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Actions and Remedies Against Government Units and Public Officers for Nonfeasance

PAUL T. WANGERIN*

INTRODUCTION

Two fundamental developments run through the expansion of modern government and the evolution of governmental tort liability. First, as government becomes larger and assumes greater responsibilities, the methods for implementing these expanded public purposes become substantially more complex than the methods used at an earlier time. As the scope of government changes, what may have been an effective mechanism for implementing governmental policy at one point in the political development of a society may not be so at a later stage. The second development is an increase in the social consciousness of modern states, a development exemplified by the expanding notion that injury should be compensated. This development is reflected in the gradual broadening of private tort liability,¹ and the similar increase in public liability.

As government becomes larger the judicial methods used to help implement the purposes of government have changed: suits against the government have dramatically increased. Two aspects of large

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1. This broadening is reflected in the movement from trespass to case as a ground of recovery at common law. This transition involved a movement beyond a strict examination of the immediate events and persons precipitating an injury. In trespass, originally, the tortfeasor was liable only if his act was directly connected to an injury; the early courts did not deal with extended causation, that is, injury removed from a direct contact with the act. Later, the restrictions of the early writs gave way to broader liability as the courts attempted to avoid the limitations inherent in direct causation. Trespass on the case replaced trespass and extended causation created additional liability. A crucial factor, rarely expressed by the courts, was added: in trespass, the direct act/injury requirement strictly limited the number of potential victims; in trespass on the case, however, the number of victims was so limited because the injury could potentially occur to numerous different people. Therefore, as the number of potential victims expanded, the courts were forced to place some new form of restriction on the right to recover for injury. This new restriction was gradually formulated into the traditional tests of negligence; namely, duty, breach of duty, injury, and proximate cause. In recent years private tort liability has taken another broadening step as the law of negligence moved into the area of strict liability for certain types of acts and products.

Public tort law, that is, recovery from the government for injury caused by governmental unit or public officers, has expanded in a manner corresponding to that of private tort law. As private liability expanded in a series of hesitant steps, public liability has broadened in a similar manner at a later time.

government have precipitated this change. First, when government was small the judicial mechanism most appropriate for encouraging government efficiency was a restriction on the possibility of individual suits against the state. Suits impeded the activities of early governmental units. However, with modern government extremely large and cumbersome, and with high level bureaucrats often isolated from day-to-day governmental operations, the courts are increasingly inclined to hold that individual suits against the government are necessary to prod the public bureaucracies into at least attempting to accomplish the purposes that government has set for itself. The second aspect of modern government which justifies expanding liability is the capability of large institutions, like government or insurers, to spread throughout society the cost of compensating injury. It is more fair to disperse the cost of compensation among numerous taxpayers than to deny recovery and force the injured plaintiff to shoulder the entire burden. This balancing of interests is a compelling reason to allow increased recovery.²

Moreover, as government grows larger, it can be expected to cause more injury. Even if by only failing to do what it says it will do, modern governments can cause serious injury as people come to expect that the government will accomplish its set purposes. In fact, because government attempts so much more today than it did in the past, it is increasingly likely that injury will be caused not so much by the government *doing* something wrong but by its *failing* to do something. This tortious failure to act by the government or a public officer is the problem of public nonfeasance.³

2. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 270 (1937); McLachlan, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 846-47 (1971); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964). See also Dugan, *Standing, The 'New Property,' and The Costs of Welfare: Dilemmas in America and West German Provider-Administration*, 45 WASH. L. REV. 497, 521 (1970).

3. Attempts to define nonfeasance or to adequately distinguish it from malfeasance are almost hopeless. Distinctions between the three types of activities evaporate when real cases are confronted. In theory, there is a distinction between "nonfeasance" and "misfeasance" or "malfeasance"; this distinction is often of great importance in determining an agent's liability to third persons. "Nonfeasance" means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do; "misfeasance" means the improper doing of an act which the agent might lawfully do, or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons; and "malfeasance" is a doing of an act which he ought not to do at all. *Owens v. Nichols*, 139 Ga. 475, 77 S.E. 635 (1913); Annot. 20 A.L.R. 97, 99-101 (1922) (supplemented in 99 A.L.R. 408 (1933)).

In this article, the term "public nonfeasance" will include the failure to act by both government itself and by its employees. See generally *Commercial News Co. v. Beard*, 116 Ill. App. 501 (1904) (non-enforcement of law is misfeasance not nonfeasance); *Schumacher v.*

This article will trace the development of governmental liability for nonfeasance. Because of the complexity of the problem of public nonfeasance, this subject will be approached by examining three questions revolving around the concept of duty. First, is there duty? If so, who owes the duty? Then, to whom is this duty owed? Duty is the central concern in actions for public nonfeasance; rarely do the courts go beyond the questions of duty. The article will also study the bases of the various public immunities to illustrate the policies militating against recovery from the government. Finally, cases from the most litigated areas of nonfeasance will be examined to explore the possibility of applying concepts from one area to justify recovery in another.

One final point must be stressed. The law of public liability is undergoing massive and rapid change. No attempt has been made in this paper to state the precise modern law in any particular jurisdiction; in fact, in many situations reference is made primarily to long-forgotten cases. Modern law on point can be readily found. It is hoped that the historical perspective supplied herein can be helpful in interpreting and understanding the modern cases.

IS THERE A DUTY?

The Application of "Duty" to Actions for Nonfeasance

Professor Prosser suggests that the term "duty" be reserved for the problem of that "relation between individuals which imposes upon one a legal obligation for the benefit of another."⁴ Although circumstances change, duty remains constant: the defendant must conform his conduct to the "legal standard of reasonable conduct in light of the apparent risk."⁵ If the defendant's failure to conform to the standard proximately causes injury to the plaintiff, the defendant is negligent and may be liable.

In a nonfeasance case, the failure to conform consists of inaction when there is a duty to act. A moral duty is usually insufficient.⁶ Liability may arise, however, when a legal duty has been imposed,⁷

State *ex rel. Furlong*, 78 Nev. 167, 370 P.2d 209 (1962); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* §29.10 at 1645 n.39 (1956); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 647 n.218 (1955)(failure of county assessor to properly perform certain statutory duties constituted nonfeasance, not misfeasance).

4. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §53, at 324 (4th ed. 1971)[hereinafter cited as PROSSER].

5. *Id.*

6. F. POLLOCK, *THE LAW OF TORTS* 11 (12th ed. 1923).

7. See generally J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 255-57 (4th ed. 1967); H. STREET, *GOVERNMENTAL LIABILITY* 39-40 (1953). For a general discussion of duty

when there has been a consciously designed purpose not to act,⁸ when one alters natural conditions and subsequently fails to repair the alterations,⁹ or when a person engages in other affirmative conduct which causes injury at a later time.¹⁰

Courts appear to have more difficulty finding a duty owed in a nonfeasance case than in other tort cases. In the latter type, the plaintiff alleges he was hurt by the defendant's act. In that case, there is a clear connection between the defendant's conduct and plaintiff's injury. In a nonfeasance case, however, the defendant has done nothing. Courts may have conceptual difficulties linking an injury with defendant's inaction. Some method of connecting the injury with the failure to act is needed.

One important connecting element looked to by the courts is the plaintiff's reliance on the completion of activities undertaken by the defendant. As early as 1401, in *Watson v. Brinth*,¹¹ liability was placed on a quasi-public officer who had undertaken a task but failed to complete it. Even at that date the courts realized that reliance was placed by individuals upon people who voluntarily undertook actions and then failed to carry them out. Five hundred years after *Watson*, Justice Cardozo set out the standard for determining when liability would attach once an activity had been undertaken:

If the conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relationship out of which arises a duty to go forward The question always is whether the imputative wrongdoer has advanced to such a point as to have launched an instrument of force or harm, or has stopped where inaction is at most a refusal to become an instrument for good.¹²

imposed by statute or other means, see 63 C.J.S., *Municipal Corporations* §§748-49, 752 (1950).

8. The concept of an intentional decision not to act is discussed extensively in Hale, *Prima Facie Torts, Combination, and Non-feasance*, 46 COLUM.L.REV. 196, 217 (1946).

9. 1 T. BEVENS, *NEGLIGENCE IN LAW* 353-54 (2d ed. 1895).

10. PROSSER, *supra* note 5, §56 at 347.

11. Y.B. 2 Hen. IV, 3B (1401), cited in *Thorne v. Deas*, 4 Johns. 84, 97 (N.Y. 1809)(repair of house).

12. *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 163, 159 N.E. 896, 898 (1928). See Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 266-69 (1936). See also James, *Tort Liability of Governmental Units and Their Officers*, 22 U.CHI.L.REV. 610, 627-28 (1955); Note, *Tort Liability of Administrative Officers in New York*, 28 ST. JOHN'S L. REV. 265 (1954). For additional cases imposing liability see *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960), cert. denied, 364 U.S. 933 (1961)(undertook but failed to complete rescue at sea); *Shannon v. City of Anchorage*, 429 P.2d 17 (Alas. 1967)(failure to provide safe

Where the courts have been unable to find that the injured victim relied on action undertaken by the government, however, decisions imposing liability for nonfeasance have attempted to find duty in a different manner, perhaps by creating a presumption of duty. One of the earliest cases involving liability for public nonfeasance, *Yelding v. Fay*,¹³ concerned the failure of a public official to keep a bull and boar for public use. The defendant was ordered by the court to prove that he had done a particular job or to prove that no duty existed to do that job. He was required to prove that no one had relied on his keeping the animals for public use. The plaintiff did not have to prove a duty existed; the defendant was required to prove it did not. Public expectation of action created a presumption of duty and thus potential liability for failure to carry out the duty.

At times, courts also have been able to find a duty without regard to plaintiff's reliance. Originally, some alternative method of overcoming the conceptual problem of liability for inaction was needed. In *Earl of Shrewsbury's Case*¹⁴ the court found that the failure to act was logically connected to a resulting tort, one set in motion by the nonfeasance.¹⁵ Thus, the court imposed liability even though it agreed that the failure to act was not itself tortious.

Other courts have not relied on the resulting tort approach.¹⁶ In *Amy v. Supervisors*¹⁷ the Supreme Court said that a governmental officer would be liable for failing to levy a tax. The court implied that the failure to act was in itself a positive act.¹⁸ This rationale was followed in a New York case, *Slavin v. State*,¹⁹ in which the

access to dock); *Town of Dublin v. State ex rel. Kirpatrick*, 198 Ind. 164, 152 N.E. 812 (1926)(failure to levy taxes to pay for construction project); *Bowden v. Kansas City*, 69 Kan. 587, 77 P. 573 (1904)(failure to provide safe place for fireman to work); *Tholkes v. Decock*, 125 Minn. 507, 147 N.W. 648 (1914)(agreed to repair culvert and then failed to do so); *Adsit v. Brady*, 4 Hill 630 (N.Y. 1843)(officer failed to remove barge from canal).

13. 72 Eng. Rep. 626 (K.B. 1596)(reported in French). This case is discussed briefly in Bohlen, *The Moral Duty to Aid Others as A Basis of Tort Liability*, 56 U. PA. L. REV. 217, 224 n.8 (1908).

14. 77 Eng. Rep. 798 (K.B. 1693).

15. *Id.* at 805-06.

16. *But see* notes 132-133 *infra* and accompanying text.

17. 78 U.S. (11 Wall.) 136 (1870).

18. *Id.* at 138. Although the Court did not reach constitutional claims in this case, it appears that the failure to act may have been a deprivation of rights without due process. *But see* *Morrell v. City of Phoenix*, 16 Ariz. 511, 147 P. 732 (1915)(charter provision immunizing city from liability for nonfeasance held constitutionally valid); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 954 (1975)(nonfeasance generally not a constitutional violation).

19. 249 App. Div. 72, 291 N.Y.S. 721 (1936). *But see* *Drzewicki v. City of Buffalo*, 51 App. Div. 2d 870, 380 N.Y.S.2d 151 (1976), stating that ample authority exists in New York for denying liability for nonfeasance.

state was held liable after failing to cancel a police bulletin that had mistakenly broadcast an incorrect license number. A police officer had pursued a car with the mistakenly-transmitted plate number and had caused a fatal crash. The court reasoned that the police had a duty to correct the mistake.²⁰ The failure to act was both a tort in itself and connected to a resulting tort.

Numerous courts have not been convinced by the rationale of these cases, however. Two cases with only a tenuous connection between failure to act and subsequent injury illustrate that courts often feel that they must draw the line somewhere when establishing a public duty. In the Massachusetts decision of *Trum v. Paxton*,²¹ a city was held not to have owed a duty when a plaintiff's cows died after eating poisonous weeds cut but not picked up by public officers. Stressing the fiscal limitations of the city, the *Trum* court indicated that there must be something more than a specific and direct connection between the failure to act and the resulting injury. If a city could be liable for failing to complete the act of cutting grass, it could be connected in some fashion to almost any injury suffered by anyone who has any contact with the government.²²

20. Other cases imposing liability on the basis of the nonfeasance or failing to provide safe conditions for people include: *United States v. Hull*, 195 F.2d 64 (1st Cir. 1952)(postal officers failed to install window securely over counter; assumption of duty to act imposes liability for failure to complete); *Stribling v. Chicago Housing Auth.*, 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975)(governmental unit liable after failing to prevent burglars from drilling through walls of vacant apartments into plaintiff's home).

21. 329 Mass. 434, 109 N.E.2d 116 (1952). *But c.f.* *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939)(before Federal Tort Claims Act, Supreme Court implied that government might be liable for failing to feed cattle which it had contracted to feed).

22. Cases which did not find sufficient connection between public nonfeasance and the plaintiff's injury and which allowed actions against the government or public officer include: *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969), *cert denied*, 396 U.S. 901 (1969) (state failed to release man from jail for at least seven months after all indictments against him had been dismissed); *Lee v. State*, 490 P.2d 1206 (Alas. 1971)(police officer failed to aid woman whose arm was grabbed by lioness); *Littler v. Jayne*, 124 Ill. 123, 16 N.E. 374 (1888)(officer failed to advertise for lowbid contracts given for electrobronzed statues of public figures held null and void); *People ex rel. Chamberlain v. Trustees of Schools*, 319 Ill. App. 370, 49 N.E.2d 666 (1943)(board failed to hold hearings); *Serpass v. Margiotta*, 59 So.2d 492 (La.App. 1952)(dog catcher failed to destroy rabid dog); *White v. State*, 199 Misc. 728, 101 N.Y.S.2d 702 (Ct.Cl.1950) (state did not release prisoner until ten months after term expired); *Ferguson v. Kinnoul*, 8 Eng. Rep. 412 (H.L. 1842) (presbytery failed to accept qualified minister for available position).

Cases which have not imposed liability on the government include: *Wheeldon v. United States*, 184 F. Supp. 81 (N.D. Cal. 1960)(failure to remove wrecks from navigable waters); *Upchurch v. Clinton County*, 330 S.W.2d 428 (Ky. 1969)(failure to catch stray dogs—officer liable but county immune); *Decarlo v. Borough of Cliffside Park*, 86 N.J. Super. 169, 206 A.2d 206 (1965), *cert. denied*, 386 U.S. 972 (1967) (failure to remove one-way street sign from corner causing loss of business); *Wrape v. North Carolina State Highway Comm'n*, 263 N.C. 499, 139 S.E.2d 570 (1965)(failure to prevent erosion; statute had been changed deleting word

The Supreme Court also dealt recently with the tenuous nature of public nonfeasance in *Hibi v. Immigration & Naturalization Service*.²³ In *Hibi*, the plaintiff, a Philippine national who had served with the United States Army, contended that the government had failed to notify him immediately after the second world war of a change in the law allowing him to become a United States citizen without satisfying certain residency requirements. The plaintiff also alleged that the Immigration Service had failed to provide a representative in the Philippines after the war to explain citizenship rights. The plaintiff, unable to become a citizen due to a subsequent change in the law, alleged injury by these failures to act. The Court was unconvinced. Reasoning that the government did not owe Hibi a duty to inform him of the law or to provide a representative to help him apply for citizenship, the Court concluded that the connection between omission and injury was too attenuated to allow recovery in an action brought more than twenty years after the alleged failure to act. The government was obligated to let Hibi become a citizen but was not obligated to tell him he could do so.

Areas in which the Duty is Limited: Failure to Legislate or Enforce Laws and Discretionary Functions

There are also situations where the government's duty to act is limited regardless of the connection between its omission and plaintiff's injury. For example, courts generally will not impose a duty upon a legislative body to enact or repeal a law.²⁴ The practical inability to compel action, or the political question doctrine, precludes the courts from interfering with the legislative process. In 1979, however, the Illinois Supreme Court broke with the majority view and held that the Illinois Constitution placed an affirmative duty upon the legislature to act.

In *Client Follow Up Co. v. Hynes*²⁵ the court was considering a

"omission" from waiver of tort immunity); *Doughty v. Philadelphia Rapid Transit Co.*, 321 Pa. 136, 184 A. 93 (1936)(failure to prevent trolley from running wrong way on one-way street).

23. 414 U.S. 5, *rehearing denied*, 414 U.S. 1104 (1973).

24. *E.g.*, *Shipley v. City of Arroyo Grande*, 92 Cal. App. 2d 748, 208 P.2d 51 (1949)(not liable for failure to repeal ordinance which permitted diagonal parking); *Jones v. City of Williamsburg*, 97 Va. 722, 34 S.E. 883 (1900)(city not liable for failing to pass antibiking ordinance); UNITED STATES ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE: ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 76 (1968)[reprint of S.Doc. No. 8, 77th Cong., 1st Sess. (1941)] (judicial review is not effective to compel enforcement of laws). See also Borchard, *Government Liability in Tort*, 34 YALE L.J. 129, 136-37 (1924) (early cases); Annot., 161 A.L.R. 1404 (1946)(failure of municipality to adopt or enforce traffic regulations, or to properly maintain traffic signal devices).

25. 75 Ill. 2d 208, 390 N.E.2d 847 (1979).

provision which directed the legislature to abolish personal property taxation. Prior cases held that such directives merely expressed the will of the people and could not be enforced by the courts. In *Hynes* the court departed from this position and abolished Cook County's corporate Personal Property Tax.

Most courts also refuse to impose a duty to enforce laws. However, some cases hold that the existence of a statute obligates the government to act.²⁶ This approach has created inconsistencies in the law. Three modern cases with similar factual situations indicate the present confusion in this area.

In *Leger v. Kelly*,²⁷ the Connecticut Commissioner of Motor Vehicles was not held liable although his deputies failed to follow a law requiring him to refuse registration to cars not equipped with safety glass. In *Leger* the plaintiff was injured in an auto accident. He contended that his injuries were aggravated because the car in which he was riding was not equipped with safety glass. The Connecticut court reasoned that a duty existed only when the actions the officer was required to perform affected the injured individual in a manner different in kind from the injury the general public would suffer. *Paglia v. State*,²⁸ decided by a New York Court of Claims a few years earlier, reached the opposite result. In *Paglia* the state was held liable when a purchaser relied on the registration forms and title papers presented by the seller of a car. The seller, who had stolen the car, had received certificates of ownership from a government officer who failed to read a list of names and titles not to be acted upon. The court concluded that despite the state's not being an insurer of titles, a certain responsibility in their actions was reasonably relied upon when officers were asked to enforce the law.²⁹

Guy v. State,³⁰ decided in New York sixteen years after *Paglia*,

26. See, e.g., *Hatahley v. United States*, 351 U.S. 173 (1956), *modifying* 220 F.2d 666 (10th Cir. 1955)(failure to comply with notice requirements of federal regulation); *City of Albany v. Burt*, 88 Ga.App. 144, 76 S.E.2d 413 (1953)(failure to enforce law requiring shut-off safety on gas pilot lights); *Bronaugh v. Murray*, 294 Ky. 715, 172 S.W.2d 591 (1943)(failure to require bus driver to obtain mandatory insurance); *Cochrane v. Mayor of City of Frostburgh*, 81 Md. 54, 31 A. 703 (1895)(failure to prevent cows from running in street); *Burnett v. City of Greenville*, 106 S.C. 255, 91 S.E. 203 (1917)(failure to prohibit drag-racing on streets not safe for that purpose). One unusual case, *Parks v. Board of County Comm'rs*, 11 Or. App. 177, 501 P.2d 85 (1972), implied that officers who failed to follow an ordinance in granting a zoning permit had an obligation to *undo* their statutory violations. See *generally* Annot., 41 A.L.R.3d 700 (1972)(personal liability of officer for injury suffered as a result of failure to enforce law or arrest lawbreaker).

27. 19 Conn. Supp. 167, 110 A.2d 635 (1954), *aff'd*, 142 Conn. 585, 116 A.2d 429 (1955).

28. 199 Misc. 625, 99 N.Y.S.2d 878 (Ct.Cl.1950).

29. *Id.*

30. 50 Misc. 2d 29, 269 N.Y.S.2d 504 (1966).

suggests that there is as much inconsistency within particular jurisdictions as exists nationally. In *Guy*, plaintiff was unable to recover from the government after being injured by an automobile driven by someone whose license had not been revoked despite prior convictions for six moving violations and responsibility for one other accident. The court denied recovery on the ground that there was no foreseeability of injury.

The final major limitation on the government's duty to act is the "discretionary function"³¹ defense. The defense is unique to public actions. Under it, courts hold that there is no duty to choose correctly when a government or public officer makes a "rational" choice between competing alternatives.^{32,33} Even when the choice is

31. See 63 AM. JUR. 2d, *Public Officers & Employees* §292 (1972); James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957).

32. See generally Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 798-800 (1956); Peck, *The Federal Tort Claims Act — A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956). Peck proposes that the discretionary function involves:

[A]cts and omissions . . . [that] were specifically directed, or risks knowingly, deliberately, or necessarily encountered, by one authorized to do so, for the advancement of a governmental objective and pursuant to discretionary authority given him . . . authority to make a decision that the act, omission, or risk involved was one which it was necessary or desirable to perform or encounter *in order to achieve* the objectives or purposes for which he was given authority.

Id. at 225-26 (emphasis in original).

The discretionary function exception seems to have grown out of deference to judicial choice, and spread by analogy to acts done by public officers in general which involved some form of rational choice. One of the earliest cases on the discretionary function defense, *Stephens v. Watson*, 91 Eng.Rep. 44 (K.B. 1672), involved an action against officers for denying an ale house license. The court said that "the want of a license can only come in question, and not the reason and cause why it was denied." *Id.* at 45. See also *Rex v. Young*, 97 Eng.Rep. 447, 449 (K.B. 1758) ("discretion does mean, (and can mean nothing else but) exercising the best of their judgment upon the occasion that calls for it"); *Gile's Case*, 93 Eng.Rep. 914 (Q.B. 1731)(mandamus inappropriate because issuance of license was discretionary). This reasoning was adopted in the United States in an action brought against a postmaster for failure to pay money. Justice Taney suggested in *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845), that "a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion" *Id.* at 98.

33. An early version of the discretionary/ministerial dichotomy appears in cases involving clerical errors by public officers. Cases imposing liability on public officers for such clerical-error ministerial nonfeasance include: *Willet v. Hutchinson*, 2 Root 85 (Conn. 1794)(failure to record title transfer); *Daggett v. Adams*, 1 Me. 198 (1821)(failure to obtain fair market value at sheriff's auction); *Bishop v. Schneider*, 46 Mo. 472 (1870)(failure to record deed); *Thomas v. Grupposo*, 73 Misc. 2d 427, 341 N.Y.S.2d 819 (1973)(failure to return motorcycle held, and then erroneously sold, at police auction); *Higby Enterprises, Inc. v. City of Utica*, 54 Misc. 2d 405, 282 N.Y.S.2d 583 (1967)(failure of clerk to give required notice to adjacent property owners of zoning change makes city liable); *Rising v. Dickinson*, 18 N.D. 478, 121 N.W. 616 (1909)(failure to file a deed); *Brougham v. City of Seattle*, 194 Wash. 1, 76 P.2d

negligently made, no liability will be imposed on the officer or government. The discretionary function defense is also referred to as the discretionary/ministerial test of liability. Under this test a duty exists when the omission is ministerial or clerical in nature but not when it results from an exercise of discretion.

Unfortunately, the courts have been unable to differentiate precisely between discretionary and ministerial acts.³⁴ This imprecision reflects the fundamental dilemma underlying any imposition of public liability: public liability must expand as a result of the growth of government, but it cannot expand too much and thus become a burdensome deterrent to public activity.

Two Supreme Court cases are illustrative of the discretionary/ministerial dichotomy and the problems created by it. *Dalehite*

1013 (1938)(failure to sell car at police auction). *Contra* *Sidbury v. Gill*, 102 F. Supp. 483 (E.D.N.C. 1952)(failure to remove fraudulently issued tax liens from taxpayer's property); *Stiglitz v. Detroit*, 239 Mich. 26, 214 N.W. 150 (1927)(failure to execute tax deeds to plaintiff as required by laws); *Yelton v. Becker*, 248 S.W.2d 86 (Mo. App. 1952)(refusal to honor reclamation bond); *Lyman v. Edgerton*, 29 Vt. 305 (1857)(failure to file index card); *Billings v. State*, 27 Wash. 288, 67 P. 583 (1902)(failure to deliver patent on sale of tide lands).

Several cases have imposed liability for clerical or other errors in situations involving court proceedings: *Jeffers v. Taylor*, 178 Ky. 392, 198 S.W. 1160 (1917) (clerk of court liable for deputy's failure to give copy of pleadings to plaintiff); *Gray v. Hakenjos*, 366 Mich. 588, 115 N.W.2d 411 (1962)(possibly subject to removal for failure to serve process); *Brown v. Lester*, 21 Miss. 392 (1850)(clerk liable for failing to put case on docket); *Clark v. Miller*, 54 N.Y. 528 (1874)(superintendent liable for failing to present claim where delay resulted in loss of claim); *Tompkins v. Sand*, 8 Wend. 462 (N.Y. 1832)(justice of peace liable after failing to accept appeal bond; judicial immunity does not apply to purely ministerial duties). Other cases have imposed liability for clerical errors when officers have failed to pay money to private parties: *Burns v. Moragne*, 128 Ala. 493, 29 So. 460 (1901); *People v. Hughey*, 382 Ill. 136, 47 N.E.2d 77 (1943); *Cassady v. Trustees of Schools*, 105 Ill. 560 (1883); *Strickfadden v. Zipprick*, 49 Ill. 286 (1868); *People ex rel. Pope County v. Shelter*, 318 Ill. App. 279, 47 N.E.2d 732 (1943); *Hupe v. Sommer*, 88 Kan. 561, 129 P. 136 (1913); *Cottongim v. Stewart*, 283 Ky. 615, 142 S.W.2d 171 (1940); *Allen v. Commonwealth*, 83 Va. 94, 1 S.E. 607 (1886). Failure to properly mark official forms has generated liability in several cases: *First Nat'l Bank of Key West v. Filer*, 107 Fla. 526, 145 So. 204 (1933)(failing to put official seal on securities); *Howley v. Scott*, 123 Minn. 159, 143 N.W. 257 (1913)(failing to stamp list and receipt "sold for taxes"); *State ex rel. Smith v. Johnson*, 12 Ohio App. 2d 87, 231 N.E.2d 81 (1967)(failing to have plaintiff candidate sign all duplicate copies of petition). Even when a particular task becomes quite difficult as, for example, audits in a bank, the courts have often imposed liability for clerical-type errors. *Tcherepnin v. Franz*, 393 F. Supp. 1197 (N.D. Ill. 1975)(director of state department of banking potentially liable for failing to act when he knew savings and loan was in serious difficulty); *State ex rel. Allen v. Title Guaranty & Surety Co.*, 27 Idaho 752, 152 P. 189 (1915)(surety liable after examiner failed to look at books). *But see* *Tucker v. Edwards*, 214 La. 560, 38 So.2d 241 (1949)(board members not liable when they failed to prosecute to conclusion a suit on a bond held by a bank which failed); *Sherlock v. State*, 198 App. Div. 494, 191 N.Y.S. 412 (1921)(state held not liable for bank inspector's failure).

34. F. BOHLEN & F. HARPER, *TORTS*, § 298, at 670 (combined ed. 1933); Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201, 206 (1956).

v. United States,³⁵ involved a borderline distinction between nonfeasance and misfeasance. The United States, preparing to ship fertilizer to recently defeated Japan and Germany, had chosen to use a fast-acting, high-nitrogen fertilizer. The fertilizer caught fire and exploded, killing hundreds of people and causing more than two hundred million dollars in property damage. The Court found that "the decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's . . . program."³⁶ Thus, the Court fashioned a test for determining whether the government had been performing a discretionary function. If a decision to act or not to act was made rationally at a planning level of government it was "discretionary" and the government was not liable.

Indian Towing v. United States,³⁷ decided only four years after *Dalehite*, involved a shipwreck caused by the Coast Guard's failure to keep a lighthouse beacon burning. Sixty thousand dollars in damages were claimed. The Court distinguished *Dalehite* in one sentence, concluding that the *Indian Towing* omission occurred at the operational rather than planning level, and that the United States should pay damages.³⁸ The Court reasoned that failure to check a battery did not involve any elements of administrative choice. By contrast, in *Dalehite* the government decision-makers had consciously chosen to use high-nitrogen fertilizer and not to take certain precautions after deciding that the risk of fire was outweighed by the urgency of providing rapidly acting fertilizer.³⁹

This distinction blurs in the leading state case, *Johnson v. State*.⁴⁰

35. 346 U.S. 15 (1953).

36. *Id.* at 42. The discretionary/ministerial dichotomy is codified in one form in the Federal Tort Claims Act 28 U.S.C. §2680(a) (1976).

37. 350 U.S. 61 (1955).

38. *Id.* at 64. The dissent argued forcefully that there was no way to distinguish the omissions actually alleged in *Dalehite* (failure to inspect the fertilizer bags) from the omissions in *Indian Towing*. *Id.* at 73-76 (Reed, J., dissenting).

39. The great disparity in damages sought in the two cases (well over two hundred million dollars in *Dalehite*, compared with sixty thousand dollars claimed in *Indian Towing*) has provided a cynical rationale for reconciling the cases.

40. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). 7 Negl. Comp. Cases Annot. 417-74 (4th Cir. 1971), collects numerous cases and suggests that *Johnson* is somewhat unique. Cf. *Wasserstein v. State*, 32 App. Div. 2d 119, 300 N.Y.S. 2d 263 (1969), *aff'd*, 27 N.Y. 2d 627, 313 N.Y.S.2d 759, 261 N.E.2d 665 (1970) (state not liable when parole officer failed to take boy into custody before he committed crime). Two years after the *Wasserstein* case, however, Nevada abolished sovereign immunity and in a factual situation similar to that in *Johnson* and *Wasserstein*. In *State v. Silva*, 86 Nev. 911, 478 P.2d 591 (1970), a cause of action was found to exist when an employee's wife was raped by an inmate of an honor

In *Johnson*, California child placement authorities failed to tell foster parents that a youth placed in their care had homicidal tendencies. After the youth had severely beaten one of the parents, suit was filed charging that failure to notify the foster parents was a purely ministerial omission and consequently California should be held liable. The California Supreme Court agreed. Although the State argued that a conscious decision not to tell the foster parents had been made after weighing the risk of violence against the need to place a difficult child, the court determined that a discretionary decision could not negate the existence of a duty. The court apparently felt that as the potential harm likely to arise from a wrong decision increases the effectiveness of the discretionary function as a method for eliminating the duty to decide correctly decreases.⁴¹

The discretionary/ministerial test is not workable. The two types of activities cannot truly be distinguished. But that is not the end of the problem. Even if the distinction could be defined and then implemented, the result might be undesirable. The exercise of discretion is not the exercise of law. One injured by a discretionary act or omission might have received a completely different fate had the decision been made by a different officer.⁴² This inconsistency of administrative result is no less troubling than the judicial inconsistency in determining when discretion is an appropriate legal defense.⁴³

From this discussion it should become clear that the question of the existence of duty itself cannot adequately serve as the basis for

camp. The state argued unsuccessfully that maintenance of the camp and the lessened security were discretionary actions. The case was remanded for a determination on the issue of negligence.

41. In an oft-cited case, Learned Hand advocated a distinctly different proposition: absolute immunity for public officers to prevent the fear of repeated litigation against them. This immunity would protect them even though they acted maliciously while carrying out discretionary activities. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949). See, e.g., Pound, *Individualization of Justice*, 7 *FORDHAM L. REV.* 153 (1938). Speaking of unfettered administrative discretion, Pound said:

Such things are not due merely to the personality of individual administrative officials. They inhere in the system itself which calls for speedy action and treating of each instance as unique, and seems to put the attainment of some object in a particular situation so much in the foreground as to eliminate the general security from consideration.

Id. at 160.

See also K. DAVIS, *DISCRETIONARY JUSTICE* 215 (1969); B. SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS* 271 (1959). Reich, *The New Property*, *supra* note 2 at 733-87 (1964).

42. See B. SCHWARTZ, *ADMINISTRATIVE LAW* 606-13 (1976) (Schwartz also expresses the fear that the discretionary function defense may be abused by public officers and become a method of justifying or defending arbitrary administrative decisions).

43. See generally PROSSER, *supra* note 4, §131.

determining public liability. Many courts simply assume a duty exists and go on to deal with other questions.

WHO OWES THE DUTY

In actions for public nonfeasance, the duty may be owed by either the officer or the government. The determination of who owes the duty is crucial because some defenses may be available to one type of public defendant and not to another.⁴⁴

Although early victims of public nonfeasance could not recover from the government itself, recovery was possible in a tort action against the officer who failed to act.⁴⁵ Two developments prompted a change in this scheme. First, the private law of torts progressed, subjecting defendants to increased liability. Second, the expanding size and scope of governmental activity increased the likelihood that a public officer would commit a tort. Since these parallel developments subjected officers to excessive liability, the courts gradually developed the idea of officer immunity. That defense protected the government's employees from ruinous suits.

However, this new immunity engendered another problem: if the officer was protected and the government retained its traditional immunity, the plaintiff would be unable to recover from any party. To avoid this problem, the courts gradually reduced the immunity of the government. Thus, the obligation to act for the benefit of another shifted from the officer to the government.⁴⁶

The legislative answer to the question of whether the officer of the government should owe the duty is similar to that arrived at by the courts. Liability has been gradually transferred from the officer to the government by one of two forms of legislative codification. One type provides immunity for officers and local governmental units.⁴⁷

44. See notes 89-101 *infra* and accompanying text.

45. See generally 1 T. BEVEN, *NEGLIGENCE IN LAW* 349 (2d ed. 1895); 2 F. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* 163-69 (1893); 6 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 102-03 (1924); B. SCHWARTZ, *ADMINISTRATIVE LAW* 555-57 (1976); Comment, *Developments in the Law, Remedies Against the United States and its Officials*, 70 *HARV. L. REV.* 827, 830 (1957).

46. See generally K. DAVIS, *ADMINISTRATIVE LAW* §231 at 801-07 (1951); R. PARKER, *ADMINISTRATIVE LAW* 288-91 (1952); see also B. SCHWARTZ, *ADMINISTRATIVE LAW* 555-57 (1976); Bermann, *Integrating Governmental & Officer Tort Liability*, 77 *COLUM. L. R.* 1175 (1977); Comment, *Developments in the Law Remedies Against the United States and its Officials*, *supra* note 45 at 830-31.

47. The Illinois Local Government and Governmental Employees Tort Immunity Act exemplifies the immunity type of statute. *ILL. REV. STAT.* ch. 85, §§1-101 to 10-101 (1977). The Act establishes broad immunity for officers and serves as a virtual index of cases that imposed personal liability on officers at common law. Public officers in Illinois now have immunity for almost every act they could commit as public employees except willful and

These laws do not alter the common law liability or immunity of the state government.⁴⁸ The second type of codification broadly acknowledges that the government itself owes the duty and will accept certain tort responsibility⁴⁹ (generally with numerous exceptions). Both types of statutes accomplish the purpose of shifting the duty from the officer, often ill-equipped to pay damage judgments, to the governmental unit.

Today this process is almost complete. If a duty is owed at all, the courts generally conclude that it is owed by the government.⁵⁰ Ironically, situations in which the modern law is most likely to hold that the government owes the duty, those involving torts committed by law enforcement officers, concern the same type of officers who were most frequently involved in the earliest period of the transition, namely, the common law sheriffs who served as the focal point in the transition between officer and government liability.

The common law sheriff was the original government bureaucrat. Sheriffs, however, were not public officers in the same sense as that term is understood today. Although the sheriff received his office and title from the king, he was not a salaried employee. Rather, he made his living by collecting a percentage of the value of the goods that he levied upon and by extracting a fee from the people whom he imprisoned for failure to pay debts.⁵¹ The sheriff, a quasi-public

wanton negligence in the enforcement or execution of a law. *Id.* at §2-207. Local governmental entities enjoy similar comprehensive immunity. It must be stressed, however, that immunity granted by the Illinois Local Government and Governmental Employee Immunity Act does not apply to higher levels of government such as the county or state. Those units remain liable in basically the same manner as at common law.

48. See notes 89-101 *infra* and accompanying text.

49. See, e.g., The Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-80 (1976). The act establishes the federal government's broad assumption of the obligation for the benefit of another. *Id.* at §1346(b). It states that the government itself owes the duty and therefore must accept liability for all of the negligent acts or omissions of its employees, but for certain exceptions. The principal exception involves acts committed or omitted while the officer or government is exercising a discretionary function. *Id.* at §2680(a). As discussed earlier in relation to the common law, no government duty exists when the officer is making a rational choice between two competing alternatives. See notes 31-43 *supra* and accompanying text. It is unclear whether, or to what extent, a federal officer has statutory immunity. The officer, of course, retains his common law defenses of reasonableness and good faith. See McCord, *Fault Without Liability: Immunity of Federal Employees*, 1966 U. ILL. L. F. 849.

50. For an historical perspective leading to present law, compare *United States v. Hull*, 195 F.2d 64 (1st Cir. 1952)(government liable for subordinate officer's failure to secure post office window) with *Rowning v. Goodchild*, 96 Eng. Rep. 536 (C.P. 1773)(local postmaster but not policy-making postmaster general, liable for deputy postman's nonfeasance). See generally F. BURDICK, *THE LAW OF TORTS* 183-84 (2d ed. 1908)(discussion of movement of the modern courts toward Holt's position that both subordinates and their superiors should be liable for subordinates' nonfeasance); see also Schirrot & Drew, *The Vicarious Liability of Public Officials Under the Civil Right Act*, 8 AKRON L. REV. 69 (1974).

51. See generally 47 AM. JUR. *Sheriffs, Police and Constables*, §§2, 47, 82, 96 (1943).

employee, realized a direct relationship between the effectiveness of the work that he or his deputies did and the amount of money that he made.⁵² Because sheriffs were not direct employees of the king, and because some method of control was needed to curb the sheriffs' excesses, the early courts did not protect the sheriff with the king's immunity from liability. He was considered a private person for the purpose of the suit.

Although Bracton had noted the potential liability of the sheriff for nonfeasance as early as the thirteenth century,⁵³ the first lengthy discussion of a sheriff's failure to act occurred in *Ashby v. White* in 1707.⁵⁴ In an action for failing to let a freeman vote, Lord Holt argued that recovery must be allowed because "[w]here a man has but one remedy to come at his right, if he loses that he loses his right."⁵⁵ Holt asserted that if "public officers . . . infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from like officers."⁵⁶

Though the central idea of this early case has been followed in a substantial number of cases imposing liability on the sheriff for a failure to act,⁵⁷ in 1875 the Supreme Court severely limited the personal liability of the sheriff in *Dow v. Humbert*.⁵⁸ Discussing the old cases, the Court reasoned that when a direct relationship existed between an officer's acts and his remuneration, logic dictated the imposition of severe personal penalties for nonfeasance. On the other hand, the American sheriff was a salaried government em-

52. *Id.* at §§ 96-111.

53. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 216-17, 348 (cc. 1260) (Thorne ed. 1968).

54. 92 Eng. Rep. 126 (K.B. 1707)(three-fold test for recovery set out: plaintiff must show 1) individual right or privilege, 2) hindered by an officer even though the officer was exercising discretion, 3) done with malice).

55. *Id.* at 136.

56. *Id.* at 137. *But cf.* *M'Kinnon v. Penson*, 156 Eng. Rep. 260, 262 (Ex.Ch. 1854)(no liability for failure to repair a highway):

[U]pon general principles of our law, the inhabitants of a county ought to have been suable by an individual for compensation, where he has sustained a personal and peculiar injury, from a neglect by them of their duty as such; but they were held not to be suable on grounds of convenience and justice; because it was impossible to bring them all into Court, because they were a fluctuating body, and individuals might be made responsible for omission of which, not they, but others, had been guilty; because, if the damages were levied on one or two there would be no practical and effective way of compensating them by contribution from the rest; because, at common law, they had no common property out of which the damages could be answered.

57. *Bondurant v. Lane*, 9 Port. 484 (Ala. 1839); *Palmer v. Gallup*, 16 Conn. 555 (1844); *Lafin v. Willard*, 33 Mass. (16 Pick.) 64 (1834); *Rich v. Bell*, 16 Mass. 294 (1820); *Hamilton v. Ward*, 4 Tex. 356 (1849).

58. 91 U.S. 294 (1875).

ployee. His personal liability should be limited accordingly.⁵⁹

The common law sheriff's modern successors, law enforcement authorities, play a similar transitional role in a recent realignment of the answer to the question of who owes the duty.⁶⁰ For example, the Federal Tort Claims Act,⁶¹ one of the broadest codifications of the expanding liability of the government, generally accepts the view that the government itself owes the duty to the plaintiff for a broad range of tortious acts and omissions committed by federal officers.⁶² Traditionally, however, Congress excluded intentional torts by governmental officers because it had concluded that the legal obligation not to do something intentionally against another person was a duty owed to that person by the individual officer and not by the government.⁶³ In 1974, however, the law was changed and the federal government acknowledged that it owes the duty of preventing certain intentional torts, particularly torts of violence or abuse of authority committed by law enforcement officers.⁶⁴ By gradually moving toward the view that the government, not the officer, generally owes the duty, the law has shifted responsibility for public nonfeasance from individuals who rarely could pay damage judgments to massive institutions far more capable of absorbing or spreading the cost of compensating injury. Increased liability in suits against the state also assures that the highest levels of government receive notice when the bureaucracy is not functioning smoothly. This notification encourages governmental superiors to closely watch subordinates likely to frustrate governmental policies.

Lord Holt suggested two hundred and seventy-five years ago in *Lane v. Cotton*⁶⁵ that the imposition of personal liability on superior officers for the negligent omissions of their subordinates would deter public wrongdoing by those subordinates. Close supervision of subordinates should promote regularity in government. The superior

59. Only two cases subsequent to *Dow* have been found that retain the early common law's imposition of personal liability on the sheriff: *Sidelinger v. Freeman*, 86 Ill. App. 514 (1899) (dictum) (sheriff may be liable for delaying until after expiration date on writ); *Gilbert v. Gallup*, 76 Ill. App. 526 (1898) (sheriff liable for damages after failing to levy on property).

60. See generally Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Note, *Damage Remedies Against Municipalities For Constitutional Violations*, 89 HARV. L. REV. 922 (1976).

61. 28 U.S.C. §§1346(b), 2671-80 (1976).

62. *Id.* §1346(b).

63. See also W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* §89, at 155-60 (1964) (a private master will be liable for a servant's intentional torts only if they arise out of the type of work performed).

64. 28 U.S.C. §2680(b) (1976).

65. 91 Eng. Rep. 1332 (K.B. 1701).

officer or the government should owe the duty for the subordinate's incompetence.

Lord Holt's prescience pinpoints the problem. As the government expands and accepts greater responsibility for correcting perceived social ills, a discontinuity often develops between the expressed policy of the government and the personal feelings of the government's employees. Officers may actively disapprove of the government policy and intentionally disrupt its implementation, or they may unconsciously fail to cooperate for a variety of non-political reasons in the practical aspects of governmental operation.⁶⁶ The courts are forced to deal with this problem chiefly in actions brought

66. For discussions of the problem of informal obstruction in the administrative process, see generally, *Jones v. SEC*, 298 U.S. 1 (1935); A. DOWNS, *INSIDE BUREAUCRACY* 261 (1967); R. POUND, *ADMINISTRATIVE LAW* 36-37, 127 (1942); B. SCHWARTZ, *THE PROFESSOR & THE COMMISSIONERS* 271 (1959); McLachlan, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 *ARIZ. L. REV.* 835, 845-47 (1971):

In sum, the competence of bureaucracies to accurately identify the relevant interests of the contemporary social and physical environment is subject to the frailties of human nature and individual prejudice. Elitism of expertise, communication loss, mutuality of interest, and racial and class bigotry, to name a few, are negative influences which frustrate rational decision-making. When these influences are allowed to continue unchecked, the best-intentioned administrator will rarely obtain a result consistent with the public interest.

Id. at 846-47.

For a discussion of informal resistance from an opposite point of view, see Comment, *Performance Ratings-Who Needs Them???*, 19 *AM. U. L. REV.* 509 (1970) (difficulty of conditions for employees and superiors in government agencies). See also 2 *Administrative Conference of the United States, Official Recommendations*, No. 71-9 at 53 (July 1970) (suggests controlling this problem by implementing techniques that correspond to private business management). See generally, for discussions of the difficult problems created by subordinate government employees, K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §7.12-1 at 342 (Supp. 1970) (discussing lawlessness of welfare employees and citing study indicating that almost one-third of decisions to withhold or terminate aid were unlawful or at least questionable); Denvir, *Controlling Welfare Bureaucracy: A Dynamic Approach*, 50 *NOTRE DAME LAW.* 457 (1975) (discussing management reform as only possible method of alleviating informal resistance); Marshaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 *CORNELL L. REV.* 772, 790 (1974) (court-imposed reforms are ineffective; subordinate officers create methods of avoiding court rules); Washington, *Welfare Grievance Machinery in New York City*, 7 *HOUS. L. REV.* 620 (1970).

Despite the difficulty of recovering damage for informal nonfeasance, injunctive relief has often been granted to force bureaucratic compliance with the policy set by the high-level government officers. Failure of government officers to follow agency rules has been a frequent source of litigation. Compare *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970) (need not comply with rule if it is meant only to assure orderly transaction of government business) with *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (agency must comply with its own rules if they provide substantive protection). See also *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969) (agency forced to comply with rules contained in informational pamphlet); *King v. Martin*, 21 *Cal. App. 3d* 791, 98 *Cal.Rptr.* 711 (1971) (welfare authorities compelled to comply with agency regulation requiring fair hearing decisions to be rendered within 60 days).

against the government for injunctive relief. Since it would be impractical for courts to allow suits against the myriad individual bureaucrats informally contributing to nonfeasance, judicial intervention has been increasingly aimed at the bureaucracy itself. With growing frequency the courts find that the government itself owes a duty, namely, the duty to work efficiently. If subordinate officers frustrate the implementation of that duty, the government itself must be held responsible. Injunctive relief against the government allows the courts to force the highest levels of bureaucracies to control the lowest level bureaucrats. While the means may have changed since the early common law when an action would have been appropriate only against the individual officer, the end result is the same: the government works more efficiently.⁶⁷

67. An agency's claimed lack of funds has not deterred courts from forcing the agency to act. *E.g.*, *Poirrier v. St. James Parish Police Jury*, 372 F. Supp. 1021 (E.D. La. 1974), *aff'd*, 531 F.2d 316 (5th Cir. 1976) (administrators failed to put vacant hospital into operation); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972) (court threatened sale of state property to obtain money for improving conditions). A related defense, lack of staff, has been equally ineffective. *E.g.*, *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972) (lack of staff no excuse for failing to process welfare applications); *Quarles v. Philip Morris, Inc.*, 271 F. Supp. 842 (E.D. Va. 1967) (EEOC forced to comply with sixty day time limit).

The lack of staff and funds in governmental offices is related to an additional problem. If officers are subject to personal liability for their failure to act or for their positive acts, it may be difficult for the government to attract talented people. There is fear that the government would cease to act at all if it had constantly to defend its acts. Notwithstanding the increasing attractiveness of civil service positions, this may be a genuine concern. This problem was raised as early as the 18th century. *MacBeath v. Haldimand*, 99 Eng. Rep. 1036 (K.B. 1786) (action for officer's failure to pay for corn and grease); *Bassett v. Godschall*, 95 Eng. Rep. 967 (K.B. 1770) (failure to issue ale-house license). For modern echoes of these early fears, see R. LORCH, *DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW* 199 (1969); B. WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* §10 at 35-36 (1903); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Clark, *Discretionary Function and Official Immunity: Judicial Forays into Sanctuaries from Tort Liability*, 16 A.F.L. REV. 33, 46 (1974). *Contra*, K. DAVIS, *ADMINISTRATIVE LAW AND GOVERNMENT* 110 (2d ed. 1975) (suggesting that government would run more efficiently if states were held liable in damages); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1617 (1956) (increasing suits against government should be allowed to stimulate unresponsive public bureaucracies); Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383, 394-402 (1970) (extensive discussion of fallacy in thinking that government would stop if courts interfered); Nelson & Avnaim, *Claims Against a California Governmental Entity or Employee*, 6 SW. L. REV. 550 (1974) (use of strict interpretation of time limits and statutory claims procedures to limit the increasing liability of governments as immunity defense is abandoned).

Informal bureaucratic resistance is often merely a reflection of the differing views held by politically responsible policy-making individuals and subordinate officers charged with carrying out the policy. See, *e.g.*, *Ramos v. County of Madera*, 4 Cal. 3d 685, 494 P.2d 93, 94 Cal.Rptr. 421 (1971), in which county welfare authorities had threatened to terminate from assistance any child over ten years old who did not work in the fields at harvest time, when the schools were closed for that purpose. The court described this as a shocking example of

Two cases from the Supreme Court are illustrative. In the early case of *Boyden v. Burke*,⁶⁸ the Court dealt with an officer who had refused to give patent reports to an applicant because of the applicant's rudeness and bad language. The officer's informal precondition of good manners, though salutary in theory, was unacceptable because "[i]ll manners or bad temper do not work a forfeiture of men's civil rights."⁶⁹ *Boyden* plainly represents the early position that the officer himself owed the duty, and that an action would be against him alone for his informal acts or omissions. With little difficulty the Court found that the officer personally owed the duty to deliver the report.

In 1974, the Supreme Court looked again at informal bureaucratic resistance. In *Edelman v. Jordan*,⁷⁰ Justice Rehnquist allowed injunctive relief against the Illinois Department of Public Aid and forced the Illinois welfare authorities to eliminate lengthy delays between application for and approval of disability benefits. Although the Court denied retroactive damages to the plaintiffs for the department's prior failures to act promptly,⁷¹ *Edelman* represents a

informal and illegal governmental action and made the city and employees personally liable for damages for failing to follow the law. See generally R. LORCH, *DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW* 203-04 (1969); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1252-57 (1965) (compares formality of agency procedures when lawyers accompany citizens with agency informality when citizens face government alone); Comment, *Scaling the Welfare Bureaucracy: Expanding Concepts of Governmental Employee Liability*, 21 *U.C.L.A. L. REV.* 624, 642-44 (1973) (extensive discussion of remedies possible against bureaucrats including possible malpractice action).

68. 55 U.S. (14 How.) 575 (1852).

69. *Id.* at 583.

70. 415 U.S. 651 (1974).

71. Most of the commentary on *Edelman* has been directed toward this aspect of the case. See, e.g., Davidson, *Welfare Cases and the "New Majority": Constitutional Theory and Practice*, 10 *HARV. C. R. - C. L. L. J.* 513 (1975); Note, *Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution*, 50 *NOTRE DAME LAW.* 496 (1975). But see *Rodriguez v. Swank*, 496 F.2d 1110 (7th Cir.), cert. denied, 419 U.S. 885 (1974). In *Rodriguez*, the court imposed a \$100 fine, payable to an applicant for assistance, if the welfare department failed to process applications within the prescribed time period. The *Rodriguez* court supported imposition of a fine for future misdeeds by the state by quoting from *Edelman* in a most elliptical fashion. See 496 F.2d 1110, 1112. For the Supreme Court's actual statement see 415 U.S. 651, 668 (1974).

Additionally, the court reasoned that if the generally available remedy of injunctive relief proves ineffective as a means to elicit efficiency in government, the remedy of damages as a monetary stimulus may be needed. Still, because courts are more willing to require future acts from the government than to make it pay for past errors, damages generally will not be awarded if injunctive relief could have been applied effectively at an earlier stage. *Industrial Comm'n v. Superior Court*, 5 *Ariz. App.* 100, 423 P.2d 375 (1967) (officers not liable for damages in failing to hold meeting because relief could be sought by mandamus); *Burns v. City Council*, 31 *Cal. App. 3d* 999, 107 *Cal.Rptr.* 787 (1973) (no liability in damages after board refused to issue license because mandamus was available as means to compel action).

large step in the development of public liability for nonfeasance. The Court accepted the fact that the government owed the duty to act and could be liable for nonfeasance.

The modern approach of finding that the duty is owed by the government evinces a concern over the expansive size of modern government. Large public institutions may be detrimental to the public interest in at least two important respects. First, bureaucratic stagnation impedes efficient government. Thus larger government may have difficulty serving its constituents. Second, public institutions now often appear to have at least one function other than the implementation of the government's expressed goals. This informal function is self-preservation. Further expansion, or at least maintenance of the status quo, has come to be a self-imposed purpose of bureaucratic existence. When the duty is imposed directly

A group of cases involving voting is representative of the development of the law of public nonfeasance and the general preference for injunctive relief when possible. But as the common law of public liability expanded, damages often were required from officers where injunctive relief was no longer possible. The earliest case suggesting this is *Sterling v. Turner*, 86 Eng.Rep. 139 (K.B. 1672), in which the mayor was held liable in money damages for failing to take a ballot vote after the voice vote for bridgemaister was inconclusive. Because injunctive relief could not compel a change in the election results, damages were allowed. *See also* *School Directors v. Miller*, 54 Ill. 338 (1870) (directors personally liable on official promissory notes after failing to call mandatory election to approve issuance); *Stradford v. Reinecke*, 6 Ill. App. 2d 537, 128 N.E.2d 588 (1955)(dicta) (officer may be subject to damages for failing to keep ballots until after determination of recount); *Lincoln v. Hapgood*, 11 Mass. 350 (1814) (election judge liable for damages for refusing to allow plaintiff to vote); *Larson v. Marsh*, 144 Neb. 644, 14 N.W.2d 189 (1944) (officer liable for nominal damages for failing to put plaintiff's name on ballot); *Schwartz v. Heffernan*, 304 N.Y. 474, 109 N.E.2d 68 (1952) (board members potentially liable in individual capacity for failure to put name on ballot); *Jeffries v. Ankeny*, 11 Ohio 372 (1842) (offspring of white man and half-breed Indian allowed cause of action for damages when town trustees refused to let him vote). *Contra*, *Gibson v. Winter-set Community School Dist.*, 358 Iowa 440, 138 N.W.2d 112 (1966)(mandamus allowed but not damages, to force board to call bond issue election; evasion of positive duty is equivalent to refusal to perform); *Kopfler v. Edwards*, 318 So. 2d 653 (La. App. 1975) (mandamus only remedy available when board failed to call election for judge). Generally, for a plaintiff to succeed in obtaining injunctive relief or mandamus, the action sought to be compelled or the inaction sought to be remedied cannot be discretionary in nature. However, the *exercise* itself of discretion has been compelled. *Huidekoper v. Hadley*, 177 F. 1 (8th Cir. 1910) (mandamus allowed to force assessor to exercise his discretion but no remedy once officer had acted); *Illinois State Board of Dental Examiners v. People ex rel Cooper*, 123 Ill. 227, 13 N.E. 201 (1887) (mandamus allowed to force board to make discretionary decision on reputability of school); *Grove v. Board of Supervisors*, 246 Ill. App. 241 (1927) (mandamus allowed to compel granting of license to run dance hall); *Tyrell v. Burke*, 110 N.J.L. 225, 164 A. 586 (1933) (dicta) (mandamus could be used to compel board to make decision whether to license qualified embalmer); *State ex rel. Federated Dep't Stores, Inc. v. Brown*, 165 Ohio St. 521, 138 N.E.2d 248 (1956) (writ of procedendo allowed to force board to hear workmen's compensation claim); *see generally* 2 F. COOPER, STATE ADMINISTRATIVE LAW 572-85 (1965); 2 J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS §§ 1310-11 at 861-63 (2d ed. 1890); Sullivan, *Judicial Review in Illinois*, 1949 U. ILL. L.F. 304, 306 (use of mandamus to compel performance by officer who fails to act in state that has not consented to public suit).

on the government itself, a mechanism exists for checking these negative aspects of big government.

TO WHOM IS THE DUTY OWED

Where courts determine that the government or its officer owes a duty to act, they may find that obligation owed to the individual injured by the government's nonfeasance or to the public. If the duty flows to the public the injured plaintiff may not recover. However, if the duty is owed to the individual himself because he incurred a specific and unique injury, the courts have held that the government or the officer will be liable. The requirement of a specific and unique injury, an injury different in kind from that suffered by the public, has been imposed on the plaintiff in order to prevent numerous individuals from suing the government for the same nonfeasance.⁷²

This specific injury/public duty test has proven to be very difficult to implement. Arbitrary decisions have proceeded from imprecise attempts to separate one factual situation from another when, in reality, no difference existed.⁷³ Because of this shortcoming, use

72. In *William's Case*, 77 Eng. Rep. 163 (K.B. 1592) involving a vicar's failure to hold Sunday services, the rationale was clear:

But when the chapel is not a private to him and his family, but public and common to all his tenants of the same manor, which may be many and of great number; there no action on the case lies for the lord; for then every of his tenants might also have his action on the case as well as the lord himself, and so *infinite actions for one default*

Id. at 164 (emphasis added). (At that time, a vicar in the Church of England was a quasi-public officer).

Almost three-hundred fifty years later, Judge Cardozo, speaking for the New York Court of Appeals, articulated the test and its rationale:

[T]he benefit . . . must be one that is not merely incidental and secondary. . . . It must be primary and immediate in such a sense and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost. The field of obligation would be expanded beyond reasonable limits if less than this were to be demanded as a condition of liability.

H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 164, 159 N.E. 896, 897 (1928); *accord*, *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945) (city not liable for failing to provide adequate water pressure and for failing to create fire department). *Contra*, *Veach v. City of Phoenix*, 102 Ariz. 195, 427 P.2d 335 (1967).

73. *Compare* *City of Providence v. Clapp*, 58 U.S. 160 (1854) (city liable for failing to remove snow) *and* *Schoden v. Schaefer*, 184 Ill. App. 456 (1913) (officer liable for failing to use drainage bonds properly) *and* *Serpas v. Margiotta*, 59 So. 2d 492 (La. App. 1952) (officer liable for failing to catch dog) *and* *Upchurch v. Clinton County*, 330 S.W.2d 428 (Ky. 1959) (officer liable when he failed to catch vicious animals) *and* *Mayor of Lyme v. Henley*, 6 Eng. Rep. 1180 (1934) [also reported at 130 Eng. Rep. 995 (C.P. 1828)] (liable for failing to erect sea wall) *with* *Kimble v. United States*, 345 F.2d 951 (D.C. Cir. 1965) (no liability for failure to locate widow potentially eligible for pension) *and* *Rough v. Quinn*, 20 Cal. 2d 488, 127 P.2d

of specific and unique injury test language gradually died out over the years. However, it may have been resurrected by the Burger Court under the Court's test of "standing" to sue in public actions. The recent decisions which require a direct and almost specifically tangible connection between the plaintiff and the injury attempt to limit public liability by using a variation of the specific injury test.⁷⁴

For example, in *Warth v. Seldin*,⁷⁵ Justice Powell wrote: "the Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens that harm alone normally does not warrant exercise of jurisdiction."⁷⁶

Similar reasoning was employed in *Rizzo v. Goode*.⁷⁷ In *Rizzo*, the plaintiff alleged that the Philadelphia Police Commissioner had failed to act to prevent civil rights violations by subordinates. The Court said that the alleged "failure to act" was insufficient to establish a connection between the plaintiffs and a specific injury; liability could not be based on such "amorphous propositions."⁷⁸ Although these cases are generally understood to involve the issue of accessibility to federal court, they can also be studied as a reinstatement of attempts to limit public liability by requiring a specific and unique injury in suits for public nonfeasance.⁷⁹

Many courts have attempted to control the extent of public liability by creating a new test for identifying the victim. Under this test, courts focus on the type of activity engaged in by the government when its act or omission injured the plaintiff.

The government or the public officer is found to owe a duty di-

1 (1942) (no liability for failing to conduct tax sale) and *East River Gas-Light Co. v. Donnelly*, 93 N.Y. 557 (1883) (no liability for failing to accept low bids) and *Butler v. Kent*, 19 Johns (N.Y.) 223 (1821) (no liability for failing to conduct lottery) and *Pain v. Patrick* 87 Eng. Rep. 191 (K.B. 1691) (no liability for failing to give residents customary free passage over river).

74. See generally G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1544 (9th ed. 1975).

75. 422 U.S. 590 (1975).

76. *Id.* at 499.

77. 423 U.S. 362 (1976). This action was brought under the Federal Civil Rights Act, 42 U.S.C. §1983 (1970).

78. *Id.* at 375-76.

79. Citizen-suit statutes provide a different answer to the question of whether the government owes the duty to the individual or to the public. These statutes suggest that any person may bring suit as a private attorney general; standing to sue, that is, a specific and unique injury, is provided by the statute itself. See, e.g., Consumer Product Safety Act, 15 U.S.C. §2073 (Supp. V. 1975); Federal Water Pollution Control Act, 33 U.S.C. §1365(a)(2) (Supp. V. 1975); Marine Protection, Research and Sanctuaries (Ocean Dumping) Act, 33 U.S.C. §1415(g) (Supp. V. 1975); Clean Air Act, 42 U.S.C. §1857(h-2) (1970); Noise Control Act, 42 U.S.C. §4911 (Supp. V. 1975). See generally Jaffee, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

rectly to the injured party when the court determines that the act or omission occurred while the government was engaged in a proprietary or private function. A proprietary function is generally considered to be an activity which could be carried out by a private party but which has been undertaken by the government.⁸⁰ Thus, when the government acts in a private manner it is liable as if it were a private party. Conversely, when the government acts in a purely public manner and conducts activities which only a government could do, the duty is held to be owed to the public and not to the private individual. Redress for public nonfeasance of a governmental nature is accomplished by way of infrequent public prosecution for criminal acts.⁸¹

The proprietary/governmental distinction and its relation to the question of to whom the duty is owed was set as early as 1466 in a reference from the Yearbooks:

[I]f there be a common way, and it is not repaired, so that I am damaged by the miring of my horse, I shall not have any action for that against those who ought to repair the way, but it is a popular action, in which case no individual shall have an action on the case, but it is an action by way of presentment.⁸²

The modern trend has clearly been to abolish the proprietary/governmental distinction. In the leading state case, *Hargrove v. Town of Cocoa Beach*,⁸³ the plaintiffs recovered after a prisoner had suffocated in a jail fire. The public officers had negligently failed to watch the jail and were unaware of the fire until it was too late to rescue the victim. The government was liable despite the obviously governmental activity involved in operating a jail. *Hargrove* exemplifies the courts' increasing unwillingness to distinguish governmental activities from proprietary ones. Realizing the inconsistency in decisions implementing the proprietary/governmental distinction,⁸⁴ the *Hargrove* court overruled numerous

80. 57 Am. Jur.2d, *Municipal, School, and State Tort Liability*, §27 (1971); Note, *Torts - Sovereign Immunity - The Government's Liability for Tortious Conduct Arising from Proprietary Functions*, 20 DE PAUL L. REV. 302, 305 (1971).

81. R. COOLEY, *HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS*, 376 (1914); Davis, *Tort Liability of Governmental Units*, 40 Minn. L. Rev. 751, 773 (1956).

82. Y.B. 5 Edw. 4, 3 pl. 93 or 2 pl. 24 (1466), *cited and quoted in* Hill v. Boston, 122 Mass. 344, 346 (1877).

83. 96 S.2d 130 (Fla. 1957); *see also*, Annot., 60 A.L.R.2d 1198 (1958).

84. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1621 (1956); 1 E. KINKHEAD, *COMMENTARIES ON THE LAW OF TORTS* 181 (1903); F. MICHELMAN & T. SANDALOW, *MATERIALS ON GOVERNMENT IN URBAN AREAS* 194-96 (1970); Prosser, *supra* note 4 at 977-78; James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 623 (1955); Kramer, *The*

Florida precedents and abolished the distinction.⁸⁵

Even those states that retain the test have gradually modified it and now allow extensive liability to be placed on the government notwithstanding extensive governmental operations. For example, in *Parker v. City of Highland Park*,^{86,87} the plaintiff, injured when he fell through a glass door, received treatment at the publically owned municipal hospital. He continued to suffer pain and subsequently went to a different hospital for treatment. A large piece of glass was located in his back. He filed suit against the city and alleged that the original doctor's nonfeasance, failure to x-ray his back, created public liability.

The Michigan Supreme Court had previously held that operating a hospital was a governmental function exception to those activities *sui generis governmental* — of essence to governing.⁸⁸

SPECIAL DEFENSES TRADITIONALLY AVAILABLE TO GOVERNMENTS AND OFFICERS FOR BREACH OF DUTY

Even where the government or its officer has breached a duty owed directly to an individual, the plaintiff will be unable to recover if a special defense protects the defendant from suit. When the courts consider whether such a defense applies, as when they deal with other aspects of public nonfeasance, they are interested in two primary social goals: the promotion of effective and responsible government, and the dispersion of the cost of compensating injury throughout the whole society.

The judicial means for accomplishing these goals have changed with the size of government. Smaller governments needed protection from individual suits in order to operate effectively; large and cumbersome modern governments need more prodding than protection. Responsive government is now more effectively promoted by allowing a greater number of private actions than the early courts

Governmental Tort Immunity Doctrine in the United States, 1790-1955, 1966 U. ILL. L. F. 793, 816-18.

An extensive collection of cases allowing recovery appears in Annot., 16 A.L.R.2d 1079 (1951) (liability of county in connection with activities which pertain, or are claimed to pertain, to private or proprietary function). It is difficult, however, to distinguish the cases allowing recovery from those in which liability was not imposed. Additional cases on the test are collected in Annot., 40 A.L.R.2d 927 (1955) (state's immunity from liability as dependent on governmental or proprietary function).

85. 96 So. 2d at 133.

86. 404 Mich. 183, 273 N.W.2d 413 (1978).

87. 404 Mich. at 27, 273 N.W.2d at 415.

88. *But c.f. Perry v. Kalamazoo State Hospital*, 404 Mich. 205, 273 N.W.2d 421 (1978) (operation of mental hospital a governmental function).

thought appropriate or useful. The goal of the courts remains the same; only the means of achieving that goal have changed. As officers themselves become individually less important, because government employs greater and greater numbers of them, their immunity increases.⁸⁹ As government itself, rather than merely through the acts of its officers, becomes increasingly responsible for injury, its special defenses diminish.⁹⁰

There are various bases for the different public immunities. Sovereign immunity is rooted in constraints on the power of courts. Governmental and officer immunity are an outgrowth of the practical considerations of fiscal limitation and the fear of unlimited litigation. The jurisdictional defense of sovereign immunity⁹¹ protects only the federal and state governments. The defense arises out of a theoretical lack of power in the courts to compel the government to do something against its will. President Jackson's legendary statement in response to an unpopular Supreme Court decision emphasizes the reality of judicial weakness: "John Marshall has made his decision. Now let him enforce it."⁹² Since the government itself enforces the law it will do so against itself only to the extent it chooses. Although the ancient maxim that "the king can do no wrong" is often used as the basis for the doctrine of sovereign immunity, perhaps a more accurate formulation would be that "the king can do whatever he pleases."⁹³

The rationale is clear. Law can be enforced only to the extent that society is organized; only the organizing force can impose law on the constituent parts of society, and it does so only to the extent it chooses. If the organizing principle chooses not to enforce the law against itself, there is no force available in society that can impose the law on it.⁹⁴

89. See notes 65-67 *supra* and accompanying text.

90. See notes 48-50 *supra* and accompanying text.

91. For discussions of sovereign immunity, as applicable to actions for official nonfeasance, see J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 250 (5th ed. 1923); PROSSER, *supra* note 5 §131 (4th ed. 1971); Borchard, *Government Liability in Tort*, 34 *YALE L.J.* 1 (1924); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 *U. COLO. L. REV.* 1 (1972).

92. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 30 (9th ed. 1975).

93. The "king can do no wrong" language represents the presumption of regularity in government and is a basis for governmental immunity.

94. Justice Holmes summarized the idea in dicta:

Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. . . . A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law

*Edelman v. Jordan*⁹⁵ reinforced the conceptual foundation of this power theory of sovereign immunity. The Court chose to allow prospective injunctive relief against a sovereign state but denied retroactive damages for prior governmental failure to act. Although the Court implied that it had the "moral authority" to order the sovereign to do what it ought to do in the future, the Court refrained from saying that it had the power to compel the sovereign to pay damages for past misdeeds.⁹⁶

The power theory of sovereign immunity helps explain two apparent anomalies in the law of public immunity: both the king's officers and small governmental units, principally cities, were traditionally not immune from suit.⁹⁷ Sovereign immunity was generally held

on which the right depends.

Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). See also 2 HOLMES-LASKI LETTERS 822 (M. Howe ed. 1953) where Justice Holmes wrote about attempting to force the legislative or executive branches of government to do something against their will:

It seems to me like shaking one's fist at the sky, when the sky furnishes the energy that enables one to raise the fist. There is a tendency to think of judges as if they were independent mouthpieces of the infinite, and not simply directors of a force that comes from the source that gives them their authority.

See generally David, *Tort Liability of Local Government Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1 (1959); Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S. CAL. L. REV. 161, 176 (1963) (government is not like private sector because it undertakes enormous tasks; should not be held to same standard as private parties because it attempts more difficult undertakings).

95. 415 U.S. 651 (1974).

96. The result in *Edelman* was foreshadowed in an early treatise dealing with the sovereign's failure to act. In 1276 a commentator implied that the sovereign could be sued for failure to pay a pension or certify a title to land, even though the sovereign clearly was immune from suit in most areas.

THE MIRROR OF JUSTICES (c.1276), reprinted in 7 SELDEN SOCIETY REPRINTS 67 (1895). In the same work the early treatise writer says that the king's court would be open to actions "against the king and queen as against any other of the people. . . ." *Id.* at 11. Professor Holdsworth cites a later yearbook reference also suggesting that the king could be enjoined to act. Y.B. 9 Hy. VI, Pasch. pl. 7 (1438), cited in 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 18 N.1 (3d ed. 1944).

The courts thus had moral authority to command the king to perform future acts correctly but no actual authority to compel payment for past wrongs. Centuries ago the courts exercised self restraint in actions against the sovereign because the king's overwhelming power; today the courts call the same restraint an implementation of the doctrine of separation of powers.

97. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (sovereign immunity does not protect local government bodies). Cf. 18 E. McQUILLIN, MUNICIPAL CORPORATIONS §53.08 (3d rev. ed. 1963) (cities' failure to act generally imposes no liability even though sovereign immunity does not apply); 1 T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE (5th ed. 1898) (immunity of cities is not based on immunity of sovereign but on idea that the government cannot be dispossessed of its property without its consent); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 931 (1976) (eleventh amendment has no application to municipalities). *But cf.* *City of New Orleans v. Ker*, 50 La. Ann. 413, 23 So. 384 (1898) (city liable for failure to give owner of stock pound necessary money to operate pound) (dicta suggests that a municipal corporation acting in its governmental nature is an agent of the state).

inapplicable to these parties on the conceptual ground that they were not sovereigns. However, the relatively insignificant power of the king's officers and smaller governmental units seems an equally plausible explanation for their inability to assert the defense.⁹⁸ The powerful sovereign could compel cities and officers to pay damage awards imposed by the courts. No one could compel the sovereign to pay.

Governmental and officer immunity are rooted in more practical considerations. Governmental resources are limited. If liability were imposed for all torts, governmental activity could be deterred. Thus, the defenses insure that the mechanism thought to promote effective government, increased liability, does not have a deleterious effect.

These defenses are also based on a presumption of regularity in government. This presumption follows from the maxim "the king can do no wrong." Wrong acts result from selfish, non-public, motives. Since, in theory, the government does not act selfishly, it should be presumed to act in the public good.

In jurisdictions where the sovereign is immune from direct suit but is responsible for its officers' torts, plaintiffs may bring actions against the government by naming a high-level officer as a nominal defendant. A nominal defendant is a defendant in name only. His actions giving rise to the suit were the direct implementation of the government's policy decisions. He will be defended by government attorneys and he will personally pay no damages. This well-accepted legal fiction avoids the jurisdictional defense of sovereign immunity.⁹⁹ Governmental immunity, however, may remain avail-

98. See *Chicago v. Sturges*, 222 U.S. 313 (1911) (state could compel city to pay damages to victims of mob violence); B. WYMAN, *PRINCIPLES OF ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 2 (1903); Crampton, *Non-Statutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 397 (1970); Vanlandingham, *Local Government Immunity Re-Examined*, 61 NW. U. L. REV. 237, 239-42 (1966) (fact that legislatures often re-enact immunity statutes after courts abolish immunity; suggests that sovereign immunity involves conflict between separate branches of government and which branch has proper authority); Comment, *Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity in Illinois*, 61 NW. U. L. REV. 265, 279 (1966) (certain legislative prerogatives should not be questioned by the courts); cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress may eliminate state's sovereign immunity if state violates fourteenth amendment).

99. The question of whom the plaintiff is actually suing, the officer or the government, is extremely complex and the subject of extensive litigation and commentary. See generally *Ex parte Young*, 209 U.S. 123 (1908) (eleventh amendment and injunctive suits against officers); *United States v. Lee*, 106 U.S. 196 (1882) (principal early case on this point); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946); 435, 436 (1962); Whitehill, *The Eleventh Amendment and Sovereign Immunity: Vagaries of a Federal Fiction*, 10 TULSA L.J. 436 (1975).

able as a defense for the government.

In *Edelman v. Jordan*,¹⁰⁰ the Court sharply distinguished the use of the nominal defendant fiction for prospective injunctive relief from its use for the retrospective relief of damages. *Edelman* granted injunctive relief compelling the defendant state's prospective conformity with HEW time limits; retroactive damages were denied. The Court reasoned that forcing other branches of government to obey the law in the future was a matter capable of sustaining judicial intervention based only on the fiction of the nominal defendant; the far more serious issue of forcing other branches of government to pay a penalty for past failure to act could not be decided based only on this fictional foundation.¹⁰¹

DISPARATE TYPES OF PUBLIC NONFEASANCE AND THE ARGUMENT BY ANALOGY¹⁰²

Governmental liability for nonfeasance is expanding. However, because the law is still developing, a jurisdiction may lack precedent permitting recovery for a specific kind of nonfeasance. This lack of case law need not prevent a court from holding the government liable. Concepts from other areas of governmental nonfeasance can be employed to justify holding for the plaintiff.

Upon casual analysis, no connection between the separate areas of law seems apparent. A jurisdiction's cases on failure to repair roads, for example, may not appear relevant in actions seeking the payment of public welfare benefits. Several fundamental relationships, however, do exist. In all areas of nonfeasance the action is brought because the government failed to act. The defenses in all areas will generally be the same, namely, sovereign, governmental, or officer immunity. Moreover, the underlying policy concerns influencing courts gradually to broaden public liability are identical in all of these cases despite the striking differences in factual situations. For these reasons the criteria used to justify or bar recovery in one area is often applicable to another.

Most of the cases fall into six categories: failure to supervise, inspect, license, protect, warn or repair. Each of these areas of public nonfeasance will now be discussed so that the possibility of applying concepts from one area to another can be explored.

100. 415 U.S. 651 (1974).

101. In *Quern v. Jordan*, ___ U.S. ___, 99 S.Ct. 1139 (1979), a follow-up case to *Edelman*, the Court reiterated this distinction between prospective and retroactive relief.

102. The argument by legal analogy is suggested in K. LLEWELLYN, *THE COMMON LAW TRADITION* 82-84 (1960).

Failure to Supervise Adequately

The government or an officer may fail to supervise the activities of employees or other individuals.¹⁰³ Where this failure results in an injury, some courts will find a duty owed directly to the plaintiff if he relied on the superior knowledge of the government or public officer.

The cases demonstrate that as the element of reliance increases, the likelihood of individual recovery also increases.¹⁰⁴ For example, the government repeatedly has been found liable for the failure of teachers to supervise. The element of reliance here is clear.¹⁰⁵ Mandatory schooling forces parents to rely on the government to protect their children. Another form of forced reliance has permitted electrical linemen to recover. Since electricity cannot be seen, the linemen necessarily relied on their superiors to turn off the current.¹⁰⁶ The reliance element was also evident where individuals drowned because the government failed to provide lifeguards.¹⁰⁷

Failure to Inspect

Some of the most difficult cases involving public nonfeasance concern the failure to adequately inspect food, drugs, or publicly

103. See, e.g., *Jordan v. United States*, 294 F. Supp. 204 (S.D. Ga. 1968) (failure to supervise fumigation of truck); *Austin W. Jones Co. v. State*, 122 Me. 214, 119 A. 577 (1923) (failing to supervise mental patient who set fire to plaintiff's store).

104. In three cases in which the government was held not liable the lack of governmental liability was phrased as an absence of duty. The plaintiff cannot claim reliance on government action where the government had no duty to act. See *Blaber v. United States*, 212 F. Supp. 95 (E.D.N.Y. 1962), *aff'd*, 332 F.2d 629 (2d Cir. 1964) (government's duty to supervise with regard to burning lumps of thorium was discretionary); *Robbins v. Scarborough*, 181 Ill. App. 58 (1913) (trustees of school board duty to check treasurer's books was a duty to the public); *Brogan v. City of Philadelphia*, 346 Pa. 208, 29 A.2d 671 (1943) (police duty was to maintain unobstructed roadway not to stop boys from throwing mortar at passerby); see also *Brooks v. Jacobs*, 139 Me. 371, 31 A.2d 414 (1943) (failed to provide students safe place from which to shovel snow); *Gardner v. State*, 281 N.Y. 212, 22 N.E.2d 344 (1939) (failed to instruct child on how to do headstand).

105. *Morris v. Ortiz*, 3 Ariz. App. 399, 415 P.2d 114 (1966), *vacated on other grounds*, 103 Ariz. 119, 437 P.2d 652 (1968) (teacher not liable after he failed to watch shop students). *Contra*, *Desmaris v. Wachusett Regional School Dist.*, 350 Mass. 591, 276 N.E.2d 691 (1971) (teacher not liable after failing to instruct child on wearing goggles). For a detailed discussion of the status in Illinois of teachers' failure to supervise, see Comment, *The In Loco Parentis Status of Illinois Schoolteachers: An Unjustifiably Broad Extension of Immunity*, 10 J. MAR. J. 599, 611-20 (1977). See also *Gerrity v. Beatty*, 71 Ill. 2d 47, 373 N.E.2d 1323 (1978) (coaches allowed "parental" defense).

106. See *United States v. Pierce*, 235 F.2d 466 (6th Cir. 1956); *Dudley v. Community Publ. Serv. Co.*, 108 F.2d 119 (5th Cir. 1939); *McGarry v. United States*, 370 F. Supp. 525 (D. Nev. 1973) (detailed discussion of many electricity cases).

107. E.g., *Brown v. United States*, 99 F. Supp. 685 (S.D.W.Va. 1951). *But cf.* *Boucher v. Fuhlbruck*, 26 Conn. Supp. 79, 213 A.2d 455 (1965) (no liability when park officials had decided not to provide lifeguard at river running thorough city park).

owned property. In these cases the injured plaintiff relies on an implicit government assurance of safety following inspection. Although numerous cases deny recovery by reasoning that the reliance of the injured victim creates no greater duty toward the victim than toward the general public, an increasing number of cases indicate that the traditional approach is no longer appropriate.¹⁰⁸ As people place greater reliance on the government, and reasonably expect it to do what it says it will do, the government's mere failure to act responsibly will often produce injury. Since the courts are clearly moving toward more compensation for individual injury, recovery follows.

A stunning modern case, *Griffin v. United States*,¹⁰⁹ epitomizes this general broadening trend, though perhaps the facts of the case indicate that the government may well have been guilty of misfeasance as well as nonfeasance. *Griffin* allowed recovery to a woman who had relied upon the government's inspection of a batch of polio vaccine. The inspection was inadequate and contaminants in the drug administered to the plaintiff completely paralyzed her. In a long and detailed opinion, the court rejected the government's defense that the duty was owed only to the general public. The court reasoned that the government had assumed a tremendous responsibility by agreeing to certify the safety of drugs. Individuals had a legal right to rely on that certification. A legal obligation for the benefit of another was created by the government's undertaking the

108. Following the rationale of several cases imposing liability when food inspectors failed adequately to inspect, *Tardos v. Bozant*, 1 La. Ann. 199 (1846) (meat); *Nickerson v. Thompson*, 33 Me. 433 (1851) (fish); *Hayes v. Porter*, 22 Me. 268 (1843) (meat), the courts have often allowed recovery to an individual victim of an inspector's failure, finding the duty to be owed specifically to the injured individual. See *Whitlock v. United States*, 304 F. Supp. 1020 (E.D.Va 1969) (railroad brakes); *Patrick v. United States*, 90 F. Supp. 340 (S.D. Cal. 1950) (underwater boat for gas leaks); *Sava v. Fuller*, 249 Cal. 2d 281, 57 Cal. Rptr. 312 (1967) (poisonous substance eaten by child); *Whitt v. Reed*, 239 S.W.2d 489 (Ky. 1951) (water pipe system; drinking fountain erupted boiling water in child's face); *Runkel v. City of New York*, 282 App. Div. 173, 123 N.Y.S.2d 485 (1953) (did not seal off building after inspectors condemned it); *Metildi v. State*, 177 Misc. 179, 30 N.Y.S.2d 168 (1941) (retaining wall). Recovery denied: *People ex rel Trust Co. v. Maryland Cas. Co.*, 132 F.2d 850 (7th Cir. 1942) (contaminated water pumped to state hospital); *Anglo-American & Overseas Corp. v. United States*, 144 F. Supp. 635 (S.D.N.Y. 1956), *aff'd*, 242 F.2d 236 (2d Cir. 1957) (poison in tomato paste); *Russell & Tucker v. United States*, 34 F. Supp. 73 (N.D. Tex. 1940) (ticks on cows); *Brooks v. University of N.C.*, 2 N.C. App. 157, 162 S.E.2d 616 (1968) (contaminated collard greens); *Antin v. Union High School Dist. No. 2*, 130 Or. 461, 280 P. 664 (1929) (exploding hot water tank); Annot. 41 A.L.R. 3d 567 (1972) (numerous cases suggest no liability for building inspector's failure to find defects).

109. 351 F. Supp. 10 (E.D. Pa. 1972), *modified*, 454 F.2d 1059 (2d Cir. 1974) (negligence *per se* by Pennsylvania law). See also Note, *The Federal Seal of Approval; Government Liability for Negligent Inspection*, 62 GEO. L.J. 937 (1974).

inspection. This obligation flowed directly to the plaintiff.

Nonetheless, a clear majority of the cases holds that the failure to inspect — particularly the failure to inspect buildings — is a breach of a duty owed only to the public.¹¹⁰ Liability generally does not follow this type of public nonfeasance. It would seem, however, that the general trend of broadening public liability will gradually influence the inspection cases.

Failure to License

Reliance on superior knowledge or expertise is the primary focus in the cases involving the failure to supervise or to inspect. That element is utilized by the courts to permit recovery without opening up the government to potentially limitless liability. However, considerations of reliance disappear from the courts' discussions in cases dealing with the government's failure to act upon license requests made by private citizens. Although there is actually a forced relationship in the license situations, one which could almost be characterized as mandatory reliance,¹¹¹ the courts rarely find that a duty is owed directly to the person seeking the license. A sense of fairness would suggest that a duty should be imposed upon the government to act, since the government's failure to act results in the inability of the person seeking the license to act. Nonetheless, the courts have not analyzed the facts in that manner.

At least as early as 1672 people were having difficulty getting cooperation from the government regarding licenses. The early cases often involved applications for tavern licenses. In *Stephens v. Watson*¹¹² the court implied that the people issuing the licenses had a duty to promote order and stability in society and that this was the purpose of licensing taverns; the duty flowed not to the tavern owner but to the public. No recovery was allowed. Later cases have

110. *United States v. Neustadt*, 366 U.S. 696 (1961) (FHA inspector failed to discover serious defect and plaintiffs suffered economic loss); *Copeland v. United States*, 347 F. Supp. 247 (M.D. Ala. 1972) (slow leak was not discovered in gas heater; occupants of low-income housing killed); *Marr v. United States*, 307 F. Supp. 930 (E.D. Okla. 1969) (failure to establish adequate procedure for inspecting aircraft); *Little Rock v. Holland*, 184 Ark. 381, 42 S.W.2d 383 (1931) (superior inspector failed to examine light pole and lineman injured because of pole's rotted condition); *Quintan v. Industrial Comm'n*, 178 Colo. 131, 495 P.2d 1137 (1972) (failure to inspect machinery); *Mead v. City of New Haven*, 40 Conn. 72 (1873) (failure to inspect boiler); *Modlin v. City of Miami Beach*, 201 So.2d 70 (Fla. 1967) (inspector failed to detect danger in structure); *Rivera v. City of Amsterdam*, 6 App. Div. 2d 637, N.Y.S.2d 530 (1958) (city inspectors knew about danger from faulty stove but failed to correct problem until after explosion and death); *Chastaine v. State*, 160 Misc. 828, 290 N.Y.S. 789 (1936) (failure to inspect elevator properly).

111. "Mandatory reliance" because the applicant must obtain a license or not operate.

112. 91 Eng. Rep. 44 (K.B. 1672).

applied the same rationale in situations in which its applicability is less obvious, and this 300 year old case states the modern rule.¹¹³

A subtle consideration in nonfeasance license cases may help distinguish the pattern of non-recovery in these cases from the general, overall broadening trend in actions for public nonfeasance. A person or business entity applying for a license will suffer only economic loss if the public officer fails to act on the request. The liberal trend of the nonfeasance cases in other areas is supported by a disproportionate number of personal injury actions. The courts are necessarily less protective of people's economic rights than their personal injury actions. Courts wishing to move to greater liability have long realized that severe personal injury is a much stronger foundation upon which to build expansive legal precedent.

Failure to Provide Protection Against the Criminal Acts of Others

The courts have repeatedly been faced with the difficult problem of determining to whom a duty is owed in situations involving the government's failure to protect individuals from the physical attacks of others. The courts are troubled by two distinct considerations: first, the government cannot, nor does it necessarily wish to, enforce all the criminal laws completely; second, the number of potential plaintiffs is virtually limitless. These factors have compelled many courts to determine that the duty is owed only to the public.

The cases on failure to protect fall into two distinct categories: the failure to protect prisoners or people in mental hospitals from each other; and the failure to protect members of the public from prisoners or other criminals. One striking fact emerges from a study of the two categories: although prisoners traditionally have been considered second class citizens, with a corresponding decrease in their legal rights,¹¹⁴ they are almost equally likely to recover for their

113. *E.g.*, *Monmier v. Godbold*, 116 La. 165, 40 So. 604 (1906) (pharmacy license); *Jafarian v. Murphy*, 280 Mass. 402, 183 N.E. 110 (1932) (minature golf license); *Meinecke v. McFarland*, 122 Mont. 515, 206 P.2d 1012 (1949) (hunting license blanks); *Annot.*, 37 A.L.R.2d 694 (1954)

However, in a number of cases in which the plaintiff has been able to show a particularly malicious attitude in the officer or a complete lack of guidelines for deciding who will get a license, courts have held that the duty was owed to the individual plaintiff. Although these cases touch almost upon misfeasance, they are instructive. *See Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (court ordered specific regulations drawn up to prevent discrimination against individual with no political clout); *Young v. Hansen*, 118 Ill. App. 2d 1, 249 N.E.2d 300 (1969) (taxi driver proved conspiracy between police and licensing board); *Lehan v. Greigg*, 257 Iowa 823, 135 N.W.2d 80 (1965) (officers liable after reissuing license to repeatedly convicted felon).

114. *See generally Prisons on Trial: A Symposium on the Changing Law of Corrections*,

injuries as are innocent third persons. This treatment results from the conjunction of two elements at work in the courts' deliberations. Although innocent third persons have the sympathy of the courts to a greater extent than do assaulted prisoners, the courts must consider the unlimited number of potential victims outside of the prison or hospital. The courts fear "infinite actions for one default."¹¹⁵ Within the prison institution itself, however, the number of victims remains strictly limited. Thus, lack of sympathy is balanced by the potentially limited number of lawsuits.

Two actions in the state courts illustrate the opposing positions in cases involving attacks on fellow prisoners. In *Kelly v. Ogilvie*,¹¹⁶ the Illinois Supreme Court held that the duty to protect prisoners from each other was a duty owed to the public rather than to the individual. The court refused to hold that the state's duty was owed to the individually injured plaintiff. *Upchurch v. State*¹¹⁷ represents the opposite view. The *Upchurch* court concluded, on facts quite similar to those in *Kelly*, that a duty was owed to the prisoner and not only to the public. The court analyzed the problem of to whom the duty was owed by discussing the discretionary/ministerial dichotomy.¹¹⁸ The decision to draw up specific safety rules and regulations for promoting prison safety was discretionary and defeated any claim that a duty existed. However, the failure to implement the new rules and regulations once they were adopted was a ministerial act to which liability could be attached. Although *Kelly's* restrictive approach still represents the majority position, *Upchurch* apparently is more representative of the current tendency toward broader liability in these cases.¹¹⁹

21 BUFFALO L. REV. 641 (1972); *Symposium: Prisons and Prisoners*, 23 HASTINGS L.J. 995 (1972).

115. *William's Case*, 77 Eng. Rep. 163, 165 (K.B. 1592).

116. 35 Ill. 2d 297, 220 N.E.2d 174 (1966).

117. 51 Haw. 150, 454 P.2d 112 (1969).

118. See notes 31-43 *supra* and accompanying text.

119. See, e.g., *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954) (cause of action stated under Federal Tort Claims Act for failing to provide sufficient guards in hospital); *Thomas v. Williams*, 105 Ga. App. 321, 124 S.E.2d 409 (1962) (liability for failure to search drunken prisoner who set himself on fire); *Roberts v. State*, 159 Ind. App. 456, 307 N.E.2d 501 (1974) (potential liability for lack of prison guards' random shooting); *Farmer v. State ex rel. Russell*, 224 Miss. 96, 79 So.2d 528 (1955) (liable because did not obtain medical treatment for prisoner); *Scolavino v. State*, 297 N.Y. 460, 74 N.E.2d 174 (1947) (mental patient); *Taylor v. Slaughter*, 171 Okla. 152, 42 P.2d 235 (1935) (liable for failure to protect from prison "kangaroo court"); *Johnson v. Hamilton County*, 156 Tenn. 298, 1 S.W.2d 528 (1927) (officer liable for failing to take razor blades from insane patient); *Hale v. Johnston*, 140 Tenn. 182, 203 S.W. 949 (1918) (liable for failure to know of unsafe conditions in jail); *Kusah v. McCorkle*, 100 Wash. 318, 170 P. 1023 (1918) (liable for failure to take weapons from cell mate). *Contra*, *Thiele v. Kennedy*, 18 Ill. App. 3d 465, 309 N.E.2d 394 (1974) (good faith decision

But despite this broadening liability, courts concerned with governmental fiscal limitations may be restrictive when deciding cases involving the failure to protect innocent third persons. In *Riss v. City of New York*,¹²⁰ the city was held not liable after failing to protect a young woman from the violent assaults of her mentally disturbed ex-boyfriend. The victim repeatedly asked for police protection after receiving numerous threats from the ex-boyfriend but her request was refused. She was told to call the police again *after* she was assaulted. The Court of Appeals of New York, which had been in the forefront of the case law trend of broadening public liability¹²¹ stated the reason for its decision simply:

[t]he amount of protection that may be provided is limited by the resources of the community and by a considered legislative decision as to how those resources may be deployed.^{122,123}

Riss suggests the dangers of broad public liability. None of the traditional public defenses was available. Sovereign immunity had been abolished in New York. The decision not to provide police protection was made negligently and foolishly at a very low level of the New York Police Department and could hardly be considered discretionary rather than ministerial. Only the ultimate policy question governing public lawsuits remained as a defense. Government is supposed to accomplish the goals it sets for itself; whatever

not to guard protects officer from liability); *Kamisky v. State*, 245 App.Div. 904, 282 N.Y.S. 496 (1935) (prison "squealer"); *Stinnett v. City of Sherman*, 43 S.W. 847 (Tex. Civ. App. 1897) (failure to prevent prisoner from being confined with crazy person). See Annot., 41 A.L.R.3d 1021 (1972). The question of failure to protect prisoners from each other may also arise in a constitutional context in civil rights actions under 42 U.S.C. §1983 (1976).

120. 22 N.Y.2d 579, 283 N.Y.S.2d 897, 240 N.E.2d 860 (1968). The reasoning implicit in *Riss* has been implemented in a number of other cases involving the failure to protect innocent third persons. See *Jamison v. McCurrie*, 388 F. Supp. 990 (N.D. Ill. 1975) (no liability for failure by police to incarcerate man who killed plaintiff's decedent; inaction not a constitutional violation); *Massengill v. Yuma County*, 104 Ariz. 518, 456 P.2d 376 (1969) (no liability after serious accident when police officers had followed but not stopped a reckless and speeding driver); *Huey v. Town of Cicero*, 41 Ill. 2d 361, 243 N.E.2d 214 (1969) (no liability when city failed to provide protection for black child in community disrupted by racial tension). See generally Annot., 46 A.L.R.3d 1084 (1972) (liability of municipality or other governmental unit for failure to provide police protection).

121. For an example of New York decisions illustrating the abandonment of sovereign immunity, see *Jones v. State*, 267 App. Div. 254, 45 N.Y.S.2d 404 (1943) (state liable after failing to prevent escape of dangerous insane prisoner). The trend in the law clearly seems to be toward imposing greater liability upon the state for injury caused by escaped prisoners. See, e.g., *Johnson v. Gallatin County*, 418 F.2d 96 (7th Cir. 1969) (plaintiff allowed to recover from sheriff after prisoner escaped).

122. 22 N.Y.2d 579, 581-82, 293 N.Y.S.2d 897, 898, 240 N.E.2d 860 (1968).

123. 86 Nev. 911, 478 P.2d 591 (1970); but cf. *Williams v. State*, 308 N.Y. 548, 127 N.E.2d 545 (1955) (New York, after abolishing sovereign immunity, not liable when prisoner escaped from good conduct work farm, and decedent died from fright in subsequent encounter).

judicial means promote that end are appropriate. In *Riss* the court's vision of potential liability imposed on the state by all the victims following in *Riss*' steps forced the court to conclude that the duty was owed to the public and not to the plaintiff. The *Riss* case suggests that the government's duty to the public is nothing less than the obligation to benefit as many people as possible within the government's fiscal limitations.

Two years after *Riss*, the Nevada court reached an essentially opposite conclusion. The innocent plaintiff in *State v. Silva* was raped by an escaped prisoner. Shortly before the rape, a prison officer had been faced with the decision of leaving open the gates of his minimum security honor camp to allow firefighting trucks easy access to the only local water supply. He decided to open the gates and the prisoner escaped. The court rejected all of the state's defenses, including the state's attempt to disclaim any duty at all by characterizing the decision to open the gates as discretionary. The duty to prevent escape was owed to the victim as well as to the general public. Thus, the private law of negligence replaced the public law of immunity.

New York's perceived difficulties with the broadening of liability, set out in *Riss*, did not deter the *Silva* court in sparsely-populated Nevada. Perhaps the limited number of potential victims in Nevada may explain the differences in result from that reached in the *Riss* case. Because Nevada has far fewer citizens to protect than New York City, the Nevada court could reasonably conclude that failure to protect innocent people could be translated into public liability without excessive fear that the government would be financially crippled by potential litigation.¹²⁴

124. Additional cases involving the failure to protect suggest the number of potential victims will not always mandate non-recovery. As early as 1911, the Supreme Court upheld the constitutionality of statutory imposition of liability on counties' failure to prevent mob action even though the number of victims was potentially unlimited. *City of Chicago v. Sturges*, 222 U.S. 313 (1911). See extensive collections of later cases at Annot., 26 A.L.R.3d 1142 (1969) (municipal liability for personal injury or death under mob violence or anti-lynching statutes); Annot., 26 A.L.R.3d 1198 (1969) (municipal liability for property damage under mob violence statutes).

It is extremely difficult to distinguish the factual situations in cases imposing liability from those in which liability is denied. Compare *Gibson v. United States*, 457 F.2d 1391 (3d Cir. 1972) (government liable when job camp administration failed to provide adequate protection and staff members were killed by enrollee) and *Swanner v. United States*, 309 F. Supp. 1183 (M.D. Ala. 1970) (government liable for failing to protect special employee/undercover agent) and *Porter v. City of Decatur*, 16 Ill. App. 3d 1031, 307 N.E.2d 440 (1974) (failure to provide officer to direct traffic on corner when officials knew a large convoy was about to pass through found to be willful and wanton conduct and not immunized by statute) and *McLeod v. Grant County School Dist.*, 42 Wash.2d 316, 255 P.2d 360 (1953) (government liable after failing to prevent rape of twelve-year-old girl by schoolmate in gymnasium at recess) with *Tilden v.*

Failure to Warn

If the cases involving the government's failure to protect are concerned with fiscal limitations, it would seem that a decrease in the public cost of preventing injury in another area should incline the courts toward imposing broader liability, especially if the government failed to perform out of mere inadvertence rather than cost-consciousness. However, in a series of cases involving only minimal preventive cost to society, cases involving the failure to warn, the courts are as divided as in any other area of public nonfeasance. The courts appear not to be impressed with the lost cost of warning. Instead, the potential cost of damages for failure to warn is more likely to influence their decisions.

When a warning need only be directed toward an individual, the courts have found that the governmental duty flows directly to the individual victim and not to the public and the individual victim can recover. In *Fair v. United States*,¹²⁵ for example, the federal government was held liable when military doctors failed to warn a threatened victim that they were about to release a homicidal patient. An individual duty was owed to the decedent because the victim was the only person likely to be harmed by the patient.

This aspect of duty was also discussed in the controversial Calif-

United States, 365 F.2d 148 (7th Cir. 1966) (no liability when base commander failed to comply with his promise not to allow dangerous enlisted man off the camp grounds) and *Mancha v. Field Museum*, 5 Ill. App. 3d 699, 283 N.E.2d 899 (1972) (statute provided immunity after officers had failed to protect child in museum from vicious assault by other children) and *LeMenager v. Fitzgerald*, 1 Ill. App. 3d 803, 274 N.E.2d 913 (1971) (statute immunized officers when police failed to protect against fire of incendiary origin) and *Keane v. Chicago*, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968) (before immunity statute enacted, city not liable for failing to provide adequate police protection in school) and *Schuster v. City of New York*, 286 App. Div. 389, 143 N.Y.S.2d 778 (1955) (city not liable when police were informed of threats on informer's life and failed to provide protection).

Several cases have dealt with the problem of the government's failure to prevent suicides. Compare *Dinnerstein v. United States*, 486 F.2d 34 (2d Cir. 1973) (government liable because government hospital had knowledge of suicidal tendencies but failed to take precautions) and *Lange v. United States*, 179 F. Supp. 777 (N.D.N.Y. 1960) (government liable when precautions were ordered but staff failed to put them into effect) and *Lawrence v. State*, 44 Misc. 2d 756, 255 N.Y.S.2d 129 (1964) (liable after failing to put bars on second floor window of man with known suicidal traits) with *Baker v. United States*, 343 F.2d 222 (8th Cir. 1965) (no liability when government had no way to foresee that patient would attempt suicide) and *Anderberg v. Newman*, 5 Ill. App. 3d 736, 283 N.E.2d 904 (1972) (decision to release mental patient who subsequently committed suicide was discretionary function and no liability could be imposed on officer) and *Kates v. State*, 47 Misc.2d 176, 261 N.Y.S.2d 988 (1965) (no liability due to unforeseeability of patient's suicide attempt). See generally Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 VAN. L. REV. 217 (1971); Note, *Hospital's Duty to Protect Mental Patient From Suicide*, 29 LA. L. REV. 558 (1969) (what constitutes reasonable care for hospitals regarding suicidal patients).

125. 234 F.2d 288 (5th Cir. 1956).

ornia case, *Johnson v. State*,¹²⁶ in which youth authorities failed to warn foster parents of a child's known violent tendencies.¹²⁷ Because the warning could be directed at specific individuals, in this case the foster parents, rather than to the general public, the court reasoned that a general duty to warn had been converted into a specific obligation to one set of individuals. This specific responsibility supported liability.

In lawsuits involving failure to protect, when the number of potential victims is sufficiently limited, the courts reason that the potential threat of massive litigation against the state does not pose sufficient danger. Judicial desire to compensate for injury thus controls. However, once the warning must be directed at the general public rather than at a limited and specific group of individuals or for a specific and unique danger, the courts dramatically limit recovery.¹²⁸

126. 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968).

127. Although *Johnson* was decided primarily on the issue of whether a discretionary decision had been made not to warn the foster parents, the court felt that the duty owed to the individuals overrode any discretion involved. *But cf.* *Martinez v. State*, 85 Cal. App. 3d 430, 149 Cal. Rptr. 519 (1978) (violent parolee murdered plaintiff's daughter; California statute shielded government officials from liability). The United States Supreme Court will review the decision. 47 U.S.L.W. 3757 (1979).

128. *Compare* *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967) (though decision to establish air traffic control system was discretionary, once system was in operation, failure to warn made government liable) *and* *United States v. State*, 351 F.2d 913 (9th Cir. 1965) (no discretionary protection provided government when officers failed to put warning lights on electric wires near runway) *with* *National Mfg. Co. v. United States*, 210 F.2d 263 (8th Cir. 1954) (no liability after failing to warn residents of oncoming flood). *Compare also* *Martin v. United States*, 392 F. Supp. 243 (C.D. Cal. 1975) (government liable for failing to give campers special warning about bears when garbage dumps were temporarily closed down) *with* *Rubenstein v. United States*, 338 F. Supp. 654 (N.D. Cal. 1972), *aff'd*, 488 F.2d 1071 (9th Cir. 1973) (normal warning to campers was sufficient when conditions were not unusual).

Cases have imposed liability on the government or a public officer, despite the large number of potential victims, for failing to place warning signs or traffic signals. *Hernandez v. United States*, 112 F. Supp. 369 (D. Hawaii 1953) (placing roadblock but not giving adequate warning); *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963) (failing to remove signs indicating turn in road after road had been straightened); *Teall v. City of Cudahy*, 60 Cal. 2d 421, 34 Cal. Rptr. 869, 386 P.2d 492 (1963) (failing to provide city traffic light at dangerous intersection); *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972) (failing to place yellow line in road); *Canepa v. State*, 306 N.Y. 272, 117 N.E.2d 550 (1954) (failing to place signs and guardrails when straight road suddenly curved); *Gurevitch v. State*, 285 App. Div. 863, 136 N.Y.S.2d 702 (1955) (failing to replace stop sign); *Rugg v. State*, 284 App. Div. 179, 131 N.Y.S.2d 2 (1954) (failing to mark curve in road on approach to narrow bridge); *Brennan v. State*, 64 Misc. 2d 213, 314 N.Y.S.2d 738 (1970) (failing to remove lighting on road which created illusion that road continued straight beyond detour); *cf.* *Perry v. City of Santa Monica*, 130 Cal. App. 2d 370, 279 P.2d 92 (1955) (no liability for failing to provide appropriate and sufficient traffic signal); *Hermann v. City of Chicago*, 16 Ill. App. 3d 696, 306 N.E.2d 516 (1973) (no liability when state failed to put up height clearance on underpass);

Failure to Repair

Actions involving the failure to repair raise the issue of the government's fiscal limitations with persuasive forcefulness. Maintenance of roads, bridges or other publicly-owned structures involves substantial expenditures. By broadly imposing a duty in this area, courts would be creating an unfulfillable requirement.¹²⁹

The cases on failure to repair focus on several essential arguments. The government argues that the duty is owed only to the public. The plaintiff counters that maintenance of roads and buildings is a proprietary rather than governmental function. Finally, the government concludes by underscoring its fiscal limitations. The real issue, whether the government has been negligent in failing to repair, rarely receives attention. But, since the test of negligence is

Genkinger v. Jefferson County, 250 Iowa 118, 93 N.W.2d 130 (1958) (no liability for failure to place guardrail or signs). *See also* Annot., 161 A.L.R. 1404 (1946).

Additional public nonfeasance cases involve the alteration of natural conditions and failure to warn of the change. *See, e.g.*, Jessup v. State, 16 Ill. Ct. Cl. 227 (1947) (state liable after failing to light or guard an open ditch); Bean v. City of Moberly, 350 Mo. 975, 169 S.W.2d 393 (1943) (city not liable for failure to follow ordinance requiring city to barricade and light open ditch); Bennett v. Whitney, 94 N.Y. 302 (1884) (officer personally liable for failing to light ditch); Koerth v. Borough of Turtle Creek, 355 Pa. 121, 49 A.2d 398 (1946) (city not liable for failing to order property owner to maintain sidewalk in reasonably safe condition).

129. It is, of course, impossible for the government to keep all roads and buildings in perfect repair and a judicial requirement thereof (accomplished by allowing extensive litigation for failure to repair), would certainly defeat the overall judicial goal of achieving responsible and efficient government. The number of cases denying liability attests to this consideration. *In re Silver Bridge Disaster Litigation*, 381 F. Supp. 931 (S.D.W.Va. 1974) (no federal liability for failing to take preventive action when federal officers knew of defects in state-owned bridge); *Deren v. City of Carbondale*, 13 Ill. App. 3d 473, 300 N.E.2d 590 (1973) (city immune despite officer's knowledge of exceptionally heavy pedestrian traffic); *Morrissey v. State*, 2 Ill. Ct. Cl. 254 (1914) (bridge collapse); *Hill v. City of Boston*, 122 Mass. 344 (1877) (no liability for failing to maintain school stairway); *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812) (earliest American case on this point); *Stevens v. North States Motor, Inc.*, 161 Minn. 345, 201 N.W. 435 (1925) (road overseer not liable for failure to repair); *Bollard v. Gihlstorff*, 134 Minn. 41, 158 N.W. 725 (1916) (highway officials not liable for failing to repair or warn of disrepair); *Dosdall v. County Comm'rs*, 30 Minn. 96, 14 N.W. 458 (1882) (county not liable after plaintiff fell through broken sidewalk on courthouse premises); *Flynn v. N.C. State Highway and Pub. Works Comm'n* 244 N.C. 617, 94 S.E.2d 571 (1956) (no recovery allowed when truck fell off nonrepaired road); *Hipp v. Ferrall*, 173 N.C. 167, 91 S.E. 831 (1917) (no liability for failing to repair bridge because injury suffered was not a particular injury unique to plaintiff); *Binkley v. Hughes*, 168 Tenn. 86, 73 S.W.2d 1111 (1934) (no liability because decision to repair bridge is discretionary function); *Fryar v. Hamilton County*, 160 Tenn. 216, 22 S.W.2d 353 (1929) (no liability for failure to repair roads without showing of willful nonfeasance); *Brooke's Abridgement*, Y.B. 5 Edw. IV 3 pl. 93 (1466) *cited in Hill v. City of Boston*, 122 Mass. 344, 346 (1877) (earliest reference to this type of public nonfeasance found); Annot., 16 A.L.R.2d 1079, 1083 (1951). For explicit early discussions of the relation of the fiscal limitations of governments to liability for failure to repair, compare *Henly v. Mayor of Lyme*, 130 Eng. Rep. 995 (H.L. 1828) [also reported at 6 Eng. Rep. 1180 (1834)] (liable for failure to repair a sea wall) *with Garlinghouse v. Jacobs*, 29 N.Y. 297 (1864) (no liability because failure to repair bridge was excused by lack of funds).

slowly becoming the rule of public liability in other areas of nonfeasance, it is not unreasonable to expect that the negligence issue will gradually appear more frequently in these cases.

The Supreme Court attempted to develop a test for municipal liability for failure to repair at an early date. In *Weightman v. Corporation of Washington*,¹³⁰ the Court established a three-fold test: an individual plaintiff may recover if the city is a corporation; if the city's charter accepts liability in tort for nonfeasance; and if the plaintiff can show a specific injury unique to himself. The specific injury requirement involves the same public policy consideration discussed throughout this article: recovery will be allowed to an individual as the personal recipient of a duty only if that recovery furthers the overall judicial purpose of promoting effective government.

Two modern decisions represent the general trend toward broadening liability in the area of failure to repair. Though clearly still in the minority, these cases suggest the methods that some courts have used to expand public liability.¹³¹ In *Milstrey v. City of*

130. 66 U.S. (1 Black) 39 (1861).

131. Various cases have allowed recovery against the governmental unit or public officers for failing to repair. See *Estrada v. Hills*, 401 F. Supp. 429 (N.D. Ill. 1975) (low-level HUD administrators potentially liable and not protected by discretionary function exception when they failed to have a dangerous building demolished); *Baldwin v. State*, 6 Cal. 3d 424, 99 Cal. Rptr. 145, 491 P.2d 1121 (1972) (overturned previous law) (state found liable for failing to correct design of highway when officials deemed conditions had changed and design was no longer safe) (see Annot., 45 A.L.R.3d 875 (1972), for a large collection of cases indicating California's minority position in allowing recovery for this type of failure to repair); *Rodriguez v. State*, 52 Haw. 156, 472 P.2d 509 (1970) (liability for overflow; no discretionary immunity because maintenance of highway culverts is an everyday function); *Strickfaden v. Green Creek Highway Dist.*, 42 *Id.* 738, 248 P. 456 (1926) (highway district may be liable for damage from failure to repair road); *Consolidated Apartment House Co. v. Mayor of Baltimore*, 131 Md. 523, 102 A. 920 (1917) (street commissioner escaped personal liability for failing to remove ashes and refuse from building, but board members who had ordered him not to clean building were held liable); *Allas v. Borough of Rumson*, 115 N.J. 593, 181 A. 175 (1935) (city liable for failure to put rail on public ramp; misfeasance, not nonfeasance); *Hover v. Barkhoof*, 44 N.Y. 113 (1870) (commissioner liable after failing to repair bridge); *Robinson v. Chamberlain*, 34 N.Y. 389 (1866) (officer held liable when he failed to keep canal lock in operating condition); *Hathaway v. Hinton*, 46 N.C. 227 (1 Jones 243) (1853) (overseer liable after stage coach fell through bridge); *Ball v. Village of Reynoldsburg*, 86 Ohio App. 337, 176 N.E.2d 739 (1960) (city liable for failing to clean out sewer); *Wensel v. North Versailles Township*, 136 Pa. Super. Ct. 485, 7 A.2d 590 (1939) (failure to repair road subjected city to liability when road collapsed under five-mile-per-hour traffic); *Fosbre v. State*, 70 Wash. 2d 578, 424 P.2d 901 (1967) (state liable after failing to repair log boom which caused boat to go out of control); *Mayor of Lynn v. Turner*, 98 Eng. Rep. 980 (K.B. 1774) (city liable after failing to clean clogged stream). *Contra*, *Pluhowsky v. City of New Haven*, 151 Conn. 337, 197 A.2d 645 (1964) (no liability when street superintendent failed to remove accumulated water from street because of discretionary function exception); *Smith v. Iowa City*, 213 Iowa 391, 239 N.W. 29 (1931) (no liability after failing to keep teeter-totter in safe condition); *Casey v.*

Hackensack,¹³² the court faced the problem of a city without a statute specifically accepting liability in tort. The court concluded that the city was not liable for the nonfeasance alleged, failing to repair a hole in the sidewalk. Nonetheless, the plaintiff recovered because the court held the city liable for the positive act of creating a nuisance. This is similar to the reasoning used two hundred fifty years earlier in the *Earl of Shrewsbury's Case*:¹³³ the failure to act itself is not tortious but is logically connected to a resulting tort.

A similar method of avoiding the traditional governmental immunity of a city was employed in *Sable v. City of Detroit*.¹³⁴ Detroit had enacted traditional barriers to liability for public nonfeasance, particularly nonfeasance for failure to repair roads. The court, however, dramatically limited this immunity by reasoning that the immunity expired after a certain period of time, a period calculated to run from when the city received notice of a dangerous hole in the street. Detroit's failure to repair the road within thirty days of this notice waived the city's governmental immunity.¹³⁵ This approach permits limited recovery for governmental failure to repair. Thus, some plaintiffs can be compensated without opening the government to fiscal ruin.

Failure to Promote Constitutionally Protected Civil Rights

This area of public nonfeasance has been litigated most extensively in recent years and has promoted more commentary than any other single issue in the law. Many actions for public nonfeasance involve suits against state officers for violations of federal civil rights, actions brought under section 1983 of the Federal Civil

Bridgewater, 107 N.J. 163, 151 A. 603 (1930) (city not liable when it failed properly to support walls of gravel pit which collapsed on plaintiff); Clausen v. Eckstein, 7 Wisc. 2d 409, 97 N.W.2d 201 (1959) (officer escaped liability because of discretionary function exception after failing to remove pile of dirt from road which caused collision). See also cases collected in Annot. 45 A.L.R.3d 875 (1972). The principle behind the cases limiting the liability of the public officer has been codified repeatedly in statutes. See, e.g., Local Government and Government Employee Tort Immunity Act, ILL.REV.STAT. ch. 85, §§1-101 et seq. (1975). See generally Eglit, Fritzsche & Muller, *Civil Rights and Civil Liberties*, 51 CHI. KENT L. REV. 337, 410 (1974).

132. 6 N.J. 400, 79 A.2d 37 (1951).

133. 77 Eng. Rep. 798 (K.B. 1693). See notes 14-15 *supra* and accompanying text.

134. 1 Mich. App. 87, 134 N.W.2d 375 (1965).

135. The concept of waiver of governmental immunity discussed in *Sable* is analogous to the waiver of sovereign immunity alleged by the plaintiffs in *Edelman v. Jordan*, 415 U.S. 651 (1974). *Jordan* alleged, but the Court did not accept, the proposition that Illinois had waived its sovereign immunity by accepting federal funds. The Court said that a waiver had to be explicitly acknowledged by the defendant governmental unit.

Rights Act of 1871.¹³⁶ Because of the massive treatment of this subject by the commentators, section 1983 actions will be treated in this paper in only the most summary and preemptory manner.¹³⁷

The 1871 Act, now section 1983, 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 persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.^{138, 139}

Generally, state inaction or nonfeasance, without more, has not been accorded the status of a constitutional violation. *Estelle v. Gamble*,¹⁴⁰ decided by the Supreme Court in 1976, established the test for determining whether government nonfeasance would be cognizable under section 1983. *Gamble*, imprisoned in a state penitentiary, filed a handwritten complaint in federal court alleging that prison authorities had failed to provide him with adequate medical treatment. His complaint detailed, however, that he had in fact been treated repeatedly, though perhaps less than adequately, by the prison authorities. Although the Court concluded in dictum that the government has an obligation to provide medical care for those whom it incarcerates, *Gamble* was not allowed to recover because his complaint did not show the requisite intentional failure to act.¹⁴¹ “[D]eliberate indifference to serious medical needs of prisoners constitutes” cruel and unusual punishment.¹⁴² However, “inadvertent failure to provide adequate medical care cannot be said to constitute a ‘wanton infliction of unnecessary pain’ or to be ‘repugnant to the conscience of mankind.’”¹⁴³ Nonfeasance apparently will not produce section 1983 liability, at least at the present time.

136. 42 U.S.C. §1983 (1976). This statute is exhaustively analyzed in Note, *Developments in the Law - Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

137. See, e.g., Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976); Comment, *Injunctive Relief Against Municipalities under §1983*, 119 U. PA. L. REV. 389 (1970); Annot., 43 L.ED.2d 833 (1976); Annot., 14 A.L.R. FED. 608 (1973).

138. 42 U.S.C. §1983 (1976).

139. Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 954 (1975).

140. 429 U.S. 97 (1976).

141. *Id.* at 103.

142. *Id.* at 104.

143. *Id.* at 105-06.

CONCLUSION

The traditional law regarding the tort liability of governmental units and public officers is clearly repositioning itself in light of the tremendous increase in the size of government and in the scope of public activities. This realignment apparently reflects a fundamental shift in legal attitude. Combining a realization that larger government compels greater judicial intrusion into the operations of government with a desire to implement the developing social consciousness of modern society, the courts have changed the traditional answers to the three basic questions of duty examined in this article.

Apparently, the various tests for determining public liability do not effectively resolve the question of when liability should be placed on the government or officer for nonfeasance. The courts themselves admit the confusion. The only fact that emerges from analysis of the cases is this: though the various tests and distinctions are devoid of internal consistency, each of these tests appears to be one step in an evolutionary progress toward broader public liability.¹⁴⁴

What the next step in the progression of public liability will be is unclear. The commentators suggest that the next step should be nothing less than the standard of negligence; both governmental and sovereign immunity should be abolished.^{145,146} This view suggests that the implementation of private negligence rules in public actions is the logical conclusion to the process of gradual step-by-step rejection of the immunities. A troubling concern arises, however, when the evolutionary progression analysis detailed above is applied to this suggested "final" step: is a standard of simple negligence without immunity the conclusion or is it merely another step in the way to the conclusion? The Supreme Court in *Dalehite v. United States* hinted at this concern in rejecting the plaintiff's attempt to impose strict liability on the government for the explosion of fertilizer bags.

Although the Supreme Court presently rejects strict liability as a

144. The proposition that in the area of public nonfeasance the courts have moved from one distinction to another in a series of steps is suggested in *Elgin v. District of Columbia*, 337 F.2d 152, 154 (D.C. Cir. 1964).

145. *E.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE §§25.01-.05 (3d ed. 1972); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 195-96 (Abr. student ed. 1965).

146. *Dalehite v. United States*, 346 U.S. 15, 44-45 (1953). In *Laird v. Nelms*, 406 U.S. 797 (1972), the Supreme Court explicitly rejected the imposition of strict liability in an action based on damages caused by a sonic boom. *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW 570 (1976) (advocating strict liability against the government).

basis for public liability, it is not likely that the courts will stop at the application of private negligence principles in public actions. The evolutionary progress in the expansion of public liability has rejected each previous step as insufficient when a broader standard of liability has been available. Speculation that the progress will continue is therefore not unfounded.¹⁴⁷

As public tort liability has expanded, most courts have not seen fit to analogize cases involving one type of public nonfeasance to cases involving another type. Nonetheless, the underlying facts of numerous disparate areas of public liability involve identical policy considerations. It should not be long before courts begin the search for precedent outside of the individual areas presumably presented by the facts of the case.

147. Strict liability, that is, liability based solely on a cause and effect relationship between act and injury, conceivably is not the last step in the progression. It is possible to speculate that the government will ultimately absorb "absolute liability" in tort, and compensate victims for any tortious injury regardless of the lack of immediate involvement by the government. An example of this type of liability is suggested by the various statutes allowing compensation from public funds for injuries suffered by private individuals at the hands of violent criminals. *See generally* Lamborn, *Scope of Programs for Governmental Compensation of Victims of Crime*, 1973 U. ILL. L.F. 21.

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