system which in practice makes that flexibility a sham. It is also difficult to understand how the Immigration and Naturalization Service could be permitted to apply the resettlement factor without any sign of legislative disapproval if Congress had intended the contrary. Finally, it is reasonable to assume that a system which contains serious disadvantages for the homeless refugee would only be adopted with a clear expression of congressional intent as to the desired result. Otherwise, the result is absurd.

The statute, as written, may permit settled persons to qualify for refugee status. On balance, however, it is highly questionable whether Congress contemplated such a result.

ROBERT A. MAUTINO

CIVIL RIGHTS—STATE ACTION—CUSTOMS HAVING THE FORCE OF LAW BY VIRTUE OF PERSISTENT PRACTICES OF STATE OFFICIALS CONSTITUTE STATE ACTION. *Adickes v. S.H. Kress and Company* (U.S. 1970).

Plaintiff-petitioner, Sandra Adickes, a white volunteer summer Freedom School teacher and full time teacher in the New York City School System, brought an action against S.H. Kress and Company in the United States District Court for the Southern District of New York[1] to recover damages under 42 U.S.C. § 1983[2] for an alleged violation of her civil rights. Miss Adickes and six Negro students attempted to use the Hattiesburg, Mississippi library facilities[3] and then, while under police surveillance, proceeded to the local Kress store to eat lunch. The Kress waitress, under orders from the store manager, took the orders of the Negro students, but refused to serve petitioner. The waitress stated: "We have to

position to provide for himself and his family in this country. Indeed, he has been doing so for the *past eight years.*" 295 F. Supp. at 1372 (emphasis added). The implication is that he had been gainfully employed since his entry into the United States. A temporary visitor who fails to maintain his status is deportable. 8 U.S.C. § 1251(a)(9) (1964).

1. Adickes v. S.H. Kress & Co., 252 F. Supp. 140 (S.D.N.Y. 1966).
2. 42 U.S.C. § 1983 (1964), states:
   Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, 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.
3. 252 F. Supp. at 142. Petitioner and her Negro students were denied use of the public library, at which time it was closed by the police.

serve Negroes, but we are not serving whites who come in with them."[4] After refusal of service, Miss Adickes and her students left the store, whereupon she was immediately arrested and charged with vagrancy.[5]

Miss Adickes alleged that she had been deprived of her right under the equal protection clause of the fourteenth amendment not to be discriminated against on the basis of race.[6] Her complaint set out two counts; one charged that Kress denied her the equal enjoyment of a place of public accommodation because of her association with Negroes and the second alleged that Kress conspired with the Hattiesburg police to deprive her of constitutional rights. The district court dismissed the conspiracy count before trial on a motion for summary judgment and directed verdict for Kress at the close of petitioner's case.[7] The court of appeals affirmed the district court's decision, holding that there was insufficient state encouragement of racial discrimination to permit petitioner to recover under the "color of state law" clause of section 1983.[8] Certiorari was granted,[9] and on hearing by the United States Supreme Court, *held*, reversed and remanded: to sustain an action under section 1983 there must be encouragement of the discrimination in the form of "state action" and this may be shown by proving the existence of a state enforced "custom" that commanded or motivated the particular act of discrimination. *Adickes v. S.H. Kress and Company, 398 U.S. 144 (1970).*

The present 42 U.S.C. § 1983 was enacted as section 1 of the Ku Klux Act of 1871.[10] It was described by the Chairman of the House

4. *Id.* at 143.
5. Achtenberg v. Mississippi, 393 F.2d 468 (5th Cir. 1968) (remanded with directions that the criminal charges be dismissed). The police were informed of petitioner's employment and financial solvency at the time of arrest.
6. U.S. CONST. *amend.* XIV, § 1, states in pertinent part:
> 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.

7. 252 F. Supp. at 144. The Court determined that Miss Adickes failed to allege any facts from which a conspiracy might be inferred.
8. Adickes v. S.H. Kress & Co., 409 F.2d 121, 125 (2nd Cir. 1968).
9. 394 U.S. 1011 (1969).
10. Ku Klux Act, ch. 22, § 1, 17 Stat. 13 (1871).

Select Committee, which drafted this legislation,[11] as modeled after section 2 of the Civil Rights Act of 1866:[12] a criminal provision that also contained language which forbade certain acts by any person "under color of any law, statute, ordinance, regulation, or custom." The Civil Rights Act of 1866 was enacted during the reconstruction era and the obvious congressional intent was to eliminate the evils of state encouraged discrimination. In 1871, faced with the terrorist tactics of the Ku Klux Klan, Congress enacted additional civil rights legislation in the form of the Ku Klux Act. Section 1 of this act provided for damages relief for private discrimination. It is not clear whether Congress intended this section to be directed at acts of discrimination that were purely private in nature or to be directed at state encouraged discrimination.[13] However, the judicial interpretation of both the 1866 and the 1871 Acts is that state encouragement in the form of "state action" is a necessary requirement to their application. The Supreme Court in the *Civil Rights Cases*[14] held that the 1866 Act was constitutional under the fourteenth amendment and thereby subject to the amendment's limitations.[15] The Court held that the fourteenth amendment cannot be used to sanction legislation which compels a private citizen not to discriminate on the basis of race. The amendment was interpreted as applying only to discrimination by the states. Therefore, with section 1983 being founded upon the 1866 Act, it is legislation authorized by the fourteenth amendment[16] and limited to a requirement of "state action."

Section 1983 is, by its own language, limited to activity "under

11. CONG. GLOBE, 42nd Cong., 1st Sess., App. 68 (1871) (statement by Representative Shellabarger).

12. Civil Rights Act, ch. 31, § 2, 14 Stat. 27 (1866).

13. For a thorough examination of the legislative history and intent of the 1866 Civil Rights Act and the 1871 Ku Klux Act, see, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

14. 109 U.S. 3 (1883).

15. Prior to the adoption of the fourteenth amendment, in 1868, the constitutional legality of the 1866 Act had to spring from the thirteenth amendment. Had this legislation been declared constitutional under the thirteenth amendment it could have been directed at acts of individuals, whether sanctioned by "state action" or not. However, there was doubt as to this act being fully authorized by that amendment. When the fourteenth amendment was adopted, it became obvious that this legislation was at least constitutional under that amendment. Therefore the Court never found the necessity to inquire as to the constitutionality of the 1866 Act under the thirteenth amendment. Thus, the crucial question of which amendment controlled the 1866 Act was resolved in favor of the fourteenth amendment and the requirement of "state action" to show a violation of civil rights was established.

16. U.S. CONST. amend. XIV, § 5, states in pertinent part:

> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

color" of law. In cases under this section "under color" of law has consistently been treated as the equivalent of the "state action" required by the fourteenth amendment.[17] There has been a consistency of treating the two phrases as synonymous, but the only thing constant about the concept of "state action" has been change. Originally the interpretation was that only action *authorized* under state law fell within the purview of the statute.[18] The Supreme Court rejected this interpretation in *United States v. Classic*,[19] a criminal case which required interpretation of the phrase "under color" of law. The Court held that misuse of power by one *clothed with authority* of state law was action "under color" of state law.[20] Further change was brought about by the Court in *Screws v. United States*,[21] where it held that "under color" of law meant under *pretense of law*.[22] In *Monroe v. Pape*,[23] the *Screws* and *Classic* tests were applied and a civil action under section 1983 was allowed against police officers for an illegal search and detention. Conduct is "under color" of state law if those persons engaged in the activity are clothed with the authority of the state and are purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law.[24]

Though "under color" of law no longer needed to be state authorized conduct, some positive involvement by the state was still necessary. In *Williams v. Howard Johnson's Restaurant*,[25] the distinction between activities required by the state and those carried out by voluntary choice and without compulsion was discussed. It was decided that unless actions are performed in obedience to some *positive provision of state law* they do not furnish a basis for action under the fourteenth amendment.[26] *Williams v. Hot*

17. Monroe v. Pape, 365 U.S. 167, 187 (1961); *see, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).
18. *See, e.g.*, Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927).
19. 313 U.S. 299 (1941).
20. *Id.* at 326.
21. 325 U.S. 91 (1945).
22. *Id.* at 111.
23. 365 U.S. 167 (1961).
24. *See, e.g.*, Williams v. United States, 341 U.S. 97 (1951); Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965); Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962).
25. 268 F.2d 845 (4th Cir. 1959).
26. *Id.* at 847.

Shoppes, Inc.,[27] involved a state statute that required segregation of certain public accommodations and the manager of a restaurant thought it compelled him to refuse service to a Negro. The circuit court held it possible that the statute might be interpreted as not applying to restaurants, and for there to be the necessary "state action" it would have to apply directly to restaurants. The Supreme Court further delineated the amount of state involvement required to constitute "state action" in *Burton v. Wilmington Parking Authority*.[28] Burton, a Negro, was refused service in a restaurant, operated by a private corporation, under lease in a building owned by the Parking Authority, an agency of the state. The Court found that the state, through its manifestations (allowing discrimination in a building owned by it) had become involved to a significant extent and this constituted the necessary "state action."

Further change in the concept of "state action" was brought about by the sit-in cases. In *Peterson v. City of Greenville*,[29] and in *Robinson v. Florida*,[30] the Supreme Court determined that state statutes requiring segregation in facilities and services in restaurants, though obviously unconstitutional and unenforceable, were in themselves sufficient to constitute "state action." Therefore, the states could not punish, as trespassers, Negroes who had been refused service in the restaurants. The Court in *Lombard v. Louisiana*,[31] held that a state could not achieve the result of maintaining racially segregated private restaurant facilities by official command of the Chief of Police, whose command had at least as much coercive effect as an ordinance. Though there were no statutes requiring segregation, the Court held that a state or a city may act as an authority through its executives just as it can through its legislative body.[32] Trespass convictions of Negroes attempting to be served were reversed.

Possibly the broadest application of the concept of "state action" to date is the Supreme Court's holding in *Reitman v. Mulkey*.[33] In an action for damages, the Court upheld the right of an individual to recover against a private landlord where his racial discrimination had been encouraged by the state. In 1965 the California Constitution was amended through a state wide referendum vote, which repealed existing anti-discriminatory housing legisla-

27. 293 F.2d 835 (D.C. Cir. 1961).
28. 365 U.S. 715 (1961).
29. 373 U.S. 244 (1963).
30. 378 U.S. 153 (1964).
31. 373 U.S. 267 (1963).
32. *Id.* at 273.
33. 387 U.S. 369 (1967).

tion.[34] This amendment gave property owners absolute discretion to refuse to sell or rent to anyone they chose. The Court held this amendment to be an unconstitutional state encouragement of racial discrimination. Though the amendment made no mention of race or any other specific grounds for discrimination, and technically was neutral (it did not command anyone to discriminate), it was still found to be state involvement and encouragement, thereby meeting the test of "state action."

The now widely used Civil Rights Act of 1964[35] and the 1871 Ku Klux Act are both directed towards state encouraged private discrimination although each provides a different remedy. The 1871 Act provides damages relief while the 1964 Act provides only injunctive or removal relief. Judicial interpretation of what constitutes the necessary state involvement under the 1964 Act and what constitutes the necessary state involvement under the 1871 Act appears to be different even though the language of the statutes in this respect is identical.[36] The difference appears to be one of degree of involvement. Amount of state involvement necessary to establish "state action" under the 1871 Act is greater than the amount required to show "state action" under the 1964 Act. A clear cut violation of the 1964 Act will not necessarily establish the required "state action" to sustain a suit under the 1871 Act. The Supreme Court, in an interpretation of "state action" under the 1964 Act, set aside a state criminal trespass conviction in *Hamm v. City of Rock Hill*,[37] holding that the defendant had a right to be served at a lunch counter, and the refusal of service and subsequent

34. CALIF. CONST. art. 1, § 26, states in pertinent part:
> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

35. 42 U.S.C. § 2000(a) (1964), in essence . . . provides for injunctive relief or removal from state courts in cases where discrimination or segregation has occurred in places of public accommodation. This includes discrimination carried out under color of state law, statutes, ordinances or regulations, or carried on under color of custom or usage. For the purposes of this statute, public accommodations include, among other things, restaurants and lunch counters.

36. Ku Klux Act of 1871, 42 U.S.C. § 1983 (1964), and Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964).

37. 379 U.S. 306 (1964).

arrest was in violation of the 1964 Act. In *Georgia v. Rachel*[38] the Court set aside a trespass conviction and held that the defendant had the right to remain and be served at a restaurant. Refusal of service and arrest was in violation of the 1964 Act. In *Achtenburg v. Mississippi*[39] the circuit court directed that the criminal (vagrancy) charges against Miss Adickes be dismissed, holding that there had been a violation of the 1964 Act.[40] But in Miss Adickes' suit against Kress, neither the trial court nor the court of appeals felt there was the necessary state involvement to sustain an action under section 1983.

Alternative methods of accomplishing reversal were available to the Supreme Court in *Adickes v. S.H. Kress & Co.*[41] First, and probably the easiest approach, would have been for the Court to examine the Mississippi trespass statute,[42] apply the *Reitman* standard, declare the statute unconstitutional, and rule that it encouraged discrimination, thereby finding the necessary "state action."[43] Had the Court done this it would have acted consistently with *Reitman* and a further clarification of the concept of "state action" would have been accomplished. By not doing so it would appear that the Court is tacitly approving a double standard; one for civil rights in the area of property ownership and a different one for civil rights in the more intangible area of human rights. Secondly,

38. 384 U.S. 780 (1966).
39. 393 F.2d 468 (5th Cir. 1968).
40. *Id.* at 474. The charge of vagrancy was labeled utterly baseless.
41. 398 U.S. 144.
42. MISS. CODE 1942, § 2046.5, states in pertinent part:

> (1) Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, . . . restaurants, dining room or lunch counters . . . , is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person. . . .
>
> . . . .
>
> (3) Any person who enters a public place of business . . . and is requested or ordered to leave therefrom . . . and . . . refuses so to do, shall be guilty of a trespass . . . .

43. Adickes v. S.H. Kress & Co., 398 U.S. 144, 188. Mr. Justice Brennan, concurring and dissenting in part, makes a thorough examination of the Mississippi trespass statute and the historical context in which it was enacted. Through this, and looking to the overall scheme of Mississippi's encouragement of discrimination, he would declare the statute an unconstitutional encouragement of racial discrimination and thereby find the necessary "state action." Mr. Justice Brennan also rejects the majority's intimation that private discrimination might be "state action" only where the private person acted under compulsion imposed by the state. He contends that *Peterson* and *Lombard* establish that when a state policy enforces private discrimination in places of public accommodation, it makes such private discrimination unconstitutional "state action," regardless of whether or not the discrimination was motivated or influenced by it.

the Court could have eliminated the difference between "state action" or "under color" of law under the 1964 Civil Rights Act and the meaning of those terms under the 1871 Act. By simply holding that the requirement of "under color" of law of section 1983 shall be the same as that of the 1964 Civil Rights Act and shall be applied accordingly, the Court could have established a single standard that would have been a giant step forward in the elimination of the evils of racial discrimination. Thirdly, and undoubtedly the most radical approach, the Court could have eliminated the need for "state action" (in regard to facilities held open to the public) as a requirement to show a violation of rights protected under the fourteenth amendment, by extending the holding of *United States v. Guest.*[44] In *Guest* Mr. Justice Brennan, concurring and dissenting in part, said:

> A majority of the members of the Court expresses the view today that § 5 [of the fourteenth amendment] empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under color of state law are implicated in the conspiracy.[45]

As the Court determined in *Marsh v. Alabama*:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for the use by the public in general, the more do his rights become circumscribed by statutory and constitutional rights of those who use it.[46]

There is no aura of constitutional protected privacy about a restaurant, as there is about one's home. Access by the public is the very reason for its existence. This approach might not be as radical as would appear at first glance for there is some support for such a holding.[47]

Instead of taking any of the alternative approaches discussed above, the Court, through an examination of the legislative intent and history of judicial interpretation of the 1871 Act, chose to reaffirm the need for "state action." It did however, broaden the range of what constitutes "state action" in the area of "custom or usage" as set out in section 1983. "Custom or usage" arguments

44. 383 U.S. 745 (1966).
45. *Id.* at 782.
46. 326 U.S. 501, 506 (1946).
47. *See* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee,* 66 COLUM. L. REV. 855 (1966).

have been employed previously in attempts to convince courts that acts of discrimination were in violation of rights protected under the fourteenth amendment. But the courts have been very quick to find that there was no "custom or usage" or to rule that there was no "state action" involved in any "custom or usage."[48] Previously the courts have rejected "custom or usage" arguments by the expedience of the supposition that the customs of the people of a state do not constitute "state action" within the prohibition of the fourteenth amendment and looking no further. The *Adickes* Court likewise determined that the customs of the people do not constitute "state action" but it went on to hold that if these customs had the force of law by virtue of persistent practices of state officials they would constitute "state action" within the prohibition of the fourteenth amendment. The Court implied that private discrimination might be "state action" only where the private person acted because he was *motivated* by a state enforced custom.[49] The Court fairly well summed up its holding in the statement:

> For state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law—in either case it is the State that has commanded the result by its law.[50]

At this time there is not, and probably never will be, a uniform criteria for determining if a "custom or usage" has or does not have the force of law necessary to constitute "state action." Obviously this will have to be decided on a case by case basis. But the Court did set some guidelines applicable to the instant case. Both the district court[51] and the majority opinion of the court of appeals[52] held that for the relevant "custom" to have the force of law it would be necessary to show that the "custom" existed throughout the entire state. The Supreme Court rejected this and held it was not necessary for the "custom" to be state wide, but it could have the force of law even if it was a "custom" within a political subdivision of a state.[53] The Court determined

48. *See, e.g.*, Adickes v. S.H. Kress & Co., 409 F.2d 121 (2nd Cir. 1968); Williams v. Howard Johnson's, Inc., 323 F.2d 102 (4th Cir. 1963); Williams v. Hot Shoppes, Inc., 293 F.2d 835 (D.C. Cir. 1961); Slack v. Atlantic White Tower System, Inc., 181 F. Supp. 124, aff'd. 284 F.2d 746 (4th Cir. 1960); Williams v. Howard Johnson's Restaurant, 268 F.2d 854 (4th Cir. 1959).

49. *But see* Adickes v. S.H. Kress & Co., 398 U.S. at 192 (Brennan, J., concurring and dissenting in part); Peterson v. City of Greenville, 373 U.S. at 251-53 (Harlan, J., concurring in result).

50. 398 U.S. at 171.

51. Adickes v. S.H. Kress & Co., 252 F. Supp. 140.

52. Adickes v. S.H. Kress & Co., 409 F.2d 121.

53. 398 U.S. at 173.

that proof relevant to showing a "custom" need not be a demonstration of a specific practice as a "custom," but the showing of a long standing and still prevailing state enforced "custom" that would encompass the particular kind of practice challenged would be adequate.[54] The Court held as being too restrictive any suggestion that the exclusive means available for demonstrating state enforcement of a "custom" would be by showing that the State used a criminal statute for this purpose. "[A] state official might act to give a custom the force of law in a variety of ways. . . ."[55] In the instant case, petitioner might be able to show that when the police subjected her to false arrest for vagrancy, they were in fact enforcing a prevailing "custom" of racial segregation and the arrest was only to harass and punish her for her association with Negroes.[56] Or Miss Adickes might be able to show that the local police encouraged the enforcement of a "custom" of segregating the races in restaurants by intentionally tolerating violence or threats of violence directed at those who violated the "custom."[57] "[S]ettled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements."[58]

RICHARD H. MCCLURE

SELECTIVE SERVICE—CONSCIENTIOUS OBJECTORS—SECTION 6(j) REQUIRES DEFERMENT FOR REGISTRANTS WHOSE BELIEFS EMANATE FROM ETHICAL OR MORAL BASES. *Welsh v. United States* (U.S. 1970)

Elliott Ashton Welsh II was convicted in the United States District Court for the Central District of California of refusing to submit to induction into the armed forces in violation of the Military

54. *Id.*
55. *Id.* at 172.
56. *Id.*
57. *Id.*
58. *Id.* at 168.