FAILED CONSTITUTIONAL EXPERIMENT: WILL V. MICHIGAN

PROPOSED FEDERAL LEGISLATION

I. INTRODUCTION

What the Davis v. Rennie series[1] of reported federal cases does best is illustrate the grotesque inequities in the Federal Civil Rights laws as articulated by the Supreme Court in Will v. Michigan, 491 U.S. 58 (1989).[2]

Jason Davis' family seeks to amend the Federal Civil Rights Act to cure these inequities. It can be said that the Davis case is one of the poster children for the failed constitutional and federal statutory experiment which is the Will v. Michigan case.[3] One of the best kept constitutional secrets in America is, indeed, the rule of law laid down in Will. This case hurts us all and thwarts some of the best work by our greatest Civil Rights Leaders both past and present. In short, Will essentially stands for the proposition that "The King can do no Wrong." It was Mr. Justice Stevens who observed in his riveting Will dissent that "Legal doctrines often flourish long after their *raison d'être* has perished. The doctrine of sovereign immunity rests on the fictional premise that the 'King can do no wrong.'" Will, 491 U.S., at 88. (Stevens, J. dissenting).

No matter how evil, reckless or intentional a State's conduct may be States are not presently subjected to damage claims under the Federal Civil Rights Act because of Will. The rule of law laid down in Will works a terrible injustice at the street level and deprives many of their civil rights including my client, Jason Davis. **Sadly, no matter how many committed mentally ill inpatients are beaten, maimed or killed tonight - within State operated mental institutions across our 50 states – not one of them or their heirs will have a Federal Civil Rights monetary damage claim against any State in the morning. This is true no matter how much blood the State has on its own hands in the aftermath of its unabashed evil, reckless or intentional conduct. This is the failed constitutional and federal statutory experiment which is Will v. Michigan.**[4] Will has perpetuated violence against the committed mentally ill across our Nation. It did so in Davis.

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[1]The Davis series of reported federal cases set forth some of the most profoundly important constitutional protections for the mentally ever articulated by our Federal Courts. See Davis v. Rennie, 264 F. 3d 86 (1st Cir. 2001); Davis v. Rennie, 997 F. Supp. 137 (D. Mass. 1998); Davis v. Rennie, 553 U.S. 1053 (2002).

[2]The law firm of Brendan J. Perry & Associates, P.C. has represented Jason Davis and his family since 1996.

[3]The Federal Civil Rights Act is but the conduit through which federal constitutional claims are asserted. Graham v. Connor, 490 U.S. 386, 393-394 (1989). Thus, when it is impermissibly restricted it necessarily results in a concurrent and impermissible restriction upon the Constitution itself. This is precisely what occurred in Will.

[4]In 1978 the Supreme Court expressly held that Towns, Counties, Cities and Municipalities can, in fact, be sued for money damages under 42 U.S.C. §1983. See Monell v. New York City Department of Social Services, 436 U.S. 658, 690 - 692 & n. 54 (1978) (Brennan, J.); The ability to sue these political bodies for money damages under 42 U.S.C. §1983, but not States, is constitutionally incongruous as the Will dissenters make axiomatic. Will, 491 U.S., 83, 93

The Will case has caused there to be a gaping hole in the Federal Civil Rights Act. This gaping hole can be cured by having Congress add but one sentence to very end of the Federal Civil Rights Act [42 U.S.C. §1983] as follows: "For the purposes of this section, the term person shall include a State and a Commonwealth together with their departments, offices, officers acting in their official capacities, agencies, entities, bodies politic and bodies corporate."

The issues flowing from Will are some of the most profoundly important constitutional issues in the history of our democracy. The brain trust and intellectual soul of the Supreme Court in 1989, Justices Marshall, Stevens, Blackmun and Brennan, clearly thought so. They were the four dissenters in Will, 491 U.S., at 71-94 and clearly four of the greatest jurists ever to sit on the Supreme Court. The very purpose of the reconstruction era civil rights statutes, as well articulated in the Will dissents, was to insure that the State ***was*** financially liable and thus accountable when ***it*** engaged in unconstitutional conduct. Id. The Will majority clearly thwarted the Congressional intent behind the initial enactment of the Reconstruction Era Civil Rights statutes as proved by the Will dissents. The "fix" though, as noted, consists of but a single "original intent" sentence which could not be undone by any court.

(Brennan, J. dissenting; Stevens, J. dissenting). Mr. Justice Stevens observed in Will that the majority's construction of Section 1983 "draws an illogical distinction between wrongs committed by county or municipal officials on the one hand, and those committed by state officials on the other." Will, 491 U.S., at 93 (Stevens, J. dissenting). "Local governing bodies…can be sued directly under §1983 for monetary, declaratory, or injunctive relief where…the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell, 436 U.S., at 690. Fundamental notions of equality, as between Plaintiffs and Defendants, demands that States also be subjected to money damage claims under 42 U.S.C. §1983. The concept that States should be subject to financial remuneration, in the Civil Rights context, is hardly a novel concept under existing Supreme Court authorities. Mr. Justice Stevens noted in his Will dissent that in "Milliken v. Bradley, *supra*, for example, a unanimous Court upheld a federal-court order requiring the State of Michigan to pay $5,800,000 to fund educational components in a desegregation decree 'notwithstanding [its] *direct* and substantial impact on the state treasury.' *Id.*, at 289, 97 S.Ct., at 2761 (emphasis added). As Justice Powell stated in his opinion concurring in the judgment, 'the State [had] been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate.' *Id.*, at 295, 97 S.Ct., at 2764. Subsequent decisions have adhered to the position that equitable relief—even 'a remedy that might require the expenditure of state funds,' *Papasan, supra*, at 282, 106 S.Ct., at 2943—may be awarded to ensure future compliance by a State with a substantive federal question determination. See also *Quern v. Jordan*, 440 U.S., at 337, 99 S.Ct., at 1143." Will, 491 U.S., at 90 (Stevens, J. dissenting; brackets, italics and emphasis in original). Mr. Justice Stevens also noted in his Will dissent that, in addition to these substantive payments, the Supreme Court "held in Hutto v. Finney, 437 U.S. 678, 98 S. Ct. 2565, 57 L.Ed.2d 522 (1978), a case challenging the administration of the Arkansas prison system, that a Federal District Court could award attorneys' fees directly against the State under §1988…and could assess attorneys' fees for bad faith litigation under §1983…'to be paid out of Department of Corrections funds.' " Will, 491 U.S., at 91 (Stevens, J. dissenting; citations omitted). Given these cases and Monell there is no viable legal basis upon which to continue to contend that States should enjoy absolute sovereign immunity. They really do not even enjoy it right now. Allowing Civil Rights victims to assert money damage claims against the States is a variation only in degree, at this point, given the cited authorities. The fact is that States have long been financially liable for their civil rights misdeeds in a very real sense.

The Davis case illustrates well the inequities of Will. The State committed Jason Davis to a mental health facility[5] where an historical wave of violence was acute, ongoing, documented and well known to all who cared to know.[6] It also provided caretakers to him which included convicted violent felons[7] hired pursuant to a written State hiring policy. When expected and, indeed, statistically probable harm[8] befell Jason Davis on August 12, 1993, the State, relying as it could on Will, told him to take the matter up with the convicted violent felons who brutalized him insofar as it was washing its hands of the matter.[9] First though the State, through the Office of its Attorney General, availed itself to a one month Federal District Court trial which it lost, a Federal Appeal which it lost and a Certiorari filing with the Supreme Court which it lost. The State then ran for

[5]The Westborough State Hospital which was operated by the Massachusetts Department of Mental Health ("DMH") in 1993.

[6]The Davis case trial exhibits, which are still part of the record in the United States District Court for the District of Massachusetts ("Federal District Court"), the United States Court of Appeals First Circuit ("First Circuit") and United States Supreme Court ("Supreme Court"), prove the documented commission of the very worst types of crimes against mentally ill inpatients at the Westborough State Hospital including Rape, Torture, Indecent Sexual Assault and Battery, Criminal Battery, Criminal Assault, Physical Violence, Physical Abuse, Neglect, Threats, Emotional Abuse, Intimidation, Swastika Branding and Verbal Abuse by staff.

[7] Philip Bragg and Paul Rennie were each hired pursuant to the DMH's internal written hiring policy. Philip Bragg had been indicted for assault with intent to murder and assault and battery with a dangerous weapon (gun) prior to commencing employment for the DMH. He pled guilty to assault and battery with a dangerous weapon (gun) and was sentenced to 10 years of incarceration in a Massachusetts prison (one year served) prior to commencing employment for the DMH at the Westborough State Hospital. Philip Bragg's felony prison sentence resulted from his having shot a 16 year old boy in the eye with a gun at short range. He was released from prison only a short time before he began employment for the DMH at the Westborough State Hospital in a direct patient care capacity. Philip Bragg also had a history of employment related violence and abuse upon patients prior his savage beating of Jason Davis. A former DMH Commissioner, Eileen P. Elias, testified under oath at trial that Philip Bragg should never have been employed as a Mental Health Care Worker in 1992 - one year before the Davis incident - given his violent proclivities. Paul Rennie was indicted for two counts of armed robbery and one count of assault and battery with a dangerous weapon prior to commencing employment for the DMH at the Westborough State Hospital in a direct patient care capacity. Paul Rennie sought to steal a car from one victim by striking him with a metal pipe and to rob money from yet another victim at gunpoint. Paul Rennie pled guilty to these two counts of armed robbery and one count of assault and battery with a dangerous weapon. He was incarcerated in a Massachusetts prison for one year prior to his DMH employment. Paul Rennie had a history of employment related violence and abuse upon patients prior to his attack on Jason Davis. See Exhibits 2/1-4; 3/1-2; 4/1-6 @jasonstrongma.com. References to the exhibits shall be to the Exhibit Number and Page of said exhibits as set forth on the website (jasonstrongma.com), e.g., (2/1-4) shall mean Exhibit 2, Pages 1-4.

[8]The employment of convicted violent felons Philip Bragg and Paul Rennie by the DMH in 1993, at the Westborough State Hospital, constituted an extreme risk of harm to all mentally ill inpatients subject to their "care", including Jason Davis, given their histories of violence and the national recidivism rate of 34.6 percent amongst convicted violent felons. See Recidivism of Prisoners released in 1983 (Bureau of Justice Statistics Special Report – Department of Justice). In short, placing Philip Bragg and Paul Rennie in direct patient care capacities was not unlike having a fox guard the henhouse. Not surprisingly, Bragg and Rennie ***were*** the principal aggressors in the two attacks upon Jason Davis on August 12, 1993. See Davis, 264 F. 3d, at 86-116.

[9]See Davis v. Rennie, 264 F. 3d 86 (1st Cir. 2001); Davis v. Rennie, 997 F. Supp. 137 (D. Mass. 1998); Davis v. Rennie, 553 U.S. 1053 (2002); Davis v. Rennie, 178 F. Supp. 2d 28 (D. Mass. 2001); (12/1).

the proverbial hills after defending the criminals - who brutalized Jason Davis - in three federal courts.

In its 2001 reported opinion the First Circuit recalled the brutalization of Jason Davis through the trial testimony of Special State Police Officer Greg Plesh, the hero who came upon the scene and stopped the bloody carnage, Jason Davis and defendant - eyewitness Nicholas Tassone. In short, in one of the two attacks[10] on Jason Davis on August 12, 1993, he was pinned to the floor in the locked ward by a number of Mental Health Care Workers so that one of their own (Philipp Bragg) could savagely beat him:

> [Special State Police Officer Greg Plesh] recounted: 'Jason is lying down the hallway, head is away from me, feet are towards me. Staff is encircling him. And it's not what I saw, it's what I felt. I initially felt the thud through the [concrete slab] floor and then heard a thud.' Plesh said he looked up and saw Bragg punch Davis in the head four to five times. Plesh continued: I turned to [Charge Nurse] Joyce Wiegers who was on my right shoulder. When I saw Jason Davis being punched, I said, 'Did you see that? Are you going to do anything about this? Are you going to allow this to happen?' She didn't say anything, and I really wasn't waiting at that point. Some more was occurring and at that point I decided to intervene. As the MHWs (Mental Health Care Workers) began rolling the patient onto his stomach, Bragg twisted Davis's neck to the side and Plesh climbed over the other MHWs to push Bragg away. **Davis testified about the punching: 'It was over and over and over and over again. It was like it would never stop. And then I was calling for help and nobody was stopping them and they kept hitting me. I felt the blood; it was, you know, it was coming down my face.'** Plesh said that Davis' 'eyes were rolling out of his head,' that '[t]here was swelling, bruising all in his face,' and that he checked to make sure that Davis's neck had not been broken. Tassone said that Davis's face was cut and bloody. (brackets supplied).

Davis, 264 F. 3d, at 94, 86-116 (brackets supplied; parenthesis in original).

The Defendant, Nicholas L. Tassone, was a Mental Health Care Worker on the ward who saw Jason Davis being pulverized by fellow workers on August 12, 1993. He was the lone Mental Health Care Worker who told a semblance of the truth at trial. He testified that Jason Davis looked like "a fighter looks after they get out of the ring, how sometimes they get cut on their eye, and they have blood dripping down their face." He observed a "puddle" of "blood" beside Jason Davis' head after the beating. (8/60, 62, 61); Davis v. Rennie, 264 F. 3d 86 – 116 (1st Cir. 2001). Mr. Tassone testified further that when he previously reported physical abuse by fellow Mental Health

[10]The first attack on Jason Davis was by Paul Rennie in a "Quiet Room" within the locked ward. The "evidence showed that Rennie provoked Davis by taunting him, and then, after the patient reacted, choked him and threw him to the mat." Davis, 264 F. 3d, at 110-111. The First Circuit ruled in Davis that when a caretaker taunts a patient the resulting patient behavior cannot then be employed as the constitutional basis upon which to physically restrain. Davis, 264 F. 3d, at 108 – 111. This was yet another seminal constitutional ruling in the Davis case.

Care Workers he received "threatening phone calls", had his "tires slashed" and the "windshield broken" on his car. (8/57). The Charge Nurse told Jason Davis, after the attack, that "[t]his is what you get when you act – this is what you get when you act like this." Davis, 264 F. 3d, at 94-95.

Following the Davis attack a cover up ensued on the part of Davis case defendants, as observed by the First Circuit, which included false allegations of wrongdoing against Special State Police Officer Greg Plesh and the alteration of medical records by Charge Nurse Joyce Weigers. (41/1-2). See Davis, 264 F. 3d, at 94-95, 115-116.[11] Many of the Davis case defendants kept their jobs for years after the Davis verdict was rendered.

The First Circuit recounted the acute psychiatric injuries sustained by Jason Davis, as per his treating psychiatrist, within its 2001 reported opinion:

> Davis presented additional medical evidence at trial from Dr. R. Amos Zeidman, his treating psychiatrist for periods beginning in 1991. In late 1996 or early 1997, Dr. Zeidman diagnosed Davis with Post Traumatic Stress Disorder (PTSD) as a result of the physical restraint at Westborough. He said that Davis 'was horrified' by the event because '[h]e thought he was going to die.' Dr. Zeidman said that Davis's PTSD symptoms included insomnia, anxiety, panic states, flashbacks, nightmares, and an inability to concentrate. He said that Davis was having difficulty making progress in therapy because he was afraid to trust anyone and that '[t]he quality of his life has suffered terribly for this.' Here, the evidence supports a finding of significant actual and potential harm. According to Dr. Zeidman, the psychological harm Davis has suffered from the incident has seriously affected his quality of life, causing a range of PTSD symptoms, demonstrating the reasonable relationship between the injury and the amount of the award.

Id., at 95, 116.

Jason Davis' life went into a downward spiral, after the events of August 12, 1993, and he died six years after his trial. (30/2). Jason Davis was just 38 years old when he died. His Mother died soon thereafter. (30/2).

The brutalization of Jason Davis, while he was an involuntarily committed inpatient in a Massachusetts Department of Mental Health facility, unequivocally resulted from the rule of law articulated by the Supreme Court in Will and the culture which it has so clearly perpetuated. Thousands more have fallen prey to this same rule of law and culture insofar as the central holding in Will v. Michigan adversely affects literally every type and kind of civil rights claim known to the United States judiciary including all forms of discrimination and brutality against all races,

[11]In her nurse's notes Charge Nurse Joyce Weigers indicated "unknown when or how injury sustained" and "unknown to writer precipitants to occurrence" of injury to Jason Davis yet the Special State Police Officer asked her, during the attack, whether she was going to put a stop to it. (41/1); Davis, 264 F. 3d, at 94, 95, 115-116. She also completed an internal complaint form which alleged that hero Special State Police Officer Greg Plesh engaged in "improper and disturbing arrest of a staff member (Philip Bragg)", who was the principal assailant, when such was not the case. Id., at 95; (41/2). (parenthesis supplied). Bragg and Weigers were both found liable by the jury for violating Jason Davis' federal civil rights. (10/1,7-9; 19/1-3). The jury imposed compensatory damages of $100,000 and punitive damages of $500,000 on each of them. (10/1,7-9; 19/1-3).

creeds, national origins, colors and ethnicities. This case has real life and devastating affects on the ability of all citizens to obtain ***street level*** enforcement of their civil rights. My client, Jason Davis, and his family can attest to that.

In Davis, the convicted violent felons: (i) were hired under a written hiring policy promulgated by the State; (ii) were hired by the State to work in direct patient care capacities with the mentally ill which requires extraordinary patience; (iii) were hired during a wave of violence[12] and abuse at the State institution including theirs; (iv) had a recidivism rate of 34.6%[13]; (v) had work histories which demonstrated extensive violence and abuse upon committed mentally ill inpatients before the Davis attack; (vi) were hired by the State following their incarceration for commission of violent crimes against the person[14]; and (vii) were deficiently trained in restraint practices as evidenced by the gruesome "restraints" to which Jason Davis was subjected as per the reported opinion by the First Circuit. See Davis v. Rennie, 264 F. 3d 86 – 116 (1st Cir. 2001); Exhibits 1-67 @ jasonstrongma.com. There were layers upon layers of "policies" of action and inaction at play in Davis which tied the State ***itself*** to the "street level" misconduct. The State should be liable in a case such as Davis because it had blood on its hands. It never honored the 2.4M judgment which entered upon the Federal District Court jury verdict rendered on October 28, 1998. Why? Will v. Michigan.

The inequities which the Will holdings perpetuate are too numerous to list here but none is more vexatious than the hollowness which it brings to the Fourteenth Amendment and the mockery it makes of our judicial system. The Commonwealth of Massachusetts was ***itself charged*** with the obligation to keep Jason Davis safe under the Constitution. See Youngberg v. Romeo, 457 U.S. 307, 315, 324 (1982). Yet when it failed miserably in this regard, it informed Jason Davis and his family to take the matter up with the violent felons who attacked him. Youngberg, 457 U.S., at 315, 324; Will, 491 U.S., at 58 -71. These violent felons were not, however, charged with insuring his safety; this was the State's obligation under the Constitution. See Youngberg. The State eviscerates constitutional rights when only its employees are responsible for protecting them. Will implements both claim shifting and damage shifting to private individuals. Will also effects the shifting of the State's obligation to provide constitutional protections into the abyss as the combined effect of Youngberg and Will make all too clear. **If States are immunized from damage claims, resulting from their failure to provide the very protections which the Constitution compels them to provide, such protections will simply not be provided. They were not in Davis. This is the failed constitutional experiment which is Will.**

Make no mistake about it the Commonwealth of Massachusetts was the ***real party*** in interest in the Davis case: its hands were firmly on the legal helm and it funded all litigation expenses across all three federal court litigations. When the State, through two of its Attorneys General, realized it

[12]See footnote 6.

[13]See footnote 8.

[14]See footnote 7,6,8.

could not "shake" Jason Davis – despite the use of the State's vast financial and legal resources over a seven (7) year period in three federal courts – it quit the case to avoid wrangling about judgments, post judgment discovery and other collection type matters with Davis' lawyers.[15] In common parlance, it was time to pay the fiddler; but the State refused to make good on a debt which was clearly its own. In Davis, the State literally defended the very criminals[16] it should have indicted, "circled the wagons" on behalf of the Commonwealth, engaged in what amounted to a legal cover up, corruptly tried to make new law which would have hurt the mentally ill as a class[17] and attempted to deflect blame against Massachusetts institutions. It then ran for the hills when it lost for the third time in the Supreme Court via the denial of its Certiorari Petition. The State wanted to win at any cost, as its litigation tactics and legal positions so clearly prove, even if it meant making "bad law" along the way which intentionally impaired the prospects for safety of the institutionalized mentally ill. The Will holdings expressly allowed it to engage in this course of conduct.

Under Will, the Commonwealth of Massachusetts was allowed to pluck all the litigation fruit it could including availing itself to a month long Federal District Court trial, a Federal Appeal and the filing of a Certiorari proceeding in the Supreme Court – while avoiding entirely the judgments entered in the very litigations perpetuated by its vast financial and legal resources. **All the roses but none of the thorns; this is the impact of Will. These litigations are very simply ones where the State is the real party in interest, which controls and financially supports the legal**

[15]On the very day that the Attorney General's Petition for a Writ of Certiorari was denied by the Supreme Court he withdrew his representation of all State employees in the Davis case. Davis, 178 F. Supp. 2d, at 28-29; (12/1).

[16]It is self-evident that all Davis case defendants found civilly liable concurrently violated 18 U.S.C. §242 which is the criminal cousin of 42 U.S.C. §1983. Thus, all civil defendants – not just Philip Bragg and Paul Rennie who were convicted violent criminals before trial – were criminals. Their conduct alone teaches us that as does the Davis verdict. Davis, 264 F. 3d, at 86-116. (10/1-9; 9/1-16; 50/1-11).

[17]The principal constitutional contention asserted by Attorneys General Harshbarger and Reilly, in the Davis line of cases, was that the United States Constitution does not obligate Doctors, Mental Health Care Workers, Charge Nurses or other health care personnel to stop one of their fellow employees from savagely brutalizing a mentally ill inpatient even if they have both the time and opportunity to do so. Simply put, their core constitutional position was that all health care personnel can simply look the other way and do nothing when the mentally ill are being brutalized in their presence. Davis, 264 F. 3d, at 86 – 116. This position was not only corrupt, barbaric, immoral and unconstitutional but, if embraced, would have forever jeopardized the safety of mentally ill inpatients in Massachusetts and, indeed, the entire First Circuit. Doctors, Nurses and Mental Health Care Workers simply would have been provided with a perpetual constitutional license to stand idly by while fellow workers beat mentally ill inpatients bloody in their presence. The speciousness of this core constitutional argument by Attorneys General Harshbarger and Reilly is evidenced by the fact that reviewing Courts resorted to age old and fundamental Supreme Court precedent to summarily reject it. See Youngberg v. Romeo, 457 U.S. 307, 314-324 (1989); Deshaney v. Winnebago Department of Social Services, 489 U.S. 189, 199-200 (1989); Davis, 264 F. 3d, at 97-98. The Romeo case was decided some 11 years before the Davis incident even occurred. Thus, Attorneys General Harshbarger and Reilly not only attempted to disadvantage an entire class of our most vulnerable citizens but their unsuccessful attempt to do so was predicated upon a contorted view of the law which was entirely at odds with long standing constitutional protections for the mentally ill. Once again; a "win at any cost" mentality. There was, quite obviously, no end to which the Massachusetts Attorneys General would not go to beat Jason Davis. This was hardly the only corrupt legal position asserted or tactic undertaken by the four State Attorneys General in the Davis line of cases. See jasonstrongma.com and Exhibits 1- 68.

agenda, yet it can still hide behind the curtain when it loses and pretend that it has no relation to or interest in the litigation. These litigations are manifestly perpetuated by the Will holdings and make a mockery of accountability and justice in our Democracy. The State can simply "play cat and mouse" with both the Constitution and the justice system any time it sees fit to do so.[18] Will eviscerates State liability, in the money damages context, and with it any hope of accountability. The raw tactics which the Will case perpetuates though further disembowel the Federal Civil Rights Act and the U.S. Constitution in the State accountability context. "Cat and mouse" is a terrible game to play with the U.S. Constitution. Will perpetuates this game as Davis has taught us.

Shortly before trial in the Davis case an Assistant Attorney General, Richard H. Spicer, orally informed the undersigned that Attorney General Scott Harshbarger had a message for me. The message was as follows: "Mr. Perry, Scott [Harshbarger] wanted me to tell you that he will pay the entire jury verdict if you win but that he will never have to pay you because you will never win." (brackets supplied). I then told Mr. Spicer I would hold the Attorney General to his word. The 2.4M Davis judgment remains unpaid. "Cat and mouse" is the order of the day under Will. It was in Davis. It still is.

II. PROPOSED AMENDMENT

What is the cure for the gaping hole left by Will? It is a one sentence addition to the tail end of 42 U.S.C. §1983. The full text of 42 U.S.C. §1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The proposed statutory amendment would be inserted after the period which succeeds the word "Columbia" in the last sentence of 42 U.S.C. §1983:

> For the purposes of this section, the term person shall include a State and a Commonwealth together with their departments, offices, officers acting in their official capacities, agencies, entities, bodies politic and bodies corporate.

This sentence is merely the reverse engineering of the Will dissents. It is the dissenters' genius. The proposed statutory amendment cures the four principle ills relative to which the Will dissenters

[18]The "grain by grain" corruption analysis of Massachusetts officials is set forth in the sixty (60) page Governor Baker letter (11.3.17) on the website's homepage (jasonstrongma.com).

so vociferously complained: (i) the inability to make the State a party to civil rights damage claims; (ii) the inability to compel States to pay civil rights damage claims; (iii) the inequities inherent in the ability to assert civil rights damage claims against municipalities but not States; and (iv) the evisceration of one of the central purposes of the Reconstruction Era Civil Rights statutes, i.e., holding the States themselves financially accountable. Will, 491 U.S., at 71-94 (Brennan, J. dissenting; Stevens, J. dissenting).

Justices Marshall, Brennan, Blackmun and Stevens proved through their dissents that the 1989 text of 42 U.S.C. §1983 already made States liable for civil rights monetary damage claims. Indeed, the 1871 Congress placed this very construction on 42 U.S.C. §1983 when it enacted its precursor[19] as the Will dissents prove. The proposed amendment merely codifies what 42 U.S.C. §1983 stood for between 1871 and 1989. **It does nothing that the 1871 Congress did not originally intend.** The amendment also strikes at the very heart of our Democracy since it makes States liable and accountable for ***their*** civil rights deprivations and implements the rule of law. The adage that the "King can do no wrong" has no place in our World much less the U.S. Constitution. We know that now more than ever given the events of the last three years. This one sentence amendment insures accountability for the "King" and does not "open up" the Federal Civil Rights Act. It merely respects the original intent of the 1871 Congress and a majority of the 1978 Supreme Court.[20]

III. NO FLOODGATES WILL OPEN

The primary contention by adversaries of the proposed legislation will be that the floodgates will open wide thereby perpetuating an avalanche of cases against States which seek money damages under the Federal Civil Rights Act. This contention is entirely disproved though by binding Supreme Court precedent which sets forth the legal predicates upon which governmental liability must be premised. No floodgates can open simply because Supreme Court precedent forecloses such a circumstance.

A State Police Officer, with an adequate work history who has been adequately trained and supervised, will not subject the State to Federal Civil Rights money damages claims even if he commits heinous criminal acts on the job. This results from the dictate of binding Supreme Court cases which require claims for governmental liability to be premised upon a governmental policy

[19]Section 1 of the Civil Rights Act of 1871.

[20]It must be recalled that Monell itself overruled Monroe v. Pape, 365 U.S. 167 (1960) which had provided municipalities with blanket immunity relative to money damages claims asserted under the Federal Civil Rights Act. See Monell, 436 U.S., at 695-702. In Monell a majority of the 1978 Supreme Court expressly ruled, as to all governmental entities including States, that "there can be no doubt that §1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly construed, against ***all forms of official violation*** of federally protected rights." Monell, 436 U.S., at 700-701. (brackets and emphasis supplied). Thus, a majority of the Supreme Court has already expressly ruled, in one of its opinions, that States ***are*** subject to money damages claims under the Federal Civil Rights Act based upon the intent of the 1871 Congress. Therefore, both the Supreme Court (1978) and Congress (1871) have determined, at points in their respective histories, that States ***should be liable*** for money damages claims under the Federal Civil Rights Act. Given these building blocks and the Will dissents, the proposed legislation cannot be described as radical since it merely embeds the original intent of the 1871 Congress and the reasoned opinions of the Supreme Court in 1978 and 1989. Monell, 436 U.S., at 658 – 714; Will, 491 U.S., at 71-94 (Brennan, J. dissenting; Stevens, J. dissenting).

which: (i) perpetuates street level misconduct; and (ii) is generated by the government's policy makers:

> If the decision to adopt that particular course of action is properly made by that government's authorized decision makers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of §1983.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986).

"Local governing bodies…can be sued directly under §1983 for monetary, declaratory, or injunctive relief where…the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Id. at 690. The Will dissents make this very point.

In 1997 the Supreme Court again articulated the central policy making municipal liability predicate in Brown, 520 U.S., at 404.

> As our §1983 municipal liability jurisprudence illustrates, however, it is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. (emphasis in original).

Binding Supreme Court precedent therefore dictates that governmental liability simply does not attach just because a State employee does wrong. The criteria to assert a claim against the government itself, as proved, requires much more than this. Claimants must not only tie their claims directly to the actions of the municipality's policy makers but they must also demonstrate the "requisite degree of culpability" on their part. Proving claims against governmental policy makers is actually a very arduous task because of the cited Supreme Court litmus tests. In Davis, where a claim against the State itself would have been actionable but for Will, the State proximately caused the street level civil rights deprivations and clearly had the "requisite degree of culpability..." as proved above. See page 6, paragraph 2, factors (i) – (vii); Brown, 520 U.S., at 404. The State should be liable in a case such as Davis because it ***did wrong.***

To be clear, aberrational behavior by a rogue employee – who had an adequate employment history and who was not ill trained or supervised – will not perpetuate State liability for damage claims even if 42 U.S.C. §1983 is amended in the manner proposed. The intensive proof related requirements in this arena insure only that a paucity of cases will be filed. Those who litigate these cases know this to be true. These types of claims against the State will be extremely difficult to prevail upon as we already know, in the directly equivalent municipality liability context, given

the strictures of Monell and Brown. Suggestions that the floodgates will open are at odds with the teachings of these cases.

When States engage in evil, reckless or intentional conduct they too should be held liable. People and municipalities are liable under binding Supreme Court authorities - why should States be any different? Are they above the law? See Monell, Brown, Pembaur, Hafer v. Melo, 502 U.S. 21, 25 (1991). The concept that the "King can do no wrong" is repugnant to our Constitution. **He can do wrong and should be punished when he does.** Why should the King enjoy absolute immunity? People, Towns, Counties, Cities and Municipalities do not.

The public statements issued by Massachusetts State Representative John Rogers, relative to the Davis case, illustrates well the vexing street level effects of Will: (i) "The facts are uncontested. They [Department of Mental Health] hired, failed to train and failed to supervise these workers and to allow the State to walk away is just wrong."; [21] and (ii) "In my mind the liability of the Commonwealth has always been crystal clear."[22]

IV. THE CONTENTION THAT THIS MOMENT IN TIME IS TOO CHAOTIC FOR THE UNITED STATES HOUSE OF REPRESENTATIVES TO PROPOSE FEDERAL CIVIL RIGHTS LEGISLATION IS INCONSISTENT WITH THE HISTORY OF THESE LEGISLATIVE ENACTMENTS IN THE UNITED STATES

The Reconstruction Era Federal Civil Rights legislation was the most profoundly important Federal Civil Rights legislation ever enacted by our Nation insofar as it included the precursor to what is now 42 U.S.C. §1983. These legislative enactments were filed in the immediate aftermath of a war which saw two halves of a Nation take up arms against each other. There has never been a more chaotic time period in American history to file Federal Civil Rights legislation then this one.[23] Yet we filed and approved Federal Civil Rights legislation in 1866, 1871 and 1875.

When President Kennedy spoke to the Nation on June 11, 1963 he acknowledged we were in chaos:

> The events in Birmingham and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them. The fires of frustration and discord are burning in every city, North and South, where legal remedies

[21] http://www.wcvb.com/article/family-waits-years-for-millions-after-son-beaten-at-hospital/8034736

[22] https://www.bostonglobe.com/metro/2014/03/09/jason-davis-beating-foreshadowed-joshua-messier-tragedy/JUTn1QniHkN8SCnrwqk9IK/story.html

[23] Upon being reelected President Lincoln literally had to sneak into Washington, D.C. under cover of darkness to combat the very real assassination threat which he faced in Baltimore, MD upon arriving back from Illinois. https://www.smithsonianmag.com/history/the-unsuccessful-plot-to-kill-abraham-lincoln-2013956/

> are not at hand. Redress is sought in the streets, in demonstrations, parades, and protests which create tensions and threaten violence and threaten lives.[24]

Days later (6.19.63) President Kennedy filed his monumental Public Accommodations Act. See 42 U.S.C. §2000a. It is these acutely chaotic times in our Nation's history which actually spawn the immediate need to enact Federal Civil Rights legislation.

There has never been a better time in American history to implement this one sentence amendment to 42 U.S.C. §1983 since our rule of law and accountability are being flouted daily. The amendment proposed here, like the Reconstruction Era statutes and the Public Accommodations Act, addresses a current legal and societal need in the United States: restoration of the rule of law and the perpetuation of accountability. There has been a wide array of arbitrary violence by State actors against State victims in recent years as has been extensively reported by the media. It should have a Federal Civil Rights remedy for damages when the State is liable.[25] There presently is none. The proposed amendment will invigorate the very heart of our democracy as our Founders intended in 1871. Turbulent times such as the present ones are the best time to enact Federal Civil Rights legislation if it is aimed at quelling the turbulence at hand. This legislation has precisely such an aim.

There can be no meaningful improvement in our State institutional conditions, policies and procedures when nobody is held accountable. When States are never subject to suits for payment of civil rights damage claims this perpetuates the contemplated sloth, incompetence and chaos one would expect to pervade our State institutions. It does. These conditions spawn multitudes of State perpetuated civil rights violations which plague our Nation and go unchecked. Ours is a Nation which has a civil judicial system which has always prospered, since the founding, upon the proposition that the imposition of civil court damages is a deterrent to those whose actions Courts seek to affect. Indeed, within the civil rights sphere itself, Courts impose damages to "punish" and "deter" the wrongdoer. Smith v. Wade, 461 U.S. 30, 54 (1983). However, since States enjoy absolute immunity under Will there is neither a vehicle to "punish" nor "deter" them nor is there incentive, on their part, to engage in corrective behavior. The States, after all, are presently accountable to nobody. In Davis the State clearly had blood on its hands but could still run away into the woods, when all was said and done, because of Will. This should not be permitted in a civilized society such as ours governed, as it is, by a Constitution which is supposed to be fair and just.

This one sentence amendment to 42 U.S.C. §1983 is the gear we need to drive our Constitution. The Will rule of law is making a mockery of our Democracy, Constitution, Federal Civil Rights Act, judiciary and core purposes of the Reconstruction Era Civil Rights statutes. It did so in Davis. The Federal Civil Rights Act and the U.S. Constitution are currently toothless giants when it comes to holding States accountable for ***their*** Federal Civil Rights deprivations. We need to change that.

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[24] https://americanrhetoric.com/speeches/jfkcivilrights.htm

[25] Sandra Bland's family was compensated by the State of Oklahoma because it chose to do so. The problem, under Will, is that it was not legally obligated to do so. Public pressure – not the law – insured justice in that case. The law should have insured this same result but could not because of Will.

V. THE CONTENTION THAT THE REPUBLICAN CONTROLLED SENATE MANDATES THAT WE SHOULD STAND DOWN, RELATIVE TO THE PROPOSED LEGISLATION, IS INCONSISTENT WITH THE HISTORY OF THESE LEGISLATIVE ENACMENTS IN THE UNITED STATES

Senator Edward M. Kennedy's landmark "Americans with Disabilities Act" became law in 1990 when President Bush, a Republican, was in the White House.[26] See 42 U.S.C. §12101. It is time to think as grand as Senator Kennedy did. Few ever do. President John F. Kennedy filed his Federal Civil Rights legislation on June 19, 1963[27] knowing full well it might cost him the presidency he so loved in the 1964 election. See 42 U.S.C. Section §2000a. We talk of profiles in courage.

The pleas of the Will dissenters should no longer be the lone cries in the constitutional wind. We must bookend them with legislative action. The dissents in Will v. Michigan are two of the most important dissents in the history of the Supreme Court and, indeed, our Nation given the fundamental civil rights principles they seek to protect. I would respectfully submit that these dissents are the modern day equivalent of Mr. Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 552-564 (1896) insofar as they too seek to protect bedrock principles of our civil rights laws which are essential to the continued vitality of our Democracy and Constitution. Justice Harlan's 1896 dissent in Plessy teaches us precisely why drawing a line in the sand is so critical even though success is not immediately at hand. The Supreme Court blessed us with monumental cures for Federal Civil Rights ills in both the Plessy and Will dissents. We should ignore the Will cure no longer. The Plessy dissent was ignored from 1896 to 1954 when Brown v. Board of Education, 347 U.S. 483 (1954) was decided. The Will dissents are likewise a beacon of righteousness which should be embraced in the plain text of 42 U.S.C. §1983.

The proposed legislation would pass in the House of Representatives right now. There may well be a majority shift in the Senate which would pave the way for a 2021 passage of this legislation in that Chamber. The proposed amendment would probably be in the House for a year or more anyway as it works its way through the committees. Even if the Senate were to thwart the proposed legislation the passage in the House alone would be monumental - not unlike Mr. Justice Harlan's dissent in Plessy – since it would raise awareness of the importance of these issues and give succeeding sessions of Congress and future generations a leg up in this most important cause. We would then have the two great building blocks for the future: the Will dissents and passage in the House of this legislation. However, with a Democratic President and a Democratic majority in the Senate this legislation would pass in both Chambers.

The brothers Kennedy did not refrain from doing right, in the Federal Civil Rights arena, merely because failure was a distinct possibility, because the task at hand seemed to be too daunting or because they might incur damage to their own prospects. Clearly, drawing a line in the sand is critical and constitutes success, by itself, as the Plessy and Will dissents already teach us.

[26] http://www.cnn.com/2009/POLITICS/08/29/kennedy.disabilities/index.html

[27] https://en.wikipedia.org/wiki/Civil_Rights_Act_of_1964

VI. THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION POSES NO LEGAL OBSTACLE IN THE PRESENT CONTEXT

The text of the Eleventh Amendment is as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The majority opinion in Will did not intimate, nor could it under controlling Eleventh Amendment jurisprudence, that Congress lacks the power to enact legislation which declares that a State is a "person" for the purposes of 42 U.S.C. §1983. The majority in Will simply observed that "[w]e found nothing substantial in the legislative history that leads us to believe that Congress intended that the word 'person' in §1983 included States of the Union. And surely nothing in the debates rises to the clearly expressed legislative intent necessary to permit that construction." Will, 491 U.S., at 69 (brackets supplied). Although this holding by the majority in Will is incorrect, as proved by the Will dissents, it still would not foreclose the legislation proposed here. Id., at 71-94. The Will majority did not hold or intimate, in its rulings or through dicta, that States could not be made parties to money damages claims, under the Federal Civil Rights Act, via an act of Congress. Instead, it merely held that the raw text of 42 U.S.C. §1983 did not embrace such a construction in 1989.

Will was a State Court action dictating that the Eleventh Amendment was not even inapplicable. Will, 491 U.S., at 71- 94 (Brennan, J. dissenting; Stevens, J. dissenting). However, any legislative amendment to 42 U.S.C. §1983 would concededly have to survive an Eleventh Amendment analysis so that claims could be asserted against the State in both State and Federal Court under its provisions. The statutory amendment proposed here would survive any Eleventh Amendment analysis given the governing Eleventh Amendment concepts embraced in Will: "'[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" Will, 491 U.S., at 75 (Brennan, J. dissenting; brackets supplied) (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)). The constitutional balance could be altered here, between the States and the Federal Government, because the word "person" would be expressly defined in the statutory amendment with "unmistakably clear language." Id. The word "State" would simply be defined as a "person" in the statute. Thus, full compliance with the Eleventh Amendment would be achieved.

A terse amendment to 42 U.S.C. §1983 would cure the ills voiced by the 1871 Congress, 1978 Supreme Court and the Will dissenters while concurrently satiating all Eleventh Amendment authorities cited in Will, 491 U.S., at 58-94.

VII. CONCLUSION [28]

My client, Jason Davis, and thousands more have been deprived of their Federal Civil Rights because of the institutional culture which Will v. Michigan has perpetuated. This failed constitutional experiment must end.

The same legal predicates which compelled the 1871 Congress to act and the Supreme Court to overrule Monroe v. Pape in 1978, through Monell, wholly substantiate the proposed legislation.

Our Nation is in dire need of the proposed amendment to 42 U.S.C. §1983.

This proposed one sentence legislative cure may well prove to be the most important piece of Federal Civil Rights legislation enacted since the Reconstruction Era.

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[28] Documents which expound upon the above principles are found at Exhibits 51-61 in the Exhibit Section of jasonstrongma.com and the 11.3.17 letter found on the website's homepage.