UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 50 | Number 3 Article 3

4-1-1972

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IMMUNITY OR RESPONSIBILITY FOR UNCONSTITUTIONAL CONDUCT: THE AFTERMATH OF JACKSON STATE AND KENT STATE

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> Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence [sic] cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime.[1]

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[1]United States v. Lee, 106 U.S. 196, 218-19 (1882) (5-4 decision). In *Lee* the Court held that officers of the United States who controlled the land of Robert E. Lee that was to become Arlington Cemetery were subject to suit in ejectment by the alleged rightful owner. Justice Miller, writing for the majority, observed that while sovereign immunity has "been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as established doctrine." *Id.* at 207. The *Lee* doctrine is still being wrestled with by the courts. *Compare* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394-95 (1971) *with* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

I. INTRODUCTION

The terrible events of May 1970 at Jackson State and Kent State Universities have had a profound impact on American society. The tragedy of both events is that there was a total breakdown of law in a society that prides itself generally on respect for the law. One major concern is who should bear responsibility for the deaths of the students at those universities. Accordingly, the report of the Scranton Commission, so far our most reliable non-judicial report of the events, has emphasized that those students responsible for the high tension and overt acts of disruption at the universities be granted "no sanctuary or immunity from prosecution on the campus."[2] Few would disagree with the wisdom of these words. On the other hand, the Scranton Commission also concludes that, at least with respect to Jackson, the absence

[2]THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST 287 (1970) (W. Scranton, Chmn.) [hereinafter cited as SCRANTON COMMISSION].

of any fear of prosecution on the part of police officials contributed to the slaughter that resulted.[3] Responsibility, one would assume, should be a two-way street with government and its officials standing no better than the ordinary citizen in terms of liability. Indeed, there is every reason to conclude that standards of liability for government and its officials should be higher. For a citizen to be oppressed by his government demeans human dignity and escalates the level of any violence that results.[4]

The judicial process, both criminal[5] and civil, has been invoked to help assess this question of responsibility. On the civil side, suits seeking damages under state tort law, section 1983 of the Civil Rights Act,[6] and the United States Constitution have been commenced in the federal and state courts on behalf of the dead and injured students against the states, municipality, and officials involved.[7] No matter how one feels about whether these defendants, or any of them, should ultimately be held responsible, clearly a decision on the merits is imperative. Statements of observers, new reports, and even photographs provide conflicting versions of the events and tend to obscure the facts. Certainly the courts are best qualified institutionally to bring clarity to the events and, by deciding upon the appropriateness of sanctions, to measure the indignation of the community.

Yet, each of the defendants in these cases has sought at the outset to avoid a resolution of responsibility by asserting immunity from suit.

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[3]SCRANTON COMMISSION 458.

[4]*See* R. CLARK, CRIME IN AMERICA 151-88 (1970).

[5]A grand jury was convened in Ohio to deliberate upon criminal responsibility for the deaths. It refused to indict the national guard or other state officials but returned indictments against twenty-five students. In so doing, the grand jury issued gratuitously a scathing condemnation of the Kent State University officials. Thereafter, this report was published, in contempt of court, and ordered destroyed. The indictments against the students, however, were allowed to stand but were subsequently dismissed. *See* J. MICHENER, KENT STATE: WHAT HAPPENED AND WHY 487-90 (1971) [hereinafter cited as MICHENER]. The federal grand jury convened in Jackson, Mississippi did not return an indictment; instead, it stated that "people should expect to be injured and killed when law enforcement officers are required to reestablish order." SCRANTON COMMISSION 456-58.

[6]Originally enacted as part of the mass of civil rights legislation that emerged from the Reconstruction Congress, the present 42 U.S.C. § 1983 (1970) provides:

> 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]*See* text accompanying notes 17-20 *infra*.

In essence, for purposes of their motions to dismiss, they admit responsibility in fact but deny responsibility at law[8] and argue that the judicial process is powerless to grant relief. Such arrogance in the face of the alleged facts of these cases challenges tolerance. One wonders, as do the mothers of the Kent plaintiffs, why the attorney general of Ohio seeks to avoid a ruling on the merits by means of such procedural artifices.[9] After all, the actions of the governments and officials involved are not on their face indefensible, and the states should welcome a final resolution by their citizens of the responsibility question.

It is true, of course, that the immunity defenses will likely not be sustained as to all defendants,[10] but states, municipalities, and some officials have traditionally been successful in its assertion. However, in the face of mounting criticism of the doctrine of sovereign and official immunity,[11] inroads have been made, and, perhaps as a result of the Jackson-Kent litigations, the doctrine's long overdue demise will finally occur. Consider the words of Justice Miller in *Lee v. United States*,[12] quoted at the outset of this article, and remember that there the government action involved the taking of land—not lives.

Coupled with the issue of amenability of states and municipalities to suit is the issue of the proper forum in which to sue. While the demise of sovereign immunity would grant state courts the power and obligation to resolve the issue of responsibility per se under state and federal law, there are further restrictions on the ability to sue states and municipalities in the federal courts. The eleventh amendment is a bar to suits against states, and section 1983 has been construed to exclude some suits against municipalities. Recent developments, however, portend a more expansive role for the federal courts on this front. Specifically, the eleventh amendment immunity doctrine could be abrogated by direct suits against states under the fourteenth amendment, and a broader interpretation of section 1983 could allow federal suits against municipalities. The Jackson-Kent litigation will also test these limitations on

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[8]The immunity defense is raised by a motion to dismiss, which admits the truth of all well pleaded allegations of the complaint. Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 172 (1967); 2A J. MOORE, FEDERAL PRACTICE § 12.08 (1968).

[9]Quite understandably, the mothers of the Kent students who were killed equate justice delayed (by means of the assertion of the "ancient doctrine of sovereign immunity") with justice denied. Krause, Scheuer, Schroeder, & Miller, *Justice Denied*, N.Y. Times, Nov. 13, 1971, at 33, col. 1.

[10]*See generally* part III *infra*.

[11]*E.g.*, Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383 (1970); Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942).

[12]106 U.S. 196 (1882).

federal jurisdiction.

The pages that follow will discuss the unique problems raised by the Jackson-Kent litigation (Part II); analyze the antecedents and present state of sovereign immunity (Part III); consider its constitutionality (Part IV); and review the statutory (section 1983) and constitutional (eleventh amendment) impediments to suing municipalities and states in the federal courts (Part V). The article will conclude (Part VI) with a recommendation of the circumstances in which a government should constitutionally be required to underwrite the injurious acts of its officials.

II. JACKSON AND KENT: TESTING THE JUDICIAL PROCESS

In the spring of 1970, subsequent to armed intervention by the United States into Cambodia, tensions on most college campuses ran high; academic routines were disrupted and many schools were closed.[13] On two campuses—Jackson State and Kent State—these tensions culminated in violent clashes that led to the killing and wounding of college students by state authorities.[14] At Kent State on May 4, 1970, four students were killed and nine wounded by Ohio National Guardsmen.[15] At Jackson State on May 15, 1970, two students were killed and twelve wounded by Mississippi highway patrolmen and City of Jackson policemen.[16]

A. The Nature of the Complaints

In the Kent actions three of the deceased students' administrators seek punitive and compensatory damages in the federal court[17] for violations of section 1983 and state tort law[18] against the following individual defendants: the former Governor of Ohio; two generals of the Ohio National Guard; three officers of the Ohio National Guard; certain

[13]Some 760 colleges either closed down completely or came close to doing so. MICHENER 7. *See also* NEWSWEEK, May 18, 1971, at 28-30.

[14]*See generally* SCRANTON COMMISSION 233-467.

[15]MICHENER 305.

[16]TIME, May 25, 1970, at 22.

[17]Scheuer v. Rhodes, Civil No. 70-859 (N.D. Ohio, filed Sept. ___, 1970); Krause v. Rhodes, Civil No. 70-544 (N.D. Ohio, filed ___ 1970); Miller v. Rhodes, Civil No. 70-816 (N.D. Ohio, filed ___ 1970).

[18]The doctrine of pendent jurisdiction is invoked to acquire jurisdiction over the state claims. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). *See also* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 797-809 (1953).

troops of the Ohio National Guard who are not yet named; and the President of Kent State University. These defendants are charged with intentional, reckless, and negligent breaches of duty owed to the plaintiffs. In addition, an action has been commenced in the Ohio state court on behalf of decedent Allison Krause against the State of Ohio alone.[19]

In the Jackson litigation an action has been filed in the federal court[20] on behalf of the killed and injured students. That action seeks punitive and compensatory damages for intentional, reckless, and negligent conduct under state law, section 1983, and the United States Constitution against the following defendants: the Governor of Mississippi; the Mayor of Jackson; the Commissioner of Public Safety of the State of Mississippi; the Chief of the Mississippi Highway Patrol and other named and unnamed police and highway patrol supervisors; the City of Jackson; and the State of Mississippi.

These litigations taken together raise virtually all possible issues of sovereign immunity as well as the question of federal court jurisdiction over suits against states and municipalities. The Kent complaints challenge the immunities that may be available to the State of Ohio and the various state officials involved. They do not, however, assert a direct right of recovery under the Constitution or raise the issue of federal court jurisdiction over states and municipalities, since Ohio is being sued in the state court and no municipality is named as a defendant. The Jackson complaint challenges prior interpretations of the eleventh amendment by suing the State of Mississippi in the federal court for damages under the fourteenth amendment,[21] thereby raising a direct confrontation between two constitutional provisions, and challenges prior interpretations of section 1983 by suing the City of Jackson for damages.

B. The Status of the Actions

As of the writing of this article,[22] the actions are in various stages of development. In the Kent federal suits,[23] all defendants moved to

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[19]Krause v. State, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971).

[20]Burton v. Williams, Civil No. 4740 (S.D. Miss., filed Aug. 28, 1970).

[21]The suit emphasizes the equal protection clause of the fourteenth amendment. It is alleged that all of the plaintiffs are black and all of the defendants are white and that the defendants were motivated by racial bias.

[22]June 1, 1972.

[23]Motions to dismiss made by all defendants in the three federal cases were consolidated before Judge Connell of the United States District Court for the Northern District of Ohio, Eastern

dismiss on the basis of the eleventh amendment. Despite the fact that the State of Ohio was not a defendant in the federal actions, the district court granted the motions as to all defendants. The district court essentially took the position that since the individual defendants were in general acting under state authority, the actions for damages against those officials were really actions against the State of Ohio. The question of immunity for each defendant was not ruled upon. As is discussed in detail below,[24] this conclusion appears flatly to contradict established eleventh amendment interpretations. The district court's decision has been appealed to the United States Court of Appeals for the Sixth Circuit.[25]

In the Ohio state court action against the State of Ohio, the trial court sustained a motion by the state to quash the complaint because of the doctrine of sovereign immunity and entered judgment for the defendant. On appeal to the Court of Appeals of Cuyahoga County, the trial court's judgment was reversed in a decision that held the doctrine of sovereign immunity unconstitutional under the United States and Ohio Constitutions.[26] The rationale of this decision is discussed in detail below. The court of appeals' decision is being appealed to the Supreme Court of Ohio.

In the Jackson action the federal court suit has been tried, and a verdict has been returned absolving the defendants of liability.[27] Each of the defendants moved to dismiss the actions on the ground of immunity from suit for the individual defendants and the eleventh amendment and section 1983 for the State of Mississippi and the City of Jackson. The district court did not rule on these motions,[28] and in view of the jury's verdict of non-liability on the merits, the defense will have to be reasserted as an alternative ground for affirmance on appeal.

Division. Brief for Appellants at 4-5, Scheuer v. Rhodes, Civil No. 70-859 (N.D. Ohio, filed Sept. ——, 1970).

[24]*See* discussion at Part V *infra.*

[25]The cases have been briefed and consolidated for argument. Krause v. Rhodes, *appeal docketed,* No. 71-1622, 6th Cir., ——, 1971; Miller v. Rhodes, *appeal docketed,* No. 71-1623, 6th Cir., ——, 1971; Scheuer v. Rhodes, *appeal docketed,* No. 71-1624, 6th Cir., ——, 1971.

[26]Krause v. State, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971) (Day, C.J.) (2-1 decision). *See generally* Wilkous, *Sovereign Immunity Abrogated in Ohio,* 21 CLEV. ST. L. REV. 25 (1972).

[27]Burton v. Williams, Civ. No. 4740 (S.D. Miss., filed Aug. 28, 1970). The jury returned a verdict during the week of March 19, 1972. By agreement of the parties, an action in state court that is based on a complaint virtually identical to the federal court action has not been activated.

[28]By consent of the plaintiffs the action against Governor Williams was dismissed prior to trial because of his ill health. Durham Morning Herald, March 16, 1972, § B, at 5B, col. 3.

C. *The Factual-Legal Dilemma Presented by These Cases*

The factual contexts of Jackson and Kent undoubtedly vary in many important ways despite the terrible similarity of resulting death. Since it is in no sense an object of this article to study the facts and reach an evaluation on the merits, these dissimilarities are of no concern here. The one thing that unites these cases for analytical purposes is the manner in which the defendants inflicted the allegedly tortious injuries. Consider the following description at Kent:

> There was a single shot—some people heard it as two almost simultaneous shots—then a period of silence lasting about two seconds, then a prolonged but thin fusillade, now a single angry burst, lasting about eight seconds, then another silence, and two final shots. The shooting had covered thirteen seconds, which is a very long time under such circumstances, and fifty-five M-1 bullets seem to have been discharged, plus five pistol shots and the single blast from a shotgun. Twenty-eight different Guardsmen did the firing, but this fact should be remembered: If each of the men had fired his weapon directly at the massed students, the killing would have been terrible, for a steel-jacketed M-1 bullet can carry two miles and penetrate two or four or six bodies in doing so. Fortunately, many of the men found it impossible to fire into a crowd and pointed their rifles upward—avoiding what could have been a general slaughter.
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> But some Guardsmen, fed up with the riotous behavior of the students and in fear of their lives, did fire directly into the crowd, and when the volley ended, thirteen bodies were scattered over the grass and the distant parking area. Four were dead, and nine were wounded more or less severely.[29]

At Jackson the events have been described as follows:

> An unidentified officer yelled "Ladies and gentlemen!" and as if on cue, the police let loose at the crowd with shotguns, pistols and rifles. They raked the building and the squirming students on the ground. One student said that those in front of the dormitory "were trying to get inside. Blood was everywhere." Another, Red Wilson, Jr., who was hit in the leg, recalled: "I was standing in front of the dorm. All I could think of was to start running and I got hit. Nobody had a chance." The firing continued for 35 seconds; about 150 shots were fired. Then someone yelled "Cease fire!" and the shooting stopped.[30]

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[29]MICHENER 305.

[30]TIME, May 25, 1970, at 22.

In both cases it seems clear that the officials of the state—National Guardsmen, highway patrolmen, and policemen—fired their weapons at the plaintiffs and that they were supervised by other officials of the State. What is not now clear, and what may never become clear, is which of these officials who fired actually hit the defendants. By the nature of the conflict, the plaintiffs were not close enough to the officials to recognize them.[31] As a result, there is no way for the plaintiffs to establish the identity of the defendants who fired the bullets that hit them unless the particular defendants admit having done so.

Since many of the defendants who fired probably fired in the air, it is likely that all such defendants will claim that they fired in the air.[32] Indeed, how are the defendants themselves to know whether their bullets actually hit the plaintiffs? In the fusillades that occurred, it was virtually impossible for them to determine that fact.

The result is that the actual assailants may forever remain unknown to the plaintiffs and, almost as likely, to the defendants themselves. In other situations involving torts by state officers, the actual tortfeasor will at some point be identified. Pre-trial discovery will usually yield the information, if it is not available to plaintiffs at the outset. Thus, when an unknown police officer shoots someone, it is possible to sue the officer as unnamed and eventually reconstruct the events to provide the necessary identity from available records.[33] But in mass tort situations, discovery will not cure the defects in proof. In a suit arising out of the Chicago convention disturbances of 1968, for instance, the plaintiff, who had been beaten by police while trying to calm a mob at Lincoln Park, was unable to identify his assailants from among photographs of two hundred police who were present.[34]

In situations in which the state or municipal body can supply the actual tortfeasor, there is, at least, a defendant against whom judgment can be entered, although satisfaction is another matter altogether.[35]

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[31]At Kent State, for instance, reliable information indicates that, of the thirteen students who were hit by bullets, the median distance from the National Guardsmen who fired was 329 feet. MICHENER 306.

[32]Indeed, this is just what the police defendants in the Jackson State litigation claimed at trial to have done. TIME, April 3, 1972, at 54.

[33]*See* Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); *cf.* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 390 n.2 (1971), in which the district court ordered the complaint served on the agents as "indicated by the records of the United States attorney participated" in plaintiff's arrest.

[34]Ries v. Lynskey, 452 F.2d 172, 174 (7th Cir. 1971).

[35]*See* Carter v. Carlson, 447 F.2d 358, 370 (D.C. Cir. 1971), in which the court cautioned: "The obstacles to recovering in tort from an individual police officer are notorious, and the

Thus, there is some remedy for a plaintiff who has been injured by official misconduct. In the event that the states rely upon sovereign immunity in the Jackson-Kent cases, however, there may well be no such alternative. The vagaries of state tort law offer no substantial hope of recovery.[36] An argument based on a joint tortfeasor concept is possible, but that theory will probably be available only if some of the defendants admit that they fired at the plaintiffs.[37] There is also a possibility of an application of the doctrine of res ipsa loquitur,[38] but the use of that doctrine in this context has been criticized[39] and its use would be especially doubtful where the tortious conduct may well be considered intentional.[40]

Ultimate liability of the individual defendants in these circumstances is at best tenuous. The result is that either the states or the municipality must be liable for the conduct of their officials or there will be no remedy for the alleged unconstitutional conduct; in essence, the assertion of sovereign immunity on the facts presented may amount to a denial of all relief. The constitutional implications of such a result are considered in Part IV B.

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obstacles to recovering from the government are almost as great." In addition, *see* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). *Cf.* Bivens v. Six Unknown Fed .Narcotics Agents, 403 U.S. 388, 411 (Burger, C.J., dissenting).

[36]In Ries v. Lynskey, 452 F.2d 172 (7th Cir. 1971), the court rejected the joint tort analogy in a police tort situation: "The present situation is not comparable to an automobile accident in which two parties are admittedly and knowledgeably involved with only one testifying as to what happened. . . . The evidence in a true sense there is uncontradicted." *Id.* at 177.

[37]*See, e.g.*, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). *Summers* held that two hunters who negligently fired in the direction of plaintiff were liable as joint tortfeasors. Here, negligence was clear, and only causation was in doubt. In the Jackson-Kent situation, however, many if not all defendants will probably deny having fired at plaintiffs, and some will deny having fired at all. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 243-44 (4th ed. 1971) [hereinafter cited as PROSSER].

[38]*See* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944), in which all of the defendants (who were hospital workers, doctors, nurses, and the hospital itself) were held liable for a negligent injury to an unconscious plaintiff. The case has been followed in some jurisdictions. Frost v. Des Moines Still College of Osteopathy, 248 Iowa 294, 79 N.W.2d 306 (1956); Beaudoin v. Watertown Memorial Hosp., 32 Wis. 2d 132, 145 N.W. 2d 166 (1966). But it has been rejected in others. Rhodes v. De Huan, 184 Kan. 473, 337 P.2d 1043 (1959); Talbot v. Dr. W. H. Groves' Latter-Day Saints Hosp., Inc., 21 Utah 2d 73, 440 P.2d 872 (1968).

[39]*See* Seavey *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950).

[40]*Res ipsa loquitur* is a doctrine that is usually reserved for alleged negligent acts. PROSSER § 39, at 217-19. In the Jackson-Kent litigation, intentional torts as well as negligent acts are alleged.

III. SOVEREIGN IMMUNITY: BACKGROUND

A. *Immunity as a Creature of Common Law*

The doctrine of sovereign or governmental immunity absolves a state and its political subdivisions, in the absence of consent to suit,[41] from liability, either direct or vicarious, for the torts committed by their agents and employees. The doctrine had its roots in Roman law and has been part of the common law for some two hundred years.[42] At one time or another, it has been basic to the law of every state.[43]

Although the doctrine emanated from the idea that the sovereign is supreme,[44] its main justification has been that to allow suits against states would be financially burdensome.[45] While this argument may have been entitled to considerable weight in the financially precarious period immediately following the Revolution,[46] it hardly suffices to justify the doctrine in the present day. Given the availability of insurance[47] and the ability of states to raise revenues, there is no reason to protect the state from the legitimate claims of its constituents.[48] Indeed, there is every

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[41]*See generally* PROSSER § 131; Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795 [hereinafter cited as Kramer].

[42]*See* PROSSER § 131, at 970-71; Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788); Mowen v. Inhabitants of Leicester, 9 Mass. 247 (1812). *See also* Note, *Torts—Sovereign Immunity—The Government's Liability For Tortious Conduct Arising From Proprietary Functions*, 20 DE PAUL L. REV. 302 (1971).

[43]*See, e.g.*, Borchard, *Governmental Liability in Tort* (pts. I-VI), 34 YALE L.J. 1, 129, 229 (1924-1925), 36 YALE L.J. 1, 757, 1039 (1926-1927).

[44]3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 458-69 (5th ed. 1942). However, the notion that "the King can do no wrong," although frequently expressed, has been specifically rejected as a basis for immunity in the United States. Langford v. United States, 101 U.S. 341, 342-43 (1879). *See generally* Borchard, *Governmental Liability in Tort*, 28 COLUM. L. REV. 577 (1928); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[45]The fear that states and political subdivisions could be financially overwhelmed by unlimited amenability to suit was basic to early articulations of the immunity doctrine. *E.g.*, State v. Hill, 54 Ala. 67 (1875), *discussed in* Kramer 803-04. Municipal bankruptcy was also a concern expressed during the debates over passage of the Civil Rights Act of 1871 (now 42 U.S.C. § 1983). CONG. GLOBE, 42d Cong., 1st Sess. 763 (1871) (Senator Casserly).

[46]*See generally* R. WATKINS, THE STATE AS A PARTY LITIGANT 52-54 (1927); Gellhorn & Schenk, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947); PROSSER § 131, at 977-78.

[47]*See generally* Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588.

[48]Municipalities may not have the same financial stability as states but they do have the ability to insure. Moreover, they may have an affirmative obligation to raise revenues to protect the fundamental rights of their constituents. *Cf.* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

reason to make the state responsible for the torts of its officials both as a matter of reasonable risk allocation[49] and of social justice.[50] But the states' awareness of their responsibility has been far from uniform. While at least six states have gone so far as to provide compensation for the innocent victims of violent crime committed by private individuals,[51] others still refuse to provide compensation for similar crimes committed by their own agents and officials. Ironically, at least one state[52] has enacted such legislation while preserving the traditional view of sovereign immunity. It is exceedingly difficult to rationalize a decision to assume responsibility for injurious acts of criminals but to refuse responsibility for those same acts by officials of the state.

Since it is most difficult as a matter of equity to justify immunity, several inroads have been made in the doctrine over the years. One of the earliest distinctions was made between types of government activity. Proprietary acts[53] of a state—situations in which the state acted in a business-corporate capacity—were held not to be immune.[54] The conclusion that an activity was proprietary resulted from the answers to questions such as how the activity was financed[55] and was the activity formerly private.[56] It soon became obvious, however, that this analysis was

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[49]*See, e.g.*, 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.3, at 1612 (1956); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[50]Montesquieu first enunciated the principle that an individual should have legal rights and remedies against the state; this principle was embodied in article 17 of the "Declaration of the Rights of Man." Borchard, *Governmental Responsibility in Tort VII*, 28 COLUM. L. REV. 577 (1928).

[51]The states of California, Hawaii, Maryland, Massachusetts, New Jersey, and New York have enacted such legislation, and other states are considering doing so. N.Y. Times, Oct. 25, 1971, § C, at 28. This type of legislation is of recent origin; it was first passed in England in 1964. *See generally* King, *If You Are Maimed by a Criminal, You Can Be Compensated (Maybe)*, N.Y. Times, March 26, 1972, § 6 (Magazine), at 40. Moreover, the federal government, which maintains tort immunity for the intentional acts of its officials under the Federal Tort Claims Act, 28 U.S.C. § 2680 (1970), provides disaster relief for accidental injury, and has been urged to compensate those injured by civil disorders. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 197-98 (1968); *see* Note, *The Ghetto Disorders: A Reconsideration of Post-Riot Remedies*, 21 U. FLA. L. REV. 84 (1968).

[52]Maryland appears still to assert immunity from tort liability for the acts of its government agents. *See* Jones v. Scofield Bros., 73 F. Supp. 395 (D. Md. 1947).

[53]*See* Bailey v. Mayor of New York, 3 Hill 531 (N.Y. Sup. Ct. 1842), which defined erection of a dam as a proprietary function.

[54]This proprietary-function distinction was initiated by France and Germany in the nineteenth century. Borchard, *Theories of Governmental Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928). This same distinction has been incorporated into the common and statutory law of the United States. Kramer 806-07, 815-17.

[55]If the activity was financed by the users, it was held to be for profit and "proprietary." *Cf.* Bolster v. City of Lawrence, 225 Mass. 387, 390, 114 N.E. 722, 724 (1917).

[56]*See* Kramer 816-17.

incapable of distinguishing with clarity between the two categories of activity.[57] On what side, for example, did education and police and fire protection fall? Merely that an activity is financed by a user tax rather than out of general tax revenues should not be determinative,[58] and that an activity was formerly private was of little help, since virtually all public functions were originally private.[59] As a result, the governmental-proprietary dichotomy has been condemned as "one of the most unsatisfactory known to law" and has been discarded in many jurisdictions.[60]

Another early notion of immunity was not sovereign immunity per se—that is, entity immunity—but rather individual or official immunity. Official immunity considered the responsibilities of the particular government official who engaged in the allegedly tortious activity. Thus, legislative and judicial officials have had a long common law history of immunity;[61] indeed, absolute legislative immunity is expressed in the Constitution. On the other hand, immunity for executive officials was not part of the common law tradition,[62] except for the immunity of the Chief Executive, which seems to have always been part of our history.[63] The doctrine of official immunity as such arose in this country at the

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[57]*See* City of Kokomo v. Loy, 185 Ind. 18, 23, 112 N.E. 994, 996 (1910).

[58]Spencer v. General Hosp., 425 F.2d 479, 486 (D.C. Cir. 1969) (en banc) (Wright, J., concurring).

[59]Police departments and fire companies were at one time private ventures. Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910, 914-15 (1936).

[60]3 K. DAVIS, ADMINISTRATIVE LAW § 25.07, at 460 (1958). *See also* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961), in which the governmental immunity doctrine was overruled in California, with Justice Traynor calling it "mistaken and unjust." *See also* 2 F. HARPER & F. JAMES, *supra* note 49, § 29.6, at 1621 (1956). *But see* UTAH CODE ANN. §§ 60-30-3 (Supp. 1965) and MICH. COMP. LAWS § 691.1407 (1964), which are recent legislative enactments granting immunity for state, county, and city "governmental" functions.

[61]*See* Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951). Absolute legislative immunity has been traced to the year 1399 and absolute judicial immunity to 1608. Barr v. Matteo, 360 U.S. 564, 579 (1959) (Warren, C.J., dissenting). *See also* Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131 (1910).

[62]The Anglo-American tradition did not include a general theory of immunity from suit or from liability on the part of public officers. It was the boast of Dicey, often quoted, that "[w]ith us every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act without legal justification as any other citizen."

2 F. HARPER & F. JAMES, *supra* note 49, § 29.8, at 1632-33 (1956) (footnotes omitted). The doctrine of executive privilege did not arise in England until 1895. *See* Barr v. Matteo, 360 U.S. 564, 578-82 (1959) (Warren, C.J., dissenting).

[63]*See* Mississippi v. Johnson, 71 U.S. 475 (1866).

end of the nineteenth century.[64] Today it is the most challenged of the three immunity categories.[65]

In the last twenty-five years, many states and the federal government have actively begun to abrogate—if not fully, at least partially[66]—the governmental and official freedom from liability.[67] The first thing to go was the governmental-proprietary distinction. In its place some jurisdictions have suggested another test for governmental and official immunity that is designed to be more flexible. This is the discretionary-ministerial-act test that has been articulated by statute[68] and judicial decisions.[69] Essentially, a discretionary act is one that requires a high degree of judgment and choice, and the theory is that if an official is subjected to tort liability it might "jeopardize the quality and efficiency of government itself."[70] This analysis represents a clear shift in thinking on the immunity issue. As explained by Judge Skelly Wright,

> Where the previous distinction had rested on a vertical classification of broad areas of activity—education, sanitation, care of the sick, etc.—as "governmental" or "proprietary," the new distinction was a horizontal one which cut across these broad areas, and looked with more particularity at the act or omission complained of as negligent.[71]

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[64]*See* Spalding v. Vilas, 161 U.S. 483 (1896). There was no doctrine of official immunity prior to *Spalding*. Barr v. Matteo, 360 U.S. 564, 579-82 (1959) (Warren, C.J., dissenting).

[65]Executive officials who have limited immunity are most amenable to suit. Pierson v. Ray, 386 U.S. 547 (1967).

[66]In most cases the abrogation is not complete, and statutory enactments provide for specific grants of immunity or liability. *See generally* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919. In addition, several states have set a maximum limit on the amount of recovery. *E.g.*, CONN. GEN. STAT. ANN. § 4-158 (1969) ($2,500; state commission may recommend higher limits in a given case to legislature); KY. REV. STAT. ANN. §§ 44.070-44.170 (1963) ($10,000); N.C. GEN. STAT. § 143-291 (1971) ($20,000). Fear of the catastrophic event that leads to staggering judgments undoubtedly remains a continuing concern. Thus, virtually all states retain immunity for damages arising from negligent fire fighting. This may be considered a reasonable restriction if it is assumed that fire insurance is carried by all. *But see* Rayonier, Inc. v. United States, 352 U.S. 315 (1957) (United States held liable under Federal Tort Claims Act for negligent fire fighting). The same cannot be said for accident insurance, however. *See* quotation at note 76 *infra*.

[67]*See* Spencer v. General Hosp., 425 F.2d 479, 488 n.20 (D.C. Cir. 1969), in which cases from twelve states that have judicially abrogated sovereign immunity in the last decade are collected. *See also* 3 K. DAVIS, *supra* note 60, § 25.04 (Supp. 1970), which collects cases from states on both sides.

[68]*E.g.*, CAL. GOV'T CODE § 820.2 (West 1966); 28 U.S.C. § 2680(a) (1970).

[69]For discussions of the discretionary-act doctrine, *see* Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

[70]Elgin v. District of Columbia, 337 F.2d 152, 154 (D.C. Cir. 1964).

[71]Spencer v. General Hosp., 425 F.2d 479, 488 (D.C. Cir. 1969).

While the concept of discretionary and ministerial functions is not new,[72] its articulation in functional terms is of fairly recent origin. The test was first articulated by statute in the Federal Tort Claims Act.[73] Judicially, this test was defined in *Dalehite v. United States*[74] as drawing the horizontal line that Judge Wright later described between the "planning" and "operational" levels of decision-making. The courts have not been able to agree, however, on which activities fall above or below the line,[75] and, as a result, attempts to draw the line have been unsure,[76] both

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[72]*Compare* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866) (President immune) *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Secretary of State not immune). *See also* Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845) (discretionary immunity for Postmaster General).

[73]28 U.S.C. § 2680(a) (1970).

[74]346 U.S. 15, 35-36 (1953). In *Dalehite* the Court was faced with apparent negligence by the government which led to explosions on several ships that virtually destroyed Texas City, Texas. Over 590 persons died and over three thousand were injured; damage claims were in excess of 200 million dollars. The Court held immune not only the cabinet-level officials but also the executives and administrators who established plans pursuant to the program and who acted upon those plans.

[75]Justice Jackson, dissenting in *Dalehite*, felt that the line was drawn too low: "The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper." 346 U.S. at 60.

[76]After the four-to-three decision in *Dalehite*, the dissenting Justices formed the majority in Indian Towing Co. v. United States, 350 U.S. 61 (1955), which—although it did not disavow the planning-operational level distinction for discretionary acts—presented a more expansive view of the government's responsibility. In *Indian Towing* negligent government operation of a lighthouse was actionable even though there was no counterpart in the private sector. Thus, the old governmental-proprietary test for immunity was eliminated for all time. *See* United States v. Union Trust Co., 350 U.S. 907 (1955) (per curiam). *See generally* Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956).

In Rayonier, Inc. v. United States, 352 U.S. 315 (1957), the Court held the United States Forest Service liable for its negligence in firefighting, even though such liability did not exist at common law. The Court thus overruled *Dalehite* to that extent. 352 U.S. at 319. Justice Frankfurter, writing for the majority, talked in terms of risk distribution rather than sovereign immunity:

> It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability. The Government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury. It points out the possibility that a fire may destroy hundreds of square miles of forests and even burn entire communities. But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees.

under the FTCA and as a matter of federal common law.[77]

Perhaps this is because the basic interest sought to be protected by the discretionary-function analysis is freedom from individual liability rather than governmental liability. Given the necessity for high executive officials to engage regularly in acts of discretion, fear of individual liability was thought to be a deterrent to responsible conduct. The most frequently cited expression of this concern was rendered by Judge Learned Hand: "To submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[78] Naturally, executive officials—from police officers to cabinet officials, Governors, and Presidents—decide and act daily in ways that vitally affect the lives of all citizens. If they decide or act tortiously or unconstitutionally, the potential for injury is maximized. On the other hand, executive officials must act and must decide and are compelled, in a sense, to engage in high-risk activity.

But while Judge Hand's analysis has validity as applied to government officials individually, it is basically inapplicable to the issue of the liability of government itself. However, since entity liability is usually derivative at common law[79] traditional tort theory forecloses governmental responsibility unless the official himself is liable under applicable law.[80] Since the officials are immune because of the discretionary-function doctrine, the government obtains the benefit of that immunity merely by the application of essentially irrelevant principles of agency.

Some attempts have been made to break out of this logical circle. In one state the government will defend any personal tort suit against

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352 U.S. 319-20. *Cf.* James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 614-15 (1955). Subsequent lower federal court decisions have retained the planning-operational distinction but have tended to take a broader view of liability. *See, e.g.*, United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962).

[77]*See* Barr v. Matteo, 360 U.S. 564 (1959) (immunity from defamation suit); David v. Cohen, 407 F.2d 1268 (D.C. Cir. 1969); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). *Cf.* Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 66 HARV. L. REV. 488 (1953).

[78]Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[79]A principal's liability for his agent's torts may be based either upon the principal's own negligence or upon the doctrine of respondeat superior, but in either case negligence of the agent must first be established. PROSSER §§ 68-70.

[80]In California, for example, the governmental body is generally immune if the employee is immune. CAL. GOV'T CODE § 815.2(b) (West 1966).

an official and will pay any judgment for negligence,[81] and this solution has been stated to meet the concerns expressed by Judge Hand.[82] A similar solution is to turn the discretionary-function doctrine around and grant the immunity for discretionary acts to the official but not to the governmental entity.[83]

In addition, these same jurisdictions have wrestled with a meaningful definition of the discretionary-function test. In applying Judge Wright's test, no discretion and, therefore, no immunity was found for the District of Columbia in the negligent construction and maintenance of a playground in a public school[84] and for a public hospital in the negligent performance of an operation[85]—activities both of which are traditionally "governmental."[86] Furthermore, individual liability of government officials has been scrutinized. The horizontal line of immunity is drawn at the policy-making level, and acts of lower officials that also require judgment, such as a surgeon's decision to operate,[87] a parole officer's decision to send a troubled child to a foster home,[88] or an officer's decision to arrest,[89] are all below that line.

The difficulty of defining a discretionary function for immunity purposes may well be overcome by these recent developments. The question is at what level a discretionary act becomes a political act.

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[81]CAL. GOV'T CODE § 825 (West 1966). However, the government still remains immune from intentional torts of its officials. *Cf.* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972).

[82]Johnson v. State, 69 Cal. 2d 782, 790-91, 477 P.2d 352, 358, 73 Cal. Rptr. 240, 247 (1968).

[83]In Carter v. Carlson, 447 F.2d 358, 367 (D.C. Cir. 1971), *cert. granted sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972), the court held: "With respect to some government functions, the threat of individual liability would have a devastating effect, while the threat of government liability would not significantly impair performance." The "government function" involved was the supervision of police officer training. The court remanded for further evidence on whether such supervision was "discretionary" or "ministerial" for the purpose of liability on the supervisors. If it was the former, then the individual but not the District would be immune. *See* Krause v. State, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971), in which the state was held liable and the officials involved were held immune. That decision is currently on appeal to the Supreme Court of Ohio. The suggestion that the state and not the individual should be held liable has been made elsewhere. *See* Foote, *supra* note 35, at 493; Mathes & Jones, *Toward a "Scope of Official Duty" Immunity For Police Officers in Damage Actions*, 53 GEO. L.J. 889, 907-08 (1965).

[84]Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964).

[85]Spencer v. General Hosp., 425 F.2d 479 (D.C. Cir. 1969).

[86]*See generally* 3 K. DAVIS, *supra* note 60, § 25.01 (Supp. 1970).

[87]"This is not to say that the performance of an operation does not involve judgment and discretion. The point is that *medical*, not governmental, judgment and discretion are involved." Spencer v. General Hosp., 425 F.2d 479, 489 (D.C. Cir. 1969) (Wright, J., concurring).

[88]*See* Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

[89]Carter v. Carlson, 447 F.2d 358, 366 (D.C. Cir. 1971), *cert. granted sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972).

Since "it is not a tort for the government to govern"[90] and since the government must act through its officials, these officials are deemed immune from suit when engaged in decisions that require judgments of a political nature. But that does not mean that all decisions by government officials that involve the exercise of judgment are discretionary. This distinction is perceived in *Johnson v. State:*[91]

> Courts and commentators have . . . centered their attention on an assurance of judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of government. Any wider judicial review, we believe, would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government.

According to this decision, the discretionary-function rationale articulates interests similar to those expressed in the separation-of-powers doctrine, which is basic to American political thought.[92] The analysis of discretionary functions in separation-of-powers terms is novel[93] and will be examined in detail below.[94]

It would seem that in all situations that do not raise separation-of-powers interests, liability of the governmental entity, as opposed to the official, for the negligent or intentional acts of the official would serve society's interests in allocation of risk to the largest feasible group[95] and freedom of officials from the harassment of litigation. When government as an institution is challenged—that is, when attacks are made on high-level decisions of the three branches—political considerations intervene that may justify immunity of both the entity and the individual. Sovereign immunity then becomes a synonym for separation of powers.

B. Immunity as a Federal Question

Insofar as general trends in the abrogation of sovereign immunity

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[90]Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting).

[91]69 Cal. 2d 782, 793, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968) (emphasis by the court); *see* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 259 (1965); *cf.* Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655 (2d Cir. 1962), *cert. denied,* 374 U.S. 827 (1963).

[92]*Cf.* Note, *The Discretionary Function Exception of the Federal Tort Claims Act,* 66 HARV. L. REV. 488, 498 (1953).

[93]This possibility, however, has been alluded to by at least one noted commentator. James, *Tort Liability of Governmental Units and Their Officers, supra* note 76, at 653-54.
at 653-54.

[94]*See* notes 203-15 and accompanying text *infra.*

[95]*See generally* Note, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection,* 57 CAL. L. REV. 1142, 1146-53 (1969).

go, the states are free to adopt or not adopt the suggestions of the FTCA or of federal common law doctrines. As a result, while some states such as California[96] and New York[97] have been instrumental in reassessing immunity, others either have not moved from rigid common law standards[98] or have done so quite cautiously.[99] When, however, the state or its officials seeks to preserve immunity in the face of challenges to the constitutionality of official conduct, the question of immunity then comes a federal one.[100]

Thus, in cases arising under section 1983, the issue is whether the state or its officials have deprived the defendant of rights secured by the Constitution.[101] It has been held that federal immunity for section 1983 purposes extends absolutely to state judicial and legislative officials but

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[96]For the codification of California's Tort Claims Act *see* CAL. GOV'T CODE §§ 810-996.6 (West 1966). In addition, *see* Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S. CAL. L. REV. 161 (1963).

[97]The New York Court of Claims Act waives the defense of sovereign immunity and places the state on a parity with private corporations with respect to tort and contract liability. N.Y. CT. CL. ACT § 8 (McKinney 1963). *See* Weiss v. Fote, 7 N.Y.2d 579, 167 N.E. 2d 63, 200 N.Y.S.2d 409 (1960). *See generally* Sherry, *The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 AD. L. REV., 39, 49-54 (1969).

[98]*E.g.*, ALA. CONST. art. I, § 14 provides that the state shall never be made party defendant in any court of law or equity. Nor can the legislature or any other state agency consent to a suit. Dunn Constr. Co. v. State Bd. of Adjustment, 234 Ala. 372, 175 So. 383 (1937). Nor can an individual waive constitutional immunity of the state from suit. State Tax Comm'n v. Commercial Realty Co., 236 Ala. 358, 182 So. 31 (1938). W. VA. CONST. art. VI, § 35 provides that the state shall never be made defendant in a court of law or equity. Under this provision the state's tort immunity has been considered absolute. State *ex rel.* Gachman v. Sims, 130 W. Va. 430, 43 S.E.2d 805 (1947).

Sovereign immunity has been made absolute by judicial decision in the states of Maryland, New Hampshire, New Mexico, Oklahoma, and South Carolina. *See* Jones v. Scofield Bros., 73 F. Supp. 395 (D. Md. 1947); St. Regis Paper Co. v. New Hampshire Water Resources Bd., 92 N.H. 164, 26 A.2d 832 (1942); Hathaway v. New Mexico State Police, 57 N.M. 747, 263 P.2d 690 (1953); Mountcastle v. State, 193 Okla. 506, 145 P.2d 392 (1943); Chick Springs Water Co. v. State Highway Dep't, 159 S.C. 481, 157 S.E. 842 (1930).

[99]This caution is reflected by states that place a statutory ceiling on recovery and limit consent to suit to negligent acts of officials. *See* note 66 *supra.*

[100]Pierson v. Ray, 386 U.S. 547 (1967); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified on rehearing en banc*, 456 F.2d 835 (1972).

[101]Monroe v. Pape, 365 U.S. 167 (1961). *See generally* Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839 (1964). Section 1983 has been interpreted to encompass constitutional rights asserted under the fourteenth amendment alone, and under the Bill of Rights through fourteenth amendment incorporation. *See* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 320-29 (1965), and cases collected therein.

qualifiedly to state executive officials.[102] Despite common law tradition, there is a reluctance to grant immunity too freely when vindication of constitutional rights is at stake. Thus, in *Jobson v. Henne*[103] the court stated:

> [T]he purpose of § 1983 as well as the other Civil Rights provisions is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action. To hold all state officers immune from suit would very largely frustrate the salutary purpose of this provision. We conclude the defense of official immunity should be applied sparingly in suits brought under § 1983.[104]

Consistent with this concern, immunity defenses have been rejected in suits against police officers,[105] sheriffs,[106] and wardens[107] (who are responsible most frequently for violations of constitutional rights) whether or not these individuals are immune under state law.[108]

In order to invoke federal standards, the alleged injury must of course rise to the level of constitutional injury; if it does not, state immunity doctrines still have viability,[109] Thus, false imprisonment, while traditionally a state law tort, may be of such a quality as to constitute an unconstitutional deprivation,[110] as may grossly negligent

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[102]*See* Pierson v. Ray, 386 U.S. 547 (1967). *See generally* Note, *The Doctrine of Official Immunity Under the Civil Rights Acts*, 68 HARV. L. REV. 1229 (1955).

[103]355 F.2d 129 (2d Cir. 1966). *See also* McLaughlin v. Tilendis, 398 F.2d 287, 290-91 (7th Cir. 1968).

[104]355 F.2d at 133-34 (footnote omitted).

[105]*E.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

[106]Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified on rehearing en banc*, 456 F.2d 835 (1972); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969).

[107]*E.g.*, Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc) *cert. denied*, 92 S. Ct. 1190 (1972); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Cal. 1964).

[108]*See, e.g.*, Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971) (state board of supervisors immune under Mississippi law but not necessarily under § 1983).

[109]Carter v. Carlson, 447 F.2d 358, 363 (D.C. Cir. 1971), *cert. granted, sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972).

[110]Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969) (nine-month imprisonment after charges had been dismissed). To rise to the level of an eighth amendment claim the treatment must be "conduct that shocks the conscience" or "barbarous treatment." Church v. Hegstrum, 416 F.2d 449 (2d Cir. 1969) (complaint dismissed); *see* Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970) (same). *But see* Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1971) (cause of action stated in action arising out of Attica prison riot); *cf.* Clutchette v. Procurier, 328 F. Supp. 767 (N.D. Cal. 1971) (prison disciplinary procedures held to violate § 1983).

conduct, such as shooting a person.[111] But these cases are concerned with something more than a typical tort injury.[112] Rather, what is looked for is a "raw abuse of power by a police officer,"[113] not simple negligence,[114] and what is sought to be protected are fundamental human rights, not mere property rights.[115] These are rights which "directly and

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[111]Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); *see* Note, *Civil Rights—Section 1983 Action Lies For Gross and Culpable Negligence*, 49 N.C.L. REV. 337 (1971).

[112]*See* Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971), in which the court held that the maintenance by a state prison superintendent of the trusty guard system was cruel and inhuman punishment under the eighth amendment after one of the guards negligently fired his shotgun, maiming the plaintiff prisoner for life. The court struggled with what constitutes the difference between simple negligence and a constitutional deprivation:

> We see, however, cruelty in the sustained maintenance, over a period of time of a needlessly hazardous condition for plaintiff and other prisoners. We might say careless preparation of a single meal, producing food poisoning in prisoners, was not cruel, but it might be so if the jailors negligently allowed the jail's only drinking water supply to become permanently infected with typhoid bacteria. The word punishment, too, implies a wrong in prison management, in contrast to the casual dereliction of a minor prison employee. Thus in an Eighth Amendment case, if there were, as here, no conscious purpose to inflict suffering, we would look next for a callous indifference to it at the management level, in the sustained knowing maintenance of bad practices and customs. When prison wardens are cruel in their attitudes, negligent as well as well as intended injuries result.

Id. at 19; *accord*, Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970). *But see* Fear v. Commonwealth, 413 F.2d 88 (3d Cir.), *cert. denied*, 396 U.S. 935 (1969); Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964); United States v. Rogers, 323 F.2d 410 (7th Cir. 1963). The Fifth Circuit continues to search for a satisfactory definition of constitutional deprivation for § 1983 purposes. Thus it recently "pretermitted" a decision based on the eighth amendment and rested on the due process clause of the fourteenth amendment. Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified on rehearing en banc*, 456 F.2d 835 (1972). The language of the *Roberts* opinion quoted *supra* must be read in light of the *Anderson* modification. *See* 456 F.2d at 834-35 (addendum by Nichols, J.).

[113]Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970); *accord*, Hopkins v. County of Cook, 305 F. Supp. 1011 (N.D. Ill. 1969) (negligence or malpractice does not amount to a violation of constitutional rights); *see* Kent v. Prosse, 265 F. Supp. 673 (W.D. Pa.), *aff'd*, 385 F.2d 406 (3d Cir. 1967) (injury in prison caused by defective machinery not deprivation of a constitutional right).

[114]Thus, a prisoner's suit under § 1983 for injury resulting from negligent medical treatment was dismissed. Kontos v. Prasse, 444 F.2d 166 (3d Cir. 1971); *cf.* note 110 *supra*. Compare Adams v. Pate, 445 F.2d 105 (7th Cir. 1971) (stench in cells not an eighth amendment violation); Wood v. Maryland Casualty Co., 322 F. Supp. 436, 440 (W.D. La. 1971) (claim of inadequate medical care *plus* claim of repeated unsuccessful attempts to gain treatment held sufficient under § 1983); Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967) (negligent act may be a deprivation of constitutional rights) (dictum).

[115]A mere property right is defined as one that is basically pecuniary in nature. *See* Rhodes v. Sigler, 448 F.2d 1237 (8th Cir. 1971) (prisoner's claim for $246 against the state of Nebraska dismissed). *See also* Kimble v. Dep't of Corrections, 411 F.2d 990 (6th Cir. 1965); Urbano v. Calissi, 384 F.2d 909 (3d Cir. 1967); Howard v. Higgins, 379 F.2d 827 (10th Cir. 1967). Also, mere denial of procedural due process in the loss of a government job has been held not of itself to present a § 1983 cause of action. Tichon v. Harder, 438 F.2d 1396, 1399 (2d Cir. 1971). What is needed is an infringement of personal liberty. Canty v. Board of Educ., 448 F.2d 428, 430 (2d Cir. 1971);

sharply implicate basic constitutional values."[116]

Once such a deprivation is found, supervisors may be held liable under section 1983 for negligence in supervising their subordinates, even though they may be immune under local law.[117] And, of course, supervisors may be liable for their direct participation in the unconstitutional acts of their subordinates.[118]

Up to now the immunity defenses for unconstitutional acts have ironically had more viability in suits against federal officers than in suits against state officials. Section 1983, by its terms, applies only to officials who act under color of *state* law.[119] While the criminal analogue to section 1983[120] refers to acting under color of *any* law and, therefore, includes federal officers, that section is less frequently invoked because of the necessity for establishing specific intent and wilfullness.[121] As has been shown above, outside the specific waiver of immunity contained in the FTCA, which does not cover intentional torts,[122] the federal common law rule on immunity is virtually absolute, and immunity has been granted even for unconstitutional deprivations involving police officers or their federal equivalent, the FBI.[123] In *Norton v. McShane,*[124] for

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see Durlin v. Henderson, 448 F.2d 1238 (5th Cir. 1971). Thus, when a plaintiff alleges racial bias in a dismissal without due process, a cause of action is stated. Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966). *But see* Newcomer v. Coleman, 323 F. Supp. 1363 (D. Conn. 1970); *cf.* Cornish v. Richland Parrish School Bd., 448 F.2d 594 (5th Cir. 1971) (black teacher fired for disseminating desegregation material); Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971) (non-tenured teacher fired without hearing); Brown v. Hirst, 322 F. Supp. 236 (W.D. Va. 1971) (sanitation employee's claim for back pay dismissed). All of these cases must now be questioned in light of the Supreme Court's decision in Lynch v. Household Fin. Corp., 92 S. Ct. 1113 (1972), which rejected the old property rights-personal rights distinction in §§ 1983, 1343(3). *See* discussion in text accompanying notes 275-76 *infra.*

[116]Freeman v. Flake, 448 F.2d 258, 262 (10th Cir. 1971) (regulation of hair length of school children not so defined). *But cf.* Epperson v. Arkansas, 393 U.S. 97 (1968). *See also* Dougherty v. Reagan, 446 F.2d 75 (9th Cir. 1971) (hair regulations for prisoners within warden's discretion).

[117]Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted, sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972).

[118]In Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified on rehearing en banc,* 456 F.2d 835 (1972), the warden who supervised the actions of police and fire officials that led to plaintiff's cruel and inhuman treatment and was held liable for their direct participation. The issue of respondeat superior was specifically left open. 438 F.2d at 199 n.13.

[119]Monroe v. Pape, 365 U.S. 167 (1961); *see* note 6 *supra.*

[120]18 U.S.C. § 242 (1970). In addition, 42 U.S.C. § 1985(3) (1970), which proscribes conspiracies to violate § 1983, does not refer to acting under color of state law.

[121]*See* Screws v. United States, 325 U.S. 91 (1944).

[122]28 U.S.C. § 2680(h) (1970). The FTCA has been criticized for not providing recovery for intentional torts. Davis, *Administrative Officers' Tort Liability,* 55 MICH. L. REV. 201 (1956).

[123]Norton v. McShane, 332 F.2d 855, 859-60 (5th Cir. 1964). *Contra,* Kozlowski v. Ferrara, 117 F. Supp. 650 (S.D.N.Y. 1954).

[124]332 F.2d 855, 859-60 (5th Cir. 1964). *Norton* granted immunity from charges of malicious

example, federal officials were sued under state tort law and section 1983. The latter allegations were deemed inapplicable to federal officers, and the former were barred by the federal common law of immunity.[125]

As a result, federal officials have been in the incongruous position of being able to violate federal constitutional rights with virtual freedom from civil liability.[126] This situation has been strongly criticized[127] and apparently was changed by the recent decision of the Supreme Court in *Bivens v. Six Unknown Federal Narcotics Agents*.[128] In *Bivens* the Court answered the question that had been left open in *Bell v. Hood*[129] and held that a cause of action for damages would be permitted against federal officials for violations of the fourth amendment.[130] Although the immunity question was not decided directly, since it had not been passed upon by the Second Circuit,[131] the Court gave some indication as to how it would rule on that issue. Justice Harlan in his concurrence made it plain that a judicial remedy would be available for violations of fundamental constitutional rights:

> But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the nation's government stand ready to afford a remedy in these circumstances.[132]

On remand, the Second Circuit held that there would be immunity only if the federal agents could show that they acted in good faith. The case was remanded to the district court for a trial of that issue.[133]

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arrest and detention to the Deputy Attorney General of the United States and the Chief and Deputy United States Marshal.

[125]In state tort actions against federal officials, their immunity is controlled by federal law. *See* Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

[126]*But see* Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962) (fourth amendment violation not within scope of official immunity).

[127]Anderson v. Nosser, 438 F.2d 183, 205 (5th Cir. 1971) (Bell, J., concurring); Norton v. McShane, 332 F.2d 855, 863-72 (5th Cir. 1964) (Gewin, J., dissenting).

[128]403 U.S. 388 (1971).

[129]327 U.S. 678 (1946).

[130]*See generally* Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 33-34 (1968).

[131]Bivens v. Six Unknown Fed. Narcotics Agents, 409 F.2d 718 (2d Cir. 1969).

[132]403 U.S. at 411.

[133]Bivens v. Six Unknown Fed. Narcotics Agents, 456 F.2d 1339 (2d Cir. 1972). The court

Since the FTCA specifically excludes coverage of intentional torts, the type of governmental acts that rise to the level of constitutional torts will almost always be outside the statutory waiver of federal immunity. Therefore, the federal courts will have to redefine immunity in constitutional terms, keeping in mind that the rationale in *Bivens* may support a direct suit under the fourteenth amendment and thereby raise constitutionally the issue of immunity of state officials and the state itself. This possibility will be discussed in Part IV.

C. *Immunity as Applied to the Jackson-Kent Actions*

For the purpose of discussing the immunity doctrine and its present scope, it is useful to analyze the Jackson-Kent actions in the context of existing law. The defendants in these actions can be divided into three categories: those who fired at the students; those who supervised, either actively or passively; and the municipality and the states. Traditional notions of common law immunity and immunity under section 1983, as well as the emerging notion of "constitutional immunity," will vary with each category of defendants.

1. *The Defendants Who Fired at the Students.* This category includes the Jackson police officers and Mississippi highway patrolmen at Jackson and the Ohio National Guardsmen at Kent. There is little reason to believe that these individuals would be immune. It seems clear that even under the common law of torts, many states[134] would deny immunity for the tortious conduct alleged in the complaints.

The torts would be also actionable under section 1983. It has been established that intentionally injuring or killing someone is a violation of due process,[135] and immunity defenses have been proscribed under section 1983 for executive officials such as police and national guardsmen.[136]

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equated the good faith immunity test with that applied to state executive officials under § 1983. *See* Pierson v. Ray, 386 U.S. 547 (1967).

[134]For example, under Mississippi law it appears that a law enforcement officer who misuses a firearm is liable for the injuries he inflicts. Holland v. Martin, 214 Miss. 1, 56 So. 2d 398, *suggestion of error overruled*, 214 Miss. 1, 58 So. 2d 62 (1952); Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938); Dean v. Brannon, 139 Miss. 312, 104 So. 173 (1925); State *ex rel.* Johnson v. Cunningham, 107 Miss. 140, 65 So. 115 (1914). Generally, law enforcement officers are liable for their torts at common law. *See* 3 K. DAVIS, *supra* note 60 § 26.03 (Supp. 1970); RESTATEMENT (SECOND) OF TORTS §§ 121, 132 (1965).

[135]Screws v. United States, 325 U.S. 91 (1945).

[136]*See* notes 102-08 and accompanying text *supra*.

As for a direct suit under the Constitution, the *Bivens* and *Bell*[137] rationales make it doubtful that immunity defenses would be sustained. In the Jackson complaint claims are specifically made under the fourteenth amendment and under other amendments as well.[138] If proved, the unconstitutional deprivations would appear to fit precisely within Justice Harlan's statement that "a remedy would be available for the most flagrant and patently unjustified sorts of police conduct."[139]

2. *The Defendants Who Supervised Those Who Fired.* Several classes of defendants are involved in this category. The first class are those defendants who supervised activity at the scenes, such as the commanding officers of the police, highway patrol,[140] and National Guard.[141] The next level includes those defendants who were involved in the events in some manner but were not in direct supervision, such as the Mayor of Jackson and the President of Kent State,[142] and those officials who had statutory responsibilities of supervision but were not present at the scene, such as the Commissioner of Public Safety of the State of Mississippi.[143] Finally, at the highest level are the Governors of Ohio and Mississippi.[144] Existing law creates a crazy quilt of immunity and liabil-

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[137]*See* notes 128-33 and accompanying text *supra.*

[138]The Jackson action asserts deprivations of rights secured by the first, fourth, eighth, ninth, thirteenth, fourteenth, and fifteenth amendments. Burton v. Williams, Civil No. 4740 (S.D. Miss., filed Aug. 28, 1970), compl. Paras. 1 & 36.

[139]Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 322, 411 (1971) (Harlan, J., concurring). *See* quote in text at note 132 *supra.*

[140]These defendants are the Inspector of the Jackson Division of the Highway Patrol, the Chief and Assistant Chief of the City of Jackson Police Department, and various assistant inspectors of the Highway Patrol and sergeants of the Jackson Police Department, as yet unnamed. These defendants are alleged to have fired and also to have supervised those other officers who fired. Burton v. Williams, Civil No. 4740 (S.D. Miss., filed Aug. 28, 1970), compl. paras. 15, 17, 22, 23, 24, 37, and 38.

[141]These defendants include the Adjutant General of the State of Ohio; a Brigadier General of the Ohio National Guard, who was the ranking officer on the Kent campus; a major and two captains of the Ohio National Guard who were troop commanders; and various other officers of the Ohio National Guard, as yet unnamed. Scheuer v. Rhodes, Civil No. 70-859 (N.D. Ohio, filed ___ 1970).

[142]It is alleged that the Mayor of Jackson and the President of Kent State requested the police and troops to come onto the campuses. It is also alleged that the Mayor of Jackson, who is also Jackson's Police Commissioner, is responsible for the actions of the police at Jackson State. *See* Scheuer v. Rhodes, Civil No. 70-859 (N.D. Ohio, filed ___ 1970); Burton v. Williams, Civil No. 4740 (S.D. Miss., filed Aug. 28, 1970), compl. paras. 14, 22, and 23.

[143]Also within this class are the Chief of the Mississippi Highway Patrol and the Chief Inspector of the northern district of the highway patrol. Burton v. Williams, Civil No. 4740 (S.D. Miss., filed Aug. 28, 1970), compl. paras. 10, 11, 22, 23, 37, and 38.

[144]Scheuer v. Rhodes, Civil No. 70-859 (N.D. Ohio, filed ___ 1970); Burton v. Williams, Civil No. 4740 (S.D. Miss., filed Aug. 28, 1970). The governors are charged with their decision to send

ity for these various defendants.

(a) *Those in Direct, On-The-Scene Supervision.* These defendants are least capable of asserting immunity under any standard. Essentially, these are the individuals who organized the armed interventions and gave whatever orders there were to fire.[145] At common law[146] or under section 1983 these individuals would likely be held liable on a theory of direct participation; for immunity purposes they really stand no differently than those defendants who fired.[147] Under a pure constitutional claim, they should fare no better than their subordinates.

(b) *Those with Supervisory Responsibilities.* This class of defendants traditionally has been able to assert immunity defenses. The decisions of the Mayor of Jackson and the President of Kent State to call for national guardsmen and police were made in the face of great pressure and, for that reason, may be immune. Given the need to make decisions on limited information and within short time frames, these individuals have in similar contexts been protected by the discretionary-function theory from the threat of harassing lawsuits.[148]

The officials with statutory responsibility for the defendants' conduct, but who did not participate directly in the events, stand in an analogous position. At common law, immunity will generally be available if the supervision and training is defined as a discretionary act.[149]

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troops and patrolmen onto the campuses and with overall responsibility for these individuals' actions once there.

[145]Although the issue of whether or not orders were given to fire will have to be resolved at trial, there have been indications that such orders were given. *Compare* MICHENER, *supra* note 5, at 297-305 *with* TIME, May 25, 1970, at 22.

[146]Numerous courts have refused to extend immunity to National Guard officers (including generals) and enlisted men. *E.g.*, Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924) (National Guard General); Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911) (same); Allen v. Gardner, 182 N.C. 425, 109 S.E. 260 (1921) (National Guard officer); Herlihy v. Donohue, 52 Mont. 501, 161 P. 164 (1916) (same); O'Shee v. Stafford, 122 La. 444, 47 So. 764 (1908) (National Guard Adjutant General).

[147]Supervisors who participate in the alleged unconstitutional acts directly or through a negligent failure to train or supervise have generally been subject to suit, although not always held liable, under § 1983. *See, e.g.*, Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971) (prison superintendent); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified on rehearing en banc*, 456 F.2d 835 (1972) (sheriff and warden); Sostre v. McGinnis, 442 F.2d 178, 189-90, 205 n.51, 206-07 (2d Cir. 1971) (en banc) (state commissioner of corrections); Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971) (mayor and police commissioner); Sheridan v. Williams, 333 F.2d 581 (9th Cir. 1964) (police chief); Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964) (police commissioner and police chief).

[148]*See notes* 77-80 and accompanying text *supra*.

[149]*See* Carter v. Carlson, 447 F.2d 358, 362-64 (D.C. Cir. 1971), *cert. granted, sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972). *See also* Note, *Tort Liability of Law Enforcement Officers: State Remedies*, 29 LA. L. REV. 130 (1968).

Under section 1983 immunity is more limited than at common law.[150] The inquiry is directed at the officials' actions with respect to the plaintiff's unconstitutional injury, and mere nonfeasance does not appear to be sufficient for liability. Thus, the Mayor of Natchez and the Mississippi Commissioner of Public Safety have been found not liable where there was no evidence that the Mayor could have averted the unconstitutional conduct or that the Commissioner had participated in, or had knowledge of, the unconstitutional conduct.[151] Similarly, a board of supervisors were held immune individually for their failure to act in promulgating effective regulations for the operation of a prison system.[152] Furthermore, the doctrine of *respondeat superior* has not been generally applied to these supervisory officials.[153] There remains, therefore, some freedom from responsibility under section 1983.

Significantly, however, even though these cases indicate a limitation on liabilty for supervisory officials, they clearly reject the traditional function of immunity—avoidance of harassing litigation. The determination concerning liability is made after trial and not on motion to dismiss. Thus, the immunity defense means very little under section 1983, and this has led at least one respected jurist to argue that it should

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[150]*See, e.g.*, United States v. Faneca, 332 F.2d 872 (5th Cir. 1964). *See generally* Note, 68 HARV. L. REV., *supra* note 102.

[151]Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified on rehearing en banc*, 456 F.2d 835 (1972). The Mayor was powerless to prevent the defendant police officials from acting without the approval of the Board of Aldermen, which on the facts could not have been obtained. The court held that the Mayor "cannot be required to do an act which would have been useless or ineffective" under penalty of damages. 438 F.2d at 199.

The Commissioner had not been shown to have had any knowledge of or to have participated in the unconstitutional acts of the highway patrolmen over whom he had a statutory duty of supervision. The court required active participation for liability. *Id. See* Jordan v. Kelly, 223 F. Supp. 731 (W.D. Mo. 1963); Burnett v. Short, 311 F. Supp. 586 (S.D. Tex. 1970); Sanberg v. Daley, 306 F. Supp. 277 (N.D. Ill. 1969); Mack v. Lewis, 298 F. Supp. 1351 (S.D. Ga. 1969).

[152]Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971). The court held that the supervisors were entitled to "a qualified immunity based on good faith performance of duty as the officials understood it." *Id.* at 28; *see* note 112 *supra*. In addition, *see* McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953) (qualified immunity concept under § 1983 discussed).

[153]The Fifth Circuit has discussed but not yet decided whether to apply *respondeat superior* to supervisors in § 1983 actions. Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971); Anderson v. Nosser, 438 F.2d 183, 199 n.13 (5th Cir. 1971), *modified on rehearing en banc*, 456 F.2d 835 (1972). At least one district court has applied the doctrine, Hill v. Toll, 320 F. Supp. 185 (E.D. Pa. 1970), and the District of Columbia Circuit has applied it to the District but not to supervisory officials. Carter v. Carlson, 447 F.2d 358, 365-66 (D.C. Cir. 1971), *cert. granted sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972) *noted in* 24 VAND. L. REV. 1252 (1971).

be discarded altogether in favor of a determination on the merits.[154]

In a direct suit under the Constitution, the question of immunity must be re-examined constitutionally. While the defendant may have a different role as a supervisor, the injury is still a fundamental deprivation of constitutional rights. The existing federal standard of immunity conceivably could be lifted intact to supply the standard for constitutional immunity, in which event, under *Barr v. Matteo*,[155] executive supervisory officials would have immunity in their discretionary functions. However, *Barr* involved an alleged tort of libel, which is certainly not a fundamental constitutional tort. Vindication of constitutional torts is of a different magnitude, and a distinction must be drawn between an injury to reputation and to the right to be free from arbitrary government interference. This distinction could well lead to a new immunity test for fundamental constitutional deprivations.[156]

(c) *The Governors.* On the face of it, the governors of Ohio and Mississippi can make the best claim of all the individual defendants for immunity from suit, at least from the point of view of the discretionary-function test. However, there appears to be no general immunity for governors at common law[157] or under section 1983.[158] Certainly, no such immunity has been extended under direct constitutional claims.[159]

One possible defense of immunity for governors is set forth in *Moyer v. Peabody*,[160] in which immunity was granted to a governor who

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[154]Judge Bazelon has argued persuasively that "[i]t would greatly simplify analysis to eliminate the various doctrines of immunity, and to weigh the degree of discretion required in the performance of a particular governmental function as a factor bearing solely on the ultimate question of liability." Carter v. Carlson, 447 F.2d 358, 364 n.15 (D.C. Cir. 1971), *cert. granted sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972); *accord*, Spencer v. General Hosp., 425 F.2d 479, 489-90 (D.C. Cir. 1969) (Wright, J., concurring).

[155]360 U.S. 564 (1959); *cf.* notes 103-05 and accompanying text *supra.*

[156]*See* further discussion at Part IV B *infra.*

[157]*See, e.g.*, Faubus v. United States, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958) (injunctive relief granted against use of National Guard); Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959) (same); Joyner v. Browning, 30 F. Supp. 512 (W.D. Tenn. 1939) (same); Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (D. Minn. 1936) (same); Russell Petroleum Co. v. Walker, 162 Okla. 216, 19 P.2d 582 (1933) (same); Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1935) (acts of governor subject to judicial review). *See* Cox v. McNutt, 12 F. Supp. 355 (S.D. Ind. 1935) (denying relief, but stating that acts of governor are reviewable); Powers Mercantile Co. v. Olson, 7 F. Supp. 865 (D. Minn. 1934) (same).

[158]*See* Sostre v. Rockefeller, 312 F. Supp. 866 (S.D.N.Y.), *rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc) (action dismissed as to Governor on the merits after trial); James v. Ogilvie, 310 F. Supp. 661 (N.D. Ill. 1970).

[159]Wells v. Rockefeller, 273 F. Supp. 984 (S.D.N.Y.), *aff'd*, 389 U.S. 421 (1967) (injunction against enforcement of New York's congressional redistricting statute). *See generally* Baker v. Carr, 369 U.S. 186 (1962).

[160]212 U.S. 78 (1909).

in good faith had ordered the arrest of defendant during an insurrection.[161] But that case would not appear applicable on the facts here presented: there are allegations of bad faith in the complaints,[162] and, although there was great turmoil on the campuses, few would argue it reached a state of insurrection.[163] Whether or not the allegations of bad faith can be proved, the question of threshold immunity would appear to be resolved in favor of plaintiffs on the face of the complaint.

However, the degree of involvement of the two governors is a relevent inquiry for deciding whether to sustain the immunity defense at trial. While the Governor of Mississippi ordered the state highway patrol onto the Jackson campus, he did not appear on the campus during the turmoil. The Governor of Ohio, on the other hand, not only ordered the national guard onto the campus but also apparently was personally involved in directing the activities on the Kent campus; as a result, he is also charged "with engaging in rhetoric and issuing orders which created the risk of unnecessary violence."[164] This allegation is borne out by some reports[165] and if proved at trial will affect the strength of the Governor of Ohio's immunity defense. Under the section 1983 immun-

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[161]*Id.* at 85. *Moyer* was an action for damages brought under § 1983 against a former governor and the adjutant general and a captain in the National Guard. The Governor had ordered Moyer's arrest because Moyer was a leader of a union the members of which were believed to be the cause of the rioting that was taking place. *Id.* at 82-84. The Court stated:

> So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief.

Id. at 85.

[162]Both complaints charge bad faith of the governors in ordering state officials on the campuses. Scheuer v. Rhodes, Civil No. 70-859 (E.D. Ohio, filed ____ 1970), compl. paras. 13(a) and 15; Burton v. Williams, Civil No. 4740 (S.D. Miss., filed Aug. 28, 1970), compl. paras. 22, 23, 37, and 38. In *Moyer*, the plaintiff alleged only a lack of probable cause to arrest. Subsequently *Moyer* was specifically limited to immunity for temporary detention of a participant in an insurrection. Sterling v. Constantin, 287 U.S. 378, 400 (1932).

[163]There is, quite naturally, little learning on what is an insurrection. One case, in distinguishing for insurance purposes between a riot and an insurrection, called an insurrection "a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof." Home Ins. Co. v. Davila, 212 F.2d 731, 736 (1st Cir. 1954). The question of definition has been raised repeatedly, however, in connection with claims for riot damage over the last few years. *See generally* PRESIDENT'S NATIONAL ADVISORY PANEL ON INSURANCE IN RIOT-AFFECTED AREAS, MEETING THE INSURANCE CRISIS OF OUR CITIES (1968).

[164]Scheuer v. Rhodes, Civil No. 70-859 (E.D. Ohio, filed ____ 1970), compl. para. 13(a).

[165]*E.g.*, TIME, May 18, 1970, at 13, indicating that Governor Rhodes took direct command of the Kent State campus and issued orders to the National Guard.

ity test discussed above,[166] mere statutory responsibility is an insufficient predicate to liability. The actual involvement in the events in question, however, turns the Governor's activity into one that may bear a direct causal relation to the injuries suffered.[167] As such, his liability should be determined not by his status as Governor but by his acts as participant.

3. *The Municipality and States: Herein of Monroe v. Pape.* As discussed above, immunity of municipalities and states is the core of the common law immunity doctrine. In some dramatic recent decisions, it has been abrogated,[168] even for the intentional torts of officials,[169] but it still remains the rule in most states. Thus, the common law tort claims will likely be dismissed in the Jackson-Kent actions.[170]

Under section 1983 even recovery for constitutional torts against these entities is doubtful. *Monroe v. Pape*[171] held as a matter of statutory construction that the "person" in section 1983[172] who under color of law deprives an individual of his constitutional rights does not include municipal bodies. Subsequently, it was held that *Monroe* also exempted states from liability under section 1983.[173] Despite these holdings, however, there have been so many recent inroads on *Monroe* that states and municipalities are arguably subject to section 1983 liability in certain circumstances.[174]

The first limitation on *Monroe* concerned municipal immunity from injunctions under section 1983. *Monroe* involved a damage action, but the majority opinion clearly indicated that its rationale was to be extended to section 1983 injunction actions as well.[175] In the face of this,

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[166]*See* notes 147-53 and accompanying text *supra.*

[167]*Compare* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), *with* Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied,* 404 U.S. 866 (1971). *See* Ries v. Lynskey, 452 F.2d 172, 178 (7th Cir. 1971) (an ordinarily prudent person is not required to foresee that a policeman will use excessive force). *See generally* Monroe v. Pape, 365 U.S. 167 (1961).

[168]*E.g.,* Hargrove v. City of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957), in which the court concluded that municipal tort immunity was "anachoristic [*sic*] not only to our system of justice but to our traditional concepts of democratic government." *See* note 60 *supra.*

[169]Carter v. Carlson, 447 F.2d 364 (D.C. Cir. 1971), *cert. granted sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972).

[170]*Cf.* MISS. CODE § 3374-112 (1942); Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917).

[171]365 U.S. 167 (1961).

[172]*See* § 1983 quoted note 6 *supra.*

[173]Williford v. California, 352 F.2d 474 (9th Cir. 1965).

[174]*See generally* Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act,* 45 S. CAL. L. REV. 131 (1972).

[175]365 U.S. at 191 n.50. *See* Comment, *Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered,* 43 U. COLO. L. REV. 105 (1971).

however, later Supreme Court decisions have granted injunctive relief under section 1983 to a school board[176] and a municipality,[177] indicating, perhaps, a change of view on *Monroe*. Whether or not as a result of the Court's indecisiveness, several circuits now regularly grant injunctive relief against municipalities and other government entities.[178] Indeed, some circuits have indicated a willingness to invoke affirmative equitable relief against municipalities that comes close to the awarding of damages. Thus, money damages have been awarded in the form of back pay or restitution.[179] Moreover, in *Hawkins v. Town of Shaw*,[180] the Fifth Circuit, finding purposeful discrimination against minorities, ordered the municipality to spend whatever funds were necessary to bring municipal services[181] for blacks up to the level of those provided to whites. This injunction could lead to municipal liability of 200,000 dollars or more.[182] If the purpose in limiting municipal liability to injunctive relief is to protect against staggering damage awards, that purpose has obviously been frustrated. Indeed, it is most difficult to see how *Monroe* can be reconciled with the results in *Hawkins*.

Clearly many circuits[183] have found *Monroe* to be an inappropriate restriction upon the vindication of constitutional rights and are whittling away its effect. At some point the Supreme Court will have to reconsider *Monroe* in light of these decisions.[184] The courts in the Jackson-Kent litigation may indeed consider this controversy surround-

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[176]Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969); Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964); McNeese v. Board of Educ., 373 U.S. 668 (1963); *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[177]Turner v. City of Memphis, 369 U.S. 350 (1962).

[178]*E.g.*, Scher v. Board of Educ., 424 F.2d 741 (3d Cir. 1970); Kelly v. Atherina Public School Dist., 378 F.2d 483 (8th Cir. 1967); Franklin v. County School Bd. of Educ., 360 F.2d 325 (4th Cir. 1966); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969). *But see* Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1971).

[179]Harkless v. Sweeney Independent School Dist., 427 F.2d 319 (5th Cir.), *cert. denied*, 400 U.S. 991 (1970); *accord*, Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), *aff'd*, 394 U.S. 618 (1969).

[180]437 F.2d 1286 (5th Cir. 1971); *accord*, Hadnot v. City of Prattsville, 309 F. Supp. 967 (M.D.S. Ala. 1970); Gantreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D. Ill. 1969).

[181]Such municipal services included paved streets, water mains, sewers, street lights, fire hydrants, and traffic control signs. 437 F.2d at 1289-91.

[182]This was the estimate provided by counsel at oral argument on the rehearing en banc of *Hawkins* on October 25, 1971.

[183]Not all circuits have followed this trend. Some circuits have used *Monroe* to extend the doctrine of entity immunity under § 1983. *E.g.*, Zuckermann v. Appellate Div., Second Dep't, 421 F.2d 625, 626 (2d Cir. 1970).

[184]It has been suggested that *Monroe*'s statutory analysis is faulty. *See* Comment, 43 U. COLO. L. REV., *supra* note 175, at 118-20. That contention will not be pursued here.

ing *Monroe* before deciding to dismiss the section 1983 claims against the City of Jackson and the States of Mississippi and Ohio.

Of course, direct constitutional suits against those entities would totally avoid the statutory limitations placed upon section 1983 by *Monroe,* since the fourteenth amendment is framed in terms of "States" and not "persons." The viability of such constitutional suits will be discussed next.

IV. SOVEREIGN IMMUNITY: TOWARD A RATIONAL THEORY OF CONSTITUTIONALITY

The doctrines of sovereign immunity and, to a lesser extent, official immunity stand as a barrier to suits against the government and its officials. But while the historical roots are there,[185] the doctrine will not withstand hard analysis except where it protects one branch of government from another.[186] Nevertheless, it was alluded to by our founding fathers.[187]

Probably the most famous apology for sovereign immunity was made by Justice Holmes, who translated the doctrine into the American experience on "logical" and "practical" grounds: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law upon which the right depends."[188] There is certainly nothing self-evident about this proposition, even though it has been quoted with approval for many years.[189]

Indeed, under our form of government Justice Holmes' proposition

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[185]See notes 43-44 *supra.*

[186]Even John Locke, an exponent of separation of powers, acknowledged that there must be some "discretionary executive power" granted to the King. *See* W. GWYN, THE MEANING OF SEPARATION OF POWERS 79 (1965).

[187]*See, e.g.,* THE FEDERALIST No. 81, at 529 (mod. lib. ed. 1937) (A. Hamilton) (emphasis in original): "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*"

[188]Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (Territory of Hawaii immune from suit in mortgage redemption action). Justice Holmes later seemed to modify his strict view of immunity by holding that the United States could, in equity, be held to have waived its sovereign immunity. *See* United States v. The Thekla, 266 U.S. 328 (1924); The Western Maid, 257 U.S. 419 (1922) (dictum). *See generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1150-56 (1953).

[189]Holmes' statement is the one "usually quoted" as the rationale for sovereign immunity. PROSSER, *supra* note 37, § 131, at 971 n.14; *see* Laski, *Responsibility of the State in England,* 32 HARV. L. REV. 447 (1932); *cf.* Note, *Private Suits Against States in the Federal Courts,* 33 U. CHI. L. REV. 331, 332 (1966).

may be wrong; many would believe that there must be a legal right against the sovereign. The whole basis of our political system, as expressed in the Declaration of Independence, is that government derives its power from the people's consent.[190] It is limited government, in which powers that are not expressly conveyed to the government become rights reserved to the people.[191]

It appears that the confusion is caused by the source of Holmes' assumption—Thomas Hobbes.[192] Certainly, Hobbes' conception of absolute monarchy as the proper form of government is plainly consistent with the notion of sovereign immunity.[193] But it is equally plain that the American theory of government was based upon the political theory

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[190]We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness - That to secure these Rights, Governments are instituted among men, deriving their just Powers from the Consent of the Governed . . . .

DECLARATION OF INDEPENDENCE.

The Supreme Court has from an early date described the rights listed in the Declaration of Independence as "fundamental rights" which government does not "grant" but "secures." Butcher's Union Co. v. Crescent City Co., 111 U.S. 746, 756-57 (1884) (Field, J., concurring) (defining "pursuit of happiness" as the "right to pursue any business or vocation"—a definition apparently consistent with Locke's statement of "life, liberty and property.").

[191]This principle finds expression in the ninth amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *See generally* Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966).

[192]Immediately prior to the above quoted rationale, Justice Holmes stated: "some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.)" Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). The precise language that Holmes referred to reads as follows:

> The sovereign of a commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may when he pleases free himself from that subjection by repealing those laws that trouble him and making of new; and consequently he was free before. For he is free that can be free when he will; nor is it possible for any person to be bound to himself, because he that can bind can release, and therefore he that is bound to himself only is not bound.

T. HOBBES, LEVIATHAN 211 (3d ed. 1958).

[193]The role of the sovereign for Hobbes has been explained as follows:

> Since the sovereign has not covenanted with anyone, he alone retains the right to all things that all men had in the state of nature. Consequently he can neither injure anyone nor commit injustice, since injustice, or injury, in the strict or legal sense is nothing but nonfulfillment of covenant, assuming a right which one has already covenanted (*sic*) away. Furthermore, since the sovereign represents the will of each of the subjects, anyone accusing the sovereign of injury is accusing himself, and to do injustice to oneself is impossible.

Berns, *Thomas Hobbes*, in HISTORY OF POLITICAL PHILOSOPHY 354, 364 (1969).

of John Locke—not that of Thomas Hobbes. For Locke the first principle was limited government based on the consent of the governed, and absolute monarchy was "no form of civil government at all."[194] One need only read the Declaration of Independence[195] and the Constitution to see the mark of that aspect of Locke's thought upon our government. Since the very reason, according to Locke, for the formation of government is to preserve individual property rights,[196] it would be utterly inconsistent to grant the government so formed the power arbitrarily to dispose of that property. The fifth and fourteenth amendments stand as monuments to Locke's view.[197]

In many ways we have gone beyond Locke in protecting individual rights as well as property rights from governmental interference,[198] and we have certainly not receded from his basic premise of limited power. It is doubtful, therefore, that Holmes would stand with Hobbes for very long. To Hobbes, for instance, the notion of judicial review of legislative acts would have been preposterous,[199] since his view postulates absolute supremacy of all laws enacted by the sovereign.[200] Yet, judicial review is a basic underpinning of our political system,[201] and even Holmes, who might have favored its limitation, would not have supported its abolition.[202]

The notion of separation of powers, which spawned the principle of judicial review, was first expounded by Locke[203] and is a basic part

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[194]J. Locke, The Second Treatise of Government § 90 (T. Peardon ed. 1952). This view of government constituted a "basic disagreement" between Locke and Hobbes. Goldwin, *John Locke*, in HISTORY OF POLITICAL PHILOSOPHY 454 (1969).

[195]See note 190 *supra*. Professor Pollak has observed: "Plainly, Locke's changed emphasis [from the absolutism of Hobbes to limited authority] carried with it philosophic implications of the first magnitude—implications embraced by Jefferson in the Declaration of Independence." 1 L. POLLAK, THE CONSTITUTION AND THE SUPREME COURT 17 (1966); *cf.* Warren, *Fourteenth Amendment: Retrospect and Prospect*, in THE FOURTEENTH AMENDMENT 214 (B. Schwartz ed. 1970).

[196]J. LOCKE, *supra* note 194, § 124.

[197]Specifically, the "just compensation" and due process clauses of the fifth amendment and the due process clause of the fourteenth. *See* Munn v. Illinois, 94 U.S. 113, 123-25 (1877) (Waite, C.J.).

[198]Indeed, we now consider government largesse to be a property right. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964); *cf.* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1462-64 (1968). *But see* Cahn & Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929 (1968).

[199]T. HOBBES, LEVIATHAN 211-21 (W. Schneider ed. 1958).

[200]*See* Berns, *supra* note 193, at 371.

[201]Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[202]O. W. HOLMES, *Law and the Courts*, in COLLECTED LEGAL PAPERS 295-96 (1920).

[203]Locke's idea of separation of powers, of course, contemplated only two powers—legislative

of our view of limited government. Separation of powers, therefore, is the only principle at work in Locke that could limit the ability of the judiciary to attack the decisions of government. While it is clear from a reading of Locke that the need for separation was based on the fear that one branch would usurp the power of another, we have not only accepted that meaning—as when the executive seeks to usurp legislative power[204]—but have also added the thought that one branch must be free of certain challenges from the governed.[205] In this sense sovereign immunity is the only constitutional limit on the power to sue the sovereign; it is, in other words, the only constitutionally based immunity. Therefore, as was noted above,[206] separation of powers is not only the basis for justifying constitutional sovereign immunity but also a means for defining its necessary limits.

The cloak of constitutional immunity is extended narrowly on the federal level[207] to legislators,[208] judges,[209] and the President as the Chief

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and executive—since he was concerned with a commonwealth. But he nevertheless emphasized the necessity for keeping these powers apart:

> And because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community contrary to the end of society and government; therefore, in well ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of diverse persons who, duly assembled, have by themselves, or jointly with others, a power to make laws; which when they have done, being separated again, they are themselves subject to the laws they have made, which is a new and near tie upon them to take care that they make them for the public good.

J. Locke, *supra* note 194, § 143.

[204]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *Compare* Berk v. Laird, 443 F.2d 1039 (2d Cir. 1971).

[205]The Constitution specifically grants immunity to the legislative branch for "speeches and debates." U.S. CONST. art. I, § 6; *see* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866). *See generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1205-07 (1953).

[206]*See* discussion at notes 203-04 *supra*.

[207]Separation-of-powers considerations as formulated by the political-question doctrine prevent judicial review of certain acts of a coordinate branch of the federal government. Baker v. Carr, 369 U.S. 186, 210 (1962); *see* Note, *Legislative Exclusion: Julian Bond and Adam Clayton Powell*, 35 U. CHI. L. REV. 151, 153, 162 (1967). However, under the supremacy clause state legislatures may not violate the Constitution even in political matters. Bond v. Floyd, 385 U.S. 116 (1966); *cf.* Powell v. McCormack, 395 U.S. 486 (1969). Thus, the possibility remains that under the separation-of-powers doctrine one branch of the federal government could act unconstitutionally and not be subject to judicial scrutiny. Thus, it has been observed that the principle of separation of powers may violate the due process clause. Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers*, 44 W. VA. L.Q. 270, 293 (1938). This paradox

Executive.[210] It does not extend constitutionally below that level to, for example, legislative employees[211] or cabinet officials,[212] although these officials may be immunized in particular situations.[213] Nor does constitutional immunity extend to the sovereign states, since separation-of-powers principles do not apply to the states.[214] Justice Douglas in *Monroe* probably falls just short of acknowledging this fact by indicating that the Court did not reach the constitutional question of whether or not Congress has the power to impose municipal liability.[215]

Obviously, the fact that immunity is not constitutionally compelled, as in the separation-of-powers situation, may not necessarily mean that its exercise is unconstitutional. Certainly, states and many of their officials have traditionally asserted immunity from suit. And while separation of powers does not apply directly, the interests that the principle protects at the federal level have applicability to decisions at the state level as well.

Therefore, to decide the proper scope of sovereign immunity two inquiries can be made: First, has our society so evolved ethically and economically as to make this doctrine constitutionally impermissible in all situations in which it is not constitutionally compelled? Secondly, and more narrowly, will this doctrine be forced to yield only if it clashes with the Constitution itself, in that it frustrates basic constitutional protections? These questions will now be considered.

A. The Broad Constitutional Attack: Sovereign Immunity as Repugnant per se to the Constitution

If sovereign immunity is not constitutionally protected by separation-of-powers principles, its exercise may be so repugnant to our

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is analyzed in depth by Professor Frank Strong. Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law (pts. 1-2)*, 69 W. VA. L. REV. 111, 249 (1967).

[209]Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967).

[210]*E.g.*, Pierson v. Ray, 386 U.S. 547 (1967).

[211]Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866).

[212]*E.g.*, House Sergeant-at-Arms, doorkeeper, clerk, and legislative counsel. *See* Kilbourn v. Thompson, 103 U.S. 168 (1880); cases cited note 208 *supra*.

[213]*E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Secretary of Commerce); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Secretary of State).

[214]*See* Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949, *cert. denied*, 339 U.S. 949 (1949). *See also* Marcedes v. Barrett, 453 F.2d 391 (3d Cir. 1971); Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969) (immunity for court reporter and court clerk as quasi-judicial officers).

[215]*See* note 207 *supra*.

[216]365 U.S. 167, 191 (1961).

basic notions of justice as to be unconstitutional. It is not always necessary, however, to reach that question and pass judgment in constitutional terms. Since sovereign immunity is a creature of common law, in many states it was a judge-made doctrine, uncodified by the legislature. Thus, it was possible for some states, such as California, to overrule its judicial doctrine of sovereign immunity on the grounds that the doctrine was "mistaken and unjust"[216] without reaching the question of whether it was unconstitutional. Other jurisdictions have reacted similarly, with some taking action only after having waited in vain for the legislature to act.[217] In those states, however, in which sovereign immunity is codified by statute or constitution,[218] the constitutional question must be reached.

1. *The Case of Krause v. Ohio*

In Ohio the court of appeals has recently ruled the doctrine of sovereign immunity unconstitutional on state and federal grounds. While this opinion is still to be reviewed by the Supreme Court of Ohio, and even though the decision will probably not reach the Supreme Court of the United States,[219] its constitutional conclusion is worthy of analysis.

Krause v. Ohio[220] relied on the equal protection and due process clauses of the fourteenth amendment to sweep away the doctrine of sovereign immunity. The equal protection argument proceeded from the

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[216]Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961) (Traynor, J.). *See also* note 168 *supra.*

[217]*See* Spencer v. General Hosp., 425 F.2d 479, 488 n.20 (D.C. Cir. 1969), in which cases of twelve states that judicially abrogated immunity are collected. In the District of Columbia the court initially suggested that the legislature abrogate immunity, but, in the face of legislative inaction, it acted itself. *Compare* Calomeris v. District of Columbia, 226 F.2d 266 (D.C. Cir. 1955), *with* Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964).

[218]*See* state constitutional provisions cited note 98 *supra.*

[219]In *Krause v. Ohio,* 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971), the court stated that the doctrine of sovereign immunity was contrary to the Ohio constitutional provision that "[s]uits may be brought against the state, in such courts and in such manner, as may be provided by law." OHIO CONST. art. I, § 16. The court also noted that a decision of the Ohio Supreme Court interpreting this provision as not self-executing, Randabaugh v. Ohio, 96 Ohio St. 513, 118 N.E. 102 (1917), was not itself based on a proper reading of legislative history. Recognizing that it could not "overrule" a higher court decision, the court nevertheless concluded that the doctrine of sovereign immunity "is judge-made in this jurisdiction, and can be unmade under the same auspice." 28 Ohio App. 2d at ____, 274 N.E.2d at 324. This decision has still to be reviewed by the Ohio Supreme Court, but even if it is upheld, the basis of the decision will likely turn on the interpretation of Ohio constitutional law and, therefore, will present an adequate and independent state ground that would preclude review by the United States Supreme Court of the federal constitutional issues involved. *See generally* Henry v. Mississippi, 379 U.S. 443 (1965).

[220]28 Ohio App. 2d 1, 274 N.E.2d 321 (1971).

existence of two arbitrary and unreasonable classifications created by sovereign immunity: private versus public tortfeasance; and some public tortfeasance (for which immunity is waived) versus other public tortfeasance (for which it is not waived).[221] The court then asked:

> Is the witholding of a remedy based on reasonable or on arbitrary grounds when it is withheld from persons injured by state torts but not private ones or from some persons but not others injured by government in tortious, but different, phases of its activity? Do such distinctions reflect a rational policy or simply capricious action?[222]

The court then briefly considered whether there was a rational basis for immunity in terms of the financial burden of such litigation on the government[223] and concluded:

> If the threat of multiple suits is not a tenable basis for the distinctions created by the immunity, and we hold it is not, then there is none. The distinctions then depend upon a gossamer as frail as that supporting those distinctions founded on nationality or race. A distinction so based is capricious and represents no policy but an arbitrary attempt to lift state responsibility without reason. In such circumstances the permissible line between reasonable classification or a rational policy, and a denial of equal protection is crossed. This fatally offends the constitution.[224]

Krause also held against immunity on due process grounds:

> If, in fact, a culpable injury has been done and goes unchastised by the law because of the doctrine of sovereign immunity, that doctrine protects injustice for no better reason than that its source is the state. And

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[221]The court stated:

> The operation of the doctrine of sovereign immunity results in different consequences for injured persons in at least two ways. Persons victimized by private tort feasors may be compensated for their damages. But so long as sovereign immunity is extant persons suffering damage through comparable fault on the part of the state may not recover unless the tortious action happens to be one within a specific exception to the immunity rule. Assuming a case within a specific exception, then two classes of persons injured by the state develop—those hurt in the course of the excepted activity and those not. Such circumstances raise the question whether such differences as those described mount arbitrary and unreasonable distinctions incompatible with the constitutional standard established by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

28 Ohio App. 2d at ____, 274 N.E.2d at 326.

[222]*Id.* at ____, 274 N.E.2d at 327.

[223]It will be recalled that the fear of financially burdensome litigation has historically been a justification for the immunity doctrine. *See* note 45 *supra.*

[224]28 Ohio App. 2d at ____, 274 N.E.2d at 327.

> the concept becomes this: "the king can do wrong with impunity." This is outlaw doctrine obviously incompatible with the rule of law. Moreover, the notion that government may irresponsibly maim or kill contravenes the most elemental notions of due process of law.[225]

The court's argument turned on the decisions of two state courts that had found sovereign immunity to be unreasonable[226] and held that the only reasonable basis for sovereign immunity, that of encouraging the state officials in the unflinching discharge of their discretionary duties,[227] could be satisfied by making the officials alone immune.[228] The court reasoned that since the only "logical"[229] reason for immunity related to the official as an individual, he and not the state should be immune for his torts.

Obviously, the facts of the Kent litigation are basic to the court's decision; although it does not speak in terms of a "constitutional" tort, the court's due process discussion indicates concern about that type of injury. On the other hand, the equal protection holding seems clearly to contemplate the demise of sovereign immunity for all tortious injury caused by the state. *Krause* is thus a landmark decision in that it is the first case to hold sovereign immunity repugnant per se to the Constitution. It does, however, seem to answer affirmatively both inquiries stated above—namely, that immunity is itself unconstitutional and, therefore, is also unconstitutional as applied to constitutional torts.

The opinion, however, does not provide a rigorous analysis of the monumental constitutional issues raised. Indeed, only two cases were cited, and they only in a general way, on the equal protection holding,[230] and none was cited on the due process holding. Accordingly, the two distinct constitutional arguments will have to be considered more closely.

2. *Sovereign Immunity as a Violation of Equal Protection*

The starting point in any constitutional analysis of sovereign immunity has to be *Palmer v. Ohio*,[231] in which the United States Supreme Court dismissed sua sponte for want of a federal question an

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[225]*Id.* at ___, 274 N.E.2d at 325.

[226]Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[227]*See* discussion in text at note 78 *supra.*

[228]This was also the approach that was applied in the District of Columbia, although not on constitutional grounds. Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted, sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972). *See* notes 78-83 and accompanying text *supra.*

[229]28 Ohio App. 2d at ___, 274 N.E.2d at 326.

[230]Baker v. Carr, 369 U.S. 186 (1962); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[231]248 U.S. 32 (1918).

action that sought to challenge Ohio's sovereign immunity on constitutional (due process) grounds. The Court held that

> [t]he right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which the decision of the State Supreme Court is controlling with this court, no federal right being involved.[232]

Obviously, this broad language must be considered before sovereign immunity can be held unconstitutional.[233]

There are several arguments against the continuing vitality of *Palmer*. First, the case did not involve what would be considered a thorough review of the constitutional issues. Indeed, the question of the unconstitutionality per se of sovereign immunity was not even argued, because the Court noted that plaintiffs conceded, "as they must, that their suit cannot be maintained without the consent of the State."[234] Plaintiffs claimed merely that the state supreme court had misconstrued the Ohio constitution in holding the provision that rejected immunity not to be self-executing.[235] Thus, there was no examination of that basic question by the Court in its cursory opinion.[236] This was probably because few litigants would have had the temerity to challenge sovereign immunity, given its universal acceptance at that time.[237] Moreover, when a proposition is finally challenged on constitutional grounds, it deserves a full hearing by the Supreme Court.[238] The development of

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[232]*Id.* at 34 (citations omitted). *Palmer* involved an appeal from the decision of the Ohio Supreme Court that held the Ohio constitutional provision waiving sovereign immunity not to be self-executing. *See* discussion note 219 *supra.*

[233]The court in *Krause* neither cited nor considered *Palmer* in its opinion.

[234]248 U.S. at 33.

[235]*Id.*

[236]The opinion was only two pages long. It cited three cases for the proposition that sovereign immunity was constitutional. One case, Hans v. Louisiana, 134 U.S. 1 (1890), dealt with the power to sue a state in the federal court—not in the state court—under the eleventh amendment. *See* section V *infra.* The others, Beers v. Arkansas, 61 U.S. (20 How.) 527 (1858), and Railroad Co. v. Tennessee, 101 U.S. 337 (1879), postulated the "elementary" principle that a state cannot be sued without its consent. *Tennessee* did, however, raise the possibility, rejected earlier in *Beers,* that a state may become subject to the Constitution (commerce clause) when it waives immunity and cannot thereafter freely withdraw such waiver.

[237]*See, e.g.,* text accompanying note 188 *supra.*

[238]*Compare* Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), *and* Selective Draft Law Cases, 245 U.S. 366 (1918), *with* Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869), *and* Welch

constitutional theory under the equal protection clause and the experience of states that have abrogated the doctrine both point to reviewing anew the question of the constitutionality of sovereign immunity.[239]

Constitutional analysis under the equal protection clause must begin with a decision on the standard of review to be applied.[240] Since the days of *Palmer,* one of the trends in interpretation of the equal protection clause has been a movement away from judicial intervention in matters of economic regulation along with a movement toward intervention in the areas of race and personal rights.[241] Thus, an inquiry into constitutionality results in restrained review in the former category and active review in the latter,[242] with a presumption of constitutionality attaching to regulation in the economic sphere.[243]

In *Krause* sovereign immunity was challenged because it created two allegedly forbidden classifications,[244] both of which resulted from a decision to condition economic recovery for tort injury. In essence, the state has made the judgment that it would prefer not to allocate its funds for this type of compensation. At the outset, therefore, the state's decision may be entitled to a presumption of constitutionality.

However, even in the area of economic legislation the line drawn by the legislature must be rational.[245] Thus, in *Levy v. Louisiana* the Court declared to be invidious a classification that denied recovery to

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v. United States, 398 U.S. 333, 359 (1970) ("casual remark" or "conclusory assertion" not a "judicial decision" and "cannot foreclose consideration of the question"). *See also* Gideon v. Wainright, 372 U.S. 335, 346 (1963) (Douglas, J., concurring) ("All constitutional questions are always open.").

[239]Compare the developments in criminal law concerning the constitutional necessity for the exclusionary rule. Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949).

[240]*See generally Developments in the Law-Equal Protection,* 82 HARV. L. REV. 1065, 1076-1133 (1969).

[241]*Id.* at 1080-81; *see, e.g.,* Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

[242]*Compare* McGowan v. Maryland, 366 U.S. 420 (1961), *with* Brown v. Board of Education, 347 U.S. 483 (1954).

[243]*See generally* Loving v. Virginia, 388 U.S. 1 (1967).

[244]The first classification was between private and state employers of tortfeasors, and the assumption was necessarily made that the former are liable for the torts of their employees on either a negligence or vicarious liability theory. The second classification was between those types of injury that the state will compensate by a voluntary waiver of immunity under common law doctrine or tort claims acts and those types of injury that the state will not compensate. An example would be waiver of immunity for negligent torts of employees but not intentional torts. *E.g.,* N. C. GEN. STAT. § 143-291 (1964). Presumably, conditioning the amount of recovery would be a variant of the questioned classification. *See* note 66 *supra.*

[245]*See* Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

illegitimates for the wrongful death of their mother by asking "why, in terms of 'equal protection' should the tortfeasors go free merely because the child is illegitimate?"[246]

Similarly, the sovereign immunity doctrine frees a tortfeasor—either the state or an immune official—from liability for an injury for which a private employer or employee could well be held liable. In this sense, the person injured by the government is "illegitimate" in that he is remediless by virtue of the state's action.[247] On the other hand, this deficiency stems not from that person's status, as in *Levy*, but from the accidental fact of the identity of the one who injures him. The state's immunity classification, therefore, cuts horizontally across all of its citizens—not vertically so as to isolate a particular segment such as illegitimates.[248] In such circumstances it is possible to argue that the classification is inoffensive, unless the immunity doctrine is shown to work a particular hardship against a given class of persons.[249] Moreover, the Court's decision in *Labine v. Vincent*[250] indicates that not all hardships (there, the inability of illegitimates to inherit) are worthy of constitutional protection.

When, however, a broad class of persons is fundamentally disfavored, a state's economic regulation will be scrutinized closely. In *Shapiro v. Thompson*[251] the Supreme Court invalidated state laws that made the availability of public assistance dependent upon a one-year

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[246]391 U.S. 68, 71 (1968). *See also* Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968).

[247]Thus, in *Levy* the Court asked:

> Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?

391 U.S. at 71.

[248]Of course, to the extent that the state's immunity does not work evenly against all citizens, a different case is presented. Moreover, the *Levy* rationale, assuming that subsequent interpretations are consistent with it, has been limited to tort actions and situations in which illegitimates are totally excluded from recovery by the state. Labine v. Vincent, 401 U.S. 532, 535-36 (1971). Both *Levy* and Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968), were six-to-three opinions. The dissenters (Harlan, Black, and Stewart, JJ.) were joined by the Court's two new members (Burger and Blackmun, JJ.) in *Labine*, thereby forming a five-to-four majority.

[249]*See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). In such an analysis the Court will only examine the application of the immunity doctrine—not the legislature's (or court's) motive in enacting it. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (Marshall, C.J.); United States v. Constantine, 296 U.S. 287, 298-99 (1935) (Brandeis, J., dissenting).

[250]401 U.S. 532 (1971); *see* note 248 *supra*.

[251]394 U.S. 618 (1969).

residency requirement. In *Shapiro* the Court was faced with facts that seemed benign compared with those in *Levy*. First, there was a clear state interest in "fiscal integrity," and, secondly, the class of persons (the poor as opposed to illegitimates) was so broad as to cut horizontally across society.[252] Nevertheless, the state's interest was held to be subordinate because the residency statute impinged upon a fundamental constitutional right—the right to travel guaranteed by the Bill of Rights.[253] This constitutional right is "*not* a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards."[254] Procedurally, this means that a state must show a "*compelling* governmental interest" to justify the classification.[255] This fundamental-right distinction becomes more clear in *Dandridge v. Williams*,[256] in which the Court held that a maximum limit on aid to dependent children did not violate the rights of those persons with large families. Justice Stewart found that no fundamental right of the petitioner was violated and, therefore, applied a restrained review of the statute's purpose and effect.[257] This difference in review is, of course, crucial to the decision of constitutionality because, although the classification may not be unconstitutional per se,[258] it places a heavy burden upon the state to defend it.

As far as the constitutionality of sovereign immunity is concerned, it would seem that both standards of review are potentially applicable. First, the restrained review of state economic regulation in the *Dandridge* and *Labine* sense would likely apply to the basic distinction between state liability in tort for its officials' conduct and private liabil-

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[252]Certainly, it could be argued that poverty is no less "accidental" than being tortiously injured by a government act, thereby equating the poor with those so injured.

[253]*See* United States v. Guest, 383 U.S. 745 (1966); Truax v. Raich, 239 U.S. 33 (1915).

[254]Shapiro v. Thompson, 394 U.S. 618, 642-43 (1969) (Stewart, J., concurring) (emphasis in original). It should be noted that Justice Stewart dissented in *Levy* and *Glona* and was in the majority in *Labine*.

[255]394 U.S. at 644 (Stewart, J., concurring) (emphasis in original).

[256]397 U.S. 471 (1970). *But cf.* Townsend v. Swank, 92 S. Ct. 502 (1971), in which the Court upset on supremacy clause grounds a state limitation on AFDC to college students and did not reach what it considered "a serious question" under the equal protection clause. *Id.* at 508.

[257]397 U.S. at 485 n.17, noting, for example, that there was no contention that the regulation had a racially discriminatory purpose. *Cf. id.* at 489 (Harlan, J., concurring); Katzenbach v. Morgan, 384 U.S. 641, 660-61 (1966) (Harlan, J., dissenting).

[258]Racial classifications as a fundamental right bear an especially heavy burden of showing an "overriding purpose." Loving v. Virginia, 388 U.S. 1, 11 (1967); *accord*, McLaughlin v. Florida, 379 U.S. 184 (1964). However, that burden can be met. Korematsu v. United States, 323 U.S. 214 (1944); *cf.* Kaplan, *Segregation Litigation and the Schools—Part I: The New Rochelle Experience*, 58 NW. U.L. REV. 1, 22 (1963).

ity for the same tortious conduct; that is, normal agency principles would or should apply to both. The state's judgment to condition relief is a fiscal one—a decision as to whether to absorb the risk of injury or leave it where it lies. Such a decision may be unfair, but it is still within the realm of legislative competence. In the application of restrained review, the argument that those injured by public employees are so unfairly treated as to become unconstitutionally injured under the equal protection clause is supported somewhat by the *Levy* analysis (which would call for liability of the state as a tortfeasor) and the exception in *Labine* under the equal protection clause for tort actions. However, the state's judgment is still an economic one in which it has a valid interest (not a mere allocation of risk as between private tortfeasors as in *Levy*), and it is hard to press the tort distinction too far. Consequently, under the standards of restrained review, the equal protection argument in *Krause* is less than compelling.

On the other hand, the injury that led the court in *Krause* to reject sovereign immunity was a constitutional injury—not a simple tort injury. A fundamental right had been denied by the taking of life without due process.[259] If the line is drawn between unconstitutional and simply tortious acts of the state, the active-review standard is called into play. Of course, the nature of the questioned classification also changes. There is no comparable private liability to evaluate because historically under master-servant doctrine a master was not liable for the intentional or malicious acts of his servant,[260] which if committed by government officials would rise to the level of constitutional injury. More precisely, it is, by definition, impossible for a private person to commit a constitutional injury; rather, that is the unique province of state officials.[261]

The question then becomes, "What is the disfavored classification?" It can only be drawn between those persons who are injured negligently by government and those who are injured unconstitutionally. But since liability of government in the former category is non-existent, or at least fitfully applied, those injured unconstitutionally may be no worse off in terms of remedy than those injured negligently.[262] Analyti-

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[259]Screws v. United States, 325 U.S. 91 (1945); *see* Monroe v. Pape, 365 U.S. 167, 170-71 (1961).

[260]PROSSER, *supra* note 37, § 70, at 464.

[261]The fourteenth amendment states: "No State shall . . . deny to any person the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see* Civil Rights Cases, 109 U.S. 3 (1883).

[262]Of course, to the extent that states waive immunity for the negligent acts of their officials, they may be said to disfavor those injured unconstitutionally (intentionally) if there is no such waiver for that type of injury.

cally, therefore, the constitutional inquiry becomes more one of due process than of equal protection. What is now at stake is the protection of a fundamental right, whether or not there is a disfavored classification under the equal protection clause.[263]

B. The Limited Constitutional Attack: Sovereign Immunity and the Protection of Fundamental Constitutional Rights

Sovereign immunity becomes antithetical to due process guarantees only if it precludes a remedy for unconstitutional conduct or so conditions that remedy as to render it meaningless. In order to level this more limited attack on sovereign immunity, we must first define constitutional injury in terms of fundamental rights, separate that type of injury from the ordinary tort injury, and then measure the extent to which an immunity doctrine can constitutionally fetter the potential remedies.

1. *Definitional Problem: What is a Fundamental Right?* Arguably every time the state or its officials act and cause injury a constitutional claim is involved under the fourteenth amendment. That is, state action alone is sufficient to define a constitutional right. Clearly, however, some state action is not tortious, even though injurious, and some state action is not unconstitutional, even though tortious. Consider, for instance, two situations: the state employee who, while driving a state car within the scope of his employment, negligently runs into plaintiff *A* and causes injury; and another state employee who intentionally and without justification shoots plaintiff *B*.[264] Both plaintiffs have been injured, perhaps equally greviously, but plaintiff *A* must find his remedy at tort against the employee and the state, whereas plaintiff *B* has, in addition, a constitutional basis to his claim. The

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[263]The distinction between the two clauses would become clear in a situation in which the legislature reasserts immunity for ordinary tort liability. By so doing, the equal protection argument (based on the favored classification) would disappear, but the due process question (based on protection against a violation of a fundamental constitutional right) would remain. *Compare* Gideon v. Wainwright, 372 U.S. 335, 341 (1963), *with* Griffin v. Illinois, 351 U.S. 12 (1956).

[264]In Monroe v. Pape, 365 U.S. 167, 196 (1961), Justice Harlan, concurring, noted the difference between a constitutional right and a state right:

> The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.

distinction has meaning, although not perhaps to plaintiff *A*,[265] because of its constitutional dimensions. Plaintiff *B* has received a different kind of injury; the state's intentional act is actually a dignitary injury.

Moreover, from society's point of view, the two types of injury are quite distinct. In the case of plaintiff *B*, the state has acted oppressively and in excess of its authority. This type of conduct is violative of fundamental rights because it is destructive of the relationship established by the Bill of Rights between the individual and the government.[266]

The ultimate form of constitutional injury is that presented in the allegations of the Jackson-Kent complaints: the taking of life without due process. This injury necessarily subsumes all other constitutional injuries, such as deprivation of the right to travel, the right to free speech, or even the right to be free of cruel and inhuman treatment. It is the most egregious constitutional deprivation because it is the only sure and certain way a state can avoid recognition of all other constitutional rights of an individual for all time.[267]

The courts have been working toward a judicial definition of funda-

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[265]Plaintiff *A* might well question why he should not have the same remedies for the same physical injury as plaintiff *B*. But the inquiry is whether the Constitution should require a remedy. Historically, a line has always been drawn between negligent and intentional conduct. Indeed, the earliest known remedies were only for intentional conduct, with damages being awarded as an alternative to vengeance. As Justice Holmes has explained: "Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked." O. W. HOLMES, THE COMMON LAW 7 (Howe ed. 1963). Even a dog, however, probably would have to distinguish according to indignation, not physical injury. In the past, the Supreme Court has wrestled, in constitutional terms, with the difference between intent and negligence. One notable example is Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), in which a defendant was negligently electrocuted when, due to an "unavoidable accident," the electric chair failed to operate properly. When the state sought to electrocute the defendant a second time, he raised objections under the eighth and fourteenth amendments. The majority held against the defendant because the state's action was "an accident, with no suggestion of malevolence . . . ." *Id.* at 463. The dissent, on the other hand, looked at the matter in terms of the defendant—not the state: "The intent of the executioner cannot lessen the torture or excuse the result." *Id.* at 477 (Burton, J., dissenting).

[266]Compare the problem of prospective overruling in Linkletter v. Walker, 381 U.S. 618 (1965), which limited the retrospective effect of Mapp v. Ohio, 367 U.S. 643 (1961), largely because the purpose of the exclusionary rule was to deter police lawlessness rather than to protect defendants. Presumably, the defendant had no right to feel indignant over the police conduct. *See* Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 201-04 (1965); *cf.* Loewy, *The Warren Court as Defender of State and Federal Criminal Laws*, 37 GEO. WASH. L. REV. 1218, 1248-49 (1969).

[267]Thus if a state desires to deprive an individual of, say, the right to travel, killing that individual is the ultimate unconstitutional act because it assures that neither the right to travel nor any other constitutional right will ever again be asserted by that individual. Looked at in this sense, damage remedies for unconstitutional conduct are meagre relief indeed.

mental constitutional rights for many years. Fundamental rights find their underpinnings in "natural rights" and in "the rights of man" expressed in seventeenth century political thought and are incorporated into our basic political documents such as the Declaration of Independence, the Preamble to the Constitution, and the Bill of Rights.[268] Certainly, first amendments rights are "fundamental personal rights" which have been incorporated into the fourteenth amendment, and any significant governmental interference with them would create a constitutional deprivation.[269] So also have fundamental rights under the fourth,[270] fifth,[271] and eighth amendments[272] been asserted through the fourteenth amendment. Nor are fundamental rights confined to the basic provisions of the Bill of Rights. The due process clause of the fourteenth amendment has an independent meaning in terms of fundamental rights. The Court has noted that "the subsequently enacted Fourteenth Amendment prohibits the States . . . from abridging fundamental personal liberties."[273]

Efforts at defining a fundamental constitutional right have also been made in cases arising under section 1983.[274] The so-called constitutional tort generally requires an intentional act, although specific intent need not be proved. Until recently some courts held that a "mere property right" was not a fundamental constitutional right under section 1983, but that distinction was specifically disapproved by the Supreme Court in *Lynch v. Household Finance Corp.*,[275] in which the Court held unconstitutional a garnishment of a savings account without notice.

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[268]*See* Commager, *Historical Background of the Fourteenth Amendment*, in THE FOURTEENTH AMENDMENT 24 (B. Schwartz ed. 1970).

[269]Gitlow v. New York, 268 U.S. 652, 666 (1925).

[270]Mapp v. Ohio, 367 U.S. 643 (1961).

[271]Malloy v. Hogan, 378 U.S. 1 (1964); *cf.* Palko v. Connecticut, 302 U.S. 319 (1937).

[272]Robinson v. California, 370 U.S. 660, 666 (1962); *cf.* Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified on rehearing en banc*, 456 F.2d 835 (1972) (eighth amendment claim asserted under § 1983 converted on rehearing to due process claim).

[273]Griswold v. Connecticut, 381 U.S. 479, 492-93 (1965). Justice Goldberg in his concurrence defined a fundamental right as one "so rooted in the traditions and conscience of our people to be ranked as fundamental." *Id.* at 487; *see* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (Cardozo, J.).

[274]*E.g.*, Kent v. Prosse, 265 F. Supp. 673 (E.D. Pa. 1967), *aff'd*, 385 F.2d 406 (3d Cir. 1967); *see* H. WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS 16 (1969).

[275]92 S. Ct. 1113 (1972). *Lynch* held that § 1343(3), the jurisdictional counterpart of § 1983, made no distinction between personal and property rights and thereby rejected the contrary view in Hague v. CIO, 307 U.S. 496, 531 (1939) (Stone, J., concurring), which had been followed by several circuits. *E.g.*, Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971); Kostohryz v. Hursh, 329 F. Supp. 319 (D. Minn. 1971).

Justice Stewart emphasized the conceptual difficulties involved in distinguishing between property and personal rights and concluded: "Property does not have rights. People have rights .... That rights in property are basic civil rights has long been recognized. Locke, On Civil Government 82-85 (1937)."[276] Of course, not all losses of property would rise to the level of an injury to civil rights. In *Lynch* it appears to have been the failure of garnishment proceedings to satisfy minimal due process standards that made fundamental the deprivation of property. Often, what must be shown is a governmental act that not only is "unlawful" or "wrongful" but also amounts to "purposeful discrimination."[277] Pure violence in the form of "severe physical abuse" by a governmental official may be sufficient,[278] especially when it amounts to what can only be called outrageous conduct.[279]

Bivens v. Six Unknown Federal Narcotics Agents[280] also gives substance to the fundamental-rights concept. Justice Brennan, in writing for the majority, distinguished between the need for a damage remedy for a constitutional injury under the fourth amendment (which Justice Harlan labeled as a fundamental right in his concurrence)[281] and the need for a remedy in an ordinary tort situation: "Nor are we asked in this case to impose liability upon a congressional employee for actions contrary to no constitutional prohibition, but merely said to be in excess of the authority delegated to him by the Congress."[282] Justice Brennan cited *Wheeldin v. Wheeler*[283] as a non-constitutional governmental injury case. In *Wheeldin* the governmental official involved issued without authority a subpoena from the House Un-American Activities Committee to plaintiff. The majority rejected plaintiff's claim of constitutional injury under the fourth amendment and refused to create a federal tort remedy.[284] Similarly, the Court has granted immunity to federal officials

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[276]92 S. Ct. 1113, 1122 (1972). The reference to Locke is most appropriate, given his impact on our political system. *See* notes 194-203 and accompanying text *supra.*

[277]City of Boston v. Massachusetts Port Authority, 444 F.2d 167, 169 (1st Cir. 1971). *See also* Madison v. Manter, 441 F.2d 537 (1st Cir. 1971); Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965). *Cf.* Snowden v. Hughes, 321 U.S. 1 (1944).

[278]*See* Tolbert v. Bragan, 451 F.2d 1020 (5th Cir. 1971); Lowe v. Warden, 450 F.2d 9 (5th Cir. 1971) (prison cases).

[279]*See* Shapo, *supra* note 101, at 327.

[280]403 U.S. 388 (1971).

[281]*See* quotation in text at note 132 *supra.*

[282]403 U.S. at 396-97.

[283]373 U.S. 647 (1963).

[284]In dissent, Justice Brennan considered the injury to be the common law tort of malicious prosecution or abuse of process, but would have created a federal right of action for its vindication. 373 U.S. at 663-67.

when common law defamation was alleged.[285]

Thus, by drawing from the above sources, one may define a violation of a fundamental right as a significant governmental interference with a substantial right protected by the Bill of Rights or governmental conduct that is flagrant and patently unjustified under the fourteenth amendment.

To vindicate these fundamental rights, against offensive state conduct both section 1983 and *Bivens* establish causes of action. If *Bivens* is utilized to assert a direct right of action for damages under the fourteenth amendment, it will not be encrusted with the immunity defenses now provided the states and municipalities under section 1983.[286] It is not entirely clear, however, that *Bivens* will be so extended. There is some doubt as to whether *Bivens* postulated a constitutionally compelled damage remedy,[287] and if it did not a separate question arises as to whether a damage remedy should be implied as a matter of federal law under the fourteenth amendment. The argument could be made that Congress has already created a statutory fourteenth amendment remedy in section 1983 and, therefore, the courts should not imply a greater remedy. However, the apparent need to hold municipal bodies responsible that has led to a limiting of *Monroe v. Pape*[288] and the additional need, as discussed below, to hold states responsible in certain circumstances, argues for a damage remedy under the fourteenth amendment. Since the damage remedy, either judicially implied or constitutionally compelled, would, by virtue of the supremacy clause, overcome all immunity defenses inconsistent with the federal right, it is not necessary at this point to resolve whether the remedy is or could be a constitutional imperative.[289]

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[285]Barr v. Matteo, 360 U.S. 564 (1959); *see* Howard v. Lyons, 360 U.S. 593 (1959); Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962) (court refused to extend the immunity in *Barr* to an alleged fourth amendment violation).

[286]*See* notes 171-74 and accompanying text *supra*. It should be pointed out, however, that *Bivens* in no way suggested that the United States itself would be prevented from asserting immunity. Justice Harlan indicated that sovereign immunity was still available. 403 U.S. at 410.

[287]The majority opinion in *Bivens* did not explicitly ground its decision to award damages on the fourth amendment; rather, it considered the question, at least partly, in federal common law terms. 403 U.S. at 396-97, *citing* J.I. Case Co. v. Borak, 377 U.S. 426 (1964). Justice Harlan, concurring, specifically considered the Court to have left open the question. 403 U.S. at 407 n.7. Certainly, if the remedy is based directly on the Constitution, Congress' power to remove it totally would be a separate problem. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312-17 (1953).

[288]See notes 176-83 and accompanying text *supra*.

[289]The distinction becomes crucial in the next section, in which the issue is whether the eleventh amendment or the fourteenth amendment should control access to the federal court.

2. *Remedies against the State for Violations of Fundamental Rights.* If a damage remedy exists under the fourteenth amendment for violation of fundamental rights, sovereign immunity is squarely challenged. The doctrine conflicts with the express language of the fourteenth amendment, which forbids a state (rather than a *person* as under section 1983[290]) from depriving a person of his fundamental rights. Thus, sovereign immunity, as a bar to vindication of fundamental rights, is swept away by the supremacy clause, unless it is given equal constitutional status. Leaving aside for the moment the impact of the eleventh amendment,[291] it is clear that the state courts would have both the power and the duty to adjudicate the constitutional dimensions of the immunity question.[292]

First, it is highly doubtful that the state (or for that matter the federal government) could constitutionally grant immunity both to itself and to its officials who commit the unconstitutional acts. There is every reason to believe that judicial remedies may be conditioned but not eliminated[293] and that due process would require the state to provide at least one defendant. This would mean at the minimum that either the offending official or the state would be subject to suit. But this theory applies only so long as there are two or more potential classes of defendants. In the Jackson-Kent actions the fact situation may be such that the offending officials—those who fired and hit the students—are unidentifiable.[294]

While it is true that any rules of evidence concerning res ipsa loquitur or joint tort-feasance[295] would be tested as matters of federal law, there may still be an inability to identify specific wrongdoers, with perhaps only those upon whom vicarious liability can be placed being subject to judgment. This was the situation in *Ries v. Lynskey,*[296] in which the plaintiff, injured in Lincoln Park during the Chicago convention of 1968, was unable to name any individual defendants but asserted

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[290]*See* note 6 *supra. See also* notes 172-73 and accompanying text *supra.*

[291]*See* section V *infra.*

[292]*See* Testa v. Katt, 330 U.S. 386 (1947); McKuett v. St. Louis & S.F. Ry., 292 U.S. 230, 234 (1934).

[293]Crowell v. Benson, 285 U.S. 22 (1932); *see* Parker v. Illinois, 333 U.S. 571 (1948). *See generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312-40 (1953). Of course, this analysis would require a state to provide some remedy for all torts, whether constitutional or not.

[294]*See* notes 29-40 and accompanying text *supra.*

[295]*See* notes 37-39 *supra.*

[296]452 F.2d 172 (7th Cir. 1971).

liability against the City of Chicago. The court dismissed the action as against the city because of the limitations of section 1983[297] and thus left the plaintiff virtually remediless.[298] No claim was made directly under the fourteenth amendment, however, and the due process argument discussed above was not made. Had it been, the court would have had to consider whether or not the state or municipality may constitutionally assert immuhity if it is the only available defendant. The answer should be plain: Due process requires the entity to stand up when its agents can not or will not. If there is no identifiable individual defendant, the entity is constitutionally compelled to defend on the merits. Similarly, if there is an individual defendant available, but both he and the state are immune under state law, that individual immunity may not be asserted in the face of the due process clause.

In situations in which there is an individual defendant as well, the state may have more mobility on the immunity issue. Arguably, it could, to take the easy case first, grant immunity to its officials for their misconduct on the legitimate ground that such immunity was necessary to encourage "unflinching" attention to duty.[299] Presumably, the state would have a valid interest in so conditioning recovery and, since a remedy would still be available against it, the defendant would not be remediless.

On the other hand, the traditional choice is to withhold immunity from offending officials and preserve it for the state. Here the choice is more difficult from a constitutional viewpoint. There is an obvious difference in the financial capacity of the two defendants. The constitutional question becomes whether the state must provide not only some remedy but also an effective remedy. Although the Supreme Court has not yet addressed itself to the problem in these terms,[300] there is good reason for it to do so. Authorities are virtually unanimous that actions against police officials are pointless, because of both the inability to

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[297]Monroe v. Pape, 365 U.S. 167 (1961), was precisely in point since it denied liability of the City of Chicago for the conduct of its officials under § 1983.

[298]The plaintiff was able to preserve a state tort law claim against the City of Chicago. 452 F.2d at 174.

[299]*See* note 78 and accompanying text *supra*. *But see* Ries v. Lynskey, 452 F.2d 172 (7th Cir. 1971), in which the court thought that municipal liability under § 1983 "might be accompanied by a *lessening of the feeling of individual responsibility* on the part of the officers who would be aware that they were no longer the prime target in the event of violation of civil rights." *Id.* at 175 (emphasis added).

[300]In *Bivens*, for example, the officials alone were sued and the Court distinguished cases against the United States that involved the "federal fiscal policy." 403 U.S. at 396.

obtain a judgment and the futility of seeking satisfaction.[301] At some point—especially where the vindication of fundamental rights is concerned—the Court should equate a patently inadequate remedy with no remedy at all. In essence, *Mapp v. Ohio*[302] demonstrates conclusively the worthlessness of damage remedies against police officials. In *Mapp* the Court resorted to the exclusionary rule because of the unsuccessful experience of states in vindicating fourth amendment rights with damage actions against the offending officials.[303] There is as much reason to analyze sovereign immunity with the same viewpoint.

Indeed, the path in this direction may have been pointed out by Chief Justice Burger in his dissent in *Bivens*.[304] The Chief Justice used his dissent as a platform for a major attack on the *Mapp* exclusionary rule and the fact that it does not aid innocent victims of illegal searches—that is, those individuals from whom *no* evidence is illegally seized.[305] Justice Burger doubted the necessity for the rule:

> But the Exclusionary Rule does not ineluctably flow from a desire to ensure that government plays the "game" according to the rules. If an *effective alternative remedy* is available, concern for official observance of the law does not require adherence to the Exclusionary Rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an *effective remedy is provided against the government.*[306]

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[301]On the problems in obtaining judgments, *see* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). *See also* Note, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 104 (1970); Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEXAS L. REV. 1015 (1967). Juries are often afraid of antagonizing police. *See* Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1209 (1952). In addition, the plaintiff's testimony is often impeached by his criminal conviction. Paulsen, *Law and Police Practice: Safeguards in the Law of Search and Seizure*, 52 NW. L. REV. 65, 72 (1957). Even if an award is won, officers are usually judgment proof. Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 346-53 (1936). Moreover, many jurisdictions forbid garnishment of the officer's salary. *See* United States v. Krakover, 377 F.2d 104 (10th Cir. 1967).

[302]367 U.S. 643 (1961).

[303]California led the way in adopting the exclusionary rule as the only effective remedy; California has also been instrumental in eliminating sovereign immunity. *Compare* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), *with* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[304]403 U.S. at 411-27.

[305]*Id.* at 414.

[306]*Id.* (emphasis added); *see* Irvine v. California, 347 U.S. 126, 134 (1954).

Moreover, Justice Burger admitted that the current tort remedies are inadequate: "Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective."[307] The conclusion from this is that Congress and the states should enact legislation that abrogates the exclusionary rule and replaces it with an effective tort-recovery scheme. That scheme, as described by Justice Burger, would provide for a "remedy against the government itself" under the "venerable doctrine of respondeat superior."[308] Thus, the obvious need for such protection is readily apparent.

Of course, Justice Burger would not go so far as to suggest this was a constitutional necessity; indeed, he suggests that Congress and the states waive their sovereign immunity in return for an abolition of the exclusionary rule.[309] The gap in his two conclusions should not be unbridgeable, however.

On the one hand, Justice Burger chastised his brothers and urged that they overrule *Weeks v. United States*[310] and *Mapp* because the exclusionary rule is fifty-five years old and "simply persists from blind imitation of the past."[311] On the other hand, he suggested that they wait until the Congress and states waive sovereign immunity legislatively. Since sovereign immunity is hundreds of years older than the exclusion-

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[307]403 U.S. at 421. Chief Justice Burger seems to have been directing his concern to state police officers since most of the problems that he catalogues arise in connection with state officials. Indeed, the impact of the exclusionary rule is felt most by the states. Thus, Burger's dissent could be read to assume that the fourth amendment damage remedy in *Bivens* is or will be extended to the states under the fourteenth amendment.

[308]*Id.* at 422; *see* Conard, *New Models of Justice*, 24 J. LEGAL ED. 202, 208-09 (1972).

[309]Chief Justice Burger is actually quite concerned about the states inadvertently losing their sovereign immunity. Thus, he suggests that any legislation waiving such immunity be interdependent upon the elimination of the exclusionary rule so that if the legislation is repudiated, the waiver would be restored. 403 U.S. at 423 n.7. Such concern with the preservation of immunity seems misplaced, especially since Chief Justice Burger acknowledges the futility of present remedial schemes.

The question of whether the Court will approve a legislative repudiation of the exclusionary rule depends upon whether the rule is constitutionally based. In Mapp v. Ohio, 367 U.S. 643 (1961), Justice Black indicated in his concurrence that it was so based: "When the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." 367 U.S. at 662. But that conclusion is less than clear. *Cf.* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 408 n.8 (1971) (Harlan, J., concurring).

[310]232 U.S. 383 (1914). *Weeks* established the exclusionary rule for federal prosecutions.

[311]403 U.S. at 420, *quoting* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

ary rule,[312] is antithetical to the spirit of our political system, and has been universally condemned for almost fifty years,[313] Holmes' aphorism about blind imitation would be far more accurately directed toward judicial abolition of sovereign immunity. At some point, when knowledge of the inadequacy of existing remedies becomes so universal, the issue ceases to be a matter of legislative waiver—a matter, in other words, of privilege—and becomes a judicial concern—a matter of right. Due process should require no less than an *effective* remedy for the violation of fundamental constitutional rights.

This, of course, is not to say that the demise of sovereign immunity as a defense to unconstitutional conduct would of itself serve fully to vindicate constitutional rights. What would be done, however, is to remove the major bar to recovery and, by so doing, open the way for the government to respond effectively to its responsibility. Even after that, many problems would remain in both obtaining verdicts and recovering judgments.[314] Certainly, the Chief Justice was aware of the practical difficulties when he suggested in his proposed legislation that an administrative or quasi-judicial body be established for the specific purpose of hearing constitutional tort suits.[315]

Another concern is the measure of damages for a constitutional deprivation. In many instances the theory of compensatory damages is inadequate when applied to constitutional injuries. The dignitary injury sustained by a denial of voting rights or of access to an integrated school can not be measured adequately on a common law tort basis. Thus, Justice Harlan has noted that it would be the "purest coincidence" if remedies for common law torts are "fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection."[316] On the other hand, some constitu-

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[312]*See* notes 185-87 and accompanying text *supra*. It is somewhat inaccurate to label the exclusionary rule as being fifty-five years old. That dates it from the *Weeks* case, but its real impact should be dated from *Mapp*, about ten years ago, when the rule was applied to the states. After all, at the time of *Mapp* empirical evidence demonstrated that the rule was necessary to deter police conduct.

[313]*See, e.g.*, Borchard, *Government Liability in Tort, supra* note 43.

[314]*See* note 301 *supra*.

[315]Chief Justice Burger noted: "I doubt that lawyers serving on such a tribunal would be swayed either by undue sympathy for officers or by the prejudice against 'criminals' that has sometimes moved lay jurors to deny claims." 403 U.S. at 423. There is no doubt that such a statutory scheme would make any tort remedy against the government more effective. But this is not the type of effectiveness that must be compelled under due process. No one, after all, has a right to the establishment of a special court system.

[316]Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring).

tional injuries, such as an illegal search and seizure, are similar to common law torts, such as invasion of privacy, and would present a greater likelihood that the available remedies would actually reflect the injury suffered,[317] so long as the remedies would include punitive damages in appropriate cases.[318] Once the government's immunity is removed, the damage remedies could be developed as a matter of federal law both to compensate for and to deter future unconstitutional conduct.[319]

V. SOVEREIGN RESPONSIBILITY AND THE ELEVENTH AMENDMENT

The eleventh amendment[320] stands as a bar to actions against a state in the federal court by both that state's own citizens[321] and citizens of other states. It was passed subsequent to the Bill of Rights in reaction to *Chisholm v. Georgia*[322] and other cases that had sustained damage actions for breach of contract against the state by private citizens of another state on the strength of Article III of the Constitution.[323] However, the eleventh amendment bars neither suits against municipalities[324] nor those against state officials,[325] and over the years inroads

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[317]*See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 409 n.9 (1971) (Harlan, J., concurring).

[318]In order to recover punitive damages under § 1983, the plaintiff must show more than a "bare" violation, but less than specific intent to violate his constitutional rights; he need not show actual damage. Adickes v. S. H. Kress & Co., 398 U.S. 144, 233 (1970) (Brennan, J., concurring in part). *See also* McDaniel v. Carroll, 457 F.2d 968 (6th Cir. 1972); Batista v. Weir, 340 F.2d 74, 87 (3d Cir. 1965).

[319]In addition to formulating new federal remedies, the court may adopt available state remedies when the federal remedies are inadequate. 42 U.S.C. § 1988 (1970); *see* Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969).

[320]"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." U.S. CONST., amend. XI.

[321]Although not within the literal language of the eleventh amendment, the limitation on suits by citizens of the same state against a state has long been acknowledged. Hans v. Louisiana, 134 U.S. 1 (1890).

[322]2 U.S. (2 Dall.) 419 (1793); *see* Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791); Oswald v. New York, 2 U.S. (2 Dall.) 415 (1793). *See generally* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 93-102 (Rev. ed. 1926); Mathis, *The Eleventh Amendment:* adoption and Interpretation, 2 GA. L. REV. 207 (1968); Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. AM. HIST. 19 (1967).

[323]"The judicial Power shall extend to all Cases, in Law and Equity . . . between a State and Citizens of another State . . . ." U.S. CONST. art. III, § 2; *see* M. IRISH & J. PROTHRO, THE POLITICS OF AMERICAN DEMOCRACY 117 (3d ed. 1965).

[324]Lincoln County v. Luning, 133 U.S. 529 (1890); Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1868). In addition state government corporations are not immune under the eleventh amendment on the theory that they are a separate entity from the state. Briscoe v. Bank of

have been made against the prohibition of suing the state itself.[326]

For the purposes of this analysis, therefore, it would be possible in a direct suit under the fourteenth amendment to sue the official or municipality in federal court for invasion of fundamental rights. But the question remains as to whether the state itself may also be sued in a federal court under the fourteenth amendment.

Consider the following situations: First, assume that the state does nothing to immunize the conduct of its officials. Under the fourteenth amendment both the state and its officials would be liable in the state court, but only the officials would be liable in the federal court, unless the plaintiffs were allowed to allege a cause of action against the state under the doctrine of pendent jurisdiction.[327]

Kentucky, 36 U.S. (11 Pet.) 257 (1837); Bank of Kentucky v. Wister, 27 U.S. (2 Pet.) 318 (1829); *cf.* Murray v. Wilson Distilling Co., 213 U.S. 151 (1909) (if state operates business directly, it is immune).

[325]*Ex parte* Young, 209 U.S. 123 (1908) (Attorney General of Minnesota).

[326]*See generally* Note, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331 (1966).

[327]The doctrine of pendent jurisdiction would broaden the jurisdiction of the federal court so as to be comparable to that of a state court of general jurisdiction. Since the state court must adjudicate federal constitutional claims properly presented, *e.g.*, Testa v. Katt, 330 U.S. 386 (1947), any such claim against the State would be necessarily within the state court's jurisdiction. Theoretically, therefore, a plaintiff could allege a federal claim against a state official, which would not be barred by the eleventh amendment, and then seek to have the federal court assume pendent jurisdiction over the State itself. Presumably, the claims would arise out of the same set of facts and constitute "one constitutional case" as required by United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). But it has been suggested that pendent jurisdiction applies only where the same parties are involved in both the federal and state claims. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 16, at 65 (1970). And it has been held in a § 1983 action that a policeman's employer, a municipality, could not be joined in the federal court under the doctrine of pendent jurisdiction. Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); Patrum v. Martin, 292 F. Supp. 370 (W.D. Ky. 1968), *aff'd sub. nom.*, Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); *cf.* Barrows v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971) (§ 1983 suit against sheriff and his surety dismissed). *See generally* D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 374-80 (1968); Annot., 5 A.L.R.3d 1040, 1071-72, 1122 (1966). It should be noted, however, that the above cases involved state claims against the nonnamed municipalities and surety. Because the limitations on jurisdiction against municipalities under § 1983 will not exist under a direct fourteenth amendment suit, the question will become whether a federal claim may be heard in the federal court. Furthermore, the joinder of so-called pendent parties (the term used to signify federally nonnamed parties) under § 1983 has been advocated in light of the *Gibbs* decision. *See* Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1969); Note, *Discretionary Factors in the Exercise of Pendent Jurisdiction: A Setback in the Second Circuit*, 64 NW. U.L. REV. 557 (1969). *See also* Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968). *Cf.* Note, *The Municipality, Section 1983 and Pendent Jurisdiction*, 5 VALPARAISO U.L. REV. 110 (1970).

If it is appropriate to use pendent jurisdiction to overcome the limitation of suit against

Alternatively, the state might grant immunity to its officials while accepting liability itself. In the federal court in a suit against an official, his immunity must be tested federally and measured in light of the absence of federal jurisdiction over the state. If the eleventh amendment prevails, the court must decide whether or not to honor the official's immunity. Under current interpretations[328] the officials would not be immune federally, and so the state's scheme of recovery would be upset. Conversely, if the official is held immune, the irony will be that federally protected rights may be vindicated only in a state forum.[329] In this circumstance the clearest solution would be to equate the state's consent to suit to a waiver of the eleventh amendment bar.[330]

While as yet damage suits have not been allowed against the state in the federal court,[331] there is support for the seeking of injunctive

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municipalities under § 1983, it could be reasoned that it is equally appropriate to use that device to overcome the limitation against suing states under the eleventh amendment. The interests are, however, of a different dimension. It may not offend any reading of § 1983 to bring in municipalities as pendent parties, and it certainly does not offend the eleventh amendment, which does not reach municipalities. The same cannot be said of suits against states in the federal court. The eleventh amendment is a constitutional mandate, and it offends basic principles of separation of powers to see the court achieve by indirection, through the device of pendent parties, what not even the Congress could achieve directly.

[328]*See* discussion in text accompanying notes 105-08 *supra.*

[329]Some would argue that the state court is the better forum for § 1983 type suits, at least in the first instance. *See* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 HARV. L. REV. 1486 (1969). *Contra,* Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 HARV. L. REV. 1352 (1970).

[330]The Supreme Court has in the past permitted a state to waive immunity for state court purposes only. *See* Great Northern Ins. Co. v. Read, 322 U.S. 47 (1944). *See also* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). Similarly, it has been held that state's waiver of municipal immunity does not extend to suits under § 1983. Brown v. Town of Caliente, 392 F.2d 546 (9th Cir. 1958). Indeed, it has been held that a state waiver of § 1983 immunity does not amount to an eleventh amendment waiver. Williams v. Eaton, 443 F.2d 422, 428 (10th Cir. 1971). But this view fails to look at the legitimate interests of the municipality and state and accept that a true waiver of immunity should not depend on the forum. Thus, it has been recognized that the reasoning of *Monroe v. Pape* is inapplicable to § 1983 where a municipality voluntarily accepts liability. Carter v. Carlson, 447 F.2d 358, 369 (D.C. Cir. 1971), *cert. granted sub nom.* District of Columbia v. Carter, 92 S. Ct. 683 (1972) (utilizing § 1988 as a means of incorporating the waiver under state law into the federal action). *See also* Sostre v. Rockefeller, 312 F. Supp. 863, 887 (S.D.N.Y. 1970), *rev'd in part,* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). Certainly, the same rationale for municipality waiver under § 1983 could also apply to state waiver under the eleventh amendment. In this case there is a true waiver of immunity which satisfies the interests that the amendment seeks to protect.

[331]Damages have been awarded against states to the United States under the strength of the commerce clause. California v. United States, 320 U.S. 577 (1944); United States v. California, 297 U.S. 175 (1936). But the United States under the supremacy clause is not prevented from suing the state by the eleventh amendment. *See* United States v. Texas, 143 U.S. 621 (1892).

relief against the state under section 1983.[332] In addition, there are devices for obtaining the consent of the state to suit in the federal court even if the state has not waived sovereign immunity for state court purposes. More directly, however, there is the argument that the fourteenth amendment should be construed as having repealed the eleventh amendment ban to opening the federal courts to damage suits against the state. These theories will be discussed below.

A. The Fictional Approach: The States' Implied Consent to be Sued

The Supreme Court has recently been confronted with objections under the eleventh amendment to suits in the federal court based on an interstate compact and under a federal statute. In *Petty v. Tennessee-Missouri Bridge Commission*,[333] the Court found that the states' creation of an interstate compact constituted a waiver of immunity for federal purposes, even though there would have been no waiver under state law. In *Parden v. Terminal Railway*,[334] a citizen of Alabama was given the right under the FELA to sue the state-owned railroad. The Court reasoned that "to read a 'sovereign immunity exception' into the Act would result . . . in a right without a remedy"[335] for one class of employees, those who worked for state-owned railroads. Instead, Alabama would be held to have impliedly consented to suit by operating a railroad subsequent to the enactment of the federal regulation.

Parden by its terms limited the implied-consent theory to suits based on a congressionally created cause of action.[336] Subsequently, in *Maryland* v. *Wirtz*[337] the Court held the minimum wage and hour provision of the Fair Labor Standards Act applicable to state employees, thereby casting aside objections based on the eleventh amendment.[338] The Act's provisions were then applied to the State of Utah,

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[332]*Cf.* Damico v. California, 389 U.S. 416 (1967), in which the Court in a per curiam opinion reversed and remanded a dismissal (won by the state below) of an action against the state seeking to enjoin as unconstitutional the state welfare law. The case turned on the inapplicability of the exhaustion doctrine to § 1983 and did not discuss the eleventh amendment. *See* McNeese v. Board of Educ., 373 U.S. 668 (1963). *But see* Eisen v. Eastman, 421 F.2d 560, 568-69 (2d Cir. 1969).

[333]359 U.S. 275 (1959).

[334]377 U.S. 184 (1964).

[335]*Id.* at 190; *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1801).

[336]The Court contends that the state's "consent" emanates not from its passage of the Constitution, which contains the commerce clause, but from its operation of a railroad after congress has legislated (FELA) pursuant to the commerce clause.

[337]392 U.S. 183 (1968).

[338]The Court refused to consider at that time all of the possible objections that might be raised under the eleventh amendment. *Id.* at 200.

which had continued to operate its state hospital after the enactment of the congressional legislation.[339] The Tenth Circuit put the question in terms of an "inevitable confrontation"[340] between the commerce clause and the eleventh amendment. Although the court relied on *Parden's* implied waiver theory, it acknowledged that the time between legislative enactment and the alleged waiver was so short as to make the waiver "neither knowing nor intelligent."[341]

Admittedly, these cases cannot be used as direct authority for the assertion that the states impliedly consented to suit when they ratified the fourteenth amendment. This is the argument that would have to be sustained in a direct suit for damages in the federal court under the fourteenth amendment. However, there seems to be no logical reason to favor implied waiver for congressional statutes and not for direct constitutional claims,[342] and there is every reason to feel that liability for unconstitutional conduct is more important to our federal scheme than liability for merely tortious conduct. Thus, the rationale of these cases should be just as compelling in terms of implied waiver for constitutional claims. But the theory smacks of sophistry, given the fictional nature of the analysis, since the states contend they have made no waiver.[343] There is no reason not to confront directly the eleventh amendment and measure its vitality against the fourteenth.

B. The Head-On Clash: The Fourteenth Amendment as a Revolution in Federalism

It is hard to avoid a direct conflict between the two constitutional commands of the eleventh and fourteenth amendments without engaging in high-level fictions, such as the implied waiver theory. Thus, historically fictions have characterized clashes between the amendments.

In a federal suit by railroad stockholders under the fourteenth amendment to enjoin the Attorney General of Minnesota from enforc-

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[339]Briggs v. Sagers, 424 F.2d 130 (10th Cir. 1970) (the state was also a named defendant).

[340]*Id.* at 131.

[341]*Id.* at 134. The court acknowledged that the *Parden* waiver came after the legislative enactment had been in force for twenty years.

[342]Compare Lynch v. United States, 299 U.S. 559, 582 (1934), where Justice Cardozo thought sovereign immunity applied equally to rights arising under the Constitution or under congressional enactments. *See generally* Comment, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331 (1966).

[343]In *Parden* Alabama maintained it had not waived immunity and asserted a state constitutional provision that prevented it from waiving immunity. 377 U.S. at 194.

ing an allegedly unconstitutional rate statute, the circuit court preliminary enjoined the Attorney General from enforcing the statute and then held him in contempt when he ignored the court's ruling. In *Ex parte Young*[344] the Supreme Court affirmed, holding that the suit was not one, in effect, against the State of Minnesota, since by enforcing an unconstitutional statute the attorney general is stripped of any state authority. But since the fourteenth amendment reaches only *state* action,[345] the suit could not be maintained without a leap of faith.[346] Therefore, the attorney general was fictionally divided into two people: a state official for purposes of jurisdiction but a private individual for purposes of enforcing unconstitutional state statutes.

The Court might easily have avoided this logical dilemma by simply overruling the eleventh amendment to the extent that it conflicted with the fourteenth.[347] This it chose not to do, and instead it expressly assumed that the eleventh amendment retained its vitality.[348] While this refusal to accept the direct challenge is unsatisfying intellectually, it achieved on the facts of *Ex parte Young* the same goals as would a direct challenge. If the attorney general could be enjoined from enforcing the unconstitutional statute (and he was the only state official who had the capacity to enforce it),[349] the injunctive relief granted against him was as effective as if granted against the state.[350]

The same is not true of the damage remedy. The basic thrust of a suit for damages is against the state itself, the entity with the ability to provide an effective remedy. Indeed, it is just because the damage remedy has been shown to be ineffective against state officials alone that the immunity doctrine is contended to be unconstitutional.[351] But the fact that the state must be sued directly to effectuate the damage remedy does not suggest a greater disruption of federalism. After all, the interference with state procedures is far greater in the injunction situation.

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[344]209 U.S. 123 (1908).

[345]*See, e.g.*, Virginia v. Rives, 100 U.S. 313, 318 (1879).

[346]Otherwise it would appear that the federal court would never have jurisdiction. *See* E. CORWIN, TWILIGHT OF THE SUPREME COURT 82 (1934).

[347]*See* Note, *Sovereign Immunity in Suits to Enjoin the Enforcement of Unconstitutional Legislation*, 50 HARV. L. REV. 956, 961 (1937).

[348]*See Ex parte* Young, 209 U.S. 123, 150 (1908).

[349]Moreover, an injunction suit may be extended to reach any successors in office. *Ex parte* La Prade, 289 U.S. 444 (1933); *cf.* Smyth v. Ames, 169 U.S. 466, 518-19 (1898).

[350]The same result obtains in suits of ejectment or trespass against state officials who are wrongfully holding property. *See* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894); United States v. Lee, 106 U.S. 196 (1882).

[351]*See* discussion at notes 301-03 and accompanying text *supra.*

Since the injunction in essence restrains the state from implementing its legislation (despite the tortured distinction between state official and individual), the federal court is able to affect drastically a state's policies. This potential for disruption led to the creation of the three-judge-court requirement in the wake of *Ex parte Young*[352] and to the limitation of injunctive relief against state officials to situations in which claims of unconstitutionality are alleged.[353]

Furthermore, in other contexts the damage remedy has been viewed as having a lesser impact upon governmental immunity. Thus, Chief Justice Vinson observed in *Larson v. Domestic & Foreign Commerce Corp.*:[354]

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief.

Larson, of course, did not involve the eleventh amendment directly, but its observations are pertinent to that inquiry: first that sovereign immunity must accede to constitutional claims (at least as against government officials); and secondly, that damage suits are less disruptive of government's functions than injunction suits.

These considerations help to focus on the original intent of the eleventh amendment. It will be recalled that during their infancy the

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[352]28 U.S.C. §§ 2281-84 (1970).

[353]In Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), the Court rejected plaintiff's attempt to enjoin Larson, the War Assets Administrator, from selling or delivering coal to anyone other than the plaintiff. The claim was based on a contract with the government—not on the Constitution—and the Court noted that such suits " 'would be productive of nothing but mischief.' " *Id.* at 704, *quoting* Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840). However,

> [t]here are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.

337 U.S. at 704. The Court distinguished United States v. Lee, 106 U.S. 196 (1882) (*see* note 1 *supra*), as being a case that involved an unconstitutional taking of property, not a mere tortious excess of authority. *But see* 337 U.S. at 717-25 (Frankfurter, J., dissenting).

[354]337 U.S. 682, 703-04 (1949).

states feared staggering judgments from contract suits such as resulted in *Chisholm v. Georgia.*[355] The amendment was designed to overcome liability in contract—not liability for unconstitutional conduct, which would not have even been a consideration at that time.[356] Today, the fear of large judgments has a questionable basis as a valid state interest. But even assuming its validity as a means of justifying sovereign immunity, there is no need to challenge the eleventh amendment's prohibition as to non-constitutional litigation. Thus, contract suits against the state need not be affected by a reinterpretation of the eleventh amendment. The eleventh amendment will be subordinated only to the fourteenth, and ordinary contract litigation will not normally raise constitutional issues.

The fourteenth amendment was clearly intended to be a revolution in federalism. While the first eleven amendments were passed as checks or limitations on the powers of the federal government, the civil war amendments, notably the fourteenth, were passed as direct limitations on the powers of the states. As such, these amendments marked a new epoch in American constitutional history.[357] While the argument has raged for many years as to whether the fourteenth amendment incorporates the Bill of Rights,[358] it is clear that before the fourteenth amendment was passed the provisions of the first eight amendments applied only to the federal government[359] and that thereafter those amendments have largely been applied to the states.[360]

The eleventh amendment looks one way and the fourteenth another. When the eleventh amendment was passed, no one contemplated a national Bill of Rights. After the fourteenth, the Court struggled with reconciling the fourteenth and the eleventh and reached a fictional compromise exemplified by *Ex parte Young.* If a constitutional right to a damage remedy against the state is postulated, however, that solution is unacceptable. In this context the eleventh amendment could openly be displaced to the extent necessary to allow vindication of these rights

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[355]2 U.S. (2 Dall.) 419 (1793).

[356]The fourteenth amendment was not passed for another seventy-five years.

[357]*See generally* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 8-9 (preface) (1908).

[358]*See generally* C. FAIRMAN & S. MORRISON, *The Fourteenth Amendment and the Bill of Rights: The Incorporation Theory* (1970).

[359]Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1883); *see* Brennan, *Landmarks of Legal Liberty,* in THE FOURTEENTH AMENDMENT 3 (B. Schwartz ed. 1970).

[360]*Compare, e.g.,* Adamson v. California, 332 U.S. 46, 68-122 (1947) (Black, J., dissenting) *with* Duncan v. Louisiana, 391 U.S. 145 (1968).

on the "logical and practical" grounds that the eleventh not only antedates the fourteenth but also was intended to be limited by that amendment.

We are returned to Holmes' rationale for sovereign immunity as modified by Locke.[361] If we assume that there can be no right against the sovereign that created the right, then the immunity will extend to those situations in which the state has acted in its sovereign capacity, such as contractual relations that formed the basis for the eleventh amendment in the first place. When, however, the right resides in the people, as fundamental constitutional rights do, they are the real sovereign, and the state must be bound because its interest is subordinate to that of the people as sovereign.[362]

VI. CONCLUSION

The immunity of the sovereign and its officials from suit has had an insidious impact on our society. While it is a Hobbesian concept foreign to our constitutional system, it has been accepted, with only occasional restraint, since the beginning of the Republic. There is really, in today's world, very little that can be said for sovereign immunity, and, consequently, it is slowly being eliminated judicially and legislatively. It would be nice if it could be swept away at once, but bad law is not always unconstitutional law. Its continued application in constitutional terms must proceed from an analysis of function and purpose—not an acceptance of absolute authority. Thus, sovereign immunity of the federal government and its highest executive, legislative, and judicial officials is entirely consistent with our constitutional scheme when its application is based on the separation-of-powers doctrine. Further, sovereign immunity may not be inconsistent with the Constitution when it seeks to circumscribe the liability of state and federal governments in their everyday dealings with the public. This category would include consensual relationships as well as simple tortious conduct and would accept such protection for government officials, both federal and state, as is contemplated by the discretionary-function test.

Sovereign immunity becomes constitutionally impermissible only when it frustrates the vindication of fundamental rights guaranteed by

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[361] *See* notes 186-96 and accompanying text *supra.*

[362] *See* Note, *Sovereign Immunity in Suits to Enjoin the Enforcement of Unconstitutional Legislation,* 50 HARV. L. REV. 956, 963 (1937).

the Constitution. At this point the doctrine ceases to be controlling because it clashes with a higher sovereignty, that of the people. In practice this means at least that state or federal governments may not grant immunity to themselves and their officials for unconstitutional conduct. It also means that government may not so limit the remedy for unconstitutional conduct as to render it meaningless, which occurs when only offending officials themselves rather than the state are served up as defendants. The ineffectiveness of a remedy against officials alone has been so well documented as to be beyond real controversy. It is government and only government, after all, that can initiate the offensive conduct, and it is government that should be responsible for the consequences of that conduct. Indeed, it should welcome this responsibility. For, as Justice Clark has recognized, "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[363]

The fascinating aspect of the Jackson-Kent litigations is that they offer an opportunity to sort out these constitutional questions. The cases pose the possibility of the two attacks on the constitutionality of sovereign immunity mentioned above—the first on the assumption that individual officials are not identifiable as defendants, and the second if they are identifiable. In addition, if the implicit promise of *Bivens* is fulfilled, there is the possibility of a direct conflict between the fourteenth and the eleventh amendments. That conflict should be resolved in favor of the fourteenth—in favor of federalism, limited, as are all matters under our "charter," by the sovereignty of the people.

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[363]Mapp v. Ohio, 367 U.S. 643, 659 (1961).