policy supporting the Act, while it would have avoided the use of a common-law rule of dubious application to the situation.

III. CONCLUSION

It is not clear whether application of the Civil Rights Act of 1964 is based on the intent of the discriminator, or the characteristics of the person being discriminated against. The Act is primarily proscriptive in nature, as are criminal statutes, most of which require an intent to commit the proscribed act. In cases in which the person being discriminated against is believed by the dis-

[50] 40 NOTRE DAME LAW. 70, 84 (1964) (emphasis added).
[51] *Id.*
[52] Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 349 (5th Cir. 1968). *See also* Daniel v. Paul, 395 U.S. 298, 307-08 (1969); Pickney v. Meloy, 241 F. Supp. 943 (N.D. Fla. 1965), on the purpose of Title II of the 1964 Civil Rights Act.
[53] Daniel v. Paul, 395 U.S. 298, 307 (1969).