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ADMINISTRATIVE OFFICERS' TORT LIABILITY*

Kenneth Culp Davis†

CASE law on tort liability of public officers and employees is much more interesting than one might expect on the basis of abstract contemplation. The traditional common-law notion that an employee should, as against the employer, bear the ultimate responsibility for his negligence has been exposed as seriously unrealistic in a holding by a unanimous Supreme Court; the decision concerning the government employee is potentially applicable to corporate employees. The many holdings that officers are not liable for deliberate and malicious torts are based on the intriguing view that justice cannot be done when malice is proved, without opening the door to unjustified charges that conscientious officers have acted maliciously. Settled law that police officers are personally liable for false arrest and related torts is in process of becoming unsettled, under the leadership of the California Supreme Court, and the reasons in favor of a basic change seem impressive. The law of torts involving excess of jurisdiction is still trying to rid itself of an unsound push given it by Justice Holmes in 1891, and to some extent it is succeeding. Especially fascinating is the rise and partial decline, during the decade from 1944 to 1954, of a literal interpretation of an 1871 federal statute, the Civil Rights Act. The present study reaches the somewhat surprising conclusion that some of the principal points made by Professor Jennings, in an excellent 1937 article¹ which has been widely influential, are out of line with the case law, and that these particular aspects of the case law are probably sound.

I. THE CENTRAL PRINCIPLE OF OFFICERS' IMMUNITY

The central principle that takes care of the great bulk of practical problems concerning tort liability of public officers and public employees is that officers are generally immune from liability for their unintentional fault in the exercise of discretionary functions. Federal law in support of this principle is firm and

* This article is a companion to another on a closely related subject, "Tort Liability of Governmental Units," 40 MINN. L. REV. 751 (1956). Professor Allan H. McCoid of the University of Minnesota Law School has made helpful suggestions about this article, which are gratefully acknowledged.

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¹ See note 152 *infra*.

clear, and most of the state law is equally so, although many state cases still seem to cling to the view that was once dominant that officers should be liable for their fault even when they are exercising discretion. By and large, the present law is the antithesis of Dicey's proposition that "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."² Indeed, one may doubt whether English courts at any time would have held the Prime Minister liable personally on account of exercise of discretionary power.

The background for the law conferring immunity upon administrative officers exercising discretionary powers is the law concerning immunity of judges. The Supreme Court early held: "It is a general principle of the highest importance to the proper administration of justice that a judicial officer in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. . . . The principle . . . obtains in all countries where there is any well-ordered system of jurisprudence."³ The doctrine has been rigorously applied in recent times with the explanation that "The purpose of the rule which exempts public officers from the harassment of private suits for damages on account of the performance of their public duties, is, secondarily, for their protection, in order that its primary objective may be secured, i.e., a fearless administration of the law."⁴ The rule applies equally to inferior judges and even to justices of the peace.⁵ Occasional liability has been

² DICEY, *THE LAW OF THE CONSTITUTION*, 8th ed., 189 (1915). The "rule of law," according to Dicey, "excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens." *Id.* at 198. But see the preface to the 9th edition, xvi (1939), by Emlyn C. S. Wade: Dicey's critics "reject, and I believe rightly, his conception of the rule of law. . . ." And at p. xcii: Dicey "seems . . . not sufficiently to have regarded the immunities which the prerogative rule—the Crown can do no wrong—afforded, and still largely affords, to Crown servants in this country."

³ *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 at 347 (1872). For especially penetrating analyses, see Jennings, "Tort Liability of Administrative Officers," 21 MINN. L. REV. 263 (1937); James, "Tort Liability of Governmental Units and Their Officers," 22 UNIV. CHI. L. REV. 610 (1955). See also Powell, "Administrative Exercise of the Police Power," 24 HARV. L. REV. 441 (1911); David, "The Tort Liability of Municipal Officers," 12 SO. CAL. L. REV. 368 (1939); Keefe, "Personal Tort Liability of Administrative Officials," 12 FORD. L. REV. 130 (1943).

⁴ *Booth v. Fletcher*, (D.C. Cir. 1938) 101 F. (2d) 676 at 680, cert. den. 307 U.S. 628 (1939). See also *Fletcher v. Wheat*, (D.C. Cir. 1938) 100 F. (2d) 432, cert. den. 307 U.S. 621 (1939). The principle of judicial immunity is so strong that the Supreme Court has held that a Justice of the Supreme Court of the Philippine Islands was immune from liability for acting in bad faith even despite the clear implication of a statute providing immunity for acting in good faith. *Alzua v. Johnson*, 231 U.S. 106 (1913).

⁵ *Allen v. Holbrook*, 103 Utah 319, 135 P. (2d) 242 (1943); *Aetna Ins. Co. v. Blumenthal*, 129 Conn. 545, 29 A. (2d) 751 (1943).

imposed on account of ministerial acts⁶ or pursuant to special statutory provision.⁷

As early as 1845 the Supreme Court applied the doctrine of judicial immunity to the Postmaster General who was sued for refusing to make payments to the plaintiffs: "A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would indeed be pregnant with the greatest mischiefs."⁸ A half century later the Court held the Postmaster General immune from liability for defamation, uttering one sentence which forms the foundation for much later law: "[T]he same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law."⁹ The Secretary of the Interior accordingly has an absolute privilege to include malicious defamation in a press release concerning official business,¹⁰ and the Secretary of the Treasury is not liable for "arbitrary, wanton, capricious, illegal, malicious, oppressive, and contemptuous" action.¹¹

Federal courts have held that the immunity similarly applies to the Attorney General, members of a parole board, a parole executive, a warden, and a director of prisons;¹² to the Comptroller

⁶ *De Courcey v. Cox*, 94 Cal. 665, 30 P. 95 (1892); *Stensrud v. Delamater*, 56 Mich. 144, 22 N.W. 272 (1885).

A significant and unusual case is *Murray v. Brancato*, 290 N.Y. 52, 48 N.E. (2d) 257 (1943), holding four to three that a judge is liable for defamation by acting with malice in delivering opinions to unofficial publishers for publication in the New York Supplement and the New York Law Journal. But the court declared (at p. 56) that "even if those opinions had been written with knowledge of their falsity and with actual intent to injure the plaintiff, the defendant, in accord with the well-established public policy, would be exempt from liability for 'composing' the opinions."

⁷ The statute is the Civil Rights Act, 17 Stat. 13 (1871), 42 U.S.C. (1952) §§1981 to 1984, discussed in Part VI below.

⁸ *Kendall v. Stokes*, 44 U.S. 87 at 98 (1845).

⁹ *Spalding v. Vilas*, 161 U.S. 483 at 498 (1896).

¹⁰ *Glass v. Ickes*, (D.C. Cir. 1940) 117 F. (2d) 273, cert. den. 311 U.S. 718 (1941). See note, 33 ILL. L. REV. 358 (1938).

¹¹ *Standard Nut Margarine Co. v. Mellon*, (D.C. Cir. 1934) 72 F. (2d) 557, cert. den. 293 U.S. 605 (1934).

¹² *Lang v. Wood*, (D.C. Cir. 1937) 92 F. (2d) 211, cert. den. 302 U.S. 686 (1937). In *Gregoire v. Biddle* (2d Cir. 1949) 177 F. (2d) 579, cert. den. 339 U.S. 949 (1950), two

of the Currency and his deputies, a United States attorney and his assistant, the general counsel for the division of insolvent banks of the Treasury Department, and a special agent for the FBI;¹³ to the members of the SEC;¹⁴ to members of a draft board;¹⁵ to the President's confidential assistant, a special assistant to the Attorney General, a director of the Federal Bureau of Prisons and a warden of a federal penitentiary;¹⁶ to a prosecuting attorney;¹⁷ to a bankruptcy conciliation commissioner;¹⁸ and to a director of an alien enemy control unit and a district director of immigration;¹⁹ to immigration officials, including an immigration inspector;²⁰ to a psychiatrist in a federal prison;²¹ and to members of a Milwaukee town board, including a building inspector, a health officer, an attorney, and a plumbing inspector.²²

Possibly the most doubtful decision is the application of the immunity to one denominated "a Special Agent of the [Federal] Bureau of Investigation."²³ The court recognized "a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign,"²⁴ and it acknowledged that "Even police, detectives and investigators . . . are generally not trained for participation in judicial determinations; and are sometimes apt to become oppressive in administration of their duties, unless kept under close restraint by prosecutors and judges. . . ."²⁵ But the court nevertheless held the FBI agent immune: "When the act done occurs in the course of official duty of the person duly appointed and required to act, it is the official action of the department; and the same reason for immunity applies as if it had been

attorneys general, two directors of the Enemy Control Unit, and the district director of immigration at Ellis Island were held not liable for damages for allegedly malicious action in arresting and holding the plaintiff as an enemy alien.

¹³ *Cooper v. O'Connor*, (D.C. Cir. 1938) 99 F. (2d) 135.

¹⁴ *Jones v. Kennedy*, (D.C. Cir. 1941) 121 F. (2d) 40, cert. den. 314 U.S. 665 (1941). The case also held that counsel in the employ of the government could properly defend the officers. On this question, see annotation, 130 A.L.R. 736 (1941).

¹⁵ *Gibson v. Reynolds*, (8th Cir. 1949) 172 F. (2d) 95, cert. den. 337 U.S. 925 (1949).

¹⁶ *Laughlin v. Rosenman*, (D.C. Cir. 1947) 163 F. (2d) 838.

¹⁷ *Yaselli v. Goff*, (2d Cir. 1926) 12 F. (2d) 396, affd. 275 U.S. 503 (1927).

¹⁸ *Adair v. Bank of America Nat. Trust & Savings Assn.*, 303 U.S. 350 (1938).

¹⁹ *Gregoire v. Biddle*, (2d Cir. 1949) 177 F. (2d) 579, cert. den. 339 U.S. 949 (1950).

²⁰ *Papagianakis v. The Samos*, (4th Cir. 1950) 186 F. (2d) 257, cert. den. 341 U.S. 921 (1951).

²¹ *Taylor v. Glotfelty*, (6th Cir. 1952) 201 F. (2d) 51.

²² *Baker v. Mueller*, (7th Cir. 1955) 222 F. (2d) 180.

²³ *Cooper v. O'Connor*, (D.C. Cir. 1938) 99 F. (2d) 135.

²⁴ *Id.* at 137.

²⁵ *Id.* at 141.

performed by the superior officer himself."²⁶ Another federal court has later observed that "In only one case does it appear that an agent of the FBI was accorded such immunity," and denied a motion to dismiss a complaint against the agent.²⁷

Recent state cases seem usually to hold that officers who exercise discretionary functions are immune from liability for their negligence or for other unintentional tort. Thus, an attorney general who wrote a letter to plaintiff's superior, demanding that plaintiff be dismissed as an assistant district attorney because of alleged communist associations, was held immune, even though the letter was released to the newspapers.²⁸ Village officers are immune from liability for revoking a liquor license.²⁹ A state fish and game warden is held not liable for failing to furnish blanks to one previously selected to sell licenses.³⁰ Members of a hospital board are not liable for wrongful discharge of employees.³¹ An investigator of the California Fish and Game Commission is immune from liability for malicious prosecution.³² Other officers are similarly held immune.³³

Recent state decisions imposing liability are exceptional and usually rest on special reasons. One of the most startling is a decision of the New York Court of Appeals³⁴ that a complaint seeking damages from election officials for refusing to place the plaintiff's name on the ballot was sufficient to state a cause of action. The court acknowledged the existence of "a line of cases holding that public officers with entirely different duties are not liable for damages, at the suit of a citizen, for making nonmalicious

²⁶ *Id.* at 142.

²⁷ *Kozlowski v. Ferrara*, (S.D. N.Y. 1954) 117 F. Supp. 650 at 652.

²⁸ *Matson v. Margiotti*, 371 Pa. 188, 88 A. (2d) 892 (1952). A dissenting judge argued mainly that the attorney general was acting outside the scope of his authority.

²⁹ *Paoli v. Mason*, 325 Ill. App. 197, 59 N.E. (2d) 499 (1945). The principle, quoted (at p. 209) from another case, was said to be that "officers exercising . . . judicial powers . . . are exempt from liability for error or mistake of judgment in the exercise of their duty in the absence of corrupt or malicious motives."

³⁰ *Meinecke v. McFarland*, 122 Mont. 515, 206 P. (2d) 1012 (1949). The case has special strength as an authority for immunity because the fact came out that the officer was bonded: "The liability of the surety cannot exceed that of his principal." *Id.* at 522.

³¹ *Wilson v. Hirst*, 67 Ariz. 197, 193 P. (2d) 461 (1948). The court made a good statement of the reason for the immunity (at p. 202): "The doctrine of immunity . . . is for the benefit of all to whom it applies, that they may be free to act in the exercise of honest judgment, uninfluenced by fear of consequences personal to themselves."

³² *White v. Towers*, 37 Cal. (2d) 727, 235 P. (2d) 209 (1951). Three of the seven judges dissented.

³³ *Trum v. Town of Paxton*, 329 Mass. 434, 109 N.E. (2d) 116 (1952) (road commissioner not liable for failing to cut brush along public way); *Leger v. Kelley*, 19 Conn. Supp. 167, 110 A. (2d) 635 (1954) (state commissioner of motor vehicles not liable for negligently registering car having no safety glass).

³⁴ *Schwartz v. Heffernan*, 304 N.Y. 474, 109 N.E. (2d) 68 (1952).

and nonfraudulent mistakes adversely affecting that citizen's rights or interests."³⁵ It disposed of that line of cases by holding: "But a different public policy operates as to election officials. . . . For at least two centuries the courts in jurisdictions with representative forms of government have given most special protection to a citizen's right to vote . . . and, correlatively, his right to be a candidate. . . ."³⁶ The case can also be explained as not involving a discretionary function, for the court said that "the board's power to determine the validity of a nominating petition 'extends only to ministerial examination'. . . ."³⁷ Still another possible way to explain the case is by emphasizing that the court said: "Surely, this amended complaint accuses defendants of more than a mere good-faith mistake."³⁸

When a surety or insurance company is the real defendant, courts may find the imposition of liability easier. Such a case may be no more significant than a case in which a truck driver is held liable for his negligence, where his company carries liability insurance covering the accident. For instance, that a dog catcher was held liable for failing to catch a rabid dog may be easily explained by the fact that an insurance company was a co-defendant.³⁹

II. LIABILITY OF PUBLIC EMPLOYEES FOR MINISTERIAL ACTS

Somewhere a line supposedly separates the performance of judicial, legislative, executive, and other "discretionary" functions from manual, clerical and other "ministerial" work. The officer who exercises what the courts call discretionary power is immune from tort liability, but the public employee whose tasks are regarded as ministerial is liable.

Even if an attorney general acts maliciously, he is immune. But even if the truck driver is guilty of nothing more serious than the kind of momentary human misjudgment that is common to all drivers, he is personally liable.

The reasons for immunity of officers exercising discretionary

³⁵ *Id.* at 482.

³⁶ *Ibid.*

³⁷ *Id.* at 480.

³⁸ *Id.* at 482. In *Larson v. Marsh*, 144 Neb. 644, 14 N.W. (2d) 189 (1944), officers were held liable for failing to place a name on a ballot. The duty was regarded as ministerial, and bonding companies were co-defendants.

³⁹ *Serpas v. Margiotta*, (La. App. 1952) 59 S. (2d) 492. A surety is liable for discharge of a deputy sheriff's shotgun at plaintiff's car, even though the surety is the State of Nevada. *Hill v. Thomas*, 70 Nev. 389, 270 P. (2d) 179 (1954). A constable and his sureties have been held liable for false imprisonment, even where the constable's action seemed quite reasonable. *Ingles v. Hotze*, 191 Okla. 378, 180 P. (2d) 302 (1942).

power are impressive and probably sound, as we have seen. The provocative question, on which the law may be in process of basic change, is whether the immunity should attach to the employee who commits an unintentional tort in the performance of ministerial functions. This question is becoming more important than it used to be, for the increased incomes of this class of workers mean that they are less often judgment-proof. We have reason to inquire whether the common-law tradition is quite at variance with the realities.

Judicial opinions may say,⁴⁰ the *Restatement* may provide,⁴¹ and most lawyers may assume that employees are legally liable for their unintentional wrongs. But the plain facts of business are otherwise. When the typical corporation is held vicariously liable for an employee's negligence, the corporation does not seek indemnity from the employee, whatever may be its theoretical legal right to indemnity. If the typical corporation were to do so, the problem would no doubt be quickly taken care of through a collective agreement; the union would force the corporation to protect the employees through insurance (or through self-insurance). The overwhelming judgment of businessmen is that the enterprise, not the individual employee, should bear the losses that result from unintentional harms in carrying on business activities. Corporate managements assume this, and they have typically acted voluntarily in obtaining the requisite insurance, protecting not only the corporation but also its employees. The traditional notion of the common law that any individual must be ultimately liable for his own wrong has been undercut by the more fundamental principle—apparently felt by businessmen more than by judges and lawyers—that the enterprise, not the employee, should assume the responsibility for the natural and normal consequences of business activity.

⁴⁰ E.g., *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943): "The liability of an agent for his own negligence has long been embedded in the law. . . . The principle is an ancient one and applies even to certain acts of public officers or public instrumentalities."

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 P. 875 (1908): "The employee's responsibility is primary. He is responsible because he committed the wrongful or negligent act. The employer's responsibility is secondary. . . . The principal . . . may indemnify himself to the full amount against his agent. These legal propositions . . . receive universal recognition."

In England, after the employer's insurance company has been held liable on account of the employee's negligence, the insurance company may recover from the employee. *Romford Ice & Cold Storage Co. v. Lister*, [1955] 3 W.L.R. 631.

⁴¹ AGENCY RESTATEMENT §401, comment c (1933): "Unless he has been authorized to act in the manner in which he acts, the agent who subjects his principal to liability because of a negligent or other wrongful act is himself subject to liability to the principal for the loss which results therefrom."

If a governmental unit is the employer, the realities are the same, except to the extent that the government is an even better loss spreader than the corporate enterprise. Under the Tort Claims Act the government is now liable for most unintentional torts resulting from ministerial work. When the government is liable, a plaintiff is unlikely to seek recovery from the employee. The most important practical question is therefore whether or not the government should be entitled to indemnity from the employee after the government has been held liable for the employee's negligence. Another way to put the question is to ask whether the loss should be borne by the government, which is best able to bear it, or by the employee, who is least able to bear it.

A set of hypothetical facts will contribute to an appreciation of the realities. A driver of a mail truck drives ten years before his first accident. The government is held liable for \$5,000. The driver earns \$4,000 a year, has three children in school, but still has managed to accumulate savings of \$5,000. Should the \$5,000 be absorbed as a part of the cost of carrying the mail, or should it come out of the driver's savings? The common-law theory, as stated by Professor Seavey, is that "indemnity should be granted under the ordinary rules of restitution because the employee caused a loss which in equity and good conscience should be paid by him."⁴² The theory is deeply entrenched, and doubtless most lawyers still believe in the legal principles which have long been familiar to them. Professor Seavey generalizes that "warm hearts, even in the breasts of able and conscientious judges, may make bad law."⁴³ In this, Professor Seavey is surely right. Warm hearts may make bad law. But warm hearts may also discover bad law and correct it. The time may be ripe for judges and lawyers to catch up with the attitudes of businessmen and of governmental administrators and to give serious consideration to the question of whether an enterprise should absorb many or most or all of the losses that are normal and expected in carrying on its activities.

The governmental practice, as well as the corporate practice, has been ahead of the legal development. A sample of the governmental reality, as distinguished from the common-law tradition, is found in Private Law 820, Eighty-second Congress, providing

⁴² Seavey, " 'Liberal Construction' and the Tort Liability of the Federal Government," 67 HARV. L. REV. 994 at 1002 (1954).

⁴³ *Id.* at 1003.

for reimbursement of a mail truck driver who had been held liable to a claimant for negligence in the operation of his truck.⁴⁴

Another sample of the governmental reality can be found in a formal opinion of the Attorney General of the United States in 1941.⁴⁵ The Secretary of Agriculture asked whether an employee, who had become intoxicated and while driving a government car had had an accident, could be required to reimburse the government for a payment made to the injured party. The intoxication makes the case a much stronger one for requiring reimbursement than a case of ordinary negligence. The Attorney General nevertheless ruled that the reimbursement could not be required. The opinion may go too far, since the employee was intoxicated. Even so, it is based upon a good deal of experience. The idea of employee reimbursement was "tried out during the earlier years of our national existence. . . . Numerous suits were filed by private parties against officers and employees of the government and the judgments obtained were sometimes in amounts so large as to threaten financial ruin and bankruptcy. . . . [T]he Congress repeatedly came to the relief of the erring officers and employees. Thus, in *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 124 [1804], the Supreme Court held Captain Murray, of the U.S. Frigate *Constellation*, personally liable for a tortious seizure, but the Congress made provision for his relief by the act of January 31, 1805, c. 12, 6 Stat. 56."⁴⁶ The Attorney General added: "Of course, the employee may be subjected to suitable discipline, including dismissal, if warranted."⁴⁷

Another kind of development showing the temper of the times is the growing body of state legislation providing that state and local governmental units may or must indemnify employees who have been held liable in tort on account of acts within their employment.⁴⁸

The problem came to the Supreme Court in *United States v. Gilman*.⁴⁹ The single question was whether the government could recover indemnity from an employee after it had been held liable

⁴⁴ 66 Stat. A143 (1952). The amount was designated as sufficient to satisfy the judgment and court costs recovered by the claimant against the driver of the mail truck.

⁴⁵ 40 Op. Atty. Gen. 38 (1941).

⁴⁶ Id. at 40.

⁴⁷ Id. at 41.

⁴⁸ For a discussion of this state legislation, see Davis, "Tort Liability of Governmental Units," 40 MINN. L. REV. 751 at 764-766 (1956).

⁴⁹ 347 U.S. 507 (1954).

under the Tort Claims Act for the employee's negligence in driving a government automobile. The Court unanimously held for the employee. The Tort Claims Act provided only that a judgment against the United States is "a complete bar" to any action by the claimant against the employee.⁵⁰ The Court found its answer neither in the statute nor in the legislative history, although in a footnote it did set forth supporting legislative history.⁵¹ It declared that the issue was "a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken."⁵²

The basis for the Court's decision is thus a general one and the reasons may be equally or largely applicable to employees of state and local governments. The Court was unimpressed with the authority of the common-law principle that a private employer has a right of indemnity against an employee whose negligence has made the employer liable. Instead, it recognized: "Here a complex of relations between federal agencies and their staffs is involved."⁵³ The Court spoke of "Tenure, retirement, discharge, veterans' preferences, the responsibility of the United States to some employees for negligent acts of other employees," and then it said: "Discipline of the employee, the exactions which may be made of him, the merits or demerits he may suffer, the rate of his promotion are of great consequence to those who make government service their career. The right of the employer to sue the employee is a form of discipline. . . . Moreover, the suits that would be brought would haul the employee to court and require him to find a lawyer, to face his employer's charge, and to submit to the ordeal of a trial. The time out for the trial and its preparation, plus the out-of-pocket expenses, might well impose on the employee a heavier financial burden than the loss of his seniority or a demotion in rank. . . . Perhaps the cost in the morale and efficiency of employees would be too high a price to pay for the rule of indemnity. . . ."⁵⁴

⁵⁰ 28 U.S.C. (1952) §2676.

⁵¹ 347 U.S. 507 at 511-513, n. 2 (1954). Mr. Francis M. Shea, then Assistant Attorney General, explained the Government's position. The Court quotes long excerpts. The key sentence is: "If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it." The question was put: "Is there any requirement that [the] employee should in any way respond to the Government if it has to pay for the injury, in the event of gross negligence?" Mr. Shea replied: "Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee."

⁵² *Id.* at 511.

⁵³ *Ibid.*

⁵⁴ *Id.* at 509-510.

Of course, the *Gilman* problem cannot properly be considered without taking into account the prevalence of liability insurance. The Court did not see fit to state the facts as to the employee's insurance, even though the government's brief pointed out that "the practice of the Government has been to restrict such claims, usually to situations in which the employee at fault is covered by liability insurance," and quoted the applicable regulation of the Coast and Geodetic Survey authorizing a requirement that all employees obtain at their own expense liability insurance for damage incurred while driving government vehicles. The Court said: "Perhaps the suits which would be instituted under the rule which petitioner asks would mostly be brought only when the employee carried insurance. But the decision we could fashion could have no such limitations, since we deal only with a rule of indemnity which is utterly independent of any underwriting of the liability."⁵⁵ The decision is thus an especially strong one, in that it applies even when the employee is covered by insurance. One effect of the decision is to relieve government employees of the payment of premiums to cover accidents in operation of government vehicles.

Perhaps the most doubtful aspect of the *Gilman* decision relates to the choice the Supreme Court made between judicial and administrative determination of the question of indemnity. The common law would in effect leave the question of indemnity to administrative determination in each case. The Court's decision foreclosed indemnity even in a case in which special circumstances call for indemnity.

Perhaps the *Gilman* case should not control if the employee was driving while drunk, or if the tort was intentional. Perhaps the common law should continue in a case like *Brady v. Roosevelt S.S. Co.*,⁵⁶ where the agent operating a vessel on behalf of the Maritime Commission was a corporation. Special problems will have to be solved when an officer is bonded, so that the real defendant may be a surety company,⁵⁷ and care will have to be taken to avoid upsetting the effectiveness of liability insurance, which may sometimes be inoperative unless the employee is liable.⁵⁸ If the

⁵⁵ Id. at 510.

⁵⁶ 317 U.S. 575 (1943).

⁵⁷ In *Rogers v. The Marshal*, 68 U.S. 644 at 650 (1863), a marshal was held liable for misconduct of his deputy. The suit was against the marshal and the sureties on his official bond.

⁵⁸ See note, 34 NEB. L. REV. 78 (1954).

doctrine is to be developed that an enterprise should bear the losses from unintentional harms that normally grow out of the enterprise, many problems of line-drawing will need to be solved. An underlying problem will be whether the lines should be drawn by administrative officers or by courts.

The cases imposing liability upon public employees who perform non-discretionary functions are scarce, probably for the reason that such defendants are seldom financially responsible.⁵⁹

A superior officer is not liable for the tort of a subordinate even when the subordinate would be liable for his own tort.⁶⁰ But for directing or participating in a tort of a subordinate a superior may be liable.⁶¹ Liability may be imposed on the superior for improper performance of a non-delegable duty.⁶² And a superior may be liable for choosing or keeping incompetent or vicious subordinates.⁶³

⁵⁹ The driver of a school bus is liable for his own negligent driving. *Hansley v. Tilton*, 234 N.C. 3, 65 S.E. (2d) 300 (1951); *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938). A public school teacher is liable for fault in administering medical treatment to a student. *Guerrieri v. Tyson*, 147 Pa. Super. 239, 24 A. (2d) 468 (1942). A physician employed in a state university infirmary may be liable. *Davie v. University of California*, 66 Cal. App. 689, 227 P. 247 (1924). A demurrer was held wrongly sustained in a suit for damages by a pupil against a school superintendent, principal, supervisor, janitor, and members of a board of education. *Whitt v. Reed*, (Ky. 1951) 239 S.W. (2d) 489. A coroner has been held liable for false arrest and confinement to a mental hospital, even though he acted in good faith and without malice. *O'Rourke v. O'Rourke*, 227 La. 262, 79 S. (2d) 87 (1955). Failing to put a name on a primary election ballot may be ministerial, so that public employees will be liable. *Schwartz v. Heffernan*, 304 N.Y. 474, 109 N.E. (2d) 68 (1952); *Larson v. Marsh*, 144 Neb. 644, 14 N.W. (2d) 189 (1944).

⁶⁰ The Supreme Court has explained: "Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person." *Robertson v. Sichel*, 127 U.S. 507 at 515 (1888). *Accord*: *Armocost v. Conservation Commission*, (S.D. W.Va. 1954) 126 F. Supp. 414; *Jones v. Kennedy*, (D.C. Cir. 1941) 121 F. (2d) 40, cert. den. 314 U.S. 665 (1941); *Fidelity & Casualty Co. v. Brightman*, (8th Cir. 1931) 53 F. (2d) 161; *Marshall v. County of Los Angeles*, 131 Cal. App. (2d) 812, 281 P. (2d) 544 (1955); *Klam v. Boehm*, 72 Idaho 259, 240 P. (2d) 484 (1952); *Gray v. Wood*, 75 R.I. 123, 64 A. (2d) 191 (1949); *Reiter v. Illinois Nat. Cas. Co.*, 397 Ill. 141, 73 N.E. (2d) 412 (1947).

By virtue of statutes, sheriffs are sometimes liable for acts of deputies. *Magenheimer v. State*, 120 Ind. 128, 90 N.E. (2d) 813 (1950); *Aetna Cas. & Surety Co. v. Clark*, 136 Tex. 238, 150 S.W. (2d) 79 (1941). The surety bonds in these cases should not be overlooked.

⁶¹ *Wadsworth v. Middletown*, 94 Conn. 435, 109 A. 246 (1920); *Nunn v. Turner*, 133 Wash. 654, 234 P. 443 (1925). In *Rich v. Warren*, (6th Cir. 1941) 123 F. (2d) 198, an army major was held liable for injuries caused to a pedestrian when his driver negligently drove a government car, the theory of liability being the major's acquiescence or encouragement.

⁶² *Chambers v. Anderson*, (6th Cir. 1932) 58 F. (2d) 151 (sheriff and deputy); *Ulvestad v. Dolphin*, 152 Wash. 580, 278 P. 681 (1929).

⁶³ *Fernelius v. Pierce*, 22 Cal. (2d) 226, 138 P. (2d) 12 (1943), a city manager and chief of police, and their bondsmen, were held liable for the acts of policemen in beating up and killing an inmate of a jail.

III. LIABILITY OF POLICE OFFICERS FOR FALSE ARREST AND RELATED TORTS

If, as most judicial opinions seem to assume, a line must be drawn between discretionary and ministerial functions to determine whether a public officer or employee is immune from liability in tort, what kind of function does an ordinary policeman perform when he arrests an individual, searches his home or his pockets, imprisons him, and makes charges against him?

From the standpoint of authority, the question is to some extent an open one, although the common-law tradition unquestionably has been that a policeman is subject to tort liability as if he were a private individual. A policeman is, of course, privileged in various circumstances, but the problem of privilege must be distinguished from the problem of immunity, which arises only if the officer acts beyond his privilege. Thus, the officer has a privilege to make an arrest upon a warrant which is fair upon its face but in fact invalid. If the act the officer commits is unprivileged and tortious, he still may escape liability if he is immune. The immunity is the same for each officer, whether the tort is false arrest, malicious prosecution, or some other tort, although privilege may vary with the tort. The question we are here concerned with is immunity. The old cases uniformly assume that policemen are not immune from tort liability,⁶⁴ and some of the recent ones do.⁶⁵ A textwriter says: "Arrest under a warrant, or the levy of civil process, is considered a 'ministerial act,' for which the officer will be liable if he acts properly, but will be liable personally if he steps outside of his authority. . . . He will be liable if he mistakenly arrests another than the person named, or seizes property not covered by the writ."⁶⁶ The *Restatement of Torts* in dealing with malicious prosecution, for instance, recognizes the immunity for a "public prosecutor" but not for a "peace officer."⁶⁷ But recent cases in both federal⁶⁸ and state⁶⁹ courts show a substantial inclination to reexamine the common-law tradition.

⁶⁴ Brock v. Stimson, 108 Mass. 520 (1871); Hefler v. Hunt, 120 Me. 10, 112 A. 675 (1921).

⁶⁵ Hughes v. Oreb, 36 Cal. (2d) 854, 228 P. (2d) 550 (1951); Mason v. Wrightson, 205 Md. 481, 109 A. (2d) 128 (1954).

⁶⁶ PROSSER, TORTS, 2d ed., 107 (1955).

⁶⁷ Sec. 656 (d) (1938).

⁶⁸ An FBI agent was held immune in Cooper v. O'Connor, (D.C. Cir. 1938) 99 F. (2d) 135.

⁶⁹ E.g., White v. Towers, 37 Cal. (2d) 727, 235 P. (2d) 209 (1951).

The problem is not one that can be resolved by inquiring into the meaning of words. If it were, the solution would be easy: when a policeman decides a question that may later divide an appellate court, he must be performing a "discretionary" function. Neither is the problem one that can be resolved by the over-simplified idea that an individual who commits a "wrong" must be held legally responsible for making decisions that a later tribunal holds to be mistaken. The problem is a highly practical one, for abuses by police officers are so widespread that estimates have been made that from one million to three and a half million illegal arrests are made annually,⁷⁰ and that three-fourths of all arrests are illegal.⁷¹ The only sensible approach is to inquire what solution will most effectively promote our basic objective of developing a fair and efficient system of law enforcement involving a minimum of abuses.

If the governmental unit is immune, the reasons for imposing liability upon the policeman for false arrest or illegal search and seizure may seem strong, for otherwise the plaintiff may be without remedy. One might initially suppose that the way to minimize illegal arrests is by providing an effective remedy against the policeman, a remedy available to a plaintiff who has incentive to use it. An officer who knows that he will be personally liable will be careful to avoid false arrests and illegal searches.

But this initial supposition is unsupported by experience. What happens in fact is that personal liability is so rarely imposed upon officers that abuses are unchecked,⁷² and, at the same time, that in the rare cases in which liability is imposed, the deterrence may be, or may be thought to be, too strong. If an officer resolves all doubts in favor of his own pocket book, the public interest in effective law enforcement is sure to suffer. Courts are usually aware of this danger. The Michigan court, for instance, has declared that "a police officer who acts in good faith in the line of duty should be protected even though overzealous in its discharge. . . . If possible, any doubt should be resolved in favor of an honest discharge of duty by peace officers, and the courts should not place them in fear of responding in damages for the lawful and proper discharge of that duty."⁷³

⁷⁰ Hall, "Police and Law in a Democratic Society," 28 *IND. L. J.* 133 at 152, 154 (1953).

⁷¹ Warner, "Investigating the Law of Arrest," 26 *A.B.A.J.* 151 (1940).

⁷² See Foote, "Tort Remedies for Police Violations of Individual Rights," 39 *MINN. L. REV.* 493 (1955), for an excellent account of the ineffectiveness of personal liability of officers when the plaintiff lacks completely clean hands.

⁷³ *Odinetz v. Budds*, 315 Mich. 512 at 518, 24 N.W. (2d) 193 (1946).

Especially enlightening case law is a line of recent decisions of the California Supreme Court, beginning with the 1951 decision in *White v. Towers*.⁷⁴ Earlier the same year the same court in a suit against policemen for false imprisonment had held that "the liability of defendant officers depends upon whether they had reasonable cause for believing that plaintiff was the person guilty of taking the money."⁷⁵ The whole question was one of privilege; lack of immunity was assumed. But in the *White* case the court said that the question was whether the defendant investigator for the Fish and Game Commission was "immune from civil liability for the alleged malicious prosecution." The court's reasoning in holding him immune has a good deal of persuasive force: "When the duty to investigate crime and to institute criminal proceedings is lodged with any public officer, it is for the best interests of the community as a whole that he be protected from harassment in the performance of that duty. The efficient functioning of our system of law enforcement is dependent largely upon the investigation of crime and the accusation of offenders by properly trained officers. A breakdown of this system at the investigative or accusatory level would wreak untold harm. . . . [Defendant] is entitled to the immunity from civil liability with which the law surrounds officials directly connected with the judicial processes."⁷⁶ The court generalized about the many cases it cited, most of which involved prosecutors: "A review of the cases which have concerned the application of the doctrine to law enforcement officers shows that the great majority of the courts have ruled in favor of the officers." Of the seven judges, three dissented, one declaring, "[T]he holding in this case is a major step toward statism."⁷⁷

In 1952 the same court seemingly applied the same doctrine to suits against a sheriff, five deputies, city manager, chief of police, three police officers, and their respective sureties, for false arrest, malicious prosecution, assault and battery, and conspiracy and trespass. The somewhat unclear opinion was quite clear in asserting: "Peace officers would be reluctant to make arrests for fear that they would be held liable for having made an honest and reasonable mistake."⁷⁸ A dissenting judge argued: "The majority of this court is, apparently, determined that no action for false arrest,

⁷⁴ 37 Cal. (2d) 727, 235 P. (2d) 209 (1951).

⁷⁵ *Hughes v. Orb*, 36 Cal. (2d) 854 at 857, 228 P. (2d) 550 (1951).

⁷⁶ 37 Cal. (2d) 727 at 729-730.

⁷⁷ *Id.* at 738.

⁷⁸ *Coverstone v. Davies*, 38 Cal. (2d) 315 at 321, 239 P. (2d) 876 (1952).

false imprisonment or malicious prosecution shall lie against any one connected with the enforcement of the law. . . ."⁷⁹

By 1955, however, the majority saw the lack of necessity for going all the way with the immunity doctrine. To protect a police officer from liability for exercising his judgment does not require that the officer be immune from liability for a clear violation of a clear rule. The court set aside a summary judgment for an officer where the allegation was that the officer made an arrest without a warrant for a misdemeanor not committed in his presence.⁸⁰

Then came a case involving a rather clear and serious abuse.⁸¹ The officers held the plaintiff in jail three days, stated to reporters that he was held for suspicion of conspiracy to commit murder and that he was a member of a criminal gang and a mobster, allowed photographers to take his picture, and then released him without filing a charge against him. The court of appeals had said: "To immunize peace officers and other public servants against claims resulting from errors of judgment while acting in the discharge of duty is now an elementary principle. . . . Not to grant immunity against civil liability to a peace officer acting within the scope of his authority for the arrest and detention of a person reasonably suspected of a felony would be to 'place every honest law enforcement officer under an unbearable handicap and would rebound to the detriment of the body politic.' "⁸² The Supreme Court did not deny this principle, but it found it inapplicable. Proof of the facts alleged, it unanimously held, puts the burden upon the defendants to show justification for the arrest.

The California court is valiantly trying to work out the problem, with results that seem preferable to a blind following of the common-law tradition. But the court is unlikely to succeed in its objective of stamping out police abuses without impairing effective law enforcement, for it lacks the indispensable tool of providing incentives where incentives will have the most effect. Vast experience proves that police abuses thrive under a system of theoretical legal liability of officers. What is needed is to provide incentives to top officials, not merely to the policemen. If the liability were imposed upon the governmental unit, then the top officials, who are strongly motivated by threats to their budgets,

⁷⁹ Id. at 324.

⁸⁰ *Miller v. Glass*, 44 Cal. (2d) 359, 282 P. (2d) 501 (1955). The clarity of the reasons for the shift is marred by the court's statement (at p. 362), after referring to malicious prosecution: "Different principles govern actions for false arrest and imprisonment, for the law expressly limits the arresting officer's authority."

⁸¹ *Dragna v. White*, 45 Cal. (2d) 469, 289 P. (2d) 428 (1955).

⁸² *Dragna v. White*, (Cal. App. 1955) 280 P. (2d) 817 at 819.

would issue the orders that would be necessary to protect against tort liability. Policemen do not respond to the largely theoretical personal liability, which is sporadically imposed and which typically lags years behind the abuse. Policemen do respond to rules enforced by their superiors, for the enforcement may be steady, swift, and sure, and the penalties, including dismissal, may be geared to the practical needs.

A recent Maryland case shows how unsatisfactory the system of personal liability can be in some circumstances.⁸³ The Baltimore Commissioner of Police issued a general order that the police "search for possession of dangerous weapons on all persons coming under police suspicion." During two months, one hundred and twenty-nine taverns in one district were entered by the police and the male patrons "frisked" in a search for concealed weapons. The plaintiff, an attorney, refused to submit, and he was searched without his consent. He sued the sergeant who was in charge of the searching squad. The Maryland court deemed itself bound by the common law that the sergeant was not relieved of liability by reason of his acting under the orders of his superior. But the court fixed the damages at one cent. Would an award of substantial damages have been desirable? Surely something would be wrong in a system in which a police sergeant would be personally penalized for conscientiously carrying out the orders of his superior. A policeman should not be required to get legal advice before following orders. If sanctions are to be effective, they must be applied to those who give the orders, not to those who follow them. Even when affirmative orders are not given, the sanctions must be directed to the high officials who know about but do little or nothing to prevent the abuses.

Personal liability of policemen is a hit-or-miss treatment of symptoms. The underlying disease can be effectively reached only by motivating the legislative and executive officers who determine policies. That can probably be done through a system of tort liability of governmental units. Other states need to study the results in New York, where state and local governmental units are liable for such torts as false arrest and false imprisonment.⁸⁴

Potentialities of surety bonds as a tool for achieving wanted results are given little heed. If bonds were required under which sureties were ultimately liable for officers' abuses, not only would

⁸³ *Mason v. Wrightson*, 205 Md. 481, 109 A. (2d) 128 (1954).

⁸⁴ *Bonnau v. State*, 278 App. Div. 181, 104 N.Y.S. (2d) 364 (1951), *affd.* 303 N.Y. 721, 103 N.E. (2d) 340 (1951); *Tierney v. State*, 266 App. Div. 434, 42 N.Y.S. (2d) 877 (1943), *affd.* 292 N.Y. 523, 54 N.E. (2d) 207 (1944).

injured parties be protected but the companies would be impelled to prevent the abuses.⁸⁵ In the line of California cases just reviewed, the one case in which sureties were named as defendants was a case in which liability was not imposed.⁸⁶ The result could have been different if the sureties had had the ultimate liability.

IV. WILLFUL AND MALICIOUS TORTS

An attitude that has often affected the law of tort liability of officers was expressed by an English court in 1703: "If publik officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from like offences."⁸⁷ If ever this attitude is fully justified, it must be when an officer acts willfully and maliciously in inflicting injury upon the plaintiff. Yet the law is that officers are often immune from liability even when they act maliciously. Why?

The reasons must be found in something other than the simple question of what is justice as between the willful and malicious officer and the innocent plaintiff who has suffered injury. The problem is indeed much more complex. If liability is imposed in one case in which the evidence clearly shows malice, then later plaintiffs who are disgruntled by official action may make charges of malice against conscientious officers, and the result may be that the potentiality of such charges, and of lawsuits based upon them, will become an extraneous influence upon the determinations that the officers must make. At all events, this is the essence of the problem.

The foundation for the federal law is a unanimous and clear decision of the Supreme Court in 1896 in *Spalding v. Vilas*.⁸⁸ The Court affirmed an order sustaining a demurrer to the plaintiff's declaration, even though the defendant Postmaster General was alleged to have injured the plaintiff "with malicious intent," and to have made false statements which "were unnecessary, malicious, and without reasonable or probable cause, and intended to de-

An Illinois statute requires the city of Chicago to indemnify policemen for any judgment against them as a result of their official activities, except when the injury results from their willful misconduct. Ill. Stat. (1955) c. 24, §1-15. From the standpoint of simple justice as between the city and the policeman who is guilty of willful misconduct, making the policeman pay a judgment against him is obviously sound. But from the standpoint of providing incentives where incentives are needed, in order to minimize willful abuses by police officers, much can be said for making the city liable even for the willful torts.

⁸⁵ For an excellent discussion of the successes of surety companies in avoiding liability on police officers' bonds, see Hall, "The Law of Arrest in Relation to Contemporary Social Problems," 3 UNIV. CHI. L. REV. 345 (1936).

⁸⁶ *Coverstone v. Davies*, 38 Cal. (2d) 315, 239 P. (2d) 876 (1952).

⁸⁷ Chief Justice Holt in *Ashby v. White*, 2 Ld. Raym. 938 at 956, 92 Eng. Rep. 126 (1703).

⁸⁸ 161 U.S. 483 (1896).

ceive." The Court first found that the Postmaster General's action was not beyond the scope of his official duties, and then it asked: "[C]an this action be maintained because of the allegation that what that officer did was done maliciously?"⁸⁹ Relating the problem to that of liability of judges, the Court held: "The motive that impelled him [the Postmaster General] to do that of which the plaintiff complains is . . . immaterial."⁹⁰ The Court succinctly stated the reason: "In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages."⁹¹

An instructive modern case is *Gregoire v. Biddle*.⁹² The plaintiff was imprisoned as an alien enemy for more than four and a half years, and he sued two successive Attorneys General of the United States, two successive directors of the enemy alien control unit of the Department of Justice, and the district director of immigration at Ellis Island, alleging that the defendants "conspired together and maliciously and wilfully entered into a scheme to deprive plaintiff . . . of his liberty." The lower court dismissed the complaint on the ground that defendants had an absolute immunity even if their unlawful acts had been induced only by personal ill will. The court of appeals held that the complaint could not stand, even though the court read it to mean that the defendants "acted altogether from personal spite and had been fully aware that they had no legal warrant for arresting or deporting the plaintiff." Judge Learned Hand declared for the court: "The immunity is absolute and is grounded upon principles of public policy. . . . It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

⁸⁹ Id. at 493.

⁹⁰ Id. at 499.

⁹¹ Id. at 498.

⁹² (2d Cir. 1949) 177 F. (2d) 579.

. . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."⁹³

The *Spalding* and the *Gregoire* cases are representative of cases in the federal courts.⁹⁴ When the courts regard the functions of the officers as "discretionary," demurrers or motions to dismiss are sustained, even though the officers have allegedly acted willfully and maliciously. Plaintiffs are thus denied the opportunity to prove their allegations. This means that no matter how convincing the evidence of malice may be, the officers are immune.

This result may be basically a failure of the legal system. What a federal court says—what Judge Learned Hand in the *Gregoire* case says—is in effect that the plaintiff must be denied justice as against the defendant, because doing justice will produce an unwanted effect in other cases. Must we acquiesce in the melancholy conclusion that we are unable, without unduly sacrificing other interests, to do justice to a deserving plaintiff who is in fact the victim of official malice? This question is a truly challenging one.

The first step is to recognize that such cases as *Spalding* and *Gregoire* almost surely do not involve injustice to the plaintiffs.

⁹³ Id. at 580-581.

⁹⁴ The cases sustaining motions to dismiss where malice of the officer is alleged are numerous. Some of the most important include *Glass v. Ickes*, (D.C. Cir. 1940) 117 F. (2d) 273, cert. den. 311 U.S. 718 (1941) (Secretary of Interior alleged to have willfully and maliciously published defamatory statements); *Lang v. Wood*, (D.C. Cir. 1937) 92 F. (2d) 211, cert. den. 302 U.S. 686 (1937) (Attorney General, members of parole board, warden of prison, and director of prisons alleged to have "maliciously, feloniously, and arbitrarily" imprisoned plaintiff); *Cooper v. O'Connor*, (D.C. Cir. 1938) 99 F. (2d) 135 (suit for malicious prosecution against Comptroller of the Currency; receiver of a national bank, general counsel of a division of the Treasury Department and general counsel for the comptroller, deputy comptroller, United States attorney, assistant United States attorney, and special agent for the FBI, for malicious prosecution; court holds "even the absence of probable cause and the presence of malice are not sufficient to impose liability upon such an officer who acts within the general scope of his authority"); *Jones v. Kennedy*, (D.C. Cir. 1941) 121 F. (2d) 40, cert. den. 314 U.S. 665 (1941) (conspiracy and malice of members of SEC); *Gibson v. Reynolds*, (8th Cir. 1949) 172 F. (2d) 95 at 97, cert. den. 337 U.S. 925 (1949) (draft officials; "some officers of government must be and are afforded personal immunity from civil actions for damages for acts done in relation to matters committed to them by law although probable cause be absent and malice be present in their enforcement of the law"); *Laughlin v. Rosenman*, (D.C. Cir. 1947) 163 F. (2d) 838 (President's confidential assistant, special assistant to the Attorney General, director of Federal Bureau of Prisons, and warden of penitentiary "all conspiring together"); *Taylor v. Glotfelty*, (6th Cir. 1952) 201 F. (2d) 51 (psychiatrist at medical center for prisoners); *Baker v. Mueller*, (7th Cir. 1955) 222 F. (2d) 180 (members of town board, building inspector, health inspector, city attorney, and plumbing inspector).

For a rather full review of English and American case law before 1926, see the elaborate opinion in *Yaselli v. Goff*, (2d Cir. 1926) 12 F. (2d) 396, affirming dismissal of a complaint in a suit for malicious prosecution against a special assistant to the Attorney General.

The Court's opinion in *Spalding* carefully demonstrated that the Postmaster General was acting within the authority conferred and was carrying out the congressional intent; despite the theory of demurrer, the Court clearly did not take literally the allegations of malice. In the *Gregoire* case, the reasons for disbelieving the allegation of malice could not have escaped alert judges; three times a judge had denied Gregoire habeas corpus, thereby accepting the view of the officers that he was a German. Gregoire was born in Lorraine when it was a part of Germany but came to the United States after it had become a part of France. The writ that finally released Gregoire was affirmed by a court of appeals, one judge of which revealed that he had previously asserted the view that one in Gregoire's circumstances should be regarded as a German.⁹⁵ Even though a reasonable decision, about which judges may differ, could conceivably be actuated by malice, Gregoire's allegation seems quite unconvincing.

In most of the cases in which motions to dismiss are granted, the allegations of malice are only in general terms and may easily be interpreted to mean no more than that the plaintiff believes strongly that the officer's determination is erroneous. The problem is to identify the rare case in which official action has truly been malicious. Can a court do that without the disadvantages of a trial? The court could treat the motion to dismiss as one for summary judgment⁹⁶ and could enter judgment for the defendant unless the plaintiff's affidavit satisfies the court that a trial on the issue of malice is appropriate, as it would be only in the rare case in which the charge of malice seems to be justified.

Such a procedure might cut far into Judge Learned Hand's remark in the *Gregoire* opinion⁹⁷ that "it is impossible to know whether the claim [of malice] is well founded until the case has been tried." Something short of trial can show whether the claim of malice has real substance or whether it is only a vigorous assertion of error.

The next question is whether officials should be forced to submit to the burden of a trial whenever the plaintiff's affidavit is

⁹⁵ *United States ex rel. Gregoire v. Watkins*, (2d Cir. 1947) 164 F. (2d) 137. An account of the earlier proceedings is given in the opinion, as well as the previous view of one of the judges.

⁹⁶ Under the 1946 amendments to rules 12(b) and 12(c) of the Federal Rules of Civil Procedure, a motion to dismiss or a motion for judgment on the pleadings may be treated as a motion for summary judgment. Alternative procedures that might be appropriate in some cases include interrogatories and discovery.

⁹⁷ *Gregoire v. Biddle*, (2d Cir. 1949) 177 F. (2d) 579 at 581, cert. den. 339 U.S. 949 (1950).

found sufficient. Perhaps judges and administrative officers who perform judicial functions should not be. But the manual worker who commits a willful tort is and probably should be personally liable, and no clear line separates the employee whose functions are deemed discretionary. Probably the line should be higher on the scale if the officer acts maliciously than if he acts negligently. Instead of a sharp line dividing officers who are immune from officers who are not immune, a court might find useful the summary judgment procedure for officers whose classification is doubtful.

State law of liability of officers for malicious action is probably essentially in accord with federal,⁹⁸ although in an occasional state case liability is imposed,⁹⁹ and although the state courts in cases not involving malice are accustomed to asserting that discretionary officers are not liable in absence of malice.¹⁰⁰

V. EXCESS OF JURISDICTION

The one factor that is most likely to win a suit for damages against an officer who performs discretionary functions is not malice but excess of jurisdiction. For under the case law, surprisingly

⁹⁸ *Wilson v. Hirst*, 67 Ariz. 197, 193 P. (2d) 461 (1948) (court affirms dismissal of complaint for wrongful discharge of plaintiffs, though action allegedly taken "wickedly, maliciously"; court relates problem to immunity of judges); *Gottschalk v. Shepperd*, 65 N.D. 544, 260 N.W. 573 (1935) (demurrer to complaint sustained, though alleged president of state university had personal malice in discharging university professor); *Nadeau v. Marshessault*, 112 Vt. 309, 24 A. (2d) 352 (1942) (overseer of poor acts judicially in administering direct relief; demurrer sustained though malice alleged); *Wasserman v. Kenosha*, 217 Wis. 223, 258 N.W. 857 (1935) (demurrer sustained, though alleged that officers who revoked building permit were actuated by "their own personal, financial, political office-holding and election interests"; court declared that an official exercising discretionary powers "cannot be made personally liable upon an allegation that he acted maliciously"); *Andersen v. Bishop*, 304 Mass. 396, 23 N.E. (2d) 1003 (1939) (district attorney and assistant not liable though malice alleged); *Matson v. Margiotti*, 371 Pa. 188, 88 A. (2d) 892 (1952) (state attorney general immune though malice alleged); *Frazier v. Moffatt*, 108 Cal. App. (2d) 379, 239 P. (2d) 123 (1951) (justice of the peace not liable even if acted maliciously).

⁹⁹ *Larson v. Marsh*, 144 Neb. 644, 14 N.W. (2d) 189 (1944) (officers and their bonding companies liable for failure to indicate plaintiff's home town on primary election ballot, where duty regarded as ministerial); *Schwartz v. Heffernan*, 304 N.Y. 474, 109 N.E. (2d) 68 (1952) (liable for failure to place name on primary election ballot); *Hedgepeth v. Swanson*, 223 N.C. 442, 27 S.E. (2d) 122 (1943) (error to sustain demurrer alleging sheriff acted maliciously, where surety named as defendant).

¹⁰⁰ *Smith v. Hefner*, 235 N.C. 1 at 7, 68 S.E. (2d) 783 (1952): "The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious." *Galli v. Brown*, 110 Cal. App. (2d) 764 at 776, 243 P. (2d) 920 (1952): "... not liable when he acts in good faith within the general scope of his authority, without malice, corruption or sinister motives." *Hester v. Miller*, 8 N.J. 81 at 84, 83 A. (2d) 773 (1951): "The rule . . . is that where there is no fraud or malice a public officer is exempt from civil action when called upon in behalf of the public to exercise his discretion."

See also *People ex rel. Schreiner v. Courtney*, 380 Ill. 171, 43 N.E. (2d) 982 (1942); *Tyrell v. Burke*, 110 N.J.L. 225, 164 A. 586 (1933); *Gasque v. Town of Conway*, 194 S.C. 15, 8 S.E. (2d) 871 (1940).

enough, an officer may be liable not only in absence of malice but even in absence of negligence, if he was mistaken with respect to facts that may be regarded as jurisdictional. The proposition that the same officer exercising the same functions may be immune from liability for malicious action where no jurisdictional mistake is involved but may be subject to liability for a reasonable and non-negligent mistake as to jurisdiction may seem so incongruous as to be almost capricious, and yet a good deal of case law supports this proposition. Such case law rests largely upon historical accident and sterile logic and seems to have little to do with common sense. At the same time, such case law has not been followed by the federal courts, and the trend in the state courts may be away from it.

A leading case is the 1891 Massachusetts decision in *Miller v. Horton*,¹⁰¹ in which Justice Holmes wrote the opinion. Members of a board of health found that a horse had glanders and ordered it destroyed. The statute provided for such action "in all cases of farcy or glanders." The judge before whom the case was tried found that the horse did not have glanders. Justice Holmes, for the court, said that the statute limited the power of the officers to "a horse that really has the glanders,"¹⁰² because "the literal and, as we think, the true, construction . . . [is] that the authority and jurisdiction of the commissioners to condemn the plaintiff's horse under [the statute] was conditional upon its actually having the glanders. If this be so, their order would not protect the defendants in a case where the commissioners acted outside their jurisdiction."¹⁰³

The problem, according to the court's analysis, is the easy one of reading the statutory words literally and applying those words to the facts found by the trial judge. The court was apparently unaware of any problem resulting from the facts that the trial judge probably did not examine the horse and probably was not trained in veterinary science, whereas the board members may have examined the horse and may have been trained in veterinary science. The facts are said to be "really" or "actually" what the trial judge has found them to be, not what the board has found them to be, even though the legislative body has put the fact-finding power in the board and not in the judge. The court's only reason for refusing to interpret the statute to mean that the officers had power to kill a horse they reasonably found to have gland-

101 152 Mass. 540, 26 N.E. 100 (1891).

102 Id. at 542.

103 Id. at 548.

ers was that the legislative body said ". . . cases of . . . glanders." The court was not wholly unaware of the practical consequences of requiring the officers to act at their peril, for it expressly rejected the argument that "few people could be found to carry out orders on these terms."¹⁰⁴

The decision in *Miller v. Horton* means that an officer may be completely without fault and still be liable. The officer's action may be reasonable, prudent, and careful, and the officer still may be liable for damages if he makes a reasonable mistake. Furthermore, the officer may be personally liable even if his finding that the horse has glanders is entirely correct, for, in a practical sense, the test of the officer's liability is not the existence of the disease but what the court finds afterwards.

Justice Holmes did not mention a prominent Connecticut case that had been decided just eight years earlier—a case in which the court was guided by practicalities instead of by wooden literalism and empty logic. In *Raymond v. Fish*,¹⁰⁵ members of the board of health were held not liable for ordering the destruction of valuable oyster brush, even though they were assumed to be mistaken in believing that the oyster brush contributed to the spread of scarlet fever and diphtheria. The statute provided that the board "shall examine into all nuisances and sources of filth injurious to the public health, and cause to be removed all filth found within the town which in their judgment shall endanger the health of the inhabitants." The court did not reason, as in *Miller v. Horton*, that the statute authorized only the examination of "nuisances and sources of filth" and the removal of "filth" and that the oyster brush was neither a nuisance nor filth and that therefore the board acted beyond its jurisdiction. Instead, the court observed that the object of the statute was to preserve public health: "If the board of health are to decide at their peril, they will not decide at all. . . . [D]uty, hampered by a liability for damages for errors committed in its discharge, would become a motive of very little power."¹⁰⁶ The problem, the court thought, was which decision would best carry out the basic purpose of protecting the public health. In one deft sentence, the court escaped the logical trap of whether the oyster brush "really" or "actually" contributed to the contagious diseases: "The statute does not mean to destroy property which is not in fact a nuisance, but who shall decide whether it is so?"¹⁰⁷

¹⁰⁴ *Id.* at 542.

¹⁰⁵ 51 Conn. 80 (1883).

¹⁰⁶ *Id.* at 97.

¹⁰⁷ *Id.* at 96-97.

The federal courts have generally escaped the logical trap of the *Miller v. Horton* doctrine. The Supreme Court has seemingly understood from an early time that for purposes of tort liability, a determination of facts affecting jurisdiction is no different from a determination of any other facts. Thus, in *Bradley v. Fisher*¹⁰⁸ in 1871, the Court declared: "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is an usurped authority. . . . But where jurisdiction over the subject-matter is invested by law in the judge, . . . the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions. . . ." ¹⁰⁹ In 1896 the Court applied the same principle to the Postmaster General: "As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision."¹¹⁰ The modern attitude of the federal courts is the same and is shown in the many cases granting motions to dismiss even when malice is alleged. The proposition that a statute never confers jurisdiction upon an officer to act maliciously is perfectly logical, but the federal courts are able to look beyond logic to practicality.¹¹¹ For instance, Judge Learned Hand in the *Gregoire* opinion¹¹² paid no heed to the argument that the officers acted "without any authority of law" in imprisoning the plaintiff as an enemy alien. Since the plaintiff had been judicially determined to be a Frenchman, the officers had no authority to imprison him as an alien enemy. But the court held that even if the officers "acted altogether from personal spite and had been fully aware that they had no legal warrant for arresting or deporting the plaintiff,"¹¹³ still

¹⁰⁸ 13 Wall. (80 U.S.) 335 (1872).

¹⁰⁹ *Id.* at 351-352.

¹¹⁰ *Spalding v. Vilas*, 161 U.S. 483 at 498 (1896). What may be the most significant departure from *Spalding v. Vilas* in the federal courts is a dictum, which apparently has been without influence in later cases, in *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 at 316 (1908). The suit was for an injunction, not for damages, concerning official destruction of unwholesome poultry. The Court declared: "If a party cannot get his hearing in advance of the seizure and destruction he has the right to have it afterward, which right may be claimed upon the trial in an action brought for the destruction of his property, and in that action those who destroyed it can only successfully defend if the jury shall find the fact of unwholesomeness as claimed by them."

¹¹¹ Nearly all the federal cases cited in the preceding section, dealing with willful and malicious torts, are here in point.

¹¹² *Gregoire v. Biddle*, (2d Cir. 1949) 177 F. (2d) 579.

¹¹³ *Id.* at 580.

they were not personally liable. To the argument that the officers, by reason of personal malice, were necessarily acting beyond the authority conferred, Judge Learned Hand responded: "A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."¹¹⁴ What a contrast with the empty logic of *Miller v. Horton*.

Falling helplessly into the logical trap of *Miller v. Horton*, the Mississippi court has picturesquely protested against the position the federal courts take: "We cannot grasp the conception that non-existence can be less than nonexistence, or that there can be different kinds of nonexistence, or that that which is absent can be more absent."¹¹⁵ The court's statement is sound only if it is interpreted literally: the court cannot grasp the conception.

The doctrine of *Miller v. Horton* is followed in a good many state decisions¹¹⁶ and it is rejected in a good many.¹¹⁷ The doctrine,

¹¹⁴ *Id.* at 581.

¹¹⁵ *National Surety Co. v. Miller*, 155 Miss. 115 at 127, 124 S. 251 (1929).

¹¹⁶ A leading case is *Lowe v. Conroy*, 120 Wis. 151, 97 N.W. 942 (1904), expressly overruling *Fath v. Koepfel*, 72 Wis. 289, 39 N.W. 539 (1888). But one may wonder whether the authority of the *Fath* case is to some extent revived by *Wasserman v. Kenosha*, 217 Wis. 223, 258 N.W. 857 (1935). The *Lowe* case imposes liability for a reasonable mistake as to whether a steer had anthrax. The *Fath* case held an officer not liable for destruction of fish thought unwholesome, the court saying (at 293) that "a judicial officer is not responsible in an action for damages . . . however erroneously, negligently, ignorantly, corruptly, or maliciously he may act. . . ." The *Wasserman* case held officers not liable for cancelling a building permit, quoting with approval from the *Fath* opinion.

Pearson v. Zehr, 138 Ill. 48, 29 N.E. 854 (1891), is a prominent case holding officers liable, although they acted carefully and reasonably in destroying allegedly diseased animals.

In *Town of Randolph v. Ketchum*, 117 Vt. 468, 94 A. (2d) 410 (1953), an overseer of the poor was held liable to a neighboring town, on the theory that the overseer exceeded his authority in taking a poor person to the plaintiff town: "When a public officer goes outside the scope of his authority or duty, he is not entitled to protection because of his office, but is liable for his acts like any private individual." *Id.* at 474.

A member of a police jury who acts pursuant to an unlawful delegation of power may be personally liable. *Strahan v. Fussell*, 218 La. 682, 50 S. (2d) 805 (1951). A sheriff is liable for reasonable mistake in levying on or taking possession of the goods of the wrong person. *Buck v. Colbath*, 70 U.S. 334 (1865); *Phillips v. Barker*, (Okla. 1954) 269 P. (2d) 337; *Choukas v. Severyns*, 3 Wash. (2d) 71, 99 P. (2d) 942 (1940); *Atlantic Finance Corp. v. Galvam*, 311 Mass. 49, 39 N.E. (2d) 951 (1942).

¹¹⁷ In addition to *Raymond v. Fish*, 51 Conn. 80 (1883), discussed above in this section, and the *Fath* and *Wasserman* cases of the preceding note, all the holdings of the federal courts are against liability, as well as such state cases as *McGuire v. Amyx*, 317 Mo. 1061, 297 S.W. 968 (1927) (health officer not liable for sending healthy person to pest house, though "jurisdiction"); *Wright v. White*, 166 Ore. 136, 110 P. (2d) 948 (1941) (lack of jurisdiction to prosecute without probable cause does not make officer liable); *Sweeney v. Young*, 82 N.H. 159 at 163, 131 A. 155 (1925) (holding officers not liable for unlawful dismissal, court declares principle: "When the officer makes an erroneous

for some unexplained and probably unexplainable reason, has a somewhat stronger application to property rights than to personal rights. For instance, even though a plaintiff who is wrongfully quarantined may be more seriously damaged than one whose property is wrongfully destroyed, under the case law he is less likely to recover damages from the officer.¹¹⁸ In what may be the most extreme application of the doctrine, the Massachusetts court holds that officers act beyond their jurisdiction and therefore become personally liable if their only fault is failure to comply with a procedural requirement: "The full performance of all conditions established by the statute are essential prerequisites to the jurisdiction of the municipal council over the subject-matter of the removal of an officer. . . . The municipal council was clothed with the power of removal of city officers so long as there was conformity to the requirements of the law. When the members ceased to comply with the law they were acting outside their official capacity and were subjected to responsibility as individuals."¹¹⁹

If the law on liability of officers for acting in excess of jurisdiction is somewhat unsatisfactory,¹²⁰ the difficulty lies largely in the principle of sovereign irresponsibility. A court that is compelled to choose between letting an innocent plaintiff bear the loss from improper destruction of his property and imposing liability upon an innocent officer who has made a reasonable mistake is sure to make an undesirable decision no matter which way it holds, for no solution can be just to both parties, except the obvious solution of allowing the loss to be borne by the public, which gets the benefit of the program the officer is administering and should therefore pay for the mistakes that are normal, natural, and expected.

preliminary decision that he has jurisdiction, and then acts in pursuance of the error, liability depends upon his right to pass upon the jurisdictional question. If he goes outside his general authority, he is not protected for the consequences of his action. If within his general authority his erroneous exercise of it is due to special reasons of jurisdictional invalidity, he is protected.")

Even in Massachusetts, a mayor has been held not liable for damages for denying an application for a license. *Jaffarian v. Murphy*, 280 Mass. 402, 183 N.E. 110 (1932).

¹¹⁸ Holding officers not liable for wrongful quarantine: *Crayton v. Larabee*, 220 N.Y. 493, 116 N.E. 355 (1917); *Beeks v. Dickinson County*, 131 Iowa 244, 108 N.W. 311 (1906). But compare *Barry v. Smith*, 191 Mass. 78, 77 N.E. 1099 (1906).

¹¹⁹ *Stiles v. Municipal Council of Lowell*, 233 Mass. 174 at 183, 123 N.E. 615 (1919). See the rather full discussion of Massachusetts cases in the opinion. A later case to somewhat the same effect, though less extreme, is *Forbes v. Kane*, 316 Mass. 207, 55 N.E. (2d) 220 (1944).

¹²⁰ The congeries of rules concerning liability of officers take on an additional flavor of artificiality and arbitrariness when they are put into the format of a *Restatement*. The rules seem far from consistent. See *TORTS RESTATEMENT* §§121i, 202e, 204e, 262, 265, 269, 271, 275, 278b, 601, 645, 656, 888, and 890f (1934-1939). The supplements of 1948 and 1954 show no change and hardly any citation of these provisions by the courts.

VI. OFFICERS' LIABILITY UNDER THE CIVIL RIGHTS ACT

Because law normally develops in a rather plodding fashion, only occasionally can one discern in a whole body of cases a clash of ideas or doctrine that partakes of the dramatic. A rather exciting legal drama is the story since 1944 of the rise and partial decline of the Civil Rights Act of 1871 as a basis for recovering damages against state officers. At one time—about 1950—the traditional immunity of officers seemed to be crumbling at an alarming rate, whether the officers exercised legislative, judicial, executive, or administrative power. The villain in the drama was the drastic language of the act, which had been designed in 1871 to resolve post-Civil War problems. But the heroes of the story, the federal judges, resorted to their powerful weapon of creative law-making through interpretation, and finally triumphed. The statute, which the Supreme Court has characterized as “loosely and blindly drafted in the first instance,”¹²¹ has succumbed to strong interpretation that rests upon little but practical judgment about practical needs.

The Civil Rights Act, in its main provision concerning civil liability, provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”¹²² Other provisions created civil liability for denial of equal protection,¹²³ and created criminal liability for designated willful action.¹²⁴

The modern expansion of civil liability of officers began in 1944 in *Snowden v. Hughes*¹²⁵ in which the Supreme Court dismissed a complaint brought against officers but nevertheless breathed life into the Act of 1871, which had been largely dormant during the twentieth century. The following year in the *Picking* case¹²⁶ the Third Circuit, taking its cue from the *Snowden* opin-

¹²¹ *Stefanelli v. Minard*, 342 U.S. 117 at 121 (1951).

¹²² 17 Stat. 13 (1871), 42 U.S.C. (1952) §1983.

¹²³ 42 U.S.C. (1952) §1985.

¹²⁴ 42 U.S.C. (1952) §§1987 and 1988.

¹²⁵ 321 U.S. 1 (1944). The cases involving civil liability have interacted with cases involving criminal liability. Outstanding cases on criminal liability under the act are *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Williams*, 341 U.S. 70 (1951); *Williams v. United States*, 341 U.S. 97 (1951).

¹²⁶ *Picking v. Pennsylvania R. Co.*, (3d Cir. 1945) 151 F. (2d) 240.

ions, succumbed completely to the literal words of the act, holding various officers personally liable, including not only the Governor of Pennsylvania but also a justice of the peace. The court sensationally departed from all previous Anglo-American tradition in holding: "If the plaintiffs brought a proper proceeding to secure their liberty before Justice of the Peace Keiffer and he refused to hear their cause, he may be answerable to the plaintiffs in damages."¹²⁷ A judicial officer may be personally liable for making a judicial determination!

In 1946 Judge Learned Hand was unable to resist the literal words of the act, as interpreted in the *Snowden* and *Picking* opinions.¹²⁸ The suit was against various officers of New York City — the Board of Standards and Appeals, the Department of Housing and Building, the Commissioner of Buildings, the Borough Superintendent, the chief engineer, and two examiners of the Building Department. Despite the clarity of federal law in recognizing the immunity of such officers apart from the act, the court said: "Whatever may have been true before, it seems to us that, since the decision of the Supreme Court in *Snowden v. Hughes*, . . . such allegations [deliberate abuse of statutory power] will support an action. . . ."¹²⁹ The court indicated that it was aware of the extreme consequences of its decision: "So far as we can see, any public officer of a state . . . will have to defend any action brought [under the act] in which the plaintiff, however irresponsible, is willing to make the necessary allegations."¹³⁰

Then came many cases rejecting the immunity of judicial, administrative, and legislative officers. For instance, the Sixth Circuit reversed a dismissal of a complaint in a suit against a justice of the peace,¹³¹ the Second Circuit reversed a dismissal of a complaint in a suit by a teacher against a school principal alleging wrongful discharge,¹³² and the Ninth Circuit reversed a dismissal of a complaint against members of a state legislative investigating committee.¹³³ Personal liability of officers of all kinds was growing rapidly.

At this point, the Supreme Court decided to use its power to change the direction of law development. In *Tenney v. Brand-*

¹²⁷ Id. at 250.

¹²⁸ *Burt v. City of New York*, (2d Cir. 1946) 156 F. (2d) 791.

¹²⁹ Id. at 791-792.

¹³⁰ Id. at 793.

¹³¹ *McShane v. Moldovan*, (6th Cir. 1949) 172 F. (2d) 1016.

¹³² *Bomar v. Keyes*, (2d Cir. 1947) 162 F. (2d) 136.

¹³³ *Brandhove v. Tenney*, (9th Cir. 1950) 183 F. (2d) 121, revd. 341 U.S. 367 (1951). See discussion of the Supreme Court decision immediately below.

hove,¹³⁴ it reversed the holding of the Ninth Circuit that legislators could be personally liable: "We think it is clear that the legislation on which this action is founded does not impose liability on the facts before us, once they are related to the presuppositions of our political history."¹³⁵ The Court traced the history of immunity of legislators, from 1523, through the colonial period, to modern times, to show "the tradition of legislative freedom." The Court said it would be "a big assumption" to assume that Congress has constitutional power to limit the freedom of state legislators acting within their traditional sphere. Without discussing the plain meaning of the statute, the Court declared: "We cannot believe that Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."¹³⁶ As to the allegation of unworthy purpose of the legislators, the Court generalized: "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."¹³⁷

The opinion in the *Tenney* case was carefully limited to the issue before the Court — the immunity of legislators. But both of the major reasons given, the tradition of immunity and the need for uninhibited discharge of duty, are fully applicable to judicial, executive, and administrative officers. The tradition of judicial immunity is probably more deeply embedded than the tradition of legislative immunity; the tradition of immunity for administrative officers is much less impressive but is nevertheless reasonably clear, especially for officers exercising judicial or legislative powers.

On the basis of the *Tenney* opinion, the lower courts were emboldened to hold that judicial officers were immune from liability, despite the clarity of the act's words.¹³⁸ Even the Third

¹³⁴ 341 U.S. 367 (1951).

¹³⁵ *Id.* at 372.

¹³⁶ *Id.* at 376.

¹³⁷ *Id.* at 377.

¹³⁸ *Tate v. Arnold*, (8th Cir. 1955) 223 F. (2d) 782 (justice of the peace immune); *Francis v. Crafts*, (1st Cir. 1953) 203 F. (2d) 809, cert. den. 346 U.S. 835 (1953); *Grubbs v. Slater*, (W.D. Ky. 1955) 133 F. Supp. 110; *United States ex rel. Peters v. Carson*, (W.D. Pa. 1954) 126 F. Supp. 137; *Souther v. Reid*, (E.D. Va. 1951) 101 F. Supp. 806; *Morgan v. Sylvester*, (S.D. N.Y. 1954) 125 F. Supp. 380.

Circuit, which had denied immunity for a justice of the peace,¹³⁹ held that the Chief Justice of the Pennsylvania Supreme Court was not liable, although it refrained from determining whether its earlier holding was overruled.¹⁴⁰

Immunity of legislators and judges was thus restored; immunity of administrative officers was the remaining problem. In 1953 the First Circuit reversed the dismissal of a complaint by school teachers against a mayor and members of a board of aldermen and common council, alleging that the officers had abrogated contract obligations.¹⁴¹ Surprisingly, Judge Magruder said in a concurring opinion: "I think that members of a city council would be liable in damages for pecuniary harm to a plaintiff intentionally inflicted by action, under color of official authority, which the defendants subjectively realized would result in depriving the plaintiff of a right or privilege secured by the Constitution."¹⁴² Judge Woodbury's dissent was not based upon immunity but upon interpretation of the complaint. The First Circuit, however, straightened itself out the following year in a masterful opinion by Judge Magruder in *Francis v. Lyman*.¹⁴³ The opinion in all probability embodies the law of the future. The court said that "we think it no longer appropriate" to "give effect to the statute in its literal wording."¹⁴⁴ Instead, the court should "fit the statute as harmoniously as may be into the familiar and generally accepted legal background, and to confine its application, within reason, to those situations which might possibly have had the approval of the Congress if it had specifically adverted to the particular cases. . . ."¹⁴⁵ The court said that in cases involving discrimination on grounds of color and other problems of major concern to the Reconstruction Congress, state officials even act at their peril, and "it

¹³⁹ *Picking v. Pennsylvania R. Co.*, (3d Cir. 1945) 151 F. (2d) 240.

¹⁴⁰ *Ginsburg v. Stern*, (3d Cir. 1955) 225 F. (2d) 245: "We refrain expressly, however, from any determination as to whether the *Picking* decision has been overruled by the Supreme Court . . . by *Tenney v. Brandhove*."

¹⁴¹ *Cobb v. City of Malden*, (1st Cir. 1953) 202 F. (2d) 701.

¹⁴² *Id.* at 707. Contrast the many cases discussed above in Part IV, in which complaints were dismissed alleging malice, including, for instance, *Gregoire v. Biddle*, (2d Cir. 1949) 177 F. (2d) 579. For application of the principle of the *Gregoire* case to municipal officers even further down the scale than members of a city council, see *Baker v. Mueller*, (7th Cir. 1955) 222 F. (2d) 180, involving members of a town board, building inspector, health inspector, city attorney, and plumbing inspector.

In a later case, *Dunn v. Gazzola*, (1st Cir. 1954) 216 F. (2d) 709, Judge Magruder wrote the opinion affirming a dismissal of a complaint against a sergeant of police and chief of police, alleging conspiracy to deprive plaintiff of equal protection; the ground was that the bare conclusionary allegation could not protect the complaint from the motion to dismiss.

¹⁴³ (1st Cir. 1954) 216 F. (2d) 583.

¹⁴⁴ *Id.* at 587.

¹⁴⁵ *Id.* at 587.

is no defense . . . that they may have acted, not maliciously, but in the good-faith belief that they were performing their official duty under what they thought was valid state legislation. . . . But beyond such situations, it seems to be the tendency of the decisions to restrict the applications of the Civil Rights Act so as to avoid the appalling inflammation of delicate state-federal relationships which undoubtedly would ensue."¹⁴⁶

The specific holding was nothing more than that superintendents of two institutions, acting pursuant to court order, were not liable for false imprisonment.¹⁴⁷ The importance of the case lies in the broad approach, including a passage quoted from an earlier opinion of Judge Magruder, that "the Act merely expresses a *prima facie* liability, leaving to the courts to work out, from case to case, the defenses by way of official privilege which might be appropriate to the particular case."¹⁴⁸

This approach, of course, leads to the judicial reinvention of law of official immunity, along the lines of what the courts have already invented apart from the Civil Rights Act.

Under such an approach, members of a city police department may be liable, as held in the Seventh Circuit.¹⁴⁹ A sheriff and deputy sheriff may be liable for an illegal search and seizure, as held by the Fifth Circuit.¹⁵⁰ And a court is likely to have doubt and difficulty with the problem of whether a state's attorney should be held liable for acquiescence in use of force by lesser officers; on this question the Seventh Circuit holds for immunity and the Fifth Circuit for liability.¹⁵¹

Perhaps the law of the future under the Civil Rights Act will be the same as the law apart from the act, except where problems are involved of the type that were the special concern of the Reconstruction Congress.

VII. PERSPECTIVE AND CONCLUSIONS

What the law of tort liability of public officers and employees most needs is an expansion of tort liability of governmental units. If the particular governmental unit is liable for the tort, so that the loss will thus be properly spread, then the courts will be re-

¹⁴⁶ *Id.* at 588.

¹⁴⁷ The court reasoned that the two superintendents could not be liable for acting pursuant to court order, for the legislators who enacted the statute were not liable, and the judge who issued the warrant of commitment was not liable.

¹⁴⁸ *Cobb v. City of Malden*, (1st Cir. 1953) 202 F. (2d) 701 at 706.

¹⁴⁹ *Geach v. Moynahan*, (7th Cir. 1953) 207 F. (2d) 714.

¹⁵⁰ *Davis v. Turner*, (5th Cir. 1952) 197 F. (2d) 847.

¹⁵¹ *Cawley v. Warren*, (7th Cir. 1954) 216 F. (2d) 74; *Lewis v. Brautigan*, (5th Cir. 1955) 227 F. (2d) 124.

lieved from the need for choosing between leaving a deserving plaintiff without remedy and imposing liability upon the individual officer or employee, who is usually either ill-equipped to bear the loss or is performing the type of function that can be properly performed only if the officer is free from the need of considering his own pocket book. The public interest in fearless administration usually should come first, so that officers must be immune from liability even when the plaintiff asserts that the officers have acted maliciously; when this is so, the only proper way to compensate deserving plaintiffs is to impose liability on the governmental unit. When the public gets the benefit of a program, the public should pay for the torts that may be expected in carrying out the program. The only satisfactory solution of many problems about liability of officers and employees is to compensate the plaintiff but to hold the officer or employee immune.

The great body of federal and state law which recognizes the central principle that officers exercising discretionary power are immune from liability for unintentional torts and even for those which are allegedly malicious seems generally satisfactory,¹⁵² and the scattered state cases that do not recognize this principle probably should do so. If this principle means that justice is denied to deserving plaintiffs, the cure should be to impose liability on the governmental unit. The only weakness in this broad conclusion lies in its application to a case in which the plaintiff can prove that the officer did in fact act maliciously, willfully, or corruptly; in such a case, a revulsion to officer immunity is natural and sound, except for the harm that may be caused to the many conscientious officers by imposing liability on the guilty officer. Conceivably, procedural means can be invented (such as affidavits and motions for summary judgment) to allow imposition of liability on the officer in an appropriate case and still protect other officers from the necessity of trial to prove absence of malice or willfulness; such a solution may be desirable especially when the

¹⁵² This conclusion is drastically in disagreement with the conclusion of Jennings, "Tort Liability of Administrative Officers," 21 MINN. L. REV. 263 (1937). Professor Jennings concluded that when officers determine issues with or without hearings or other procedural safeguards, the test of their liability should be "whether they acted beyond the bounds of reasonable official action" (p. 309), and "whether they had acted in the circumstances as reasonable men would have acted." (p. 312) These two tests seem to be the same. Both are out of line with the case law, for if the Jennings test were followed, officers would often be liable for unintentional torts, and motions to dismiss would have to be denied whenever malice is properly alleged. The cases are overwhelming that the effective test for liability of officers exercising high discretionary powers is not reasonableness of the officers' determinations, and policy reasons seem strongly to support the cases.

functions performed involve a larger proportion of the ministerial and a lesser proportion of the so-called discretionary. Complete immunity of officers performing legislative or judicial duties should probably be continued—even when malice can be proved.

The common-law tradition that a servant is liable for his own torts committed in the course of employment and that he must indemnify the master for any loss resulting from unintentional fault of the servant is contrary to the realities of both corporate employment and government employment. The Supreme Court has unanimously brought federal law into accord with the realities, and other courts may well follow the Supreme Court's lead in departing from the common-law tradition.

The common-law tradition that a servant is liable for his own and related torts has been recently reexamined in some thoughtful state court opinions, with the result that policemen may be immune from liability when they have acted in good faith. The only satisfactory solution of the problem of police abuses is likely to be imposition of liability upon the governmental unit, thereby providing to executive and legislative officers the needed incentive for effective discipline of policemen.

Various state courts have developed confused doctrine in trying to distinguish jurisdictional questions from other questions. The unfortunate result, following *Miller v. Horton*,¹⁵³ is to hold officers personally liable for reasonable mistakes even in absence of fault. Federal courts from an early time have been quite clear that officers should be immune from liability so long as their action is not "manifestly or palpably beyond . . . authority."¹⁵⁴ From a practical standpoint, the federal law is superior to the law of the state courts that adhere to the doctrine of *Miller v. Horton*.

Since 1944, literal interpretation of the Civil Rights Act of 1871 has induced many federal courts to impose liability upon officers in many circumstances in which they would otherwise be immune, but beginning with the Supreme Court's 1951 decision in *Tenney v. Brandhove*,¹⁵⁵ literal interpretation has declined drastically. Officers in the future are likely seldom to be held liable under the act unless they would be liable apart from the act or unless their action involves subject matter of the kind that the Reconstruction Congress may have had specially in mind.

¹⁵³ 152 Mass. 540, 26 N.E. 100 (1891).

¹⁵⁴ Quoted from *Spalding v. Vilas*, 161 U.S. 483 at 498 (1896).

¹⁵⁵ *Tenney v. Brandhove*, 341 U.S. 367 (1951).