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DEVELOPMENTS IN CONSTITUTIONAL LAW

THE GOOD FAITH DEFENSE IN CONSTITUTIONAL LITIGATION

Leon Friedman*

I. INTRODUCTION

Suits against government officials have increased enormously in recent years. In fiscal year 1960 the Administrative Office of the United States Courts reported 247 civil rights cases filed in federal district courts. By fiscal year 1970 there were 3,985 such suits, an increase of 1,614%, and by fiscal year 1976, the figure had grown to 12,329, an increase of 4,991% over 1960. These figures include both civil rights suits against state officials under 42 U.S.C. § 1983 and actions against federal officials for

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1. Civil rights suits are divided into five separate categories by the Administrative Office of the United States Courts: Voting, Jobs, Accommodations, Welfare, and Other Civil Rights. These categories correspond to suits brought under 42 U.S.C. §§ 1981 through 1985, suits under Title VII, 42 U.S.C. § 2000e (employment discrimination), and suits under Title I, 42 U.S.C. § 2000a (public accommodations). Included also are suits against federal officers for injunctions or damages for constitutional torts. See text accompanying notes 46-50 infra. In fiscal year 1976, a total of 1,276 cases out of 12,329 filed involved a federal official as defendant. See 1976 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C-2, I-14 [hereinafter cited as 1976 ANNUAL REPORT]. Some of these cases involved suits against private individuals brought under §§ 1981, 1982, Title VII and Title I. It is impossible to determine precisely how many of the civil rights cases involved only suits against state or federal officials. A computer printout supplied to the author on December 29, 1976, of all the civil rights cases filed in fiscal year 1976 indicates that the great majority of the cases involved voting, welfare, and “other civil rights” issues which would generally involve government officials. Many employment discrimination cases also involve government agencies as employers. As indicated in this article, the great majority of reported cases brought for violations of civil rights involve § 1983 cases against state officials or suits against federal officials for constitutional violations.


4. 1976 ANNUAL REPORT, supra note 1, Table 16, at 78.

5. 42 U.S.C. § 1983 (1971) provides:

   Civil action for deprivation of rights.

   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

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constitutio nal torts after the Supreme Court's decision in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics. The Administrative Office further reports that an additional 7,460 civil rights suits were brought by prisoners against state and federal prison officials. The total of 19,789 cases was the largest category of civil litigation in the federal district courts, comprising 15% of the total filings in 1976.

These suits involve claims against almost every type of government official, from the President of the United States, the Attorney General, high White House and FBI officials, and Cabinet Officers, to sheriffs, police officers, school administrators, IRS agents, hospital superintendents, governors, state military officials, building inspectors, and prison officials.

A wide variety of official actions form the basis of such law suits: wrongful death claims, assaults, illegal searches, illegal

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7. 1976 ANNUAL REPORT, supra note 1, Table C-2, I-14-15.
10. Among other defendants in the Halperin case were National Security Advisor and later Secretary of State Henry A. Kissinger, Presidential Assistants H. R. Haldeman and John Ehrlichman, and Assistant Director of the FBI William C. Sullivan.
arrests\textsuperscript{24} or break-ins,\textsuperscript{25} inadequate medical attention,\textsuperscript{26} tax investigations,\textsuperscript{27} illegal wiretaps\textsuperscript{28} and a range of improper actions by school administrators.\textsuperscript{29}

Any one of several factors may be responsible for this outburst of civil rights activity: Victim groups have developed a greater awareness of their legal rights and a willingness to assert them; new legal rules such as those which emerged from the Bivens\textsuperscript{30} decision have provided a rationale for such suits; and congressional committees, such as the Ervin and Church committees,\textsuperscript{31} and investigative reporters have provided solid evidence on which to base such suits.\textsuperscript{32} Regardless of the cause, federal courts have now had to cope with difficult legal questions to determine the extent to which state and federal officers at every level must answer by paying money damages for complaints about their official actions.

II. The Retreat From Absolute Immunity

The existing legal standards were largely inadequate to deal with the multiplicity of claims being brought against all levels of government officials. While difficult problems have arisen regarding the nature of the constitutional right asserted,\textsuperscript{33} the standing of the plaintiff,\textsuperscript{34} the extent of his injury,\textsuperscript{35} or the liability of the governmental entity involved,\textsuperscript{36} perhaps the most crucial question

\begin{thebibliography}{99}
\bibitem{24} Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974).
\bibitem{25} Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), \textit{cert. denied}, 415 U.S. 917 (1974).
\bibitem{26} Kellerman v. Askew, 541 F.2d 1089 (5th Cir. 1976).
\bibitem{27} White v. Boyle, 538 F.2d 1077 (4th Cir. 1976).
\bibitem{28} Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975).
\bibitem{29} See Wood v. Strickland, 420 U.S. 308 (1975); McCormack v. Attala Bd. of Educ., 541 F.2d 1094 (5th Cir. 1976); Skehan v. Board of Trustees, 538 F.2d 53 (3d Cir. 1976).
\bibitem{32} Lake v. Ehrlichman, No. 74-887 (D.D.C. 1974), was filed as a result of various newspaper stories concerning the Kissinger tapes. Lowenstein v. Rooney, 401 F. Supp. 953 (E.D.N.Y. 1974), resulted from an article appearing on February 25, 1974, in the New York Times at page 52, describing how the FBI supplied secret material in its files to Congressman John Rooney in his campaign against Allard K. Lowenstein.
\bibitem{34} See Warth v. Seldin, 422 U.S. 490 (1975).
\bibitem{36} City of Kenoshia v. Bruno, 412 U.S. 507 (1973); Fine v. City of New York, 529 F.2d 70, 73 (2d Cir. 1975). Whether a government entity is entitled to the same kind of good faith defense as a government official is discussed in Owen v. City of Independence, Mo., 421 F. Supp. 1110 (W.D. Mo. 1976).
\end{thebibliography}
has been the scope of immunity for the officials whose actions are under attack.

The Supreme Court held in 1959 in *Barr v. Matteo* that federal officials of subcabinet rank were absolutely immune from libel or slander liability for statements made within their line of duty. In *Barr* the plaintiffs, subordinate officials in the Office of Rent Stabilization, sued the Acting Director for libel because of a press release he had issued announcing his intention to suspend the plaintiffs for their participation in formulating a certain plan for the use of agency funds. The jury found for the plaintiffs and the judgment was affirmed by the court of appeals. The Supreme Court reversed. Quoting from an earlier decision in *Spalding v. Vilas*, which involved a libel suit against the Postmaster General, the Court noted:

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.

The Court further stated:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

It concluded:

> We think that under these circumstances a publicly expressed statement of the position of the agency head ... was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively. ... The fact that the action here taken was within the outer

38. 161 U.S. 483 (1896).
perimeter of petitioner's line of duty is enough to render the privilege applicable . . . ."\(^{41}\)

_Barr v. Matteo_ has been cited as establishing the doctrine of absolute immunity for "discretionary acts" by executive department officials. The doctrine was explained by Professor Louis Jaffe some years ago:

> [I]f the officer acts in an area where customarily he has discretion — that is, has a power and duty to make a choice among valid alternatives — he is not held liable in damages even though in the case at hand he made a choice that was beyond his power, or indeed had no valid choice open to him at all.\(^{42}\)

The doctrine was invoked in 1972 by the Second Circuit when the _Bivens_ case was remanded to it.\(^{43}\) The Second Circuit's approach to the problem requires that a court first determine whether an official is acting within the "outer perimeter" of his or her line of duty and then decide whether the acts complained of were discretionary or not. Once it has been established that the officers were acting within the scope of their authority, in order to be immune they must show that they perform "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority."\(^{44}\)

There are a number of difficulties with the doctrine, however. First, there is some discretion attached to almost every governmental function. Thus the crucial concept in the doctrine becomes impossible to define. As the Second Circuit said: "[W]ords such as ‘discretion’ are not particularly helpful."\(^{45}\) Secondly, liability has attached to a wide range of activities of government officials who perform more than mere ministerial acts. Professor Jaffe explains:

> [T]here are areas, notably actions against police officers for false arrest, battery, and trespass, and actions for summary destruction of property and improper collection of taxes, where recovery has long been allowed, despite the exercise by the officer of more than a “merely ministerial” function. This is partic-

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41. Id. at 574-75.
44. Id. at 1342-43 (quoting _Barr v. Matteo_, 360 U.S. 565, 575 (1959)).
45. Id. at 1345.
ularly clear in the case of police officers, who are called upon to make extremely difficult factual choices, and important, if unarticulated, policy decisions . . . .46

Thus the use of the "discretionary" concept is misleading and often states rather than explains the result.

In recent years the Barr v. Matteo principle has played a very limited role in determining the scope of immunity for executive department officials. There are a number of reasons behind this development. Again, there are serious definitional and intellectual problems with the notion of "discretionary acts."47 Additionally, the Supreme Court never fully adopted the reasoning of the Barr decision. Only four Justices joined in the opinion of the Court which declared federal officials absolutely immune. Justice Black concurred in the judgment only because he concluded that the statements complained of were "related more or less to general matters committed by law to [the defendant's] control and supervision."48 Justice Black concluded that on the undisputed facts the defendant proved he was entitled to a qualified privilege since he was acting within the scope of his duties in issuing the statement in question, and his right to criticize other government employees was protected by the first amendment.49 Four other Justices dissented and would have affirmed the judgment for the plaintiff.

In addition, Barr v. Matteo involved a cause of action for libel and slander which was not a constitutional violation.50 In balancing the need for effective functioning of government against the assertion of a common law tort claim, a court might well conclude that the latter interest has to yield. But federal courts are bound to enforce the Constitution and to protect a citizen's constitutional rights against all those who would violate them, including government officials at every level. As a district court recently noted: "[A]lthough an executive official may be absolutely immune when monetary relief is sought in an ordinary tort action, courts must apply a different standard to a claim

47. See text accompanying notes 44-46 supra.
49. Id. at 577.
50. In Paul v. Davis, 424 U.S. 693 (1976), the Supreme Court held that defamation actions do not rise to the level of a violation of a constitutional right. See also Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., No. 74-1899 (D.C. Cir. June 28, 1976).
brought under the Civil Rights Act for the deprivation of a constitutional right."51 Many claims against government officials may involve an overlap of common law tort claims and constitutional violations. For example, if a police officer uses excessive force against a person, the victim may sue for assault and for violation of section 1983,52 or if a police officer participates in an illegal break-in, the officer's conduct may constitute a trespass as well as a fourth amendment violation.53 In that situation the constitutional standard must apply.54 It is a rare case in which a government official is sued solely for a common law tort. Thus Barr v. Matteo has a limited role to play in the many cases brought under the civil rights acts.

In 1973 in the case of Doe v. McMillan55 the Supreme Court had occasion to reexamine the scope of immunity for federal officials. In that case the plaintiffs brought an action against several members of Congress, members of their staffs and the Superintendent of Documents and the Public Printer because of the attempted publication of a special report which discussed, in part, the disciplinary problems of specifically named students in the District of Columbia school system. The Supreme Court upheld


52. Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).


Some conduct may be actionable as a tort in state courts but may not rise to a violation of § 1983. See Paul v. Davis, 424 U.S. 693 (1976) (libel); Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970)(improper and negligent medical attention). The converse is also true. Some conduct may be actionable in federal court as a § 1983 violation or a constitutional tort even if there is no comparable state law violation. See Strickland v. Inlow, 519 F.2d 244 (8th Cir. 1975), on remand from Wood v. Strickland, 420 U.S. 308 (1975)(procedural due process violation); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973)(first amendment violation). If the two causes of action overlap, however, the same mental component (whether malice, willfulness or negligence) will generally be required for both. See Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds sub nom. District of Columbia v. Carter, 409 U.S. 418 (1973); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). But see Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976).

the absolute immunity of the legislators involved but, contrary to *Barr v. Matteo*, it did not grant blanket immunity to the Superintendent of Documents and the Public Printer even though they were high executive department officials sued for invasion of privacy, a tort akin to libel and slander. In its decision the Court explained the limitations of its *Barr* ruling as follows:

In the *Barr* case, the Court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same for all officials for all purposes. . . . Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith . . . . But policemen and like officials apparently enjoy a more limited privilege. . . . Also, the Court determined in *Barr* that the scope of immunity from defamation suits should be determined by the relation of the publication complained of to the duties entrusted to the officer. . . .

Because the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens, there is no ready-made answer as to whether the remaining federal respondents — the Public Printer and the Superintendent of Documents — should be accorded absolute immunity in this case.56

After considering the functions of the Superintendent of Documents and the Public Printer, the Court concluded:

[F]or the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. . . . The scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same. The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity" . . . they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.57

56. *Id.* at 319-20 (citations omitted).
57. *Id.* at 324 (citations omitted).
Thus, even in an area where *Barr v. Matteo* seemed precisely on point the Court avoided a finding of absolute immunity and opted for a more flexible rule of qualified immunity.

The absolute immunity approach of *Barr v. Matteo*, then, has been held to be too inflexible to deal with the great variety of claims brought against government officials. The Supreme Court has affirmed absolute immunity only for limited classes of government officials, such as legislators, prosecutors or judges, who, because of their special functions, require special protection. Executive department officials generally, though, cannot clothe themselves with absolute protection against civil damage suits.

Following the Supreme Court’s decisions in *Doe v. McMillan* and *Scheuer v. Rhodes*, the lower federal courts began to reject any notions of absolute immunity. Whereas in 1964 the Fifth Circuit in *Norton v. McShane* had declared that even federal marshalls (i.e., low level officials) were absolutely immune if they were acting within the outer perimeter of their line of duty, and in 1967 the Seventh Circuit in *Scherer v. Brennan* made a similar finding, the approach changed in the 1970’s. The District of Columbia Circuit, for example, held in *Apton v. Wilson*, a 1974 case, that even high-level officials of the Justice Department, including the Attorney General and his immediate deputies, enjoyed only a qualified immunity when charged with arranging mass arrests and illegal confinement during the Mayday Demonstration in Washington in May 1971.

The Fifth Circuit in *Donaldson v. O’Connor* held that any

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59. Imbler v. Pachtman, 424 U.S. 409 (1976). However, prosecutors are liable for damages arising out of actions not related to their prosecutorial functions such as arranging for mass arrests. Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974). See also Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976); Martin v. Merola, 532 F.2d 191 (2d Cir. 1976) (issuing press releases).
61. Id. at 306.
63. 332 F.2d 855 (5th Cir. 1964).
64. 379 F.2d 609 (7th Cir. 1967) (secret service agents).
65. 506 F.2d 83 (D.C. Cir. 1974).
66. Id. at 93.
67. 493 F.2d 507 (5th Cir. 1974), aff’d in part, rev’d in part, 422 U.S. 563 (1975). See text accompanying note 80 infra. See also Sportique Fashions, Inc. v. Sullivan, 421 F. Supp. 302 (N.D. Cal. 1976): “[T]he now appears to be the law that claims of violations of constitutional or civil rights fail under the ‘good faith’ test of Scheuer, while Barr applies to no more than actions for common-law torts.” Id. at 306.
notion of absolute immunity for discretionary acts was inconsistent with the purpose of the civil rights acts:

Official immunity has been restricted under § 1983, because that provision is directed at actions "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory", and provides that "every person" subjecting another to a deprivation of constitutional rights shall be liable. . . . It has been the view of the courts that recognizing broad judicial immunities "would practically constitute a judicial repeal" of § 1983, since state officers are likely to be the primary persons found acting "under color of" law.68

Instead of applying the "'discretionary act test' for determining when official immunity is appropriate in § 1983 cases,"69 the Fifth Circuit applied a good faith test similar to that ultimately adopted by the Supreme Court: "[W]e . . . have applied . . . the 'good faith for qualified governmental immunity' test, allowing immunity when (1) the officer's acts were discretionary; and (2) the officer was acting in good faith."70

III. THE DEVELOPMENT OF THE GOOD FAITH DEFENSE

A year after the decision in *Doe v. McMillan*, the Supreme Court reexamined the immunity test to be applied when government officials are sued for violating a citizen's constitutional rights. The Court held in *Scheuer v. Rhodes*72 that "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability" under the Civil Rights Act, 42 U.S.C. § 1983.73 The case involved a suit brought by the survivors of the four students killed at Kent State by members of the Ohio National Guard in May 1970. The defendants included the Governor of the State, the Adjutant General, his assistant, and various officers and enlisted members of the Ohio National Guard. The district court dismissed the action on the grounds that inas-

69. Id. See also Economou v. United States Dept of Agriculture, 535 F.2d 688 (2d Cir. 1976), cert. granted sub nom. Butz v. Economou, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977): "We are satisfied that the individual defendants [including the Secretary of Agriculture] do not require and are not entitled to absolute immunity in order to enable them to perform their duties." Id. at 696.
73. Id. at 243.
much as the suit was brought against the State of Ohio it was
barred by the eleventh amendment. The Court of Appeals for the
Sixth Circuit affirmed the dismissal on the alternate ground that
the defendants were absolutely immune from suit. The Supreme
Court reversed, holding that instead of absolute immunity only
a qualified immunity

is available to officers of the executive branch of government,
the variation being dependent upon the scope of discretion and
responsibilities of the office and all the circumstances as they
reasonably appeared at the time of the action on which liability
is sought to be based. It is the existence of reasonable grounds
for the belief formed at the time and in light of all the circum-
stances, coupled with good-faith belief, that affords a basis for
qualified immunity of executive officers for acts performed in
the course of official conduct.

Although Scheuer involved a section 1983 action against
state officials, the approach taken in that case was soon extended
to suits against federal officials for constitutional torts or for
violation of other federal statutes such as the wiretap law. Thus
the Scheuer case established the basic test to determine the lia-
bility of all state and federal executive branch officers when sued
for violating the Constitution.

At the core of the test lies the concept of good faith. The
Court in Scheuer noted the district court's acceptance of the Gov-
ernor's claim that he had acted in good faith. But in the opinion
of the Supreme Court “[t]here was no evidence from which such
a finding of good faith could be properly made and, in the circum-
stances of these cases, such a dispositive conclusion could not be
judicially noticed.”

The Court, however, did not define the meaning of “good
faith” in the context of a civil rights action. Did “good faith”
mean that the government officials acted without malice or an
evil intent, that they affirmatively believed that they were acting
within the law or the limits of their authority, or that they were

F.2d 1339 (2d Cir. 1972), on remand from 403 U.S. 388 (1971), Rodriguez v. Ritchey, 539
F.2d 394 (5th Cir. 1976); Mark v. Graff, 521 F.2d 1376 (9th Cir. 1975); Brubaker v. King,
following what they thought were lawful orders of their superiors? These questions awaited decision.

The next Supreme Court case to examine the problem was Wood v. Strickland. In Wood two Arkansas high school students had been expelled for allegedly violating a school board regulation prohibiting the use of intoxicating beverages at school activities. The students had put a malt liquor containing 3.2% alcohol into the school punch which raised its alcoholic content to 0.91%. After being expelled, the students sued the members of the school board and two school administrators under 42 U.S.C. § 1983 for violating their constitutional rights by denying them due process.

The district court ruled that the students could not succeed in their cause of action unless they could demonstrate that the school officials had acted with malice, which the court defined as “ill will against a person — a wrongful act done intentionally without just cause or excuse.” The court of appeals considered the test too restrictive and held that a specific intent to injure the students was not necessary: “It need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a subjective, one.”

The Supreme Court held that the correct test was somewhere between the formulation of the district court and that of the court of appeals:

The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an “objective” versus a “subjective” test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

The Court held that malice was not the only consideration:

To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a

Good Faith Defense

student’s constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.83

The Court acknowledged that while a malicious intent would undermine any defense by a government official, another crucial factor was whether the right infringed had been clearly established by law:

Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are “charged with predicting the future course of constitutional law.” Pierson v. Ray, 386 U.S. at 557. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student’s clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.84

The Court remanded the case to the court of appeals with the instruction that it apply the new subjective/objective test of good faith.85

The next Supreme Court case to discuss the good faith defense was O’Connor v. Donaldson.86 A former patient of a state mental hospital (Donaldson) sued the hospital superintendent (O’Connor) and other members of the hospital staff under 42 U.S.C. § 1983 for intentionally depriving him of his constitutional right to liberty for fifteen years. Trial testimony demonstrated

83. Id. at 322.
84. Id.
85. On remand, the court of appeals held that the members of the board had violated the procedural due process rights of the students involved by not giving them adequate notice of all the charges against them. Thus they were entitled to the equitable relief they sought (i.e., clearing their records). The case was remanded to the district court for application of the reasonable good faith test to determine whether damages should be imposed as well. See Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975).
86. 422 U.S. 563 (1975).
that the patient posed no danger to himself or to others. Furthermore, responsible persons outside the hospital were willing to provide for him upon his release and one defendant acknowledged that Donaldson could have earned his own living outside the hospital. A jury returned a verdict of $28,500 in compensatory damages and $10,000 in punitive damages against the defendants.

O'Connor's principal defense was that he had acted in good faith and was therefore immune from any liability for monetary damages. He claimed that state law had authorized indefinite custodial confinement of the "sick" even if they were not given treatment and were not potentially harmful to anyone. The trial judge instructed the jury with respect to the good faith defense that O'Connor would be immune from damages if he "'reasonably believed in good faith that detention of [Donaldson] was proper for the length of time he was so confined . . . .'" The trial court had rejected a proposed instruction by O'Connor as follows: "'[I]f defendants acted pursuant to a statute which was not declared unconstitutional at the time, they cannot be held accountable for such action.'" The Supreme Court held that "[t]he fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement," but it did not conclude that O'Connor's proposed instruction on good faith was properly rejected by the trial judge. Rather, it remanded the case for the lower court to determine whether the rejection of the proposed instruction comported with the new qualified immunity test established in Wood v. Strickland. The Court concluded:

For purposes of this question, an official has, of course, no duty to anticipate unforeseeable constitutional developments. . . . Accordingly, we vacate the judgment of the Court of Appeals and remand the case to enable that court to consider, in light of Wood v. Strickland, whether the District Judge's failure to instruct with regard to the effect of O'Connor's claimed reliance on state law rendered inadequate the instructions as to O'Connor's liability for compensatory and punitive damages."

87. Id. at 571.
88. Id. at 570 n.5.
89. Id. at 574.
90. Id. at 577. See notes 79-85 supra for a discussion of Wood v. Strickland.
IV. THE ELEMENTS OF THE GOOD FAITH DEFENSE

The decisions of the Supreme Court in Scheuer v. Rhodes,92 Wood v. Strickland,93 and O'Connor v. Donaldson94 have established the broad outlines of the good faith defense in constitutional litigation. Lower federal courts have amplified the holdings of those cases and it is now possible to lay out the chief features of the defense.

A. The good faith defense comes into play only when a constitutional violation has occurred.

There is no occasion to apply the good faith defense if there has been no constitutional violation. That is, if the government official has acted properly and in conformity with the Constitution, proof that the action was taken in good faith need not be offered. There may be situations, though, in which proof of bad faith may itself lead to a finding that a constitutional violation has occurred. For example, a prosecutor who presses criminal charges in bad faith under a dormant statute may violate the equal protection clause of the Constitution,95 but if he prosecutes a personal enemy for larceny or fraud or any other ordinary crime he does not have to show that there was no personal malice involved.

If a police officer arrests an individual because he hates that person, and the arrestee is later indicted for and convicted of the crime, the animus behind the arrest is irrelevant. If the officer had probable cause to arrest the individual, he is generally protected from liability for false arrest regardless of his motive96 unless excessive force is used.97 It is only when there is a finding that

94. 422 U.S. 563 (1975).
95. See United States v. Falk, 479 F.2d 616 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1971). See also United States v. Berrios, 501 F.2d 1307 (2d Cir. 1974); Murguia v. Municipal Court, 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975).
probable cause did not exist that the arresting officer's state of mind becomes relevant. 88

B. **Good faith is a defense to a claim for money damages but not to a request for injunctive or declaratory relief.**

This principle is a corollary of the first: If a constitutional violation has occurred, a court must enjoin its continuance whether or not the officials involved had a good faith belief in the legality their actions. The Supreme Court made it clear in *O'Connor v. Donaldson* that the lower court finding that plaintiff's constitutional right to liberty had been violated was not to be disturbed. 89 If Donaldson had still been confined, his release would have been ordered.

In *National Treasury Employees Union v. Nixon*, 100 a suit against then President Nixon, the District of Columbia Circuit Court held that good faith is only a defense to a suit for damages: "A good faith defense in a suit for damages brought against any federal official as an individual is seemingly established by Bivens v. Six Unknown Agents . . . but that defense is not assertable in the face of a quest limited to injunctive, declaratory or mandamus relief." 101

In a number of cases dealing with unconstitutional prison conditions, the officials involved did not have to answer in money damages because they had a good faith belief in the legality of their actions, but they were enjoined from continuing them. 102 In a case involving sick leave benefits for pregnant school teachers, the Ninth Circuit held (prior to the Supreme Court's decision in *General Electric Co. v. Gilbert*) 103 that the school board had violated Title VII of the Civil Rights Act by not granting such leaves. 104 Thus, the plaintiff school teacher was entitled to all equitable remedies provided by the Act, including back pay, costs and attorneys' fees as well as a declaration that the policy was

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88. See Boscarino v. Nelson, 518 F.2d 879 (7th Cir. 1975); Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968).
89. 422 U.S. 563, 577 n.12 (1975).
100. 492 F.2d 587 (D.C. Cir. 1974).
101. Id. at 609 (citations omitted).
102. Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).
illegal. But in view of the unsettled state of the law relating to the problem, the individual school board members could not be held liable for damages under 42 U.S.C. § 1983. Similarly, in a case involving reverse discrimination, a district court held:

It has long been the law that officials, acting in their official capacities, are subject to injunctive and declaratory relief for violating constitutional rights. . . . That one or more of the defendants may not have been directly involved in the commission of the discrimination is no bar; governmental entities and superior officials may be held responsible for the constitutional violations of their subordinates for the purposes of injunctive and declaratory relief.105

C. A finding of subjective bad faith renders unnecessary any inquiry into the reasonableness of the official’s belief in the legality of his conduct.

The Supreme Court’s decision in Wood v. Strickland established the reasonable good faith test: The “official himself must be acting sincerely and with a belief that he is doing right,”106 and that belief must be reasonable. If the defendant does not act in good faith, it is irrelevant how uncertain the law is with respect to the right involved. His subjective lack of good faith is enough to lead to liability.107

One example of this approach appears in Halperin v. Kissinger.108 In that case a number of high government officials, including former President Nixon, were sued for installing and maintaining a warrantless wiretap on the Halperin home tele-

107. The Supreme Court seems not to have recognized this point in O’Connor v. Donaldson, 422 U.S. 563 (1975). In that case the jury awarded both compensatory and punitive damages, the latter based on instructions which required an affirmative finding of malice. Therefore the existence of a statute permitting continued confinement of persons in Donaldson’s position should have been irrelevant. Nevertheless, the Supreme Court remanded for a reexamination of the defendant’s proposed instructions relating to his reliance on state law. Subsequently the case was settled with the payment of damages to O’Connor. The correct approach was indicated by Judge Frankel in Hupart v. Board of Higher Educ., 420 F. Supp. 1087, 1108 (S.D.N.Y. 1976), when he noted: “In light of the sharp split among legal scholars over the question of the constitutionality of reverse discrimination, these defendants, if they acted with the requisite subjective state of mind, might on that score escape liability.” (Emphasis added.) See letter from Bruce J. Ennis, Esq., to Leon Friedman (Jan. 26, 1977), a copy of which is on file in the office of the Hofstra Law Review.
phone for twenty-one months. The court held that the state of the law was uncertain with respect to national security wiretaps and the applicability of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which established a civil cause of action for illegal taps. The uncertainty of the law, however, did not establish a good faith defense for those who by their actions showed that they acted in subjective bad faith:

From this factual base, the liability and responsibility of certain defendants emerges: former President Nixon, for having initiated and overseen the program without any temporal or informational limits on the surveillance; Attorney General Mitchell, for having failed to carry out review and renewal obligations during the entire twenty-one month surveillance period; H.R. Haldeman, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification.

... [T]he Court finds under all the circumstances presented that a subjective good faith defense is unavailable.¹⁰⁹

If the government official has proved his subjective good faith or sincerity, it is then necessary to determine whether the official's sincere belief in the legality of what he did was reasonable. Thus it is necessary to reach the "reasonableness" or objective part of the test only if an initial finding of subjective good faith has been made.

D. The defense of reasonable good faith is a question of fact which must be proved by a preponderance of the evidence.

No matter which part of the test is relied upon, the proof of reasonable good faith is a factual question with the burden of proof placed on the defendant official. In a recent case in the Third Circuit, Skehan v. Board of Trustees of Bloomsburg State College,¹¹⁰ the court of appeals en banc laid out the following test to determine whether a professor was entitled to damages because he was removed from his position without a pretermination hearing. The court said:

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¹⁰⁹. Id. at 845 (citations omitted).
We therefore hold that in § 1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that, under the standards of Wood v. Strickland, official immunity should attach. On remand the district court must determine whether the defendants met their burden of establishing (1) that they did not know and reasonably need not have known that depriving Skehan of a pretermination hearing violated due process, and (2) that they acted without malicious intention to deprive him of his constitutional rights or cause him to suffer other injury.\(^{111}\)

This approach was followed by the District of Columbia Circuit in its en banc opinion in Zweibon v. Mitchell: "[A] good faith defense to liability . . . will be established if appellees can demonstrate (1) that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of this case; and (2) that this belief was itself reasonable."\(^{112}\) Further, a district court in Tennessee noted that "in asserting the defense of good faith it is necessary that the defendants establish that they acted in good faith and with a reasonable belief as to the validity of their actions."\(^{113}\)

Since reasonable good faith must be proved by the defendant, it is rare that the issue can be determined on a motion for summary judgment: "[G]ood faith is a question usually reserved for the fact-finder, so ‘even when there is no dispute as to the facts, it usually is for the jury to decide whether the conduct in question meets the reasonable man standard . . .’.\(^{114}\)

E. Lack of subjective good faith is not necessarily equivalent to malice or bad motive.

The Supreme Court's formulation of the good faith defense

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112. 516 F.2d 594, 671 (D.C. Cir. 1975) (emphasis added) (footnote omitted).
114. Shifrin v. Wilson, 412 F. Supp. 1282, 1296 (D.D.C. 1976). See also Walker v. Calahan, 542 F.2d 681 (6th Cir. 1976); Kellerman v. Askew, 541 F.2d 1089 (5th Cir. 1976); Weir v. Muller, 527 F.2d 872 (5th Cir. 1976); Safeguard Mut. Ins. Co. v. Miller, 68 F.R.D. 239 (E.D. Pa. 1975); Sartin v. City of Columbus Util. Comm'n, 421 F. Supp. 393 (N.D. Miss. 1976): "Whether the Commissioner acted in subjective good faith . . . is a question of fact which must be decided after evidentiary hearing, and it is therefore not a proper subject for summary judgment." Id. at 399. See also Redman v. Warrener, 516 F.2d 766 (1st Cir. 1975). But cf. White v. Boyle, 538 F.2d 1077 (4th Cir. 1976); Jones v. United States, 536 F.2d 269 (8th Cir. 1976); Brubaker v. King, 505 F.2d 534 (7th Cir. 1974).
began with the subjective element: Was the official "acting sincerely and with a belief that he [was] doing right," i.e., lawfully. In some cases lack of good faith has been held to be equivalent to malice, but such a finding is not necessarily the sole determinant of liability. In a recent case in the Fifth Circuit, a college president dismissed three student editors of the college newspaper because of their poor grammar, spelling and expression. The students sued, claiming a violation of their first amendment rights. The court held that "President Williams cannot avoid responsibility for his abridgment of First Amendment rights because his motives were to serve the best interest of the school." The court thus found that although the president had not acted out of malice he had nevertheless violated the students' rights and had to pay damages.

In another case, Faraca v. Clements, the plaintiffs were an interracial couple seeking employment with a state mental center in Georgia. Although they were highly qualified applicants, the director of the center refused them employment because he feared that adverse consequences would result from hiring them. Despite the director's claim that he acted out of a "good faith concern for the program he was administering" and "not out of any personal bias or prejudice," the court found him personally liable under 42 U.S.C. § 1981. The court held that there was a difference between a knowing failure to obey the law in a good faith fear of the consequences and a good faith belief that it is legal to take a particular action. "While the latter may constitute a legitimate defense to a claim by an injured party . . . the former does not."

In some cases, proof of negligence has been considered sufficient to establish liability in a section 1983 action. Typical are cases in which a police chief negligently failed to train and supervise police officers under his control, a prison official negligently

116. Schiff v. Williams, 519 F.2d 251, 261 (5th Cir. 1975).
117. Id.
118. 506 F.2d 956 (5th Cir. 1975).
119. Id. at 960.
120. Id. (citations omitted). Although the case involved a suit under § 1981, the court cited relevant decisions under § 1983, indicating that the proposed test would be the same for both types of actions.
failed to provide necessary medical attention to inmates\textsuperscript{122} or to control guards beating a prisoner,\textsuperscript{123} and mental health officials negligently failed to prevent some inmates from beating another inmate.\textsuperscript{124}

Each of these cases has one point in common: The negligence of the official involved might have an ongoing and recurrent effect upon the lives of other citizens. Although some courts have phrased the question in terms of whether the negligence was “simple,”\textsuperscript{125} the crucial question should be whether the official’s actions were likely to have a continuing impact and to injure other citizens in the same target area. For example, if a prison official negligently fails to mail one letter to a prisoner’s lawyer, that action may not rise to a section 1983 violation; but if the official establishes procedures that are likely to lose or delay a significant amount of prisoner mail, the official should have to answer in damages to anyone affected.\textsuperscript{126}

The point is illustrated in \textit{Bryan v. Jones},\textsuperscript{127} a recent en banc decision in the Fifth Circuit. In that case a sheriff was sued under section 1983 for false imprisonment because he negligently failed to investigate whether the plaintiff was being held in jail lawfully. (The sheriff had kept the plaintiff in jail for a month after the District Attorney had moved to dismiss all charges.) Under the common law, the intent to imprison would have been sufficient to impose liability even if the sheriff thought he had legal authority to detain a prisoner. The Fifth Circuit in \textit{Bryan v. Jones} held, however, that to succeed in a section 1983 action a plaintiff must prove more than the mere intent to imprison required for common law tort liability.\textsuperscript{128} In other words, a good faith defense could defeat a section 1983 claim even if it would not have barred a common law false imprisonment claim. Furthermore, the court agreed that some negligent action by the sheriff might lead to liability under section 1983. The court explained: “If [the sher-

\textsuperscript{122}Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972).

\textsuperscript{123}Byrd v. Breshke, 466 F.2d 6 (7th Cir. 1972).

\textsuperscript{124}Stance v. Staras, 507 F.2d 554 (7th Cir. 1974). \textit{See also} Harper v. Cserr, 544 F.2d 1121 (1st Cir. 1976).

\textsuperscript{125}Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976)(en banc). \textit{See also} Howell v. Cataldi, 464 F.2d 272, 278 (3d Cir. 1972).


\textsuperscript{127}530 F.2d 1210 (5th Cir. 1976).

\textsuperscript{128}\textit{Id.} at 1213-14.
iff] negligently establishes a record keeping system in which errors of this kind are likely, he will be held liable."

This same type of distinction was also recognized by the Supreme Court in *Estelle v. Gamble.* In that case the plaintiff, a prisoner in Texas, injured his back. He received superficial medical treatment and continued to complain about his pain, but the authorities insisted that he return to work. After continued complaints he received medication for irregular cardiac rhythm, a condition which had not previously been diagnosed. The prisoner then brought a section 1983 action alleging inadequate medical attention by the prison officials and doctors.

The Supreme Court held that the complaint stated a valid cause of action under section 1983 against the defendants for subjecting the plaintiff to cruel and unusual punishment. In the Court's opinion, inadequate medical attention to prisoners may impose unnecessary pain and suffering on them which is forbidden by the eighth amendment. The Court stated that "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." The Court further noted, however, that "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" will lead to a constitutional violation.

In short, whereas a single negligent act is not enough, either a malicious act or acts evincing deliberate indifference to prisoners' medical needs will result in liability. Negligently establishing a system in which a prisoner would not receive adequate medical attention would meet the latter test.

In a recent district court decision, a prisoner sued a sheriff because of two homosexual rapes which occurred when he was in jail. The sheriff was aware that sexual assaults occurred in the jail, but he did not take proper precautions to prevent them. The judge charged the jury as follows: "The Court finds that its in-

129. Id. at 1215.
130. 45-U.S.L.W. 4023 (U.S. Nov. 30, 1976).
131. Id. at 4024-25.
132. Id. at 4026-27.
133. Id. at 4027.
structure on Woodhous’ simple negligence was the proper standard of care as warranted by the evidence.” The court thus reasoned that failure to take precautions to prevent homosexual assaults in the jail after the official was aware that rapes had occurred there had the potential of affecting others in the jail as well as the plaintiff. Therefore the sheriff could be held liable.

This approach comports with the basic theory of the reasonable, good faith defense. In the same way that a public official cannot ignore or disregard “settled, indisputable law,” the official cannot act in a way that may negligently override the constitutional rights of the people he is supposed to serve. The underlying rationale of the section 1983 cause of action is the recognition that government officials, by virtue of their office, have the potential for inflicting great harm on citizens. While on the one hand, section 1983 should not inhibit the “vigorous, and effective administration of policies of government,” public officials should not be allowed to ignore safeguards affecting the lives and rights of the people they serve. Single, isolated acts can be excused but negligent acts that have great and widespread potential for harm cannot be permitted.

135. Woodhous v. Commonwealth of Virginia, 487 F.2d 889 (4th Cir. (1973). In Woodhous a prisoner brought a § 1983 action complaining that he had a right to be reasonably protected from constant threats of violence and sexual assaults by fellow inmates. The court held that the prisoner could bring such an action even though he had not yet been assaulted.


139. In his dissenting opinion in Bonner v. Coughlin, 545 F.2d 565, 573 (7th Cir. 1976), Judge Swygert argues that the good faith defense does not apply to negligent action. He took issue with the majority opinion which claimed:

[Good faith is nothing but the absence of bad faith, and since an official can only act in bad faith when he is acting intentionally, a nonintentional act can never be in bad faith. While it may be true that a nonintentional act cannot be in bad faith, it is not true that good faith is simply the absence of bad faith. Good faith requires that “[t]he official himself [is] acting sincerely and with a belief that he is doing right.” Wood, 420 U.S. at 321, 95 S.Ct. at 1000. Such an affirmative belief is only possible with respect to intentional acts. It is nonsensical to speak of committing a negligent act in good faith. The guards who left the door to Bonner’s cell unlocked could not have done so in good faith unless they were conscious of what they were doing, a hypothesis inconsistent with the assumption that they were merely negligent. Since the dichotomy between good and bad faith is irrelevant to negligent conduct, the majority’s reliance on Wood is inapposite.

Id. at 573.

However, Judge Swygert’s opinion goes too far since it would predicate § 1983 liability upon simple negligence—a conclusion which has been rejected by most of the courts who
F. Lack of subjective good faith may be inferred from the circumstances of the case.

From its view of the circumstances surrounding a case, a court may determine that the defendant did not act in good faith. The Supreme Court held in *Monroe v. Pape* that liability under section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” A court of appeals has recently held that suits for constitutional violations should incorporate the normal tort rule that “a person intends the natural foreseeable consequences of his actions.” Thus, the acts of a government official may lead a court to conclude that he must have known that a person’s constitutional rights were being violated.

*Manfredonia v. Barry*, *Lykken v. Vavreck* and *Tatum v. Morton* are recent cases which exemplify the application of this standard. In *Manfredonia* two police officers arrested a well-known lecturer on birth control, William Baird, and one member of the audience before whom he was speaking for endangering the welfare of a child. The police officers who were later sued under section 1983 for making the arrests claimed that they had “acted honestly in the belief that Baird’s comments about the contraceptive and other devices on his demonstration board made in the presence of ‘teenagers’ observed in the audience endangered their physical, mental or moral welfare.” The court commented:

This, of course, would not justify the arrest of Mrs. Manfredonia, nor of Mr. Baird. She did no lecturing and her baby daughter could not possibly have comprehended what was said. There is not a scintilla of evidence that Baird was addressing his

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130-138 supra. See *Kimbrough v. O’Neil*, 545 F.2d 1059 (7th Cir. 1976) for a later discussion of this problem.


141. Id. at 187.


146. The “child” involved was the infant daughter of an audience member, although the presence of teenagers during the lecture was cited by the arresting officers as justification for the arrest. *Manfredonia v. Barry*, 401 F. Supp. 762, 768 (E.D.N.Y. 1975).

147. Id.
The court concluded that the police officers must answer in damages because they had acted in clear disregard of the plaintiffs' first amendment rights.

In *Lykken v. Vavreck*, a similar case arising in Minnesota, two officers arrested a college professor for operating a disorderly house and for selling liquor without a license. The arrest grew out of a fund-raising affair in the professor's house held on behalf of a group called "People Against Missiles," which opposed a proposed antiballistic missile installation in North Dakota. The professor was charging a fifty-cent donation for each glass of beer in order to raise money in support of the cause. Twenty policemen entered the house to effect the arrests and seized not only beer and wine in the professor's house but "virtually every piece of paper in sight." The court held the arrests and the seizure of the papers were a violation of the fourth amendment:

The conclusion is inescapable that the arrests here in question were improperly motivated, undertaken not in furtherance of good faith law enforcement but for the purpose of harassing those at the gathering because of their political beliefs, and the arrests were thus illegal. The extent of the search of the premises incident to the arrests plus Tidgwell's inquiry to the F.B.I. concerning the seized papers further indicate that the police were interested not in good faith law enforcement but in using the arrests as a pretext for seizing any and all potentially damning evidence of any possible law violation that might serendipitously be turned up. Accordingly, the court need not reach the question of the existence *vel non* of probable cause, since it is not necessary for the result. The Fourth Amendment protects the people of this nation against unreasonable searches and seizures. Under all the circumstances the activities of the Minneapolis police at the David Lykken home on the evening of May 9, 1970, were unreasonable, and thus a violation of plaintiffs' constitutional rights.

Lastly, in *Tatum v. Morton*, another case involving interference with first amendment rights, a police officer in Washington-
ton, D.C., arrested a number of individuals who were engaging in a Quaker prayer vigil near the White House. The officer made the arrests because he feared the influx of outsiders who might damage property. Ostensibly to prevent such damage, he set up police lines near the vigil and ordered the demonstrators to disperse. When they refused, he arrested the plaintiffs. The district court held that the police officer had violated the plaintiffs' first amendment rights.

More recently, in *Halperin v. Kissinger*, President Nixon, Attorney General John Mitchell and other high officials of the federal government were sued for engaging in a wiretap program against Morton Halperin, a former member of the National Security Council staff. The evidence showed that the wiretap had been kept on for twenty-one months although after the first five months of the tap Halperin was no longer a government employee. The defendants claimed that the wiretap was a good faith effort to locate leaks of important government information. The court rejected defendants' good faith defense and, granting summary judgment for the plaintiff against President Nixon, John Mitchell and H.R. Haldeman, commented:

> The evidence reflects a twenty-one month wiretap without fruits or evidence of wrongdoing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents.

This approach to the problem of good faith has been followed in other cases involving actions seeking only injunctive relief or damages under other federal statutes. In all these cases the government officials' claim of sincerity was rejected by the courts on the basis of objective facts which the courts interpreted as

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155. *Id.*
157. *See Feminist Women's Health Center, Inc. v. Mohammad*, 415 F. Supp. 1258 (N.D. Fla. 1976), where a suit was filed under the Sherman Act against hospital staff doctors for pressuring other doctors not to assist the women's center in providing elective abortions: "The evidence adduced thus far on the whole preponderates toward the inference that the mainspring of the defendants' actions was economic." *Id.* at 1270.
Good Faith Defense showing an intent to deprive the citizen of his constitutional rights.

G. Lack of subjective good faith can be shown by the failure to observe procedural safeguards.

It has long been the law that an agency’s failure to follow its own rules and regulations may result in a violation of the due process clause. In the context of a good faith defense such failure may serve as conclusive evidence of subjective bad faith. The Halperin case is illustrative. On May 5, 1969, Attorney General John Mitchell wrote a memorandum to J. Edgar Hoover, FBI Director, informing him of new procedures to be followed in national security wiretaps. The new procedures required detailed justifications before wiretaps would be installed, close supervision of the taps, a ninety-day renewal requirement and detailed recordkeeping. On May 9, 1969, less than a week after the memorandum was written, a national security wiretap was installed on Mr. Halperin’s telephone in which practically none of these procedures was followed. The failure to follow his own established procedures was one reason for the finding of subjective bad faith on the part of Mr. Mitchell.

Hupart v. Board of Higher Education is also illustrative. In Hupart members of the Board of Higher Education of New York City were sued for damages because they engaged in “reverse discrimination” by excluding qualified white males from the city college’s biomedical program in favor of minority group students. The evidence established that racial factors were intentionally employed in the selection of applicants and that white majority candidates were deliberately excluded from consideration. The court held that individual board members who were responsible for the race-conscious policy would have to answer in damages to the persons injured even though the legality of reverse discrimination was still uncertain at the time. In this case the Board violated its own established policy against using race as an admissions criterion:

[T]here was another constitutional violation here—the depar-

160. Id. at 844-45.
ture from the Board's own policy against using race as an admissions criterion. Any defendant who knew, or should have known, of this policy and deliberately departed therefrom would seemingly be liable, irrespective of whether he thought he was doing the right or "fair" thing.\(^{162}\)

In an analogous case decided by the Second Circuit,\(^{163}\) a prisoner sued the warden of Clinton Prison for segregating him in a "strip cell" and forcing him to sleep nude on a concrete floor for twenty-one days without bedding of any kind. The warden claimed he should not be personally liable for damages because he did not personally impose the punishment at issue. The court approved the award of $1,500 damages against the warden, not only because he must have had knowledge of the existence of the strip cells but because he failed to follow existing law on the procedures for imposing discipline in the prison. Under established state law the warden was required to keep a daily record of the proceedings of the prison including every punishment inflicted on a prisoner and every charge of cruel and unjust treatment by a guard.\(^{164}\)

H. Lack of subjective good faith may be inferred from inaction and from failure to act.

In Downie v. Powers,\(^{165}\) a group of Jehovah's Witnesses were attacked by a mob, and police officers, though aware of threats of violence, did nothing to prevent the formation of the mob or to restore order after violence erupted. Holding that a new trial was necessary, the court stated: "One charged with the duty of keeping the peace cannot be an innocent bystander where the constitutionally protected rights of persons are being invaded. He must stand on the side of the law and order or be counted among the mob."\(^{166}\)

This principle has been followed in a series of recent cases dealing with control of police officers by their superiors. In Sims v. Adams,\(^{167}\) the plaintiff sued a police officer for false arrest and assault; included also as defendants were the mayor of the city, the chief of police and other supervisory personnel. The com-

\(^{162}\) Id. at 1108.
\(^{163}\) Wright v. McMann, 460 F.2d 126 (2d Cir. 1972).
\(^{164}\) Id. at 136. See also Seals v. Nicholl, 378 F. Supp. 172, 175 (N.D. Ill. 1973).
\(^{165}\) 193 F.2d 760 (10th Cir. 1951).
\(^{166}\) Id. at 764.
\(^{167}\) 537 F.2d 829 (5th Cir. 1976).
plaint alleged that the superiors knew of the violent tendencies of the police officer and failed to control him. Despite these allegations, the district court dismissed the superiors from the case. The court of appeals reversed: "Sims' complaint states a cause of action against defendants Massell and Jenkins because they allegedly breached the duties of a mayor and a chief of police to control a policeman's known propensity for improper use of force."  

Similar results have occurred in cases dealing with a jailer's indifference to the punishment of prisoners under his care. In a case involving the beating of a prisoner by an arresting officer, the Fifth Circuit held that the jailer who stood by while the beating occurred and did not obtain medical attention for the prisoner was answerable in damages. The court explained its holding:

It is well established that a warden's deliberate indifference to an inmate's severe and obvious injuries is tantamount to an intentional infliction of cruel and unusual punishment. . . . It has also been held that a supervisory officer is liable under § 1983 if he refuses to intervene where his subordinates are beating an inmate in his presence. . . . Here the jury verdict against Chanclor establishes that the plaintiff was in fact viciously beaten in violation of his Eighth Amendment rights. Moore's admission that this occurred in his presence, without objection or intervention, and that he thereafter made no effort to obtain medical assistance established as a matter of law the necessary intent under the rationale of these cases.

This approach is in conformity with the general tort principle that a person may be held liable for his omissions or inactions if he is under some affirmative duty to act and he fails to act accordingly.

I. Government officials relying upon an objective good faith

168. Id. at 832.
169. Harris v. Chanclor, 537 F.2d 203 (5th Cir. 1976). See also Smith v. Ross, 482 F.2d 33 (6th Cir. 1973), where the court stated:
[A] law enforcement officer can be liable under § 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly, and thereby denies equal protection to persons legitimately exercising rights guaranteed them under state or federal law. Acts of omission are actionable in this context to the same extent as are acts of commission.

Id. at 36-37.
170. Harris v. Chanclor, 537 F.2d 203, 206 (5th Cir. 1976)(citations omitted).
defense must be able to point to an open, affirmative legal command or judicial decision as the basis for their actions.

Even if a defendant proves his sincerity and belief that his actions were lawful, he is not fully exonerated from liability; the defendant must still prove that this belief was reasonable. This part of the Wood v. Strickland test has been called the "objective good faith defense."

In order to prevail on the second part of the test, a defendant must prove that he was acting in conformity with an openly declared legal command. For example, a police officer who executes a search warrant in good faith fulfills this part of the test. Similarly, if a court has ordered the officer to take certain action, he would generally be deemed to have had a good faith belief that it was lawful for him to take that action.

If a court did not order the particular action, but state law authorized it, a government official can ordinarily rely on the statute to support a good faith defense. In the leading case on the subject, Pierson v. Ray, three police officer defendants were sued under section 1983 for arresting the plaintiffs under a disorderly conduct law which was held unconstitutional four years after the arrests in question. In Pierson the Supreme Court held that an officer was not "charged with predicting the future course of constitutional law," and could act "under a statute that he reasonably believed to be valid but that was later held unconstitutional."

Later, in O'Connor v. Donaldson, the Supreme Court again cited a reliance on state law as a crucial factor in determining objective good faith. The Supreme Court vacated and remanded the court of appeals' decision affirming the judgment against O'Connor because the court of appeals had not considered "whether it was error for the trial judge to refuse the additional instruction concerning O'Connor's claimed reliance on state law as authorization for Donaldson's continued confinement."

There may be some situations, however, in which a govern-

175. Id. at 557.
176. Id. at 555.
177. 422 U.S. 563 (1975).
178. Id. at 577.
ment official may not properly rely on a particular provision of state law. For example, if the same or similar law has been declared unconstitutional in some other jurisdiction, or if because of developing constitutional doctrine it may be foreseeable that the law is not valid, then a reasonable public official should realize that the law should no longer be invoked. Further, as noted below, a government official may reveal a lack of subjective good faith in relying upon the law. In almost all other situations, though, a reliance upon state law as authorizing the action under attack would immunize the official involved.

A public official need not rely only upon an explicit statute to legitimize his actions; a judicial decision may justify the actions and also insulate the official from damages. In *Laverne v. Corning*, various officials of the town of Laurel Hollow, New York, were sued for entering the grounds of an artist's estate without a warrant. They claimed that they were inspecting the estate for evidence of a zoning law violation. The New York Court of Appeals found the entry illegal and reversed a criminal conviction based upon evidence found during the unauthorized inspection. The artist then sued the officials involved for damages, claiming a violation of the fourth amendment. The Court of Appeals for the Second Circuit held that at the time the entry occurred, Supreme Court precedents, including *Frank v. Maryland*, justified administrative entries without a search warrant. It was only after the entry occurred, the court noted, that the Supreme Court decided *Camara v. Municipal Court*, which overruled the *Frank* case and declared administrative searches subject to the warrant requirements of the fourth amendment. Under such circumstances, according to the *Laverne* court, in 1962 the city officials could reasonably have relied upon the *Frank* case and therefore they were immune from damages.

In the same fashion, reliance upon administrative regulations or even upon an openly declared administrative practice not

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179. See, e.g., text accompanying notes 192-194 & 219-221 infra.
180. See text accompanying notes 190-224 infra.
181. 522 F.2d 1144 (2d Cir. 1975).
embodied in regulations could serve as evidence of objective good faith.\textsuperscript{187} Government officials, though, must base their actions on established, "open" law. If officials act secretly over a long period of time to violate the constitutional rights of citizens, they cannot be allowed to rely on the undisturbed "administrative practice" as the basis for an objective good faith defense. Secrecy is itself a sign of questionable legality. If an administrative practice is kept secret, there is no opportunity for public discussion or debate about it. More importantly, there is no chance for the political process to overturn a practice if no one is aware of its existence.

It would thus be unthinkable, for example, for an FBI agent to claim that the long practice of "black-bag" jobs (burglaries) engaged in by FBI agents for about twenty years insulated them from any \textit{Bivens}-type action. Even if they were ordered to commit the burglaries and the practice had gone on for years, the agents should not escape liability. While it is possible that reliance upon some Presidential Executive Order or command could serve also as the basis of a good faith belief, it must, at the very least, be as clear, open and unequivocal as a statutory command would be.

\textit{J. A government official is charged with knowledge of foreseeable constitutional developments.}

Although the Supreme Court noted in \textit{Pierson v. Ray}\textsuperscript{188} that an officer is not "charged with predicting the future course of constitutional law," the Court added an important qualification in \textit{O'Connor v. Donaldson}\textsuperscript{189} when it said that an officer is not charged with anticipating "unforeseeable constitutional developments."\textsuperscript{190} In other words, where an explicit state law serves as the basis for an officer's action, as in \textit{Pierson}, the officer does not have to anticipate that the law may be declared invalid. Similarly, when an officer relies upon an explicit Supreme Court decision, he does not have to anticipate that the Supreme Court may overrule that decision. The officer is, however, chargeable when later judicial decisions do not alter or change the state of the law which existed when he acted, but only clarify or make more explicit what the law was at the time.

An early Supreme Court example of this principle is \textit{Lane v.}
In that case the plaintiff, a black citizen of Oklahoma, sued certain state election officials for damages under section 1983 for failure to register him as a voter. The officials relied upon a state law that was passed after the Oklahoma "grandfather clause" had been declared unconstitutional by the Supreme Court in *Guinn v. United States.* The earlier law prohibited anyone from registering to vote unless his grandfather had previously voted—a transparent attempt to deprive blacks of the right to vote since their grandfathers at the time had been slaves. After this law was invalidated in 1915, Oklahoma passed a new law permitting people to register as voters if they had voted in 1914 (before the *Guinn* case had been decided) or if they had registered during a special registration period between April 30, 1916, and May 11, 1916. In other words, an eligible black citizen who had been barred from voting by the grandfather clause had only twelve days to register or he would be forever barred from voting. The Supreme Court found the new law a clear violation of the fifteenth amendment and an obvious ruse to reestablish the discredited grandfather clause. Although the second Oklahoma law had never been declared unconstitutional, the Supreme Court reversed a judgment in the defendants' favor and remanded the case.

There are more recent cases which take the same approach. In *Slate v. McFetridge,* the plaintiffs sued several Chicago city officials under section 1983 for damages because the officials had refused to process a request for a permit to hold a demonstration in one of the city parks during the 1968 Democratic National Convention. The request was made early in July but the defendants refused to process or act on it until it was too late to hold the rally. The Chicago ordinance governing the issuance of permits gave city officials wide discretion on the matter and did not require any kind of prompt notice to applicants concerning the disposition of the permit application. The court of appeals examined the state of the law at the time the application was made, paying particular attention to *Freedman v. Maryland,* a 1965 case which required swift administrative review of requests to
exercise first amendment rights. The court in *Slate* observed that the Chicago ordinance had not been declared unconstitutional and noted that “a man [should] not be held liable in damages for actions or omissions which he could not or should not be expected to have known would cause his liability.” 197 The defendants argued that *Freedman* involved censorship of movies and that it was therefore not relevant to the delayed denial of a park permit. The court of appeals nevertheless found the defendants liable for damages: “[D]efendants had notice by *Freedman* that their prompt resolution of [plaintiff] Slate’s permit request was a dictate of due process in the protection of First Amendment rights.” 198

In a similar case, *Seals v. Nicholl*, 199 an individual sued members of the Chicago police for seizing, impounding and destroying his car. The plaintiff had been arrested in a private parking lot on suspicion of larceny and was unable to raise bail. The police towed his car away from the private parking lot. Under the procedures in force at the time of the arrest, notice was sent to the prisoner’s home address advising him that his car had been impounded and that he had fifteen days in which to reclaim it. The towing report clearly labelled the car as “prisoner property.” 200 The prisoner was discharged after nineteen days. He never received the notice about the car when he was in jail and the car was destroyed by the police in the interim. While the procedure at issue was subsequently declared unconstitutional by the Supreme Court in *Robinson v. Hanrahan*, 201 the defendants in *Seals* argued that they had had a good faith belief that the procedure was adequate at the time the car had been towed away. The court rejected defendants’ contention on the ground that *Robinson* did not establish “any new or more severe standard for due process” and merely “involved the application of existing constitutional law.” 202 “Thus,” according to the court, “even if defendants . . . did rely on statutory provisions to provide less than actual notice

197. Slate v. McFetridge, 484 F.2d 1169, 1174 (7th Cir. 1973).
198. Id. at 1176. See also Shifrin v. Wilson, 412 F. Supp. 1282 (D.D.C. 1976), where the court stated: “The clear implication of *Pierson* is that an officer can be held liable when acting under a statute which has not been declared unconstitutional, if it is found that he or she should have anticipated that the statute could not pass constitutional muster.” Id. at 1296 (footnote omitted).
200. Id. at 174.
to plaintiff, such action does not constitute justification in circumstances such as those involved in this case and cannot, therefore, form the basis of a good faith defense."

A number of similar cases have arisen in relation to prison discipline and in each case it became necessary to examine the state of the law at the time that the acts in question occurred to determine whether a good faith defense would succeed. In the *Mukmuk* case the warden was accused of taking certain literature from the plaintiff and punishing him for its possession. The events at issue took place in 1967. In 1964, however, the Second Circuit had held that punishing prisoners for the possession of religious literature violated the first amendment. According to the court, therefore, the warden in *Mukmuk* "had received sufficient warning from the courts by 1967 that it was unconstitutional to impose punishment for its possession. If it was, indeed, religious literature, the warden may be liable in damages, assuming that a sufficient personal responsibility is shown." Similarly, in *Johnson v. Anderson*, a warden sent certain prisoners to solitary confinement without giving them a chance to be heard in their own defense when, nine months earlier, the Third Circuit had held that such a course was improper. The *Johnson* court concluded that the warden "failed to establish an official immunity defense with respect to this portion of plaintiff's due process claim" inasmuch as "a reasonable man in [his] position would have sought legal counsel from the Attorney General's office concerning plaintiffs' procedural rights. If he had sought such advice, he clearly would not have followed the course which he chose."

In still another case, *Knell v. Bensinger*, the plaintiff had been put in isolation in prison for fifteen days. He asked for certain law books which were denied him on the basis of a prison regulation which denied reading materials to all inmates in soli-

203. *Id.*
205. *Id.* at 275.
207. *Id.* at 850. See also *Hostrop v. Board of Junior College Dist.* No. 515, 523 F.2d 569 (7th Cir. 1975). In *Hostrop* members of the school board were charged with knowledge that they could not dismiss a faculty member for exercising protected first amendment rights since *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), had been decided before the dismissal in July 1970. However, they were not required to know that they had to grant a teacher a due process hearing inasmuch as *Board of Regents v. Roth*, 408 U.S. 564 (1972), establishing that constitutional principle, was decided after the dismissal.
208. 522 F.2d 720 (7th Cir. 1975).
tary confinement. The Court of Appeals for the Seventh Circuit noted that "there existed a well established principle that the state could not absolutely deny inmates incarcerated in its prisons a reasonable and effective right of access to the courts to challenge their confinement . . . ." Since the deprivation involved was only for fifteen days, however, the court decided that the warden could have had a reasonable good faith belief in the legality of a temporary denial of access.

Similar results have occurred in other areas. In *Morales v. Hamilton*, for example, a border guard was sued for stopping a car on an Arizona state highway without probable cause while looking for illegal aliens. The stop occurred on June 4, 1973, a few weeks before the Supreme Court decided *Almeida-Sanchez v. United States*, which declared roving border searches unconstitutional. The *Morales* court said that numerous court decisions had permitted roving automobile searches in border regions before *Almeida-Sanchez* and therefore the guard acted reasonably in relying upon the prior law.

Further, in *Picha v. Wielgos*, three students were searched by school officials who were looking for drugs after the police had been alerted. The court held that by November 1973 when the search occurred, it was widely known that the courts would not permit any invasion of privacy if fourth amendment standards of reasonableness were not met "unless that intrusion was reasonably justified in terms of the school’s legitimate interests." In the court’s opinion: "School officials cannot claim immunity when they violate the well settled rights of their students."

Sometimes it is necessary to make an elaborate analysis of the state of the law to determine if similar laws have been under judicial attack. In *Foster v. Zeeko*, two police officers were sued

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209. *Id.* at 726.
210. *Id.* at 726-27.
212. 413 U.S. 266 (1973).
215. *Id.* at 1220.
216. *Id. See also* Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976).
217. 540 F.2d 1310 (7th Cir. 1976).
for false arrest. In December 1971 they had arrested the plaintiffs who were found in an apartment where marijuana was allegedly present. Charged with violating a Chicago “disorderly house” ordinance, the plaintiffs argued that by 1971 various decisions had made it clear that ordinances of the type involved were invalid for reasons of vagueness and overbreadth.\textsuperscript{218} In fact, another section of the same ordinance had been previously declared unconstitutional by a district court and that decision was final.\textsuperscript{219} The court of appeals in \textit{Foster} examined similar provisions under Illinois law to determine how they had fared in the courts. It also looked into the relevant Supreme Court decisions and found that the key case of \textit{Papachristou v. City of Jacksonville},\textsuperscript{220} holding broad vagrancy laws unconstitutional, had not been decided until February 1972, three months after the arrests. It then looked into the history of “disorderly house” statutes and concluded that there was enough uncertainty about the law to justify a reversal of a judgment in favor of the plaintiffs.\textsuperscript{221}

In \textit{Zweibon v. Mitchell},\textsuperscript{222} the Court of Appeals for the District of Columbia held that warrantless wiretaps for national security purposes were in violation of the fourth amendment. Whether the officials responsible for the wiretapping had to answer in damages was to be determined at a later hearing. The court of appeals “decline[d] to express any views as to the reasonableness of any belief that warrantless wiretapping under the circumstances of this case was constitutional, at least until the trial judge determine[d] that appellees did in fact have such a belief.”\textsuperscript{223} The court directed the trial court to consider “judicial precedent . . . presidential practice . . . and congressional legislation” in determining the good faith of the officials involved.\textsuperscript{224}

\textit{K. That government officials are ordered to violate a person’s constitutional rights cannot serve as the basis of an objective good faith defense.}

It is a fundamental principle of the common law that one who obeys an illegal order is equally liable as the person giving

\begin{itemize}
\item \textsuperscript{218} \textit{Id.} at 1313.
\item \textsuperscript{219} See \textit{Landry v. Daley}, 280 F. Supp. 968 (N.D. Ill. 1968), \textit{appeal dismissed}, 410 F.2d 551 (7th Cir. 1969).
\item \textsuperscript{220} 405 U.S. 156 (1972).
\item \textsuperscript{221} \textit{Foster v. Zeeko}, 540 F.2d 1310, 1314 (7th Cir. 1976).
\item \textsuperscript{222} 516 F.2d 594 (D.C. Cir. 1975).
\item \textsuperscript{223} \textit{Id.} at 671 n.274.
\item \textsuperscript{224} \textit{Id.}
\end{itemize}
the order. In short, orders from superiors are not per se the equivalent of statutory commands permitting an official to invoke the objective good faith defense.

This principle is illustrated in a recent case in the Sixth Circuit. In Glasson v. City of Louisville, the plaintiff sued a police officer for grabbing an anti-Nixon poster from her during a presidential motorcade in Louisville, Kentucky, in 1970. The Chief of Police had issued orders to all police officers to confiscate "any sign or poster that was 'detrimental' or 'injurious' to the President." The police officer had been directed by his immediate superior to grab the plaintiff's poster. Despite the fact that his actions had been directed by two superiors, the officer who removed the poster was held liable for violating the first amendment rights of the plaintiff. The court was not convinced that the destruction was done "in good faith" inasmuch as "the actions of [the officers] were the result of an official determination not to permit dissent and of their failure to accord to appellant the right to engage in activity protected by the First Amendment."

L. Reliance upon the advice of counsel may provide the basis for an objective good faith defense.

In Schiff v. Williams, the Fifth Circuit held a college professor liable for firing three student editors of a school newspaper because he did not like what they were publishing. The court said that the president's belief that he had the right to fire the students stated no defense to a section 1983 action since "it appears clear that he should have known better and would have had he sought legal advice." Similarly, a district court in Delaware held that "a reasonable man in [the prison warden's] position would have sought legal counsel from the Attorney General's office concerning plaintiff's procedural rights. If he had sought such advice, he clearly would not have followed the course which he chose." From these cases it can be inferred that if a government

225. See Mitchell v. Harmony, 54 U.S. (13 How.) 115, 132 (1851); Axtell's Case, 84 Eng. Rep. 1060 (1660). Although these cases involved criminal liability, the principles discussed apply to suits for damages as well as to suits brought under well-accepted tort principles. See Prosser, HANDBOOK ON THE LAW OF TORTS, ch. 12, § 70 (4th ed. 1971).

226. 518 F.2d 899 (6th Cir. 1975).
227. Id. at 901.
228. Id. at 910-11.
229. 519 F.2d 257 (5th Cir. 1975).
230. Id. at 263 (Gee, J., concurring).
While this principle is expressed in certain cases, there are limits to its application. In Adler v. Lynch, a case exemplifying the principle, the plaintiff purchased land to be used for a personal residence and a dog kennel. According to the plaintiff, at the time she purchased the land she was unaware that it was zoned exclusively for single residences. When she was notified by the County Permits and Inspection Department that the kennel was in violation of the zoning laws and was ordered to remove the kennel, she requested a variance from the County Planning Commission. The Board of Commissioners denied her request but gave her one year within which to terminate the operation of the kennel. Subsequently, the deputy county attorney told the Board that it had exceeded its authority in granting the plaintiff the one-year extension for the kennel. The deputy county attorney then wrote to plaintiff advising her that she had only ninety days within which to discontinue the kennel. When she failed to act by the specified date, the Board held a meeting (without sending individual notice of the meeting to plaintiff) and instructed the county attorney to take legal action against her. The plaintiff was arrested for violating the zoning laws but all charges were ultimately dropped. Eventually the woman sued members of the Board for violating her due process rights by not giving her notice of the final meeting and by voting to take action against her after they had told her she could keep the kennel for a year. The court held that even though proper notice should have been given, the commissioners were not liable for damages:

The Court does not interpret Wood to stand for the proposition that it is not good faith for an official to accept erroneous advice from his appointed counsel on a question of law of sufficient complexity to justify a resort to expert legal guidance, at least, when the advice which is forthcoming is not patently unreasonable . . . .

The court explained that

[t]o hold otherwise, and predicate personal liability upon the defendants['] dependency upon expert legal counsel would se-

233. Id. at 714 (footnote omitted).
riously and substantially undermine the very purposes for which the doctrine of official immunity was developed. The principal effect of such a holding would be to make public officials—who are often not themselves attorneys—skeptical of apparently reasonable advice from qualified counsel, uncertain of their personal wellbeing in the exercise of their official discretion whenever the matter at hand was beyond their personal level of legal sophistication, and ultimately timid in their administration of the law, especially in the enforcement of the ill-defined outer limits of most public policies.24

Tillman v. Wheaton-Haven Recreation Association235 illustrates the limits on the application of the principle. In Tillman the plaintiffs had brought an action under sections 1981 and 1982 against the directors of a nonprofit corporation, who had excluded them from a community swimming pool association because of their race. The Supreme Court held that the association was not a private club and that the association’s racially discriminatory policy violated section 1982.236 On remand, the court of appeals assessed damages against the directors of the corporation even though they had relied on advice of counsel when they excluded the black applicants from membership.237 With respect to advice of counsel the court said:

The claim that a corporate officer may violate §§ 1981 and 1982 with impunity because he exercised due diligence by relying on advice of counsel about the meaning of the law is designed to severely restrict the application of these statutes. Judicial approval of this claim is warranted by neither precedent nor policy. . . . The Wheaton-Haven directors knew all the relevant facts, and they fully intended to exclude all persons who could not qualify under their white-only policy. Their ignorance of the law though engendered by lawyers’ advice and corroborated by lower federal courts, is no defense.238

More recently, in Halperin v. Kissinger,239 two of the defendants, President Nixon and H.R. Haldeman, relied upon the advice of John Mitchell, then Attorney General, that it was legal to install warrantless wiretaps. This reliance did not insulate them

234. Id.
236. Id. at 438.
237. 517 F.2d 1141, 1143 (4th Cir. 1975).
238. Id. at 1145-46 (citations omitted).
from liability; they were high government officials who should have known better and their actions demonstrated that they lacked subjective good faith in what they did.

**M. A mistake of law provides no basis for an objective good faith defense.**

The Supreme Court commented in *Wood v. Strickland* that an act violating a student’s constitutional rights cannot be “justified by ignorance or disregard of settled indisputable law.” Thus the objective good faith defense depends upon a reasonable belief in the legality of the official’s action. It is clearly unreasonable for a government official to be ignorant of or mistaken about the law. Thus, although a mistake of fact may exonerate an official if the mistake was reasonable, a mistake of law cannot generally provide such a defense.

This distinction is illustrated in *Lucero v. Donovan*, a case decided by the Ninth Circuit. In *Lucero* two police officers stopped a male Mexican on the street who appeared to be under the influence of narcotics. They asked him where he lived and whether they could search his residence. He consented to the search. He took the police to one sister’s apartment where they were informed that her brother did not live there. They then went to the apartment of another sister. When the police began to search the second apartment they discovered a woman—the plaintiff Mrs. Lucero—bathing her two small children. She told the police that it was her apartment and that her brother was only a guest. She then demanded to see a search warrant. The police promptly arrested her and seized certain vitamin tablets under the mistaken belief that they were drugs. The plaintiff was forcibly undressed and searched at the police station by two policewomen. She subsequently brought a section 1983 action against the two arresting officers and the two policewomen who searched her.

The district court directed a verdict for the defendant officers but the court of appeals reversed, stating that the issue of good faith was for a jury to decide. As the court framed the question, whether the police officers seized the pills unlawfully depends

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241. 354 F.2d 16 (9th Cir. 1965). For the general problem of mistake of law as a defense to a § 1983 action, see Theis, *supra* note 54.
242. Lucero v. Donovan, 354 F.2d 16, 22 (9th Cir. 1965).
only on whether the plaintiff’s protest to the police came before or after the seizure. A jury might conclude that the police had reasonably relied on the consent of her brother, although the facts in this case made that extremely unlikely. Even if they could have relied on the original consent, however, the plaintiff’s protest vitiated that consent as a matter of law and, from that moment, the police could no longer reasonably believe in their right to continue to search the apartment.

This distinction is similar to the one long existing in the criminal law between mistake of law and mistake of fact. If a wife mistakenly believes that a burglar is climbing into her home and shoots him, only to discover that the burglar is her husband, she has committed no crime. The mistake of fact would be a complete defense since she lacked the necessary criminal intent. On the other hand, if she shoots a fleeing person, mistakenly thinking that the law permits her to use deadly force against an unarmed trespasser, her mistake of law is no defense.

The problem has recently arisen in criminal trials relating to the break-in at the office of Daniel Ellsberg’s psychiatrist. Two Cuban-Americans were enlisted by E. Howard Hunt to break into the office of Dr. Louis Fielding to look for Daniel Ellsberg’s psychiatric file. They were told by Hunt that the break-in was a top secret national security mission authorized by the White House and that he had legal authority to authorize the search for the records. The Cuban-Americans were indicted and tried under 18 U.S.C. § 241 for conspiring to interfere with Dr. Fielding’s fourth amendment rights. The trial judge rejected an instruction that the defendants’ mistake of law as to Hunt’s authority could serve as a defense to the charges. The court of appeals reversed the conviction. One judge (Judge Wilkey) would permit a broad mistake of law defense similar to a mistake of fact defense. The concurring judge (Judge Merhige) limited the defense to that authorized by the Model Penal Code:

The introduction of an “official” source for an individual’s reliance on a mistaken concept of the law in acting “illegally” significantly diminishes the strength of the policy foundations supporting the general rule on mistake of law, and adds policy

243. Id. at 20.
244. Id. at 21.
considerations of grave import that would favor an opposite result. In my view, the defense is available if, and only if, an individual (1) reasonably, on the basis of an objective standard, (2) relies on a (3) conclusion or statement of law (4) issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field. The first three issues are of course of a factual nature that may be submitted to a jury; the fourth is a question of law as it deals with interpretations of the parameters of legal authority.248

He concluded:

Applying the defense to the facts of this case, the record discloses sufficient evidence of reliance on an official interpretation of the law for the matter to have been submitted to the jury. Barker and Martinez assert that they relied on Hunt’s authority as delegated from an intelligence superstructure controlled by the White House, and firmly believed that they were acting in a legal capacity. The Executive Branch of the United States Government is vested with substantive responsibilities in the field of national security, and decisions of its officials on the extent of their legal authority deserve some deference from the public. A jury may well find that John Ehrlichman, then Assistant to the President for Domestic Affairs, expressed or implied that the break-in of Dr. Fielding’s office was legal under a national security rationale, and that Hunt, as an executive official in a go-between capacity, passed the position on to the defendants, which they, acting as reasonable men, relied upon in performing the break-in.249

A third judge (Judge Leventhal) dissented from the reversal, claiming that the mistake of law defense was stretched far beyond its limits.250

For purposes of determining liability in civil, as opposed to criminal, litigation the ALI formulation is too broad. As noted above, a malicious intent is not necessary to a section 1983 claim—if a mistake of law leads to the violation of a clearly established constitutional right, the good faith defense cannot be invoked.251 A police officer or other government official has sufficient protection from tort liability if the law is sufficiently unsettled so that he could reasonably believe in the legality of his acts.

248. Id. at 955.
249. Id. at 957.
250. Id. at 963-69.
251. See text accompanying notes 240-249 supra.
Just as citizens cannot plead ignorance of the law, however, as a basis for escaping criminal liability, government officials should not be permitted to rely upon ignorance of the law which it is their duty to enforce.

V. Conclusion

An action brought under 42 U.S.C. § 1983 is based on the assumption that those public officials who violate the constitutional rights of the citizens they are serving must answer in damages for their actions. Officials defending such suits will generally attempt to invoke absolute immunity or, if such a defense is unavailable, they will try to justify their actions on the theory that they were taken in good faith. Absolute immunity for executive department officials, however, has no place in section 1983 actions.252 Furthermore, to establish broad rules of immunity through judicial interpretation is to undercut the purpose of section 1983 and of federal causes of action brought directly under the Constitution.

Generally, the same rules governing liability for analogous torts under the common law should apply in section 1983 actions; a finding of malice or subjective bad faith is always a basis for liability and these may be inferred from the circumstances of each case. In addition, negligent courses of action that have the potential for widespread injury should also result in liability.

It is clear that public officials are bound to follow the law they are paid to enforce. The rapid constitutional developments of the past fifteen years have created problems for officials who must take account of the new protections for citizens. It is not asking too much of these officials, however, that they become acquainted with the new constitutional cases and the implications for the conduct of their offices. If they remain ignorant of what the law means with respect to their treatment of fellow citizens, a strong dose of tort liability may be the best medicine to insure that all officials obey the law.

252. See notes 33-70 supra and accompanying text.