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Legislative Abrogation of Immunities
Under Section 1983

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 any action at law, suit in equity, or other proper proceeding for redress.¹

I. Introduction

Section 1983 of the Civil Rights Act of 1871 has survived a rocky history of dormance,² expansion,³ contraction,⁴ and reexpansion.⁵ Despite this history, the statute today plays an important role in the private enforcement of civil rights.⁶ Section 1983, however, has not been able to reach its full potential as a civil rights statute. Individuals' civil rights continue to be violated⁷ under color of state law, and section 1983 has often failed to provide an adequate remedy.⁸ One factor which has kept section 1983 from becoming a truly effective civil rights tool has been the immunities granted under the statute.

During its 108-year existence, the application of section 1983 has been controlled largely by judicial interpretations of its legislative history and pur-

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² The broad, sweeping language of § 1983 allowed courts large amounts of discretion in its interpretation. Court interpretation of the fourteenth amendment, which was the source of both the statute and § 1983, took most of the vigor from the protective language. See, e.g., Barney v. City of New York, 193 U.S. 430 (1904) (act must be authorized by state law to be state action), overruled in United States v. Raines, 362 U.S. 17 (1960); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (limited the rights of the fourteenth amendment to those rights correlative to the existence of national government). See Gressman, The Unhappy History of Civil Rights Legislation, 50 MICH. L. REV. 1323 (1952); Developments in the Law—Section 1983 and Federalism, 90 HARV. L. REV. 1133 (1977) [hereinafter cited as Developments].
³ See, e.g., Monroe v. Pape, 364 U.S. 167 (1961) (under color of state law in civil context includes misuse of power; federal remedy is supplemental to state remedy; specific intent to deprive a citizen of a federal right need not be shown); United States v. Classic, 313 U.S. 299 (1941) (criminal counterpart of § 1983, now 18 U.S.C. §§ 241-242 (1976), interpreted to include misuse of power); Hague v. CIO, 307 U.S. 496 (1939).
⁵ See Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978) ("person" includes local governing bodies where the act consists of unconstitutional implementation or execution of a policy statement, ordinance, regulation, decision, or custom which represents official policy).
⁷ See, e.g., Senate Hearings, supra note 6, at 135 (testimony of Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights); Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 YALE L.J. 447 (1978); The Metcalfe Report on the Misuse of Police Authority in Chicago, CHICAGO DEFENDER, July 1973, reprinted in Senate Hearings, supra note 6, at 216.
⁸ "Currently, §1983 is neither an effective deterrent to police misconduct nor an effective remedy to the victims of police abuse." Senate Hearings, supra note 6, at 142 (prepared statement of Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights).
pose. The statute, however, is subject to congressional control and change. Congress is currently studying various amendments to section 1983, with the Civil Rights Improvements Act of 1977 (Civil Rights Bill or Bill) as the prototype. Although the Civil Rights Bill did not receive congressional approval, it was the subject of congressional hearings and received attention in the legal community.

The purpose of this note is to focus on the governmental and official immunities of section 1983 with a prospective view toward their codification or change. The Civil Rights Bill will be used as a starting point for analysis. Two broad issues will be examined: 1) to what extent should governmental immunity be granted under section 1983, if at all; and 2) to what extent should official immunity be granted under section 1983, if at all. Governmental immunity, in this context, refers to that immunity granted a state, municipality or other unit of government. Official immunity refers to the insulation from liability of any human agent of a state or local government entity. Officers include police, judges, prosecutors, and other state and local agents.

II. Immunities Under Section 1983

Immunity as a generic term describes the protection of an individual or entity from legal liability. The broad language of section 1983, on its face, imposes liability on "every person" who "under color of" state law subjects "any citizen" to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]." A literal interpretation of section 1983 would subject anyone who violated an individual's protected rights under color of state law to liability. The absolute liability standard suggested by the language, however, has been rejected. In lieu of a literal interpretation of the statute, immunities have been incorporated into section 1983 by way of two independent routes: judicial definition of statutory language and the incorporation of common law principles.

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9 "With few exceptions, the Supreme Court decisions . . . have been based on the Court's interpretation of section 1983, a statute that Congress wrote and that Congress is empowered to change." Senate Hearings, supra note 6, at 2 (statement of Sen. Bayh).


A slightly amended version of S. 35 is being studied. Some form of the bill will be reintroduced in the 96th Congress.


13 Questions of the liability of individual government agents also include the issue of to what extent the immunity of an individual official should be extended to the governmental unit, if at all.

14 "Immunity does not mean that no acts in fact were done, but that there may be no prosecution in respect thereto. Immunity does not wipe out the history of events." United States v. Swift, 186 F. 1002, 1017 (N.D. Ill. 1911). W. Prosser, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971).


The most prominent example of the creation of an immunity by definition occurred in *Monroe v. Pape*\(^7\), when the Supreme Court held that a municipality was not a "person" within the meaning of section 1983. This interpretation resulted in complete exclusion of municipalities from liability.\(^8\) In *Monell v. New York City Department of Social Services*,\(^9\) the Court reversed its prior stance and reinterpreted the definition of "person" to include a municipality in narrowly defined circumstances. The expansion of the definition of "person" in *Monell* resulted in a qualified immunity for municipalities.

Immunities have also been achieved by the incorporation of common law concepts into section 1983. Courts have refused to interpret the broad language of section 1983 as abrogating the legal tradition of immunity for public officials.\(^20\) As a result, section 1983 is "read against the background of tort liability that makes a man responsible for the natural consequences of his actions."\(^21\) Common law immunities arise when a court determines that certain policy considerations require insulation of an individual or entity from exposure to suit.\(^22\) Such immunities include absolute protection from suit,\(^23\) affirmative defenses of good faith,\(^24\) and subtle shifts in burdens of proof.\(^25\)

Although immunity by definition and immunity by common law have different conceptual foundations, the effect, in either case, is a limitation of remedy for the plaintiff. For this reason a prospective analysis of the extent to which immunity will be granted under section 1983 requires resolution of the competing interests of the individual alleging a constitutional harm and the government or its agent claiming the need for immunity. This balancing approach is not susceptible to a mechanical resolution, but necessarily involves policy decisions and value judgments. Such a balancing of interests, whether by the judiciary or Congress, requires an understanding of the policies behind immunity and of the purposes of section 1983.

### A. Justification for Immunity

Immunity for government officials and government entities stems from the common law doctrine of sovereign immunity. The original justification for

\(^7\) 365 U.S. 167 (1961).

\(^8\) The exclusion of the federal government and federal officials from the purview of § 1983 in effect gives immunity to the federal government by its omission. The advisability of extending § 1983 to the federal government will not be discussed in this note. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); *Newman*, supra note 7, at 496.


\(^22\) See text accompanying notes 26-38 infra.


immunity was that the King was incapable of wrongdoing, 26 a rationale which has since been rejected. 27 Courts, however, have continued to apply the doctrine on public policy grounds. 28

The primary reason given by modern courts for granting immunities is that the fear of liability will reduce the effectiveness of government entities and their agents by discouraging aggressive performance of duties. 29 Timid performance of public duties, however, will depend upon whether both the government-employer and the employee are exposed to liability and upon the amount of discretion exercised by the government employee. If liability is borne by the employer, the employee-officer is not likely to be inhibited in the vigorous performance of public duties. 30 The government is capable of action only through its officers, 31 therefore, reluctant performance of public duties due to fear of liability appears less probable when the individual agent will not be liable. Fear of liability by the government-employer, rather, would be reflected in the official policy of the government. In addition, the claim that the prospect of liability confines the actions of the government entity must be considered in light of the countervailing desire for government restraint when its activities threaten constitutional rights. 32

Even if the fear of liability discourages the aggressive performance of duties, the impact is not as great when little discretion is provided to the officer involved. The nature of the officer's duties will affect the range of choices, and therefore the amount of discretion to be exercised. For example, a police officer has the discretion to give a verbal warning or to arrest an individual. The prosecutor has a wider range of choices: the decisions of whether to prosecute, drop charges or plea bargain. Therefore, when the prosecutor holds back on aggressive performance of his duties the impact is greater. 33 When examining whether fear of liability will cause timidity of action, the amount of discretion exercised by the officer becomes an important factor.

A second justification given for the immunity of officials and government entities is that it will prevent harassment and vexatious litigation. 34 Although it is true that litigation is time-consuming and may be used for harassment, this is an unfortunate element of all lawsuits. Unless absolute immunity were

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26 416 U.S. at 239; Borchard, Government Liability in Torts, 34 Yale L. J. 1 (1924).
27 See Blackstone, Commentaries (10th ed. 1887); K. Davis, Administrative Law Treatise § 25.00 (1958); Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209 (1963).
31 See Adekalu v. New York City, 431 F. Supp. 812, 819 (S.D.N.Y. 1977) ("all municipal actions are performed for the municipality by its human agents"). Any government entity, whether the state or its political subdivision, can only act through its employees.
32 See Freed, supra note 25, at 564.
granted, only the elimination of section 1983 could completely protect officials from the dangers of unfounded charges.

Third, it is argued that the imposition of liability on government units will result in an excessive and unbearable financial burden. The validity of this argument is suspect for two reasons. First, the trend toward abandonment of state sovereign immunity for torts has not resulted in unbearable liability for the entities involved. Second, because many state and local governments are now liable for common law torts, it is difficult to justify on financial grounds why those entities should not also be liable for violations of constitutional rights.

In addition to the concerns of financial burdens on the government entity, the prospect of personal liability by individual agents may discourage qualified applicants from seeking governmental employment. Fear of personal liability by officers of the government, however, is dependent upon whether the agent carries insurance, whether an indemnity agreement exists between the agent and the government entity, and whether the government will also be liable in an action for damages. The existence of these factors would appear to mitigate the seriousness of a reduced government applicant pool.

Individual and governmental immunities have not been considered analytically related under the current judicial interpretations of section 1983, in part because of the separate origins of definitional immunity and common law immunity. When a person is definitionally excluded from application of section 1983, courts need not examine the policy reasons for immunity because Congress has presumably made the choice to protect the individual from liability. When, however, the immunity is based on the common law, a court must find a policy justification for use of the doctrine. Now that Congress has the opportunity to reexamine section 1983, it should realize that the related lines of justification for both individual and governmental immunity under section 1983 require that they be considered and analyzed together.

35 See note 71 infra.
37 Senate Hearings, supra note 6, at 112 (testimony of Charles A. Barrett, Chief Deputy Attorney General of California, representing the National Association of Attorney Generals):

SENATOR METZENBAUM: Didn’t you tell the truck driver who drives your garbage truck not to drink while he’s on the job? Didn’t you tell each of your employees not to drive their automobiles recklessly? And don’t you accept responsibility when they transgress those rules? How do you make that distinction?

You say you know that you have told them not to do these things. I’m not always certain that you have — that every municipality has — done that, and that every public body has done it; because I’m not sure that the emphasis on the protection of constitutional rights is always this great.

But assuming that you have, again, how do you make the distinction that you have told them not to drive while intoxicated and they do it and you pay the damages. Why shouldn’t you pay the damages when you violate a constitutional right?

MR. BARRETT: It’s a hard distinction to make. I will certainly concede that, Senator.

But I still think that the persons in the community should not be forced to pay that on behalf of the person who is violating the law and violating someone’s rights.

The person should be forced to pay that — the defendant himself — and not the entity that employs him.

38 See Baxter, Enterprise Liability, Public and Private, 42 Law & Contemp. Probs. 45, 47-48 (1978): “Only the conjunction of official immunity with sovereign immunity can lead us into any confident conclusion about the social desirability of the official immunity rule . . . .”
B. Purposes of Section 1983: Their Effect on Remedy

Section 1983 has been interpreted as both a compensatory and deterrent device. With the opportunity to amend the statute, Congress may now reevaluate the manner in which these goals are to be met and the emphasis to be accorded compensation and deterrence.

Because constitutional rights continue to be violated, the need for a more effective remedy continues. If constitutional rights are more important than other rights, absent other considerations dealt with in this note, the remedy for constitutional violations should be at least as broad as that given for non-constitutional violations. Both the form and the breadth of the strengthened remedy will depend upon how the remedy achieves the acknowledged purposes of compensation and deterrence.

It is possible to achieve deterrence without compensation. For example, if deterrence were the paramount purpose of section 1983, a bifurcated remedial system would be appropriate: individuals and entities would be immune from damage actions, but subject to injunctions. Conversely, if compensation were the predominant goal of section 1983, there would be little reason to subject individuals and entities to injunctive suits. But the goals of compensation and deterrence are not mutually exclusive and there is no reason for Congress to prefer or exclude either when dealing with section 1983.

With an understanding of the justifications for immunity, the dual purpose of section 1983 and the link between these purposes and the remedies to be allowed, it is now possible to examine governmental and official immunity under section 1983.

III. Governmental Liability

A. Current Law

During the growth of section 1983 as a functional civil rights statute, the word “person” had been construed to exclude a state or municipality. In

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40 In the private sector damages have served to compensate the individuals harmed, while both damages and injunctions have been effective deterrents against unlawful conduct. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).
41 Bifurcation of the nonperson interpretation of Monroe was rejected in City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973). Justice Rehnquist reasoned: “We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word ‘person’ in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.” Monell does not change the conclusion reached in City of Kenosha. 436 U.S. at 701 n.66.
42 U.S. CONST. amend. XI provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Edelman v. Jordan, 415 U.S. 651 (1974), held that the eleventh amendment immunity was not abrogated by § 1983, notwithstanding consent by a state to suit in its own courts. Moor v. County of Alameda, 411 U.S. 693 (1973). Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), indicated that Congress has the power under § 5 of the fourteenth amendment to override the eleventh amendment. Doubt as to the vitality of Edelman after the 1978 Monell decision, see Hutto v. Finney, 437 U.S. 678 (1978), was relieved in Quern v. Jordan, 99 S. Ct. 1139 (1979), where the Supreme Court stated that Monell does not affect the Edelman decision. In order to hold a state liable under § 1983, Congress will have to demonstrate a clear congressional purpose to abrogate the eleventh amendment.
1978, however, the Supreme Court held in *Monell v. New York City Department of Social Services*\(^4\) that "[l]ocal governing bodies. . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."\(^5\) Under *Monell*, unconstitutional action pursuant to custom would subject a municipality to liability even if it did not have formal approval.\(^6\) The Supreme Court further indicated that a municipality could not be held liable solely on the basis of *respondeat superior*, but did not expound on what would be sufficient to hold a municipality liable.\(^7\)

*Monell* left the "full contours"\(^8\) of municipal immunity unexamined. It was left to later cases to determine whether some sort of qualified immunity would be available to protect municipalities and to delineate what factors in addition to the employer-employee relationship would give rise to liability.\(^9\) *Monell* exposed municipalities to suit under section 1983 to a limited degree. Its ultimate impact, however, will be determined by the treatment it receives by the lower courts.\(^10\)

B. Legislative Reform

1. Need for Legislative Action

Although *Monell* was a major breakthrough in expanding remedies under section 1983, state and municipal liability under the statute remains a likely subject of congressional review for three reasons. First, the history of section 1983 demonstrates that it has been subject to an uneven interpretation by the courts.\(^11\) Unless Congress is willing to leave the many questions of governmental liability to the judiciary, it should act to expand, clarify or codify the desired rules under section 1983. Second, *Monell* specifically left open the possibility that some kind of municipal immunity might obtain under section 1983.\(^12\) This possibility could result in emasculating many of the breakthroughs made possible by *Monell*. Finally, state immunity under the eleventh amendment can be abrogated only by specific congressional authorization.\(^13\) For these three reasons, changes in governmental or official immunity should come through legislation.

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\(^{5}\) Id. at 690.
\(^{6}\) Id. at 690-91.
\(^{7}\) Id. at 691.
\(^{8}\) Id. at 695.
\(^{10}\) Blum, supra note 12. The post-*Monell* decisions indicate that *Monell* might not significantly increase the remedy for § 1983 plaintiffs. See, e.g., Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978) (municipality not liable for injury inflicted by police officer); Reimer v. Short, 578 F.2d 621 (5th Cir. 1978) (municipality not liable where police officer exceeded authority).
\(^{11}\) See notes 2-5 supra.
\(^{12}\) 436 U.S. at 701.
\(^{13}\) See note 42 supra.
2. Legislation

The 95th Congress considered expansion of governmental liability under section 1983 in the Civil Rights Bill. The Bill would have retained the current version of section 1983, but would have expanded and defined its scope. It called, in part, for expansion of the definition of "person" to include:

any natural person, any association or combination of natural persons, any partnership, corporation, or other legal entity, any State or territory, any municipality, county, parish, or other State, territorial, or local governmental subdivision, unit or agency, the District of Columbia, or any agency of the District of Columbia; and "State or territory" shall include the District of Columbia.

The Bill further made states, municipalities or their subdivisions or agencies liable for damages under section 1983 when any officer, agent or employee or other person clothed with governmental authority was involved in any of the following four specific circumstances: 1) when such person's conduct was authorized or required by statute, ordinance, policy or practice, or when performed by the person who was responsible for making the policy; 2) when such person acted at the direction, or with the encouragement of a supervisory officer; 3) when a supervisory officer, with authority to act, knew or should have known that a subordinate had previously engaged in such conduct and failed to halt or take reasonable steps to prevent the conduct; or 4) when the person seeking relief could not identify the particular officer or agent who inflicted the wrong, or prove causation.

In contrast to the limitation of damage liability, the Bill authorized injunctive relief against the state, municipality, subdivision or agency whenever any agent violated the provisions of section 1983. The Bill directed, in mandatory language, that the federal court "shall" order disciplinary or other remedial measures.

C. Critique

1. Comparison of Current Law with the Legislation

The Civil Rights Bill was introduced prior to Monell. Of the four delineated circumstances in which a state or municipality would have been liable under the Bill, Monell specifically reaches only the first: conduct authorized or required by statute, ordinance, policy or practice. In certain circumstances, however, Monell might be interpreted to include instances when,

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55 Id. § 2(b).
56 Id. § 2(c)(1).
57 Id. § 2(c)(2).
58 See text accompanying notes 44-48 supra.
as stated in the second provision for entity liability, a person acted at the direction or with the encouragement of a supervisory officer.59

The third circumstance in which the Bill in which a state or municipality would have been held liable was designed to remedy the type of situation which existed in Rizzo v. Goode.60 In Rizzo, section 1983 injunctive relief was denied, despite some indications of a pattern of illegal and unconstitutional police misconduct. The decision was justified, in part, because no affirmative misconduct was shown by the supervisory authorities.61 Monell, unlike the Bill, would not appear to reach a Rizzo situation unless a municipal custom could be shown.62

The fourth instance in which a municipality would have been exposed to damages under the proposed legislation was in situations when a constitutional deprivation had occurred, but the specific wrongdoer could not be identified. The impetus for this provision was Burton v. Waller.63 In Burton, several Jackson State college students who had survived a police confrontation brought an action under section 1983. No recovery was allowed, despite a finding of use of excessive force, because the plaintiffs were unable to identify the individual wrongdoers. In Burton, a remedy would be available only if the employer accepted responsibility simply on the basis of the employer-employee relationship. This, in turn, results in a respondeat superior standard being used to hold the entity liable. Monell, however, indicates that a municipality is not liable "solely because it employs a tortfeasor."64 The Bill, in contrast, would have provided a remedy in a Burton situation.

Monell is consistent with the holding in City of Kenosha v. Bruno65 that section 1983 makes no distinction between damages and injunctive relief. The Bill, however, would have treated the two remedies differently. Under the Civil Rights Bill damages would have been awarded only in the four circumstances described above, while equitable relief would have been given whenever a person clothed with the authority of the state engaged in prohibited conduct.66

59 A high-level supervisory officer who encourages illegal conduct for purely personal motives might not be held liable under Monell because no municipal policy or custom is involved. If the same supervisor encourages the same action under tacit approval of the government entity or pursuant to custom, Monell would appear to hold the municipality liable.


61 The requirement of affirmative misconduct applies to damage actions under § 1983, as well as to requests for injunctive relief. "The plain words of the statute impose liability—whether in the form of payment of redressive damages or being placed under an injunction—only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." Id. at 370-71. Cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977) (consistent pattern of official racial discrimination is not a prerequisite to showing an equal protection violation).

62 Section 1983 relief was also denied because of the need for federalism and comity between the federal and state governments. The concerns of federalism and comity have been the subject of extensive legal writing. See, e.g., Developments, supra note 2; Note, Rethinking Federal Injunctive Relief Against Police Abuse: Picking Up the Pieces After Rizzo v. Goode, 7 Rut.-Cam. L.J. 530 (1976). See also O'Shea v. Littleton, 414 U.S. 488, 499-504 (1974) (White, J.).

63 502 F.2d 1261 (5th Cir. 1974).

64 436 U.S. at 691.


In order to determine the proper scope of state or municipal liability, entity immunity must be viewed in light of the compensatory and deterrent purposes of section 1983. Both current law under Monell and the Bill raise questions concerning the extent to which the government-employer should be liable for the acts of its agents solely on the basis of the employer-employee relationship. Respondeat superior is a common law doctrine which holds a master liable for the unlawful conduct of his servant when the servant acts within the scope of his employment. The employer is liable even though the specific act of the servant was unauthorized.\(^6\) Respondeat superior can be used both to expose the employer-entity to liability and to hold the immediate master-supervisor liable.\(^6\) Prior to Monell, plaintiffs attempted to bring actions against supervisory officials under the theory of respondeat superior in order to reach more defendants. Courts, however, rejected the use of respondeat superior against supervisory officials.\(^6\) In a similar manner, Monell rejected the use of respondeat superior as the sole basis for holding a municipality liable.\(^7\)

With the exception of a Burton situation, the delineated circumstances in the Bill in which a government entity would be liable are not based upon a respondeat superior theory. In lieu of this vicarious liability, the Bill designated specific instances of municipal responsibility, thereby retaining sovereign immunity to a limited degree. Under this approach states and municipalities may be able to escape damages purely because of their status as a branch of the government. For example, a government entity would not be held liable for random constitutional violations by its agents. Yet no corresponding protection is given either the entity\(^7\) or private corporations\(^7\) for common law actions. One critic of the Bill emphasized this deficiency in the legislation. "The commentators unite in denouncing the immunity of public entities as irrational, absurd and a blot on our system of justice. This bill should abolish that immunity altogether rather than just partially eliminate it."\(^7\)

The Justice Department strongly supported the expansion of the definition of "persons" under section 1983 for both damages and injunctive relief.\(^7\) The Department hinted that in fact the Bill did not go far enough in that it would not have clearly imposed liability for a single unlawful act of an agent-officer of a government entity.\(^7\)

\(^6\) Restatement (Second) of Agency § 219 (1958).  
\(^7\) 436 U.S. at 691.  
\(^7\) See, e.g., Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957); Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977); Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974); Merrill v. City of Manchester, 332 A.2d 378 (N.H. 1974); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Oroz v. Board of City Comm'rs, 575 P.2d 1155, 1157 (Wyo. 1978) (36 states have abolished immunity in some form).  
\(^7\) Senate Hearings, supra note 6, at 45 (prepared statement of Prof. Don B. Kates, Jr.).  
\(^7\) Senate Hearings, supra note 6, at 44 (testimony of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice).  
\(^7\) Id. at 45 (dialogue between Senator Mathias and Drew S. Days III).
Justifications for immunity, such as fear of timid action, fear of vexatious litigation, and fear of excessive liability are less compelling when dealing with the liability of an entity rather than an individual.76 Further, policy justifications given by the Rizzo Court, such as the concern for federalism and comity between federal and state courts, are insufficient to shield government entities for three reasons. First, section five of the fourteenth amendment gives Congress broader powers to involve itself in state and local government than does article I.77 Second, section 1983 does not deal with a taxing statute or the regulation of commerce, but rather with fourteenth amendment guarantees of personal liberty. These guarantees are of paramount importance in preserving individual rights. It has been stated that congressional enforcement of constitutional rights is the essence of federalism.78 Third, Congress and the courts can provide broad guidelines by which to prevent excessive interference. If federalism is allowed to preclude a section 1983 remedy, the result will be that government agents will be allowed to violate constitutional rights solely because the act was in the name of the state or local government.79

Despite the apparent rejection of vicarious liability in the Civil Rights Bill, some commentators expressed a view that in practice the Bill would have incorporated respondeat superior liability to a large extent. The Justice Department, for example, noted that the Bill might have allowed liability in many cases of isolated illegal conduct. The Department indicated, for example, that police departments often have a file on certain officers who have a history of illegal conduct or brutality that could serve to extend liability to government entities.80 It is also possible that the broad standard that would hold entities liable when a supervisor knew or should have known of the illegal conduct or brutality that could serve to extend liability to government entities.81 Yet the language and structure of the Civil Rights Bill clearly limit the instances when a municipality would be liable. It would be unwise to conclude that the Bill would be interpreted so expansively as to allow for vicarious liability. If Congress wants to use a vicarious liability standard, it should do so in direct language.

76 See text accompanying notes 26-38 supra.
77 U.S. Const. amend. XIV, § 5 reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." While state sovereignty is a limiting factor under article I powers, see National League of Cities v. Usery, 426 U.S. 833 (1976), § 5 of the fourteenth amendment allows much greater power over state activities. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (§ 5 of fourteenth amendment is not subject to eleventh amendment prohibition).
78 Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people ... "). Developments, supra note 2, at 1361; Senate Hearings, supra note 6, at 497 (prepared statement of Pamela S. Horowitz, Legislative Counsel, American Civil Liberties Union).
79 Even lower courts have expressed frustration over the fact that Rizzo precludes an injunctive remedy despite a pattern of illegal activity. See Lewis v. Hyland, 554 F.2d 93 (3d Cir.), cert. denied, 434 U.S. 931 (1977) (Marshall and Brennan, JJ., dissenting); Senate Hearings, supra note 6, at 495 (testimony of Frank Askin, General Counsel, American Civil Liberties Union). However, respondeat superior would be limited by the scope of the officer's duty so that actions by an off-duty police officer would not expose the government to liability. See Note, Damage Remedies Against Municipalities For Constitutional Violations, 99 Harv. L. Rev. 922, 953 (1976).
80 Senate Hearings, supra note 6, at 45 (testimony of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice).
81 Id. at 117 (prepared statement of Hon. Rufus L. Edmisten, National Association of Attorneys General).
3. Damage v. Injunctive Relief

Coupled with the failure to incorporate a vicarious liability standard into the Bill was the separate treatment of money damages from injunctive relief. While section 1983 could achieve both compensation and deterrence without identical criteria for damages and injunctions, distinct treatment of the remedies is not necessary. Full compensation would call for a respondeat superior standard so as to provide maximum monetary remedy for victims of isolated illegal conduct as well as for victims of an illegal policy or pattern of conduct. The goal of maximum deterrence, however, does not require an injunction for isolated illegal conduct. Only acts which are likely to be repeated call for injunctive relief. However, if an injunction were given in an instance when there was little likelihood of repeated illegal conduct, no affirmative harm would result. As a remedial device, there is no reason to limit injunctive relief under section 1983.

The fear of excessive federal interference with state and local activities under section 1983 was initially raised when injunctive relief was ordered. Yet, the possibility of federal intrusion upon state and local governments is also possible when monetary awards are allowed. If a distinction between the amount of interference by the federal government caused by an injunction as opposed to that caused by damages can be made, it lies only in the breadth of the remedy. Damage actions usually require payment to an isolated party. Injunctive relief sweeps across a wider path, and by an order for affirmative conduct it can affect both the daily routine and finances of the government entity. Even this distinction, however, does not justify a limitation of relief. When the fear of excessive involvement with state activity is balanced against the need for federal intervention to protect constitutional rights, the conclusion may be drawn that protected rights should be given priority.

Making protected rights a priority, however, does not tell the district court how far it can go in shaping a damage or injunctive remedy. It would be impossible to draft an effective provision which could apply in every situation to prevent courts from fashioning an overly intrusive remedy. There is no certain test to preclude unnecessary federal interference. Instead, the legislative history of any legislation should include an indication of Congress' respect for the need for comity between the federal and state systems. The language of any proposed legislation should be discretionary. This is unlike the Civil Rights Bill which phrased the injunctive relief provision with mandatory language. Discretionary language would allow a court to fashion the most appropriate remedy with the least federal interference. Courts would be guided by the

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82 See text accompanying notes 109-10 infra.  
85 Levin, The Section 1983 Municipal Immunity Doctrine, 65 Geo. L. J. 1483, 1535-36 (1977). However, a class action damage suit could also affect both the daily routine and finances of the government entity. See generally Fed. R. Civ. P. 23.  
IV. Official Liability

A. Current law

1. Qualified Immunity

Section 1983 is the primary basis for imposing liability upon individual state and local officials for unconstitutional conduct. Individual officers have been shielded, however, either in whole or in part from section 1983 liability through absolute or qualified immunity.

The vast majority of executive officials, from governors to police officers, are protected under section 1983 by a sliding scale of qualified immunity. The general rule of section 1983 executive immunity was first articulated in Scheur v. Rhodes.

In varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

In order to qualify for the protection of qualified immunity, the state officer must demonstrate both a good faith belief and reasonable grounds for the belief that his actions were proper in light of the circumstances. In addition, it must be shown that the officer acted within the course of "official conduct." The reasonableness requirement was clarified soon after Scheur in Wood v. Strickland, which held that an official would be responsible "if he knew or

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87 The following language would serve to incorporate respondeat superior into § 1983 and provide equally broad remedies for both damages and injunctions:

§ 2(c) (1) A State, municipality or any unit of government or agency thereof shall be liable for damages or other monetary relief for the conduct actionable under paragraph (a) of this section of any officer, employer, or agent of, or any other person clothed with the authority of, such State, municipality, or unit of government or agency thereof.

§ 2(c) (2) A State, municipality or any unit of government or agency thereof shall be subject to injunctive or declaratory relief when necessary to prevent the recurrence of such conduct and in other cases when such relief is necessary and proper.

See also Senate Hearings, supra note 6, at 67 (letter from Drew S. Days III, Assistant Attorney General, Department of Justice, to Hon. Howard M. Metzenbaum).

88 McCormack & Kirkpatrick, supra note 20.


92 416 U.S. at 247.

93 Id. at 248.

reasonably should have known" that his action would cause an unconstitutional deprivation of the right of another. 95

Under the varying immunity standard for public officials, as presented in Scheur, an officer with broad discretion would be entitled to a correspondingly broad grant of immunity. The requirement of both a subjective good faith and an objective reasonable belief makes an official liable under section 1983 when he acts with personal malice or is negligent.

2. Absolute Immunity

A grant of absolute immunity functions like a definitional exclusion of an officer from the purview of section 1983 in that an officer with absolute immunity suffers no liability. 96 Absolute immunity applies without regard to the intent of the actor or the legality of his actions. 97 Currently, legislators, 98 judges, 99 and prosecutors in their judicial role 100 have been awarded absolute protection from suit. These three categories of government officers exercise the broadest discretion of any state or local government officials. Conceptually, absolute immunity is the logical end of the Scheur sliding scale of immunity.

B. Legislative Reform

Two specific provisions of the Civil Rights Bill dealt with the immunities of agents of a government entity. First, the Bill would have made supervisory officers with command responsibility jointly and severally liable with the individual wrongdoer whenever the municipality would have also been liable.

In contrast to Rizzo v. Goode, 101 in which the Supreme Court refused to impose liability on supervisory officials without some kind of affirmative act on the part of the supervisor, the Bill called for respondeat superior liability for supervisory officials in the four circumstances in which the entity would have been liable. 102 Use of respondeat superior to hold the supervisor jointly and severally liable with the agent tortfeasor is contrary to both the basic scheme of the legislation and the common law refusal to hold government entities to respondeat superior liability. For example, a supervisory official would be responsible under the strict wording of the Bill whenever an agent carried out an unconstitutional

95 420 U.S. at 322.
96 See text accompanying notes 14-25 supra.
102 See text accompanying note 52 supra.
policy or regulation. Yet the agent would be immune from suit as long as there was objective and subjective good faith as to the reasonableness of the policy.103

The second provision of the Bill dealing with immunity and liability of agents of a government entity dealt with the absolute immunity of a prosecutor. Under the Bill, a prosecuting attorney would be liable for monetary damages when: 1) the acts or omissions of the prosecutor in the course of the prosecution violated the criminal defendant’s rights to due process under the fifth or fourteenth amendment or would have violated the rights if a conviction had occurred; 2) he knew or reasonably should have known that his conduct deprived the defendant of due process; and, 3) his conduct consisted of suppressing, concealing, destroying, altering, or failing to make timely disclosure of evidence or investigative leads to evidence. The provision was limited by a statement which disclaimed any effect on liability for acts outside the prosecutor’s function in a criminal proceeding or the liability of any individual other than the prosecuting attorney.104

C. Critique

1. Liability of Supervisory Officials

The anomaly of holding supervisors liable for the unconstitutional acts of their agents when no fault can be attributed to the supervisor was quickly attacked by commentators of the legislation.105 One purpose of respondeat superior is to allocate risk to the employer and the public at large.106 The employer in the public sector is not the supervisor but rather the state or municipality. Therefore, respondeat superior is an inappropriate doctrine for binding supervisory public officials.107 Also, respondeat superior need not be applied to supervisors in order to meet the compensatory and deterrent purposes of section 1983 as long as the governmental entity is responsible.

In many instances some sort of independent fault may be established on the part of the supervisor. If a respondeat superior standard is applied to the governmental entity, however, it is unnecessary and unfair to hold supervisory officials liable absent some indication of involvement on their part. The goals of section 1983 would still be met without imposing vicarious liability upon supervisors. Compensation would be provided by the government employer and wrongdoer.108 Deterrence would be necessary only where there is some indication of fault or bad faith by the employee. If the supervisor has not been guilty of neglect of duties or bad faith, a finding of liability would serve no deterrent purpose.

105 Senate Hearings, supra note 6, at 62 (prepared statement of Drew S. Days III, Assistant Attorney General, Department of Justice); id. at 314 (prepared statement of Hon. Edward T. Gignoux, U.S. District Judge, Judicial Conference of the United States); id. at 121 (prepared statement of Hon. Louis J. Lefkowitz, National Association of Attorneys General).
106 See generally W. Prosser, supra note 4, § 69.
107 Schirott & Drew, supra note 68, at 70.
108 Theoretical arguments concerning compensation do not take into account the fact that individual defendants in a § 1983 action are often judgment-proof. See Kates & Kooba, supra note 34, at 136-37.
The legislation, instead, should specify that omissions by the supervisors, as occurred in *Rizzo*, would be actionable. It should establish clearly that negligent failure to provide adequate selection, training or supervision of employees is sufficient to subject supervisors to liability.\(^{109}\)

2. Liability of Officials with Qualified Immunity

With the exception of supervisory officials, the Bill would not have altered any other official liability currently limited by qualified immunity. Continued use of qualified immunity under the *Scheur* standard comports with the compensatory and deterrent purposes of section 1983. The objective and subjective good faith requirements fulfill the deterrent potential of section 1983. Deterrence requires discouraging or inhibiting unlawful conduct by the officer. Both malicious action and negligent action imply some control by the officer over his actions. Such malicious or negligent conduct would result in a personal damage action against the officer. The fear of damage suits would have some deterrent effect. Injunctions, similarly, are effective only when the agent has some control over his actions.

The use of qualified immunity, however, does not allow for compensation for every victim of an unconstitutional deprivation under section 1983. A deprivation which was reasonable in light of the circumstances, but which nonetheless deprived an individual of his constitutional rights would not be compensated. The harm to the victim, however, is of equal magnitude regardless of the motivation of the perpetrator. Two alternatives are open to Congress. First, it may determine that the need for compensation under section 1983 outweighs the detriment of imposing liability without subjective or objective fault. To mandate compensation for every section 1983 violation would impose an absolute liability standard upon the officer involved. Under this first alternative, unless the legislature is willing to place an onerous burden on public employees, compensation to some injured persons must be denied.

Under a second alternative, compensation and immunities could coexist. The option is to provide, as did the Bill, that the immunity of the agent-officer will not protect the municipality from suit.\(^{110}\) This suggestion has generated both praise\(^{111}\) and condemnation.\(^{112}\)

When an individual is granted immunity, there is usually some policy reason for the protection. If that immunity is extended to the employer without independent justification, the immunity of the employer derives from that of the employee. This derivative immunity is not a new concept, and its denial is not unknown to the law. In agency law, the principal does not have a defense simply because the agent has an immunity from civil liability.\(^{113}\) Immunity is

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\(^{109}\) *Senate Hearings, supra* note 6, at 451 (prepared statement of Prof. Don B. Kates, Jr.).


\(^{111}\) *Senate Hearings, supra* note 6, at 296 (prepared statement of Eric Schnapper, NAACP Legal Defense and Education Fund, Inc.).

\(^{112}\) *Id.* at 358 (prepared statement of D. Lowell Jenson, California District Attorneys Association) ("the mind-boggling methodology of governmental entity liability set forth in sec. 2(d) (1) offends the common sense which should be part of any law. . .").

\(^{113}\) *Restatement (Second) of Agency* § 217 (1958).
awarded because of some need to protect the individual from exposure to civil liability. Because the policy justification for immunity applies only to the individual awarded it, immunity is a nondelegable right. Thus the employer remains responsible under *respondeat superior* unless an independent immunity exists for him. The fact that the employee is immune from suit does not deny that a constitutional deprivation has occurred. When policy prevents the individual government agent from being held personally liable, compensation should come from the employer-municipality.

3. Prosecutorial Immunity and Officials with Absolute Immunity

Not surprisingly, the abrogation of absolute immunity for prosecutors and the insertion of only a qualified immunity was severely criticized. The Bill would not strip prosecutors of all protection but would expose them to liability when the three specified conditions were met. The effect of this proposal would be to broaden the present constitutional protection afforded criminal defendants by *Brady v. Maryland* and *United States v. Agurs*. *Brady* states that suppression by the prosecution of material evidence which is favorable to the defendant who has requested it violates due process irrespective of the good or bad faith of the prosecution. *Agurs* clarified *Brady* in holding that the Constitution does not require the prosecution to disclose everything that might influence the jury. *Agurs* stated that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." The legislation, however, would expand the concept of materiality to encompass "investigative leads to evidence." This approach expands the conclusion of *Agurs* and for purposes of section 1983 would result in increasing the rights of a criminal defendant. The purpose of section 1983, as its words indicate, is to guarantee an individual protection against the "deprivation of any rights, privileges, or immunities secured by the Constitution and law." Section 1983, both in past interpretation and in all other facets of the Bill, has dealt with the minimal guarantees of the Constitution and other laws. Because inclusion of "investigative leads to evidence" is an attempt to expand a criminal defendant's constitutional rights, this provision departs from the purpose of the

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114 *Id.*, Comment b: "Immunities, unlike privileges, are not delegable and are available as a defense only to persons who have them."

115 *See*, e.g., *Fields v. Synthetic Ropes, Inc.*, 215 A.2d 427 (Del. 1965) (personal liability of the employee is not the basis of the action but rather the agent's negligent performance of the employer's business); *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); *Kowaleski v. Kowaleski*, 361 P.2d 64 (Ore. 1961); *Freeland v. Freeland*, 162 S.E.2d 922, 926 (W. Va. 1968) ("The tortious act remains; only the remedy against the servant is denied."); *Annotation, 1 A.L.R.2d 677 (1965).*

116 *See*, e.g., *Senate Hearings, supra note 6*, at 62 (prepared statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice); *id.* at 348-55 (testimony and prepared statement of Lee C. Falke, President-Elect, National District Attorneys Association); *id.* at 116-30 (prepared statements of Hon. Rufus L. Edmisten, Hon. Louis J. Leikowitz, Hon. Robert F. Stephens, and Hon. Evelle J. Younger, National Association of Attorneys General).

117 *See text accompanying note 104 supra.*


119 427 U.S. 97 (1976). Evidence clearly supportive of a claim of innocence must be given to the defendant even if not requested. *Id.* at 107.

120 *Id.* at 109-10.

121 *See*, e.g., *Paul v. Davis*, 424 U.S. 693 (1976).
Bill and of section 1983. If such a provision is desired, a substantive civil rights statute would be much more appropriate.

Aside from tradition, the distinction used to support absolute as opposed to qualified immunity for prosecutors stems from the need for independent decision-making by officers with extensive discretion. The discretion exercised by the legislature and judiciary involves policymaking and rendering judgments. On the other hand, the executive branch and its agents act primarily to enforce the policies and decisions of its coequal branches. Although prosecutors are officers of the judiciary, they not only make policy decisions to prosecute but also function as executive officials to enforce their decisions. A judge who renders a judgment, a legislator who rejects a bill, and a prosecutor who dismisses an action in lieu of prosecution all make decisions employing the widest possible discretion. For these types of discretionary actions, absolute immunity should be preserved. Of these three officers, only the prosecutor will take on an executive function in proceeding with the mechanics of a prosecution.

Suppression of evidence in the course of a criminal prosecution is not part of the judicial discretion of whether to prosecute but is part of the act of prosecution. Just as a police officer is subject to suit for unconstitutional conduct in the course of an arrest, so should the prosecutor be liable for unconstitutional conduct in the course of a prosecution.

Individuals with absolute immunity are allowed to deprive others of constitutional rights without fear of personal liability from damage suits. Blatant constitutional violations, however, may be subject to correction or deterrence through other methods such as the supervisory controls of punishment by the employer, reprimand, loss of job and criminal prosecutions. These methods offer some deterrence if the agent is aware of the consequences of his illegal conduct. In addition, legislative and judicial oversight and procedural constraints offer limited assistance in preventing unconstitutional conduct. For example, in many instances an unconstitutional action by a judge, prosecutor or legislator may be overruled, reversed or declared unconstitutional by higher courts. Judicial overview is effective when an unconstitutional conviction or statute is prevented from taking effect. Judicial overview is, however, an ineffective compensatory device when an action is found unconstitutional after the harm has been inflicted. For example, in Stump v. Sparkman a determination that the plaintiff’s rights had been violated by a court order to have her sterilized was of little consolation to the plaintiff years after the sterilization.

Criminal laws, at least in theory, offer some deterrence of unconstitutional conduct.

122 See notes 26-27, 73 supra.


124 Justice White, concurring in Imbler, noted that "[t]here is no one to sue the prosecutor for an erroneous decision not to prosecute." 424 U.S. at 438.

125 See id. at 432.

126 Mashaw, supra note 29, at 23-26.

activity. The criminal counterpart of section 1983, 18 U.S.C. § 242, provides for fines of up to $1,000 and imprisonment for not more than one year for any person who willfully subjects another to an unconstitutional deprivation under color of state law. Unfortunately, the statute has been rarely enforced.

The effect then, of retaining absolute immunity for certain officials, even with the above mentioned checks on excessive abuse, will result in cases where constitutional violations will go unremedied.

In the previous discussion of qualified immunity, it was suggested that the means to obtain compensation for victims of unconstitutional violations was to make the state or municipality liable even though the individual agent was immune. This derivative liability is not advisable when applied to individuals with broad discretionary functions. One purpose of retaining absolute immunity for individuals with a wide range of discretion was the fear that the imposition of liability would produce timid action by these individuals. As indicated previously with respect to judges, prosecutors in their judicial function of determining whether to prosecute, and legislators, timid action by these officers is more likely to produce greater societal harm than is timid action by officers with less discretion. If officers with broad discretion require a flexible area within which to function, a court proceeding on the issue of government liability might circumscribe legitimate areas of action. The fear of being second-guessed in the courtroom, even though the agents would not be personally liable, would be significantly reduced, however, if the government were only liable when the agent with broad discretion acted without subjective or objective good faith. The judge, prosecutor or legislator would know that as long as he acted in good faith, he would not expose the municipality to liability. Making the municipality liable only when these agents did not meet a qualified immunity standard would allow many suits to be dismissed on the pleadings.

There would remain an area where victims of unconstitutional activities would have no compensation: when the judge, legislator or prosecutor acted with both subjective and objective good faith. Judicial review would arrest the harm in some cases and in other instances would keep the harm from being in-

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128 18 U.S.C. § 242 (1976) reads:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.


130 See text accompanying notes 110-15 supra.

131 Qualified immunity, as opposed to absolute immunity, does not necessarily mean that the issues of good faith and reasonable action must always proceed to trial. Plaintiff may be required to allege facts sufficient to raise the issues of good faith and reasonable action. See, e.g., Taylor v. Nichols, 558 F.2d 561, 567 (10th Cir. 1977); Oakley v. City of Pasadena, 535 F.2d 503 (9th Cir. 1976); Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973). See also Imbler v. Pachtman, 424 U.S. at 419 n.13.
flicted at all. Some uncompensated individuals, however, will bear the burden of society's need to have its officers with broad discretion function freely.

V. Conclusion

Section 1983 has the potential to be an effective statute for the compensation and deterrence of unconstitutional action under color of state law. The full potential of section 1983, however, is limited by the immunities currently awarded to defendants. Congressional action is necessary, therefore, to realize the full compensation and deterrence possible under section 1983.

In the area of municipal and state liability, the government entity should be liable for all constitutional deprivations caused by its agents with qualified immunity under the doctrine of respondeat superior. This would bring government entities in line with private entities and would allow for maximum compensation for individuals harmed by government actions. It would also serve to deter government agents through use of the injunctive power of the court.

In the area of official immunity, government officers currently protected from personal liability by qualified immunity should continue to be protected. Exposing such individuals to liability would have no deterrent effect when the action was in good faith and reasonable under the circumstances. The compensatory goal of section 1983 would be fulfilled by refusing to extend the immunity of the individual agent to protect the government entity. When an unconstitutional deprivation has occurred, the government would continue to be liable even though the agent is immune from personal liability. Supervisory officials should not be liable for acts of subordinates solely by use of respondeat superior. They should, however, be liable if they are in any way responsible for the constitutional violation.

The absolute immunity currently granted to legislators, judges and prosecutors in their judicial role should continue. The broad immunity is commensurate with the broad discretion required by these government officials. Prosecutors who withhold exculpatory evidence during the course of a prosecution, however, are not acting in a quasi-judicial role but are functioning as executive officers. For this reason, prosecutors should be liable to the extent of other governmental officials when they unconstitutionally withhold exculpatory evidence. However, the constitutional right to have exculpatory evidence revealed to a defendant should not be expanded in section 1983 to include access to "investigate leads to evidence."

Compensation for individuals who are deprived of constitutional rights by officials with absolute immunity should come from the government entity. In order to protect the wide discretion necessary for judges, legislators and prosecutors in their judicial role, however, government entities should be liable only when the agents demonstrate bad faith or unreasonable action. Conduct by officials with absolute immunity which was undertaken in good faith and which was reasonable under the circumstances, but was later adjudicated to have caused an unconstitutional deprivation of a citizen's rights, would go uncompensated under section 1983.

Congress should indicate a serious commitment to the protection of rights
guaranteed by our Constitution and laws. The suggestions outlined above would allow section 1983 to become a truly effective statute. They would provide maximum compensation for victims of constitutional violations and optimum deterrence of unlawful conduct under color of state law.

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