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Immunity of Federal and State Judges from Civil Suit - Time for a Qualified Immunity?

Douglas K. Barth

IMMUNITY OF FEDERAL AND STATE JUDGES FROM CIVIL SUIT—TIME FOR A QUALIFIED IMMUNITY?

While other immunity theories have been modified by legislative and judicial action, the doctrine of absolute judicial immunity has survived such challenges intact. When combined with a reluctance among judicial councils to impose sanctions on malicious judges, this shield of immunity not only leaves the injured victim without a remedy, but also allows the offending judge to remain on the bench. After examining and rejecting the policy considerations supporting total immunity, the author discusses the civil law system of judicial immunity and the qualified immunity developed for executive officers. He proposes a partial immunity for judges limited to good-faith acts and suggests means of enforcing limited judicial liability.

I. INTRODUCTION

THE COMMON LAW PRINCIPLE of judicial immunity from civil suit is deeply entrenched in the Anglo-American legal system. Immunity has consistently shielded judges from common law tort actions, including malicious prosecution,[1] false imprisonment,[2] and libel and slander,[3] as well as from statutory suits from deprivations of constitutional and civil rights.[4] Although a judge's act may ultimately be overturned by an appellate court,[5] the victim often incurs substantial damage in the interim.[6] Furthermore,

1. O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926 (1966). For the outcome of this particular litigation, see note 7 *infra*.

2. Ravenscroft v. Casey, 139 F.2d 776 (2d Cir. 1944); Stahl v. Currey, 135 Ohio St. 253, 20 N.E.2d 529 (1939).

3. Garfield v. Palmieri, 297 F.2d 526 (2d Cir.), *cert. denied*, 369 U.S. 871 (1962).

4. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967); Carter v. Duggan, 455 F.2d 1156 (5th Cir. 1972); Berg v. Cwiklinski, 416 F.2d 929 (7th Cir. 1969).

5. The use of appellate review to redress acts of judicial misconduct has been criticized. *See, e.g.*, Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U.L. REV. 615, 638–39 (1970).

6. Damage resulting from judicial misconduct can be direct economic loss from lost employment or consequential damage from appellate costs, including bail, and reputational or

correction of present judicial maladministration by removal or disciplinary proceedings[7] usually is directed only toward the correction of future irresponsible action; it does not compensate for the injuries caused by the judge's act. These deficiencies of the judicial immunity doctrine along with recent development in the area of governmental immunity necessitate a serious inquiry into the continued validity of absolute judicial immunity.

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emotional injury. In Berg v. Cwiklinski, 416 F.2d 929 (7th Cir. 1969), the plaintiff sued for recovery of $500,000 alleging "loss of personal reputation and property and frustration and mortification." The plaintiff's cause of action arose out of a traffic violation where he was the defendant and at which the arresting officer failed to appear. He refused to answer incriminating questions directed to him by the prosecuting attorney. Upon the recommendation of the prosecuting officer, the judge placed Berg in contempt of court and held him in custody until that afternoon, when the arresting officer finally arrived at the court. The judge dismissed the contempt charge, since the officer then could testify as to the questions concerning the violation. Damages in this situation would be the loss of a day's wages and possible reputational injury.

A clearer case of reputational injury and, more significantly, emotional and mental distress, occurred when a California superior court judge made the following remarks in sentencing (charge unknown) a 13 year old Mexican-American boy:

> You are just an animal. You are lower than an animal. Even animals don't do that. . . .
>
> Mexican people, after 13 years of age, it's perfectly all right to go out and act like an animal. . . .
>
> . . . .
>
> You are no particular good to anybody. . . . You ought to commit suicide . . . .
>
> Maybe Hitler was right. The animals in our society probably ought to be destroyed because they have no right to live among human beings.

Kates, *supra* note 5, at 625 n.28 (conversation overheard by author).

7. A classic example of the problems inherent in removal and disciplinary proceedings occurred in the case of Federal District Court Judge Stephen Chandler of the Western District of Oklahoma. During his tenure on the federal bench, Judge Chandler had been the subject of criminal and civil litigation, as well as being twice disqualified from hearing cases before him. In 1965, he was sued for malicious prosecution, libel, and slander. In O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965), *cert. denied,* 384 U.S. 926 (1966), Judge Chandler had come before a grand jury and explained that he believed the plaintiff's bankruptcy claim, pending in Chandler's court, was fraudulent. The judge consequently informed the grand jury of possible criminal acts committed by the plaintiff and urged the grand jury to conduct an investigation of these activities. The result of the grand jury investigation was an indictment brought against the plaintiff, which was later dismissed. The case against Judge Chandler was dismissed on the basis of judicial immunity.

An indictment, which was later quashed, charged him with conspiracy to defraud the State of Oklahoma. Chandler v. Judicial Council, 398 U.S. 74, 77 n.4 (1970). After refusing to remove himself, the judge was twice disqualified by the court of appeals, on the ground of bias toward a party. Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966); Occidental Petroleum Corp. v. Chandler, 303 F.2d 55 (10th Cir. 1962), *cert. denied,* 372 U.S. 915 (1963).

As a result of this situation, the Judicial Council of the Tenth Circuit Court of Appeals ordered, pursuant to 28 U.S.C. § 332 (1970), that all cases presently before Judge Chandler be reassigned to other judges and no new cases be assigned to him. Misc. Order No. 1111, 382 U.S. 1003, 1004 (1966). This order was later modified so that Judge Chandler could hear the cases pending before him. During the next few months, the Council and Judge Chandler were able to reach an agreement resolving this dispute, but the judge, in the meantime, had filed a

Absolute immunity places an impregnable barrier before a person injured by malicious judicial misconduct.[8] A qualified, good-faith immunity would alleviate injustices to these innocent victims. The objective of this Note, therefore, is to review the present law of absolute judicial immunity and to propose a new system of qualified immunity. Qualified judicial immunity in civil law countries and the adoption of qualified immunity for executive and administrative officials in this country provide the analytic framework justifying reform. The final part of the Note will analyze the elements of the proposed alternative system. First, the three potential foundations for the development of judicial liability will be discussed: (1) a common law cause of action based on tort liability; (2) an action based on 42 U.S.C. § 1983;[9] and (3) a direct constitutional cause of action. Then, a workable standard of liability will be suggested, followed by an analysis of the question of whether the state or the judge must pay the damages.

II. JUDICIAL IMMUNITY IN THE UNITED STATES

Two important conditions, both judicially imposed, must be met before a judge is immunized from civil suit. First, judicial immunity may only be invoked if the judicial officer[10] was acting in a discretionary, rather than a ministerial, role.[11] The distinction, however, is one of degree only, since

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motion in the United States Supreme Court, asking for leave to petition for a writ of mandamus. In support of this motion, the judge argued that the pertinent statute did not authorize the order and that the Council's actions were unconstitutional in that they usurped the constitutional impeachment power. Unfortunately, these issues were never resolved, as the Supreme Court found that the facts did not justify issuance of the writ. Chandler v. Judicial Council, 386 U.S. 74 (1970). However, the Chandler situation has led to renewed discussion of the adequacy of impeachment as a means of removing federal judges. *See generally* Battisti, *An Independent Judiciary or an Evanescent Dream?* 25 CASE W. RES. L. REV. 711 (1975); Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?* 57 CALIF. L. REV. 659 (1969); Comment, *The Limitations of Article III on the Proposed Judicial Removal Machinery: S. 1506*, 118 U. PA. L. REV. 1064 (1970); Note, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448 (1967); Comment, *Removal of Federal Judges—New Alternatives to an Old Problem*, 13 U.C.L.A. L. REV. 1385 (1966); Note, *Removal of Federal Judges—Alternatives to Impeachment*, 20 VAND. L. REV. 723 (1967).

8. The procedural effect of absolute immunity is significantly different from that of qualified immunity. Absolute immunity "defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). *See* Wood v. Strickland, 420 U.S. 308, 320–22 (1975); Scheuer v. Rhodes, 416 U.S. 232, 238–39 (1974).

9. 42 U.S.C. § 1983 (1970).

10. Although "judicial officers" has been interpreted to include prosecuting attorneys and other court officers (*see* Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969)), for purposes of this Note, the term "judicial officers" is limited to appointed or elected judges.

11. *Ex parte* Virginia, 100 U.S. 339, 348 (1879). To fulfill his discretionary role, the judge must use his personal judgment in performing the act; in his ministerial role, the judge is

"it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance."[12] Second, the judge must have subject matter jurisdiction over the case.[13] This condition immunizes a judge even if he acts in excess of his jurisdictional authority. The distinction between acts without jurisdiction and those in excess of jurisdiction was clarified by Mr. Justice Field in *Bradley v. Fisher*,[14] when he observed:

> Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where the jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.[15]

If the judge is acting within his discretionary power and has subject matter jurisdiction over the case, he may be immune from any civil liability, even when his acts are based on malicious or corrupt motives.[16]

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required by law to perform certain acts in specific ways. The same distinction applies to other governmental officers performing administrative functions. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 132, at 988–90 (4th ed. 1971). The underlying policy favoring immunity for discretionary acts is that

> where the matter is trusted to the discretion or judgment of an officer, the very nature of the authority is inconsistent with responsibility in damages for the manner of its exercise, since to hold the officer to such responsibility would be to confer a discretion and then make its exercise a wrong.

2 T. COOLEY, A TREATISE ON THE LAW OF TORTS § 312, at 420–21 (4th ed. 1932).

12. Ham v. County of Los Angeles, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920).

13. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351–52 (1872). Whether the judge has subject matter jurisdiction depends on the nature of the grant of jurisdiction to his court. If the judge has the "authority of law to act officially in the matter then at hand," he has jurisdiction over the case. 2 T. COOLEY, *supra* note 11, at 437.

Jurisdiction may exist in situations other than in a courtroom; for example, a judge has jurisdiction over certain matters within his office. McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972). A judge, though, does not have jurisdiction to use physical force to eject a person from his courtroom and can be held liable for assault and battery. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974).

14. 80 U.S. (13 Wall.) 335 (1872).

15. *Id.* at 351–52.

16. Pierson v. Ray, 386 U.S. 547, 554 (1967) (statutory cause of action under 42 U.S.C. § 1983 (1970) for deprivation of civil rights); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872) (common law action for trespass); Cheramie v. Tucker, 493 F.2d 586, 588 (5th Cir. 1974); Skolnick v. Campbell, 398 F.2d 23, 26–27 (7th Cir. 1968); O'Bryan v. Chandler, 352 F.2d 987, 988 (10th Cir. 1965), *cert. denied*, 384 U.S. 926 (1966); Meredith v. Van Oosterhout, 286 F.2d 216, 220 (8th Cir. 1960), *cert. denied*, 365 U.S. 835 (1961); John v. Gibson, 270 F.2d 36, 39 (9th Cir. 1959), *cert. denied*, 361 U.S. 970 (1960).

Two theories have been used in attempting to hold judges liable for their acts. The first is a tort action brought in state courts;[17] the second is based on 42 U.S.C. § 1983,[18] which provides a cause of action for deprivations of constitutional and civil rights.[19] Absolute judicial immunity, however, has consistently precluded suits under both of these theories.

Absolute immunity from tort actions did not fully develop until the 1870's. Prior to that time, some state courts had immunized those judges who acted in good faith, whereas other courts had upheld absolute judicial immunity.[20] For example, a survey of 19th century case law in 14 randomly selected eastern and midwestern states shows that in nine states the prevailing rule was absolute immunity,[21] in four states immunity depended upon the judge's good faith,[22] and in one state the law was inconclusive.[23]

Many administrative officers also enjoy immunity from suit because of the discretionary function inherent in the nature of their jobs. Early cases established an absolute immunity for administrative officers. *E.g.*, Stewart v. Case, 53 Minn. 62, 54 N.W. 938 (1893). The modern trend, however, is to permit only a qualified immunity dependent upon the good faith of the officer in performing the act. Scheuer v. Rhodes, 416 U.S. 232 (1974); Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958). *See generally* Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201 (1956); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937). Although the same rationale (the discretionary function exception) is used to support both executive and judicial immunity, executive immunity is becoming increasingly qualified. The degree of qualification is dependent not only on the good faith of the official, but also on the scope of his discretion and the existence of reasonable grounds, in light of the circumstances, to support the belief formed. *See* text accompanying notes 148–64 *infra*.

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

18. 42 U.S.C. § 1983 (1970).

19. *See* Pierson v. Ray, 386 U.S. 547 (1967).

20. The ambiguity found in these decisions is exemplified in Phelps v. Sills, 1 Day 315 (Conn. 1804), one of the earliest cases to apply judicial immunity. In *Phelps*, the Supreme Court of Errors of Connecticut, after reviewing prior English cases, stated: "It is, therefore, a settled principle, that however erroneous his judgment may be, either by positive acts, neglect, or refusal to do certain acts, or however injurious to a suitor, a judge is never liable, in any civil action, for damages arising from his mistake." *Id.* at 329. On its face, this statement would seem to support absolute immunity, regardless of the motives of the judge. There is some question, however, whether this is an accurate interpretation. The court noted specifically that "no impurity of motive is imputed to [the defendant judge] and none is to be inferred." *Id.* This comment by the court indicates that proof of bad faith or malicious intent might have led to a different result.

21. Hamilton v. Williams, 26 Ala. 527 (1855); Trammel v. Town of Russellville, 34 Ark. 105 (1879); Deal v. Harris, 8 Md. 40 (1855); Stewart v. Case, 53 Minn. 62, 54 N.W. 938 (1893); Stone v. Graves, 8 Mo. 111 (1843); Scott v. Fishblate, 117 N.C. 265, 23 S.E. 436 (1895); Root v. Rose, 6 N.D. 575, 72 N.W. 1022 (1897); Yates v. Lansing, 5 Johns. 282 (N.Y. 1810); Rudd v. Darling, 64 Vt. 456, 25 A. 479 (1892).

22. Garfield v. Douglass, 22 Ill. 100 (1859); Wasson v. Mitchell, 18 Iowa 153 (1864); Gregory v. Brown, 7 Ky. 28 (1815); Vennum v. Huston, 38 Neb. 293, 56 N.W. 970 (1893).

23. Phelps v. Sill, 1 Day 315 (Conn. 1804). A commentator who conducted a more extensive study of state judicial immunity prior to 1871 found that absolute judicial immunity had been adopted in thirteen states, and in six states immunity was dependent upon good faith. The other eighteen states either had not ruled on this question or their decisions were unclear. Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 326–27 (1969).

The United States Supreme Court addressed judicial immunity for the first time in 1868. In *Randall v. Brigham*,[24] the plaintiff-attorney had been found guilty of malpractice and misconduct by the Massachusetts Superior Court.[25] The court, acting pursuant to state statute, disbarred the plaintiff, who then brought a civil suit for wrongful removal against the superior court judge.[26] Mr. Justice Field incorporated two English concepts into the judicial immunity doctrine announced by the Court.[27] Apparently aware of the English distinctions between inferior and superior judges,[28] and good faith as opposed to malicious acts,[29] Justice Field observed:

Many of the states upholding judicial immunity from civil liability allowed judges to be brought to trial for criminal acts. *See, e.g.*, Evans v. Foster, 1 N.H. 375 (1819); Lining v. Bentham, 1 S.C.L. (2 Bay) 1 (S.C. 1796).

24. 74 U.S. (7 Wall.) 523 (1868).

25. *Id.* at 526.

26. *Id.*

27. Great Britain originally allowed civil suits against judges. These suits were in the form of a complaint of "false judgment," and were brought against the judge causing the injury. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 664–68 (2d ed. 1898). Only justices of the King's court were allowed to hear the suit and they could find for the complainant either on the basis of a factual error in the record or as a matter of law. *Id.* at 666–67. If the King's justices decided favorably for the complainant, the inferior court's judgment would be annulled and pecuniary damages would be paid in certain cases. *Id.* at 667. Although Great Britain later adopted judicial immunity, these suits may have been the basis for the exception to the doctrine in the case of an inferior court judge acting in bad faith. *See* notes 28–29 *infra*.

28. In Great Britain, a distinction developed between acts done within the court's jurisdiction and those acts done in excess of the court's jurisdiction. An inferior court judge acting in excess of his jurisdiction would not be immune, whereas often a superior court judge, also acting in excess of his jurisdiction, would be immune. *See* Prickett v. Gratiex, 115 Eng. Rep. 1158 (K.B. 1846); Davis v. Capper, 109 Eng. Rep. 362 (K.B. 1829); 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 239 (1924). The theory supporting liability of inferior court justices was that since the jurisdiction of an inferior court was set by law, those justices could not determine their jurisdiction. If they attempted to do so and erred in defining its limits too broadly, this was the equivalent of acting outside their jurisdiction. *Id.* Because a superior court judge, on the other hand, did have the authority to determine his jurisdiction, it was difficult to allege that he had exceeded his jurisdictional limits. *See* J. CLERK & W. LINDSELL, TORTS ¶ 1976 (13th ed. 1969).

The liability of inferior court justices for acts in excess of their jurisdiction was codified in the Justices' Protection Act of 1848, 11 & 12 Vict., c. 44, § 1. Section 1 of the Act provided that a judge, acting within his jurisdiction, could be sued for malicious conduct. The malice requirement of section 1, however, did not have to be fulfilled where the justice acted in excess of his jurisdiction. *Id.* § 2.

29. During the 19th century, an English inferior court judge was liable for malicious or corrupt acts, even when the judge acted within his authority. Linford v. Fitzroy, 116 Eng. Rep. 1253, 1258 (Q.B. 1849); Cave v. Mountain, 133 Eng. Rep. 330, 333 (C.P. 1840); Burley v. Bethune, 128 Eng. Rep. 816, 818 (C.P. 1814). Thus, the judge was immune only where he acted within his jurisdiction and in good faith. This concept was codified in section 1 of the Justices' Protection Act of 1848, which stated:

> [E]very action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort;

> [I]t is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, *unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly.*[30]

Thus, the first Supreme Court decision on judicial immunity allowed exceptions to the doctrine for malicious or corrupt judicial acts and for acts of inferior court judges in excess of their jurisdiction.

Three years later, the Supreme Court had an opportunity to reconsider the doctrine of judicial immunity in *Bradley v. Fisher*.[31] During the trial of John Suratt for the murder of President Lincoln, Bradley, an attorney for the defendant, accosted and threatened Judge Fisher, the presiding judge.[32] The judge subsequently ordered attorney Bradley's name to be stricken from the roll of the District of Columbia Criminal Court.[33] Bradley thereupon brought a civil suit against Judge Fisher, requesting pecuniary damages of $20,000.[34]

The Court, with apparent indifference to the qualified immunity doctrine announced in *Randall*, held that "judges of courts are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and *are alleged to have been done maliciously or corruptly.*"[35] To reconcile his earlier statements in *Randall* with the holding of absolute judicial immunity in *Bradley*, Justice Field wrote:

> and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause.

Justices' Protection Act of 1848, 11 & 12 Vict., c. 44, § 1.

Mr. Justice Field, however, expanded the concept of malicious judicial acts by applying it to all judges, not solely to inferior court judges, which had been the limit imposed by the English courts.

30. 74 U.S. at 535–36 (emphasis added).

31. 80 U.S. (13 Wall.) 335 (1872).

32. *Id.* at 337. Although the order stated that the threat occurred as the judge was leaving the bench during a recess, the plaintiff claimed in his declaration that he did not approach the judge until the judge had left the courthouse. *Id.* at 337–38.

33. *Id.* The plaintiff, however, interpreted the order as striking his name from the rolls of the Criminal Court and the Supreme Court of the District of Columbia. Although the criminal court later became a branch of the supreme court, the Supreme Court found that at the time of the act, the two courts were separate and independent. *Id.* at 344–45.

34. *Id.* at 338–39.

35. *Id.* at 351 (emphasis added). The reason offered by Mr. Justice Field for dispelling the notion that liability is dependent upon the motive of the judge is that a losing party would claim a malicious motive solely to get his claim into court and in disregard of whether the motive ascribed had any basis in fact. *Id.* at 354.

> The qualifying words [in the *Randall* opinion] were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.[36]

After *Bradley*, then, a person injured by malicious judicial conduct was precluded from bringing a tort action against the judge. Since the common law tort action was the only vehicle upon which a judicial misconduct suit could be based at that time, the *Bradley* decision had the effect of prohibiting all civil suits against judges.

Subsequent to the Supreme Court's decision in *Randall*, but while *Bradley* was being argued before the Court, Congress enacted the Civil Rights Act of 1871.[37] The main purposes of the Act were to protect black citizens from organized racist movements,[38] and to provide a remedy for injuries that were occurring at the hands of federal and state law enforcement officials during Reconstruction. Section 1 of the 1871 Act[39] provided:

> 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.[40]

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36. *Id.* at 351.

37. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (now 42 U.S.C. § 1983 (1970)). This Act was passed in response to criticism of the ineffective enforcement of state laws in the South during Reconstruction. Although the Act was aimed at state officials in general, the judicial maladministration occurring at this time was a specific target of the Act's supporters. For example, Senator Osborn observed that "justice is mocked, innocence punished, perjury rewarded, and crime defiant in the halls of justice." CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871). Representative Platt equated the Southern county judges with "little Kings, with almost despotic powers." CONG. GLOBE, 42d Cong., 1st Sess. 186 app. (1871).

38. The debates over the Act centered on the activities of the Ku Klux Klan to the extent that the 1871 Act became known as the "Ku Klux Klan Act." See the debates on the Civil Rights Act in CONG. GLOBE, 42d Cong., 1st Sess. (1871).

39. Section 1 is now codified at 42 U.S.C. § 1983 (1970).

40. 42 U.S.C. § 1983 (1970). Although at the time of passage section 1983 was a rather uncontroversial part of the entire Act, in the last 15 years the number of section 1983 actions has skyrocketed. *See* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 563; Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615, 620 n.19 (1970).

For the first time, it appeared there was statutory authority for relief from judicial abuse.[41] Yet, by the turn of the century the possibility of suits against judicial officers under section 1 had received little attention. Even though congressional debates on the Civil Rights Act indicated that state judges were defendants within the anticipated scope of that section,[42] it was not until 1945 that a federal court discussed this issue in depth. In *Picking v. Pennsylvania Railroad,*[43] the Third Circuit held that judicial immunity was not a valid defense to a suit brought under section 1983, the successor to section 1 of the Civil Rights Act of 1871. The plaintiffs in *Picking* had been denied a hearing after their arrest in violation of their fourteenth amendment due process rights.[44] Suing under section 1983, the plaintiffs named 23 defendants, including the judge. On the issue of judicial immunity, the court reasoned:

> [T]he privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so. . . . The statute must be deemed to include members of the state judiciary acting in official capacity.[45]

Although other federal circuit courts also found judicial liability under section 1983 within a few years of *Picking*,[46] the *Picking* holding, and those

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41. Although the plain import of the statutory language would seem to indicate that its application to individuals acting under color of state law is unlimited, recent Supreme Court decisions have held that the statute is not applicable to state legislators, judges, and prosecutors. Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951). As support for this interpretation the Court has cited the 1871 debates on the Act. *See* Pierson v. Ray, 386 U.S. 547, 554–55 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951). The debates, including the expressed intent of the author of section 1 of the Act, do not support the Court's interpretation of the term "person," particularly when used in reference to judicial officers. *See* notes 66–77 *infra* and accompanying text.

42. CONG. GLOBE, 42d Cong., 1st Sess. 365–66 (remarks of Rep. Arthur); *id.* at 217 app. (remarks of Sen. Thurman). *See* notes 68–77 *infra* and accompanying text.

43. 151 F.2d 240 (3d Cir. 1945), *cert. denied,* 332 U.S. 776 (1947). This case was subsequently overruled in Bauers v. Heisel, 361 F.2d 581 (1966).

44. 151 F.2d at 245.

45. *Id.* at 250.

46. In McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949), the plaintiff claimed that a justice of the peace, a constable, and others had conspired to deprive her of a fair and impartial jury in violation of her fourteenth amendment due process rights. She brought suit against these state officials under the early counterparts of 42 U.S.C. §§ 1983, 1985 (1970). The *McShane* court did not specifically discuss the judicial immunity issue, apparently because it had not been raised by the defendant. The court, however, did find that all the defendants, including the judge, were state officers acting under color of state law and therefore the district court had jurisdiction over them under section 1983.

decisions adopting it, were rendered nugatory by later judicial rulings.[47]

In 1951 the Supreme Court addressed the issue of state legislators' immunity from section 1983 suits. The Court in *Tenney v. Brandhove*[48] held that the common law rule of immunity for legislators survived the Civil Rights Act of 1871 and rendered state legislators immune from a section 1983 suit.[49] The *Tenney* decision provided a sample statutory construction for courts determining judicial immunity under section 1983.

The Supreme Court, however, hesitated to apply the *Tenney* rationale to state judicial officers, and it consistently denied certiorari in federal court cases establishing judicial immunity in section 1983 suits[50] until *Pierson v. Ray* was decided in 1967.[51] In *Pierson*, a group of black clergymen attempting to use a "white only" waiting room in a Jackson, Mississippi, bus terminal were arrested and convicted of violating a state breach-of-the-peace statute.[52] Only one year before *Pierson*, the Court in *Boynton v. Virginia*[53] had determined that racial discrimination against interstate passengers in bus terminals was violative of the Interstate Commerce Act.[54] Although the defense directed the police court judge to the *Boynton* holding,[55] he imposed the maximum sentence upon the defendants.[56] The judge's decision was reversed

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One year after the *Picking* decision, the Second Circuit Court of Appeals also interpreted a predecessor to section 1983 as including state judges. Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946).

47. *See* cases cited in Tate v. Arnold, 223 F.2d 782, 785 (8th Cir. 1955).

48. 341 U.S. 367 (1951).

49. The immunity of legislators was more strongly entrenched in Anglo-American law prior to 1871 than was judicial immunity. The constitutions of the federal and many state governments contained provisions upholding this immunity. *See, e.g.*, U.S. CONST., art. I, § 6; MASS. CONST. of 1780, art. 21; N.H. CONST. of 1784, art. 30. This historical analysis provided the foundation for the *Tenney* opinion. *See* Tenney v. Brandhove, 341 U.S. 367, 372–76 (1951).

50. *E.g.*, O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926, *reh. denied*, 385 U.S. 889 (1966); Garfield v. Palmieri, 297 F.2d 526 (2d Cir. 1961), *cert. denied*, 369 U.S. 871 (1962); Meredith v. Van Oosterhout, 286 F.2d 216 (8th Cir. 1960), *cert. denied*, 365 U.S. 835 (1961); John v. Gibson, 270 F.2d 36 (9th Cir. 1959), *cert. denied*, 361 U.S. 970 (1960); Kenney v. Fox, 232 F.2d 288 (6th Cir.), *cert. denied*, 352 U.S. 855 (1956); Eaton v. Bibb, 217 F.2d 446 (7th Cir. 1954), *cert. denied*, 350 U.S. 915 (1955); Francis v. Crafts, 203 F.2d 809 (1st Cir.), *cert. denied*, 346 U.S. 835 (1953).

51. 386 U.S. 547 (1967).

52. MISS. CODE ANN. § 2087.5 (Supp. 1971), provided that it is a misdemeanor for a group of people, who have congregated in a public place in such a manner that a breach of the peace may occur, to refuse to leave when ordered to move on by the police. After the arrest had occurred in *Pierson*, but before the Supreme Court's decision, this statute was held unconstitutional by the Supreme Court in Thomas v. Mississippi, 380 U.S. 524 (1965).

53. 364 U.S. 454 (1960). The petitioner in *Boynton* had been arrested and convicted for attempting to use part of an interstate bus terminal restaurant designated for "white only."

54. *Id.* at 463–64.

55. Kates, *supra* note 40, at 628–29.

56. Maximum sentences in this instance consisted of a $200 fine and four months in jail. 386 U.S. at 549–50. Here, damages potentially would include all of the elements described in note 6 *supra*.

by a state appellate court,[57] but the clergymen brought suit in the United States District Court for the Southern District of Mississippi against the police court judge and the officers making the arrest for false arrest and violation of section 1983.[58]

Mr. Chief Justice Warren, speaking for the majority, recognized only limited immunity for the police officers, depending on whether they had acted in good faith and with probable cause.[59] Nevertheless, the Court found the police court judge absolutely immune from section 1983 suits. The decision was based on (1) the belief that judicial immunity was a well-established principle of common law[60] and (2) the legislative history of section 1 of the Civil Rights Act.[61] However, both the pre-1871 judicial immunity cases and the legislative history of the Act indicate that Mr. Chief Justice Warren's reasons were unsound.[62]

Judicial immunity was not unanimously supported under the common law nor was it "solidly established" by 1871. The doctrine had strong roots in the English judicial system, but not even in England was total immunity granted to inferior court judges.[63] There were also differences among the states in the application of the doctrine even after it was adopted in the United States and only half the states had any type of judicial immunity in 1871.[64] It is therefore difficult to support Chief Justice Warren's statement

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57. 386 U.S. at 550.

58. In the federal district court, a jury found in favor of both the judge and the police officers. The Court of Appeals for the Fifth Circuit, however, found the judge immune. Since the state statute under which the police officers acted was later held unconstitutional (*see* note 52 *supra*), the court found that they could be held liable under section 1983 even if good faith and probable cause in making the arrest were shown.

59. 386 U.S. at 557.

60. Mr. Chief Justice Warren concluded, without elaboration, that "few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial discretion." 386 U.S. at 553–54.

61. After summarily noting some of the reasons for the doctrine, the Court turned to the legislative history of section 1983. Chief Justice Warren concluded that since the legislative record did not indicate that Congress intended to "abolish wholesale all common-law immunities," and that "Congress would have specifically so provided had it wished to abolish the doctrine," judicial officers had an absolute immunity from section 1983 actions. *Id.* at 554–55.

The Court also relied on Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872), and Tenney v. Brandhove, 341 U.S. 367 (1951), to support its position.

62. Mr. Justice Douglas vigorously dissented from the Court's interpretation of the common law and the legislative history. By reviewing the attitudes of certain representative members of the 42d Congress, Justice Douglas was able to present a strong criticism of the majority's view of congressional intent: "The position that Congress did not intend to change the common-law rule of judicial immunity ignores the fact that every member of Congress who spoke on the issue assumed that the words of the statute meant what they said and that judges would be liable." 386 U.S. at 561.

63. *See* notes 28–29 *supra*.

64. An observer has noted that of the 37 states existing by 1871, only 13 had adopted absolute immunity, 6 provided only a qualified immunity, 9 states had not clearly resolved the

that "few doctrines were more solidly established at common law than the immunity of judges."[65]

The Court's unjustified reliance upon the legislative history of section 1 has been severely criticized.[66] Although the Court correctly stated that there is "no clear indication . . . Congress meant to abolish wholesale all common-law immunities [by enacting the Civil Rights Act],"[67] this does not mean that Congress intended to preserve all of the common law immunities, including those which existed for the judiciary. In fact, the legislative record indicated that Congress recognized and accepted the fact that state judges would not be immune from actions based on section 1 of the Act. Most of the members of Congress believed that the maladministration of justice in the South was due to some extent to acts or omissions of state judicial officers.[68] The legislative record is replete with statements similar to the one quoted by Mr. Justice Douglas in his dissenting opinion: "Mr. Rainey of South Carolina noted that 'The courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity.' "[69]

Furthermore, opponents of the bill did not hesitate to condemn the scope of section 1 for including judges as potential defendants. Representative Lewis of Kentucky observed that "by the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be."[70] Another Congressman had a more dramatic response to the intended scope of section 1:

> Under the provisions of this section every judge in the State court . . . will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread, and bent upon him the scowl of unbridled power, the forerunner of the impending wrath, which is gathering itself to burst upon its victim . . . .[71]

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issue either for or against the doctrine, and the final 9 states had not been presented with the issue. Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 326–27 (1969).

65. 386 U.S. at 553–54.

66. *E.g.*, Pierson v. Ray, 386 U.S. 547, 559–63 (1967) (Douglas, J., dissenting); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615, 621–23 (1970); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 327–28 (1969).

67. 386 U.S. at 554.

68. *See* note 37 *supra*.

69. 386 U.S. at 559.

70. CONG. GLOBE, 42d Cong., 1st Sess. 385 (1871).

71. *Id.* at 366 (remarks of Rep. Arthur). *See id.* at 217 app. (remarks of Sen. Thurman).

Apparently, both sides believed that section 1 included judges; the proponents of the bill never denied the opposition's statements concerning the inclusion of judges.

Additional legislative support exists for holding judges not immune from section 1983 suits. Section 1 was designed to complement an 1866 statute that provided a criminal remedy for the same deprivations for which section 1 provided a civil remedy.[72] The debate over the 1866 criminal statute confirms that that statute, as well as section 1, was to include judges. For example, Representative Eldridge objected to the bill because it attached "pains and penalties to the judge of a State court who, in the exercise of his judicial functions, shall act contrary to its provisions."[73] Members of the Senate were similarly distressed by the provision.[74] Representative Wilson, the author of the 1866 Act, observed that if Congress had the authority to make judges criminally liable, then it could also make them civilly liable.[75] In fact, the use of the 1866 Act as a model for section 1 of the 1871 Act was specifically advocated by the author of the 1871 Act.[76] The relationship between the two sections was also recognized by the Supreme Court in *Monroe v. Pape*.[77]

Because the doctrine of judicial immunity was judicially created, it is reasonable to assume that the legislators of the 42d Congress looked to contemporary judicial decisions to determine the extent of the immunity. Such an examination reveals the judicial viewpoint in 1871, as expressed in *Randall*, of partial immunity dependent on the good faith of the judge and his jurisdictional authority;[78] the absolute immunity theory of *Bradley* had not

72. Representative Shellabarger, the author of the 1871 Act, stated:

> My first inquiry is as to the warrant which we have for enacting such a section as this. The model for it will be found in the second section of the act of April 9, 1866, known as the "civil rights act". That section provides a criminal proceeding in identically the same case as this one provides a civil remedy for . . . .

CONG. GLOBE, 42d Cong., 1st Sess. 68 app. (1871); *Compare* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (now codified at 42 U.S.C. § 1983 (1970)) *with* Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (now codified at 18 U.S.C. § 242 (1970)).

The criminal statute, section 242, provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242 (1970).

73. CONG. GLOBE, 39th Cong., 1st Sess. 1154–55 (1866).

74. *Id.* at 475–76 (Sens. Cowan and Trunbull).

75. *Id.* at 1925.

76. *See* note 72 *supra*.

77. 365 U.S. 167, 185 (1961).

78. *See* text accompanying notes 24–30 *supra*.

yet been developed.[79] The Supreme Court's position on the question of immunity is reflected in the aforementioned congressional belief that judges could be liable under the 1871 Act.

Thus, a careful review of the legislative history of section 1983 and of contemporary case law indicates that the legislature intended to impose liability on those judges who violated section 1983. The *Pierson v. Ray* decision is typical of many decisions, both federal and state, which have unjustifiably upheld judicial immunity without adequately analyzing the doctrine. Nevertheless, the *Pierson* holding is the governing rule.[80] Although the courts have recently qualified the immunity doctrine with respect to executive, administrative, and other quasi-judicial officers who perform discretionary acts,[81] they have consistently upheld judicial immunity as prohibiting section 1983 suits against judges.

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79. The *Bradley* case was decided six months after the debates on the 1871 Act had ended.

80. In the closely related field of prosecutorial immunity, however, the Supreme Court recently has held that a prosecutor, acting within the scope of his duties in prosecuting criminal cases, has absolute immunity from a civil suit for damages brought under section 1983. Imbler v. Pachtman, 424 U.S. 409 (1976). *Imbler* presented a situation where the petitioner was found guilty of a first degree felony-murder and was sentenced to death. After the trial, new corroborative witnesses supporting Imbler's alibi were discovered and the credibility of the prosecution's prime identification witness came into question. Consequently, Imbler petitioned the California Supreme Court for a writ of habeas corpus, but the state court denied the writ. *In re* Imbler, 60 Cal. 2d 554, 387 P.2d 6, 35 Cal. Rptr. 293 (1963), *cert. denied*, 379 U.S. 908 (1964). Five years later, Imbler petitioned the federal district court for a writ of habeas corpus on the same grounds. The federal court, arriving at a different result from that reached by the state court, found that the prosecution knew that some of their prime witness' testimony was misleading and had cause to suspect that other testimony was false. Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969). The writ was granted and Imbler was released. Imbler then filed a 1983 action against the prosecutor for unlawful deprivation of his liberty.

In an opinion by Mr. Justice Powell, the Supreme Court reviewed the common law approach to prosecutorial immunity and the policy reasons supporting immunity in arriving at its conclusion of absolute prosecutorial immunity. The Court also attempted to delineate the distinction between recipients of only a qualified immunity and those officers entitled to absolute immunity. This ambiguous distinction, along with its ramifications on judicial immunity, is critically analyzed at notes 165–85 *infra* and accompanying text.

The *Imbler* decision recently has been applied to a suit alleging a direct constitutional cause of action against an assistant United States district attorney. Although this was not a section 1983 action, the Third Circuit found that the *Imbler* policy considerations existed under this new cause of action and therefore granted an absolute immunity to the federal prosecutor. *See* Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976).

81. O'Connor v. Donaldson, 422 U.S. 563 (1975) (Superintendent of state mental institution has a qualified immunity); Wood v. Strickland, 420 U.S. 308 (1975) (School official has only a qualified, good-faith immunity, dependent upon whether "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." *Id.* at 322.) (This same test was applied in *O'Connor.*); Scheuer v. Rhodes, 416 U.S. 232 (1974) (Executive officials have a qualified immunity, dependent upon "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief." *Id.* at 247–48.).

III. A Critical Analysis of the Arguments Supporting Absolute Judicial Immunity

The Court's decisions in *Bradley* and *Pierson* firmly entrench the judiciary's immunity from either tort or section 1983 suits. Even so, the four policy reasons typically recited to support judicial immunity demonstrate the doctrine's inherent fallacies.[82]

The need for finality in judicial proceedings is the first justification for immunity.[83] Arguably, the immunity doctrine provides a final resolution in a system of potentially infinite controversies.[84] In theory, a plaintiff who lost a suit could bring another suit against that judge, and another suit against the judge who heard the case against the trial judge, *ad infinitum*.[85] The initial premise of this argument, however, is faulty. As a practical matter, numerous suits would deplete the financial resources of the litigant, particularly if he lost in the lower court and had to pay his own expenses as well as court costs. Furthermore, there are means other than judicial immunity to achieve finality. Within the last century the American legal system has undergone intense introspection resulting in the advent of more extensive procedural safeguards. Little judicial time would be wasted by using a summary judgment[86] or other pretrial procedure to dispose of a frivolous suit against a judge.[87]

The need for an independent judiciary is another rebuttable argument supporting judicial immunity.[88] For our purposes, the term "independent

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82. Many of the reasons offered in support of executive or administrative immunity are either identical or analogous to the reasoning advanced in defense of judicial immunity. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). *But see* Imbler v. Pachtman, 424 U.S. 409 (1976). Yet, recent cases have held that executive and administrative officers are entitled to only a qualified, good-faith immunity. *See* text accompanying notes 148–56 *infra*.

83. *See* Floyd and Barker, 77 Eng. Rep. 1305, 1306 (K.B. 1608), where Lord Coke expressed the common fear that allowing such suits would lead to infinite controversies.

84. Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 271–74 (1937).

85. 2 T. Cooley, A Treatise on the Law of Torts § 312, at 425 (4th ed. 1932).

86. Fed. R. Civ. P. 56.

87. The most common means of disposing of a case in this situation, other than by summary judgment, would be a judgment on the pleadings. Fed. R. Civ. P. 12(c). In addition, the presiding judge may hold a pretrial conference with the parties at which time he may discourage the continuance of a frivolous suit. Fed. R. Civ. P. 16.

88. One of the most often quoted statements of this argument is in Scott v. Stansfield, L.R. 3 Ex. 220 (1868), where the court reasoned that the doctrine is not for the protection of the judge, "but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 223. Although the *Scott* court negated the practical result that it is the judge who is receiving the protection, it was correct in observing that the public will benefit to some extent by the immunity doctrine. The benefit to the public from an independent judiciary must be balanced against the need to provide a remedy to the injured party. Under a system of total immunity, there is

judiciary"[89] means that the judge should be protected from influence exerted by private parties.[90] However, the judiciary is not independent of public whim. On both the state and local levels judges are often elected, not appointed, and so must answer to the public. Even where judges are appointed, they are often subject to pressure from political parties directly reflecting the prevailing attitudes of their constituencies. When the independence theory has been applied to the executive branch as a basis for sovereign immunity, cases abrogating state tort immunity[91] have indicated that the independence of government institutions cannot override the need to remedy government-caused injuries. The same reasoning should be applied to the judiciary.

It is also argued that putting a judge on the stand as a defendant will diminish respect for his subsequent actions.[92] Although trying a judge may lessen respect for the individual, respect for the judiciary as an institution is more seriously undermined by not requiring the judge to account for his malicious acts.[93]

If judges were unable to claim immunity it is arguable that they would be sued by every party who was dissatisfied with the outcome of his case,[94]

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no balancing in a particular case, since this system rests on the assumption that the public need automatically outweighs the private remedy. But if the judicial act is maliciously motivated, then it might be advisable to limit that judge's independence and to make him fear the consequences of his malicious act, since in this situation the public is not being benefitted but is being injured by propagating a judicial system in which judges have the freedom to act maliciously without fear of suit. Hence, the best system is one of a qualified judicial immunity, which would result in a true "balancing" and greater protection for both the general public and the private individual.

89. Jennings, *supra* note 84, at 271. Another interpretation of this phrase is that of independence between federal and state governments. The argument is based on a division of power between federal and state levels, which would be infringed upon if the courts allowed a state judge to be sued in the federal courts, as occurs in a section 1983 suit. The Supreme Court, however, has rejected this argument, particularly where the state officer has violated the claimant's constitutional rights. *Ex parte* Virginia, 100 U.S. 339 (1879). It should also be noted that one of the purposes of section 1983 was to allow suits against state officers in federal courts and the federal-state conflict was ineffectively used as an argument against the passage of the 1871 Act.

90. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872); Yates v. Lansing, 5 Johns. 282, 298 (N.Y. 1810); Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868).

91. *See, e.g.*, Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Smith v. Idaho, 93 Idaho 795, 437 P.2d 937 (1970); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89, *cert. denied*, 362 U.S. 968 (1959); Willis v. Department of Conservation & Economic Div., 55 N.J. 534, 264 A.2d 34 (1970); Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975); Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). *See generally* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919.

92. 2 T. COOLEY, *supra* note 85, at 424.

93. The Watergate trials have taught us that respect for any government institution may be promoted by bringing to justice those officials who abuse their powers.

94. 2 T. COOLEY, *supra* note 85, at 424.

and that occupying "the judge's time and mind with the defense of his own interests,"[95] would distract his attention from judicial responsibilities. However, this threat is illusory. Frivolous or insubstantial claims are easily dismissed by summary judgment or judgment on the pleadings.[96] Dismissal may be granted where there is no genuine issue of material fact,[97] providing a vehicle for the quick elimination of unjustified claims. Most, if not all, of the frivolous suits brought by parties dissatisfied with the judgment would be disposed of prior to trial.

In addition, judicial liability may not even increase the number of suits filed. A person who would bring a frivolous suit under a qualified judicial immunity system is just as apt to do so under the present system by pleading that the judge did not have subject matter jurisdiction and therefore was liable for his acts.[98] More importantly, those claimants who suffer an actual injury as a result of malicious judicial misconduct should not be denied a remedy solely to prevent possible frivolous and insubstantial claims.[99]

Neither the need for finality, the need for an independent judiciary, the aversion to a multiplicity of suits, nor the fear of the negative effect on respect for judicial opinion holds up under close scrutiny as support for judicial immunity. The weakness of these justifications is further demonstrated by the presence, indeed acceptance, of judicial liability in other parts of the world, most notably the civil law countries.

IV JUDICIAL LIABILITY IN CIVIL LAW COUNTRIES

Judicial liability has long existed in the civil law countries. Although the inherent differences between the common law and the civil law systems cannot be denied, those relevant to the question of judicial immunity are insignificant and do not preclude a comparison of immunity under the two systems.

The fundamental difference between civil and common law jurisdictions is that common law countries, such as the United States and Great Britain, depend upon judicial precedents and strict procedural forms of action. The

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95. *Id.*

96. FED. R. CIV. P. 56, 12(c). *See* note 87 *supra.*

97. FED. R. CIV. P. 56(c).

98. *See* Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 331 & n.51 (1969).

99. In the area of executive and administrative immunity, the need to provide a remedy to the injured victim has received greater attention than the protection of the officials from frivolous claims. Although the same problem of frivolous litigation arises in this area, the Supreme Court has granted executive and administrative officials only a limited, good-faith immunity. O'Connor v. Donaldson, 422 U.S. 563 (1975); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

continental countries, on the other hand, have enacted comprehensive civil and criminal codes,[100] preferring legislation to case law precedent. Advocates of judicial immunity may seek to explain the success of judicial liability in civil law countries by contending that the discretion of judges in a civil law system could not be impeded by judicial liability because civil law judges merely apply the codifications; they do not exercise discretion. The inherent weakness in this argument is the premise that a civil law judge exercises less discretion than his common law counterpart merely because he relies on codified law. The contrary is true; most of the codes use broad general terms, allowing a judge great latitude in interpreting a particular section.[101]

Even this major difference between the systems, the preference for codes over case law, is disappearing. Previous judicial decisions are used extensively as precedent by the judiciary in civil law countries, while an increasing amount of legislation is being enacted in common law jurisdictions. It has been noted that

> French law is codified, and legislation occupies a paramount position. While this statement is valid, it is no more true than an assertion that English, American, or Australian law is based upon judicial decisions. In many areas of those legal systems legislation is of great importance, and similarly in France there are areas of the law that consist primarily of judicial decisions. A few of the most important areas where this is true are administrative law, private international law, and noncontractual liability.[102]

Another distinction pointed to as prohibiting an analogy is that civil law countries operate under a bifurcated legal system. Under the civil law system, private law governs the relationships between private citizens, and public law presides over governmental organizations and their contact with individuals.[103] Although this division is absent in the common law coun-

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100. However, judicial decisions are being given more precedential value by the judiciary in civil law countries. Moreover, an increasing amount of legislation is being enacted in common law jurisdictions. *See* text accompanying note 102 *infra*.

101. [T]here are a great many cases where the judge's role is far more creative. The legislature sometimes deliberately speaks in very general terms: it has said that divorce can be obtained where there are serious grounds; contracts must be performed in good faith; a person must repair the damage caused another by his fault; the penalty for a crime can be reduced if there are extenuating circumstances; an act of a government official is invalid if in excess of his powers. The legislature, however, has not defined serious grounds or fault, nor explained what is required by good faith nor what constitute extenuating circumstances.

R. DAVID, *Preface* to FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY xiii (1972).

102. *Id.* at xii.

103. *See* E. COHN, MANUAL OF GERMAN LAW 6–7 (1968); R. DAVID, THE FRENCH LEGAL SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS 45–46 (1958); R. DAVID, *supra* note 101, at 98–107.

tries,[104] it does not affect the issue of judicial immunity. Under either system, the question of judicial immunity is one of private law.[105]

A third difference is the structure of the judiciary in the respective systems. Although judicial organization varies among civil law countries, all have an element in common with the common law countries: the judiciary is independent in theory and practice from the other governmental branches.[106] In civil law countries the court structure is not only divided vertically as in common law countries, it is divided horizontally into subject matter areas as well. Thus, in France there are courts which only resolve

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As with most code countries, the German legal system relies upon a fundamental distinction between two areas of law: (1) private law, which includes torts, contracts, property, commercial transactions, and domestic relations; and (2) public law, which consists of administrative law, criminal law, and constitutional law. *See* E. COHN, *supra*, at ¶ 13. The oldest, and probably the simplest, definition of this distinction was offered by Ulpian in his Digest: "*Publicum jus est, quod ad statum rei Romanae spectat; privatum, quod ad singulorum utilitatem* ('Public law is that which concerns the state of the commonwealth; private law that which is for the use of private individuals')." ULPIAN, DIGEST, *quoted in* R. DAVID, *supra* note 101, at 98. The practical application of this distinction, however, is far more difficult than Ulpian's definition would indicate. Municipalities often contract with private businesses to handle certain public services. Although this transaction concerns a state agency, the German courts will likely apply private law, since the basic nature of the dealings between these parties is private contract law. E. COHN, *supra*, at ¶ 11.

Two court hierarchies have been developed to handle the private and public law areas. For the private law domain, jurisdiction is vested in the ordinary courts (*ordentliche Gerichte*). *Id.* at ¶ 12. The ordinary courts, in turn, are divided into different levels: (1) the local courts (*Amtsgericht*), having civil jurisdiction where the monetary amount is small and having criminal jurisdiction over petty offenses; (2) the district courts (*Landgericht*), having original jurisdiction in most other civil and criminal cases; (3) the courts of appeals (*Oberlandesgericht*), of which there are nineteen; and (4) the Federal Supreme Court (*Bundesgerichtshof*). *Id.* at ¶ 53–56.

Questions of administrative law, however, are decided in specially created administrative courts (*Verwaltungsgericht*). *Id.* at ¶ 57. Both of these court systems have jurisdiction over constitutional issues, but, on appeal, these issues are heard before the *Bundesgerichtshof*. *Id.* at ¶ 64.

104. The common law jurisdictions have developed a set of rules governing administrative areas, but not to the same extent as civil law countries. For example, both Germany and France have a separate court system which handles administrative adjudications, *see* note 103 *supra*, whereas in Great Britain and the United States the same courts have authority over both private and public lawsuits.

105. Judicial liability in the United States would be treated as a private, nonadministrative adjudication, either as a section 1983 action, a common law tort action, or a constitutional action. Although judicial liability in a civil law jurisdiction would seem to be a public law question, it is treated as a private law action in most civil law countries. *See* text accompanying notes 186–229, 112, 139 *infra*.

106. In Germany, this principle is set forth in article 97 of the Basic Law, E. COHN, *supra* note 103, at 41, whereas in France, it may be implied from the French Constitution and has traditionally been a part of the system. R. DAVID, *supra* note 101, at 28, 57–58. The independence of the judiciary in the United States may be implied from the separation of powers and the system of checks and balances inherent in the Constitution. *See generally* Muskrat v. United States, 219 U.S. 346 (1911); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

questions of commercial, labor, and agricultural law.[107] In Germany, there are five sets of courts covering different subject areas, each with its own appellate courts.[108]

Distinctions also exist in the training for judgeships in the respective systems. Many judges in the United States are appointed or elected to the bench after years of service in the legal profession, but most civil law judges enter the judiciary immediately upon completion of their legal education.[109] The immediate placement into the judicial ranks causes a judge to view a case as an academician, not as an advocate. The civil law judge is primarily a theoretician; he "is particularly interested in the coherence of legal principles and the harmony of the system."[110] Although the experiential difference between the systems is genuine, it is difficult to conceive how these differences undermine the proposition that the judicial immunity experience in civil law countries may provide guidelines to be used in the adoption of qualified immunity in the United States.

In summary, the differences between the common and civil law systems do not justify their disparate treatment of judicial liability. In fact, the two systems are similar in their independent judiciaries and in the application of private versus public law to the issue of judicial immunity.[111] Both Germany and France allow private suits against the judiciary. The specifics under which their systems operate suggest a possible framework adaptable for application in the United States.

A. *Germany*

1. *Personal Liability*

As a general proposition, judges in the German system have only a partial immunity from suit. In practice, an action against a judge would be brought in a civil court in accordance with the rules of private law.[112] The

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107. M. AMOS & P. WALTON, INTRODUCTION TO FRENCH LAW 7 (3d ed. F.H. Lawson, A.E. Anton & L.N. Brown eds. 1967).

108. E. COHN, *supra* note 103, at 36.

109. R. DAVID, *supra* note 101, at 54.

110. *Id.* at 57.

111. Since the major differences between the two systems have only a minimal impact on judicial liability, the question of why civil law countries have adopted judicial liability becomes even more difficult to answer. Perhaps judicial liability exists today in civil law countries but not in common law countries because of the diverse historical development of the two systems. Just as judicial immunity was formulated early in the development of Anglo-American law, judicial liability also has deep historical roots in the civil law. In Germany, for example, the liability of judges was well established prior to the nineteenth century. *See* text accompanying notes 114–21 *infra*. During this same period, American and English courts were solidifying the doctrine of judicial immunity.

112. Hink, *The German Law of Governmental Tort Liability*, 18 RUTGERS U.L. REV. 1069 (1964). France, however, has developed a separate system of administrative courts, which apply their own body of administrative law to claims against government entities and officials. *See* notes 136–38 *infra* and accompanying text.

cause of action would be based on section 839 of the *Burgerliches Gesetzbuch* (BGB) which provides for the liability of state officials.[113] Although it is codified today, such liability was a fundamental principle of the German common law.

Prior to the codification of the German civil law in 1896, many of the German states had developed a body of rules *(Gemeinrecht)* which became the common law.[114] The *Gemeinrecht* contained rules on the liability of public officials to third parties for injuries resulting from a violation of their duties.[115] The duties of a German judge included a variety of functions not strictly judicial in nature,[116] and the liability of a judge was so broad that in some states judges were accountable for all wrongs.[117]

By the end of the eighteenth century, most of the common law, including that on the liability of public officials, had been incorporated into statutory law *(Partikularrecht).*[118] Under the Prussian Procedural Code, a judge who was "negligent in his official duty to obey the laws should be responsible to the party whom he had injured."[119] And under the Saxony Civil Code, judges were liable for "damages caused by malicious and grossly negligent misconduct."[120] But both of these Codes had limitations; the Prussian code required an exhaustion of other remedies and the Saxony code required the claimant to show that he would still have been injured even if he had used another legal remedy to avert the injury.[121]

In 1896, the common law and statutory rules on tort liability of public officials were codified in section 839 of the BGB. Subdivision 1 of that provision states that when an official breaches an official duty, either willfully or negligently, he must compensate the injured party.[122] In addition, section 839(2) grants partial immunity to judicial officers by relieving judges from liability if the breach consisted of giving judgment in a suit.[123] If, however,

113. BURGERLICHES GESETZBUCH [BGB] § 839 (W. Ger.). *See* notes 122–29 *infra* and accompanying text for the text of section 839 and a discussion of its effects on judicial officers.

114. Hink, *supra* note 112, at 1070.

115. *Id.*

116. *Id.* For a partial list of the functions peculiar to the German judiciary, see *id.* at 1070 n.5.

117. *Id.* at 1071. However, in other states only grossly negligent or intentional acts could be the basis for judicial liability. *Id.* Hink also observed that there might have been a requirement of exhaustion of remedies before an injured claimant could proceed against the judge. *Id.*

118. *Id.*

119. *Id.* at 1072.

120. *Id.*

121. *Id.*

122. BGB § 839(1):

> If an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom. If only negligence is imputable to the official, he may be held liable only if the injured party is unable to obtain compensation elsewhere.

123. *Id.* § 839(2):

> If an official commits a breach of his official duty in giving judgment in an action,

there is a criminal statute providing for liability for the particular breach, the judge does not have immunity and can be sued.[124] Finally, section 839(3) restates the common law principle that there is no liability if the injured party either wilfully or negligently failed to use another legal remedy to prevent the damage.[125]

In Germany, the distinction between discretionary and ministerial roles does not have as much of an effect on liability as it does in the United States.[126] Although an official may not be liable for the use of his discretionary powers, there are limitations to his immunity,[127] so that whenever an official acts in violation of section 823, which provides for general private tort liability, it is considered a breach of his official duty. Thus, a judge under German law has immunity only when rendering judgment. Any other judicial act may lead to liability.[128] The rendering of a judgment in an action also has a more limited meaning in Germany than it does in the United States. A German judge, for example, would be liable under section 839(1) for "procedural rulings on motions or court orders of a general nature, issuance of warrants for arrest, or subpoenas"[129] because these are not considered judgments.

2. *State Liability*

Liability of the German state for acts committed by public officials is based on two concepts: the *fiscus*, or private corporate liability, and gov-

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he is not responsible for any damage arising therefrom, unless the breach of duty is punished with a public penalty to be enforced by criminal proceedings. This provision does not apply to a breach of duty consisting of refusal or delay in the exercise of the office.

124. *Id.*

125. *Id.* § 839(3):

The duty to make compensation does not arise if the injured party has wilfully or negligently omitted to avert the injury by making use of a legal remedy.

One commentator has found six requirements that a claimant must show under section 839: (1) the act was done in the "exercise of an official function;" (2) the officer violated one of his official duties; (3) the officer owed a specific duty to a third party; (4) the officer was at fault; (5) if the act is one of negligence, not intentional, then the claimant exhausted other sources of restitution; (6) the claimant did not wilfully or negligently omit to use other legal remedies to prevent the damage. Hink, *supra* note 112, at 1077–85.

126. The issue is not what function (ministerial or discretionary) the judge was performing at the time he committed the act, but whether he owed an official duty to the injured party. It is likely, however, that the "judgment exception" of section 839(2) is based partially on the fact that when giving a judgment the judge is exercising his greatest degree of discretion.

127. An official who subjects himself to private tort liability is in breach of his official duty. Hink, *supra* note 112, at 1082. A judge may be liable where he has acted "in a purely arbitrary fashion" or has "thoroughly abused his discretion." *Id.*

128. Braband, *Liability in Tort of the Government and Its Employees: A Comparative Analysis with Emphasis on German Law*, 33 N.Y.U.L. REV. 18, 31 (1958).

129. *Id.*

ernmental liability.[130] Under the *fiscus* concept, the private citizen has the option of dealing with the government in certain situations, as in contractual matters. By contrast, the citizen does not have an alternative to dealing with the state when it acts in its governmental capacity.[131] Judicial acts are almost always considered to be within the governmental functions concept.

The liability of the state for governmental functions is governed by article 34 of the *Grundgesetz*, or the Bonn Constitution:[132]

> If any person, in exercising the duties of a public office entrusted to him, violates his official duty to a third person, liability shall in principle rest with the state or the public body which employs that person. In the case of wilful intent or gross negligence, the employing body's right of recourse against the public employee shall be reserved.[133]

When article 34 is read in conjunction with section 839, as was intended by the authors of the *Grundgesetz*, the liability of the state for the acts of its judicial officers is conclusive.[134] The only remaining issue is the state's right of indemnity from the judge. The second sentence of article 34 indicates that the state only has a right of recourse when an official, including a judge, has acted wilfully or with gross negligence.[135]

B. *France*

In France, the judicial system is divided into two court hierarchies, the regular, or civil, courts and the administrative courts.[136] This division is a consequence of the structure of French government being divided into executive, legislative, and judicial spheres, with Parliament supreme. The judiciary occupies the weakest position in French government, even though the executive has lost considerable strength over the past two cen-

130. *Id.* at 32–45; Hink, *supra* note 112, at 1095.

131. Braband, *supra* note 128, at 38.

132. During the period of occupation by Allied forces after World War II, the representatives of the West German states met in the Parliamentary Council, their purpose being to formulate a unified system of laws to govern all of West Germany. Their efforts produced the *Grundgesetz* or Basic Law for the Federal Republic of Germany. This has become the constitution of West Germany, commonly called the Bonn Constitution, and is effective until such time as all of Germany is reunited. *See* Hink, *supra* note 112, at 1128.

133. GRUNDGESETZ art. 34 (W.Ger.), *appearing in* Hink, *supra* note 112, at 1128–29.

134. There are a few exceptions to the liability of the state for the acts of its public officers, most of which are included in the Law on the Liability of the Empire for its Officials, May 22, 1910, [1910] REICHGESETZBLATT [RGBl] 798 (W. Ger.). However, apparently none of these exceptions include judicial officers. *See* Hink, *supra* note 112, at 1138, 1118–20.

135. Civil Service Act of July 14, 1953, [1953] 1 BUNDESGESETZBLATT [BGBl] 551, ¶ 78, § 2 (W. Ger.), *appearing* in Hink, *supra* note 112, at 1129 n.252.

136. These two systems of law are labeled, respectively, the *droit civil* and the *droit administratif.*

turies in reaction to the powerful monarchies of the early Republics. Even today, regular courts neither pass upon the constitutionality of legislation nor control executive activity.[137] To provide judicial control over legislative and executive activity, a separate court system with limited jurisdiction, the administrative courts, was established as a division of the executive branch.[138]

1. *Personal Liability*

Suits against a French judge must be brought in a civil court.[139] Judges of all civil courts, except the *Cour de Cassation,*[140] the highest civil court, may be liable either under criminal provisons of the Penal Code[141] or under civil provisions in the Code of Civil Procedure.[142] In a civil action, the cause of action is specifically limited by the Code and includes "fraud, intentional wrongful conduct or gross professional negligence . . . and unreasonable delay in rendering a decision."[143] The procedure for bringing a suit is intentionally complicated and involves first obtaining permission to sue from

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137. R. DAVID, *supra* note 101, at 27.

138. As a general rule, the administrative courts handle claims against the government and its employees, while the regular courts adjudicate private law questions. In effect, the French administrative law has been judicially developed by the highest administrative court, the *Conseil d'Etat,* whereas the private law has developed from various codes and statutes. Traditionally, the distinction between the two systems has been based on the nature of the act. The administrative courts have assumed jurisdiction over the *faute de service,* or service-connected fault, where the government itself, and not the individual employee, was at fault. On the other hand, when the act is a *faute personnelle,* or personal fault, then the officer is personally liable in the civil courts. *See* R. SCHLESINGER, COMPARATIVE LAW 352–54 (3d ed. 1970); Hink, *Service-Connected Versus Personal Fault in the French Law of Government Tort Liability,* 18 RUTGERS U.L. REV. 17 (1963).

One of the major problems occurs when the *Conseil d'Etat* and the highest civil court, *Cour de Cassation,* reach inconsistent results. To resolve this conflict, an intermediary court, the *Tribunal des Conflicts,* has the power to decide the issue in conflict or to select the proper court system for resolution of the question. P. HERZOG & M. WESER, CIVIL PROCEDURE IN FRANCE 116–18 (1967). Another important problem, at least from the perspective of the potential plaintiff, is the determination of whom to sue—the state in the administrative tribunals or the officer in the civil courts. The administrative courts handle claims against the government so long as the tort was service connected. If the act is a *faute personnelle* (private wrong), only the officer and not the state is liable, and therefore he must be sued in the civil courts. Likewise, if the act is a *faute de service,* then only the government is liable and the officer is relieved from liability. Hink, *supra,* at 50. The dual system thus puts the burden on the injured party to determine whether the act is a personal fault or a service-connected fault.

139. Jacoby, *Federal Tort Claims Act and French Law of Governmental Liability: A Comparative Study,* 7 VAND. L. REV. 246, 255 (1954).

140. P. HERZOG & H. WESER, *supra* note 138, at 138.

141. CODE PENALE arts. 183, 185 (Fr.).

142. C. PRO. CIV. arts. 505–09 (Fr.). Under the Civil Code there is a provision on general tort liability, article 1382, but there is no specific article on the tort liability of public officers as there is in Germany under section 839 of the BGB.

143. P. HERZOG & M. WESER, *supra* note 138, at 132–33.

the presiding judge of the civil appellate court.[144] If permission is granted, the suit is then instituted in an appellate court, or in the *Cour de Cassation* if a judge at the appellate court level is the defendant.[145]

2. *State Liability*

Although the judge must be sued personally, the state is liable on the judgment.[146] However, the state has a right of reimbursement against the judge on any judgments the state must pay.[147]

V. Qualified Immunity for Governmental Officials: A Case in Point Against the Judiciary

It is not necessary, however, to look to civil law countries alone for guidance respecting judicial liability. The elevated status of an immune judiciary is further demonstrated by an examination of the type of immunity granted other governmental officials in this country. Not only are these officials restricted to a qualified privilege, but the nature of their offices, requiring the widest leeway in the exercise of discretion, plus an historic grant of absolute privilege, demonstrates conclusively that absolute judicial immunity is unjustifiably unique.

In *Scheuer v. Rhodes*,[148] the personal representatives of the estates of students who died in the Kent State tragedy brought suit under 42 U.S.C. § 1983 against the Governor of Ohio, the Adjutant General and his assistant, various officers of the Ohio National Guard, and the President of Kent State University. Mr. Chief Justice Burger, after finding that the eleventh amendment did not bar the suit, held that the state officers had a qualified, not absolute, immunity, the degree of qualification "being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."[149]

Although a judge was not included among the *Scheuer* defendants, the decision is important because the rationales cited by the Court as the traditional basis for executive immunity are the same as those offered in support of judicial immunity. As articulated by Chief Justice Burger:

144. *Id.* at 132. If permission is denied, the litigant may appeal, but if he loses on appeal, he may be subject to a fine. *Id.*

145. *Id.* at 133.

146. Jacoby, *supra* note 139, at 255.

147. P. Herzog & M. Weser, *supra* note 138, at 133; Jacoby, *supra* note 139, at 255.

148. 416 U.S. 232 (1974).

149. *Id.* at 247.

> This official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.[150]

Throughout the opinion, the Court relied heavily on the similarity between judicial immunity and the immunity of public officials. At one point in the opinion, Chief Justice Burger noticed that executive officers, "[l]ike legislators and judges . . . are entitled to rely on traditional sources for the factual information on which they decide and act."[151]

One year later, the Supreme Court again faced the issue of public official immunity. In *Wood v. Strickland*[152] an Arkansas school board had expelled two female high school students for "spiking" the punch served at a meeting of an extracurricular organization. The girls had admitted their involvement when the faculty advisor of the organization told them that she would handle their punishment. Knowledge of the incident quickly spread to the board, however, and the members expelled the students for three months. The students then brought suit under section 1983 against the school board members, alleging denial of their due process rights.[153]

As in *Scheuer*, the Court in *Wood* relied heavily on the discretionary nature of a school board member's duties:

> School board members . . . must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making, but to intimidation." [*quoting Pierson*] The im-

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150. *Id.* at 239–40. This rationale has been applied to judges and other officials having discretionary power. Imbler v. Pachtman, 424 U.S. 409, 423–24 (1976) (state prosecutor); Wood v. Strickland 420 U.S. 308, 319 (1975) (school board members and school administrators); Pierson v. Ray, 386 U.S. 547, 554 (1967) (judges).

It should be noted that the remarks quoted are quite similar to those used in conjunction with judicial officers. In fact, the Court further emphasized the similarity in the rationale of the judicial immunity and public officer immunity doctrines:

> We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments. . . .

416 U.S. at 246 n.8, *quoting* Spalding v. Vilas, 161 U.S. 483, 498 (1896).

151. 416 U.S. at 246. Only once did the Court attempt to distinguish the immunity of public officers from judicial immunity, and that was in a footnote on the development of the immunity doctrines. *Id.* at 239 n.4.

152. 420 U.S. 308 (1975).

153. *Id.* at 309–13.

> position of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.[154]

The Court also relied on cases upholding absolute immunity in determining the scope of a school board member's immunity: "*Tenney v. Brandhove*, *Pierson v. Ray*, and *Scheuer v. Rhodes* drew upon a very similar background and were animated by a very similar judgment in construing § 1983 . . . .[W]e now rely on those same sources in determining whether and to what extent school officials are immune from damage suits under § 1983."[155] Although both *Tenney* and *Pierson* recognized absolute immunity, the *Wood* Court, purportedly relying on these cases, extended a school board member's immunity only to acts done in good faith or with no knowledge of their unconstitutionality.[156]

There are several possible reasons why the Court treated executive officers differently from judicial officers. The Court, if persuaded by the policy reasons supporting judicial immunity,[157] may have determined that extending absolute immunity to executive officers was unwarranted because of the inherent differences between executive and judicial roles and the different treatment afforded each at common law.[158]

An executive or administrative official is faced with problems peculiar to his office when making a decision. First, there are usually only untested precedents from past administrations and statutory authorization is often too general or too ambiguous to provide much specific guidance. Therefore, the discretion involved in the decisionmaking process is of a more "political"

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154. *Id.* at 319–20.

155. *Id.* at 320–21.

156. The Court specifically held:

> [A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

420 U.S. at 322.

157. *See* text accompanying notes 82–99 *supra*.

158. Another possible reason for the inconsistent results is that the judiciary, when faced with a case involving judicial immunity, spends less time reviewing case precedents and legislative history, whereas when faced with the question of immunity for other public officers, the court will analyze the issue in greater depth. In *Pierson*, the Supreme Court, when faced with the issue of judicial immunity for the first time in almost a century, concluded its discussion of the issue in a little over one page. 386 U.S. at 553–55. In *Scheuer*, however, the Court took over 10 pages to decide the question of executive immunity. 416 U.S. at 238–49.

nature than a "legal" nature; there is a "complete absence of any adequate criteria by which to determine that their exercise of such a discretion in a particular way was 'legally' wrongful."[159] Although the official could hold hearings on the matter, these hearings would not normally have the adversary element necessary for a complete exposition of the facts. More importantly, executive and administrative officials are often unable to hold hearings because they must act within a relatively short period of time.[160] Consequently, "[d]ecisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and . . . there is often no consensus as to the appropriate remedy."[161] Because of the dearth of reliable authority and the pace of the executive decisionmaking process, it is likely that some decisions are erroneous, even when the official acted with good faith. Thus, qualified immunity for administrative officials is justifiable.[162]

A judge, on the other hand, uses different resources to guide his decision. Although the judge exercises discretion in making a decision, he has been fully briefed on the factual dispute, he is aware of the legal arguments that might apply, he is informed of the case precedents or statutory authorizations upon which he may rely, and he has more time to consider his choices. Therefore, why should judicial officers be given greater immunity than executive officers?

In neither situation, however, should a malicious or corrupt official be given immunity. The disqualifying effect of bad faith was explicitly applied to executive officers in *Scheuer*.[163] The same principle should pertain to judicial officers since they are equally susceptible to a charge of malice.[164]

In *Imbler v. Pachtman*[165] the Court explained the seeming inconsistencies among the past decisions by relying upon the common law development of the respective immunity theories. The plaintiff in *Imbler* had logically argued that a state prosecutor, as a member of the executive branch, could

159. Jennings, *supra* note 84, at 275.

160. *See id.* at 296–97.

161. Scheuer v. Rhodes, 416 U.S. 232, 246–47 (1974).

162. The Supreme Court used the same rationale to justify *absolute* immunity for prosecutors. In Imbler v. Pachtman, 424 U.S. 409 (1976), Mr. Justice Powell observed that "frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation." *Id.* at 425. The Court, however, determined that a prosecutor's role was more closely akin to that of a judge.

163. Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).

164. The presence of malice and the intention to deprive a person of his civil rights is wholly incompatible with the judicial function. When a judge acts intentionally and knowingly to deprive a person of his constitutional rights the exercises no discretion or individual judgment; he acts no longer as a judge, but as a "minister" of his own prejudices.

Pierson v. Ray, 386 U.S. 547, 567 n.6 (1967) (Douglas, J., dissenting).

165. 424 U.S. 409 (1976). *See* note 80 *supra*.

only claim a qualified immunity in accordance with *Scheuer* and other executive immunity cases.[166] The Court disagreed, holding that a prosecutor's function was more closely akin to that of judges and grand jurors, and therefore he should be granted complete immunity. In justification of the different degrees of immunity afforded executive and judicial officers, Mr. Justice Powell observed:

> Our earlier decisions on Section 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under Section 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. The liability of a state prosecutor under Section 1983 must be determined in the same manner.[167]

Despite Mr. Justice Powell's assessment, a "considered inquiry into the immunity historically accorded" judges at common law reveals that judges were not uniformly granted an absolute immunity.[168] The states differed on the immunity question,[169] while the first Supreme Court decision on this issue, *Randall v. Brigham*,[170] denied immunity where the judicial act was malicious or corrupt, or where an inferior court had acted in excess of its jurisdiction. It is also doubtful that the decision in *Pierson*, the first Supreme Court judicial immunity case decided under section 1983, was based upon a "considered inquiry:" the *Pierson* Court cited only one case to support its interpretation of the common law approach.[171]

Whether the immunity accorded top executive officers by the common law was qualified or absolute was not adequately answered in *Scheuer*. The *Scheuer* decision relies on many cases involving lower echelon and nonexecutive officers,[172] and the only top-executive officer immunity cases it cites are *Spalding v. Vilas*[173] and *Barr v. Matteo*.[174] Both of these deci-

166. *Id.* at 420–21. The string of Supreme Court immunity cases from *Pierson* to *O'Connor* would seem to support the plaintiff's contention.

167. *Id.* at 421.

168. *See* text accompanying notes 20–36 *supra*.

169. *See* text accompanying notes 20–23 *supra*.

170. 74 U.S. (7 Wall.) 523 (1868). *See* text accompanying notes 24–30 *supra*.

171. 386 U.S. at 554, *citing* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

172. For cases concerning lower executive officers, the *Scheuer* opinion cited *Pierson* and Monroe v. Pape, 365 U.S. 167 (1961), both involving city police officers. For nonexecutive officers, the Court cited Gravel v. United States, 408 U.S. 606 (1972) (federal legislators), Pierson v. Ray, 386 U.S. 547 (1967) (state judge), and Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators). Although the Court relied heavily on these nonexecutive immunity cases, these cases granted an absolute immunity, not a qualified immunity as advocated by the *Scheuer* result.

173. 161 U.S. 483 (1896).

174. 360 U.S. 564 (1959).

sions granted an absolute, not a qualified, immunity to the respective executives.[175] In *Spalding*, the petitioner sued the Postmaster General, claiming he had maliciously circulated a false statement that injured the petitioner's legal practice. The Supreme Court gave the Postmaster absolute immunity, even though his alleged act may have been maliciously motivated. In this case of first impression, the Court stated:

> We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. . . . [I]t is clear . . . that [an executive] cannot be held liable to a civil suit for damages . . . by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages.[176]

In *Barr* the respondents alleged that a press release issued by the Acting Director of the Office of Rent Stabilization had defamed them. The Court, relying principally on *Spalding*,[177] held that the director was absolutely immune from suit despite the ultra vires nature of the act and the malicious motivation of the executive.

It is thus difficult to understand the *Scheuer* Court's reliance on either *Spalding* or *Barr* to support its interpretation that the common law allowed only a qualified immunity to executive officers. In addition, a review of the executive immunity cases not discussed in *Scheuer* supports the conclusion

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175. Mr. Justice White's concurring opinion in Imbler v. Pachtman, 424 U.S. 409 (1976), indicates that the majority theory based on the common law development of the immunity theories is erroneous when applied to executive officers. Justice White states:

> Accordingly, we have declined to construe § 1983 to extend absolute immunity from damage suits to a variety of state officials, *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes* [416 U.S. 232 (1974)] (various executive officers, including the State's chief executive officer); *Pierson v. Ray*, 386 U.S. 547 (1967) (policemen); and this notwithstanding the fact that, at least with respect to high executive officers, absolute immunity from suit for damages would have applied at common law. *Spalding v. Vilas*, 161 U.S. 483 (1896); *Alzua v. Johnson*, 231 U.S. 106 (1913).

424 U.S. at 434 (White, J., concurring).

176. 161 U.S. at 498.

177. The Court also made frequent reference to Judge Learned Hand's decision in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

that executive officials were granted an absolute, not a qualified, immunity at common law. In *Cooper v. O'Connor*,[178] the United States Court of Appeals for the District of Columbia Circuit held that the Comptroller of the Currency, his deputies, and other lesser federal officials were absolutely immune from liability for damages resulting from their roles in the prosecution of a bank president. The court concluded that "as the acts of appellees were performed in the discharge of their official duties, the motives with which those duties were performed are immaterial."[179] Eleven years earlier, the same court had found the Secretary of the Treasury also entitled to absolute immunity.[180]

Although the preceeding cases indicate a common law absolute immunity for executive officials,[181] the Supreme Court in *Wood v. Strickland*[182] granted school board members a qualified, good-faith immunity. In its limited "inquiry into the immunity historically accorded the relevant officials [school board members] at common law," the Court observed that "state courts have generally recognized that such officers should be protected from tort liability under state law for all good-faith, nonmalicious action taken to fulfill their official duties."[183] As authority for this conclusion, Mr. Justice White cited state court decisions from eight jurisdictions.[184] Not all states, though, agreed. In *Sweeney v. Young*,[185] for example, school authorities had dismissed a student for misconduct. The student subsequently brought a civil action for damages against members of the school board. The New Hampshire Supreme Court held that since the action taken was within the general range of the school officials' duties, they were entitled to an absolute, not a qualified, immunity. In short, neither the discretionary nature rationale nor the common law immunity distinctions justify the inconsistency of affording executives qualified immunity and judges absolute immunity.

VI. Liability for Judicial Misconduct

The preceeding survey of judicial immunity demonstrates several significant points. First, since the Court's decision in *Bradley* has eliminated

178. 99 F.2d 135 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1983).

179. *Id.* at 142.

180. Mellon v. Brewer, 18 F.2d 168 (D.C. Cir. 1927).

181. For other decisions concerning immunity for executive officers, see Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1937) (Attorney General, U.S. Parole Board members, Director of Prisons); Smith v. O'Brien, 88 F.2d 769 (D.C. Cir. 1937) (Chairman of the Federal Tariff Commission); Standard Nut Margarine Co. v. Mellon, 72 F.2d 557 (D.C. Cir. 1934) (Assistant Secretary of the Treasury).

182. 420 U.S. 308 (1975).

183. *Id.* at 318.

184. *Id.* These jurisdictions are: Arkansas, Georgia, Kentucky, Illinois, Maine, Massachusetts, Missouri, and New Hampshire.

185. 82 N.H. 159, 131 A. 155 (1925).

tort liability, and the decision in *Pearson* has eliminated section 1983 liability, the doctrine of absolute judicial immunity appears firmly entrenched in the United States. However, the logic underlying this doctrine leaves much to be desired and provides an opening for the return of both causes of action. Furthermore, standards of accountability developed in civil law systems provide conclusive proof that liability can exist within the judicial system. And finally, the presence of a qualified immunity for other governmental officials demands the same treatment for the judiciary.

Although a return to qualified judicial immunity is theoretically justifiable, actually imposing liability for the malicious or unauthorized acts of American judges would raise a new series of practical problems. For example, how does one sue a judge—in tort, under section 1983, or under a constitutional cause of action? What standard of liability should apply? And, once a judge is held liable, who pays the damages—the state or the individual judge?

Our structure of dual federalism creates jurisdictional complexities which could complicate imposition of judicial liability. The wrongful act itself may be simple libel, protected by state law, or malicious prosecution which may rise to the level of a constitutional violation of due process.

A. *Potential Causes of Action for Judicial Liability*

Causes of action which could provide viable routes to imposing judicial liability now exist in both state and federal law. Principal among these are a state tort action and a federal statutory or constitutional claim. Each course would present different problems depending on whether the defendant was a federal or state judge.

1. *Federal Judges*

The most obvious theory of liability would be simple common law tort—malicious prosecution, false imprisonment, or libel and slander.[186] In theory, the judiciary itself could abrogate judicial immunity at will since it is a judicially created doctrine. In practice, a state court might not be willing to sit in judgment of a fellow judge and disrupt 200 years of common law development.[187] The most direct solution, therefore, would be for state legislatures to establish a limited liability by statute similar to the modern

186. For examples of these tort actions under absolute immunity, see O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926 (1966); Garfield v. Palmieri, 297 F.2d 526 (2d Cir.), *cert. denied*, 369 U.S. 871 (1962); Ravenscroft v. Casey, 139 F.2d 776 (2d Cir. 1944).

187. Recently, some state courts have overturned the common law doctrine of sovereign immunity, which was equally well established. *See* cases cited in note 91 *supra*.

waivers of state sovereign immunity.[188] On the federal level, the Federal Tort Claims Act[189] would have to be amended to specifically allow suits against federal judges.

Tort liability, however, would not cover all areas of judicial misconduct. A judge may also commit certain constitutional violations which are not violations of state tort law.[190] For those constitutional infringements that are also torts,[191] the plaintiff's chances of recovery are dependent on the vagaries of state tort law[192] unless he sues on a constitutional, rather than a tort, cause of action. If the plaintiff sues on a constitutional cause of action in a state court, however, the defendant federal judge would be likely to remove to federal court under 28 U.S.C. § 1441[193] or 1442.[194] Unlike removal under 28 U.S.C. § 1441 for federal questions, section 1442 removal jurisdiction has been construed to permit the federal courts to hear cases removed from state courts even if they would not originally have had jurisdiction over the same action.[195] Therefore, assuming the abrogation of absolute judicial immunity, a plaintiff could sue a federal judge on a constitutional claim in state court without being defeated by federal removal jurisdiction.

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188. For example, in Florida, Iowa, New York, and Washington, state tort immunity has been abolished by statutory law. *See* FLA. STAT. § 768.151 (Supp. 1976); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 986 & n.59 (4th ed. 1971).

189. 28 U.S.C. §§ 1346, 2671–80 (1970).

190. For example, a judge may deprive a party of a statutory right to a hearing. Although this action would violate the litigant's fifth amendment due process rights, it may not be a tort under state law *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1535 n.20 (1972).

Furthermore, state tort law may not adequately compensate a victim of governmental abuse of power even where the constitutional violation is also a tort. A government official has the potential to inflict greater harm than does a private citizen. *See* Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 HARV. L. REV. 922, 953 (1976).

191. False imprisonment and malicious prosecution may also violate the fifth and fourteenth amendment due process clauses.

192. Dellinger, *supra* note 190, at 1535.

193. 28 U.S.C. § 1441 (1970).

194. 28 U.S.C. § 1442 (1970).

195. Section 1442(a)(3) states:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> . . . .
>
> (3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties.

Removal under section 1442 does not require the federal court to have had original jurisdiction over the suit. Willingham v. Morgan, 395 U.S. 402, 406 (1969).

An argument could be made that the term "color of office" does not include tortious judicial acts or other misconduct. *See* Anpey v. Thornton, 65 F. Supp. 216 (D. Minn. 1946). However, in Willingham v. Morgan, 395 U.S. 402 (1969), the Supreme Court interpreted the "color of office" requirement to mean that the alleged acts must occur during the officer's performance of his duties:

If a constitutionally based suit were removed to federal court under section 1441,[196] jurisdiction would be coextensive with the original jurisdiction of the federal court under 28 U.S.C. § 1331 or 1343. The limitations of section 1983, discussed below, would bar a suit against a federal judge under 28 U.S.C. § 1343. Section 1331 grants jurisdiction, but neither that section nor the federal Constitution provide a specific damage remedy. In the past, a constitutionally based suit originating in a federal court would have been dismissed for failure to state a cause of action unless a specific damage remedy was authorized by another federal statute.[197] Thus, if a plaintiff sued in state court and the defendant removed to federal court under section 1441, or if he sued originally in federal court, he would be precluded from recovery for constitutional, nontortious, injuries.

Within the past few years, however, a number of federal courts have shown a willingness to allow a constitutionally based cause of action for damages with jurisdiction under section 1331 even when there is no specific statutory authorization for such a remedy.[198] The possibility of such a suit

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> The federal officer removal statute is not "narrow" or "limited." Colorado v. Symes, 286 U.S. 510, 517 (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law.
>
> . . . .
>
> In a civil suit of this nature, we think it was sufficient for petitioners to have shown that their relationship to respondent derived solely from their official duties. Past cases have interpreted the "color of office" test to require a showing of a "causal connection" between the charged conduct and asserted authority. . . . In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times.

Id. at 406–07, 409. Thus, under the liberal test established in *Willingham*, federal judicial misconduct almost always would fall within the "color of office" requirement of section 1442.

Because of this absolute right of removal, a federal judge may be able to remove to the federal court of which he is a member. In Meredith v. Van Oosterhout, 286 F.2d 216 (1960), *cert. denied*, 365 U.S. 835 (1961), a United States judge for the Eighth Circuit was sued for alleged malicious acts in rendering a judgment against the plaintiff in a prior suit. The judge then removed to the federal district court and the case was ultimately adjudicated by the United States Court of Appeals for the Eighth Circuit, the judge's own court.

196. A state or federal judge could remove to federal court under 28 U.S.C. § 1441 (1970), if that court would have original jurisdiction over the suit. Section 1441(a), (b) provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

197. 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3563, at 415 (1975).

198. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388

has existed since 1946, when the Supreme Court, in *Bell v. Hood,*[199] held that jurisdiction existed under 28 U.S.C. § 41(1) (the predecessor of 28 U.S.C. § 1331)[200] over a suit brought to recover damages for a violation of the plaintiff's fourth and fifth amendment rights. The Court remanded the case to the district court, however, for a determination of whether a cause of action for damages existed for the unconstitutional violation of the fourth amendment by a federal agent. *Bell*, therefore, did not provide a conclusive decision.[201]

This question was finally answered when the Supreme Court faced the issue in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[202] In *Bivens*, agents from the Federal Bureau of Narcotics illegally broke into the plaintiff's apartment and arrested him for an alleged narcotics violation. Bivens later brought a civil action in federal court claiming violation of his fourth amendment rights, and alleged jurisdiction under 28 U.S.C. § 1331. If his allegations had been true, Bivens could have raised his claim as a defense, and could have successfully had any evidence suppressed at a subsequent prosecution; but since no charges were ever brought against him, Bivens was left without a remedy for the unconstitutional invasion of his privacy.

In a 5–4 decision, Mr. Justice Brennan, writing for the majority, held that a violation of the fourth amendment by federal officers gives rise to a cause of action for damages.[203] Finding that the fourth amendment provides a federal right independent of state common law,[204] the Court determined that it had the power to create a damage remedy directly from a

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(1971); Hanna v. City of Euclid, 514 F.2d 393 (6th Cir. 1975); Skehan v. Board of Trustees of Bloomfield State College, 501 F.2d 31 (3d Cir. 1974); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156–57 (4th Cir. 1974); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972); Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa. 1975); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973).

199. 327 U.S. 678 (1946).

200. This section is the general federal question jurisdiction statute, now codified at 28 U.S.C. § 1331 (1970).

201. 327 U.S. at 684–85.

Jurisdiction and a cause of action are two separate and distinct concepts, although both must exist before a suit can be brought. A common mistake is to assume that 28 U.S.C. § 1331 (1970), a *jurisdictional* statute, provides a cause of action in and of itself. Section 1331 only grants to the federal courts the jurisdiction to hear a suit based on a federal question cause of action. The federal question, whether it involves a federal statute or the Constitution, also must be alleged since it is the cause of action. Previously, a cause of action for damages based directly on a violation of a constitutional provision, without any statutory authorization as, for example, section 1983, was not recognized. *See* text accompanying note 197 *supra.*

202. 403 U.S. 388 (1971). There was, however, a Supreme Court decision in 1933 which had indicated that a plaintiff could sue for damages under the fifth amendment. *See* Jacobs v. United States, 290 U.S. 13 (1933).

203. 403 U.S. at 397.

204. Respondents had argued that their unreasonable search constituted an invasion of the right of privacy—a tort actionable in the state courts. In this situation, the fourth amendment

violation of a constitutional provision.[205] To support this conclusion, Justice Brennan noted: "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[206]

Although the specific holding of *Bivens* is limited to a cause of action based on the fourth amendment, later decisions have relied on *Bivens* in finding a damage remedy inherent in other constitutional provisions.[207] For example, in *Apton v. Wilson,*[208] the Court of Appeals for the District of Columbia Circuit held that a deprivation of rights under the fifth amendment due process clause gives rise to a cause of action for damages.[209] This cause of action could serve as a route to liability for many acts of judicial misconduct by federal judges, such as malicious prosecution or the denial of a hearing.

Thus, although tort liability in the state courts would provide a remedy for some wrongful acts of federal judges, the most direct approach to liability for deprivations of constitutional rights would be through a cause of action based on the Constitution. The *Bivens* and *Apton* decisions have laid the foundations for such suits against federal agents. It now remains to extend those decisions to cover the actions of a federal judge who maliciously deprives a litigant of his constitutional rights.

For either tort liability or a constitutional cause of action to be effective, however, both federal and state jurisdictions must adopt an equivalent standard of immunity. Otherwise, a federal judge's right of removal to federal court under 28 U.S.C. § 1442 would bar recovery. If the state has retained absolute judicial immunity while the federal government grants only a qualified immunity, then the federal judge would prefer to be tried in the state court under state law. The state court would dismiss the suit on the grounds of absolute immunity and the plaintiff might be precluded from refiling in federal court, depending on whether the federal court would have

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provisions could only be interposed as a limitation on the defense of federal authority. *Id.* at 390–91. In response, the Court observed that the fourth amendment's scope was broader than conduct unlawful under state tort law. *Id.* at 392–94.

205. The power of the Court to create constitutional damage remedies was bitterly contested by the three dissenting justices, Mr. Chief Justice Burger, Mr. Justice Black, and Mr. Justice Blackmun, who claimed that this power was exclusively vested in Congress. *Id.* at 411–12, 427–30.

206. *Id.* at 395.

207. *E.g.*, Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974); United States *ex rel.* Moore v. Koelzer, 457 F.2d 982 (3d Cir. 1972); Patmore v. Carlson, 392 F. Supp. 747 (E.D. Ill. 1975).

208. 506 F.2d 83 (D.C. Cir. 1974).

209. The *Apton* court also noted that the district court had federal question jurisdiction over this cause of action under 28 U.S.C. § 1331. *Id.* at 95.

original jurisdiction. On the other hand, if the federal court retained absolute immunity while the state court adopted qualified immunity, then the federal judge would remove. Thus, if differing immunity standards were available, a federal judge would always be absolutely immune.

2. *State Judges*

Absent immunity, a state judge would also be liable for common law torts. Jurisdiction over such suits is vested only in the state courts, and, unlike suits against federal judges, there is no right of removal to the federal courts.[210] For those harms that violate federally or constitutionally protected rights, either a direct constitutional cause of action with jurisdiction under 28 U.S.C. § 1331[211] or a cause of action based on section 1983 through 28 U.S.C. § 1343[212] is available. A section 1983 suit could be brought either in a state court,[213] in which case the defendant state judge could remove to federal court under 28 U.S.C. § 1441,[214] or in a federal court under 28 U.S.C. § 1343. While an action under section 1983 would comport with the original purpose of that section,[215] section 1983 is limited to persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[216] Accordingly, a state judge who

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210. A federal court would not have original jurisdiction over nonconstitutional torts nor does a state judge have an absolute right of removal.

211. 28 U.S.C. § 1331 (1970). Section 1331(a) states:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

See text accompanying notes 198–209 *supra.*

212. 28 U.S.C. § 1343 (1970). Section 1343(3) states:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any persons:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . . .

213. Although a jurisdictional statute, 28 U.S.C. § 1343 (1970), was enacted to provide federal jurisdiction for section 1983 suits (*see* note 212 *supra*), section 1343 gives no indication that it provides *exclusive* jurisdiction in the federal courts. Consequently, section 1983 suits have been brought in state courts. *See* Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered,* 65 NW. U.L. REV. 615, 616 n.4 (1970).

214. *See* note 196 *supra* and accompanying text.

215. Section 1983 was enacted to provide "a federal remedy for deprivations of constitutional rights and immunities caused by state officials acting under color of state law." 21 WAYNE L. REV. 1103 (1975). Moreover, the legislative record on the debates surrounding the enactment of section 1983 indicates that judicial officers were meant to be included under this section. *See* text accompanying notes 66–76 *supra.*

216. This phrase has been interpreted by the Supreme Court in United States v. Price, 383 U.S. 787, 794 n.7 (1966), to be the equivalent of the "state action" requirement of the fourteenth amendment.

maliciously deprived a person of a constitutionally protected right would be amenable to suit under section 1983, but a federal judge would not be.[217]

A third potential cause of action, adoption of which would eliminate the necessity for and the problems inherent in a section 1983 action,[218] is the direct constitutional cause of action with jurisdiction under 28 U.S.C. § 1331. Although the *Bivens* case was limited to federal agents, recent cases have relied on *Bivens* to imply constitutionally based causes of action for deprivations of constitutional rights by state agencies and municipalities,[219] which could be extended to state judges. The development of municipal liability is illustrative of this approach.

Municipalities have consistently been found not to be within the scope of section 1983. Although the basis for this exclusion is different from the defense to section 1983 afforded to state judges,[220] there are analytic similarities. In *City of Kenosha v. Bruno*,[221] the Supreme Court held that the municipality was not a "person" and therefore was not amenable to suit under section 1983.[222] More importantly for our purposes, however, the Court left open the possibility of a direct constitutional cause of action for damages against a municipality. In remanding the suit, the Court ordered that the amount in controversy be determined, and observed that if this amount exceeded the $10,000 jurisdictional limit of section 1331, then jurisdiction would exist.[223] Although the Court did not explicitly identify the cause of action, it appeared that the action was to be based on a violation of the petitioner's fourteenth amendment due process rights. This presumption

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217. Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615, 624 (1970). However, a federal judge may be liable under section 1983 in the rare situation where he "is a willful participant in joint activity with the State or its agents." United States v. Price, 383 U.S. 787, 794 (1966). *See* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

218. The establishment of a section 1983 action would require the Supreme Court to overrule Pierson v. Ray, 386 U.S. 547 (1967).

219. *See, e.g.*, City of Kenosha v. Bruno, 412 U.S. 507 (1973); Shehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974); Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa. 1975); Maybanks v. Ingraham, 378 F. Supp. 913 (E.D. Pa. 1974).

220. Although a state judge may be a "person" under section 1983, the Supreme Court has found that he is entitled to absolute immunity when sued under that statute. Pierson v. Ray, 386 U.S. 547 (1967). A municipality, however, is not a "person" within the meaning of section 1983 and, therefore, the immunity issue is never reached in a section 1983 suit against a municipality. City of Kenosha v. Bruno, 412 U.S. 507 (1973); Monroe v. Pape, 365 U.S. 167 (1961).

221. 412 U.S. 507 (1973).

222. The holding in *Kenosha* was limited to a section 1983 suit for equitable relief. However, in 1961 the Court determined that a municipality was not a "person" within the meaning of section 1983 in a suit for damages. Monroe v. Pape, 365 U.S. 167 (1961).

223. 412 U.S. at 514. *See The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 262 (1973); Note, *Damage Remedies Against Municipalities for Constitutional Violations* 89 HARV. L. REV. 922, 929–30 (1976).

is supported by Mr. Justice Brennan's concurring opinion in which he cited both *Bell* and *Bivens* in commenting upon the Court's remand order.[224]

Numerous cases after *Kenosha* have upheld direct constitutional causes of action for damages against state agencies and officials.[225] Allowing a suit against a state agency in a federal or state court for the deprivation of a person's constitutional rights without having to allege a cause of action based on another federal statute is the most direct and efficient route toward liability. The same approach could be utilized in a suit against a state judge who has maliciously deprived a person of his constitutional rights if the bar of absolute immunity were removed.

3. *Factors Affecting the Choice of a Cause of Action*

Even if the above causes of action were utilized, certain problems would arise from the different minimum amount requirements of their respective jurisdictional statutes and the removal power. General federal question jurisdiction under 28 U.S.C. § 1331 requires a $10,000 minimum,[226] while section 1983 suits with section 1343 jurisdiction have no minimum amount requirement.[227] Most state courts have a lower minimum requirement than section 1331. Though similar disparities exist for other types of suits, the disparity in constitutional suits is significant due to the difficulty of valuing the damages caused by the deprivation of a constitutional right. In the past, constitutional suits based on section 1331 were dismissed for lack of jurisdiction by some courts because of the courts' perceived incapability of valuing the injury.[228] Other courts, however, took the position that a constitutional right is inherently worth more than $10,000.[229]

Jurisdiction for section 1983 claims exists in federal courts by virtue of 28 U.S.C. § 1343, and may exist in state courts (depending on the particular state's jurisdictional statutes). Unlike section 1331 and most state jurisdic-

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224. Mr. Justice Brennan, the author of the *Bivens* opinion, stated:

> Appellees did assert 28 U.S.C. § 1331 as an alternative ground of jurisdiction. . . . If appellees can prove their allegation that at least $10,000 is in controversy, then § 1331 jurisdiction is available, Bell v. Hood, 327 U.S. 678 (1946); *cf.* Bivens v. Six Fed. Narcotics Agents, 403 U.S. 388 (1971), and they are clearly entitled to relief.

412 U.S. at 516 (Brennan, J., concurring). *See* Maybanks v. Ingraham, 378 F. Supp. 913 (E.D. Pa. 1974), for an application of the *Kenosha* proposition.

225. *E.g.*, Shehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974); Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa. 1975); Maybanks v. Ingraham, 378 F. Supp. 913 (E.D. Pa. 1974).

226. *See* note 211 *supra.*

227. *See* note 212 *supra.*

228. *See* Goldsmith v. Sutherland, 426 F.2d 1395 (1970).

229. Cortright v. Resor, 325 F. Supp. 797 (S.D.N.Y.), *rev'd*, 447 F.2d 245 (2d Cir. 1971); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1158–59 (2d ed. 1973); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 262–63 (1973).

tional statutes, section 1343 has no minimum amount. Thus, when suing a state judge, the plaintiff most likely would want to bring suit in federal court under sections 1983 and 1343 rather than bringing a constitutional claim under section 1331.

A direct constitutional cause of action in a federal court, however, must be based on 28 U.S.C. § 1331 jurisdiction. Thus, if a plaintiff brought suit in a federal court under this cause of action, he would have to allege damages in excess of $10,000. As this action is the only one available for a plaintiff suing a *federal* judge for a constitutional, nontortious, violation, this plaintiff is unfairly disadvantaged in comparison to a plaintiff suing a state judge under sections 1983 and 1343. One answer to this discrepancy is for the plaintiff to sue the federal judge in a state court where the jurisdictional amount requirement would presumably be much less than the $10,000 section 1331 requirement. Even if the federal judge removes to federal court under 28 U.S.C. § 1442, the absence of the minimum amount is insignificant in such removal proceedings.

Therefore, in order to avoid meeting section 1331's $10,000 minimum amount requirement, a plaintiff should consider the following actions: (1) suing a state judge under sections 1983 and 1343 in a federal court; (2) suing a state judge under a direct constitutional cause of action in a state court; (3) suing a federal judge under a direct constitutional cause of action in a state court.

B. *Standard of Liability for Judicial Misconduct*

A standard of liability to be imposed upon judges may be determined by reference to the examples provided by civil law countries and by executive immunity in the United States. Both France and Germany provide liability in cases of willful judicial misconduct. In Germany, there is immunity for error in rendering a decision, but tortious conduct of misfeasance in connection with ministerial acts is not protected.[230] Similarly, it was noted that in France "[f]raud, intentional wrongful conduct or gross professional negligence" are actionable.[231]

Two tests for executive and administrative immunity have been used in the United States. Both are based on good faith and reasonable action. In *Scheuer v. Rhodes*, the Supreme Court held that the standard for qualified immunity "is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief."[232] A different test was used in *Wood v. Strickland:*

230. *See* text accompanying notes 122–29 *supra.*
231. *See* text accompanying notes 139–45 *supra.*
232. 416 U.S. 232, 247–48 (1974).

> [W]e hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[233]

Unfortunately, the *Scheuer* and *Wood* tests are unsatisfactory when applied to judges. Both tests adopt the "reasonable man" standard of negligence actions, but holding judges liable for negligence would present several problems. First, in order to allow suits for judicial malpractice, a professional standard of conduct for judges would have to be established.[234] Second, judges would be subject to more frivolous litigation if their actions could be attacked for mere negligence.[235] Finally, the spector of judicial malpractice suits would deter persons from seeking judicial positions.[236]

A malice standard, similar to the *New York Times* test,[237] would be more suitable for determining judicial liability.[238] Adoption of this standard has three distinct advantages: (1) it alleviates the problems of determining what constitutes professional judicial competence; (2) it gives the plaintiff the burden of proving malice, instead of the defendant having to show good faith and reasonableness of action; and (3) it satisfies the purpose of judicial liability by providing a remedy for malicious judicial acts, not honest errors.[239]

C. *Who Pays the Damages?*

There are two potential sources of remuneration for judicial misconduct—the individual judge and the state. Unless the particular state

233. 420 U.S. 308, 322 (1975).

234. Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 335 (1969).

235. *Id.*

236. *Id.*

237. The test adopted in New York Times v. Sullivan, 376 U.S. 254 (1964), is that liability will result when the act is done with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280.

238. Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 335–38 (1969); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615, 624 (1970).

239. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1645 (1956), where the authors observe:

> Where the charge is one of honest mistake, we exempt the officer because we deem that an *actual holding of liability* would have worse consequences than the *possibility of an actual mistake* (which under the circumstances we are willing to condone). But it is stretching the argument pretty far to say that the *mere inquiry into malice* would have worse consequences than the *possibility of actual malice* (which we would not, for a minute, condone). Since the danger that official power will be abused is greatest where motives are improper, the balance here may well swing the other way.

(emphasis original).

has waived its immunity, however, the injured victim will have to sue the judge personally. The eleventh amendment specifically provides that a state may not be sued by citizens of another state.[240] In *Hans v. Louisiana*,[241] the Supreme Court expanded this amendment by holding that an unconsenting state is also immune from suits brought by its own citizens. However, the immunity theory was modified in *Ex parte Young*,[242] where the Court held that when a state officer, acting under state law, violates a constitutional provision, he "is subjected in his person to the consequences of his individual conduct."[243]

After *Ex parte Young*, numerous suits were brought against state officials demanding payment from the state treasury.[244] Although most of these suits were successful, a few were held barred by the eleventh amendment. In 1974, the Supreme Court clarified the meaning of *Ex parte Young*, holding, in *Edelman v. Jordan*,[245] that a "suit by private parties seeking to impose a liability payable from public funds in the state treasury is foreclosed by the Amendment if the State does not consent to suit."[246] Thus, an injured party could impose personal liability on a state judge. If the party, however, sought reimbursement from state funds, his suit would be barred by the eleventh amendment, unless immunity was waived by the state.[247]

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240. "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." U.S. CONST. Amend. XI.

The amendment only applies to suits brought in federal court. Where a state official is the named party but recovery is sought from the state treasury, then the suit is against the state for eleventh amendment purposes. Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Poindexter v. Greenhow, 114 U.S. 270 (1885). Thus, the amendment would apply to section 1983 actions brought under section 1343.

241. 134 U.S. 1 (1890).

242. 209 U.S. 123 (1908).

243. *Id.* at 160.

244. *See* State Dep't of Health and Rehabilitative Services v. Zarate, 407 U.S. 918 (1972), *aff'g* 347 F. Supp. 1004 (S.D. Fla. 1971); Graham v. Richardson, 403 U.S. 365 (1971); Wyman v. Bowens, 397 U.S. 49 (1970), *aff'g* Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969); Shapiro v. Thompson, 394 U.S. 618 (1969). Although most of these suits were successful, a few were held barred by the eleventh amendment. *See, e.g.*, Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).

245. 415 U.S. 651 (1974).

246. *Id.* (syllabus).

247. This analysis is supported by the Supreme Court's discussion of the eleventh amendment in Scheuer v. Rhodes, 416 U.S. 232 (1974). In *Scheuer*, the Court cites *Edelman* for the proposition that "it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damage from the public treasury." *Id.* at 238. The Court then states:

> Analyzing the complaints in light of these precedents, we see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* . . . . Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints . . . are not barred by the Eleventh Amendment.

Id. (emphasis original).

State tort immunity has been abolished or limited in 37 states.[248] In most of these states, where the state legislature has enacted tort claims statutes, the state assumes liability for certain types of torts committed by its employees while reserving immunity from other torts.[249] Thus, if judicial immunity were limited, the injured party's ability to receive compensation from the state would depend on the respective state tort claims statute.

The assumption of liability by the state for acts of its employees is similar to the civil law system. In France, the judge is sued personally, with the state having a right of reimbursement against the judge.[250] Similarly, in Germany the state is ultimately liable for judicial misconduct.[251] The advantage in holding the state responsible for judicial misconduct is that judicial disciplinary boards may deal more harshly with a judge who has subjected the state to liability.

Under current law, therefore, the judge would most likely have to pay the damages awarded the injured party, unless the state has waived its immunity. This result is consistent with policy considerations behind judicial liability; if the judge is held financially accountable for his malicious wrongdoings, he will be less inclined to abuse his office. While it could be argued that personal liability will deter qualified candidates from seeking judicial positions, that conclusion is spurious. Assumedly, a qualified candidate would act with a high degree of integrity and honesty once in office and, therefore, would have no occasion to be subject to judicial liability.

VII. CONCLUSION

The development of the judicial immunity doctrine is the result of the long-term exercise of unchallenged judicial authority. Although the doctrine did have roots in the English common law, its development in the United States may be attributed more to a willingness by the courts to find that the doctrine was solidly established and to an inadequate investigation of the reasons offered in support of judicial immunity than to its historical founda-

248. Note, *Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future*, 10 SUFFOLK U.L. REV. 521, 523–24 (1976).

249. *See, e.g.*, ORE. REV. STAT. § 30.260–.300 (1967). *See generally* Note, *Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future*, 10 SUFFOLK U.L. REV. 521 (1976).

Although the eleventh amendment problem would not apply to federal judges, suits against the federal government have been barred in the past on the basis of sovereign immunity. Cohens v. Virginia, 19 U.S. (6 Wheat.) 257 (1821). But, in 1946 the United States waived its immunity in part by the adoption of the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–80 (1970). In Cromelin v. United States, 177 F.2d 275 (5th Cir. 1949), the court found that a federal judge was not within the scope of the FTCA. Therefore, a federal judge could only be personally liable.

250. *See* text accompanying notes 146–47 *supra*.

251. *See* text accompanying notes 130–35 *supra*.

tions. If the courts had investigated, they would have found either that the rationales were inherently unsound or that they had been considerably weakened by modern procedural safeguards.

Moreover, the integrity of the judicial immunity doctrine comes into question when the decisions supporting this doctrine are compared with recent cases finding only a qualified immunity for executive and administrative officials acting in a similar discretionary capacity. The Supreme Court's belated attempt to distinguish between qualified and absolute immunity cases on the basis of their common law foundations is not adequately supported by the appropriate lines of judicial, executive, and administrative decisions. In fact, there are more similarities between the judicial role and other executive or administrative positions which favor granting the same qualified immunity to all officials than there are differences between the respective positions which require different levels of immunity.

While civil law jurisdictions have surged ahead in allowing tort claims against public officers, including judges, the common law countries have been reluctant to depart from the notion that public officials, particularly judges, should not be held accountable for their actions. In developing a qualified immunity, the civil law countries have specified conduct that will lead to judicial liability, and have developed a system of remuneration which guarantees payment to the injured party. These characteristics may provide a guideline to framers of a qualified judicial immunity doctrine in the United States.

A variety of mechanisms are available to the courts and legislators to implement a qualified, good-faith immunity doctrine. To provide an impartial coverage of federal and state judges, however, the states must allow limited tort liability. There must also be a remedy for deprivations of constitutional rights, possibly through a specific statutory enactment, similar to section 1983, covering both state and federal judges, or derived as a result of judicial action finding a direct constitutional cause of action against judges for violations of constitutionally guaranteed rights.

The trend of modern judicial procedure has been to provide a remedy for damages resulting from the acts of federal or state public officers. This trend, unfortunately, has bypassed persons injured from judicial misconduct on the basis of an antiquated immunity theory. The time has come to reevaluate the immunity doctrine and to recognize that the establishment of a good-faith immunity would be a further step towards a judicial system of fair, impartial, and unprejudiced justice.

DOUGLAS K. BARTH