OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION:	NORMAN JETT, Petitioner V. DALLAS INDEPENDENT SCHOOL DISTRICT; and DALLAS INDEPENDENT SCHOOL DISTRICT, Petitioner V. NORMAN JETT
CASE NO:	87-2084; 88-214
PLACE:	WASHINGTON, D.C.
DATE:	March 28, 1989
PAGES:	1 - 45

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

NORMAN JETT,
Petitioner
v. : No. 87-2084
DALLAS INDEPENDENT SCHOOL DISTRICT
and
DALLAS INDEPENDENT SCHOOL DISTRICT
Petitioner
v. : No. 88-214
NORMAN JETT

Washington, D.C.

Tuesday, March 28, 1989

The above entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 o'clock a.m.

APPEARANCES:

FRANK M. GILSTRAP, ESQ., Arlington, Texas, on behalf of the petitioner/
respondent Jett

LEONARD J. SCHWARTZ, ESQ., Dallas, Texas, on behalf of the respondent/
petitioner Dallas Independent School

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-2084, Norman Jett v. Dallas Independent School District, consolidated with 88-214, Dallas School District v. Norman Jett.

Mr. Gilstrap?

ORAL ARGUMENT OF FRANK M. GILSTRAP, ESQ.

ON BEHALF OF THE PETITIONER/RESPONDENT JETT

MR. GILSTRAP: Mr. Chief Justice, and may it please the Court, it has been a little over 10 years since the Court handed down its opinion in Monell v. Department of Social Services. There, the Court set forth the rules that a plaintiff must abide by in seeking to establish liability against a unit of local government under 42 U.S.C., sec. 1983.

Specifically, in Monell, the Court held that the plaintiff must show that the deprivation of which he is complaining was caused by the official policy or custom of the unit of local government.

Today, the issue before the Court is whether this same policy or custom requirement should be extended to suits under section 1981.

Now, the Monell Court derived the policy or custom requirement from the language of section 1983. I think it's clear that the policy or custom requirement

is language specific. The Court last year -- the plurality opinion in Praprotnik -- spoke of the crucial terms in section 1983 and I think it's apparent that the Court in Monell read the words in section 1983, statute, ordinance, regulation, custom or usage, followed by the phrase subject or cause to be subjected, and derived from that the policy or custom requirement.

Now, our argument is quite simple. If these crucial terms are necessary, or are the basis of the policy or custom requirement, then there can't be a policy or custom requirement in section 1981, because it doesn't contain the crucial terms.

The Court had a very similar issue before it in the color of law cases -- the most famous is Jones v. Alfred H. Mayer Company in 1968. That was a section 1982 case, and the issue there was whether suit could be brought against a private defendant. The defendant said that suit could only be brought against a public entity under section 1982.

The Court read section 1982, noted that there was no color of law language, and said, "Therefore, we're not going to read a color of law restriction into section 1982."

Now, we're -- our argument is analogous to that. We're asking for the same reasoning process. We

don't want the Court to read a policy or custom requirement into section 1981 when it's not there in the language of the statute.

QUESTION: Of course, if you need section 1983 to bring a private action under section 1981, it's a different ball game.

MR. GILSTRAP: It is a different ball game, your Honor, and that is what I want to talk about now, because the Respondent has not really challenged our analysis of language under section 1981. The Respondent, rather, has sought -- has devoted about 80 percent of his brief to seeking to avoid our argument, and his argument is this.

Section 1981 merely declares rights. It does not, in and of itself, have a direct civil remedy. To enforce section 1981, according to the Respondent, then you have to bring suit under section 1983. And if that's the law, then we lose on this point, because section 1983 obviously contains a policy or custom requirement.

There's two problems with the Respondent's argument. First of all, the Court has rejected it previously. This exact argument was made in Jones v. Alfred H. Mayer. There -- that case involved section 1982, and the defendant said section 1982 merely

declares rights, and to recover under section 1982, you have to sue under section 1983.

The Court didn't bother to analyze that argument, but it did clearly reject it, because it allowed that plaintiff to recover under section --

QUESTION: But of course, that plaintiff had to have an implied cause of action under 1982 or not sue at all, whereas if you're suing a public entity, 1983 gives you the right of that.

MR. GILSTRAP: Well, there are stare decisis problems with that, too, your Honor.

In 1948, the Court handed down two cases. In Hurd v. Hodge, it used section 1982 to declare racial restrictive covenants illegal or contrary to section 1982, in the District of Columbia.

And then, a few months later, in a case called Takahashi, out of California, it allowed the plaintiff, who was an alien, to recover, under section 1981, directly, and there was no mention of section 1983.

QUESTION: Well, 1983 didn't apply to the District of Columbia at the time Hurd v. Hodge was decided, I think.

MR. GILSTRAP: That's correct, your Honor. But 1983 obviously applied to the State of California in Takahashi, and I don't see there's any way the Court can

adopt the Respondent's argument without overruling Takahashi.

Moreover, I don't see any way that the Court can distinguish -- can distinguish the numerous cases that it has decided which allow a plaintiff under section 1981 and 82 to recover against a private entity.

QUESTION: Well, Mr. Gilstrap, as a suggestion, in that regard, the Court has recognized that section 1981 had its roots in the Civil Rights Act of 1866, which was a 13th Amendment statute, and the Enforcement Act of 1870. And it seems logical, don't you think, that the 42nd Congress might have wanted the statute directed at State action, as opposed to private action, to be enforced under section 1983, which created a specific damages action against State officials.

But the private right of action, based on the 13th Amendment, was unaffected by section 1983. I think that's a valid distinction.

MR. GILSTRAP: That is the argument that the Respondent's made. He says that assuming arguendo that there was a right to sue under section -- under the Civil Right Act of 1866, that Congress somehow amended that when it passed the 1871 Civil Rights Act -- the so-called Ku Klux Klan act.

The problem with that is twofold. One, we

have all of these cases that say "Be wary of repeal by implication." But we don't have to deal with those.

There is a saving clause in section -- in the Civil Rights Act of 1871. In section 7 of that Act, the Congress in 1871 said, "Nothing herein contained shall be construed to supercede or repeal any former act or law, except so far as same may be repugnant thereto."

QUESTION: Well, there's no explicit provision for a civil damage remedy against State actors in the 1866 Act, and Congress explicitly considered and they created a comprehensive scheme for that kind of liability in 1871.

Now, doesn't our opinion in Fausto indicate that an explicit civil remedy, rather than one by implication, would be exclusive?

MR. GILSTRAP: Well, I don't think that this is a case of an implied remedy, your Honor. I believe that there is language in section 3 of the Civil Rights Act of 1866 in which Congress explicitly sets forth -- certainly says that there is a civil remedy. And that was what the Court held or said in a case called Moore v. Alameda County, that was decided before Monell.

There, the Court said that the initial portion of section 3 establishes Federal jurisdiction to hear civil actions to enforce section 1.

Now, it's our position that Congress created a general right of action under the Civil Rights Act of 1866 against all defendants, both public and private. Once that's accepted, then to get to where the Respondent wants to go, you have to say that there is a repeal by implication, and you have to ignore the safe clause.

QUESTION: But we don't have to accept your premise, and indeed there is strong indication that the 42nd Congress, at least, was very opposed to vicarious liability such as you propose against municipalities. And it's hard to believe that the 39th Congress would have felt --

MR. GILSTRAP: Well, your Honor, first of all, again, the Court has repeatedly said that it's a hazardous procedure to attempt to infer the language of an earlier Congress from the statements of a later Congress.

And moreover, well -- that I think is the basic problem. Now, there is language, as I say, in section 3 of the 1866 Act that I don't believe can be explained any other way, and again, the Court has got to ignore its interpretation as set forth in Moore v. County of Alameda to do this.

In the other argument, the other argument that

has been put forth by the respondent to construe this language in Section 3 of the 1866 Act, which gives the Federal Courts cognizance of all causes, civil and criminal, affecting persons who cannot enforce, in State court, any of the rights secured by section 1, is that that gave the Federal courts merely jurisdiction to hear State causes of action where, due to some local rule, a suit could not be brought by a freedman.

That was rejected. That approach was rejected by this Court in 1872, in a case called Bylou v. United States. There there was an attempt to bring a murder prosecution in Federal court, because under the law of Kentucky, a freedman or a black person could not testify against a white person under Kentucky statutes.

In that case, the Court rejected that argument -- that interpretation of this part of section 3, and said that to hold that way would turn the Federal courts into courts of general jurisdiction.

Also, I might add that in the modern jurisdictional statute, we have the phrase -- in 1343.3, the Federal courts are given jurisdiction over suits to redress deprivation of any right secured by any Act of Congress providing for equal rights, and in Chapman v. Houston Welfare Rights Organization and Maine v. Tivoto, the Court said that phrase "any Act of Congress

providing for equal rights" means section 1981 and 82, and it doesn't mean section 1983.

QUESTION: Mr. Gilstrap, I was just checking Takahashi that you referred to a moment ago.

That came up through the State courts in California. You didn't need a Federal cause of action in Federal court to bring that.

MR. GILSTRAP: That's correct, your Honor, but at the time the Civil Rights Act of 1866 was passed, they -- I believe that it was contemplated that these suits would be brought in State court.

QUESTION: Well, but certainly Takahashi doesn't stand for the proposition that there is a private cause of action to sue Governmental officials under section 1981 or 1982 without the intervention of section 1983.

MR. GILSTRAP: I think that it does, your Honor. I think that in their -- in the State courts of California, the plaintiff was allowed to compel the officials of California to issue him a fishing license, which had been denied to him because he was an alien.

QUESTION: But California courts are courts of general jurisdiction. They can entertain any sort of a Federal, Constitutional or statutory claim without the need for section 1983 or 1981.

MR. GILSTRAP: Well, I don't know, and that's not immediately apparent from the opinion in Takahashi, your Honor. I -- that's the best I can do.

Now, the Respondent also brings forward some legislative history, and I want to deal with that.

The Respondent relies a great deal on an amendment that was offered in 1866 by Representative Bingham. The Respondent says that this -- that in this amendment, Congress considered and rejected a civil remedy. That is incorrect.

In the 1866 debates, Representative Bingham was an opponent of the act. And you can understand the episode in the debates by noting -- understanding the tactic that opponents often use in trying to weaken legislation. You propose to delete a remedy and substitute a weaker one.

Now, the amendment proposed by Representative Bingham deleted a phrase that prohibited discrimination and civil rights remunities, and it also deleted the criminal remedies that were found in section 2 and section 6. And it proposed in lieu thereof to give the plaintiff an action with double costs of recovery without regard to the amount of damages -- a sort of civil penalty.

Throughout the entire debates, there is not

one mention with regard to this amendment of the proposed civil remedy. What that episode means is that Congress was loath to get rid of the criminal remedy. It doesn't mean that it was not loath -- that it was loath to impose a civil remedy, because that episode doesn't involve a civil remedy.

The Respondent also illustrates his point --

QUESTION: Mr. Gilstrap, can I -- let me -- a big part of your case is reliance on the maxim of construction that repeals by implication are disfavored. As you know, there are a lot of maxims of construction, some of which contradict one another.

One of them is that you never construe -- you try to construe two statutes when you have two separate statutes, in such a way that each of them has some independent significance. And that sometimes runs flatly into collision with the other maxim.

Statute A will be interpreted one way when it's out there all by itself, but later, when Statute B is passed, in order to give each of them independent significance, you have to interpret Statute A somewhat differently. Why isn't that what is going on here?

As an original matter, if there was nothing on the books but 1981, we might interpret it one way, but after you have 1983, you try to construe the two so as

to harmonize them. Courts have been doing this forever. It has very little to do with Congressional intent, because frankly, Congress probably wasn't even thinking about this.

MR. GILSTRAP: Well, Justice Scalia, I think that the courts have been rather reluctant in this area, to harmonize statutes. I'll give you an example.

In Johnson v. Railway Express Agency, the plaintiff -- the defendant in that suit said there is no need to read section 1981 to include a claim for employment discrimination. We already have Title 7.

In that case, the Court says it makes no difference. We can have -- apparently -- several different, not altogether consistent remedies.

QUESTION: This is one area where we don't care whether statutes bump into each other, and collide, and make no sense. This is the general exception to --

MR. GILSTRAP: Well, I don't think they bump into each other and collide and make no sense. They're simply parallel.

There is one set of remedies for a deprivation under section 1981 and 1982, which after all is a very narrow set of rights, and there is another type of remedy under section 1983, which encompasses a much broader set of rights. And I don't see that there's any

inconsistency here.

Certainly if the Court were writing the legislation, and the Court wanted to harmonize it, they might construe these statutes this way, but the Court is again seeking the will of Congress.

QUESTION: Well, that was my whole point, though. We don't really seek the will of Congress when we reconcile statutes.

MR. GILSTRAP: Well, I understand you on that, Justice Scalia, but I know that there is a contrary view, and I am simply trying to say that there is certainly no repugnancy among the statutes.

It's perfectly permissible to have a section 1981 remedy that has one set of rules, and a section 1983 remedy that has another. No one has said that there's anything contradictory about that.

Now, turning -- you know, once we get past -- I would also add, by the way, that Congress has been asked to repeal the remedy under section 1981, and has refused to do so. In 1972, in the Equal Employment Opportunity Amendments to Title 7, the Senate rejected an amendment that would have deprived the plaintiff of a right to sue under section 1981.

It seems to me that there is such a large body of jurisprudence that has been built up over the years

around the notion that a plaintiff can sue directly under 1981 and 1982 that that is reason enough for the Court to not tamper with this area of cases merely because it may think that some of them have been decided wrongly.

QUESTION: But that jurisprudence just didn't grow up around suits against State actors, did it?

MR. GILSTRAP: No, it grew up in part around suit against State actors. There's one other suit that -- one other -- go ahead, your Honor.

QUESTION: If you're right, it would seem to me very difficult to limit this doctrine of respondeat superior liability under 1981 to just the employment context.

MR. GILSTRAP: Well --

QUESTION: I guess it would extend to any kind of allegedly discriminatory action by a single police officer in making an arrest, or whatever it might be. I don't see a stopping point there with employment law.

MR. GILSTRAP: Well, there is a stopping point, Justice O'Connor, because you must remember, we're dealing with section 1981. It's not section 1983, that arguably covers all rights, privileges and immunities. It's section 1981, which covers only a few, express, discrete areas -- the so-called enumerated

rights under section 1981.

Now, insofar as the so-called respondeat superior rule is concerned, first of all, it's our position that if the policy or custom requirement doesn't apply, then the Court has to look at the common law. That's what it did in the immunity cases under section 1983, and in fact, section 3 of the Act invites the Court to extend the common law.

Respondeat superior does not mean that everybody's liable for everything. There are rules under respondeat superior. There are rules involving fellow servants, there are rules involving course and scope of employment. There are probably rules involving punitive damages, and there may well be rules involving -- that exempt lower-level employees from the operation of respondeat superior.

The circuit courts seem to have had no problem in this area. I can give the Court two citations --Miller v. Bank of California in the Ninth Circuit, and Garner v. Ciarusso in the Fifth Circuit. The court had -- appears to have had no problem in reading -- in interpreting what is respondeat superior to be very much like the rules under Title 7, where the defendant, including the Governmental defendant, is liable for the acts of supervisory employees, but not lower-level

employees.

I don't know where the line is going to be drawn. I am certain that wherever the line is drawn, we are within it, because here, our client was recommended for discharge by the action of the person. It's clearly supervisory -- that is, the school principal.

Now, given the fact that -- I believe that at this point, then, I've said and covered what I need to cover, and if the Court has no further questions at this time, I'd like to reserve my time.

QUESTION: Is there a second question on your petition?

MR. GILSTRAP: There -- there was. I may -- let me just speak to that briefly, Justice O'Connor.

There was a second question. The first question said, does Monell apply? The second question raises the question once again, what does Monell mean?

Here there are, as usual, some very interesting facts involving Monell. Here the -- our client was recommended for discharge -- for removal from his coaching position by the principal. The jury found that the principal clearly was acting in response to racial prejudice, and in retaliation for our client's exercise of First Amendment rights.

QUESTION: Well, what if we disagree with you,

and think Monell does apply? Then what happens to this suit?

MR. GILSTRAP: Well, then obviously we've got to meet the policy or custom requirement, and to do that, we have to examine the actions of the superintendent that upheld the firing or the removal -- excuse me.

And there, there's two questions. First of all, is the superintendent, who is the chief executive officer, and as far as I can tell, the highest ranking official whose conduct has been examined under the Monell standard to date -- is he a policymaker? And the question, as you set forth in Praprotnik, is whether under State law, the school district delegated policymaking authority to him.

We submit that that issue has not been determined, and indeed, it's barely been briefed. We submit that that way to resolve that question is for the Court to do what it's done in the past, and allow the lower courts to determine State law, and to remand that portion of the case to the Fifth Circuit and ultimately to the trial court.

If there are no further questions --

QUESTION: I take it Mr. Taut is out of the case, isn't he?

MR. GILSTRAP: Mr. Taut has settled, that is correct, Justice Blackman.

QUESTION: Very well, Mr. Gilstrap.

MR. GILSTRAP: Thank you.

QUESTION: Mr. Schwartz, we'll hear from you.

ORAL ARGUMENT OF LEONARD J. SCHWARTZ

ON BEHALF OF THE RESPONDENT/PETITIONER DALLAS

INDEPENDENT SCHOOL DISTRICT

MR. SCHWARTZ: Mr. Chief Justice, and may it please the Court, to begin with, I want to briefly touch on the second question.

The Superintendent, under State law, is not and cannot be a policymaker. That is no ands, ifs, or buts.

City of St. Louis said that the question of who is a policymaker is a question of State law, and it is a matter of law. Hence, to both the section 1981 claims and the section 1983 claims, the Fifth Circuit erred when it refused to dismiss the claims rather than sending it back for a trial as to whether or not the superintendent, in acting, knew if there was discrimination.

Whether he knew or not is not the question. The question is whether, under State law, he's a

policymaker. He is not.

QUESTION: Well, didn't he have the final right to transfer an employee?

MR. SCHWARTZ: Yes, your Honor, he did.

He had the right to make discrete decisions within School Board policy, but he had to act within School Board policy, an the policy of the School Board was certain policies admitted by the Petitioner were --one, he couldn't transfer in violation of someone's free speech. He could not transfer in violation of Federal law, particularly the law of discrimination.

We have strong policies to try to prevent what occurred. And if he acted in violation of those policies, he was acting outside of what the School Board was allowing, not by making --

QUESTION: Well, did the courts below ever really grapple with the issue?

MR. SCHWARTZ: We asked the Fifth Circuit, on rehearing, to do so. And they simply refused. They did not address the issue of State law. Had they done so, it would have been --

QUESTION: Well, I don't see why we should do it here.

MR. SCHWARTZ: With all due respect, your Honor, you did it in City of St. Louis. It was this

Court that looked at the State law ultimately, and in fact held, and under State law of Missouri, that there was no policymaker. And I think that given the Fifth Circuit refused, and given -- I think that this Court should remand it, if the question wasn't clear, of State law. Then certainly the circuit which knows best is the State law of the State of Texas.

But since it is so clear within this case what State law is --

QUESTION: Mr. Schwartz, a lot depends on what the policy you're talking about is. Surely the municipality can't adopt a policy as general as "Thou shalt not violate the Federal Constitution," and then leave it to the Superintendent to decide, well, I will always transfer somebody when he criticizes the School Board.

MR. SCHWARTZ: Oh, I agree, your Honor.

QUESTION: All right, and he adopts that policy. But -- you couldn't come before us and argue, well, he had no right to adopt a policy that would violate the First Amendment, if that does so.

MR. SCHWARTZ: No, your Honor, I agree.

QUESTION: Well, isn't that the kind of an issue we have here? To be sure, they said you couldn't transfer anybody because of discriminatory reasons, but

that's so --

MR. SCHWARTZ: Your Honor, if they passed this general policy, and then turn their back consistently, what happens is you have a custom, and it becomes a custom of allowing the violation of speech, and clearly under every precedent of this Court, that would then become, in essence, a policy of the Board.

But there's no evidence of that. In this case, that's not present. In this case, we have a discrete decision -- exactly, in fact on all fours -- with the kind of discrete decision-making that was allowed, or was not allowed, as a matter of creating policy in City of St. Louis.

So there's no question that somehow this Board has done something, set up a policy, and then turned its back and created a custom that does not exist. Therefore, I think it falls right within City of St. Louis.

But I might turn, for a moment, to the statement made by Petitioner that we do not challenge, in his analysis, the language, and that we focus solely on the right to bring an action under 1983. That's not the case at all.

In fact, I think the answer to the question of whether or not section 1981 supports the doctrine of

respondeat superior may be found ultimately by accepting his premise for the sake of argument, of course, that the Petitioner does have an implied right of action under section 1981 -- a proposition, of course, which we strongly dispute.

But still, the bottom line would be that Congress clearly has stated its intention that respondeat superior is not to be used to hold a public corporation, such as a school district, liable for a Constitutional tort. In 1977, in Monell, this Court held that its reading of the legislative history of 1983 led it to conclude that Congress did not intend --

QUESTION: Mr. Schwartz, it's a small point, but that was not a holding. It was pure dictum in the case.

MR. SCHWARTZ: That may be, your Honor.

But clearly, since Monell, it has become a strong holding of this Court. And it -- clearly the Court's decisions have stated that its view is that Congress did not intend a municipality to be held liable for a Constitutional tort. And there are five points surrounding the way the Court arrived at that decision that I'd like to emphasize.

First and foremost, the same Constitutional difficulties which led Congress to reject the Sherman

Amendment in 1871 were present in 1866 -- only, certainly, more so, because the 14th Amendment had yet to be passed.

When Congress passed the Ku Klux Klan Act, it was attempting, in part, to actually enforce the 1866 Act. When Congress in 1871, when it passed the 1871 statute, expressly provided for a civil damages action for violation of section 1981 rights, it specifically rejected doing so under the doctrine of respondeat superior.

Two of the major authorities which this Court in Monell --

QUESTION: Is that argument based on the Sherman Amendment, the rejection of the Sherman Amendment?

MR. SCHWARTZ: Yes, your Honor, I think --

QUESTION: Which of course had nothing to do with respondeat superior.

MR. SCHWARTZ: That's correct, your Honor.

In Monell, what the Court did was, it looked at the rejection of the Sherman amendment, which was certainly broader than respondeat superior, but it was vicarious liability, and said that it led this Court to believe that its reading of that history, that Congress was objecting all vicarious liability.

And I'll go further to point out that two of the decisions that were before the legislature, the Congress -- both Prig and Denison -- were decided before 1866. So, clearly, if they were relevant to the 1871 Congress, as to its power, they certainly were relevant in 1866.

The fourth point -- section 1 of the 1871 Act, which was construed in Monell, was modeled on section 2 of the 1866 Act. Hence, the first four points demonstrate that the rejection of the Sherman Amendment during the Ku Klux Klan debates is highly relevant.

The rejection of the Sherman Amendment forcefully presents that Congress' view is to its authority, or rather lack of authority, in 1866, to hold a municipality vicariously liable for a Constitutional tort.

Moreover, and I think most importantly, the rejection was a Congressional expression of policy regarding respondeat superior as a means of enforcing 1981 rights.

Finally, point five. Congress accepted first the Monroe v. Pape formulation, which has since been rejected, that a municipality or school board is never liable for a civil rights. But then, later, after Monell, and after the formulation that a municipality

can only be held liable when it is the cause of the deprivation -- Congress accepted that. Prior to Monell, bills were often introduced to change Monroe. None succeeded.

In 1979, two years after Monell, 1983 was amended to bring the District of Columbia within the Act's purview. Congress did not, at that time, when it presumptively was well aware of Monell, attempt to legislatively overrule Monell's holding that the Congress did not intend for a municipality to be subject to vicarious liability.

If an implied right exists, if it exists, it exists because of the inherent power in this Court to protect civil rights and to create a remedy for the vindication of those violations that are not otherwise protected.

However, the Court's not acting alone when it does that. What it is attempting to do is to make effective the Congressional intention in passing those statutes.

The Court, in framing a remedy under 1981, if there is an implied action, should be guided by the Congress' specific statement in 1983. So, if this Court does feel there is an implied right, and says "We're going to fashion a remedy," it ought to be consistent

with the enforcement of the Civil Rights Act, and not contrary to what Congress has stated.

Congress specifically rejected municipal respondeat superior as a means of enforcing section 1981 rights.

QUESTION: Excuse me, did we fashion a remedy, or does Congress have to have intended remedy?

MR. SCHWARTZ: Well --

QUESTION: I mean, you say --

MR. SCHWARTZ: If you are implying a right of action, you are going to both imply that action, and, I believe, fashion the way that remedy works within that cause of action.

QUESTION: And that has nothing to do with Congressional intent?

MR. SCHWARTZ: Well, yes, it does. Under Cort v. Ash, there are four factors this Court has said that it will apply in implying a right. I think that if you analyze Cort, you'll find in fact that it would be inappropriate to imply a right of action.

But I'm going to assume that this Court wishes to do that.

QUESTION: Yes.

MR. SCHWARTZ: If it does, one of those factors still says that you try to take Congressional

intent, and that's what this Court will be fashioning.

QUESTION: Can I ask what your -- you've been arguing, or just assuming for the sake of argument, that there's a right of action created.

Is your position that there is no right of action created under 1981, or no right of action for damages?

MR. SCHWARTZ: There is no right of action created for damages under 1981 against --

QUESTION: But there is for --

MR. SCHWARTZ: -- against a municipality.

QUESTION: But there is a right of action for injunction, or injunctive relief, under 1981?

MR. SCHWARTZ: Well, if it's against a municipality, you don't even have to imply the right to enforce any of the rights, because you always have jurisdiction under 1983 for any action under color of State law.

So long as you have that, there's no question of having to imply a right. The question is, here, the only reason the Court would imply a right under 1981 is --

QUESTION: Now, never mind the municipality. Somebody is depriving me of rights guaranteed by 1981, and I'm not -- I don't even want to sue the

municipality. I just want to sue the officer who's acting independently.

Can I sue him, at least, for an injunction?

MR. SCHWARTZ: Yes, your Honor.

QUESTION: I can? But not for damages?

MR. SCHWARTZ: Not for damages.

Congress has spoken to the damages very clearly in 1983. I think --

QUESTION: Why do you draw that line? I mean, you say there is a private right of action for injunction, but not for damages?

MR. SCHWARTZ: Well, I draw that line only because Congress in 1983 has said, "Here's how you sue for damages." And so, there doesn't need to be an implied right.

But when one --

QUESTION: Well, I'm talking about a private individual, now. Suit against a private individual. So 1983 is out of the question, right?

MR. SCHWARTZ: Okay.

QUESTION: Forget 1983 -- just 1981.

Why is there a right of action for an injunction, but not for damages?

MR. SCHWARTZ: Against a private individual?

QUESTION: Yes.

MR. SCHWARTZ: Well, we're getting into some issues that are before the Court in another matter. But -- there is some question as to what 1981 gives one a right to do in the private situation.

Quite frankly, I don't know what the answer is, and I wait with the rest of the public to hear what this Court is going to say in McLean.

(Laughter.)

QUESTION: You're a big help.

(Laughter.)

MR. SCHWARTZ: Well, I would suggest, if the Court wants to get into it, I certainly would argue.

QUESTION: In the meantime -- in the meantime, you're faced with Jones.

MR. SCHWARTZ: Excuse me, your Honor?

QUESTION: In the meantime, you're faced with the Jones case.

MR. SCHWARTZ: Yes, sir, and I don't see that there is really -- that that's -- that there's a real conflict.

Jones was a private action in which there was no Congressional situation that said you have a right to sue.

QUESTION: Well, I take it your basic position is that section 1981 simply didn't create any liability

of any kind against State actors, is that right?

MR. SCHWARTZ: That's correct, your Honor.

QUESTION: That didn't come until section 1983 was passed.

MR. SCHWARTZ: That's correct.

QUESTION: So, all this stuff that you've been talking about is based on a different assumption.

MR. SCHWARTZ: It's based simply on saying that even if they're right when they say they brought this action that we would still be successful, your Honor, because once you look at the 1871 statute and see what Congress intended, I think that in fashioning a remedy, that this Court would still want to be consistent with what Congress has clearly stated regarding vicarious liability.

And so, then, I take the easiest road.

QUESTION: Am I correct in interpreting your argument as indicating that under sections 1981 and 1982, which I guess would be the same, there is a broader right of action against private defendants than against public defendants?

MR. SCHWARTZ: No, your Honor. I'm not saying that.

QUESTION: You don't think there's more relief against private than public?

MR. SCHWARTZ: Well, to some extent, I do, and I would -- certainly the private, there's all kinds of immunities that the public institution has, and this Court has sustained -- the qualified immunities that arise, but that don't imply in that private sector case.

QUESTION: See, the irony in your argument is that at the time Jones was decided, the Court of Appeals had held that the only remedy was against State action, and there was no remedy against private. And the Court said no, there's at least as much against private. Now you're sort of turning it on its head.

MR. SCHWARTZ: Well, I don't know that I'm turning on its head. I think the legislative history leads me to the conclusion that in fact what Congress intended for vicarious liability, assuming of course that the Court was correct in Monell and City of St. Louis, and Pembaur and all the other decisions that it's handed down, that Congress did not intend vicarious liability to lead to municipal liability.

And if that's the case, then I don't think that it's inconsistent to say that --

QUESTION: But if you -- for that argument, you really rely on this Court's interpretation of the meaning of the Sherman Act, the Sherman Amendment, or the rejection of the Sherman Amendment, in 1871, and how

that can shed light on what the 1866 statute meant -- which was enacted in the light of common law principles which were quite contrary to that -- is really kind of baffling to me.

MR. SCHWARTZ: Well, I think that really it's not so baffling if you're -- because my reading of the legislative history in 1866 was, there was no right of action. It was intended --

QUESTION: Well, but the Court has rejected that, at least in 1982 cases.

MR. SCHWARTZ: What the Court rejected was not that -- what Congress in 1866 meant to pass.

What the Court has said is in order to effectuate the purpose behind that statute, in order to effectuate the purpose behind that statute, it was going to imply a right.

I think it's very important to imply --

QUESTION: Yes, but when the Court implies a right, what that means is the Court thinks that Congress, without expressly so stating, impliedly so indicated.

So when you say "imply" you're really talking about the intent of Congress, not the intent of this Court.

MR. SCHWARTZ: No, I think the Court is saying

--

QUESTION: You think this Court has the power just to make up remedies, out of old cloth?

MR. SCHWARTZ: No. I think what -- because of Cort v. Ash, what I think the Court is doing is clearly -- if Congress -- implied rights are kind of funny, because certainly if Congress wanted a right of action, they know how to say so.

QUESTION: Yes, but they also were enacting this statute at a time when the general rule was if they enact a rule of law, an action, a common, right of action would be implied. That was typically done at this time, so there's no need to fill in these loopholes that we find necessary now.

MR. SCHWARTZ: Well, one, I point out that the Federal court didn't even have jurisdiction for this type of a civil action -- the Federal court did not -- in 1866. So I'm -- again, I don't think that the Congress -- and I would also look at the Bingham Amendment quite differently, of course, then the Petitioner. I think it was Congress' specific statement. It was rejected, that cause of action in a civil sense, and was sticking to what it -- it even doubted then.

In 1866, we have to remember. The 13th

Amendment had just passed. Congress did not even believe, or at least a significant minority in Congress, did not even believe they had authority to pass the pristine Act they passed. So they were very cautious about what they did, and it's what led to the 14th Amendment, was that when they doubted it -- and the person who most evidences that was of course Representative Bingham, who voted against the 1866 Act and introduced the 14th Amendment, in order to be able to pass a statute similar to 1983, which he believed was very important.

But he did not believe that they could go beyond what they were doing in the 1866 Act. He thought it was un-Constitutional, and I think he evidenced a great feeling toward civil rights. So we're not saying that he opposed it simply because he opposed civil rights.

He opposed it because of what he thought it did, and he thought simply that it couldn't go any further.

QUESTION: Well, did the Court of Appeals in this case decide that there was a cause of action under 1981?

MR. SCHWARTZ: Well, I think it's inferred, clearly, from the Court of Appeals opinion.

QUESTION: But the Court of Appeals just said there had to be -- there had to be a policy.

MR. SCHWARTZ: Respondeat superior.

QUESTION: But now your position is there's no cause of action at all?

MR. SCHWARTZ: I have two positions, your Honor.

QUESTION: Yes, but one of them is there's no cause of action at all.

MR. SCHWARTZ: That's correct, your Honor.

QUESTION: Now, you didn't cross appeal, did you?

MR. SCHWARTZ: Yes, your Honor, we did cross appeal.

QUESTION: Oh, you have? Did we grant you?

MR. SCHWARTZ: We are here on cert.

QUESTION: And was that the case --

MR. SCHWARTZ: That was not the question presented in our --

QUESTION: So you have never challenged that holding of the Court of Appeals.

MR. SCHWARTZ: Your Honor --

QUESTION: Is that right, or no?

MR. SCHWARTZ: What we challenge is --

QUESTION: Because if you haven't, you

certainly are asking for far broader relief than otherwise.

MR. SCHWARTZ: What we're asking for is a holding, simple holding, that respondeat superior does not apply to 1981.

The reasoning to get there is one of twofold, but I'd like to point out that there was some question about whether we preserved the issue in the trial court.

One, the only time section 1981 was mentioned in the trial court, in the appendix, will be found in the second amended complaint under the jurisdictional statement, which we denied jurisdiction.

And I would also point out that the charge to the jury, we did not have to object to, because it doesn't mention 1981 at all. It mentions only the 14th Amendment and equal protection of the law.

So, clearly, there was nothing to file some kind of objection to.

QUESTION: And 1983?

MR. SCHWARTZ: It mentions 1983, of course, as jurisdictional, and charges the jury about 1983, but it never mentions 1981. It never charged the jury about 1981.

It charged the jury simply that a 14th Amendment denial of equal rights -- and that's in the

appendix under the charge. So clearly we did preserve the issue.

QUESTION: So, where did 1981 get into the case?

MR. SCHWARTZ: After we moved that there should be no respondeat superior. The trial court rejected our motion for new trial, and motion n.o.v. by saying, respondeat superior applies because under 1981 there is vicarious liability.

QUESTION: Was that after verdict?

MR. SCHWARTZ: That was after verdict.

So, clearly, there was no time during the trial that we were -- other than the filing of our answer --that we had to preserve that issue. And we did preserve it in our answer.

I'd like briefly to say one other thing -- and I alluded to -- before this Court is another case, Patterson v. McLean Credit.

I think the Respondent clearly wins, regardless of the decision in that case, whatever it may be.

If this Court does overrule Runyon, obviously we're going to succeed. But even if it affirms Runyon, we have shown that the Monell reasoning applies to section 1981, regardless of whether or not it was

decided as far as section 1983.

Then, I'd like to turn to the specific language that was used in Monell that Petitioner claims is not there. The "causes or subjects to be caused" language.

First of all, he says, well, in interpreting 1981, look at the 1866 statute, and look at section 3. But then, when you try to look for this language, this so-called crucial language, look only to 1981.

I suggest -- he's like a magician, who shows an audience a top hat that looks empty. Well, of course, if you look at all, and you see the false bottom, what you find is the rabbit. In this case, if you follow his reasoning, and you look at the statute, the 1866 statute -- Congress when it passed the 1866 statute, saw section 1 as only a declaration of rights, nothing more.

The enforcement mechanism, where we should look to see the intent of the Congress was section 2. That's the enforcement mechanism, and the legislative history is very clear that Congress thought that was the important portion of the Act. And it contains those so-called magic words.

So, Monell does apply when you look at the 1866 Act in its entirety, and the legislative history

that was important in Monell is equally important here, and the Congressional statement of policy, I think, should govern this Court.

I'm going to end -- I see I have some time left.

When I was preparing, I read a Law Review article that was prepared by retired Chief Justice Burger, and he said, if you have time left, you do yourself a favor, and certainly the Court a favor, if you sit down.

I hope that was a unanimous opinion.

(Laughter.)

QUESTION: Thank you, Mr. Schwartz.

Mr. Gilstrap, do you have rebuttal?

REBUTTAL ARGUMENT OF RANK M. GILSTRAP

ON BEHALF OF THE PETITIONER/RESPONDENT JETT

MR. GILSTRAP: I do.

Mr. Chief Justice, and may it please the Court, the Respondent did not preserve his argument that there is no cause of action directly under section 1981.

We have refuted that chapter and verse in our reply brief. Indeed, throughout the trial proceedings, in his pleadings, they concede that there is a cause of action under section 1981. The first time we hear the

argument is after we have briefed, and after they present their brief, and our first chance to respond is in our reply brief.

Now, --

QUESTION: What difference does it make, so long as he's just using that argument to sustain the judgement that he won?

MR. GILSTRAP: Your Honor, certainly the Court can ignore the fact that it hadn't been preserved. But it seems to me where the Respondent makes an argument that has such broader consequence -- that is, that the cause of action doesn't exist at all -- then it doesn't make a lot of sense to say that he's merely using that to support his position that under that cause of action, you can't get certain relief.

The Respondent also argues section 2. Respondent says that the only remedy in section -- in the Civil Rights Act of 1866 is section 2. It's a criminal section, and it contains the magic words.

Of course, if there is a civil remedy under section 1981, or under the Civil Rights Act of 1866, then he loses, because in fact that civil remedy does not contain the magic words, and that is exactly the reasoning that the Court used in Jones.

But we don't have to reach the issue of

whether or not there's a civil remedy in order to refute his argument. There is another criminal section of the Act. The Civil Rights Act of 1866 also contained section 6, which made it a crime for any person to aid and abet certain others.

There are no statutes, there are no cases construing that particular section, but that language is carried forward into the 1870 Act, and there, in sections 4, 5 and 6, we have equivalent language, and there are several cases construing those.

One of them -- some of the cases are the 241 cases, and they're -- a long time ago, the Court held that we are not going to read into those cases a color of law requirement.

The Court is not going to -- in other words, the section 2 of the 1866 Act contained the policy or custom language, and Congress intended for that language to apply only to section 2.

Now, counsel's position primarily rests on the Sherman Amendment debates. We must remember that the primary role of the Sherman Amendment debates in Monell were to undo the holding, in Monroe v. Pape, that a municipality is not a person.

The Sherman Amendment debates were mentioned only in passing in the policy or custom portion of the

opinion, which, as Justice Stevens points out, is dicta.

There, there's a footnote which bolsters the Court's holding that respondeat superior is not the rule, policy or custom is the rule. But it is clear that the reason that the Court adopts the policy or custom requirement turns on the language of the statute, and not the Sherman Amendment debates.

And, again, it seems to me quite hazardous to say that we're going to look at this debate that occurred in 1871, and somehow extrapolate back to 1866, and there to say that Congress had this intent, despite the fact that there was almost a complete turnover in Congressional membership between 1866 and 1871, and despite the fact that the policy or custom language does not appear in the statute.

Counsel says, well, the section 1981 cases are implied causes of action. We reject that. We don't need to go into the implied cause of action cases. You can deal with it strictly as an express cause of action. You can look at the language of section 3 and say that manifests Congress' intent.

All you have to do is read Moore v. County of Alameda.

One thing more, and then I'll sit down. Section 3 simply says, your Honor, specifically rely on

-- the language in section 3 is this language.

Section 3, the first part, first clause, gives the Federal courts cognizance of all causes, civil and criminal, affecting persons who cannot enforce in State courts any of the rights secured to them by section 1.

Counsel says, "Oh, that only applies to the right to sue in court." In other words, this allowed persons who could not bring suit in State court, because of race, for example, to bring suit in Federal court to enforce common law causes of action.

That wouldn't -- the problem, though, is that the statute refers to any of the rights secured by section 1, and the right that he's talking about is only one right under section 1981 -- the right to sue, be parties, and give evidence.

Since the Court used broader language there, it must have referred to any suit, to enforce any of the rights under section 1981.

If there are no further questions, I'll conclude my argument. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gilstrap.

The case is submitted.

(Whereupon, at 11:03 o'clock a.m, the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-2084 - NORMAN JETT, Petitioner V. DALLAS INDEPENDENT SCHOOL DISTRICT;
and
No. 88-214 - DALLAS INDEPENDENT SCHOOL DISTRICT, Petitioner V. NORMAN JETT

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)