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THE BREADTH OF THE TORT PERSPECTIVE:
JUDICIAL REVIEW FOR TORTIOUS CONDUCT OF
GOVERNMENTAL AGENCIES AND AGENTS

Sidney H. Willig*

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I. INTRODUCTION

The actions of administrative agencies encompass life's adventure for all persons who reside in the nation, independent of their state, county, or municipality. We educate, sanitize, police, and regulate occupations, professions, business, and industry through such agencies. Furthermore, the functioning of the agency is not necessarily an institutional expression, but often is exercised by individuals within and without the parameters of agency authority. Because of this pervasiveness and lack of common direction it is necessary to rely on judicial review as an available means for modifying or terminating an administrative agency action.

The torts actions form a time-honored substantive system designed to protect individuals, as well as collectives and organizations, from civil wrongdoing. It is therefore appropriate that, apart from the judicial review for administrative agency civil wrongdoing that has been established by statutes and jurisdictional privileges, a remedy should exist in tort for agency wrongdoing. Presently the torts remedies contemplate a group termed "unintentional" (i.e., negligence actions), and another group termed the "intentional" torts, both a part of our common law heritage. This latter group includes assault, battery, illegal seizure, detention or imprisonment of individuals, malicious prosecution, abuse of process, the defamatory torts, fraud, and certain torts of more modern application, such as the illegal deprivation of civil rights, wrongful invasion of privacy, and trespass to contractual expectations or the right to publicity. The judicial review available for allegedly wrongful governmental agency actions encompasses

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the 'full spectrum of redress afforded by these varied unintentional and intentional torts causes of action.\(^2\)

In seeking judicial review of what a regulatee believes to be unjust, irregular, excessive, or unfair action taken by an administrative agency, the regulatee looks first to the underlying statute of the agency, and second, if the agency is a federal one, to the Administrative Procedure Act.\(^3\) The latter statute reads in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.\(^4\)

Both the Administrative Procedure Act and the individual agency statute help the regulatee evaluate whether judicial review of the agency action is available, as well as the extent or scope of such review by the court.\(^5\) A

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2. See Restatement (Second) of Torts ch. 45A, Introductory Note at 395 (1979):

A tort action for damages is one means of obtaining a judicial determination of whether the governmental action is unauthorized or wrongful. There are other methods of obtaining judicial review of administrative action, such as suit for a declaratory judgment, for an injunction, for mandamus, for habeas corpus or for establishing possession of or title to property. Viewed in this light, the availability of the tort action against the government or a public officer is only a fractional part of the broad question of whether the governmental action should be subjected at all to court review. For this reason the subject of governmental tort immunity has often been regarded as primarily concerned with the fields of constitutional law, administrative law and local government law; and some of the most thorough studies of the subject matter are to be found in treatises and articles by authorities in these fields.


5. Of course, the courts themselves shape a regulatee's right to review. The following observation has been made regarding the role of the courts in establishing the rules of judicial review:

The detailed law of judicial review is mostly the product of fluctuating case-law, which the courts develop in an unplanned and essentially untidy manner. But taken as a whole their work expresses vital constitutional principles which form a very important part of the regulating constitutional mechanism.
statute on its face may foreclose judicial review, or specifically provide for it, or not address the matter at all.\textsuperscript{6} Mere silence does not necessarily indicate preclusion,\textsuperscript{7} but when judicial review is prescribed, it must be attained in accordance with the statute.\textsuperscript{8} The method, the timing, the forum, and the form of the action as specified in the statute must be followed.

The actions taken by an administrative agency are generally described as quasi-executive, quasi-legislative, and quasi-judicial.\textsuperscript{9} It is to the last two functions, once finalized by the agency, to which most judicial review is directed.\textsuperscript{10} When an agency sets rules, regulations, or guidelines that adversely affect the regulatee's rights (for example, by placing him in an unfair competitive position, or by putting him in jeopardy of penalty or imprisonment), then there exist opportunities for judicial review to reform or annul such quasi-legislative acts. Similarly, when some right of the regulatee has been adversely adjudicated by an agency, and if the matter has the indicia of a case or controversy, then such review will be meaningful and available.\textsuperscript{11}

of democratic government. This constitutional aspect is... easily seen... since so many American cases are governed by the Bill of Rights or by general statutes such as the Administrative Procedure Act.


\textsuperscript{6} See, e.g., 5 U.S.C. § 704 (1976):

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.


\textsuperscript{8} See Ortego v. Weinberger, 516 F.2d 1005, 1009 (5th Cir. 1975) ("Where an act provides procedures for judicial review, a court cannot review an agency decision by any other means...").

\textsuperscript{9} As to the significance of "quasi" in describing these functions, see Mulhearn v. Federal Shipbuilding & Dry Dock Co., 2 N.J. 356, 66 A.2d 726 (1949).

\textsuperscript{10} See REPORT OF THE ATT’Y GENERAL’S COMM’N ON ADMINISTRATIVE PROCEDURE 7 (1941). In the area of quasi-executive power, much of such activity is cloaked with organizational and individual discretion far less subject to timely agency and judicial review.

\textsuperscript{11} For a recent discussion of the "amount in controversy" requirement for constitutional claims, see Chagnon v. Bell, 468 F. Supp. 927 (D.D.C. 1979). Plaintiffs had brought suit against the Attorney General and three Federal Bureau of Investigation employees seeking damages and declaratory relief for allegedly illegal surveillance. The district court carefully distinguished Carey v. Piphus, 435 U.S. 247 (1978), in which the United States Supreme Court held that compensatory damages should not be awarded for violation of fifth amendment rights (procedural due process) absent a showing of actual harm. Recognizing that Carey did not address violations of rights other than those protected by the fifth amendment, the Chagnon court concluded that plaintiffs had a compensable claim which could be heard by the court:

Plaintiffs' claims for relief from an allegedly illegal search and seizure in
As is well known to students of administrative law and procedure, judicial relief for supposed or threatened injury does not become available, however, until the prescribed administrative remedy has been exhausted. This follows from the accepted proposition that premature interruptions of the administrative process, if permitted, will undermine both the efficiency and the autonomy of the government agency. Thus, "exhaustion of remedies" within the agency framework is the rule unless it appears early and obviously that the agency is operating outside the scope of its mandate. This is supported by the doctrine of primary jurisdiction, which dictates that conflicts between the agency's underlying statute and its regulatory scheme will not usually be presented in court until the agency has had a chance to set forth its interpretation of its own regulations. A clear showing of irreparable injury from an impending or ongoing agency action, however, may permit judicial review into the agency process despite the exhaustion and primary jurisdiction doctrines.

When judicial review is precluded by statute, or when an agency refuses to invoke remedial machinery that exists to vindicate an affirmative right, filing a complaint as an independent cause of action in tort may be a means for speedy redress, and a useful device to escape the frustration.
of preclusion or agency inertia.\textsuperscript{16} Fairness dictates that when administrative remedial machinery either does not exist, or fails to vindicate an affirmative right, then, as one court has stated, "[T]here can be no objection to an independent cause of action in the federal courts."\textsuperscript{17} In this context, various procedures for review, including mandamus, may be exerted.\textsuperscript{18} Even when denial of a cause of action is appropriate, the frustrated and angry regulatee may find it enjoys renovation through constructive judicial effort.

II. **Tort Actions as a Remedy for the Injured Regulatee**

Given that a tort action may be available to review agency action, the breadth of such a species of tort becomes an important consideration. Although suit in tort is viewed as an alternative method of judicial review of administrative law and procedure, the theory of the basic tort action is worth reiterating. A suit in tort is a cause of action based upon civil wrongdoing by one party adversely affecting the person, psyche, property, prospects, or peace of mind of another. Besides the traditional spectrum of tortious causes of action known to offer redress against individuals for their civil wrongs, two other tort classifications are available when the tortfeasor is a governmental agency or individual(s) representing that agency. One such group may be termed "constitutional torts."\textsuperscript{19} These consist of gov-

\begin{itemize}
  \item \textsuperscript{16} See Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977). Class action plaintiffs alleged violations of a portion of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) (amended 1978), which prohibits discrimination against qualified handicapped persons in programs receiving federal financial assistance, the equal protection clause of the fourteenth amendment, and other federal statutes. The Seventh Circuit, reversing the trial court which had dismissed the lawsuit, held that a private cause of action could be implied to vindicate statutorily created rights. 548 F.2d at 1287-88. The court went on to point out that "[t]here being no administrative remedy open to these plaintiffs, neither the exhaustion nor primary jurisdiction doctrine applies." Id. at 1287. It is interesting to note that plaintiffs' complaint embraced some fundamental tort causes of action, including interference with employment prospects (right to contract) and mental distress.
  \item \textsuperscript{17} 548 F.2d at 1286.
  \item \textsuperscript{18} White v. Mathews, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978) (compelling cessation of unreasonable delays in Social Security Administration hearings).
  \item \textsuperscript{19} A tort action may be useful to accomplish judicial review of a governmental activity whether prospective, ongoing, or past. In this latter group are the legion of cases which arise because an agency has made a decision to terminate a job, a benefit, a contractual arrangement, or a particular status without a pre-termination hearing and/or a full evidentiary hearing. These are always alleged to be fourteenth amendment violations. The decisions turn on whether privileges, interests (liberty or property), or entitlements are at stake, and whether concepts of procedural due process are applicable. See, e.g., Board of Curators v. Horowitz, 435 U.S. 78 (1978) (suit brought under 42 U.S.C. § 1983 (1976)). One of plaintiff's claims was that the state medical school failed to follow its own rules regarding academic evaluation of students, and that this violated her fourteenth amendment due process rights. The Supreme Court did not uphold plaintiff's argument, but the decision was arguably based more on the factual underpinnings of plaintiff's claim rather than on her theoretical legal reasoning. See Goss v. Lopez, 419 U.S.
ernmental wrongdoings which violate the constitutional rights of the plaintiff. The other group, reliant on the first but worthy of separate classification, may be termed "statutory torts," of which 42 U.S.C. § 1983 is a prime example. While redress under these two classifications is often not directly financially rewarding in terms of the traditional damage award, it is indirectly rewarding if it ends a practice that is economically or personally damaging to the plaintiff. In fact, an injunction against government agency transgression may be more valuable than a financial award years after the fact. Suits based on a "constitutional" or "statutory" tort theory also have the same deterrence value of regular torts suits.


20. 42 U.S.C. § 1983 (1976) provides that: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the 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.

21. In point of fact, most readers who have used diet foods and beverages will recall that cyclamates were removed from the marketplace almost seven years ago. The owner of the patent and manufacturer, Abbott Laboratories, has sought for years to have the Food and Drug Administration readmit such products to use, in light of new scientific evidence. Having exhausted all avenues in the agency, Abbott Laboratories filed suit seeking an order mandating prompt action by the FDA, or in trial Judge Moran's words, "Abbott's efforts have been toward persuading the court to substitute itself as decision maker and to make a substantive determination that cyclamate is safe to a reasonable certainty. The court is not so persuaded. That does not mean, however, that plaintiff may not be entitled to more limited relief." Abbott Labs. v. Harris, [1980 New Matters] FOOD DRUG COS. L. REV. (CCH) ¶ 38,046 (N.D. Ill., June 12, 1980).

When federal courts try cases based upon traditional torts causes, they use the substantive law and the accouterments of the particular state involved. See Birnbaum v. United States, 588 F.2d 319, 327 (2d Cir. 1978). Damages also fit the parameters of that general picture. With respect to "constitutional" torts and some "statutory" torts, the court's discretionary powers are not likely to make for consistency in such awards. These awards often contemplate the realities of the financial resources of the governmental treasury and the individual tortfeasors, along with the gravamen of the tort. See Note, Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus, 93 Harv. L. Rev. 966 (1980): [R]eliance on the "background of tort liability" in construing constitutional torts is inappropriate with respect to damages. The purpose of both section 1983 and Bivens-type remedies is not merely compensation for the consequential injuries that accompany a constitutional violation, but more fundamentally, redress for the abridgement of the constitutional right itself.

... [T]he common law model is an inappropriate reference point for measuring damages, not only for substantive constitutional violations, but also for denials of procedural due process.

Id. at 967, 974.
These two groups of tort actions meet with particular defenses. As for
the "constitutional torts," the defenses partake of the special language
of the United States Constitution and interpretation thereof by the United
States Supreme Court. In the case of "statutory torts," a plaintiff is often
met with procedural defenses in addition to substantive defenses based on
constitutional principles.

A. Case Study: License Denial as Grounds for a Civil Rights Action

For nine years Mr. Shamie tried to obtain a liquor license from the
city of Pontiac, Michigan, without success. His was a first application; he
had not suffered a revocation for cause. As a general rule, the issue of
granting or refusing a license application, whether it be to drive a car, to
practice medicine, or to buy and sell liquor, is not usually subject to the
adjudicative processes within an agency. The application is made, requested
qualifications are examined, and a grant or denial of license is made sum-
marily. In some statutes there are small elements for discretion by the licens-
ing board, but even as to these adjudication is not the rule. The statutes
normally provide for the quasi-judicial apparatus of the licensing agency.

22. Administrative agencies regularly raise the defense that their actions are
not subject to judicial review at the time suit is brought. But even in those in-
stances where a preclusory statute and seemingly pronounced legislative intent
deny judicial review of the agency action, such immunity from review must fall before the need to vindicate constitutional guarantees. See Butz v. Eco-
nomou, 438 U.S. 478, 504 (1978) (holding that federal executive officials have an
immunity no different from that of their peers in state government); Lehmann,
Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts

23. While a demand for recovery based upon 42 U.S.C. § 1983 (1976) is often
coupled with recitation of a cause of action based upon trespass to the person or
disruption of his emotional well-being, § 1983 itself has been substantially dis-
tinguished from any need to show the willful intent of the defendant as would be
required for a criminal prosecution. In Monroe v. Pape, 365 U.S. 167 (1961), the
seemingly § 1983 case, Justice Douglas said the action should merely be read in
analog to the "background of tort liability that makes a man responsible for the
natural consequences of his actions." Id. at 187. It was no accident, therefore,
that with this history the various common law defenses would be available to as-
sist in the defense of a § 1983 action.

Section 1983 on its face imposes a requirement that defendant act under color
of state law. When a court seeks to find "state action" where the impetus for the
constitutional deprivation is private, fact finding must reveal that the state has
become significantly involved with the alleged violative actions. The mere fact
of state regulation alone does not transform what is essentially a private action
into "state action" for purposes of a § 1983 cause of action. No easy answer exists
to the question of whether particular discriminatory conduct is private or has
such a state involvement or nexus as to permit relief under § 1983. Rather, the
facts in each case must be sifted, and the circumstances weighed, before a determina-
tion can be made as to whether the "state action" requirement is met.

Federal agents are not subject to suit under § 1983 because they act under color of federal law, not state law. See Norton v. McShane, 382 F.2d 855, 862 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965); Askew v. Bloemker, 548 F.2d 673,

to operate only in those cases where the prior grant of license is to be revoked, suspended, or reinstated. For the applicant, failure to receive a license ultimately means failure to obtain a return on the investment in preparation for the license.

Following his repeated failures to receive a liquor license, Shamie filed suit in federal district court against the city and various city officials, alleging infringement of his due process rights and violations of 42 U.S.C. § 1983. According to Monell v. Department of Social Services, local governments enjoy immunity from suit under section 1983 unless "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." The United States Court of Appeals for the Sixth Circuit found that the city's persistent refusal to give Shamie reasons for denying his application was a proper trigger to the Monell exception as a "deprivation" that had been "claimed from a decision issuing from a policy or 'custom' of the local government." The court then considered the merits of Shamie's claim. The district court had found that under applicable Michigan law, a first-time applicant is not normally entitled even to minimal due process. One theory for this holding would be that an impossible burden would be imposed upon state licensing boards if they were required to accord a hearing and make a quasi-judicial determination for each license applicant who failed. The district court had also found, however, that an agreement between Shamie and the city attorney that Shamie would be given reasons for future denials of his application endowed Shamie with a "property" interest, something as a novitiate in liquor licensure he had not previously possessed. On this basis the trial court held, rather strangely, that he had been denied due process, and assessed exemplary damages of twenty-five dollars per day to accrue from the date the city first failed to live up to the agreement until it did. The complaint against the individual city officials was dismissed, but the city sought reversal of the damage judgment on appeal. Finding no constitutional violation, the Sixth Circuit reversed the trial court's judgment, and

25. 436 U.S. 658 (1978). Independent of whether municipal corporations are per se "persons" within the purview of 42 U.S.C. § 1983, individual city officials are liable in their official capacities. They are proper parties and are liable in tort for deprivations occasioned by them under city ordinances. See Uhl v. Ness City, 406 F. Supp. 1012, 1016 (D. Kan. 1975), aff'd, 590 F.2d 839 (10th Cir. 1979); Adams v. City of Colorado Springs, 308 F. Supp. 1397, 1401 (D. Colo.), aff'd mem., 399 U.S. 901 (1970). Often a municipality, its agencies, and/or its agents are the sole source of services vital to residents. For example, when the Board of Water Supply is the sole source of water service, the unreasonable, arbitrary, or capricious termination of that service, by its nature a constitutionally protected entitlement, will be seen as violative of due process. Uhl v. Ness City, 406 F. Supp. at 1018.

26. 436 U.S. at 690.
27. 620 F.2d at 120.
29. 443 F. Supp. at 684.
30. Id. at 685.
carefully distinguished Shamie’s status from that of recent plaintiffs who have symbolized the “due process” revolution of the last decade:

[T]he City’s promise to tell him why his application might be rejected does not automatically confer on him a “property interest” protected by constitutional due process. The City’s agreement altered Shamie’s legal rights only insofar as he thereby became entitled to the benefit of his bargain. Our research has produced no authority to support a contrary conclusion. Shamie’s expectations here simply do not rise to the level of the “property interests” traditionally afforded due process protection. His status is not comparable to that of welfare recipients’ loss of benefits, Goldberg v. Kelly; parolees threatened with revocation of parole or probation, Morissey v. Brewer, and Gagnon v. Scarpelli; wage earners against whom an order of attachment is sought, Sniadach v. Family Finance Corp.; or a driver who faces revocation of driver’s license, Bell v. Burson. Neither do his interests arise from “independent sources such as state law.”

The Shamie decision provides some insight as to the qualifications that a would-be plaintiff should possess in order to bring an action for license denial, but clearly it will be difficult to bootstrap such a claim to the level of a constitutional deprivation. Courts are still most likely to intercede when plaintiff links his loss or damage to property rights in issue, such as where a claim for license denial involves a prior grant of license which has been revoked.

B. The Immunity Problem: Can the Agency and/or its Officials be Sued?

Three common questions arise in this context. First, how much immunity, if any, does the agency possess? Second, how much immunity, if any, does the agency official possess? Third, to the extent that such immunities exist, how can they be asserted, and how can they be diminished or totally lost? The United States Supreme Court has stated that immunity “is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.” Its

31. 620 F.2d at 121.
33. Barr v. Matteo, 360 U.S. 564, 572-73 (1959), in which the United States Supreme Court conferred absolute immunity on the acting director of the Federal Office of Rent Stabilization who was being sued for libel by former employees of that office. In countering the “Pandora’s box argument,” the Court stated:

   We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed.

   Id. at 576. In a vigorous dissent, Justice Brennan argued that “only a qualified privilege is necessary here, and that is all I would afford the officials.” Id. at 586 (Brennan, J., dissenting). See also Spalding v. Vilas, 161 U.S. 483 (1896) (conferencing an absolute privilege on the Postmaster General).
grant is not to protect the private interest of the governmental official, but rather to promote the public interest in freeing officials from fear of damage suits arising from acts performed in the course of carrying out their agency function. The theory is that such suits would not only tend to inhibit agency initiative and action, but would also expend agency time and energy (the public's resources) in their defense.

The doctrine of official immunity may be employed as a complete bar to an action, thus partaking of the character of an absolute privilege depending on the legal theory of the action, the nature of defendant's official position, and the nature and circumstances of the alleged misconduct. If in the court's interpretation the doctrine of official immunity permits the proof of facts, which if present constitutes an affirmative defense, the application of the doctrine is better characterized as a qualified privilege. Such proof may be in the form of officials' affidavits alleging good faith in all their actions, as well as a reasonable reliance upon law and regulations in both substantive and procedural aspects. Additionally, official immunity is not generally assertable in the face of an action limited to injunctive, declaratory, or mandamus relief. To allow otherwise would be to still the effort to make an agency answer for its excesses, shortcomings, or inertia. The doctrine of official immunity, derived from the more general principle of sovereign immunity, is always examined in a manner to assure it is reconcilable with the interests of individual citizens who may be economically harmed by oppressive or malicious officials. Because such a balancing approach is essentially a judicial exercise, the body of the law of immunity to civil damage suits has been largely judge-made.

Judges were themselves the first to receive immunity. The United States Supreme Court decided in 1871 that conferral of absolute immunity for judges was essential to free and fair action in the courts. Although

34. See, e.g., Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), cert. denied, 417 U.S. 908 (1974). The court pointed out the following distinction between an absolute and qualified privilege:

The scope of the official privilege rule, or the extent of its application to a particular official, varies depending upon the nature of his duties and functions. We have described the absolute privilege of legislators, judges, judicial officers, and some executives which may be asserted as a plea in bar. The doctrine is applied in a somewhat different form to other officials—a qualified privilege—whereby in an action it may be asserted as a matter of defense, but it is "qualified" in that proof to support the defense is required. This proof is often lack of malice, or good faith, or some similar showing of good and proper cause for the act complained of. If such a defense can be established during the course of the trial, the jury or judge must then find for the defendant. This qualified privilege thus does not meet that element of the purpose of the rule that the official should not be required to expend time in the defense of litigation brought against him, but it is in accord with the other elements.

Id. at 342.


administrative agencies are as old as the Republic, it was mainly via the first World War and its aftermath that their authority was established. The exercise of their quasi-judicial function involved sums of money and privileges rivaling those of the "real" judiciary. As a result, it was natural to extend the immunity granted judges to the officers carrying out a judicial function for their agencies.

One question to be resolved by the courts in the development of the law was whether the absolute immunity accorded judges should be granted to other agency officials, particularly with respect to section 1983 actions. As regards prosecuting attorneys, that question was answered by the United States Supreme Court in Imbler v. Pachtman.\textsuperscript{37} In a scenario reminiscent of the cinematic heyday of California, shortly after convicted murderer Paul Imbler lost his last appeal and was to be punished by death in the gas chamber, Deputy District Attorney Richard Pachtman, who had prosecuted the case against him, wrote to the Governor of California describing new evidence turned up after trial by himself and an investigator for the state correctional authority. The evidence offered corroboration for Imbler's alibi and testimony affecting the trustworthiness of the state's prime witness. Pachtman pointed out, however, that leads to the new information had been available to Imbler's counsel and that none of the evidence was conclusive of Imbler's innocence. He stated that he wrote to the governor because he believed "'a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented.'"\textsuperscript{38} The letter was dated August 17, 1962. Imbler's execution was scheduled for September 12, 1962, but was subsequently stayed.

Following the letter, Imbler filed a state habeas corpus petition, and in the brief thereto, although praising Pachtman's post-trial detective work, he charged that the prosecution had knowingly used false testimony and suppressed material evidence at Imbler's trial. The petition was denied,\textsuperscript{39} and Imber remained in prison until 1968 when he filed a petition for habeas corpus in federal court on the same grounds. Looking solely to the record, the district court granted the writ of habeas corpus,\textsuperscript{40} and the United States Court of Appeals for the Ninth Circuit subsequently affirmed.\textsuperscript{41} Imbler was released.

to judges. Such immunity does not include acts and statements separate from the judicial function. See, e.g., Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974). Absolute immunity has also been accorded to legislators "acting in a field where legislators traditionally have power to act." Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

\textsuperscript{37} 424 U.S. 409 (1976).
\textsuperscript{38} Id. at 413 (footnote omitted).
\textsuperscript{39} In re Imbler, 60 Cal. 2d 554, 387 P.2d 6, 35 Cal. Rptr. 293 (1963), cert. denied, 379 U.S. 908 (1964).
\textsuperscript{41} Imbler v. California, 424 F.2d 631, 632 (9th Cir.), cert. denied, 400 U.S. 865 (1970).
In 1972 Imbler filed a civil rights action under 42 U.S.C. § 1983 against Pachtman, the police fingerprint expert, and various other officers of the Los Angeles police force, demanding $2.7 million in actual and exemplary damages from each defendant, plus fifteen thousand dollars for attorneys’ fees. The case was eventually litigated before the United States Supreme Court on writ of certiorari.42 In the majority opinion of the Court, Justice Powell pointed out that section 1983 “provides that ‘every person’ who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages.”43 Powell went on to note, however, that “[t]he statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads. But that view has not prevailed.”44 The Court reasoned that the statutory tort described in section 1983 is “to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.”45 The Supreme Court concluded that as acting within the scope of his duty to initiate and pursue a prosecution, and in presentation of the state’s case, a prosecuting attorney is absolutely immune from a civil suit for damages under 42 U.S.C. § 1983,46 as indeed he would be were the suit couched merely in terms of malicious prosecution.

The judiciary has been unwilling to extend the absolute immunity of judges and prosecutors to section 1983 actions to other government officials. For executive officials, including many agency officers, the judiciary has developed various approaches to the issue of immunity. The United States Supreme Court decision in Scheuer v. Rhodes47 exhibits a trend away from

42. 424 U.S. 409 (1976).
43. Id. at 417.
44. Id.
45. Id. at 418 (citing Tenney v. Brandhove, 341 U.S. 367 (1951)).
46. Id. at 431.
47. 416 U.S. 232 (1974). The Supreme Court conferred only a qualified good faith immunity on the governor of the state of Ohio and other state officials sued by the parents of students killed by National Guardsmen at Kent State University. The United States Court of Appeals for the Sixth Circuit had affirmed the trial court’s dismissal of the suit for failure to state a cause of action. 471 F.2d 430 (6th Cir. 1972). The United States Supreme Court reversed the court of appeals and remanded the case for trial. 416 U.S. at 250. In the opinion, the Supreme Court discussed the scope and availability of a qualified immunity:

[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. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.] Id. at 247-48.

See generally Restatement (Second) of Torts ch. 45A (1979). Restatement (Second) of Torts § 895D (1979), sets forth the following “black-letter” rules regarding the immunity of public officers:

(1) Except as provided in this Section a public officer is not immune from tort liability.
the complete bar of absolute official immunity. In that decision, the Court held that when a state executive officer acts under state law, in a manner violative of the Constitution, his affront to the superior authority of that Constitution may strip him of his official or representative character and may subject him personally to consequences of his individual conduct.48

A presumption of qualified immunity exists at the outset of a section 1983 action against a state official, a presumption which is shaped by the scope of discretion and responsibilities of the particular state official, any statutory endowment of immunity, and the particular circumstances of the action taken. As a general rule, it can be stated that as the range of discretion, responsibilities, and duties possessed by the official increases, so does the scope of his immunity as to his official acts.49 Both a common law immunity and an immunity codified by state statute may be claimed by a given state official. The qualified immunity may be stripped from him under certain conditions, and certainly a grant of state immunity cannot insulate the officer from liability under a federal statute such as section 1983. An action by a state official under color of state law, which intentionally, recklessly, wilfully, or wantonly causes damage to an individual by an assault upon that individual's federal rights and privileges is not immunized from suit. Even when the official's conduct is less than blatantly reprehensible, the public official may lose his cloak of qualified immunity. The public interest requires decisions and action to enforce laws for the public protection. Public officials who fail to make decisions when they are needed, or who fail to carry out a statutory mandate or legislative policy are not faithfully and fully performing the duty of office, and may risk liability exposure.

The grant of qualified immunity has been gradually extended to include exercise of quasi-judicial functions by agencies and their officials, and then to a generalized immunity for the performance of discretionary acts. The essence of the judicial role, the power to exercise discretion, has been distinguished by the courts as worthy of immunity.50 From this has come the rather universal rule that a qualified immunity will cloak the

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(2) A public officer acting within the general scope of his authority is immune from tort liability for an act or omission involving the exercise of a judicial or legislative function.

(3) A public officer acting within the general scope of his authority is not subject to tort liability for an administrative act or omission if

(a) he is immune because engaged in the exercise of a discretionary function,

(b) he is privileged and does not exceed or abuse the privilege, or

(c) his conduct was not tortious because he was not negligent in the performance of his responsibility.

48. 416 U.S. at 250.

49. Barr v. Matteo, 360 U.S. 564, 573-74 (1959) (but holding that the principle of immunity which frees senior public officials to exercise their duties uninhibited by fear of damage suits covers all public officials acting within the scope of their assignment).

50. See cases cited note 36 supra.
officer’s action if the allegedly tortious conduct occurred during the performance of a discretionary function, rather than one merely ministerial.51 The result of this has been to encourage legislation to insulate governmental officers and employees from the consequences of allegedly tortious conduct while performing ministerial duties within the scope of their authority and responsibility. While ministerial activity by minions of administrative agencies is subject to common law scrutiny, exemption has accrued through special legislative enactments.52 In one instance, immunity of the officer is exchanged for the right to pursue the claim against the government.53

While judicially or legislatively conferred immunity might immunize an agency officer from a suit in tort, except on grounds that the government itself will allow, tortious conduct which takes on the proportions of contra-constitutional action can and will suffer challenge in the face of such immunity.54 The result has been to couple clear intentional tort actions for assault, battery, invasion of privacy, conversion, and the like with allegations of the same official tortious conduct depicted as violative of plaintiff’s constitutional rights or as violative of a statute more narrowly prohibitive of constitutional wrongdoing. Leading cases which find agency personnel liable contain in large part descriptions of circumstances where there has been unnecessarily cruel, violent, or officious handling of the regulatee; where the action was carried out with demonstrable malice, excessive force, or reckless disregard for the truth; and where there is either express or constructive evidence that the agency officer knew he was acting contrary to law or enforcing a law known to be invalid. For the most part, such litigation, if successful, has struck fairly low on the agency level.

Only in recent years have state courts indicated revulsion to the concept of governmental immunity. Even now, however, while lip service is given to the theory of holding state governments and state officials liable on the same basis as private tortfeasors, for reasons of state finance as well as tradition most states are still dragging their feet. When the changes occur they are limited and rarely retroactive.55 Finally, one must note that such changes find the judiciary in the vanguard rather than the legislature. While perhaps the foremost case was Muskopf v. Corning Hospital District,56 decided some twenty years ago, a number of other cases are distinguishable as bringing the anachronistic nature of governmental tort immunity to the attention of judicial colleagues in other states.57

53. Id.
57. See cases cited note 55 supra.

https://scholarship.law.missouri.edu/mlr/vol45/iss4/3
In summary, it can be stated that most government officials now enjoy a qualified immunity. An affirmative defense to a damage action against government officials can be based upon the good faith and reasonable belief in the lawfulness of the action taken. The circumstances of taking such action, including, for example, the amount of force used and the excessive debasement of the individual(s) against whom the action was taken are all highly material in determining whether immunity is appropriate. Clearly, a major impediment to bringing a tort cause of action against an agency or its officers is the immunity which has been accorded to these public-sector defendants.

C. The Federal Tort Claims Act

The seminal statute of the federal government's consent to suit was first enacted in 1946 as the Federal Tort Claims Act. The exceptions contained therein, however, have proven to be snares for the unwary. For instance, a physician operates on the right leg of his patient, when his entire discussion with the patient previous to the operation and the consent obtained from the patient was directed to the left leg. The patient later brings suit and alleges that the Veterans Administration physician is liable for medical malpractice and professional negligence. The government defends by stating the action is really one in assault and battery, and the government's motion to dismiss is granted.

Given the breadth of the first listed exception to the Federal Tort Claims Act, it seems that federal officers, so long as they are exercising

58. Another substantial impediment to the recovery of damage awards is the doctrine of sovereign immunity and the eleventh amendment prohibition against retroactive damage awards against a state as enunciated in Edelman v. Jordan, 415 U.S. 651 (1974). A thorough discussion of the eleventh amendment and its implications for the regulatee seeking a damage award is beyond the scope of this paper, but helpful analysis of this topic can be found in C. Abernathy, Civil Rights Cases and Materials 202-18 (1980). See also Restatement (Second) of Torts § 895B (1979), which sets forth the following "black-letter" rules regarding the liability exposure of the states:

(1) A State and its governmental agencies are not subject to suit without the consent of the State.
(2) Except to the extent that a State declines to give consent to tort liability, it and its governmental agencies are subject to the liability.
(3) Even when a State is subject to tort liability, it and its governmental agencies are immune to the liability for acts and omissions constituting
   (a) the exercise of a judicial or legislative function, or
   (b) the exercise of an administrative function involving the determination of fundamental governmental policy.
(4) Consent to suit and repudiation of general tort immunity do not establish liability for an act or omission that is otherwise privileged or is not tortious.

61. Id. at 277.
62. The exceptions to the Federal Tort Claims Act are set forth at 28 U.S.C. § 2680 (1976), which reads as follows:
   The provisions of this chapter and section 1346 (b) of this title shall not apply to—
due care in effectuation of the statutes and regulations that are their charge, are outside of the "consent to sue" given by the Act, even if the statutes or regulations they are implementing prove invalid. Similarly, even if the federal actors have patently abused their discretion, their performance of a discretionary function within the scope of their assignment moves them beyond the pale of the Act. The theory which espoused the enactment of the Federal Tort Claims Act was that governmental efforts should achieve a reasonable level of efficiency and responsibility, and that failure to meet this standard should result in liability exposure similar to that

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

which exists in the private sector. The exceptions to the Act, however, continue to immunize the United States against the usual run of intentional torts, expressly excluding claims for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation, misrepresentation, deceit, or interference with contract rights.\(^\text{64}\)

It is important to recognize that the United States Supreme Court decision in Dalehite v. United States\(^\text{65}\) has served to immunize federal actors from liability under the Federal Tort Claims Act if those actors are performing a discretionary function. In that 1947 decision, the government was held not liable for extensive damage resulting from the explosion of two cargo vessels in the harbor of Texas City, Texas. The Court, in interpreting the "discretionary" provision in the Federal Tort Claims Act, stated the following:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.\(^\text{66}\)

There is some evidence that this position has eroded, at least with respect to benefactory services of government agencies. In Ozark Air Lines, Inc. v. Delta Air Lines, Inc.,\(^\text{67}\) for example, a federal district court found that the United States, through its Federal Aviation Administration ground controller, was negligent with respect to a ground collision of two taxiing aircraft. The court pointed out that "when the government undertakes to perform services not required by specific legislation, it has the duty to perform these services carefully."\(^\text{68}\) Perhaps of greater significance, however, is the provision in the 1974 amendments to the Act which removed the shield against claims sounding in assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process if alleged to have been committed by federal investigative or law enforcement officers.\(^\text{69}\)

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\(^{64}\) 28 U.S.C. § 2680(h) (1976). The first six exceptions cited in the text are actionable if committed by federal investigative or law enforcement officers. See note 69 and accompanying text infra.

\(^{65}\) 346 U.S. 15 (1953).

\(^{66}\) Id. at 35-36.

\(^{67}\) 402 F. Supp. 687 (N.D. Ill. 1975).

\(^{68}\) Id. at 693. See also Indian Towing Co. v. United States, 350 U.S. 61 (1955); Somlo v. United States, 274 F. Supp. 827 (N.D. Ill. 1967).

III. CONCLUSION

For a number of years now, perhaps instigated by the pace-quickening effect of *Goldberg v. Kelly*, it has become increasingly apparent that the judiciary will not sit idly by and allow an administrative agency, be it federal, state, or local, to by-pass rights guaranteed the regulatees and the general public by the first fourteen amendments. An independent action in tort is available to the regulatee who has suffered injury as a result of agency action, but such an action is likely to meet with formidable barriers, such as exhaustion requirements, preclusion statutes, statutorily and judicially created immunities, and common law and statutory defenses. In addition, the expansion of the doctrine of equitable abstention, which requires federal courts to abstain from adjudication of federal constitutional claims in deference to pending state court proceedings, could curb federal court intervention into state agency processes. The case of *Withrow v. Larkin* is a perfect example of a federal court ruling too harshly and too quickly on a matter better resolved by state agencies or courts. Nonetheless, given the proper set of circumstances, the tort action may offer an attractive alternative to the litigious regulatee. Only through the development of fair, efficient state and federal agencies will the need for the torts claim as a remedy for governmental wrongdoing be diminished.

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71. See generally Younger v. Harris, 401 U.S. 37 (1971). This is not to say that the federal courts will refuse to exercise their judicial powers courageously and decisively.
72. 421 U.S. 35 (1975) (reversing injunction granted by three-judge panel which enjoined Wisconsin State Examining Board from conducting contested hearing to determine whether physician had engaged in professional misconduct).