

ADVICE ON OFFICIAL LIABILITY AND IMMUNITY

*Thomas J. Madden and Nicholas W. Allard**

Summary

Abstract

Recommendations

I. Federal

II. State

I. Introduction

The Subject

The ACUS Mandate

II. Analytic framework

Key Concepts

Competing Objectives, Core Values

Alternative Methods of Dealing With Governmental Wrongs

III. The Existing System of Dealing with Governmental Wrongs

A. *The Private Damage Action*

1. Expansion of Individual Liability For Money Damages

—Judicially Discovered Rights—General Trends

—Section 1983 Actions

—Bivens Actions

—Litigation Costs—

Attorneys' Fees

—Litigation Costs—

Government's Defense of Officials

2. The Immunity Doctrine

—Evolution of the Case Law

—The Case Law's Matrix of Issues

a. Source of Immunity

b. Degree of Immunity Available

c. Discretionary and Mandatory Action

d. Scope of the Defendant's Authority

e. Piercing the Immunity Defense

—An Evaluation

B. *Existing Forms of Public Enterprise Liability*

1. Federal Enterprise Liability

—Insurance

* Thomas J. Madden and Nicholas W. Allard are attorneys at Kaye, Scholer, Fierman, Hays & Handler, Washington, D.C. This report was prepared with the assistance of Patrick R. Harkins and David H. Remes, also of that firm.

- Indemnification
- Direct Government or Enterprise Liability
- 2. State Enterprise Liability
- C. *Administrative Controls Over Federal Officials*
 - 1. Individual Sanctions
 - Elected Officials
 - Political Appointees
 - Excepted Service
 - Competitive Service
 - a. Reduction in Grade or Removal by the Agency for Unacceptable Performance
 - b. Disciplinary Sanctions Imposed By the Agency to “Promote the Efficiency of the Service”
- D. *External Controls*
 - 1. Impeachment
 - 2. The Electorate
 - 3. Congressional Control
 - 4. Special Prosecutor
 - 5. Public Pressure

The role of Administrative and External Controls in the Civil Sanction System

IV. Analysis: Changes at the Federal Level

- A. *Summary of Issues Raised by Proposals to Establish Federal Enterprise Liability.*
 - 1. Proposed Legislation
 - a. H.R. 7034
 - b. S. 1775
 - 2. Assessment of Issues Raised by H.R. 7034 and S. 1775
 - a. Retention of the “Good Faith” Defense
 - b. The Search for an Effective Substitute Deterrent
 - c. Jury Trial and “Additional” Damages
 - d. Attorney Fees
 - e. Torts of Former Officials
 - f. “Scope of Office” versus “Color of Law”
 - g. The Problematic Distinction Between Constitutional and Non-Constitutional Torts

B. *Recommendation*

V. Analysis: Changes at the State and Local Level

- A. *Liability Under 42 U.S.C. § 1983*
 - 1. Reprise
 - 2. Problems Related to Federal Assistance
 - a. Rights and Obligations Under Section 1983
 - b. Remedies Under Section 1983
 - c. Increased Litigation
- B. *State Responses to Section 1983 Liability*

C. *The Congressional Response to Section 1983 Liability: Legislative Developments*

D. *A New Legislative Option*

1. Exhaustion
2. Exceptions to Exhaustion
3. Minimum Standards

E. *Recommendation*

Volume II: Appendices**

Appendix A: Statutory Materials

Appendix B: State Survey

Appendix C: Annotated Survey of the Literature

** Some of the appendices for this report have not been published herein. They are the complete Appendix A: Statutory Materials and Appendix B: State Survey. These documents are stored in the project files of the Administrative Conference of the United States.

SUMMARY

Abstract

This study addresses the problems surrounding current rules governing official liability and immunity and evaluates alternative public policy responses to these problems. The focus of this study is the increasing vulnerability of executive branch officials at the federal, state and local levels to personal liability for money damages. The study concludes that the existing liability and immunity rules result in a civil sanction system that is not optimal, and recommendations are offered on desirable changes.

The recommendations of this study are based on a public policy analysis of official liability and immunity rules. The purpose is not to give advice on appropriate action under existing law or even to predict the course of legal developments. Rather, the objective is to identify the framework of the policy issues in this field and then to offer advice on changes that are worthwhile and feasible. The study also appraises the arguments commonly voiced in the ongoing debate over the subject of lawsuits against public officials. It examines relatively unexplored but important areas such as the role of administrative controls in a civil sanction system and the problem of dealing with governmental wrongs at the state and local levels. It is also intended that the comprehensive nature of this study, and the extensive materials compiled in the Appendices, will provide a useful tool in the continuing public examination of existing rules for official liability and immunity.

Although recognizing that existing liability and immunity rules have been developed and will inevitably continue to be significantly influenced by the courts, the study recommends a legislative response to the problems arising from governmental wrongs. Only legislation can produce a comprehensive and coherent change that addresses the complex legal, administrative, and social aspects of the problems. Legislation is also appropriate because of the need to accommodate the competing interests such as the desire for governmental accountability, the need to motivate government officials to engage in socially beneficial conduct, and the interest in minimizing government costs and inappropriate burdens on government officials. Moreover, the widespread interest in pending legislation before Congress and a significant amount of new state legislation demonstrate that the legislative forum will maximize public participation in revising the present civil sanction system.

RECOMMENDATIONS

I. Federal

Under current law, individual federal officials may be held personally liable for constitutional violations they are found to have committed while acting within the scope of their office or employment. Damages may not be recovered against the United States for violations of constitutional rights as such, although claims

arising out of the same conduct may sometimes be stated against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680.

There is nearly universal agreement that the existing system of civil sanctions for constitutional violations by federal officials neither provides adequate assurance of compensation for victims of such violations, nor affords the degree of measured deterrence required to discourage improper conduct by government officials without discouraging proper conduct as well. In addition, the federal government often has interests at stake in constitutional tort litigation involving its officials which cannot adequately be represented by the individual officials themselves as defendants.

Recommendation

To serve the primary goals of compensation, deterrence, and fairness in dealing with constitutional torts committed by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should enact legislation providing that the United States shall be exclusively liable for damages for torts arising under the Constitution of the United States and committed by federal officials while acting within the scope of their office or employment.

Such legislation should provide:

(1) That, in constitutional tort actions, the United States may not assert as a defense the absolute or qualified immunity of the official whose conduct gave rise to the claim, or his reasonable good-faith belief in the lawfulness of his conduct. Such immunities, and the good-faith defense, have been judicially created for policy reasons to assure that exposure to personal liability shall not deter individual officials from the vigorous discharge of their responsibilities, and serve no purpose when the government is substituted as defendant other than to limit the extent to which genuine victims of constitutional injuries may secure redress. In providing that the United States shall not assert such immunities or the good-faith defense, Congress may wish to provide that the United States shall be permitted to assert any applicable immunities of the President, and, perhaps, of federal judges and members of Congress.

(2) That there shall be vested in an office of the Executive Branch independent authority to investigate constitutional tort cases in which there has been a judgment of liability against or money compromise by the United States, and that such office shall be vested with independent authority to conduct disciplinary proceedings in such cases as may be appropriate. Such a disciplinary mechanism is essential to perform the deterrent and corrective functions now served by the damage action remedy against individual government officials; existing administrative disciplinary mechanisms, by themselves, are neither directed toward nor capable of performing these functions under current law.

(a) One approach for implementing this recommendation would be to establish an Office of Disciplinary Counsel to investigate and, where appropriate, to prosecute official misconduct before an administrative tribunal independent of the agency that employed the offending official. Another approach would be

to augment the existing authority and responsibilities of the Office of Special Counsel and the Merit Systems Protection Board under 5 U.S.C. §§ 1201–1209 to perform the functions described herein.

(b) If Congress should choose to rely on the Office of Special Counsel and the Merit Systems Protection Board to implement this recommendation, separate mechanisms would nevertheless be required to provide for independent investigation and disciplinary proceedings with respect to federal officials not subject to the jurisdiction of the Office of Special Counsel and the Merit Systems Protection Board.

(c) Notwithstanding the authority of the independent disciplinary mechanism utilized to implement this recommendation, the agency that employed the offending official would be responsible in the first instance for investigation and, where appropriate, for disciplining the official or implementing other corrective steps, and such action should not be postponed pending the outcome of any constitutional tort suit that may be filed against the United States. Congress should provide every federal agency with explicit statutory authority to employ existing administrative mechanisms for disciplining officials found to have violated constitutional rights.

(d) Before proceeding with disciplinary action against any official for a violation of constitutional rights, the Disciplinary Counsel or Special Counsel should determine whether the agency that employed the official has already taken disciplinary or other corrective action, and, if so, whether the agency's action is satisfactory from the standpoint of the system's overall goals of deterrence and accountability. The Disciplinary Counsel or Special Counsel would be authorized to initiate disciplinary proceedings before the Merit Systems Protection Board or other independent administrative tribunal only if he determined that the agency that employed the official had taken no disciplinary or other corrective action, or that the agency's action was insufficient. Any discipline later imposed by the Merit Systems Protection Board or other independent administrative tribunal would be reduced by any discipline imposed by the agency in its own proceedings.

(e) The Disciplinary Counsel or Special Counsel should be directed to compile and forward to the House and Senate Judiciary Committees periodic reports setting forth the cases he has reviewed, and explaining with particularity why he chose to proceed or not to proceed with independent disciplinary action in each case.

(3) That Congress should provide not only for actual damages but for reasonable liquidated damages in the event that actual damages are nominal or nonexistent because the injury caused by the violation of a constitutional right is of an intangible nature. Congress should also consider allowing "additional" damages against the United States in cases where the conduct giving rise to the tort was undertaken with the malicious intention to cause a deprivation of constitutional rights or with reckless disregard for the plaintiff's constitutional rights.

(4) That the right to jury trial should be retained for plaintiffs whose claims had arisen as of the effective date of the legislation implementing this

recommendation, and that Congress should consider extending the jury trial right to plaintiffs whose claims arose subsequent to the effective date of the legislation.

(5) That Congress consider the appropriateness of allowing attorney fees under such legislation in the context of a more comprehensive review of the attorney fee issue in across-the-board federal legislation.

(6) That legislation implementing this recommendation provide a mechanism for holding former government officials accountable for constitutional torts committed while they were in office, where a plaintiff has secured a judgment against or money compromise by the United States. Congress should consider allowing federal officials leaving government service to elect either to be sued individually for such torts, or to have the United States substituted in their place; and, in electing the latter, such officials would agree to submit to appropriate sanctions imposed by the agency for which they were employed when their tortious conduct occurred.

(7) That such legislation should provide for periodic review by the House and Senate Judiciary Committees of the operation of the legislation implementing the new system of federal enterprise liability and independent administrative sanctions.

II. State

The Supreme Court's expansion of the scope of 42 U.S.C. § 1983 to include claims based on alleged violations of federal statutory laws gives rise to the spectre of an increase in the number of section 1983 actions against state and local officials and municipalities involved with federal assistance programs. The continued devolution of responsibility for managing federal programs to the state and local levels is likely to add further to the rise in these types of section 1983 claims.

Although most states have some system to insulate government officials from personal liability under section 1983, increased litigation under that section is sure to have an adverse impact on state and local administration of federal assistance programs. To date, efforts to address the problem of expanded section 1983 liability have focused exclusively on amending section 1983 by deleting the phrase "and laws," thereby negating the effect of the Supreme Court's decision in *Maine v. Thiboutot*.

However, in light of the importance of section 1983 in the vindication of personal rights, amending that section is the least viable alternative for ameliorating the somewhat more discrete problem of derivative liability and increased litigation involving federal assistance programs. Instead, following the Supreme Court's decision in *Patsy v. Board of Regents of Florida* and the suggestions made by several of the Justices in that case, this recommendation calls upon Congress to consider legislation that would require the exhaustion of state administrative remedies as a prerequisite to bringing an action under 42 U.S.C. § 1983 for an alleged violation of the terms, conditions or rights created by a federal assistance program by any state or local official or political subdivision of a state.

The purpose of this recommendation is to avoid an increase in the number of claims likely to be filed under 42 U.S.C. § 1983 against state and local officials and municipalities involved in the administration of federal assistance programs, and to provide an alternative system for the resolution of such claims. In addition, this recommendation seeks to preserve existing remedies for the vindication of federal constitutional rights; provide an adequate, less costly and less time-consuming process for resolving disputes that arise out of federal assistance programs; encourage state and local governments to maximize managerial efficiency of programs and projects funded by federal assistance; ameliorate the adverse impact that section 1983 litigation would have on the successful operation of federal assistance programs by state and local entities and officials; and reduce the level of intervention by the federal judiciary in the administration of federal assistance programs. The recommendation set forth below should thus be applicable to all federal assistance programs benefiting state and local entities and third parties. Legislation to require exhaustion of state administrative remedies should contain the following general provisions:

(1) A third party or intended beneficiary of a federal assistance program would be required, prior to bringing an action under section 1983, to exhaust state administrative remedies which have been determined to be in substantial compliance with minimum standards promulgated by the federal agency having primary responsibility for the assistance program which forms the basis for the third party complaint or grievance.

State receipt of federal assistance would not be conditioned upon that state's agreeing to establish administrative remedies in compliance with minimum federal standards. Instead, state provision of adequate administrative remedies would be voluntary. However, the exhaustion requirement would only be applicable in those states where such remedies have been implemented.

(2) Claims based purely on alleged federal constitutional violations would not be subject to exhaustion in any case. In addition, a federal court would be authorized to grant interim relief in appropriate cases in accordance with federal rules of civil procedure, and would also be authorized to waive the exhaustion requirement in any case in which the court determines that exhaustion would be futile or the administrative remedy would be clearly inadequate.

(3) A federal agency having primary responsibility for the administration of federal assistance programs would promulgate—in consultation with state and local entities and interested persons and groups—minimum standards to guide states in establishing administrative procedures and remedies for third-party complaints relating to such programs. Such standards would be patterned after the following general statutory requirements: specific maximum time limits for replying to a grievance or claim filed by a party; specific maximum time limits in which the relief requested would either have to be granted or denied; priority processing of claims of an emergency nature, including those in which delay would endanger or create substantial risk of injury or damage to a person or group of persons; safeguards to ensure independent decision making within the state administrative process; *de novo* review in every case of state administrative determinations as to questions of fact and law; and, procedures for periodic

review of the continued adequacy of state administrative procedures, as well as complaints about the integrity or fairness of a state's procedures.

I. INTRODUCTION

The Subject

Immunity of the sovereign from liability for money damages in civil actions is among the most deeply rooted doctrines of our legal order. Mitigating the harsh consequences of denying compensation to victims of official misconduct under the sovereign immunity doctrine, a body of law has arisen permitting damage actions against officials where such misconduct is alleged. In addition, the sovereign immunity defense generally does not apply to municipalities and other units of local government charged with violations of federal law. Even in those instances where sovereign immunity has been waived or does not apply, liability for official misconduct may extend to not only the government, but also to the errant official.

The existing system of civil sanctions for official misconduct thus relies heavily on the recovery of damages from officials to accomplish the goal of compensating the victims of such misconduct. The possibility of such recovery, in turn, is largely relied upon to deter further official misconduct and to assure the wrongdoer's accountability to the victim and to society at large.

Notwithstanding the apparent logic of the existing system, most observers today agree that the system fails to serve two of its primary goals—measured deterrence of official misconduct, and adequate compensation of the victims of such misconduct. On the one hand, the ever-present threat of damage suits is widely believed to deter not only improper conduct by officials, but proper conduct as well. On the other hand, there is general recognition that private damage actions against individual officials do not afford the victims of official misconduct financially responsible defendants. A further concern, at the local level, is the potentially crippling effect of large civil damage awards against municipalities in a period of recession and retrenchment.

In recent years, the impetus for change of the civil sanction system has grown. This trend is fueled by the modern expansion of governmental activity that can give rise to allegations of harm, by the explosion of judicially recognized causes of action that can give rise to official liability as well as by judicial constriction of the umbrella of official immunity. Literally thousands of lawsuits are pending in which the issue of official immunity is critical. For ten years Congress has considered legislation that would revamp the existing law governing the liability of federal officials for actions taken in the course of their official duties.¹ At the state and local levels of government there are tremendously varied responses to increasingly acute problems of official liability.²

1. See *infra* Chapter IV and legislative material compiled in Appendix A.

2. See *infra* Chapter V and State Survey compiled in Appendix B.

Inevitably, however, the debate over legislative alternatives to the existing system has been bedeviled by seemingly incompatible political considerations. Many government officials contend that the real problem to be addressed is not how to deter official misconduct or to compensate its victims, but rather how to free civil servants from the debilitating threat of civil damage actions, and municipal governments from the crushing burden of civil liability. Civil liberties groups and others, by contrast, focus on the importance of deterrence and accountability, and on the need to assure adequate compensation for the victims of government misconduct. Reconciliation of these competing concerns has thus far proved a most formidable challenge.

Adding to the complications created by political disagreements among those favoring reform is the vastness and intricacy of the subject. The burgeoning literature devoted to the topic of sovereign immunity and official liability attests to the intense concern for the subject among scholars.³ Recent Supreme Court cases alone involve the immunity of executive branch officials ranging from the President⁴ and his closest advisors⁵ to middle- and lower-level career civil servants,⁶ members of the armed forces,⁷ legislative officials including members of Congress,⁸ and quasi-judicial officers like federal prosecutors⁹ and administrative law judges,¹⁰ and finally, state and local officials in all branches of government.¹¹

Moreover, fundamental questions about the ideal scope of government involvement in everyday life, and about the proper allocation of power between the federal government and the states, bear directly on proposed alternatives to the existing system of sovereign immunity and official liability. Indeed, it has been noted that the problems this study will address cannot be readily resolved: "The answers turn in part upon empirical data that are unavailable. They concern fundamental values about which there is little social agreement."¹²

The ACUS Mandate

The Administrative Conference of the United States (ACUS) has initiated and sponsored this project in order to obtain comprehensive analysis and advice

3. See *infra* Annotated Survey of the Literature compiled in Appendix C.

4. *Nixon v. Fitzgerald*, 102 S. Ct. 2690 (1981).

5. *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided court*, 101 S. Ct. 3132 (1981).

6. *Velde v. National Black Police Ass'n., Inc.*, 631 F.2d 784 (D.C. Cir. 1980), *remanded in light of Harlow*, *supra* note 5 102 S. Ct. 3503 (1982).

7. *United States v. Brown*, 348 U.S. 110 (1954); see also *Coffey v. United States*, 324 F. Supp. 1087 (S.D. Cal. 1971).

8. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). See also *Benford v. ABC, Inc.*, 502 F. Supp. 1148 (D. Md. 1980).

9. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

10. *Butz v. Economou*, 438 U.S. 478 (1978).

11. *E.g.* *Owen v. City of Independence*, 445 U.S. 622 (1980); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Maher v. Gagne*, 448 U.S. 122 (1980).

12. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281, 282.

on the law of official liability and immunity.¹³ In executing the ACUS mandate, this project has been focused in a number of significant ways. First, consistent with ACUS' mandate and for practical reasons, it is worthwhile for this project to concentrate on the subject of executive rather than judicial or legislative immunity. The law of judicial immunity, although provocative, is relatively straightforward.¹⁴ Legislative immunity similarly is a less fertile area for this

13. The research contract with ACUS describes the project as follows:

The Contractor shall conduct a study, prepare a report, and shall draft proposed recommendations on the subject of government officials' personal liability for violations of the Constitution and civil rights laws arising out of actions taken in the course of official business.

The contract describes the scope of the work under the project as follows:

The Contractor, in the course of preparing the report and recommendations shall:

(1) Briefly summarize the background of the problem, relevant case law, legal analyses and other articles.

(2) Analyze the relative costs and benefits of the existing liability system.

(3) Evaluate relevant proposals for legislation, including, without limitation, bills that would substitute the U.S. for the official, immunize the official, create administrative disciplinary systems, expand the Federal Tort Claims Act, and modify 42 U.S.C. § 1983.

(4) Examine special problems facing particular groups of officials, including state and local employees or others involved with federal grant or revenue sharing programs, law enforcement officials, and high-level supervisory personnel, and recommend solutions.

(5) Examine significant procedural questions that are likely to arise under the current system including, without limitation, choice of state or federal forum, governmental reimbursement of officials' judgments and attorneys' fees, rules governing punitive damage awards, utility of 'preemptive' declaratory judgment suits, pleading and burden of proof issues, and recommend useful approaches to resolving them.

The Contractor shall also participate in such meetings of the Conference, its committees, its Council, and the Chairman's staff as may be required by the Office of the Chairman, for consideration of the study and report that are the subject of this contract and resulting proposals, including plenary sessions and other meetings taking place after submission of and payment for the final report as provided herein. The Contractor shall cooperate with the staff of the Office of the Chairman as necessary and appropriate for the completion of this contract.

14. Note the outrageous judicial conduct that was immunized by *Stump v. Sparkman*, 435 U.S. 349 (1978). The Court reversed the seventh circuit which had denied immunity for a judge who approved (on the day it was filed) a mother's petition to have her daughter sterilized. (There was no arguable statutory basis for entertaining the sterilization petition, the hearing was *ex parte*, the only grounds for the order was the mother's uncorroborated statement that her 15-year old daughter was "somewhat retarded" and associated with young men, and there was no notice or possibility of appeal afforded to the girl (the girl, told she needed an appendectomy, was operated upon shortly after approval of the petition).) *See also*, *Pierson v. Ray*, 386 U.S. 547 (1967).

As Justice Rehnquist sarcastically noted about judicial immunity:

If one were to hazard an informed guess as to why such a distinction in treatment between judges and prosecutors, on the one hand, and other public officials on the other, obtains, mine would be that those who decide the common law know through personal experience the sort of pressures that might exist for such decision makers in the absence of absolute immunity, but may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed. But the cynical among us might not unreasonably feel that this is simply another unfortunate example of

project to explore. Legislative immunity for Congressmen derives, of course, from the Speech or Debate Clause of Article I of the United States Constitution¹⁵ and case law affords comparable immunity for state and local legislators.¹⁶

Another refinement to this project that is appropriate in light of the ACUS mandate is to consider the ramifications of official immunity at the state and local level, but only insofar as the potential liability flows from federal assistance programs. Even this, in itself, is an appropriate subject for a separate research project.¹⁷

It is probably impossible to formulate rules sufficiently general for use in appraising existing or proposed substitute mechanisms for the control and deterrence of official misconduct in the myriad of circumstances in which it may occur. Account must be taken of the unique issues raised in the many disparate contexts involved—from that of the cop on the beat, to that of the state social worker, the federal program manager, and the President of the United States. Any search for a simple solution to the problem in all of its contexts is sure to be disappointed.

With these limitations in mind, the Authors hope that this study will avoid undue abstraction while attending to those complexities of the subject that have consistently eluded recognition. This project aims not only to suggest areas in which future study would be worthwhile, but to offer recommendations for such change as may clearly be warranted today. The starting point will be to describe the analytic framework of the study.

judges treating those who are not part of the judicial machinery as 'lesser breeds without the law.'

Butz v. Economou, 438 U.S. 478, 528 n.*** (1978) (Rehnquist, J., concurring in part and dissenting in part, joined by Burger, C. J., Stewart, J., and Stevens, J.). *But see* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Lopez v. Vanderwater, 620 F.2d 1229 (7th Cir. 1980).

15. Hutchinson v. Proxmire, 443 U.S. 111 (1979); United States v. Helstoski, 442 U.S. 477 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1881).

In recent years, the Court has restricted the availability of Speech or Debate Clause immunity. The Court has refused to find legislators immune unless the challenged activity can be shown to have been not merely related to legislative activities but essential to the deliberations of the legislature. *See* Hutchinson v. Proxmire, 443 U.S. 111, 130–33 (1979); *see also* Davis v. Passman, 442 U.S. 228 (1979); Gravel v. United States, 408 U.S. 606 (1972); Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1131 n.96 (1981). And one very recent decision is of great concern to Congressional staff members. Benford v. ABC, Inc., *supra* note 8.

16. Tenney v. Brandhove, 341 U.S. 367 (1951); Lake Country Estate, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

17. *See generally*, Madden & Harkins, *New Block Grant Programs Face Period of Adjustment in the Courts*, Nat. L.J., Mar. 8, 1982, at 29; Groszyk & Madden, *Managing Without Immunity: The Challenge for State and Local Government Officials in the 80's*, Pub. Ad. Rev. (March/April 1981); Peters, *Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot*, 13 Urb. Law. 407 (1981); Freilich, *1979–1980 Annual Review of Local Gov't Law: Municipal Liability and Other Uncertainties*, 12 Urb. Law. 557 (1980).

II. ANALYTIC FRAMEWORK

An appreciation of the complexity of the subject may be gleaned from the works of Schuck¹ and Cass,² among others.³ Their analysis has revealed the extent of the underbrush, and provides a useful point of departure for this study. An essential first step is to sketch the conceptual framework distilled, for the purposes of this study, from the case law and literature.

Key Concepts

The terms "official immunity" and "official liability" are used to refer to the personal immunity and liability of government officials⁴ in civil damage actions brought against officials in their individual capacities for actions taken in the course of employment or, in some cases, under color of office or law. The terms, correctly applied, do not embrace lawsuits arising from conduct ordinarily unrelated to the official's performance of his governmental duties, or where no action under color of office or law is involved. An obvious example of such conduct is a car accident involving a vacationing government official that leads to a suit seeking damages for the official's negligent driving. Claims of this sort have nothing whatsoever to do with any government function or purported exercise of legal authority.⁵ The terms "official immunity" and "official liability" also do not apply to causes of action for injunctive relief, which are deemed to be ultimately directed toward the government rather than to the individual holding an official position.

The term "governmental immunity" refers to the doctrine of sovereign immunity. In the context of this report, the term "governmental liability" applies to situations in which the government has waived sovereign immunity and is derivatively liable for the conduct of officials. Treating the government responsibility as analogous to that of the employer under the doctrine of *respondeat superior* is, of course, only one way to look at the matter. Equally valid is the notion that the government's responsibility is not *derivative* but *ultimate*.⁶

1. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281. Professor Schuck's book on this subject is forthcoming in 1983. See also *Federal Tort Claims Act: Hearing on S. 1775 Before the Agency Administration Subcommittee of the Senate Judiciary Committee (Pt. 2)*, 97th Cong., 2d Sess. (1982) (testimony of Peter H. Schuck).

2. Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110 (1981).

3. E.g., *Civil Liability of Government Officials*, 42 Law & Contemp. Probs. 1 (winter 1978), see especially 8 (Mashaw), 46 (Baxter), and 62 (Epstein).

4. As used in this report, the term "government official" encompasses officials, employees, and all kinds of executive branch personnel.

5. The question of when certain very high ranking officials such as the Secretary of State or the Attorney General are ever completely "off-duty" is an interesting but relatively minor issue for the purposes of this study.

6. A key issue to be considered in determining the extent of governmental liability for individual misconduct is whether such liability should arise only when the alleged misconduct has been committed by a government official acting within the scope of his office or employment, or whether such liability should attach to misconduct committed by any person allegedly acting under color of office or law as well. See Comment, *Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act*, 12 Conn. L. Rev. 492, 535-36 (1980).

The term "governmental wrongs" is used to refer to harm inflicted by government officials within the scope of their office or employment, or by persons acting under color of office or law, that causes a legally cognizable injury. This term is also necessarily imprecise, for there are any number of possible classifications of governmental wrongs.⁷ When a distinction is intended between constitutional and other legal harms this will be noted.

This project's focus on the executive official at the federal, state, and local level is also broad. At each level of government, there are many instances in which the distinction blurs between executive, legislative, and judicial officials. And, moreover, there are numerous types of executive officials. As will be shown, the differences among the various kinds of officials—elected officials, political appointees, civil service or career government employees, members of the armed forces, officials with direct public contact such as law enforcement officers, and social workers, and of course, former officials of all kinds—may be critical with respect to the immunity issue.⁸ For example, it may be useful to determine whether the incidence of litigation falls disproportionately on any particular type of official. And, of course, understanding the function and characteristics of particular officials is crucial for analyzing how various components of an alternative system of civil sanctions will affect their behavior.

Competing Objectives, Core Values

An appraisal of alternative systems for dealing with governmental wrongs involves a balancing of societal interests and values. These interests may be viewed from the perspectives of the victim, the official, and the public.

For the victim, there are the immediate objectives of compensation and retribution, and the longer-range goal of deterrence. Fundamental principles of justice demand assurances of compensation or redress adequate to make the victim whole for wrongs suffered as a result of official misconduct. The objective of retribution, referred to by some as accountability and by others as punishment, is recognized as an independent interest of the victim. Indeed, it is this objective which may dominate the decision to sue officials when there is little prospect of recovering damages.

From the official's perspective, the matter essentially is one of fairness to himself and his colleagues. Most government officials are dedicated, hardworking, and well-intentioned, often making sacrifices in pay and other benefits to serve the public. From this standpoint, it is thought to be unfair to punish or impose sanctions on an individual carrying out his responsibilities as a govern-

7. See, e.g., Mashaw, *supra* note 3, at 10–14; Cass, *supra* note 2, at 1139–41.

8. See Schuck, *supra* note 1, at 293–95. It is beyond the scope of this study to examine in depth such special cases as the military, see, e.g., H.R. 3799, 97th Cong., 1st Sess. (1981), and federal public defenders, see, e.g., H.R. 3060, 97th Cong., 1st Sess. (April 7, 1981). See *Tort Claims: Hearings on H.R. 24, H.R. 3060, and H.R. 3799 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 97th Cong., 1st Sess. (1981). See Comment, *Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act*, *supra*, note 6, at 511–25.

ment official, or to subject that individual to the threat of personal damage actions, simply by virtue of holding an official position and attempting to carry out governmental responsibilities.

The public interest demands that an official who violates legal standards be held to account. For, as Justice Brandeis observed long ago:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the omnipresent teacher. For good or for ill, it teaches the whole people by its example.⁹

The very legitimacy of our system is ill-served when government officials are not held accountable for their misconduct. Indeed, in a nation deeply suspicious of government power and imbued with the conviction that no person is above the law, the social interest of discerning and penalizing abuses of governmental power is a transcendent one.¹⁰

Legitimacy also involves the question of how and who is to set immunity rules and to administer them. For example, it may not be deemed legitimate to involve the judiciary to decide cases where they are required to second-guess executive policy decisions. And officials, however agreeable to the concept of accountability, may nevertheless deeply resent citizen review of official actions.¹¹

Fairness is also essential to the public interest in coping with government wrongs. An individual official should be able to discern whether or not his activity is within standards that will be deemed to be acceptable. In the absence of clear guidelines, or if behavioral guidelines are routinely changed and applied retroactively, it would be considered unfair to the official to impose sanctions for, without more, failure to anticipate the applicable standard of conduct—even if, at the same time, it seemed fair to afford the injured party redress.

Still another aspect of fairness from a systemic standpoint is whether there is a risk of sanctions being imposed on the official erroneously—either when the official has not actually violated a standard of conduct, or when the sanction is in some sense in excess of what would be deemed just under the circumstances.

The public interest is also served by the overriding objective of achieving effective and responsible government. Thus, official liability systems ought to deter wrongdoing by officials, without discouraging officials from executing their duties in a decisive, selfless, and socially beneficial manner. The possibility that liability for one sort of official error could induce other errors in the opposite direction—a phenomena sometimes referred to as “overdeterrence”—has received exhaustive attention from the courts in particular.¹² Concern about the

9. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting opinion).

10. Mashaw, *supra* note 3. See also Vaughn, *The Personal Accountability of Public Employees*, 25 Am. U.L. Rev. 85 (1975).

11. See, e.g., Schuck, *supra* note 1, at 363–64 (discussion of police reaction to civilian review boards).

12. See Cass, *supra* note 2, at 1153. See *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

problem of overdeterrence has, in fact, been the mainstay rationale for the absolute immunity of certain officials.¹³

There are numerous alternative formulations of the relevant objectives to be found in the literature and the case law. However, the general statement provided above will serve for the purposes of this study to provide a touchstone for appraisal of alternative systems of coping with governmental wrongs. That is, the existing civil sanction system and feasible alternatives will be evaluated in terms of whether they serve these objectives and values.

There is no formal calculus for this task. It is well recognized that the interests and values related to official immunity often collide with one another. And the necessary tradeoffs may well involve comparing "apples and oranges." Any estimation of the preferred method of the optimal civil sanction system inescapably involves difficult judgments.

Alternative Methods of Dealing With Governmental Wrongs

This study evaluates four categories of methods of dealing with governmental wrongs. The present civil sanctions system relies to varying extent on a combination of all four types of responses.

First, of course, is the private action seeking damages from individuals for violations of constitutional or other rights. This is the approach defined earlier as "official liability" and is presently the principal means for responding to governmental wrongs.

Another approach for affording redress for such injuries is the private action seeking damages from the government itself. Viewed as a means by which society as a whole bears the cost of the transgressions of its public servants, this approach can be referred to as "enterprise liability," a term borrowed from tort law, where it is traditionally related to private enterprise, but is now generally applied to government enterprises as well. Under such a system, liability is imposed upon the entity best suited, by reason of size, insurability and control, to minimize the cost of official wrongs.¹⁴ Although at all levels of government there have been partial waivers of sovereign immunity, enterprise liability is not available for the redress of a large class of governmental wrongs such as constitutional torts.

The form of enterprise liability on which this report will focus is one in which the government is required to make direct payment once the fact of wrongdoing has been established. Government responsibility for such costs of litigation as attorneys' fees and damages are components of enterprise liability.

13. *Nixon v. Fitzgerald*, 102 S. Ct. 2690, 2703 (1982) (the President); *Stump v. Sparkman*, 435 U.S. 349, 356-64 (1978) (judges); *Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951) (legislators).

14. See, e.g., Schuck, *supra* note 1, at 288.

Alternative forms of enterprise liability that will be discussed are insurance¹⁵ and indemnity¹⁶ systems.

For the purpose of compensating victims, enterprise liability has an advantage over official liability: the governmental "enterprise" is much more likely than the individual officer to have the funds required to satisfy a judgment.¹⁷ This, however, could not be the only advantage of a system of enterprise liability. Enterprise liability can tend to decrease the overdeterrence or "chill" placed on the vigorous decisionmaking process of a government official who is afraid to act because of the overhanging threat of personal damage actions.

Two problems arise, however, when the governmental "enterprise" is required to satisfy judgments. First, the potential for *underdeterrence* exists where the threat of personal liability no longer confronts governmental officials. Whereas the threat of individual liability induce officials to modify their behavior, enterprise liability, by contrast, only indirectly encourages officials to modify their behavior; largely to the extent that *other* officials, through a system of administrative controls, choose to require.¹⁸

A third important category of responses to governmental wrongs may be referred to as internal administrative controls. This category includes mechanisms of control within the executive branch: *i.e.*, a wide range of inducements to good behavior and sanctions for bad behavior including job termination or transfer, promotion or demotion, and changes in pay and perquisites.

Needless to say, the array of internal incentives and sanctions comprising the administrative system of control, like the other alternatives, serves some goals more effectively and others less effectively. For example, although disciplinary proceedings focus on the acts of a particular official, and may serve a deterrent or retributive function, they do not, standing alone, afford compensation to the victims of governmental wrongdoing. Moreover, these devices may also make it possible for agency heads to shift responsibility for misconduct from their own policies to the poor judgment or wrongdoing of an individual selected to serve as a scapegoat.

A most significant characteristic of existing administrative methods of controlling governmental wrongdoing is that, unlike private damage actions against officials or the government, disciplinary sanctions generally cannot be instituted by the victim. In the current system, injured individuals must rely on others to initiate such actions. Though they may complain, petition, or use publicity to urge that disciplinary action be taken, they cannot themselves compel the initiation of internal administrative control procedures, or act as parties thereto.

15. Insurance is a form of loss shifting in which the government shares the risk of loss with a third party, the insurer.

16. Indemnification involves government liability in private damage actions where the individual official is a nominal defendant.

17. Cass, *supra* note 2, at 1174.

18. *Id.* at 1175.

The final type of response amounts to a variety of external controls that originate outside the executive branch. These controls include not only judicial review of official action but also legislative oversight—up to and including the remedy of impeachment—as well as the expression of public sentiment by means of the ballot. In contrast to administrative controls, external controls are less certain and clearly defined, and often depend heavily upon the level of publicity regarding official misconduct. Although, by themselves, legislative, judicial, or electoral controls are unlikely to prove an effective response to official misconduct, the symbiotic interplay of such external controls with the other instruments of the civil sanction system must be considered in appraising needed modifications.

Having painted the foregoing schematic in broad strokes, a portrait of the existing civil sanction system may be clearer.

III. THE EXISTING SYSTEM OF DEALING WITH GOVERNMENTAL WRONGS

An understanding of the present civil sanction system is essential. The first section below describes the private suit for damages in terms of both liability and immunity of officials. The following sections describe the extent that the current civil sanction system involves alternative methods of responding to governmental wrongs: *i.e.*, enterprise liability, administrative disciplinary controls, and finally, external controls.

A. *The Private Damage Action*

1. *Expansion of Individual Liability For Money Damages*

The last decade has witnessed a significant expansion in the vulnerability of executive branch officials at the federal, state and local levels to personal liability for money damages. A number of factors have led to the greatly increased number of actions brought against government officials during this time. A most significant factor that hardly requires elaboration is the extraordinary growth of government. Simply put, expanded government operation coincides with a higher incidence of harmful official action of all kinds—both real and perceived—that generates suits alleging a variety of legal wrongs. Here it will be assumed that the scope of government is a given variable.

Other contributing factors merit consideration. In general, the well-recognized trend towards an expansion in judicially-discovered rights results in increased claims alleging violation of constitutional rights. The broadening of the section 1983 action, as well as the recognition and expansion of the direct *Bivens* action also play major roles in this expansion of zones of potential individual liability for money damages. In addition, the recently increased ability to recoup court costs and attorneys' fees in section 1983 actions has provided an incentive for plaintiffs to bring actions against executive officials at the state and local level. Finally, the broadened availability of information about government activities through channels such as the Freedom of Information Act has made it easier to establish the factual predicate for litigation against officials. Some of the most significant influences on the evolving nature of the private damage action against officials are briefly reviewed below.

—*Judicially Discovered Rights—General Trends*

During the early 1970's, the Supreme Court greatly widened the procedural due process rights designed to protect the individual against government infringement.¹ The Court created new "property" and "liberty" rights in recognition of citizens' growing reliance on government for benefits and other entitlements.² In doing so, the old distinction between privileges and rights was

1. For a discussion of this judicial expansion of recognized rights, *see, e.g.*, L. Tribe, *American Constitutional Law* § 10-9 (1978).

2. Charles Reich's article, *The New Property*, 73 Yale L.J. 733 (1964) played a significant role in recognizing the increased dependence of many citizens upon the state.

rejected. As Professor Tribe has written, “[f]or the first time, the Court recognized as entitlements interests founded neither on constitutional nor on common-law claims of right but on a state-fostered (and hence justifiable) expectation.”³ For example, the Court recognized an individual’s property right to welfare benefits once welfare assistance has been initiated (thus the benefits cannot be terminated without a hearing),⁴ and a prisoner’s liberty interest in parole once an early release is promised.⁵ The Court also recognized a property interest in government employment where continued employment is promised expressly or through implication.⁶

Furthermore, the early 1970’s saw an expansion in what some describe as the “core” procedural due process interests, as well as the creation of the new entitlements. Thus, under some circumstances, the government must meet due process requirements before maligning a person’s good name or reputation.⁷ The Court also built a type of privacy interest into the core property interest by enabling people to be secure against seizure of their personal belongings by the state or another party with state approval.⁸ In the latter half of the 1970’s, the Court reversed this liberalizing trend and began to narrow the individual’s liberty and property rights protected by procedural due process.⁹ These rights, however, certainly remain far greater than they did a decade ago.

—Section 1983 Actions¹⁰

In addition to the increase in judicially discovered rights, the courts in recent years have eased the requirements for plaintiffs bringing damage suits based on those rights. In the last two decades, the number of actions brought against state and local government officials under 42 U.S.C. § 1983 has increased nearly one hundred-fold.¹¹ That provision, enacted in the Civil Rights Act of 1871, provides for liability in a civil action for any person who under color of law deprives another person of “any rights, privileges or immunities secured by the Constitution and laws.”

Several recent decisions have increased the vulnerability of state and local government officials to suits brought under section 1983. For example, in *Maine v. Thiboutot*,¹² the Supreme Court held that the phrase “and laws” in that

3. Tribe, *supra* note 1, at 515.

4. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

5. *Morrissey v. Brewer*, 408 U.S. 471 (1972). The same entitlement interest in probation was recognized in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

6. *See Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

7. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

8. Tribe, *supra* note 1, at 520.

9. *See id.*, §§ 10–11.

10. An expanded analysis of the section 1983 case law, with an emphasis on liability under federal assistance, is contained in Chapter V.

11. In 1979, there were nearly 25,000 filings in federal courts, as compared to 261 in 1961. Groszyk & Madden, *Managing Without Immunity: The Challenge for State and Local Government Officials in the 1980’s*, *Pub. Admin. Rev.* (March/April 1981).

12. 448 U.S. 1 (1980).

provision refers to all federal statutes, and not just those pertaining to civil rights. This broad interpretation will undoubtedly increase the number of section 1983 suits filed against state and local government officials for violations of federally guaranteed rights.¹³

Other recent decisions open the door to more suits against government officials. In *Parratt v. Taylor*,¹⁴ decided in 1981, the Court decided that section 1983 is not limited to intentional deprivations of constitutional rights. One year later, the Court held that a plaintiff is not required to exhaust state administrative remedies prior to the filing of a section 1983 action.¹⁵

The trend toward increased section 1983 litigation could be slowed if, in the wake of *Harlow v. Fitzgerald*,¹⁶ discussed below, it becomes easier for state and local officials to establish a good-faith defense. But this result is hardly inevitable. And notwithstanding *Harlow*, the defendant official would probably maintain the burden of pleading his good-faith defense.¹⁷ In most circuits the defendant official also bears the burden of persuasion.¹⁸

—*Bivens* Actions

In addition to the expansion of liability for money damages for state and local officials under section 1983, the number and types of actions against federal officials has also greatly increased in the decade since the Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Agents*.¹⁹ In *Bivens*, the Supreme Court held that a plaintiff may bring an action for money damages against a federal official who violates his Fourth Amendment rights. Despite the lack of any statutory cause of action, the court expressly found in *Bivens* that a cause of action may be premised upon a violation of the Constitution.

The number of direct "*Bivens* actions" brought has increased dramatically, with law enforcement and prison officials as the most frequent defendants.²⁰

13. In his dissent, Justice Powell stated "[n]o one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial." *Id.* at 23. Federal statutes will not automatically allow a plaintiff to sue under section 1983, however—the courts now must determine whether the statute secures rights which can be litigated in section 1983 claims. The Supreme Court has recently held that where "the remedial devices in a particular act are sufficiently comprehensive, they may suffice to demonstrate a congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewage Authority v. National Sea Clammers Associations*, 453 U.S. 1, 20 (1981).

14. 101 S. Ct. 1908 (1981).

15. *Patsy v. Board of Regents*, 102 S. Ct. 2557 (1982).

16. 102 S. Ct. 2727 (1982).

17. *See Gomez v. Toledo*, 446 U.S. 635 (1980).

18. *See Cass, Official Liability: Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1129 n.90 (1981) (cases collected).

19. 403 U.S. 388 (1971).

20. *See, e.g., Federal Tort Claims Act: Hearings on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary (Pt. 1)*, 97th Cong., 1st Sess. 4 (1981) (testimony of Deputy Attorney General Edward C. Schmults). Cass reports nearly a fivefold increase in the legal actions filed by prisoners alleging violations of constitutional guarantee in the decade from 1970 to 1980. Cass, *supra* note 18, at 1159. (Based on figures of the Administrative Office of the United States Courts).

One reason for the proliferation of direct actions for violations of constitutional rights has been the courts' expansion of the so-called *Bivens* action. Although the Supreme Court restricted its holding in *Bivens* to the fourth amendment's guarantee against unreasonable searches and seizures, some lower federal courts have since extended the theory to the first, fifth, sixth, eighth, ninth, tenth, thirteenth and fourteenth amendments.²¹ In *Davis v. Passman*,²² the Supreme Court held that a *Bivens* action may be brought directly on the due process clause of the fifth amendment. The Court, citing *Bivens*, reasoned that a damages remedy was appropriate and that there was no congressional declaration that money damages should not be awarded.²³

In addition, the Supreme Court held in *Carlson v. Green* that a *Bivens* remedy is available even where an alternative remedy against the federal government under the Federal Tort Claims Act (FTCA) is available.²⁴ The Court reasoned that four advantages of the *Bivens* action indicated that Congress did not intend to limit a plaintiff to the FTCA remedy. First, it concluded that since the *Bivens* remedy is recoverable against individuals, it serves as a more effective deterrent than the FTCA remedy against the federal government. Second, punitive damages may be awarded in a *Bivens* suit but are statutorily prohibited in a FTCA suit. Third, a plaintiff cannot opt for a jury trial in a FTCA action. Finally, an action under the FTCA exists only if the state in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward.²⁵

Some courts have also applied *Bivens* in suits alleging unconstitutional conduct by state officials, despite the availability of alternative remedies such as section 1983, and other courts, going even further, have allowed *Bivens* actions against private individuals or entities.²⁶

—Litigation Costs—Attorneys' Fees

It is widely recognized that the willingness to litigate claims against government officials is also related to the amount and incidence of the cost of

21. See, e.g., Lehmann, *Bivens and its Progeny: the Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 Hastings Const. L.Q. 531, 566-72 (1977); note, *Bivens and the Creation of a Cause of Action for Money Damages Arising Directly From the Due Process Clauses*, 29 Emory L.J. 231 (1980).

22. 442 U.S. 228 (1979).

23. *Id.* at 245-47.

24. 446 U.S. 14 (1980). The basic provisions of the Federal Tort Claims Act appear in 28 U.S.C. § 1346(b), 2671-2680.

25. 446 U.S. at 20-23. Following *Bivens*, the FTCA was amended to waive sovereign immunity and allow suits against the federal government arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, and abuse of process committed by law enforcement officers. 28 U.S.C. § 2680(h). See Boger, Gitenstein, & Vertvil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497 (1976) (reprinting excerpts from legislative history).

26. See Lehmann, *supra* note 21, at 575-87.

litigation.²⁷ The proliferation of section 1983 actions against state and local government officials is partially explained by the availability of attorneys' fees for successful plaintiffs. In 1976, Congress passed the Civil Rights Attorneys' Fees Awards Act of 1976, thereby authorizing courts to award attorneys' fees to the prevailing party in actions to enforce the terms of the Civil Rights Act of 1866, which includes section 1983.²⁸ Moreover, in *Maher v. Gagne*,²⁹ the 1980 companion case to *Thiboutot*, the Supreme Court held that this attorneys' fees provision applies to all types of section 1983 actions, and not just to those based on a violation of the Constitution or a federal statute providing for the protection of civil rights. In that same case, the Court also decided that a plaintiff may be awarded attorneys' fees even if he prevails through a settlement rather than through litigation.³⁰

Under the so-called "American Rule," such awards are not recoverable in *Bivens* actions. The FTCA does not provide for fees and costs.

—*Litigation Costs—Government's Defense of Officials*

When a federal official is sued for actions taken within the scope of his official duty, he will ordinarily be represented by Justice Department attorneys, at government expense.³¹ This is also generally the case throughout the states. This representation of federal employees will usually be provided regardless of whether the suit is brought in state or federal court, as long as the official is not the target of a federal criminal investigation concerning those actions. The official must make his request for representation to his superior in the agency in which he works. The agency will then forward the request to the Justice Department, along with a statement of whether the employee was acting within the scope of his employment.³²

In addition to the exception for officials subject to a federal criminal investigation, the Justice Department will not defend an official in two other situations: when a vigorous defense will conflict with other interests of the United States, or when the defenses of several defendant officials in the action are

27. It seems desire for retribution or harrassment motivates suits independently of the likely amount of a damage award or the cost of litigation. It is assumed that litigants are no angrier now than they ever have been and thus that this factor does not explain the increased amount of damage actions against officials.

28. Codified at 42 U.S.C. § 1988 (1976). Successful defendants may also be reimbursed, but the standards are much more stringent than for plaintiffs. *See Cass, supra* note 18, at 1155 n. 70. *See generally*, Witt, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 13 Urb. Law. 589 (1981).

29. 448 U.S. 122 (1980).

30. *Id.* *See also* *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981).

31. Certain plaintiffs are able to obtain low cost legal aid or pro bono representation. However, officials have probably greater access to relatively free defense counsel in most cases.

32. United States Department of Justice, Monograph, *Damage Suits Against Federal Officials; Department of Justice Representations Immunity 11* (Revised, November 1981). *See also* 28 C.F.R. §§ 50.15, 50.16 (1981); United States Attorneys' Manual, Title 4, ¶¶ 4-13.000, 13.300 *et seq.*

inconsistent. In such cases, the Justice Department will retain private counsel for the official at public expense.³³

For state and local officials sued in their individual capacity under section 1983, state or local law will govern the availability of public counsel (or public payment) for the defense. A majority of states do provide for public defense if the actions upon which the suit is based were taken within the scope of the officials' employment.³⁴

2. *The Immunity Doctrine*

—*Evolution of the Case Law*

Tracing the development of the immunity doctrine reveals that the courts have used federal, state, and local precedents interchangeably, and even a cursory analysis of the evolution of the case law also demonstrates the difficulties encountered by the judiciary in wrestling with the public policy issues in this field.

The doctrine of official immunity, which some contend is an essential underpinning to our form of government, did not reach its zenith until the mid-twentieth century.³⁵ Professor Mashaw explains:

Early opinions made no distinction between public officers and ordinary citizens in determining liability for tortious conduct. Indeed, many early decisions imposed liability for official acts that were not even tortious by private-law standards [*E.g.*, *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.)].

. . . Nineteenth century decisions often afforded public officers little protection against liability even for actions taken in the performance of their official duties.³⁶

A departure from this early pattern was anticipated by the 1872 case of *Bradley v. Fisher*,³⁷ where the Supreme Court established absolute immunity for judges acting in their judicial capacity, so long as there was subject matter

33. See Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 8–9 (1979). Between 1976 and 1979, the Justice Department retained approximately 75 private firms for such representation, pursuant to 28 C.F.R. § 50.16, at a cost in excess of \$2 million. *Id.* Critics of the controversial private counsel program maintain that it is costly, extends the duration of cases, and makes them more difficult to settle. *Id.*

34. See *infra* Chapter V and Appendix B.

35. A provocative and interesting colloquy on the antecedents and symbiotic development of sovereign immunity and official immunity is reprinted at 42 Law & Contemp. Prob. 82–89 (Winter 1978).

36. Mashaw, *Civil Liability of Government Officials*, 42 Law & Contemp. Prob. 1 Part II, at 14–15, n.3. In a quote from Engdahl, *Immunity and Accountability for Public Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 47 (1972), Mashaw notes “[t]hese standards of personal official liability were repeatedly reaffirmed and applied during the same decade around the turn of the century when the Supreme Court was enlarging the immunity of the state; indeed it was only for this reason that the expanding state immunity was considered to be consistent with the tradition of effective redress for positive governmental wrongs.”

37. 80 U.S. (13 Wall.) 335 (1872).

jurisdiction.³⁸ Even malicious or corrupt motives would not subject a judge to liability.³⁹ In providing this broad cloak of immunity, the Court stressed the importance of absolute judicial freedom:

[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.⁴⁰

Subsequently, high-level executive officers were also deemed entitled to absolute immunity from civil suit, where their alleged wrongful acts were committed in the course of the discharge of their duties. In *Spalding v. Vilas*,⁴¹ the Supreme Court reasoned that the public policy considerations which exempt judges from civil liability also apply to the heads of executive departments. As in *Bradley*, the Court recognized “a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision.”⁴²

This broad protection from liability received an additional extension from the often quoted decision by Judge Learned Hand in *Gregoire v. Biddle*,⁴³ decided over 50 years after *Spalding*. Not only did the Court hold that the officials’ alleged maliciousness would not, if proven, subject them to liability, but Judge Hand also apparently eliminated the distinction for officials acting without legal authority.⁴⁴ Furthermore, *Biddle* broadened the doctrine of absolute immunity for heads of executive departments to cover mid-level executive officials (in

38. The Court distinguished cases in which there clearly was no jurisdiction. In the latter case, “any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.” *Id.* at 352. Thus, the judge would be subject to civil liability. *Cf.* *Stump v. Sparkman*, 435 U.S. 349 (1978).

39. 80 U.S. (13 Wall.) at 352.

40. *Id.* at 347. This absolute protection for the judicial officers from liability in civil suits remains today, despite the evolution of only a qualified immunity for executive officers. Critics have maintained that no legitimate reason exists for this distinction, except perhaps the willingness on the part of judges to be more protective of themselves than of others who bear similar responsibilities and pressures. *E.g.*, *Butz v. Economou*, 438 U.S. 478, 528 n. “*” (1978), *quoted supra* Chapter I, note 14. At this time, absolute immunity is also available to judicial officers like prosecutors, legislators, and the President of the United States. *See Nixon v. Fitzgerald*, 102 S. Ct. 2690 (1982).

41. 161 U.S. 483 (1896).

42. *Id.* at 498.

43. 177 F.2d 579 (2d Cir. 1949).

44. Hand asserted, “[w]hat is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.” *Id.* at 581.

Biddle, the Director of the Enemy Alien Control Unit of the Justice Department and a district director of Immigration were accused of false arrest and imprisonment).

The Supreme Court explicitly extended this protection from civil liability to lower-level executive officers in *Barr v. Matteo*.⁴⁵ The Court stated:

We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted. . . .⁴⁶

Thus, since the director of the Office of Rent Stabilization acted "within the outer perimeter of [his] line of duty"⁴⁷ in allegedly libeling his employees, he was protected by absolute immunity.

This immunity from liability was held to apply to local government officials. In its 1967 decision in *Pierson v. Ray*,⁴⁸ the Supreme Court addressed the question of the liability of a judge and police officers who allegedly, under color of state law, infringed the plaintiff's federally guaranteed rights. The plaintiff joined his section 1983 suit with an action for false arrest and imprisonment. In addition to finding that the judge was immune from prosecution,⁴⁹ the Court held that section 1983 did not remove the police officers' defense of good faith and probable cause which they could assert in the common-law action for false arrest and imprisonment. They could therefore claim the same immunity for the section 1983 count as they could for the state law count.⁵⁰

The enormous change in the area of official immunity during the past decade began in the 1974 landmark case of *Scheuer v. Rhodes*.⁵¹ There, the estates of the students killed at the demonstration at Kent State University brought a section 1983 action against the Governor of Ohio, the university president, and various

45. 360 U.S. 564 (1959).

46. *Id.* at 572-73 (footnotes omitted) (Justice Harlan, writing for a plurality of four).

47. *Id.* at 575.

48. 386 U.S. 547 (1967).

49. The Court cited *Bradley v. Fisher*, *supra* note 37, in so holding.

50. 386 U.S. at 555-57.

51. 416 U.S. 232 (1974).

officers and enlisted members of the Ohio National Guard.⁵² The Court decided that only a limited or qualified good-faith immunity applies to both officers of the executive branch of government. In elaborating on this new standard, the Court stated:

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.⁵³

By affording the state officials the absolute immunity recognized in previous decisions, “§ 1983 would be drained of meaning,” the Court reasoned.⁵⁴

In the eight years since *Scheuer*, the Court continued to whittle away the immunity from civil suits for executive officials. In *Wood v. Strickland*,⁵⁵ the Court decided that the immunity standard contains elements of both an objective and a subjective good-faith test. Thus, a school official would not be protected simply on the basis of his good intentions. Instead, the standard would also be based on “knowledge of the basic, unquestioned constitutional rights of his charges.”⁵⁶ If a school official knew or reasonably should have known that his actions violated a student’s rights, or if he acted maliciously, he would be subject to liability. The Court announced the same standard for superintendents of state hospitals in *O’Connor v. Donaldson*⁵⁷ and for prison officials in *Procunier v. Navarette*.⁵⁸

Despite the narrowing of the exemption for executive officials, however, prosecutors remain absolutely immune for actions taken in initiating and pursuing a criminal prosecution. This complete protection from liability for actions taken within the scope of prosecutorial duties has been described as a form of “quasi-judicial” immunity which was consistently recognized at common law.⁵⁹ In *Imbler v. Pachtman*,⁶⁰ the Supreme Court held that this absolute immunity also

52. The plaintiffs charged that these officials, acting under color of state law, “intentionally, recklessly, willfully and wantonly” caused an unprecedented National Guard deployment on the campus and ordered the Guard members to perform allegedly illegal acts resulting in the students’ deaths. *Id.* at 235.

53. *Id.* at 247–48.

54. *Id.* at 248.

55. 420 U.S. 320 (1975) (§ 1983 action brought by students against school officials, charging infringement of due process under color of state law for expulsion from school).

56. *Id.* at 322.

57. 422 U.S. 563 (1975).

58. 434 U.S. 555 (1978).

59. See, e.g., *Tyler v. Witkowski*, 511 F.2d 449 (7th Cir. 1975); *Kostal v. Stoner*, 292 F.2d 492 (10th Cir. 1961), cert. denied, 369 U.S. 868 (1962).

60. 424 U.S. 419 (1976). Legislators and judges also retain their absolute immunity. Absolute immunity has been extended to legislative aides as well. *Gravel v. United States*, 408 U.S. 606 (1972).

exists in section 1983 suits. In addition, agency officials who perform functions analogous to those of a prosecutor are entitled to absolute immunity.⁶¹

During the past several terms, the Court has addressed the issues of what type of immunity should be granted to high federal executive officials, and to the President himself. Federal cabinet officials, including officers, are only to be awarded the *Scheuer* qualified good-faith immunity, the Court decided in *Butz v. Economou*.⁶²

In *Economou*, the plaintiff filed an action against a number of officials in the Department of Agriculture and other federal agencies, including the Secretary of Agriculture, alleging that they had instituted an investigation and administrative proceedings against him for his criticism of the Department. The defendants asserted that, as federal officials, they were entitled to absolute immunity for all discretionary acts within the scope of their authority. In rejecting this argument and extending the *Scheuer* holding to cover federal officers, Justice White wrote for the majority:

[I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. . . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers [emphasis in the original].⁶³

The Court in *Economou* also refused to recognize absolute immunity for cabinet officers, severely limiting its 1896 holding in *Spalding v. Vilas*.⁶⁴ Justice White, in addition to stating that our system of jurisprudence rests on the assumption that all individuals are subject to federal law, reasoned that “the greater power of such officials affords a greater potential for a regime of lawless conduct.”⁶⁵ But the Court left open the possibility that absolute immunity might be granted to certain officials exercising discretionary authority, where such protection is essential for the proper functioning of government.⁶⁶

In the recent case of *Nixon v. Fitzgerald*,⁶⁷ however, a sharply divided (5–4) Court held that the President is entitled to absolute immunity. Justice Powell,

61. *Butz v. Economou*, 438 U.S. 478 (1978).

62. *Id.* Four justices dissented on this point.

63. *Id.* at 500–601.

64. The dissent criticized the majority’s “unnaturally constrained reading” of *Spalding* and stated that “*Spalding* clearly and inescapably stands for the proposition that high-ranking executive officials acting within the outer limits of their authority are absolutely immune from suit.” *Id.* at 518, 519.

65. *Id.* at 506.

66. *Id.* at 507.

67. 102 S. Ct. 2690 (1982). In *Kissinger v. Halperin*, 452 U.S. 713 (1981), an equally divided Court failed to decide the issue.

writing for the majority, considered Presidential immunity “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.”⁶⁸ This shield from civil liability extends for all acts within the “outer perimeter” of the President’s official responsibility.⁶⁹ Despite a vigorous dissent, the Court reasoned that alternative remedies for protection against Presidential misconduct are available, such as impeachment, scrutiny by the press, and oversight by Congress.⁷⁰

In *Harlow v. Fitzgerald*,⁷¹ the companion case to *Nixon v. Fitzgerald*, the Court refused to extend this absolute immunity to high-ranking White House officials. The Court rejected the officials’ reliance on *Gravel v. United States*,⁷² where the immunity for legislators was extended to cover their aides. Relying on *Economou*, the Court stated that such a derivative immunity for Presidential aides would sweep too wide and could not be reconciled with its “functional” approach to immunity law.⁷³ The Court did leave open the possibility that “[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.”⁷⁴ Generally, however, only a qualified, good-faith immunity will apply.

Most importantly, the subjective and objective analysis called for the test for this good-faith immunity was altered from that outlined in *Wood v. Strickland*. Concerned that judicial inquiry into subjective motivation may be disruptive of effective government, the Court decided that “bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.”⁷⁵ Thus, the Court removed the subjective element from the good-faith defense. The Court stated:

Reliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time

68. 102 S. Ct. at 2701. The Court added, “[b]ecause of the singular importance of the President’s duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.” *Id.* at 2703.

69. *Id.* at 2705. The President’s reorganization of the Air Force, in which plaintiff was dismissed from his job (he alleged it was in retaliation for testimony before Congress on military cost-overruns), was “well within” this outer perimeter. *Id.*

70. *Id.* at 2705–06.

71. 102 S. Ct. 2727 (1982). The action alleged that the two close aides of President Nixon, Bryce Harlow and Alexander Butterfield, conspired with the President to unlawfully discharge Fitzgerald.

72. 408 U.S. 606 (1972).

73. 102 S. Ct. at 2734–35.

74. *Id.*

75. *Id.* at 2738.

was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.⁷⁶

The most recent case on governmental immunity to reach the Supreme Court was remanded for further consideration in light of this decision.⁷⁷

—*The Case Law's Matrix of Issues*

The foregoing essentially chronological description of the case law can be usefully complimented by a review organized according to the most significant immunity law issues. Any analysis of the matrix of issues presented by the case law on the immunity doctrine will inevitably be less than crystal clear, as the decisions in this area have not been very consistent, especially in recent years.

a. *Source of Immunity*

In determining the degree of immunity to be granted to various government officials, the courts have looked to a number of sources for guidance. The paramount consideration has been that of public policy—what degree of immunity will best serve societal interests—but the courts have not always considered all of the competing policy considerations and they have examined other factors as well. For example, with regard to judicial immunity, the Supreme Court considered the English common-law rule, as well as policy considerations.⁷⁸ In determining the appropriateness of a similar blanket immunity for federal legislators, the Court found, of course, the shield from liability to be rooted in the Speech or Debate Clause of the Constitution.⁷⁹ And the scope of Presidential immunity was considered by Justice Powell to be "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history,"⁸⁰ and was justifiable on policy grounds. The vigorous dissent by Justice White, on the

76. *Id.* at 2739.

77. *Velde v. National Black Police Ass'n.*, 102 S. Ct. 3503 (1982). This case is particularly significant in that it involves the immunity issue in the context of § 1983 actions involving federal grants. See *infra* Chapter V, §A.

78. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347–49 (1872). The purported necessity of absolute judicial freedom was the paramount consideration of the Court, however.

79. U.S. Const. art. I, § 6, cl. 1. The Court has held that "legislators engaged 'in the sphere of legitimate legislative activity' . . . should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); see also *Kilbourn v. Thompson*, 103 U.S., 168, 204 (1881).

80. *Nixon v. Fitzgerald*, 102 S. Ct. 2690, 2701 (1982).

other hand, in strongly rejecting the constitutional underpinnings of the decision characterized the majority decision as “almost wholly a policy choice [and] a choice that is without substantial support.”⁸¹

For lower executive officials, the Court’s so-called “functional” approach has been based, in part, on public policy grounds. The most important of the grounds favoring immunity is the fear that broad liability to suit will deter officials from principled and forceful decisionmaking⁸² and the belief that such broad liability for officials who must exercise discretion is unjust.⁸³ Balanced against these considerations is the need for a remedy for those who have been wrongly injured, and the policy of deterring government officials from carelessly or intentionally taking actions that will infringe citizens’ rights.

b. Degree of Immunity Available

There are generally two basic categories of immunity to be provided for government officials—absolute and qualified good-faith immunity. Absolute immunity is available to judges,⁸⁴ federal legislators,⁸⁵ prosecutors,⁸⁶ and the President.⁸⁷ In addition, legislative aides are covered by this blanket protection,⁸⁸ as are agency officials who perform functions analogous to those of a prosecutor or judge.⁸⁹ The grant of absolute immunity does not mean that these officials may never be sued for money damages. For example, a judge is not immune from suit when he has injured someone in a case where the court clearly has no jurisdiction,⁹⁰ and a federal legislator is only protected for actions taken “in the sphere of legitimate legislative activity.”⁹¹ Similarly, the President receives absolute immunity only for actions taken within the outer perimeter of his official responsibility.⁹²

For executive officials other than the President, prosecutors, and those who perform analogous functions to those of a prosecutor or judge, only qualified immunity is available as a defense to a suit for money damages. Even this qualified defense may be available only for discretionary actions. As the Court explained in *Scheuer v. Rhodes*, the degree of immunity varies depending upon “the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought

81. *Id.* at 2712.

82. *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 319–20 (1975); *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

83. *See, e.g.*, *Scheuer v. Rhodes*, *supra* note 51, at 240.

84. *See Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).

85. *See Dombrowski v. Eastland*, *supra* note 79; *Kilbourn v. Thompson*, *supra* note 79.

86. *See Imbler v. Pachtman*, 424 U.S. 409 (1976); *Tyler v. Witkowski*, 511 F.2d 449 (7th Cir. 1975).

87. *Nixon v. Fitzgerald*, *supra* note 67.

88. *Gravel v. United States*, 408 U.S. 478 (1978).

89. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478 (1978).

90. *Bradley v. Fisher*, *supra* note 84.

91. *Dombrowski v. Eastland*, *supra* note 79, at 85.

92. *Nixon v. Fitzgerald*, *supra* note 67.

to be based.”⁹³ This qualified good-faith defense applies to local, state and federal executive officials. It is applicable to governors,⁹⁴ Cabinet officials,⁹⁵ and presidential aides,⁹⁶ as well as to lower-ranking officials. The Court has left open the possibility that certain high-ranking federal officials may be entitled to absolute immunity if public policy would require such a blanket protection.⁹⁷ But these officials would bear the burden of showing that public policy requires a grant of absolute immunity for them.⁹⁸

c. *Discretionary and Mandatory Action*

The Court has indicated in its decisions over the past twenty-five years that officials with greater discretionary authority are to be protected to a greater degree by the immunity defense than those exercising less discretion in their actions. This result, it has been noted, is perverse in that it is officials who exercise the least amount of discretionary authority who are most prone to damage actions and may be the most likely to react to the risk of suit by performing their duties in a manner designed to avoid suit rather than promote the public interest,⁹⁹ as the Court stated in *Barr v. Matteo*:

To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion it entails.¹⁰⁰

In *Scheuer v. Rhodes*, the Court, in granting a qualified immunity for both the governor of a state and lower executive officials, decided that “the variation [in immunity is] dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.”¹⁰¹ In its remand, the Court directed the district court to determine whether the officers acted within the range of discretion permitted for the holders of these offices; it also indicated that the governor’s office would permit the exercise of more discretion than would be the case for lower officers.¹⁰²

93. 416 U.S. at 247.

94. *Id.* at 247–48.

95. *Butz v. Economou*, *supra* note 61.

96. *Harlow v. Fitzgerald*, *supra* note 71.

97. For example, the Court indicated, “[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.” *Id.* at 2735.

98. *Id.* at 2735–36. *See also* *Butz v. Economou*, *supra* note 61.

99. Schuck, *Suing our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281, 293–95, 299–300.

100. 360 U.S. 564, 573 (1959). The defendant, the acting director of the Office of Rent Stabilization, exercised discretion in his duties.

101. 416 U.S. 232, 247 (1974).

102. *Id.* at 250. The Court stated, “[i]n short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.” *Id.* at 247.

In *Butz v. Economou*,¹⁰³ the Court rejected absolute immunity for Cabinet officials, despite its recognition that such high officials are required to constantly exercise their discretion. Balanced against the need to protect officials who are required to exercise discretion was the Court's fear that "the greater power of such officials affords a greater potential for a regime of lawless conduct."¹⁰⁴ Thus, only qualified immunity was appropriate. These same considerations were reiterated in awarding only a qualified immunity to high White House officials, who also must exercise their discretion in day-to-day decisionmaking.¹⁰⁵

Where an official performs no discretionary functions and engages only in ministerial duties, the law is well-settled that no immunity exists for torts committed. This concept has been the common law and has remained virtually unchanged over the years. The greater question lies in determining what functions are discretionary.¹⁰⁶

d. Scope of the Defendant's Authority

Another issue is whether a defendant official has acted within the scope of his authority. Where he has acted within that scope, the official is protected by whatever type of immunity is applicable—otherwise, he is not. Perhaps the wide variety of situations in which the immunity defense can be raised has inhibited the Court from articulating rules of general applicability and the cases are often remanded for a determination of that factual issue.¹⁰⁷

The standard for the determination has been phrased in various ways, such as "within the outer perimeter of [the official's] line of duty,"¹⁰⁸ and "acts performed in the course of official conduct."¹⁰⁹ In the few cases where the Supreme Court has made this factual determination, the accompanying analysis and discussion have not been very helpful. For example, in holding that the acting director of the Office of Rent Stabilization acted within the scope of his authority in stating in a press release that he planned to suspend certain employees for conduct for which the agency had been criticized, the Court merely stated that it would be "an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty." The Court added that the fact that the official was not required by law or by his superiors to make the statement was not a factor to be considered, since he was of policy-making rank, acting at a level of government where the concept of duty encompasses the sound exercise of discretionary authority.¹¹⁰

103. 438 U.S. 478 (1978).

104. *Id.* at 506.

105. *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982).

106. K. Davis, *Administrative Law Treatise* §§ 26.15–16 (Supp. 1982).

107. *See, e.g., Scheuer v. Rhodes*, *supra* note 51, at 502.

108. *Barr v. Matteo*, *supra* note 45, at 575.

109. *Scheuer v. Rhodes*, *supra* note 51, at 248.

110. *Barr v. Matteo*, *supra* note 45, at 575.

Similarly, President Nixon was considered to be acting within the outer perimeter of the duties of his office in ordering a departmental reorganization in the Air Force, in which the job of the plaintiff (who had testified before Congress on military cost-overruns) was eliminated. In so ruling, the Court only stated that finding otherwise would subject the President to trial on numerous allegations, and would deprive the absolute immunity of its intended effect.¹¹¹ Thus, in those few cases where the Supreme Court has addressed the question of the scope of a defendant official's authority, it has allowed a broad scope for officials that must exercise discretion.¹¹²

e. Piercing the Immunity Defense

As discussed above, neither an absolute nor a qualified immunity is available to a defendant official where the actions which form the basis of the suit were not within the outer perimeter of the official's authority. Thus, such a threshold demonstration by the plaintiff could preclude the immunity defense. However, this is often hard to accomplish. With very high officials such as the President, it may be almost impossible to argue that a particular action was not within the outer reach of the scope of their office.¹¹³

The qualified good-faith immunity is an affirmative defense that must be pleaded by a defendant official not entitled to absolute immunity.¹¹⁴ By demonstrating that the official did not have a good-faith belief that he was not violating the plaintiff's rights, the plaintiff may successfully attack this defense. Previously, this good-faith test contained both objective and subjective elements,¹¹⁵ but in its 1982 decision in *Harlow v. Fitzgerald*, the Supreme Court decided that inquiries into whether a defendant official acted with a malicious intention only served to protect insubstantial claims from summary judgment. It therefore eliminated this subjective element from the test. Now only a showing that the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]" will pierce the qualified immunity defense.¹¹⁶

Furthermore, the defense will not fail if the law upon which the plaintiff relies was not clearly established at the time the official acted. In this circumstance, the Court reasoned, the official could not fairly be said to "know" that the law forbade the actions which he took. But if the law was clearly established, the defense will ordinarily fail; only a showing by the official that he neither

111. *Nixon v. Fitzgerald*, *supra* note 67, at 2705.

112. A related issue is whether official immunity should be available for action under color of official title. *See infra* Chapter IV, § B.

113. In *Nixon v. Fitzgerald*, for example, it was argued without success that the alleged misconduct by the President involved illegal interference with a congressional witness which was outside the scope of the President's authority. *See, e.g.*, Brief *Amicus Curiae* of Senator Orrin G. Hatch, et al. at 20, *Nixon v. Fitzgerald*, 102 S. Ct. 2690 (1982).

114. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

115. *Wood v. Strickland*, *supra* note 55, at 322.

116. *Harlow v. Fitzgerald*, *supra* note 71, at 2737 (emphasis in the original).

knew nor should have known of the relevant legal standard will allow his defense to be sustained.¹¹⁷

It remains to be seen, however, whether the new good-faith standard will have the intended effect of facilitating the early dismissal of suits. It may be, for example, that the so-called objective test contains in many cases subjective issues. The realm of other difficult issues that could frustrate early dispositions is as vast as the ingenuity of counsel.

—*An Evaluation*

The case law establishes a confusing and often unsatisfactory array of rules for official liability and immunity. There is virtually no evidence that these rules accomplish the social objectives they are purported to advance such as compensation, deterrence and encouraging desirable official conduct.

But the judicial process, by its very nature is ill-suited to make the type of comprehensive policy decisions that many believe are needed in this area.¹¹⁸ The courts depend on individual cases which arise serendipitously, and they are decided one by one, rather than in a cohesive manner most conducive to general policy. Moreover, courts are often hampered and insulated from the acquisition of the type of factual record that would inform broad policy choices.

Criticism of the courts' liability and immunity rules comes easily in such circumstances. But the courts are only filling vacuums not grabbing turf. It seems obvious that initiatives for changing the present civil sanction system's primary reliance on the private damage action must come from the legislative arena with a strong assist from the executive branch. One commentator suggests that this process, now well underway, is actually promoted by the difficulties created by the case law:

[T]he [Supreme] Court's approach can be sensibly viewed as a heroic effort to fashion a just system of incentives and deterrents in the face of chronic legislative inaction. The Court, in this view, has fashioned a respectable legal artifact given the crudeness of the tools available to it. Moreover, by magnifying the anomalies of this ineffective and often unjust system, the Court's effort could stimulate a rationalization and strengthening of that system.¹¹⁹

B. Existing Forms of Public Enterprise Liability

In response to the increased threat of personal liability caused by the several factors discussed above, various attempts have been made at all levels of government to shift this risk elsewhere.¹²⁰ The following sections will consider several of the existing arrangements for shifting damages from personal liability to governmental or enterprise liability at the federal and state levels, including:

117. *Id.* at 2739.

118. *See infra* Chapters IV and V.

119. Schuck, *supra* note 99, at 286–87 (footnotes omitted).

120. *See infra* Chapters IV and V, and Appendix B.

(1) liability insurance for the individual official, (2) governmental indemnification of the official, and (3) direct liability of the governmental enterprise for the actions of its employees.

1. *Federal Enterprise Liability*¹²¹

—*Insurance*

One method available for shifting the risk of liability away from the individual official is the utilization of liability insurance.¹²² In the private sector individuals frequently make use of liability insurance to avoid large financial losses caused by accidents, fire, theft, etc. Government employees could also utilize liability insurance to protect against the risk of a large adverse judgment. The employee could purchase such insurance individually or be covered instead by a group program purchased by his employer. By paying a premium to an insurance company, the risk of liability is shared with the third-party insurer.¹²³ The individual employee is thus freer to operate without the threat of personal liability hanging over his head.

Federal law generally does not authorize the purchase of insurance against the personal liability of officials.¹²⁴ One reason for this limited use of insurance as a means of shifting liability to the enterprise is that such a program might be contrary to public policy because it reduces the deterrent value of a personal judgment against the government official.¹²⁵ To the extent that insurance is

121. There are three forms of enterprise liability. Under a system of liability insurance the insurer receives premium payments and pays the plaintiff for loss. Under a system of indemnification, the enterprise reimburses the individual defendant who pays off the plaintiff. In contrast, under a system direct enterprise liability, the government itself would pay the plaintiff directly.

122. Mashaw, *supra* note 36, at 8.

123. A federal agency usually will decide to assume the risk of its own liability thereby acting, in effect, as a self-insurer. According to Federal Procurement Regulations:

Ordinarily, it is the policy of the Government not to insure its own risks. In the absence of specific statutory authority for the payment of insurance premiums, appropriated moneys of the United States generally are not regarded as available for that purpose.

41 C.F.R. §1-10.301 (1981). The Comptroller General has stated:

It is the established policy of the Government to be a self-insurer of its own risks of loss on the theory that size of the Government resources permits it to do so. . . . Comp. Gen. Dec. B-168106, 74-2 CPD ¶3 (1974).

124. There are limited areas where the Government will purchase insurance which would cover negligence for which its employees would be otherwise personally liable. These include insuring the risk of loss for the first one hundred dollars of property damage in auto accidents involving rented cars, and also damage for rented aircraft, and rented buses. *See* Comp. Gen. Dec. B-168106, 74-2 CPD ¶3 (1974). Certain medical personnel obtain liability insurance. *See, e.g.*, 42 U.S.C. §§ 2458a and 2458b. Such insurance may be distinguished from indemnification of federal officials which is available on a limited basis. Federal officials have difficulty purchasing liability insurance on their own. *See, Amendments to the Federal Tort Claims Act: Hearings before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 96th Cong., 1st Sess. 88 (1979) (statement of Ordway Burden, Law Enforcement Assistance Foundation).

125. *See Schuck, supra* note 99, at 332 and n. 179; Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1160-64 (1981).

effective, it may so fully reduce the incentive to avoid liability-producing activity that underdeterrence becomes a problem.¹²⁶

A second reason for the limited reliance on insurance is the costs associated with dealing with an intermediary (the insurance company) which would not exist in a system of direct enterprise liability.¹²⁷

—Indemnification

Another method of shifting the risk of liability away from the individual official is indemnification. Under a statutory system of indemnification, the government itself would be required to pay any adverse judgment suffered by the individual official, including the cost of defending the action. At the present time, there is no general statutory provisions for indemnification of federal employees, even where the liability clearly arose within the scope of their employment.¹²⁸

The major reason why indemnification is not frequently used as a substitute for personal liability is the potential for a conflict of interest between the defendant enterprise and the defendant employee. For example, a defendant employee may defend a tort action by claiming that the enterprise was solely responsible for the alleged tortious conduct. In such a situation, the enterprise would, in effect, reimburse the employee for the employee's efforts to place liability on the enterprise. Another reason why indemnification is not widely used is that it results in the same form and amount of compensation as direct enterprise liability, but involves an extra step in paying out a claim and the extra administrative costs that go along with that step. Finally, indemnification does not eliminate the necessity for officials to participate in and defend lawsuits.

—Direct Government or Enterprise Liability

Prior to the enactment of the Federal Tort Claims Act (FTCA), damage suits against the United States arising from common-law torts were generally barred by sovereign immunity.¹²⁹ Created in England and developed in the United States, sovereign immunity stands for the proposition that the sovereign cannot be sued without its consent.¹³⁰ The doctrine of sovereign immunity has no explicit

126. Cass, *supra* note 125, at 1160. Proponents of enterprise liability claim that such a system is necessary to overcome the problem of overdeterrence.

127. As the Comptroller General explains: "Self insurance [by the Government] will affect in a survey of those items of cost and profit that would normally be included in the premiums charged by private insurers." Comp. Gen. Dec. *supra* note 123.

128. Schuck, *supra* note 99, at 333; *Hearings on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary*, 97th Cong. 1st Sess. (1981) (statement of Edward C. Schmults). Schuck reports that there are only two exceptions in which indemnification is specifically authorized by statute: "for actions based on 'anything done' in enforcement of the Internal Revenue Code (26 U.S.C. § 7423) and for malpractice suits against medical personnel of several named agencies (*See* 10 U.S.C. § 1089(f), 22 U.S.C. § 817(f), 38 U.S.C. § 4116(e), and 42 U.S.C. §§ 233(f) and 2458a(b))." Schuck, *supra* note 99, at 333 n.180.

129. Comment, *Scope of the Discretionary Function Exception Under the Federal Tort Claims Act*, 67 Geo. L.J. 879, 882 (1979).

130. *Basso v. United States*, 239 U.S. 602 (1916).

constitutional or statutory basis. Rather, it emerged as a result of judge-made law.¹³¹ Chief Justice Marshall, in *Cohens v. Virginia* stated:

“The universally received opinion is, that no suit can be commenced or prosecuted against the United States. . . .”¹³²

Because of the sovereign immunity bar, one of the only remedies available to an individual tortiously aggrieved by an agent of the government was a “private bill” from Congress allowing recovery against the United States government.¹³³ The growing number and burden of private bills¹³⁴ and mounting hostility to sovereign immunity eventually led Congress to pass the FTCA and thus create a simplified recovery procedure for those injured by governmental negligence. The FTCA waived the United States’ immunity from suit for claims arising out of the “negligent” or “wrongful” conduct of government employees acting “within the scope of employment.” 28 U.S.C. § 1346(b) (1976) provides:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Later amendments to the FTCA also waived the United States’ immunity in suits arising from the “intentional torts” of its employees, such as assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution when committed by federal investigative or law enforcement officers.¹³⁵

The FTCA as it currently reads, however, leaves the immunity of the United States government intact in several important areas. First, the government cannot be held liable for the performance or non-performance of a discretionary function or duty. 28 U.S.C. § 2680 provides:

[T]his title shall not apply to—

(a) Any claim based upon . . . the performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Second, it appears that the United States cannot be held liable in any tort action based on a constitutional claim. This exception to the FTCA stems from the fact

131. Comment, *Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act*, 42 Conn. L. Rev. 492, 499 (1980).

132. 19 U.S. (6 Wheat.) 264 (1821).

133. 67 Geo. L.J. 879, 883 (1979). An injured plaintiff could also bring an application for administrative settlement. *Id.*

134. See *Dalehite v. United States*, 346 U.S. 15, 24–25 n.9 (1953); Symposium, 42 Law & Contemp. Prob. at 86–87.

135. Intentional Tort Amendment Act of 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h)).

that under 28 U.S.C. § 1346(b), the United States can only be liable where a private person would be liable *under the state law*. Since the constitutional tort is based on *federal law*, the argument follows that the United States cannot be liable for constitutional torts under the FTCA and thus retains its immunity.¹³⁶ Finally, the United States generally is able to assert the immunities and defenses of its employees as a defense in an action covered by the FTCA.¹³⁷ For example, under present law the United States cannot be held liable for any tort committed by a government employee who was acting in good faith. Although the FTCA is the predominant form of enterprise liability at the federal level, there are other statutes that have authorized suits against the United States for wrong of its employees. These include the Swine Flu Immunization Act,¹³⁸ and the Teton Dam Act.¹³⁹

2. State Enterprise Liability

The extent to which state governments provide for the shifting of the risk of liability away from the government official or employee varies from state to state.¹⁴⁰ Many states now provide for the protection of state government officials and employees in the form of free defense counsel, indemnification or insurance.¹⁴¹ In addition, some states extend these protections to officials and employees of a state's political subdivisions.¹⁴² However, the availability of these protections in every case is contingent upon that official's having acted in good faith.¹⁴³

While there is clearly a trend today among state governments to adopt some form of governmental assumption of liability, a significant number of states limit the degree to which the state will indemnify an official,¹⁴⁴ while a few states still have no formal or extensive system for direct governmental liability.¹⁴⁵ Moreover, in a limited number of states, sovereign immunity is still the rule.¹⁴⁶

136. Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 4 (1979).

137. *Norton v. United States*, 581 F.2d 390 (4th Cir. 1978).

138. Pub. L. No. 94-380, 90 Stat. 1113 (1976) (codified at 42 U.S.C. § 247b). The liability provisions were subsequently repealed by Pub. L. No. 95-626, 92 Stat. 3551 (1978).

139. Pub. L. No. 94-400, 90 Stat. 1211 (1976).

140. Recent developments are discussed in Chapter V and Appendix B at length.

141. See, e.g., Ariz. Rev. Stat. § 41-621, *et seq.*; Nev. Rev. Stat. §§ 41.0339 and 41.0349. See also Schuck, *supra* note 99, at 334.

142. See, e.g., Cal. Gov't Code § 995.

143. The good-faith aspect of state protection of officials and employees means that the officials must be found to have acted within the "[c]ourse and scope of employment." See, e.g., Mass. Gen. Laws ch. 258, § 2; Minn. Stat. Ann. § 3.736(9).

144. See, e.g., Ky. Rev. Stat. § 44.070.

145. See letters from Wilson L. Condon, Attorney General of Alaska and Jeffrey P. Hallem, Assistant Attorney General of South Dakota, to Thomas J. Madden, contained in Appendix B.

146. See letter from Robert O. Welford, Attorney General of North Dakota, to Thomas J. Madden, contained in Appendix B.

C. *Administrative Controls Over Federal Officials*¹⁴⁷

The existing system of administrative disciplinary controls on officials constitutes a third method for dealing with governmental wrongs. The procedures which are available vary greatly depending on the official position held by the alleged wrongdoer. For example, career civil servants are subject to disciplinary proceedings with established, explicit, substantive and procedural norms.¹⁴⁸ These internal disciplinary proceedings are of particular interest because career civil servants represent the vast majority of government officials and are the ones most often sued. In contrast, administrative controls are not generally available for elected officials, political appointees and former officials. These latter types of officials are, however, sensitive to external controls such as adverse publicity, congressional oversight and judicial review.¹⁴⁹ The application of both internal and external controls to former officials of all types poses special problems for consideration.

It is important to recognize that the fundamental purpose of the existing administrative controls is to promote administrative efficiency and not to deter official wrongdoing that harms individual members of the public. The principal legislative mechanism permitting agencies to discipline officials provides for sanctions that will "promote the efficiency of the service."¹⁵⁰ As Supreme Court Justice Powell recognized in *Arnett v. Kennedy*: "[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch."¹⁵¹

There is no general agreement on whether the existing administrative disciplinary system adequately satisfies either the goals of efficiency or deterrence. In light of the obvious elusiveness of quantifying the system's effectiveness in achieving these goals, it is hardly surprising that there are few promising avenues for evaluating the system, much less any substantial empirical evidence of the performance of administrative controls.¹⁵²

147. This section will discuss existing administrative sanctions only at the federal level. It is both infeasible and unnecessary to describe the myriad administrative controls in each of the fifty states and local sanctions as well.

148. See, e.g., 5 U.S.C. §§ 7101-7901.

149. External controls are examined *infra* at pp. 3-64 through 3-70.

150. 5 U.S.C. § 7503(a).

151. 416 U.S. 134, 168 (1974).

152. In developing a model for conducting the necessary evaluation a starting point would be the recent literature on the theory and historical development of administrative agencies. See, e.g., Stewart, *Reformation of Administrative Law*, 88 Harv. L. Rev. 1667, 1677-78 (1975). Ackerman and Hassler, *Beyond the New Deal*, 89 Yale L.J. 1466, 1471-72 (1980); see also 1 K. Davis, *Administrative Law Treatise* §§ 1.6-1.9 (1978).

Several commentators suggest, however, that the administrative disciplinary system does little to improve the efficiency of the service noting that inefficiency is not a grounds for dismissal or suspension in Civil Service adverse action. See Mashaw, *supra* note 36; Merrill, *supra*; R. Vaughn, *The Spoiled Systems*, *supra*. It has even been suggested that civil service regulations, in general, limit the government's ability to reward good, as well as punish poor, job performance, thus removing

1. Individual Sanctions

—Elected Officials

The President and the Vice President are not subject to the administrative sanctions imposed on other officials from within the executive branch of government. They are not subject to civil service disciplinary procedures, and, under the Constitution, they can only be removed from office by the electorate or after impeachment. Of course, at the state level where there are often numerous elected executive officials, the problems of disciplining these officials are more significant.

—Political Appointees

Political appointees are subject to different administrative sanctions than are civil servants who are members of the "competitive service."¹⁵³ They may be treated more harshly than other civil servants, since they are not protected by the statutory and regulatory procedures designed to protect civil servants from arbitrary treatment.¹⁵⁴ Political appointees may be removed at the will of the President. This removal power is said to be implied in the appointment power set out in Article II of the Constitution. The extreme sanction of removal, however, may not be too meaningful since the President might want to retain an otherwise valuable official. While the President may unilaterally remove certain executive officials, congressional concurrence may be required to support the removal of appointed officials of independent agencies or quasi-legislative or judicial officials.¹⁵⁵

Excepted Service

The President has authority to appoint a limited number of persons to positions specifically excepted from the competitive service, as defined below. These include a number of sub-cabinet level appointments of individuals believed

incentives for employees to engage in desirable behavior. Cass, *supra* note 125. One authority has noted that he was unaware of any case "in which the most extreme pecuniary sanctions available—loss of a government job or demotion—have been imposed for mere negligence." Mashaw, *supra* note 36, at 23.

153. According to the Lloyd-LaFollete Act, 5 U.S.C. §§ 2101 *et seq.*, those persons whose appointments are made by nomination for confirmation by the Senate are not part of the "competitive service." Under Article II, § 2 of the Constitution, certain appointments made by the President must be approved by two-thirds of the Senate. Officials appointed to these positions are those whom this report refers to as political appointees.

154. *Id.*

155. Compare *Myers v. United States*, 272 U.S. 52 (1926) (President may remove postmaster without congressional approval) with *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (President may not remove FTC Commissioner without congressional approval) and *Wiener v. United States*, 357 U.S. 349 (1958) (President may not remove War Claims Commissioner without congressional consent).

by the President and his officers to be desirable in order to carry out policy and political objectives. They are referred to as "Schedule C" officials.¹⁵⁶

—*Competitive Service*

The competitive service is statutorily defined in the Lloyd-LaFollete Act:¹⁵⁷

(a) The 'competitive service' consists of—

(1) all civil service positions in the executive branch, except—

(A) positions which are specifically exempted from the competitive service by or under statute;

(B) positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs; and,

(C) positions in the Senior Executive Service.¹⁵⁸

a. *Reduction in Grade or Removal by the Agency for Unacceptable Performance*

Federal civil servants are generally subject to performance evaluations.¹⁵⁹ Each agency must develop a performance appraisal system to evaluate employees periodically and provide a basis for promoting, reassigning, and demoting them. The system is meant to "recogniz[e] and reward[] employees whose performance so warrants," and "assist[] employees in improving unacceptable performance."¹⁶⁰ The applicable statutory and regulatory provisions do not define in detail what conduct is so unsatisfactory as to warrant disciplinary action. Gross abuses of power or constitutional violations may fall within the definition.¹⁶¹

Subject to notice and hearing requirements, "an employee may be reduced in grade or removed at any time during the performance appraisal cycle that the employee's performance in one or more critical elements of the job becomes unacceptable."¹⁶² A "critical element" is "a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action" such as removal or a grade

156. 5 C.F.R. § 6.2. Schedule C positions are those of a confidential or policy-determining character. Except as otherwise may be required by statute, Civil Service rules and regulations do not apply to removals from positions in Schedule C or from positions excepted from the competitive service by statute. Exec. Order No. 10577, 5 U.S.C. § 3301 note.

157. "Civil service" is defined in the statute to include "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services." 5 U.S.C. § 2101(1).

158. 5 U.S.C. § 2102. Although the statute here distinguishes between the "competitive service" and the "Senior Executive Service," members of these two groups are generally subject to the same kinds of administrative sanctions and receive the same statutory and regulatory protection. The statute also provides that even those whose appointments are subject to Senate confirmation may be specifically included in the competitive services by statute. 5 U.S.C. § 2102(b).

159. The details of which federal employees are subject to this sort of evaluation are set out in 5 U.S.C. § 4301, 5 C.F.R. § 432.201(b), 5 C.F.R. § 432.201(c), and statutes and regulations cited therein.

160. 5 U.S.C. § 4302.

161. See generally 5 C.F.R. Part 432.

162. 5 C.F.R. § 432.203(a).

reduction, even without regard to the employee's performance on other components of the job.¹⁶³ However, a reduction in grade or removal may be based only on those instances of unacceptable conduct which occurred within the past year.¹⁶⁴

Disciplinary actions for unsatisfactory performance must be initiated by the employee's own agency. The statute does not provide for either a private right of action by members of the public, or for direct prosecution by an outside agency such as the Office of Personnel Management (OPM).¹⁶⁵ However, members of the public, or other agencies might of course bring an employee's actions to the attention of his or her agency in an attempt to precipitate disciplinary proceedings. They might also try to employ publicity to spur the agency into action.

b. Disciplinary Sanctions Imposed By the Agency to "Promote the Efficiency of the Service"

Agencies may remove, suspend, reduce in grade, reduce in salary, or furlough for thirty days or less, employees, when such measures would "promote the efficiency of the service."¹⁶⁶ These sanctions are brought into play by the employee's own agency, rather than by a private right of action, and must be accompanied by certain procedural protections.

163. 5 C.F.R. § 430.202(e). An employee whose reduction in grade or removal is proposed because of an unsatisfactory performance is entitled to thirty days notice of the charges against him or her, representation by an attorney, an opportunity to answer the charges orally and in writing, and a written decision. 5 U.S.C. § 4303(b). An employee who is reduced in grade or removed because of inadequate performance may appeal the agency's decision to the Merit Systems Protection Board, a federal body dealing with disciplinary hearings in most of the agencies. 5 U.S.C. § 4303(e). The Merit Systems Protection Board and this appeal mechanism are described in detail in *Rescuing Riffs: An Overview of the Merit Systems Protection Board* 6 District Lawyer 32-35 (1982). In cases involving a removal, the Board itself must hear the appeal. When only a demotion is involved, the Board may appoint an administrative law judge to hear the appeal. The agency's decision may be sustained only if it is based on "substantial evidence." 5 U.S.C. § 7701(c)(1)(A). Under certain circumstances the Office of Personnel Management may also participate in such appeals. 5 U.S.C. § 7703(d). Finally, "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." 5 U.S.C. § 7703(a)(1). The procedures, jurisdiction, and standards appropriate to such appeals are set out in 5 U.S.C. § 7703.

The courts are frequently deferential to decisions made by the Merit Systems Protection Board. *See, e.g.,* Gueory v. Hampton, 510 F.2d 1222, 1225 (D.C. Cir. 1974); Mendelson v. Macy, 356 F.2d 796 (D.C. Cir. 1966).

164. 5 U.S.C. § 4303(c)(2)(A).

165. The OPM can, however, within one year of an employee's appointment, bring a direct action against employees when discipline is necessary "to promote the efficiency of the agency." The Office of Special Counsel can in appropriate circumstances prosecute a disciplinary action. 5 U.S.C. §§ 1201-09.

166. *See* 5 U.S.C. §§ 7503, 7513, 7543; 5 C.F.R. §§ 752.101-752.606. This group of sanctions is referred to as "adverse actions."

The phrase "promote the efficiency of the service" is broad.¹⁶⁷ Nevertheless, OPM regulations defining how agencies shall determine whether a sanction is appropriate illustrate the type of misconduct that is meant to be subject to disciplinary actions.¹⁶⁸ It is apparent that these regulations are primarily directed to promoting administrative efficiency and *not* toward deterring official wrongs which result in harm to individual members of the public.

Courts have upheld dismissals of employees for a broad range of conduct such as leaving a job without permission for eleven days,¹⁶⁹ receiving gratuities

167. The Supreme Court has found that it is not so vague or overbroad as to violate the due process clause of the fifth amendment. *See Arnett v. Kennedy*, 416 U.S. 134, 159-60 (1974), *reh'g denied*, 417 U.S. 977 (1974). The Supreme Court refused to strike down the Lloyd-LaFollete Act in a suit brought by a former competitive service employee of the Office of Economic Opportunity. Kennedy had been removed by the agency for, among other charges, allegedly attempting to bribe a community representative. The Court noted that in framing the standard "to promote the efficiency of the service," Congress sought to "give myriad different federal employees performing widely disparate tasks a common standard of job protection." *Id.* at 159.

168. 5 C.F.R. § 731.202 provides:

(a) *General*. In determining whether its action will promote the efficiency of the service, OPM shall make its determination on the basis of:

- (1) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance in the position applied for or employed in; or
- (2) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance by the employing agency of its duties and responsibilities.

(b) *Specific factors*. Among the reasons which may be used in making a determination under paragraph (a) of this section, any of the following reasons may be considered a basis for disqualification:

- (1) Delinquency or misconduct in prior employment;
- (2) Criminal, dishonest, infamous or notoriously disgraceful conduct;
- (3) Intentional false statement or deception or fraud in examination or appointment;
- (4) Refusal to furnish testimony as required by § 5.3 of this chapter;
- (5) Habitual use of intoxicating beverages to excess;
- (6) Abuse of narcotics, drugs, or other controlled substances;
- (7) Reasonable doubt as to the loyalty of the person involved to the Government of the United States; or
- (8) Any statutory disqualification which makes the individual unfit for the service.

(c) *Additional considerations*. In making its determination under paragraph (a) of this section, OPM shall consider the following additional factors to the extent that these factors are deemed pertinent to the individual case:

- (1) The kind of position for which the person is applying or in which the person is employed, including its sensitivity;
- (2) The nature and seriousness of the conduct;
- (3) The circumstances surrounding the conduct;
- (4) The recency of the conduct;
- (5) The age of the applicant or appointee at the time of the conduct;
- (6) Contributing social or environmental conditions;
- (7) The absence or presence of rehabilitation or efforts toward rehabilitation.

169. *Chiriaco v. United States*, 235 F. Supp. 850 (N.D. Ala. 1963), *aff'd*, 339 F.2d 588 (5th Cir. 1964).

and accepting loans from a company with whom the employee had official dealings,¹⁷⁰ behaving unbearably discourteously toward subordinates and co-workers,¹⁷¹ failing to carry out a superior's orders,¹⁷² and exercising bad judgment.¹⁷³

Courts have required that there be a nexus between the unsatisfactory conduct and the employee's job performance. Even immoral¹⁷⁴ or criminal¹⁷⁵ conduct does not support dismissal unless it is shown to be related to the employee's job performance. Many official abuses of power or commissions of torts might be considered severe enough to require the imposition of disciplinary sanctions to "promote the efficiency of the service." On the other hand, the official can always defend the action on the basis that the misconduct could not be "reasonably" expected to affect the job performance, or does not "reasonably" interfere with the agency's effective performance of its duties.

An employee who is brought up on disciplinary charges to "promote the efficiency of the service" is entitled to advance written notice, an opportunity to answer the charges orally and in writing, representations by an attorney, and a written decision.¹⁷⁶ Except in the case of a suspension for fourteen days or less, the employee has a right to appeal the agency's decision to the Merit Systems Protection Board.¹⁷⁷

170. *Monahan v. United States*, 354 F.2d 306 (Ct. Cl. 1965).

171. *Green v. Baughman*, 243 F.2d 610 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 819 (1957).

172. *Halsey v. Nitze*, 390 F.2d 142 (4th Cir. 1968), *cert. denied*, 392 U.S. 939 (1968).

173. *Korman v. United States*, 462 F.2d 1382 (Ct. Cl. 1972).

174. In *Major v. Hampton*, 413 F. Supp. 66 (E.D. La. 1976), the court overturned the dismissal of a married Internal Revenue Service agent who rented a "shack pad" in New Orleans. The court found no rational basis for concluding that the agent's conduct would discredit him or the agency.

175. *Grebosz v. United States Civil Service Commission*, 472 F. Supp. 1081 (S.D.N.Y. 1979).

176. The specific applicable procedures are set out in 5 U.S.C. §§ 7503, 7513, and 7543. The procedures are somewhat less rigorous when only a suspension for fourteen days or less is being sought. The employee is not *entitled* to a hearing, but the agency may choose to provide one. 5 U.S.C. §§ 7513(c), 7543(c). In *Arnett v. Kennedy*, *supra* note 167, 156-58, the Supreme Court found that a hearing prior to the determination was not constitutionally required. However, the appeal mechanism does provide for a hearing after the administrative action has been taken.

177. 5 U.S.C. §§ 7513(d), 7543(d). The Office of Personnel Management (OPM) regulations provide that OPM may, for a period of one year after an appointment, "instruct an agency to remove an appointee when OPM determines this action will promote the efficiency of the service." 5 C.F.R. § 731.201. When OPM acts to bring about the removal of an employee, it need not comply with all the procedures set out for removals initiated by the agencies themselves. 5 C.F.R. § 731.302(c); 5 C.F.R. § 731.201. The legitimacy of this regulation is based on 5 U.S.C. §§ 3301 and 3302, which give the President (and thus OPM) general powers to prescribe regulations so as to promote the efficiency of the service. Even after an employee has been working for more than one year, OPM may require the removal of an appointee who it finds made an intentional false statement or perpetrated a deception or fraud in the course of his or her examination or appointment. 5 C.F.R. § 731.202.

D. *External Controls*

Executive officials are subject to sanctions from without as well as within the administrative system. In general, however, these sanctions depend on publicity, and are most commonly effective only against outrageous or notorious conduct. These sanctions are rarely exercised merely because of the harm suffered by a single individual. In addition, the sanctions usually apply only to current as opposed to former officials. While the latter continue to be liable for actual crimes they have committed, they are only subject to impeachment and the other sanctions described below if they have taken another public office. Former officials, of course, would continue to be vulnerable to adverse publicity.

1. *Impeachment*

Under the Constitution “[t]he President, Vice President and all civil Officers of the United States, shall be removed from office on Impeachment for, and conviction of Treason, Bribery, or other high Crimes and Misdemeanors.”¹⁷⁸ A vote of two thirds of the Senate is required to bring about such a removal.¹⁷⁹ Conceivably therefore, if the President, Vice President, or other high ranking federal official caused a serious harm to an individual, this official might be threatened with impeachment. But “high Crimes and Misdemeanors” may be interpreted quite narrowly, and more significantly it would be the extraordinary case that would overcome the institutional hurdles to impeachment.

2. *The Electorate*

Elections subject elected officials directly, and others indirectly, to incentives and sanctions for their performance. The effectiveness of their control hinges upon whether misconduct is publicized. The risk of losing an election because of voters’ reactions to an individual case of wrongdoing by any elected official is minimal unless the incident involved criminal or particularly scandalous behavior. Obviously, the impact on the election of the President and Vice President of the conduct of a single official is even less substantial.

3. *Congressional Control*

Congress may, at least theoretically, curb executive abuses of power in three ways. First, it may in some instances override or reverse administrative decisions it finds unacceptable. Second, it may seek to curb future abuses by enacting limiting legislation. Third, Congress may conduct oversight hearings. However, each of these sanctions is limited both by the fact that only a few very serious problems of a national magnitude can possibly be dealt with at the Congressional level and by separation of powers considerations.

Many executive decisions are taken too quickly for Congress to have an opportunity to react. For example, if a law enforcement agent were to decide to conduct an illegal search, Congress could not possibly stop the search before it

178. U.S. Const. art. II, § 4.

179. U.S. Const. art. I, § 3, cl. 6.

happened. Furthermore, since Congress cannot possibly be kept informed of the plans or acts of all government officials, it cannot serve as the regulatory body which insures that individual government officials do not abuse their discretion. Finally, there are constitutional limits on the extent to which Congress can intervene in executive branch affairs.¹⁸⁰

This same concern arises with respect to congressional regulation of future agency activity. While Congress clearly has the power to abolish and create certain agencies, as well as to define their general purposes, it does not have unlimited authority to dictate precisely how executive branch affairs should be conducted.¹⁸¹ Thus, while Congress may generally exert an influence by, for example, defining those agencies with which it is particularly displeased, or by passing limiting legislation,¹⁸² it is unrealistic to expect Congress to bear much of the burden of insuring that individual executive officials perform their jobs properly.

Like the impeachment and electorate sanctions, congressional oversight is highly dependent upon publicity. Unless the public can be made aware of and becomes outraged at executive abuses, Congress will probably not spend a great deal of its time attempting to discipline executive officials.

4. *Special Prosecutor*

High-level administrative officials¹⁸³ are subject to investigation by a court-appointed Special Prosecutor if they are suspected of violating any federal criminal law other than a petty criminal offense.¹⁸⁴ Therefore, to the extent that federal criminal law overlaps with executive abuses of authority, the appointment of a Special Prosecutor may be regarded as a sanction against executive wrongs. This sanction is useful only in a very limited number of cases, and is unlikely to be employed unless public exposure of an executive official's alleged abuses have created a political demand for investigation.

The law covering the appointment of Special Prosecutors requires that if the Attorney General receives information that high-level officials have committed federal crimes, the Department of Justice is to conduct a preliminary

180. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (holding that the Presidential Recordings and Materials Preservation Act did not violate the separation of powers principle, but noting that it is appropriate to examine the extent to which congressional legislation might prevent the executive from performing its function); *Gregg v. Georgia*, 428 U.S. 153, 199 n. 50 (1976) (per Stewart, J., with Powell, J., and Stevens, J., concurring and White, J., Burger, J., Rehnquist C.J., and Blackmun, J., concurring in part with the judgment) (it would be unconstitutional to prohibit the President from granting a reprieve from a death sentence as matter of executive clemency).

181. *Gregg*, *supra* note 180.

182. See, e.g., the War Powers Resolution, 50 U.S.C. §§ 1541-48, requiring the President to consult Congress before taking certain military actions.

183. Special prosecutors are to be appointed to investigate the President and the Vice President, Cabinet officials, high-level Executive Office employees, and certain campaign officials. 28 U.S.C. § 591.

184. 28 U.S.C. § 591.

investigation. Based on this investigation the Attorney General may recommend that no Special Prosecutor be appointed.¹⁸⁵ If the Attorney General does not so recommend, he or she shall apply for the appointment of a Special Prosecutor.¹⁸⁶ Special statutory provisions cover the authority for removal of a Special Prosecutor,¹⁸⁷ who may bring suits based on his investigations, and submission to Congress of reports on his activities.

Therefore, while Special Prosecutors can in certain situations conduct relatively independent investigations from within the administration, this institution is unlikely to prove very effective as a general means of dealing with wrongs committed by executive officials.

5. *Public Pressure*

Public pressure plays an important role in correcting and deterring improper activities of government officials. The sanctions such as impeachment, non-re-election, and the appointment of a Special Prosecutor, are usually imposed only when sufficient public pressure is brought to bear. However, such pressure can be brought to bear only if a wrongful act is accompanied by sufficient publicity and then only if the public is able to make its discontent known. Therefore, it is unrealistic to presume that substantial public pressure could generally be aroused with respect to the activities of most government officials.

The public lacks the investigative and informational capacity to determine whether each of the thousands of federal executive officials are carrying out their jobs properly. Thus, unless a low-level official engaged in either extreme or repeatedly wrongful actions, the public would probably not become aware that a wrongful act had occurred. Moreover, it will generally prove difficult to organize public pressure against an official who has not harmed a substantial number of persons.

* * *

The Role of Administrative and External Controls in the Civil Sanction System

Existing internal administrative and independent external controls provide means by which government officials may be sanctioned for their wrongdoing. However, the current federal system for administrative disciplinary controls was not developed primarily to regulate conduct that directly harms the public, and for this reason cannot fully serve all the goals related to official liability and immunity rules such as compensation of victims and deterrence.

Furthermore, former officials are not subject to internal disciplinary procedures. Nor are they subject to impeachment or removal from office.¹⁸⁸ Other

185. 28 U.S.C. § 592(b)(1).

186. Under 28 U.S.C. § 49, a panel of judges from the Circuit Court of Appeals for the District of Columbia is responsible for appointing the Special Prosecutor.

187. 28 U.S.C. §§ 594-96.

188. However, a government official who has left one government position but taken on a new one may be subject to certain disciplinary sanctions for actions taken in the old job.

officials, those appointed or elected, are subject only to sanctions rarely employed as a result of harms suffered by individual members of the public.

Nevertheless, while the existing system of disciplinary and other remedies does not satisfy all the goals of a system dealing with governmental wrongdoing, it is a good first step toward such a system. Most importantly, it provides an established mechanism with sufficient resources and expertise to investigate the acts of numerous individual government officials. Thus, in developing an alternative method of dealing with governmental wrongdoing one should build on this existing system, but adjust it as well, so that it covers high ranking officials as well as civil servants and so that it explicitly applies to misconduct that results in harm to individual members of the public.

IV. ANALYSIS: CHANGES AT THE FEDERAL LEVEL

There is almost universal dissatisfaction with the current system of civil sanctions for violations of constitutional rights by federal officials. This dissatisfaction stems, in part, from the recognition that private damage actions against individual government officials do not afford the victims of official misconduct "a financially responsible defendant."¹ Of equal concern to many is the perception that the threat of personal liability—or, at a minimum, the risk of suit—deters not only improper conduct by government officials, but proper conduct as well.² Adding to these pragmatic concerns is the conviction that the government *ought* to be liable for the wrongs committed in its name, rather than impose the loss upon an individual official "who is more anvil than hammer."³ Finally, some critics of the current system cite the supposed cost to the government of retaining private counsel to defend individual government officials in *Bivens* suits.⁴

1. *Federal Tort Claims Act: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 95th Cong., 2d Sess. 4 (1978) (statement of Attorney General Griffin B. Bell) (hereinafter cited as *1978 House Hearings*); see *Tort Claims: Hearings on H.R. 24, H.R. 3060, and H.R. 3795 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 97th Cong., 1st Sess. 27 (1982) (statement of Edward C. Schmults, Deputy Attorney General) (hereinafter cited as *1982 House Hearings*).

2. See *1978 House Hearings*, *supra* note 1, at 4 (statement of Attorney General Bell); *1982 House Hearings*, *supra* note 1, at 27 (statement of Deputy Attorney General Schmults).

3. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 347, reprinted in *Federal Tort Claims Act: Hearing on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary (Pt.2)*, 97th Cong., 2d Sess. 35 (1982) (hereinafter cited as *1982 Senate Hearing*).

4. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). See, e.g., *Amendments to the Federal Tort Claims Act: Joint Hearing on S. 2117 Before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary (Pt.1)*, 95th Cong., 2d Sess. 7 (1978) (statement of Attorney General Bell) (hereinafter cited as *1978 Senate Hearing*). Employment of such private counsel is often militated by ethical or policy considerations. See *1982 House Hearings*, *supra* note 1, at 241–42 (statement of Stanley S. Harris, U.S. Attorney for the District of Columbia); *Amendments to the Federal Tort Claims Act: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 96th Cong., 1st Sess. 3 (1979) (statement of Deputy Attorney General Benjamin R. Civiletti) (hereinafter cited as *1979 House Hearings*). It has been estimated that the Justice Department has spent over \$2 million for such private counsel since 1976. *1982 House Hearings*, *supra* note 1, at 24 (testimony of Deputy Attorney General Schmults); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 9 n. 28 (1979).

The actual economy to the federal government resulting from an enterprise liability system is uncertain at best. See *1979 House Hearings*, *supra*, at 12 (Department of Justice Memorandum, Cost estimate for the proposed amendments to Federal Tort Claims Act (May 7, 1979)). Insofar as substituting the United States as defendant would afford plaintiffs "a financially responsible defendant," it is far from obvious that adopting an enterprise liability system would save the government any money at all, except to the extent that legislation establishing such liability would definitively permit the government to settle rather than pay to litigate cases involving alleged employee misconduct. See *1982 House Hearings*, *supra*, note 1 at 248 (statement of Royce C. Lamberth, Chief,

Animated by these and other subsidiary concerns, critics of the current system of civil sanctions have sought for the past ten years its modification or replacement—at least at the federal level—by a system of “enterprise liability” in which the government, rather than the individual government official, would be liable in damages for constitutional injuries caused by official misconduct.⁵ Substituting the government for the individual official as defendant in civil damage actions would promote the goal of compensating victims of such misconduct, while the goals of deterrence and employee accountability would be served by a system of administrative rather than judicial sanctions.⁶

Despite wide support for the broad goals of enterprise liability, legislative efforts to establish such a system have so far foundered on disagreements over appropriate substitute mechanisms of accountability. Failure to reach agreement

Civil Division, Office of the U.S. Attorney for the District of Columbia) (arguing that substitution of United States as defendant would facilitate settlement and reduce litigation).

It thus appears that the major gain from the standpoint of government policy would be to assure the government’s complete control over the defense of constitutional tort actions. *Cf. id.* at 2–4 (statement of U.S. Attorney Harris); *1979 House Hearings, supra*, at 3–4 (statement of Deputy Attorney General Civiletti).

5. See H.R. 10439, 93rd Cong., 1st Sess. (1973); S. 2558, 93rd Cong., 1st Sess. (1973); H.R. 12715, 93rd Cong., 2d Sess. (1974); H.R. 9219, 95th Cong., 1st Sess. (1977); H.R. 9437, 95th Cong., 1st Sess. (1977); S. 2117, 95th Cong., 1st Sess. (1977); S. 2868, 95th Cong., 2d Sess. (1978); S. 3314, 95th Cong., 2d Sess. (1978); H.R. 193, 96th Cong., 1st Sess. (1979); H.R. 2659, 96th Cong., 1st Sess. (1979); S. 695, 96th Cong., 1st Sess. (1979); H.R. 24, 97th Cong., 1st Sess. (1981); H.R. 1696, 97th Cong., 1st Sess. (1981); S. 1775, 97th Cong., 1st Sess. (1981); H.R. 6359, 97th Cong., 2d Sess. (1982); H.R. 7034, 97th Cong., 2d Sess. (1982); H.R. 595, 98th Cong., 1st Sess. (1983). Copies of the foregoing bills are reproduced in Appendix A-1 hereto, together with a summary and chronology of each.

In 1974, Congress amended the Federal Tort Claims Act, 42 U.S.C. §§ 1346(b), 2671–2680 (“FTCA”), to permit suits against the government for assault, battery, false arrest, abuse of process, and malicious prosecution by federal investigative or law enforcement officers. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h)). Such torts are arguably coterminous with claims arising under the due process clause of the fifth amendment and other provisions of the Bill of Rights. See *infra* Part IV-B(2)(g). Having enacted Pub. L. No. 93-253, the 93rd Congress failed to act on alternative legislation proposed by the Nixon Administration that would have broadened the FTCA to cover all claims of unconstitutional torts involving any government official. *Federal Tort Claims Amendment: Hearings on H.R. 10439 Before the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary*, 93rd Cong., 2d Sess. 14–15 (1974) (statement of Irving Jaffe, Acting Assistant Attorney General, Civil Division, Department of Justice). See also *Intelligence Activities and the Rights of Americans: Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 755, 94th Cong., 2d Sess. 336–38 (1976) (recommending statutorily-created federal cause of action against the government and individual federal intelligence officer or agent for actual or threatened injury caused by a violation of the Constitution committed under color of law).

6. See *infra* Part IV-B(2)(b). Calls for a system in which government officials would be indemnified either by the government or under an insurance program have failed to gain currency, presumably because such a system could not eliminate the debilitating effect on employee morale and decisionmaking vigor said to result from the risk of suit. In addition, insurers are reportedly unwilling to cover at least some federal officials. See *1978 House Hearings, supra* note 1, at 31 (statement of John S. McNerney, National President, Federal Criminal Investigators Association).

upon such mechanisms reflects the fact that assuring redress and deterrence, and fostering vigorous decisionmaking by federal officials, are often seen as incompatible goals.⁷ Thus, although legislative proposals to establish some form of enterprise liability at the federal level have been sounded since shortly after *Bivens* itself was decided,⁸ none has yet been adopted.⁹

Legislation pending in the 97th Congress would have amended the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680, to provide an exclusive remedy against the United States for constitutional torts committed by government officials while acting within the scope of their office or employment. The following section analyzes that proposed legislation—H.R. 7034 (reintroduced in the 98th Congress as H.R. 595) and S. 1775—and considers a number of issues raised by those and other bills that illustrate the principal problems involved in establishing a system of enterprise liability at the federal level. Analysis of these bills may facilitate consideration of any legislation that may be introduced on this subject in the 98th Congress.

A. SUMMARY OF ISSUES RAISED BY PROPOSALS TO ESTABLISH FEDERAL ENTERPRISE LIABILITY

1. Proposed Legislation

(a) H.R. 7034.¹⁰

H.R. 7034 would have amended the Federal Tort Claims Act (“FTCA”) to provide that the United States would be exclusively liable with respect to a claim arising under the Constitution of the United States for torts committed by

7. See 1978 Senate Hearing, *supra* note 4, at 8 (statement of Attorney General Bell). The current Administration has taken the position that:

The problem here is not really Government employees acting in an unlawful fashion . . . [but rather] the overhang of litigation and the burden on Government employees of having . . . to be worried about their own cases.

Federal Tort Claims Act: Hearings on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary (Pt.1), 97th Cong., 1st Sess. 7–8 (1981) (statement of Deputy Attorney General Schmults) (hereinafter cited as *1981 Senate Hearings*). The previous Administration, by contrast, took the view that the problem of deterrence was sufficiently serious that a new employee discipline proceeding was warranted “to replace the sanction against employee misconduct presumably lost by immunizing employees from civil liability.” *1979 House Hearings, supra* note 4, at 4 (statement of Deputy Attorney General Civiletti).

8. See *supra* note 4.

9. Of the 17 bills reproduced in Appendix A-1, only three—H.R. 9219, S. 3314, and H.R. 7034 (in lieu of H.R. 24)—were even forwarded to full committee by the responsible subcommittee. None was ever reported out of committee.

10. H.R. 7034 was pending in the House Judiciary Committee at the end of the 97th Congress, having been approved and forwarded by the Subcommittee on Administrative Law and Governmental Relations. H.R. 7034 was reintroduced in the 98th Congress as H.R. 595. 129 Cong. Rec. H94 (daily ed. Jan. 6, 1983).

government officials acting within the scope of their office or employment.¹¹ With respect to any constitutional tort claim, the United States would have been made liable for the greater of either actual damages or liquidated damages, which would have been assessed in an amount which was the greater of either (A) \$2,000 or (B) in the case of a continuing violation, \$200 per day for each violation.¹² If it were established that the defendant official acted with malicious intent or reckless disregard for the plaintiff's constitutional rights, "additional" damages of up to \$100,000 would have been authorized.¹³ A successful claimant would also have been entitled to receive reasonable attorney fees and all other litigation costs reasonably incurred, including attorney fees or costs attributable to processing an administrative claim for money damages based on the alleged constitutional tort.¹⁴

Under H.R. 7034, a suit against an individual government official for an alleged constitutional tort would have become a suit against the United States "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose. . . ."¹⁵ The United States would have been free to

11. H.R. 7034, § 202 (proposed 28 U.S.C. § 2699(b)).

Both H.R. 7034 and S. 1775 would have provided an exclusive remedy against the United States not only with respect to constitutional torts, but also generally in suits based upon acts or omissions of United States officials committed within the scope of office or employment. See H.R. 7034, § 101 (proposed 28 U.S.C. § 2679(b)); S. 1775, § 5(a) (same). Currently, a plaintiff may, as a rule, sue both the official and the government for the same conduct, stating a constitutional tort claim against the former under *Bivens*, and a non-constitutional tort claim against the latter under the FTCA. See *Carlson v. Green*, 100 S. Ct. 1468, 1472 (1980) (construing 28 U.S.C. § 2680(h)). Only in a limited set of cases has Congress explicitly made suit against the government under the FTCA an exclusive remedy. See 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); 38 U.S.C. § 4116(a), 42 U.S.C. §§ 233(a), 2458(a) (malpractice by certain government health personnel). The statutory enshrinement of a distinction between constitutional and non-constitutional torts has been criticized as unsound and unnecessary. See, e.g., 1979 *House Hearings*, *supra* note 4, at 23 (statement of George A. Bermann, Professor of Law, Columbia University Law School).

12. H.R. 7034, § 202 (proposed 28 U.S.C. § 2693). Proposals to replace the *Bivens* remedy have typically provided for liquidated damages to assure successful plaintiffs monetary recovery where actual damages are small or nonexistent, on the premise that proof of concrete injury "is often impossible in the case of nonviolent conduct involving violations of constitutional rights which are of an intangible nature." 1978 *Senate Hearing*, *supra* note 4, at 8 (statement of Attorney General Bell). A liquidated damages provision by definition establishes both a floor and a ceiling on the government's liability in cases where it is appropriate to award such damages. See *infra* note 44.

13. H.R. 7034, § 202 (proposed 28 U.S.C. § 2693). Notwithstanding the provision for such "additional" damages, H.R. 7034 purported to preclude "punitive damages." *Id.* ([t]he United States . . . shall not be liable . . . for punitive damages").

14. H.R. 7034, § 202 (proposed 28 U.S.C. § 2698(a)). Under H.R. 7034, an action could not have been instituted against the United States unless the claim had first been presented to, and denied by, the appropriate federal agency. *Id.* (proposed 28 U.S.C. § 2694(a)). A similar condition applies to suits against the United States under the FTCA. See 28 U.S.C. § 2675.

15. H.R. 7034, § 202 (proposed 28 U.S.C. § 2698(d)(1)). Certification by the Attorney General would have triggered removal to federal court of a suit brought in a state court. *Id.* § 202 (proposed 28 U.S.C. § 2698(d)(2)). The Attorney General's certification that the defendant official was acting within the scope of his office or employment at the time of the incident would have been

assert as a defense to a constitutional tort claim "the absolute or qualified immunity of the employee whose act gave rise to the claim, or his reasonable good faith belief in the lawfulness of his conduct."¹⁶

Finally, H.R. 7034 provided that, where a constitutional tort action resulted in a judgment against the United States or an award, compromise, or settlement paid by the United States, "the Attorney General shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate to the head of the department or agency which employed the employee at the time of the employee's alleged act or omission giving rise to the claim."¹⁷ H.R. 7034 was drafted so as to preserve the right to a jury trial in constitutional tort cases, a right now provided by the *Bivens* remedy.¹⁸

(b) *S. 1775*¹⁹

S. 1775 was substantially similar to H.R. 7034, with three significant exceptions. First, *S. 1775* would have provided that the individual official and the United States would be jointly liable for punitive damages of up to \$50,000 for the official's willful and malicious violation of constitutional rights.²⁰ Second, no provision was made under *S. 1775* for any award to a prevailing plaintiff of attorney fees or other litigation costs. And, third, *S. 1775* would not have provided for jury trial in all constitutional tort cases, but only in cases either pending on the date of the enactment of the bill, or based on claims that had arisen as of that date.²¹

2. *Assessment of Issues Raised by H.R. 7034 and S. 1775*

As noted above, there is nearly unanimous support for the proposition that the United States, and not individual federal officials, should bear the ultimate

"binding and conclusive [only] on the United States and the defendant employee," *id.* § 202 (proposed 28 U.S.C. § 2698(d)(3)), and not on the party bringing the action.

If a plaintiff successfully challenged the Attorney General's certification upon removal, the district court would have been required to remand the cause to the state court, inasmuch as the Attorney General's certification was the predicate for removal. *Id.* If the Attorney General did not make such a certification, the defendant employee would have been allowed to request the federal district court—but apparently not the state court—in which the suit has been filed to certify that the defendant was acting within the scope of his office or employment at the time of the alleged injury. *Id.*

16. H.R. 7034, § 202 (proposed 28 U.S.C. § 2693).

17. H.R. 7034, § 202 (proposed 28 U.S.C. § 2700).

18. *Id.* § 303(a). Significantly, the power to award "additional" damages for malicious constitutional torts was vested with the court, not the jury. *See supra* note 13.

19. *S. 1775*, 97th Cong., 1st Sess., 127 Cong. Rec. S12, 152-53 (daily ed. Oct. 26, 1981). *S. 1775* was pending in the Subcommittee on Agency Administration of the Senate Judiciary Committee at the end of the 98th Congress. Senator Grassley, Chairman of the Subcommittee, was expected to introduce new legislation in the 98th Congress.

20. *S. 1775*, § 3 (proposed 28 U.S.C. § 2674(b)(3)) (amendment of Sen. Specter, adopted (Sept. 23, 1982)). The United States would have been entitled to recover the amount paid under this subsection from the official. *Id.* Under *S. 1775*, the maximum amounts allowed for actual and liquidated damages were also lower than those set by H.R. 7034. *Id.* *See infra* note 44.

21. *S. 1775*, § 10(b)(1).

financial responsibility for constitutional violations.²² But differences have inevitably arisen over central elements of any new system of exclusive enterprise liability, and both H.R. 7034 and S. 1775 aptly illustrate the dilemmas facing efforts to establish such a system.

(a) *Retention of the "Good Faith" Defense.*

The most hotly disputed issue in establishing an exclusive system of enterprise liability is whether the government should be allowed, as H.R. 7034 and S. 1775 provided, to assert as a defense the official's "absolute or qualified immunity . . . or his reasonable good faith belief in the lawfulness of his conduct."²³

For obvious reasons, the availability of the "good-faith" defense would—especially after *Harlow v. Fitzgerald*—significantly limit the extent of the gov-

22. *But see 1982 House Hearings, supra* note 1, at 431, 435–40 (statement of Thomas Devine on behalf of the Government Accountability Project ("GAP") of the Institute for Policy Studies). Disputing the premise that the threat of personal liability "functionally paralyzes any conscientious federal employee," *id.* at 435, and that judgment-proof government officials thwart the goal of victim compensation, *id.* at 438–39, GAP has proposed a modified version of H.R. 7034 that would supplement, but not supplant, the *Bivens*-type remedy. *Id.* at 451. Similarly, Professor Neuborne has suggested that the Federal Tort Claims Act simply be amended to permit *Bivens* defendants to implead the United States, establishing "a self-executing mechanism [that] would allocate the economic loss caused by a constitutional violation to the proper party." *1981 Senate Hearings, supra* note 7, at 29 (statement of Professor Burt Neuborne on behalf of ACLU).

These proposals for an alternative to an exclusive system of enterprise liability echo the joint government/employee liability recommended by the Senate Select Committee, S. Rep. No. 755, *supra* note 5, at 336–38 (1974), and the Senate Committee on Government, S. Rep. No. 588, 93rd Cong., 1st Sess. 2–4, *reprinted in* 1974 U.S. Code Cong. & Ad. News 2789 (analyzing proposed amendment to H.R. 8245)—ultimately enacted into law as Pub. L. No. 93-253, *supra* note 5—to provide, among other things, a remedy against the United States for certain intentional non-constitutional torts of its investigative and law enforcement officers). Attorney General Bell did not favor allowing a plaintiff to choose between suing the employee and suing the government. *1978 Senate Hearing, supra* note 4, at 119 (Letter from Justice Department to Sen. Abourezk (Mar. 13, 1977)).

23. H.R. 7034, § 202 (proposed 28 U.S.C. § 2693); S. 1775, § 5(b) (proposed 28 U.S.C. § 2679(d)(2)). *Cf. Norton v. United States*, 581 F.2d 390, 394–95 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978) (holding that Congress intended to allow the government to assert an official's good faith in suits brought under 28 U.S.C. § 2680(h)). The Supreme Court appears to define qualified immunity as the right to invoke the good-faith defense. *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2737 (1982); *see infra* note 24. For convenience, the issue of whether to allow the government to assert either the absolute or qualified immunity of its officials is discussed herein under the rubric of whether to allow the government to assert the good-faith defense.

Several earlier bills, in contrast to H.R. 7034 and S. 1775, would have precluded the United States from asserting—except in cases involving a Member of Congress, a judge, a prosecutor, or a person performing analogous functions—the absolute or qualified immunity of the official whose conduct was at issue, or the official's reasonable good-faith belief in the lawfulness of his conduct. *See* S. 3314, *supra* note 5, § 3(b); H.R. 2659, *supra* note 5, § (3); S. 695, *supra* note 5, § 3; H.R. 24, *supra* note 5, § 3. This approach was supported by the previous Administration. *See infra* note 26. Under S. 2117, *supra* note 5, § 3, and under H.R. 9219, *supra* note 5, § 3, a federal officer's or employee's "good faith reliance on a court order or legislative authorization" would have constituted a complete defense in a constitutional tort suit against the United States, but the United States would nevertheless have been required to compensate the person whose constitutional rights had been violated.

ernment's liability for the constitutional torts of its officials, and thus the availability of damage awards to the victims of such torts to redress violations of constitutional rights.²⁴

Moreover, allowing the government to assert the good-faith defense would also limit the operation of any disciplinary mechanism that would be triggered by a determination of liability or settlement by the government;²⁵ such mechanism would—at least in the view of the current Administration—be activated only when the official had intentionally violated the plaintiff's constitutional rights.²⁶

24. 102 S. Ct. 2727, 2736–39 (1982). Defining “[q]ualified or ‘good faith’ immunity,” the Supreme Court held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* at 2738. This “[r]eliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law,” *id.* at 2739, supersedes reliance both on objective factors and on subjective factors (*i.e.*, “permissible intentions”) in determining whether the official acted in good faith. *Id.* at 2737. Whether the adjustment of the good-faith defense to rely wholly on objective factors will actually reduce the extent of liability for official misconduct, or will simply “permit the resolution of many insubstantial claims on summary judgment,” *id.* at 2739, is highly doubtful, for although *Harlow* may have somewhat simplified trial of the good faith issue with respect to the question of unclear applicable law. Other subjective elements certainly remain to be asserted or denied in establishing the official’s state of mind. *See, e.g.*, *Briggs v. Goodwin*, No. 80-2269 (D.C. Cir. Jan. 11, 1983); *McSurely v. McClellan*, No. 82-2369 (D.C. Cir. Dec. 10, 1982); *Dale v. Bartels*, No. 74-Civ. 1382-CLB (S.D. N.Y., Dec. 17, 1982); *cf. Sampson v. King*, 693 F.2d 566 (5th Cir. 1982); *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982); *United States v. Irving*, 684 F.2d 494 (7th Cir. 1982); *Standridge v. City of Seaside*, 545 F. Supp. 1195 (N.D. Cal. 1982); *Thompson v. Pennsylvania Parole Board Member Jefferson*, 544 F. Supp. 173 (E.D. Penn. 1982).

25. *See* H.R. 7034, § 202 (proposed 28 U.S.C. § 2700); S. 1775, § 5 (proposed 28 U.S.C. § 2679(f)).

26. To be sure, even if the government were permitted to assert the good-faith defense, the agency that employed the official whose conduct was challenged would theoretically be free to initiate its own internal investigation and disciplinary proceedings under existing law at any time, irrespective of the pendency of the lawsuit. But the current Administration has strongly implied that a determination of liability or money settlement by the United States would be a necessary predicate for disciplinary action against the defendant official. *See 1981 Senate Hearings, supra* note 7, at 9 (testimony of Deputy Attorney General Schmults) (arguing against waiver of good faith on ground that disciplinary proceedings would be triggered by determination of liability, and that where the official has acted in good faith “there should be no disciplinary proceedings”).

As initially drafted (in the form of H.R. 24), H.R. 7034 was criticized by some for eliminating the “good-faith” defense in constitutional tort suits. *See 1982 House Hearings, supra* note 1, at 341 (statement of J. Bryan Hyland, President, Association of Federal Investigators); *id.* at 343–45 (statement of Ira M. Lechner, Legislative Counsel, National Association of Police Organizations, Inc.). H.R. 24’s original “good faith” waiver was specifically endorsed by, among others, the Federal Executive and Professional Association (“FEPA”), *see id.* at 328 (statement of Richard K. Pelz, President of FEPA), and waiver of the defense under earlier legislative proposals was supported by the FBI, *see 1979 House Hearings, supra* note 4, at 80 (statement of William H. Webster, Director, FBI) and by the Carter Administration, *see 1978 House Hearings, supra* note 1, at 14 (statement of Irving Jaffee, Deputy Assistant Attorney General, Civil Division, Department of Justice), as well as by the American Bar Association, *1979 House Hearings, supra* note 4, at 152 (statement of B. James George, Jr., Immediate Past Chairperson, Criminal Justice Section, American Bar Association).

Because permitting the government to assert the official's good faith would thus undercut the goals of assuring victim compensation and reinforcing official accountability, those who would preserve the good-faith defense for the government in constitutional tort suits bear a heavy burden of justification for their position. The argument advanced in support of retaining the good-faith defense for the government does not meet that burden.

At the outset, it should be understood that under established tort doctrine applicable to every analogous situation of private and public vicarious liability, the United States would not be permitted to invoke the "good-faith" immunity of its officials in constitutional tort suits. At common law, the majority rule in the private employment context is that an employer sued for the tort of an employee under the doctrine of *respondeat superior* may not invoke the employee's immunities.²⁷ Moreover, the majority common-law rule in the public employment context at the state and local level is that a government agency sued for the tort of a public official under the doctrine of *respondeat superior* may not invoke the official's immunities.²⁸ Indeed, in FTCA suits, virtually every federal court that has considered the issue has concluded that (a) the doctrine of *respondeat superior* does not permit the United States to invoke the immunities of its officials,²⁹ and (b) Congress did not intend for the United States to be able to invoke the immunities of its officials in suits for intentional torts brought under 28 U.S.C. § 2680(h).³⁰

27. See, e.g., *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); *Hallmark Insurance Co. v. Crary Enterprises, Inc.*, 72 Wis.2d 472, 475, 241 N.W.2d 171, 173 (1976); Restatement (Second) of Agency § 217 Comment b (1958); 2 F. Harper & F. James, *The Law of Torts*, § 26.17, at 1427 n.6 (1956); W. Seavey, *Handbook on the Law of Agency*, § 93, at 167 (1964).

28. See, e.g., *James v. Prince George's County*, 288 Md. 315, 418 A.2d 1173, 1182 (1980); *Maynard v. City of Madison*, 101 Wis.2d 273, 304 N.W.2d 163, 169 (1981); *Mutnan v. City of Monongahela*, 45 Pa. Commw. 23, 406 A.2d 811, 813-14 (1979).

29. See *Downs v. United States*, 382 F. Supp. 713, 749-51 (M.D. Tenn. 1974), *aff'd in pertinent part*, 522 F.2d 990, 998 (6th Cir. 1975); *United States v. Massachusetts Bonding & Insurance Co.*, 227 F.2d 385, 387 (1st Cir. 1956), *rev'd on other grounds*, 352 U.S. 128 (1958); *Ray v. United States*, 228 F.2d 574, 585 n.10, 586 n.12 (5th Cir. 1955) (Brown, J., dissenting); *United States v. Trubow*, 214 F.2d 192, 196 (9th Cir. 1954); *Jackson v. United States*, 196 F.2d 725, 726 (3d Cir. 1952); *United States v. Hull*, 195 F.2d 64, 68 (1st Cir. 1952); The only decision *contra* appears to be *Brooks v. United States*, 152 F. Supp. 535, 537 (S.D.N.Y. 1957) (alternative holding), relying on the premise that common-law *respondeat superior* entitles an employer to invoke his employee's immunities.

30. Four of the five federal courts to have considered the issue have reached this conclusion. The Fourth Circuit, declining to rely on the common-law doctrine of *respondeat superior*, has held that Congress intended to permit the United States to plead the qualified immunity of its officials in suits under 28 U.S.C. § 2680(h). *Norton v. United States*, 581 F.2d 390, 393-96 (4th Cir. 1978), *rev'g* 427 F. Supp. 138, 146-52 (E.D. Va. 1977). In addition to the district court in *Norton*, the three other federal courts that have considered the issue have reached the opposite conclusion. See *Picariello v. Fenton*, 491 F. Supp. 1026, 1040-42, (M.D. Pa. 1980); *Townsend v. Carmel*, 494 F. Supp. 30, 36-37 (D.D.C. 1980); *Crain v. Krehbiel*, 443 F. Supp. 202, 215-17 (N.D. Cal. 1978). Cf. *Downs v. United States*, 522 F.2d 990, 998 (6th Cir. 1975). See also Comment, *Sovereign Immunity*, 47 Geo. Wash. L. Rev. 651 (1979) (criticizing Fourth Circuit's *Norton* decision).

Allowing the United States to plead the "good-faith" immunity of federal officials in constitutional tort suits would not appear to place the United States on a par with employers who face liability under *respondeat superior*.³¹ On the contrary, the government would have an advantage enjoyed neither by private nor public employers at common law, nor by the United States itself in non-constitutional tort suits.

The principal argument for retaining the good-faith defense asserts, in essence, that no genuine wrongdoing has occurred where the official has acted in good faith, and that a judgment against the government in such cases would cause an unwarranted imputation of wrongdoing on the defendant official's part.³²

This argument simply cannot withstand scrutiny. The good-faith defense is made available to the individual government official not because the official's good faith somehow negates the fact of constitutional injury, or because a determination of liability would unfairly stigmatize him. Instead, "underlying the qualified immunity which public officials enjoy for actions taken in good faith is the fear that exposure to personal liability would deter them from acting at all."³³ Thus, although a government official's good faith may be relevant to whether a party whose constitutional rights have been violated should be entitled to compensation from the official, the official's good faith cannot be relevant to whether the victim is entitled to compensation from the government.³⁴

31. FBI Director Webster, in fact, has suggested that the apt analogy in this context might be not to *respondeat superior* doctrine at all, but to decisional law denying insurance companies the right to assert the immunities of those whom they have insured. *1978 House Hearings, supra* note 1, at 97.

32. See *1982 House Hearings, supra* note 1, at 343-44 (statement of Ira M. Lechner, Legislative Council, Nat'l Ass'n of Police Organizations, Inc.); *id.* at 334 (statement of Ordway P. Burden, President, Law Enforcement Assistance Foundation); *id.* at 138 (statement of Joseph A. Morris, General Counsel, Office of Personnel Management).

Viewed in this light, the good-faith defense is not an excuse for misconduct, but rather a denial that any *injury* has occurred. Thus, Deputy Attorney General Schmults has frankly stated the Administration's view that the good-faith defense:

[R]eally goes to the merits of the plaintiff's claim by testing the action of an employee against the standard of reasonableness and good faith. . . . [a]nd certainly no employee wants to be found 'guilty,' if you will, of unconstitutional acts and suffer the resulting stigma. So that, even where the United States and not the employee would be the defendant, our view is that employees would be discouraged from acting in uncertain areas where they might subject the Government to financial liability.

1981 Senate Hearings, supra note 7, at 9.

33. *Carlson v. Green*, 100 S. Ct. at 1473 n.7, *citing* *Butz v. Economou*, 438 U.S. 478, 497 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). See *Owen v. City of Independence*, 445 U.S. 612 (1980). As FBI Director William H. Webster has stated, the good-faith defense "is for the individual protection of the agent." *1978 House Hearings, supra* note 1, at 97 (testimony).

34. See *1979 House Hearings, supra* note 4, at 126-27 (statement of Prof. Bermann); *Norton v. United States*, 581 F.2d at 398 (Butzner, J., dissenting). As Deputy Attorney General Civiletti testified:

[T]he good faith defense doesn't mean that the conduct is not regrettable, terribly negligent, that everyone doesn't feel awful remorse about it, and there hasn't been real

As for the claim that a determination of liability absent bad faith would unfairly stigmatize the defendant official, it must be remembered that in such a case the official *did* commit a constitutional injury, even though his conduct may have been unintentional.³⁵ Surely solicitude for the tortfeasor's reputation cannot be allowed to override his victim's right to compensation. And surely the fact of the tortfeasor's good faith cannot be allowed to remove the basis for disciplining him on grounds other than motive, such as negligence or incompetence. There is no reason why an official should not be held accountable for such misfeasance.³⁶

Congress, of course, may specifically provide by legislation that no finding of liability on the government's part in a constitutional tort case shall give rise to any adverse inference as to the official's good faith. Indeed, it would appear sound for Congress to provide that, once the United States has been substituted for an official in a constitutional tort suit, the official shall be free to treat that suit—say, in answering questions of potential creditors, employers, or others—as if he had never been named as a defendant. Congress should specifically

harm or substantial harm, if not physically, to money values or at least to the dignity of the individual and the privacy of the individual.

I will give you a quick example. Investigators, three of them, go to a home of suspects looking for racketeering—numbers, or whatever. When they go in the home and they are queried about it later, each one says he thought the other had a search warrant. None of them had a search warrant.

They find a man and woman 75 years old in there. They take the woman and strip the woman down and do cavity searches and whatever—in the wrong home.

That is not a gift when you are talking about compensation for that kind of wrong under the fourth amendment.

1979 House Hearings, *supra* note 4, at 19.

35. See *supra* note 29. As Deputy Attorney General Civiletti pointed out in his testimony, *id.*, the good-faith defense is applicable not only when the relevant law was unclear or not yet established, but when other circumstances may have operated to render a violation of constitutional rights unintentional or unknowing. Moreover, in the context of common-law torts, to excuse a wrong it is ordinarily not enough to show that the relevant law had not previously been declared.

36. Public Citizen criticized H.R. 7034 for its original *limited* retention (in H.R. 24) of the good-faith defense with respect to the conduct of Members of Congress, judges, prosecutors, or others performing analogous functions. 1982 House Hearings, *supra* note 1 at 357–58 (statement of Alan B. Morrison, Director of Litigation, Public Citizen). Presumably, new legislation proceeding along those lines would now provide for retention of the defense with respect to the conduct of the President as well. See *Nixon v. Fitzgerald*, 102 S. Ct. 2690, 2705 (1982). Nevertheless, there would appear to be some merit to Mr. Morrison's contention that "all the reasons that lead to the elimination of the good faith defense in all other situations apply here." 1982 House Hearings, *supra* note 1, at 357 (Morrison statement). If the concern is to spare such officials the ordeal of administrative proceedings in the event that liability is established, future legislation might be drafted to bar any administrative investigation or proceeding against such officials upon a showing that an otherwise available immunity could have barred recovery in a given case in which liability was found. The power of Congress to abrogate the absolute or qualified immunity of any federal official, even without transferring liability to the United States, seems clear. See *Nixon v. Fitzgerald*, 102 S. Ct. at 2719 n.27.

provide that the defendant official is entitled to assert a good-faith defense in any administrative investigation or disciplinary proceeding under the bill.³⁷

Apart from the respects in which waiver by the government of the good-faith defense would vindicate the goals of compensation and deterrence, waiver of the defense would also operate to limit discovery and facilitate the disposition of claims.³⁸ As Elliot Richardson, otherwise a proponent of good-faith immunity, has noted, "retention of the good faith defense [would] cause federal officials to continue to be enmeshed in years of pre-trial depositions and document discovery aimed at determining the state of mind of an official."³⁹ Reducing constitutional tort suits to these two issues—did a violation of the plaintiff's constitutional rights occur, and was that injury caused by a government official acting within the scope of his office or employment—would dramatically simplify trials, and encourage early settlement.⁴⁰

One other argument is sometimes advanced in favor of retaining the good-faith defense for the government in constitutional tort suits—namely, that waiver

37. H.R. 7034, § 202 (proposed 28 U.S.C. § 2700). As Deputy Assistant Attorney General Jaffe noted in connection with legislation supported by the Carter Administration, "in any disciplinary proceeding, the good faith of the employees will be very much an issue, and if [a defendant employee] can establish that he had a good faith belief that what he was doing was lawful and proper, then disciplinary proceedings on that basis would not proceed." *1978 House Hearings, supra* note 1, at 14.

38. As the Justice Department observed in commenting on the cost impact of earlier legislation providing for waiver of the good-faith defense:

Major discovery savings would . . . accrue to the agencies and departments employing those individuals who have been sued. Currently, the burden on an agency can be immense. The FBI, for example, has had to examine hundreds of thousands of documents in connection with suits against individuals. In addition to the savings associated with the discovery process, simplification of the issues involved in a constitutional tort action will reduce the amount of attorney time necessary for each case.

1979 House Hearings, supra note 4, at 13 n.1 (Department of Justice Memorandum of May 7, 1979).

Although *Harlow v. Fitzgerald* may have somewhat simplified trial of the good-faith issue with respect to the question of unclear applicable law, *see supra* note 24, other subjective elements would certainly remain to be asserted or denied in establishing an official's state of mind, and thus the problem of discovery would continue to plague constitutional tort suits where the good-faith defense could otherwise be raised.

39. 1982 Senate Hearing, *supra* note 1, at 125. Mr. Richardson appeared to suggest that this problem should be treated by removing the subjective element from the good faith test. *Id.*, as the Supreme Court did in *Harlow* with respect to unclear applicable law.

40. The strength of the official's good-faith defense has been an important element in settlement discussions. *1982 House Hearings, supra* note 1, at 251 (testimony of Royce C. Lamberth, Chief, Civil Division, Office of the U.S. Attorney for the District of Columbia). Whatever the impact of *Harlow* on the discovery involved whenever the good-faith defense is asserted, *see supra* note 38, the assertion of the good-faith defense may be expected frequently to postpone settlement pending appellate review of a district court's ruling on summary judgment for either party with respect to the so-called "objective" factors upon which the good-faith defense must now rely.

of the defense would enable plaintiffs to “prevail more easily, thereby increasing economic costs to the [g]overnment.”⁴¹

As to this argument, it must be observed at the outset that any increased cost to the government by virtue of its expanded liability will at least partially be offset by the litigation savings that would result from simplification of the issues,⁴² and the incentive for early settlement.⁴³ And certainly the “economic costs to the government” may be moderated by setting liquidated damages in a reasonable amount.⁴⁴ But there is a deeper, more fundamental reason for allowing recovery notwithstanding cost. As the current Administration has forthrightly declared:

[W]here someone has a genuine grievance—where someone has a genuine claim that he has been deprived of a constitutional right—we ought to afford him avenues of relief without regard to cost. We cannot put a price on constitutional liberties.⁴⁵

If a constitutional injury has occurred, redress should not be denied.

(b) *The Search for an Effective Substitute Deterrent*

As noted above, a key source of dissatisfaction with the existing system of civil sanctions is its supposed “overdeterrent” effect—*viz.*, that the threat of personal liability (or, at a minimum, the risk of being sued) deters not only improper conduct by government officials, but proper conduct as well.⁴⁶ On the other hand, the *Bivens* remedy has been made available precisely because, standing alone, the remedy of suing the United States “is not a sufficient protector of the citizens’ constitutional rights.”⁴⁷

Indeed, in stressing the salutary deterrent function served by the threat of personal liability—including punitive damages—the Supreme Court has specifically emphasized “the doubt cast on the validity of the assumption that there exist adequate mechanisms for disciplining federal employees” who violate constitutional rights.⁴⁸ The Court has implied that the threat of disciplinary action

41. 1982 House Hearings, *supra* note 1, at 138 (statement of Joseph A. Morris, General Counsel, Office of Personnel Management (OPM)).

42. *See supra* note 38.

43. *See supra* note 40.

44. As noted above, liquidated damages under H.R. 7034 would have been set at the greater of \$2,000 or, in the case of a continuing violation, \$200 per day for each such violation. *See supra* note 12. Liquidated damages under S. 1775 would have been set at the greater of \$1,000 or, in the case of a continuing violation, \$100 per day for each day up to a maximum of \$15,000. S. 1775, § 3 (proposed 28 U.S.C. § 2674(b)(2)).

45. 1982 House Hearings, *supra* note 1, at 141 (statement of Joseph A. Morris, OPM) (arguing that possibility of increased damage awards by virtue of substitution of government as defendant in constitutional tort suits is worth risking).

46. *See supra* note 2.

47. *Carlson v. Green*, 100 S. Ct. at 1474.

48. *Id.* at 1473 & n.8, *citing* 1978 House Hearings, *supra* note 1, at 6 (statement of Attorney General Bell). As the existence of the exclusionary rule demonstrates, existing mechanisms of deterrence have not been deemed sufficient to deter Fourth Amendment violations. *See Mapp v. Ohio*, 367 U.S. 634 (1961). If the Supreme Court should eventually adopt a “good faith” exception

under existing mechanisms is, at most, a supplement to, and not a substitute for, the deterrence imposed by the risk of personal liability.⁴⁹

One basic question, then, in replacing the existing system of civil sanctions with a system of "enterprise liability" is how to assure that the substitute deterrent mechanism will equally serve the goal of measured deterrence.

The approach taken in H.R. 7034 and S. 1775 was one of bare reliance on existing mechanisms. The two bills, as noted previously, provided that, when there has been a judgment against or money settlement by the United States, the Attorney General "shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate" to the head of the defendant official's department or agency.⁵⁰

This provision was criticized by many for failing to offer an adequate substitute for the deterrence function of the existing system of civil sanctions—in marked contrast to earlier proposals, whose somewhat cumbersome provisions for administrative action upon determination of liability, and for judicial review

to the exclusionary rule, the Court may well signal Congress that additional, substitute mechanisms of deterrence are needed. *See* Transcript of Oral Argument in *Illinois v. Gates*, No. 81-430 (Feb./Mar., 1983) (question of Justice Stevens during Reargument).

49. *Carlson v. Green*, 100 S. Ct. at 1473. Much of the doubt about the efficacy of existing mechanisms of accountability is attributable to the law enforcement and intelligence agency abuses revealed during the last decade. *See 1979 House Hearings, supra* note 4, at 45 & n.32 (Statement of Karen Christensen, Legislative Counsel, American Civil Liberties Union). *See also* "Prosecution for Domestic Spying Rejected in 1977," *New York Times*, Mar. 15, 1982, at A12, col. 1 (describing contents of 1976 report by Justice Department acknowledging apparent violation of "fundamental constitutional rights" by federal agencies and officials, but recommending against criminal prosecution); Association of the Bar of the City of New York, Committee on Civil Rights, *Intelligence Agency Abuses: The Need for a Temporary Special Prosecutor*, 31 Rec. A.B. City N.Y. 601 (1976); U.S. Department of Justice, *Report Concerning Investigation and Prosecutorial Decisions with Respect to Central Intelligence Agency Mail Opening Activities in the United States* (1977).

One witness noted in hearings on H.R. 2659 the Federal Bureau of Investigation's administrative inquiry into illegal investigative activities directed against the Weather Underground:

In April, 1979 the Department of Justice Office of Professional Responsibility informed FBI Director William Webster that it had evidence of 32 illegal surreptitious entries, 17 illegal wiretaps, 2 unauthorized microphone installations, and numerous illegal mail openings conducted against relatives and associates of Weather Underground members. After eight months of review, the Director informed the Attorney General that of the 61 special agents and 7 supervisors implicated in these illegal activities, disciplinary action was appropriate for only 2 agents and 4 supervisors. Ultimately, only mild sanctions were applied to the six employees. Letter from William H. Webster, Director, Federal Bureau of Investigation to Attorney General Griffin B. Bell at 1 (Dec. 5, 1978). Two street agents were 'censured,' meaning that they merely received a letter which identifies a deficient act or omission and calls for proper conduct in the future. Of the [four] supervisors, two were 'recommended for dismissal,' one was demoted and the fourth was suspended for 30 days without pay. Dismissal does not affect vested retirement or pension rights.

1979 House Hearings, supra note 4, at 45 & n.2 (statement of Karen Christensen, ACLU) (text and footnotes conjoined).

50. H.R. 7034, § 202 (proposed 28 U.S.C. § 2700); S. 1775, § 5(c) (proposed 28 U.S.C. § 2679(f)).

of such action, may well have accounted for that legislation's failure to be adopted.⁵¹

Plainly some middle ground must be found. An administrative mechanism that depends on an agency's inclination to repudiate the conduct of its officials can scarcely be expected to foster public confidence that errant officials will either be made to account for their actions, or will be effectively dissuaded from future misconduct.⁵² On the one hand, an agency may be reluctant to punish officials who have committed wrongful acts in the belief that "they were doing their duty to their country and to their agency."⁵³ At the same time, however, internal proceedings may afford agency officials an opportunity to use the defendant official as a scapegoat for their own wrongdoing, or to punish him for bringing their misconduct to light in the course of the proceedings.⁵⁴ Indeed, there is good reason to suppose that administrative proceedings arising from constitutional torts will frequently involve claims implicating agency policy or policymakers in the defendant official's misconduct,⁵⁵ and thereby compromise the agency's impartiality.⁵⁶

Thus, with sound reason, the Federal Executive & Professional Association has urged that "the proceeding . . . not be conducted by the head of the agency in which the employee or employees work," but rather that an independent agency be designated for that purpose.⁵⁷ Remitting administrative action to such an independent body would, by declining to rely solely for discharge of disciplinary responsibilities on those with the most incentive to misuse it, presumably meet at least some of the concerns of the previous Administration and such groups as Public Citizen, which had argued for victim participation in independent disciplinary proceedings as "essential" to any "meaningful substitute" for the existing mechanism of actual and punitive damages.⁵⁸

51. See S. 3314, *supra* note 5, § 13; H.R. 2659, *supra* note 5, § 8; S. 695, *supra* note 5, § 12(a). H.R. 2659 and S. 695 were Carter Administration proposals.

52. The concerns expressed go beyond the law enforcement and intelligence context. Thus Senator Metzenbaum stated, to Attorney General Bell's expression of assent, that:

[I]n the case of employees [accused of wrongdoing], you have to have some kind of a review board that is totally unresponsive to the agency that is itself involved in the alleged wrongdoing. Or else the person who claims to have been wronged will never feel that they got justice; and probably the American people, when they learn about it, will not think they got justice. It will always be suspect—whether it is the CIA investigating its own people, or Cointel, or whether it is HEW or any other agency.

1978 Senate Hearing, *supra* note 4, at 13.

53. 1979 House Hearings, *supra* note 4, at 127 (remarks of Rep. McClory).

54. *Id.*

55. *Id.* Indeed, U.S. Attorney Harris specifically cited the tendency of defendant officials to plead that they were only "following . . . orders." 1982 House Hearings, *supra* note 1, at 242.

56. See *supra* notes 46 & 51.

57. 1982 House Hearings, *supra* note 1, at 330–31 (statement of Richard Pelz of FEPA).

58. 1982 House Hearings, *supra* note 1, at 361 (statement of Alan B. Morrison); see 1978 Senate Hearing, *supra* note 4, at 6 (statement of Attorney General Bell) (advocating "procedures in which the injured person can participate in a meaningful way"). In its testimony on H.R. 24, Public Citizen called for:

One approach along these lines would be to establish, for independent investigation and, in appropriate cases, prosecution of disciplinary proceedings, an Office of Disciplinary Counsel modeled on the existing Office of Special Counsel under the Civil Service Reform Act of 1978.⁵⁹ Another approach—one advocated by the Federal Executive & Professional Association (“FEPA”)—would be to utilize the Merit Systems Protection Board (“MSPB”) itself as a disciplinary body.⁶⁰ As the FEPA observed, the Special Counsel himself is already authorized to investigate abuses of authority in the context of prohibited personnel practices.⁶¹

Thus Congress could specifically require the Special Counsel to investigate constitutional tort cases in which there had been judgment of liability or money compromise by the government, and direct the prosecution of such cases, when appropriate, before the Merit Systems Protection Board. No judicial determination in the constitutional tort suit would be binding on the defendant official in proceedings before the Merit Systems Protection Board, and the defendant official could assert that all defenses that would have been available to him had he been a party to the constitutional tort suit under the old system of civil sanctions.⁶²

-
- (1) the right of the victim to initiate an administrative investigation which cannot be terminated without adequate reasons;
 - (2) the right of the victim to participate in an appropriate manner in the investigation and subsequent disciplinary proceedings, if any; and
 - (3) the right of the victim to agency, and ultimately judicial, review if no punishment is meted out, or if the punishment is wholly inadequate for the violation.

1982 House Hearings, *supra* note 1, at 361 (statement of Alan B. Morrison). These recommendations were incorporated in legislation supported by the previous Administration. See Bell, *supra* note 4, at 12–13.

59. Act of Oct. 10, 1978, Pub. L. No. 95-367 § 202, 92 Stat. 1111 (codified at 5 U.S.C. § 1201–1209). This option—establishing an Office of Disciplinary Counsel—was proposed by the Fund for Constitutional Government. See *1979 House Hearings*, *supra* note 4, at 74.

60. *1982 House Hearing*, *supra* note 1, at 311 (testimony of Richard K. Pelz), *citing* 5 U.S.C. § 1207 (authorizing MSPB to impose disciplinary sanctions). The MSPB is authorized, *inter alia*, to hear and adjudicate allegations of prohibited personnel practices, 5 U.S.C. § 1205(a), and to enforce compliance with its orders by any federal agency or official. *Id.* § 1205(a)(2). Compliance may be enforced by orders that salary payments be withheld pending compliance. *Id.* § 1205(d)(2).

61. *1982 House Hearing*, *supra* note 1, at 311 (testimony of Richard Pelz, FEPA), *citing* 5 U.S.C. § 1207. Chapter 12 of Title 5 of the United States Code, 5 U.S.C. §§ 1201–1209—pertaining to the Merit Systems Protection Board and Special Counsel—are reproduced in Appendix A-2.

The Special Counsel is currently authorized to receive and investigate allegations of “prohibited personnel practices.” 5 U.S.C. § 1206(a)(4). If the Special Counsel determines that there is “a substantial likelihood . . . [of] a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to the public health and safety,” *id.* § 1206(a)(3)(A), the Special Counsel may under certain circumstances require the agency head to conduct an investigation and submit a written report. *Id.* § 1206(a)(3)(B). The Special Counsel may recommend as to what corrective action should be taken, if any, *id.* § 1206(c)(1)(A), and, if the agency has not taken the corrective action recommended, the Special Counsel may request that the MSPB order such corrective action. *Id.* § 1206(c)(1)(B).

62. Whatever one’s view of any particular option for establishing an administrative mechanism with “teeth,” it cannot be the case that “permitting the alleged [sic] tort victim to have a say in the disciplinary proceedings will ‘wipe out’ the protection sought to be given [by the new system]

The agency that employs the official whose conduct has been challenged would, of course, continue to be responsible in the first instance for investigating and, where appropriate, disciplining the official or implementing other corrective steps even prior to the outcome of the constitutional tort suit against the government. Existing disciplinary mechanisms are directed toward conduct related to job performance and are designed to promote administrative efficiency. It would be desirable for Congress to provide explicit authorization for applying existing disciplinary mechanisms to official misconduct.

Congress could also provide that, before proceeding with disciplinary action against any official for a constitutional tort, the Special Counsel shall determine whether the agency that employs the official has already acted, and, if so, whether the agency's action is satisfactory from the standpoint of the system's overall goals of deterrence and accountability.

The Special Counsel would initiate disciplinary proceedings before the MSPB only if he determined that the agency that employed the official had taken no action, or that the agency's action was insufficient; any discipline later imposed by the Merit Systems Protection Board would be reduced by any discipline imposed by the agency in its own proceedings. The Special Counsel would annually compile and forward to the House and Senate Judiciary Committees a report setting forth the cases he has reviewed, explaining with particularity why he chose to proceed or not to proceed with independent action in each case.

(c) *Jury Trial and "Additional" Damages*

In rejecting the argument that the Federal Tort Claims Act provides as effective a remedy as *Bivens*-type actions, the Supreme Court has specifically stressed the availability of punitive damages and the option of a jury trial in *Bivens* suits.⁶³ As the Court noted:

Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' *Bivens*, 403 U.S. at 397, and are especially appropriate to redress the violation by a government official of a citizen's constitutional rights. Moreover, punitive damages are available in 'a proper' § 1983 action, *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978) (punitive damages not awarded because district court found defendants 'did not act with a malicious intention to deprive respondents of their rights or to do them [some] other injury'), and *Butz v. Economou*, *supra*, suggests that the 'constitutional design' would be stood on its head if federal officials did not face at least

and place the employee in a very tenuous position.'" 1978 House Hearings, *supra* note 1, at 32 (statement of John S. McNerney, National President, Federal Criminal Investigators Association). It is difficult to see how authorizing the Special Counsel to act on the victim's complaint, for example, or to summon the victim to appear as a witness, would place the defendant official at any unfair disadvantage. In any event, even under existing administrative mechanisms, the victim of alleged misconduct may trigger an investigation. See, e.g., 5 U.S.C. § 1206.

63. *Carlson v. Green*, 100 S. Ct. at 1473-74. Jury trial is currently provided under the FTCA only in civil actions against the United States for the recovery of internal revenue taxes erroneously of illegally assessed or collected, penalties collected without authority, or any other sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws. 28 U.S.C. § 2402.

the same liability as state officials guilty of the same constitutional transgression. 438 U.S. at 504. But punitive damages in an FTCA suit are statutorily prohibited. 28 U.S.C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional act.⁶⁴

The Court noted that “after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury.”⁶⁵ (Such a problem, of course, would not arise under legislation providing—as did H.R. 7034 and S. 1775—for liquidated as well as actual damages.)

With respect to the argument that juries have been biased against *Bivens* defendants, the Court answered that no suggestion had been made that judges would be more receptive, and the Court noted further that no explanation had been given for “why the plaintiff should not retain the choice.”⁶⁶ In view of the minute number of recoveries by plaintiffs in *Bivens* suits,⁶⁷ the concern about jury bias appears to be wholly misplaced. To be sure, however, juries may be more ready to award punitive damages against the government than against individual *Bivens* defendants. But any legitimate concern about the risk of excessive jury awards should be met by setting a ceiling on the amount of punitive damages that may be awarded for a constitutional tort committed with malice, and not by denying such damages altogether, or by denying the plaintiff the right to a jury trial.

Needless to say, such damages are more properly cast as “additional” or “exemplary” than as “punitive” damages. For the object of assessing such damages against the government is not to punish the sovereign, but to express sharp social disapproval of constitutional torts committed with malice, and to spur the government with special force to minimize the possibility that such malicious conduct will recur.⁶⁸ As FEPA has noted:

[T]he lawsuit is not simply a device to recompense the injured party for the damages which he or she may have suffered at the hands of Federal employees who have overstepped the bounds of their authority, in certain

64. *Id.* at 1473–74.

65. *Id.* at 1473 n.9.

66. *Id.* at 1474.

67. According to Deputy Attorney General Schmults, “several thousand” constitutional tort actions had been filed as of November 1981, but only nine had eventuated in money judgments against federal employees. 1982 *Senate Hearings*, *supra* note 7, at 23. See Bell, *supra* note 4, at 2 n.5 (listing 7 cases in which money judgments had been entered for plaintiffs in *Bivens* actions). The number of cases settled by the defendant official is unknown.

68. In holding on policy grounds that municipalities ought not to be liable for punitive damages under 42 U.S.C. § 1983, the Supreme Court emphasized the availability of punitive damages against the offending official. *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748, 2761 (1981). “In our view,” the Court stated, “this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office.” *Id.* Under a system of federal enterprise liability that would make the United States exclusively liable for constitutional torts, of course, the availability of punitive damages against an offending official could not be relied upon to “directly advance[] the public’s interest in preventing repeated constitutional violations.” *Id.*

cases. There is more involved than simple . . . compensation. At issue are alleged deprivations of basic and precious individual rights guaranteed by our constitution, particularly in the Bill of Rights. The litigation becomes an opportunity for the public through the voice of the court to make a statement that the abuse of authority was so unjustified as to threaten the basic principles of a responsive and responsible government in a democratic society. The award of punitive damages would make such a statement. . . . [Moreover,] the Attorney General in settling a suit [should be allowed] to agree to punitive damages, which would constitute a statement on his part that the action of the Federal employee or employees transcended the bound[s] of acceptability and excuse.⁶⁹

Insofar as the goal of "additional" damages would serve such a function, allowing such damages to be assessed would complement the Special Counsel procedures outlined above.⁷⁰

Even more fundamentally, allowing additional damage awards against the United States in appropriate cases may be constitutionally *required* by the principle that Congress may not strip the federal judiciary of the power to fashion remedies as deemed necessary to enforce constitutional rights.⁷¹ Whether the right to jury trial in constitutional tort cases may be eliminated would presumably depend, at least in part, on the credibility of the requisite congressional declaration that the new non-jury trial remedy would be "equally effective" as the existing jury trial remedy.⁷²

Of course, allowing malice to be placed in issue at trial may entail some sacrifice of the litigation economies achieved by waiver of the good-faith defense. But such economies would not altogether be eliminated, since at least the good-faith issue itself would have been placed beyond trial, and, as noted above, there are sound reasons for doing that, independent of litigation savings. Moreover,

69. See 1982 House Hearings, *supra* note 1, at 328-29 (statement of Richard K. Pelz).

70. See *supra* pp. 4-26 to 4-29.

71. See 1981 Senate Hearings, *supra* note 7, at 25-6 (Neuborne statement). Cf. *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933) (per Hughes, C.J.) (notwithstanding lack of statutory provision for award of interest on amount of loss caused by taking, constitutional requirement of just compensation held to require inclusion of interest in damage award; "the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate.'). See generally Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129 (1981); Saeger, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981).

72. *Carlson v. Green*, 100 S. Ct. 1468, 1472 (1980). To be sure, H.R. 24, § 3, declares that the exclusive remedy against the United States "shall be deemed an equally effective substitute for any recovery against any employee of the United States for tort claims arising under the Constitution." Although the Supreme Court in *Carlson* stated that a *Bivens*-type action *may* be defeated by such a declaration, 100 S. Ct. at 1472, the validity of the declaration itself would surely be subject to judicial review. It is far from certain that a mere *ipse dixit* by Congress would survive review.

the expense of litigating allegations of malice can be expected, at least until experience proves otherwise, to discourage their frivolous assertion.⁷³

(d) *Attorney Fees*

As noted above, H.R. 7034, but not S. 1775, provided that a prevailing plaintiff (*i.e.*, one who has won a judgment, or received a cash settlement from the government) would be entitled to "a reasonable attorney's fee and other litigation costs reasonably incurred, including attorney fees or costs attributable to processing [the initial] administrative claim. . . ." ⁷⁴ This provision, too, has been a source of controversy.

Thus, on the one hand, the Association of Federal Investigators and the SEC favored eliminating attorney fees altogether, arguing that the possibility of such fees would only encourage litigation and, even worse, induce "artful pleading" by lawyers to set forth constitutional rather than non-constitutional tort claims whenever possible.⁷⁵ On the other hand, the same considerations that support awarding attorney fees under 42 U.S.C. § 1988 in cases of proven violations of constitutional rights would seem to apply here as well. Inasmuch as the attorney fee issue raises questions that go far beyond the constitutional tort context, however, any recommendation on the issue would be beyond the scope of this report.

(e) *Torts of Former Officials*

Although H.R. 7034 and S. 1775 appeared to cover claims for acts or omissions of former government officials committed while such officials were in government service, the bills provided no administrative mechanism for bringing former officials themselves to account. Under H.R. 2659, a Carter Administration bill, former officials could elect either to be sued individually after leaving government service, or to have the government substituted in their place. In choosing the latter, the former official would have agreed to submit to a disciplinary proceeding that could have resulted in a fine equal to as much as one-twelfth of the annual salary earned at the time the act or omission occurred.⁷⁶ Whatever one may think of the specific remedy authorized by H.R. 2659, it would seem wholly anomalous to place beyond accountability officials who had left government service before a determination of liability.

(f) "Scope of Office" versus "Color of Law"

A serious issue is presented by the Attorney General certification requirement under H.R. 7034 and S. 1775. First, as a matter of public policy it would

73. To minimize the discovery burden if punitive damages are made available, the trial might proceed in two stages, in the first determining liability, and in the second—involving discovery on the issue of malice—following the first only if liability is established.

74. H.R. 7034, § 202 (proposed 28 U.S.C. § 2697(a)).

75. 1982 *House Hearings*, *supra* note 1, at 341 (statement of J. Brian Hyland); *id.* at 284 (statement of SEC); *see id.* at 258 (statement of William H. Taft IV, General Counsel, Department of Defense).

76. *See 1979 House Hearings*, *supra* note 4, at 81 (statement of FBI Director Webster) (praising former official provision as "fair and worthwhile").

appear advisable to replace the "scope of office or employment" criterion with the broader requirement of "color of law," tracking the criterion of liability applicable to state and local officials under 42 U.S.C. § 1983.⁷⁷

By expanding the circumstances under which constitutional violations would be judicially cognizable, such a substitution would obviously enable an enterprise liability system to promote even more effectively its twin goals of assuring victim compensation and deterring official misconduct. As Professor Bermann has testified, this approach:

[I]s more consistent with the values of full compensation and loss-spreading for injuries somehow connected with governmental action. It would more effectively relieve the official of the prospect of personal litigation and liability, which is one of the chief purposes behind H.R. 2659. Finally, it would often avoid the necessity of premature threshold determinations on the question whether the employee was acting within the scope of his authority or solely under color of office. Both in terms of its relevance and its feasibility, this determination is best left to the disciplinary phase of the affair.⁷⁸

Nevertheless, before exposing the United States to such liability—vastly greater than under the *Bivens* doctrine—prudence counsels a more limited experiment, establishing liability of the United States only where an official has committed a constitutional tort within the scope of his office or employment.

(g) *The Problematic Distinction Between Constitutional and Non-constitutional Torts*

The distinction between constitutional and non-constitutional torts—a distinction that would have been enshrined in both H.R. 7034 and S. 1775⁷⁹—is significant insofar as the *Bivens* remedy against individual government officials provides plaintiffs with rights not afforded plaintiffs in FTCA suits against the government—to wit, the right to jury trial and punitive damages.⁸⁰ In addition, the right of a successful plaintiff to attorney fees in constitutional tort cases—by analogy to 42 U.S.C. § 1988—is also recognized in some legislative proposals to replace the *Bivens* remedy but is not currently afforded a successful plaintiff under the FTCA.⁸¹

77. This was the approach embodied by H.R. 2659, *supra* note 4, the Carter Administration bill, *see* 1979 House Hearings, *supra* note 4, at 8 (statement of Deputy Attorney General Civiletti); 1978 Senate Hearings, *supra* note 4, at 39–40 (S. 2117), as well as by earlier legislative proposals. *See* S. Rep. No. 588, *supra* note 22, at 34; S. Rep. No. 755, *supra* note 4, at 337–38.

78. 1979 House Hearings, *supra* note 4, at 124. Under H.R. 7034 and S. 1775, an individual government official would remain personally liable for constitutional misconduct committed outside of the scope of his office or employment, but under color of law. These bills do not, and could not, purport to provide an "equally effective" substitute for the existing system of treating such misconduct. *Bivens v. Six Unknown Named Agents*, 403 U.S. at 397.

79. *See supra* note 11.

80. *See* *Carlson v. Green*, 101 S. Ct. at 1473–74.

81. *See, e.g.*, H.R. 7034, § 202 (proposed 28 U.S.C. § 2698(a)). *Cf. Lauritzen v. Secretary of the Navy*, No. CV 81-879 (AWT) (C.D. Cal., Sept. 9, 1982) (available Oct. 15, 1982, on LEXIS, Genfed library, Dist. file) (holding that successful *Bivens* plaintiff may recover attorney fees from the United States under § 204(a) of the Equal Access to Justice Act, 28 U.S.C. § 2412).

The availability of such "extra" rights has been understood to render the *Bivens* remedy "more effective" than the FTCA remedy.⁸² Undoubtedly for this reason, the distinction is maintained in proposed legislation to replace the *Bivens* remedy. The alternative to maintaining the distinction would be either to extend such "extra" rights to non-constitutional suits, or to eliminate them from "constitutional" tort suits.⁸³

The practical problem entailed by the distinction, of course, is its natural tendency to encourage "skillful counsel [to] plead the existence of a constitutional tort when their case in reality sounds in a traditional, common law cause of action."⁸⁴ If the distinction is to be maintained in any legislation replacing the *Bivens* remedy—as this report recommends it ought to be—Congress should make clear in the legislative history its intention that the courts be alert to the possibility of such skillful pleading, and decide a plaintiff's entitlement to the special advantages of pleading constitutional torts "based on the true gravamen of the tort as alleged and proven."⁸⁵

B. Recommendation

Under current law, individual federal officials may be held personally liable for constitutional violations they are found to have committed while acting within the scope of their office or employment. Damages may not be recovered against the United States for violations of constitutional rights as such, although claims arising out of the same conduct may sometimes be stated against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–80.

There is nearly universal agreement that the existing system of civil sanctions for constitutional violations by federal officials neither provides adequate assurance of compensation for victims of such violations, nor affords the degree of measured deterrence required to discourage improper conduct by government officials without discouraging proper conduct as well. In addition, the federal government often has interests at stake in constitutional tort litigation involving its officials which cannot adequately be represented by the individual official as defendants.

RECOMMENDATION

To serve the primary goals of compensation, deterrence, and fairness in dealing with constitutional torts committed by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should enact legislation providing that the United States shall be exclusively liable for damages for torts arising under the Constitution of the

82. *Carlson v. Green*, 101 S. Ct. at 1473.

83. Compare 1979 House Hearings, *supra* note 4, at 41 (statement of Karen Christensen, ACLU) (urging extension of such rights to non-constitutional tort suits) with 1982 House Hearings, *supra* note 1, at 284 (statement of SEC) (urging elimination of such rights in constitutional tort suits).

84. U.S. Department of Justice, *Section-by-Section Analysis of S. 695*, at 8 (1979).

85. *Id.*

United States and committed by federal officials while acting within the scope of their office or employment.

Such legislation should provide:

(1) That, in constitutional tort actions, the United States may not assert as a defense the absolute or qualified immunity of the official whose conduct gave rise to the claim, or his reasonable good-faith belief in the lawfulness of his conduct. Such immunities, and the good-faith defense, have been judicially created for policy reasons to assure that exposure to personal liability shall not deter individual officials from the vigorous discharge of their responsibilities, and serve no purpose when the government is substituted as defendant other than to limit the extent to which genuine victims of constitutional injuries may secure redress. In providing that the United States shall not assert such immunities or the good-faith defense, Congress may wish to provide that the United States shall be permitted to assert any applicable immunities of the President, and, perhaps, of federal judges and members of Congress.

(2) That there shall be vested in an office of the Executive Branch independent authority to investigate constitutional tort cases in which there has been a judgment of liability against or money compromise by the United States, and that such office shall be vested with independent authority to conduct disciplinary proceedings in such cases as may be appropriate. Such a disciplinary mechanism is essential to perform the deterrent and corrective functions now served by the damage action remedy against individual government officials; existing administrative disciplinary mechanisms, by themselves, are neither directed toward nor capable of performing these functions under current law.

(a) One approach for implementing this recommendation would be to establish an Office of Disciplinary Counsel to investigate and, where appropriate, to prosecute official misconduct before an administrative tribunal independent of the agency that employed the offending official. Another approach would be to augment the existing authority and responsibilities of the Office of Special Counsel and the Merit Systems Protection Board under 5 U.S.C. §§ 1201-09 to perform the functions described herein.

(b) If Congress should choose to rely on the Office of Special Counsel and the Merit Systems Protection Board in implementing this recommendation, separate mechanisms would nevertheless be required to provide for independent investigation and disciplinary proceedings with respect to federal officials not subject to the jurisdiction of the Office of Special Counsel and the Merit Systems Protection Board.

(c) Notwithstanding the authority of the independent disciplinary mechanism utilized to implement this recommendation, the agency that employed the offending official would be responsible in the first instance for investigation and, where appropriate, for disciplining the official or implementing other corrective steps, and such action should not be postponed pending the outcome of any constitutional tort suit that may be filed against the United States. Congress should provide every federal agency with explicit statutory authority to employ existing administrative mechanisms for disciplining officials found to have violated constitutional rights.

(d) Before proceeding with disciplinary action against any official for a violation of constitutional rights, the Disciplinary Counsel or Special Counsel should determine whether the agency that employed the official has already taken disciplinary or other corrective action, and, if so, whether the agency's action is satisfactory from the standpoint of the system's overall goals of deterrence and accountability. The Disciplinary Counsel or Special Counsel would be authorized to initiate disciplinary proceedings before the Merit Systems Protection Board or other independent administrative tribunal only if he determined that the agency that employed the official had taken no disciplinary or other corrective action, or that the agency's action was insufficient. Any discipline later imposed by the Merit Systems Protection Board or other independent administrative tribunal would be reduced by any discipline imposed by the agency in its own proceedings.

(e) The Disciplinary Counsel or Special Counsel should be directed to compile and forward to the House and Senate Judiciary Committees periodic reports setting forth the cases he has reviewed, and explaining with particularity why he chose to proceed or not to proceed with independent disciplinary action in each case.

(3) That Congress should provide not only for actual damages but for reasonable liquidated damages in the event that the actual damages are nominal or nonexistent because the injury caused by the violation of a constitutional right is of an intangible nature. Congress should also consider allowing "additional" damages against the United States in cases where the conduct giving rise to the tort was undertaken with the malicious intention to cause a deprivation of constitutional rights or with reckless disregard for the plaintiff's constitutional rights.

(4) That the right to jury trial should be retained for plaintiffs whose claims had arisen as of the effective date of the legislation implementing this recommendation, and that Congress should consider extending the jury trial right to plaintiffs whose claims arose subsequent to the effective date of the legislation.

(5) That Congress consider the appropriateness of allowing attorney fees under such legislation in the context of a more comprehensive review of the attorney fee issue in federal legislation across-the-board.

(6) That legislation implementing this recommendation provide a mechanism for holding former government officials accountable for constitutional torts committed while they were in office, where a plaintiff has secured a judgment against or money compromise by the United States. Congress should consider allowing federal officials leaving government service to elect either to be sued individually for such torts, or to have the United States substituted in their place; and, in electing the latter, such officials would agree to submit to appropriate sanctions imposed by the agency for which they were employed when their tortious conduct occurred.

(7) That such legislation should provide for periodic review by the House and Senate Judiciary Committees of the operation of the legislation implementing the new system of federal enterprise liability and independent administrative sanctions.

V. ANALYSIS: CHANGES AT THE STATE AND LOCAL LEVEL

In recent years, the Supreme Court has broadened significantly the potential liability of state and local officials in cases brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Similarly, the Court's recent decisions have expanded the liability of municipalities and other local governmental units for money damages under section 1983 and for the costs of attorney fees pursuant to the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988. It is widely believed that since section 1988 went into effect the availability of attorney fees in itself has contributed greatly to the marked increase of section 1983 cases. These developments have been the subject of congressional scrutiny and intense criticism by state and local officials who claim that the floodgates are open for frivolous and expensive lawsuits against state and local officials and municipalities.

A substantial number of the section 1983 cases arise from actions taken by state and local officials in administering federal assistance programs.¹ Federal assistance will continue to be a major source of section 1983 litigation because, notwithstanding the Reagan Administration's efforts to reduce grant funds, federal grant outlays are estimated to exceed \$81.4 billion in FY 1983.²

And perhaps the greatest irony of the Reagan Administration's "New Federalism" initiatives, which are intended to transfer to state and local governments greater responsibility for managing federal assistance programs, is that this policy could dramatically increase the states' exposure to litigation under section 1983.³ For this reason alone, it is appropriate to consider whether improvements can be made in the existing civil sanction system to better meet the twin objectives of effective management of federal assistance programs by state and local officials and the vigorous enforcement of individual rights and federal laws relating to such programs.

This chapter first reviews the major Supreme Court decisions involving section 1983 and examines the special problems these decisions present for state and local officials and municipalities involved in the administration and management of federal assistance. The chapter then presents the results of a nationwide survey of state civil sanction systems and legislative developments. Recent congressional proposals to amend sections 1983 and 1988 are also reviewed. Conclusions and recommendations are limited to the problems of section 1983

1. The term federal assistance as used in this chapter encompasses any disbursement or transfer of property—including money—by the federal government that supports programs and projects that benefit the public and that is accompanied by an agreement by the recipient to comply with any terms or conditions relating to the use of the disbursement or property.

2. See OMB, *The Budget of the United States Government, 1983, Special Analysis H: Federal Aid to State and Local Governments*.

3. Madden & Harkins, *New Block Grant Programs Face Period of Adjustment in the Courts*, V. 4, no. 26, *The National Law Journal* 29 (March 8, 1982).

liability insofar as liability arises out of the acts of state and local officials and municipalities in administering federal assistance.⁴

A. *Liability Under 42 U.S.C. § 1983*

1. *Reprise*

The Supreme Court's 1961 decision in *Monroe v. Pape*,⁵ established section 1983 as the primary basis for the recovery of money damages against state and local officials. According to *Monroe*, section 1983 actions are available to an injured party even though a remedy exists under state law, since "the federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before that federal one is invoked."⁶ However, the Court in *Monroe* retained the concept of absolute immunity from liability for municipalities under section 1983.⁷

Since *Monroe*, section 1983 has been used to establish the personal liability of several types of public officials and employees at all levels of state and local government.⁸ For example, officials declared amenable to suit under section 1983 include a state governor,⁹ state prison officials,¹⁰ township supervisors,¹¹ police officers,¹² a commissioner of police,¹³ welfare officials,¹⁴ a school superintendent,¹⁵ local school officials,¹⁶ and a state commissioner of education.¹⁷

4. No attempt is made to discuss and resolve the problem of section 1983 liability in all of its complexities. Rather, the discussion of section 1983 liability is limited solely to the somewhat relatively narrow area of federal assistance and the special problems for state and local officials and municipalities involved with federal assistance programs under that provision.

5. 365 U.S. 167 (1961). The Court in *Monroe* considered the "under color of" state law language of section 1983 and held that that section provided "a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Id.* at 172.

6. *Id.* at 183. In addition, plaintiffs are not required to exhaust state administrative remedies prior to bringing a section 1983 action. *See Patsy v. Board of Regents*, 102 S. Ct. 2557 (1982).

7. 365 U.S. at 187-92.

8. States continue to enjoy eleventh amendment immunity to damages suits under section 1983, since they are not considered to be persons within the meaning of that section. *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974). However, as a practical matter, a state is subject to liability under section 1983 in cases where injunctive relief against state officials in their official capacity is awarded and consequently the state must implement the terms of the injunction. *Ex parte Young*, 209 U.S. 123 (1908). *See Edelman, supra*, at 667-68 (federal courts may enjoin state officials to conform their conduct even though such an injunction may have an ancillary effect on the state treasury).

9. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

10. *Procunier v. Navarette*, 434 U.S. 555 (1978); *cf. Jaworski v. Schmidt*, 684 F.2d 498 (7th Cir. 1982).

11. *Detz v. Hoover*, 539 F. Supp. 532 (E.D. Pa. 1982).

12. *Pierson v. Ray*, 386 U.S. 547 (1967); *DiGiovanni v. City of Philadelphia*, 531 F. Supp. 141 (E.D. Pa. 1982).

13. *DiGiovanni, supra* note 12.

14. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

15. *Ingrahm v. Wright*, 525 F.2d 909 (5th Cir. 1976).

16. *Wood v. Strickland*, 420 U.S. 308 (1975).

17. *Barrea v. Wheller*, 475 F.2d 1338 (8th Cir. 1973), *aff'd*, 417 U.S. 402 (1974).

State and local officials may defend themselves from liability under section 1983 by asserting a qualified-immunity defense.¹⁸

The impact of section 1983 on the activities of local governments and their officials increased dramatically with two landmark rulings by the Supreme Court: *Monell v. Department of Social Services*¹⁹ and *Owen v. City of Independence*.²⁰ These two decisions broadened the liability of municipalities for the actions of their officials in suits under section 1983.²¹ In *Monell*, the Court held for the first time that municipalities are subject to suit under section 1983, overruling a contrary holding made only eighteen years earlier in *Monroe*.²² The crowning blow to local governmental immunity came two years later in *Owen*, where the Court held that local governments could not claim the qualified-immunity defense. In *Owen*, the Court ruled that a municipality sued under section 1983 is liable under ordinary standards of negligence and may not claim the good faith of its officers or agents as a defense to such suits.²³ In reaching this result the Court strongly credited public policy considerations of compensation of victims and deterrence of future deprivations.²⁴

In the aftermath of *Monell* and *Owen*, municipalities and other local governmental units²⁵ face a form of strict liability which closely approaches enterprise liability, since in addition to suing a local official under section 1983, a plaintiff may simultaneously sue that official's governmental employer.²⁶ Local liability, however, is limited to actual damages. According to *City of Newport*

18. See *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982), *modifying* *Scheuer v. Rhodes*, *supra* note 9.

19. 436 U.S. 658 (1978).

20. 445 U.S. 622 (1980).

21. However, a municipality is not vicariously liable for the acts of its agents or employees under the doctrine of *respondeat superior*. 436 U.S. at 691. See also *Leonhard v. U.S.*, 633 F.2d 599, 622 (2d Cir. 1980).

22. In *Monell*, the court determined that a city policy which required pregnant employees to take maternity leave after the fifth month of pregnancy violated rights secured by section 1983. The Court consciously reversed its holding in *Monroe* and declared that local governments could be liable for violations of section 1983. The Court stated "[if government, in the execution of its] policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury [then] the government [can be held] responsible." 436 U.S. at 684.

23. The Court considered the scope of municipal liability under section 1983 in the context of a suit by a city police chief challenging his dismissal by the city manager without notice of the reasons for dismissal or an opportunity to be heard. 445 U.S. at 625-30.

24. *Id.* at 651.

25. County governments are also subject to suit under section 1983 if under the state constitution the county is not considered to be part of the state for eleventh amendment purposes. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 668 n.12 (1974); *Holley v. Lavine*, 605 F.2d 638 (2d Cir. 1979), *cert. den.*, 446 U.S. 913 (1980); *Knight v. Carlson*, 478 F. Supp. 55 (E.D. Cal. 1979).

26. See, e.g., *Garris v. Rowland*, 51 U.S.L.W. 2050 (5th Cir. June 24, 1982).

v. Fact Concerts, Inc.,²⁷ section 1983 liability does not extend to punitive damages.²⁸

The potential for a dramatic increase in suits against state and local officials and municipalities involved in managing federal grant programs is perhaps seen most clearly in *Maine v. Thiboutot*.²⁹ In *Thiboutot*, the Court stated explicitly what had been the implicit premise of a generation of section 1983 litigation; namely, that section 1983 reaches the "deprivation of any rights secured by the constitution and laws"³⁰ of the United States. The Court held that section 1983 should be read in accordance with its literal language, and thus should be construed to "broadly encompass violations of federal statutory law as well as constitutional law."³¹

The Court in *Thiboutot* also had occasion to consider whether attorney fees could be awarded in section 1983 claims based on purely statutory violations.³² The Court, relying once again on the "plain language" reasoning which it had applied to section 1983, held that section 1988 authorized the award of attorney's fees in "any § 1983 action."³³

A trend toward increased litigation arising from federal grants and assistance may be marked by the decision in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.³⁴ Justice Powell, writing for the majority, held that private suits under section 1983 may be used to enforce federal statutory rights unless Congress has explicitly or implicitly precluded such suits. Thus, section 1983 is not available "when the remedial devices provided in a particular act are sufficiently comprehensive, [so as] to demonstrate congressional intent

27. 453 U.S. 247 (1981). The Supreme Court ruled that municipalities are immune from liability for punitive damages under section 1983. According to Justice Blackmun, damages for punitive purposes are not "sensibly assessed" against a governmental entity, since the traditional objectives of punitive damages—retribution, deterrence and punishment—would not be served by imposing such liability on a municipality vis-a-vis its blameless or unknowing taxpayers. *Id.* at 261.

28. The decision in *Fact Concerts* has been welcomed by local officials. See, e.g., *Municipal Liability Under 42 U.S.C. § 1983: Hearings Before the Subcommittee on the Constitution of the Senate Committee Judiciary*, 97th Cong., 1st Sess. 322 (1981) (statement of Ken Eikenberry) (hereinafter cited as *Section 1983 Hearings*).

29. 448 U.S. 1 (1980).

30. 42 U.S.C. § 1983.

31. 448 U.S. at 4.

32. *Id.* at 9.

33. *Id.* While the ruling in *Thiboutot* underscored the scope of sections 1983 and 1988, the Court's decision in the companion case of *Maher v. Gagne*, 448 U.S. 122 (1980), imposed on section 1983 defendants the added burden of attorney's fees in cases where a plaintiff prevails through a settlement rather than through litigation leading to favorable judgment. Successful defendants may also be reimbursed, but the standards are much more stringent than for plaintiffs. See Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1155 n. 170 (1981). For a general discussion of the Act, see Witt, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 13 Urb. Law. 589 (1981). One lower court has decided, however, that where a statute provides a private cause of action, a plaintiff cannot add a claim under section 1983 for the sole reason of obtaining an attorney fee award. See *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981).

34. 453 U.S. 1 (1981).

to preclude such suits.”³⁵ Importantly, Justice Powell also declared that private suits may be precluded if the statute at issue fails to establish the kind of “rights, privileges and immunities” enforceable under section 1983;³⁶ an exception first recognized by Justice Rehnquist in *Pennhurst State School and Hospital v. Halderman*.³⁷

Although *National Sea Clammers* may well have been intended to restrict the availability of section 1983, its consequence may be to open the door to litigation still further. Justice Powell’s attempt to articulate two narrow exceptions to section 1983 availability—the “exclusive remedy” and “rights” exceptions—could have the anomalous effect of making section 1983 the remedy of choice in disputes involving claims under many federal-state cooperative programs.³⁸

In addition to *Thiboutot* and *National Sea Clammers*, the greatest impact on the subject of official liability as it relates to federal assistance may evolve from a long-running dispute over fund termination involving federal defendants. The issue in *Velde v. National Black Police Ass’n*.³⁹ was whether federal officials may claim absolute immunity from personal liability for allegedly failing to enforce statutory conditions of grant funding against state and local government agencies charged with discrimination.

At the end of its 1981 term the Court remanded *Velde* in light of its decision in the controversial case of *Harlow v. Fitzgerald*.⁴⁰ As discussed in detail elsewhere, the Court held in that case that the President’s chief aides are not entitled to absolute immunity.

The ruling in *Velde* is significant to all types of assistance mechanisms with respect to state and local as well as federal officials. In view of the Court’s apparent refusal to grant absolute immunity, it is now more certain than ever that the decisions of government officials under an assistance program, which affect the substantive obligations and rights created by such program, will be challenged by litigation notwithstanding the ability of officials to raise and ultimately establish a qualified immunity.

2. Problems Related To Federal Assistance

This section analyzes the implications of the recent case law for federal assistance by focusing on the 1981 block grant programs,⁴¹ because these mea-

35. *Id.* at 20.

36. *Id.*

37. 451 U.S. 1 (1981). In *Pennhurst*, the Supreme Court was concerned about the unintended consequences that might result if open-ended and “indeterminate” statutory phrases of grant statutes are construed as conferring enforceable rights on individuals. *Id.* at 4. The significance of *Pennhurst* is considered below in relation to the obligation of state and local grantees to comply with the conditions of grant assistance. See *infra* text accompanying note 52.

38. This point is analyzed below more fully in connection with the discussion of block grant suits under section 1983. See *infra* text accompanying note 63.

39. 102 S. Ct. 3503 (1982).

40. 102 S. Ct. 2727 (1982).

41. A block grant is a federal program designed to achieve some broad national purpose and in which funds are allocated under a formula to a state government for use in a broad functional

asures are representative of the current movement giving state and local officials more responsibility for managing federal grant programs. It should be noted that as a matter of law, the courts have not recognized any difference between block grants and other federal grant programs.⁴²

a. *Rights and Obligations Under Section 1983*

Federal grants are presently the central topic of an impassioned debate over the proper role of the federal government in our federal system. To one extent or another, the nine block grants enacted in 1981 are each aimed at alleviating the perceived frustration over the federal government's intrusion into the traditional prerogatives of state and local governments.⁴³

However, it is apparent that several factors could give rise to potential legal problems for state and local officials who manage federal grant programs including block grants.⁴⁴ For example, at a time when many local governments and community groups are experiencing financial difficulties,⁴⁵ fierce compe-

area at the state's discretion. See Advisory Commission on Intergovernmental Relations, *Back in Vogue: The Politics of Block Grant Legislation*, n. 16, Intergovernmental Perspective, Washington, D.C., U.S. Government Printing Office, Spring 1981. The statutory authorizations for the 1981 block grant programs are contained in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 97th Cong., 1st Sess., 95 Stat. 357 (Aug. 13, 1981) (hereinafter OBRA) which establishes block grants in the areas of preventive health, maternal and child health services, alcohol, drug abuse and mental health, primary care, social services, community services, low-income energy assistance, community development and education. See also Madden, *Lessons From Block Revenue Sharing*, 36 Fed. B.J. 107 (1977).

42. *Ely v. Welde*, 451 F.2d 1130 (5th Cir. 1971).

43. In an effort to further shift responsibility to the state and local levels, the President's 1983 budget package proposes to combine approximately 35 social programs into seven new block grants and expand three of the block grants enacted in 1981 to include five existing categorical programs. See *The Budget of the United States Government, 1983, Special Analysis H*, *supra* note 2.

44. As a separate matter, it should be noted that a recent General Accounting Office report entitled *Early Observations On Block Grant Implementation*, (GAO/GGD-82-79, Aug. 24, 1982), suggests that based on 13 states examined by GAO, state assumption of responsibility for the 1981 block grants has proceeded rather smoothly.

45. The declining fiscal condition of American cities of all sizes and the adverse impact on cities of federal budget reductions under grants has been well-documented. For example, a November, 1981 report by the United States Conference of Mayors (USCM) entitled, *The FY82 Budget and the Cities: A Hundred City Survey*, indicates that cuts in federal spending have fallen disproportionately on grants to state and local government, with cities being forced to absorb major reductions in housing, community development, education, transit, employment and other vital programs. As a result, cities have had to reduce substantially both the level and types of services they provide to urban residents.

In addition, a staff study prepared by the Joint Economic Committee of Congress entitled, *Emergency Interim Survey: Fiscal Condition of 48 Large Cities* (January 1982), supports the findings of the USCM. The study concludes that a majority of the 48 cities surveyed have had to reduce real service expenditure levels for virtually every service offered in order to accommodate reductions in federal assistance. The study emphasizes that cities, unable to maintain current service levels, are in no position to assume additional administrative or fiscal responsibilities since city governments simply do not have the resources to undertake such responsibilities. The survey thus makes the gloomy prediction that "there will be less success in making state and local government responsible for managing and financing many programs now funded by the Federal Government."

tition can be expected between local entities for available funds.⁴⁶ In addition, the unprecedented shift in power to the states to distribute funds received under block grants is likely to generate legal challenges to the use and distribution of limited funds.⁴⁷

The procedural requirements and substantive conditions imposed on state and local grantees under block grant programs are also likely to provide a source for legal challenges by third parties and intended beneficiaries⁴⁸ of block grant funds. And importantly, state and local grantees will be subject to the so-called crosscutting requirements of the more than 20 statutes that govern the expenditure of all types of grant funds.⁴⁹ In this regard, state officials are required to make contractual assurances that they will perform the various statutory conditions which accompany block grant assistance and that they will distribute funds equitably to local entities.⁵⁰

The assurances made by a state in its annual application will establish important rights for the millions of third parties identified by Congress as the

46. In its April, 1982 report entitled *Briefing Book on Block Grants and New Federalism*, the Coalition on Block Grants and Human Needs emphasizes that one of the impacts of block grants on states will be "intense political pressure about allocation choices." The Coalition reports that competing groups that once vied for federal appropriations will now devote their attention to allocation decisions by state and local officials, and that this competition will become especially "intense" as additional funding cuts in grant programs are enacted by Congress.

47. Although to date there has been relatively little litigation involving the 1981 block grants, it is widely acknowledged that the opportunity for extensive litigation is likely to increase as states make greater use of their discretion to make funding decisions and as constituencies become frustrated by service cuts or other decisions associated with state and local implementation of block grant programs. See, e.g., Coalition on Block Grants and Human Needs, *Briefing Book on Block Grants and New Federalism*, at 71 (April 1982); Remarks of Milton J. Socolar, General Counsel of the General Accounting Office, before The Brookings Institute Seminar on New Federalism, Washington, D.C., June 21-22, 1982.

48. Grant programs typically create benefits not only for the direct recipient of the grant, usually a state or local government or agency, but also for persons or groups—generally referred to as third parties or intended beneficiaries—who often are given certain enumerated rights under the statute authorizing the grant program.

49. There are over sixty government-wide national policies and administrative requirements. These policies include, among others, non-discrimination, environmental protection and energy conservation, and are reflected in these statutes, including: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; the Clean Air Act of 1972, 42 U.S.C. § 1857; Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; and the Federal Water Pollution Control Act of 1948, 33 U.S.C. § 1251 *et seq.* GAO's report, *Early Observations On Block Grant Implementation*, emphasizes that states have been given little guidance on and have limited experience with federal crosscutting requirements. GAO thus suggests that the Office of Management and Budget, in coordination with federal agencies, develop a program for assessing state compliance with federal crosscutting mandates. GAO/GGD-82-79, p.p. 42-44.

50. The 1981 block grants require each state to submit an application for assistance in which the state makes assurances that it will comply with the conditions of federal block grant assistance. For example, the statute authorizing the Community Services Block Grant program, which is worth \$348.0 million in FY 1982, requires that at least 90 percent of the funds be distributed to political subdivisions, nonprofit community organizations or migrant and seasonal farm worker organizations. Five percent is allowed for program transfer and five percent is allowed for administrative expenses.

intended beneficiaries of block grant assistance, and will also create obligations for the direct recipient of such assistance, including the state, units of local government and private agencies.⁵¹

The Supreme Court's opinion in *Pennhurst State School and Hospital v. Halderman*⁵² provides important guidance on when federal grant statutes—including those establishing block grants—are likely to be construed as creating "rights" or imposing "obligations" enforceable under section 1983.

Pennhurst involved the interpretation of the Developmentally Disabled Assistance and Bill of Rights Act.⁵³ The plaintiffs asserted that the Bill of Rights section of the Act—set forth in the form of legislative findings—required Pennsylvania to establish individual treatment programs for each resident of Pennhurst State School and Hospital. The Supreme Court disagreed and concluded that the Act did not create rights nor impose obligations on a state that received federal grant assistance under the Act.

The significance of *Pennhurst* to the new block grant programs can be seen from the rationale of Justice Rehnquist's majority opinion. Initially, Justice Rehnquist acknowledged the authority of Congress to establish grant programs and set conditions for the expenditure of funds under the spending power of the Constitution.⁵⁴ But he reasoned that the implications of this authority are that:

[L]egislation enacted pursuant to the spending power is much in the nature of contract: In return for federal funds, the states agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the 'contract.'⁵⁵

Justice Rehnquist continued:

There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously.⁵⁶

Justice Rehnquist concluded that this statement was a "canon" of statutory construction for all federal grant programs.

51. Federal courts have found third-party beneficiary contracts to exist in situations where a grantee promises or agrees to provide the benefits of grant assistance to another party. *See, e.g.,* *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

52. 451 U.S. 1 (1981).

53. *See* 42 U.S.C. §§ 6010(1) and (2) which provide that persons with developmental disabilities have a "right for appropriate treatment, services and rehabilitation for such disabilities . . . in a setting that is least restrictive of the person's liberty."

54. The spending power is derived from Art. I, § 8, cl. 1 of the Constitution, which states that "Congress shall have the power to . . . provide for the . . . general welfare of the United States."

55. 451 U.S. at 17.

56. *Id.* at 17–18.

The “knowing acceptance” principle of *Pennhurst* was recently cited by the U.S. Court of Appeals for the Third Circuit to support its decision not to give retroactive effect to section 185 of the Education Amendments of 1978⁵⁷ which authorizes the Department of Education to order repayment of federal funds misapplied or misspent by grant recipients. In *State of New Jersey Department of Education v. Hufstedler*,⁵⁸ the Department had contended that it could compel the repayment of grant funds under section 185, even though such funds had been awarded in 1976, five years prior to the enactment of section 185. The Third Circuit acknowledged that *Pennhurst* was not directly applicable, but nevertheless concluded that:

[T]he overarching principle of *Pennhurst*—that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute enforcing the grant—precludes us from giving retroactive effect to a statute passed five years after the last disputed funds were received.⁵⁹

At a time when there is vigorous opposition by the administration and grant recipients to excessive federal regulation of grant programs, *Pennhurst* provides a viable basis for challenging the broad range of conditions that now govern federal grant programs. However, *Pennhurst* also establishes a very important corollary: where a federal grant statute imposes unambiguous conditions—as many federal grant statutes do—state and local grantees will be legally obligated to perform such conditions.⁶⁰

b. Remedies Under Section 1983

National Sea Clammers has emerged as the pivotal decision for determining whether the ultimate beneficiaries of federal assistance will have remedies under

57. 20 U.S.C. § 2835.

58. 662 F.2d 208 (3d Cir. 1981).

59. *Id.* at p. 214. In contrast, just two days after the Third Circuit’s decision in *Hufstedler*, the Fourth Circuit held that section 185 authorized the department to order West Virginia to repay federal funds determined to have been misspent by the state, even though the funds in question were received by the state in 1975. Notably, unlike the Third Circuit, the Fourth Circuit made no reference to the “overarching principle of *Pennhurst*.” *State of West Virginia v. Department of Education*, 667 F.2d 417 (4th Cir. 1981).

60. The *Pennhurst* decision continues to generate legal controversy despite the Court’s 1981 decision. Pennsylvania recently filed a petition for certiorari with the Supreme Court seeking review of the Third Circuit’s refusal to order a refund of more than \$1.2 million paid in fines by Pennsylvania. *Pennhurst State School and Hospital v. Halderman*, 673 F.2d 628 (3d Cir. 1982) (*en banc*), *petition for cert. filed*, 51 U.S.L.W. 3027 (U.S. June 18, 1982) (No. 81-2363). The fines were paid pursuant to a contempt citation issued against Pennsylvania for its failure to comply with a federal district court’s order requiring Pennsylvania to fund Special Masters who were supervising the transfer of residents at Pennhurst State School and Hospital. *See Halderman v. Pennhurst State School and Hospital*, 533 F. Supp. 631 (E.D. Pa. 1981). Pennsylvania’s failure to comply with the district court’s order was based on the state legislature’s refusal to grant a supplemental appropriation for \$900,000 for special masters’ salaries and expenses. The issue the Supreme Court is being asked to consider—whether the state’s inability to comply with the district court’s order because of the legislature’s refusal to appropriate the necessary funds is a defense to the fines imposed on the state for civil contempt—raises a more fundamental question concerning the scope of the remedial powers of federal courts in actions brought against state officials under state law.

section 1983. Under this case, third party beneficiaries can bring a section 1983 action if they are denied benefits under a block grant, unless (1) Congress has provided an exclusive remedy, or (2) if the rights the beneficiary seeks to protect are not the kind of rights protectable under section 1983.

A strong argument can be made that private suits under section 1983 may be brought to remedy violations of the statutory provisions of the 1981 block grant programs. A brief analysis of the Supreme Court's reasoning in *National Sea Clammers* supports this view.

In *National Sea Clammers*, the Court indicated that legislative intent is the relevant inquiry under the exclusive remedy exception to section 1983 suits.⁶¹ In that case, the Court concluded that the "elaborate enforcement provisions" under the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research and Sanctuaries Act (MPRSA) were evidence of congressional intent to "supplant any remedy that otherwise would be available under section 1983."⁶²

In the new block grants, as with most other grant programs, Congress has only provided limited administrative procedures for withholding funds from a state grantee that fails to meet the statutory requirements of a block grant.⁶³ It is very unlikely that these remedies would be considered to constitute the "unusually elaborate enforcement" mechanisms found to exist in *National Sea Clammers*.⁶⁴ Furthermore, since the block grant statutes do not expressly authorize private suits, as was the case with the statutes at issue in *National Sea Clammers*, the withholding remedies alone would not appear to be the type of remedial devices "sufficiently comprehensive" to demonstrate congressional intent to preclude private suits under section 1983.

61. 453 U.S. at 21.

62. *Id.* Even before the Supreme Court's express disavowal of the availability of section 1983 in situations where Congress has established an "exclusive remedy," lower courts relied upon the existence of such remedies to preclude section 1983 suits. *See, e.g.*, *Uniformed Firefighters Ass'n v. City of New York*, 512 F. Supp. 289 (S.D.N.Y. 1981); *Meyerson v. Arizona*, 501 F. Supp. 859, 864 (D. Ariz. 1981). *But see Smith v. City of Chicago*, No. 79 C-3499 (N.D. Ill. March 20, 1981).

63. Congress has established a procedure whereby the Secretary of the Department of Health and Human Services is authorized to withhold grant funds from a state that fails to use such funds in accordance with the terms and conditions of the Community Services, Preventive Health, Primary Care, Maternal and Child Health, Low-Income Energy Assistance, and Alcohol, Drug Abuse and Mental Health Block Grants. *See, e.g.*, OBRA *supra* note 41, §§ 679, 1907, 1917, and 1929. In addition, the Secretary of Housing and Urban Development is authorized to withhold funds used in violation of the terms and conditions of the Community Development Block Grant program. *Id.* § 302(c)(1).

64. At least one expert on the subject of federal grant litigation has commented that the "exclusive remedy" exception may be inappropriate to apply to federal grant statutes in which typically the only remedies available are administrative sanctions such as suspension or termination of federal grant funds. In such cases, the individuals most directly affected—third party grant recipients—are afforded little participation in the administrative proceeding. Thus, it is unlikely that a court would find them "exclusive." *See Brown, Pennhurst As A Source of Defenses for State and Local Governments*, 31 *Cath. U.L. Rev.* 449 (1982).

The second exception of *National Sea Clammers* raises the more difficult question of whether the 1981 block grants establish the kinds of "rights" enforceable under section 1983. Neither Congress nor the Supreme Court has provided guidance on the nature of rights that may be protected under section 1983.⁶⁵

Since section 1983 is a purely remedial statute and provides no substantive rights,⁶⁶ a plaintiff in a block grant suit will have to show that the statute in question confers a right protectable under section 1983. Most grant statutes, including the block grant statutes, expressly identify the intended beneficiaries of federal assistance.⁶⁷ Third parties would thus appear to have a strong argument that they do, in fact, have legal rights to the benefits of block grant assistance, and that such rights are enforceable under section 1983.

Two recent district court opinions are particularly instructive on the range of potential judicial dispositions of section 1983 suits. These are *Balf Co., Inc. v. Gaitor*,⁶⁸ which demonstrates the degree to which a federal grant statute can be interpreted as creating legal rights, and *Ryans v. New Jersey Comm'n For The Blind*,⁶⁹ which involved the question of whether the availability of administrative remedies under a grant program precluded a section 1983 suit based on the "exclusive remedy" test of *National Sea Clammers*.

In *Gaitor*, a case involving the Federal-Aid Highway Act (FAHA),⁷⁰ the Balf Company sued the City of Hartford under section 1983, claiming that the city was required to satisfy federal regulations⁷¹ before implementing its decision to restrict vehicular traffic on a local access road financed primarily through FAHA funds and used extensively by Balf Company to transport its concrete mix and other stone products. The city defended on the grounds that Balf Company lacked standing, arguing that based on *Cort v. Ash*,⁷² FAHA provided no

65. The Court in *National Sea Clammers* did not reach the question of whether there existed rights protectable under section 1983, because it found that Congress had "foreclosed a § 1983 remedy" by providing an exclusive remedy. 453 U.S. at 21.

66. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-18 (1979).

67. See, e.g., the Alcohol, Drug Abuse and Mental Health Block Grant statute, which provides that in its annual application for assistance, a "state agrees to make grants to community mental health centers in the state for the provision of comprehensive mental health services—(A) principally to individuals . . . who are chronically ill . . ." and also "agrees to require that any community mental health center . . . provide—(A) outpatient services, including specialized services for children, the elderly, [and] individuals who are chronically mentally ill. . . ." OBRA *supra* note 41, §§ 1915(c)(3) and (4). See also Title I of the Rehabilitation Act of 1973, 29 U.S.C. § 723, which specifies a number of benefits and services which must be provided to eligible handicapped individuals.

68. 534 F. Supp. 600 (D. Conn. 1982).

69. 542 F. Supp. 841 (D. N.J. 1982).

70. 23 U.S.C. § 101 *et seq.*

71. 23 C.F.R. § 620.203(a).

72. 422 U.S. 66 (1975). In *Cort v. Ash*, the Supreme Court adopted a four factor test for analyzing whether a private cause of action can be implied under a particular statute. The first and most important of the *Ash* factors is whether the plaintiff is one of the class for whose especial benefit the statute was enacted.

“right” upon which to base a section 1983 claim, since FAHA was not adopted for the “especial benefit” of the Balf Company.

The district court characterized the issue in *Gaitor* as whether a “plaintiff in a section 1983 action must establish independent statutory rights and a corresponding implied right to sue under that statute before such party can bring a section 1983 action, or alternatively, whether some lesser standard to confer standing is mandated after *Maine v. Thiboutot*.”⁷³ The court found that the *Cort v. Ash* analysis was inapplicable in a section 1983 action, reasoning:

[I]f the plaintiff was unable to prove that the FAHA was adopted for its especial benefit, then presumably that plaintiff would be barred from suing the state defendants, even if the acts of those defendants violated federal law and seriously injured the plaintiff. *Thiboutot* and § 1983 thus would be rendered *sui generis* in these type of cases, a result that the *Thiboutot* Court by its language clearly did not contemplate.⁷⁴

In light of this analysis, the court announced a separate test for recognizing rights enforceable under section 1983. The court held that a plaintiff in a section 1983 action “need not establish that it has an implied right to sue under a separate federal statute, but rather must demonstrate that it has suffered an injury by the administration of a joint federal-state cooperative program and was an *intended beneficiary* of that program.”⁷⁵ (Emphasis in original.)

The court went on to find that FAHA, though not adopted for the “especial benefit” of the Balf Company, “clearly was intended . . . to benefit those persons who travel extensively in interstate commerce.”⁷⁶ Thus, the court ruled that Balf Company had standing to bring suit under section 1983, because it “may have been deprived of a ‘right’ secured by the laws of the United States, namely, the right to require [compliance] with FAHA regulations.”⁷⁷

Gaitor is significant because it demonstrates the liberal degree to which a grant statute can be construed as creating a federally protectable right under section 1983. The decision in *Ryans* further extends the potential applicability of section 1983 to rights arising out of the administration of federal assistance programs by state and local officials because of its narrow reading of the “exclusive remedy” exception enunciated in *National Sea Clammers*. In *Ryans* a central issue was whether the administrative remedies of the Rehabilitation Act of 1973, 29 U.S.C. § 722(d), were exclusive and thus precluded a section 1983 action to enforce rights created by Title I of the same Act.⁷⁸

73. 534 F. Supp. at 604.

74. *Id.*

75. *Id.* at 605. In its analysis, the court relied heavily on *Yapalater v. Bates*, 494 F. Supp. 1349 (S.D.N.Y. 1980), where the court concluded that *Thiboutot* “necessarily limits the applicability of the *Cort v. Ash* analysis.” *Bates* at 1357. The effect of *Thiboutot* being to “create a remedy where injury flows from a state’s violation of governing federal law in a joint federal-state cooperative program.” *Bates* at 1358.

76. *Id.*

77. *Id.*

78. 542 F. Supp. at 844.

The court turned to the Rehabilitation Act's legislative history in order to determine whether "a § 1983 remedy would be inconsistent with the statutory scheme" of 29 U.S.C. § 722(d) and whether the statute "suggests an intent on the part of Congress to foreclose" an action under section 1983. The court held that unlike the circumstances in *National Sea Clammers*—where the underlying statutes contained their own highly comprehensive set of enforcement remedies—"the procedures set forth in 29 U.S.C. § 722(d) and a civil action under § 1983 would not be inconsistent but complementary."⁷⁹ In reaching this conclusion, the district court emphasized that it was "heeding" the "mandate" of *Rosado v. Wyman*,⁸⁰ where the Supreme Court held that courts should be:

[M]ost reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.⁸¹

Gaitor and *Ryans* are but two recent examples of a long line of cases in which third parties have sued state and local officials and agencies for denial of rights and benefits secured under a federal grant statute,⁸² as well as for failure to comply with the terms, conditions, and assurances relating to grant assistance.⁸³

Gaitor's and *Ryans'* interpretation of *National Sea Clammers* have heightened significance when one considers that most, if not all, federal grants establish literally scores of directives and conditions which state and local grant admin-

79. *Id.* at 848. 29 U.S.C. § 722(d) requires the director of a state vocational rehabilitation agency to establish procedures for the review, upon the request of a handicapped individual, of determinations made by the state rehabilitation counselor respecting that individual's eligibility to receive benefits under Title I of the Rehabilitation Act. In addition, any handicapped person who is dissatisfied with the decision of the state agency director may request the Secretary of Health and Human Services (HHS) to review the state director's decision. In such cases, the Secretary is authorized to make recommendations to the state director as to the appropriate disposition of the matter.

80. 397 U.S. 397 (1970).

81. *Id.* at 420.

82. See generally Madden, *Constitutional and Legal Foundations of Federal Grant Programs*, Federal Grant Law, ABA (1981). See also *Goldberg v. Kelly*, 397 U.S. 254 (1970); *South Eastern Human Development Corp. v. Schweiker*, No. 82-1241 (8th Cir. Aug. 27, 1982); *Montgomery Improvement Association v. HUD*, 645 F.2d 291 (5th Cir. 1981); *Lynch v. Maher*, 507 F. Supp. 1268 (D. Conn. 1981); *Coalition for Block Grant Compliance v. Dept. of Housing and Urban Development*, 450 F. Supp. 43 (E.D. Mich. 1978).

83. See, e.g., *Hendrick Hudson Central School District v. Rowley*, 50 U.S.L.W. 4925, (U.S. June 28, 1982), *Lau v. Nichols*, and *Bossier Parish School Bd. v. Lemon*, *supra* note 51; *City of Englewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972). Apart from actions against state and local officials, it is well established that third parties may sue federal grantor agencies to assure that such agencies enforce the requirements of grant programs providing third party benefits or rights. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). But see *Weems v. Pierce*, 534 F. Supp. 740 (C.D. Ill. 1982). Finally, apart from suits brought by third parties, the federal government has ample authority to sue state and local grantees to enforce compliance with the conditions of grant assistance. See *United States v. Marion County School District*, 625 F.2d 607, *reh. den.*, 629 F.2d 1350 (5th Cir. 1980).

istrators must interpret and enforce. If these officials misinterpret or inadvertently disregard such directives and conditions, they are likely to subject themselves, or in the case of local officials their government employer, to suit under section 1983 by an aggrieved third party.⁸⁴ The potential for such a result is perhaps most apparent in the case of the 1981 block grants.

The Reagan Administration, in implementing its policy of giving state and local officials greater discretion to spend federal grant funds, has kept federal regulation of the 1981 block grants at a minimal level.⁸⁵ However, without the guidance of federal regulations state and local officials will face difficult choices in interpreting and complying with the myriad of federal statutory directives and conditions accompanying block grant assistance.

A recent decision by the U.S. Court of Appeals for the Eighth Circuit is an example of the confusion that can result over the interpretation of the obligations a federal grant statute may impose on a state that receives federal assistance. In *South Eastern Human Development Corporation v. Schweiker*,⁸⁶ the plaintiff, a nonprofit community services organization, sued South Dakota⁸⁷ for its failure to comply with the reporting and public hearing requirements of section 1742 of OBRA. Title VI of OBRA established the Community Services Block Grant Program (CSBG). For fiscal year 1982 only, a state had the choice either to administer the CSBG program or to have its allotment distributed by HHS.⁸⁸ The Governor of South Dakota notified HHS of the state's intention to administer the CSBG program during FY 1982. However, no public hearings were held regarding FY 1982 Community Service funds and the state did not submit its report on the planned use of FY 1982 funds until December 11, 1981, more than two months after the commencement of FY 1982.⁸⁹

84. One congressional witness has testified that the decision in *Maine v. Thiboutot* gives rise too "double jeopardy" in the area of grants administration, since on the one hand, acceptance of a federal grant requires compliance with "many complex statutes and regulations," while on the other hand, "mandates from the judiciary" create the prospect of having to pay "millions of dollars to implement systematic relief." See *Section 1983 Hearings*, *supra* note 28, at 372 (statement of the Honorable J. Joseph Curran, representing the National Conference of State Legislatures).

85. For example, the final regulations published by the Department of Health and Human Services covering seven of the nine new block grants emphasize flexibility and primary reliance on state discretion. See 47 Fed. Reg. 29472 (July 6, 1982).

86. No. 82-1241 (8th Cir. Aug. 27, 1982).

87. The suit named several defendants, including the Secretary of the U.S. Department of Health and Human Services, the Governor of South Dakota, and that state's planning bureau and its director. If the plaintiff had not named a federal defendant official, the case might well have been brought under section 1983.

88. OBRA, *supra* note 41, § 682(b)(3).

89. The dispute arose out of a series of decisions made by the Governor of South Dakota which culminated in the termination of grant funds for SEHDC. SEHDC claimed that because the reporting and public hearing requirements were not complied with, the Secretary of the Department of Health and Human Services (HHS) was obligated to distribute, in lieu of the state, the state's FY 1982 block grant allotment. Such action would have resulted in SEHDC's receiving two fiscal quarters' worth of community services funds.

Rejecting the district court's conclusion that state grantees need not comply with section 1742,⁹⁰ the Eighth Circuit ruled that the most logical reading of section 1742 and its legislative history indicated that in adopting section 1742, Congress clearly intended to provide minimal protection for a state's citizens in the form of reporting and public participation mechanisms. Thus, the court ordered the Secretary of HHS to distribute to SEHDC the funds they would have received for the first two quarters of FY 1982.

The problem of increased grant litigation—in which plaintiffs generally seek injunctive or other equitable relief⁹¹—is only the tip of the section 1983 iceberg: liability for money damages is now a foreseeable consequence for the mismanagement or misinterpretation of a federal grant program, since section 1983 explicitly provides that “every person . . . shall be liable to the party injured.” Moreover, several commentators have suggested that lower courts following *Thiboutot* and *Owen* may feel compelled to award damages to a prevailing party in a section 1983 grant suit.⁹²

In such suits, government officials will be insulated from liability for money damages to the extent that the circumstances surrounding the challenged action fall within *Scheuer's* analysis of the good-faith immunity defense. However, local governments would, as a result of *Monell*, *Owen* and *Thiboutot*, be liable for actual damages a third party may incur as a result of the mismanagement or improper administration of a program relating to a federal grant.⁹³

Fortunately, for state and local officials, the threat of personal liability under section 1983 is offset in varying degrees by the existence at the state level

90. Civ. 81-3072, (D.S.D. 1982).

91. See, e.g., *Lau v. Nichols*, *supra* note 51; *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *Barrera v. Wheller*, 475 F.2d 1338 (8th Cir. 1973), *aff'd*, 417 U.S. 402 (1974); *Fox v. Dept. of Housing and Urban Development*, 468 F. Supp. 987 (E.D. Pa. 1980).

92. See, e.g., *Section 1983 Hearings*, *supra* note 28, at 95 (statement of Roy D. Bates on behalf of the National Institute of Municipal Law Officers); *Id.* at 336 (statement of Prof. George D. Brown). Professor Brown makes an interesting observation with respect to the types of situations in which damages might be awarded in grant suits. Professor Brown reasons that since the denial of a government benefit essential to a person's health or life itself could result in serious and demonstrable harm, such action could arguably be viewed as a common-law tort and thus properly subject to damages. It should be noted, however, that a successful argument along these lines requires first that there be a deprivation of some “right,” as required by section 1983 itself. Whether a benefit conferred on an individual by a particular grant statute will rise to the level of a right protected by section 1983 will be a crucial, if not determinative, issue in all section 1983 grant disputes. This issue was analyzed *supra* in the text accompanying note 66.

93. Although comprehensive empirical data on the fiscal impact on municipalities of increased liability under sections 1983 and 1988 is not available, a 1981 survey by the National Institute of Municipal Law Officers (NIMLO) documents the potential liability of local governments for damages pursuant to section 1983. The NIMLO survey of more than 200 municipalities indicates that there is approximately \$4.8 billion in pending civil rights claims against local governments. See *Section 1983 Hearings*, *supra* note 28, at 120 (statement of Roy D. Bates on behalf of NIMLO). While this figure is staggering, the actual dollar amount of recoveries against municipalities sued under section 1983 is not known.

of systems⁹⁴ which provide (1) free defense counsel; (2) indemnification; (3) insurance; and (4) risk management training.⁹⁵ For municipalities, however, the threat of section 1983 liability remains acute.⁹⁶

c. Increased Litigation

While the existence at the state level of systems designed to protect officials from personal liability may effectively serve in many instances to insulate the individual from financial disaster, other identifiable problems will persist.

For one thing, the prospect of increased litigation is likely to dampen state or local government enthusiasm for taking innovative and adaptive approaches toward program management, as it would seem more likely than not that as officials exercise greater discretion, they increase the probability that their administration of a federally assisted program will be challenged. Program managers, when confronted with the prospect of increased liability, may introduce protective measures to insulate themselves from that risk. These measures, in the form of more elaborate procedures, extensive review and coordination mechanisms, or manifold levels of decision and approval—all of which seem managerially proper—could add to existing levels of administrative inertia, delay and wasted resources. Consequently, government may become less effective as decision makers become more preoccupied with the possible consequences of a decision, rather than being concerned about the effect their decisions will have on the intended recipients of governmental assistance.

A second effect of increased litigation under federal assistance programs relates to the degree to which delegation occurs in most government bureaucracies. The government official made a party to most section 1983 actions is often the highest elected or appointed official having responsibility over the function or person whose actions precipitated the alleged injury. In very large bureaucracies, such as those servicing social assistance programs, the actions of subordinate officials may be beyond the direct cognizance of the person in charge. As a result, higher ranking government officials will bear a disproportionate burden of liability solely because of their rank rather than because of any misconduct on their part.

The third possible effect of increased litigation is a deterioration of state relations with the federal government. Presently, the federal government and its

94. See *infra* text accompanying note 105.

95. Risk management as used here, refers to a process in which sources of official liability are identified and analyzed in an effort to devise ways to avoid or reduce such liability. Risk management techniques can range from formal training programs and workshops to periodic seminars and informal question and answer sessions. Regardless of what form of risk management is practiced, its overriding benefit can be the reduction and elimination of the sources of official liability, resulting in a reduction in the costs of official misconduct to a state or local governmental employer. An overview discussion of risk management and its increasing popularity among municipalities is provided by Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Governments?*, 13 Urb. Law. 1 (1981).

96. For a review of the problems faced by municipalities, local officials and employees as a result of the failure (or unwillingness) of the insurance industry to provide adequate liability insurance coverage, see Jaron, *supra* note 95.

officials retain much more immunity than state or local officials and municipalities. This disparity in burden-sharing and liability between the federal "actors" on one hand and state and local governments and officials on the other, can be a source of friction, and may result in an understandable reluctance by some state and local governments to assume responsibilities for federal assistance programs when the greatest legal exposure is directed toward them.

A fourth consequence of increased litigation could be to heighten the already developing weariness of government officials who discover more and more of their time and energy being sapped in responding to legal claims and defending their actions under federal assistance programs, rather than in directing and overseeing tasks and subordinates. Consequently, state and local officials may choose not to administer federal assistance programs beyond what they are compelled to do.⁹⁷

Finally, it is widely acknowledged that the often mentioned fear of increased liability is no less chilling for public officials at the state and local levels than for those at the federal level. It could thereby discourage vigorous decision-making at lower levels of government.⁹⁸

Giving state and local grantees and officials greater flexibility to manage federal programs is a broad policy decision supportable on many grounds.⁹⁹ However, whatever policy changes are sought and implemented at the national level,¹⁰⁰ it is clear that careful consideration should be given to the fact that

97. Justice Powell, in his dissent in *Thiboutot*, perhaps best summarizes the negative impact that case could have on the future operation of federal grant and assistance programs:

In practical effect of today's decision means that state and local governments, officers and employees now may face liability whenever a person believes he has been injured by the administration of any federal-state program, whether or not that program is related to equal or civil rights.

448 U.S. at 22. The pernicious effect of *Thiboutot* has also been the topic of several scholarly articles. See, e.g., Peters, *Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot*. 13 Urb. Law. 407 (1981); Groszyk & Madden, *Managing Without Immunity: The Challenge For State and Local Government Officials In the 1980s*, Pub. Ad. Rev. (March/April 1981).

98. See *Section 1983 Hearings*, supra note 28, at 397 (statement of Scott Fosler and George Cross, representing the National Association of Counties).

99. Executive Order 12372, issued July 14, 1982, is the most recent example of the current administration's policy of giving state and local governments more responsibility for administering federal financial assistance and development programs. E.O. 12372 revokes OMB Circular A-95, relating to Evaluation, Review and Coordination of Federal and Federally Assisted Programs and Projects. The new order, to become effective April 30, 1983, strengthens the authority of state and local officials to establish federal assistance review procedures and priorities.

100. Several proposals which relate to the federal grant system are awaiting congressional action. S. 807, the Federal Assistance Improvement Act of 1981, contains several provisions aimed at improving the federal grant system by simplifying federal assistance requirements to provide greater flexibility to state and local recipients. Although S. 807 has been before Congress in one form or another in recent years, and was recently reported by the Senate Committee on Government Affairs, it is unlikely that the bill will ever be acted upon so long as the President's New Federalism proposal remains a viable alternative. Another old idea has surfaced in the form of S. 10, which

federal assistance programs frequently establish a myriad of rights, conditions and obligations which—according to current law—will be enforceable under section 1983.

A relatively unexplored avenue for ameliorating the problem of increased litigation under section 1983 is discussed in the 1982 case of *Patsy v. Board of Regents of State of Florida*.¹⁰¹ In *Patsy*, the Supreme Court held that a judicially-imposed requirement of exhaustion of state administrative remedies as a prerequisite to an action under section 1983 was improper.¹⁰² Importantly, however, in his opinion for the Court, Justice Marshall expressly acknowledged Congress' authority to require exhaustion of state administrative remedies as a prerequisite to bringing *any* action under section 1983,¹⁰³ a view that was shared by three other Justices in their concurring opinions.¹⁰⁴

The Court's approval of such authority takes on added importance when considering viable solutions for avoiding increased section 1983 litigation involving federal assistance programs.

For example, congressional enactment of an exhaustion requirement for claims arising out of state or local management of federal assistance programs would appear to offer a promising system for meeting the twin objectives of effective management of federal assistance programs and the vigorous enforcement of individual rights relating to such programs.

passed the Senate last year and would establish a Commission for More Effective Government, patterned after the old Hoover Commissions. However, it is unlikely that the House Government Operations Committee will act on S. 10's companion bill—H.R. 18—this session. In the event that the discussions on New Federalism reach a deadlock, or if Congress is unable to accept the legislation on the proposal, S. 807 and S. 10 may again become central topics of congressional debate.

101. See note 6, *supra*.

102. Such a requirement had been adopted below by the Fifth Circuit as well as other Courts of Appeals. See, e.g., *Patsy v. Florida International Univ.*, 634 F.2d 900 (5th Cir. 1981) (*en banc*); *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969); *Secret v. Brierton*, 584 F.2d 823 (7th Cir. 1978).

103. Justice Marshall relied in part on the legislative history of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(e), to hold that federal courts are generally precluded from requiring exhaustion of state administrative remedies under section 1983. Congress in enacting section 1997(e), according to *Patsy*, carved out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and established a detailed scheme to ensure that state administrative remedies are adequate and effective. Justice Marshall concluded that a "judicially developed exhaustion rule in other [section 1983] cases" would be inconsistent with Congress' decision to adopt section 1997(e). 102 S. Ct. 2565. Justice Marshall observed that "Congress' superior institutional competence [suggests] that legislative not judicial solutions are preferable." *Id.* at 2567. He also emphasized that "it is not for us to say whether Congress . . . should create a similar scheme for other categories of § 1983 claims or whether Congress . . . should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims." *Id.* at 2567-68.

104. Justice O'Connor, joined by Justice Rehnquist in her concurring opinion, noted that "perhaps Congress' enactment of [42 U.S.C. § 1997(e)], which creates a limited exhaustion requirement for prisoners bringing § 1983 suits, will prompt it to reconsider the possibility of requiring exhaustion in the remainder of § 1983 cases." 102 S. Ct. at 2568. Similarly, Justice White, concurring in part, stated that "exhaustion is a statutory issue and the dispositive word on the matter belongs to Congress." *Id.* at 2569.

Since section 1983 actions would not be precluded but merely postponed until administrative remedies have been exhausted, plaintiffs would retain the important right to have their claims heard by a federal court. Importantly, constitutional claims could be an exception to an exhaustion requirement, thus assuring no delay in the vindication of constitutional rights.

State governments—in keeping with the trend giving them primary responsibility for managing federal programs—would have a first-hand opportunity to correct whatever problems may be found to exist since the state's incentive to establish adequate administrative procedures will be strongest in situations where the state's potential for being sued under section 1983 is the greatest. Moreover, giving the states primary responsibility for handling complaints arising out of grant programs would substantially reduce the need to resort to federal courts for the resolution of disputes which often take years to resolve due to the inherent limitations of the adversary process.

In addition, the existence of state administrative procedures is likely to heighten each state's awareness of the special needs of its citizenry at a time when states are being given more and more responsibility for administering federal assistance programs. The effective use of such procedures is likely over time to reduce the need for federal intervention, and at the same time allow the state to develop procedures which are best suited for handling complaints that arise within the state.

Finally, federal courts could be authorized to waive the exhaustion requirement in prescribed cases in order to ensure that state procedures made available are used to resolve those claims which are best suited for resolution in an administrative forum.

B. State Responses to Section 1983 Liability

The extensive experience at the state level in coping with section 1983 liability provides an obviously worthwhile source of information for evaluating innovations that may have general applicability. Accordingly, a survey was conducted in which the fifty state attorneys general were asked to provide information on existing systems directed toward ameliorating the problem of official liability.¹⁰⁵ Specifically, each state attorney general was contacted to determine:

- (1) Whether enterprise liability had been substituted for the personal liability of officials or employees in any respect?
- (2) Whether there exists a mechanism for either defending, indemnifying or insuring officials and employees in damage actions?
- (3) Whether there exists a risk management program designed to identify and reduce potential areas of liability exposure?
- (4) Whether any disciplinary procedures or administrative plans have been implemented to correct and reduce instances of official or employee misconduct that have or could result in liability?

105. See Appendix B, which contains a copy of the survey letter sent to each attorney general. In many instances, telephone contacts provided useful supplements to the survey.

- (5) Whether, based on the state's activities and experience in the area of official immunity and liability there are any suggestions or recommendations to be made with respect to the problem of liability of state or local officials for money damages?

While the mechanisms in effect in any state are to some extent unique, the survey responses indicate several common ways in which the states seek to protect government officials from liability under section 1983. By way of summary, many states now provide for the defense and indemnification of state officials and employees who acted in good faith.¹⁰⁶ Without exception, however, the availability of these protections is contingent upon that official's having acted within the "course and scope of employment" and that his or her conduct was not "willful and wanton," "malicious," "malfeasant," or "grossly negligent." In effect, these state statutes follow closely the qualified immunity standard of *Scheuer v. Rhodes*.¹⁰⁷ In some states, the protective measures noted here extend to officials and employees of that state's political subdivisions.¹⁰⁸ In addition, many states authorize or require programs of insurance for state officials, employees of state agencies, and persons employed by political subdivisions.¹⁰⁹

No state appears to have embarked on a comprehensive shift toward reliance on enterprise liability to the extent reflected at the federal level in the proposed amendments to the FTCA. The survey reveals that state experience with risk management training programs, disciplinary proceedings, and similar approaches varies widely.¹¹⁰

A description of the different state approaches to section 1983 liability and a summary discussion of the relevant statutory provisions in effect in each state is presented below.¹¹¹ In cases where no survey response was received from a state's attorney general, the relevant provisions of that state code are briefly discussed, although without a survey response it was not possible to report the experience of such states under these provisions.

106. See, e.g., Ariz. Rev. Stat. § 41-621, *et seq.*; Cal. Gov't. Code § 995; 10 Del. C. §§ 3925 and 4001; Iowa C. § 25A.21; La. Rev. Stat. § 5108.1; Md. Code Ann. § 16C; Mass. Gen. Laws. Ann. ch. 258, §§ 2, 6, and 9; Nev. Rev. Stat. §§ 41.0339 and § 41.0349; N.J. Stat. Ann. § 59.1-1 *et seq.*; Pa. Code § 39.1 *et seq.*; Minn. Stat. § 3.736; Wash. Rev. Code Ann. §§ 4.92.060, 4.92.070 and § 4.92.130; Wis. Stat. § 895.46.

107. See Cass *supra*, at 1172.

108. See, e.g., Cal. Gov't. Code § 995; Fla. Stat. §§ 111.071 and 768.28(9)(a); Mass. Gen. Laws ch. 258, § 2; Nev. Rev. Stat. § 41.0339 and 41.0349; N.M. Stat. Ann. § 41-4-1 *et seq.*; Pa. Code § 8521 *et seq.*; Wyo. Stat. § 1-39-101 *et seq.*

109. See, e.g., Ga. Code Ann. §§ 89-973, 89-974 [O.C.G.A. §§ 45-9-1 through 45-9-5]; N.D. Cent. Code § 32-12.1-15.

110. See, e.g., Appendix B, Letters to Thomas J. Madden from Attorney Generals of the following states: Alaska, Kansas, Massachusetts, Mississippi, Missouri, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Utah and Washington. *But see* Letter to Thomas J. Madden from Gerald L. Baliles, Attorney General, Commonwealth of Virginia.

111. Analysis and comparison of state approaches is incomplete pending the expected imminent receipt of additional responses. All of the responses received to date, along with supplementary materials, are contained in Appendix B. The thoroughness of some state survey responses has facilitated a more extended analysis of some states.

APPENDIX A - LEGISLATIVE BIBLIOGRAPHY

CHRONOLOGY93rd Congress

H.R. 10439 Sponsored by Rodino, cosponsored by Hutchinson on September 20, 1973. To amend Title 28 U.S.C. to provide for exclusive remedy against the United States in suits based on acts or omissions of United States employees.

September 20, 1973, referred to House Committee on the Judiciary.

September 25, 1973, referred to Subcommittee on Claims and Governmental Relations.

March 27, 1974, hearings before Subcommittee

April 2, 1974, executive comment receive from the United States Postal Service.

H.R. 12715 Sponsored by Chappell on February 7, 1974. To amend Title 28 U.S.C. to provide for exclusive remedy against the United States in suits based on acts or omissions of United States employees.

February 7, 1974, referred to House Committee on the Judiciary.

February 11, 1974, referred to Subcommittee Claims and Governmental Relations.

S. 2558 Sponsored by Hruska on October 10, 1973. To amend Title 28 U.S.C. to provide for exclusive remedy against the United States in suits based upon acts or omissions of United States employees.

October 10, 1973, referred to Senate Committee on the Judiciary.

November 15, 1973, referred to Subcommittee Improvements in Judicial Machinery.

April 9, 1974, executive comment received from the Treasury Department.

95th Congress

H.R. 9219 Sponsored by Rodino on September 20, 1977. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees.

September 20, 1977, referred to House Committee on the Judiciary.

September 29, 1977, referred to Subcommittee on Administrative Law and Governmental Relations.

February 23, 1978, first day of Subcommittee hearings.

May 17, 1978, final day of Subcommittee hearings.

July 12, 1978, first day of Subcommittee consideration and markup.

July 20, 1978, final day of Subcommittee consideration and markup.

July 20, 1978, forwarded to full Committee, with amendments.

H.R. 9437 Sponsored by Zeferetti on October 4, 1977. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States for suits based upon acts or omissions of United States officers, and employees routinely assigned to perform investigative, inspection or law enforcement functions.

October 4, 1977, referred to House Committee on the Judiciary.

October 7, 1977, referred to Subcommittee on Administrative Law and Governmental Relations.

October 27, 1977, executive comment requested from the Agriculture Department, Labor Department, Treasury Department, FTC and FCC.

- 3 -

- S. 2117 Sponsored by Eastland on September 16, 1977. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees.
- September 16, 1977, referred to Senate Committee on the Judiciary.
- September 21, 1977, referred to Subcommittee on Citizens and Shareholders Rights.
- December 14, 1977, executive comment requested from the Justice Department.
- January 20, 1978, executive comment received from the Justice Department.
- January 26, 1978, first day of Subcommittee hearings.
- June 15, 1978, final day of Subcommittee hearings.
- S. 2868 Sponsored by Percy on April 10, 1978. To provide a remedy against the United States for torts arising under the Constitution or laws of the United States committed by officers or employees of the United States.
- April 10, 1978, referred to Senate Committee on the Judiciary.
- April 14, 1978, referred to Subcommittee on Citizens and Shareholders Rights.
- June 15, 1978, hearings held by Subcommittee.
- S. 3314 Sponsored by Metzenbaum on July 18, 1978. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees and to amend Title 5 U.S.C. to permit a person aggrieved by a constitutional injury to initiate a disciplinary inquiry.

- 4 -

July 18, 1978, referred to Senate Committee on the Judiciary.

July 19, 1978, referred to Subcommittee on Citizens and Shareholders Rights.

July 26, 1978, Subcommittee reported measure without amendments to full Committee.

96th Congress

H.R. 193 Sponsored by Chappell on January 15, 1979. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or commissions of United States employees.

January 15, 1979, referred to House Committee on the Judiciary.

February 27, 1979, referred to Subcommittee on Administrative Law and Governmental Relations.

June 20, 1979, for further action, see H.R. 2659.

H.R. 2659 Sponsored by Rodino on March 3, 1979. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts and to establish procedures whereby a person injured by a constitutional tort may initiate and participate in a disciplinary inquiry with respect to such a tort.

March 6, 1979, referred to House Committee on the Judiciary.

March 14, 1979, referred to Subcommittee on Administrative Law and Governmental Relations.

- 5 -

June 20, 1979, first day of Subcommittee hearings.

August 1, 1979, final day of Subcommittee hearings.

October 4, 1979, executive comment received from the Justice Department.

October 31, 1979, Subcommittee consideration and markup session held.

S. 695 Sponsored by Kennedy on March 15, 1979. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in actions based upon acts or omissions of United States employees, and to amend Title 5 U.S.C. to permit a person injured by a constitutional tort to initiate and participate in a disciplinary inquiry of the offending act or omission.

March 15, 1979, referred to Senate Committee on the Judiciary.

March 30, 1979, referred to Subcommittee on the Constitution.

97th Congress

H.R. 24 Sponsored by Danielson on January 5, 1981. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, to establish procedures whereby a person injured by a constitutional tort may initiate and participate in a disciplinary inquiry with respect to such tort.

January 5, 1981, referred to House Committee on the Judiciary.

February 17, 1981, referred to Subcommittee on Administrative Law and Governmental Relations.

February 25, 1981, executive comment requested from Justice Department, Treasury Department and Office of Personnel Management.

October 13, 1981, subcommittee hearings held (Nov. 5, 1981; May 19, 20, 1982; May 26, 1982).

- 6 -

November 5, 1981, executive comment requested from Department of Defense.

July 29, 1981, subcommittee consideration and markup session held.

August 19, 1982, clean bill H.R. 7034 forwarded by subcommittee to full committee in lieu of H.R. 24.

H.R. 1696 Sponsored by Chappell on February 5, 1981. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees.

February 5, 1981, referred to House Committee on the Judiciary.

February 17, 1981, referred to Subcommittee on Administrative Law and Governmental Relations.

H.R. 6359 Sponsored by Kindness on May 12, 1982. A bill to amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, and to establish procedures whereby a person injured by a constitutional tort may obtain a remedy.

May 12, 1982, referred to House Committee on the Judiciary.

May 17, 1982, referred to Subcommittee on Administrative Law and Governmental Relations.

H.R. 7034 Sponsored by Hall on August 19, 1982. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts.

August 19, 1982, referred to House Committee on the Judiciary.

For previous action, see H.R. 24.

- 7 -

- S. 1775 Sponsored by Grassley on October 26, 1981. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts.
- October 26, 1981, referred to Senate Committee on the Judiciary.
- November 2, 1981, referred to Subcommittee on Agency Administration.
- November 13, 1981, subcommittee hearings held (November 16, 1981 and March 31, 1982).
- June 9, 1982, considered by Subcommittee on Agency Administration.
- September 23, 1983, subcommittee consideration and markup session held.

Alabama

Unlike many states, Alabama law does not provide for either the defense, indemnification or insurance of government officials and employees in suits arising out of an official's or employee's conduct that is within the scope of employment.

Alaska

According to the Attorney General, Alaska has had very little litigation in which claims under section 1983 have been raised. However, the potential for official liability under section 1983 is viewed as a significant problem. Although Alaska, like most states, has not formally substituted enterprise liability for the personal liability of state officials, various collective bargaining agreements provide for state defense and indemnification of state officials and employees acting within the scope of their authority and responsibilities.

The Attorney General reports that no special or formal disciplinary procedures have been instituted; no formal provisions exist for the defense, indemnification or insuring of state officials; and Alaska has not—except with respect to equal employment—instituted a risk management training program to avoid official or employee misconduct.

Arizona

Arizona has not substituted enterprise liability for the personal liability of officials or employees of the state. However, Arizona, pursuant to Ariz. Rev. Stat. § 41-621, *et seq.*, provides insurance coverage for all officers, agents and employees against liability for acts or omissions of any nature while acting in the course and scope of employment or authorization. Additionally, Arizona law states that a state officer, agent or employee is not personally liable for an injury or damage resulting from his act or omission in a public official capacity where the exercise of discretion is involved and the official acted in good faith without wanton disregard of his statutory duties. *Id.* The Attorney General will defend a state official, agent or employee if self-insurance coverage is also provided. *Id.*

There is no state-wide training program to avoid potential liability under section 1983 actions, although the State's Risk Management Services relating to insurance does provide limited training through specialized seminars usually conducted by the Attorney General's office.

Arkansas

The State of Arkansas will pay actual, but not punitive, damages adjudged or entered as a result of a compromise settlement, approved and recommended by the Attorney General, against officers or employees of the state based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of employment and in the performance of his official duties. Ark. Stat. Ann. § 12-3401.

California

California has not substituted enterprise liability for personal liability. According to the Attorney General, the State of California is self-insured. In ad-

dition, the state and all of its political subdivisions are required to provide for the defense of an employee or former employee in any civil action based on an act or omission arising out of the scope of his employment. Cal. Gov't Code § 995. In such actions, either the state or the local governmental unit may refuse to defend the employee if he acted or failed to act because of fraud, corruption or malice, or if a conflict of interest would be created as a result of defending the employee. *Id.* § 995.2.

In cases where the state or a local governmental unit defends the government employee, as well as those in which the employee conducts his own defense, the government is required to either pay or indemnify the employee for any judgment, settlement or compromise against him, once it is established that the injury arose out of an act or omission occurring in the scope of employment. *Id.* § 825 *et seq.* California law also authorizes local governmental units to insure any employee against all or any part of his liability resulting from an act or omission in the scope of his employment. *Id.* § 990.

Informal risk management training exists, and the Attorney General keeps agencies informed of recent developments on liability and will, upon request, review and edit employee training manuals.

Colorado

Colorado has not substituted enterprise liability for the personal liability of state officers. The state's insurance policy, however, does provide coverage for actions against state officials and employees under 42 U.S.C. § 1983.

In addition, a public entity—defined to include counties and cities—is required to indemnify an employee for any settlement or judgment against him in an action arising out of injuries due to an act or omission occurring during the performance of his duties and within the scope of employment, except where the employee's acts or omissions were willful or wanton. A public entity, however, is not required to provide for the defense of its employees, but must bear the costs of a defense if the employee's actions occurred within the scope of employment and were not willful or wanton. Colo. Rev. Stat. § 24-10-110 *et seq.*

According to the Attorney General, the state has no risk management training experience regarding official misconduct.

Connecticut

Connecticut law deals with the liability of both state and municipal officers and employees. Conn. Gen. Stat. § 4-165 provides:

No state officer or employee shall be personally liable for damage or injury, not wanton or wilful, caused in the performance of his duties and within the scope of his employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter.

Similarly, section 7-465 makes local governments liable for damages caused by local officers or employees whose actions meet good faith standards of conduct.

Delaware

Like most states, Delaware has not substituted enterprise liability for the personal liability of state officials or employees. However, according to the Attorney General, Delaware law provides that public officers who act in connection with the determination of policy, in good faith and without gross or wanton negligence, are entitled to be indemnified for any judgment rendered against them and for the cost and expense of litigation, including attorney's fees. Del. Code Ann. tit. 10, § 4001 *et seq.* State officers and employees also have a right to representation. *Id.* § 3925.

The Attorney General did not comment on Delaware's experience with risk management training for officials and employees.

District of Columbia

Although the District of Columbia does not provide for the defense or indemnification of its officers or employees, except in claims relating to an employee's negligent operation of a motor vehicle, D.C. Code Ann. § 1-1211 *et seq.*, the mayor is authorized to settle claims and suits against the District brought under section 1983 and arising out of the negligence or wrongful act of any officer or employee for whose acts the District would be liable if it were a private individual. *See* D.C. Code Ann. § 1-1202(1).

Florida

Although Florida has not adopted enterprise liability as a substitute for official liability, officers and employees of the state and its political subdivisions are not personally liable in state court actions for their tortious acts within the course and scope of their employment so long as their actions do not exhibit bad faith, maliciousness or a wanton and willful disregard of human rights, safety or property. Fla. Stat. §§ 111.071 and 768.28(9)(a). Similarly, in federal civil rights suits under 42 U.S.C. § 1983, the state will pay any judgment entered against a state official unless it is determined that the official intentionally violated the plaintiff's rights. *Id.* §§ 111.071 and 284.38. The state also provides a legal defense for state officers and employees for such law suits arising out of their official duties, *Id.* § 111.07, while political subdivisions have the discretion, in certain cases, to provide for the representation of officials and employees. *Id.* §§ 111.06, 111.065.

Any judgments against state officials and the cost of the defense of such actions are paid from the state's self-insurance trust fund. *Id.* §§ 111.071, 284.30, 284.31. Since the Funds' inception in 1972, Florida has defended 2,524 section 1983 damage actions against state officials at a cost of \$2.5 million. The Attorney General points out, however, that this figure is somewhat misleading because it does not include the salary and support services for the assistant attorneys general who devote full time to section 1983 cases.

The Attorney General did not comment on Florida's experience with risk management training.

Georgia

According to the Attorney General, the State of Georgia has established a self-insured indemnity program that provides coverage for state officials and

employees. Ga. Code Ann. §§ 89-973, 89-974 [effective November 1, 1982, the State of Georgia is adopting a new code. The new cite will be O.C.G.A. §§ 45-9-1 through 45-9-5]. Local governments may also provide insurance coverage for local public officials and employees. *Id.* § 89-943. Notably, the Georgia State Merit System has a training division which offers courses on public personnel management and instruction on public official and employee liability.

Hawaii

The State of Hawaii has waived its immunity for liability for the torts of its employees and will assume liability to the same extent as a private individual under like circumstances. Hawaii Rev. Stat. § 662-2. However, § 662-2 is not applicable to "any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation." Thus, Hawaii officials sued in connection with the administration of a federal assistance program as interpreted by state law would appear to be subject to personal liability under section 1983. Hawaii Rev. Stat. § 662-15. In most other cases, the Attorney General is authorized to defend any employee of the state in any civil action brought against the employee resulting from an act or omission while acting within the scope of his employment. *Id.* § 662-16. Finally, the State of Hawaii has waived its sovereign immunity and is covered by liability insurance in cases where section 662 is not applicable. *Id.* § 661-1 *et seq.*

Idaho

Idaho's Tort Claims Act, Chapter 9 of the Idaho Code, § 6-903 covers the liability of all governmental employees, including officers, employees and servants of the state and its political subdivisions. In all civil actions, either the state or a political subdivision is liable, with certain exceptions, in lieu of the employee.

Idaho law requires the state to provide a comprehensive liability insurance plan to protect the state and its employees from claims and civil lawsuits. *Id.* § 6-919. Political subdivisions are authorized to purchase the necessary liability insurance for themselves and their employees. *Id.* § 6-923.

Illinois

In 1981, Illinois enacted legislation to provide a program for purchasing liability insurance protection for state employees who act within the scope of their employment. Ill. Ann. Stat., Ch. 127, § 6364. In addition, section 6364 requires the State to defend, indemnify and hold harmless an employee against any claim in tort. *Id.* Chapter 85, § 2-302 of the Ill. Ann. Stat. governs actions against employees of local governments. It provides:

If any claim or action is instituted against an employee or former employee of a local public entity based on an injury allegedly arising out of an act or omission occurring within the scope of his employment as such employee, the entity may elect to do any one or more of the following:

- a) Appear and defend against the claim or action;
- b) Indemnify the employee or former employee for his court costs incurred in the defense of such claim or action;

- c) Pay, or indemnify the employee or former employee for a judgment based on such claim or action, or
- d) Pay, or indemnify the employee or former employee for, a compromise or settlement of such a claim or action.

Indiana

Chapter 16 of the Ind. Code Ann. covers the liability of government employees of the State and its political subdivisions. With respect to indemnification and defense of employees, section 34-4-16.5-5 provides that the "governmental entity shall pay any judgment, compromise, or settlement of a claim or suit against an employee when the act or omission causing the loss is within the scope of his employment, regardless of whether the employee can or cannot be held personally liable for the loss and when the governor, in the case of a claim or suit against a state employee, or the governing body of the political subdivision, in the case of a claim or suits against an employee of political subdivision, determines that paying the judgment, compromise, or settlement is in the best interest of the governmental entity."

Section 34-4-16.5-18 permits a governmental entity to purchase insurance to cover the liability of itself or its employees. Sections 34-4-16.7-1 and .7-2 relate specifically to the personal civil liability under civil rights laws of employees acting within the scope of employment and the defense of such employees for claims or suits arising under civil rights laws.

Iowa

The Attorney General reports that the most relevant Iowa statute bearing on the question of official liability is Iowa Code § 25A.21 (1981), part of the Iowa Tort Claims Act, which provides:

The state shall defend and, except in cases of malfeasance in office or willful and wanton conduct, shall indemnify and hold harmless any employee of the state against any claim as defined in section 25A.2, subsection 5, paragraph 'b', including claims arising under the Constitution, statutes, or rules of the United States or of any state.

As with California and Florida, Iowa law also provides protections for local officials pursuant to the Municipal Tort Claims Act, Iowa Code § 613A.8 (1981).

Under these statutes government attorneys defend state and local officials sued for damages pursuant to section 1983. The indemnity provisions, however, are basically limited to negligence claims and do not extend to claims grounded in "willful and wanton conduct." In addition, the indemnity provisions of Iowa law are largely inapplicable to section 1983 damage awards because such provisions are limited to negligence claims. No general insurance program is provided or available to state employees for such risks, although the universities may have policies that would cover some such claims. But the Iowa State Association of Counties has developed a reinsurance program in which many counties participate that would cover many claims arising out of law enforcement activities. However, such coverage does not extend to the full range of section 1983 exposure.

Although that language has not been authoritatively construed by the Iowa Supreme Court, the Attorney General is of the view that section 1983 cases in which damages could be recovered against state officials would involve "willful and wanton conduct," and would thus preclude indemnification.

The State of Iowa also self-insures against most risks and is developing a fairly comprehensive risk management program, but this program has not focused significantly as yet upon issues of personal liability for official misconduct.

While there have been no major damage awards against state officials in Iowa, several pending cases involve damage claims against correctional officers at penal institutions for alleged assaults against inmates. Were those to be successful, the officers would be personally liable for the damages.

Unlike most states, Iowa law establishes procedures for disciplining employees who violate a person's constitutional rights at penal institutions, including suspension and discharge. While such procedures have been found useful in preventing such violations, they are not considered a "substitute" for damages in the sense that their existence would be a defense to an allegation of past violations by the persons directly responsible.

Iowa has instituted a variety of training programs, especially in the law enforcement and corrections area, to insure that these functions are performed according to constitutional and statutory requirements.

The Attorney General of Iowa made the following observations with respect to official liability. First, it is questionable, in his opinion, whether states could or should adopt enterprise liability to address the problem of section 1983 damages for official misconduct, either by way of direct indemnification or purchase of insurance at government expense. Rather, Congress could substitute a system of governmental liability for personal liability by expressly overriding the eleventh amendment pursuant to section 5 of the fourteenth amendment. Another possibility would be the development of appropriate insurance coverage to be purchased at their own expense by government officials.

Second, Congress should also consider "fine tuning" sections 1983 and 1988 to express more precisely the types of matters and the degree of risk to which it wishes to expose state governments and state officials. With respect to attorneys' fees in particular, while there is clearly an important role for such awards in true civil rights/civil liberties cases, section 1988 occasionally creates unfortunate distortions in the conduct of government litigation. The vague terms in which Congress has expressed itself afford countless opportunities for creative counsel to expand the frontiers of official liability. For example, the State of Iowa has been defending against a claim for fees in the hundreds of thousands of dollars in a case in which a very large corporation successfully challenged as an undue burden on commerce an Iowa statute which limited the length of twin-trailer vehicles operating on its highways.

Kansas

According to the response of the Attorney General, Kansas has not instituted any insurance or indemnity programs, and does not provide for the defense of state officers or employees.

Kentucky

The Commonwealth of Kentucky has adopted enterprise liability to the extent that it will compensate persons for damages—up to \$50,000—sustained as a proximate result of the negligence of any officer or employee of the state while acting within the scope of employment. Ky. Rev. Stat. § 44.070.

The Commonwealth also provides liability insurance to certain public officers and employees, among them full-time public advocates, Ky. Rev. Stat. § 31.025, members of governing boards and faculty and staff of each state institution of higher education, Ky. Rev. Stat. § 164.2871, and members of the State Fair Board, Ky. Rev. Stat. § 247.140. According to the Kentucky Attorney General, several bills to provide liability insurance for other public employees, including the Attorney General and his staff attorneys and investigators, have failed. In 1976, the Kentucky legislature enacted a statute providing that the Commonwealth would defend civil actions against state employees arising out of acts made in the scope and course of employment. The Kentucky Supreme Court, however, invalidated the act in an unpublished opinion in 1980.

According to the Attorney General, Kentucky has no disciplinary procedures designed to correct or reduce instances of official or employee misconduct and no risk management practices. The Commonwealth does provide some training to its officials and employees regarding affirmative action, equal employment opportunity, and discrimination.

Louisiana

Louisiana has not substituted enterprise liability for the personal liability of state officials or employees. However, the state will save harmless and indemnify all officers and employees of the state from any financial loss arising out of any claim, demand, suit or judgment in any court, including federal court pursuant to a claim under 42 U.S.C. §§ 1981–83 by reason of alleged negligence or other act, provided that the officer was acting in the discharge of his duties and within the scope of his employment, and that such damages did not result from the willful and wrongful act or gross negligence of such officer. La. Rev. Stat. Ann. §§ 13:5108.1 and .2.

These sections of the Louisiana Code do not limit or modify the rights and obligations of any insurer under any policy of insurance. The Attorney General assumes control of the defense of the officer, unless *inter alia*, the Attorney General or the attorney for the employing department determines that the officer was not acting in the discharge of his duties, or that he was acting in a willful or wanton manner or was grossly negligent. Notably, according to the Attorney General, individual state agencies provide training to their officers and employees as desired, necessary and practical. The Attorney General has provided certain training on a statewide basis, including instruction concerning 42 U.S.C. § 1983 for all justices of the peace, and on the Louisiana Administrative Procedure Act for all state regulatory bodies.

Maine

The Tort Claims Act of the State of Maine, Chapter 741 of Me. Rev. Stat. Ann. § 8103(3), limits the liability of employees of the state to a maximum

damage award of \$10,000. In cases where the employee is found liable, the provisions of section 8116 would apply, which provides for state purchase of insurance on behalf of its employees to insure them against any personal liability which they may incur out of or in the course and scope of their duties. Section 8112 governs the defense and indemnification of local officers and employees and authorizes a governmental entity in its discretion and with the consent of the employee, to assume the defense of and indemnify any employee against a claim which arises out of an act or omission occurring within the course or scope of his employment.

Maryland

In 1979, the Maryland General Assembly enacted Article 78, § 16C of the Annotated Code of Maryland in an attempt to deal with some of the problems relating to the liability of state officials for money damages under section 1983. That section provides for the indemnification of a state officer or employee for . . . any settlement or judgment rendered against him, so long as the act or omission which formed the basis for liability occurred during the performance of his duties and in the scope of his employment, and did not amount to gross negligence and was done without malice.

The legislative findings supporting section 16C are a salient example of the Maryland Assembly's acknowledgement of the need to protect state officials and employees from personal liability. That section provides, in part:

Recent court decisions throughout the country have created new grounds of personal liability of public officers and employees accruing from the discharge of their public duties. As a result it is becoming increasingly difficult to recruit and retain qualified personnel to serve in public positions that involve either the exercise of discretion or dealing with the public at large; and it has also become increasingly difficult and expensive to protect such officers and employees through public liability insurance.

As a matter of State policy, it is essential to protect State officers and employees, when acting within the scope of their public duties and responsibilities, from liability except for instances of malicious conduct or gross negligence.

In addition to section 16C, in Chapter 298 of the Laws of 1981, the General Assembly waived the immunity of the state and state employees in certain tort actions and provided that the State Treasurer provide self-insurance sufficient to cover the liability of the state and its employees. Finally, Maryland has instituted a number of formal and informal training sessions to avoid official misconduct that could give rise to such liability. For example, attorneys representing the state universities have conducted sessions outlining appropriate procedures to be followed by university officials in attempting to avoid liability for allegedly unconstitutional firing, hiring and tenure decisions.

Massachusetts

Since 1978, Massachusetts has had legislation eliminating personal liability of officers and employees of the Commonwealth and its political subdivisions. In cases where a government official or employee is sued for a negligent or

wrongful act or omission occurring within the scope of his office or employment, a suit against the governmental employer is the "exclusive" remedy. Mass. Gen. Laws Ch. 258, § 2. Commonwealth officials remain personally liable for their own intentional torts, as well as for civil rights violations under state and federal laws. However, section 9 of chapter 258 also authorizes the indemnification of Commonwealth employees from personal financial loss and the costs of attorneys' fees in an amount up to \$1,000,000, in cases where the Commonwealth retains its sovereign immunity, and the official or employee was acting within the scope of his duties or employment.

Massachusetts has had limited experience with risk management training in the area of section 1983. The Attorney General notes that the Commonwealth has been very fortunate in that only a few cases so far have resulted in damage awards against individual Commonwealth officials, and that even those awards have been relatively small.

Michigan

The State of Michigan may, but is not required, to indemnify or provide a defense against liability for officers and employees who are sued under 42 U.S.C. § 1983, where the conduct involved falls within that official's course of employment and scope of authority. Mich. Comp. Laws § 691.1408.

The Attorney General reports that in an effort to reduce liability under 42 U.S.C. 1983, his office continually counsels client agencies to improve their understanding of their legal obligations and the rights which citizens enjoy.

Minnesota

Under Minnesota's tort claims statute, Minn. Stat. Ann. § 3.736(9), the state "shall defend, save harmless, and indemnify any employee of the state against expenses, attorney's fees, judgments, fines and amounts paid" in connection with any tort claim arising out of an act or omission if the employee was acting within the scope of his employment. However, Minnesota's exclusion of liability for "any loss of benefits or compensation due under a program of public assistance or public welfare," *Id.* § 3.736(3)(i), should be reconsidered in light of recent Supreme Court interpretation of section 1983 liability.

According to the Attorney General, the state has not undertaken to provide risk management training for officials and employees.

Mississippi

The State of Mississippi, based upon the response of the Attorney General, appears not to provide for either the defense or indemnification of government officials and employees. Instead, official bonds are required to be taken out by office holders in order to exercise the duties and functions of their respective offices. In the application for these bonds, there is typically an indemnification agreement wherein the individual that is seeking the bond has to sign a document that guarantees that he will indemnify the bonding company against any losses, attorneys' fees, court costs, etc., that may be incurred in the defense of the bonding company in any action that may be filed against the official and the bonding company.

As a result of section 1983 actions being filed against state officials who

have bonds, even in cases where the officials prevailed in their defense, there have been cases in which cross claims have been filed against the individuals by the bonding company for indemnification for attorneys' fees and costs that for the bonding company. According to the Attorney General, in one case, the face value of the bond was only \$50,000, but the bonding company came back, after a successful defense on behalf of the officials by the State Attorney General's Office, and sought \$57,000 in attorneys' fees and costs from the state official who had the bond. Thus, the Attorney General notes that the bond approach has not only turned out to be worthless, but also has become a liability in certain types of actions.

Missouri

Missouri has not substituted enterprise liability for the liability of state officials or employees. However, according to the Attorney General, the response of the State of Missouri to the increasing number of lawsuits affecting the personal liability of state officers and employees for money damages has been to intensify its legal efforts in defending such lawsuits and by creating a tort defense fund for certain employees to pay judgments entered against them. Mo. Rev. Stat. § 105.710. The fund will provide a maximum payment of \$100,000 where the official acted "in connection with [his] official duties." The Attorney General will defend specified state officials and employees whom he has determined were acting in connection with their official duties.

With regard to risk management training, Missouri has enacted a minimum police standards bill providing for the selection and training of police officers. Mo. Rev. Stat. Chapter 590 (1978). In regard to suits by inmates of the state's correctional system against correctional personnel, there has been instituted an inmate grievance procedure which department personnel feel does cut down on the number of lawsuits filed.

Montana

Subject to certain limitations, every governmental entity is subject to liability for the torts of its employees. Mont. Code. Ann. § 2-9-102. In such cases, § 2-9-305(2) of the Annotated Code of Montana provides that in an action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission or other actionable conduct of the employee committed while acting within the course and scope of his office or employment, the governmental entity or employer shall be made a party defendant to the action. In addition, in any action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the governmental entity employer for any money judgments or legal expenses to which he may be subject as a result of the suit, unless the conduct upon which the claim is brought did not arise out of the course and scope of his employment or is an intentional tort or felonious act of the employee. *Id.* Liability is, however, effectively limited to \$300,000 per plaintiff and \$1,000,000 total for all persons injured by an instance of actionable conduct, according to the Montana Department of Administration. Mont. Code Ann. § 2-9-104.

The State self-insures for liability risks, except for automobile liability for which it obtains commercial insurance, Mont. Code Ann. § 2-9-201, and political subdivisions are authorized to self-insure similarly, *id.* § 2-9-211. With respect to 42 U.S.C. § 1983 actions, however, the Montana Department of Administration reports that the state has neither commercial nor self-insurance to cover liability. The state Department of Administration plans to seek legislation in 1983 providing for self-insurance for the state for § 1983 claims. The state will provide a defense for officials and employees sued for acts arising in the scope of their employment.

Montana has no disciplinary procedure that automatically comes into play when the state defends or indemnifies an official. Separate state official misconduct statutes, though, punish those who commit egregious acts. Montana conducts seminars and training programs for state employees in the areas of affirmative action, equal opportunity, and grievances.

Nebraska

The Attorney General reports that although Nebraska only recently instituted a limited indemnity program for state employees, Neb. Rev. Stat. § 81-8, 239.05, it has already indemnified employees of the state for two judgments rendered under section 1983. In addition, the Attorney General is required to defend any state officer, employee or agent if the action arose out of an act or omission occurring in the course and scope of employment, except that no defense is required if the act or omission amounted to malfeasance or a willful or wanton neglect of one's duty. *Id.* § 81-239.06.

Nebraska's Department of Correctional Services has on-going training in areas which might create liability under section 1983. The Attorney General was unaware of whether any other agencies of the State of Nebraska presently have specific training programs for liability under section 1983.

Nevada

Although Nevada has not adopted enterprise liability, the state has enacted comprehensive legislation to deal with the problem of liability under section 1983. Chapter 41 of Nev. Rev. Stat., § 41.0339, obligates the Attorney General to defend public officers and employees of the state and its political subdivisions in "any civil action" involving activities performed with the scope of an officer's or employee's public duties. Pursuant to Chapter 41, the Attorney General reports that he has defended many public officers and employees in lawsuits initiated pursuant to 42 U.S.C. § 1983.

The obligation of the state and its local governments to indemnify public officers or employees found liable in section 1983 litigation is covered by section 41.0349, which requires indemnification except in situations where (1) the person has failed to submit a timely request for defense; (2) the person has failed to cooperate in good faith in the defense of the action; (3) the act or omission of the person has been adjudicated not to be within the scope of his public duty; or (4) the act or omission of the person was wanton or malicious. Nevada law also permits the state and any local government to insure itself or any of its officers or employers against liability. Nev. Rev. Stat. § 41.038. The Attorney

General did not comment on Nevada's experience with risk management training.

New Hampshire

Chapter 99-D:2 of the N.H. Rev. Stat. Ann. provides that "if any claim is made or if any civil action is commenced against a present or former . . . official or employee of the state," the Attorney General shall defend such person or retain outside counsel to defend such person if he determines that the "acts complained of were committed . . . while acting within the scope of official duty and that said acts were not wanton or reckless." In such cases, the state is required to "indemnify and hold harmless such person" for any costs, damages, awards, judgments or settlements. The state is also self-insured. *Id.* § 99-D:3.

The Attorney General reports that although his office has not instituted any sort of risk management training, there are several courses being offered by the state for different types of state officials.

New Jersey

While New Jersey has not adopted enterprise liability, the extent of liability of officials or employees of the state is governed by the New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:1-1 *et seq.* Under the Act, either a public entity or public employee or official may have liability for money damages. The Act does provide that a state employee will be indemnified for any judgment rendered against him, *id.* § 10-1, including claims under 42 U.S.C. § 1983, for all actions taken within the scope of employment and not involving actual malice, fraud, willful misconduct or the commission of a crime. In no event may an employee be indemnified for an award of punitive damages. *Id.*

The Tort Claims Act also provides for the defense by the Attorney General of any employee or former employee of the state in "any action" brought on account of an act or omission in the scope of employment which did not amount to "actual fraud, willful misconduct or actual malice." *Id.* § 59-10A-1, -2. The Act governs the liability of all public entities in the State of New Jersey; however it only provides for and mandates defenses and indemnity by the State of its own employees. Public employees of other governmental entities such as counties and municipalities do not receive mandatory representation and indemnification but each such public entity may elect to provide same. A judgment against a public entity under the Tort Claims Act bars a judgment against a public employee for the same conduct and *vice versa*.

The Attorney General reports that there are presently no statistics available which would assist in making an analysis of judgments paid by the state or other public entities generally as a result of official misconduct. While it may be possible to identify civil rights suits filed against the state or state employees, they have not been catalogued by the nature of the allegations made. The Attorney General noted that most suits filed under 42 U.S.C. § 1983 have consisted of claims by prisoners, claims for money damages and injunctive relief in corrective mental health treatment, and claims for damages based upon alleged wrongdoing by law enforcement personnel.

According to the Attorney General, there is an active relationship between his office and the state agencies and officials being represented which provides counsel to these individuals on the latest legal developments and identifies conduct which may lead to liability. However, there are no formal statewide training programs addressed to avoiding or identifying official misconduct. Law enforcement agencies typically do have training programs which include consideration of the constitutional right of individuals.

What may be significant to the successful administration of federal assistance programs in New Jersey is the Attorney General's emphasis of two problems the state faces in defending or settling claims under 42 U.S.C. § 1983. The first is the reluctance of the courts to defer to state law on judicial and administrative proceedings and the second problem is that of attorneys' fees. With regard to the latter, two problems have occurred. The state has found that attorneys' fees have been awarded with only a limited review by the court of the amounts claimed such that these fees not only compensate a plaintiff's attorney but enrich him while the courts utilize the awarding of fees as a punitive measure. The result, according to the Attorney General, is that fee awards are excessive, and probably exceed the fees which would be charged to a client in any given case. In many cases, compensatory damages are non-existent or nominal but attorneys' fees are determined to be several orders of magnitude times the compensatory damages. This is so even where no substantial non-compensatory statutory or constitutional right is vindicated. Furthermore, the Attorney General reports that at least one federal judge in this District has taken the position that attorneys' fees cannot be the subject of a settlement between the parties as part of a settlement of all outstanding claims because of a perceived conflict of interest on the part of plaintiff's attorney. As a result, it has been very difficult to settle some cases, especially where the state is settling to avoid litigation and believes there is a serious issue as to whether a constitutional right has been violated.

New Mexico

The State of New Mexico, like California, Florida and Iowa, provides for the comprehensive coverage of officials and employees of both the state and its political subdivisions. *See* New Mexico Tort Claims Act, N.M. Stat. Ann. §§ 41-4-1 through 41-4-29 (1979). The obligation to defend and indemnify both present and former government officials and employees is contained in § 41-4-4(c), which provides:

When liability is alleged against any public employee for any torts alleged to have been committed within the scope of his duty, or for a violation of property rights or any rights, privileges or immunities secured by the Constitution and laws of the United States or the constitution and laws of New Mexico, the governmental entity shall provide a defense and pay any settlement or judgment. If an insurance carrier provides a defense to any public employee sued, the duty to defend imposed by this subsection shall be deemed to have been satisfied.

The Attorney General did not comment on the state's experience with risk management training.

New York

A telephone interview with an Assistant Attorney General of New York revealed that N.Y. Pub. Off. Law, Book 46, § 17, establishes a system for the defense and indemnification of state officers and employees who act within the scope of employment and are subsequently sued under section 1983. These protections are not available, however, to an officer or employee whose actions are determined to have been intentionally wrong or reckless.

North Carolina

North Carolina has not adopted enterprise liability. However, upon request, the Attorney General may, but is not required to, provide for the defense of any civil action brought against an employee or former employee in his official or individual capacity on account of an act or omission made in the scope and course of his employment as a state employee. N.C. Gen. Stat. § 143-300.3. In addition, § 143-300.6 provides, in part, that “all final judgments . . . against State employees in actions or suits . . . , or any amounts payable under a settlement . . . , shall be paid by the” authority which employs or employed the state employee.

North Dakota

North Dakota has not adopted enterprise liability, but authorizes the state agencies to insure against liability for any state employee. *See* N.D. Cent. Code, § 32-12.1-15. The Attorney General is required to defend any state employee for “alleged negligence within the scope of employment” when liability insurance coverage is not available. The Attorney General reports that the trend in North Dakota is toward the purchasing of liability insurance. North Dakota law also authorizes political subdivisions to purchase insurance coverage, *id.*, and requires that political subdivisions defend and indemnify employees for negligent acts or omissions which cause injury and which arise out of the scope of employment. *Id.* § 32-12.1-03.

Ohio

According to the Attorney General, the potential liability of state officers and employees for good-faith actions performed within the scope of their official responsibilities or employment has been a perplexing problem facing the State of Ohio for some time. In the last eight years alone, the Ohio General Assembly has enacted several pieces of legislation which contain “solutions” to the problem.

In 1974, the General Assembly enacted House Bill 800 which effectuated the waiver of sovereign immunity contained in Article I, Section 16 of the Ohio constitution and created a court of claims having exclusive original jurisdiction over all civil actions for damages filed against the State of Ohio. Chapter 2743, Ohio Rev. Code Ann., contains the statutory provisions relating to the state officers and employees to be joined with the state as defendants in actions filed in the court of claims. It was believed that plaintiffs would join the state officers and employees with the “deep-pocket” defendant, the state, instead of pursuing the individuals in separate actions filed in the common pleas courts of the state. Indeed, most plaintiffs either sued only the state or joined the individuals with

the state in actions filed in the court of claims. Almost uniformly when the court of claims rendered a judgment in favor of the plaintiffs it was issued only against the state or its named department and not against the individuals that had been joined as defendants. Thus, for a while, the initial legislative scheme provided some protection for state officers and employees.

However, plaintiffs quickly learned of the conservative nature of the court of claims and began filing civil actions against individual officers and employees in common pleas court and/or civil rights actions against the individuals in federal court in addition to filing an action against the state in the court of claims. The initial legislative response to this development came in the summer of 1975 when the General Assembly enacted legislation allowing specific state entities to purchase liability insurance covering the acts of their officers and employees. The amendment to section 2743.02, Ohio Rev. Code Ann., contained in House Bill 682 is illustrative of this initial response.

Liability insurance for some state entities proved to be a prohibitively expensive remedy to the problem. As an alternative solution, the General Assembly began to enact legislation permitting specific state entities to indemnify directly their officers and employees.¹¹²

In an effort to eliminate the separate common pleas court actions against individuals, the General Assembly enacted Amended Substitute House Bill 149 in 1977, which again amended Section 2743.02, Revised Code, to read:

(A) The state hereby waives, in exchange for the complainant's waiver of his cause of action against state officers or employees, its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent, that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee, the waiver shall be void if the court determines that the act or omission was not within the scope of the officer's or employee's office or employment.

* * * * *

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action except a civil action for one thousand dollars or less, that is filed in the court of claims.

The Amended Substitute House Bill 149 waiver has markedly reduced the number of separate common pleas court actions brought against individual state officers and employees. However, the waiver coupled with the aforementioned conservative nature of the court of claims has resulted in some plaintiffs electing

112. See Amendment made to Section 2743.02(C), Ohio Rev. Code Ann., by Amended Substitute House Bill 1192, accompanying the Attorney General's response in Appendix B.

to forego an action against the state in the court of claims and to pursue only a common pleas court action against the individual state officer or employee.

The Amended Substitute House Bill 149 waiver could not and did not affect actions brought in federal court based upon the alleged violation of federal constitutional rights by state officers and employees. By 1979, the number of pending section 1983 actions had increased to the point that the Attorney General organized a new federal litigation section to handle only section 1983 actions. Also, by 1979, a number of bills seeking to give various state entities the authority to purchase liability insurance and/or indemnify directly their officers and employees were pending before the General Assembly. A new "solution" was clearly needed.

On February 19, 1980, the General Assembly enacted Amended Substitute Senate Bill 76¹¹³ in the hope of finding a comprehensive solution to the problem. The major provisions of Amended Substitute Senate Bill 76 are:

1. The immunity of state officers and employees in civil actions for damages arising under the laws of the State of Ohio. Section 9.86, Revised Code.
2. The indemnification of state officers and employees from judgments and settlements in civil actions arising under the laws of the United States and the laws of a foreign jurisdiction. Section 9.87, Revised Code.
3. The defense of state officers and employees by the Attorney General when certain conditions are met. Sections 109.36 through 109.366, Ohio Rev. Code Ann.

The Attorney General reports that during the two years since their passage, the provisions of Amended Substitute Senate Bill have effectively protected state officers and employees from liability in and the expenses of defending against civil actions based on good-faith actions taken in the course of their official responsibilities or employment.

Oklahoma

Oklahoma law provides for the defense and indemnification of officers and employees of both the state and its political subdivisions, who act in good faith in the course of employment. Okla. Stat. Ann. tit. 74, § 20(f) and tit. 51, §§ 160 through 162.

Oregon

Section 30.260 *et seq.* of Or. Rev. Stat., entitled "Tort Actions Against Public Bodies," provides a comprehensive system for defending and indemnifying officers, employees and agents acting within the scope of their employment or duties. Oregon law also permits local governments to procure insurance against liability. *Id.* § 30.282.

Pennsylvania

Pennsylvania has not adopted enterprise liability, and the Attorney General reports that most civil rights suits against Commonwealth employees are in the area of inmate suits directed against correction officials. The Commonwealth's

113. A copy of this bill is included in Appendix B.

Employee Liability Self-Insurance Program (ELSIP) is designed to fund from departmental appropriations the payment of expenses and judgments arising out of section 1983 cases. In addition, the Commonwealth will defend and indemnify, pursuant to the provisions of its code of regulations, Pa. Code § 39.1 *et seq.*, Commonwealth employees and officials who are sued for alleged negligence or other unintentional misconduct occurring while in the scope of employment.

Political subdivisions of the Commonwealth are required, in certain cases, to defend and indemnify local government employees in actions arising out of an injury caused by the employee while within the scope of his office or duties. 42 Pa. Code § 8521 *et seq.* Pennsylvania law authorizes local governments to self-insure. *Id.* § 8564.

Interestingly, the Attorney General reports that the Commonwealth's ultimate monetary exposure to civil rights liability is very small and that, therefore, there is no ongoing systematic and comprehensive training to avoid official misconduct. All of the larger departments of Pennsylvania government do, however, have legal staffs and it is their duty to make employees aware of the proper legal manner in which to conduct their duties and this advice is given, *inter alia*, to insure compliance with all statutes and the Constitution. In particular, the Commonwealth's corrections officials are thoroughly trained before beginning assignments, and this training includes lectures and briefings by legal staff on constitutional legal policies. Similarly, the state police include lectures and briefings on this subject in their ongoing training programs. Also, upon the implementation of section 504 of the Rehabilitation Act of 1973 and its regulations relating to the handicapped (45 C.F.R. § 84.1), special educational sessions and briefings were arranged so that Commonwealth government would be in compliance with those regulations.

The Attorney General did note one particularly significant experience of the Commonwealth as a result of its enactment several years ago of a limited waiver of sovereign immunity for eight classes of torts, 42 Pa. Cons. Stat. § 8521 *et seq.*, and a later similar enactment as to local governments. The Attorney General believes this legal remedy reduced the number of civil rights actions. That is, when the Commonwealth enjoyed complete sovereign immunity, many persons affected by tortious conduct of officials would style those obvious tort cases as civil rights actions in federal court. Now that in fact Pennsylvania has an improved torts claim procedure, those types of civil rights cases have been reduced.

Rhode Island

Section 9-31-8 of R.I. Gen. Laws provides for the defense of state employees in any action brought on account of an act or omission that occurred within the scope of his employment. The Attorney General may, however, refuse to defend in certain enumerated situations which are determined to exist. *Id.* § 9-31-9. The State has discretion to indemnify any employee up to \$50,000, if a judgment is rendered against the employee.

South Carolina

Based upon the limited response of the Attorney General, South Carolina appears to have no formal system for the defense or indemnification of state

officials and employees in actions under section 1983. However, the State does provide very limited insurance coverage for certain torts. In addition, the Attorney General reports that South Carolina has not instituted any risk management training regarding official misconduct.

South Dakota

The Attorney General reports that South Dakota is just beginning to see the liability effects of 42 U.S.C. § 1983. One of the steps the state has taken concerning this liability is to purchase insurance coverage specifically for section 1983 liability.

Tennessee

The "Tennessee Governmental Tort Liability Act," Tenn. Code Ann. § 29-20-205 *et seq.*, governs the liability of governmental entities of the State of Tennessee for injury proximately caused by a negligent act or omission of any employee within the scope of employment, except for an injury that "arises out of the exercise or performance or the failure to exercise or perform a discretionary function." According to section 29-20-310(b):

No claim may be brought against an employee or judgment entered against an employee for damages for which the governmental entity is liable under this chapter unless the amount of damages sought or judgment entered exceeds the minimum limits set out in § 29-20-404 or the amount of insurance coverage actually carried by the governmental entity, whichever is greater, and the governmental entity is also made a party defendant to the action.

Under section 29-20-406, local governments may insure their employees against liability.

Texas

The State of Texas does not defend or indemnify public officials or employees, although the state is self-insured. The Attorney General reports that his office has conducted seminars, but not training sessions, and keeps state agencies apprised of changes or trends in the law and what conduct has been viewed as violative of section 1983.

Utah

The State of Utah has not adopted enterprise liability. However, Utah Code Ann., § 63-48-1 *et seq.*, provides for the indemnification of public employees for acts committed during the performance of their duties, within the scope of their employment, or under color of authority, so long as the act did not occur because of gross negligence, fraud or malice. Within the last year and a half, the State of Utah has instituted a self-insurance program, which covers both state agencies and state employees, up to the statutory limits of liability that may be recovered against the state and its employees for acts committed within the scope of employment.

Vermont

Title 12, § 5601 *et seq.* of the Vt. Stat. Ann., makes the state liable for "injury caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of his office or employment." Vermont

has purchased, pursuant to sections 1401-06 of Title 29, Vt. Stat. Ann., a general liability insurance policy to cover those instances where section 5601 does not provide protection for state employees, the most notable of which is "any claim based upon an act or omission of an employee . . . exercising due care, in the execution of a statute or regulation, . . . or based upon the exercise or performance of a discretionary function or duty on the part of a state agency."

The Attorney General reports that Vermont has not instituted any formalized training to avoid official misconduct.

Virginia

The Commonwealth of Virginia still recognizes the common-law doctrine of sovereign immunity as a bar to tort liability of the Commonwealth, its agencies, and officials. The recent Virginia Supreme Court decision in *James v. Jane*, 221 V. 43 (1980) summarizes Virginia law concerning tort liability of commonwealth officials. Under *James v. Jane*, Commonwealth officials are immune from liability for negligence where: (1) the official is acting within the scope of his official duties; (2) his duties involve substantial discretion; (3) the official's duties involve an activity in which the Commonwealth has a substantial governmental interest; and (4) the Commonwealth exercises significant control of the official's duties.

Virginia officials, of course, are subject to suit in federal court under 42 U.S.C. § 1983 and, therefore, have potential personal liability arising out of their employment. This potential exposure has prompted Virginia to address the question of official liability through insurance and preventive measures described below.

Effective July 1, 1982, the Virginia Tort Claims Act ("Act"), Va. Code § 8.01-195.1 *et seq.* waives the sovereign immunity of the Commonwealth for tort liability up to \$25,000.00 or an amount equal to the effective limits of any applicable liability insurance coverage, whichever is greater. This Act applies prospectively and only to the liability of the Commonwealth itself. It does not affect the sovereign immunity of Commonwealth officials. Thus Virginia has provided a limited remedy for some claims not recoverable from the employee or official responsible.

In 1973, the Virginia Attorney General proposed and assisted in obtaining for the Commonwealth a master insurance policy covering liability of state employees and officials. This master policy is available to any commonwealth agency on a voluntary basis. Agencies pay separate premiums based upon the number of employees covered and the liability risks associated with the agency's responsibilities. Of the approximately 135 separate commonwealth agencies, boards, commissions, and other commonwealth governmental entities, 65 such entities are presently covered by the master insurance policy. The policy covers negligent and wrongful acts of Commonwealth officials and clearly insures against potential liability of officials sued under 42 U.S.C. § 1983. Liability for punitive damages in excess of \$1,000.00, per occurrence, per employee, is expressly excluded from policy coverage.

A number of Virginia agencies not covered by the above described master policy have comprehensive general liability insurance policies which specifically

include negligent personal injury liability. These policies usually exclude coverage for wrongful acts and, therefore do not cover liability under 42 U.S.C. § 1983.

Virginia, unlike many states, has an Office of Risk Management which was established in 1980 as a part of the Department of General Services. Initially, the primary responsibility of the Office was insurance protection of commonwealth-owned real property and buildings.

The responsibilities of the Office have been broadened by 1982 legislation, authorizing the establishment of an insurance plan for the liability of the Commonwealth, its agencies, officials and employees. This insurance program will be established, in part, to provide coverage for potential liability of the Commonwealth as a result of the new Virginia Tort Claims Act.

The Office of Risk Management has no comprehensive records of the number or size of claims made or judgments paid under existing commonwealth insurance programs. This is due, in part, to the fact that the Office itself has existed only since 1980. There has been no requirement that agencies report such information to any centralized record keeping system. This Office has recently suggested to officials of the Office of Risk Management the importance of developing state-wide risk management information for future use.

Since the early 1970's the Virginia Department of Personnel and Training has conducted regular programs relating to affirmative action requirements, equal employment opportunity, and human relations management. Training has been provided to agency heads and their supervisory personnel in a workshop setting. These workshops typically include informative speakers, question and answer sessions, and distribution of written materials. According to the Attorney General, this training is designed to promote lawful employment procedures and to avoid possible official liability.

Washington

Washington has not substituted enterprise liability for official liability. However, the state, pursuant to Wash. Rev. Code §§ 4.92.060 and .070, provides for the defense and indemnification of state officers and employees in situations where such officers' and employees' "acts or omissions were, or purported to be in good faith, [and] within the scope of [their] official duties." In addition, the state has established a tort claims fund which pays all claims covered by section 4.92.070. See Wash. Rev. Code § 4.92.130. The Attorney General reports that some state agencies have had limited risk management training experience.

West Virginia

Enterprise liability has not been substituted for official liability. However, according to the Attorney General, all of West Virginia's state officials are covered by insurance for section 1983 personal liability. In addition, W. Va. Code § 8-12-7 permits local governments to purchase liability insurance coverage for local public officials and employees.

The West Virginia Department of Corrections has for about four years been offering correctional officer training at the West Virginia State Police Academy.

However, such training is not specifically addressed by legislation in West Virginia and funds have become increasingly scarce. In addition, the Attorney General reports that his office at times provides information to local officials, such as sheriffs and county commissioners, with regard to recent decisions which may affect them, but that the state's Department of Corrections has only considered some sort of "small claims" procedure for its inmates to help cut down the number of section 1983 lawsuits.

Wisconsin

Wisconsin has not adopted enterprise liability, and continues to enjoy sovereign immunity, *Fiala v. Voight*, 93 Wis. 2d 337, 286 N.W.2d 824 (1980), which is provided for in its constitution, and which the courts have ruled is procedural in nature and a matter of personal jurisdiction. Officers or employees of the state, however, are personally liable for actions taken in the course of their employment. *Cords v. Ehly*, 62 Wis. 2d 31, 214 N.W.2d 432 (1974); *Chart v. Dvorak*, 57 Wis. 2d 92, 203 N.W.2d 673 (1973). That liability is, however, limited to breach of duties which are ministerial, as opposed to discretionary, with a ministerial duty being described as one which is absolute and imperative, leaving nothing to judgment or discretion. *Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977); *Pavlik v. Kinsey*, 81 Wis. 2d 42, 259 N.W.2d 709 (1977); *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976). An action against an officer in his official capacity, under circumstances where liability is sought to be imposed on the office, rather than the person, gives rise to sovereign immunity. *Appel v. Halverson*, 50 Wis. 2d 230, 184 N.W.2d 99 (1971).

Against that background, the Attorney General reports that Wisconsin has sought to insure itself. Pursuant to section 895.46, Wis. Stat., the state assumes responsibility for the payment of judgments arising out of acts taken within the scope of employment, and for the payment of the costs of defense under the same circumstances, with the provision that the state has the option of providing counsel. Under section 165.25(6), Wis. Stat., the Attorney General is authorized to defend such actions, and is given the authority to compromise. Under section 893.82, Wis. Stat., notice to the office of the Attorney General is required and a limit is placed on the amount of recovery. The employee is not left bare for the excess, however, since the obligation to pay the judgment is contained in section 895.46, Wis. Stat., and is unlimited, section 893.82, Wis. Stat., because that statute does not place a limit on the state's obligation to pay, but on the amount of recovery so that in the case of multiple plaintiffs or defendants, the exposure is higher than the stated limit. The system covers everything, including medical malpractice at university hospitals, automobile liability for the entire state fleet as well as officers and employees driving personal vehicles on business and the traditional governmental liability.

The Attorney General identified three sources of official liability: civil rights actions brought pursuant to 42 U.S.C. § 1983, ordinary negligence actions brought pursuant to state law, and intentional tort actions brought pursuant to

state law including such things as assault (excessive force in arrest cases, for example) and defamation. Neither the notice requirements or dollar limits of section 893.82 apply to section 1983 actions.

The Wisconsin system has been in operation, with minor modifications, since about the middle of 1974, and according to the Attorney General, has served the state well. Loss experience is substantially lower than would reasonably be expected.

Wyoming

Wyoming has not adopted enterprise liability, although in 1979, Wyoming enacted the Governmental Claims Act, Wyo. Stat. § 1-39-101 *et seq.* The Act provides for sovereign immunity for all employees' actions within their authority except for certain enumerated torts, which include liability arising out of the operation of motor vehicles, aircraft and watercraft; maintenance of public buildings or parks; operation of airports; operation of public utilities; operation of health care facilities; negligence of health care providers; maintenance or operation of a public facility; and all tortious conduct of law enforcement officers. The maximum liability is \$500,000.00, and the governmental entity is obliged to indemnify its employees to that extent.

The Attorney General reports that most section 1983 claims in Wyoming arise out of tortious conduct of law enforcement officers. In such cases, the governmental entity employer indemnifies. When a non-law enforcement employee is sued under section 1983, Wyoming law provides a defense on behalf of the employee individually and, if the act complained of is within the scope of employment, indemnification would probably be available.

Section 104(a) of the Act provides the immunity described above, and Section 104(b) provides that a "governmental entity shall save harmless, and indemnify its public employees against any tort claim or judgment arising out of an act or omission occurring within the scope of their duties." One school construes this language as limited to those torts for which immunity is waived within the Act. The other believes that this language applies to "constitutional torts" under section 1983 for which liability exists independently of the Act. The question has not yet been judicially determined. The Attorney General reports that Wyoming has no training programs to reduce the risk of liability for official or employee misconduct.

C. The Congressional Response to Section 1983 Liability: Legislative Developments

As seen above, most states have enacted some form of legislation designed to provide a system of protections for state—and sometimes local—officials and employees from the threat of liability under 42 U.S.C. § 1983. Although a few state attorney generals who responded to the survey indicated that section 1983 had not been a major problem for the state, the most widely shared view of the state attorney generals was the suggestion that legislation be enacted to amend

sections 1983 and 1988 so as to negate the impact of *Thiboutot*, *Owen* and other recent cases.

During the 97th Congress, the Senate Committee on the Judiciary considered such amendments to sections 1983 and 1988. Hearings were held on S. 584 and S. 585, sponsored by Senator Orrin Hatch (R-Utah).¹¹⁴

S. 584, if enacted, would effectively overrule the decision in *Thiboutot* by deleting from section 1983 the phrase "and laws." Thus, claimants who feel they have been deprived of rights or benefits conferred under a federal assistance program would no longer be able to resort to section 1983 to remedy such deprivations on the basis of the "and laws" aspect of that provision.

S. 585, as reported by the Subcommittee on the Constitution on May 4, 1982, would restore the good-faith defense to local governments in damage actions brought under section 1983, thereby partially overruling the holding in *Owen*. However, unless S. 584 were also enacted into law, the enactment of S. 585 alone would not assure a noticeable decrease in the number of suits filed against local governments, since section 1983 would still be available for injunctive or other equitable relief.

As noted at the outset of this Chapter, consideration of section 1983 has been limited to the problem of "derivative" liability under federal assistance programs. Consequently, no attempt was made to explore the complex problems that section 1983 may cause for state or local officials in other contexts. While the testimony presented to the Senate Committee on the Judiciary vividly demonstrated the problems created for state and local governments and officials as a result of recent developments under section 1983, any legislation to amend that provision is likely to continue to generate controversy and face strong opposition from influential members of Congress and groups concerned with the protection of civil liberties. Given the controversy engendered by any discussion to amend section 1983, and because no parallel action to amend section 1983 has been undertaken in the House, the prospects for passage of such a measure in the near future is remote. In any event, amending section 1983—which even prior to *Thiboutot* served to vindicate a plethora of individual rights against governmental abuse—appears to be the least desirable, if not least feasible, way to ameliorate the threatening prospect of "derivative" liability.

D. A New Legislative Option

The case law analyzed above clearly points to the conclusion that federal assistance programs are an area ripe for litigation under section 1983. Moreover,

114. The Committee held four (4) days of hearings in 1981 at which representatives of several public interest groups such as the National Association of Attorney Generals, the National League of Cities, the National Institute of Municipal Law Officers and the National Conference of State Legislatures and the National Association of Counties testified in support of S. 584 and S. 585. See generally *Section 1983 Hearings*, *supra* note 28, at 593 (statement of Heinz Hink, representing the National League of Cities). Several individuals and representatives of other organizations—such as the American Civil Liberties Union—expressed deep concern about any legislation to amend either sections 1983 or 1988. *Id.* at 44 (statement of Steven Steinglass, representing the National Legal Aid and Defender Association).

increased litigation under section 1983 involving federal assistance programs is likely to have a serious and negative impact on the effective operation of such programs by state and local officials, even though these officials will be insulated from personal liability in situations where good-faith immunity is available.

However, fundamental changes in sections 1983 and 1988 appear to be the least appropriate way to address the problem of increased litigation under section 1983 arising from federal assistance programs. Instead, following the Supreme Court's decision in *Patsy*, Congress should conduct hearings in order to consider legislation that would require the exhaustion of state administrative remedies prior to bringing suit under section 1983 for an alleged violation of the terms or conditions of a federal assistance program by any state or local official or political subdivision of a state.¹¹⁵ The legislation should be applicable to all types of federal assistance programs. And importantly, exhaustion should not be required for actions brought under section 1983 which allege a colorable constitutional violation.

Such legislation could be drafted with the following goals in mind: preservation of existing remedies for the vindication of federal constitutional rights; providing aggrieved individuals or groups with an adequate, orderly, less costly and less time-consuming process for hearing their complaints; encouraging state and local grantees to maximize managerial efficiency of programs funded by federal assistance; ameliorating the adverse impact that increased section 1983 litigation could have on the successful assumption of responsibility by state and local entities for the administration and management of federal assistance programs; and reduction in the burdens that would otherwise be imposed on the federal judiciary if each time a complaint arises out of state or local administration of a federal assistance program, judicial action is required to settle that dispute.

Legislation to establish an exhaustion requirement would have the following key features:

(1) *Exhaustion*

A claimant would be required, prior to bringing an action under section 1983, to exhaust state administrative remedies which have been determined to be in substantial compliance with minimum acceptable standards promulgated by the federal agency having primary responsibility for the assistance program which forms the basis for the complaint or grievance.

(2) *Exceptions to Exhaustion*

Either the legislation, the regulations, or both, would set forth the following exceptions or qualifications with respect to the requirement of exhaustion:

- Claims based purely on alleged federal constitutional violations would not be subject to exhaustion in any case.

115. The administrative remedies provided to potentially aggrieved claimants and intended beneficiaries under the Rehabilitation Act of 1973, 29 U.S.C. § 722(d) and the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1415, as well as the regulations and the case law relating thereto, should also be consulted in developing the framework for legislation along these lines.

- A federal court would be authorized to grant interim relief in appropriate cases.
- A federal court would be authorized to waive the exhaustion requirement in any case in which the court determines that exhaustion would be futile or the administrative remedy would be clearly inadequate.

(3) *Minimum Standards*

A state or local government would not be required, as a condition to receiving federal assistance, to establish administrative procedures that comport with the federal minimum standards. State provision of such procedures would be voluntary. A state, for example, could provide whatever procedure it deems appropriate and might even choose not to provide any procedures at all. Importantly, however, the exhaustion requirement would only be applicable in those cases where state administrative procedures have been determined to meet the minimum federal standards.

Thus, there would be a built-in incentive—temporary relief from section 1983 actions—for states to develop procedures for dealing with problems which may arise out of state and local administration of federal assistance programs. In deciding whether to provide such remedies, states which serve fewer beneficiaries would likely weigh the benefits that would be gained by having to defend fewer section 1983 claims against the costs that would be incurred under an administrative grievance process. Those states which serve a greater number of beneficiaries—and thus face a greater potential or risk of being sued under section 1983—would be free to develop whatever procedures best meet their particular concerns or problems.

The minimum standards could be designed to address the types of claims or disputes likely to arise under a federal assistance program. Thus, the legislation should contain a requirement—similar to that found under 42 U.S.C. § 1997(e)—that the federal grantor agency consult with and solicit the views of state and local agencies and persons and organizations in its effort to develop adequate and appropriate minimum standards.

While the legislation should not attempt to establish the minimum standards that would apply in any particular case—a task to be performed by the appropriate grantor agency in consultation with identified persons and groups—the legislation could, in addition to the consultation requirement, contain the following general provisions:

- Specific maximum time limits for replying to grievance or claim filed by a party.
- Specific maximum time limits in which the relief requested would either have to be granted or denied.
- Priority processing of claims of an emergency nature, including those in which delay would endanger or create substantial risk of injury or damage to a person or group of persons.
- Safeguards to ensure independent decision making within the state administrative process.

- De novo review in every case of state administrative determinations as to questions of fact and law.
- Procedures for periodic review of the continued adequacy of state administrative procedures, as well as complaints about the integrity or fairness of a state's procedures.

It is recognized that the details of the proposed legislation raise many questions. Thus, the recommendation for congressional hearings is only a first step. As noted by the Supreme Court in *Patsy*—several important questions would be (1) how to define the types of federal assistance claims for which exhaustion would be required; (2) what tolling requirements and time limitations should be imposed; (3) what would be the *res judicata* and collateral estoppel effect of particular administrative determinations; and (4) how to deal with claims of a dual nature—i.e., those based on alleged violations of constitutional standards, as well as claims based on federal statutory rights.

E. Recommendation

The Supreme Court's expansion of the scope of 42 U.S.C. § 1983 to include claims based on alleged violations of federal statutory laws gives rise to the spectre of an increase in the number of section 1983 actions against state and local officials and municipalities involved with federal assistance programs. The continued devolution of responsibility for managing federal programs to the state and local levels is likely to add to the rise in these types of section 1983 claims still further.

Although most states have some system to insulate government officials from personal liability under section 1983, increased litigation under that section is sure to have an adverse impact on state and local administration of federal assistance programs. To date, efforts to address the problem of expanded section 1983 liability have focused exclusively on amending section 1983 by deleting the phrase "and laws," thereby negating the effect of the Supreme Court's decision in *Maine v. Thiboutot*.

However, in light of the importance of section 1983 in the vindication of personal rights, amending that section is the least viable alternative for ameliorating the somewhat more discrete problem of derivative liability and increased litigation involving federal assistance programs. Instead, following the Supreme Court's decision in *Patsy v. Board of Regents of Florida* and the suggestions made by several of the Justices in that case, this recommendation calls upon Congress to consider legislation that would require the exhaustion of state administrative remedies as a prerequisite to bringing an action under 42 U.S.C. § 1983 for an alleged violation of the terms, conditions or rights created by a federal assistance program by any state or local official or political subdivision of a state.

RECOMMENDATION

The purpose of this recommendation is to avoid an increase in the number of claims likely to be filed under 42 U.S.C. § 1983 against state and local

officials and municipalities involved in the administration of federal assistance programs, and to provide an alternative system for the resolution of such claims. In addition, this recommendation seeks to preserve existing remedies for the vindication of federal constitutional rights; provide an adequate, less costly and less time-consuming process for resolving disputes that arise out of federal assistance programs; encourage state and local governments to maximize managerial efficiency of programs and projects funded by federal assistance; ameliorate the adverse impact that section 1983 litigation would have on the successful operation of federal assistance programs by state and local entities and officials; and reduce the level of intervention by the federal judiciary in the administration of federal assistance programs. The recommendation set forth below should thus be applicable to all federal assistance programs benefiting state and local entities and third parties. Legislation to require exhaustion of state administrative remedies should contain the following general provisions:

(1) A third party or intended beneficiary of a federal assistance program would be required, prior to bringing an action under section 1983, to exhaust state administrative remedies which have been determined to be in substantial compliance with minimum standards promulgated by the federal agency having primary responsibility for the assistance program that forms the basis for the third party complaint or grievance.

State receipt of federal assistance would not be conditioned upon that state's agreeing to establish administrative remedies in compliance with minimum federal standards. Instead, state provision of adequate administrative remedies would be voluntary. However, the exhaustion requirement would only be applicable in those states where such remedies have been implemented.

(2) Claims based purely on alleged federal constitutional violations would not be subject to exhaustion in any case. In addition, a federal court would be authorized to grant interim relief in appropriate cases in accordance with federal rules of civil procedure, and would also be authorized to waive the exhaustion requirement in any case in which the court determines that exhaustion would be futile or the administrative remedy would be clearly inadequate.

(3) A federal agency having primary responsibility for the administration of federal assistance programs would promulgate—in consultation with state and local entities and interested persons and groups—minimum standards to guide states in establishing administrative procedures and remedies for third party complaints relating to such programs. Such standards would be patterned after the following general statutory requirements: specific maximum time limits for replying to a grievance or claim filed by a party; specific maximum time limits in which the relief requested would either have to be granted or denied; priority processing of claims of an emergency nature, including those in which delay would endanger or create substantial risk of injury or damage to a person or group of persons; safeguards to ensure independent decision making within the state administrative process; *de novo* review in every case of state administrative determinations as to questions of fact and law; and procedures for periodic review of the continued adequacy of state administrative procedures, as well as complaints about the integrity or fairness of a state's procedures.

APPENDIX C

ANNOTATED SURVEY OF LITERATURE

- I. Congressmen and State Legislators
- II. Federal Officials
- III. General
- IV. Judicial Immunity
- V. Municipalities
- VI. Presidential Immunity
- VII. State & Municipal Immunity Under the Civil Rights Act
- VIII. State Sovereign and Governmental Immunity

This collection of annotations is a selective survey of the commentaries concerning official liability for the period 1961 to 1982. The annotations are divided into eight general topics and are presented in reverse chronological order.

CONGRESSMEN AND STATE LEGISLATORS

Comment, Speech or Debate Clause Immunity for Congressional Hiring Practices: Its Necessity and Its Implications, 28 U.C.L.A. L. Rev. 217 (1980).

A comment centering on Davis v. Passman, 442 U.S. 228 (1979), beginning with an examination of the historical roots of the speech or debate clause. The author analyzes various Supreme Court rulings in order to delineate the scope of the privilege afforded by the Court. Finally, this comment takes a critical look at the Court's approach to the immunity's scope, and suggests a more equitable means of determining when the privilege should attach.

Comment, The Speech or Debate Clause in the Criminal Context, 15 New Eng. L. Rev. 407 (1980).

This comment analyzes the conflict between bribery prosecutions and the speech or debate clause and considers the role of the Supreme Court's decision in United States v. Helstoski, 442 U.S. 477 (1979) in seeking a resolution to the conflict. This is done by an examination of the decision; a look at the historical evolution of the speech or debate clause; and, an assessment of whether the Helstoski holding goes too far or not far enough toward preserving the role played by the speech or debate clause in the constitutional framework of separate but equal branches of government.

Hutchinson v. Proxmire: The Vanishing Immunity Under Speech or Debate Clause, 14 J. Mar. L. Rev. 263 (1980).

The author traces the evolution of the speech or debate clause from British common law through its application in Hutchinson v. Proxmire, 443 U.S. 111 (1979). The conclusion is reached that a narrow interpretation of the clause is appropriate in this case because the facts dealt with informing the public of the wasteful expenditure of tax money, a subject at the very heart of the legislative process.

Note, Legislative Immunity and Congressional Necessity, 68 Geo. L.J. 783 (1980).

Discussion of Hutchinson v. Proxmire in light of the historical development of the speech or debate clause and prior Supreme Court decisions. The author criticizes the Supreme Court's movement toward limiting the scope of immunity granted legislators and concludes that the decision in Hutchinson erodes the doctrine of legislative immunity which could lead to an undermining of the ability of Congress to legislate.

Note, Speech or Debate Clause and the Search for the Golden Fleece, 9 Cap. U.L. Rev. 729 (1980).

This note attempts to determine the present status of the speech or debate clause through an analysis of Hutchinson v. Proxmire and other recent Supreme Court decisions.

Further, it suggests alternative theories or factors which the Court could have used in reaching its decision in Proxmire.

Proxmire and the Golden Fleece: A Case Against Blanket Immunity Under the Speech or Debate Clause, 26 Loy. L. Rev. 159 (1980).

This article discusses the Supreme Court decision in Hutchinson v. Proxmire that congressional press releases and newsletters are not protected by the speech or debate clause. The author briefly discusses prior federal cases interpreting the clause and then examines the theoretical foundations of the Supreme Court's decision in Proxmire. The author examines Justice Brennan's dissent, and argues that it is unlikely that it will have sufficient force to give new life to the absolute immunity contained in the speech or debate clause.

Bolton, Vanderstar & Baldwin, The Legislator's Shield: Speech or Debate Clause Protection Against State Interrogation, 62 Marq. L. Rev. 351 (1979).

The authors of this article were co-counsel for former Congressman William A. Steiger who, at the time of his death, was litigating in the Wisconsin Supreme Court the question whether under the speech or debate clause a state prosecutor can compel a congressman to reveal the names of citizens who supplied, in confidence, information about legislative matters. The purposes and history of the clause are traced back to English laws, and Supreme Court decisions concerning the clause are discussed. The authors present arguments on why Rep. Steiger's conversations were protected and warn that if Congress and its members are to be denied access to useful information due to citizen reluctance to come forward without confidentiality, the institutional integrity of the legislative branch will be irreparably impaired.

Bradley, The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption, 57 N.C.L. Rev. 197 (1979).

The author examines the historical background of the speech or debate clause to determine whether the scope given the privilege by the courts has been appropriate. In opposition to those who have argued that the courts have interpreted the clause too narrowly, Bradley feels that the courts have taken too broad a view of the clause. Thus, a serious impediment to successful investigation and prosecution of congressional corruption has been created.

Comment, Sixth Circuit Court Recognizes Common Law Speech or Debate Privilege for State Legislators in Excluding Evidence of Bribery Solicited by State Senator, 13 Suffolk U.L. Rev. 1538 (1979).

A discussion of the sixth circuit's rationale for recognizing a speech or debate privilege in a bribery prosecution, United States v. Gillock, 587 F.2d 284 (6th Cir. 1978). The author criticizes the ruling and suggests that the court should have granted official immunity which would ensure legislative independence but permit a legislator to be prosecuted.

Comment, The Supreme Court Interprets the Speech and Debate Clause, 48 U. Cin. L. Rev. 1015 (1979).

The author of this comment analyzes several recent Supreme Court decisions interpreting the speech and debate clause and criticizes the Court's limiting the clause to formal proceedings by attempting to distinguish between legislative activity and political activity. The author argues that this test fails to recognize congressional functions which may not fall within protected "legislative activities" such as informing the public of legislative affairs and overseeing the executive and judiciary branches. The author calls upon the Court to constitutionally recognize these two important congressional functions.

Note, A Common-Law Privilege for State Legislators in Federal Criminal Prosecutions, 54 St. John's L. Rev. 79 (1979).

This note explores the problems involved in adopting a common-law speech or debate privilege for state legislators. It examines the many conflicting arguments advanced in circuit court cases that have considered this question. The writer demonstrates that neither the constitutional privilege as construed by the Supreme Court, nor its historical roots, prohibit state legislators from receiving protection in federal actions.

Note, Evidentiary Implications of the Speech or Debate Clause, 88 Yale L.J. 1280 (1979).

Through a discussion of United States v. Helstoski, 576 F.2d 511 (3d Cir. 1978), this note interprets the evidentiary privilege based on the distinction between protected legislative acts and unprotected non-legislative acts under the speech or debate clause. The author argues that reliance on this distinction would render bribery prosecutions of congressmen feasible while protecting the legislative process from improper interference.

Note, Judicially Created Criminal Immunity for State Legislators, 10 U. Tol. L. Rev. 1037 (1979).

To provide a basis for analysis of United States v. Gillock, this note examines the legislative history of Federal Rule of Evidence 501 and the historical development of the speech or debate privilege. The focal point of this note is the court's creation of an immunity privilege in federal criminal actions in the absence of a common-law precedent, a severe departure from the position adopted in other circuits.

Note, Looking for Privileges and Immunities, 41 U. Pitt. L. Rev. 89 (1979).

This note examines past Supreme Court interpretations of the privileges and immunities clause and the tests used by the Court to answer privilege and immunity questions. Two recent decisions, Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371 (1978), and Hicklin v. Orbeck, 437 U.S. 518 (1978), which used different tests in determining whether state laws were unconstitutional, are examined. The author argues that use of the Hicklin test, a general balancing of the federal interest in equal treatment against the state's needed leeway in protecting its own interests with weight given to the state justification factor, will result in increased litigation which will delineate the contours of the clause.

Note, The Case for a Speech or Debate Privilege for State Legislators In Federal Courts, 13 Val. U.L. Rev. 501 (1979).

This note first examines the common-law origins of the speech or debate clause in the English Parliament as a protective measure for members against criminal liability and interference by the Crown. Next, the scope of this privilege is viewed through Supreme Court decisions. This note discusses the Court's interpretation in Tenney v. Brandhove, 341 U.S. 367 (1951). Finally, an alternative solution to the question of a common-law speech or debate privilege for state legislators is proposed.

Note, Davis v. Passman: Will Bivens Survive?, 41 U. Pitt. L. Rev. 131 (1979).

This note, written before the Supreme Court handed down its decision in Davis v. Passman, argues that the Supreme Court should reverse the fifth circuit's decision refusing to extend the scope of Bivens to imply a cause of action for damages from the due process clause of the fifth amendment. The author argues that Bivens-type remedies are an important link in the protection of individual liberties. The Bivens doctrine should remain broad and should insure that where rights protected by the Constitution are violated, there will be a remedy when there is no adequate statutory substitute.

Comment, *The Constitutional Limits of the Speech or Debate Clause*, 25 UCLA L. Rev. 796 (1978).

This comment attempts to find a solution to the problem of mutually exclusive constitutional rights and privileges being asserted in cases involving speech or debate immunity. After tracing the English and American roots of the clause, the author examines the Supreme Court's treatment of the clause. According to the author, the most desirable solution would be enactment of a statute that provides for a limited waiver of the privilege of immunity in constitutional actions. The government would provide counsel, and would pay any damages out of a special fund established for such purpose. Suits by private litigants would be the only ones permitted under this scheme.

Comment, *Protection of State Legislative Activity From Federal Prosecution: Common-Law and Constitutional Immunity*, 58 B.U.L. Rev. 469 (1978).

The author attempts to determine whether any federal criminal immunity, either of common-law or constitutional origin, safeguards the performance of state legislative duties. Court decisions from the First, Third and Seventh Circuit Courts of Appeals holding that evidentiary privilege did not bar discovery of legislative activities in criminal prosecutions are examined. The development of the concept of legislative immunity is discussed and the circuit courts' reasoning in each of the decisions is reviewed and criticized. The author argues that courts should recognize a common-law immunity for state legislators charged with federal crimes, as well as a constitutional immunity for acts within their legislative function.

Comment, *McSurely v. McClellan: Civil Suits Under the Speech or Debate Clause*, 71 Nw. U.L. Rev. 783 (1977).

After analyzing application of the speech or debate clause as a defense to a civil suit stemming from a congressional investigation, the author concludes that absolute immunity should attach only when the investigation has a proper legislative purpose. The defendants also must neither disseminate actionable material outside Congress nor commit an unlawful act against the plaintiffs. The use of this test will aid in defining the line between guarding against abuses of power and ensuring unintimidated representation by members of Congress.

Comment, Neither Federal Speech or Debate Clause Nor Official Immunity Doctrine Bars Admission of State Legislators' Statements in Federal Criminal Proceedings, 8 Rut.-Cam. L. Rev. 550 (1977).

This comment criticizes the seventh circuit's refusal to afford a testimonial privilege barring inquiry into the official activities of a state legislator in a federal criminal prosecution, as a misapplication of the doctrine of official immunity (United States v. Craig, 537 F.2d 957 (7th Cir. 1976)).

Equal Access and the First Amendment: The Debate Behind "Speech or Debate", 4 Hastings Const. L.Q. 35 (1977).

A critique of the D.C. Circuit's holding in Consumers Union of the U.S. v. Periodical Correspondent's Assoc., 515 F.2d 1341 (D.C. Cir. 1975) in which the writer suggests that the court erred in its decision. She explains that this case could lead to a catalogue of potential constitutional horrors.

Greenberg, A Member of Congress is Liable for Damages Arising From His Sex-Based Dismissal of a Staff Member, But May Assert a Qualified Immunity Defense, 46 Geo. Wash. L. Rev. 137 (1977).

A discussion of Davis v. Passman, 544 F.2d 865 (5th Cir. 1977) in which the court concluded that a congressman's dismissal of an employee on the basis of sex is a basis for an action for damages under the Constitution. The court also held that such a dismissal is outside the scope of legitimate legislative activity as defined by the Supreme Court.

Note, A Speech or Debate Privilege for State Legislators Who Violate Federal Criminal Laws?, 68 J. Crim. L. 31 (1977).

The authors of this note examine a seventh circuit decision United States v. Craig that state legislators do not have a federal common-law speech or debate immunity privilege when being prosecuted for a federal crime. The authors trace the development of the speech or debate privilege and discuss a number of court decisions establishing its scope. After comparing the constitutional privilege with the doctrine of official immunity, the authors argue that the doctrine of official immunity for legislators is still a viable alternative for determining the scope of a legislator's privilege in those situations where a constitutional privilege is unavailable.

Cases, The Speech or Debate Privilege Enjoyed by State Legislators in Federal Criminal Prosecutions Arises Under Federal Common Law, 45 U. Cin. L. Rev. 325 (1976).

The author examines the seventh circuit's decision in United States v. Craig, 528 F.2d 773 (7th Cir. 1976) that the speech or debate privilege enjoyed by state legislators in federal prosecutions arises under federal common law and may be waived. The rationale and history of the speech or debate privilege are examined, as are Supreme Court decisions applying the doctrine to state legislators. The author believes that the application of an absolute common-law speech or debate privilege in the Craig context is inappropriate. Rather, evidence of state legislative activity should be considered privileged until the prosecution has established probable cause on the basis of other evidence.

Comment, Legislative Immunity: Congressional Investigators Immune From Charges of Invasion of Privacy, 28 U. Fla. L. Rev. 843 (1976).

The author discusses the holding in McSurely v. McClellan, 521 F.2d 1024 (D.C. Cir. 1975) that the speech or debate clause provides immunity for a congressional investigator's inspection, copying and transportation of material seized by a county prosecutor in violation of the fourth amendment, so long as the congressional aide did not participate directly in the fourth amendment violation. The development of the tests applied by the fourth circuit are discussed. The author criticizes the court's decision in McSurely and states that perhaps its most far-reaching impact is its apparent approval of potentially abusive investigatory powers for an agency that is not required to defend its actions in a court.

Speech or Debate Clause as a Defense in Private Civil Suits, 10 Ga. L. Rev. 953 (1976).

The recent use of the speech or debate clause as an obstruction to private civil suits does not seem warranted by the history of purpose of the clause. The author proposes a test -- based by analogy upon decisions in contempt proceedings initiated by Congress -- to balance constitutional interests at stake so that those acts by legislators that violate the constitutional rights of private citizens are not privileged.

Zweig, Congressional Agent's Seizure and Subcommittee's Review of Documents Known to be Irrelevant to Purpose of Investigation Are Still Within Immunity of Speech or Debate Clause Because Investigation is Facially Legislative and Because of Lawful Means Used to Obtain Documents, 65 Geo. L.J. 167 (1976).

Criticizes the decision in McSurely v. McClellan which excluded fourth amendment violations from protection under the speech or debate clause. The author argues that the court unjustifiably broadened the scope of the clause by holding that seizure of irrelevant material was immune from suit. The court is accused of sacrificing an individual's rights to ensure the goals of speech or debate for nonlegislative reasons.

Charney & Selvers, Executive Encroachment on Congressional Immunity, 50 St. John's L. Rev. 38 (1975).

This article discusses the opinion of the Court of Appeals for the District of Columbia Circuit in Hartke v. Federal Aviation Administration, 369 F. Supp. 741 (1973). In order to fully understand the implications of this decision, the author provides a brief examination of the origin and status of airport searches and the historical path which the congressional immunity doctrine has traversed.

Cella, The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality, 8 Suffolk U.L. Rev. 1019 (1974).

This article deals with developments in the area of the legislative privilege of speech or debate, and primarily concern its interpretation by the Supreme Court in United States v. Brewster, 408 U.S. 501 (1972), Gravel v. United States, 408 U.S. 606 (1972), and Doe v. McMillan, 412 U.S. 306 (1973). In the author's view, these cases present a direct threat to the continued functioning of the Congress as a coequal branch of government.

Comment, Congressional Prerequisites and Fair Elections: The Case of the Franking Privilege, 83 Yale L.J. 1055 (1974).

An examination of the different ways in which the courts and Congress have attempted to reconcile the conflicting needs for fair elections and subsidizing communication between the representative and constituent. Outlines the judicial attempts from 1968 to 1972 to resolve the problem by statutory interpretation; analyzes the solution offered by Congress in 1973; considers four traditional proposals and offers a proposal to allow the political market to balance competition with communication.

Kutner, Due Process of Debate: A Senator's Dilemma, 26 Baylor L. Rev. 287 (1974).

The author discussed the issues and implications of the case Gravel v. United States in which the Supreme Court held that certain arrangements established by Senator Gravel to publish the Pentagon Papers were not protected by the speech or debate clause. The positions and arguments of the individual Justices are examined in depth. The history of the clause is traced from its English roots, and American judicial precedents interpreting the clause are reviewed. The author concludes by discussing the arguments presented in the briefs filed in the case.

Note, Unenforced Congressional Subpoenas: Judicial Action and Congressional Immunity, 59 Iowa L. Rev. 581 (1974).

Consideration of two interrelated problems presented in United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (1973); the first is a discussion on whether the federal judiciary should expand protection to cover individuals whose first amendment rights are threatened by an unenforced congressional committee subpoena and who are without any alternative means for protection of those rights. Second, if the courts do so expand their protection, the question of whether congressional immunity under the speech or debate clause may bar judicial action.

Suarez, Congressional Immunity: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach, 20 Vill. L. Rev. 97 (1974).

A study of eight Supreme Court decisions involving interpretation of the speech or debate clause. The author attempts to extract a definitional approach to congressional immunity from each one. These approaches, as well as others, are criticized and an evaluation is made of their constitutional validity.

Comment, Immunity Under the Speech or Debate Clause for Republication and From Questioning About Sources, 71 Mich. L. Rev. 1251 (1973).

A discussion of Gravel v. United States which criticizes the Supreme Court's failure to define the proper role of the judiciary in adjudicating conflicts between different branches of the government and the place the speech or debate clause must necessarily have in defining this role. The author argues that the Court's imprecision was more than a missed opportunity to clarify the underlying rationale of the limitations on immunity, for it led the Court to restrict the scope of immunity unwisely with regard to Gravel's activities at a subcommittee meeting and to his aide.

Comment, Speech or Debate Clause -- Alleged Criminal Conduct of Congressmen Not Within the Scope of Legislative Immunity, 26 Vand. L. Rev. 327 (1973).

The author argues is that if the privilege of legislative immunity is to perform its traditional function of allowing legislators to carry out their duties without fear of prosecution, it should be applied broadly to effectuate its intended purpose of preserving the independence of the legislature. It should be left up to Congress to reprimand or expel any member found guilty of criminal transgressions.

Ervin, The Gravel and Brewster Cases: An Assault on Congressional Independence, 59 Va. L. Rev. 175 (1973).

The author asserts that the Supreme Court's decisions in Gravel v. United States and United States v. Brewster have restricted congressional immunity to the point where members of Congress can no longer acquire information on the activities of the executive branch nor report such information to their constituents without risking criminal prosecution. He concludes that these decisions pose a clear and present threat to the continued independence of Congress as a coordinate branch of government and constitute a further deterioration of its power and prerogatives in relation to the executive and judicial branches.

Note, Scope of Legislative Immunity Restrictively Extended to Aides, 4 Seton Hall L. Rev. 277 (1973).

A thorough examination of Gravel v. United States, which presents an analysis of the development of the speech or debate clause. The author submits that this ruling could allow one branch of government to enlist the aid of a second in subduing the proper operation of the third.

Note, Speech or Debate Clause, 22 De Paul L. Rev. 713 (1973).

A discussion of the Supreme Court's holding in Gravel v. United States. The author explores the nature of the legislative process and attempts to determine which of its aspects are entitled to the protection of the speech or debate clause.

Note, The Speech or Debate Clause and Immunity for Congressional Aides, 11 Duq. L. Rev. 677 (1973).

A discussion of the immunity doctrine as applied by the Supreme Court in Gravel v. United States. The primary focus is on Justice Stewart's suggestion that recognition of the immunity doctrine by the courts should be on a case-by-case basis in order to develop a proper scope of immunity which would prove to be adequate over the long-run.

Runstein & Silvergate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1,113 (1973).

The authors argue that the scope of the speech or debate clause must be defined historically. They trace the evolution of the privilege as a means of preserving legislative independence and conclude that the clause's current scope must encompass all legitimate functions of a legislature. This requires that the privilege be interpreted broadly to prevent executive intrusions. The authors also contend that a narrow viewpoint should be considered in private civil suits brought against congressmen or congressional committees, especially suits involving constitutional rights. Finally, because certain Supreme Court decisions have not afforded adequate protection, the authors outline several legislative options through which Congress could preserve its independence.

Comment, Speech or Debate Clause Held No Bar to Declaratory Judgment and Injunction Against Publication of Congressional Committee Report by Public Printer, 16 N.Y.L.F. 934 (1970).

The author discusses the declaratory judgment in Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970) and the issuance of a permanent injunction barring publication or distribution of a congressional committee report by the Public Printer and Superintendent of Documents. An action against the individual committee members was dismissed because of their immunity. The author supports the decision but notes an apparent inconsistency in affording absolute immunity to the defendants as individuals, while finding the report to have no relationship to proper legislative purpose. Because a revised report was subsequently issued by the Committee, supported by a House Resolution prohibiting obstruction by the courts, the author feels that the doctrine of legislative immunity prevented a test of the constitutionality of legislative activity in this case.

Note, Declaratory and Injunctive Relief Against a Congressional Committee, 1970 Wis. L. Rev. 1216.

A note discussing the appropriateness of declaratory and injunctive relief against a congressional committee and the effect of the speech or debate clause in the congressional immunity defense. Concludes that although used sparingly, declaratory and injunctive relief should be allowed to protect individual rights.

Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk U.L. Rev. 1 (1968).

In this article, the historical origins and development of the doctrine of legislative privilege, together with its underlying and emergent public policy considerations are discussed at length. Prior American judicial decisions making specific applications of this doctrine are discussed, as are the rationale and implications of Coffin v. Coffin, 4 Mass. 1 (1808).

Note, Speech or Debate Clause Held Bar to Injunction Against Contempt of Congress Proceeding, 43 N.Y.U. L. Rev. 1227 (1968).

A discussion of Stamler v. Willis, 287 F. Supp. 734 (N.D. Ill. 1968) which reaches the conclusion that courts should not hinder congressional investigations, despite claims of illegitimacy. However, when Congress seeks to test its investigatory power in the courts, the courts may properly inquire into whether the committee investigation is a legitimate exercise of legislative activity. Also concludes that injunctive or declaratory relief is inappropriate if the investigation was based on constitutional authority.

Comment, Scope of Immunity for Legislators and Their Employees, 77 Yale L.J. 366 (1967).

Traditionally, the scope of the speech or debate clause has been broadly interpreted to include much more than verbal expressions on the floor of Congress. However, its limits have never been entirely clear. This article discusses cases which suggest that the Supreme Court is beginning to narrow the reach of the clause.

Charles, "They Shall Not Be Questioned in Any Other Place": A New Look at Legislative Immunity, 3 L. in Trans. Q. 45 (1966).

This article focuses on a number of court decisions involving legislative investigations which strongly suggest that committees within the California state legislature may not have legislative immunity from actions brought on the basis of libel.

Comment, The Bribed Congressmen's Immunity from Prosecution, 75 Yale L.J. 335 (1965).

This comment criticizes the five arguments advanced by the fourth circuit in United States v. Johnson, 337 F.2d 180 (4th Cir. 1964). The author feels that the court's rationale in construing the free speech or debate clause is unsupportable as a comprehensive prohibition of any congressional attempt to subject its members to prosecution for bribery.

Note, Congressional Immunity and Conflict of Interest, 1965 Wis. L. Rev. 702.

A note on United States v. Johnson which brings up the issue of judicial jurisdiction over a congressman accused of bribery where delivery of a speech on the floor of Congress is an element of the alleged bribery. It suggests a choice between barring prosecution in order to uphold the integrity of independent legislative activity, or that bribery is a violation of the duties of public office which is subject to judicial inquiry.

Note, Absolute Privilege to Investigators for Congressional Committees, 63 Colum. L. Rev. 326 (1963).

A discussion of Wheeldin v. Wheeler, 302 F.2d 36 (9th Cir. 1962) involving an action for damages against a congressional committee investigator who allegedly exercised with malicious intent the subpoena power delegated to him. The case is considered in light of the developing law of personal immunity of administrative officials, and the problem of allowable extent of delegation of discretionary functions.

FEDERAL OFFICIALS

Blitz, Erosion of Official Immunity of Personnel Supervisors in the Public Sector, 8 Hastings Const. L.Q. 671 (1981).

This article identifies the areas in which a public personnel manager can injure constitutional interests of employees; it also analyzes the impact of Butz v. Economou, 438 U.S. 478 (1978), and the availability of a new remedy for constitutional transgressions committed by supervisors in the federal government.

Cass, Damage Suits Against Public Officers, 129 U. Pa. L. Rev. 1110 (1981).

This in-depth article reviews the law of official liability and attempts to assess the appropriate scope of personal damage liability for government officers. Cass probes into the value of official liability to secure appropriate official behavior and argues that it is a poor device to effect constraint of official authority. He feels that a better, if still imperfect, mechanism may be to hold the governmental enterprise, rather than the individual officer, liable for improper official conduct.

Note, Police Liability for Negligent Failure to Prevent Crime, 94 Harv. L. Rev. 821 (1981).

This note argues that the rule of law immunizing police officers from liability for negligent failure to prevent crime is not justified. A number of court decisions concerning attempts to recover against states and the federal government for negligent failure to prevent crime are discussed. The author calls for abandonment of the no-duty rule and adoption of an alternative liability approach. He discusses a number of proposals, arguing in favor of utilizing professional standards governing law enforcement crime prevention activity which would allow judicial review of all police activity, but would afford sufficient deference to police discretion.

Student Project, Constitutional Torts Ten Years After Bivens, 9 Hofstra L. Rev. 943 (1981).

This project attempts to define the legitimate contours of a federal cause of action for monetary redress for constitutional violations by establishing a normative theory for the judiciary's role. The authors conclude that the vitality of the Bivens cause of action is consistent with and compelled by the essence of civil liberties.

Burgess, Official Immunity and Civil Liability for Constitutional Torts Committed by Military Commanders After Butz v. Economou, 89 Mil. L. Rev. 25 (1980).

The author reviews the Supreme Court's decision in Butz v. Economou, and discusses its possible application to military commanders. It is argued that there is nothing to prevent application of this rule of law against commanders and that they could be sued and held personally liable for damages. She urges that commanders be made aware of this, and that remedial legislation be requested from Congress.

Comment, Bivens and the Creation of a Cause of Action For Money Damages Arising Directly From the Due Process Clauses, 29 Emory L.J. 231 (1980).

In assessing the due process developments since Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), this comment discusses the state of the law prior to Bivens, the Bivens decision itself, and the extension of the doctrine to the due process clauses of the fifth and fourteenth amendments. The author argues that recent cases have not provided the kind of guidance necessary to enable lower federal courts to make consistent decisions in the Bivens constitutional tort area.

Comment, Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act, 42 Conn. L. Rev. 492 (1980).

This article examines the inadequacies of remedies available to individuals under the Federal Tort Claims Act and other laws. The decision in Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979) is used to point out the failure of existing statutes to provide relief for constitutional violations. The author also examines the monetary relief that is available and the exemptions affecting the rights of military men. The article closes with a discussion of various proposals to amend the Tort Claims Act, including two that would make the U.S. the exclusive party defendant in civil actions arising out of acts or omissions of government employees.

Comment, Executive Immunity For Constitutional Torts After Butz v. Economou, 20 Santa Clara L. Rev. 453 (1980).

This comment on Butz v. Economou: (1) redefines a constitutional tort as it has been shaped by recent decisions; (2) documents judicial attacks on executive immunity; (3) discusses Butz in term of expanding levels of immunity; and, (4) offers suggestions to develop standards for deciding constitutional tort issues.

Dolan, Constitutional Torts and the Federal Tort Claims Act, 14 U. Rich. L. Rev. 281 (1980).

After first describing the law of constitutional torts and official immunity, the author examines a proposal to amend the FTCA to make the government the exclusive defendant in constitutional tort suits. He warns that although this proposal could alleviate the current problems of unproductive litigation and failures to provide relief for tort victims, such an amendment must be closely watched to insure it will not create a new set of problems in the area of liability.

Note, Davis v. Passman: A Private Cause of Action For Damages Under the Fifth Amendment, 41 La. L. Rev. 275 (1980).

A note on Davis v. Passman, 442 U.S. 228 (1979), in which the author suggests that the decision left to future cases the responsibility for precisely defining the nature of the Bivens remedy and determining the point at which judicial extension of the Bivens rationale will end.

Note, Federal Executive Officials: Absolute Immunity For Common Law Torts, 47 Tenn. L. Rev. 859 (1980).

A chronological evaluation of the doctrine of qualified immunity culminating with the Butz v. Economou decision. The author applies this analysis to the holding in Granger v. Marek, 583 F.2d 781 (6th Cir. 1978).

Note, Government Officials Charged With Violating Serviceman's Fifth Amendment Rights Not Entitled to Absolute Immunity, 11 Seton Hall L. Rev. 275 (1980).

Note discussing Jaffe v. U.S., 592 F.2d 712 (3d Cir. 1979) in which the writer contends that arguments in favor of absolute immunity apply with far more force to negligent activity than to willful deprivations of constitutional guarantees.

Note, Qualified Immunity for Federal Officials: A Proposed Standard for Defamation Cases, 58 Tex. L. Rev. 789 (1980).

This note argues that the common law/constitutional tort distinction of Butz is invalid and proposes that qualified immunity be applied regardless of the tort involved. The author addresses the tort of defamation and proposes a new form of qualified immunity that is appropriate for defamation suits against federal officials.

Bell, Proposed Amendments to the Federal Tort Claims Act, 16 Harv. J. Legis. 1 (1979).

The then Attorney General argues that the huge increases in Bivens claims against government officials and suits against federal employees in their individual capacities on common-law tort theories for acts performed within the scope of their duties is not serving the public interest. A citizen's remedies against the United States for an alleged wrongful act by one of its employees are discussed, along with the problems facing the government in these suits. Finally, various legislative proposals before the Congress that would amend the Federal Tort Claims Act are discussed.

Butz v. Economou: The King Can Still Do Wrong, 6 W. St. U.L. Rev. 355 (1979).

This article discusses Butz v. Economou, and specifically deals with the policy considerations which led the Supreme Court to redefine the immunity protection of federal officials within the executive branch. It also discusses whether the Court's solution is indeed workable.

Comment, FTCA: Liability of U.S. for Torts Committed in Good Faith by Federal Law Enforcement Officers, 63 Minn. L. Rev. 1293 (1979).

This comment focuses on the Federal Tort Claims Act as it specifically relates to the decision in Norton v. United States, 581 F.2d 390 (4th Cir. 1978). The court held in favor of the plaintiff and declined the government's defense of good faith on the part of its officials. The author believes the decision to be overly restrictive and charges that the court failed to fully effectuate the remedial purposes of the FTCA.

Comment, Scope of the Discretionary Function Exception Under the Federal Tort Claims Act, 67 Geo. L.J. 879 (1979).

The case of Wright v. United States, 568 F.2d 153 (10th Cir. 1977) held, inter alia, that government liability for two deaths on a bridge constructed by the Department of the Interior was barred, due to the discretionary function exception of the Tort Claims Act. This article discusses the case and reviews the legislative history of the exception. Supreme Court and lower court interpretations of the exception are also examined. Finally, the tenth circuit's discussion in Wright is examined and compared with the other decisions. The decision is criticized as being too broad and too vague.

Klein, Degree of Immunity Applicable to Federal Executive Officials Arising Under the Constitution, 52 Temp. L.Q. 102 (1979).

Note discussing Butz v. Economou, centering on the idea that the right to be compensated for injury to a constitutionally protected interest by a government employee should not hinge on fortuitous circumstances such as whether that officer is employed by a state or the federal government.

Note, Absolute Immunity Denied Federal Administrative Official, 27 Kan. L. Rev. 688 (1979).

This note discusses the development of the competing immunities doctrines, the policy considerations for executive immunity, and the Supreme Court's construction of a qualified immunity in Butz v. Economou from a line of cases that perhaps suggested a different result.

Note, "Damages or Nothing" -- The Efficacy of the Bivens-Type Remedy, 64 Cornell L. Rev. 667 (1979).

The author discusses the obstacles that face a plaintiff in suits against federal officials for damages arising from alleged violations of constitutional rights. The author supports creation of a discrete statutory scheme to insure compensation to deserving plaintiffs because he feels merely waiving sovereign immunity would not significantly increase compensation.

Note, Davis v. Passman: Will Bivens Survive?, 41 U. Pitt. L. Rev. 131 (1979).

This note, written before the Supreme Court handed down its decision in Davis v. Passman, argues that the Supreme Court should reverse the Fifth Circuit's decision refusing to extend the scope of Bivens to imply a cause of action for damages from the due process clause of the fifth amendment. The author argues that Bivens-type remedies are an important link in the protection of individual liberties. The Bivens doctrine should remain broad and should insure that where rights protected by the Constitution are violated, there will be a remedy when there is no adequate statutory substitute.

Note, Governmental Immunities For Governmental Officials, 11 Urb. Law. 172 (1979).

In recent years, since Bivens v. Six Unknown Named Agents, the courts have been busy recasting the applicability of governmental immunities in all tort damage suits. This note discusses the immunity standards applied to federal officials as well as state officials.

Note, Scope of Immunity Available to Federal Government Officials, 1979 Wis. L. Rev. 604.

This note analyzes Butz v. Economou. It also traces the development of the immunity doctrine and evaluates the court's holding in Butz in light of the major precedents. The note also addresses alternative approaches to the issue of immunity for federal executive officials.

Qualified Immunity for Executive Officials for Constitutional Violations: Butz v. Economou, 20 B.C.L. Rev. 575 (1979).

This casenote discusses the doctrines of absolute and qualified immunity as they existed prior to Butz. This is followed by a treatment of the precedential and theoretical problems created by the Butz decision. Lastly, the probable distinction between constitutional and common-law claims created by Butz is discussed and criticized as untenable and unwarranted. The author argues that the Supreme Court should create a general rule of qualified immunity for executive officials in all cases.

Rothenburg, Qualified Immunity for Official Acts, 21 A.F.L. Rev. 433 (1979)

The author argues that the Supreme Court will never grant absolute immunity for official acts where constitutional violations result. Nor will the Court grant immunity to an official who has been sued as an individual and leave the plaintiff without a remedy as long as the Federal Tort Claims Act gives the government immunity for the discretionary acts of its officials. The author suggests that quality of executive decision making is degraded when it is done with one eye on the courthouse door. He calls for legislation to provide proper redress to the injured party while at the same time freeing officials from an unnecessary burden.

Baxter, Enterprise Liability, Public and Private, 42 Law & Contemp. Probs. 45 (Winter 1978).

This article is a commentary on Mashaw, "Civil Liability of Government Officers." Through creation and analysis of an analogous situation set in the context of the private sector, the author illustrates why Mashaw's proposal to impose a system of enterprise liability on individual agencies might not have the desired effect. The author agrees that such a system deserves a good deal more thought, but re-emphasizes his belief that damage remedies against a government enterprise must be viewed primarily as compensation mechanisms rather than behavior modifiers.

Comment, An Intolerable Accommodation: A Fresh Look at the Immunity Doctrine, 27 Am. U.L. Rev. 863 (1978).

Although recent Supreme Court decisions suggest a retreat from increasing the personal accountability of public officials, future developments will probably not involve any dramatic changes in doctrine. The author suggests that the Court should further shape the doctrine, and continue use of a legal test that, while sensitive to the difficulties of high office, also protects the rights of injured individuals and gives government officials incentive to act carefully.

Comment, Qualified Abrogation of Federal Executive Immunity: A Risky Experiment in Judicial Legislation, 19 S. Tex. L.J. 683 (1978).

The purpose of this comment is threefold: (1) to trace the history of executive immunity; (2) to provide insight as to where the doctrine stands today; and (3) to demonstrate that absolute immunity for high-ranking executive officials should be reinstated for the benefit of the public-at-large.

Epstein, Private-Law Models for Official Immunity, 42 Law & Contemp. Probs. 53 (Winter 1978).

This article, a commentary on Mashaw, "Civil Liability of Government Officers," opens with a discussion of the principles of the private law of tort in an effort to determine the extent to which private-law models of individual obligation can be used to aid in clarification of the proper scope of special immunity for government officials. The author concludes that while tort law should govern in some circumstances, the class of cases involving discretionary administrative acts cause the private-law models to break down. The article concludes with the statement that it is the courts that must strike the balance in this area.

Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. U.L. Rev. 526 (1978)

This article argues that the immunity doctrine presently applied by the federal courts is overly protective of executive officials who violate individuals' constitutional rights. The author suggests a compromise between the need to redress constitutional torts and the need to protect innocent public servants, through a rule which, with proper safeguards, recognizes the role which fault should play in an expanded qualified immunity doctrine.

Grodin, The Impact of Stencel Upon Sovereign Immunity Under the Exclusive-Remedy Provision of the Federal Employees Compensation Act, 30 JAG 209 (1978).

The author states that the extent of third-party liability limitation against suit where the injured party is a federal employee covered by the FECA has not been determined by the Supreme Court. Therefore, this comment examines and analyzes the elements of Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977) and compares these factors to an analogous situation under the FECA.

Mashaw, Civil Liability of Government Officers: Property Rights and Official Accountability, 42 Law & Contemp. Probs. 8 (Winter 1978).

This article examines the rationale for the official immunity doctrine with regard to civil actions based on negligence, that is, failure to exercise due care under the circumstances. The author does this by: (1) exploring the range of harms caused by government officers; (2) outlining existing laws of official immunity; (3) analyzing the alternatives to civil liability; and (4) discussing the effects of civil liability on the behavior of government officials.

Note, Balancing the Vindication of Constitutional Guarantees Against the Effective Functioning of Government: The Official Immunity Scale Does Not Work, 28 De Paul L. Rev. 143 (1978).

This note on Butz v. Economou outlines the doctrine of official immunity as it exists today, analyzes the basis of the Supreme Court's decision and comments on the deficiencies of the official immunity doctrine. Finally, it discusses an alternative approach for balancing the competing issues.

Note, The Discretionary-Function Exception to the Federal Tort Claims Act, 42 Alb. L. Rev. 721 (1978).

This Note discusses the district court decision in Birnbaum v. United States, 436 F. Supp. 967 (E.D.N.Y. 1977) that the exemptions in the Federal Tort Claims Act do not apply to a C.I.A. mail-opening scheme. The legislative history of the discretionary-function exception is discussed, as are two tests developed by federal courts for determining whether particular government functions are discretionary. The author believes that although the Birnbaum decision's addition of a new factor to the tests might have some conceptual and practical problems, it does have strong policy advantages. The major benefit is allowing suits in tort where the government initiates illegal programs.

Olson, Official Liability and its Less Legalistic Alternatives, 42 Law & Contemp. Probs. 67 (Winter 1978).

This article is a commentary on Mashaw, "Civil Liability of Government Officers." The author, a professor of economics, tries to provide a framework for debating the issue of official immunity by discussing in a very broad context how government bureaucracies work to achieve social purposes and why elimination of official immunity cannot solve the problem of the inadequacies of bureaucracies and indeed, cannot even touch the largest part of that problem.

Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175 (1977).

According to the author, the lowering of the shield of immunity from government and its officers has created a problem of coordination. After briefly discussing the current status of sovereign and individual officer immunity, the author discusses a number of problems that have arisen because, as he argues, courts and legislatures have not thought out their decisions to include both governmental and officer liability, leaving the relationship between the two ill-defined. The author next discusses some alternatives to this parallel system, primarily focusing on government based liability with the option of later redress against the official if the government deemed it necessary. The article ends with a discussion of recent developments in governmental tort law in France and Germany.

Casto, Barr v. Mateo and the Problem of Coequal Protection For State and Federal Administrators, 13 Tulsa L.J. 195 (1977).

This article explores the propriety of a dual system of official immunities as first expounded in Barr v. Mateo, 360 U.S. 564 (1959). That decision has been interpreted as establishing a broad doctrine of absolute immunity for federal administrators, while other decisions indicate that state administrators are only entitled to qualified immunity.

Jacoby, Roads to the Demise of the Doctrine of Sovereign Immunity, 29 Ad. L. Rev. 265 (1977).

Adoption of Pub. L. No. 94-574 (90 Stat. 272), which partially eliminated the defense of sovereign immunity, seems to have succeeded in undoing some of the worst shortcomings in the area of sovereign immunity. The author calls for additional comprehensive study on possible revisions to some aspects of the Tucker Act, such as the non-liability of the government under contracts implied in law, and broad areas now excluded from Federal Tort Claims Act liability, such as the non-application of the absolute liability doctrine, or the statutory exclusion of affirmative relief even when a discretionary function is abused.

Lehmann, Bivens and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials, 4 Hastings Const. L.Q. 531 (1977).

The purpose of this article is threefold: (1) to determine what the Supreme Court held in Bivens v. Six Unknown Named Agents; (2) to analyze how lower federal courts have applied and extended the holding of Bivens; and (3) to consider which extentions have a legitimate basis in the language of the Court opinion and to determine what special advantages arise from basing a lawsuit on Bivens.

Note, A Federal Executive Official Will Not Be Accorded Absolute Immunity From an Action for Malicious Institution of Administrative Proceeding Because Performance of Executive Duties is Adequately Protected By a Qualified Immunity, 45 Geo. Wash. L. Rev. 861 (1977).

Note which suggests that the court in Economou v. United States Dept. of Agriculture, 535 F.2d 688 (2d Cir. 1976) discarded the rule established by the Supreme Court in Barr v. Matteo, 360 U.S. 564 (1959) that executive officials are entitled to absolute immunity from suit for common law torts committed by them in their official capacities. In doing so, the court failed to recognize the distinction between actions based on common law and those alleging violation of constitutional rights.

Note, Action For Damages -- Vicarious Liability of a Federal Official, 12 Land & Water L. Rev. 737 (1977).

An evaluation of Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976) in terms of the court's holding that the doctrine of vicarious liability has no application in a civil rights action for damages against a federal official. According to the author, this could result in there being no adequate remedy for injured parties and the public could be deprived of an effective means of holding public officials accountable for unconstitutional conduct.

Note, Economou v. United States Department of Agriculture: Blurring the Distinctions Between Constitutional and Common Law Tort Immunity, 18 Wm. & Mary L. Rev. 628 (1977).

The author reviews a Second Circuit Court of Appeals decision that officials of the Department of Agriculture and a subordinate agency were entitled to qualified immunity. It is argued that the court reached the right decision, but for the wrong reason because it failed to recognize the distinctive features of constitutional torts that may compel the grant of qualified immunity to government executives. According to the author, the Second Circuit erroneously equated common-law tort immunity with the immunity granted in suits alleging deprivation of constitutional rights. Because the author feels a qualified immunity standard, rather than absolute immunity, should apply to common-law torts as well as constitutional torts, he supports the decision.

Note, Federal Executive Immunity From Civil Liability in Damages: A Reevaluation of Barr v. Matteo, 77 Colum. L. Rev. 625 (1977).

This note examines the decisions in Barr and § 1983 cases, as well as lower court cases that have attempted to reconcile those decisions. It compares the interests at stake in tort actions against federal officials and § 1983 claims against state officers in order to discern possible differences justifying different standards of immunity. Finally, it discusses the functional approach to immunity followed in § 1983 cases and recommends that Barr be overruled in favor of this method of analysis.

Note, Federal Executive Officials Sued For Alleged Violations of Constitutional Rights Entitled Only to a Qualified Immunity, 53 Tul. L. Rev. 955 (1977).

A discussion of the justification for executive immunity relying on 2 bases: (1) it is unjust to hold executive officials liable for the exercise of their discretion, especially in the absence of bad faith; and (2) if the imposition of liability is possible, executive officials may be hesitant to carry out their duties.

Boger, Gitenstein & Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 N.C.L. Rev. 497 (1976).

This article describes the 1974 amendment to the Federal Tort Claims Act, the events which led to its enactment, and the methods suggested by the authors, by which it should be interpreted and implemented by the bar and by the courts. The authors believe that particular attention should be given to the legislative history of the amendment by the bar and courts. This will allow the amendment to serve as a spur to greater reform of the sovereign immunity doctrine.

Comment, Accountability for Government Immunity: Limiting Qualified Immunity and the Good Faith Defense, 49 Temp. L.Q. 938 (1976).

The author focuses on the civil damages remedy for official deprivations of constitutional rights, exploring the conflict between the protections afforded by the Bill of Rights and § 1983, and the policies underlying the doctrine of official immunity. A number of police misconduct cases are examined and the implications of their holdings discussed. The author calls for rejection of the standard adopted by the Supreme Court in Bivens II because he feels application of a lesser standard (good faith and reasonable belief) in civil cases than in criminal cases has created a dichotomy in the thrust of the fourth amendment.

Comment, Scope of Immunity From Damage Actions Available to Administrative Agency Officials, 30 Rut. L. Rev. 209 (1976).

This comment examines the court's reasoning in Economou v. United States Dept. of Agriculture for departing from the traditional application of the federal official immunity doctrine. It also suggests a framework for analysis of immunity questions.

Harris & Schnepper, Federal Tort Claims Act: Discretionary Function Exception Revisited, 31 U. Miami L. Rev. 161 (1976).

The authors attempt to refute the idea that the federal courts have taken confusing and inconsistent positions with regard to the discretionary-function exception to the FTCA. This is accomplished by analyzing recent opinions and finding a trend which has led to a less confusing and more definite framework depending upon certain factors which appear in every case. By analyzing these factors, the authors conclude that the outcome in this area will be susceptible to a higher degree of predictability.

Mayer, Immunity Denied to Federal Officials Failing to Perform Discretionary Duties, 35 Fed. B.J. 206 (1976).

A discussion of Estrada v. Hills, 401 F. Supp. 429 (N.D. Ill. 1975) which argues that the best solution for compensating victims of government negligence is for Congress to approve those amendments to the Federal Tort Claims Act which propose an exclusive remedy.

Murchison, Waivers of Intergovernmental Immunity in Federal Environmental Statutes, 62 Va. L. Rev. 1,177 (1976).

The author examines several Supreme Court decisions concerning the extent to which Congress intended the environmental statutes to waive federal immunity from state regulation. The statutes require federal agencies to comply with state environmental requirements. The decisions are criticized for strictly construing the waivers, and establishing a distinction between substantive and procedural regulations that the author feels will impede the achievement of the goals the environmental statutes.

Note, Congressional Control of Agency Privilege, 9 U. Mich. J.L. Ref. 348 (1976).

This note provides an introductory and largely historical analysis of "agency privilege," -- the refusal of federal executive officials to furnish information and documents to congressional bodies in the absence of a claim of privilege by the President.

Note, Damages for Federal Employment Discrimination: § 1981 and Qualified Executive Immunity, 85 Yale L.J. 518 (1976).

This note argues that personal liability of government officials can be provided by an alternative remedy for racial discrimination in federal employment: an independent action for damages and back pay against federal officials, brought under 42 U.S.C. § 1981 and tailored by the doctrine of qualified executive immunity.

Abernathy, Sovereign Immunity in a Constitutional Government: The Federal Employment Discrimination Cases, 10 Harv. C.R.-C.L. L. Rev. 322 (1975).

The author provides an in-depth review of the application of the sovereign immunity doctrine in one particular area of the law -- employment discrimination suits against federal officials. He also makes a general argument that the sovereign immunity doctrine reflects the allocation of power among the three branches of government, and that certain courts have misapplied the Supreme Court's basic rules of sovereign immunity in employment discrimination cases.

Berger, Congressional Subpoenas to Executive Officials, 75 Colum. L. Rev. 865 (1975).

A discussion of the issues surrounding congressional subpoenas which includes: (1) a survey of the historical roots of judicial review of congressional subpoenas; (2) an evaluation of the considerations governing judicial review of congressional subpoenas issued to private individuals; (3) the applicability of such considerations to congressional subpoenas issued to executive officials; and (4) the various methods of enforcement regarding executive officials.

Justice Department Officials Given Qualified Immunity in Civil Damages Action, 21 Wayne L. Rev. 1141 (1975).

A casenote on Bivens v. Six Unknown Named Agents, in which the author analyzes the Supreme Court's rationale and argues that the utilization of authority dealing with federal judicial review of state officials' actions to determine standards for review of the acts of federal officials is a disservice to the principles inherent in a system of government encompassing co-equal branches.

McManis, Personal Liability of State Officials Under State and Federal Law, 9 Ga. L. Rev. 821 (1975).

This article begins with a broad overview of sovereign and official immunity, both in the federal government and under Georgia law. The personal liability of state officials under the Civil Rights Act and various state laws is examined in some detail in an attempt to determine the scope of liability. The article ends with a brief discussion on means of lessening the impact of personal liability with a focus on liability insurance. The author argues that the antidotes to personal liability are clearly defined procedures, drafted with an eye toward protecting the rights of individuals, and well-trained and supervised personnel who are themselves accorded fair treatment.

Clark, Discretionary Function and Official Immunity: Judicial Forays into Sanctuary from Tort Liability, 16 A.F.L. Rev. 33 (1974).

This article argues that the courts are narrowing both the application of the discretionary function exception under the Federal Tort Claims Act, and the official immunity doctrine in individual damage actions. The balance between society's interests in redressing individual wrongs and in sparing our officials the burden of justifying their decisions is, according to the author, clearly shifting.

Horlbeck & Harkness, Executive Immunity and the Constitutional Tort, 51 Den. L.J. 321 (1974).

The authors undertake an examination of the justification for and the operation of the doctrine of official immunity, and attempts to determine the role executive immunity should play in constitutional tort cases. They concluded that the traditional test for determining whether immunity is available -- scope of authority and discretionary function -- should be amended by incorporating as a third element the good faith defense which is currently an independent defense.

Nahmod, Section 1983 and the "Background" of Tort Liability, 50 Ind. L.J. 5 (1974).

This article examines how courts have applied the "background of tort liability" dictum from Monroe v. Pape, and discusses the relevance of tort concepts in a section 1983 context, including issues of duty and standard of conduct, negligence, constitutional duty, and proximate cause. A brief overview is also provided of section 1983 defenses, including good faith and reasonableness, and consent. The author warns that courts in section 1983 cases must be careful not to let tort law alone determine section 1983 liability.

Note, Edelman v. Jordan: Protection of the Government or Protection From the Government?, 29 U. Miami L. Rev. 144 (1974).

A note commenting on Edelman v. Jordan, 415 U.S. 651 (1974) which praises the Supreme Court's decision for bringing a new perspective to the archaic doctrine of sovereign immunity while reinforcing the idea that the Constitution is meant to serve as a limit on the federal government.

Note, Executive Privilege May Not Be Asserted as a Defense to an Action for Damages for Deprivation of Constitutional Rights Without Showing Probable Cause, 18 How. L.J. 477 (1974).

A discussion of Sparrow v. Goodman, 361 F. Supp. 566 (W.D.N.C. 1973), a ruling which departs from the usual line of cases dealing with executive privilege, but one which is well-founded in common law. The author praises the court for properly recognizing the danger of allowing federal officers to escape liability at the expense of constitutional violations.

Note, Sovereign Immunity -- Scheuer v. Rhodes: Reconciling § 1983 Damage Actions With Governmental Immunities, 53 N.C.L. Rev. 439 (1974).

The author credits the Supreme Court with initiating a reevaluation of government immunity justification and for proposing a workable qualified immunity standard with regard to alleged abuses of discretionary power. Even though the Court has recognized the necessity for individual accountability in § 1983 actions, the next step is to assure that the accountability be extended to the government.

Reynolds, Strict Liability Under the Federal Tort Claims Act: Does "Wrongful" Cover a Few Sins, No Sins, Or Non-Sins?, 23 Am. U.L. Rev. 813 (1974).

This article attempts to determine the scope of the liability that may be imposed under the Federal Tort Claims Act for "ultrahazardous" activity in light of the Supreme Court decision in Laird v. Nelms, 406 U.S. 797 (1972). The author argues that the Act should be construed to include strict liability for ultra-hazardous activities.

Inadequacies of Federal Sovereign Immunity: A New Perspective, 61 Geo. L.J. 1535 (1973).

This article reviews the status of federal sovereign immunity under the Federal Tort Claims Act and the Tucker Act. The author argues in support of a complete elimination of the sovereign immunity defense by a statutory amendment that consolidates the current provisions permitting suit into a single statement making the United States liable, as a private person, for any acts or omissions of its employees or agents within the scope of their authority.

Note, Bivens v. Six Unknown Named Agents: A New Direction in Federal Police Immunity, 24 Hastings L.J. 987 (1973).

In exploring the result of Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972) this note traces: (1) the conflicting approaches to the immunity doctrine prior to Bivens and the double standard which afforded federal police an immunity denied state police; (2) the reasoning of the decision, its probable impact on other federal jurisdictions, and its effect upon individual federal police officers; and (3) the issues left unresolved by the Bivens decision.

Note, Utility, Fairness and the Takings Clause: Three Perspectives on Laird v. Nelms, 59 Va. L. Rev. 1034 (1973).

The author criticizes the Supreme Court holding in Laird v. Nelms, 406 U.S. 797 (1972) that the Federal Tort Claims Act does not allow the government to be sued in strict liability. The decision is described as having tenuous statutory construction, and myopic disregard of principles of constitutional law. The author uses three arguments in attacking the decision: a utilitarian argument advocating imposing enterprise liability on the government to generate efficiency, the fairness of subjecting citizens to unequal risks without the offer of compensation, and the failure to allow recovery when the government destroys private property.

Peck, Laird v. Nelms: A Call For Review and Revision of the Federal Tort Claims Act, 48 Wash. L. Rev. 391 (1973).

This article evaluates Laird v. Nelms in its historical context, criticizing the Supreme Court's rationale and outlining the problems the decision creates. The author argues that unless the Federal Tort Claims Act is amended to reject the decision, its coverage will be greatly reduced. This will result from liabilities being limited to those based upon proof of wrongdoing from liabilities being limited to those based upon proof of wrongdoing by employees for which the government is responsible on a respondeat superior basis.

Comment, Sovereign Immunity -- An Anathema to the "Constitutional Tort", 12 Santa Clara Law. 543 (1972).

This comment analyzes Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972), with emphasis placed on the nature of the cause of action and its relation to the government in terms of the conflicting interests of the federal courts in safeguarding an individual's constitutional rights and Congress' precluding certain suits against the government.

Jones & Davis, Recovery of Compensation From the Federal Government Where No Legal Action May Be Maintained: Profile of a Congressional Reference Case, 28 Mo. B.J. 69 (1972).

This article discusses the elaborate procedures involving cases of "Congressional Reference," a process where a claim against the government, which is without legal remedy is satisfied by private bill. In order to fully explain this process, the authors examine Sherman Webb et al. v. United States, 192 Ct. Cl. 925 (1970), an action based on such a proceeding.

Ausness, The Effect of Sovereign Immunity On Environmental Protection Suits Against Government Officials, 6 Val. U.L. Rev. 1 (1971).

This article traces the development of the immunity doctrine and considers its present and potential impact on environmental litigation.

Davis, Sovereign Immunity Must Go, 22 Ad. L. Rev. 383 (1970).

Professor Davis argues in support of an amendment to the Administrative Procedure Act to abolish sovereign immunity in suits in federal courts for specific relief. According to the author, sovereign immunity: (1) often causes serious, substantive injustice; (2) allows final determinations without regard to procedural justice; and (3) causes gross inefficiency in the allocation of functions between officers and agencies, by preventing courts from resolving issues and controversies they are especially qualified to resolve.

Sherry, The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the U.S. and N.Y. Court of Claims, 22 Ad. L. Rev. 597 (1970).

This article supports the thesis that popular disenchantment with judicial supervision of public administration is traceable to a preoccupation with the concept of sovereign immunity. The author challenges the assumption that the creation of judicial forums in which the sovereign may be sued ipso facto vitiates the sovereign immunity doctrine.

Cahn & Cahn, The New Sovereign Immunity, 81 Harv. L. Rev. 929 (1968).

The authors discuss the difficulties that are inherent in legal actions brought to force an agency to comply with a governing statute or internal regulations. They advocate establishing a citizens advocacy center to investigate complaints and monitor the discretionary actions of federal officials.

Reynolds, The Discretionary Function Exception of the Federal Tort Claims Act, 57 Geo. L.J. 81 (1968).

In an attempt to provide some guidelines to assist courts in applying the discretionary function exception to the Tort Claims Act, the author takes an in-depth look at court decisions and commentaries concerning the exception. He recommends that the variety of tests used in the past be dropped in favor of the "operational-planning" test which should also help to keep the discretionary function exception from swallowing the Act.

Comment, Immunity of Federal Officials from Civil Liability in Antitrust Suits, 19 Stan. L. Rev. 1,101 (1967).

This comment discusses: (1) the meaning of "scope of authority" and "acting within the outer perimeter of their line of duty," and (2) the extension of the immunity doctrine set forth in Barr v. Matteo to exempt government officials from liability for statutory violations and common-law torts other than libel and slander.

Dwyer, Responsibility of the Federal Government For Acts of Its Officials, 11 Rocky Mtn. Min. L. Inst. 395 (1966).

This article suggests that the doctrine of sovereign immunity is in a state of disrepute, without valid justification for its existence. The author contends that the doctrine gained its current status from continued use in cases where its presence was unwarranted.

Mikva, Sovereign Immunity: In a Democracy the Emperor Has No Clothes, 1966 U. Ill. L.F. 828.

This article is limited to a discussion of sovereign immunity in suits against the federal government. The primary focus is on the Federal Tort Claims Act, with particular attention to the exemptions outlined in sections 2680(a) and 2680(h) of the Act.

Note, Immunity of Public Official From Liability Under the Federal Civil Rights Act, 18 Ark. L. Rev. 81 (1964).

A survey of cases analyzing the difficulty of using the Civil Rights Act to protect an individual from official oppression, while at the same time, not subjecting honest, conscientious officials to the harrassment of vexatious litigation.

Abend, Federal Liability for Takings and Torts: An Anomalous Relationship, 31 Fordham L. Rev. 481 (1963).

This article opens with a discussion of the influence that the "contract theory" had, both before and after adoption of the Tucker Act, on suits against the U.S. This theory gradually diminished, although not disappearing, while the theory of claims standing alone on the Constitution gained strength. The author discussed the adoption of the Federal Tort Claims Act and criticizes the situation that developed where it appears recovery under the Tucker Act for tortious conduct can sometimes be greater than can be obtained under the Tort Claims Act. This results from the considerable interplay between the two statutes in the area of torts and "takings." The author suggests the possible remedy of repealing the exceptions to the Tort Claims Act.

Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963).

The author addresses himself to the history of sovereign immunity as applied to suits against administrative officers in England and the U.S. He analyzes English precedents to show that relief was available against the King's officers. He then shows how English doctrines not thought to involve the doctrine of sovereign immunity were preserved in American law, and protests the tendency of recent cases to explain these actions in terms of sovereign immunity.

Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209 (1963).

In this article, Part II of a series, the author examines the immunities of officers and of the state and the role of the damage action against the office and the state. The general treatment of the discretionary function is discussed. The author emphasizes the difficulty of making a determination of liability in case, involving negligence because of what amounts to "second guessing" the government decision.

Note, Actions "In Substance and Effect" Against the Government, 17 Rut. L. Rev. 475 (1963)

A discussion of Malone v. Bowdoin, 369 U.S. 643 (1962) presenting an historical analysis of official immunity beginning with United States v. Lee, 106 U.S. 196 (1882). The author concludes that: (1) Congress seems to prefer suits against the U.S. rather than its officers; (2) the decision in Malone is unnecessarily broad; and (3) the decision may tend to inhibit a growth of the law that would allow all parties to obtain relief from injury caused by the government.

The Supreme Court Refused to Expand the Exception to the Rule that the Doctrine of Sovereign Immunity Will Bar Suits Which Seek Specific Relief Against Federal Government Officials, 24 U. Pitt. L. Rev. 631 (1963).

A case note on Malone v. Bowdoin, which argues that the Supreme Court is not the proper institution to originally set the standard for determinations which affect the basic relationship between the state and the individual.

Becht, The Absolute Privilege of the Executive in Defamation, 15 Vand. L. Rev. 1127 (1962).

In answering the question, should executive officers have an absolute privilege to commit defamation, the author traces the evolution of the immunity privilege from its origin in England, through American state and federal courts. After balancing the factors for and against absolute immunity, the writer reaches the conclusion that officials should receive only a qualified privilege in defamation.

Comment, Suits Against Officers of the Federal Government, 16 Vand. L. Rev. 231 (1962).

An historical look at the doctrine of sovereign immunity as it applies to the Supreme Court's holding in Malone v. Bowdoin.

Hardin, Executive Privilege in the Federal Courts, 71 Yale L.J. 879 (1962).

The author contends that the executive branch has not cooperated with the judiciary to the extent that it properly should and safely could, and the courts' virtually unilateral efforts to avoid open conflict with executive officers have had some deplorable effects on the administration of justice.

Note, Suit for Specific Relief Against Federal Officers -- United States Not a Necessary Party, 59 Mich. L. Rev. 1270 (1961).

An examination of Bowdoin v. Malone, 284 F.2d 95 (5th Cir. 1960) in which the author attempts to clarify the extent to which the doctrine of sovereign immunity applies in suits against government officials, as opposed to suits against the U.S. itself.

GENERAL

Comment, Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act, 1981 Duke L.J. 116.

The comment examines the historical explanations for the doctrine of sovereign immunity as applied in non-statutory review actions and the doctrine's purposes in modern society. The author reviews the case law since the 1976 amendments to the Administrative Procedure Act to discover if the decisions comport with the doctrine's modern rationale.

Note, Official Immunity in Federal Court: Supreme Court of Virginia v. Consumers Union of the United States, 67 Cornell L. Rev. 188 (1981).

The author discusses the scope official immunity as developed and applied to state and federal executive, legislative and judicial officers by the Supreme Court. The recent decision Supreme Court of Virginia v. Consumers Union of United States, 446 U.S. 719 (1980) holding that the doctrine of legislative immunity bars a federal court from issuing an injunction against state court judges for promulgating rules regulating attorney conduct is examined. The decision is criticized for what is seen as a failure to consider the constitutional roots of official immunity.

Schuck, Suing Our Servants: The Court, Congress and the Liability of Public Officials for Damages, 1980 Sup. Ct. Rev. 281.

A discussion of Supreme Court's decisions during the 1979 terms expanding judicially sanctioned official and governmental liability. The author suggests that the trend toward holding public agencies and officials liable will produce less deterrence of illegality, less vigorous decision-making and less equity.

Weeks, Personal Liability Under Federal Law: Major Developments Since Monell, 13 Urb. Law. 263 (1980).

This article reviews various changes that have come about since Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The areas discussed are: redefinition of immunity for federal executive officials; liability of state agencies; decrease of Congressional immunity; and, the issue of liability arising out of negligent conduct.

Fox, The King Must Do No Wrong: A Critique of the Current Status of Sovereign and Official Immunity, 25 Wayne L. Rev. 177 (1979).

This article attempts to define the scope of sovereign immunity by reviewing significant cases involving the doctrine. The author analyzes the cases in light of the competing policies involved when immunity is raised, and explains a proper balance between providing adequate redress for those harmed and shielding public servants from liability in order to promote unfettered decision-making.

Stewart, The Enforcement of Judgements Against the United States, 12 Creighton L. Rev. 815 (1979).

Discussion of the judiciary's power to enforce a judgement for taking of property without relief, against the United States made possible by a waiver of immunity. The author argues that in the context of the fifth amendment, courts do have enforcement power, irrespective of congressional appropriation.

Boyer, Civil Liability for Prejudicial Pre-Trial Statements by Prosecutors, 15 Am. Crim. L. Rev. 231 (1978).

The author makes an analysis of the doctrine of prosecutorial immunity in light of the decision in Imbler v. Pachtman, 424 U.S. 409 (1976) and comes to the conclusion that a cause of action may lie under the Civil Rights Act to provide a remedy to defendants deprived of their right to a fair trial, due to pre-trial statements made by a prosecutor. Justice is best served, according to the author, by removing the shield of absolute prosecutorial immunity when such statements are made.

Friedman, Developments in Constitutional Law -- The Good Faith Defense in Constitutional Litigation, 5 Hofstra L. Rev. 501 (1977).

The author examines the decisions that have narrowed the scope of immunity for government officials -- federal, state and local -- whose actions are under attack. The development of the "good faith" defense and the Supreme Court's decisions are examined, as well as lower federal court decisions that amplified the holdings in those cases. The author lays out the chief features of the good faith defense.

Note, The Continued Restriction of the Federal Government's Immunity from State Taxation, 26 De Paul L. Rev. 874 (1977).

The author discusses the Supreme Court decision United States v. County of Fresno, 429 U.S. 452 (1977) upholding the right of two California counties to tax federal employees on their possessory interest in tax-exempt housing owned by the federal government. The note reviews the two-step process used by the Court in determining the constitutionality of the state tax.

Comment, Edelman v. Jordan: The Case of the Vanishing Retroactive Benefit and the Reappearing Defense of Sovereign Immunity, 12 Hous. L. Rev. 891 (1975).

The purpose of this comment on Edelman v. Jordan, 415 U.S. 651 (1974) is to explore possible means of minimizing the effect of the decision and to assess its departure from earlier decisions in terms of legislative, social and judicial history and objectives.

Vaughn, The Personal Accountability of Public Employees, 25 Am. U.L. Rev. 85 (1975).

The author traces the development of public employee liability in tort for acts committed in the course of public employment. After doing this, he proposes an alternative approach to public employee accountability. Vaughn advocates adopting a procedure to allow a private citizen to invoke the civil service system to act against public employees. The Swedish system for public employee accountability, which is similar to Vaughn's proposal, is discussed.

Comment, Participant Governmental Action Immunity From the Antitrust Laws: Fact or Fiction?, 50 Tex. L. Rev. 474 (1972).

The author discusses whether an agency delegated authority by a legislative body to accomplish a certain goal is immune from the antitrust laws if it participates in a transaction subject to antitrust challenge. The author recommends a distinction be made between "governing" and "procurement" activities for antitrust immunity. He feels the procurement function should be included under the antitrust laws.

Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972).

An examination of the Supreme Court's logic and the implication of its decision in Bivens v. Six Unknown Named Agents, which held that one whose fourth amendment rights have been violated by a federal officer has a cause of action for money damages based directly on that amendment. The author discusses the purpose of the fourth amendment, the power to infer remedies directly from the Constitution, and the respective institutional roles of the Court and the Congress in the implementation of the Constitution. The author argues that the court should be free to apply the same standard in creating constitutionally based remedies as it does in effectuating federal statutes, and that Congress may modify, within limits, judicially created remedial mechanisms inferred directly from constitutional provisions.

Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1 (1972).

This article discusses constitutional doctrines that have changed quite subtly but nonetheless radically during recent years. The author endeavors to show the contrast between the modern immunity doctrines and earlier American law, and to trace the process of conceptual confusion by which modern rules have gradually supplanted the old.

Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 389 (1970).

The author discusses the development of the doctrine of sovereign immunity in federal courts and argues in support of legislative measures to: 1) eliminate sovereign immunity as a barrier to judicial review of administrative action; 2) expand subject matter jurisdiction of U.S. district courts to accommodate such review, and to provide a remedy against the U.S. for the resolution of property disputes; and 3) eliminate the remaining technicalities concerning the identification, naming, capacity, and joinder of parties defendant in actions challenging federal administrative action.

Comment, The American Doctrine of Sovereign Immunity: An Historical Analysis, 13 Vill. L. Rev. 583 (1968).

This comment traces the historical evolution of sovereign immunity and analyzes the case law that has developed. It discusses the inter-relationship between the judiciary and the executive with special emphasis on whether the executive can have any influence on judicial formulation of the substantive doctrine of sovereign immunity.

Kramer, The Governmental Tort Immunity Doctrine in the United States 1790-1955, 1966 U. Ill. L.F. 795.

The doctrine of governmental immunity has persisted in various forms for hundreds of years and in many countries, and has been used to shield almost every conceivable type of political entity from suit. This article attempts to explain why this doctrine has endured for such a lengthy period of time.

Note, Tort Immunity of Minor Governmental Officials, 14 Clev.-Mar. L.R. 365 (1965).

The author discusses the issues that federal and state courts have considered in civil suits against public officials, including scope of authority, malice or ulterior motives, and discretion. The historical development of the doctrine of immunity is traced from its English roots. The author argues that federal courts are more willing than state courts to extend immunity to lower-ranking public officials.

Roady, Lee, Land, Larson, and Malone -- Sovereign Immunity Revisited, 43 Tex. L. Rev. 1062 (1965).

The author discusses four Supreme Court decisions involving the doctrine of sovereign immunity using the format of an epic poem. The four cases concerned the taking of property by the government without compensating the owners.

Littlefield, Stare Decisis, Prospective Overruling, and Judicial Legislation in the Context of Sovereign Immunity, 9 St. Louis U.L.J. 56 (1964).

The author discusses a number of court decisions applying or refusing to apply the doctrine of sovereign immunity in light of the principle of stare decisis, and examines the use by courts of prospective overruling of the doctrine of sovereign immunity.

Lawton, Disintegration of Governmental Immunity, 30 Ins. Couns. J. 251 (1963).

A survey of court decisions which found occasion to re-evaluate the concepts of governmental and charitable immunity. A number of courts have rejected one or both of these common-law principles. The author attempts to clarify the interaction of these principles.

JUDICIAL IMMUNITY

Note, Judicial Immunity: Developments in Federal Law, 33 Baylor L. Rev. 351 (1981).

This note discusses the development of the federal doctrine of judicial immunity, and the implied perimeters of judicial jurisdiction and function. It also considers the possible effects of traditional immunity upon liability of judges for attorney's fees and injunctive relief.

Note, Official Immunity in Federal Court: Supreme Court of Virginia v. Consumers Union of the United States, 67 Cornell L. Rev. 188 (1981).

The author discusses the scope of official immunity as developed and applied to state and federal executive, legislative and judicial officers by the Supreme Court. The recent decision, Supreme Court of Virginia v. Consumers Union of United States, 446 U.S. 719 (1980), holding that the doctrine of legislative immunity bars a federal court from issuing an injunction against state court judges for promulgating rules regulating attorney conduct is examined. The decision is criticized for what is seen as a failing to consider the constitutional roots of official immunity.

Note, The Right to Attorney Fees Versus Governmental Immunity, 1981 Det. C.L. Rev. 127.

The sole issue discussed in this note concerning Supreme Court of Virginia v. Consumers Union of the United States is the role the Virginia court played in relation to the Bar Code and the consequential effect on the plaintiff's entitlement to attorneys' fees. In other words, if the court is deemed to have acted in a legislative capacity, is the court immune from liability under the doctrine of legislative immunity?

Way, A Call for Limits to Judicial Immunity: Must Judges Be Kings In Their Courts?, 64 Judicature 390 (1981).

The author questions whether judges should have a qualified form of immunity, similar to that accorded to executive officials, or whether the present doctrine of absolute immunity is required. In deciding on the former, the author contends that qualified immunity would still protect judges from suits by disgruntled litigants, but not from suits by those who can prove judicial negligence or malice.

Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 Duke L.J. 879.

The author provides a detailed history of the doctrine of judicial immunity in English law and in the United States courts. The Supreme Court's decision in Stump v. Sparkman, 435 U.S. 349 (1978) that a judge is absolutely immune from suits for damages for his judicial acts, unless he acted in the clear absence of subject matter jurisdiction, is examined at length. The author argues in support of the principle that judicial immunity should not be available when the actions complained of prevented the complainant from seeking normal appellate correction of error.

Comment, Derivative Immunity for Private Attempts to Corrupt the Judiciary in Violation of 42 U.S.C. § 1983, 14 Ga. L. Rev. 344 (1980).

Comment on Sparks v. Duval County Ranch Co., 588 F.2d 124 (5th Cir. 1979) that analyzes the problems faced by the courts when the question of derivative immunity arises with regard to private co-conspirators. The writer agrees with the court's decision that immunity should never be permitted to be a means of defending judicial corruption. However, he feels the court might have overstepped its bounds in abolishing the doctrine altogether, including circumstances where the private person is acting in good faith in obedience to a judicial order.

Comment, Private Party Liability in Section 1983 Actions Alleging Conspiracy With Absolutely-Immune State Actors, 1980 Wis. L. Rev. 1056.

This comment examines three methods by which federal courts limit private-party liability under a section 1983 conspiracy based cause of action: (1) imposition of a particularized pleading requirement when conspiracy on concerted action with an absolutely immune state official is alleged; (2) use of the absolute immunity of the state actor to create a jurisdictional defect; and (3) application of derivative immunity to shield the private party from liability. The author argues that of the three approaches, only the first is legally sound. The author believes that the Supreme Court's reaffirmation of near-absolute judicial immunity in Stump v. Sparkman, coupled with lower court decisions expanding the classes of officials entitled to both qualified and absolute immunity will only encourage the filing of section 1983 conspiracy suits as plaintiffs attempt to enhance their chances of recovery.

Feinman & Cohen, Suing Judges: History and Theory, 31 S.C.L. Rev. 201 (1980).

An examination of the history of judicial immunity to determine if this reverence for the past is warranted. The authors also examine the issue on policy grounds, making a thorough review of the case law and literature. They conclude that immunity is indefensible on policy and historical grounds but do not aggressively argue for adoption of their suggested reforms.

Katz, The Quest for Qualified Judicial Immunity, 36 Mo. B.J. 376 (1980).

A basic rule of modern law is that a judge is immune from civil liability for actions within the scope of his jurisdiction, no matter how erroneous or malicious. This principle is derived from English common law and is intended to maintain the integrity and independence of our judicial system. This article examines whether this absolute privilege of immunity should be continued or whether a form of qualified immunity is more desirable.

Note, Liability of a Private Coconspirator Under 42 U.S.C. § 1983 When Acting in Conspiracy With An Immune State Judge, 33 Okla. L. Rev. 824 (1980).

This note discusses the validity of extending immunity to private individuals who act in conspiracy with an immune state judge to violate a person's constitutional rights. Specifically, it considers whether the immunity accorded a state judge should extend to his coconspirators in an action based on § 1983.

Note, Stump v. Sparkman: The Scope of Judicial and Derivative Immunities under 42 U.S.C. § 1983, 6 Women's Rts. L. Rep. 107 (1980).

This note argues that policy considerations do not support further expansion of judicial and derivative immunity. Defendants reach an understanding with a judge to violate another's constitutional rights should not be lightly excluded from liability on the strength of unexamined dictum which is being rejected by the circuit courts.

Note, The Abolition of the Doctrine of Derivative Immunity in the Fifth Circuit: Sparks v. Duval County Ranch Co., 32 Ala. L. Rev. 251 (1980).

The author traces the development of the doctrines of judicial and derivative immunity in the federal courts. More recent cases showing a shift in judicial opinion with respect to derivative immunity are discussed, including the Sparks decision which abolished the doctrine previously established in the Fifth Circuit. The author concludes that although the change in treatment of derivative immunity is encouraging, whether the doctrine will eventually be completely discredited is uncertain.

Note, The Abrogation of Derivative Immunity, 17 Hous. L. Rev. 399 (1980).

The author discusses the Fifth Circuit decision, Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979), that a state judge's co-conspirators are liable for damages under the Civil Rights Act of 1871, regardless of possible judicial immunity.

Note, Immunity Under § 1983: A Benefit to the Public?, 12 Conn. L. Rev. 116 (1979).

In analyzing Sparks v. Duval County Ranch Co., 588 F.2d 124 (5th Cir. 1979), this note discusses the validity of the court's affording a defendant state judge an unqualified immunity where criminal allegations had been raised against the judge. The court's strict adherence to vicarious immunity in § 1983 actions is also considered in light of decisions from other circuits rejecting this rule.

Note, Judicial Immunity -- Absolute Immunity Reaffirmed in Stump v. Sparkman, 27 U. Kan. L. Rev. 518 (1979).

This note analyzes the decision in Stump v. Sparkman with emphasis on the explications of the judicial act and jurisdictional requirements and evaluates Stump in light of the policy underpinnings of the judicial immunity doctrine.

Note, State Court Judge Has Absolute Immunity in § 1983 Action, 1979 Wash. U.L.Q. 288.

A note on Stump v. Sparkman which concludes that while the decision may lend impetus to the calls for extending only qualified immunity to judges, it precludes the possibility that the Supreme Court will actually take such action.

Comment, Judicial Act and Jurisdiction Broadly Defined, 62 Marq. L. Rev. 112 (1978).

An examination of Stump v. Sparkman in light of the historical context of two exceptions to judicial immunity: 1) acts that cannot be characterized as judicial acts, and 2) acts done in the clear absence of any jurisdiction.

Comment, Judicial Immunity: An Unqualified Sanction of Tyranny from the Bench?, 30 U. Fla. L. Rev. 810 (1978).

Comment on Stump v. Sparkman in which the author argues that the Supreme Court's analysis of the purpose of judicial immunity focused solely on the need to protect judges from malicious lawsuits, without considering the extent to which an individual's rights were circumscribed or whether an appeal was effectively foreclosed. According to the author, if the Court had balanced individual constitutional rights against the adverse effects of judicial liability, the result need not have been in favor of judicial immunity.

Comment, Judicial Immunity -- Courts of General Jurisdiction, 18 Washburn L.J. 158 (1978).

The author contends that the continuation of common-law immunity is of the highest importance. Judges should be guided by the constitution's due process guarantee, and an awareness that judicial immunity may reach out as an offensive weapon to do irreversible harm to those in whose interest the doctrine exists. The article argues that judges must remain sensitive to how far the veil of judicial immunity should extend.

Nagel, Judicial Immunity and Sovereignty, 6 Hastings Const. L.Q. 237 (1978).

The thesis of this discussion is that the rationales asserted by the Supreme Court in support of absolute judicial immunity do not justify the result. However, the alternative explanation of institutional self-interest does not fully explain the special status accorded the judicial function either.

Note, A Judge Can Do No Wrong: Immunity Is Extended for Lack of Specific Jurisdiction, 27 De Paul L. Rev. 1219 (1978).

After examining the evolution of the doctrine of judicial immunity, this note challenges the Supreme Court's application of the doctrine in Stump v. Sparkman. The author calls for a more rational immunity standard -- one under which society's interest in an efficient judiciary can be maintained while awarding damages when situations similar to Stump arise.

Note, Judicial Immunity: A Sword for the Malicious or a Shield for the Conscientious?, 8 U. Balt. L. Rev. 141 (1978).

An analysis of the Supreme Court's decision in Stump v. Sparkman. The author criticizes the Court for expanding judicial immunity and allowing the injuries which some persons will inevitably suffer at the hands of unscrupulous judges to go unremedied in order to allow all judges to be free from personal liability.

Note, Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability, 20 Ariz. L. Rev. 549 (1978).

This note examines the doctrine of absolute judicial immunity, including its history and exceptions, and discusses the most recent Supreme Court decisions on the subject. After analyzing the arguments supporting judicial immunity, the author offers a proposal that judges be granted only a qualified immunity so tort law can function to discipline the errant judge and compensate the injured.

Rosenberg, Stump v. Sparkman: The Doctrine of Judicial Immunity, 64 Va. L. Rev. 833 (1978).

This article discusses the issue of judicial immunity from suit, focusing on how the Supreme Court reached its decision in Stump v. Sparkman. The test that was articulated by the Court is discussed, as are the Court's expansive interpretations of subject matter jurisdiction and judicial acts. The decision is severely criticized, because the author feels it is a possible invitation to judicial lawlessness in the case of the vary judges who might be deterred from misconduct if the doctrine were less than all-embracing.

Kenyon, Judicial Immunity -- Who Will Defend the Judges?, 19 N.H. B.J. 93 (1977).

An examination of recent decisions under 42 U.S.C. § 1983 which have drawn important distinctions between administrative and judicial acts and their relationship to the public policy questions which underlie the doctrine of judicial immunity.

Note, Immunity of Federal and State Judges from Civil Suit - Time for a Qualified Immunity, 27 Case W. Res. L. Rev. 727 (1977).

The author reviews the doctrine of absolute judicial immunity and criticizes the policy considerations supporting total immunity. The civil law systems of judicial immunity in several foreign countries are described, as well as the qualified immunity granted other governmental officials here in the United States. The author argues in support of adopting a qualified immunity for federal and state judges.

Note, Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions, 1976 Duke L.J. 95.

The author examines the scope of immunity for "quasi-judicial officers" (prosecuting attorneys, clerks of court, parole board members, and prison officials) and attempts to illustrate how the Supreme Court decision in Scheuer v. Rhodes, 416 U.S. 232 (1974), redefined the scope of immunity for such officials by holding that even the highest executive officials of a state were protected, not by absolute immunity, but by a qualified immunity in section 1983 suits.

Judge, Scherott & Bliss, Judicial Immunity Under the Civil Rights Act: Here Come the Judges' Defenses, 7 J. Mar. J. Prac. & Proc. 213 (1974).

In light of the fact that the number of civil rights actions being filed against various members of the judiciary are on the rise, this article examines the defenses which are available to judicial and quasi-judicial officers in civil rights actions.

MUNICIPALITIES

Note, Municipal Tort Immunity in Virginia, 68 Va. L. Rev. 639 (1982).

This note discusses the developments of municipal immunity in common law and the application of the doctrine in Virginia. It examines the arguments supporting municipal immunity and the allocative nature of the doctrine. The author concludes that municipal immunity is not justified, and that a rule of liability would encourage more efficient decision-making.

Note, Taking the Chartered Route Around Municipal Immunity, 41 Md. L. Rev. 316 (1982).

An examination of the recent trend in court decisions arguing that insulating municipalities from tort liability unjustly renders a tort victim remediless. In reviewing two companion cases, James v. Prince George's County, and Dawson v. Prince George's County, 288 Md. 315, 418 A.2d 1173 (1980) the author illustrates the way in which Maryland's municipalities have struck a delicate balance between municipal immunity and tort victims' interests.

Note, Municipal Immunity: Developments Since Jackson v. City of Florence, 5 Am. J. Tr. Adv. 115 (1981).

A discussion of Jackson v. City of Florence, 320 So. 2d 68 (Ala. 1975) in which the Alabama Supreme Court abolished the doctrine of municipal immunity. The court recognized that the legislature has the power to provide any protections to municipalities it deems necessary. The focus of this note is the legislature's reaction to the court's observation.

Comment, Governmental Immunity Restricted for Municipalities, 18 Washburn L.J. 182 (1978).

An historical examination of municipal immunity in Kansas leading to the Kansas Supreme Court's decision in Gorrell v. City of Parsons, 223 Kan. 645, 576 P.2d 616 (1978) abolishing municipal immunity from tort liability.

Comment, California Governmental Immunity from Malicious Prosecution Liability: "There Oughta Be A Law", 17 Santa Clara L. Rev. 429 (1977).

This comment discusses the policy, illustrated by Collins v. City & County of San Francisco, 50 Cal. App. 3d 671, 123 Cal. Rptr. 525 (1975), of shielding governmental entities from liability for malicious prosecution. It also reviews the major California cases and the pertinent provisions of the 1963 Tort Claims Act (Cal. Govt. Code § 810 (West 1966)) which codified the law in this area.

Note, Board of Commissioners of the Port of New Orleans and Other Such Boards and Agencies are no Longer Immune From Suit in Tort. Board of Commissioners v. Splendour S. & E. Co., 273 So. 2d 19 (La. 1973), 23 Cath. U.L. Rev. 181 (1973).

The author discusses the Louisiana Supreme Court decision overruling prior decisions by holding that the Dock Board of the Port of New Orleans is not immune to suit. The history of the immunity doctrine in Louisiana courts is reviewed, as is the state constitution's provision authorizing the legislature to provide for suits against the state. Although the author views the court's decision as based on public policy considerations rather than substantive aspects of law and precedent, it is a decision he supports.

Comment, Case for the Abrogation of Municipal Tort Immunity in Mississippi, 41 Miss. L.J. 289 (1970).

The writers attempt to show the patent fallacy of the judiciary blindly labelling municipal corporate functions as either "governmental" or "private" as a condition precedent for adjudicating lawsuits involving municipal tort immunity. They contend that this antiquated rationale should be replaced with a modern outlook, i.e., a public policy favoring recovery for all municipal torts.

Note, Municipal Tort Liability in North Dakota, 46 N.D.L. Rev. 83 (1969).

The purpose of this note is to examine municipal tort liability in North Dakota; to determine the direction the courts appear to be headed; and, to present conclusions and recommendations. The writer attempts to reflect the North Dakota case law against Chapter 40-42 of the North Dakota Century Code, the primary section on tort liability.

Sease, Iowa Municipal Tort Immunity, 16 Drake L. Rev. 35 (1966).

A review of recent Iowa cases involving governmental immunity. The writer analyzes the present status of municipal immunity, and concludes that because it cannot be predicted whether the doctrine will apply in many circumstances, it should be abandoned.

Vanlandingham, Local Government Immunity Re-Examined, 61 Nw. U.L. Rev. 237 (1966).

The author reviews a series of decisions by various states' supreme courts abrogating or modifying the common-law doctrine of local governmental immunity from torts due to negligence. The historical development of sovereign immunity is traced from its English roots, with particular attention to judicial efforts to modify immunity and the problems this has raised. The author argues that because state legislatures have for the most part neglected their obligation to act, state courts have to deal with an issue that has become archaic and unjust.

Baum, Tort Liability of Local Governments and their Employees: An Introduction to the Illinois Immunity Act, 1966 U. Ill. L.F. 981.

This article is intended to serve as an introduction to the Illinois Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. Ch. 85 §§ 1-101 to 10-101 (1965)), touching on its background, the basic immunities it establishes and the policies upon which they rest. The author discusses some of the questions raised by the Act's numerous and sometimes complex provisions.

Fleming, The Abolishment of Municipal Immunity in Wisconsin, 23 Gavel 8 (1962).

This article discusses the impact of Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1960) on Wisconsin municipalities. This decisions, and others like it, emphasize the need for legislative action to establish a ceiling upon the amount of damages recoverable in tort claims, and additionally, to create a statue of limitations upon such actions.

Michigan No Longer Recognizes the Doctrine of Governmental Immunity As Applied to Municipalities, 8 How. L.J. 58 (1962).

A discussion of Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) in which the writer contends the court's decision is sufficiently broad to encompass the abolition of immunity of all governmental bodies thus putting Michigan in the trend toward municipal responsibility for ordinary torts.

Note, Local Government Immunity From Tort Liability Removed, 10 U. Kan. L. Rev. 610 (1962).

A discussion of Muskopf v. Corning Hospital District, 11 Cal. Rptr. 89, 359 P.2d 457 (1961), in which the writer compares that decision with Kansas cases involving municipal liability.

Halperin v. Kissinger: The D.C. Circuit Rejects Presidential Immunity From Damage Actions, 26 Loy. L. Rev. 144 (1980).

Casenote on Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979) in which the author suggests that the problem of presidential immunity might best be solved if Congress amended the Federal Tort Claims Act. This amendment would delete the immunity currently granted to the federal government for acts of its officials and employees, and would allow the government to recoup damages due to their actions.

Note, Presidential Immunity From Constitutional Damage Liability, 60 B.U.L. Rev. 879 (1980).

This note argues that the qualified immunity doctrine should not apply to the President; rather, he should continue to enjoy absolute immunity from damage liability. The author reviews traditional and current immunity doctrines and suggests that the current law reflects a preference for inherent systematic checks on unconstitutional conduct.

Comment, Executive Privilege and the Congress: Perspectives and Recommendations, 23 De Paul L. Rev. 692 (1978).

This comment analyzes the statutory authority and constitutional theory behind the doctrine of executive privilege. The author attempts to demonstrate that there is no solid basis for its existence; furthermore, its unsupported assertions have relegated Congress to a role of executive "caddy" in the legislative process, resulting in the growing cynicism of the American people toward their government.

Demonstration that Documents Were Arguably Relevant and Likely to Lead to Admissible Evidence Was Sufficient to Overcome a Presumption that Presidential Communications are Privileged from Discovery in Civil Cases -- Sun Oil Co. v. United States, 514 F.2d 1020 (Ct. Cl. 1975), 44 Geo. Wash. L. Rev. 816 (1976).

Discussion of executive privilege and how it affects the discovery process. The author concludes that the Court of Claims properly held that the presidential privilege of confidentiality cannot be absolute in civil litigation, yet the fact that the court allowed this privilege to be overcome merely by plaintiff's argument of relevancy could result in the effective extinction of presidential privilege in civil discovery. It is suggested that the court should have been more consistent with the Supreme Court's decision in United States v. Nixon, 418 U.S. 683 (1974), so as to preserve the vitality of executive privilege.

Note, Executive Privilege: Myths and Realities, 8 Sw. U.L. Rev. 931 (1976).

An historical examination of executive privilege with respect to United States v. Nixon, in which the author attempts to give a precise and rigorous definition of this concept. He clearly demonstrates that executive privilege is not a myth but a privilege which in fact does exist.

Hager, The Constitution, the Court and the Coverup: Reflections on United States v. Nixon, 29 Okla. L. Rev. 591 (1976).

An examination of the events surrounding the Supreme Court's holding in United States v. Nixon -- how the case arose and what it decided. The effect of Nixon on the constitutional process, judicial review, and government secrecy is also discussed.

Owens, The Establishment of a Doctrine: Executive Privilege After United States v. Nixon, 4 Tex. So. U.L. Rev. 22 (1976).

This article focuses on the judicial treatment of a claim of executive privilege and two questions which arise upon the making of such a claim: 1) Whether there is any such privilege recognized by the courts under the circumstances of a particular case. 2) What are the parameters of the privilege?

Rhodes, From Burr to Nixon, 35 Fed. B.J. 218 (1976).

An historical discussion of executive privilege comparing the rationale of the Supreme Court decision in United States v. Nixon with John Marshall's arguments in United States v. Aaron Burr, 25 Fed. Cas. 187 (No. 14,694) (D. Va. 1807).

Berger, Executive Privilege: A Reply to Professor Sofafer, 75 Colum. L. Rev. 603 (1975).

Berger's rebuttal to Professor Sofafer's review of his book Executive Privilege: A Constitutional Myth (1974). Mr. Berger concedes that criticism plays a necessary role in testing the truth of a scholarly work but feels that the critic must himself be above reproach. He submits that Professor Sofafer has failed in this task.

Berger, Executive Privilege in Light of United States v. Nixon, 9 Loy. L.A.L. Rev. 20 (1975).

An historical look at the doctrine of executive privilege as it applies in United States v. Nixon. This discussion is based on the author's extensive research of the doctrine as originally treated by the authors of the Constitution.

Berger, Executive Privilege, Professor Rosenblum, and the Higher Criticism, 1975 Duke L.J. 921.

Berger's rebuttal to Professor Rosenblum's review of his book, Executive Privilege: A Constitutional Myth (1974) in which Berger concluded that executive privilege does not have a constitutional basis. Berger criticizes the review for its blatant disregard of the historical facts which led to his conclusions.

Clark, Book Review, Executive Privilege: A Review of Berger, 8 Akron L. Rev. 324 (1975).

A review of Raoul Berger's Executive Privilege: A Constitutional Myth (1974), in which the reviewer disagrees with Berger's central position, while hailing the work as a monument to scholarly research.

Comment, Executive Privileges: What Are the Limits?, 54 Or. L. Rev. 81 (1975).

This comment probes the meaning of executive privilege, sorting out the privileges which comprise it and identifying the source and scope of each. The author supports the theory that with careful attention to certain distinctions, a clear identification of legal issues is presented when executive privilege is claimed.

Danielson, Presidential Immunity From Criminal Prosecution, 63 Geo. L.J. 1065 (1975).

An examination of the question whether the President is immune from criminal prosecution while in office. The author concludes that although the Constitution expressly grants limited privilege from arrest to Senators and Representatives, it confers no similar privilege on the President. Historical data provided by the author suggest that the framers of the Constitution considered such a provision and rejected it.

Elles, Comments on Executive Privilege in Light of United States v. Nixon, 9 Loy. L.A.L. Rev. 33 (1975).

A response to Raoul Berger's discussion of executive privilege in which the author objects to what he sees as Berger's preoccupation with original intent. The author's first complaint concerns the theoretical and practical implications. The second concerns the difficulties involved on determining with accuracy and clarity the original intent of the authors of the Constitution.

Rotunda, Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote, 1975 U. Ill. L.F. 1.

This article does not attempt to set out all circumstances under which a former or sitting President may be compelled to give evidence before a judicial or congressional body. Rather, by using specific historical examples, the author attempts to demonstrate that arguments asserting that compelled testimony will cause the downfall of our political system are groundless.

Albert & Simon, Enforcing Subpoenas Against the President: A Question of Mr. Jaworski's Authority, 74 Colum. L. Rev. 544 (1974).

An analysis of two questions raised by Mr. Jaworski's need for additional information and President Nixon's reliance on executive privilege in resisting the subpoena. The questions are: 1) Whether Mr. Jaworski's competency to represent the U.S. against the President is properly conferred by law, and, if so, 2) whether such a law is constitutional.

Berger, The Incarnation of Executive Privilege, 22 UCLA L. Rev. 4 (1974).

This article attempts to analyze the struggle between the judiciary and the executive over which is the final arbiter of the limits of presidential privilege as encompassed in United States v. Nixon.

Comment, Executive Privilege to Withhold Information From Congress: Constitutional or Political Doctrine, 42 UMKC L. Rev. 374 (1974).

This article attempts to refute the claim that there is an absolute, unchecked executive privilege to withhold information from Congress, and to demonstrate that executive privilege is necessarily limited and its exercise must be subject to judicial review in order to prevent abuse.

Comment, Great Cases and Soft Law: A Comment on United States v. Nixon, 22 UCLA L. Rev. 76 (1974).

A comment on United States v. Nixon, analyzing the decision's significance as precedent against the background of the unusual events of Watergate. The author suggests that perhaps the Supreme Court should not have heard the case at all, and left the outcome to our political system, i.e., the two other branches of government.

Comment, United States v. Nixon and the FOIA: New Impetus for Agency Disclosure, 24 Emory L.J. 405 (1974).

The main argument of this comment is that the decision in United States v. Nixon will have an important effect by increasing agency disclosure of material covered by the FOIA Exemption 5 (inter- and intra-agency communications) leaving intact Exemption 1 concerning material containing military secrets.

Ervin, Controlling "Executive Privilege", 20 Loy. L. Rev. 11 (1974).

The author discusses the issues that arose as a result of then-President Nixon's broad claim of executive privilege in the Watergate case. The problems these claims presented to Congress are described, as is a detailed argument in support of legislation that would prevent such broad claims.

Gard, Executive Privilege: A Rhyme Without Reason, 8 Ga. L. Rev. 809 (1974).

An examination of the validity of a presidential claim of executive privilege when exercised against a congressional inquiry by analyzing arguments previously used by proponents of executive privilege. After evaluation of the historical usage theory it is suggested that history does not support it. Next, the separation of powers justification is undercut by close examination of constitutional principles. Finally, the author attacks the various public policy arguments used to support the privilege.

Gunther, Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process, 22 UCLA L. Rev. 30 (1974).

Most of the attention regarding United States v. Nixon, focused on the separation of powers pertaining to judicial-executive relations. This article focuses on a less prominent dimension of this controversy: the impact of the Supreme Court's action on the relative strengths of the legislature and judiciary.

Karst & Horowitz, Presidential Prerogative and Judicial Review, 22 UCLA L. Rev. 47 (1974).

This article discusses the role of the courts in relation to presidential powers, focusing on: 1) The argument that the President is constitutionally immune from the judicial process to compel production of subpoenaed information; and 2) the argument that the President has an absolute, unreviewable, discretionary privilege to control the release of information.

Kurland, United States v. Nixon: Who Killed Cock Robin?, 22 UCLA L. Rev. 68 (1974).

A survey of the role of the Supreme Court in the events of Watergate. Cases reviewed are: New York Times Co. v. United States, 403 U.S. 713 (1971) (Pentagon Papers Case); O'Brien v. Brown, 409 U.S. 1 (1972), Cousins v. Wigoda, 409 U.S. 1201 (1972) (Democratic Convention Cases); and United States v. Nixon, 418 U.S. 683 (1974). According to the author, each case demonstrates the Court's role as one which was not contemplated by the authors of the Constitution.

Kutner, Executive Privilege ... Growth of Power Over a Declining Congress, 20 Loy. L. Rev. 33 (1974).

The author discusses his theory that the problems executive privilege have come about through the gradual erosion of the powers of Congress in conjunction with the steady growth of a powerful, centralized presidency.

Nathanson, From Watergate to Marbury v. Madison: Some Reflections on Presidential Privilege in Current Historical Perspectives, 16 Ariz. L. Rev. 59 (1974).

An inquiry into the question of presidential privilege, in relation to its immediate impact on the problems of Watergate, as presented in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), and in relation to its long-term implications for the office of the presidency and the practice of separation of powers.

Note, Executive Privilege: Tilting the Scales in Favor of Secrecy, 53 N.C.L. Rev. 419 (1974).

The author discusses the Supreme Court's decision in United States v. Nixon which held that while executive privilege is rooted in the Constitution, the courts must be the final arbiters of the scope and validity of any claim of privilege. Brief outlines of earlier Court decisions with regard to executive privilege are provided. The decision in Nixon is criticized for adopting a test for determining the need for disclosure that is seen as being inequitable to those seeking the release of information.

O'Brien, The Dissenting Opinions of Nixon v. Sirica: An Argument for Executive Privilege in the White House Tapes Controversy, 28 Sw. L.J. 373 (1974).

In this article, the author attempts to explain the legal and political foundations of the concept of executive privilege which he feels has historically been a part of our constitutional system of government.

The President Does not Have an Absolute Privilege to Withhold Evidence From a Grand Jury -- Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), 87 Harv. L. Rev. 1557 (1974).

A discussion of Nixon v. Sirica in which the Court of Appeals rejected the President's broad claims of executive immunity and privilege. The author concludes that unlike the Burr decision, the unusual circumstances in this case -- evidence of criminal wrongdoing by Presidential advisors, the President's handling of the tapes, and his personal interest in the outcome -- provided a number of possible reasons for the court to reject the President's claims.

Sofafer, Book Review, Executive Privilege: A Constitutional Myth, 88 Harv. L. Rev. 281 (1974).

Professor Sofafer's review of Raoul Berger's book. The reviewer praises Berger's scholarship, but attacks the book as being wholly one-sided and misleading.

Note, United States v. Nixon: What Price Unanimity?, 2 Ohio N.U.L. Rev. 303 (1974).

This note attempts to answer the question: to what degree did the Supreme Court in United States v. Nixon effectively underwrite a broadened executive privilege while simultaneously declining to adopt the president's interpretation of that privilege's contours?

Note, Policing the Executive Privilege, 5 U. Mich. J.L. Ref. 568 (1972).

This note reviews the nature of the controversy which contributed to the introduction S. 1125, 92d Cong., 1st Sess. (1971) by Senator Fullbright, and examines the provisions of the bill.

Ervin, Executive Privilege: The Need for Congressional Action, 62 Ill. B.J. 66 (1973).

The author asserts that the Watergate hearings and other investigations point toward the need for a free flow of information between the executive branch and Congress. Legislation which has been introduced and would require federal officials to appear and testify when requested is discussed, with the author concluding that more than a climate of cooperation and goodwill is needed.

Berger, Executive Privilege v. Congressional Inquiry, 12 UCLA L. Rev. 1044 (1965).

A history of the century-old battle between Congress and the President over the legislature's claims of constitutional power to inquire into executive conduct and the President's claim of privilege in withholding information.

STATE & MUNICIPAL
IMMUNITY UNDER THE CIVIL RIGHTS ACT

Note, Municipal Corporations are Immune From Exemplary Damages Under 42 U.S.C. § 1983, 13 Tex. Tech L. Rev. 156 (1982).

A consideration of City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748 (1981) and the Supreme Court's rationale in deciding this case based on: (1) the status of the defendant as a municipality; and (2) the presence of gross negligence or malice in the municipality's actions.

Note, Municipalities Immune From Punitive Damages Under 42 U.S.C. § 1983, 21 Washburn L.J. 379 (1982).

An historical analysis of the development of the doctrine of municipal immunity in actions brought under 42 U.S.C. § 1983. This note briefly outlines the major cases in this area and concludes that the Supreme Court's track record indicates that granting municipalities immunity from punitive damages is necessitated by public policy.

Comment, A New Perspective on Legislative Immunity in § 1983 Actions, 28 UCLA L. Rev. 1087 (1981).

This comment analyzes the Supreme Court's current approach to legislative immunity and demonstrates the Court's failure to fully consider the policies of legislative immunity and the purposes of § 1983.

Comment, Municipalities are not Immune for Constitutional Violations and Cannot Raise the Good Faith of Its Officials As A Defense, 57 N.D.L. Rev. 93 (1981).

Comment on Owen v. City of Independence, 445 U.S. 622 (1980) in which the author contends that Owen chips away at the already eroded historical concept of sovereign immunity. Owen is in keeping with current notions of governmental responsibility, that is, individuals who are harmed by abuses of governmental authority should be compensated.

Goode, The Changing Nature of Local Governmental Liability Under § 1983, 22 Urb. L. Ann. 71 (1981).

This article discusses the new rules of governmental liability, as created by a series of recent Supreme Court decisions, and their implications for future litigation. The decisions involve questions of statutory construction and as such are subject to modification by legislative action. The result of this examination is a discussion of how the rules of litigation in this area have been substantially altered.

Hutchins, Municipal Corporations are not Immune From Suit for Violations of Civil Rights Under 42 U.S.C. § 1983, 12 Tex. Tech L. Rev. 500 (1981).

A discussion of recent Supreme Court decisions regarding municipal liability under 42 U.S.C. § 1983. The author contends that although the Court has recognized that municipalities possess neither an absolute nor qualified immunity under § 1983, it still must address the scope of municipal liability.

Municipalities Held Strictly Liable Under § 1983, 59 Wash. U.L.Q. 535 (1981).

A discussion of the controversy surrounding municipal liability under § 1983 since it first arose in Monroe v. Pape, 365 U.S. 167 (1961) through the Court's more recent interpretation in Owen v. City of Independence.

Note, Owen v. City of Independence: Expanding the Scope of Municipal Liability Under § 1983, 47 Brooklyn L. Rev. 517 (1981).

This note discusses the Supreme Court's holding in Owen v. City of Independence. It begins with an historical review of the leading decisions under § 1983 and concludes that Owen clearly reflects a considered weighing of competing policies, i.e., the preservation of constitutionally protected rights versus the protection of municipal treasuries.

Note, The End of Good Faith Immunity for Municipalities Under § 1983, 15 Suffolk U.L. Rev. 130 (1981).

A discussion of the Supreme Court's rationale in imposing strict liability on a municipality for deprivation of constitutional rights in Owen v. City of Independence. The author believes that this decision could place an added financial burden on the taxpayers if the number of suits under § 1983 continues to rise.

Peters, Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot, 13 Urb. Law. 407 (1981).

Because of recent Supreme Court decisions, municipalities and other local government units must exercise caution in establishing guidelines for future conduct. Municipalities should also be aware of the defenses to § 1983 suits which are still valid in light of these decisions. This article presents considerations which municipalities should keep in mind in implementing future policies.

Qualified Immunity not Extended to Municipalities Under 42 U.S.C. § 1983, 20 Washburn L.J. 618 (1981).

Using the decision in Owen v. City of Independence, the author presents an historical analysis of judicial decisions under 42 U.S.C. § 1983. She concludes that although public policy supports the right of an individual to be compensated for constitutional violations, the effects of Owen on the ability of municipalities to pay damages are very uncertain.

Freilich et al., 1979-1980 Annual Review of Local Government Law: Municipal Liability and Other Certain Uncertainties, 12 Urb. Law. 577 (1980).

A discussion of three major Supreme Court cases (Owen, Thiboutot and Maher) and the effects of each upon the immunity granted to municipalities in suits under 42 U.S.C. § 1983. The authors find it disturbing that: 1) states are protected under the eleventh amendment from retroactive damages; 2) individuals may claim immunity for good faith actions; and 3) § 1983 grants no immunity remedy against the U.S.

Carlisle, Owen v. City of Independence: Toward Constructing a Model for Municipal Liability After Monell, Pts. 1 and 2, 12 Urb. Law. 292 (1980), 12 Urb. Law. 727 (1980).

The author suggests that actions, such as Owen, seeking damages for unconstitutional conduct should be distinguished from other causes of action requesting prospective declarations as to the constitutionality of basic policy decisions. In addition, when a statute operates to provide a tort remedy for damages against a governmental defendant, all tort defenses traditionally available to its employees as individual defendants should be accorded.

Comment, Civil Rights Litigant, 42 U.S.C. § 1983, and Local Government Immunity, 33 Ark. L. Rev. 529 (1980).

A judicial history of § 1983 actions which concludes that Monell v. Department of Social Services, 436 U.S. 658 (1978), raises more issues than it decides. Does qualified immunity for local governments exist under § 1983? When do official acts represent official policy? Is a particular governmental unit to be characterized as the state or local governmental body? The writer contends that these questions can only be answered on a case-by-case basis.

Comment, Derivative Immunity: An Unjustifiable Bar to § 1983 Actions, 1980 Duke L.J. 568.

Through a discussion of the development of the doctrines of derivative immunity and its current status in the federal courts, this comment argues that a general doctrine of derivative immunity is unjustifiable. An evaluation is made of the first and fifth circuits' rejections of the doctrine and their standard of liability under § 1983. Finally, the writer proposes an alternative that would establish a sliding scale of liability for private defendants depending upon whether they acted with, or in reliance or obedience to public officials.

Comment, Derivative Immunity Under § 1983: Conspiracies Between Immune Judicial Officials and Private Persons, 14 J. Mar. L. Rev. 89 (1980).

This comment surveys the differing ways in which jurisdictions have adopted a policy of derivative immunity. The author contends that this doctrine serves the important objective of restricting access to the federal courts and review of state court decisions, but nevertheless, leaves valid federal claims unredressed.

Comment, Strict Liability Under § 1983 for Municipal Deprivations of Federal Rights? Owen v. City of Independence, 55 St. John's L. Rev. 153 (1980).

This comment examines several issues which the Supreme Court left open in its Owen decision. The author contends that a strict liability standard for municipal violations of § 1983 is not only unwarranted in light of the historical purpose of liability without fault, but is inconsistent with the realities of the municipal government system. He also argues that an alternative theory of municipal liability based on negligence has not been precluded by § 1983 precedents.

Kramer, § 1983 and Municipal Liability: Selected Issues Two Years after Monell v. Department of Social Services, 12 Urb. Law. 232 (1980).

This article focuses on three areas left untouched in dealing with the elemental parts of a cause of action under § 1983: the continued liability of a Bivens cause of action arising directly under the Constitution; the parameters of official policy, rule, custom or usage which falls under the Monell - § 1983 rubric; and finally, what impact the type of governmental unit sued has on the available relief.

Kushner, The Impact of § 1983 after Monell on Municipal Policy Formulation and Implementation, 12 Urb. Law. 466 (1980).

This article examines Monell v. Department of Social Services, as well as subsequent federal district and appellate cases with respect to their impact upon the formulation and implementation of municipal and local governmental policy. It also discusses the guidelines propounded in Monell, and followed in subsequent decisions, to determine what actions constitute a "custom or usage" that will give rise to municipal liability under § 1983.

Note, Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism, 53 S. Cal. L. Rev. 945 (1980).

An in-depth examination of the issues in the area of suits by individuals against state and local governmental officials or entities pursuant to federal statutes in federal courts. The authors delineate the rights and options available to the parties and discuss the federal statutes that may be used to sue state and local governmental entities and officials. The defenses that may be raised in such actions, including the official immunities that have developed under § 1983 of the civil rights statutes, are also examined.

Note, Demise of Municipal Immunity Under § 1983, 14 Ga. L. Rev. 605 (1980).

An examination of Owen v. City of Independence, in which the author analyzes the issue of municipal liability under § 1983 as a conflict of two principles: compensation of individuals whose constitutional rights have been violated, and, the ability of local governments to conduct the public's business unfettered by fears of civil liability.

Note, § 1983 Liability of Private Actors Who Conspire With Immune State Officials, 80 Colum. L. Rev. 802 (1980).

After describing the elements of a § 1983 conspiracy action, this note analyzes the restrictions that some courts have placed on plaintiffs' ability to recover from private persons who conspire with immune state officials. The author determines that these restrictions are contrary to applicable case law. Finally, he examines the contention that the restrictions on recovery are necessary to prevent an onslaught of frivolous § 1983 conspiracy claims.

Note, The Abrogation of Derivative Immunity, 17 Hous. L. Rev. 399 (1980).

The author discusses the Fifth Circuit decision Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) that a state judge's coconspirators are liable for damages under the Civil Rights Act of 1871, regardless of possible judicial immunity.

Seng, Municipal Liability for Police Misconduct, 51 Miss. L.J. 1 (1980).

This article pursues the idea of municipal liability for the misconduct of its police officers. Three varieties of police misconduct are discussed: actions pursuant to an ordinance or policy illegal on its face; abuse of process; and police brutality. The author applies the principles developed in Monell and Owen to each situation and discusses specific problems of pleading, proof and remedies.

Whitman, Constitutional Torts, 79 Mich. L. Rev. 5 (1980).

In this article, the author discusses the explosion of constitutional tort suits during the period 1961-1979 by analyzing the significance of the overlap between state tort law remedies and remedies under § 1983. The author concludes that the courts' dissatisfaction with § 1983 cannot be attributed to the fact that it has been used to provide a remedy which supplements state law.

Casto, Innovations In the Defense of Official Immunity Under § 1983, 47 Tenn. L. Rev. 47 (1979).

This article contends that the Supreme Court has created a number of questions in its decisions with regard to immunities: What are the proper sources of law for developing a system of official immunities? To what extent has the court relied upon these sources in developing a system of official immunities? In a specific case, how does one determine whether absolute or qualified immunity is applicable?

Comment, § 1983, Immunity, and the Public Defender: The Misapplication of Imbler v. Pachtman, 55 Chi.[-]Kent L. Rev. 477 (1979).

This comment examines the development of § 1983 claims against public defenders, the defense of immunity often allowed by the courts to defeat such claims, and the application by some courts of the immunity defense without first locating the requisite state action. Finally, this comment assesses the opinion in Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978).

Comment, Section 1983 Municipal Liability and the Doctrine of Respondeat Superior, 46 U. Chi. L. Rev. 935 (1979).

This comment analyzes the propriety of municipal respondeat superior liability. First, it examines the reasons offered by the Monell Court for rejecting respondeat superior in § 1983 actions against municipalities. It then argues that the purpose and legislative history of the provision demand a scheme of respondeat superior liability. Finally, it explores the countervailing concerns of federalism, and considers their impact on such a liability scheme.

Comment, States' Eleventh Amendment Immunity Under § 1983, 10 Cum. L. Rev. 223 (1979).

A discussion of states' sovereign immunity cases culminating with the Supreme Court decision in Monell v. Department of Social Services. The author contends that certain of these decisions are difficult to reconcile with others and that the Court has recognized the power of Congress to pass a statute pursuant to the fourteenth amendment which abrogates the immunity of the eleventh amendment.

Comment, Suing Municipalities under 42 U.S.C. § 1983: The Impact of Monell v. Department of Social Services, 24 Vill. L. Rev. 1008 (1979).

This comment discusses the Supreme Court's holding in Monell v. Department of Social Services light of the legislative history of § 1983 and the relevant case law. It also explores the anticipated impact of Monell and the question whether the decision has provided new impetus to the Civil Rights Act of 1871.

Day & Jacobs, Opening the Deep Pocket - Sovereign Immunity Under § 1983, 31 Baylor L. Rev. 389 (1979).

Monetary awards against states in § 1983 actions were foreclosed by the eleventh amendment to the Constitution, and the Supreme Court decision in Monroe v. Pape, 365 U.S. 167 (1961) precluded municipal liability for suits brought under § 1983. This article examines recent Supreme Court decisions which have made possible the recovery of damages from municipalities under § 1983 and have eroded the states' eleventh amendment immunity.

Love, Damages: A Remedy for the Violation of Constitutional Rights, 67 Calif. L. Rev. 1242 (1979).

The author discusses the emergence of damages as a remedy for enforcement of constitutional guarantees and attempts to determine the kinds of damages that ought to be recoverable in § 1983 and Bivens actions in light of the Supreme Court decision in Carey v. Piphus, 435 U.S. 247 (1978). The author recommends judicial or legislative recognition of presumed compensatory damages in actions for violations of constitutional rights that protect intangible, dignitary interests.

Note, Absolute Immunity Withdrawn - Qualified Immunity Left as a Possibility, 1979 Wis. L. Rev. 943.

This note discusses the Supreme Court decision in Monell v. Department of Social Services that a municipality is subject to suit under § 1983. The author examines the general notion of qualified immunity, and surveys judicial approaches to qualified municipal immunity in civil rights suits other than damage actions under § 1983. The author concludes that the concept of qualified immunity has no place in § 1983 litigation against municipalities.

Note, Cities Liable Under § 1983: Monell v. Department of Social Services, 32 Sw. L.J. 1347 (1979).

A discussion of the Supreme Court's ruling in Monell v. Department of Social Services in which the author lauds the Court for its truly landmark decision, in that it greatly expands the availability of § 1983 relief for any citizen deprived of constitutional rights under the color of state law. It also provides plaintiffs with a wide range of financially responsible defendants.

Note, Claims Against States for Damages, 7 Fla. St. U.L. Rev. 525 (1979).

This note discusses cases giving rise to § 1983 claims for monetary relief against states, and analyzes the decisions which established standards governing judicial findings of congressional intent to abrogate the eleventh amendment. It applies those standards to the language and history of § 1983, and discusses the Supreme Court's intentions in light of the conflict between federalism and the interest of plaintiffs in being afforded an effective remedy.

Note, Immunity Under § 1983: A Benefit to the Public?, 12 Conn. L. Rev. 116 (1979).

In analyzing Sparks v. Duval County Ranch Co., 588 F.2d 124 (5th Cir. 1979) this note discusses the validity of the court's affording a defendant state judge an unqualified immunity where criminal allegations have been raised against the judge. The court's strict adherence to vicarious immunity in § 1983 actions is also considered in light of decisions from other circuits rejecting the rule.

Note, Legislative Abrogation of Immunities Under § 1983, 55 Notre Dame Law. 133 (1979).

This note focuses on the governmental and official immunities of § 1983 with a perspective toward their codification or change. Two issues are examined: (1) to what extent should governmental immunity be granted under § 1983, if at all; and (2) to what extent should official immunity be granted under § 1983, if at all?

Note, Local Government Liability Under 42 U.S.C. § 1983, 18 Washburn L.J. 366 (1979).

A discussion of significant federal court cases dealing with municipal liability in § 1983 actions, culminating with Monell v. Department of Social Services. The writer contends that the Supreme Court has removed a major stumbling block for those who seek recovery from a municipality; however, municipal immunity will continue to bar actions based upon respondeat superior.

Note, Local Governmental Entities No Longer Absolutely Immune Under § 1983, 28 De Paul L. Rev. 429 (1979).

This note examines the problems created by Monroe v. Pape and its successors. It also discusses the Monell v. Department of Social Services opinion and its impact on three key areas: the approaches taken by the lower federal courts in which section 1983 actions involved local governmental entities; the status of school boards vis-a-vis municipal corporations in § 1983 suits; and the general posture assumed by the Supreme Court with regard to civil rights litigation.

Note, Monell v. Department of Social Services: A Supreme Court Adoption of Lower Court Exceptions, 1979 Utah L. Rev. 251.

This note traces the compelling policy arguments voiced in the lower federal courts which facilitated the circumvention of municipal immunity long before the Supreme Court's decision in Monell v. Department of Social Services. From this perspective, Monell's significance disappears and the case becomes a final eulogy for the once invincible municipal immunity doctrine.

Note, Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability Under § 1983, 7 Hofstra L. Rev. 893 (1979).

This note traces the background of municipal liability under § 1983 through the Supreme Court decision in Monell v. Department of Social Services. It concludes that the holding in Monell excluding respondeat superior as a source of liability under the statute is not justified by either the legislative history relied on by the Court or general principles of statutory construction.

Note, Monell v. Department of Social Services: The Court Compromises on Municipal Liability Under § 1983, 57 N.C.L. Rev. 459 (1979).

An evaluation of Monell v. Department of Social Services as a compromise between two extremes - the total municipal immunity of Monroe v. Pape on the one hand, and full municipal liability on the other.

Note, Municipal Corporations Will no Longer Have Absolute Immunity From Claims for Violations of Constitutional And Federal Rights, 56 U. Det. J. Urb. L. 691 (1979).

An examination of the Monell v. Department of Social Services decision suggesting that it will become the basis for an increase in the number of suits under § 1983, which in turn would increase the operating budgets of municipalities. The conclusion is drawn that in the long run this cost will be borne by the taxpayer.

Note, Municipal Liability for § 1983 Actions, 10 U. Tol. L. Rev. 519 (1979).

This note attempts to explain the Supreme Court's change of position from Monroe v. Pape in Monell v. Department of Social Services. The author first reviews the doctrine of municipal immunity as established in Monroe, followed by a discussion of the Monell Court's reasoning for its departure from Monroe. Finally, she discusses the difficulties that can arise in the interpretation and application of a Monell-type doctrine.

Note, Municipal Liability Under § 1983: The Meaning of "Policy or Custom", 79 Colum. L. Rev. 304 (1979).

This note seeks to define the duty of local governments under the twin criteria of "policy" or "custom" by reexamining the legislative history of § 1983. First, it briefly describes the holding in Monell v. Department of Social Services and examines questions left open by the Supreme Court. Second, it establishes that the duty Congress meant to impose covers a wide range of official actions. Finally, it suggests a model of municipal liability under standards developed from the legislative history.

Note, New Liability for Land Use Regulators in Ohio - The Limits of Regulatory Power, 28 Clev. St. L. Rev. 283 (1979).

This article concentrates on the significance of Monell v. Department of Social Services to local governments in Ohio. Monell has forced local governments to pay particular attention to the specific limitations on their powers to regulate. Significant financial liability may be imposed if these bodies exceed their authority and deprive an individual of a constitutionally protected right.

Note, The Status of Official and Municipal Immunity From Damage Actions Under 42 U.S.C. § 1983, 14 Land & Water L. Rev. 281 (1979).

This note briefly examines the effect of the Supreme Court's decision in Monell v. Department of Social Services upon official immunity. It then considers the issues of where the lines of municipal liability should be drawn, and whether residual municipal immunity has survived.

Schnapper, Civil Rights Litigation After Monell, 79 Colum. L. Rev. 213 (1979).

This article outlines the issues that must be dealt with after Monell v. Department of Social Services: (1) rules and practices which are "official acts, policies and customs" subjecting a government to suit under Monell, (2) possible defenses available to a city, and (3) scope of relief available on § 1983 actions against state officials. The author urges that claims arising under state laws be tried in federal court when joined with § 1983 claims.

Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610 (1979).

This article examines the growth of prisoner civil rights suits and takes a close look at how these suits are handled in a number of different states. The author makes various recommendations that he feels will reduce the number of frivolous suits, and improve the ability of the courts to identify the meritorious cases and fairly adjudicate them.

Comment, Cities as Persons Under 42 U.S.C. § 1983, 10 N.C. Cent. L.J. 115 (1978).

A review of Monell v. Department of Social Services inquiring into the factors that led to the abandonment of the "nonperson" rule after nearly two decades of reaffirmance. The comment also discusses the situations in which a city can be held accountable for violations of civil rights as opposed to those where the city still enjoys an immunity under § 1983.

Comment, Civil Rights: Discarding § 1983 Municipal Immunity - Is That Enough?, 30 U. Fla. L. Rev. 979 (1978).

This comment argues that the Supreme Court's holding in Monell v. Department of Social Services will not open the floodgates of § 1983 litigation against municipalities. Rather, it has merely legitimized a course already followed by most lower courts - the official capacity device used to allow individuals to attack an allegedly unconstitutional policy. The Court has recognized the validity of these suits, allowing the true defendant, the city, to be sued.

Comment, Municipal Immunity No Longer a Bar to 42 U.S.C. § 1983 Suits?, 24 Loy. L. Rev. 761 (1978).

A review of recent civil rights suits involving the doctrine of municipal immunity, specifically focusing on Monell v. Department of Social Services. The writer concludes that repercussions of this decision cannot be foreseen until the Supreme Court defines the issues of "custom" and "usage" and until the existence of qualified immunities is established for municipalities.

Comment, "Vicarious Immunity" of Private Persons in § 1983 Actions: "An Unexplained Assumption", 28 Case W. Res. L. Rev. 1014 (1978).

In most federal circuits, when all the "state" defendants in an action under 42 U.S.C. § 1983 are accorded immunity, so are any private defendants who have allegedly acted in concert with them. After tracing the evolution of this doctrine of "vicarious immunity" and weighing the arguments for and against it, the author proposes the rejection of the doctrine and adoption of a subjective and objective good faith standard for private § 1983 defendants alleged to have acted in concert with state officials.

Nahmod, Persons Who Are Not "Persons": Absolute Individual Immunity Under § 1983, 28 De Paul L. Rev. 1 (1978).

In this article, the author examines the issue of absolute immunity under § 1983. He explores the doctrine's history, the distinction between actions for damages and injunctions, and projects the doctrine's effect on certain individuals in the future.

Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers Misconduct, 87 Yale L.J. 447 (1978).

According to the author, the private suit for civil damages is the most promising weapon in the battle to restrain official misconduct; however, because of statutory limitations and appellate court decisions, it suffers from serious shortcomings. Among other possible remedies, the author suggests that the U.S. be permitted to intervene as a plaintiff in § 1983 suits and to initiate suits for the benefit of the victim. Another suggested change is to allow suits directly against the defendant's employing department. In connection with this idea, the author argues that where the liability is placed on the wrongdoer's employer, the good faith and immunity from suit defenses should be abolished.

Note, Governmental Liability Under § 1983 and the Fourteenth Amendment After Monell, 66 St. John's L. Rev. 66 (1978).

This note first reviews judicial interpretation of the scope of § 1983 with respect to the question of municipal liability. It is suggested that the Supreme Court's decision in Monell v. Department of Social Services including municipalities as persons for purposes of § 1983 will foreclose resort to a constitutionally derived remedy. Finally, the author contends that Monell will terminate the absolute immunity from § 1983 liability that has been accorded state governments.

Note, The Emergence of Municipal Liability Under 42 U.S.C. § 1983, 8 Cap. U.L. Rev. 103 (1978).

This note discusses the major Supreme Court decisions between Monroe v. Pape and Monell v. Department of Social Services with regard to their attempts to establish municipal liability under § 1983 and highlights the major factors in the Court's decision to impose liability on municipalities.

Theis, Official Immunity and the Civil Rights Act, 38 La. L. Rev. 281 (1978).

This article outlines two approaches to determining the proper scope of immunity for government officers under § 1983 and argues for the superiority of one over the other. The author assesses the Supreme Court's most recent decisions within this framework and states that their incoherence is the most damaging objection to them.

Walston, Local Governments Can Be Directly Sued Under 42 U.S.C. § 1983 Where Unconstitutional Action Is Pursuant to Governmental Custom or Implants Official Policy, 10 Tex. Tech L. Rev. 145 (1978).

An analysis of judicial developments with regard to immunities culminating with Monell v. Department of Social Services. The writer discusses arguments for and against municipal immunity within the context of Monell and concludes that the decision merely establishes the outer limits of § 1983 municipal liability.

Comment, Liability of State Supervisory Officials Under § 1983, 22 S.D.L. Rev. 369 (1977).

This comment examines the liability of state governmental bodies under § 1983. It expands this discussion to include the possible theories of recovery under § 1983 against such governmental bodies and supervisors accused of violating an individual's constitutional rights.

Comment, Official Immunity from Damages in § 1983 Suits: Wood v. Strickland, 56 Or. L. Rev. 124 (1977).

A comment on Wood v. Strickland, 420 U.S. 308 (1975) reviewing developments leading to the formulation of the Strickland standard of qualified immunity. The author discusses changes from previous case law, and suggests several factors to be considered in applying the standard.

Kenyon, Judicial Immunity -- Who Will Defend the Judges?, 19 N.H.B.J. 93 (1977).

An examination of recent decisions under 42 U.S.C. § 1983 which have drawn important distinctions between administrative and judicial acts and their relationship to the public policy questions which underlie the doctrine of judicial immunity.

Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions, 30 Vand. L. Rev. 941 (1977).

This article reviews the Supreme Court's decision in Wood v. Strickland, 420 U.S. 308 (1975) and attempts to examine the relationship in constitutional tort actions between the various defenses and immunities and the prima facie case. The author suggests solutions to the difficulties the courts have encountered in determining the scope of immunities and burdens of proof.

Levin, The Section 1983 Municipal Immunity Doctrine, 65 Geo. L.J. 1 483 (1977).

Since Monroe v. Pape, federal courts have struggled with municipal immunity as enunciated in that decision. The author proposes that in actions brought under 42 U.S.C. § 1983 municipalities should be immune from vicarious liability, but liable for unconstitutional policies, regardless of the relief being sought.

Note, Developments In the Law -- § 1983 and Federalism, 90 Harv. L. Rev. 1,133 (1977).

This note examines the enforcement of constitutional rights under § 1983 in light of the enhanced contemporary concern with state autonomy and integrity. The author discusses the ramifications of the concern with states' interests in § 1983 actions and attempts to give some content to the vague contours of Federalism.

Note, Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine, 36 Md. L. Rev. 123 (1977).

The author examines the Supreme Court's decision in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and discusses the reasoning and the principles that the decision embodies. The applicability of Bivens principles to other constitutional provisions is considered, as well as the question of municipalities' liability under the fourteenth amendment. The author argues that exclusion of municipalities from the coverage of 42 U.S.C. § 1983 constitutes a congressional determination that, on balance, makes judicial recognition of an independent damage remedy ill-advised.

Note, Municipal Liability Under § 1981, 66 Geo. L.J. 143 (1977).

A survey of cases involving § 1981 municipal liability in which the writer looks at the scope of protection afforded by § 1981 of the Civil Rights Act and considers the statute's language, legislative history and purpose. This leads to his conclusion that the extension of § 1981 liability to municipalities is justified.

Note, Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis, 30 Stan. L. Rev. 191 (1977).

This note analyzes the development of § 1983 interpretations and the Supreme Court's failures to define appropriate limiting standards. The author proposes a standard for limiting defamation actions under § 1983 that he argues is doctrinally sound and more protective of fourteenth amendments rights than is the standard in Paul v. Davis, 424 U.S. 693 (1976).

Note, Suit Against Municipal Board of Trustees and Its Individual Members for Declaratory and Injunctive Relief and for Damages Not Maintainable Under § 1983, 55 Tex. L. Rev. 501 (1977).

A review of the section 1983 cases which allowed the court in Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) to confront the two central issues in that case: (1) how to define the term "person" under § 1983, and (2) how to apply the party-in-fact doctrine.

Note, Wood v. Strickland and the Burden of Proving "Good Faith" in a Student's § 1983 Damages Action, 15 J. Fam. L. 679 (1977).

This note addresses a two-fold question: given a student's § 1983 damages action against a school official for a violation of a constitutional right, is the burden on the student to prove the official's bad faith an essential element of his action or is the "good faith" defense an affirmative one, in which case the burden would be on the defendant to show that his actions were in good faith?

Comment, Accountability for Government Immunity: Limiting Qualified Immunity and the Good Faith Defense, 49 Temp L.Q. 938 (1976).

The author focuses on the civil damages remedy for official deprivations of constitutional rights, specifically exploring the conflict between the protections afforded by the Bill of Rights and § 1983, and the policies underlying the doctrine of official immunity. A number of police misconduct cases are examined and the implications of their holdings discussed. The author calls for rejection of the standard adopted by the Supreme Court in Bivens, because he feels the use of a lesser standard (good faith and reasonable belief) in civil cases than in criminal cases has created a dichotomy in the thrust of the fourth amendment.

Comment, § 1983 and The New Supreme Court: Cutting the Civil Rights Act Down to Size, 15 Duq. L. Rev. 49 (1976).

The purpose of this comment is to examine recent decisions and their effect on § 1983 litigation in order to determine whether they jeopardize the usefulness of § 1983 as a statute capable of redressing constitutional rights.

Comment, § 1983, The Eleventh Amendment, and General Principles of Tort Immunities and Defenses: Who is Left to Sue?, 45 UMKC L. Rev. 29 (1976).

This comment attempts to explore the problems faced by the Supreme Court in dealing with cases arising under 42 U.S.C. § 1983. These include the concepts of sovereign immunity; official immunity; congressional intent as to the scope of the word "person" as used in the statute; the amenability to federal suit of states and their subdivisions; and the effect of the eleventh amendment on all of these aspects.

McCormack & Kirkpatrick, Immunities of State Officials Under Section 1983, 8 Rut.-Cam. L. Rev. 65 (1976).

A discussion of the Supreme Court's adoption of a policy holding that § 1983 does not abrogate the traditional absolute immunity of legislators, nor does it prevent public officials from claiming a form of "qualified immunity." The author argues that this policy has led to a wide range of immunity claims from state officials, thus opening the door to the complexities of a sliding scale of official immunity under § 1983.

Note, Quasi-Judicial Immunity: Its Scope and Limitations in § 1983 Actions, 1976 Duke L.J. 95.

The author examines the scope of immunity for "quasi-judicial officers" (prosecuting attorneys, clerks of court, parole board members, and prison officials) and attempts to show how the Supreme Court decision in Scheuer v. Rhodes, 416 U.S. 232 (1974), redefined the scope of immunity for such officials.

Note, Second Guessing the Court: Ex Post Facto Liability Under 42 U.S.C. § 1983, 28 Baylor L. Rev. 339 (1976).

An analysis of Wood v. Strickland, and O'Connor v. Donaldson, 422 U.S. 563 (1975) in which the Supreme Court formulated new criteria for determining whether the conduct of state officers is violative of § 1983. The author discusses the standard used in Wood, the apprehensions prompted by the decision, and the fulfillment of those apprehensions in O'Connor.

Note, The Status of Public Officials as Persons Under 42 U.S.C. § 1983, 54 N.C.L. Rev. 1062 (1976).

A casenote on Burt v. Board of Trustees of Edgefield County School District, 521 F.2d 1,201 (4th Cir. 1975), evaluating the Fourth Circuit's rationale through a brief history of municipal liability under § 1983, and a discussion of congressional intent as to the extent governmental units are to be considered "persons" under that § 1983 of the Civil Rights Act.

Note, Wood v. Strickland: Liability of School Board Members For Damages Resulting From Deprivation of a Student's Civil Rights, 13 Cal. W.L. Rev. 153 (1976).

An examination of Wood v. Strickland and its effect on the immunity held by school board members. The author compares the school officials' immunity, against the background of the board members' duties and the mechanics of the school system, to the immunity traditionally recognized for other government officials. From this analysis, a different standard of immunity is suggested, one which would broaden the protection from monetary damages offered to school officials.

Stern, Wood v. Strickland: The Aftermath, 8 Urb. Law. 885 (1976).

A discussion of Wood v. Strickland and the impact that the decision will have on public education in the future, especially in the number of civil rights actions that could follow.

Wood v. Strickland: Objectifying the Standard of Good Faith for School Board Members in Defense to Personal Liability Under § 1983, 10 Loy. L.A.L. Rev. 149 (1976).

A discussion of the controversy in the federal courts surrounding the immunity granted governmental officials from personal liability for violation of constitutional rights. The author concentrates his analysis on the issue of whether this immunity should extend to individual members of school boards.

Yudof, Liability for Constitutional Torts and the Risk-Averse Public School Official, 49 S. Cal. L. Rev. 1322 (1976).

This article explores some of the judge-made law and problems that have developed in relation to § 1983 suits in light of Wood v. Strickland, 420 U.S. 308 (1975). It attempts to anticipate the possible impact of Wood through a discussion of the possible meanings of the "good faith" and "settled Law" approach to immunity from damages under § 1983.

Bristow, § 1983: An Analysis and Suggested Approach, 29 Ark. L. Rev. 255 (1975).

The author reviews the body of law that has been created by § 1983 litigation in what he terms an effort to heighten judicial awareness of § 1983 law as an independent body of law. Among the topics discussed are the relationship between § 1983 and the common law of torts; why a body of federal law is necessary to accomplish the goals of § 1983; and what gives rise to a § 1983 claim. The author also reviews a number of cases that have created what he calls § 1983 defenses.

Comment, State Executive Officials Afforded Qualified Immunity From Liability in Suits Maintained Under § 1983, 20 Vill. L. Rev. 1057 (1975).

In order to evaluate the Supreme Court's rationale in Scheuer v. Rhodes, the author examines the congressional purpose in enacting § 1983, and the prior case law dealing with personal immunity as applied to officials in the judicial, legislative, and executive branches of state government.

Fullwood, Immunity Under 42 U.S.C. § 1983, 7 N.C. Cent. L.J. 39 (1975).

This article is a survey of court decisions which played a role in the development of legislative, judicial, executive and administrative immunities under § 1983.

Hundt, Suing Municipalities Directly Under the Fourteenth Amendment, 70 Nw. U.L. Rev. 770 (1975).

This article theorizes that recent § 1983 cases illustrate the need for an alternative cause of action for meritorious civil rights claims and that the reasoning of Bivens offers the best alternative to § 1983 suits, that is, a judicially created action asserting fourteenth amendment rights directly against municipalities.

Bodensteiner, Federal Court Jurisdiction of Suits Against "Non-Persons" for Deprivations of Constitutional Rights, 8 Val. U.L. Rev. 215 (1974).

This article discusses two Supreme Court rulings -- Moor v. County of Alameda, 411 U.S. 693 (1973), and City of Kenosha v. Bruno, 412 U.S. 507 (1973) -- holding that the scope of "person" as used in § 1983 does not include a county or a municipality for purposes of either equitable relief or damages. The author argues that plaintiffs can obtain both equitable relief and damages from counties and municipalities, if they have a constitutional claim, by stating a claim directly under the Constitution and alleging jurisdiction under 28 U.S.C. §§ 1343(3) and § 1331(a) where the jurisdictional amount is met. By examining three factors -- stating a claim under the Constitution, jurisdiction under § 1331(a), and jurisdiction under § 1343(3) -- the author illustrates why Moor and Bruno did not insulate counties and municipalities from suit for deprivations of constitutional rights. The Bruno decision is called wrong for suggesting that jurisdiction cannot be based on § 1343(3), when a cause of action is not stated under § 1983.

Comment, § 1983, Eleventh Amendment, Executive Immunity, 8 Akron L. Rev. 163 (1974).

A comment on Scheuer v. Rhodes classifying the Supreme Court's decision as a restatement of a policy that was already generally understood by most jurists. According to the author, the impact of the decision on executive officials will be slight, however, under § 1983 at least the plaintiff will be granted a day in court.

Judge, Scherott, Bliss, Judicial Immunity Under the Civil Rights Act: Here Come the Judges' Defenses, J. Mar. J. Prac. & Proc. 213 (1974).

In light of the fact that the number of civil rights actions being filed against various members of the judiciary are on the use, this article examines the defenses which are available to judicial and quasi-judicial officers in such actions.

McCormack, Federalism and § 1983: Limitations On Judicial Enforcement of Constitutional Protections, 60 Va. L. Rev. 1250 (1974).

The first part of this article defines a § 1983 cause of action by exploring the relationship between the remedy sought for a given harm and the applicability of the eleventh amendment and personal immunities. The second part examines how this cause of action is affected by the doctrines of abstention and res judicata.

Municipal Liability Under § 1983 of the Civil Rights Act, 5 N.C. Cent. L.J. 351 (1974).

This article attempts to analyze the impact of City of Kenosha v. Bruno, 412 U.S. 507 (1973) in light of the history of the enactment of § 1983, and other Supreme Court interpretations of the Act with regard to municipal liability. It also looks at the federal courts' attempts to evade the seemingly harsh effect of Monroe v. Pape.

Note, Neither the Eleventh Amendment nor the Doctrine of Executive Immunity Automatically Bar a Suit for Damages Brought Against State Officials in Their Individual Capacities Under 42 U.S.C. § 1983 -- Scheuer v. Rhodes, 416 U.S. 232 (1974), 24 Cath. U.L. Rev. 164 (1974).

The author explores the issues posed by eleventh amendment sovereign immunity and common-law executive immunity as presented in Scheuer, and as compared to earlier suits brought under § 1983. Although the decision is termed narrow, the author feels that it promises that section 1983 will not be wholly circumscribed by common-law privileges.

Note, Suit for Damages Under § 1983 Against State Officials for Discretionary Acts Barred by Common Law Doctrine of Executive Immunity, 10 Ga. S.B.J. 669 (1974).

A survey of sovereign immunity and the questions answered and unanswered by the 6th Circuit in Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972).

Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law & Soc. Ord. 557.

A criticism of the Supreme Court's recent tendency to extend the reach of § 1983. Instead, the Court should place a premium upon requiring the exhaustion of state remedies and upon the utilization of state courts to resolve matters that would otherwise clog the federal courts. In this article, the author suggests some fundamental reforms that are needed in order to correct this trend.

Kates & Kouba, Liability of Public Entities Under § 1983 of the Civil Rights Act, 45 S. Cal. L. Rev. 131 (1972).

The thesis of this article is that municipal immunity is not compelled by the legislative history upon which the Monroe v. Pape decision is based, and that, in any event, Monroe has been misconstrued by lower courts to immunize public entities which neither the Supreme Court nor the Congress intended to protect. After showing Monroe to be misguided, the authors examine four types of § 1983 suits which should be permissible despite the Monroe mandate.

Note, Defense of "Good Faith" Under § 1983, 1971 Wash. U.L.Q. 666.

A note discussing London v. Florida Dep't of Health and Rehabilitative Services Division of Family Services, 313 F. Supp. 591 (N.D. Fla. 1970) in relation to Monroe and Pierson and their holding that the common-law defenses to torts are available under § 1983. The author believes that this limits the effectiveness of § 1983.

Comment, Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection, 57 Cal. L. Rev. 1142 (1969).

The author argues that the complicity of state and local governments in racial discrimination is a "state action" that violates the fourteenth amendment; however, the remedies available are not sufficient to spur governments to change their policies. The problems with bringing suit under common law and the barrier of sovereign immunity are discussed. The author argues that if the courts consider § 1983 inapplicable to states or municipalities under any circumstances, then they could create a remedy pursuant to the fourteenth amendment by making it self-executing with respect to affording monetary damages.

Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv. L. Rev. 1486 (1969).

After examining the purposes of section 1983 and the recent judicial interpretations of the law, the author argues that many deprivations of federally-secured rights are outside the scope of section 1983 and that in such cases, plaintiffs should seek redress in the state courts if state remedies appear adequate to redress the violation.

Comment, Civil Actions for Damages Under the Federal Civil Rights Statutes, 45 Tex. L. Rev. 1015 (1967).

This comment discusses the extent and nature of the broad spectrum of civil rights protected by federal statutes and the problems that have been encountered in assessing pecuniary damages for their infringement.

De Forest, Action of Municipal Housing Authority and Its Director Held not Enjoinable Under § 1983, 3 Harv. C.R. L. Rev. 225 (1967).

An analysis of the District Court's rationale in Randell v. Newark Housing Authority, 266 F. Supp. 171 (D.N.J. 1967), in light of the precedent set by the Supreme Court in Monroe v. Pape with regard to injunctive actions. The writer contends that although the Court clearly intended to foreclose the possibility of injunctive actions against municipalities, the logic behind its decision is vulnerable to attack and a strong district judge might reject this application. However, since the Randell court did not feel it necessary to contradict the Supreme Court, various civil rights violations could be left without legal remedies, if Randell is widely followed.

Shapo, Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, 60 Nw. U.L. Rev. 277 (1965).

This article analyzes the jurisprudential development of a federal statutory remedy -- 42 U.S.C. § 1983. It does so by tracing the prior nine decades of legislative and judicial history of the statute culminating in a discussion of the Supreme Court's ruling in Monroe v. Pape, 365 U.S. 167 (1961).

Note, Section 1983: A Civil Remedy for the Protection of Federal Rights, 39 N.Y.U.L. Rev. 839 (1964).

This note examines 42 U.S.C. § 1983 by attempting to suggest solutions to the following problems involved in its interpretation: 1) Does § 1983 protect against deprivations of all or merely some federal rights? 2) What are the remedies available to a plaintiff deprived of a protected right? 3) What are the legitimate defenses and jurisdictional objections that need to be identified and limited?

STATE SOVEREIGN AND GOVERNMENTAL IMMUNITY

Comment, Sovereign Immunity in Connecticut: Survey and Economic Analysis, 13 Conn. L. Rev. 293 (1981).

This comment surveys sovereign immunity in Connecticut and discusses the impact of federalism on the scope of immunity. It also discusses what light an economic analysis throws on the subject.

De Mars, Intentional Nuisance in Fact: Should it be a Bar to a Governmental Function Defense in Michigan?, 1981 Det. C.L. Rev. 771.

This article is a detailed discussion of the definitional, theoretical and pleading problems that have been created by the Michigan Supreme Court holding that a claim based on an "intentional nuisance in fact," created and then maintained by a governmental agency, is not defeated by statutory immunity. Because the legislature has codified common-law governmental immunity, the author suggests the Michigan legislature should draft the nuisance exceptions into the statute which exist at common law. A proposed amendment is appended to the article, and would impose burdens on both the governmental agency and any plaintiff, as well as a limitation of liability under certain conditions.

Glannon, Governmental Tort Liability Under the Massachusetts Tort Claims Act of 1978, 66 Mass. L. Rev. 7 (1981).

The responsibility of governmental bodies, their officers and employees, for torts committed in the scope of public employment was radically restructured by the Massachusetts Tort Claims Act of 1978 (1978 Mass. Acts, Ch. 512). According to the author governmental immunity in Massachusetts is not dead, but has been transformed. This article explains the principal features of the Act, discusses the major interpretative issues it raises, and speculates as to how some of those issues will be resolved by the courts.

Groszyk & Madden, Managing Without Immunity: The Challenge for State and Local Government Officials in the 1980s, Pub. Ad. Rev. (March/April 1981).

The authors address three major aspects of the state of governmental immunity: 1) the evolving diminution of state and local government immunity; 2) the rise of fourteenth amendment rights; and 3) the growth in implied rights derived from federal statutes. The conclusion is reached that these factors will combine to foster greater reluctance on the part of state and local governments toward assuming administrative responsibility for federal assistance programs. The article concludes with a discussion of possible remedial measures to secure some measure of immunity for state and local government officials.

Note, Immunity From Suit on Implied Contract: Isn't it Time Kansas Entered the 20th Century?, 20 Washburn L.J. 557 (1981).

This note discusses state immunity from suit arising from an implied contract, comparing other states' approaches to immunity from suit on a contract. The author analyzes the procedure that must be followed in Kansas to satisfy a claim against the state based on an implied contract.

Note, State Sovereign Immunity, 56 Wash. L. Rev. 277 (1981).

Casenote discussing Nevada v. Hall, 440 U.S. 410 (1979) covering: (1) the doctrine of sovereign immunity in other state and federal courts; (2) the Supreme Court's reasoning in Hall; and (3) suggestions the Court might use in limiting a state court's jurisdiction over a sister state in future cases.

Taylor, A Re-examination of Sovereign Tort Immunity in Virginia, 15 U. Rich. L. Rev. 247 (1981).

The author argues that the Virginia State government ought to be responsible for the consequences of its negligent conduct just like any private citizen. According to the author, immunity is a "no-duty" rule which breeds irresponsibility at a time when government encroachment upon individual privacy is pervasive. It is argued that immunity is contrary to the notion that there ought to be a right for every wrong, and that the courts should be available for redress.

Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations, 69 Calif. L. Rev. 189 (1981).

This article explores the problem of vindicating Constitutional rights in state courts by: (1) detailing the current structure and limitations of remedies in federal courts; (2) defining the problems confronting persons seeking damages for constitutional violations by states; (3) considering the duty of the state courts to assume jurisdiction over suits against states; (4) establishing that damage claims against states are not precluded by sovereign immunity; and, (5) analyzing the circumstances under which a state judge must grant the requested remedy against the state.

Cervare & Hardy, The Massachusetts Governmental Tort Liability Act and Its Discretionary Function Immunity: An Analysis and Modest Proposal, 14 Suffolk U.L. Rev. 1251 (1980).

This article outlines the historical developments leading to the Tort Liability Act and focuses on the provision of the Act which preserves a type of governmental immunity for discretionary acts. The author compares this provision with analogous federal and state statutes, and discusses a general analytical framework applicable to situations within the ambit of the new statute.

Comment, Constitutional Law: Governmental Immunity Statute Violates Equal Protections as Applied to Kansas Turnpike Authority, 19 Washburn L.J. 581 (1980).

An historical discussion of the evolution of sovereign immunity in Kansas, and its effect on Flax v. Kansas Turnpike Authority, 226 Kan. 1, 596 P.2d 446 (1979). The author also discusses the factual situation of this case which could provide a useful protection approach in construing the Kansas Tort Claims Act.

Comment, Judicial Clarification of a Common-Law Doctrine: The Pennsylvania Doctrine of Official Immunity, 84 Dick. L. Rev. 473 (1980).

A review of the status of official immunity in Pennsylvania. This comment considers the purposes of this doctrine and evaluates judicial decisions on official immunity. The author examines pertinent sections of a comprehensive tort claims act (Act 152), 42 Pa. Cons. Stat. Ann §§ 2310, as well as the state supreme court decision in DuBree v. Commonwealth, 481 Pa. 540, 393 A.2d 293 (1978).

Comment, The Eleventh Amendment, Sovereign Immunity and Full Faith and Credit: No Constitutional Refuge For a State as a Defendant, 42 U. Pitt. L. Rev. 57 (1980).

A discussion of the Supreme Court's holding in Nevada v. Hall that a state may no longer successfully claim immunity from suit in a court beyond its borders. The author argues that the eleventh amendment provides a basis in support of a state's immunity in a sister state's courts which could lead to the reversal of Hall.

Comment, Wyoming's Governmental Claims Act: Sovereign Immunity With Exceptions -- A Statutory Analysis, 15 Land & Water L. Rev. 619 (1980).

This comment focuses on Wyoming's Governmental Claims Act (Wyo. Stat. §§ 1-39-101 through 1-39-119 and § 26-3 128.1 (Supp. 1979)). An analysis is made of the significant provisions, and the author recommends several changes. The article concludes with a discussion of the extent to which the legislature succeeded in balancing equities through the Act.

Martin, The New Interpretation of Sovereign Immunity for the States, 16 Cal. W.L. Rev. 39 (1980).

Analysis of the Supreme Court decision in Nevada v. Hall that a state may not claim immunity in a private law suit in the courts of another state. The author argues that the Hall decision is a bad piece of Constitutional law, is based upon some very dubious reasoning, and runs against the grain of American Constitutionalism.

McMahon, The State as Defendant: The Doctrine of Sovereign Immunity in Alabama, 41 Ala. Law. 583 (1980).

This article presents a description of the policy reasons for and against the doctrine of sovereign immunity and discusses the areas where sovereign immunity still plays an important role. It describes where it exists and the limitations on its application with particular attention to its development in the State of Alabama.

Note, Hennessy v. Webb: Sovereign Immunity for the Less-Than-Sovereign -- How Far Will It Go?, 32 Mercer L. Rev. 433 (1980).

A critique of the Georgia Supreme Court's opinion in Hennessy v. Webb, 245 Ga. 329, 264 S.E.2d 878 (1980) which utilized the ministerial discretionary function test in applying the doctrine of sovereign immunity. The author suggests that the court should have decided the case based on the traditional concepts of tort law without discussing sovereign immunity, thus reducing the case to a simple trial on the merits.

Note, Holding Governments Strictly Liable for the Release of Dangerous Parolees, 55 N.Y.U.L. Rev. 907 (1980).

This note attempts to determine the extent to which state parole boards and their officers should be held liable when a member of the community is injured by a violent parolee. The author argues in support of: (1) discarding immunity for government and holding the parole institutions strictly liable for injuries resulting from violent crimes; and (2) retaining immunity for officers requiring them to indemnify the government for its liability only when their actions fall below a specified standard of care.

Note, Nevada v. Hall: Sovereign Immunity, Federalism and Compromising Relations Between Sister States, 1980 Utah L. Rev. 395.

The author examines the Supreme Court decision in Nevada v. Hall that state sovereign immunity does not have a Constitutional basis. The historical background of the doctrine of sovereign immunity is reviewed. The author discusses the Court's reference in the decision to "cooperative federalism."

Note, Sovereign Immunity: Application of Missouri's 1978 Sovereign Immunity Legislation to School Districts, 45 Mo. L. Rev. 771 (1980).

A note discussing Beiser v. Parkway School District, 589 S.W.2d 277 (Mo. 1979) in which the writer contends that neither Beiser nor Missouri's sovereign immunity legislation have any effect on municipal employees' personal liability for negligent acts.

Note, Sovereign Immunity in Sister-State Courts: Full Faith and Credit and Federal Common Law Solutions, 80 Colum. L. Rev. 1493 (1980).

This note examines the implications of the freedom given state courts in Nevada v. Hall. It argues that the Supreme Court decision, unless limited, threatens to upset the interstate relationships appropriate to the federal system. The note also expands upon the Court's suggestion that full faith and credit may limit choice of law in suits against states in sister-state courts, and explores some plausible full faith and credit restrictions.

Note, The Abolition of Sister State Immunity: Nevada v. Hall and Territorial Sovereignty, 60 B.U.L. Rev. 601 (1980).

The author analyzes the Supreme Court decision in Nevada v. Hall that there is no express or implied Constitutional provision extending a state's sovereign immunity to sister-state forums. An historical analysis is made to show that sovereign immunity was a common-law doctrine at the time the Constitution was ratified and that no subsequent Constitutional provision provided for sovereign immunity in sister-state courts. The author argues that Hall will not require a fundamental readjustment of the system of cooperative federalism, but, instead, will provide for the balancing of competing state interests.

Note, The Doctrine of Sovereign Immunity is Alive and Well -- Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), 8 Fla. St. U.L. Rev. 377 (1980).

The author discusses the implications of a Florida State Supreme Court decision that discretionary government actions, i.e. those carried out at the planning rather than the operational level of government, are not subject to liability in tort. It is argued that despite the broad waiver of the doctrine of sovereign immunity in tort actions by the Florida legislature in 1975, the court's ruling makes it clear the doctrine is still alive.

Stewart, The State as an Unwilling Defendant: Reflections on Nevada v. Hall, 59 Neb. L. Rev. 246 (1980).

A discussion of the issues of state sovereign immunity in the context of the Supreme Court decision that a state may be sued against its will by citizens of another state in the latter's courts.

Comment, Governmental Immunity: Has It Really Been Abrogated?, 5 So. U.L. Rev. 217 (1979).

This comment focuses on the many problems that still exist following the abrogation of sovereign immunity in Louisiana in 1974. It attempts to illustrate the impact of this abrogation on the tort law of Louisiana. In order to allow for a comparative analysis of the pre- and post-abrogation eras, the author also presents an historical examination of sovereign immunity.

Note, Municipal Corporations: Municipal Immunity a Changing Doctrine in Oklahoma, 32 Okla. L. Rev. 890 (1979).

A discussion of recent changes in the Oklahoma laws of municipal immunity, culminating in the 1978 Political Subdivision Tort Claims Act (51 Okla. Stat. § 151-70 (1978)), which, according to the author, demonstrate growing dissatisfaction with the broad immunity from tort liability previously enjoyed by municipalities. Although the basis for sovereign immunity is archaic, the author contends that this Act is an attempt to achieve a balance between the need for municipal liability and the needs of individuals injured by the tortious conduct of municipal employees.

Note, Sovereign Immunity in Missouri: Judicial Abrogation and Legislative Reenactment, 1979 Wash. U.L.Q. 865.

This note surveys the case law concerning governmental immunity in Missouri prior to the passage of the Tort Immunity Act, analyzes the impact of the Act on traditional governmental functions, examines the Act's statutory provisions to determine the scope of retained governmental immunity, and critically evaluates what the author sees as the Act's conspicuous omissions.

Note, Sovereign Immunity in the State of Wyoming, 14 Land & Water L. Rev. 271 (1979).

This note reviews the decision in Oroz v. Board of County Commissioners of Carbon County, 575 P.2d 1155 (Wyo. 1978) and speculates whether the sovereign immunity of Wyoming could withstand a challenge in the Wyoming Supreme Court.

Note, State Borders are New Boundaries for Sovereign Immunity -- Nevada v. Hall, 29 De Paul L. Rev. 191 (1979).

The author reviews and analyzes the Supreme Court decision holding that a citizen of California may bring a personal injury action against the State of Nevada without its consent in a California court. Although supporting the decision, the author criticizes what she sees as the Court's failure to adequately delineate the intended scope of its decision.

Note, State's Eleventh Amendment Immunity Substantially Reduced, 10 U. Tol. L. Rev. 541 (1979).

This note examines the purpose and interpretations of the eleventh amendment, followed by a discussion of the traditional reluctance of American courts to award attorney fees. The Supreme Court's holding in Hutto v. Finney, 437 U.S. 678 (1978) is examined in light of this historical background. The author concludes with a discussion of the potential impact of Hutto on allowances from state funds.

Note, The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights, 33 U. Miami L. Rev. 691 (1979).

The author examines Baldwin v. Fish and Game Commission, 436 U.S. 371 (1978), and discusses its impact on Supreme Court review of the acts of state legislatures that discriminate against nonresidents. The history of the privileges and immunities clause is analyzed, as well as the equal protection clause, and the Court's treatment of these in its decision.

Olson, Governmental Immunity From Tort Liability -- Two Decades of Decline: 1959-1979, 31 Baylor L. Rev. 485 (1979).

Discussion of the status of governmental immunity in Texas after enactment of the Texas Tort Claims Act. The author speculates it is probable that, in time, both the legislature and the courts will further erode the doctrine of sovereign immunity.

Orake & Oldham, Commercial Carrier Decision and the Status of Governmental Immunity in Florida, 53 Fla. B.J. 504 (1979).

A discussion of Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979) in which the authors examine the Florida Supreme Court's rationale in allowing a waiver of sovereign immunity while simultaneously holding that certain governmental functions remain immune from tort liability.

Ripple & Kenyon, State Sovereignty -- A Polished but Slippery Crown, 54 Notre Dame Law. 745 (1979).

Based on an analysis of two Supreme Court decisions involving state sovereignty, National League of Cities v. Usery, 426 U.S. 833 (1976) and Edelman v. Jordan, 415 U.S. 651 (1974), the authors attempt to identify what they term "major ideological vectors" on the Court's view of State government's role in the federal structure. The authors argue that there has not been any massive ideological shift by the Court toward the enhancement of the powers of state governments, particularly in light of the Court's decisions involving the enforcement powers of the fourteenth amendment.

Comment, Absolute Versus Qualified Immunity for Public Officials Acting in Quasi-Judicial Capacities, 24 Wayne L. Rev. 1513 (1978).

A discussion of Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977) in relation to the type of immunity (absolute or qualified) offered to public officials. The rationale of the court is examined to determine how this decision could affect future cases.

Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Constitutional Imposition of Suit upon the States, 126 U. Pa. L. Rev. 1203 (1978).

This article addresses congressional power to override state immunity. It first sets out the case law on the subject and then examines alternate theories supporting congressional power to impose suit upon the states. The interpretive functions of the federal courts in the sovereign immunity area are discussed.

Note, Abrogation of Sovereign Immunity -- Scope of Retained Immunity, 43 Mo. L. Rev. 387 (1978).

This note on Jones v. State Highway Commission, 557 S.W.2d 225 (Mo. 1977) surveys recent decisions and discusses the prevailing judicial treatment of retained governmental tort immunity. The author also analyzes decisions in jurisdictions that have abrogated governmental tort immunity but do not have a statutory exception to liability.

Smith & Singer, Limitations on Federal Judicial Power in Civil Rights Cases: "Persons," Eleventh Amendment, Vicarious Liability, 14 Wake Forest L. Rev. 711 (1978).

This article is an effort to describe the limitations of federal judicial power over claims against states in order to provide a guide for the practitioner, as well as to make some predictions about the probable evolution of these restrictions in areas not yet fully developed by the courts.

Sovereign Immunity in Georgia, 27 Emory L.J. 717 (1978).

A survey of various states' laws which have limited sovereign immunity, and a call for Georgia to implement the immunity waiver schemes called for in the 1974 Court of Claims Amendment to the Georgia Constitution.

Sovereign Immunity In Massachusetts, 13 New Eng. L. Rev. 877 (1978).

An analysis of Massachusetts State Senate bill No. 1647 which was enacted on July 20, 1978 (1978 Mass. Acts Ch. 512). This law complied with a Supreme Judicial Court decision, Whitney v. City of Worcester, 366 N.E.2d. 1210 (1977) severely limiting sovereign immunity in Massachusetts.

Sovereign Immunity in Missouri: The King Was Dead, Temporarily, 47 UMKC L. Rev. 230 (1978).

An analysis of the Missouri Supreme Court decision Jones v. State Highway Commission in which the defense of sovereign immunity was judicially abrogated, only to be severely limited by subsequent legislative action (Mo. Rev. Stat. § 537-600-645 (1978)). The author examines this situation through a review of the development and history of the sovereign immunity doctrine in both the U.S. and Missouri.

Willetts, Virginia's Law of Sovereign Immunity: An Overview, 12 U. Rich. L. Rev. 429 (1978).

The purpose of this article is to examine the doctrine of sovereign immunity in Virginia where, as in many other states, the law has undergone change and evolution. The focus is on the immunity of state officers and political subdivisions.

Comment, Abrogation of Sovereign Immunity in Contract Cases in Maryland, 6 U. Balt. L. Rev. 337 (1977).

An analysis of the 1976 Maryland Act which prohibits both state and local units of government from raising the defense of sovereign immunity in certain contract cases (Law of May 4, 1976, Ch. 450, 1976 Md. Laws 1180). The author points out several ambiguities in the Act and recommends changes to remedy this problem.

Comment, Sovereign Immunity: State Liability Under Federal Law and Limits of the Implied Waiver Doctrine, 9 Conn. L. Rev. 247 (1977).

A discussion of the theory of implied waiver of immunity that states may be sued in federal court when they enter federally regulated spheres and cause harm for which federal law provides a private cause of action. The author criticizes Supreme Court decisions interpreting the doctrine as requiring a fair appraisal to states that their conduct in a federally regulated sphere constitutes consent to be sued, as hampering the vindication of federally protected rights and impairing the relationship between a state and its citizens under federal law.

Comments, The Employee Defense Act: Wearing Down Sovereign Immunity, 66 Ky. L.J. 150 (1977).

The author discusses the effect and implications of Kentucky's adoption of the Employee Defense Act with regard to the doctrine of sovereign immunity. The Act is criticized for its indefinite language and for placing a dollar limit on state liability. The author calls on the Kentucky courts to abrogate the doctrine of sovereign immunity, since the legislature appears unlikely to take such action.

Liberman, State Sovereign Immunity in Suits to Enforce Federal Rights, 1977 Wash. U.L.Q. 195.

The author discusses the doctrine of state sovereign immunity and reviews a number of state and federal court decisions, focusing on what are the exceptions to the doctrine's application in federal question cases.

Note, Enforcement of Judgements Against Governmental Entities: The New Sovereign Immunity, 37 La. L. Rev. 983 (1977).

The author describes various cases concerning execution of tort judgements against Louisiana governmental bodies, as well as presenting a brief legislative history of that section of the state constitution governing executions against the state. A recent Louisiana Third Circuit Court of Appeals decision that a plaintiff may not seize public property in an attempt to execute a judgment is discussed in light of the constitutional provision. The author calls for creation by the state legislature of a uniform system for payment of judgments against the state.

Note, The Re-emergence of State Sovereignty as a Limit on Congressional Power Under the Commerce Clause, 28 Case W. Res. L. Rev. 166 (1977).

This note discusses Supreme Court decisions involving the tenth amendment and the limits on federal power where it operates directly on state-conducted activities. It supports the Court's rearticulation of state sovereignty as a basis for immunity from congressional power under commerce clause of the Constitution.

State As A Party Defendant: Abrogation of Sovereign Immunity in Tort in Maryland, 36 Md. L. Rev. 653 (1977).

This article examines the development of sovereign immunity, focusing on its historical roots in England and the early rationales advanced for its use in the United States. The author suggests that Maryland retain immunity only in those limited areas related to the performance of governmental functions that are unique to the government or involve discretionary decision-making. Outside these perimeters legislature should abrogate the state's immunity.

Weick, Erosion of State Sovereign Immunity and the Eleventh Amendment by Federal Decisional Law, 10 Akron L. Rev. 583 (1977).

This article explores recent court decisions discussing the issues of state sovereign immunity from suit in federal courts via the eleventh amendment and the scope of immunity which state officials have in damage suits under the Civil Rights Act.

Harley & Wasinger, Governmental Immunity: Despotism
Mantle or Creature of Necessity, 16 Washburn L.J. 12
(1976).

An analysis of the Brown decisions with a focus on historical development is offered as an example of the judicial thinking which has created changes in the application of governmental immunity. In addition, a state-by-state analysis of governmental immunity is presented to indicate the growing national trend toward statutory schemes which apply the doctrine in a more limited manner.

Note, Contract Obligations Can Be Enforced Against the
State of Oklahoma in an Ordinary Action at Law, 11 Tulsa
L.J. 459 (1976).

A discussion of Oklahoma's requirement for an appropriation before a suit arising from a contract can be instituted against the state without its consent as it applies in State Board of Public Affairs v. Principal Funding Corp., 542 P.2d 503 (Okla. 1975). The author contends that Oklahoma should follow the lead of the many other states which have abrogated the doctrine of sovereign immunity from suits arising from contracts.

Note, Damage Remedies Against Municipalities for
Constitutional Violations, 89 Harv. L. Rev. 922 (1976).

This note argues that the Supreme Court's holding in Bivens provides the doctrinal basis for a direct right of action for damages under the Constitution against municipalities and other local governmental units. The author examines the Court's treatment of section 1983 and its legislative history and finds that neither bar judicial creation of such a right of action. Finally, the defenses that would be available to a municipality and the components of a prima facie case are discussed.

Note, Kansas Supreme Court Upholds Kansas Governmental
Immunity Statutes, 25 U. Kan. L. Rev. 140 (1976).

Casenote on Brown v. Wichita State University, 219 Kan. 2, 547 P.2d 1015 (1976) which begins with a brief history of governmental immunity in Kansas. The author then explores the court's treatment of the federal and state constitutional challenges raised by the plaintiffs. The author examines the equal protection and due process issues and discusses the limitations that the Brown court placed on § 2 and § 18 of the Kansas Bill of Rights.

Note, Misapplication of Governmental Immunity -- Epting v. Utah, 1976 Utah L. Rev. 186.

The author analyzes the Utah Supreme Court dismissal of a suit against the state on the basis of two exceptions from the general waiver of immunity contained in the Utah Governmental Immunity Act: the discretionary function exception, and the incarceration exception. A number of cases concerning the discretionary function exception are discussed. The author criticizes the Epting decision for failing to apply a planning-operational analysis to determine if use of the discretionary function exception is appropriate.

Note, Suing State Welfare Officials for Damages in Federal Court: The Eleventh Amendment and Qualified Immunity, 4 Fla. St. U.L. Rev. 105 (1976).

This note discusses the eleventh amendment immunity of state welfare officials from suits for damages in federal courts and the impact of Edelman v. Jordan, 415 U.S. 651 (1974) on welfare litigation. It also considers whether the application of the doctrine of qualified immunity will be of any real benefit to welfare claimants whose benefits have been wrongfully withheld.

Potter, Sovereign Immunity in Pennsylvania, An Open Letter to Mr. Justice Pomeroy, 38 U. Pitt. L. Rev. 185 (1976).

The author proposes that the Pennsylvania Supreme Court's decision in Brown v. Commonwealth, 453 Pa. 566, 305 A.2d 868 (1973) be overturned, and the doctrine of sovereign immunity be put before the General Assembly where the legislature could consider the extent to which the state should be responsible to its citizens in court.

The Eleventh Amendment: Implied Waiver of State Immunity Re-examined, 53 Chi.[-]Kent L. Rev. 475 (1976).

An examination of the test advanced by the Seventh Circuit Court of Appeals in Williamson Towing Co. v. Illinois, 534 F.2d 758 (7th Cir. 1976), for determining whether a state has waived immunity from suit under the eleventh amendment by participating in a federal program. The test requires a showing of express statutory language providing that the statute's private remedy is applicable to the states. The author concludes that the test is inadequate to aid the courts in handling those statutes which expressly provide for private actions against a class of defendants but remain unclear as to whether Congress intended states be included in that class. The author argues for an alternative test requiring a showing of statutory language from which it could reasonably be inferred that states have been included in the statute's defendant class. Then, courts could consider whether certain specified policy conditions exist which further warrant the conclusion that the statute provides for a waiver of immunity.

Edelman and Scheur: The Relationship Between the Eleventh Amendment and Executive Immunity, 58 Marq. L. Rev. 741 (1975).

The purpose of this article is to examine the effect of the decision in Edelman v. Jordan on the concept of implied waiver by a state of its eleventh amendment protection; to assess its holding as to when a suit against a state officer is barred; and, in conjunction with Scheuer v. Rhodes, 416 U.S. 232 (1974), examine the permissible remedies against state officers.

Note, Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution, 50 Notre Dame Law. 496 (1975).

A critical examination of the broad issue of state immunity from suits in federal courts as treated in Edelman v. Jordan. The author discusses elements of constitutional history and interpretation, conflicting precedents, modern concepts of federalism and the moral responsibilities of government.

Should the King Remove His Armor?, 53 N.C.L. Rev. 1114 (1975).

The author discusses a North Carolina Court of Appeals decision holding that the state waived its immunity from suit by entering into a legislatively-authorized employment contract that it subsequently breached. The historic treatment of the sovereign immunity doctrine by the North Carolina courts is reviewed. The author concludes with an argument for total abolition of sovereign immunity.

Theis, "Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights, 59 Minn. L. Rev. 991 (1975).

A discussion of two eighth circuit opinions -- Mattes v. Schnarr, 502 F.2d 588 (8th Cir. 1974) and Bill v. Wolff, 496 F.2d 1252 (8th Cir. 1974) -- in which the court allowed a police officer's defense that he thought his actions were lawful, thus creating a new shield against charges of official misconduct. After much consideration, the author finds this new doctrine to be both unfounded and misguided.

Whitehill, The Eleventh Amendment and Sovereign Immunity: Vagaries of a Federal Fiction, 10 Tulsa L.J. 436 (1975).

A discussion of the federal courts' recent attempts to allow legitimate redress against a state while swearing continued allegiance to the traditional postulate of state sovereign immunity. This anomaly exists due to the persistent federal problems anchored in the application of eleventh amendment rights.

Comment, Scheuer v. Rhodes: A Restatement of Absolute Immunity, 60 Iowa L. Rev. 191 (1974).

This comment explains the potential significance of Scheuer v. Rhodes upon damage litigation involving state officials in federal courts. It surveys the relevant tests for determining whether the eleventh amendment acts as a bar to such action. The author discusses the common-law doctrine of executive immunity with emphasis on the test promulgated by Scheuer for determining the degree of immunity for state officers.

Comment, Sovereign Immunity and the Tennessee Governmental Tort Liability Act, 41 Tenn. L. Rev. 885 (1974).

The comment begins with an historical survey of sovereign immunity with emphasis on its treatment in Tennessee. The remainder of the comment focuses on the Tennessee Governmental Tort Liability Act, and the influence it has had upon judicial refinements of sovereign immunity, most notably the governmental-proprietary distinction and the municipality-county differentiation.

Davis, An Approach to Legal Control of the Police, 52 Tex. L. Rev. 703 (1974).

Through an examination of seven questions, the author suggests that the use of an exclusionary rule for the judicial control of the police should be supplemented by two other tools. The first is judicially-required police rule-making. The second is tort liability, not of officers, but of governmental units, for police abuses.

Morgan, Cameron v. State: Widening the Breach in Governmental Immunity, 9 Lincoln L. Rev. 107 (1974).

The ruling handed down by the California Supreme Court in Cameron v. State, 7 Cal. 3d 318, 102 Cal. Rptr. 305, 497 P.2d 777 (1972), provides the author some new insights to an old problem. The true stature of this case stands out when high-lighted against the background of prior law in the area of governmental immunity.

Note, Governmental Immunity in Ohio: Common Law Doctrine or Constitutional Prohibition, 3 Cap. U.L. Rev. 134 (1974).

A note on Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972) which court granted constitutional status to the doctrine of governmental immunity by its interpretation of Section 16, Article I of the Ohio Constitution. This decision, in effect, ended all judicial power to consider the policy merits of the doctrine.

Note, Governmental Immunity in West Virginia -- Long Live the King?, 76 W. Va. L. Rev. 543 (1974).

This note discusses the basis for the governmental immunity doctrine in West Virginia by examining its sources; limitations imposed by statutes and judicial decisions; possible ways of avoiding the effects of the doctrine as it presently exists; and factors to be considered with regard to an eventual abolition of the doctrine.

Note, Governmental Immunity Judicially Abrogated in Pennsylvania, 25 Mercer L. Rev. 969 (1974).

A casenote on Ayala v. Philadelphia Board of Public Education, 305 A.2d 877 (Pa. 1973) beginning with a survey of the distinctions between governmental and sovereign immunity and concluding with the author's argument that the doctrine of governmental immunity has become a form of licensed negligence, insofar as the burden borne by the injured citizen.

Note, Official Immunity In Ohio: How to Sue the King's Men, 43 U. Cin. L. Rev. 557 (1974).

This note traces the development of official immunity in Ohio. Exceptions to the doctrine are discussed in an effort to describe those circumstances in which a state officer may be sued. Finally, official immunity is discussed in light of underlying policy issues and alternatives are suggested which more fairly balance individual rights and public interests.

Note, Pennsylvania Abrogates Governmental Immunity, But Refuses to Abolish Sovereign Immunity, 8 U. Rich. L. Rev. 372 (1974).

Casenote on Ayala v. Philadelphia Board of Public Education and Brown v. Commonwealth that attempts to explain the effect of Ayala as laying a foundation for future courts to abolish sovereign immunity in despite Brown's rejection of that abrogation.

Comment, Governmental Immunity: The End of "Kings X", 34 La. L. Rev. 69 (1973).

This comment examines a Louisiana Supreme Court decision that governmental agencies are not immune to suit in tort and compares it with decisions abrogating the doctrine of sovereign immunity in other states. The author argues that an immunity rule should be adopted by courts that limits the standard that there must be a duty owed to the injured individual which is different from that owed to the general public. If such a duty is found, the nature of the governmental function (i.e., judicial or legislative, governmental or proprietary) is irrelevant.

Comment, Governmental Privileges: Roadblock to Effective Discovery, 7 U.S.F.L. Rev. 282 (1973).

This comment explores the problem of governmental privilege and the role it plays in criminal discovery in California. The focus is on the defense attorney and what information may be denied him because of this privilege.

Comment, Governmental Tort Immunity in Pennsylvania: A Job for the Judiciary, 46 Temp. L.Q. 345 (1973).

A discussion of the problems involved in abolishing governmental immunity in Pennsylvania. The author contends that although the judiciary created and nurtured the doctrine, the Pennsylvania Supreme Court refuses to abrogate it believing such action to be a legislative prerogative.

Comment, Judicial Abrogation of Governmental and Sovereign Immunity: A National Trend with a Pennsylvania Perspective, 78 Dick. L. Rev. 365 (1973).

The author discusses two Pennsylvania Supreme Court decisions -- one abolishing the immunity of local governmental units from tort liability, and the other upholding the concept of sovereign (state) immunity. The treatment of both types of immunity in other states is examined in detail, as are their historic roots. Finally, obstacles to courts abrogating existing law of government immunity are discussed using a number of other states and Pennsylvania as examples. The author believes that should the Pennsylvania legislature fail to enact comprehensive tort legislation, the court should abolish the doctrine of sovereign immunity on the theory that it was court-originated and can be court-abrogated.

Comment, State Sovereign Immunity: No More King's X?, 52 Tex. L. Rev. 100 (1973).

This comment discusses the effect the Supreme Court decision Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973) will have on state sovereign immunity. The background to the adoption of the eleventh amendment to the Constitution is examined as is the development of the implied waiver theory. The author criticizes the Supreme Court decision as not being broad enough to insure that the federal government remains supreme within its proper sphere of action.

Comment, The Role of the Maine Law Court in Abrogating the Common-Law Doctrines of Governmental and Charitable Immunity, 25 Maine L. Rev. 359 (1973).

This comment examines whether the public policy issues embodied in the immunity rules and the reliance interests attributed to those rules by the Maine Law Court justified the radical departure from the court's traditional role of deciding cases properly before it. By analyzing four decisions, the author reveals a failure by the court to fully acknowledge its role as policy-maker and to recognize that reliance upon the immunity rules is unfounded and unworthy of the court's protection.

Jackson, Governmental Immunity -- A Plea for Legislative Action, 61 Ill. B.J. 322 (1973).

A discussion of the insurance provisions of the Illinois Tort Claims Act which has created a serious problem -- governmental units may determine for themselves whether they will be obligated to respond by payment of damages to victims of their negligence. The author feels that this situation is potentially unconstitutional and needs prompt attention from the legislature.

Note, Equal Protection and State Immunity From Tort Liability, 1973 Wash. U.L.Q. 716.

A note on Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), in which the author discusses the Ohio Supreme Court's rationale in using the "reasonable relation" test over the "equal protection" test in applying state immunity. He believes that although the choice is easily justifiable, the court should have more closely examined the rationality of these classifications under Ohio law.

Note, State Sovereign Immunity Bars Employee Suits in Federal Court Under the Fair Labor Standards Act, 23 Cath. U.L. Rev. 171 (1973).

A discussion of aspects of the Supreme Court decision in Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare that the 1966 amendments to the Fair Labor Standards Act did not deprive a state of its Constitutional immunity to suit in a federal forum by employees of its nonprofit institutions.

Comment, The Colorado Governmental Immunity Act: A Judicial Challenge and the Legislative Response, 43 U. Colo. L. Rev. 449 (1972).

This comment examines the substance of the Colorado Governmental Immunity Act (Colo. Rev. Stat. Ann. §§ 130-11-1 et seq. (Supp. 1971)) in order to suggest how key provisions should be interpreted and to evaluate its impact with respect to prior law.

Minge, Government Immunity From Damage Actions in Wyoming, 7 Land & Water L. Rev. 229 (1972).

This article examines the extent to which governmental immunity shields the state of Wyoming and its political subdivisions from liability for damages -- primarily damages in tort -- and to make some recommendations.

Note, Abrogation of Governmental Immunity, 6 U. Rich. L. Rev. 397 (1972).

According to the author, decisions such as Proffitt v. State, 482 P.2d 965 (Colo. 1971); Flournoy v. School District Number One, 482 P.2d 966 (Colo. 1971), and Evans v. Board of County Commissioners, 482 P.2d 968 (Colo. 1971), have responded to the criticism of governmental immunity by abrogating this doctrine in Colorado. This note focuses on the application of various approaches to abrogation.

Note, Krause v. State: Is Ohio Sovereign Immunity Unconstitutional?, 33 U. Pitt. L. Rev. 611 (1972).

The Ohio Court of Appeals held in Krause v. State, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971) that the doctrine of state sovereign immunity violates the equal protection clause of the Constitution and is therefore null and void. This note examines the decision and comments upon its prospective effect on the State of Ohio.

Note, Sovereign Immunity -- Denial of Equal Protection, 52 B.U.L. Rev. 202 (1972).

This note discusses the implications of the holding by the Court of Appeals for Cuyahoga County, Ohio, that the operation of the doctrine of sovereign immunity in Ohio results in discrimination prohibited by the fourteenth amendment, and cannot be used to shield the state from responsibility for the tortious acts of its agents.

State Sovereign Immunity Bars Employees' Suit Against State Employer Even Though Congress Has Applied the Fair Labor Standards Act to States as Employers, 17 Vill. L. Rev. 713 (1972).

A discussion of Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, 452 F.2d 820 (8th Cir. 1971). The author puzzles over whether the decision was based upon the eleventh amendment or common-law sovereign immunity and proposes reasons for believing it to be the former.

Note, Sovereign Immunity In Indiana -- Requiem?, 6 Ind. L. Rev. 92 (1972).

The author traces the development of the concept of governmental tort responsibility in Indiana. An Indiana Supreme Court decision holding state tort liability must be determined in the same manner as that of cities and counties is analyzed. The author concludes that all that remains to shelter the state from potential tort liability is the common-law privilege of immunity extended to governmental employees for discretionary acts.

Note, The Doctrine of Immunity Judicially Abrogated and Legislatively Reinstated, 50 J. Urb. L. 154 (1972).

A brief discussion of Maki v. East Tawas, 385 Mich. 151, 188 N.W.2d 593 (1971) and the struggle between the traditional broad application of sovereign immunity except when a state consented to be sued and the modern trend toward narrowly construing the immunity doctrine.

Alperin, Immunity of Administrative Officials From Tort Liability in Massachusetts, 56 Mass. L.Q. 79 (1971).

This note reveals that while the federal courts and most state courts have adopted rules of absolute or qualified immunity, Massachusetts has not clearly done so. The author examines the Massachusetts case law which has dealt with the issue of immunity for officials and attempts to assess the present status of the law in this area.

Comment, Governmental Immunity in Kansas: Prospects for Enlightened Change, 19 U. Kan. L. Rev. 211 (1971).

The initial holding by the Kansas Supreme Court that the state and its agencies are not immune from suits for their torts while engaged in proprietary functions is discussed in this comment. (Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969)). The history of the doctrine of governmental immunity is reviewed and the recent fluctuations in the doctrine as applied in Kansas are examined. The author suggests possible alternatives for future legislative action.

Freeman, Circumventing Immunities, Charitable and Governmental, 6 Forum 178 (1971).

The author discusses a number of stratagems that a lawyer might employ to circumvent New Jersey's legislative enactments preventing suits against government bodies.

Greenhill & Murto, Governmental Immunity, 49 Tex. L. Rev. 462 (1971).

This article opens with a general discussion of state and local governments' immunity from tort claims. The Texas Tort Claims Act is examined and its provisions are compared with the laws of other states. The authors call for substantial modification of the doctrine of absolute immunity from tort claims, with a general reservation of immunity only at the planning and policy-making levels, and in the areas of legislative and judicial actions.

Kionka, The King Is Dead, Long Live the King: State Sovereign Immunity in Illinois, 49 Ill. B.J. 660 (1971).

This article reviews the status of sovereign immunity in Illinois. According to the author, the tort liability of the State of Illinois is much more limited and uncertain under the present law than that of local governments and other institutions. The author also discusses the 1970 Illinois Constitution which he believes provides an opportunity to create a uniform system permitting suits against the state in Illinois courts.

Comment, Waiver of State Immunity: Private Damage Actions Against the States Arising Under Federal Law, 50 B.U.L. Rev. 590 (1970).

Where a cause of action arises under validly enacted federal law, the federal courts will have jurisdiction, even in suits against a state. The doctrines of state immunity have no vitality when confronted with a federally-created right. Briggs v. Sagers, 424 F.2d 130 (10th Cir.), cert. denied, 400 U.S. 829 (1970).

Eichner, A Century of Tort Immunities In Virginia, 4 U. Rich. L. Rev. 238 (1970).

This article traces the origins of common-law tort immunities in Virginia and points out the manner in which courts in other states have been handling the question of tort immunity.

Governmental Tort Immunity in Kansas, 10 Washburn L.J. 59 (1970).

This article provides a survey of governmental immunity and presents ideas and alternatives which the author hopes may lead to reform of the anachronism of governmental immunity as exists in Kansas.

Greenhill, Recent Developments in Governmental and Charitable Immunities, 21 Fed'n Ins. Couns. Q. 123 (1970).

The author reviews a number of recent decisions by various state supreme courts involving charitable and governmental immunities. Although he sees no compelling reason for the failure by courts to examine or re-examine the charitable immunity doctrine, he believes that governmental immunity cannot and should not be wholly abolished.

Comment, The Governmental Immunity Doctrine in Texas -- An Analysis and Some Proposed Changes, 23 Sw. L.J. 341 (1969).

The purpose of this comment is to examine the status of governmental immunity in Texas; to determine the constitutional power of the legislature to act in this area; to analyze the developments in the remaining forty-nine states and to suggest basic standards which should be embodied in any future legislation.

Flint, Governmental Tort Immunity in Georgia, 5 Ga. St. B.J. 494 (1969).

The author's purpose is to examine and evaluate the present application of governmental tort immunity in Georgia in view of the steady trend in other jurisdictions toward altering or abolishing this doctrine. He attempts to determine what, if any, changes or alternatives to this doctrine are justified.

Blades, Comment on Governmental Tort Immunity in Kansas, 16 U. Kan. L. Rev. 265 (1968).

The author of this article attempts to demonstrate that the substance of criticism of governmental immunity applies with full force to the doctrine as it currently exists in Kansas, and then considers what must be done to set in motion to processes of needed reform in the state.

Comment, State Governmental Corporation Immunity From Federal Jurisdiction Under the Eleventh Amendment, 72 Dick. L. Rev. 296 (1968).

The author argues that a diversity action in federal court against a state governmental corporation is a prohibited suit under the eleventh amendment. A number of federal court decisions on this issue are discussed, and the immunity of federal governmental corporations is reviewed. The author criticizes the federal court decisions denying immunity as unwarranted extensions of the power of the federal judiciary over the affairs of the states.

Greenhill, Should Governmental Immunity for Torts Be Re-Examined, and, If So, By Whom?, 31 Tex. B.J. 1036 (1968).

This article surveys the status of doctrines of charitable and sovereign immunity as they exist in the State of Texas, in light of Watkins v. Southcrest Baptist Church, 399 S.W.2d 530 (Tex. 1966). The author concludes that legislative action is the best means to modify these immunities.

Jenkins, Impact of Sovereign Immunity of Subcontractors Dealing with State and Local Government, 2 Pub. Cont. L.J. 27 (1968).

This article is a reprint of a speech concerning the sovereign immunity defense and other remedies available to contractors dealing with states which adhere to the doctrine of sovereign immunity.

Lansing, The King Can Do Wrong: The Oregon Tort Claims Act, 47 Or. L. Rev. 357 (1968).

The Oregon Tort Claims Act (Or. Rev. Stat. §§ 30.260 -.300 (1967)) waives governmental immunity to tort liability in some areas, but it retains it in others. The author's purpose in this article is to analyze the Act and to shed as much light as possible on its sometimes conflicting applications of immunity and liability.

Note, California Public Entity Immunity From Tort Claims by Prisoners, 19 Hastings L.J. 573 (1968).

The author attempts to determine the extent to which a public entity is protected from suit by a prisoner under the California Tort Claims Act for injuries caused by its employees. The Act immunizes public entities from liability for injuries to prisoners. The general effect of the Tort Claims Act is examined, as well as the public entity immunity provision and court decisions interpreting it. The author criticizes various decisions that he feels continually seek new ways of avoiding the immunity created. He argues that the legislature should either make its intent clear and close the loopholes, or, more preferably, repeal the immunity provision and permit the doctrine of respondeat superior to be applied.

Note, Sovereign Liability for Defective or Dangerous Plan or Design -- California Government Code Section 830.6, 19 Hastings L.J. 584 (1968).

The author examines the legislative background and policy goals of a section of the California Tort Claims Act dealing with immunity from liability for injuries resulting from the plan or design of public property. Two court decisions illustrating conflicting approaches to the section are reviewed, with the author arguing that the one finding liability for breach of a continuing duty to operate in safe condition, whether the defective condition arose from the daily use of government property or from a structural defect of the property, should be sustained.

Note, The Discretionary Immunity Doctrine in California, 19 Hastings L.J. 561 (1968).

The author discusses the section in the California Tort Claims Act that provides that governmental officials are not personally liable for harm resulting from "discretionary" acts within the scope of their authority. Court decisions prior to enactment of the Act, and the legislative intent in its adoption are examined. The author describes and appraises the various judicial approaches to interpreting the immunity provision used by California courts. One, the "dampen the ardor" approach, is cited as being more in tune with the legislative intent because it balances the needs of the public for uninhibited decision-making with the loss suffered by the injured plaintiff.

Comment, Ohio Sovereign Immunity: Long Live, 28 Ohio St. L.J. 75 (1967).

Despite repeated attacks on the doctrine of sovereign immunity, it retains its vitality in most jurisdictions. This comment has a twofold purpose in exploring this phenomenon: 1) to set out the Ohio position on sovereign immunity, and 2) to propose a modest step toward abolition of the doctrine in Ohio.

Note, Claims Against the State of Ohio: The Need for Reform, 36 U. Cin. L. Rev. 239 (1967).

An examination of governmental immunity and its consequences under the present system in Ohio primarily concerning the issue of government tort liability. Various methods of abrogating governmental immunity are discussed with the major emphasis on underlying policy issues. Finally, the writer presents his views on desirable provisions of legislative measures for reform of the doctrine in Ohio.

Note, Governmental Immunity -- Special Procedural Requirements Unconstitutional, 17 De Paul L. Rev. 236 (1967).

The author discusses various decisions by the Illinois Supreme Court in their effort to update the rules concerning governmental tort liability. The argument is made that recent decisions by the court have established a trend toward placing upon governmental agencies, with certain modifications, the same responsibility individuals or business entities have with respect to tort liability.

Note, Utah Governmental Immunity: An Analysis, 1967 Utah L. Rev. 120.

This note attempts to assign the Utah Act its place in the history of governmental tort immunity, and to analyze it in the context of prior Utah law. The author compares it with similar statutes in other states, and attempts to provide some guidelines for judicial construction and further refinement.

O'Brien, Suing the Sovereign in Tort, 43 L.A.B. Bull. 11 (1967).

This article discusses two main segments of the 1963 California statute establishing the ground rules for filing and enforcing tort claims against public entities (Stats. 1963, Ch. 1681). Both segments are contained in Division 3.6 of the Government Code -- Parts 3 and 4 concerning procedures for filing a claim and for bringing an action; and Part 2, concerning liability.

Ross, State Immunity and the Arkansas Claims Commission, 21 Ark. L. Rev. 180 (1967).

This discussion of governmental immunity cases in Arkansas first attempts to determine which state organizations, agencies, and institutions fall within the phrase "the State of Arkansas" and therefore enjoy immunity, and which do not and are protected only by common law. Following this classification, the author examines the artful efforts of plaintiffs to involve the state in actions without making the state a "defendant." Once accomplished, he discusses when the state is actually a defendant as the term is used in the state constitution.

Snouffer, Sovereign Immunity, Suits Against Public Officers, and the Dead Letter of Oregon Law, 46 Or. L. Rev. 286 (1967).

This article discusses the conflict of an Oregon constitutional provision preserving sovereign immunity until such time as the legislature enacts a general law for bringing suit against the state, and a legislative provision allowing suits to be brought against public officers.

Alstyne, Governmental Tort Liability: A Decade of Change, 1966 U. Ill. L.F. 919.

This article reviews recent developments with respect to governmental tort responsibility in 14 different jurisdictions where the law has undergone substantial change. Attention is directed primarily to the degree in which the barriers of governmental immunity have been broken down and supplanted by new rules governing tort liability and immunity. An effort is made to assess the significance of the recent developments and their future meaning.

Comment, From Richard to Myers and Beyond: The King is Dead; Long Live the King, 43 U. Det. L.J. 404 (1966).

This comment traces the path from Richards v. School District of the City of Birmingham, 348 Mich. 490, 83 N.W.2d 643 (1957) which contained the first utterance of dissatisfaction with the doctrine of sovereign immunity, to Myers v. Genesee County Auditor, 375 Mich. 1, 133 N.W.2d 190 (1965) which was a complete judicial undoing of immunity.

Comment, State Immunity In Illinois; The Court of Claims, 15 De Paul L. Rev. 340 (1966).

This comment examines the historical background of Illinois Constitution Article IV § 26, the sovereign immunity clause, the current laws which affect it, and speculates on its future application.

Lawyer, Birth and Death of Governmental Immunity, 15 Clev.-Mar. L. Rev. 529 (1966).

The author traces the development of the doctrine of governmental immunity through court decisions, and examines the results in states where the doctrine was judicially abrogated. The author argues that there is really no justification for retention of the doctrine and that courts should take the initiative in this area in an effort to prod state legislatures into action.

Mathes & Jones, Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions, 53 Geo. L.J. 889 (1965).

The authors briefly review the civil liability of public entities and individual officers absent a federal statute and under federal law (the Civil Rights Act) and conclude there are numerous defects in the present system. The authors call for courts to elaborate a "scope of official duty" immunity for police officers. The possibility of liability could still be retained in the case of facts showing plain excess or dereliction, such as Monroe v. Pape, 365 U.S. 167 (1961).

Mosk, Problems of Sovereign Liability, 3 San Diego L. Rev. 7 (1966).

A brief history of sovereign immunity followed by an outline of the anticipated legal, governmental and fiscal problems California might face in view of its abrogation of sovereign immunity. The author bases his outline on references to New York cases because New York was the first state to impose governmental liability.

Schoenbrun, Sovereign Immunity, 44 Tex. L. Rev. 151 (1965).

The author describes the operation of the doctrine of sovereign immunity as it applies to parties entering contractual relationships with the State of Texas. Various methods of avoiding the doctrine's application, *i.e.* legal arguments, securing legislative permission to sue the state, are discussed. The author argues for creation of an administrative board to handle some claims against the state, and outright waiver of immunity in other situations so the courts could handle the claims.

Comment, Governmental Immunity in Arizona: The Stone Case, 6 Ariz. L. Rev. 102 (1964).

The author's purpose in this comment is threefold: 1) to give a brief survey on the doctrine of governmental immunity; 2) to review the rationale of court decisions in other states involving the issue of governmental immunity; and 3) to examine Arizona's position and discuss some of the problems which will confront public bodies in the state and to suggest possible solutions.

Comment, The Disappearing Doctrine of Governmental Immunity From Tort Liability, 26 Ga. B.J. 435 (1964).

The author reviews the historic applications by courts at the state and county levels of the doctrine of sovereign immunity. The trend toward governmental responsibility is discussed and it is argued that the entire doctrine of excusing governmental entities for their neglect was, and remains, a mistake.

Comment, The Role of the Courts in Abolishing Governmental Immunity, 1964 Duke L.J. 888.

The author argues for judicial abolition of the doctrine of governmental immunity in order to press legislatures into action. He supports a cautious approach by the courts, and recommends that their objective should be to create a workable framework which will instill confidence within public entities and legislatures, thus facilitating a climate in which an orderly, comprehensive legislative solution can grow.

Governmental Liability for Torts of Employees: The End of Sovereign Immunity in California, 5 Santa Clara Law. 81 (1964).

An examination of those provisions of a 1963 California statute (Cal. Gov't Code §§ 810-895.8) which the author believes bring an end to the doctrine of sovereign immunity in the state. This results from the application of general liability to governmental entities, rather than establishing general immunity, which was the original intent.

Hamill, The Changing Concept of Sovereign Immunity, 13 Def. L.J. 653 (1964).

The author discusses the Oklahoma Supreme Court decision Ard v. Oklahoma City, 382 P.2d 728 (Okla. 1963) concerning tort liability of a municipal corporation for personal injuries, and reviews the case histories in the development of the doctrine of sovereign immunity. The test of governmental versus proprietary functions is reviewed, and a summary of the status of the doctrine of sovereign immunity in each of the 50 states is provided.

Comment, Sovereign Immunity in Colorado, and the Feasibility of Judicial Abrogation, 35 Colo. L. Rev. 529 (1963).

This comment traces the history of the doctrine of sovereign immunity in Colorado. It also discusses cases in other states which have judicially modified or abolished the doctrine so that some perspective can be gained as to the possible results, should Colorado follow suit.

Ghiardi, Abolition of Tort Immunity, 24 Gavel 30 (1963).

The author provides a brief summary of the Wisconsin Supreme Court decisions abolishing government, charitable and religious immunity.

Judicial Abrogation in Wisconsin; Outlook for Colorado, 35 Colo. L. Rev. 265 (1963).

An analysis of Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) focusing on the trend toward abrogation of the doctrine of sovereign immunity. The writer considers the question of how abrogation should take place in Colorado -- through the courts or the legislature.

Note, Sovereign Immunity -- Legislative Role -- Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), 12 Cath. U.L. Rev. 58 (1963).

A discussion of the Wisconsin Supreme Court decision that a public body shall be liable for damages for the torts of its officers, agents and employees, whether by omission or commission, occurring in the course of business of such public body, by reason of the rule of respondeat superior. The author examines cases in other states that have met limited success against sovereign immunity and the statutory and legislative regimes in those states.

Stanton, Sovereign Immunity, 38 Cal. St. B.J. 177 (1963).

This article is the work of the California Law Revisions Commission on the status of sovereign immunity in California. It summarizes the Commission's study of existing legislation and briefly outlines several recommendations submitted to the State legislature.

Davis, Suing the Government by Falsely Pretending to Sue an Officer, 29 U. Chi. L. Rev. 435 (1962).

The author contends that the federal courts have upheld the doctrine of sovereign immunity by using false pretenses in the disposition of cases. He believes that even if no one is harmed by these fallacies, they do cause damage. This is shown by joinder of superior officers and developments concerning substitution of successor officers.

Comment, Liabilities of Public Bodies, Officers, and Employees -- Governmental Immunity, 11 Drake L. Rev. 79 (1962).

The author discusses the general scope of governmental immunity in Iowa, and a variety of substantive rules and procedural aspects applicable to different classes of cases dealing with this area. He also reviews a number of recent decisions by Iowa courts and, actions by the Iowa legislature.

Hestler, Judicial Legislation and the Doctrine of Governmental Immunity, 39 U. Det. L.J. 570 (1962).

An analysis of Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) and McDowell v. Mackie, 365 Mich. 268, 112 N.W.2d 491 (1961) that describes the two cases as being the end of governmental immunity in Michigan. Prior to these rulings, the common-law doctrine of governmental immunity was in full force and effect in Michigan except as modified by the legislature.

Note, Government Immunity Unavailable to California State Agencies Except in Some Cases of Discretionary Acts, 46 Minn. L. Rev. 1143 (1962).

The author discusses two California Supreme Court decisions rejecting the doctrine of governmental immunity. Decisions by the highest courts of Florida and Illinois following the same line are also described. The author criticizes one of the California decisions as attempting to implement a rule of governmental liability under a test of impaired function which he feels is too subjective.

Note, Governmental Immunity Doctrine Modified to Permit Tort Liability for Ministerial Acts, 9 UCLA L. Rev. 266 (1962).

Note discussing the effects of Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 359 P.2d 457 (1961) on various provisions of the California code that deal with governmental immunity and official liability.

Note, Sovereign Immunity: Will Ohio Follow Michigan's Lead?, 31 U. Cin. L. Rev. 307 (1962).

The author urges the Ohio courts to follow Michigan's lead in doing away with the sovereign immunity doctrine as judicial precedent. Such action would force the legislature to create a more workable rule. The author reaches this position after making an examination of the historical background of sovereign immunity and the evolution of the law in Ohio.

Cases, Sovereign Immunity, 35 Temp. L.Q. 112 (1961).

This article provides brief over-views of the status of the doctrine of sovereign immunity in various states.

Comment, Abolition of Sovereign Immunity in Washington, 36 Wash. L. Rev. & St. B.J. 312 (1961).

Comment on the Washington State legislature's apparent abolition of the doctrine of sovereign immunity with enactment of Wash. Sess. Laws 1961, Ch. 136. The author questions whether the abolition is in fact only partial and attempts to predict its full impact.

Comment, Right of Court to Abrogate Immunity Without Legislative Consent, 37 N.D.L. Rev. 373 (1961).

A comment on Muskopf v. Corning Hospital District, in which the writer argues that while blind allegiance to antiquated and outgrown precedent should not be condoned, the courts have recognized immunity only with reluctance because they feel bound by precedent and Constitutional divisions of powers.

Crahan, Governmental Tort Responsibility In California, 36 L.A.B. Bull. 415 (1961).

The author discusses the merits of Muskopf v. Corning Hospital District and briefly comments on the state of governmental immunity in California. He suggests some possible solutions to the problem of government tort liability, which he categorizes as being "socio-legal" in nature.

Note, Governmental Immunity Abolished and then Reinstated on Another Basis in California, 38 U. Det. L.J. 675 (1961).

A discussion of the doctrine of governmental immunity and its historical development from English common law through Muskopf v. Corning Hospital District.

Note, Official Immunity: Scope of Authority Restricted [Lipman v. Brisbane Elementary School District, 359 P.2d 465 (Cal. 1961)], 49 Calif. L. Rev. 772 (1961).

A discussion of a California Supreme Court decision that acts by officials outside the scope of their authority were not entitled to the protection of official immunity. The author compares the California decision to current federal courts statements on the limits of scope of authority.