TOWARD STATE AND MUNICIPAL LIABILITY IN DAMAGES FOR DENIAL OF RACIAL EQUAL PROTECTION

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[T]he most important single task to which American law must address itself is the task of eradicating racism. . . . We want to think that all this will disappear, that it is really some other problem ("immigration," "poverty"), by that recharacterization merged into the manageable. But it does not disappear, it will not merge, and if justice is the business of law, then, easily and by far, the first item on our law's agenda is and always ought to have been the use of *every resource and technique of the law* to deal with racism. Strong words? I wish they were stronger.¹

Racism in American society manifests itself in a multitude of different ways.² But perhaps the most urgently disheartening phenom-

1. Professor Charles L. Black, Jr., of Yale Law School, in Black, *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 69-70 (1967) (emphasis added). "How we would like to forget this, and turn to problems amenable to a more cheerful engineering, problems of venial failure rather than of sweating national shame! . . . [W]e yearn for the rite that will exorcise this most stubborn of our attendant demons, our old capricious cruelty now in its third century, the crime that bloodies our sacred arrows and puts around us that odor the Cheyenne smelt around the man who defiled the ultimate covenant by killing a tribal brother, as our racism defiles our covenant with each other and with the world." *Id.* at 69.

2. See generally REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL

enon is the involvement of state and local governments themselves in racial discrimination—an involvement which, in these times of racial crisis, merits condemnation and eradication no matter what its extent. This “state action”³ in furtherance of discrimination occurs in many forms: Discriminatory acts may be performed by the state or municipality as an entity, as in enactment of racially discriminatory laws;⁴ they may be performed by an agent of the state, as in abuses by police officers or administrative officials;⁵ or they may be committed by a purely private party with whom the government is tied via some kind of special relationship and in whose behavior the government has been intentionally or negligently culpable—as in a government’s negligent omission to include an anti-discrimination clause in its lease to a private party.⁶

This complicity continues to be for the most part unchecked, largely for one reason: the unavailability of a sufficiently effective remedy for the victims of such discrimination. Non-whites suffer public or private discrimination in which governmental involvement plainly constitutes “state action” and plainly violates tort law or the equal protection clause, but the only remedies available are hopelessly insufficient to spur governmental entities to change their laws, change their behavior, and make their agents toe the line. This Comment will attempt to demonstrate that fact, and to demonstrate additionally that none of the available remedies fully compensates a plaintiff for his damage. It will be argued that the best remedy to provide true protection, deterrence, and compensation would be a *monetary* remedy: liability of states and municipalities in money damages for denial of racial equal protection.

This remedy is generally unavailable in the United States today. Some instances of racial discrimination are conducive to redress by a normal tort action. After racially-motivated police abuse, for instance, the aggrieved party might want to bring suit for false arrest or battery,

DISORDERS (1968); 27 GUILD PRACTITIONER 169-200 (1968) (Special Issue on Racism in the Law).

3. Because of the language of the fourteenth amendment (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws”), the equal protection clause bars only “state action,” not private action. But private acts are in some situations deemed to be acts of the state for purposes of the amendment; the dividing line between “private” and “state action” is not a sharp one. See generally Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960). This Comment is not concerned with urging expansion of the state action concept. It merely urges that, when racial equal protection is denied in situations where “state action” would admittedly be found under present case law, the government should be liable in damages.

4. *E.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1880) (exclusion of blacks from juries).

5. *E.g.*, *Screws v. United States*, 325 U.S. 91 (1945).

6. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

joining the city or state either on a *respondeat superior* theory⁷ or on a theory of direct liability for negligence in employee supervision.⁸ But governmental liability in such actions is barred in most states by the doctrine of sovereign immunity. If the discriminatory acts are not subsumable within a normal tort category, he might ground his cause of action directly on the equal protection clause, suing either under section 1983 of the federal Civil Rights Act of 1871⁹—which grants a remedy in money damages for deprivations of constitutional rights—or under the fourteenth amendment itself. But governmental liability has thus far been barred by *Monroe v. Pape*,¹⁰ in which the United States Supreme Court held that section 1983 is inapplicable to governmental entities, and by *Bell v. Hood*,¹¹ in which a federal district court refused to create a damages remedy to vindicate constitutional interests.¹²

Part I of this Comment deals with the common law tort action. It discusses sovereign immunity and the recently increasing tendency of courts to abrogate it for reasons of public policy, reasons which appear all the more imperative in the case of torts with racial overtones. Part II is concerned with the second type of action—suits based upon the equal protection guarantee itself. It discusses the constitutional mandate for adequate effectuation of the supremacy of racial equal protection rights and argues that because presently available remedies fail to provide such effectuation, the judiciary is mandated to provide a remedy which is in fact more effective: a damages remedy. It then explores potential remedial avenues: A court could hold that an action will lie under section 1983 to the extent that a state has voluntarily abrogated its sovereign immunity, or it could create a new remedy directly under the fourteenth amendment itself. Part III discusses a moral imperative for judicial action: the role of a damages remedy as a kind of partial “reparations” for the damage of state-involved racism over the past 200 years. Part IV concludes by suggesting that judicial flexibility will be required in treating the many varieties of governmental involvement.

Although legislatures could provide the required reforms much

7. *E.g.*, *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

8. *E.g.*, *Thomas v. Johnson*, 295 F. Supp. 1025 (D.D.C. 1968).

9. Originally enacted as part of the mass of civil rights legislation which emerged from the Reconstruction Congress, the present 42 U.S.C. § 1983 (1964) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

10. 365 U.S. 167 (1961).

11. 71 F. Supp. 813 (S.D. Cal. 1947).

12. See Part II, section B(2) *infra*.

more easily than could courts, this Comment addresses itself chiefly to the judiciary of the United States, both federal and state. Since an appreciation of political realities suggests that a legislative solution is improbable in the foreseeable future, the urgent task of providing the remedy has fallen upon the judiciary. Herewith is an open plea to the American judiciary to do all within its power to provide a quite moderate but quite necessary remedy—a damages remedy against states or municipalities whenever state action has played a part in denying racial equal protection.

I

RACIAL EQUAL PROTECTION CASES BROUGHT UNDER ORDINARY TORT LAW: THE BARRIER OF SOVEREIGN IMMUNITY

Many racially discriminatory acts which involve state action can be subsumed within a normal tort category, such as false arrest or battery stemming from racially-motivated police abuse, but a tort remedy is usually barred by the doctrine of sovereign immunity. The rule allows a governmental entity acting in its governmental¹³ capacity to assert an absolute defense to any suit brought against it—even though liability would clearly attach if the defendant were a private party—unless it has statutorily “consented” to be sued.¹⁴ Although hundreds of commentaries and articles¹⁵ have attacked the doctrine, and although there is a recent impressive trend among the states in favor of its abolition,¹⁶ most states nonetheless retain the rule to a considerable extent.¹⁷

13. Municipal corporations historically have been regarded as having a dual character. In their “public” capacity as subdivisions of the state—their “governmental” capacity—they partake in the state’s sovereign immunity. But in their “proprietary” functions, functions which are characteristic of all corporations whether private or public, they are not immune. Predictably, this tenuous “governmental”-“proprietary” distinction has become obscured in practice. Much of the confusion has resulted from judicial inconsistency. Motivated by the injustice of the sovereign immunity barrier, judges have manifested a habit of affixing the label “proprietary” upon activities which would seem to be logically “governmental,” in order to avoid the operation of the immunity. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 125, at 1004-10 (3d ed. 1964). Although an argument to the effect that the activity in question is “proprietary” may sometimes provide a means of circumventing sovereign immunity, this Comment will proceed on the assumption that all activities discussed are admittedly “governmental” in nature.

14. *Id.* at § 125.

15. By 1942 so many articles had been written on municipal sovereign immunity that an entire article was devoted to a bibliography on the subject: Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 *LAW & CONTEMP. PROB.* 214 (1942).

16. 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.01 (Supp. 1965); 2 F. HARPER & F. JAMES, JR., *THE LAW OF TORTS* § 29.1 (Supp. 1968).

17. See Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 *U. ILL. L.F.* 919, 969-78.

A. Public Policy and Abrogation of Sovereign Immunity

Moral and public policy considerations press strongly for abrogation of sovereign immunity. A major consideration is the principle of just loss allocation which generally prevails throughout the rest of the law of torts: the fundamental fairness of providing compensation to an innocent party who has been damaged by an admittedly guilty defendant. Normal loss allocation would be particularly equitable in suits against governmental entities because losses resulting from governmental activities would be borne ultimately by those who receive the benefits of governmental activities: the general public.¹⁸ Public policy also demands that tort losses be most efficiently compensated by spreading the loss among the largest possible group, and a governmental entity is a most efficient vehicle for such a loss distribution. Moreover, abrogation of sovereign immunity would protect not only the interests of the injured parties themselves, but also those of the others in the community;¹⁹ citizens would not have to fear the possibility of having to shoulder losses from government-caused damage, and they would be able to feel more assured that the government is exercising the utmost care to avoid such damage. Another vital consideration is the public policy of discouraging lawbreaking and increasing respect for law, a policy which takes on added significance when the lawbreaker in question is the government itself. As Professor Davis has noted,

[T]here are the strongest reasons of public policy for keeping the Government within the law, and the courts are the primary authorities within our system for determining what the law is when controversies arise. Just as courts protect private rights from illegal encroachment by other private parties, courts should protect private rights from illegal encroachment by the Government. *The rule of law in this sense must be preserved. . . . [T]he fact that one of the parties is the Government is a reason in favor of the use of judicial power, not a reason against it.*²⁰

These policy considerations which support elimination of governmental immunity with respect to ordinary torts are of even more crucial import when the tort has racial overtones. In such cases the injustice of denying compensation for invasion of an interest is magnified, because one of the interests invaded holds the high priority of a constitutional right and because, more often than in ordinary torts, the damage occasioned by the invasion is likely to extend beyond the immediate situational context, frequently affecting the individual's entire later

18. *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 22-25, 163 N.E.2d 89, 94-96 (1959), *cert. denied*, 362 U.S. 968 (1960).

19. Brief for Petitioners at 42, *Monroe v. Pape*, 365 U.S. 167 (1961).

20. Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 455 (1962) (emphasis added).

life.²¹ And in such cases the public interest in government's remaining within the bounds of the law is likewise magnified, since one of the laws involved is the Constitution itself. This public interest gains even more significance because the constitutional breach is racial in nature, since each act of discrimination adds an additional increment to the societal pool of racial bigotry, from which all—non-white *and* white—are the sufferers. Because of the inescapable role of government as an example and standard-bearer for the rest of society, the increment added to this pool by governmental acts is incalculably greater than that added by private acts.

Because of such concerns, sovereign immunity is on the decline. Abolition or modification of the doctrine has been increasing rapidly, and most of the reform has come from the judiciary.²² Indeed, "[a]pparently no state legislature has acted on the problem except after a state court has done so."²³ Governmental entities have argued that any change in the rule should come only from the legislature, but most courts have not been persuaded. They stress that the doctrine was created by the courts themselves,²⁴ not the legislatures: "We closed our courtroom doors without legislative help, and we can likewise open them."²⁵ The courts have emphasized that the doctrine has survived only by judicial adherence to unsure and shaky precedent, the rule being "an Eighteenth Century anachronism."²⁶ It "has existed only by the force of inertia."²⁷ Originally based on the notion that "the King can do no wrong," its historical evolution is rife with confusion, "misreading of ancient maxim," and sixteenth century metaphysical concepts;²⁸ its translation into American law as a rule of governmental tort immunity is "one of the mysteries of legal evolution."²⁹ All but one³⁰ of the decisions abrogating sovereign immunity have rested solely on "policy

21. *E.g.*, *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 & 494 n.11 (1954).

22. 3 K. DAVIS, *supra* note 16, § 25.01 (Supp. 1965); 2 F. HARPER & F. JAMES, JR., *supra* note 16, § 29.1 (Supp. 1968).

23. 3 K. DAVIS, *supra* note 16, § 25.18 (Supp. 1965).

24. Where certain common law immunities have been preserved by the legislature in a comprehensive tort claims act, *e.g.*, CAL. GOV'T CODE § 815 (West 1966), the barrier to judicial abrogation of sovereign immunity is admittedly greater. However, in actions based on 42 U.S.C. § 1983 (see Part II section B(1) *infra*) or on the fourteenth amendment itself (see Part II section B(2) *infra*), the supremacy clause would bridge the statutory obstacle.

25. *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 287, 118 N.W.2d 795, 800 (1962), *quoting* *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 178, 260 P.2d 765, 774 (1953).

26. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133 (Fla. 1957).

27. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961) (Traynor, J.).

28. *Id.* at 214, 359 P.2d at 458, 11 Cal. Rptr. at 90.

29. *Borchard, Government Responsibility in Tort*, 34 YALE L.J. 1, 4 (1924).

30. *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alas. 1962).

grounds and an overruling of precedents."³¹ In overturning Illinois's sovereign immunity, the Illinois supreme court stressed:

We have repeatedly held that the doctrine of *stare decisis* is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present day concepts of right and justice.³²

The court quoted with approval from an opinion³³ of the New Jersey supreme court:

[J]udges of an earlier generation declared the immunity simply because they believed it to be a sound instrument of judicial policy which would further the moral, social and economic welfare of the people of the State. When judges of a later generation firmly reach a contrary conclusion they must be ready to discharge their own judicial responsibilities in conformance with modern concepts and needs. It should be borne in mind that we are not dealing with property law or other fields of law where stability and predictability may be of the utmost concern. We are dealing with the law of torts where there can be little, if any, justifiable reliance and where the rule of *stare decisis* is admittedly limited.³⁴

Indeed, the United States Supreme Court has noted that American sovereign immunity "has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."³⁵

Much remains to be done, however, for most states still retain the doctrine to a significant extent.³⁶ And even in states which, like California,³⁷ have largely abolished it, immunity is nevertheless preserved for acts arising from "discretionary" as opposed to "ministerial" activities.³⁸ This has become known generally as the "discretionary exception."

31. 3 K. DAVIS, *supra* note 16, at 104 (Supp. 1965).

32. *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 26, 163 N.E.2d 89, 96 (1959), *cert. denied* 362 U.S. 968 (1960).

33. *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 42, 141 A.2d 276, 283 (1958) (abrogating charitable immunity).

34. *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 26, 163 N.E.2d 89, 96 (1959), *cert. denied*, 362 U.S. 968 (1960).

35. *National City Bank v. Republic of China*, 348 U.S. 356, 359 (1955).

36. *Van Alstyne*, *supra* note 17, at 969-78.

37. California Tort Claims Act, CAL. GOV'T CODE §§ 810-895.8, 900-978.8, 989-991.2, 995-996.6, 11007.4 (West 1966), CAL. LABOR CODE §§ 3365-3366 (West Supp. 1968). See generally A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.5 (1964).

38. *Van Alstyne*, *supra* note 17, at 974-75; e.g., CAL. GOV'T CODE §§ 820.2, 815.2(b) (West 1966). The theoretical criteria underlying the distinction are not entirely clear, but, generally speaking, if the "nature of the duty" is "absolute, certain,

B. Limitation or Abolition of the "Discretionary Exception"

Two lines of argument have been predominant in the justification of the discretionary exception. One theory is that the "subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions," so that "it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation."³⁹ The absence of immunity would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."⁴⁰ But whatever the merit of this argument in a context where the employee himself would have to shoulder the costs of liability, it is largely invalid in an action where the governmental entity would bear such costs. Even the fear of litigational harassment is unwarranted, for it "assumes that the present system of administration of justice is incapable of effectively eliminating the groundless actions from those brought in good faith except by a full-dress trial on the merits,"⁴¹ and the problem can be alleviated almost entirely by requiring the governmental entity to furnish legal defense for employee defendants.⁴² Arguably, however, the non-immunity of his employer would be sufficient in itself to dampen an employee's zeal: He might fear that he would be fired or severely disciplined,⁴³ or that a suit against the entity might disclose errors by him that otherwise would remain undiscovered by his supervisors.⁴⁴

It is "unlikely"⁴⁵ that these indirect influences would severely dampen the zeal of public employees. And, to the extent that they may, no one has ever demonstrated that the results of such dampened zeal

and imperative, involving merely the execution of a set task," it is usually deemed "ministerial"; if the powers vested in the official are "to be exerted or withheld according to his own judgment as to what is necessary and proper," they are usually deemed "discretionary." A. VAN ALSTYNE, *supra* note 37, § 5.54.

39. *Lipman v. Brisbane Elementary School Dist.*, 55 Cal. 2d 224, 229, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961).

40. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 940 (1950).

41. See, e.g., Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 479 (1963). "This assumption merits skepticism in view of the wide variety of available protections against unfounded litigation which have been utilized successfully in other areas of the law." *Id.* See also Van Alstyne, *supra* note 17, at 978.

42. E.g., CAL. GOV'T CODE § 995 (West 1966).

43. *Johnson v. State*, 69 Cal. 2d 782, 792 n.7, 447 P.2d 352, 359-60, 73 Cal. Rptr. 240, 247-48 (1968).

44. *Id.*; cf. Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207, 224 (1956).

45. *Johnson v. State*, 69 Cal. 2d 782, 792, 447 P.2d 352, 359-60, 73 Cal. Rptr. 240, 247-48 (1968); cf. Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 66 HARV. L. REV. 488, 495-96 (1953).

would in fact be deleterious. Reluctance to deter "fearless exercise of judgment"⁴⁶ implies a concern that employees will not feel free to take chances in exercising their discretionary powers, and that this overly conservative attitude would discourage the development of creative programs which could be extremely beneficial to the public or would discourage the forthright performance of duties vital to the general welfare. But this concern is backed by no empirical validation whatsoever; it has yet to be shown that such a willingness to take chances produces benefits to the public which would not have issued otherwise. On the other hand, it is not difficult to demonstrate the frequent *detrimental* effects of unchecked discretionary zeal: One need only glance at the record of two hundred years of government involvement in racism in American history. Even granting *arguendo* that some beneficial innovations or activities may be deterred, the accompanying deterrence of tortious activities—especially racially oppressive activities—certainly would be more than adequate compensation in terms of the public welfare. The California supreme court noted this fact recently in *Johnson v. State*,⁴⁷ a decision limiting the scope of discretionary immunity in California. "[T]o the extent that . . . a deterrent effect takes hold," the court stated, the effect will be a completely "wholesome" one.⁴⁸

An employee in a private enterprise naturally gives some consideration to the potential liability of his employer, and this attention promotes careful work; the potential liability of a governmental entity, to the extent that it affects primary conduct at all, will similarly influence public employees.⁴⁹

A more fundamental justification of the discretionary exception is rooted in the separation-of-powers principle. There is a "felt need to prevent juries, or judges sitting as triers of fact, from passing judgment upon decisions made by public officials in areas of policy and discretion where, by law, fundamental responsibility for making such decisions has been vested in them."⁵⁰ Permitting liability for decisions of day-to-day political governance would create an opportunity for jurors or judges to substitute their own discretion for discretion "expressly entrusted to a coordinate branch of government,"⁵¹ under the guise of a

46. *Johnson v. State*, 69 Cal. 2d 782, 792, 447 P.2d 352, 359, 73 Cal. Rptr. 240, 247 (1968).

47. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). The opinion "is clearly the most significant and thorough consideration of the [discretionary exception] problem in California decisional law." A. VAN ALSTYNE, CALIFORNIA—GOVERNMENT TORT LIABILITY § 5.53, at 13 (Supp. 1969).

48. 69 Cal. 2d at 792, 447 P.2d at 359, 73 Cal. Rptr. at 247; James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 652 (1955).

49. 69 Cal. 2d at 792-93, 447 P.2d at 360, 73 Cal. Rptr. at 248.

50. Van Alstyne, *supra* note 17, at 975.

51. *Johnson v. State*, 69 Cal. 2d 782, 793, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968); see 3 K. DAVIS, *supra* note 16, at § 25.13 (Supp. 1965) (the effect

determination of negligence they could merely insert their own judgment in place of the judgment of a popularly-elected official or his agent. Such a transfer of decisionmaking power clearly would pose potential dangers to the institutional structure and to the ultimate welfare of the state. Moreover, when the discretionary decision in question is made by a highly qualified "expert" and the subject matter is extremely specialized and technical, these dangers loom even greater; judicial competence is even more in doubt.⁵²

Such problems, however, do not justify the state of most of the present law. Immunity is often granted regardless of indications of " 'malice,' dishonesty, corruption, or gross carelessness"⁵³—a virtual blank check which is unwise and unjust.⁵⁴ And judicial attempts to draw the line between "discretionary" and "ministerial" functions have led to inequities and "no more consistency than the proprietary-governmental distinction."⁵⁵ Even attempts at more precise doctrinal distinctions—such as the "planning level"—"operational level" dichotomy which ostensibly governs judicial application of the Federal Tort Claims Act⁵⁶—have proven susceptible to irrationality and "arbitrariness."⁵⁷

Reforms in the application of the discretionary exception are thus vitally necessary. Immunity should never attach to acts which might have involved "venality, corruption or malice,"⁵⁸ and perhaps even where there is merely "some indication that due care was not exercised [in the discretionary decision] . . . or that no reasonable official could have adopted it."⁵⁹ Additionally, courts should require "a showing that the course of action, in favor of which discretion was exercised, was supported by governmental necessity or reason."⁶⁰ With respect to methodology, courts should not focus upon the nature of the employee's activities in general,⁶¹ but rather upon the nature of the particular decision which caused the plaintiff's injury.⁶² Moreover, mere au-

would be "to transfer the discretionary power from the [administrative officer] to the jury").

52. See 3 K. DAVIS, *supra* note 16, § 25.13 (1958, Supp. 1965).

53. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 224 & n.45 (1963).

54. See, e.g., Van Alstyne, *supra* note 41, at 478.

55. Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047, 1052 (1968).

56. See generally Mikva, *Sovereign Immunity: In a Democracy the Emperor Has No Clothes*, 1966 U. ILL. L.F. 828.

57. See Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167, 172-73 (1952).

58. See Van Alstyne, *supra* note 41, at 478.

59. See 3 K. DAVIS, *supra* note 16, § 25.13 (Supp. 1965) (quoting from *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960)).

60. Note, *supra* note 55, at 1070 n.108.

61. E.g., *Glickman v. Glasner*, 230 Cal. App. 2d 120, 40 Cal. Rptr. 719 (1964).

62. A. VAN ALSTYNE, *supra* note 37, § 5.53 (Supp. 1969).

thority and opportunity to exercise discretion should never suffice to obtain immunity; there should be a showing that such discretion was in fact exercised, that the official actually made "a policy decision, consciously balancing risks and advantages"⁶³ Any immunity granted must attach only to the basic policy decision itself—never to any implementation of that basic policy, even if performed by the same person.⁶⁴ Most importantly, courts must eschew the prevalent semantic, literal approach whereby the court first attempts a precise general definition of "discretion" and then tries to apply it to the given fact situation.⁶⁵ "Since obviously no mechanical separation of all activities . . . is possible,"⁶⁶ courts should determine immunity in each case by appraising the particular factual circumstances in light of the basic reasons for the immunity.⁶⁷ Thus, a decision should merit insulation from judicial review only if the court justifiably fears a highly dangerous intrusion into the separation of powers.⁶⁸

If immunity for discretionary functions is to remain in any form, such measures are the very least that must be taken. It is by no means evident, however, that absolute immunity is ever necessary for adequate protection against potential dangers; the discretionary nature of the decision need only be considered in the determination of *liability* in each case. It will figure heavily into the determination of whether the agent indeed took an "unreasonable risk,"⁶⁹ and it can be a crucial factor with respect to "foreseeability"⁷⁰ or to the "burden" which would have been imposed on the agent's conduct in attempting to protect against the risk.⁷¹ Indeed, "an examination of the federal cases reveals that, generally speaking, situations in which discretionary functions have been found would probably not have involved tort liability had the court

63. *Johnson v. State*, 69 Cal. 2d 782, 794-95 n.8, 447 P.2d 352, 361, 73 Cal. Rptr. 240, 249 (1968); see *Peck*, *supra* note 44, at 225-26.

64. See *Johnson v. State*, 69 Cal. 2d 782, 796, 447 P.2d 352, 362-63, 73 Cal. Rptr. 240, 250-51 (1968); *Van Alstyne*, *supra* note 41, at 480.

65. See *Johnson v. State*, 69 Cal. 2d 782, 788, 447 P.2d 352, 356-57, 73 Cal. Rptr. 240, 244-45 (1968).

66. *Ne Casek v. City of Los Angeles*, 233 Cal. App. 2d 131, 135, 43 Cal. Rptr. 294, 297 (1965). "[I]t would be difficult to conceive of any official act . . . that did not admit of some discretion in the manner of its performance. . . ." *Ham v. County of Los Angeles*, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920).

67. *Johnson v. State*, 69 Cal. 2d 782, 789-90, 447 P.2d 352, 357-58, 73 Cal. Rptr. 240, 245-46 (1968). "The immunity should be no broader than the reason for the immunity." 3 K. DAVIS, *supra* note 16, § 25.13 (Supp. 1965).

68. See *Johnson v. State*, 69 Cal. 2d 782, 794, 447 P.2d 352, 360-61, 73 Cal. Rptr. 240, 248-49 (1968). The court wisely has limited such immunity solely to areas in which the responsibility for "basic policy decisions" has been committed to the coordinate branch of government. *Id.* at 793, 447 P.2d at 360, 73 Cal. Rptr. at 248.

69. See W. PROSSER, *supra* note 13, at § 31.

70. Note, *supra* note 55, at 1064-70.

71. See W. PROSSER, *supra* note 13, at § 31.

gone on to make that determination.”⁷²

The fear that jurors will merely substitute their own discretion for the official's rests on the fact that in decisions involving discretion “[a]lmost invariably, a reasonable man could have decided either way”⁷³ But courts can allay this fear greatly by requiring a jury instruction which clearly warns jurors that they must find in favor of liability only if there occurred an abuse of discretion which no reasonable man could have made. When the subject matter is highly technical and the decision was made by a well-qualified “expert,” courts can require an additional instruction warning the jurors to consider this factor heavily in their determination of the unreasonability of the risk taken. Furthermore, defense counsel will of course stress these issues in argument and testimony. In extreme cases, the issues might even justify a directed verdict. It is possible that such safeguards might not provide the same degree of protection which absolute immunity supposedly achieves, but any differential seems clearly outweighed by the dangers of unchecked absolute discretion—dangers which are especially great in decisions involving racial issues.⁷⁴ And the slim chance of infrequent intrusions into the separation of powers certainly bodes no more ill for our institutional integrity than does the opportunity for unreviewable breaching of “the supreme Law of the Land.”⁷⁵ Abandonment of all discretionary exceptions has already been urged with respect to municipal liability,⁷⁶ and the arguments apply equally as forcefully to liability of the state.

II

RACIAL EQUAL PROTECTION CASES BROUGHT UNDER THE EQUAL PROTECTION CLAUSE

A. The Constitutional Mandate for Governmental Liability

Most denials of racial equal protection are not subsumable within an ordinary tort category, so that a remedy for these wrongs must be grounded upon a violation of the equal protection guarantee itself. In such cases a damages remedy against states or municipalities is mandated by the necessity of effectuating the supremacy of constitutional rights. Case law indicates clearly that, when constitutional rights are at issue and presently available remedies are insufficient, courts have a duty to provide creative relief which will truly effectuate those rights.

72. Note, *supra* note 55, at 1067.

73. Van Alstyne, *supra* note 17, at 975.

74. See text accompanying notes 18-22 *supra*.

75. U.S. CONST. art. VI.

76. Note, *supra* note 55, at 1066-70.

1. *The Requirement of Adequate Remedial Effectuation of Constitutional Rights*

a. *In Terms of Protection*

Judicial creation of the exclusionary rule in criminal cases clearly illustrates the mandate. The courts were well aware that the rule would suppress relevant and reliable evidence,⁷⁷ but they nevertheless fashioned it because no other available remedy was sufficiently effective in protecting the constitutional rights at issue. In *People v. Cahan*,⁷⁸ for example, Justice (now Chief Justice) Traynor of the California supreme court stated that "[w]e have been compelled" to adopt the doctrine in California "because other remedies have completely failed to secure compliance with the constitutional provisions. . . . [N]either administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures."⁷⁹ The United States Supreme Court employed similar reasoning in *Mapp v. Ohio*,⁸⁰ quoting extensively from the *Cahan* opinion and stating that the remedy must be provided if the constitutional guarantee were not to become a mere "form of words."⁸¹

Judicial concern for constitutional effectuation in terms of remedies has been conspicuously evident when the constitutional guarantee in question is racial equal protection.⁸² Available relief must really *work*, or a potentially more effective remedy must be provided. *Green v. County School Board*,⁸³ a recent school desegregation decision of the United States Supreme Court, exemplifies the imperative. Like many other school boards in the South, the respondent had been using a "freedom of choice" plan to desegregate its schools. The plan was ineffective, but the board continued to use it anyway. The Court, in compelling creation of a new program, emphasized that the use of a plan which failed "to provide meaningful assurance of prompt and ef-

77. E.g., *People v. Cahan*, 44 Cal. 2d 434, 443, 282 P.2d 905, 910 (1955).

78. 44 Cal. 2d 434, 282 P.2d 905 (1955).

79. *Id.* at 445-47, 282 P.2d at 911-13.

80. 367 U.S. 643 (1961).

81. *Id.* at 655.

82. The expanding effectuation of the equal protection clause until it inevitably reaches "the pre-eminence [and] scope its framers intended" was predicted as early as 1949. See Tussinan & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). It was suggested that the clause appeared "to be entering the most fruitful and significant period of its career." *Id.* at 381. The judiciary's particular concern for equal protection effectuation in racial cases stems from the traditional concept that the fourteenth amendment applies "with a highly special force to the racial field." Black, *supra* note 1, at 70. See *Strauder v. West Virginia*, 100 U.S. 303, 306-07, 310 (1879); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71-72 (1872); *Loving v. Virginia*, 388 U.S. 1 (1967); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131, 143 (1950).

83. 391 U.S. 430 (1968).

fective disestablishment of a dual system" was "intolerable."⁸⁴ It added:

The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation.⁸⁵

The "freedom of choice" plan may be successful in some contexts, the Court said, but it must not be used unless it offers "real promise" of full effectiveness.⁸⁶ Even though it may achieve some progress, "if there are reasonably available other ways," such as zoning, which promise "speedier and more effective" desegregation, such alternatives must be employed if equal protection rights are to be genuinely protected.⁸⁷

*Barrows v. Jackson*⁸⁸ further typifies the extent of the constitutional mandate. As in the earlier case of *Shelley v. Kraemer*,⁸⁹ the United States Supreme Court dealt in *Barrows* with a racially restrictive covenant. But whereas the plaintiff in *Shelley* sought to enjoin possession by the blacks who had purchased property from the breaching co-covenantor, the plaintiff in *Barrows* sued the co-covenantor himself, demanding money damages for his breach.⁹⁰ The Court granted the defendant standing to assert the third-party equal protection rights of the blacks, despite the general principle of standing that one cannot challenge constitutionality unless "he is within the class whose constitutional rights are allegedly infringed."⁹¹ The Court stressed that this remedial flexibility was required in order to adequately protect racial equal protection rights, because the blacks, *Shelley v. Kraemer* remedy alone was insufficient; unless the Court permitted the third-party assertion, "a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur."⁹² Thus, the

84. *Id.* at 438.

85. *Id.* at 438-39.

86. *Id.* at 440.

87. *Id.* at 441. The new Burger Court has indicated that the effectiveness of a desegregation plan is to be judged in terms of its potential for providing desegregation "at once" rather than merely with "all deliberate speed." *Alexander v. Holmes County Bd. of Educ.*, 90 S. Ct. 29 (1969) (per curiam). Because the standard of allowing "all deliberate speed" for desegregation had proved ineffective, the Court held that it "is no longer constitutionally permissible." *Id.* Hence "the Court of Appeals should have denied all motions for additional time" *Id.*

88. 346 U.S. 249 (1953).

89. 334 U.S. 1 (1948).

90. 346 U.S. at 251.

91. *Id.* at 256.

92. *Id.* at 254.

Court held, "the reasons which underlie our rule denying standing to raise another's rights . . . are outweighed by the need to protect the fundamental rights [at issue]."⁹³

b. In Terms of a Full Return to the Status Quo Ante

The necessity of effectuation of racial equal protection rights demands not only efficacy in terms of present and future protection of the plaintiff's interest, but also in terms of his full return to the status quo ante—the elimination of the *effects* of discriminatory acts as well as the acts themselves. The plaintiff should be restored, to the fullest extent possible, to the position he enjoyed prior to the discriminatory act. Although this is the traditional measure of recovery in all non-contract actions,⁹⁴ the judiciary has been particularly concerned with it in cases dealing with racial equal protection.

Many of the voting rights cases illustrate this imperative. *Louisiana v. United States*⁹⁵ was a Supreme Court case dealing with Louisiana's use of certain discriminatory voter eligibility tests. Because of the gross discrimination in voter registration in prior years, the district court's injunction required a complete re-registration of voters as a precondition to state adoption of an otherwise acceptable voting "citizenship test." The Supreme Court affirmed, noting that the absence of discrimination in the future would not be sufficient to adequately restore the status quo ante: "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."⁹⁶ "The need to eradicate past evil effects," the Court continued, "completely justified the District Court in entering the decree it did."⁹⁷ Similarly, the Fifth Circuit Court of Appeals in *Alabama v. United States*⁹⁸ affirmed a district court order to re-register eligible black voters, stressing that "complete relief 'requires that the decree . . . correct the effect of the Board's past discriminatory practices. . . .'"⁹⁹ In *United States v. Ward*¹⁰⁰ the Court of Appeals went so far as to apply "freezing principles" in order to remedy the effects of discrimination: Black voting applicants would be tested by standards formerly applied to whites rather than by the new, higher standards cur-

93. *Id.* at 257.

94. "[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort." RESTATEMENT OF TORTS § 901, comment *a* at 537 (1939); *e.g.*, CAL. CIV. CODE § 3333 (West 1954).

95. 380 U.S. 145 (1965).

96. *Id.* at 154 (emphasis added).

97. *Id.* at 156.

98. 304 F.2d 583 (5th Cir. 1962), *aff'd mem.*, 371 U.S. 37 (1962).

99. 304 F.2d 583, 589 (5th Cir. 1962).

100. 349 F.2d 795 (5th Cir. 1965).

rently being applied to all. The relief was constitutionally mandated because "so long as the 1,760 white voters retain their preferential permanent registration . . . Negroes suffer the consequences of *past* discrimination even though the pattern or practice ceases as to all contemporary applicants" ¹⁰¹

The courts have also demonstrated this concern in jury discrimination cases. In *Mitchell v. Johnson*,¹⁰² an Alabama federal district court found systematic exclusion of blacks from jury service. The court stated that a prohibitory injunction would be issued, but that additional relief was required to ensure "strict accordance" with "constitutional principles."¹⁰³ The mandate of the equal protection clause necessitated "emptying the Macon County jury box, abandoning the present Macon County jury roll," and starting the jury selection process afresh.¹⁰⁴ Similar action was decreed by the Fifth Circuit Court of Appeals in the recent case of *Pullum v. Greene*,¹⁰⁵ where "federal constitutional mandates" were again held to require the "receding of past wrongs."¹⁰⁶

Desegregation cases, especially those dealing with de jure school desegregation, have presented recurring illustrations of the judicial attitude. Courts have demanded not only the cessation of segregation—via invalidation of segregation statutes or practices—but also a complete eradication of the effects entrenched by the old system. They have repeatedly commanded restoration of the status quo ante, whether it be by means of "freedom of choice" plans, "free transfer" plans, busing of students, geographical re-zoning, teacher transfers, or school "pairing."¹⁰⁷ Indeed, judicial concern for the status quo ante has increasingly pervaded more and more areas of conduct. In the recent case of *United States v. Beach Associates, Inc.*,¹⁰⁸ a federal district court compelled a beach club not only to cease its policy of racial segregation, but also to issue extensive publicity to remedy the longstanding general public impression that the facilities were segregated. To succeed in "eliminating the effects" of the discrimination, the court ordered the defendants to provide "notice to the general public that the beach and cottage are places of public accommodation, that they are not private, and that they are available to persons of all races on an equal basis" ¹⁰⁹

101. *Id.* at 803. The Fifth Circuit has been especially active on this issue. See, e.g., *United States v. Duke*, 332 F.2d 759, 768-69 (5th Cir. 1964).

102. 250 F. Supp. 117 (M.D. Ala. 1966).

103. *Id.* at 123.

104. *Id.*

105. 396 F.2d 251 (5th Cir. 1968).

106. *Id.* at 257.

107. See generally *Green v. County School Bd.*, 391 U.S. 430 (1968).

108. 286 F. Supp. 801 (D. Md. 1968).

109. *Id.* at 808.

If, as the courts have indicated, it is imperative to effectuate the supremacy of the equal protection clause in racial cases—if courts indeed have a duty to provide relief which is truly effective in terms of protection, deterrence, and restoration of the status quo ante—then judicial provisions of a damages remedy against states or cities for denial of racial equal protection is vital. The damages remedy would provide the most positive hope for compliance with this constitutional mandate, presently available remedies having proved dishearteningly ineffective.

2. *The Inadequacy of Presently Available Remedies*

a. *Damages Suits Against the Agent*

When the wrong has been committed by a state or municipal official, a plaintiff might attempt to sue the official for damages. In many states, however, he is absolutely protected by immunity in almost all of his actions.¹¹⁰ Even in those states where immunity has been abrogated, a considerable "discretionary exception" usually remains.¹¹¹ And where the agent is not immune in some way, all too often he is judgment-proof; damages are simply uncollectable.¹¹² This situation is most characteristic of police torts; indeed, recognition of the meaninglessness of private damages suits was one of the bases for judicial adoption of the exclusionary rule.¹¹³ Even in the few states—such as California¹¹⁴—which provide statutorily for indemnification of employees involved in tort actions, there is no indemnity for exemplary or punitive damages¹¹⁵—and there is ordinarily no indemnity at all if the employee was guilty of corruption, actual malice, or actual fraud, or if he was not acting within the scope of his employment.¹¹⁶ Furthermore, there is no indemnity unless the employee makes a timely written request for state defense at his trial; if he fails to do so for any reason, the plaintiff has no way to protect himself from an uncollectable judgment.¹¹⁷

Perhaps most important, even if the responsible agent is neither immune nor judgment-proof, a damages suit against him will usually fail to provide an adequate deterrent effect. Genuinely effective relief clearly demands not only that the particular discriminatory acts be stopped, but also that the plaintiff—and others similarly situated—re-

110. See W. PROSSER, *supra* note 13, § 126.

111. See *id.*

112. Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 450 (1941); 16 CLEV.-MAR. L. REV. 448, 449, 450 (1967).

113. See, e.g., *People v. Cahan*, 44 Cal. 2d 434, 445, 447-49, 282 P.2d 905, 911-12, 913-14 (1955).

114. CAL. GOV'T CODE §§ 825-825.6 (West 1966).

115. *Id.*

116. *Id.*

117. A. VAN ALSTYNE, *supra* note 37, § 10.22.

ceive reasonable assurance that the same or similar acts will not recur.¹¹⁸ This can be accomplished only by providing "incentives to top officials, by imposing liability on the governmental unit. The top officials, motivated by threats to their budgets, would issue the orders that would be necessary to check the abuses in order to avoid having to pay damages."¹¹⁹

The situation with respect to police officers has prompted special concern. While it issued a caveat that "[w]e do not reach those policy considerations," the Supreme Court in *Monroe v. Pape* felt nonetheless compelled to mention the fact, urged by appellants, that "private remedies against officers . . . are conspicuously ineffective" and that if the governmental entity were held liable it would be caused "to eradicate abuses that exist at the police level."¹²⁰ Because police violations of racial equal protection are not uncommon but rather are frequently a matter of ingrained habit and "custom,"¹²¹ only a sanction which affects the controlling policymakers will ensure the needed reforms. Even the exclusionary rule has not satisfied the need for an adequate deterrent;¹²² indeed, Chief Justice Warren in *Terry v.*

118. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 648, 651-53, 655-56 (1961); *Elkins v. United States*, 364 U.S. 206, 217-18, 220-21 (1960); *People v. Cahan*, 44 Cal. 2d 434, 445, 447, 448-49, 282 P.2d 905, 911-12, 913-14 (1955).

119. 3 K. DAVIS, *supra* note 16, § 25.17 (Supp. 1965).

120. 365 U.S. 167, 191 (1961).

121. Brief for Petitioners at 41-42, *Monroe v. Pape*, 365 U.S. 167 (1961).

122. Because it is only a rule of evidence, "the presence of the exclusionary rule in a jurisdiction may in certain situations influence the police to reject efforts to make a case for formal prosecution and to rely on such informal and illegal sanctions as they see fit to devise and apply." Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 39. The frequent result is that police become more dependent upon the tools of harassment and confiscation. The head of a federal narcotics unit has said that "his men do search unlawfully because they have an obligation 'to get narcotics off the street' even if no prosecution results." J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 193 n.92 (1966). Harassment and/or arrest without any contemplated prosecution are becoming increasingly popular as weapons against unpopular political advocacy. And police have no qualms whatever about employing unconstitutional methods to gather information "for intelligence purposes" against those they consider "subversive." D. WHITEHEAD, THE F.B.I. STORY 339-40 n.2 (1956). Police raids for the sole purpose of confiscation—variously termed "tip-overs," "kick-ins," or "bust-ins"—are a common practice. L. TIFFANY, D. MCINTYRE, JR., & D. ROTENBERG, DETECTION OF CRIME 187-89 (1967). Even when the police do contemplate actual prosecution of the individual, the exclusionary rule often presents more of a theoretical deterrent than an actual one. It is often quite simple "to create the impression that legal requirements have been complied with:"

This can be done, for example, in situations where arrests and searches are made upon inadequate grounds but the officer testifies later that the person arrested fitted a general description given in a police bulletin of a person wanted by the police. This process of making the law fit what was done, rather than conforming the practice to the requirements of law, produces an appearance of conformity and thus may make it possible to achieve conviction without having, at the same time, to change the practice.

W. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 429 (1965).

*Ohio*¹²³ was careful to note that judicial approval of the exclusionary rule "should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate."¹²⁴ Thus Professor Foote has argued extensively¹²⁵ that "Governmental liability is important not only to provide financially responsible defendants, but primarily so that the deterrent will be effective where it is needed—at the level where police policy is made."¹²⁶ Professor Davis is even more emphatic:

Policemen, as experience proves, are largely indifferent to theoretical personal liability, which is sporadically imposed and which typically lags years behind the abuse. But policemen, like any other employees, do respond to rules enforced by their superiors, for the enforcement may be steady, swift, and sure, and the penalties, including suspension or dismissal, provide fully effective motivation.¹²⁷

b. Non-Damages Remedies Against the Government

Remedies other than damages, such as injunctive or declaratory relief,¹²⁸ are available against states and municipalities for denial of racial equal protection. But very often the discriminatory act in question has already terminated, so that there is no present behavior to enjoin. The injured party might seek equitable relief protecting against recurrences of the same or similar activities, but many injuries are caused not by repetitive or institutionalized conduct, only by an isolated act which probably will not recur. In any event, the original constitutional

Indeed, "Skeptics, including in their rank some very able and very wise trial judges—as well as prosecutors and police—suggest that with the [*Mapp*] decision came an increase, significant in its proportions, in 'accommodation' by police officers of *their stories*, not always of *their actions*, to the law."

[T]he seeming increase of *improbable* testimony . . . by police officers since the [*Mapp*] decision . . . creates some question as to the degree that [*Mapp*] has affected police testimony and the degree to which it has affected police actions.

Kuh, *The Mapp Case One Year After: An Appraisal of Its Impact in New York*, 148 N.Y.L.J. 4, n.2 (1962). Furthermore, police can often avoid the exclusionary rule altogether by using the illegally-obtained evidence against someone other than the defendant himself. Such evidence may be legally used, for instance, against co-defendants whose fourth amendment rights were not violated by an illegal eavesdropping against the defendant, even though introduction of such evidence against them is clearly damaging. *Alderman v. United States*, 394 U.S. 165 (1968) (standing to assert the fourth amendment violation is limited to the defendant himself and the owner of the property on which the eavesdropping was perpetrated).

123. 392 U.S. 1 (1968).

124. *Id.* at 15.

125. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 495-96 (1955).

126. *Id.* at 514.

127. 3 K. DAVIS, *supra* note 16, § 25.17 (Supp. 1965).

128. *E.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

invasion will remain fully unremedied.

Even if the wrong is such that an equitable remedy would be meaningful in theory, it is often meaningless in practice. A conspicuous example is the history of Southern school desegregation: After fourteen years, Southern schools remain nearly as segregated as when *Brown v. Board of Education*¹²⁹ began the long train of desegregation ultimatums in 1954.¹³⁰ The inefficacy of the remedy is due partially to the lack of effectual sanctions guaranteeing compliance; the threat of a contempt citation is too remote or improbable to provide the needed impetus. Another reason for inefficacy is the fact that defendants often can easily circumvent injunctions or judicially invalidated statutes merely by altering the *form* of their discriminatory activity. For example, faced with a declaration of the unconstitutionality of its school segregation laws and a subsequent order to desegregate, a Virginia county school board responded by closing down its public schools and giving "tuition grants" to students attending certain exclusively-white private schools.¹³¹ Similarly, faced with an invalidation of "grandfather clauses" in state voting eligibility laws, Louisiana responded by requiring an "interpretation test," under which the voting registrar determined eligibility in his unlimited discretion, and by relying even more heavily upon the "white primary" system to continue to keep blacks out of the electoral process.¹³² And when the white primaries were invalidated¹³³ and the "interpretation test" did not appear to be working sufficiently well, the Louisiana legislature responded by creating a "Segregation Committee" which would cooperate with white "Citizens Councils" to instruct registrars to exclude blacks and to erase them wholesale from the voting rolls.¹³⁴ Indeed, the opportunities for evasion which accompany non-damages remedies have become so glaring that a federal court of appeals in a recent discrimination case¹³⁵ actually found it necessary to state that the injunction it was about to issue should not be taken as "a paper proclamation of good intentions to be filed away and forgotten."¹³⁶

In criminal cases, non-damages remedies are even more likely to be a mere slap on the wrist. Writs of prohibition or injunctions—assuming they can be obtained at all in the particular fact situation—may

129. 347 U.S. 483 (1954).

130. See *Green v. County School Bd.*, 391 U.S. 430, 438-39, (1968). See also *Alexander v. Holmes County Bd. of Educ.*, 90 S. Ct. 29 (1969) (discussed in note 87 *supra*).

131. *Griffin v. County School Bd.*, 377 U.S. 218, 220-23 (1964).

132. *Louisiana v. United States*, 380 U.S. 145, 148-49 (1965).

133. *Smith v. Allwright*, 321 U.S. 649 (1944).

134. *Louisiana v. United States*, 380 U.S. 145, 149-50 (1965).

135. *Wall v. Stanly County Bd. of Educ.*, 378 F.2d 275 (4th Cir. 1967).

136. *Id.* at 279.

have little deterrent effect with respect to future prosecutions. The state has little to lose in continuing to prosecute similar cases; its costs in terms of litigation expenses are minimal, especially in view of the limited number of discrimination plaintiffs who can afford adequate legal counsel and the even smaller number who can afford the money¹³⁷ or time for appeal. Even when precedent indicates that a conviction without doubt will be overturned on appeal, and even when there is a likelihood of appeal, the government may continue its current practices for pure nuisance value alone—the state's "deterrent" value in forcing defendants to undergo the physical hardships and loss of freedom accompanying arrest and detention, the loss of time and energy accompanying the legal proceedings, and the loss of money incurred by attorneys' fees and bail.¹³⁸ Moreover, even if the government's prosecution is in good faith, the cost of its mistake is nonetheless borne almost entirely by the aggrieved party.

Furthermore, even assuming that relief other than damages were effective in theory and in practice, it is usually not really available to most victims of racial discrimination because of its nonmonetary character. Such a plaintiff too often considers non-damages remedies too time-consuming and bothersome to obtain, especially since his personal rewards would be few or nonexistent. The possibility of pecuniary recompense which a damages remedy offers would provide an incentive for him to seek redress. More important, even when desire may be ample, money may not. This is often the case even in class actions. A damages remedy would help alleviate this financial problem by offering the possibility of contingent fee arrangements with attorneys.

Thus, although it would not be a panacea, a damages remedy must be added to the remedial arsenal. It would offer the most positive hope of effective protection of racial equal protection rights, especially in terms of "the deterrent function essential to the protection of constitutional interests."¹³⁹ Additionally, it offers the most positive hope in terms of effectuating the fullest possible return to the status quo ante. Non-damages remedies, questionably adequate as they are in terms of the status quo ante with respect to electoral, jury, and educational systems,¹⁴⁰ are generally even less adequate when individuals rather than institutions are the target. And even in the institutional context the

137. Legal Aid societies and Neighborhood Legal Assistance organizations restrict their provision of free services to those in the very lowest poverty levels, delimited by a specific "annual income" figure. And they are usually severely overworked and understaffed, so that even those qualifying financially are often turned away.

138. *E.g.*, *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

139. Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 17 (1968).

140. See text accompanying notes 94-109 *supra*.

remedies wholly fail to compensate plaintiffs for their loss of citizenship rights, their loss of dignity, their inconvenience and humiliation. In criminal cases, the incompleteness of such relief is even more stark. Even if prosecution is successfully barred, the fact remains that equal protection rights were violated and remain violated. Moreover, in criminal cases the victim has suffered even *more* damage than in the noncriminal context: He has suffered not just the detriment of being denied the ability to exercise certain rights, but also the harm resulting from the mechanics of the criminal procedural process—the loss of freedom, time, and money. The state or city has already denied equal protection, the state or city has already exacted a punishment from the defendant; barring prosecution merely prevents the government from imposing an *additional* penalty.

Monetary relief is truly an essential component of any attempted restoration of the status quo ante. The Court of Appeals for the Fifth Circuit recognized this fact in *United States v. McLeod*.¹⁴¹ Local officials had attempted to intimidate blacks into refraining from registering to vote by arresting a number of them on groundless charges. In an equity action at the instance of the United States, the court stated:

In order to grant full relief in this case, we must see that as far as possible the persons who were arrested and prosecuted . . . are placed in the position in which they would have stood had the county not acted unlawfully. Only in this manner may we be sure that the possibility of unlawful arrest and prosecution will not deter Negroes from participating in the voting process. . . . Of course no court order can completely eradicate the effect of the . . . actions. If nothing else remains, the mental anguish and the nuisance of having to defend baseless prosecutions could well deter Negroes from participating in the registration process. The Court can and must, however, do all within its power to eradicate the effect of the unlawful prosecutions. . . . We therefore hold that the district court should enter an order requiring the . . . County to return all fines, and to expunge from the record all arrests and convictions resulting from the prosecutions which form the basis of these suits. The individuals so prosecuted would not have had to bear the costs of their defense had these prosecutions been enjoined as they should have been. The district court's order should therefore include a requirement that the county reimburse the individuals involved for the costs, including reasonable attorneys' fees, incurred in the defense of the state criminal prosecutions. The district court should take whatever additional action is necessary to return the individuals to their status quo ante.¹⁴²

Although, as the court noted, no monetary relief "can completely

141. 385 F.2d 734 (5th Cir. 1967) (Wisdom, J.).

142. *Id.* at 749-50.

eradicate the effect" of discriminatory acts, at least such relief usually brings a plaintiff much closer to the status quo ante than does non-monetary relief alone. When a discriminatory act results in pecuniary injury, a monetary award is the only relief which makes the plaintiff whole.¹⁴³ When injury is nonpecuniary, money is certainly no substitute—in a literal sense—for lost citizenship rights and degradation; but, as tort law recognizes as a general principle,¹⁴⁴ money is the most nearly complete "compensation" available. If the relief granted in the *McLeod* case were available to all discrimination victims, it would be a fine start. But a court order such as *McLeod's* is one which few judges currently are willing to provide as a general rule, especially in suits where the United States Department of Justice is not the moving party. Moreover, since such a suit is in equity, monetary awards will always remain a matter of the judge's discretion, and the plaintiff is denied a jury trial.¹⁴⁵ A damages remedy at law, generally available, would afford *all* victims of racial discrimination a genuinely meaningful chance for restoration to their status quo ante.

B. Routes to Liability

In fulfilling their duty of constitutional effectuation, the courts have available two different remedial approaches. Congress has already provided one remedial vehicle in section 1983, title 42, United States Code¹⁴⁶ if its intent and scope are properly interpreted. Alternatively, courts can create a damages remedy under the fourteenth amendment itself.

1. Applicability of Section 1983 to the Extent of State Abrogation of Sovereign Immunity

Section 1983, which affords a civil remedy, including damages, for "the deprivation of any rights, privileges or immunities secured by the Constitution,"¹⁴⁷ would be a convenient vehicle for relief¹⁴⁸ in racial

143. "Where there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that he would occupy had no tort been committed." RESTATEMENT OF TORTS § 903, comment *a* at 540 (1939).

144. Although there "is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering," "[n]evertheless, damages given for pain and humiliation are compensatory in that they give to the injured person some pecuniary return for what he has suffered or is likely to suffer." *Id.*

145. See H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 13 (2d ed. 1948).

146. 42 U.S.C. § 1983 (1964).

147. The full text of the statute is quoted in note 9 *supra*.

148. The statute can be employed in state as well as federal courts; the only

equal protection cases. The statute would be broadly applicable to the whole spectrum of discriminatory activities. Unfortunately, however, *Monroe v. Pape*¹⁴⁹ has thus far barred the door. Plaintiffs in that action, victims of an illegal search and arrest, sued Chicago police officers and the City of Chicago for violations of fourteenth amendment rights. The United States Supreme Court affirmed dismissal as to the city, holding that municipalities are not "within the ambit of" section 1983.¹⁵⁰ Subsequent lower court decisions¹⁵¹ have held that *Monroe's* construction of the statute excludes states as well as municipalities from its ambit.¹⁵²

Justice Douglas, speaking for the Court in *Monroe*, based his conclusion that Congress did not intend the term "person" to apply to municipalities upon Congress' rejection of an amendment which would have made municipalities liable. The amendment was introduced during the consideration of the Act of April 20, 1871—the bill which eventually became section 1983 of the present Code—by Senator Sherman of Ohio. It was passed by the Senate but rejected by the House.¹⁵³ A conference committee wrote another version, which was again rejected by the House.¹⁵⁴ The two versions of the Sherman amendment were substantially identical, providing generally that a "county, city, or parish" would be liable whenever there occurred within it certain acts of racial violence, such as destruction of buildings, whipping, or murder.¹⁵⁵ The Court concluded that "The response of the Congress to the

restriction will be that a plaintiff cannot sue a state in a federal forum, because of the eleventh amendment. Although the amendment on its face bars suit against a state in federal court only by "Citizens of another State, or by Citizens or Subjects of any Foreign State," the Supreme Court has construed it to bar suit by citizens of the same state. *Hans v. Louisiana*, 134 U.S. 1 (1890). The amendment does not apply, however, to political subdivisions of a state, such as counties or cities. *Hopkins v. Clemson Agricultural College*, 221 U.S. 636 (1910).

149. 365 U.S. 167 (1961).

150. *Id.* at 187. In the opinion the Court refers to the statute by its designation as R.S. § 1979.

151. *Williford v. California*, 352 F.2d 474 (9th Cir. 1965); *Charlton v. City of Hialeah*, 188 F.2d 421 (5th Cir. 1951).

152. Such holdings would be important only in a state forum, since a federal forum suit against a state would be already barred by the eleventh amendment (see note 148 *supra*).

153. 365 U.S. at 188.

154. *Id.* at 188-89.

155. The first version provided:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case

proposal to make municipalities liable . . . was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."¹⁵⁶

It is significant,¹⁵⁷ however, that at the time the amendment was rejected no city or state had yet waived any governmental immunity in

the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damaged by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

CONG. GLOBE, 42nd Cong., 1st Sess. 663 (1871). The second version provided:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damaged by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment.

Id. at 749.

156. 365 U.S. at 191.

157. Courts may be said to have a duty, "in applying the statutory language [of section 1983], to fit the statute as harmoniously as may be into the familiar and generally accepted legal background . . ." *Francis v. Lyman*, 216 F.2d 583, 587 (1st Cir. 1954) (Magruder, C.J.).

tort.¹⁵⁸ In that context, the Sherman amendment would have achieved municipal liability by congressional destruction of the municipality's governmental immunity defense. Thus the defeat of the amendment could be attributed solely to a reluctance to force liability upon *unwilling* governmental entities, and thus *Monroe* would not bar liability under section 1983 to the extent that an entity has abrogated its immunity on its own initiative.

The discussions in Congress indicate that the *imposition* of liability was the underlying concern of Congress. The *Monroe* opinion itself stated that Congress' debates focused upon the "constitutional power of Congress to *impose* civil liability on municipalities."¹⁵⁹ And the very statements quoted by the Court to support its holding reveal this principal concern of Congress. The opinion quoted¹⁶⁰ a statement in the House by one of its representatives to the conference committee: "We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that that section *imposing* liability upon towns and counties must go out or we should fail to agree."¹⁶¹ And further that "the House had solemnly decided that in their judgment Congress had no constitutional power to *impose* any obligation upon county and town organizations, the mere instrumentality for the administration of state law."¹⁶² The congressional discussions all accepted as a postulate the fact that inclusion of cities would entail abrogation of a government's immunity defense, something which would not occur where it has already abolished its own defense voluntarily. Thus, it may be argued,

Monroe seems to exclude public entities from the purview of the federal Civil Rights Act for the reason that (and thus perhaps only to the extent that) traditional concepts of sovereign immunity as recognized by state law were intended to be left undisturbed by Congress. To the extent that state law, as in California, admits liability of public entities for the torts of their employees, the reasons for limiting the application of § 1983 to public employees no longer are persuasive.¹⁶³

The possibility remains, of course, that Congress did not intend municipalities to be liable *even if* they had "consented" to liability. The language in *Monroe* does not resolve the issue; because of its impreciseness it can be used to support either view. However, the language used

158. See Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795, 801-21.

159. 365 U.S. at 190 (emphasis added).

160. *Id.*

161. CONG. GLOBE, *supra* note 155, at 804 (emphasis added).

162. *Id.* (emphasis added).

163. A VAN ALSTYNE, *supra* note 37, § 7.8.

in cases¹⁶⁴ protecting certain state officials—such as judges, legislators, court officials, and prosecutors—from liability under section 1983 provide some hint of the legislative attitude. In each of these cases the category of officer involved was protected under state law by sovereign immunity. The narrow language of these opinions is significant as an indication of the general judicial view of Congress' concerns and intent: The holdings were based quite unambiguously on a theory that Congress merely did not intend to abrogate the immunity in question. The opinions leave no room to believe that liability was denied on a theory that Congress intended section 1983 never to apply to these individuals, that liability would not issue even if a state were to waive the sovereign immunity of the class of officers involved.¹⁶⁵ For example, in *Pierson v. Ray*,¹⁶⁶ a recent Supreme Court decision rejecting a claim against a judge under the statute, the Court stated:

The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove*, 341 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established¹⁶⁷

Similarly, *Francis v. Crafts*,¹⁶⁸ a First Circuit decision prior to *Pierson*, upheld dismissal of a section 1983 action against a judge on the same ground—that Congress did not intend to abrogate the immunity in question.¹⁶⁹ Indeed, *Tenney v. Brandhove*,¹⁷⁰ cited in *Pierson*, made a point of stressing that Congress was reluctant to intrude upon a state's sovereign immunity: "Did Congress by the general language of its 1871 statute mean to *overturn* the tradition of legislative freedom . . . carefully preserved in the formation of State and National Governments here?"¹⁷¹

The argument against a blanket exclusion of municipalities has

164. *E.g.*, *Pierson v. Ray*, 386 U.S. 547 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kenney v. Fox*, 232 F.2d 288 (6th Cir. 1956); *Francis v. Lyman*, 216 F.2d 583 (1st Cir. 1954); *Cawley v. Warren*, 216 F.2d 74 (7th Cir. 1954); *Francis v. Crafts*, 203 F.2d 809 (1st Cir. 1953).

165. The issue of *non-immune* officers was not, of course, directly before the courts in these cases. Nevertheless, the courts did have the option of explaining their holdings according to a broad notion of general congressional intent—that Congress did not intend the type of officer to be liable, under any circumstances. They did not exercise that option. Nor were they at all ambiguous; they quite clearly restricted their discussions to Congress' intent with respect to abrogation of the immunity.

166. 386 U.S. 547 (1967).

167. *Id.* at 554.

168. 203 F.2d 809 (1st Cir. 1953).

169. *Id.* at 812.

170. 341 U.S. 367 (1951).

171. *Id.* at 376 (emphasis added).

been raised so far in only one case, *Brown v. Town of Caliente*.¹⁷² That case involved an action against a town and county alleging an unlawful search and coerced confessions. The plaintiff contended on appeal that

[*Monroe v. Pape*] and other cases announcing the rule of immunity of political subdivisions from suit under the Civil Rights Act, were based on the theory that political subdivisions had sovereign immunity; and since sovereign immunity has been abolished in Nevada, the bar to such an action has been removed.¹⁷³

The court of appeals denied the contention with a single sentence:

The Supreme Court having considered the Civil Rights Act, and having held municipalities were not liable under it, we cannot see how any action by the state of Nevada, either by its courts or by the Legislature, . . . by abolishing sovereign immunity in Nevada, can bring about a different reading or different result to [*Monroe v. Pape*].¹⁷⁴

The court's "argument" assumes its own conclusion. The court assumes without analysis that *Monroe's* rejection of municipal liability included *all* municipalities, those which had abrogated sovereign immunity as well as those which had not. Not one item of supporting evidence or reasoning is offered. The court merely cites¹⁷⁵ a few post-*Monroe* lower court decisions,¹⁷⁶ none of which deal with the sovereign immunity issue at all. The cases simply cite *Monroe* and each other.¹⁷⁷ In those cases where the issue might have arisen—where the state in question had abolished its immunity—the opinions are nonetheless silent. Apparently *Brown* is the only case where the issue was even presented, and *Brown's* inadequate treatment of the problem cannot be considered dispositive.

2. Judicial Creation of a Remedy Directly Under the Fourteenth Amendment

Even if a court considers section 1983 inapplicable to states or

172. 392 F.2d 546 (9th Cir. 1968).

173. *Id.* at 547.

174. *Id.* at 548.

175. *Id.* at 547.

176. The court first cites the Ninth Circuit decisions in *Loux v. Rhay*, 375 F.2d 55, 58 (9th Cir. 1967); *Williford v. California*, 352 F.2d 474, 476 (9th Cir. 1965); *Harvey v. Sadler*, 331 F.2d 387, 390 (9th Cir. 1964); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963). The court then cites *Wallach v. City of Pagedale*, 359 F.2d 57 (8th Cir. 1966); *United States ex rel. Lee v. Illinois*, 343 F.2d 120 (7th Cir. 1965); *Garrison v. County of Bernalillo*, 338 F.2d 1002 (10th Cir. 1964); *Spampinato v. City of New York*, 311 F.2d 439 (2d Cir. 1962).

177. The cases usually just cite the phrases from *Monroe* like a simplistic formula. *E.g.*, *Wallach v. City of Pagedale*, 359 F.2d 57, 59 (8th Cir. 1966) ("a municipality is not within the purview of" section 1983); *Garrison v. County of Bernalillo*, 338 F.2d 1002, 1003 (10th Cir. 1964) ("not within the ambit of" section 1983).

municipalities under any circumstances, it could create a remedy on its own initiative pursuant to the fourteenth amendment itself. Use of the fourteenth amendment itself as the basis for a remedy is certainly not novel; it is normal procedure in suits for injunctions,¹⁷⁸ declaratory judgments,¹⁷⁹ mandamus,¹⁸⁰ and habeas corpus,¹⁸¹ and in judicial nullifications of convictions and statutes in criminal cases.¹⁸² If the fourteenth amendment is thus viewed as self-executing¹⁸³ with respect to these forms of relief, it should also be self-executing with respect to relief in the form of damages. If a court will provide a needed remedy in racial equal protection cases by overturning a conviction or enjoining enforcement of a statute on the basis of the fourteenth amendment alone, there is little reason¹⁸⁴ why it should not similarly provide a remedy to afford monetary relief.

However, no court has yet done so. Indeed, the only case¹⁸⁵ so far which comes near the issue is *Bell v. Hood*,¹⁸⁶ a federal district court decision on remand from the Supreme Court.¹⁸⁷ The court dismissed an action for damages brought under the fourth and fifth amendments on the ground of failure to state a claim on which relief could be granted. Plaintiffs claimed that the defendant F.B.I. agents performed searches and detentions which violated their constitutional rights; no applicable federal statute provided a remedy, since federal officers are

178. *E.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

179. *E.g.*, *Lee v. Washington*, 390 U.S. 333 (1968).

180. *E.g.*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

181. *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

182. *E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967).

183. That is, a court can provide such relief without the necessity of congressional enactment of a statute specifically granting the remedy. If the fourteenth amendment had not been viewed in this light, no relief could issue except pursuant to section 5 of the amendment ("The Congress shall have power to enforce this article by appropriate legislation").

184. One possible reason is that the remedy would have too great a disruptive effect upon governmental machinery. But the needlessness of such fears

is rapidly becoming obvious. We know from experience that the Federal Tort Claims Act has not hindered the public service and has not endangered the public safety . . . and the New York experience proves overwhelmingly that substituting sovereign responsibility for sovereign immunity can be wholly beneficial and in no respect harmful.

3 K. DAVIS, *supra* note 16, § 25.01. There has been "[g]radually mounting evidence that such liability was unlikely to be either fiscally excessive or administratively destructive. . . ." Van Alstyne, *supra* note 17, at 920. Indeed, "[i]t is an historical anomaly that the ordinary remedy of damages has become extraordinary" (Katz, *supra* note 139, at 43) for it "has traditionally been viewed as the standard, effective method, and the one which presents the least danger of interference with the proper functioning of government." *Id.* at 6.

185. *But see* *Nash v. Air Terminal Servs.*, 85 F. Supp. 545 (E.D. Va. 1949), discussed in note 200 *infra*.

186. 71 F. Supp. 813 (S.D. Cal. 1947).

187. 327 U.S. 678 (1946). The issue in the Supreme Court decision was solely one of jurisdiction. A district court had held that jurisdiction was lacking, for want of a

not covered by section 1983.¹⁸⁸ The court held that the Bill of Rights did not provide sufficient federal grounds for the plaintiffs' claim.

Most of the explicit grounds for the holding are not in point here,¹⁸⁹ but the decision is significant in its "implicit decision that the Constitution, without more, does not create duties enforceable at the instance of a party aggrieved,"¹⁹⁰ that a court is somehow very limited in its powers of remedial implementation when it is dealing with the Constitution instead of a statute or the common law. Because a constitutional rather than a statutory interest was at issue, the court did not consider employing the judicial power to create a remedy where a right does not provide a remedy on its face.

The existence of such power is undisputed in situations where the right has been created statutorily. This is the common "action on the statute," whereby a court creates a civil remedy in damages for violation of a duty or standard created by the legislature—created, for instance, by statutory administrative regulations¹⁹¹ or the criminal law.¹⁹² Since courts do possess such powers outside the constitutional context, judicial hesitancy when dealing with the Constitution implies a view that interests created by the Constitution should be treated differently from those created by statutes. But there is no basis for such a distinction, either in legal philosophy or legal history.¹⁹³ Presenting exhaustive research and analysis, one commentator has stated that:

Constitutionally defined interests in liberty, as rules of decision in ordinary cases, ought to be accorded the same legal status as other authoritative pronouncements. Interests in liberty can function as rules of decision only because, apart from their essence as statements of political ethics, they carry with them the force of ultimate authority.¹⁹⁴

He concludes that the remedial methodology employed in the "action on

federal question. The court of appeals affirmed. *Bell v. Hood*, 150 F.2d 96 (9th Cir. 1945). On certiorari the Supreme Court reversed, holding that the complaint did state a claim "arising under" federal law for the purposes of jurisdiction (28 U.S.C. § 41(1) (1940), *as amended*, 28 U.S.C. § 1331 (1964)), but expressed no opinion whether it stated a cause of action as pleaded.

188. See note 9 *supra*.

189. The holding was based largely on arguments relating to the immunity of federal officers and the nature of equitable relief. The arguments are set forth and analyzed in Katz, *supra* note 139, at 1-8.

190. *Id.* at 6.

191. A graphic example is the remedial implementation of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1964). See Katz, *supra* note 139, at 31-33.

192. See generally J. FLEMING, *THE LAW OF TORTS* 126-31 (3d ed. 1965).

193. See Katz, *supra* note 139, at 17-51. Although Katz speaks in terms of federal courts and the *Bell v. Hood* factual situation, his discussion seems generally applicable to all constitutionally defined rights.

194. *Id.* at 33.

the statute" situation should apply no less equally when the "statute" involved is the Constitution:

In what way is the Bill of Rights so different from acts of Congress that courts will devise an effective remedial system to enforce the duties created by the latter but not the former? Is not the Constitution a "super-statute" in the sense that, if it does differ from ordinary legislation, its commands must be taken more seriously, its effectiveness must be more profound?¹⁹⁵

The Constitution, "the political ethic that creates the duties upon which the fabric of our civil society depends," surely merits "at least as much remedial implementation as section 14(a) of the Securities Exchange Act of 1934."¹⁹⁶

Justice Black's opinion for the Supreme Court in its remand¹⁹⁷ of the *Bell* case seems to support this position, suggesting possible eventual reversal of the district court's rule.¹⁹⁸ The opinion noted the "merit"¹⁹⁹ of the plaintiff's action and emphasized that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."²⁰⁰

III

AN ADDITIONAL IMPERATIVE FOR JUDICIAL ACTION: THE "REPARATIONS" DEBT

Governmental liability in racial equal protection cases is mandated not only by the imperative of public policy²⁰¹ and the imperative of effectuating constitutional rights,²⁰² but also by a moral imperative. This is the imperative of reparations, of adoption of some feasible means of repaying the monetary and ethical debt of states and municipalities for the damage of 200 years of state-involved racism. The staggering

195. *Id.*

196. *Id.*

197. *Bell v. Hood*, 327 U.S. 678 (1946). See note 187 *supra*.

198. 61 HARV. L. REV. 362, 362-63 (1948).

199. 327 U.S. at 684.

200. *Id.* Indeed, in *Nash v. Air Terminal Services*, 85 F. Supp. 545 (E.D. Va. 1949), a district court stated that violation of the fifth amendment by unequal federal restaurant accommodations constituted "a cause of action for such damages as may have thereby been occasioned the plaintiff," citing the *Bell* Supreme Court case as support. *Id.* at 549. However, *Nash's* weight as authority seems scant. Its use of the phrase "cause of action" in its allusion to the Supreme Court decision—which ruled only on the jurisdictional issue (see note 187 *supra*)—seems to indicate a misreading of that opinion. This possibility is heightened by the fact that *Nash* did not even mention the *Bell* district court decision, nor did it discuss the issue at all.

201. See Part I, section A *supra*.

202. See Part II, section A *supra*.

record of past governmental involvement in racism actually demands nothing less than direct monetary reparations in order to repay the debt, but the problems involved in establishing a feasible administrative scheme of money distribution make such a direct approach almost impossible. However, if the discrimination victims of today were able to obtain relief which is monetary in nature, this would be a kind of indirect approach: Every dollar recovered by a member of a racial minority would be a dollar in partial payment not only of the immediate damage he suffered, but also of two centuries' worth of past damage. Provision of the remedy is, in short, the very *least* we can do to help repay the debt, even if only symbolically.

The concept of a reparations debt may seem spurious or extreme until, examining history, one realizes the *extent* of racial oppression. No matter what the degree of "state action" considered, the record of state-involved racism is almost incredible—especially, of course, with respect to blacks. The slavery structure, in which state and municipal involvement was clear and open,²⁰³ had effects ranging far beyond the immediate harms of the bondage itself. Before reaching their destination in the United States, over two-thirds of those on every slave ship were already dead,²⁰⁴ having suffered "a trip so brutal that only an age which has been debased by the existence of Nazi crematoria could believe it really happened."²⁰⁵ Blatantly racist state laws have been enacted which make the relatively recent segregation (Jim Crow) laws²⁰⁶ seem almost like gifts from heaven: The "black codes" of the post-

203. See generally A. WEINSTEIN & F. GATELL, *AMERICAN NEGRO SLAVERY* (1968).

204. C. SILBERMAN, *CRISIS IN BLACK AND WHITE* 83 (1964).

205. *Id.* at 82. One observer described a typical scene:

The height, sometimes, between decks, was only eighteen inches; so that the unfortunate human beings could not turn around, or even on their sides, the elevation being less than the breadth of their shoulders; and here they are usually chained to the decks by the neck and legs. In such a place the sense of misery and suffocation is so great that the Negroes . . . are driven to frenzy. They [the slave traders] had on one occasion taken a slave vessel in the river Bonny: the slaves were stowed in the narrow space between decks, and chained together. They heard a horrid din and tumult among them, and could not imagine from what cause it proceeded. They opened the hatches and turned them up on deck. [The Negroes] were manacled together, in twos and threes. Their horror may be well conceived, when they found a number of [Negroes] in different stages of suffocation; many of them were foaming at the mouth, and in the last agonies—many were dead. The tumult they had heard was the frenzy of those suffocating wretches in the last stage of fury and desperation, struggling to extricate themselves. When they were all dragged up, nineteen were irrecoverably dead. Many destroyed one another, in the hopes of procuring room to breathe; men strangled those next to them, and women drove nails into each other's brains. Many unfortunate creatures, on other occasions, took the first opportunity of leaping overboard, and getting rid, in this way, of an intolerable life.

Id. at 82-83.

206. See generally C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (rev. ed. 1957).

Civil War South were unbelievable, even aside from their inclusion of "apprenticeship laws which practically returned the Negro to the old master and slave relationship under another name."²⁰⁷ The second-class citizenship created by state laws, both in this century and the last,²⁰⁸ was as clearly present in the North as in the South.²⁰⁹

Upon arrival in the nation's capital, every Negro over the age of twelve had to post bond, as if he were out on bail, and had to report within five days of his arrival. Negroes could not appear on the streets after 10 P.M. without special permit; a permit was also required for any public gathering, while private meetings were expressly forbidden. The burden of proof was on free Negroes to prove their freedom; in the absence of proof, they could be jailed, and even if they subsequently demonstrated their free status, they could be sold into slavery if they were unable to pay for their keep while in jail. . . . [F]our states in the West literally barred Negroes from physical entry; in Oregon, free Negroes could enter, but they could not own real property, could not sign contracts or engage in law suits.²¹⁰

The legislative actions of the South were distinguishable only in their more blatant statements of purpose: "When the Mississippi Constitution was revised in 1890, for example, the purpose of revision was stated quite badly: 'The policy of crushing out the manhood of the Negro citizens is to be carried on to success.'"²¹¹

Where state and municipal laws left off, the actions of state officials completed the job. Administrators,²¹² legislators and governors,²¹³ and law enforcement officers²¹⁴ have been involved, often actively and openly, in acts of discrimination ranging all the way to premeditated murder.²¹⁵ The judicial system has also been actively involved, with culpability extending all the way up the appellate ladder.²¹⁶ By their actions²¹⁷ the courts have even proven to be allies of

207. C. MANGUM, *THE LEGAL STATUS OF THE NEGRO* 163 (1940).

208. See generally *id.*; G. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* (1910).

209. C. SILBERMAN, *supra* note 204, at 5, 92.

210. *Id.* at 92.

211. *Id.* at 23.

212. E.g., A. RAPER, *THE TRAGEDY OF LYNCHING* 278 (1933).

213. E.g., C. WOODWARD, *supra* note 206, at 72.

214. E.g., A. RAPER, *supra* note 212, at 233-60; SOUTHERN COMM'N ON THE STUDY OF LYNCHING, *LYNCHINGS AND WHAT THEY MEAN* 44-48 (1931).

215. E.g., COMM'N ON INTERRACIAL COOPERATION, *THE MOB STILL RIDES* 11-13 (1936).

216. See, e.g., Meltsner, *Southern Appellate Courts: A Dead End*, in *SOUTHERN JUSTICE* 136 (L. Friedman ed. 1965).

217. See J. CHADBOURN, *LYNCHING AND THE LAW* (1933). "[A] pro-lynching sentiment is expressing itself in manifold ways in the judicial process—in part by stifling investigation, stultifying rulings of the court on motions and evidence, sentimentalizing jury and witnesses." *Id.* at 23.

the American tradition of lynching, even to the point of "legal lynching"—the imposition of a death sentence solely to prevent mobs from lynching the accused.²¹⁸ The prosecutorial role is amply demonstrated by the fact that of the more than 3,700 instances of lynching throughout the United States between 1900 and 1930,²¹⁹ those which were followed by convictions amounted to eight-tenths of one percent.²²⁰ And exaggerated or totally unfounded charges against the black defendant were usually the cause of the lynching in the first place.²²¹ When state anti-discrimination statutes finally began to appear, state courts "reduced them to a practical nullity,"²²² while continuing to provide drastically more severe sentences and drastically higher percentages of convictions for black defendants.²²³ The actions of the North in these respects have been no less reprehensible than those of the South.²²⁴

State-involved racism has had effects far beyond the immediate damage of the moment. Irreparable psychological injury has been engendered,²²⁵ and there has been wholesale destruction of one of man's proudest possessions: his racial culture.²²⁶ Most crucially, state racism has been an "effective means of tightening and freezing—in many cases instigating—segregation and discrimination."²²⁷ State racism has spurred not just acts of private racism, but it has also sustained and encouraged a culture and morality of racism which has infected virtually all aspects of contemporary American society. It is impossible to calculate, for example, the effects produced by the consistent holdings of Southern courts that a statement that a white man "is a Negro or akin to a Negro" constitutes slander per se.²²⁸ In effect, states and municipalities share the guilt every time any private discriminatory act is committed.²²⁹

218. COMM'N ON INTERRACIAL COOPERATION, *supra* note 215, at 17.

219. See J. CHADBOURN, *supra* note 217, at 3.

220. *Id.* at 13.

221. See COMM'N ON INTERRACIAL COOPERATION, *supra* note 215, at 8-9.

222. Green, *The Thrust of Tort Law: I*, 64 W. VA. L. REV. 1, 23 (1961); see, e.g., Note, 105 U. PA. L. REV. 115 (1956).

223. See, e.g., J. CHADBOURN, *supra* note 217, at 11.

224. See, e.g., C. WOODWARD, *supra* note 206, at 99-100; A. RAPER, *supra* note 212, at 385-440.

225. E.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 & n.11 (1954).

226. See, e.g., C. KLUCKHOHN & D. LEIGHTON, *THE NAVAHO* 82-84, 88 (1962).

227. C. WOODWARD, *supra* note 206, at 91; see *id.* at 90-92.

228. G. STEPHENSON, *supra* note 208, at 26-27; see *id.* at 26-34; C. MANGUM, *supra* note 207, at 18-25.

229. Justice Douglas has been arguing along these lines for years in his "custom" notion of "state action." His belief is that a long-perpetuated community custom of racial discrimination involves the state in private discriminatory acts just as clearly as if the state were an active participant. E.g., *Garner v. Louisiana*, 368 U.S. 157, 177-81 (1961) (concurring opinion).

There is thus a large debt to pay. It has been suggested²³⁰ that the debt be liquidated by giving America's blacks 400 billion dollars and five Southern states. The concept of an administrative structure for the distribution of reparations is not mere fancy, for such a structure was established in post-war Germany with respect to German Jews, and the United States has in effect done so with respect to American Indians by setting up the Indian Claims Commission.²³¹ However, the problems which would be involved in setting up such a scheme for all racial minorities appear to be almost insoluble. The huge monetary burden,²³² the problem of proof and stale evidence, the problem of establishing who qualifies as a member of a particular "race"²³³ and of who is entitled to how much²³⁴—all seem incapable of even long-range solutions. Judicial action to enable today's discrimination victims to recover money damages against state and local governments would be a kind of second-best approach for the transfer of money from the pocket of the debtor to that of the creditor—a transfer which becomes all the more necessary as the debt increases every day. And, of course, the existence of the debt serves to underscore the glaring need for deterrence of state-involved racism—deterrence which a damages remedy would go a long way toward providing.

IV

FINAL CONSIDERATIONS

Because of the public policy factors which press for governmental liability, especially in a racial context,²³⁵ the necessity of adequate effectuation of constitutional rights,²³⁶ and the moral imperative of compensatory "reparations,"²³⁷ it is absolutely necessary that as many as possible of those who are denied racial equal protection by states or municipalities recover money damages. This Comment thus far has attempted to show that the very *least* that must be done is to allow a plaintiff to get a damages suit into court in the first place. This essen-

230. The idea has been presented by, among others, attorney Milton Henry of Michigan. Sherrill, *Birth of a (Black) Nation*, ESQUIRE, Jan. 1969, at 70-77.

231. Indian Claims Commission Act, 60 Stat. 1049 (1946), as amended, 25 U.S.C. §§ 70-70w (Supp. IV, 1965-68). See generally Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511 (1966).

232. In terms of a land grant, if American blacks were only given reparations proportionate—in terms of population—to those already given to American Indians, they would receive 63 states the size of Mississippi. Sherrill, *supra* note 230, at 76.

233. Cf. Wilkinson, *supra* note 231, at 523-24.

234. For enlightenment as to the incredibly complex problems inherent in even a relatively simple reparations structure, see generally N. ROBINSON, *RESTITUTION LEGISLATION IN GERMANY (A SURVEY OF ENACTMENTS)* (1949).

235. See Part I, section A *supra*.

236. See Part II, section A *supra*.

237. See Part III *supra*.

tial first step should ideally be taken by state legislatures, but it is clear that courts usually can initiate the change themselves if they so desire—by abrogation of sovereign immunity so that state tort law may be used,²³⁸ by sustaining actions under section 1983 when applicable,²³⁹ or by creating a new remedy pursuant to the fourteenth amendment itself.²⁴⁰

If racial equal protection is to be truly safeguarded, however, a plaintiff must know not only that a court will at least *consider* his monetary claim against the government, but also that if he does succeed in proving the existence of state action and of discrimination, he ultimately will be compensated for his injury. The exigency of the demands of the Constitution, of public policy, and of reparations demand no less.

This is not to say that courts should treat all cases identically. Because of the many varieties of activity which can constitute “state action,” the seriousness of the governmental wrong will vary from case to case. There may be clearly intentional discrimination, such as the enactment of laws which cause or compel discrimination.²⁴¹ There will be numerous types of negligent conduct with regard to public employees, whether it is direct²⁴² or merely on the basis of *respondeat superior*. When a discriminatory act is committed by a private party who is not a government employee but whose actions constitute “state action” because of the government’s significant involvement²⁴³ with him or because of the private party’s performance of a governmental function,²⁴⁴ the government’s wrongdoing can take many forms. It may be an omission to insert a non-discrimination clause in a lease of government property to the private party;²⁴⁵ it may be positive encouragement of the private party’s discrimination;²⁴⁶ it may be negligence related to the active “delegation” of its powers to the private party;²⁴⁷ it may be inaction in the face of knowledge that a private party is performing a municipal function in a discriminatory manner.²⁴⁸ In some situations the govern-

238. See Part I *supra*.

239. See Part II, section B(1) *supra*.

240. See Part II, section B(2) *supra*.

241. *E.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1880).

242. *Cf.* *Thomas v. Johnson*, 295 F. Supp. 1025 (D.D.C. 1968) (city’s motion to dismiss denied with respect to, *inter alia*, its own negligence in supervising negligent police officer).

243. *E.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

244. *E.g.*, *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944).

245. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

246. *E.g.*, *Lombard v. Louisiana*, 373 U.S. 267 (1963).

247. *E.g.*, *Smith v. Allwright*, 321 U.S. 649 (1944); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960).

248. *E.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946).

ment conceivably might even be held vicariously liable, on a theory of agency, for the acts of the private party himself.²⁴⁹

Because of this variety—and the probability that the “state action” concept will be extended to cover even more types of private activity²⁵⁰—any attempt at this point to construct firm rules as to how the judiciary should treat the various fact situations would be dangerously speculative, imprecise, and beyond the scope of this paper. In the absence of legislative guidance, the courts should approach the matter on a case-by-case basis. Potential dangers or inequities in particular situations can be alleviated as they arise: Where liability may seem overly harsh in view of the government’s limited capacity to prevent the particular kind of wrong at issue,²⁵¹ the court could restrict liability to actual damages. Where governmental liability might seem too severe because the individual wrongdoer acted with malice or in direct opposition to state law, the court could permit the government a right of indemnification against him; the right could be granted not only where the government’s liability is vicarious,²⁵² but also where it is di-

249. The agency approach would seem promising when a government’s delegation of powers to a private party is substantial and is backed up by the state’s criminal sanctions. For example, in *Boman v. Birmingham Transit Company*, 280 F.2d 531 (5th Cir. 1960), black plaintiffs brought a class action to enjoin a franchised bus company from enforcing its published policy of seating passengers according to race. The company was acting pursuant to a city ordinance which provided:

Section 1. That carriers of passengers for hire operating in the City of Birmingham are authorized to formulate and promulgate such rules and regulations for the seating of passengers on public conveyances in their charge as are reasonably necessary to assure the speedy, orderly, convenient, safe and peaceful handling of passengers.

Section 2. A willful refusal to obey a reasonable request of an operator or driver of such a public conveyance with relation to the seating of passengers thereon shall constitute a breach of the peace.

The court held that the city’s delegation had the effect of making the private act “state action,” and the language of the opinion is significant: “Where, as here, the City delegated to its franchise holder the power to make rules for seating of passengers and made the violation of such rules criminal . . . we conclude that the Bus Company to that extent became an *agent* of the state . . .” *Id.* at 535 (emphasis added). If such an agency relationship entitles the private act to be treated as the state’s act for purposes of enjoining the behavior, arguably it should also be treated as the state’s act for purposes of tort liability for the behavior.

250. See Silard, *A Constitutional Forecast: Demise of the “State Action” Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); Black, *supra* note 1.

251. *E.g.*, the enactment by referendum of an unconstitutional law, as in *Reitman v. Mulkey*, 387 U.S. 369 (1967) (California’s “Proposition 13”).

252. *E.g.*, CAL. GOV’T CODE § 825.6 (West 1966). With respect to judicial action in the absence of statute, little precedent exists. At common law a private employer who has suffered such liability may always maintain an indemnity action against his employee, but it is questionable whether this right is applicable to governmental employers as well. A. VAN ALSTYNE, *supra* note 37, § 2.9. The chief source of the skepticism is *United States v. Gilman*, 347 U.S. 507 (1954), in which the Supreme Court denied the federal government the right to maintain an indemnity action against an employee subsequent to a finding of governmental liability under the Federal Tort Claims

rect.²⁵³ Where judicial imposition of liability might seem unfair because of the government's failure to procure liability insurance in reliance upon a long history of sovereign immunity, the court could make its decree prospective only,²⁵⁴ though perhaps making an exception for the plaintiff at bar.²⁵⁵

But in this judicial balancing of interests and policies the court must at the same time remain aware that the case is more than a normal tort action, that it is particularly special because of the particular sanctity of the plaintiff's interest. And in considering that interest the court must keep in mind that

"Equal protection of the laws" means more than merely the absence of governmental action *designed* to discriminate; . . . *the arbitrary quality of thoughtlessness can be as disastrous and unfair* to private rights and the public interest as the perversity of a willful scheme.²⁵⁶

There must be a willingness to cope with the obstacles of unsatisfactory precedent²⁵⁷ and to exercise judicial crea-

Act. However, the *Gilman* holding seemed to rest almost totally on the question of legislative intent in the enactment of the Federal Tort Claims Act; the Court was fearful of a judicial rewriting of the particular statute. And where the opinion did speak of the distinction between private and public employers, the Court was obviously assuming a blanket right of indemnity applicable to *all* employees, even those whose "fault" may have been very slight. See *id.* at 509-10. Thus, in cases where a state employee has acted with malice or in direct opposition to state law, a court conceivably could provide the government a right of indemnity even in the absence of statute.

253. This type of indemnity would be based on the fact that the government's fault was far less grave than that of the other wrongdoer (the individual)—such as where the individual was an active wrongdoer while the government was guilty only of passive neglect, or where the individual was under a primary duty while the government was only secondarily responsible. See W. PROSSER, *supra* note 13, § 48.

254. *E.g.*, *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962) (abrogation of sovereign immunity was to take effect at end of next legislative session).

255. *E.g.*, *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

256. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968) (city Redevelopment Agency's lack of attempt to procure urban renewal relocation facilities for non-whites to same extent as for whites) (emphasis added).

257. See Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

Unhampered by a rigid theory of precedent like that adhered to in England, American courts have a great responsibility for participation in the creative adaptation of law to current needs [I]t is never a satisfactory answer to an argument for judicial creativity that the need for change is one that could be accomplished by statute. Where a need for reform is clear but no reforming statute has been enacted, courts must choose among the unsatisfactory precedent and other rules open to judicial adoption, even though the range of choice may not be as wide as that open to a legislature.

Increasingly in recent decades, American courts have been discharging this responsibility. . . . Not only is the nature of these cases significant, but also their variety and the number of different courts represented . . . are im-

tivity²⁵⁸ when necessary.

Indeed, in situations where there may be insufficient satisfaction of the precise prerequisites of "intent" or "negligence" liability but where the injury has been severe and recurrence clearly must be prevented, a court should remain open to the possibility of strict liability. In recent years the doctrine has been increasingly extended,²⁵⁹ even with respect to governmental entities,²⁶⁰ and it has been suggested increasingly as the proper basis for tort liability of governmental units where there are "exceptional losses that are not otherwise sufficiently spread,"²⁶¹ "irrespective of fault and irrespective of extra-hazardous elements."²⁶² Such an approach would be especially useful where the cause of the harm was a very knotty "discretionary" decision, for "[i]t seems clear that the notion of fault has diminished relevance in this context"²⁶³ while the injury may be no less substantial. Because of the special nature of governmental entities, Professor Davis notes, in many cases

the basis for government liability should not be fault but should be equitable loss spreading. The ultimate principle may be that the taxpaying public should usually bear the fortuitous and heavy losses that result from governmental activity. The key idea will be neither comparison with private liability in the same circumstances, nor the extra-hazardous character of the activity, . . . nor fault on the part of the governmental unit or its agents; the key idea will be simply that a beneficent governmental unit ought not to allow exceptional losses to be borne by those upon whom the governmental activity has happened to inflict them.²⁶⁴

Even where a particular type of case would be more efficiently resolved by action of the legislature, action by the judiciary can be useful as a powerful means of prompting legislative initiative.²⁶⁵ Fears that

pressive evidence of continuing reform of tort law through candidly creative judicial action.

Id. at 484-86. Cf. *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960).

258. See Probert, *Creative Judicial Sanctioning: Application in the Law of Torts*, 49 IOWA L. REV. 277; Keeton, *supra* note 257.

259. See, e.g., Keeton, *supra* note 257, at 484-86 & cases cited n.60.

260. E.g., CAL. AGRIC. CODE §§ 30652-54 (West 1968) (livestock killed by dogs); CAL. PENAL CODE §§ 4900-06 (West 1956) (erroneous—though "fault"—less—conviction and imprisonment on a felony charge, followed by official pardon).

261. 3 K. DAVIS, *supra* note 16, § 25.17; see A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* § 6 (1951).

262. 3 K. DAVIS, *supra* note 16, § 25.18, at 126 (Supp. 1965). "In the long run, the public who get the benefit of governmental activities should usually bear the fortuitous and heavy losses that result from those activities." *Id.*

263. Van Alstyne, *supra* note 17, at 975. In discretionary functions "fault" is often difficult to prove because "[a]lmost invariably, a reasonable man could have decided either way." *Id.*

264. 3 K. DAVIS, *supra* note 16, § 25.17.

265. "Past experience indicates that judicial abrogation has been the most effective way of prompting legislative action" in the field of governmental tort liability. Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J.

judicial action will prompt legislative action only in the form of an overruling of the court's decision, with attendant embarrassment and loss of public respect for the courts, appear to be unfounded; where legislation in the realm of governmental liability has in fact ensued after judicial activism, it has tended "more to ratify and confirm the judicial policy decision than to discredit it."²⁶⁶ And more importantly, states Professor Black, it must be remembered that

at a deeper level, "judicial deference" to other authorities in matters of racism seems . . . to rest on a tragically mistaken evaluation. We ought not to be deciding which branch or organ of government is most nicely suited to dealing with this problem; we ought to be using every governmental power to its fullest extent, straining every resource we have to deal with it.²⁶⁷

The resources exist.

The straining must begin.

Korey Arthur Mandel

888, 892 n.15. "Apparently no state legislature has acted on the problem [of governmental tort liability] except after a state court has done so." 3 K. DAVIS, *supra* note 16, § 25.18, at 125 (Supp. 1965).

266. Van Alstyne, *supra* note 17, at 968-69.

267. Black, *supra* note 1, at 105.