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I. INTRODUCTION

[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.[1]

The power of the judiciary to curb excesses of the other branches of government and to provide redress to individuals whose constitutional rights are violated long has been recognized. Chief Justice Marshall underscored the undisputed acceptance of this power in *Marbury v. Madison*:

> If one of the heads of the departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law.[2]

Similarly, the federal judiciary's power to remedy unconstitutional action through injunctive relief is not seriously disputed.[3] Federal courts have encountered great difficulty, however, in fashioning damage remedies for injured individuals. Although Congress and the Supreme Court have held out the promise of compensatory relief to individuals injured by the unconstitutional conduct of government officers,[4] the application of common law immunity doctrines to the law of constitutional torts has caused the denial of an effec-

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

2. *Id.* at 170. This principle applies with equal vigor to legislative actions. The Chief Justice added: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Id.* at 177. The principle that "color of office" creates no immunity for the unlawful invasion of individual rights has been called "[t]he pride and glory of Anglo-American common law." Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937). *See* Kilbourn v. Thompson, 103 U.S. 168 (1881); Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765) (upholding the award of damages against Lord Halifax, the Secretary of State, for issuing an unlawful general warrant for the seizure of papers); Wilkes v. Wood, 95 Eng. Rep. 767 (K.B. 1763).

3. *See Ex parte* Young, 209 U.S. 123 (1908). The only limitations on judicial power to enjoin state action are the abstention doctrines of Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), and Younger v. Harris, 401 U.S. 37 (1971). These doctrines mandate that federal courts refrain from ruling on the constitutionality of a limited class of state activities to permit the state courts to have the first opportunity to do so. For a discussion of the obstacles imposed by the *Younger* doctrine on the availability of injunctive relief against state officials, see Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

4. *See* text accompanying notes 6-15 *infra*.

tive federal remedy for most victims of such conduct.[5] The promise of compensation is offered by section 1 of the Civil Rights Act of 1871,[6] which was enacted by the Reconstruction Congress to curb widespread official lawlessness in the South through enforcement of the provisions of the fourteenth amendment.[7] The Act represents a commitment to the philosophy that every individual is entitled to the protection of the law, regardless of the "color of office" the lawbreaker possesses.[8] The Act expressly permits an injured party to seek damages from "every person"[9] who, while acting under color

5. *See* text accompanying notes 79-278 *infra*.

6. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1970)):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7. For a description of the conditions in the South prior to the adoption of the fourteenth amendment, see FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951). Section 1983 was enacted for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." H.R. REP. No. 320, 42d Cong., 1st Sess. (1871). *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 545 (1972). For a discussion of the legislative purpose of § 1983, see Mitchum v. Foster, 407 U.S. 225, 238-42 (1972); Monroe v. Pape, 365 U.S. 167, 171-83 (1961); Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 280-82 (1965).

8. The prohibitions of the fourteenth amendment are "enforce[able] against State action, however put forth, whether that action be executive, legislative, or judicial." *Ex parte* Virginia, 100 U.S. 339, 346 (1879). *See* CONG. GLOBE, 42d Cong., 1st Sess. 374-76 (1871) (remarks of Rep. Lowe); *id.* at 429 (remarks of Sen. Beatty); *id.* at 365-66 (remarks of Rep. Arthur); *id.* at app. 78 (remarks of Rep. Perry). Representative Shellabarger, who introduced the Civil Rights Act bill to the House, noted that the Act provided a civil remedy not only to freed slaves, "but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution." *Id.* at app. 68. *See id.* at app. 257 (remarks of Sen. Wilson); *id.* at app. 262 (remarks of Rep. Dunnell).

9. The statute originally provided that "any" person who violated its proscriptions was liable. As altered by the reviser who codified the Revised Statutes in 1878, the statute imposes liability on "[e]very" such person. 42 U.S.C. § 1983 (1970). As a result, it has been argued that no official immunities may be interposed to bar recovery under the Act. "To most, 'every person' would mean *every person*, not every person *except* . . . ." Pierson v. Ray, 386 U.S. 547, 559 (1965) (Douglas, J., dissenting) (emphasis in original). Judge Magruder has noted:

> The enactment in terms contains no recognition of possible defenses, by way of privilege, even where the defendants may have acted in good faith, in compliance with what they helieved to be their official duty. Reading the language of the Act in its broadest sweep, it would seem to make no difference that the conduct of the defendants might not have been tortious at common law; for the Act, if read literally, creates a new federal tort, where all that has to be proved is that the defendants . . . under color of state law . . . depriv[ed] [the plaintiff] of rights, etc., secured by the Constitution of the United States.

Cobb v. City of Malden, 202 F.2d 701, 706 (1st Cir. 1953) (Magruder, C.J., concurring).

of state law, has deprived him of a federally protected right.[10] Early decisions appeared to fulfill the promise of an effective federal remedy. In *Nixon v. Herndon*[11] the Court held that state officials would be liable in damages for denying a plaintiff his right to vote by enforcing a racially discriminatory election law. The Court made no mention of any possible defenses or other limitations upon liability that might be available to state officials.

The Court recently has expanded the ability of individuals to receive compensation for deprivations of their rights by federal officials. In *Bivens v. Six Unknown Named Agents*[12] the Court held that in the absence of a federal statutory remedy for unconstitutional searches, the Constitution itself provides for a damage action against the offending federal officers.[13] In sweeping language, the Court suggested that, when Congress has expressed no contrary intention, federal common law provides the full panoply of remedies furnished by the common law for private legal injuries.[14] Moreover,

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During the debates on the Act, only opponents of the Act made references to possible immunities of state officials. Representative Lewis expressed the typical fear that if the bill were enacted, state judges would be "liable to a suit in the Federal Court and subject to damages for [their] decision[s] . . . ." CONG. GLOBE, 42d Cong., 1st Sess. 385 (1871). *See also id.* at 365-66 (remarks of Rep. Arthur). Representative Shellabarger, the bill's sponsor on the House floor, repeatedly corrected errors or misunderstandings on the part of his colleagues but did not take exception to any of the statements that the Act applied to all state officials, including judges. *See* Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285, 1296 & n.56 (1953).

10. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

11. 273 U.S. 536 (1927).

12. 403 U.S. 388 (1971).

13. This is true at least when there has been "no explicit congressional declaration" that individuals injured by a government officer's violation of the Constitution may not rely on a specified remedy, "but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397. Congress cannot, however, "restrict, abrogate, or dilute" constitutional guarantees, even in the exercise of its broad powers under § 5 of the fourteenth amendment. Katzenbach v. Morgan, 384 U.S. 641, 651 & n.10 (1966). *See* Oregon v. Mitchell, 400 U.S. 112, 128-29 (1970) (opinion of Black, J.); *id.* at 249 & n.31 (separate opinion of Brennan, J.). *But see* Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 247 (1971). Congressional power under § 5 of the fourteenth amendment has been likened to its power under the necessary and proper clause. U.S. CONST. art. I, § 8, cl. 18. *Compare* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), *with* National League of Cities v. Usery, 426 U.S. 833 (1976). *See generally* Katzenbach v. Morgan, 384 U.S. 461 (1966); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

14. 403 U.S. at 395-97. Quoting Bell v. Hood, 327 U.S. 678, 684 (1946), the Court stated that "federal courts may use any available remedy to make good the wrong done." 403 U.S. at 396. The question, answered affirmatively by the Court, was "merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Id.* at 397. Justice Harlan, concurring, rejected the notion that "the power to authorize damages as a judicial remedy for the vindication of a

the Court's opinion clearly indicated that the aggrieved individual may avail himself of all possible remedies if more than one are available.[15]

There always have been exceptions to the promise of an adequate federal remedy for illegal official action. For example, the speech and debate clause of the Constitution confers upon members of Congress an immunity for conduct in the sphere of legitimate legislative activity.[16] This immunity subsequently was extended to state legislators sued under section 1983.[17] In 1868, the year in which the fourteenth amendment was ratified, the Supreme Court held that judges are immune to federal suits attacking the propriety of their actions.[18] With the creation of new immunity doctrines and the

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federal constitutional right is placed by the Constitution itself exclusively in Congress' hands." *Id.* at 401-02. Justice Harlan added, "The question then, is, as I see it, whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id.* at 407. Justice Harlan's answer was that "these injuries be compensable according to uniform rules of federal law . . . ." *Id.* at 409.

While *Bivens* concerned violations of the fourth amendment, the Court's opinion did not suggest that the constitutional remedy was limited to fourth amendment cases. The right to sue federal officers for violating individuals' constitutional rights has been upheld in myriad circumstances. *Bivens* has been read to confer a cause of action against persons acting under color of federal law "for violation of any constitutionally protected interest." Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974). *See* Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972); Bethea v. Reid, 445 F.2d 1163 (3d Cir.), *cert. denied,* 404 U.S. 1061 (1971); Shifrin v. Wilson, 412 F. Supp. 1282 (D.C. Cir. 1976). This does not mean, however, that the same considerations always apply to actions under the Constitution and those brought under § 1983. In particular, certain limitations on § 1983 remedies, derived from the statute's language, might not necessarily be applicable to actions under the Constitution.

15. The Court did not condition the availability of the damage remedy on the nonavailability of other remedies. An individual facing criminal prosecution may rely on the fourth amendment's guarantee against unreasonable searches and seizures to suppress the admission of illegally obtained evidence. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). Such a person may then pursue a damage remedy against the offending officer, although he might have to await the resolution of his criminal trial before seeking this remedy. *See* Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976); Meadows v. Evans, 529 F.2d 385 (5th Cir. 1976); Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974). There have been some suggestions that criminal defendants be limited to one remedy. *See* Stone v. Powell, 428 U.S. 465, 496-502 (1976) (Burger, C.J., concurring) (abrogation of exclusionary rule, irrespective of existence of adequate damage remedies); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 420-22 (1971) (Burger, C.J., dissenting) (limitation to damage remedy); Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights,* 59 MINN. L. REV. 991, 1023 (1975) (limitation to suppression of evidence). *See also* Stone v. Powell, 428 U.S. at 541-42 (White, J., dissenting) (suggesting that no remedies be afforded the victim of an unconstitutional search when the police acted in good faith).

16. U.S. CONST. art. I, § 6.

17. Tenney v. Brandhove, 341 U.S. 367 (1951).

18. Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868). The doctrine was reaffirmed in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). It was not until 1967, however, that the Court

expansion of those already in existence, color of office often became a serious—sometimes insuperable—barrier to recovery of damages in federal courts. The Court's suggestion in *Bivens* that "federal courts may use any available remedy to make good the wrong done"[19] does not reflect the reality of the situation. Generally, the courts will not even entertain suits against members of the judicial[20] or legislative[21] branches of government. Furthermore, the ability of plaintiffs to prosecute suits against members of the executive branch for alleged constitutional violations is tempered by the existence of affirmative defenses and immunities.

Prior to *Scheuer v. Rhodes*[22] and *Wood v. Strickland*,[23] the standard by which the actions of state executive and administrative officials were judged was applied unevenly in the federal courts.[24] Moreover, the broad protection offered officials by the prevailing immunity doctrines prevented plaintiffs from obtaining relief when officials did not act in bad faith.[25] *Scheuer* and *Wood* injected some uniformity into this area by providing that the liability of state executive officers for damages depends upon whether they knew or reasonably should have known in light of their responsibilities and range of discretion that their actions would violate the Constitution. If the officers disregarded settled constitutional doctrines in formulating their actions, the honesty of their intentions would not insulate them from liability.[26]

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applied the judicial immunity doctrine to actions where judicial action was alleged to be unconstitutional. *See* Pierson v. Ray, 386 U.S. 547 (1967).

19. 403 U.S. at 396.

20. *See* notes 90-114 *infra* and accompanying text.

21. *See* notes 79-89 *infra* and accompanying text.

22. 416 U.S. 232 (1974).

23. 420 U.S. 308 (1975).

24. *Compare* Bell v. Wolff, 496 F.2d 1252 (8th Cir. 1974), *with* Slate v. McFetridge, 484 F.2d 1169 (7th Cir. 1973).

25. *See, e.g.*, Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973). Plaintiff, denied employment as a page in the South Carolina Senate on the basis of her sex, was barred from recovering damages from the clerk of the Senate, who denied her the position, because the latter "acted in the light of a long-standing, albeit vaguely defined, 'custom' of the South Carolina Senate barring female pages. He did no more, or less, than what had always been done." *Id.* at 229. The court suggested elsewhere in the opinion that officials who have reasonable grounds to believe that they are acting within the bounds of the law are protected from damages. *Id.* To the extent that a finding of such a reasonable belief was made in this case, however, it was predicated upon the clerk's reliance on the custom itself, rather than a finding that reliance on that custom was reasonable in light of prevailing constitutional doctrine at the time of his actions. While reference was made in the opinion to the "inchoate state of legal guidelines," *id.*, the court did not endeavor to substantiate this assertion.

26. This standard was by no means new or novel. Indeed, in some circuits a similar standard had been applied prior to *Scheuer* and *Wood*. *See, e.g.*, Slate v. McFetridge, 484

Scheuer and *Wood* have raised serious questions that remain unresolved. For example, how much constitutional law is an official required to know; are state officials and employees required to remain current with district court, court of appeals, and Supreme Court decisions; does an official's rank in the governmental hierarchy affect the degree of knowledge to which he is to be held; and who has the burden of proving knowledge and bad faith? The lower federal courts have not spoken with a single voice on these points. Although one panel of a court of appeals has held a college president responsible for knowledge of one of the court's decisions issued only two months earlier,[27] another panel of the same court held school board members immune in the face of compelling precedent from the Supreme Court.[28] Similarly, one panel has required defendants to prove they did not know that their actions were unconstitutional, while another has allocated that burden to the plaintiff.[29]

Although compelling arguments support the granting of immunities and affirmative defenses to government officials, the broad

F.2d 1169 (7th Cir. 1973). Some commentators suggested a similar standard. *See* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 17 (1974) (suggesting that officials be held to a standard of reasonable foreseeability of the unconstitutionality of their actions). This, however, was not the prevailing standard. *See* Kotmair v. Gray, 505 F.2d 744 (4th Cir. 1974); Anderson v. Reynolds, 476 F.2d 665 (10th Cir. 1973). *Cf.* Shapo, *supra* note 7, at 328. Shapo argues that a correct reading of § 1983 would require that the defendant's conduct be "outrageous" in order for liability to arise. Shapo's argument is premised on the notion that the Act was intended to secure the rights of freedmen in the South and little else. Yet testimony before the Joint Committee on Reconstruction, which proposed the fourteenth amendment to the Congress, indicated that wrongs were being inflicted on Northern whites and those Southern whites who remained loyal to the Union, as well as on blacks. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1354 (1964). Representative Shellabarger described the rights which the legislation enforcing the fourteenth amendment sought to secure as "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871) (quoting Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823)). Undoubtedly, the primary purpose of the legislation was to curb violence in the South. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 374 (remarks of Rep. Lowe). It must be borne in mind, however, that tbe express purpose of the legislation was to "enforce the Provisions of the Fourteenth Amendment." The breadth of the Act's protection must, therefore, be coextensive with that of the amendment. Judge Henry Friendly, who shares some of Shapo's views on the proper scope of § 1983, has noted that "[a] literal reading of the . . . statute would embrace every case where state action was claimed to violate any provision of the Federal Constitution . . . ." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 91 (1973).

27. Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975). Query whether the opinion was published during that two month lag?

28. Sapp v. Renfroe, 511 F.2d 172 (5th Cir. 1975).

29. *Compare* Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975), *with* Hanneman v. Breier, 528 F.2d 750 (7th Cir. 1976).

remedial purposes of section 1983 mandate that plaintiffs proving a constitutional deprivation not be left without a remedy. An adequate solution to the problem has not yet been formulated,[30] and as one commentator has suggested, the only solution may be amendment of the Civil Rights Act of 1871.[31] Recent developments suggest that even without congressional action municipalities and other subdivisions of the state not protected by the eleventh amendment may be subject to liability for the actions of their officers.[32] Presently, however, an aggrieved individual's primary remedy is recovery of damages from the offending officers. This right of recovery hinges on whether the officer should have understood the unconstitutional effect of his actions. Although the need for uniformity in the standard of liability, in the burden of proof, and in the scope of official defenses and immunities is acute, neither the courts nor the commentators have articulated a consistent or principled standard by which to judge what government officials should know. This Article examines the relation in constitutional tort actions between the various defenses and immunities and the prima facie case and suggests just solutions to the difficulties the courts have encountered in determining the scope of these immunities and the burdens of proof.

II. THE BACKGROUND OF LIABILITY FOR CONSTITUTIONAL TORTS

A. *Monroe v. Pape*

In *Monroe v. Pape*[33] the Supreme Court held that police officers may be held liable under section 1983 for infringing upon the constitutional rights of others even when their actions are not shown to be willful.[34] Plaintiffs in *Monroe* alleged that defendant police offi-

30. The major proposal put forth to remedy this problem has been to impose liability on governmental entities for constitutional deprivations caused by their agents. *See, e.g.*, Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 717-22 (1974); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514-15 (1955); Jaffe, *Suits Against Government and Officers: Damage Actions*, 77 HARV. L. REV. 209, 229-30 (1963). Monroe v. Pape, 365 U.S. 167 (1961), foreclosed this possibility in actions under § 1983. It appears, however, that damages may be recovered from state government entities in actions filed directly under the Constitution. *See* notes 281-300 *infra* and accompanying text.

31. Davis, *supra* note 30, at 720-21. Congress recently responded to the call for legislative action by introducing the Civil Rights Improvements Act of 1977, S. 35, 95th Cong., 1st Sess., 123 CONG. REC. S205 (daily ed. Jan. 10, 1977). The bill would impose liability in some instances upon states and their political subdivisions for deprivations caused by their officers.

32. *See, e.g.*, Hostrop v. Board of Junior College, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976).

33. 365 U.S. 167 (1961).

34. *Id.* at 187. The allegations in *Monroe*, however, support the inference that defen-

cers, acting without a warrant in violation of the fourth and fourteenth amendments, broke into their home early one morning, rousted them from bed, ransacked the premises, and arrested one of them. Defendants claimed to be beyond the reach of section 1983, arguing that their actions violated Illinois law and, therefore, that they could not have acted under color of that state's laws.[35] Absent action taken under color of state law, defendants could not constitutionally be held liable under the statute.[36] The Court rejected this interpretation of section 1983, noting that one purpose of the statute was to provide aggrieved individuals with a federal remedy "where the state remedy, though adequate in theory, was not available in practice."[37] Consequently, the Court determined that plaintiffs' federal claims could be heard although defendants' conduct also violated state law and a state remedy was available.[38] The Court also noted that because the word "willfully" does not appear in section 1983,[39] the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"[40] and plaintiffs should not be required to demonstrate that defendants' actions were willfully calculated to cause them a constitutional deprivation.

Monroe established that individuals deprived of constitutional rights by a state officer's "[m]isuse of power, possessed by virtue

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dants' actions were wilful and malevolent. It is therefore arguable that *Monroe* "lends no support to the proposition that negligence, or omission, is sufficient to create liability." *See* Mullins v. City of River Rouge, 338 F. Supp. 26, 29 (E.D. Mich. 1972). Indeed, the legislative debates preceding the enactment of § 1983 give no indication that Congress contemplated that deprivations of constitutional rights could result from wholly unintentional conduct. Yet Congress considered the fact that denial of the equal protection of the laws could result from the states' *"lack of power* or inclination" to afford protection. CONG. GLOBE, 42d Cong., 1st Sess. app. 374 (1871) (remarks of Rep. Beatty) (emphasis supplied). Elsewhere members of Congress spoke of the states' "incompeten[ce] to suppress . . . outrages," *id.* at 249 (remarks of Sen. Morton), or the "neglect of the authorities to enforce the laws." *Id.* at app. 257 (remarks of Sen. Wilson). And the statute itself speaks in terms of causation of constitutional injuries, not wilful effectuation of the same. *Compare* 42 U.S.C. § 1983 (1970) *with* 18 U.S.C. § 242 (1970).

35. *Id.* at 172. An early Supreme Court decision supported the view that action violating state law could not be deemed to be taken "under color of" state law. *See* Barney v. City of New York, 193 U.S. 430 (1904). The doctrine was implicitly repudiated in Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), in which the Court held that unconstitutional actions by state officers may be enjoined by a federal court even when the state did not authorize the actions. *Barney* was overruled in United States v. Raines, 362 U.S. 17 (1960).

36. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

37. 365 U.S. at 174.

38. *Id.* at 183.

39. *Id.* at 187.

40. *Id.*

of state law and made possible only because the wrongdoer is clothed with the authority of the state" are entitled to recover damages in the federal courts.[41] Lower federal courts, relying on dictum in *Monroe* that men are responsible under section 1983 for the natural consequences of their actions, have held that liability for the deprivation of constitutional rights need not be predicated on the flagrance, malevolence,[42] or improper motive of the offending officer.[43] Nor must the officer have intended that his conduct would result in a deprivation of the plaintiff's constitutional rights.[44] Although imposition of liability on government officers who have acted in good faith finds only limited support in the common law,[45]

41. *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). The only possible exception is for conduct of officers that is in "the ambit of their personal pursuits," Screws v. United States, 325 U.S. 91, 111 (1945), but this exception is limited to situations in which the state officer is acting as a private citizen. *See, e.g.*, Perkins v. Rich, 204 F. Supp. 98 (D. Del. 1962), *aff'd*, 316 F.2d 236 (3d Cir. 1963) (police inspector who signed a criminal complaint against an individual who made an obscene phone call to his home did not act under color of law since the action of signing the complaint could be taken by any private citizen similarly aggrieved). *Compare* Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1977), *with* Edwards v. Vasel, 349 F. Supp. 164 (E.D. Mo.), *aff'd*, 469 F.2d 338 (8th Cir. 1972). In Rogers v. Fuller, 410 F.Supp. 187, 191 (M.D.N.C. 1976), the court held that police officers who stole rare coins from plaintiffs in the course of an arrest could not be held liable under § 1983 "[i]n the absence of evidence that a state body or organization has actually organized a theft . . . ." This view, however, is refuted by *Monroe*. *Cf.* United States v. Senak, 477 F.2d 304 (7th Cir. 1973) (public defender who extorted money from clients acted under color of state law). *See also* Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973).

42. Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968).

43. Whirl v. Kern, 407 F.2d 781, 787 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).

44. *See, e.g.*, Puckett v. Cox, 456 F.2d 233, 234-35 (6th Cir. 1972); McCray v. Maryland, 456 F.2d 1, 5 (4th Cir. 1972); Huey v. Barloga, 277 F. Supp 864, 872 (N.D. Ill. 1967). Recent cases suggest, however, that intent may be an element of some substantive constitutional infringements. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 292 (1977) (equal protection); Estelle v. Gamble, 429 U.S. 97 (1976) (cruel and unusual punishment); Washington v. Davis, 426 U.S. 229 (1976) (equal protection).

45. RESTATEMENT (SECOND) OF TORTS § 121, Comment i (1965). The Restatement rule is that a peace officer who arrests another due to a mistake of law other than a mistake as to the validity of a statute or ordinance is liable in damages to the person he arrests. *See, e.g.*, Coffman v. Burkhalter, 98 Ill. App. 304 (1901); Fetter v. Wilt, 46 Pa. 457 (1864). The Restatement expresses no opinion as to the liability of a peace officer who arrests an individual under a statute or ordinance that is later declared unconstitutional. RESTATEMENT, *supra*, at § 121. It has been noted, however, that "the cases are in accord that an officer is liable for an arrest without a warrant under an unconstitutional statute." Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officer for Action or Nonaction*, 77 U. PA. L. REV. 155, 170-71 (1928). *See* Tillman v. Beard, 121 Mich. 475, 80 N.W. 248 (1899); Barling v. West, 29 Wis. 307 (1871); W. PROSSER, THE LAW OF TORTS 132-33 (4th ed. 1971). In Kilbourn v. Thompson, 103 U.S. 168 (1881), the Sergeant-at-Arms of the House of Representatives arrested the plaintiff under a warrant issued by the House. Plaintiff refused to testify in a congressional investigation and the House issued a contempt citation against him. The Court held that the House did not have jurisdiction to conduct the particular investigation.

the language of section 1983, which defines liability for subjecting persons to deprivations of federally protected rights or for causing such deprivations,[46] comports with this view. One acting without an improper motive certainly could cause the deprivation of another's right. The common law is an inadequate resource for the vindication of the important constitutional rights for several reasons, and it should not be used to limit the scope of actions under section 1983. For example, many constitutional torts know no common law analogue[47] for the simple reason that the Constitution protects a wider range of interests than does the common law. The relevance of the common law to constitutional adjudications lies more with its broad notions of liability and compensation than with any particular doctrine developed to solve a particular problem. The form of redress the federal courts provide in such cases should be a matter of constitutional policy, not of legal tradition. The common law may serve as a useful indicator of society's notions of responsibility and fault,[48]

The Sergeant-at-Arms, therefore, was liable for false arrest and could not assert the issuance of the warrant as a defense. The common law did, however, protect administrative officers from liability when exercising a discretionary function. *See* 1 HARPER & JAMES, *supra* note 15, at 58; PROSSER, *supra*, at 988-89; Jennings, *supra* note 2, at 276-80. *Compare* Gottschalck v. Shepperd, 65 N.D. 544, 260 N.W. 573 (1935), *with* Wood v. Strickland, 420 U.S. 308 (1975).

46. *See* Cobb v. City of Malden, 202 F.2d 701, 706 (1st Cir. 1953) (Magruder, C.J., concurring). *But see* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974). Nahmod argues that § 1983 is "silent on the question of the basis of liability . . . ." *Id.* at 13. As the court noted in Joseph v. Rowlen, 402 F.2d 367, 369 (7th Cir. 1968), there is nothing in the language of § 1983 that counsels in favor of requiring a showing of an improper motive on the defendant's part as a predicate to recovery under the statute. It is true that there is considerable disagreement on whether pure negligence on a defendant's part could serve as the basis of recovery under the statute. *See* Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976), *cert. granted*, 97 S. Ct. 783 (1977); Brown v. United States, 486 F.2d 284 (8th Cir. 1973); Puckett v. Cox, 456 F.2d 233 (6th Cir. 1972); McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973); Madison v. Manter, 441 F.2d 537 (1st Cir. 1971); Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971); McCormack, *supra* note 26, at 55. *Compare* Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972), *with* Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) (en banc). One court has imposed strict liability on a jailer who failed to release an inmate whose term had expired even though the jailer was not apprised of the expiration of the sentence. Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969). *But cf.* Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 865 (1976) (good faith may be a sufficient defense when sheriff failed to release prisoner because of a typographical error in grand jury report). There is no question, however, that when a state officer intends the result of his actions, albeit without an improper motive or awareness of the unconstitutionality of his conduct, he is subject to liability unless he proves an affirmative defense. *See* Skehan v. Board of Trustees, 538 F.2d 53 (3d Cir. 1976) (en banc), *cert. denied*, 429 U.S. 979 (1976); Jenkins v. Meyers, 338 F. Supp. 383, 389 (N.D. Ill. 1972), *aff'd mem.*, 481 F.2d 1406 (7th Cir. 1973).

47. *See* Laverne v. Corning, 522 F.2d 1144, 1148 (2d Cir. 1975).

48. *See* O. HOLMES, THE COMMON LAW 1 (1881).

but it "is not an infallible guide"[49] to the development of principles designed to protect rights guaranteed by the Constitution. Thus, if the primary concern of providing a federal remedy is to ensure that individuals are compensated for wrongs inflicted upon them, then the defendants' motives for causing those wrongs should be irrelevant.

B. *Municipal Immunity: The Paradox of Monroe v. Pape*

Monroe v. Pape[50] furnished a basis for developing a rational framework for allocating liability in civil rights damage actions. Unfortunately, the *Monroe* Court's additional holding that Congress did not undertake to bring municipal corporations within the ambit of section 1983[51] portended the eventual breakdown of that scheme. In reaching this decision, the Court, purporting to rely on the legislative history of section 1983, held that municipalities were not "persons" putatively liable under the Act for unconstitutional conduct. The legislative history of the Civil Rights Act of 1871, however, contains no reference to the liability of municipalities for the actions of their officers.[52] During its debates, Congress did consider an amendment to the Civil Rights Act bill, proposed by Senator Sherman of Ohio, that would have imposed liability on counties and municipalities for certain acts of violence committed within their boundaries by "any persons riotously and tumultuously assembled together . . . ."[53] The sponsors of the amendment thus sought to hold municipalities liable for injuries caused neither by their agents nor by any deliberate nonfeasance on their part. Although the Senate gave its approval,[54] the amendment was defeated in the House,[55] where two objections were raised. The first was that Congress lacked constitutional authority to enact such a measure, but subsequent developments have demonstrated that this objection was not valid.[56]

49. Adickes v. S.H. Kress & Co., 398 U.S. 144, 232 (1970) (Brennan, J., concurring in part and dissenting in part).

50. 365 U.S. 167 (1961).

51. *Id.* at 187.

52. *See* Kates, *Suing Municipalities and Other Public Entities Under the Federal Civil Rights Act*, 4 CLEARINGHOUSE REV. 177, 197 (1970).

53. CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871).

54. *Id.* at 704-05.

55. *Id.* at 725.

56. The eleventh amendment's grant to the state of absolute immunity to private suits in the federal courts is not extended to their political subdivisions. *See* Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Griffin v. County School Bd., 377 U.S. 218 (1964). Moreover, § 5 of the fourteenth amendment has been read to empower Congress to impose financial

Second, some congressmen felt that the amendment would impose liability on municipalities for conduct for which they bore no responsibility.[57] The considerations ultimately leading to the amendment's defeat are difficult to assess. The debates disclose no unified opposition,[58] but the Court nevertheless interpreted the defeat as a clear congressional declaration against municipal liability under section 1983.[59]

Although the Sherman Amendment was rejected, the enactment of section 1983 itself indicates that Congress may have intended to impose liability on municipalities. Section 1983, as ultimately enacted, imposed liability on every "person" who violated its prohibitions. Two months prior to enacting that statute, Congress had passed the "Dictionary Act,"[60] which provided that, in construing congressional legislation, "the word 'person' may extend and be applied to bodies politic and corporate." While application of the Dictionary Act has been deemed optional,[61] the Act indicates congressional awareness and approval of the use of the word "person" to include municipalities. In light of this awareness, Congress would not have been likely to use the term "person" to describe those subject to liability if it had vehemently opposed the

liability on tbe states for actions violating that amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

57. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 762, 788 (1871) (remarks of Sen. Stevenson and Rep. Kerr).

58. The reasons given by the bill's opponents were not based uniformly on the fear that it would have subjected municipalities to the reach of federal law. After the House rejected the Sherman Amendment, Representative Poland stated that "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law." CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871). Senator Sherman argued vigorously that Congress had the authority to subject municipalities and counties to the reach of federal law. *Id.* at 820-21. It is by no means clear that Congress believed it to be beyond its powers to impose legal obligations on municipalities. A major objection both to the Sherman Amendment and a compromise bill adopted in its place that imposed liability on individuals otherwise covered by the Act for failing to prevent certain wrongs which they were able to prevent (now 42 U.S.C. § 1986 (1970)), was that they undertook "to give jurisdiction to the Federal courts of offenses not against the Constitution of the United States, not against tbe laws of the United States alone, but also against the laws of the States alone . . . ." CONG. GLOBE, 42d Cong., 1st Sess. 822 (1871) (remarks of Sen. Thurman). The compromise bill that ultimately was adopted extended liability in damages to persons having knowledge of the commission of specified wrongs who neglect or refuse to prevent them. *Id.* at 804; *see* 42 U.S.C. § 1986 (1970).

59. 365 U.S. at 191.

60. "An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof." Act of Feb. 25, 1871, ch. 71, 16 Stat. 431.

61. 365 U.S. at 191.

concept of municipal liability.[62] The *Monroe* Court nevertheless concluded that congressional reaction to the Sherman Amendment "was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include" municipalities.[63]

The imposition of liability on municipalities and other subentities of state government has two salutary effects. First, municipal liability assures an individual adequate compensation for injuries caused by an individual officer who is judgment-proof or able to render only minimal redress.[64] An officer's perceived inability to compensate an injured individual also might affect a jury's assessment of damages against him, resulting in either an inadequate award of damages[65] or no award at all[66] even in the presence of a clear constitutional violation. The second effect is deterrence. Municipalities and agencies that must answer in damages for the unconstitutional actions of their officers are likely to compel officers to respect constitutional rights and to dismiss those officers who consistently disregard them.[67] Although potential liability provides municipalities with an economic incentive to curb illegal conduct by their officers, the Supreme Court did not believe that Congress intended to effectuate the policy of the 1871 Act in such a manner.

The *Monroe* doctrine has been expanded in all directions. The Court has not permitted the maintainence of section 1983 suits against municipalities even when state law had abrogated their immunity.[68] Nor has the Court permitted the exercise of pendent

62. *See* Note, *Developing Governmental Liability Under 42 U.S.C. § 1983,* 55 MINN. L. REV. 1201, 1206 (1971).

63. 365 U.S. at 191.

64. The plaintiffs in *Monroe* argued that "private remedies against officers . . . are conspicuously ineffective," and that "municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level." *Id.* at 191 (footnote omitted). A similar argument was noted favorably by the court in Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966). The court stated: "Neither the personal assets of policemen nor the nominal bonds they furnish afford genuine hope of redress." Commentators have noted that governmental liability is necessary in order to provide "financially responsible defendants." Foote, *supra* note 30, at 514. *See* Jaffe, *supra* note 30, at 229-30.

65. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting).

66. *See* Joseph v. Rowlen, 425 F.2d 1010 (7th Cir. 1970) (upholding a jury's refusal to award damages after reaching a verdict for the plaintiff). *But see* Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976), *cert. granted,* 97 S. Ct. 1642 (1977); Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 580 (7th Cir. 1975), *cert. denied,* 425 U.S. 963 (1976).

67. *See* Davis, *supra* note 30, at 721-22; Foote, *supra* note 30, at 514-15; Jaffe, *supra* note 30, at 229-30.

68. Moor v. County of Alameda, 411 U.S. 693 (1973). It has been argued that those in the 42d Congress who objected to the Sherman Amendment did not intend to create munici-

jurisdiction over state claims against municipalities when their officers are sued in federal court under section 1983.[69] The Court also has held that municipalities may not be sued when injunctive relief is sought.[70] Finally, the lower federal courts have extended the immunity created by *Monroe* to state agencies,[71] county agencies,[72] municipal agencies,[73] and other governmental entities that are not protected by the eleventh amendment from damage suits.[74]

The difficulties created by *Monroe* are apparent. The Court expanded the availability of the civil rights damage remedy by holding that state officers could be held liable for the infliction of constitutional injuries even when their actions were neither willful nor permissible under state law. This holding opened the door to a multitude of civil rights suits theretofore not cognizable in federal courts.[75] At the same time, the Court limited the relief available by granting to municipalities immunity from suit under section 1983. The rejection of municipal liability placed a burden, not only on the plaintiff, but also on the defendant state officer who bore the cost of compensation. Even when he acted in good faith,[76] the officer had

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pal immunity, but merely to defer to their immunity under local common law. *See* Carter v. Carlson, 447 F.2d 358, 369 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973). This argument was not raised in *Monroe* since Illinois abolished sovereign immunity in Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), some time after the raid giving rise to the *Monroe* suit. The Court rejected this argument in *Moor.*

69. Aldinger v. Howard, 427 U.S. 1 (1976). The Court had previously held in Moor v. County of Alameda, 411 U.S. 693 (1973), that it was not an abuse of discretion for a district court to refuse to entertain a pendent state law claim against a county in a federal suit against its officers.

70. City of Kenosha v. Bruno, 412 U.S. 507 (1973). The Court, however, has disregarded this doctrine on occasion. *See, e.g.,* Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

71. *See, e.g,* Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *vacated on other grounds,* 421 U.S. 983 (1975); Cheramie v. Tucker, 493 F.2d 586 (5th Cir.), *cert. denied,* 419 U.S. 868 (1974); Sykes v. California, 497 F.2d 197 (9th Cir. 1974); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), *cert. denied,* 416 U.S. 995 (1974); Avins v. Mangum, 450 F.2d 932 (2d Cir. 1971).

72. *See, e.g.,* Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) (en banc); Adkins v. Duval County School Bd., 511 F.2d 690 (5th Cir. 1975); Robinson v. McCorkle, 462 F.2d 111 (3d Cir.), *cert. denied,* 409 U.S. 1042 (1972).

73. *See, e.g.,* Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974); Lehman v. City of Pittsburgh, 474 F.2d 21 (3d Cir. 1973).

74. *See, e.g.,* Jorden v. Metropolitan Util. Dist., 498 F.2d 514 (8th Cir. 1974); Bennett v. Gravelle, 323 F. Supp. 203 (D. Md.), *aff'd,* 451 F.2d 1011 (4th Cir. 1971), *cert. dismissed,* 407 U.S. 917 (1972). *See generally Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1194-95 (1977) [hereinafter cited as *Developments*].

75. In 1961, the year *Monroe* was decided, 270 private civil rights suits were filed in the federal courts. ANN. REP. OF THE DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS, Table C2, at 238 (1961). In 1966, 1154 such actions were commenced. *Id.,* Table C2, at 171 (1966).

76. This is how the lower federal courts read *Monroe.* In Nesmith v. Alford, 318 F.2d

to answer in damages for the natural consequences of his actions.[77] The municipal employer that placed the officer in a position to cause a constitutional injury and presumably benefited from his actions[78] incurred no liability whatsoever. Soon after *Monroe,* the Court recognized the mischievous implications of this scheme of liability. Its response created various personal defenses and immunities to protect government officers from its consequences.

III. THE "CRAZY QUILT" OF IMMUNITIES

A. *Legislative Immunity*

Prior to *Monroe,* federal courts had recognized one official immunity to section 1983 actions—the immunity of state legislators to suits arising out of their conduct "in the sphere of legitimate legislative activity."[79] The Constitution itself provides that "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place."[80] The Court extended this immunity in *Tenney v. Brandhove*[81] to include state legislators. The legislative immunity is rooted in the common law and has been recognized since the seventeenth century.[82] It was intended to protect members of Parliament from prosecution for seditious speeches, thereby enabling them to discharge their duties as they saw fit without fear of incurring civil or criminal liability.[83] Legislators are protected "not only from the consequences of litigation's results but also from the burden of defending themselves."[84] Although it protected truant public officers as well as conscientious ones, the immunity was considered necessary to eliminate the artificial constraints and inhibitions that arise when a legislator must litigate matters concerning his official conduct.

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110 (5th Cir. 1963), *cert. denied,* 375 U.S. 975 (1964), defendant police officers arrested the plaintiffs, a white professor and his students, for joining a group of blacks at a cafe. The arrests were made after the City Attorney recommended to the Commissioner of Police that plaintiffs be arrested. A jury returned a verdict for the defendants and the Court of Appeals for the Fifth Circuit reversed, holding that plaintiffs were entitled to a directed verdict. The court accepted the contention that defendants acted in good faith but found their good faith irrelevant. The deprivation of the plaintiffs' constitutional right by defendants was determinative.

77. 365 U.S. at 187.
78. *See* Jaffe, *supra* note 30, at 229.
79. Tenney v. Brandhove, 341 U.S. 367, 376 (1951).
80. U.S. CONST. art. I, § 6, cl. 1.
81. 341 U.S. 367 (1951).
82. *Id.* at 372. *See also Developments, supra* note 74, at 1200.
83. 341 U.S. at 375.
84. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) *(per curiam).*

In *Tenney* the plaintiff brought suit against members of the California Senate Fact-Finding Committee on Un-American Activities, alleging violations of his first and fourteenth amendment rights arising from contempt proceedings brought against him for his failure to testify at an investigatory hearing. The complaint alleged that the Committee's purpose in holding the hearing was not legislative but was designed "to intimidate and silence" the plaintiff.[85] In holding that the committee members could not be sued for their actions, the Court noted that legislative immunity had been recognized both by the common law and by the constitutions of many of the original states. As the Court stated in its only reference to section 1983 and its purposes, "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of section 1983.[86] The *Tenney* Court declined to recognize an exception to the absolute immunity rule by precluding legislators motivated by improper purposes from asserting the privilege. Instead, "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."[87] Committee members would lose the immunity only if it were "obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive."[88]

Although an absolute legislative immunity obviously protects not only honest public officials, but corrupt ones as well, the desire to free honest officials from fear of retaliation has outweighed the injuries that may result from complete immunity. The constitutional rights of individuals necessarily are balanced, as with all section 1983 immunities, against the deterrent effect of damage liability upon the effective performance of official functions. With respect to legislators, that balance was struck in favor of unrestrained discretion in the performance of legislative duties. At least when legislators act qua legislators, therefore, their decisions cannot be subjected to judicial scrutiny in damage actions.[89]

85. 341 U.S. at 371.

86. 341 U.S. at 376. This was the extent of the Court's discussion of the legislative history and purpose of § 1983, having determined that the "limits" of the statute "were not spelled out in debate." *Id.* It is clear, however, that the statute was intended to correct injustice brought about by "all the apparatus and machinery of [state] government . . . ." CONG. GLOBE, 42d Cong., 1st Sess. app. 78 (remarks of Rep. Perry). The broad language of the statute bears this out.

87. 341 U.S. at 378.

88. *Id. See, e.g.*, Davis v. Passman, 544 F.2d 865, 879 (5th Cir. 1977).

89. *See* United States v. Brewster, 408 U.S. 501, 512 (1972). In *Brewster* the Court

B. *Judicial Immunity*

In *Pierson v. Ray*[90] the Court again injected common law tort immunities and defenses into the law of constitutional torts, ending the brief period during which section 1983 was enforced on a basis of strict liability.[91] The plaintiffs in *Pierson* had participated in a civil rights demonstration and were arrested and convicted of disorderly conduct under an ordinance later held unconstitutional.[92] Following a successful de novo appeal in which one of the plaintiffs won a directed verdict, the charges against the others were dismissed. Plaintiffs subsequently instituted a section 1983 damage action against the arresting officers and the municipal police justice who had convicted them. The Court held the justice "immune from liability for damages for his role in these convictions"[93] because his only involvement was to adjudge plaintiffs guilty when their cases came before his court.[94]

The *Pierson* Court noted that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."[95] In light of the *Tenney* holding that Congress did not intend by enacting section 1983 to abolish wholesale all common law immunities, the Court determined that Congress would have provided specifically for judicial liability had it wished to abolish the doctrine.[96] The legislative history of section 1983 provides little support for the Court's holding. Those members of Congress who addressed the issue assumed that judges could be held liable under the statute.[97] Moreover, the only Supreme Court pronouncement on the

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suggested that congressmen are entitled to an immunity with respect to acts "generally done in Congress in relation to the business before it." *See also* Gravel v. United States, 408 U.S. 606, 625 (1972). Under *Tenney,* the same considerations would apply to state legislators. For a rare example of a legislator's liability for violating an individual's constitutional rights, see Davis v. Passman, 544 F.2d 865 (5th Cir. 1977). There a congressman's claim to immunity to a suit by a former member of his staff, alleging sex discrimination, was rejected.

90. 386 U.S. 547 (1967).

91. *See* note 76 *supra.*

92. 386 U.S. at 550. The ordinance was declared unconstitutional in Thomas v. Mississippi, 380 U.S. 524 (1965).

93. 386 U.S. at 553.

94. *Id.*

95. *Id.* at 553-54. Other judicial officers are entitled to rely on the same immunity. *See* Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975) (magistrate); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (justice of the peace); Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972) (referee).

96. 386 U.S. at 554-55.

97. *Id.* at 561-63 (Douglas, J., dissenting); Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 328 (1969). *But see* McCormack, *supra* note 26, at 12 n.65.

subject prior to the enactment of section 1983 indicated that judges may be held liable for malicious or corrupt acts carried out in excess of jurisdiction.[98] The Court had not recognized an absolute judicial immunity to damage suits not arising under the Constitution until 1872.[99] Thus the Court's holding in *Pierson* was not faithful even to the common law doctrines it purported to incorporate into the statute. A more suitable justification for judicial immunity would have been the balancing process that produced legislative immunity. In theory, the amenability of judges to damage suits would curtail their independence and divert their attention from the business of the courts to the chore of defending often vexatious or malicious law suits.[100] Against this burden one must weigh the extent to which individual rights might suffer. Presumably, judges may be expected to exhibit greater approbation for the rule of law than would other public officials. In addition, their errors generally may be corrected on appeal. As the Court noted in *Pierson:*

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.[101]

Accordingly, the Court held that judges are immune to damage suits arising out of "acts within the judicial role."[102] The Court did not define the scope of the immunity, noting only that the "immunity applies even when the judge is accused of acting maliciously and corruptly."[103]

The balance, however, need not be struck in favor of judicial immunity if the possibility of liability would not interfere unduly with judicial independence. Judges who act in "the clear absence of all jurisdiction over the subject-matter" of a controversy may be held liable for their injudicious actions.[104] Thus a judge vested with

98. Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868).

99. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). *See also* Adair v. Bank of America Nat'l Trust & Sav. Ass'n, 303 U.S. 350 (1938); Alzua v. Johnson, 231 U.S. 106 (1913).

100. *See* Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered,* 65 Nw. U.L. Rev. 615 (1970).

101. 386 U.S. at 554.

102. *Id.* Judges may be subject, however, to injunctive relief. *See* Blouin v. Dembitz, 489 F.2d 488 (2d Cir. 1973); Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom.* O'Shea v. Littleton, 414 U.S. 488 (1974); Bilick v. Dudley, 356 F. Supp. 945 (S.D.N.Y. 1973).

103. 386 U.S. at 554.

104. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52 (1872).

jurisdiction solely over civil matters could be held liable for assuming jurisdiction over a criminal matter.[105] On the other hand, a judge vested with jurisdiction over criminal matters could not be held liable for convicting individuals of nonexistent offenses or for imposing unlawfully excessive sentences.[106] A good illustration of the principle that liability should extend only to instances of the most outrageous judicial behavior is offered by *Sparkman v. McFarlin.*[107] The defendant, an Indiana Circuit Court judge, acting without a hearing in an ex parte proceeding, granted the petition of the plaintiff's mother that her fifteen year old daughter be sterilized.[108] No guardian *ad litem* was appointed to represent the daughter's interests. The plaintiff was taken to a hospital, ostensibly for the purpose of having an appendectomy, and was sterilized. The defendant, having "cited no statutory or common law authority under which he was purporting to act," was not granted immunity to the damage action.[109] The court rejected the argument that an Indiana statute conferring original jurisdiction upon the defendant's court "in all cases at law and in equity," granted him jurisdiction to issue the sterilization order.[110] The court added that even if defendant had not been foreclosed from fashioning his order, "we would still find his action to be an illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process."[111]

105. *Id.* at 352. *See, e.g.,* Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (justice of the peace who bodily assaulted a person in his courtroom); Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972) (juvenile court referee without power to incarcerate individuals who ordered incarceration of juvenile); Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963), *cert. denied,* 379 U.S. 938 (1964) (judge who, after disqualifying himself from a case, interfered with the proceedings and filed a false affidavit therein).

106. 80 U.S. (13 Wall.) at 352. *See* Wiggins v. Hess, 531 F.2d 920 (8th Cir. 1976) (judge who sentenced a misdemeanant to prison when the offense carried no prison sentence); Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied,* 424 U.S. 975 (1976) (a judge without statutory authority who ordered property attachment to satisfy a fine); Robinson v. McCorkle, 462 F.2d 111 (3d Cir.), *cert. denied,* 409 U.S. 1042 (1972) (judge who committed an individual to a state hospital under a previously repealed statute). *But see* Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971) (judge who ordered the sterilization of a woman when no state law authorized the entry of such an order acted in the absence of jurisdiction and was not immune to suit).

107. 552 F.2d 172 (7th Cir. 1977), *cert. granted sub nom.* Stump v. Sparkman, 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977).

108. The petition averred that the plaintiff was "somewhat retarded" although she attended public school at the proper class level for her age, and that she had been staying overnight with older youths and men. *Id.* at 173.

109. *Id.* at 174.

110. *Id.*

111. *Id.* at 176.

The court's denial of judicial immunity in *Sparkman* is understandable. Not only did the outrageous nature of defendant's alleged actions undoubtedly make the court more receptive to the claim for damages, but more significantly, the policies underlying the doctrine of judicial immunity did not warrant insulating the defendant from suit. Dismissal of the complaint would have served none of those policies. As was suggested above, the doctrine is a product of balancing the constitutional rights of individuals against the inimical effects of judicial liability, including the diversion of judges' attention from the exercise of their duties to the defense of damage suits and the possible curtailment of judicial independence through the "chilling effect" of potential liability. Implicit in the balance struck is the assumption that most damage suits will be frivolous or malicious and that judges, therefore, must be protected from the burden of defending themselves. Absent this assumption, judges need not be protected from the fact of litigation, but only from its unjust results. In some situations, however, and *Sparkman* is paradigmatic in this respect, the merits of the complaint may be assessed by the court before the defendant is required to come forth and explain his actions. Indeed, this is precisely what occurs in cases in which a judge is absolutely immune; the action is dismissed at the first opportunity. For example, if the pleadings assert that a judge acted without jurisdiction, statutory or otherwise, the court may determine the correctness of that allegation by looking to the documentary evidence attached to the complaint. The documentary evidence would consist entirely of inherently trustworthy, certified court records, such as the judge's final decree or a record of the proceedings in questions. The court then would be confronted with a question of law—whether the evidence demonstrates that the judge acted without jurisdiction. This process would eliminate all frivolous or vexatious suits at their outset, before the judge is required to present himself and defend his actions.

Apparently, this process was employed by the court of appeals in *Sparkman*. The court's conclusion that the defendant acted without jurisdiction was correct; the defendant had no legal basis for assuming jurisdiction over a petition to sterilize a young girl who was neither a ward of the court nor collaterally under its jurisdiction. Rather, the petition sought relief without stating a basis in law for exercising control over the young girl. The defendant's argument that he could exercise jurisdiction over "all cases in law and equity" assumed that the petition presented him with a "case," an untenable position. The notion that any petition requesting relief, even if there is no legal basis for bringing the respondent before the court,

presents a "case" in law or in equity is difficult to accept because many claims for relief are not justiciable. Because the defendant did not rely upon any statute or legal doctrine vesting the court with jurisdiction, no legal basis justified exercising power over the girl's liberty. The severity of the sanction she was to suffer merely exacerbated the situation.

Moreover, the question remains whether the defendant in *Sparkman* acted as a judge at all. His willingness to impose an extreme and irreversible sanction upon a party who was not given the oportunity to be heard clearly violated accepted norms of judicial behavior. Although equity may provide temporary relief against parties not before the court, such relief is granted only in emergency situations and usually is coupled with safeguards designed both to make the respondent whole and to give him an opportunity to be heard at the first possible instance. Permanent relief in the form of a final decree, on the other hand, is not granted without affording all parties an opportunity to be heard. The extreme departure from the elementary requirements of due process, tantamount to law by fiat, is far removed from traditional judicial behavior. Such departures also may be determined from court records accompanying a complaint, thus relieving the defendant of the need to defend a meritless suit.

A final consideration is whether the failure to grant judicial immunity in cases such as *Sparkman* will "chill" the behavior of other judges. Unless judges are exposed to suit when their legally incorrect actions are colorable or arguably plausible under some legal doctrine, judicial independence will not be curtailed by denial of immunity. A threshold does exist, however, beyond which an action is wholly unreasonable and beyond which no colorable argument can be made. In cases that are beyond this boundary, the imposition of damages would chill no one. Although the classification of such cases as *sui generis* contributes to this result, that classification merely demonstrates that ordinary judicial behavior is immune to attack in a damage action.

Judicial behavior is otherwise tempered by the amenability of judges to criminal process. The likelihood of vexatious suits or harassment in this context is minimal because the decision to prosecute is committed to the discretion of a federal prosecutor. In twice holding that judges may be prosecuted for "wilfully depriv[ing] the citizen of his constitutional rights,"[112] the Court has opened itself to

112. O'Shea v. Littleton, 414 U.S. 488, 503 (1974); *Ex parte* Virginia, 100 U.S. 339 (1879).

the criticism that judges, who are not protected from criminal sanctions for certain conduct, should not receive immunity from civil actions arising from the same conduct.[113] This criticism fails to consider the possibility of widespread abuse of the civil remedy against judges, a problem that simply does not exist in the criminal context. While some injustice necessarily accrues to any unqualified immunity doctrine, a balance must be drawn between the rights of aggrieved individuals and the interest of society in insulating the judicial decision-making process from outside pressure. A possible accommodation of these conflicting interests could be made by permitting the injured individual to maintain a damage action when the judge has been indicted by federal prosecutors for the conduct causing the injury. In such a case, the prior indictment would indicate that the societal interest in protecting the integrity of the judicial process would be served best by reexamination of the judge's conduct. Courts do err, but the judicial immunity doctrine should not be abrogated beyond the accommodation suggested above.[114] Judicial decisions usually are best reexamined upon appeal and in light of their legal correctness, rather than in terms of the motives behind the judge's decision. In the appellate courts the correctness of the judge's decision is at trial, not the judge himself.

C. Quasi-Judicial Immunity

Judicial functionaries, such as court clerks, court reporters, and sheriffs, often are accorded a quasi-judicial immunity for acts performed within the scope of their employment.[115] The immunity usually extends to ministerial actions performed at the direction of a court.[116] The immunity, however, does not protect a quasi-judicial

113. ANTIEU, FEDERAL CIVIL RIGHTS ACT 39 (Supp. 1975).

114. *Developments, supra* note 74, at 1202-04, argues for carving out more exceptions to the doctrine of judicial immunity. It is argued, for example, that the law should not shield a judge who knowingly falsifies the law. *Id.* at 1203. Such an exception to the immunity doctrine, however, would eviscerate the immunity altogether. An allegation that a judge knowingly falsified the law can be made whenever a judge commits reversible error. That he may be ultimately vindicated is no comfort if he must submit himself to a trial where his faculties for legal reasoning are at issue.

115. *See, e.g.*, Henig v. Odorioso, 385 F.2d 491 (3d Cir. 1967), *cert. denied,* 390 U.S. 1016 (1968).

116. *See* Pennsylvania *ex rel.* Feiling v. Sincavage, 439 F.2d 1133 (3d Cir. 1971); Lockhart v. Hoenstine, 411 F.2d 455 (3d Cir.), *cert. denied,* 396 U.S. 941 (1969). *Compare* Sebastian v. United States, 531 F.2d 900 (8th Cir.), *cert. denied,* 429 U.S. 856 (1976), *with* Doe v. McMillan, 412 U.S. 306 (1973). In *Doe* the Court held that federal officials who published a report pursuant to Congressional direction were not immune to a suit challenging the publication of the report precisely because the officials exercised no discretion in publishing the report. *See also* McGhee v. Moyer, 60 F.R.D. 578 (W.D. Va. 1973).

officer for the improper performance of his duties.[117] Moreover, recent decisions indicate that court personnel performing ministerial functions are entitled only to a qualified good-faith immunity.[118] This immunity is considerably narrower than an absolute immunity and, unlike an absolute immunity, is no bar to litigation itself.[119]

Court personnel engaged in activities "intimately associated with the judicial phase of the criminal process" are shielded from damage suits by an absolute immunity coextensive in scope with judicial immunity.[120] As *Imbler v. Pachtman*[121] illustrates, the primary beneficiaries of this immunity are prosecutors. *Imbler* held that a state prosecuting attorney acting within the scope of his duties in initiating and pursuing a criminal prosecution was not amenable to suit under section 1983.[122] The considerations favoring recognition of a prosecutorial immunity were similar to those relied upon to justify the judicial immunity. The Court viewed this decision to initiate a suit,[123] which involves the exercise of discretion, as the function most likely to invite an action against the prosecutor. Concerned that the filing of harassing and unfounded law suits against prosecutors would interfere with their independent judgment, the Court granted prosecutors broad protection.[124] In addition, the Court expressed fear that without an absolute immunity prosecutors would divert their energies and attention "from the pressing duty of enforcing the criminal law"[125] to defending their previous conduct. With regard to prosecutorial misconduct during the course of trial, the Court noted that "[t]he presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some techni-

117. McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972).

118. *See, e.g.*, Hazo v. Geltz, 537 F.2d 747 (3d Cir. 1976).

119. "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). *See* notes 174-201 *infra* and accompanying text.

120. Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

121. *Id.*

122. The plaintiff alleged that the prosecutor failed to disclose information favorable to plaintiff's defense of a pending criminal action. When the prosecutor did disclose this evidence after plaintiff's conviction was affirmed, plaintiff used the evidence to obtain his release on habeas corpus. The timely release of evidence is required by Brady v. Maryland, 373 U.S. 83 (1963).

123. 424 U.S. at 421.

124. *Id.* at 423.

125. *Id.* at 425.

cal issues by the lay jury."[126] As is the case with judicial misconduct, willful prosecutorial misconduct would be addressed through the criminal analogue of section 1983.[127]

Imbler left standing, however, cases holding "that a prosecutor engaged in certain investigating activities enjoys not the absolute immunity associated with the judicial process, but only a good-faith defense . . . ."[128] This limitation upon the immunity is analogous to the exception to immunity for judges acting in the absence of jurisdiction. Thus immunity has been denied to prosecutors engaged in planning a raid for the purpose of committing murders,[129] inducing sheriffs to coerce a confession from a suspect,[130] entering into a conspiracy,[131] and defaming defendants in a press conference.[132] In contrast, a prosecutor who has solicited and procured perjured testimony retains his immunity.[133] Such disparate treatment inheres in any blanket immunity rule, as the majority in *Imbler* conceded.[134] Given the impracticality of subjecting prosecutors to a wide range of suits, a balancing process in which the evils accompanying each alternative are weighed must be employed to determine the amenability of prosecutors to damage suits.[135] In applying the balancing process, the critical factor is the degree to which the prosecutorial function is impaired by subjecting prosecutors to liability. Two unfounded claims frequently lodged against prosecutors are the use of perjured testimony and the basing of a decision to prosecute upon insufficient evidence. The few genuine wrongs of this nature should be left unredressed rather than allow unfounded claims to proceed to trial. *Imbler* suggests, moreover, that the criminal defendant's constitutional rights may be better protected if prosecutors are immune to suit. The complaint in *Imbler* was based upon the prosecutor's failure to disclose to the

126. *Id.*
127. *Id.* at 429. *See* O'Shea v. Littleton, 414 U.S. 488, 503 (1974).
128. 424 U.S. at 430.
129. Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974).
130. Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955).
131. Holton v. Boman, 493 F.2d 1176 (7th Cir. 1974); Madison v. Purdy, 410 F.2d 99 (5th Cir. 1969).
132. Martin v. Merola, 532 F.2d 191 (2d Cir. 1976).
133. Tate v. Grose, 412 F. Supp. 487 (E.D. Pa. 1976).
134. Imbler v. Pachtman, 424 U.S. 409, 425 (1976).
135. *See* Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).

plaintiff, then a criminal defendant, information favorable to his defense.[136] The evidence was disclosed after the plaintiff's conviction had been affirmed, and it provided the basis for his release on habeas corpus. In the absence of prosecutorial immunity, another prosecutor in similar circumstances might have decided not to release newly discovered evidence in order to insulate himself from liability. In such circumstances, the balancing process is struck decidedly in favor of immunity.[137]

D. "Qualified" Executive and Administrative Immunities

(1) The Need for a Unitary National Standard

In *Pierson v. Ray,*[138] plaintiffs, arrested pursuant to an ordi-

136. Disclosure of such information is required by Brady v. Maryland, 373 U.S. 83 (1963).

137. *But see Developments, supra* note 74, at 1203. The best dividing line for an immunity is not necessarily the line separating prosecutorial from investigatory functions. While it is clear that investigatory actions need not enjoy absolute immunity, it would appear that some prosecutorial actions also do not merit blanket protection from suit. Under *Imbler,* a prosecutor who procures an indictment against a person previously acquitted of the offense charged is performing a purely prosecutorial function and, as such, is immune to suit predicated on the procurement of the indictment. *See* Weathers v. Ebert, 505 F.2d 514 (4th Cir. 1974), *cert. denied,* 424 U.S. 975 (1976). Yet the interference with prosecutorial independence and discretion posed by such a suit is minimal. Similar considerations apply when prosecutors agree to drop prosecution in exchange for compliance with an illegal demand by the putative defendant. In Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975), prosecutors who forced an individual to sign a form releasing police officers from liability for their actions in connection with her arrest, in exchange for dismissal of her prosecution, were held immune to suit. If the critical question is the susceptibility of prosecutorial liability to abuse amounting to restraint upon prosecutorial discretion, it would seem best to allow the plaintiff to proceed with the suit. The issue in such a case is purely the extra-prosecutorial part of the bargain, and the case is no different than a case involving extortion by a prosecutor, which would be cognizable under *Imbler. Cf.* United States v. Senak, 477 F.2d 304 (7th Cir. 1973) (adopting test for public defender). Given the desirability of affording redress to injured parties whenever practicable, the more desirable test for noninvestigatory prosecutorial conduct would be the traditional common law discretion test, i.e., whether the prosecutorial conduct under attack is committed to the discretion of the prosecutor. An abuse of discretion would be protected, but conduct falling outside that discretion would not. That is the test used under the Federal Tort Claims Act with respect to the decisionmaking process. *See* 28 U.S.C. § 2680(a) (1970).

138. 386 U.S. 547 (1967). According to police officers, plaintiffs behaved peacefully "and engaged in no boisterous or objectionable conduct in the 'white only' area" while attempting to integrate a segregated waiting room in a Jackson, Mississippi, bus terminal. *Id.* at 553. The police officers testified that a large crowd had followed the ministers into the terminal and threatened to engage in violent conduct. The officers "took no action against any persons in the crowd who were threatening violence because they 'had determined that the ministers was [sic] the cause of the violence if any might occur,' although the ministers were concededly orderly and polite and the police did not claim that it was beyond their power to control the allegedly disorderly crowd." *Id.* (footnote omitted). Rather, the officers arrested

nance subsequently held unconstitutional, brought a section 1983 action against both the arresting officers and the judge who presided at their trial. The Court of Appeals for the Fifth Circuit, in reversing a jury verdict for the defendants, held the police officers liable under section 1983 even though the ordinance had not been declared unconstitutional at the time they made the arrests. The court of appeals, however, did hold that no damages could be recovered in a pendent common law claim if the police officers had probable cause to believe that the ordinance had been violated. The Supreme Court granted certiorari "to determine if the Court of Appeals correctly held that [police officers] could not assert the defense of good faith and probable cause to an action under § 1983 for unconstitutional arrest."[139] The Court, stating that Congress did not intend to abolish common law immunities by enacting section 1983, accepted the assertion that common law privileges and defenses to actions for false arrest were included in the statute.[140] The Court also accepted on policy grounds the proposition that a poorly paid police officer should be insulated from liability arising in the daily performance of his duties, even when constitutional violations result. The Court observed that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[141] Thus, absent bad faith, the officer who reasonably believes his actions to be constitutional is excused from liability and is not charged with predicting the future course of constitutional law.[142] Seizing upon the finding in *Monroe* that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"[143] the

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the ministers and charged them with disorderly conduct. *See* notes 100-12 *supra* and accompanying text.

139. 386 U.S. at 551-52 (footnote omitted). The police officers claimed that "they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid." *Id.* at 555.

140. *Id.* at 553-55.

141. *Id.* at 555.

142. *Id.* at 557. One court subsequently observed that a failure to excuse officers from liability in such circumstances "would require law enforcement officers to respond in damages every time they miscalculated in regard to what a court of last resort would determine constituted an invasion of constitutional rights, even where, as here, a trial judge—more learned in the law than a police officer—held that no such violation occurred." Bowens v. Knazze, 237 F. Supp. 826, 829 (N.D. Ill. 1965). Another court has referred to the defense erected by *Pierson* as a "sound policy umbrella under which police officers should be permitted to operate in their somewhat thankless task of protecting the communities which they serve . . . ." Foster v. Zeeko, 540 F.2d 1310, 1315 (7th Cir. 1976).

143. 365 U.S. at 187.

Pierson Court held that defendants were entitled to the common law defense of "good faith and probable cause."[144] Thus, apparently concluding that the defendant's mistake of law was reasonable, the Court remanded the case for a determination whether the officers had probable cause to arrest the defendants for violating the ordinance. Although the Court purported to incorporate into section 1983 the defenses available to police officers at common law, the prevailing common law view was "that an officer is liable for an arrest without a warrant under an unconstitutional statute."[145] The common law courts recognized the harshness of this rule, but nevertheless concluded that the officer's protection should be at the expense of the party for whom he is acting rather than imposed upon his victim.[146] The possibility that the municipality ultimately would be held liable, however, was foreclosed by *Monroe v. Pape.*

The defense to section 1983 actions established by *Pierson* contained subjective and objective prongs. The officer was required to prove both that he acted in good faith and that his belief in the legality of his actions was reasonable.[147] An initial difficulty with this formulation was its apparent foreclosure of the defense to officers making arrests without probable cause, a group undoubtedly included among those *Pierson* intended to protect.[148] An officer could prevail only if he "reasonably believed in good faith that the arrest was constitutional."[149] Subsequently, the Court of Appeals for

144. 386 U.S. at 557.

145. Field, *supra* note 45, at 170-71. *Cf.* PROSSER, *supra* note 45, at § 26. The Restatement of Torts "expresses no opinion" on the liability of police officers for arresting individuals under an unconstitutional statute, but does recommend that no protection he accorded police officers who make a mistake of law other than one as to constitutionality of a statute, however reasonable the mistake may be. *See* RESTATEMENT (SECOND) OF TORTS § 121, at 207 (1965). *See generally* Theis, *supra* note 15, at 991-97.

146. *See* Campbell v. Sherman, 35 Wis. 103, 110 (1874). The court suggested that an officer not wishing to assume the risk of damage actions should "require a bond of indemnity from the party for whom he is acting."

147. As the Court stated, the defense was one of "good faith" and "probable cause." 386 U.S. at 557. *See* Theis, *supra* note 15, at 1004-05.

148. *See* Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348-49 (2d Cir. 1972) (Lumbard, J., concurring).

149. 386 U.S. at 557. Probable cause is traditionally defined in terms of the reasonableness of the belief of the arresting officer. Probable cause to arrest is based on reasonable grounds to believe that a crime has been committed and that the person arrested has committed it. *See, e.g.,* Draper v. United States, 358 U.S. 307 (1959). Thus the good faith defense set out in *Pierson* mandates that judgment be awarded to defendants only when they have probable cause to arrest under a presumptively valid statute. Theis, arguing that *Pierson* mandates only an inquiry into the officer's reasonable beliefs as to the legality of his actions and not as to the facts concerning an arrest, concludes that this inquiry "becomes quite subjective." Theis, *supra* note 15, at 1005. An inquiry into the officer's belief in the legality

the Seventh Circuit relied on *Pierson* in holding that a police officer is not "entitled to a defense of good faith when he makes an arrest without a warrant and without probable cause."[150] Because the arrest and search of individuals without probable cause is the most commonplace unconstitutional police activity, the *Pierson* defense appeared to be no defense at all.

Bivens v. Six Unknown Named Agents[151] resurrected the good faith defense and established it as the most pervasive obstacle to recovery of damages by victims of unconstitutional police conduct. Plaintiff, alleging that federal officers had entered and searched his apartment and arrested him without probable cause, brought suit to redress the deprivation of his fourth amendment rights. On remand from the Supreme Court,[152] the Court of Appeals for the Second Circuit found that the officers were entitled to establish a defense of good faith in the absence of "probable cause in the constitutional sense."[153] The court stated that a police officer realistically could not be expected to familiarize himself with the intricacies of the constitutional standards governing searches and seizures any more than he could be expected to judge the constitutionality of a statute. This is especially true in instances in which the police officer must make split-second decisions concerning matters upon which even "learned and experienced jurists" have encountered difficulty unraveling "[t]he numerous dissents, concurrences and reversals."[154] The *Bivens* court therefore held that "it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted."[155] This new formulation appears no different from requiring probable cause before a search or arrest is made, but the court clearly intended to open the defense to officers acting on something less than probable cause. Thus, after *Bivens,* actions that are unreasonable under the Constitution nevertheless might be found

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of his action, however, necessarily entails examination of the facts that prompted the officer to act. The reasonableness of the officer's belief in the legality of his actions cannot be made in a vacuum nor can it be determined without reference to the facts. The inquiry mandated by *Pierson* is no more subjective than is a determination of the existence of probable cause.

150. Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968). *See* Anderson v. Haas, 341 F.2d 497, 501 (3d Cir. 1965).

151. 456 F.2d 1339 (2d Cir. 1972).

152. *See* notes 12-15 *supra* and accompanying text.

153. 456 F.2d at 1348.

154. *Id.*

155. *Id.*

reasonable in assessing liability for unconstitutional conduct.[156] Although *Bivens* involved federal officers, its standard has been applied to both state and federal officers.

Incorporation of the good faith defense into section 1983 in a manner consistent with common law tort liability presented an additional difficulty.[157] The purpose of the *Pierson* decision is fulfilled only to the extent that reference to a "national common law" determines the availability of the defense. If the courts look to state law rather than to national common law in determining the availability of the defense, the purposes of section 1983 and *Pierson* necessarily are frustrated. One of the purposes of section 1983 was to overcome the deficiencies in the relief available to parties under state law. To the extent that the laws of the defendant's state determine the outcome of a case, the state courts have the power to determine fderal rights by broadening the defenses applicable to section 1983 damage actions. While some courts have consulted national common law to determine the merits of the defense in accordance with prevailing tort law,[158] others have allowed defendants to escape liability solely on the ground that the law of their state would protect them in a common law tort action. In *Qualls v. Parish,*[159] for example, the defendant sheriff shot at the plaintiff's automobile during a high-speed chase, killing the decedent of a second plaintiff. The defendant was privileged to shoot only under the laws of his state, but the court upheld the good faith defense, arguing that "a decision to the contrary would be unfair to an officer who relied, in good faith, upon the settled law of his state."[160] In effect this holding permits state courts—or legislatures, if they choose to modify the

156. *See id.* at 1348-49 (Lumbard, J., concurring). *Cf.* Nahmod, *supra* note 46, at 29 n.95.

Theis argues that *Bivens* permits the police officer to "judge for himself whether his belief as to the lawfulness of his actions is reasonable." Theis, *supra* note 15, at 1010. *Bivens* makes clear, however, that the reasonableness of the belief must be proved to the finder of fact, in much the same fashion as the officer would be required to prove the reasonableness of his belief if the standard by which he was judged were probable cause. The real vice of *Bivens* is its insinuation of a "reasonable but less than constitutionally reasonable" standard into the good faith defense.

The *Bivens* holding soon became the law of the land. *See, e.g.,* Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974); Fidtler v. Rundle, 497 F.2d 794 (3d Cir. 1974); Hill v. Rowland, 474 F.2d 1374 (5th Cir. 1973); Rodriguez v. Jones, 473 F.2d 599 (5th Cir.), *cert. denied,* 412 U.S. 953 (1973); Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972).

157. *See* Whirl v. Kern, 407 F.2d 781, 788 (5th Cir.), *cert. denied,* 396 U.S. 901 (1969).

158. *See, e.g.,* Boscarino v. Nelson, 518 F.2d 879, 882 n.3 (7th Cir. 1975); Fidtler v. Rundle, 497 F.2d 794, 799-800 (3d Cir. 1974).

159. 534 F.2d 690 (6th Cir. 1976).

160. *Id.* at 694. *See also* Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir. 1977).

common law privileges by legislation—to authorize their officers to violate the constitutional rights of others. Moreover, state laws pertaining to privileges rarely are subject to constitutional attack. Incorporation of state laws into a federal statute designed to alleviate the inadequacies of state law is much different from mere reference to the background of tort liability. Federal common law, developed during years of section 1983 litigation, must be the ultimate guide in determining the adequacy of defenses.[161]

The courts need not remain completely faithful to the common law in fashioning the substantive law of defenses under section 1983. Cases arise in which the alleged unconstitutional conduct has no common law analogue (employment discrimination for example) or in which the common law offered no defenses. Complete adherence to the common law produces situations in which one police officer may escape liability after intentionally shooting and killing an individual,[162] while others may be held liable for conduct deemed merely negligent by the courts.[163] Conduct protected by common law privileges is no worthier of protection than other conduct violating constitutional rights. A single national standard for defenses to damage suits, based on federal policies rather than local legal traditions and applicable to officials at all bureaucratic echelons, is the only means of preserving the integrity of constitutional guarantees. The Supreme Court has suggested such a standard in recent decisions concerning the immunity of executive and administrative officials to civil rights damage actions.

(2) The Development of the *Scheuer* and *Wood* Standards

Although *Pierson* to some extent clarified the parameters of damage liability of law enforcement officials, the scope of protection afforded other public officials remained unresolved until the Supreme Court's decision in *Scheuer v. Rhodes*.[164] A substantial body of the federal common law of torts, which was developed outside the realm of constitutional adjudications and which offered immunity to federal executive officials, often shaped the standards employed in constitutional disputes. The starting point of this development

161. *See* Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975); 1971 WASH. U.L.Q. 666, 671.

162. *See, e.g.*, Qualls v. Parrish, 534 F.2d 690 (6th Cir. 1976); Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974).

163. *See, e.g.*, Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971). *But compare* Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969), *with* Bryan v. Jones, 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976).

164. 416 U.S. 232 (1974).

was *Spalding v. Vilas.*[165] Applying the same considerations that militate in favor of judicial immunity, the *Spalding* Court held that the head of a federal department enjoyed immunity to suits arising out of "action having more or less connection with the general matters committed by law to his control or supervision."[166] *Barr v. Matteo,*[167] a defamation suit brought by administrators of the Office of Rent Stabilization for statements made by the agency's acting director in announcing their dismissal, extended the immunity to federal officials below cabinet rank. The Court granted the defendant immunity to suit because the action was "within the outer perimeter" of his duties.[168] Justice Harlan, speaking for a plurality, reasoned that:

> [O]fficials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administrations of policies of government.[169]

In dissent Chief Justice Warren argued that the Court had failed to give "even the slightest consideration to the interest of the individual who is defamed" and that the Court's holding represented a "complete annihilation of his interest."[170] Although *Barr* was a defamation case and thus called for a balancing of the defendant's first amendment rights against the rights of the discharged employees,[171] lower federal courts interpreted the decision as establishing an executive immunity to all tort suits, including those in which the plaintiff's constitutional interests are at stake rather than those of the

165. 161 U.S. 483 (1896). In *Spalding* the Postmaster General was sued for attaching a statement to checks mailed to clients of the plaintiff that seemed to question both the value of the latter's services and his honesty. The plaintiff, claiming that the defendant acted maliciously in issuing the statement, alleged that he had suffered a loss of reputation and of payments due from his clients.

166. *Id.* at 498.

167. 360 U.S. 564 (1959).

168. *Id.* at 575.

169. *Id.* at 571. *See also* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam,* 275 U.S. 503 (1927).

170. 360 U.S. at 578 (Warren, C.J., dissenting).

171. Indeed, subsequent decisions demonstrate that the first amendment bars defamation suits by public officials, such as the plaintiffs in *Barr,* except in cases when it is shown that the defendant made the defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 280 (1964). *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

defendant.[172] State officials, however, often had been held to a more lax standard.[173]

In *Scheuer v. Rhodes* the Governor of Ohio and other state officials were sued by the representatives of three students killed by the Ohio National Guard at Kent State University. Plaintiffs alleged that defendants " 'intentionally, recklessly, willfully and wantonly' caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents."[174] The district court dismissed the complaint, holding that the eleventh amendment barred the action.[175] The Court of Appeals for the Sixth Circuit affirmed, relying on the defendants' purported absolute "executive immunity" as an alternative ground for sustaining the district court's action. A unanimous Supreme Court readily disposed of the contention that the eleventh amendment barred the suit, noting that the defendants were sued in their individual capacities and therefore were not protected by the amendment's prohibition of suits against the states.[176] The Court then traced the historical development of the doctrine of official immunity:

> This official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.[177]
>
> . . . .
>
> Public officials, whether governors, mayors, or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.[178]

172. *See, e.g.*, Chapman v. Kleindienst, 507 F.2d 1246, 1249, n.4 (7th Cir. 1974).

173. *See, e.g.*, Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975) (absolute immunity); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973) (subjective good faith). *But see* Slate v. McFetridge, 484 F.2d 1169 (7th Cir. 1973) (good faith and reasonable belief in legality of action taken).

174. 416 U.S. at 235.

175. *Id.* at 232-34.

176. *Id.* at 237-38.

177. *Id.* at 239-40.

178. *Id.* at 241-42.

A new twist, however, appeared in the Court's analysis. The Court noted that a final resolution of the immunity question must be based upon the functions and responsibilities of the defendants "as well as the purposes of . . . § 1983."[179] Because the statute addressed the misuse of power by those clothed with state authority, "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. Indeed . . . the legislative history indicates that there is no absolute immunity."[180] Thus the Court refused to confine itself to the common law in determining individual rights under the Constitution.

Resort to the purposes of section 1983, however, did not mandate that no immunity be granted public officers. Under the Court's analysis, officials of the executive branch, like police officers, could rely upon their good faith, reasonable belief in the legality of their actions to escape liability. This limitation upon liability was designed to ensure that officials with a broad range of duties would act swiftly and firmly when the need arose, undeterred by the legal consequences of their actions because of the risk that "action deferred will be futile or constitute virtual abdication of office."[181] A balancing process, designed to minimize judicial intervention in the decisionmaking process, resulted in the creation of a "qualified immunity" for executive officials. Although the Court conceded that section 1983 "would be drained of meaning" if the actions of high executive officers were not reviewable in the federal courts,[182] the new interpretation of official immunity established a nearly insuperable barrier to the recovery of damages from such officials. In the balancing process, the policy of deterring unconstitutional official action did not weigh as heavily as the goal of minimizing judicial interference with official action. While holding that executive officers would be amenable to suit in the federal courts, the Court did express the concern that their freedom of action be preserved "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."[183] The Court therefore concluded:

> These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being

179. *Id.* at 243.
180. *Id.*
181. *Id.* at 246.
182. *Id.* at 248.
183. *Id.* at 247.

> 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.[184]

The Court did not explain whether the "qualified immunity" available to executive officers was a defense or another element of the cause of action. Although the immunity was analogized to the good-faith defense of police officers, the Court noted that the district court had accepted as fact the good faith of the Governor and had afforded the plaintiffs "no opportunity . . . to contest the facts assumed in that conclusion."[185] This suggests that the burden of proving the absence of defendants' good faith was placed on the plaintiffs. The confusion engendered by the Court's failure to clarify the appropriate burdens of proof in cases against executive officials has not yet been resolved fully.

The immunity doctrine announced in *Scheuer* was modified in *Wood v. Strickland.*[186] Plaintiffs in *Wood* were expelled from school by members of the school board for violating a rule prohibiting the use or possession of alcoholic beverages on school grounds. The plaintiffs, who were given neither a hearing nor an opportunity to rebut the charges prior to expulsion, sought damages for the denial of their right to due process.[187] The defendants asserted an absolute immunity to liability under section 1983. Noting that lower courts had not resolved the question of the liability of administrative officials with a "single voice," the Court offered a solution to the problem. The Court found that the school board, in promulgating the rule, had "function[ed] at different times in the nature of legislators and adjudicators in the school disciplinary process."[188] As was noted above, both legislators and adjudicators generally are immune to section 1983 suits. The analogy, however, did not lead the Court to hold the defendants absolutely immune to suit. Instead, the Court concluded that administrative officers bore greater resemblance to executive officers than to their legislative and judicial counterparts and therefore were entitled only to the "qualified good-

184. *Id.* at 247-48.

185. *Id.* at 249-50.

186. 420 U.S. 308 (1975).

187. Four years after the students' expulsion, the Supreme Court held in Goss v. Lopez, 419 U.S. 565 (1975), that the students were entitled to notice and an opportunity to he heard prior to suspension for any length of time.

188. 420 U.S. at 319.

faith immunity" announced in *Scheuer*.

The analogy to executive officers is more compelling than would appear at first blush. Administrative tribunals are not courts, nor are they entitled to the presumption of jurisdiction that is granted to judicial actions.[189] The absence in *Wood* of such judicial safeguards as notice and an adversary hearing suggests that the school board's actions were not entitled to the deference accorded judicial actions.[190] Similarly, because the action attacked in *Wood* was the procedure for adjudicating an infraction of a rule rather than the promulgation of the rule itself, the analogy to legislative action is inapposite. Administrative officers, like their executive counterparts, exercise a great deal of discretion on an ad hoc basis and frequently promulgate the policies they later promote and enforce. These considerations indicate that administrative officers should not be accorded the sweeping protection offered to judges and legislators.

If executive officials are shielded with a good-faith immunity, however, administrators should be offered similar protection. Moreover, administrative officials cannot be distinguished satisfactorily from executive officers if the premise that imposition of liability upon public officials deters their independent exercise of judgment and results in the deferral of necessary action is accepted. These "strong public-policy reasons," as well as "[c]ommon-law tradition," persuaded the *Wood* Court to extend to administrative officers the "qualified good-faith immunity" first articulated in *Scheuer*.[191]

Early common law decisions recognized the "judicial" capacity of administrative tribunals and applied the analogy in creating an immunity that extended even to malicious acts performed in an adjudicative capacity.[192] Subsequently, this "quasi-judicial" immunity was limited to acts committed in good faith and with honest intentions.[193] Discretionary acts similarly were protected if taken in good faith,[194] and administrative officers were held liable, without

189. Jennings, *supra* note 2, at 281.

190. *Cf.* Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *cert. granted sub nom.* Stump v. Sparkman, 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977). This is not to suggest that administrative officials require the protection of an absolute immunity in cases in which the officials do comply with procedural due process requirements. *See Ed. Note* p. 1003 *infra*.

191. 420 U.S. at 318.

192. Jennings, *supra* note 2, at 277.

193. *Id.* at 278.

194. PROSSER, *supra* note 45, at 988-89.

regard to their official status, only for ministerial acts.[195] The reasonableness of the administrative officer's belief in the legality of his action did not play a role in determining the extent of his liability. As one court stated:

> That a jury is better fitted to pass upon an educational question when the honesty and good faith of the committee is made an issue is hardly to be maintained. Entire independence of school boards in their judicial [sic] action is as desirable and important in the public interest as the independence of judges of courts.[196]

Once again the common law was a less than infallible guide. The *Wood* majority noted that absolute immunity "would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations."[197] Moreover, regardless of common law doctrine, the Court held that only reasonable conduct would be protected:

> To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public officer requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[198]

Justice Powell, dissenting with three other members of the Court, maintained that the majority had not been faithful to *Scheuer*. The dissent recognized that the question whether an official acted reasonably and in good faith in light of the circumstances

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195. HARPER & JAMES, *supra* note 15, at 58 (1956).

196. Sweeney v. Young, 82 N.H. 159, 165, 131 A. 155, 158 (1925). *But cf.* Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) (reliance on statute is not an absolute defense).

197. 420 U.S. at 320. The Court's rejection of absolute immunity was unanimous. The Court was divided only on the meaning of good faith.

198. *Id.* at 322 (citation omitted).

was different from the "harsh standard, requiring knowledge of what is characterized as 'settled, indisputable law.' "[199] The dissent also stated that the officials in effect were being held to a standard of constitutional prophesy because the Court only earlier in the same term had established that students must be given adversary hearings. Unfortunately, the majority disregarded a substantial body of case law decided prior to *Wood* indicating that students have the right to be confronted prior to expulsion with the evidence against them.[200] The Court neither indicated the meaning of "settled, indisputable" law nor discussed the appropriate burdens of proof in actions challenging unconstitutional conduct. Subsequently, the Court held that the *Wood* standard was applicable in other contexts, including an action against a hospital superintendent and staff for committing a patient against his wishes.[201] Thus, although the Court has clarified the parties to whom the standard applies, its exact application remains unclear.

IV. Refining the Standards of Official Liability and Immunity

A. *Toward a Unitary Immunity*

Wood v. Strickland was a breakthrough in the effort to unravel the "crazy quilt" of immunities engendered by the Court's reluctance to impose municipal liability in section 1983 actions. With the exception of those officials who enjoy absolute immunity for their official conduct, all public officers, from a policeman to a state governor, apparently are held to the same standard of liability. That

199. *Id.* at 329 (Powell, J., dissenting).

200. In the decision from which appeal was taken to the Supreme Court, the court of appeals stated that it was "reasonably well established" that students "cannot . . . be given lengthy suspensions for violating valid rules without being accorded substantive and procedural due process." Strickland v. Inlow, 485 F.2d 186, 189 (8th Cir. 1973). That court previously had held that college students facing suspensions were entitled to "procedural due process . . . by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures." Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied,* 398 U.S. 965 (1970); Jones v. Snead, 431 F.2d 1115 (8th Cir. 1970).

The right not to be expelled from college without a prior hearing generally has been recognized since the decision in Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961), which established that a tax-supported college could not expel students for misconduct without affording them "the rudiments of an adversary proceeding." *Id.* at 159. *See also* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967). This right also was extended to public school students. *See* Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969). *See also* Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971) (hearing required prior to 30 day additional suspension from public school).

201. O'Connor v. Donaldson, 422 U.S. 563 (1975).

standard asks whether the official knew or should have known that his actions would result in the deprivation of constitutional rights and whether he acted with malicious intent to cause a deprivation or other injury. To the extent that the official acted with subjective good faith or, in other words, without malice, the critical focus is upon the official's knowledge that deprivation would occur. As the *Wood* dissent recognized, this standard does not merely restate the objective prong of the *Pierson* good faith defense, but adds another element to the inquiry. Presently, the reasonableness of an officer's belief in the legality of his actions is measured not by some abstract and undefined standard or through the eyes of one not acquainted with the relevant law, but rather in light of the settled constitutional rights of the aggrieved person. In determining liability under section 1983, all public officials not enjoying an absolute immunity are held to at least a modicum of legal knowledge.[202]

Wood and *Scheuer* suggest that the unitary standard is subject to two variables, both dependent upon the position of the official in the stratum of the governmental bureaucracy. For example, a police officer is not held to the same degree of legal knowledge as is his department chief, but the officer also does not exercise as much discretion and, therefore, cannot be accorded equal deference. Thus the standard of inquiry remains the same in every case, but the scope of the official's discretion and responsibility has a twofold effect upon the standard against which the officer's conduct is evaluated.[203]

The amount of legal knowledge that public officials must possess remains unclear. Most public officers are not lawyers and likely will be as unfamiliar with settled law as they are with areas in which the courts are in conflict. With the exception of those controversial cases receiving coverage in the news media, most public officers remain unaware of the cases rendered daily refining constitutional

202. *See* Foster v. Zeeko, 540 F.2d 1310 (7th Cir. 1976) (police officers); Skehan v. Board of Trustees, 538 F.2d 53 (3d Cir.) (en banc), *cert. denied,* 429 U.S. 979 (1976) (college officials); Economou v. United States Dep't of Agriculture, 535 F.2d 688 (2d Cir. 1976) (U.S. Agriculture Dep't officials); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975) (local elected officials); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975) (prison officials); Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975) (college president); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) (Internal Revenue Service agents); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), *cert. denied,* 423 U.S. 930 (1975) (police officers); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); Shifrin v. Wilson, 412 F. Supp. 1282 (D.D.C. 1976) (police chief); Burkhart v. Saxbe, 397 F. Supp. 499 (E.D. Pa. 1975) (U.S. Attorney General).

203. *See* Hearn v. Rhay, 68 F.R.D. 574, 578 (E.D. Wash. 1975); *cf.* Chaudoin v. Atkinson, 406 F. Supp. 32 (D. Del. 1975) (availability of immunity defense for National Guard adjutant general turns on elements of subjective good faith and objective reasonableness).

mandates. For example, in *Demkowicz v. Endry*[204] a high school teacher brought an action against school officials, asserting that a school district rule requiring termination of any pregnant teacher ninety days before the expected date of delivery violated the fourteenth amendment by creating an irrebuttable presumption that pregnant school teachers are incompetent.[205] In holding the rule unconstitutional, the court examined the defendants' asserted good faith belief in light of a "chronology of events"[206] relevant to determining the adequacy of their defense. The "chronology" consisted mostly of federal court decisions concerning the constitutionality of maternity leave policies. Noting the "unsettled" state of the law on the date of the plaintiff's resignation, the court upheld the

204. 411 F. Supp. 1184 (S.D. Ohio 1975).

205. A similar policy was held unconstitutional in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

206. The chronology was as follows:

> The defendants assert that they acted at all times pertinent to this case in good faith and in the reasonable belief that the challenged maternity leave policy was constitutional. The following chronology of events is relevant to this assertion:
>
> 1. *May 12, 1971.* The United States District Court for the Northern District of Ohio held that mandatory maternity leave policies were constitutional. *LaFleur v. Cleveland Board of Education,* 326 F. Supp. 1208.
> 2. *May 17, 1971.* The United States District Court for the Eastern Division of Virginia held that such policies were unconstitutional. *Cohen v. Chesterfield County School Board,* 326 F. Supp. 1159.
> 3. *November 19, 1971.* Sharon Demkowicz submitted her resignation without protest.
> 4. *June 28, 1972.* The United States District Court for the Southern District of Ohio held that mandatory maternity leave policies were unconstitutional. *Heath v. Westerville Board of Education,* 345 F. Supp. 501.
> 5. *July 27, 1972.* The United States Court of Appeals for the Sixth Circuit reversed the decision of the district court in *LaFleur* and held that such policies were unconstitutional. 465 F.2d 1184.
> 6. *January 15, 1973.* The United States Court of Appeals for the Fourth Circuit reversed the decision of the district court in *Cohen,* and held that such policies were constitutional. 474 F.2d 395.
> 7. *February 20, 1973.* The Reynoldsburg Board of Education modified its maternity policy, providing, *inter alia,* that all pregnant teachers were entitled to a one-year leave of absence without pay.
> 8. *April 23, 1973.* The United State Supreme Court granted certiorari in both *LaFleur* and *Cohen.* 411 U.S. 947, 93 S.Ct. 1925, 36 L.Ed.2d 408.
> 9. *June 19, 1973.* Plaintiff's counsel wrote defendant Cherry and demanded her reinstatement, citing *Heath v. Westerville Board of Education, supra.* Defendants did not reply.
> 10. *January 21, 1974.* The Supreme Court decided *LaFleur* and *Cohen,* holding that inflexible mandatory maternity leave policies which affect public school teachers are unconstitutional. 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52.
> 11. *February 19, 1974.* The Reynoldsburg Board of Education revised its maternity leave policy in light of the Supreme Court's decision in *LaFleur.*

411 F. Supp. at 1188-89.

"affirmative defense"[207] of good faith and reasonable belief. This approach raises several questions. First, should a high school principal be expected to know of cases establishing the unsettled state of the law? Second, if the proper approach is to assemble all the relevant cases in a chronological checklist, should the critical date be the day the case was decided, the day it first appeared in United States Law Week, or the day it was reprinted in the advance sheets? One court characterized a similar inquiry as follows: "[T]he legal background survey result[s] in such an intricate and highly technical syndrome which would give guidance to a legal scholar but would not refiect any real illumination upon whether a police officer . . . would have been aware that his basis for acting was constitutionally infirm."[208] A solution that was employed in *Laverne v. Corning*[209] was to admit expert testimony from law professors on the state of the law at the time of the conduct in question. That testimony, however, can relate no more than the results of an after-the-fact research project, a task that the *Demkowicz* court was quite capable of performing. One simplistic resolution of the questions presented by the *Wood* test would be to declare that "prior to an authoritative Supreme Court decision on an issue, disagreement among courts, or perhaps even among commentators, . . . should be sufficient to bar liability."[210] This solution, however, permits liability to be assessed only in the rarest of instances, drains section 1983 of meaning, and fails to recognize that most cases can be distinguished upon their facts. Surely, as one court observed, "[the] law can be settled without there having been a specific case with identical facts which was decided adversely" to similarly situated officials.[211]

In applying the *Wood* standard, most courts have not considered the defendant's position even though it is crucial in assessing what he should have known or the amount of discretion he was entitled to exercise. In *Picha v. Wielgos*[212] the court held that, in spite of contrary advice from his superintendent, a school principal should have known that acting in conjunction with police officers

207. *Id.* at 1191.

208. Foster v. Zeeko, 540 F.2d 1310, 1315 (7th Cir. 1976).

209. 376 F. Supp. 836 (S.D.N.Y. 1974), *aff'd*, 522 F.2d 1144 (2d Cir. 1975). The use of this procedure is questionable in light of *Imbler*. There the Court cautioned against "the resolution of . . . highly technical questions by the lay jury." 424 U.S. 425 (1976).

210. *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 219, 224 (1975).

211. Picha v. Wielgos, 410 F. Supp. 1214, 1219 (N.D. Ill. 1976). *See also* Seals v. Nicholl, 378 F. Supp. 172, 178 (N.D. Ill. 1973) (application of this principle).

212. 410 F. Supp. 1214 (N.D. Ill. 1976).

by ordering the search of three students for drugs would be unconstitutional. Prior to *Picha,* only two district court decisions had suggested that the fourth amendment restrained "quasigovernmental" parties from acting in conjunction with police officers.[213] In *Sapp v. Renfroe,*[214] on the other hand, school board members who had expelled a high school student for refusing to enroll in an ROTC course were held immune to his attendant damage suit. Immunity was granted in the face of Supreme Court cases apparently prohibiting conscription into military training of persons whose personal beliefs forbid participation in such activities.[215] The *Sapp* court also refused to view as determinative a similar court of appeals decision because it "illustrate[d] by the cogency of the dissent the lack of constitutional certitude in this area."[216] During the same year, another panel of the same court held a college president to knowledge of a two-month-old decision emanating from that circuit.[217] The only uniformity in the cases involves instances in which recent decisions have found similar actions constitutional,[218] or in which the official conduct was so outrageous as to belie any claim of reasonableness.[219] Another marked tendency has been to absolve officials of liability when their actions were not preceded by decisions "on all fours" holding like conduct unconstitutional.[220]

Too much of the courts' inquiry has focused upon whether the relevant law was "settled." Defendants are not permitted to rest on their subjective good faith because such reliance "might foster ignorance of the law or, at least, encourage feigned ignorance of the law."[221] Similarly, defendants who have demonstrated no awareness

213. *Id.* at 1219. The Illinois Supreme Court, however, had held in 1968 that a principal had the same latitude to search a student for objects believed to be dangerous to the student as would his parents. Illinois v. Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968).

214. 511 F.2d 172 (5th Cir. 1975).

215. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). In addition, longstanding Supreme Court precedent indicated that school children could not be compelled by the state to pledge allegiance to the flag. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

216. 511 F.2d at 178.

217. Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975).

218. *See, e.g.,* Shirley v. Chagrin Falls Village Exempted Schools Bds. of Educ., 521 F.2d 1329 (6th Cir. 1975); Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975).

219. *See* Manfredonia v. Barry, 401 F. Supp. 762 (E.D.N.Y. 1975); Tatum v. Morton, 402 F. Supp. 719 (D.D.C. 1974); Campise v. Hamilton, 382 F. Supp. 172 (S.D. Tex. 1974); Landman v. Royster, 354 F. Supp. 1302 (E.D. Va. 1973).

220. *See, e.g.,* Sullivan v. Meade Ind. School Dist. No. 101, 530 F.2d 799 (8th Cir. 1976); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975).

221. Glasson v. City of Louisville, 518 F.2d 899, 909-10 (6th Cir.), *cert. denied,* 423 U.S. 930 (1975).

of the constitutional rights of the persons affected should not be absolved of liability because the law is not "settled." Public officials should not be held to the degree of awareness shown by sophisticated constitutional lawyers, but expecting a modicum of awareness is not unreasonable. The deterrent effect of section 1983 would be reduced to a nullity if officials who disregard the law are excused on the theory that they reasonably could have thought their actions to be legal had they known the law.

Professor Theis argues convincingly that if ignorance of the law is no excuse for the ordinary citizen, it cannot be an excuse for those charged with enforcing the laws:

> If automobile drivers were to complaint that their state's motor vehicle code not only had too many provisions (upon any one of which might be predicated a finding of negligent conduct), but also left too many crucial questions with less than rigid answers, would courts or the legislature be moved to dispense with these rules?[222]

The response to this argument often is that the private individual, unlike the public officer, has no duty to act and therefore assumes the risk that his actions will not be excused for ignorance of the law. The public officer, on the other hand, has an affirmative duty to act in certain circumstances and should be excused from the consequences of fulfilling his duties.[223] The fallacy of this argument is readily apparent. If the determination of liability is grounded upon whether one voluntarily has assumed the risk that his actions will be declared illegal, there is no reason to suppose that the risk is not assumed in the course of employment—a person assumes the risk when he enters government employment.

After-the-fact rationalizations in the absence of a showing that the officers actually entertained such rationales subvert the goal of informed decisionmaking. The state of the law should not be examined absent evidence that the defendant relied upon an ascertainable and concrete legal fact before acting.[224] Only when such a showing is made can the officer be said to have acted upon a mistake of law rather than upon indifference to the law. Until an officer has demonstrated that he relied upon some knowledge of the law, the inquiry should not shift to whether the law was settled.

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222. Theis, *supra* note 15, at 1020-21. *See also Developments, supra* note 74, at 1222-23.

223. Jennings, *supra* note 2, at 266-67.

224. *See* United States *ex rel.* Tyrrell v. Speaker, 535 F.2d 823, 828 (3d Cir. 1976). There the court held that when the defendant "offered no evidence that he did rely on a state statute, court order, or the general law" in taking his unconstitutional actions, he could not assert a good faith immunity.

Additional problems arise on determining whether the law was settled. Although one may argue that a point is not settled until decided by the Supreme Court, most federal law is generated by the lower federal courts and may be "settled" without a final decision by the Supreme Court. For instance, the Supreme Court will not pass on many issues upon which the lower courts are not in conflict. To absolve defendants of liability when a body of decisions suggests that particular actions are unconstitutional is to countenance disregard of the law. Although all officials should not be held to an awareness of lower federal court decisions, the present analysis does not require that all officials be aware of all settled law. To that extent, the finder of fact may determine that a defendant's low position in the bureaucracy justified his lack of familiarity with a particular, settled legal doctrine. A policymaking official, on the other hand, may be required to consider lower court decisions in formulating his policies. While no cut and dry test can gauge whether the law was settled, certain broad observations can be made. Thus the law may be considered settled when a particular state action or a close analogue has been found constitutionally infirm by a number of federal courts. This might deter some policymaking personnel from instituting practices found unconstitutional by courts in other localities, but that is no more than recognition that unanimity among the lower federal courts is entitled to some deference. Disagreement among the courts or paucity of decisions on an issue would suggest that the issue was not so settled as to preclude state officials from acting because of it. Unfortunately, these broad guidelines do not lend themselves to further refinement and the inquiry often will require the court to embark on a journey through chartless territory. The court must not only hypothesize how it would have decided the case had it arisen at the time of the events in question, but it also must gauge the certitude with which it would have rendered its decision.

The difficulties encountered in determining whether an area of the law was settled at a past date support the notion that the focus should be placed upon whether the official made an informed decision. The degree of legal knowledge to which an official will be held thus depends upon his rank. Perhaps lower-level personnel, such as school teachers, police patrolmen, and welfare case workers, would be held, in the absence of actual knowledge of other legal developments, only to knowledge of Supreme Court decisions. Another relevant question that must be asked, however, is whether the officials disregarded knowledge that was available. Thus, if a police officer neglects periodically supplied reports of legal developments affect-

ing police procedures, he may be deemed not to have displayed the level of legal knowledge required of him. Supervisory personnel, such as the chief of police or the head of a welfare department, would be required to acquaint themselves with district court and court of appeals decisions before instituting a policy raising constitutional questions. Consultation with counsel should be required at the policymaking level,[225] and to the extent the advice is faulty, those proferring it should be held liable.[226] Because one rationale for the good faith defense is that officials, particularly police officers, often must make split-second decisions, a defendant whose decision is not hurried and who has legal advice available should be liable for failing to seek such advice.[227]

Among the arguments against such a scheme of liability are the following:[228] (1) the desirability of independent decisionmaking by government officers unhampered by the threat of law suits; (2) the fear that capable, responsible individuals would not accept public office because of the threat of personal liability; (3) the fear that constant litigation would hamper greatly public officers' capability to perform their duties; and (4) the unfairness of imposing liability on an officer for actions taken in good faith. Undoubtedly, any pattern of liability that does not cloak all public officers with absolute immunity will have some of these effects. Upon reflection, however, the salutary effects of imposing liability upon officers who fail to acquaint themselves with the law greatly outweigh the adverse features of such a rule. As one court stated half a century ago, "One of the first things an officer should learn on assuming the duties of office is the law bearing on his office and its duties. He does not become the law of the land by assuming office, and can do no act unless the law authorizes him to do so."[229] Imposing liability for misinformed or uninformed action, rather than interfering with independent decisionmaking, actually encourages informed decisions. Only continuous failure to obey the law would engender constant litigation, and if that had ever been a serious concern, a qualified immunity no doubt would have been erected to limit suits for in-

225. *See* Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975); Shifrin v. Wilson, 412 F. Supp. 1282 (D.D.C. 1976); PROSSER, *supra* note 45, at 160.

226. *But see* Schoonfield v. Mayor of Baltimore, 399 F. Supp. 1068, 1079 (D. Md. 1975), *aff'd mem.*, 544 F.2d 515 (4th Cir. 1976).

227. *Cf.* Nahmod, *supra* note 46, at 29 n.97.

228. Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130, 131 (1943).

229. D'Aquilla v. Anderson, 153 Miss. 549, 558, 120 So. 434, 436 (1929).

junctive and declaratory relief. Because such an immunity has not been developed,[230] however, the quantity of litigation must never have been of major concern. Nor is the fear that responsible individuals will decline public office well founded. A growing number of school districts have purchased liability insurance for their board members,[231] and other agencies undoubtedly will act similarly if the threat of damages being imposed on their officials is realized. More states also will join the widespread practice of indemnifying officers for liability incurred in the performance of their duties if modification of the immunity rule increases personal liability.[232] The trend toward providing indemnity for public officials also will eliminate whatever concerns exist about the unfairness of imposing liability for well-intended actions based on inadequate knowledge of the law. Finally, the simplest answer to the charge of unfairness is the greater unfairness that arises when damages are denied to the victim of the constitutional deprivation.

B. The Burden of Proof

As the foregoing suggests, the defendant should bear the burden of persuading the court or the jury that he acted with a proper motive and with reasonable consideration for the constitutional rights of the plaintiff. In allocating the burden of proof, one must first determine which questions are for the judge and which are for the jury.

The issue of motive, or subjective good faith, is a question of fact to be determined by the jury. Courts have not agreed, however, about the proper role of the jury with regard to the objective prong of the defense. Thus one court, after admitting testimony on the state of the law from a law professor, submitted the issues arising under the objective prong to the jury.[233] In contrast, another court declared that the determination of what defendants should have known was so intertwined with legal issues that it was unsuitable for a jury.[234] Professor Davis has suggested that, rather than attempting to distinguish literally between "law" and "fact," the terms should be used to denote the allocation of functions between judge and jury. The primary criterion for allocating functions would

230. *See* Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975).

231. *See* Note, 1976 ILL. L.F. 1129, 1140.

232. *See, e.g.*, ILL. REV. STAT., ch. 24, §§ 1-4-5 to -4-6 (1975).

233. Laverne v. Corning, 376 F. Supp. 836 (S.D.N.Y. 1974), *aff'd*, 522 F.2d 1144 (2d Cir. 1975).

234. Picha v. Wielgos, 410 F. Supp. 1214, 1219 (N.D. Ill. 1976).

be the desirability of substituting judicial judgment in light of the comparative qualifications of the judge and jury.[235] According to this analysis, the judge would ascertain the settled law existing at the time of the alleged constitutional deprivation, and the jury would determine what the defendant knew or should have known. Although tort law generally gives the jury considerable discretion to decide, not only what a party did, but also what it should have done,[236] the jury's discretion should be more limited in section 1983 actions, the elements of which are dictated by federal policy considerations rather than by the common sense norms of human behavior prevalent in tort law. Thus, while tort law protects individuals who adhere to the norm of behavior established by their peers, an official's adherence to the norms of his colleagues would not necessarily vitiate a claim for damages. In this regard, the jury should be instructed that all officials must show some awareness of legal developments affecting matters committed to their supervision. These instructions should explain the elements to be considered in determining what an official should have known. The court might provide broad guidelines to aid the jury in assessing the degree of legal knowledge required by the official's position or rank. Additionally, the jury should be given a framework for determining how an official's duties affect that constructive knowledge. For example, official conduct requiring speedy action may require less knowledge than action taken under circumstances in which time is available to ascertain the legality of the contemplated action.

The jury also should be instructed that the burden of proving entitlement to an immunity rests with the defendant. To the extent that a defendant is exempted from the categorical language of section 1983, he ought to carry the burden of persuading the jury of that fact. While there is disagreement among and within the circuits,[237] the majority of courts recognize that good faith is only a defense.[238]

235. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 30.01 to .04 (1958 & Supp. 1970). *But see* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546, 554 (1965) (Jaffe argues that it is appropriate in certain cases to allow the jury to have primary responsihility for lawmaking.) *See also* HOLMES, *supra* note 48, at 126.

236. 2 HARPER & JAMES, *supra* note 15, at 881-82. Thus the jury generally decides how the "reasonable man" would have behaved under the circumstances of the case.

237. *Compare* Hennings v. Grafton, 523 F.2d 861, 864 (7th Cir. 1975), *with* Haaneman v. Breier, 528 F.2d 750 (7th Cir. 1976).

238. *See* Skehan v. Board of Trustees, 538 F.2d 53 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976); Navarette v. Enomoto, 536 F.2d 277, 280 (9th Cir. 1976); Muzquiz v. City of San Antonio, 528 F.2d 499, 500 n.5 (5th Cir. 1976); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), *cert.*

Although the Supreme Court has not addressed the issue directly, *O'Connor v. Donaldson*[239] tacitly approved of allocating the burden of proof on the immunity issue to the defendants. The Court held in *O'Connor* that the jury was improperly instructed on the objective prong of the immunity standard, but found the instructions on the subjective prong proper. The issues had been submitted to the jury as a defense.[240] This allocation of burdens was based, at least partially, upon a perception of the qualified immunity as an extension of the *Pierson* good-faith defense. Because police officers may assert good faith only from a defensive posture, allocating the burden in a different manner makes little sense when some other official, such as the officer's supervisor, is sued. While the latter may have more discretion in certain areas, he also knows why he acted as he did. Because recognition of an immunity necessarily undercuts one of the central purposes of section 1983, compensation to victims of unconstitutional conduct, those seeking to obtain immunity should have the burden of showing why this purpose should be disregarded.

A more compelling argument for placing the burden of proof on the defendant looks to the matters around which the controversy revolves. Much, if not all, of the relevant evidence will deal with the defendant's knowledge and good faith and will be possessed by the defendant himself.[241] The defendant obviously is in a better position to prepare a case on these subjects than is the plaintiff. If officials are required to show a degree of legal awareness, then they should be compelled to demonstrate that they did not disregard the law altogether in formulating their decisions. Because the plaintiff will have established a prima facie case in his case in chief, those seeking immunity from the violation should proffer an appropriate justification.

This allocation of the burden of proof also would facilitate adjudication of the substantive constitutional claims and would have the salutary effect of "settling" the law. In cases in which a plaintiff is unable to allege that the defendant acted maliciously, placing the burden of proof on the plaintiff would require the dismissal of his action if the applicable law was not settled. On the other hand, when the burden is placed on the defendant, only actions failing to

dismissed, 426 U.S. 918 (1976); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974). *Contra*, Bonner v. Coughlin, 545 F.2d 565, 568 (7th Cir. 1976).

239. 422 U.S. 563 (1975), *vacating and remanding* 493 F.2d 507 (5th Cir. 1974).

240. 493 F.2d at 527.

241. *See* Apton v. Wilson, 506 F.2d 83, 94-95 (D.C. Cir. 1974).

state a constitutional violation will be dismissed. Moreover, denial of a motion to dismiss constitutes a ruling on the merits of the plaintiff's constitutional claim and "settles" the applicable law for future actions by the same defendant.[242]

C. *Enforcement of Unconstitutional Statutes*

Typically, the plaintiff alleging a deprivation of constitutional rights will not prevail when the officer's actions were valid under the constitutional standards prevailing at the time of their occurrence. Some courts have gone even further in cases involving actions taken pursuant to unconstitutional statutes by creating an irrebuttable presumption that the actions were valid. In *Mattis v. Kissling,*[243] for example, a police officer shot and killed a suspected felon fleeing unarmed from the scene of a nonviolent felony. The court upheld the officer's contention that reliance on a state statute authorizing the use of deadly force in apprehending felony suspects provided a complete defense to the section 1983 action. Under the court's holding, the defendant could be held liable only if the authorizing statute had been declared unconstitutional prior to the officer's actions. In *Hanna v. Drobnick*[244] defendant building inspectors entered several houses pursuant to an ordinance requiring sellers to open their homes to inspection prior to sale. The court affirmed a summary judgment for the defendants granted on the basis of their good-faith reliance on the validity of the unconstitutional ordinance. According to the *Hanna* court, the officials' actions "were presumptively valid under a city ordinance which they had no part in adopting and which had not been declared unconstitutional."[245] Still another court, in dismissing an action against a defendant who had operated within the terms of a statute, stated that "A statute is presumed to be constitutional until struck down."[246]

The policy basis for these holdings is readily apparent. Faced with a statute authorizing certain actions, an official is unlikely to question its validity or endeavor to ascertain whether it comports

242. *See* text accompanying notes 250-65 *infra.*

243. No. 72-Civ. (3) (E.D. Mo., filed Jan. 16, 1973), *rev'd on other grounds,* 502 F.2d 588 (8th Cir. 1974).

244. 514 F.2d 393 (6th Cir. 1975).

245. *Id.* at 397.

246. Rios v. Cessna Fin. Corp., 488 F.2d 25, 28 (10th Cir. 1973). *But see* Foster v. Zeeko, 540 F.2d 1310 (7th Cir. 1976). *See also* Tucker v. Maher, 497 F.2d 1309 (2d Cir.), *cert. denied,* 419 U.S. 997 (1974); Hagopian v. Consolidated Equities Corp., 397 F. Supp. 934 (N.D. Ga. 1975); Hustari v. Vanderport, 380 F. Supp. 645 (D. Minn. 1974).

with constitutional mandates. Indeed, requiring public officers "to defy their city's ordinance and their supervisors' instructions" by asserting the unconstitutionality of a law not yet scrutinized by a court may impose an onerous burden upon them.[247] On the other hand, failure to impose liability frequently allows public officers "one 'free' constitutional violation before they are liable for ignoring constitutional rights that arise in each unique factual setting."[248]

In some contexts, unconstitutional practices might be perpetuated indefinitely if reliance on an unconstitutional statute serves as a complete defense to a section 1983 action. One illustration arises in situations in which police officers routinely arrest individuals under an unconstitutional disorderly conduct ordinance without subsequently filing charges.[249] State court review of the constitutionality of the ordinance is not available because there are no criminal proceedings in which the constitutional infringement can be asserted. Moreover, declaratory and injunctive relief is difficult to obtain because, given the nature of the conduct involved, a person rarely could make the requisite showing of a likelihood of another arrest for a similar offense.[250] In the absence of an adjudication of the ordinance's validity, police officers remain free to enforce it and to rely upon the defense that the statute previously had not been ruled unconstitutional.

Recognizing the anomaly of a situation in which a good faith defense forecloses both the recovery of damages and the adjudication of constitutional questions, the eighth circuit concluded in *Mattis v. Schnarr*[251] that the plaintiff was entitled to a ruling on the constitutionality of the officer's conduct. In *Mattis* an officer's immunity to damages was upheld on the basis of a state statute authorizing the shooting of an unarmed felony suspect fleeing from the scene of a crime. Failure to reach the constitutional claim would have assured future enforcement of the statute without a test of its constitutionality. The court found this unacceptable, stating that: "The plaintiff has a right to have the validity of the act determined. It is insufficient to say that since you cannot recover damages, you

247. Hanna v. Drobnick, 514 F.2d 393, 397 (6th Cir. 1975).

248. Picha v. Wielgos, 410 F. Supp. 1214, 1219 (N.D. Ill. 1976).

249. The existence of such a practice was alleged by the plaintiffs in Foster v. Zeeko, 540 F.2d 1310 (7th Cir. 1976).

250. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974).

251. 502 F.2d 588 (8th Cir. 1974), *on remand*, 404 F. Supp. 643 (E.D. Mo. 1975), *rev'd*, 547 F.2d 1007 (8th Cir. 1976), *vacated sub nom.* Ashford v. Mattis, 97 S. Ct. 1739 (1977).

cannot challenge the statutes which occasioned the loss. Such a result would leave the plaintiff without a remedy."[252] The court relaxed the standing requirement, thereby permitting the plaintiff to seek a declaratory judgment that both the shooting and the authorizing act were unconstitutional. Although this approach may be criticized for providing for advisory opinions, it does no more than call for review of a law that otherwise evades review while regularly affecting the constitutional rights of individuals. Similar exceptions already exist with respect to questions of mootness.[253] The eighth circuit, sitting en banc, subsequently found the authorizing statute unconstitutional.[254] The Supreme Court vacated the judgment in a brief per curiam opinion,[255] finding no live "case or controversy" between the parties. The Court rejected the eighth circuit's approach because it required the district court "to answer the hypothetical question whether the defendants would have been liable apart from their defense of good faith. No 'present right' of appellee was at stake."[256] Apparently, the Court did not consider the possibility that its rejection of the court of appeals' ruling precluded all review of the statute in question.

Sapp v. Renfroe[257] further illustrates that avoidance of the underlying constitutional issue can lead to perpetuation of unconstitutional practices. In *Sapp* the plaintiff, who was expelled from public school for refusing to attend ROTC classes, sought injunctive relief and damages from the responsible school officials. He already had graduated from a private school, however, when his claim reached the court of appeals. The court refused to rule on the claim for injunctive relief on the ground of mootness and then rejected plaintiff's claim for damages by determining that the defendants reasonably might not have known that the expulsion would violate the plaintiff's constitutional rights. Having concluded that the damage claim could not stand, the court saw "no reason to reach a decision on the merits of Sapp's claim" and therefore declined to rule on the substantive constitutional issue.[258] By neither reaching the merits of

252. 502 F.2d at 595. The court relied on Chief Justice Marshall's pronouncement in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), that "every right, when withheld, must have a remedy, and every injury its proper redress."

253. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975); Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115 (1974).

254. Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976).

255. Ashcroft v. Mattis, 97 S. Ct. 1739 (1977).

256. *Id.* at 1740.

257. 511 F.2d 172 (5th Cir. 1975).

258. *Id.* at 178.

the underlying constitutional claim nor providing a decision "on all fours" to which a plaintiff subsequently could point,[259] the court ensured that damage claims based on similar violations also would fail. Furthermore, the defendants were permitted to continue the same conduct with impunity.

These illustrations underscore a major shortcoming of the immunity doctrine. While the damage action is not the most appropriate device for challenging the constitutionality of state laws, there are cases in which such an action is the only available or appropriate device.[260] In such cases, adherence to the prudential rule requiring avoidance of constitutional decisions unnecessary for resolution of the controversy[261] forecloses review of practices very much in need of judicial scrutiny. The prudential rule is not required constitutionally,[262] and the Court has been flexible in deciding cases that technically have become moot during litigation.[263] For example, in *Gerstein v. Pugh*,[264] a class action challenging a state's procedure for detaining criminal defendants pending trial, the named plaintiffs were no longer in pretrial detention when the case reached the Supreme Court. Rejecting the assertions that the case was moot and that any opinion it rendered therefore would be advisory, the Court stated:

> Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."[265]

The same flexibility should be employed in cases in which the

259. *See* text accompanying notes 214-16 *supra*.

260. *See* C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 41 (Supp. 1976).

261. Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

262. *See id.* at 346; Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

263. *See generally* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974).

264. 420 U.S. 103 (1975).

265. *Id.* at 110 n.11; *accord*, Tucker v. City of Montgomery Bd. of Comm'rs, 410 F. Supp. 494, 502 (M.D. Ala. 1976). The "capable of repetition, yet evading review" analysis does not require that the named plaintiff demonstrate the likelihood of future injury to himself. In Sosna v. Iowa, 419 U.S. 393 (1975), this analysis was used to reach the merits of a challenge to Iowa's durational residency requirement for divorce. In order to allege the likelihood of future injury to herself, the named plaintiff would have had to allege that she would divorce her husband, move out of the state, and come back to the state to get married again.

absence of a "case or controversy" concerning an alleged constitutional deprivation results from application of the immunity doctrine. The only significant difference between *Gerstein* and *Mattis* is that in the former the complaint was filed before the alleged deprivation became moot.[266] The time at which the complaint is filed should not be determinative, however, because in each case final resolution will occur long after the deprivation has ceased. Moreover, the plaintiff in *Mattis* would have had difficulty filing his complaint while the deprivation was taking place. Although the possibility that the allegedly unconstitutional conduct would be repeated was as great in *Mattis* as it was in *Gerstein,* the manner in which the district court in *Mattis* framed the issues permitted it to evade review of the defendant's conduct.

One solution not foreclosed conclusively by *Mattis* would determine the constitutionality of the practice in question before reaching the question of liability.[267] The damage action in *Mattis* was, after all, a live "case or controversy" until the district court granted the defendants immunity from damages. By examining the affirmative defense prior to determining whether plaintiff had established a prima facie case, the district court might have put the cart before the horse. The presence of adverse parties and a concrete set of facts obviates the risk that a court will render a mere advisory opinion in deciding the constitutional questions before reaching the affirmative defenses. If this approach is rejected, however, a direct outgrowth of the immunity doctrine will be the erection of a conceptual strait-jacket barring all review of certain official practices that may be constitutionally pernicious.

Some of the difficulty in this area stems from the readiness of courts to embrace the notion that no liability may attach when a statute has not previously been ruled unconstitutional.[268] Because

266. Another difference was that *Gerstein* was a class action and *Mattis* was not. While that formal distinction has been used to defeat review of technically moot cases capable of repetition, it has been used sparingly. DeFunis v. Odegaard, 416 U.S. 312 (1974), is an example of such a case, hut it is notable that DeFunis's claim was defeated not because the lapse of time mooted his claim, but rather because he was accorded the treatment to which he claimed to be entitled. The requirement that the formalism of a class action be invoked is wholly unpersuasive, however, in the context of *Mattis,* in which the claimed wrong has not been undone. Nothing in the Supreme Court's opinion in *Mattis* suggested, moreover, that the case would have been treated differently had it been designated a class action.

267. *See* Fidtler v. Rundle, 497 F.2d 794 (3d Cir. 1974). *Cf.* Shifrin v. Wilson, 412 F. Supp. 1282 (D.D.C. 1976) (defendant arrested for making a speech in public had standing to challenge the constitutionality of a police regulation prohibiting speechmaking in public places without a permit).

268. Consider the following excerpt from *Ex parte* Young, 209 U.S. 123, 159-60 (1908):

an unconstitutional law imparts no authority to those acting under it and does not affect the rights and liabilities of individuals coming within its terms, a presumption of statutory validity is groundless.[269] If officers are to be absolved from liability for acting under unconstitutional statutes, a different justification must be offered. The common law, which called for the imposition of damages in every case, cannot serve as such a justification.[270]

Actions taken pursuant to an unconstitutional statute must therefore be judged by the same standards as any other unconstitutional conduct.[271] While it may be unrealistic to expect lower-level personnel to prophesy the unconstitutionality of a statute, the duty to inquire into its validity may arise in appropriate cases.[272] To mitigate the possibility of unfairness, the burden of compensating the victim should be directed at supervisory personnel, who are in a better position to question the validity of laws and to obtain informed opinions. Basic tort law imposes a duty of inquiry on those engaged in activities creating a special relationship to others.[273] To

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The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

269. *Id. See* Nixon v. Herndon, 273 U.S. 536 (1927); Smith v. Costello, 77 Idaho 205, 290 P.2d 742 (1955). In another context, see Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin,* 33 U. CHI. L. REV. 719, 749 (1966). In Gross v. Rice, 71 Me. 241, 252 (1880), the Maine Supreme Court answered the contention that officials acting pursuant to statutory authorization should be protected until the statute is declared invalid thus:

We do not comprehend the logic of a statute having effect as if constitutional, when not so; to be a law for one pupose and not another; a law for one man and not another. It must be either valid or invalid from the beginning, or from the date of the constitutional provision affecting it.

270. *See* Field, *supra* note 145, at 170-71; Theis, *supra* note 15, at 1011.

271. Pierson v. Ray, 386 U.S. 547 (1967), does not mandate otherwise. At the time of the events leading to the suit in *Pierson,* there was authority that the maintenance of segregated facilities at interstate bus terminals violated § 216(d) of Part II of the Interstate Commerce Act, 49 U.S.C. § 316(d). Boynton v. Virginia, 364 U.S. 454 (1960). There was no suggestion in the cases, however, that the ordinance relied on by the defendants in *Pierson* was unconstitutional. Indeed, Feiner v. New York, 340 U.S. 315 (1951), could have led one to believe that the actions of the officers in *Pierson* were constitutional.

272. *Cf.* Foster v. Zeeko, 540 F.2d 1310, 1319 (7th Cir. 1976).

273. According to PROSSER, *supra* note 45, at 160 n.21 (quoting Gobrecht v. Beckwith,

the extent that supervisory personnel are aware or should be aware[274] of the unconstitutionality of laws and fail to take corrective action, liability should be imposed.[275] The case against such personnel is made easier when they promulgate the procedures under which the constitutional deprivation occurs.[276] Although the doctrine of *respondeat superior* never has been applied to the actions of public officers,[277] even in the context of unconstitutional conduct,[278] liability could be predicated on actions of supervisors that require subordinates to perform certain duties and the concomitant failure to inform subordinates not to perform other activities.

D. Municipal Liability: The Light at the End of the Tunnel?

Many of the difficulties the courts encounter in fashioning a sensible immunity doctrine stem from the holding in *Monroe v. Pape* that municipal corporations cannot be sued under section 1983. Because most constitutional violations occur in law enforcement, an area generally under the control of municipalities, plaintiffs frequently must seek redress from individual officers. The eleventh amendment creates a similar problem with respect to injuries caused by state officials. With regard to injuries caused by federal "investigative or law enforcement officer[s]," the immunity doctrine has been rendered meaningless by the 1974 amendment of the

82 N.H. 415, 420, 135 A. 20, 22 (1926)): "Where a duty to use care is imposed and where knowledge is necessary to careful conduct, voluntary ignorance is equivalent to negligence."

274. Constructive knowledge could be imputed to supervisory personnel when the laws or regulations governing the activities of such personnel impose a duty to review actions of their subordinates. *See* United States *ex rel.* Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975).

275. *Cf.* Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972) (a police officer must stop another officer from summarily punishing a third person in his presence or with his knowledge); Harris v. Chanclor, 537 F.2d 203, 206 (5th Cir. 1976) (supervisory officer found liable for failing to stop his subordinates from beating an inmate in his presence). Rizzo v. Goode, 423 U.S. 362 (1976), is not to the contrary. In *Rizzo,* the Court held that Philadelphia citizens were not entitled to injunctive relief against the chief of police when they had shown that on 16 occasions over a number of years police officers had violated the constitutional rights of individuals. The Court was not satisfied that the plaintiffs bad demonstrated that they would suffer real and immediate injury if relief was not granted. The plaintiffs also failed to show that the incidents cited resulted from departmental policies. *But cf.* Allee v. Medrano, 416 U.S. 802, 812 (1974) (sustaining an injunction against police supervisory personnel in light of a showing of a "pervasive pattern" of police misconduct). When departmental policies require that statutes be enforced, deprivations suffered because of the failure of supervisory personnel who promulgate such policy to inform their subordinates of the invalidity of those statutes are directly attributable to the policies set by such personnel.

276. *See* Seals v. Nicholl, 378 F. Supp. 172 (N.D. Ill. 1973).

277. *See* 1 MECHEM, AGENCY § 1502 (2d ed. 1914).

278. *See, e.g.,* Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975); Adams v. Pate, 445 F.2d 105 (7th Cir. 1971).

Federal Tort Claims Act.[279] The amendment imposes liability upon the federal government for claims arising "out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."[280] Victims of illegal federal conduct are thus guaranteed compensation in every case, regardless of the state of mind of the officer causing the injury. Similar developments regarding injuries caused by municipal officials appear to be on the horizon.

The impetus for the 1974 amendment was provided by *Bivens v. Six Unknown Named Agents*[281] in which the Court held that federal law enforcement agents who had conducted an illegal search in violation of the plaintiff's fourth amendment rights could be sued for damages directly under the Constitution. The Court, holding that general federal question jurisdiction[282] would attach, declared that plaintiffs whose constitutional rights have been violated have a federal right of action for damages, regardless of the absence of specific statutory authorization.

The possibility of a constitutional right of action against municipalities was acknowledged by the Court in *City of Kenosha v. Bruno.*[283] Plaintiffs in *Bruno* sought declaratory and injunctive relief against a municipality under section 1983. The Court raised the issue of jurisdiction sua sponte and held that the city could not be sued under the statute. The plaintiffs, however, had asserted both civil rights jurisdiction[284] and federal question jurisdiction. The Court therefore remanded the case for consideration of whether the requisite ten thousand dollars was in controversy to establish federal question jurisdiction. Only a claim directly under the Constitution could have been asserted against the city under general federal question jurisdiction. Justice Brennan, citing *Bivens* to support his conclusion, noted that, if "at least $10,000 is in controversy, then § 1331 jurisdiction is available."[285]

279. Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (amending 28 U.S.C. § 2680(h) (1970)).

280. 28 U.S.C. § 2680(h) (Supp. IV 1974). For the purposes of § 1346(h), "investigative or law enforcement officer" means any officer of the United States who is empowered by law "to execute searches, to seize evidence, or to make arrests for violation of Federal Law."

281. 403 U.S. 388 (1971).

282. 28 U.S.C. § 1331(a) (1970).

283. 412 U.S. 507 (1973).

284. 28 U.S.C. § 1343(3) (1970).

285. 412 U.S. at 516 (Brennan, J., concurring).

286. *See, e.g.*, Brault v. Town of Milton, 527 F.2d 730 (2d Cir.), *rev'd on other grounds*, 527 F.2d 736 (2d Cir. 1975) (en banc); Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); Hanna v. Drobnick, 514 F.2d 393 (6tb Cir. 1975); Roane v. Callisburg Ind. School Dist., 511 F.2d 633 (5th Cir. 1975); Skehan

In the wake of *Bruno*, federal courts of appeals have accepted the premise that municipalities may be sued directly under the Constitution when ten thousand dollars is in controversy.[286] Although the Supreme Court has avoided the issue,[287] the concept of municipal liability has received great support both in the lower courts and in commentaries.[288] One distinction could be drawn, however, to defeat municipal liability. Although a remedy was implied in *Bivens* against federal officers in the absence of a congressional enactment, the implication of a constitutional remedy against municipalities may vitiate the congressional mandate of section 1983. In implying a constitutional remedy against federal officers, the *Bivens* Court emphasized the absence of an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy."[289] May section 1983 be viewed as an "explicit congressional declaration" that municipalities are immune to suits under the Constitution? The *Monroe* Court emphasized that Congress had failed to enact the Sherman Amendment to the Civil Rights bill because of the belief that it lacked the constitutional power to impose liability on municipalities[290] and not because of a desire to create municipal immunity. The Sherman Amendment would have created municipal liability for acts committed by ordinary citizens in the community, regardless of the municipality's active connivance or assent to the prohibited conduct. Because repeal by implication is disfavored, the enactment of section 1983 should not be viewed as a congressional declaration that relief under the Constitution be foreclosed.[291] More-

v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975).

287. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

288. *See generally* Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976).

289. 403 U.S. at 397.

290. *See* notes 56-59 *supra* and accompanying text.

291. A compelling analogy is offered by the history of 42 U.S.C. § 1981 (1970), following passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -15 (1970), *as amended* (Supp. II 1972). Both statutes offered redress for racial discrimination in employment. Title VII, however, included a shorter statute of limitations and required recourse to administrative remedies prior to the filing of suit in the federal courts. Defendants to § 1981 employment discrimination suits subsequently contended that plaintiffs were required to comply with the procedural requirements of Title VII, which would have operated as a partial repeal of § 1981. Most courts, however, declined to imply even a partial repeal of the right to proceed directly under § 1981. In Gresham v. Chambers, 501 F.2d 687, 690-91 (2d Cir. 1974), the court concluded that since "a private person had the right to sue under § 1981 for racial discrimination in employment prior to the enactment of Title VII," and since "nothing in

over, Congress lacks the power to repeal a constitutional remedy even if so inclined.[292]

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the language of Title VII purports expressly to require recourse to [administrative remedies] before such a suit may be brought," the right to proceed directly under § 1981 was left undisturbed by the enactment of the Equal Employment Opportunities Act. *Accord,* Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973); Gilliam v. City of Omaha, 459 F.2d 63 (8th Cir. 1972); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied,* 405 U.S. 916 (1972); Young v. ITT, 438 F.2d 757 (3d Cir. 1971).

The prevailing rationale for not finding a repeal by Title VII of the right to proceed directly under § 1981 was that Title VII was intended to augment, not replace, other available remedies for violations of civil rights. In Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Supreme Court held that Title VII and § 1981 provided alternative and independent avenues of relief for employment discrimination. The Court stated:

> Congress did not expect that a § 1981 court action usually would be resorted to only upon completion of Title VII procedures . . . . We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a § 1981 action while an [administrative] claim is pending.

Id. at 461.

In reaching its conclusion that a § 1981 action may be filed without exhaustion of Title VII's administrative procedures, the Court relied on the legislative history of the 1972 amendments to Title VII. The House Report on the 1972 amendments noted "that the two procedures augment each other and are not mutually exclusive." H.R. REP. No. 238, 92nd Cong., 1st Sess. 19 (1971). In 1972, the Senate rejected an amendment to Title VII that would have deprived a claimant of the right to sue under § 1981. 118 CONG. REC. 3371-73 (1972).

Most lower court decisions that reached the same result as *Johnson* were decided prior to the 1972 amendments to Title VII, when there was no indication of legislative intent regarding the continued viability of § 1981 in the employment context. Note, moreover, that the *Johnson* Court indicated that an explicit proscription of § 1981 actions would have been the sort of congressional indication of repeal required to overcome the presumption against repeal by implication.

But see Brown v. General Services Administration, 425 U.S. 820 (1976). There the Court held that § 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (Supp. II 1972), provided the exclusive remedy for discrimination in federal employment. The Court noted that when Congress enacted § 717 it believed that no other remedy was available to federal employees complaining of discrimination. The Court stressed the "balance, *completeness,* and structural integrity" of the § 717 remedy in holding it to be exclusive. 425 U.S. at 832 (emphasis added). Section 717 did not diminish any substantive rights of complainants but merely provided a procedure for asserting them. *Brown* thus addressed a substitution of remedies that were equal in effectiveness. *See generally* Davis v. Passman, 544 F.2d 865, 875-76 (5th Cir. 1977); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971).

292. In Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966), the Court stated that § 5 of the fourteenth amendment does not authorize Congress

> to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

Note also the following excerpt from Justice Black's opinion for the Court in Oregon v. Mitchell, 400 U.S. 112, 128-29 (1970): "Congress has no power under the enforcement sections

In the absence of legislation injecting new blood into section 1983, a constitutional damage remedy against municipalities would aid the resolution of many of the difficulties encountered in fashioning an immunity doctrine that accommodates the rights of victims. For example, because the immunities and defenses available to public officials are personal, some courts have held them unavailable to municipalities sued under the Constitution.[293] Accordingly, the governmental body must compensate injured individuals while the officer who acted in good faith in causing the injuries is protected. Other courts have held, however, that because the doctrine of *respondeat superior* has no application to section 1983 actions, municipal liability may attach only when the act giving rise to the constitutional violation "was required by a policy adopted by the governing board" of the governmental entity in question.[294] Although this holding may constrict the availability of the damage remedy, it does allow suits against a municipality for official activities carried out on its behalf. The burden on the individual officer is minimized, and the municipality may be compelled to modify institutional practices that encourage violations.[295] Furthermore, many states and municipalities require their officers to enforce all the laws on their books.[296] Municipal liability would provide a remedy for the enforcement of unconstitutional statutes and ordinances in such circumstances. In cases of individual abuse, a suit would not lie against the institution, but to the extent that a municipality is unwilling or unable to modify institutional practices that cause constitutional injuries, compensation of injured individuals would be a cost of doing business.

One difficulty inherent in the constitutional remedy against municipalities is the ten thousand dollar amount in controversy requirement for federal question jurisdiction, which may preclude many individuals from asserting their claims. Only Congress can

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[of the fourteenth and fifteenth amendments] to undercut the amendments' guarantees of personal equality and freedom from discrimination . . . or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States."

See also id. at 296 (Stewart, J., concurring in part and dissenting in part). The only statement to the contrary appears in Cox, *supra* note 13, at 247-61.

293. *See* Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975), *cert. denied,* 425 U.S. 963 (1976); Hander v. San Jacinto Junior College, 519 F.2d 273, 277 n.1 (5th Cir. 1975).

294. McDonald v. Illinois, 557 F.2d 596, 604 (7th Cir. 1977).

295. *See* JAFFE, *supra* note 30, at 229.

296. *See* K. DAVIS, POLICE DISCRETION 54-58 (1975).

resolve this difficulty through statutory amendment, such as the recently enacted amendment[297] to 28 U.S.C. § 1331,[298] which did away with the amount in controversy requirement in suits against federal officers. The problem arises whenever municipal liability is sought for constitutional deprivations.[299]

E. The Legislative Solution: Fulfilling the Promise of Section 1983

Even if municipal liability under the Constitution were recognized as an established doctrine, the promise of compensation would not be fulfilled in every case. That goal can be achieved only by amendment of section 1983. Enactment of the Civil Rights Improvements Act of 1977[300] would further significant realization of the promise in the statute. Under the bill, liability would be imposed upon states, municipalities, and their agencies when officers or employees

> directly responsible for the conduct of the subordinate officer or employee who committed [a constitutional violation] directed, authorized, approved, or encouraged any action by such subordinate officer or employee which resulted in such violation, [or] failed to act in any manner to remedy a pervasive pattern of unconstitutional or unlawful conduct engaged in by such subordinate officer or employee which, in the absence of remedial action, was likely to continue or recur in the future.[301]

Liability also would be imposed on these governmental units when "the party seeking such damages . . . establishes that one or more employees of such State, municipality, agency, or unit of government engaged in grossly negligent conduct in violation of the provisions of this section [1983], but cannot identify such officer or employee or prove causation with respect to such officer or employee."[302]

Thus, the bill would impose liability on all nonfederal governmental units for unconstitutional institutional practices, for participation by supervisory personnel in unconstitutional action, and for the failure of such personnel to prevent institutional disregard for the rights of individuals. Government units also would appear liable

297. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721.

298. This section establishes federal question jurisdiction.

299. *See* Davis, *supra* note 30, at 720-21 n.47. Davis proposed that § 1983 be amended to provide for municipal and federal liability for constitutional deprivations. In light of Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), Congress could impose liability on the states *qua* states as well.

300. S.35, 95th Cong., 1st Sess. (1977), 123 CONG. REC. S205 (daily ed. Jan. 10, 1977).

301. *Id.*

302. *Id.*

for their employees' enforcement of unconstitutional statutes or ordinances after their infirmity becomes apparent. Failure of supervisory personnel to apprise subordinates of the unconstitutionality of a statute or regulation that they otherwise would be required to enforce would result in liability. Although enforcement of an apparent rule of law by a subordinate official may be reasonable, the individual injured by the enforcement would be assured of compensation.[303] The bill also renders government units liable when the official causing the constitutional violation was grossly negligent and cannot be identified. This provision raises the question whether damages should be awarded only when the official cannot be identified. Assuming that the grossly negligent official who has been identified may be immune to damages in appropriate circumstances, should the plaintiff's entitlement to damages depend upon his ability to identify the official? This approach places a premium on maintaining ignorance of the official's identity.

One questionable aspect of the bill is its abrogation of prosecutorial immunity for failure to disclose to criminal defendants evidence that the prosecutor knows or reasonably should know is exculpatory to the defendant. The bill would not affect prosecutorial immunity in any other respect. If the defendant's ability to secure his freedom is valued more highly than the damage remedy, then providing the accused with this remedy may deter prosecutors in cases such as *Imbler* from disclosing either exculpatory evidence that came into their possession after the accused was convicted and proceedings were closed or information that was available at trial, but negligently was not disclosed. The temptation to withhold such evidence and thereby to avoid damage liability would prevent the accused from securing both his freedom and compensatory relief.

In other respects, the bill would render section 1983 an effective deterrent to unconstitutional conduct by state officers. While the bill provides little added relief to individuals either arrested without probable cause or mistakenly injured by subordinate officials, it does address the serious problem of institutional wrongs, a problem that is most acute in both the prison and welfare systems. Compensation of injured individuals in every instance of unconstitutional state action may be unrealistic. Nevertheless, redress for institu-

303. The impact of this provision would appear to be greatest in the welfare area. Welfare recipients denied benefits hy the enforcement of unconstitutional rules or departmental practices of welfare agencies would be compensated for their deprivations of benefits directly from the state treasuries. Edelman v. Jordan, 415 U.S. 651 (1974), would be overruled to that extent.

tional misconduct would tend to reduce substantially official illegality.

V. CONCLUSION

In dealing with the immunities of public officers to damage actions arising from their unconstitutional conduct, the overriding concern should be preservation of the integrity of constitutional guarantees without subjecting officers to unduly harsh penalties. The major decisions of the Supreme Court have focused primarily on protecting public officials from undue burdens. Redress for constitutional deprivations has been relegated to a secondary role. The dual considerations of compensation for injuries and deterrence of future violations through the award of damages have received lip service, but not support, in the Court's decisions. The result has been the nearly total eradication of the damage remedy for constitutional violations.

Ours is a society thoroughly immersed in law. *Wood* suggests that even the layman—the teacher, the welfare caseworker—must concern himself with the development of constitutional doctrines affecting his line of work if he is to avoid damage liability for violating the constitutional rights of those whose lives are affected by his official actions. The cases have not suggested, however, a reasonable demarcation line beyond which we will not require the aggrieving official to show familiarity with the law. The tendency of decisions to focus upon the officer's state of mind has led to disregard of two important considerations: the injury suffered by the complaining party and the institutional nature of the wrong.[304] Courts often look at each case in isolation and disregard the role of public institutions in shaping the conduct of their officers. Police officers conduct illegal searches because they know that they will receive the support of their superiors, no matter how many intrusions they conduct. Other public officers will deny hearings to those whose rights are to be affected knowing that the institutions they serve prefer to avoid the inconvenience of meeting constitutional requirements. Yet in the courtroom these officers are allowed to raise unfamiliarity with recent law as a defense to civil damage actions, and plaintiffs' actions are dismissed without even a determination that their constitutional rights had been violated. Supervisory officers, who should

304. *Cf.* Estelle v. Gamble, 97 S. Ct. 285, 293 (1976) (Stevens, J., dissenting) (subjective motivation of defendant is improper constitutional standard).

keep abreast of legal developments and initiate policy guidelines to comply with their legal requirements, generally have not had to answer for the actions of their subordinates. Although the institutions have enjoyed the fruits of their officers' misdeeds, they have not been subject to liability until recently. Government institutions must be held accountable for the consequences of actions taken on their behalf if they are to be instilled with a greater sense of legal responsibility. An institutional policy or practice will not be abandoned until it proves costly in terms of damage liability.

An individual officer should not be allowed the defense of ignorance of the law, whether or not the particular law is settled. Furthermore, unless his action was taken with awareness of the legal standards involved, the unsettled nature of the law should be no defense. If an officer was not aware of legal standards, his disregard of the law can be no more permissible when the law is unclear than when it is settled or undisputed. Obviously, the potential liability is sufficient to compel many states to indemnify their officers for liability incurred in the performance of their duties. In that case, institutional policies will have to be modified to ensure greater compliance with constitutional standards. The major concern of courts and legislatures should be the provision of redress for constitutional injuries and the encouragement of institutional respect for the Constitution. For insofar as they are not enforceable, constitutional rights are no more than empty promises.

Ed. Note—The following language should be inserted at page 976 following note 190:

> Given that administrative officials generally promulgate rules, adjudicate violations thereof, and enforce their "judgments," the risk of arbitrary action by such officials is immense. The risk is certainly more acute at the enforcement level, which may be analogized to executive action, and it is most likely that constitutional injuries will be shown predominantly in cases involving enforcement of adjudications rather than promulgation of rules. In *Wood* the injury complained of was the plaintiff's expulsion from school and the manner in which the expulsion was ordered, rather than the promulgation of any rule by the school board. Even in cases in which administrative officials promulgate unconstitutional rules, injuries will stem from their enforcement rather than from their mere adoption.