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Personal Liability of State Officials under State and Federal Law

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The common law rule of governmental immunity made governments immune from suit and held public officials personally liable for the torts they committed in the performance of their duties. In recent years, however, the law of tort liability has moved toward the increased immunity of governmental officials and employees and the increased liability of governmental units. In this Article Professor McManis first outlines the notion of sovereign immunity, following with an analysis of the nature and the scope of the immunity afforded governmental officials under federal and state law, with a particular emphasis on the law of Georgia. The author next turns to the tort liability of public officials under section 1983 of the Civil Rights Act and other federal statutes, and he concludes with suggested methods through which personal tort liability may be avoided by governmental officials and employees.

I. INTRODUCTION

At English common law public officials were routinely held personally liable for torts committed in the performance of their duty. Since the King could do no wrong, any mistake in judgment on the part of one of the King's officials was, a fortiori, an act for which the government would take no responsibility. Yet, a public official who failed to perform his duty might be subject to criminal prosecution. An English magistrate who failed to call out the militia when confronted with civil disorders, for example, could be tried for dereliction in the performance of his duties. If damage were done, however, the magistrate could be held personally liable for it.[1]

While the law thus no doubt encouraged public officials in the

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[1] *Compare* Rex v. Kennett, 172 Eng. Rep. 76 (1832), *with* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 204-10 (1965).

most forceful terms to tread the fine line between misfeasance and dereliction, it must inevitably have discouraged all but the foolhardy from undertaking public office in the first place. The law of tort liability of public officials during the past quarter century has accordingly been described as moving away from the early common law position that a public official is liable for his torts and the government immune from suit for the torts of its officials, toward increased immunity of officers and employees and increased liability of governmental units.[2] The movement has been uneven, however, and as a consequence there are some occasions when a public official may still be held personally liable to an aggrieved citizen and other occasions when an aggrieved citizen has no remedy at all—either against the public official or the government itself. The chief concern of this Article is with the liability and the immunity of the public official. That subject, however, cannot be adequately treated without at least passing mention of its relation to the matter of sovereign immunity and liability.

Historically, federal, state, and local governmental units have been held to be immune from liability in tort, except when consent to suit has been given.[3] The United States Supreme Court early announced that the federal government could not be sued without its consent,[4] and the Georgia court has similarly so held with respect to the state of Georgia.[5] The doctrine bars suits for damages against state agencies, and also against municipalities—at least when the latter are performing governmental as opposed to proprietary or ministerial functions.[6]

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[2] K. DAVIS, ADMINISTRATIVE LAW TEXT § 26.01 (3d ed. 1972) [hereinafter cited as DAVIS].

[3] *Id.* at § 25.01.

[4] United States v. McLemore, 45 U.S. (4 How.) 286 (1846). *See also* Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). In the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680 (1970), however, the United States has liberally consented to be sued for the negligence of its officers and employees. The Act has recently been amended, moreover, to grant a cause of action for damages against the United States when a federal investigative or law enforcement officer is claimed to have committed assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. *See* 28 U.S.C.A. § 2680 (h) (Supp. 1975).

[5] *See, e.g.*, Crowder v. Department of State Parks, 228 Ga. 436, 185 S.E.2d 908 (1971). The state of Georgia has not consented to be sued for the torts of its employees. There is, however, a legislative scheme by which claims are filed with a Claims Advisory Board and, if approved, compensated by means of a special act of the legislature. *See* GA. CODE ANN. §§ 47-504 to -510 (1974), *as amended*, (Supp. 1974).

[6] *See, e.g.*, GA. CODE ANN. § 69-301 (1967). *See generally* R. SENTELL, THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 4 (1964).

The United States Constitution itself recognizes the states' sovereign immunity from suits for damages, thanks in no small measure to the state of Georgia. In 1793, shortly after the federal judiciary was established, the United States Supreme Court decided the case of *Chisholm v. Georgia*,[7] which held that the Constitution permitted a citizen of one state to sue another state in federal court even though the state had not consented to suit. The popular uproar over that decision led to the eleventh amendment, which took away the federal judiciary's power in such cases. The amendment was subsequently construed as barring unconsented suits against states in federal courts even when suit was brought by a citizen of the state sued and even though the basis of jurisdiction was a claim under federal law.[8]

Because a state government cannot be sued for damages without its consent, it is common for aggrieved citizens to attempt to head off injury by bringing suits for injunctive or declaratory relief against state officials.[9] In such cases the only immunity at issue is sovereign immunity—the question being the extent to which a court can issue orders to a state official without interfering unduly with the sovereign functions of the state.[10] These suits in equity, which are in reality suits against the state, are to be distinguished from actions for damages which are brought against the public official personally. This Article will focus exclusively on those situations in which state or federal law immunizes a state official from or subjects a state official to the latter kind of liability. As we shall subsequently see, however, suits for injunction may play an important role in determining an officer's personal liability for damages.[11] The first topic considered will be the scope of official immunity under federal and state law. Then attention will be focused on the most significant areas of potential personal liability under each body of law. Finally, methods for avoiding liability will be discussed.

II. Immunity of Public Officials

While much of the law immunizing public officials from suit is of recent origin, certain public officials have long enjoyed immunity

[7] 2 U.S. (2 Dall.) 419 (1793).

[8] C. Wright, Federal Courts § 48 (2d ed. 1970) [hereinafter cited as Wright].

[9] Davis at § 27.03.

[10] *Id.* at § 27.04.

[11] In numerous instances, recognition of a constitutional right in a suit for injunctive relief has precipitated actions for damages. *See, e.g.*, text accompanying notes 90-115 *infra*.

from suit. Judges, for example, though responsible for the harsh rule applicable to other public officials, have prudently accorded themselves complete immunity for their judicial acts, even when their conduct is corrupt or malicious and intended to do injury.[12] The same absolute protection, oftentimes with constitutional sanction, extends to members of the state and national legislatures as well as to inferior legislative bodies, such as municipal councils, and to high executive officials of government.[13]

The reason given for this blanket immunity is not, of course, to protect corrupt officials, but to free public officials generally from the fear of vexatious suits and personal liability—either of which might dampen the ardor of all but the most resolute or irresponsible public officials in the discharge of their duties.[14] Perhaps too, the grant of blanket immunity to judges and legislators implicitly recognizes that there are limits to the injuries which can be inflicted in the courtroom or on the floor of the legislature. Not surprisingly, in the bulk of the cases in which legislative or judicial immunity has been utilized, claims of defamation growing out of alleged excesses in judicial or legislative rhetoric have been involved.[15]

No doubt wary of the greater potential for abuse by the executive branch of government—which after all has far greater day-to-day contact with the bulk of the citizenry than do either judges or legislators—courts have been reluctant to accord a similar blanket immunity to the Executive Branch and have accordingly limited immunity to the very highest executive officials or to those acting in a clearly legislative or judicial capacity. The courts, to be sure, have recognized a similar immunity for those who act in a "quasi-judicial" or "discretionary" capacity[16] and have read that immunity broadly to include any act requiring personal deliberation, decision, and judgment. This immunity thus provides substantial protection for middle level officials. In contrast with the immunity accorded judicial, legislative, and high executive officials, however, the protection for quasi-judicial or discretionary acts is limited to those decisions which are done honestly and in good faith and is thus described variously as a "qualified immunity" or as "privileged"

[12] W. PROSSER, THE LAW OF TORTS § 132, at 987 (4th ed. 1971) [hereinafter cited as PROSSER].

[13] *Id.* at 988.

[14] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[15] *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367 (1951).

[16] PROSSER § 132 at 988.

conduct.[17] The practical difference between a qualified immunity and an absolute immunity is that the qualified immunity merely provides protection against ultimate personal liability and then only if litigation establishes that the decision was made in good faith. In contrast, the absolute immunity, which applies whether the officer acted in good faith or not, provides protection in most instances against protracted litigation as well as against ultimate personal liability, since in the absence of the factual issue of good faith, most litigation involving a public official can be terminated on a pretrial motion. Even an official enjoying an absolute immunity, of course, will have to go to trial if there is a factual issue as to whether the official was acting in the scope of his official duties.[18]

At the bottom of the heap, acts involving little or no discretion are classified as "ministerial" only and are done improperly at the officer's peril, regardless of good faith.[19] Historically, for example, the decision of a law enforcement official to arrest or imprison a suspect has been classified as ministerial, so that if the arrest is not made with probable cause, *i.e.* objective justification, the officer is liable for false arrest even if he acted in good faith and even if the suspect is ultimately proved guilty.[20] Similarly, an officer who without authority detains a prisoner is liable for false imprisonment regardless of good faith.[21]

A. *Official Immunity Under Georgia Law*

Georgia law is in accord with the above stated principles. The Georgia courts have held as a general rule that "public officers, when acting in good faith and within the scope of their duty, are not liable to private action."[22] This general rule, as might be expected, is pockmarked with exceptions. Much depends upon how the courts label the public officer's harm-causing act.

If the court characterizes the offending act of the public officer as essentially "judicial" in character, then it becomes difficult indeed

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[17] *See id.* at 989.

[18] Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962) (question whether an officer of a security division of a federal agency was acting in the scope of his official duties in volunteering adverse information to the employer of a former federal employee is question of fact to be decided at trial).

[19] PROSSER § 132, at 989-90.

[20] *Id.* §§ 25-26.

[21] *Id.* § 11, at 45-46.

[22] Hodges v. Youmans, 122 Ga. App. 487, 491, 177 S.E.2d 577, 579 (1970) (italics omitted); Vickers v. Motte, 109 Ga. App. 615, 617, 137 S.E.2d 77, 79 (1964).

to hold the public officer personally liable, as exemplified by *Calhoun v. Little.*[23] In that case the plaintiff brought an action for false imprisonment alleging that the defendant, mayor pro tem of the city of Waresboro, while sitting as the presiding officer of the municipal court, had maliciously and without authority of law sentenced the plaintiff to three days in the town jail. The jury returned a verdict for the defendant, and the plaintiff appealed the denial of his motion for a new trial. Although finding that the plaintiff had been confined pursuant to a void municipal ordinance, the Georgia supreme court affirmed the denial of the motion for a new trial, stating that "[t]he presiding officer of a court clothed with authority to decide questions of law which may come before it will be protected in the exercise of this authority, however erroneous this decision might be."[24] The court, however, expressed the caveat that "where there is a clear absence of jurisdiction over the subject-matter, the officer will be liable for exercising it, provided such want of jurisdiction is known to him."[25] In other words, a public officer acting in a judicial capacity is virtually immune from personal liability, since he can only be held liable if he is shown to have known that he did not have subject-matter jurisdiction of the case.[26]

There is a second label, or perhaps set of labels, that the courts have attached to the acts of a public officer which affect his personal liability. Although courts may refer to the offending act as discretionary, quasi-judicial, legislative, or administrative, the word "discretionary" seems to be the most often used. With the attachment of that label the standard seems to be that when public authorities

> are acting within the scope of their duties and exercising a discretionary power, the courts are not warranted in interfering, unless fraud or corruption is shown, or the power or discretion is being manifestly abused to the oppression of the citizen.[27]

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[23] 106 Ga. 336, 32 S.E. 86 (1898).

[24] *Id.* at 342-43, 32 S.E. at 89.

[25] *Id.* at 341-42, 32 S.E. at 89.

[26] *See* Hill v. Bartlett, 126 Ga. App. 833, 192 S.E.2d 427 (1972).

[27] Partain v. Maddox, 131 Ga. App. 778, 782, 206 S.E.2d 618, 621 (1974), *citing* Hudspeth v. Hall, 113 Ga. 4, 38 S.E. 358 (1901) *and* City of Atlanta v. Holliday, 96 Ga. 546, 23 S.E. 509 (1895). *But see* City of Hawkinsville v. Wilson & Wilson, Inc., 231 Ga. 110, 200 S.E.2d 262 (1973), in which the court quoted from the trial court's order as follows:

> [I]t seems clear that the defendant commissioners would be liable in damages if two conditions are met, namely that they acted contrary to a non-discretionary, ministerial duty and that they acted with malice.

Id. at 112, 200 S.E.2d at 264.

Thus, it appears that a public officer enjoys a qualified immunity from liability when exercising discretion within the scope of his duties, since the public officer is personally liable only if shown to have acted oppressively, fraudulently, or corruptly. It also appears that liability attaches if the public officer is shown to have acted maliciously or in bad faith.[28]

A further possible qualification to an official's immunity for discretionary acts is illustrated in the landmark case of *Pruden v. Love.*[29] In *Pruden* the plaintiff recovered a verdict of $100 against the mayor and council of Dalton in their personal capacity for tearing down the plaintiff's house as a public nuisance. On appeal, the supreme court recognized that the defendants clearly had the power to declare the house a public nuisance. Nevertheless, the court held that their actions were unprotected because they had failed to substantially comply with the law in that they had failed to give the plaintiff notice. There was some evidence indicating that the council acted in bad faith, which no doubt led to the court's conclusion that, although the defendants "could not be held personally liable unless they acted either maliciously, corruptly, oppressively, or without authority of law,"[30] the evidence was sufficient to show that the defendants had acted oppressively. On the basis of the language in *Pruden,* however, it could be argued that to act without authority of law is to act oppressively and that, just as with judicial acts, discretionary acts which are done without authority of law may render an officer liable. Later decisions applying the codification of the *Pruden* language, however, have tended to equate oppressiveness with maliciousness.[31]

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[28] City of Hawkinsville v. Wilson & Wilson, Inc., 231 Ga. 110, 200 S.E.2d 262 (1973). The court quoted the following from the trial court's order: "[P]unitive damages are authorized in this state in the case of all malicious torts." *Id.* at 112, 200 S.E.2d at 264. *See also* Vickers v. Motte, 109 Ga. App. 615, 137 S.E.2d 77 (1964).

[29] 67 Ga. 190 (1881). The holding of this case is codified at GA. CODE ANN. § 69-208 (1967), which provides as follows:

> Members of the council and other officers of a municipal corporation shall be personally liable to one who sustains special damages as the result of any official act of such officers, if done oppressively, maliciously, corruptly, or without authority of law.

[30] Pruden v. Love, 67 Ga. 190, 193-94 (1881).

[31] *See, e.g.,* City of Hawkinsville v. Wilson & Wilson, Inc., 231 Ga. 110, 200 S.E.2d 262 (1973), an action by an operator of a garage against the city commissioners for refusing to issue a business license upon the payment of the required tax. The Supreme Court of Georgia used the language of the statute codifying *Pruden*, but also indicated, quoting the trial court's order, that "the defendant commissioners would be liable in damages if two conditions are met, namely that they acted contrary to a non-discretionary, ministerial duty and that they

Even in light of much judicial rhetoric to the effect that public officers are entitled to the quasi-immunity discussed above, there appear to be at least two special instances in which liability can be based on simple negligence. The first instance concerns the public officer who is required to carry an official bond. Such an officer appears to be liable, at least to the extent of the bond, for simple negligence.[32] The second instance concerns ministerial acts. If the act is labeled "ministerial," then as articulated by at least one court, public officers "may even be liable for non-feasance as well as misfeasance, for mistakes and neglects. . . ."[33] The two instances in which there may be liability for negligence are not always distinguished, as illustrated by the case of *Thomas v. Williams*.[34] There, the plaintiff brought suit against the acting chief of police of Snellville, seeking to hold him personally liable for the death of the plaintiff's husband, who died from exposure to fire and smoke while incarcerated in the city jail. The defendant police officer demurred and was sustained. On appeal, the court held that the plaintiff's petition, which only alleged negligence, was good as against a general demurrer. The plaintiff was thus required to allege only negligence in order to set out a cause of action. At trial, the plaintiff would not have the more difficult burden of proving maliciousness or oppressiveness. The defendant in *Thomas*, therefore, was held not to be entitled to quasi-immunity, though the reason for that holding is not made clear. In support of its decision, however, the court in *Thomas* cited a case involving a sheriff's liability under an official bond. Thus, it may have been that the court was simply misapplying, in the case of an officer not required to carry a bond, precedent involving bonded officers. Alternatively, the court could have been applying the well-established rule that the acts of a jailor, like the acts of an arresting officer, are purely ministerial.[35]

While at least some acts of public "officials" may thus be treated

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acted with malice." *Id.* at 112, 200 S.E.2d at 264. *Cf.* Koehler v. Massell, 229 Ga. 359, 191 S.E.2d 830 (1972). There does not appear to be any difference, in so far as personal liability is concerned, in the way the law is applied to public officers on the state, county or municipal levels.

[32] *E.g.*, Fidelity-Phenix Ins. Co. v. Mauldin, 118 Ga. App. 401, 163 S.E.2d 834 (1968).

[33] Vickers v. Motte, 109 Ga. App. 615, 618, 137 S.E.2d 77, 80 (1964) (citations omitted).

[34] 105 Ga. App. 321, 124 S.E.2d 409 (1962), *followed* Winston v. City of Austell, 123 Ga. App. 183, 179 S.E.2d 665 (1971).

[35] *See* note 21 and accompanying text *supra*. A further possible alternative is that the court in *Thomas* was implying that the defendant was not an officer at all, but an employee. *See* notes 36-38 and accompanying text *infra*.

as ministerial, the acts of one classified as an "employee" as opposed to an "officer" are likely to be treated as ministerial as a matter of course. In the case of *Foster v. Crowder*,[36] for example, the plaintiff was struck by a city truck being driven by the defendant, a city employee. Relying solely on negligence, the plaintiff sought to hold the defendant personally liable. The plaintiff's complaint was dismissed, and on appeal the court reversed, pointing out that "[a]n employee who commits a wrongful or tortious act violates a duty he owes to the one who is injured and is personally liable. . . ."[37] The court, however, footnoted the word "employee" in the above quotation and made the following statement: "Officers in the performance of administrative, legislative or judicial functions can be held only for malicious, corrupt, oppressive or unauthorized action."[38] Thus, whether an act will be classified as ministerial or discretionary may depend on whether the actor is classified as an officer or an employee.

Since a suit against the employee in his individual capacity is not a suit against the state, Georgia's doctrine of sovereign immunity cannot protect the employee in that capacity. To the contrary, there is ample precedent in Georgia for suing a state employee individually for the manner in which he performed official duties.[39]

An example of a suit maintained against a state employee individually is the case of *Cannon v. Montgomery*.[40] In the *Cannon* case, a private individual and the State Department of Game and Fish had a dispute as to who owned a particular piece of property. An employee of the State Department of Game and Fish was sent to the property as a guard. While there, he removed the lock from a

[36] 117 Ga. App. 568, 161 S.E.2d 364 (1968).

[37] *Id.* at 569, 161 S.E.2d at 365-66.

[38] *Id.* at 569 n.2, 161 S.E.2d at 365 n.2 (citations omitted). *See also* GA. CODE ANN. § 69-307 (1967) which provides as follows: "A municipal corporation shall not be liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law." The Georgia courts in applying this statute have upon occasion had to decide whether or not a given municipal employee was an "officer". For example, in McWilliams v. City of Rome, 142 Ga. 848, 83 S.E. 945 (1914), the court held that a Superintendent of Public Works was not an "officer" within the meaning of the statute. Because the definition of the term "officers" within the meaning of this statute may well be different from the definition applied when an official's personal liability is involved, cases applying this statute are of little assistance in determining whether a qualified immunity attaches.

[39] Cannon v. Montgomery, 184 Ga. 588, 192 S.E. 206 (1937); Dennison Mfg. Co. v. Wright, 156 Ga. 789, 120 S.E. 120 (1923); Perry v. Regents of the Univ. Sys., 127 Ga. App. 42, 192 S.E.2d 518 (1972); Irwin v. Arrendale, 117 Ga. App. 1, 159 S.E.2d 719 (1967).

[40] 184 Ga. 588, 192 S.E.2d 206 (1937).

building located on the disputed property and took up residence. When the purported private landowner sued the guard for trespass and for damage to the building, the court allowed the suit since it was brought against the guard in his individual capacity.

A second example is *Perry v. Regents of the University System.*[41] After the plaintiff, a former state employee, had quit her job with the state, her supervisor noticed that some state funds were missing from their department. The supervisor told the other employees: "We know who took the money. We just can't prove it. She is no longer with us." The plaintiff was allegedly the only employee who had left that department during the preceeding several years.

Mrs. Perry sued the Board of Regents and she also sued her supervisor in his individual capacity for slander. The court affirmed the trial court's dismissal as to the Board of Regents under the doctrine of sovereign immunity. The supervisor contended that he too was immune from suit as he was a state employee acting within the scope of his authority. The court disagreed, since he was being sued only in his individual capacity, and reversed a dismissal of the suit as to him.

Faced with the difficulty of classifying the acts and status of various agents of the state, the courts occasionally simply avoid labelling the act as discretionary or ministerial or the actor as an officer or employee. For example, in *McClellan v. Carter,*[42] the plaintiff sought to hold a state cattle inspector personally liable for the death of the plaintiff's bull, which had been left overnight in a cattle dip. The petition alleged that the defendant's acts were negligent, unauthorized by law, not within the scope of defendant's duties, wanton, and done with intent to injure the plaintiff. Without bothering to label the defendant's actions as judicial, discretionary, or ministerial, the court held that the plaintiff's petition was good as against a general demurrer:

> While we recognize the general rule that public officers, when acting in good faith and within the scope of their duty, are not liable to private action, we recognize also that it is well settled that when they do things not authorized by law, or act in a wanton or malicious way and with intent to injure the property of another, they are responsible for a violation of their duty.[43]

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[41] 127 Ga. App. 42, 192 S.E.2d 518 (1972).

[42] 30 Ga. App. 150, 117 S.E. 118 (1923).

[43] *Id.* at 151, 117 S.E.2d at 118.

The court pointed out that the petition in the case not only alleged that the acts of the defendant were unauthorized by law, careless, negligent, and outside the scope of his authority, but that they were wanton and done intentionally and with the intent to injure and damage the plaintiff. The court also remarked, however, that the petition showed that the defendant did not give to the animal that necessary care required by law.[44]

B. *Official Immunity Under Federal Law*

Only recently, and in marked contrast to state court treatment of state officials, the federal courts have tended to extend absolute immunity to federal executive officials generally. The steps in this development are illustrated in the following cases. In *Gregoire v. Biddle,*[45] a complaint was filed against two successive Attorneys-General of the United States, two successive directors of a wartime enemy alien control unit of the Department of Justice, and the District Director of Immigration at Ellis Island, alleging that they had arrested the plaintiff on the pretense that he was a German, and thus an enemy alien, and had kept him in custody until he was released by writ of habeas corpus. These acts had occurred despite the ruling of a hearing board that the plaintiff was a Frenchman. The Second Circuit affirmed the dismissal of the complaint with the observation that officers of the Department of Justice, when engaged in prosecuting private persons, enjoy the same absolute immunity as judges. The court pointed to the historical justification that it is better to leave unredressed the wrongs done by dishonest officials than to subject those who try to do their duty to the constant dread of retaliation. In *Barr v. Matteo,*[46] the Supreme Court held for much the same reasons that the Acting Director of the Office of Rent Stabilization was "absolutely privileged" (*i.e.*, absolutely immune) with respect to defamatory material contained in a press release accusing former employees of his agency of wrongdoing so that he was not liable even if he acted maliciously.

In *Norton v. McShane,*[47] a group of white Mississippians brought suit against various Justice Department officials and a Deputy United States Marshall, alleging that the day following the enroll-

[44] *Id.*

[45] 177 F.2d 579 (2d Cir. 1949).

[46] 360 U.S. 564 (1959).

[47] 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965).

ment of James Meredith at the University of Mississippi, the defendants unlawfully and maliciously arrested and detained them without charges for 21 hours, during which time they were made to sit in a rigid position for 18 hours without speaking, eating, or drinking, were assaulted and battered with a billy club, and were subjected to other mistreatment. On the authority of *Barr v. Matteo,* the Fifth Circuit affirmed a grant of summary judgment in favor of the federal officials.[48]

Finally, in two cases which surely represent the outer limit of executive immunity, the Seventh Circuit, on the authority of *Barr* and *McShane*, first affirmed a grant of summary judgment in favor of various Treasury Department officials who had been assigned to protect the President during a trip to Chicago and who attempted to bar the plaintiff, a registered firearms dealer who kept a cannon in his garage and a large cache of weapons in his home near O'Hare Field, from going into his house, except in their presence.[49] To add insult to this unredressed injury, one year later the Seventh Circuit, in a second suit brought by the disgruntled gun dealer, once again affirmed a grant of summary judgment, this time in favor of a Secret Service agent who, after the first incident, went to Chicago to lecture to a police academy and remarked in the course of a question and answer period that the plaintiff was a "nut" and that the Secret Service had dismantled a cannon that plaintiff had pointed at O'Hare Field the day the President arrived there in 1964.[50]

Despite these developments, a still more recent case suggests that a major modification in the absolute immunity of federal officials may be in the making. In *Apton v. Wilson,*[51] the Court of Appeals for the District of Columbia Circuit held that high officials of the Department of Justice—namely then Attorney-General John Mitchell, Deputy Attorney-General Richard Kleindienst and other Justice Department officials—did not enjoy absolute immunity from civil liability for directing or participating in law enforcement activity which may have deprived innocent persons of their first and fifth amendment rights during the May Day demonstrations of 1971. Rather, they enjoyed only a qualified immunity which de-

[48] The authority of the *Norton* case, however, has been drawn into question by more recent cases. *See* note 70 and accompanying text *infra*.

[49] Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967).

[50] Scherer v. Morrow, 401 F.2d 204 (7th Cir. 1968), *cert. denied*, 393 U.S. 1084 (1969).

[51] 506 F.2d 83 (D.C. Cir. 1974).

pended, in turn, on a factual showing regarding their knowledge of the nature of the impending demonstrations and their good faith belief in the need for the law enforcement activities which were ultimately ordered. Thus, when constitutional rights have allegedly been violated, it would appear that immunity from suit is qualified even at the very highest levels of the Executive Branch.[52]

These developments are of more than casual interest to state officials, not only because the decisions may influence state courts, which as we have seen are generally much more disposed to restrict absolute immunity to superior officers,[53] but also because, as will be seen, state officials who are sued in federal court will enjoy immunity to the same extent as do federal officials.[54]

Having sketched the parameters of the immunity of public officials under state and federal law, it is necessary to turn to the correlative issue of the extent of official *liability* under those two bodies of law. Here, as with the development of official immunity, federal law has recently taken the lead. As a result, public official liability is as a practical matter primarily a question of federal law, with state law simply supplementing and filling in gaps which federal law does not reach. For that reason, the scope of official liability will be considered primarily in the context of federal law, with resort to state law only where it extends liability beyond that imposed by federal law.

III. Personal Liability of State Officials Under State and Federal Law—Civil Rights Violations

Not surprisingly, a survey of federal law discloses that the one area in which state officials are expressly and routinely held personally liable is the area of civil rights. Section 1 of the Civil Rights Act of 1871, enacted pursuant to the enforcement clause of the fourteenth amendment, and now codified at section 1983 of Title 42 of the United States Code, expressly provides that:

> 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 depriva-

[52] Compare this result with the recent Supreme Court cases discussed in the text accompanying notes 69-70 *infra*, dealing with alleged constitutional violations by high state officials.

[53] *See* text accompanying notes 12-21 *supra*. *See also* Prosser § 132, at 988.

[54] *See* notes 70, 86 and accompanying text *infra*.

> tion 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.

Companion provisions creating civil liability for denials of equal protection of the laws[55] have been construed as being limited to racial or perhaps some other class-based discrimination,[56] but the language of section 1983 is not so limited. Nor is the provision, in contrast to its criminal law counterpart,[57] limited to malicious conduct.[58] Moreover, the literal language of the statute would make judges, legislators, and executive officials liable, even when they act reasonably and in good faith.[59]

A. *Development of Liability Under Section 1983*

The question of whether good faith and reasonableness constitute a defense to a section 1983 claim did not arise during the first seventy years of the statute's life for the simple reason that cases were rarely brought under the provision. Those which were brought dealt primarily with the voting rights of blacks and the alleged deprivation of those rights through official action taken pursuant to an unconstitutional state statute.[60] The relief granted in such cases was normally to enjoin the enforcement of the statute. Not until 1939 did the Supreme Court uphold the right of blacks to sue for damages sustained because they were deprived of the right to vote.[61] Not until 1945, moreover, did the Court suggest, and then only in the context of the criminal law counterpart of section 1983, that state officers could violate state law and nevertheless be acting "under color of state law" for purposes of section 1983.[62] Acting under "color" of law, in short, was interpreted to mean nothing more than acting

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[55] 42 U.S.C. §§ 1981-82 (1970) prohibit racial discrimination in the enforcement of contracts and in the purchase and sale of property, respectively. 42 U.S.C § 1985(3) (1970) prohibits conspiracies to deprive a person or class of persons of the equal protection of the laws.

[56] *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). *See also* cases cited in notes 115-19 *infra*.

[57] 18 U.S.C. §§ 241-42 (1970) are criminal law equivalents of sections 1983 and 1985(3).

[58] *See* text following note 67 *infra*.

[59] *See* DAVIS, § 26.05.

[60] *See* Shapo, *Constitutional Tort:* Monroe v. Pape, *and The Frontiers Beyond*, 60 N.W.U.L. REV. 277, 282-83 (1965).

[61] Lane v. Wilson, 307 U.S. 268 (1939).

[62] Screws v. United States, 325 U.S. 91, 107-08 (1945).

under pretense of state law.

As a result of this holding, a spate of lower court cases began to be brought under section 1983 against state officials. The courts at first tended to apply the language of the statute literally, regardless of the state official involved. Thus, a complaint brought by a person claiming to have been wrongfully extradited from one state to another was allowed to stand against the governor and a justice of the peace of the state as well as against various police officials.[63]

Faced with the expanding contours of liability under section 1983, the Supreme Court quickly decided that legislators could not be held personally liable under that provision,[64] thus abandoning the literal language of the statute. A later decision reaffirmed absolute immunity with respect to state judges.[65] The Court has not, however, recognized a similar absolute immunity for state executive officers. In the landmark case of *Monroe v. Pape*,[66] the Court confirmed that just as a state official can be prosecuted under the criminal statute prohibiting civil rights violations even though he is also violating state law, so can a state official be sued under section 1983 for conduct amounting to a common law tort. Section 1983, said the Court, "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[67] The Court held, further, that in contrast to its criminal counterpart, section 1983 does not require a showing or a specific intent to deprive a person of a federal right.

In *Pierson v. Ray*,[68] however, the Supreme Court decided that the background of tort liability against which section 1983 is to be interpreted itself provides some limited protection to state officials. In *Pierson*, the Court excused a policeman from liability for making arrest under a statute which he reasonably believed to be valid but which was later held unconstitutional. The Court noted that at common law, a policeman was not personally liable for arrests made in good faith and with probable cause. Likewise, under section 1983 a policeman, prior to making an arrest, should not be required to review the constitutionality of the statute on which he is relying.

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[63] Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947).

[64] Tenney v. Brandhove, 341 U.S. 367 (1951).

[65] Pierson v. Ray, 386 U.S. 547 (1967).

[66] 365 U.S. 167 (1961).

[67] 365 U.S. at 187.

[68] 386 U.S. 547 (1967).

Like the common law privilege of police officers, however, the defense recognized in *Pierson* is qualified by a requirement that the officer act in good faith, *i.e.* without malicious motives, and with probable cause, *i.e.* an objective basis for making an arrest.

The *Pierson* requirements of good faith and an objective basis for official conduct have become the touchstones of executive immunity under section 1983. In *Scheuer v. Rhodes,*[69] a civil rights case in which the parents of the students killed at Kent State University sued the Governor of Ohio, the Adjutant-General of the Ohio National Guard, various National Guard officers and enlisted members, and the president of the University, the Court held that the immunity of executive officials in state government is not absolute but qualified by a requirement of good faith and reasonable grounds for that good faith, and varies among officials only in degree, depending on the scope of discretion and responsibility of the office and the circumstances existing at the time the challenged action was taken. Thus the qualified immunity of a police officer and that of a high level executive official differ only to the extent that there are clearer legal standards governing the reasonableness of an arrest than there are governing the reasonableness of controlling a civil disorder.[70]

Only recently, the Court in *Wood v. Strickland*[71] applied the *Pierson* requirements in yet another context, holding that high school students who had been expelled for violating a school regulation prohibiting use or possession of alcoholic beverages at school activities could maintain an action for damages against school officials for violation of their right to procedural due process and could

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[69] 416 U.S. 232 (1974).

[70] The disparity between the qualified immunity of high state officials in *Scheuer* and the apparent absolute immunity accorded, without regard to rank or the type of violation alleged, to federal officials in such cases as the *Scherer* cases and *Norton v. McShane,* discussed in text accompanying notes 47-50 *supra,* undoubtedly led to the decision of the Court of Appeals for the District of Columbia Circuit in the case of Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974), qualifying, in cases alleging constitutional violations, the otherwise absolute immunity of federal officials. The court was also influenced, of course, by the intervening case of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which held that although no federal statute expressly provides civil remedies for a federal official's violation of a person's federal constitutional rights, federal courts can award money damages as a remedy implied in the fourth amendment itself. More recently still, of course, the Federal Tort Claims Act has been amended to give a cause of action for damages against the United States when an investigative or law enforcement official is claimed to have committed an intentional tort. *See* note 4 *supra.*

[71] 420 U.S. 308 (1975).

recover if the school officials knew or reasonably should have known that the action they took would violate the clearly established constitutional rights of the students affected.[72]

[72] The *Wood* decision has prompted the Attorney General of the State of Georgia to circulate a memorandum to all members of state boards and other state officials cautioning them that as a result of *Wood* there appears to be "a new affirmative duty on the part of those state officials whose discretionary actions or judgments directly affect others (*e.g.*, their subordinates or possibly even citizens generally) to become and remain more or less familiar with 'the basic, unquestioned constitutional rights' of those individuals whom their decisions and actions directly affect." Memorandum of the Attorney General, dated Mar. 28, 1975, at 4 (italics omitted). It is true, as the Attorney General's memorandum points out, that even though the Court in *Wood* limited its holding to the specific context of school discipline, there is no reason to suppose that a lesser responsibility will be placed on other state officials and board members with respect to knowledge of the basic, unquestioned constitutional rights of those directly affected by their discretionary decisions and actions. However, it is not so clear that the Court in *Wood* "added a new ingredient to the pot," as the Attorney General's memorandum indicated, or that prior to *Wood*, good faith on the part of public officials was, in and of itself, enough to avoid liability. Indeed, all that is "new" about *Wood* is that the Court for the first time has applied the requirements of *Pierson* and *Scheuer* to a case in which the alleged constitutional violation did not involve a direct physical invasion of an individual's person, but rather the deprivation of an intangible right to procedural due process. Good faith has never in and of itself been enough in cases involving a direct physical invasion of another's person. As *Pierson* and *Scheuer* illustrate, the Court has always required that in addition to an official's subjective good faith, there must be a reasonable basis for the official's conduct. *See* text accompanying notes 68-70 *supra*. Nor has the Court ever required a showing, in such cases, that an official was aware that his conduct amounted to a deprivation of another's civil rights. *See* text following note 67 *supra*. It is enough that the official was acting consciously and that the conscious action thus taken resulted in a constitutional violation. *See* text accompanying notes 73-77 *infra*. Here, as elsewhere, ignorance of the law has never been an excuse. Similarly, in the law of torts, once knowledge of the immediate consequences of one's conduct has been established, liability is routinely imposed for other unintended and even unforseeable *factual* consequences of one's conduct. *See, e.g.* Baldinger v. Banks, 26 Misc. 2d 1086, 201 N.Y.S.2d 629 (Sup. Ct. of NY, Kings Co., 1960) (minor who intended to offensively touch another minor held liable for unintended and unforseeable physical injuries which resulted); Garrett v. Dailey, 46 Wash.2d 197, 279 P.2d 1091 (1955).

When the consequences of one's own conduct amount to no more than a denial of an intangible right to procedural due process, the line between knowledge of factual consequences and knowledge of the law becomes blurred. If an official acts in bad faith or without reasonable grounds, however, liability attaches regardless of whether the resulting consequences are classified as legal or factual. The only pertinent question with respect to liability is whether the official acted in good faith and with reasonable grounds for doing so. Hence, the Court declared in *Wood* that an official will only be held liable for "consciously acting in such a way as to deprive another of his or her procedural due process rights, if the actor knew or should have known that such a deprivation would be the result of the official's conduct." The Court's language thus recognizes the twin requirements of subjective good faith and an objective basis for that good faith. An official's subjective protestations of good faith and ignorance of the law will not be controlling when objective circumstances indicate the official knew or should have known that procedural due process rights were being violated. Those circumstances would arguably be shown to exist, for example, not only on evidence of the officials' actual or constructive knowledge of the requirements of due process, but also when

B. *Scope of Liability Under Section 1983—Intent Requirement*

What, then, is the precise scope of a state official's liability under section 1983? Does the Court's holding in *Monroe* that there is no requirement of any specific intent to deprive a person of a federal right mean that an official can be held liable for a merely negligent violation of another's constitutional right? While at least one court has extended liability under section 1983 to the grossly negligent conduct of a police officer,[73] the courts have in general been unwilling to extend liability under section 1983 to merely negligent conduct.[74] Thus, even though no specific intent to deprive another of a federal right is required, liability does appear to be limited to conduct which would be classified in the law of torts as "intentional"—namely conduct which is knowing or voluntary and whose immediate consequences are relatively certain, as opposed to conduct which is merely inadvertent and whose consequences are merely within the realm of the foreseeable.[75]

While this limitation on section 1983 liability may to some extent free supervisory officials from liability for the misconduct of subordinates when the gist of the complaint against the supervisor is that the subordinate was inadequately trained or supervised, the protection thus afforded is incomplete because of the uncertain parameters of the concept of intentional misconduct in the law of torts. If a subordinate is simply carrying out the orders of a superior officer, for example, the courts are unlikely to be impressed with the fact that the superior officer did not know of the specific constitutional violation at the time it occurred. In a close-to-home illustration, a mayor in Georgia was recently held liable under section 1983 for

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it appears that the official must have been aware that his or her conduct was patently unfair. Conversely, as with a police officer making an arrest, an official will be excused from liability when it appears that the official, even though mistaken, did in fact act in good faith and with probable cause to believe that procedural due process rights were not being violated.

The Attorney General, by characterizing the imposition of liability on one who did not know but should have known of the requirements of procedural due process, as a "new ingredient" in official liability under section 1983, not only ignores the *Pierson* and *Scheuer* requirements of an objective basis for subjective protestations of good faith, but also ignores the distinction, drawn in *Monroe* and subsequent cases, between a requirement of specific intent and a requirement of conscious conduct.

[73] Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). *See generally* Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971), discussed in text accompanying note 108 *infra*.

[74] *See, e.g.*, notes 108, 110 and accompanying text *infra*.

[75] PROSSER §§ 8, 31 at 31-32, 145. *See also* RESTATEMENT (SECOND) OF TORTS § 8A (1965).

$35,000 actual damages and $10,000 punitive damages when, in the course of a civil disorder, the mayor issued a "shoot-to-kill" order to the police, and a policeman later shot a juvenile who was resisting arrest on what could have been no more than a misdemeanor charge.[76] The district court observed that while the mayor did not pull the trigger or order it pulled, his "shoot-to-kill" orders and related statements at the time created the feeling of authority on the part of the city policeman that caused the officer to do what he did to the plaintiff. Similarly, a warden of a prison was held liable, notwithstanding his rare inspections of the prison, for $1,500 compensatory damages after a prisoner was incarcerated naked in an unheated "strip cell" for a period of days in accordance with the prison's routine "rehabilitative" practice.[77] The warden's knowledge of the specific incident in question was immaterial, given his general knowledge of prison practice.

C. *Scope of Liability Under Section 1983—Specified Violations*

The question of the mental state necessary to impose liability under section 1983 is but a part of the question raised by the Supreme Court's holding in *Monroe* of the extent to which section 1983 liability and the common law of tort liability against which section 1983 is to be interpreted are coterminous. The major cases in the development of section 1983 liability have, of course, been police misconduct cases in which the alleged constitutional violation falls within the boundaries of such common law torts to person and property as assault, battery, false imprisonment, conversion of personal property, and trespass to land. The reason that these common law torts rise to the level of constitutional violations when committed by state officials is that they constitute deprivations of life, liberty, or property in violation of the due process clause of the fourteenth amendment and may constitute an unreasonable search and seizure in violation of the fourth amendment or cruel and unusual punishment in violation of the eighth amendment. Just as at common law, however, liability under section 1983 is not limited to the direct infliction of physical injuries to person and property. Indirect physical injuries resulting from the refusal to provide medical care[78] or

[76] Palmer v. Hall, 380 F. Supp. 120 (M.D. Ga. 1974), *modified*, 517 F.2d 705 (5th Cir. 1975) (finding that police officer relied on order of mayor not supported by substantial evidence).

[77] Wright v. McMann, 460 F.2d 126 (2d Cir. 1972), *cert. denied*, 409 U.S. 885 (1972).

[78] Landman v. Royster, 354 F. Supp. 1302 (E.D. Va. 1973).

adequate protection for the safety of prisoners,[79] for example, have been held to constitute violations of section 1983. No doubt influenced by the expansion of common law tort liability to include such torts as wrongful infliction of mental distress and invasion of privacy,[80] as well as by the emerging constitutional right of privacy,[81] courts have also extended liability under section 1983 to cover purely emotional injuries when such injuries result from an otherwise unconstitutional act by a state official.[82] In the recent case of *McGhee v. Moyer,*[83] for example, a welfare recipient was allowed to sue various state welfare officials who removed her children from school on account of poor conditions at home and subsequently refused to inform her of the children's whereabouts. The court made no mention of the constitutional violation involved beyond stating that "if the plaintiff can prove her allegations she will have shown a deprivation of her right to the custody of her children. . . ." The court apparently viewed the loss of custody of the children as either a deprivation of the parent's liberty to rear her children or as an invasion of the parent's right to privacy, both of which have been recognized as rights protected by the Constitution.[84]

In at least one area, the commission of a common law tort by a state official has been held not to give rise to liability under section 1983. In *Morey v. Independent School District,*[85] the court held that a teacher's claim for damages for defamation was not recoverable under section 1983 because a defamed person has not been deprived of any rights, privileges, or immunities secured to him by the Constitution or laws of the United States.[86] At common law, however, a

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[79] Schwab v. First Appalachian Ins. Co., 58 F.R.D. 615 (S.D. Fla. 1973); Kish v. County of Milwaukee, 48 F.R.D. 102 (E.D. Wis. 1969).

[80] *See* PROSSER §§ 12, 117 at 49, 802.

[81] *See* note 84 *infra. Cf.* Bivins v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (rejecting the notion that the fourth amendment proscribes *only* such conduct as would constitute an invasion of privacy under state law).

[82] In the absence of other allegations of constitutional violations, however, a claim that a prison warden by his conduct gave a state prisoner ulcers does not state a deprivation of a federally protected right. Medlock v. Burke, 285 F. Supp. 67 (E.D. Wis. 1968).

[83] 60 F.R.D. 578 (W.D. Va. 1973).

[84] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to educate one's children as one chooses made applicable to states by force of the fourteenth amendment). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (specific guarantees of Bill of Rights create zone of privacy protected from government intrusion).

[85] 312 F. Supp. 1257 (D. Minn. 1969), *adopted,* 429 F.2d 428 (8th Cir. 1970).

[86] The holding in *Morey* would appear consistent with the sum of Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974), which merely qualified in cases of constitutional violations, the otherwise

good deal of overlap is recognized between the tort of defamation and that of invasion of privacy.[87] Thus, in some future case a court might well be sufficiently influenced by the common law to characterize a particularly egregious defamatory statement by a public official as a violation of the constitutional right of privacy. Even if the federal courts do not impose liability for defamation as a matter of federal law, of course, the case of *Perry v. Regents of the University System*[88] indicates that at least when the defendant is classified as an employee rather than as an official, there may be liability for defamation as a matter of state common law.[89]

While defamation is an area in which common law liability extends beyond section 1983 liability, there are several areas in which liability under section 1983 extends beyond the common law of tort liability. The most frequent cases of this sort involve charges by public employees, students, recipients of government benefits, and state prisoners that state officials have abridged their first amendment freedom of speech or denied them procedural due process in the course of disciplinary or regulatory actions. In *Perry v. Sinderman,*[90] a case in which a nontenured professor at a state school claimed that the nonrenewal of his contract was because of his public criticism of the Board of Regents, the Supreme Court held that even though the nontenured professor had no contractual or tenurial right, and thus no protectable property interest in continued employment, governmental officials could not deprive him of a valuable governmental benefit on a basis that infringed his constitutionally protected interest in freedom of speech. As the Court had previously stated in *Pickering v. Board of Education,*[91] first amendment rights are not absolute, but once a teacher has established that nonrenewal was because of the teacher's exercise of constitutionally protected rights, the burden is on the employer to show that the teacher's acts materially and substantially interfered with the re-

absolute immunity of federal officials and Barr v. Matteo, 360 U.S. 564 (1959), which held that a federal official is absolutely immune from suits for defamation allegedly occurring in the exercise of official duties. *See* text accompanying notes 46 and 51 *supra*. *See also* Hines v. D'Artois, 383 F. Supp. 184 (W.D. La. 1974).

[87] PROSSER § 117, at 813.

[88] 127 Ga. App. 42, 192 S.E.2d 518 (1972). *See* text accompanying note 41 *supra*.

[89] The *Perry* case is in accord with Barr v. Matteo, 360 U.S. 564 (1959), which recognizes that at some point a defamatory statement made by a *federal* employee would no longer be within the scope of the employee's duties.

[90] 408 U.S. 593 (1972).

[91] 391 U.S. 563 (1968).

quirements of appropriate discipline in the operation of the school. Even in the absence of a claimed deprivation of first amendment rights, the Court in *Board of Regents v. Roth,*[92] held that a public employee who has a legitimate claim of entitlement to continued employment cannot be deprived of that interest without notice and an opportunity to be heard, as required by the due process clause of the fourteenth amendment. The *Roth* requirement of procedural due process has spawned numerous suits for injunctive relief in Georgia and elsewhere, which have spelled out what sort of process a public employee is due.[93]

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[92] 408 U.S. 564 (1972).

[93] The requirements of due process are not set in cement. More process is due in some cases than in others. The Fifth Circuit, in a case involving the firing of a nontenured professor who was said to have had an "expectation of reemployment," held that due process meant that:

> (a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist, (b) he be advised of the names and the nature of the testimony of witnesses against him, (c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense, (d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.

Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970). While *Roth* subsequently overruled *Ferguson* on the nature of the property interest required to give rise to a right to procedural due process, the *Ferguson* requirements for the type of process which is due are still valid. While the *Ferguson* requirements give some idea of the elements of due process, they lose more and more precedential value as the facts of a case depart from the *Ferguson* facts. In Robison v. Wichita Falls & North Texas Community Action Corp., 507 F.2d 245 (5th Cir. 1975), the court declined to apply the *Ferguson* criteria literally to the case of a poverty program executive fired for "submitting false travel vouchers." The *Robison* court said: "The process sufficient to satisfy the due process requirement depends on the facts and circumstances of an individual case and not on figures of speech imported from other cases." *Id.* at 253. For an application of the *Ferguson* criteria in the Northern District of Georgia, see Parker v. Letson, 380 F. Supp. 280 (N.D. Ga. 1974), in which the court held that the failure of a school board to notify a teacher of the names and nature of testimony of witnesses and the failure of the board to give her a copy of the supervisor's memorandum which was then used against her at her discharge hearing, constituted a violation of the teacher's constitutional right to minimum procedural due process. *See also* Eley v. Morris ___ F. Supp. ___ (N.D. Ga. 1974), in which a three judge court declared that the statutory and regulatory scheme governing the termination of classified state employees covered by the Georgia State Merit System is unconstitutional in failing to provide a list of specific charges prior to termination and in failing to provide for a pretermination hearing or other meaningful opportunity to protect the employee's interests before termination.

The most recent Supreme Court case in the area of nonprobationary employee dismissals is Arnett v. Kennedy, 416 U.S. 134 (1974), in which the Court upheld the discharge of a nonprobationary *federal* employee pursuant to the provisions of the Lloyd-LaFollette Act, 5 U.S.C. § 7501 (1970). The provisions of that Act have thus become a standard by which the sufficiency of state procedures is measured. The court in *Eley* decided, citing the Fifth Circuit's opinion in Davis v. Vandiver, 494 F.2d 830 (5th Cir. 1974), that *Arnett* demands procedures substantially equivalent to those upheld in *Arnett*—namely, procedures which

Likewise, lower courts, following *Perry* and *Roth*, have awarded damages against state officials for particularly egregious violations of the first amendment and procedural due process rights of employees. In *McLaughlin v. Tilendis*,[94] the Seventh Circuit reversed the dismissal of a teacher's complaint which had alleged that the teacher was wrongfully discharged because of his association with a teacher's union. The court held that an unjustified interference with the teacher's associational freedom presented a claim under section 1983. In *Smith v. Losee*,[95] the Tenth Circuit upheld an award of $4,100 in actual damages and $2,500 in punitive damages against a college president and two deans who had discharged a nontenured professor because of his political activities in favor of a candidate for the state senate. In a similar case, an assistant professor fired on account of his antiwar activities was awarded reinstatement and $9,000 compensatory damages for salary loss.[96] In *Horton v. Orange County Board of Education*,[97] in which a termination of a teacher because of insubordination was determined proper, but the teacher was not notified of the reason for her termination, an award for damages for her net pecuniary loss for the period between the date of dismissal and the trial court's decision was upheld.

The principles involved in the *Sinderman* and *Roth* cases are applicable not only to public employees generally but to public school students,[98] recipients of government benefits,[99] and state pris-

provide for 1) advance notice of the charge, 2) an opportunity to respond to the charge, and 3) a pretermination opportunity to refute the charge before a responsible official. In arriving at that conclusion the *Eley* court also relied on the Supreme Court's recent decision in Goss v. Lopez, 419 U.S. 565 (1975), with respect to the procedural rights of temporarily suspended public high school students. *See* note 98 *infra*.

[94] 398 F.2d 287 (7th Cir. 1968). *See generally* Note, *Damages Under § 1983: The School Context*, 46 IND. L.J. 521 (1971).

[95] 485 F.2d 334 (10th Cir. 1973).

[96] Stolberg v. Members of Bd. of Trustees, 474 F.2d 485 (2d Cir. 1973). The court, noting that the professor was subsequently elected to the state legislature, prudently declined to award additional compensatory damages for humiliation.

[97] 464 F.2d 536 (4th Cir. 1972).

[98] *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (certain regulations and provisions of Ohio law are unconstitutional in permitting high school students to be temporarily suspended from school without providing minimal due process protections); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (school policy prohibiting the wearing of arm bands and providing for suspension of students who refused to remove arm bands held unconstitutional in absence of showing that the conduct materially and substantially interfered with the requirements of appropriate discipline in the operation of the school). *See also* Papish v. Board of Curators, 410 U.S. 667 (1973) (university regulation requiring students to observe generally accepted standards of conduct and prohibiting indecent conduct or speech could not be used as a basis

oners[100] as well, although in these cases, actions for damages, as opposed to suits for injunctive relief, are less frequent—due, no doubt, to the fact that actual monetary losses may be smaller and more difficult to prove. The Supreme Court confirmed in *Wood v. Strickland*[101] that actions for damages may be brought by school students against school officials. *Wood* also suggests the type of conduct which may be actionable. In *Wood*, although the principal allegedly assured the plaintiff students that he would recommend leniency for their infraction of school rules, the school board, without having given the students an opportunity to be heard and acting on the basis of a hearsay telephone report involving only one of the three students, voted to expel all three plaintiffs from school for the remainder of the semester. Similarly, in *Thonen v. Jenkins*,[102] two college students who were disciplined for having published in a student newspaper a letter containing a vulgarity addressed to the college president were awarded $100 each in compensatory damages and $3,400 in counsel fees and expenses.

While suits for damages by government benefit recipients are still

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for expelling a student for distributing a newspaper containing a political cartoon of policemen raping the Statute of Liberty and an article entitled 'Mother Fucker Acquitted'); Healy v. James, 408 U.S. 169 (1972) (mere dissemination of ideas, no matter how offensive to good taste, may not be prohibited on a state university campus in the name of "conventions of decency" alone). *See generally* Note, *Damages Under § 1983: The School Context*, 46 IND. L.J. 521 (1971).

[99] Goldberg v. Kelly, 397 U.S. 254 (1970) (due process clause requires that a welfare recipient be given a hearing *before* the termination of benefits); Shapiro v. Thompson, 394 U.S. 618 (1969) (state residency requirements for welfare recipients interfere with constitutionally protected right of interstate travel); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment compensation because of claimant's religious refusal to work on Sunday constitutes infringement of first amendment right to free exercise of religion); Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemption because of refusal to subscribe to a loyalty oath constitutes an infringement of first amendment right to free speech). *But see* Dandridge v. Williams, 397 U.S. 471 (1970) (maximum grant limitation of state welfare laws does not deny welfare recipients with large families equal protection of the laws).

[100] Wolff v. McDonnell, 418 U.S. 539 (1974) (procedure for denial of a prisoner's good-time credits must observe minimal due process requirements of advance written notice, written statement by fact finders, and a limited opportunity to present evidence); Procunier v. Martinez, 416 U.S. 396 (1974) (censorship of a prisoner's correspondence can be no greater than is necessary to further the government's interest in security, order and rehabilitation, and decision to withhold delivery of a letter must be accompanied by minimum procedural safeguards against arbitrariness or error); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation must be accomplished by notice and an informal hearing before an impartial hearing officer to determine if there is reasonable ground to support the revocation, and hearing officer must state the reasons for revoking parole).

[101] 420 U.S. 308 (1975).

[102] 374 F. Supp. 134 (E.D.N.C. 1974).

more rare, *McGhee v. Moyer*,[103] the case in which a welfare recipient was allowed to sue welfare officials for having deprived her of her children,[104] demonstrates that such suits are possible. The most likely source of actions for damages in this area is from mental patients claiming to have been deprived of the treatment which courts have declared in suits for injunctive relief to be implicit in their involuntary commitment.[105] In *O'Connor v. Donaldson*,[106] for example, the Supreme Court recently approved the constitutional reasoning upon which a judgment was rendered in favor of a former mental patient who had been involuntarily civilly committed to a state mental hospital and given little or no treatment over 14 years. The plaintiff was awarded $28,500 compensatory damages and $10,100 punitive damages against the attending physicians and the clinical director of the hospital for deprivation of his right to receive treatment or be released. The judgment was vacated because of an erroneous jury instruction regarding official immunity. It bears pointing out that in *O'Connor* the persistent refusal of the defendant to release the patient, even though various individuals and groups proposed reasonable alternatives to continued confinement, was as critical to the decision as the inability of the defendant to explain the denial of treatment. Constitutionally inadequate treatment, resulting solely from factors beyond a public official's control and unaccompanied by evidence of a lack of good faith, would not appear to be enough to render one personally liable. At the opposite extreme from *O'Connor*, a complaint was allowed to stand against officials and a mental institution's supervising psychiatrist who were in effect charged with *excessive* treatment for having allegedly forced the complaining patient, under the guise of a "work therapy" program, to work eight hours a day for a municipality and eight hours a night six nights a week in the institution's boiler house, for pay averaging 36 cents an hour during the day and a penny an hour

[103] 60 F.R.D. 578 (W.D. Va. 1973).

[104] *See generally* Hatfield v. Williams, 64 F.R.D. 71 (N.D. Iowa 1974) (action by mother against adoption agency and its employee asking damages for deprivation of due process in surrender of child to agency).

[105] *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971), *supplemented*, 344 F. Supp. 387 (1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

Procedural due process has been held to be required in the commitment process. *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F.Supp. 1078 (E.D. Wis. 1972), *vacated*, 43 U.S.L.W. 3600 (U.S. May 12, 1975).

[106] 95 S.Ct. 2486 (1975), *vacating and remanding* 493 F.2d 507 (5th Cir. 1974).

at night.[107]

A final benefit recipient case which bears mention is *Gomez v. Florida State Employment Service*,[108] in which the Fifth Circuit upheld a complaint of various migratory farm workers who brought suit against state employees of the State Employment Service and the sanitarian of the county board of health for failing to comply with a federal labor statute and regulations protecting migratory farm workers. This case is particularly important, for it illustrates that although section 1983 has been most often used to protect *constitutional* rights, the language of the statute is such that state officials may be held to respond in damages not only for deprivations of rights conferred by the federal constitution but for deprivations of federal *statutory* rights as well. Thus, any state official administering a program based on federal law could be held liable under section 1983 for knowingly and wrongfully withholding a federal statutory entitlement.

While prisoners' suits for injunctive relief under section 1983 have been legion, cases in which prisoners have recovered damages have been few—due in part, no doubt, to the disinclination of juries to award damages in such cases. Most cases, moreover, have involved physical injury rather than deprivation of intangible procedural rights. For example, in *Roberts v. Williams*,[109] the most spectacular prisoner case to date, the Fifth Circuit upheld an $85,000 award against a sheriff in favor of a juvenile prisoner who was permanently blinded when a prison trusty guard shot him with a gun. Since the claim was merely that the sheriff negligently failed to train and supervise the trusty, however, the award was ultimately upheld on the basis of a pendent state law negligence claim—which federal courts have been held to have the power to adjudicate along with accompanying federal claims[110]—rather than on the prisoner's section 1983 claim itself.[111] In a few cases, prisoners have recovered

[107] Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966). *See also* Winters v. Miller, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971) (right to refuse treatment); Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973) (right to be paid for institution-maintaining labor); Friedman, *The Mentally Handicapped Citizen and Institutional Labor*, 87 HARV. L. REV. 567 (1974).

[108] 417 F.2d 569 (5th Cir. 1969). *See also* Blue v. Craig, 505 F.2d 830 (4th Cir. 1974) (section 1983 applies to rights created by Social Security Act).

[109] 456 F.2d 819 (5th Cir. 1971), *cert. denied*, 404 U.S. 866 (1971).

[110] *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966). *See generally* WRIGHT § 19; Sullivan, *Pendent Jurisdiction: The Impact of* Hagans *and* Moor, 7 IND. L. REV. 925 (1974).

[111] The court's original opinion in *Roberts*, upholding the award as proper under section 1983, was modified by addendum in light of the en banc decision of the Fifth Circuit in

damages for procedural due process violations. In the case of *Wright v. McMann*,[112] which has already been mentioned,[113] damages of $1,500 against a prison warden were awarded a prisoner who was incarcerated in a strip cell for a period of days and was not given notice of the reason or an opportunity to be heard. Similarly, in *Sostre v. McGinnis*[114] the court upheld a $9,300 award in compensatory damages (though reversing an award of punitive damages) against various corrections officials for having incarcerated a prisoner in punitive segregation for an extended period of time without according him procedural due process.

A final area of personal liability under section 1983 and its companion provisions, of course, is liability for race discrimination and other analogous violations of the equal protection clause of the fourteenth amendment. While the civil rights legislation of the 1960's and 1970's is the principal weapon for attacking institutional discrimination in state agencies and the private sector, section 1983 remains an alternative remedy against individual officers when a case of purposeful discrimination can be made out.

A finding of purposeful discrimination need not be based on evidence of bad motives, as a recent case involving a Georgia public official demonstrates. In *Faraca v. Clements*,[115] a director of a mental retardation center with an excellent equal employment record was nevertheless held personally liable for $7,188 for having refused, on the ground of possible adverse reaction from visitors and state legislators, to employ an interracial couple for a cottage administration position. The court reiterated that a public official cannot find sanctuary from the consequences of an act of racial discrimination in a fear that public reaction will bring unfavorable results. The court thus approved the district court's distinction between the plaintiff's knowing failure to obey the law and the situation in which a public official, as in *Pierson v. Ray*, violates a citizen's rights in executing his duties in a way he in good faith believes the law to require.

State officials should also be concerned with the expanding parameters of equal protection, which is not limited to racial discrimina-

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Anderson v. Nosser, 456 F.2d 835 (5th Cir.), *cert. denied*, 409 U.S. 848 (1972), specifically holding that negligent conduct does not give rise to a cognizable claim under section 1983.

[112] 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972).

[113] *See* note 77 and accompanying text *supra*.

[114] 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972).

[115] 506 F.2d 956 (5th Cir. 1975), *cert. denied*, 43 U.S.L.W. 3659 (June 16, 1975).

tion but extends to any similarly class-based discrimination. Despite the current clamor for ratification of the Equal Rights Amendment, for example, courts are increasingly willing to grant relief under the equal protection clause of the fourteenth amendment for sex-based discrimination.[116] Indeed, recent cases decided under section 1983's companion civil conspiracy provision have recognized equal protection violations when the class discriminated against constituted a group of whites of a particular religious persuasion whose freedom to worship was being hampered by militant blacks,[117] employees of unspecified race who were allegedly discriminated against for support and advocacy of equal employment opportunity and opposition to a state agency's employment practices,[118] supporters of a particular political candidate,[119] and even a group of employees active in a local environmental group.[120] Indeed, with so many groups qualifying as potential discriminatees, the most serious threat of personal liability for equal protection violations might well prove to stem from a public official's well-meaning but misguided attempts to eliminate the effects of past discrimination by engaging in reverse discrimination.

IV. Potential Personal Liability under Other Federal Statutes

While section 1983 is the principal means for imposing personal liability on state officials under federal law, there are other storm clouds on the horizon. Various pieces of social legislation containing civil liability provisions have either recently been expanded to apply to state and local officials or at least have not yet been construed to exclude public officials from liability. The Fair Labor Standards Act regulates not only wages and hours, but now contains equal pay provisions and anti-age discrimination provisions and has recently been amended to apply to public employees.[121] Since constitutional

[116] *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (statute providing that when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female held to violate the equal protection clause). *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973) (federal statute presuming that spouses of male armed forces personnel are dependants, while requiring proof of dependancy of spouses of female personnel held to deprive servicewomen of due process under the fifth amendment).

[117] Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971).

[118] Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971).

[119] Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973).

[120] Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir.), *opinion withdrawn, action dismissed as moot*, 507 F.2d 216 (1975) (en banc) (per curiam).

[121] 29 U.S.C.A. § 203(e) (Supp. 1975).

questions have been raised as to whether a state government can be sued by an aggrieved employee in federal court,[122] the amendments may result in suits for back pay being brought against public officials personally. When violations of the FLSA are intentional, of course, actions for its violation could be brought under section 1983 even in the absence of a separately granted private right of action.[123] The action provided by the FLSA is important, however, because private employers have been held liable for merely negligent violations, and indeed have been held liable without regard to fault.[124]

A public official might also be found personally liable under the Fair Credit Reporting Act[125] for having willfully or negligently failed to advise an employee or applicant that an adverse employment decision had been made on the basis of a credit report obtained from a consumer credit reporting agency. Under the FCRA, which is primarily concerned with regulating the practices of credit reporting agencies, a user of such a report may be held liable for failing to advise the employee and supply the name of the agency making the report.[126] There is nothing in the language which limits the act to private employers.

A final area of potential personal liability is under the federal securities statutes.[127] It has recently been suggested that the civil remedies routinely available under the securities statutes in cases involving private parties might also be applied to public officials who enjoy personal gain as a result of inside information in connection with the purchase or sale of a security.[128]

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[122] *Cf.* Employees of Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973), in which the Court held that nothing in the legislative history of the 1966 Amendments to the Fair Labor Standards Act disclosed a congressional purpose to deprive a state of its constitutional immunity to suit in a federal forum by employees of its non-profit institutions.

[123] *See* text accompanying note 107 *supra*.

[124] *See, e.g.*, Brennan v. Partida, 492 F.2d 707 (5th Cir. 1974) (employer's good faith does not excuse his obligation to pay what is due under the FLSA; nor does it matter that the parties had no intention of creating an employment relationship, for application of the FLSA does not turn upon intent); Wirtz v. Harper Buffing Machine Co., 280 F. Supp. 376 (D. Conn. 1968) (neither ignorance nor good intention is defense against penalty of double damages for violations with respect to minimum overtime compensation).

[125] 15 U.S.C. §§ 1681-81t (1970).

[126] 15 U.S.C. §§ 1681m to -81o (1970).

[127] Securities Act of 1933, §§ 11, 12, 15 U.S.C. §§ 77k, 77 *l* (1970); Securities Exchange Act of 1934, § 10b, 15 U.S.C. § 78j (1970).

[128] Note, *The Government Insider and Rule 10b-5: A New Application for an Expanding Doctrine*, 47 So. CAL. L. REV. 1491 (1974).

V. Avoiding Personal Liability

Having outlined the principal areas of a state official's potential personal liability under state and federal law, it is perhaps appropriate to conclude with some observations about how personal liability can be avoided. There is, unfortunately, no easy way. As we have seen, absolute immunity from suit is virtually nonexistent because of the qualification placed on that immunity by the requirement of good faith and, in federal law cases, reasonable grounds for belief. Even avoiding ultimate liability, of course, depends on an official's being able to establish his or her good faith and reasonable grounds for taking the action complained of. A certain amount of protection against liability is afforded by the seventh amendment of the Constitution, which provides a right to jury trial in suits at common law.[129] Should liability be incurred, however, indemnification by the government or a private insurer is an uncertain matter.

The Georgia legislature has recently enacted enabling legislation specifically authorizing municipalities, counties, and other governmental units to purchase policies of liability insurance or contracts of indemnity, insuring or indemnifying members of the governing body and any of its supervisors, administrators, employees, or other selected or appointed officers.[130] The insurance may protect against personal liability for damages growing out of the performance of public duties, whether liability is based upon negligence, violation of contract rights, or violation of civil, constitutional, common law, or other statutory rights, whether state, federal, or local.[131] Indeed, this statute and an earlier more limited one authorizing insurance for board of education members are specifically designed to allow for the use of federal grant funds in the purchase of such insurance.[132]

The mere availability of liability insurance, however, does not mean complete protection against personal liability. Limitations on coverage may be imposed by judicial considerations of public policy as well as by the insurance policy itself. The courts of several states, for example, have held that the same public policy which precludes insurance against criminal acts should operate to avoid imposing

[129] *Cf.* Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974).

[130] Ga. Code Ann. § 89-943 (Supp. 1974).

[131] *Id.*

[132] *See* Ga. Code Ann. § 32-849 (Supp. 1974); Ga. Code Ann. § 89-945 (Supp. 1974).

liability upon an insurer for the intentional misconduct of an insured.[133] Other courts have held that imposing liability on an insurer for punitive damages allowed against the insured is barred for the same public policy reasons.[134]

The Georgia court of appeals has spoken to the former question by distinguishing between an intentional act and an intentional injury, holding that while it may be against public policy to insure against injuries intentionally inflicted, it is not against public policy for a contract of insurance to cover the liability for accidental injuries ensuing out of the willful and wanton misconduct of the insured.[135] The Georgia courts, however, have not considered the question whether insurance coverage for punitive damages contravenes public policy. While there is a clear conflict on this point in the judicial decisions in other states,[136] the better view appears to be that, since damages are assessed as a deterrent, permitting a person to shift the burden to an insurance company would serve no purpose.[137]

Even if public policy permits at least some coverage for the intentional acts of public officials, the specific insurance policy issued may further limit coverage. The particular public official liability policy endorsed by the Association of County Commissioners of Georgia, for example, excludes from coverage any damages ensuing from bodily injury or injury to tangible property and also excludes from coverage any claims for false arrest, libel, slander, defamation of character, invasion of privacy, wrongful eviction, assault or battery, or any claim arising out of the non-sudden discharge of air or water pollutants.[138] The effect of these exclusions—if they are read to exclude those civil rights violations which can also be characterized as one or more of the above listed common law torts—is to exclude from coverage all section 1983 claims except those based on violations of intangible procedural due process, equal protection, or first amendment rights.

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[133] *See* Annot., 20 A.L.R.3d 320 (1968).

[134] *See* Annot., 20 A.L.R.3d 343 (1968).

[135] Travelers Indem. Co. v. Hood, 110 Ga. App. 855, 140 S.E.2d 68 (1964).

[136] Annot., 20 A.L.R.3d 343, 348 (1968).

[137] *See, e.g.*, Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962), which held that an insurance policy providing specifically for coverage of punitive damages would contravene public policy under Florida law. *See generally* Kendrigan, *Public Policy's Prohibition Against Insurance Coverage for Punitive Damages*, 36 INS. C.J. 622 (1969).

[138] *See* Public Official Liability Policy, IV(a)(4)-(7), issued by the Reserve Insurance Company.

In the end, liability insurance is no substitute for maintaining a scrupulous respect for the constitutional rights of those with whom one's agency comes in contact in the performance of public responsibilities. While the task of protecting the rights of others is not always easy, it does not place an undue burden on the efficient administration of governmental agencies, for the fundamental principles of our freedom also make sound principles of management. Indeed, throughout the cases imposing personal liability for civil rights violations is a common thread of poor administration, whether it be poor training and supervision of employees (which lead to the employees' personal liability) or poorly conceived or nonexistent administrative procedures (which sometimes lead to the personal liability of supervisors). Conversely, the antidotes to personal liability are clearly defined procedures, drafted with an eye toward protecting the rights of individuals, and well-trained and supervised personnel who are themselves accorded fair treatment.

Admittedly, the guardians of the public purse sometimes create an impossible situation for administrators by providing inadequate financing, but the administrator can avoid personal liability even in those situations as long as he or she acts in good faith and reasonably under the circumstances. Indeed, conscientious administrators who find themselves impossibly under-financed often welcome civil rights suits seeking injunctive relief, because the aggrieved citizen is often able to accomplish in court what the administrator has been unable to accomplish through regular channels.

Even so, maintaining a scrupulous respect for the constitutional rights of those with whom one's agency comes in contact in the performance of public duties is not always an easy rule to observe, for here as in the criminal law area the guardians of the constitutional rights we all enjoy are on occasion persons of the most obstreperous sort, whose motives may be no more lofty than to goad the public official into intemperate action. Nevertheless, the Constitution makes no distinction between upright and obnoxious persons. The preoccupation in the Bill of Rights with the protection of the rights of criminal defendants attests to that. The same principle governs in the area of civil liability. Apropos is a now famous judicial quotation—speaking to the somewhat different question of the scope of a municipality's duty to repair its streets—which observes that a "drunken man is as much entitled to a safe street, as a sober one, and much more in need of it."[139] The same could be said for

[139] Robinson v. Pioche, Bayerque & Co., 5 Cal. 461, 462 (1855).

the constitutional rights of all persons, be they obstreperous or not, to enjoy security of person and property, privacy, free speech, and freedom from arbitrary governmental action.