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Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying out for Understanding

Dean J. Spader

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IMMUNITY v. LIABILITY AND THE CLASH OF FUNDAMENTAL VALUES: ANCIENT MYSTERIES CRYING OUT FOR UNDERSTANDING

DEAN J. SPADER*

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* Associate Professor, Criminal Justice Studies Program, University of South Dakota. Visiting Professor, University of Texas at San Antonio. Former prosecutor for City and County of Denver and Private Practitioner. B.A. St. Louis University, 1970; M.A. Marquette University, 1971; M.S.J.A., University of Denver, 1974; J.D. University of Denver, 1975. Member of Colorado and South Dakota Bars.

> These dualities, if not eternal, have long appeared in Anglo-American law.
>
> Daniel Meador[1]
>
> No real understanding is possible without awareness of these pairs of opposites which permeate everything man does.
>
> E.F. Schumacher[2]
>
> If life feels the tug of these opposing tendencies, so also must the law which is to prescribe the rule of life.
>
> Benjamin Cardozo[3]

I. INTRODUCTION

Philosophers synthesize, judges balance, and politicians compromise. In ethics, law, and politics, conflicts between thesis and antithesis, individual rights and social policy, and competing interest groups create the demand for resolutions of divergent perspectives. Very often these conflicts involve value v. value (e.g. freedom v. equality) rather than value v. disvalue (e.g. fairness v. unfairness, truth v. untruth, good v. evil). When there is a parity between conflicting fundamental values, or "when all interests involved are deemed worthy of protection, some reconciliation between them will ordinarily be attempted."[4] All societies experience the conflicts between competing fundamental values, and a certain amount of conflict is a sign of societal vitality.

> Conflict prevents the ossification of social systems by exerting pressures for innovation and creativity; it prevents habitual accommodations from freezing into rigid molds and hence progressively impoverishing the ability to react creatively to novel circumstances. The clash of values and interests, the tension between what is and what some groups or individuals feel ought to be, the conflict between vested interest groups and new strata demanding their share of wealth, power, and status are all productive of social vitality.[5]

If other institutions in our society do not resolve these conflicts, then inevitably, the legal system becomes the forum for resolution.

This article isolates two "fundamental concepts" of our social and legal system—liability and immunity, particularly sovereign immunity and liability. After showing how the two concepts are conflicting fundamental opposites, this article will then illustrate how these fundamental

1. Meador, *Some Yins and Yangs of Our Judicial System*, 66 A.B.A.J. 122 (1980). Meador, former president of the ABA, states that "there are numerous dualities, but I mention only four." *Id.* Dualism may pervade the law as it does ordinary language.

2. E. SCHUMACHER, A GUIDE FOR THE PERPLEXED 127 (1977).

3. B. CARDOZO, THE PARADOXES OF THE LEGAL SCIENCE 7 (1928).

4. Bodenheimer, *Compromise in the Realization of Ideas and Values* in COMPROMISE IN ETHICS, LAW, AND POLITICS 144 (J. Pennock & J. Chapman eds. 1979).

5. Coser, *Some Sociological Aspects of Conflict* in 3 THE INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES 235 (D. Sills ed. 1968).

opposites clash by juxtaposing nine diametrically opposed justifications or arguments for each concept. Finally, the reconcilation, or lack of it, between these fundamental opposites is shown by the legal system's application of them in such doctrines as absolute immunity, strict liability, and qualified immunity. The themes of this article are summarized in the quotes beginning it: 1) the presence of dualisms or opposites is inevitable; 2) awareness of these ever-present and present everywhere dualisms (here, liability v. immunity) is essential to legal understanding; and 3) the "tug" between the opposites is the source of synthesis. Conflict becomes the source of creativity and ingenuity needed to seek proper resolutions. In the words of John Dewey: "Conflict is the gadfly of thought. It stirs us to observation and memory. It instigates to invention. Conflict shocks us out of sheeplike passivity, and sets us at noting and contriving. . . . It is the sine qua non of reflection and ingenuity."[6] In short, fundamental opposites must be clearly isolated in two polar perspectives; the more the dualisms are "clarified and logically developed, the more they *diverge*, until [they] appear to be exact opposites of each other."[7] Then, out of this clash of clearly isolated fundamental opposites, the phoenix of creativity rises to aid the decisionmaker in the proper synthesis, balance, or compromise of these fundamental conflicts.

II. The Opposites: Immunity and Liability

Judges and practitioners often find little practical value in jurisprudence and theory. If theorists tend only to see the forest, and practitioners tend only to see the trees, then good theory and good practice occurs when there is an ability to perceive the forest and trees, or to marry the abstract with the concrete. One theorist whose writing "does indeed give great aid to the analysis of legal problems and in breaking down our complex and variable terms," is Wesley Hohfeld.[8] Publishing his work in 1919, Hohfeld analyzed eight "fundamental concepts" (right, privilege, power, immunity, duty, no-right, liability and disability) which he believed are "the lowest common denominators of the law" and which made it possible "not only to discover essential similarities and illuminating analogies in the midst of what appears superficially to be infinite and hopeless variety, but also to discern common principles of justice and

6. J. Dewey, Human Nature and Conduct 300 (1930).

7. E. Schumacher, *supra* note 2, at 122.

8. Corbin, *Foreword* to W. Hohfeld, Fundamental Legal Conceptions: As Applied in Judicial Reasoning x-xi (W. Cook ed. 1963).

policy underlying the various jural problems involved."[9] Hohfeld repudiated the idea that his system was "a merely philosophical inquiry" and stated that his main purpose was to "aid in the understanding and in the solution of practical, everyday problems of the law."[10]

Hohfeld believed, perhaps correctly, that all legal problems could be stated in terms of eight fundamental concepts because these concepts reduced all legal relationships "to their lowest generic terms."[11] At the same time, Hohfeld showed "the great practical importance of a clear appreciation of the distinctions and discriminations set forth."[12] Calling Hohfeld's conceptual analysis "by far the most ingenious and influential work" in conceptual analysis, Feinberg and Gross illustrated how Hohfeld's system "is worked out with perfect symmetry and great elegance."[13]

Hohfeld arranges the eight fundamental concepts in the following scheme:[14]

Jural Opposites	right no-right	privilege duty	power disability	immunity liability
Jural Correlatives	right duty	privilege no-right	power liability	immunity disability

It is not possible to discuss fully Hohfeld's complete system in this article.[15] For immediate purposes, it should be noted that Hohfeld lists liability as the jural correlative of power and the jural opposite of immunity. Similarly, he lists immunity as the jural correlative of disability and the jural opposite of liability. The following discussion develops the meaning of jural correlatives and jural opposites, then focuses on the specific set of jural opposites which are the central topic of this article.

There is a critical difference between jural correlatives and jural opposites. A crude analogy can aid in making the distinction clear. In

9. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING 64 (W. Cook ed. 1963).
10. *Id.* at 26.
11. *Id.* at 64.
12. *Id.* at 63.
13. J. FEINBERG & H. GROSS, PHILOSOPHY OF LAW, 178-79 (2nd ed. 1980).
14. W. HOHFELD, *supra* note 9, at 65.
15. The system and illustration of its immense practical value are available elsewhere. *See* Cook, *Introduction* to W. HOHFELD, *supra* note 9, at 3-22; J. FEINBERG & H. GROSS, *supra* note 13, at 176-79. The chief insight of Hohfeld's analysis is the recognition that the term "right" is being used to represent four distinct legal conceptions. Hohfeld's analysis separates these four relations in the four concepts of "right", "privilege", "power", and "immunity" and then shows the jural opposites and jural correlatives of each. "One great merit of Hohfeld's analysis is that he adopted his terms out of actual judicial usage." Corbin, *supra* note 8 at xii. A right is not the same as a privilege, or a power, or an immunity. Each has different meanings, different correlatives, and different opposites.

American money, a coin cannot exist without a head and a tail. Though distinctly different, the head and tail of a coin obviously have a common relationship. Both distinctiveness and commonality are noted in the cliche, "You're talking about two sides of the same coin." Heads and tails are different sides of the same coin, though these different sides have a common connection such that one cannot exist without the other. It makes no sense to speak of a coin with only heads, or to speak of a coin with only tails. Heads imply tails and tails imply heads. Though one is only viewing one side of the coin (the head, for example), it is logical to infer that the other side of the coin is tails.

A very similar relationship as to that of heads/tails/coins exists in the legal concepts of rights/duty/law. Just as a head implies a tail on a coin, a right implies a duty in the law. If one person holds a legal right, then all other persons have the lawful duty to respect that right. Each legal right implies that there is a legal duty not to violate that right. Duties "co-relate" to rights much like heads co-relate to tails. This co-relation, or the direct and perhaps proportional relationship, of rights and duties has been the subject of much discussion in jurisprudence. When two legal terms co-relate, such that the one implies the existence of the other, the result is a set of "jural correlatives."

Jural opposites are quite different from jural correlatives. If jural correlatives exist when one legal concept (here, a right) implies the *presence* of another legal concept (here, a duty), then jural opposites are legal concepts where the presence of one legal concept implies the *absence*, or negation, of the other. If immunity is the opposite of liability, and vice versa, then immunity negates liability and liability negates immunity. Where one is present, the other is absent. As jural opposites, immunity and liability have a different meaning than when used with their jural correlatives, which respectively are disability and power.[16]

16. Because the correlatives of immunity and liability are not the topic of this article, an extensive analysis of their meanings as legal correlatives is not necessary. In brief, if one individual holds a power and, if that power is exercised, at least one individual will have his legal relations altered.

> The situation Hohfeld described by saying that the one whose legal relations will be altered if the power is exercised is under a "liability". Care must be taken to guard against misapprehension. "Liability" as commonly used is a vague term and usually suggests something disadvantageous or burdensome. Not so in Hohfeld's system for a "liability" may be a desirable thing. . . . [A]ny person can by offering to enter into a contract with another person confer upon the latter—without his consent, be it noted—a power by "accepting" the offer to bring into existence new legal relations. It follows that every person in the community who is legally capable of contracting is under a liability to have such a power conferred upon him at any moment.

Cook, *supra* note 15, at 8.

On the other hand, the correlative of immunity is disability. Cook describes the meaning of immunity as a "right" in this context and disability as its correlative.

Another use of the term "right," possibly less usual but by no means unknown, is to denote

Hohfeld's distinctions are very useful. If a government and a governmental official have immunity, then this immunity has a correlative "disability" on the part of the party who is suing; that is, the plaintiff is "disabled" or dismissed from the suit due to the immunity of the defendant government or official. The extent of the plaintiff's "disability" correlates to the extent of defendant's immunity. If the defendant is absolutely immune, the plaintiff is absolutely "disabled" from suing. With immunity, the government or official has a form of "right", which is the negative "right" of "freedom from the legal power or 'control' of another as regards some legal relation."[17] The plaintiff cannot sue the defendant because of the defendant's immunity from suit. Immunity is, then, a form of "right" held by the government or governmental official. Immunity is a "trump" over other "rights", and thereby frees the immune party from the claims of rights from others.[18]

If the jural correlatives of immunity and disability describe the legal relationship of the immunized defendant and the disabled plaintiff, the jural opposites of immunity and liability describe not only the immune relationship but also its opposite, the liability relationship. If liability attaches to the defendant, the defendant is not freed from the legal control of another, but rather is bound by it.[19] Immunity is freedom from; liability is the absence of this negative freedom, or is the state of being controlled by, or bound to, another to the extent of the liability.

If at times the law justifies giving immunity to the sovereign and its

> that one person is not subject to the power of another person to alter the legal relations of the person said to have the "right." For example, often when we speak of the "right" of a person not to be deprived of his liberty or property without due process of law, the idea sought to be conveyed is of the exemption of the person concerned from a legal power on the part of the persons composing the government to alter his legal relations in a certain way. In such cases the real concept is one of exemption from legal power, i.e., "immunity." At times, indeed, the word "immunity" is used in exactly this sense in constitutional law. In Hohfeld's system it is the generic term to describe any legal situation in which a given legal relation vested in one person cannot be changed by the acts of another person. Correlatively, the one who lacks the power to alter the first person's legal relations is said to be under a "disability," that is, he lacks the legal power to accomplish the change in question.

Id. at 8-9. Obviously, Hohfeld's suggested use of the terms has not been followed. Immunity, as used in this article and most others on the topic of sovereign immunity, means the "power" of the government to alter a citizen's legal relations with impunity. Therefore, if the sovereign or the governmental official has immunity in the sense of power, then the individual does not have an "immunity" but has a "disability," as used and understood by Hohfeld. Using Hohfeldian terms, it would be more accurate to speak of "sovereign power" rather than sovereign immunity, and "qualified power" rather than qualified immunity. It also makes more common sense to do so. Unfortunately, common sense is not so common in common law terminology.

17. W. HOHFELD, *supra* note 9, at 60.

18. For the contrary idea that rights are trumps over utilitarian policies designed to maximize the greatest good for the greatest number, see R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

19. The term "liable" comes from the French word *ligare*, which means to bind.

employees, and at other times, the law justifies the imposition of liability, then fundamental opposites clash. Because liability is "the very opposite of immunity,"[20] these two fundamental opposites should generate fundamentally opposite justifications. Such is the case. By definition, immunity generates the exact opposite justifications of the justifications for liability. These fundamental opposites protect fundamentally opposite values and considerations. To paraphrase Schumacher, no real understanding is possible without an awareness of these pairs of opposing justifications which permeate every discussion of, and decision affecting, the immunity-liability dilemma.

III. Nine Opposing Justifications Underlying the Immunity-Liability Dilemma

If immunity and liability are logical opposites, then each should generate logically opposing justifications. Justifications go beyond the doctrines of sovereign immunity, or their opposites of liability, and probe the reasons for granting immunity or imposing liability. All forms of immunity must be justified in a just society, as must all forms of liability. The paradox of jural opposites is that each fundamental opposite protects fundamental values. The synthesis, balance, or compromise that is struck is never easy and is always open to the demands of the opposing justifications. Justice Cardozo, in his eloquent classic entitled *The Paradoxes of Legal Science*, noted the pervasiveness of fundamental opposites in the law, and opined as to the great problems in the law:

> The reconciliation of the irreconcilable, the merger of antithesis, the synthesis of opposites, these are the great problems of the law. . . . We fancy ourselves to be dealing with some ultra-modern controversy, the product of the clash of interests in an industrial society. The problem is laid bare, and at its core are the ancient mysteries crying out for understanding.[21]

Cardozo's jurisprudence is the philosophy of a dualist. He believed that "[t]here are two principles inherent in the very nature of things, recurring in some particular embodiments whatever field we explore—the spirit of change, and the spirit of conservation. There can be nothing real without both."[22] The recognition of this inherent dichotomization of principles escapes the logical analyst who believes that dilemmas can be resolved by logic alone. Logic has its functions and its limits. Its function is to isolate logical opposites, such as liability and immunity, as well

20. W. Hohfeld, *supra* note 9, at 60.
21. B. Cardozo, *supra* note 3, at 4.
22. *Id.* at 7 (quoting Whitehead).

as to isolate their logically opposing justifications. The limits of logic end at that point; logic cannot resolve the dilemma. Qualities of statemanship beyond logic, such as understanding, wisdom, and experience, must intervene to reconcile the "unending paradox."[23]

The following analysis attempts a logical analysis and nothing more. Except to the extent that hidden values intrude in subtle ways, there is no attempt to determine which justifications should be prioritized and which should not. Rather, the following analysis suggests that "Order can be produced out of chaotic law only through full understanding of policy considerations."[24] If the present law of immunity-liability is chaotic, perhaps it is because there is not a full understanding of the conflicting justifications or policy considerations underlying the law.[25] The following nine headings attempt what no other analyst (to my knowledge) has done: namely, to show that most of the common justifications or rationales in the immunity-liability debate can be juxtaposed into nine basic conflicting opposites.[26]

23. *Id.* at 7.

24. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.01, at 546 (1958) "[T]he law governing the redress of the individual against public authorities, national, State, or municipal, for injuries sustained in the exercise of governmental powers, is in a state of incongruity and confusion unique in history." Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 3 (1924). More recently, two noted writers observed: "In summary, the system of governmental liability resembles a patchwork quilt, and a rather imperfectly constructed one, at that." W. GELHORN & CLARK BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 377 (6th ed. 1974).

25. These nine conflicting justifications hopefully are comprehensive, but they certainly are not exclusive. There are others which were omitted for various reasons. Also, there is no agreement among analysts as to which justifications are more important than others. Therefore, the ordering of the nine varies with different judges and observers.

26. This juxtapositioning is similar to the "Thrust" and "Parry" method in the classic: Llewellyn, *Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950). Llewellyn showed that fifty-six canons of statutory interpretation could be juxtaposed to illustrate how "there are two opposing canons on a almost every point." *Id.* at 401. As a legal realist, Llewellyn's point was to counteract formalism in the law; however, in doing so his relativism omitted the utilities of dualism (chief of which are noted by DEWEY, *supra* note 7, and Coser, *supra* note 5); to bring out conflicts which are the sine qua non of reflection, ingenuity, and more creative reconciliations.

1. Interest of People v. Interest of Individual

a. Immunity is necessary to protect the interests of the public.	a. Liability is necessary to protect the interests of the injured victim.
b. "The interests of the people require that due protection be accorded to them [heads of executive departments] in respect of their official acts"[27]	b. "It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals."[28]

The immunity-liability dilemma involves the philosophical issue of the many and the one, the political science issue of the state and the citizen, and the sociological issue of the collective and the individual. In the words of Justice Cardozo, "the one is in rivalry with the many, the individual with the group, . . . where is the line that we shall call the jural median?"[29] Immunity protects the interests of the many, the collective, or their representative, the state. Liability preserves the interest of the one, the individual, or the citizen. Although not always mutually exclusive (it can be argued that the best government is that government which protects the individual), the rationales underlying the immunity-liability issue tend to dichotomize into the state-individual, social utility-individual rights, public policy-individual justice conundrum. These are the "two considerations of high importance which . . . come into sharp conflict—on the one hand, the protection of the individual citizen . . . on the other, the protection of the public interest."[30]

Judges promoting immunity inevitably state: "Considerations of 'public policy and convenience' therefore compelled a judicial recognition of immunity from suits arising from official acts."[31] Judges promoting abrogation of immunity and favoring more liability of government cite the morality and democratic nature of liability: "[Immunity] is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State."[32] At its

27. Spalding v. Vilas, 161 U.S. 483, 498 (1896).
28. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting (quoting Abraham Lincoln)).
29. B. CARDOZO, *supra* note 3, at 6.
30. Barr v. Matteo, 360 U.S. 564, 564-65 (1959).
31. Nixon v. Fitzgerald, 457 U.S. 731, 745 (1982).
32. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting). Commentators favoring liability argue that democracy, by definition, implies responsibility and accountability of governmental officials, and in an era of expansive governmental power in the hands of large numbers of nonelected administrative officials, absolute immunity is out-dated and

broadest level, the issue is one that pits the public interest in an effective government against individuals claiming injury by that government. It should not be surprising, then, that the same court may have two separate, often conflicting, lines of cases.[33]

2. *Rule of Law v. Rule of Man (Discretion)*

a. Immunity is necessary to maintain the supremacy of the lawmaker (rule of man).	a. Liability is necessary to maintain the supremacy of the rule of law.
b. "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the rights depends."[34] (Justice Holmes)	b. "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[35]

The issue of sovereign immunity often involves vigorous debates concerning who is sovereign: the government or the people, the lawmaker or the law itself. One commentator states that "where the claim is created by the federal Constitution, Holmes' logic does not hold: The law set forth in that document was made by the people of the United States, not by the state in question."[36] Even in nonconstitutional areas,

even dangerous. *See generally* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 215-18 (1963); James, *Tort Liability of Governmental Units and Officers*, 22 U. CHI. L. REV. 610 (1955); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937).

33. Professor Davis urges the U.S. Supreme Court to follow one line of cases favoring more individual justice and governmental liability, and to discard another line of cases favoring more governmental and official immunity. Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383 (1969).

34. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1970) (action based on local law against the territory of the United States barred by sovereign immunity). The doctrine of common law sovereign immunity in nonconstitutional cases has incurred voluminous criticism calling for its partial or complete abolition. *See, e.g.*, Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383 (1969); W. PROSSER, LAW OF TORTS § 131, at 971 (4th ed. 1971); Comment, *Sovereign Immunity: A Battleground of Competing Considerations*, 12 SW. U.L.R. 457 (1981).

35. Nixon v. Fitzgerald, 457 U.S. 731, 768 (1982) (White, J., dissenting; quoting Chief Justice Marshall). "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." United States v. Lee, 106 U.S. 196, 220 (1882).

36. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CAL. L. REV. 189, 196-97 (1981). U.S. CONST. preamble ("We the People of the United States . . . do ordain and establish this Constitution"); *see*, Willis, *The Doctrine of Sovereignty Under the United States Constitution*, 15 VA. L. REV. 437, 453 (1929).

Holmes' belief that the government should be immune *qua* lawmaker has caught fire from critics. Professor Davis states: "Today hardly anyone agrees that [Holmes'] stated ground for exempting the sovereign from suit is either logical or practical."[37]

Although advocates of immunity no longer give credence to the maxim that the king can do no wrong,[38] they have not been willing to replace rule of man totally by rule of law in the area of immunity. Some immunity is necessary to protect discretion ("rule of man").[39] No government can exist without some discretion, and the extravagant version of the rule of law (epitomized by the phrase, "We are a government of laws and not of men") has been rejected. The ideal of the supremacy of the rule of law has not, can not, nor should be realized. "Every government has always been *a government of laws and of men* . . . [n]o government has ever come close to being a government of laws and not of men. Every system of administration has always had a large measure of discretionary power."[40] If one believes Professor Davis' recent assertions that ninety percent of all administrative action is informal discretionary conduct, then discretion (not possession!) is nine-tenths of the law.[41] The point is that immunity is just one of many sources for allowing and protecting discretion ("rule of man"), and discretionary powers allow governmental officials to rule without preordained laws. Therefore, immunity, like rule of man discretion, threatens the ideal of rule of law and whenever immunity is granted, dissenting judges point out that the grant of immunity places the official beyond the law because no law limits the official's decision.[42] Immunity prioritizes more rule of man by providing more protection for discretionary decisions; liability prioritizes

37. K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 96 (1975).

38. "The maxim is pointless where there is no king." Maguire, *State Liability for Tort*, 30 HARV. L. REV. 20 (1916). However, Jaffe's historical analysis of immunity suggests that the maxim meant "precisely the contrary to what it later came to mean." Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). Jaffe argues that the maxim meant the King was not entitled to do wrong and must not do so, though obviously the English government and the King himself were factually capable of it.

39. "At the outset it was more or less obvious that some vestige of the governmental immunity must be retained." W. PROSSER, *supra* note 34, § 131, at 986. For a more thorough discussion of the philosophical foundations for the rule of law v. rule of man debate, *see* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2:10-2:12, at 97-117 (2nd ed. 1978); Spader, *Rule of Law v. Rule of Man (Discretion): The Search for the Golden Zigazg Between Conflicting Fundamental Values*, 12 J. OF CRIMINAL JUSTICE 379-94 (1984).

40. K. DAVIS, *supra* note 37, at 33 (emphasis original).

41. K. DAVIS, *supra* note 39, at 14.

42. "Now, however, the Court clothes the Office of the President with sovereign immunity, placing it beyond the law." Nixon v. Fitzgerald, 457 U.S. 731, 767 (1982) (White, J., dissenting) (granting absolute presidential immunity for damages caused by actions of the President within the outer perimeter of the President's official responsibility).

more rule of law by providing more compensation for individuals injured by certain decisions which fall outside the legal powers of a government official. Advocates of immunity would leave more decisions of officials discretionary; advocates of liability would confine, structure, and check more of the decisions of government officers by more rule of law.[43]

3. *Protecting Decisionmaking v. Compensating Injuries*

a. Immunity is necessary to protect the functioning of government.

b. "Of course, it is not a tort for government to govern, . . ."[44] (Justice Jackson)

a. Liability is necessary to preserve the accountability of government.

b. For every wrong there ought to be a remedy. "[T]he general rule is, and always has been, that there must be a remedy for every wrong, that the doctrine of immunity runs directly counter to this basic concept of justice."[45]

Justice Jackson's oft-cited phrase capsulizes the concept that government can commit injuries while governing without incurring tort liability. Much government action by definition affects various individuals and interest groups adversely. When government governs and thereby engages in injurious actions, immunity denies a remedy for the injury, which is precisely why immunity competes with the principle of justice that urges courts to provide remedies for every wrong.[46] The latter principle has been the chief reason why sovereign immunity has not had expansive application for municipal corporations.[47] Injuries caused by governing are not torts under the legal doctrine of sovereign immunity. These two countervailing principles, the one stating that governmental immunity for injuries committed while governing is a necessity and the other stating that immunity destroys a basic principle of justice, have

43. *See* Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924). "The 'rule of law' which Dicey and others extol is designed by judicial control to restrict within the bounds of legality the operation of the governmental machine in its contact with the citizen." *Id.*

44. Dalehite v. United States, 346 U.S. 15, 57 (1957) (Jackson, J., dissenting).

45. H. GRILLIOT, INTRODUCTION TO LAW AND THE LEGAL SYSTEM 122 (3rd ed. 1983).

46. A corollary principle of justice is "Elemental notions of fairness dictate that one who causes a loss should bear the loss." Owen v. City of Independence, Mo., 445 U.S. 622, 654 (1980).

47. *See* 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.02 (3rd. rev. ed. 1977) at 104:

> [T]he sovereign or governmental immunity doctrine, holding that the state, its subdivisions and municipal entities, may not be held liable for tortious acts was never completely accepted by the courts, its underlying principle being deemed contrary to the basic concept of the law of torts that liability follows negligence, . . . As a result, the trend of judicial decisions was always to restrict, rather than expand, the doctrine of municipal immunity.

created the ever-present question whether immunity is a "despotic mantle or creature of necessity."[48]

The failure of many commentators to recognize the underlying paradox leads many to make absolutist statements that speak in terms of dichotomies rather than degrees.[49] It makes no sense to call for the complete abolition of sovereign immunity, just as it makes no sense to advocate its total adoption in all governmental actions.[50] In the *Dalehite* case, which probably involved one of the greatest claims of damages in an immunity suit, even the dissenting Justice Jackson found it necessary to say "of course" governing is not a tort.[51] The question is not whether immunity *or* liability should prevail; both are necessary and both will remain part of the law pertaining to governments. The question is one of degree: How much immunity or liability should exist? That question inevitably will involve a shifting dynamic answer depending on the degree to which the many policy considerations underlying immunity or liability are prioritized. One set of competing considerations is the government's need for immunity from injuries committed while governing as opposed to the victim's demand for individual justice and a remedy. The loss must fall somewhere and the choices are to place it on the taxpaying public, the offending official, the governmental entity, the injured, or some combination of these. The goal is to "reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes" of government.[52]

4. *Separation of Powers v. Combination of Powers*

a. Immunity is necessary to maintain separation of powers.	a. Liability is necessary to allow the judicial branch to check the power of other branches.
b. "The primary justification for	b. "Courts of justice are estab-

48. Harley and Wasinger, *Governmental Immunity: Despotic Mantle or Creature of Necessity*, 16 WASHBURN L.J. 12 (1976).

49. G.K. Chesterton once defined a paradox (and I paraphrase) as a truth standing on its head trying to get attention. If a paradox is a truth, it ought not to be abolished simply because it requires a bit of balancing to deal with it.

50. Most critics of the doctrine make the same mistake as its advocates did—to seek total victory. The following statement is an example of the type of conclusion against sovereign immunity that uses terms of dichotomy rather than degree: "Whatever usefulness sovereign immunity may have once served has long since been outlived. It should be put to rest along with the other dinosaurs of the law." Comment, *supra* note 34, at 484. To equate immunity to dinosaurs is a profound failure to recognize the necessity of immunity for some governmental functions.

51. Dalehite v. U.S., 346 U.S. 15, 57 (1953) (involved over 300 suits arising from an explosion in a Texas harbor of 4850 tons of fertilizer which leveled much of Texas City, Texas, and killed over 300 people).

52. Butz v. Economou, 438 U.S. 478, 503 (1978).

the retention of the sovereign immunity doctrine is that it prevents the courts from interfering unduly with operations of the executive branch."[53]

lished, not only to decide upon controverted rights of the citizens as against each other, but also upon rights in controversy between them and their government."[54]

This rationale removes the debate from more abstract jurisprudential principles of law to social and political philosophies of government. Discussions of the relationships of the coordinate branches of government pervade most U.S. Supreme Court decisions affecting the immunity-liability balance. In terms of the quantity of discussion about the purpose of immunity, this rationale certainly is "primary." Numerous courts have stated that sovereign immunity is a legislative issue. The argument for separation of powers is a pervasive and powerful basis for attaching immunity. In the trend-changing case of *Owen v. City of Independence, Mo.*, where the Court refused to grant the municipality a good faith defense and imposed a form of strict liability, the Court still recognized that many decisions are immune from judicial intervention:

> A large part of the municipality's responsibilities involved broad discretionary decisions on issues of public policy—decisions that affected large numbers of persons and called for a delicate balancing of competing considerations. For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government.[55]

If the separation of functions is reduced, the courts in effect review the discretionary, policymaking decisions which are the functions of the other branches of government and thereby combine all functions in the judiciary.[56] Using the separation of powers rationale as a basis for immunity engages the court in theories of judicial review, which theories constitute multiple degrees ranging along a spectrum from judicial activism on the one hand to extreme judicial restraint on the other.[57] Those favor-

53. W. GELHORN & B. BOYER, ADMINISTRATIVE LAW AND PROCESSES 291 (1981).

54. United States v. Lee, 106 U.S. 196, 220 (1882). *Lee* is a classic case which "categorically rejected the government's claim that the suit infringed upon its sovereign immunity." B. SCHWARTZ, ADMINISTRATIVE LAW 578 (2nd ed. 1984). Schwartz provides a concise overview of tort suits and the trends, §§ 19.7-19.27 at 557-82. Professor Davis has urged the Court to retain the spirit and holding of the *Lee* case. K. DAVIS, *supra* note 24, § 27.10, at 614.

55. 445 U.S. 622, 648 (1980).

56.
> Immunity for 'discretionary' activities serves no other purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place.

Johnson v. State, 69 Cal. 2d 782, 794 n.8, 447 P.2d 352, 361 n.8 (1968).

57. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); *Sym-*

ing liability and the need for judicial determination of it emphasize the protection of individual rights, especially constitutional rights.[58] Judicial activism becomes a necessity to assure that important constitutional rights are not read out of a statute by the statute's silence about them or by the application of immunity.[59]

On the other hand, those favoring immunity and the need for a clear separation of powers emphasize judicial abstention.[60] Before exercising jurisdiction, a "court must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive branch."[61] Often, the presence of other remedies and other means of controlling governmental action are used to provide further justification for the courts to abstain and to tolerate a privilege of immunity.[62] Abstentionists believe the presumption should be against judicial interference with the decisions of other branches of

posium: Judicial Review versus Democracy, 42 OHIO ST. L.J. 1 (1981); A. BONNICKSEN, CIVIL RIGHTS AND LIBERTIES 185-202 (listing seven different judicial positions on a range from extreme restraint to extreme activism).

58. *See* Sterling v. Constantin, 287 U.S. 378 (1932) (restraining the executive power of the Governor of Texas). "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." *Id.* at 398.

59. "[W]here constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity . . . in order to defeat them." P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 336 (2nd ed. 1973). Professor Davis argues that even if immunity were abolished for torts and specific relief, "courts will still be limited to deciding issues appropriate for judicial determination, and they will still be limited by the limitations on the scope of judicial review prescribed by the Administrative Procedure Act in 5 U.S.C. § 706." Davis, *supra* note 34, at 405.

60. *See, e.g.*, Justice Powell's dissenting opinion in Owen v. City of Independence, Mo., 445 U.S. 622 (1980). "The rationale for immunity derives from the theory of the separation of powers. . . . This Court has recognized the importance of preserving the autonomy of executive bodies entrusted with discretionary powers." *Id.* at 677-78.

61. Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982). *See* Nixon v. General Services Administration, 433 U.S. 425, 443 (1977); United States v. Nixon, 418 U.S. 683, 703-13 (1974).

62. In Nixon v. Fitzgerald, 457 U.S. 731 (1982), the Court listed several alternatives.

> A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action. . . . The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office . . . . Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

Id. at 757. However, none of these alternative remedies redress the harm done to the injured victim and most are inapplicable to the thousands of governmental officials who are nonelected bureaucrats, which probably explains the Court's switch from absolute immunity for many high level executive branch officials, Barr v. Matteo, 360 U.S. 564 (1959), to only a qualified immunity, Scheuer v. Rhodes, 416 U.S. 232 (1974). For hapless victims, if the courtroom door is closed by the immunity bar, an alternative is a private bill but "[l]egislative relief is time-consuming to obtain, due to the need to work out compromises acceptable to a majority." Comment, *supra* note 34, at 469.

government.[63]

The separation of powers debate had its first judicial expression in *Marbury v. Madison*.[64] *Marbury* gave the judiciary the power to invalidate a law passed by Congress if the Court found the statute to be repugnant to the Constitution.[65] Eighteen years later, Chief Justice Marshall, by way of dictum and without justifying reasons, expressed the first reported opinion on the federal government's immunity.[66] Although some scholars have termed the process of how the doctrine of immunity became established in the United States "one of the mysteries of legal evolution," the intermingling of it with the separation of powers doctrine began early and continues as an unabated debate today.[67]

5. *Fairness To Government Official v. Fairness To Injured Victim*

a. Immunity is necessary to provide fairness and protect good faith exercise of discretion.

b. "[B]asic fairness requires a qualified immunity. . . . The good faith defense . . . authorizes liability only when officials acted with malicious intent or when they 'knew or should have known that their conduct violated the

a. Liability is necessary to provide fairness by allocating losses caused by good faith ignorance of the law.

b. "[I]t is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all taxpayers."[70] "The knowledge that a municipality will be liable for all of its injurous conduct, whether committed in

63. "First, as recognized by the doctrine of separation of powers, some governmental decisions should be at least presumptively insulated from judicial review." Owen v. City of Independence, Mo., 445 U.S. 622, 667 (1980) (Powell, J., dissenting).

64. 5 U.S. (1 Cranch) 137 (1803).

65. Chief Justice Marshall provided the initial attempt to draw the line between the branches of government:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers perform duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Id. at 170. This limiting statement must be viewed against the following expansive statement: "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.

66. "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

67. Borchard, *supra* note 24, at 4. This mystery also was acknowledged by the U.S. Supreme Court in United States v. Lee, 106 U.S. 196, 207 (1882): "[T]he principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." For a more complete history, *see* Jaffe, *supra* note 38; Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963).

68. Owen v. City of Independence, Mo., 445 U.S. 622, 669 (1980) (Powell, J., dissenting).

constitutional norm.' "[68] "It has been customary to explain the discretionary exception on one or both of two grounds. The first is the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by law to exercise discretion."[69] good faith or not, should . . . minimize the likelihood of unintentional infringements on constitutional rights."[71]

The good faith defense conflicts with the basic principle that ignorance of the law is no excuse. Qualified immunity may exist when there is a good faith belief by the governmental official that his actions are lawful. Ignorance of the law, then, provides the excuse or immunity if the good faith ignorance results in the violation of rights and causes injury.[72] Proponents of more liability believe that the good-faith defense encourages ignorance of the law, which in turn causes more violations of rights. "Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated."[73]

Proponents of more immunity argue that the "countervailing considerations" should include fairness to the governmental official. Although withdrawal of the good faith defense provides more fairness to the injured victims of malfeasance, retention of it provides more fairness to the governmental official whose "liability should not attach unless there was notice that a constitutional right was at risk."[74] Herein exists a

69. Jaffe, *supra* note 67, at 223. "By placing the office above the Constitution because of a stated policy of fairness to the official, the *Butz* Court allows a greater unfairness since damages are denied to the victim of the constitutional deprivation." Comment, *Executive Immunity For Constitutional Torts After Butz v. Economou*, 20 SANTA CLARA L. REV. 453, 480 (1980).

70. Owen v. City of Independence, Mo., 445 U.S. 622, 655 (1980).

71. *Id.* at 651-52.

72. "Yet owing to qualified immunity enjoyed by most governmental officials . . . , many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense." *Id.* at 651.

73. *Id.* The rejection of the good faith defense has another justification which is based on deterrence theory. Greater deterrence will be obtained, the argument goes, if government officials are required to know the law, especially constitutional law.

74. *Id.* at 660 (Powell, J., dissenting). Professor Davis distills the *Owen* decision and Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978) into the following:

> If a municipality's legal adviser guesses wrong about which turn constitutional development may take and the municipality in good faith, on the basis of his advice, takes action that "may fairly be said to represent official policy," but that action is later held to deprive a person of his constitutional rights, the municipality is liable for damages, whether its action is governmental, proprietary, discretionary, ministerial, executive, legislative, or judicial.

K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.03 at 395 (1982 Supp.). Even Davis advocates a number of limitations on the present state of strict liability for municipalities, especially limitations which will protect legislative and judicial functions. *Id.* § 25.04 at 399-402 and § 26.23 at 475-80.

classic example of an irreconcilable conflict between agents of government and private citizens. Governmental officials may be held liable for violations of which they had no knowledge or notice, or private citizens may be remediless if the ignorance of the law ("good-faith") of the official is established. In *Owen v. City of Independence, Mo.*, the Court "resolved" the issue by attaching strict liability only to the governmental entity (which provides a remedy for the victim) but granting qualified immunity to the official (which protects the official from liability for good-faith errors).[75]

6. *Encouraging Risk v. Encouraging Caution*

a. Immunity is necessary to encourage risk, vigorous exercise of official authority, decisiveness, principled decisionmaking, flexibility in government decisions and actions and to avoid paralysis.

b. "Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error than not to decide or act at all."[76]

a. Liability is necessary to encourage due care and caution, attentiveness, vigilance, responsibility, accountability, diligence, and to require minimal knowledge of the law and individual rights. Immunity breeds negligence; liability breeds caution.

b. "The knowledge that a municipality will be liable for all injurious conduct . . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."[77] "[P]erhaps an increased sense of caution and responsibility . . . would be wholesome."[78]

This set of conflicting rationales is the most perplexing. Completely contradictory statements emerge from the courts depending upon whether the courts want governmental officials to be adventurous, deci-

75. "The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages. . . . And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy.'" Owen v. City of Independence, Mo., 445 U.S. 622, 657 (1980).

76. Scheuer v. Rhodes, 416 U.S. 232, 242 (1974).

77. Owen v. City of Independence, Mo., 445 U.S. 622, 651-52 (1980).

78. Dalehite v. United States, 346 U.S. 15, 58 (1953) (Jackson, J., dissenting).

sive, risk-taking actors, or whether the courts believe governmental officials should be cautious, careful, doubt-harboring actors. On the negative side, proponents of immunity argue that government officials will be unduly timid, compromising, and chilled by the extension of liability. "Caution, of course, is not always a virtue and undue caution is to be avoided."[79] This rationale for immunity also underlies the exception for discretionary decisions. "[I]f the officer is answerable, he may hesitate to do what should be done and the government is the loser."[80] To the extent that the courts seek zeal above caution, action above doubt, effectiveness of government above compensation to the injured, and boldness above fear, they will incline toward more immunity.[81] To the extent that those values are reversed, the courts will move toward liability. The public interest in the vigorous and effective discharge of official responsibilities must be balanced against the need for accurate and effective remedies for citizens whose rights have been violated.[82]

7. *Closing the Public Fisc v. Opening the Public Fisc*

a. Immunity is necessary to protect the public treasury and taxes from claims of individuals.

b. "The essential point to be made is that sovereign immunity survives as a historical vestige of early pragmatic considerations, necessitating the protection of the public purse of a young, a relatively impoverished federal and state body politic."[83]

a. Liability is necessary to use the public treasury and taxes to compensate individuals.

b. "The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury."[84]

The public interest in protecting against raids on the public fisc and

79. Nixon v. Fitzgerald, 457 U.S. 731, 784 (1982).

80. Jaffe, *supra* note 67, at 223. Jaffe states that the justifications for immunity in 5 and 6 are the two customary reasons given "to explain the discretionary exception." *Id.* at 223.

81. Judge Learned Hand advanced the same rationale:

> [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Gregorie v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (denying relief to a plaintiff for false imprisonment).

82. *See* Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.S.L.A. L. REV. 463 (1963).

83. Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 AD. L. REV. 597, 613 (1969).

84. Owen v. City of Independence, Mo., 445 U.S. 622, 657 (1980).

the principle of compensation often collide. Where the claims for compensation are large, the court may explicitly acknowledge the need to "protect the public treasury."[85] Jaffe's review of the history of the legal tradition of immunity concludes that "treasury liability for tort" is one of the three "sensitive areas"[86] and that "expediency rather than any abstract theory" determined the presence or absence of immunity.[87] Historically, when nightwatchman governmental entities were the norm, the governmental budget was nearly non-existent and immunity was the pragmatic means of limiting claims on the budget. With the massive development, first of the regulatory state then of the welfare state, and the inherent power which regulation and welfare monies conveyed to governmental officials, immunity no longer protected just the nightwatchman; it also protected the regulator, investigator, adjudicator, prosecutor, administrator and dispenser of the welfare monies. The immense change in government has led some analysts to argue that immunity has changed from being a shield for limited public funds to being a shield for immense governmental power.

> Sovereign immunity is at best a judicial protective device created to immunize a weak government against oppressive and insensitive citizen demands. It had vogue and was appropriate to American jurisprudence when government weakness and citizen rapacity were paramount. Today it is the citizen who is helpless in the face of growing governmental intrusion into his very life, often with unpredictable and tragic results. The likelihood that government will continue to grow and make its presence felt is self-evident. Thus immunity, both in its judicial and non-judicial sense, is not only anachronistic but also dangerous to our democratic institutions if allowed to exist untrameled by controls appropriate to contain it.[88]

Whether immunity is a limiter on tax burdens or a ravisher of citizen liberties, the immunity-liability issue is "paradoxical precisely because it is difficult to strike the appropriate balance between the individual and the state when the costs to one meet head-on with the goals of the other."[89] It is clear that two policy interests—the one protecting individuals' rights and the other protecting public fics, the one compensating injured parties and the other limiting governmental budgets (or deficits)—are at loggerheads.

Advocates of more immunity also point out the monetary inequity

85. Dalehite v. United States, 346 U.S. 15, 60 (1953) (Jackson, J., dissenting) (noting how the discretionary exception of the Torts Claim Act is meant to protect public taxes).

86. Jaffe, *supra* note 38, at 29.

87. *Id.* at 3.

88. Sherry, *supra* note 83, at 615.

89. Comment, *supra* note 69, at 478.

of imposing strict liability on small municipal governmental units, but not on larger state and federal budgets,[90] and of imposing liability on the lower paid ministerial employees at the more operational levels of government but not on employees with discretionary, policy making powers, who are at the higher paying levels of government.[91] Equitable loss-spreading within a governmental unit also may create inequitable loss-spreading between governmental units. Different balancings on the immunity-liability scale for different levels of government and governmental employees create, critics argue, inequitable monetary burdens. "The jogged interface of these diametrically opposed considerations goes a long way in explaining the deplorable state of the law in this area."[92]

8. Continuity of Government v. Stopping the Government in its Tracks

a. Immunity is necessary to provide continuous government for the community as a whole.

b. "There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The government, as representative of the community as a whole, cannot be

a. Liability is necessary to stop government in its tracks when it is injurious to individual rights.

b. "If it was a trespass, then the officers of the government *should be restrained* whether they be professed to be acting for the government or not."[94]

90. "The Court neglects, however, the fact that many local governments lack the resources to withstand substantial unanticipated liability under § 1983. . . . [R]uinous judgments under the statute could imperil local governments." Owen v. City of Independence, Mo., 445 U.S. 622, 670 (1980) (Powell, J., dissenting).

91. "The practical effect of the discretionary test is that it carves out a broad sector of governmental employees (those whose jobs do not require the use of discretion), who formerly were protected by the sovereign immunity doctrine, and singles them out to be personally liable for their negligence. Who are these employees? They are those least able to pay a personal judgment. Only policymaking employees (whose jobs require the use of discretion) and who therefore are the highest paid government employees, will be allowed to invoke the doctrine to shield themselves from personal liability.

Kruger v. Wilson, 325 N.W.2d 851, 855 (S.D. 1982) (Fosheim, C.J., dissenting). This inequity may be remedied by liability insurance or personal errors and omissions insurance, which also draws on the public exchequer or the lower level employee's niggardly salary.

92. Comment, *supra* note 34, at 470. On the other hand, federalism demands independence and local control of the state and local governments and it may be a bit naive to expect consistency between different levels of government in an area, such as the immunity-liability dilemma, which has so many competing considerations to balance.

93. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 704 (1949). *Larson* quoted Decator v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840), to buttress its rejection of specific relief: " 'The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given them.' " 337 U.S. at 704. Davis calls the *Larson* case "the cornerstone of federal law of sovereign immunity for two decades." K. DAVIS, *supra* note 24, at 338.

stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."[93]

Since *Ex parte Young*, the need to protect the government from being "stopped in its tracks" has conflicted with the need to prevent illegal actions of governmental officials by the granting of specific relief in the form of injunctions, declaratory judgments, and remedies other than damages. In order to overcome the obvious impossibility of stopping a governmental official in his tracks, but not stopping the government in its tracks, the courts have relied on the *Young* fiction that a governmental official who acts unlawfully is stripped of his governmental character "and is subjected in his person to the consequences of his individual conduct."[95] A governmental officer stripped naked by his illegality is no longer acting for the government—in theory. Practically, it is obvious that the stopping of a governmental official, naked or clothed with power, is stopping the government.

These competing rationales—the need for continuity in government and the need to stop abusive or excessive uses of power—arise most often in specific relief cases. The rationales closely parallel the competing considerations underlying the separation of powers rationales. Inconsistency and unpredictability have been present precisely because the conflicting rationales have been reconcilable only through legal fictions. The case law represents the "balance of two principles of first importance to the American legal system. When equally important factors are balanced against each other, however, the result is often two irreconcilable lines of decisions."[96]

Calling the law of sovereign immunity "sophistical and erratic" and calling for an amendment to the APA allowing specific relief, Professor Davis has listed several instances to show that "courts including the Supreme Court are constantly interfering with public administration and constantly stopping the government in its tracks."[97] As part of the trend against immunity,[98] the federal government partially ended the need for

94. Goltra v. Weeks, 271 U.S. 536, 544 (1926). *See also* Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

95. Ex parte Young, 209 U.S. 123, 160 (1908) (allowing injunction against a state attorney general under equity powers despite the sovereign immunity doctrine and the eleventh amendment).

96. Comment, *supra* note 34, at 474.

97. Davis, *supra* note 34, at 401.

98. The Court of Claims Act of 1855 currently at 28 U.S.C. § 1491 (1976); The Tucker Act of 1975, currently at 28 U.S.C. § 1346(a)(2) (1976); the Federal Tort Claims Act of 1946, currently at 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2401-02, 2411-12, 2671-80 (1976).

the fiction and amended the APA in 1976 to allow actions "seeking relief other than money damages."[99] However, it is clear that even with the 1976 amendment to the APA, there are circumstances when this immunity rationale (not stopping the government in its tracks) still may prevail, if for no other reasons than that all the exceptions contained in the waiver of suits for damages may also be contained in the waiver of suits for specific relief.[100]

9. *Deterring Lawsuits v. Encouraging Lawsuits*

a. Immunity is necessary to prevent vexatious lawsuits and maintain the judicial floodgates against an inundation of lawsuits.

b. It is necessary to develop "various rules and doctrines . . . sufficient to prevent a flood of burdensome litigation. . . ."[101]

a. Liability is necessary to open the courthouse door and provide more remedies to hapless plaintiffs.

b. "The american dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed . . . let the Courts serve that ancient need."[102]

This set of competing rationales is similar, but not identical, to those above which argue for immunity in order not to allow interference with the prompt and effective administration of public affairs in the executive and legislative branches. The floodgates rationale switches the argument of potential interference to the judicial branch in order to support more immunity. The countervailing rationale is that the courts must be the stopgap for all injustices not remedied by the other branches of government.[103]

99. 5 U.S.C. § 702 (1976).

100. Even Professor Davis, probably the harshest critic of immunity, acknowledged that such exceptions as military emergency are "the most persuasive reason" for some sovereign immunity. Davis, *supra* note 34, at 393. Yet, he maintains that since the 1976 Amendment allowing specific relief, whose "meaning is simple and entirely clear," the courts have still allowed the defense because "the legal mind has ways of transforming what is simple and clear into something complex and confused." K. DAVIS, *supra* note 74, at 481.

101. Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1526 (1962).

102. Warth v. Seldin, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting).

103.
> With the growing complexities of government it [the judiciary] is often the one and only place where effective relief can be obtained. . . . [W]here wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors. . . . To wait for a sign from Congress is to allow important constitutional questions to go undecided and personal liberty unprotected.

Flast v. Cohen, 392 U.S. 83, 111-12 (1968) (Douglas, J., concurring) (granting standing to a taxpayer to challenge federal spending for parochial schools in violation of the first amendment establishment clause).

The nine conflicting justifications (18 total) are not mutually exclusive and there is considerable overlap between them. There are also more specific justifications which flesh out the general ones given above. However, the juxtapositioning should indicate the central thesis based upon Hohfeld's jurisprudence: opposite fundamental concepts generate opposite justifications. If Hohfeld is correct in his analysis of immunity and liability as jural opposites, then it should not be surprising that these fundamental concepts which describe legal relations generate opposing justifications. Conflicting justifications which are at loggerheads should be the expected logical result. The process of synthesizing, balancing, or compromising these conflicts requires human faculties beyond logic. These conflicting justifications cannot be resolved, as by some elimination process.

> Divergent problems cannot be killed; they cannot be solved in the sense of establishing a "correct formula"; . . . . It is important for us to become fully aware of these pairs of opposites. Our logical mind does not like them: it generally operates on the either/or yes/no principle, like a computer. So, at any time it wishes to give its exclusive allegiance to either one or the other of the pair, and since this exclusiveness inevitably leads to an ever more obvious loss of realism and truth, the mind may suddenly change sides, often without even noticing it. It swings like a pendulum from one opposite to the other, and each time there is a feeling of "making up one's mind afresh"; or the mind may become rigid and lifeless, fixing itself on one side of the pair of opposites and feeling that now "the problem has been solved." The pairs of opposites put tension into the world, a tension that sharpens man's sensitivity and increases his self-awareness.[104]

Becoming fully aware of the pairs of opposites creates the needed tension to set the mind at creating the synthesis, balance, or compromise of the fundamental opposites.

The following sections illustrate the opposites in their legal form and the degrees between the opposites. Once degrees of balance are recognized, multiple options become available for the creative balance.[105] The analysis provides a framework with which to understand the dichotomous opposites and degrees underlying the fundamental concepts and their progeny (other legal opposites such as good faith-bad faith, and so on).

104. E. SCHUMACHER, *supra* note 2, at 126-27.

105. *See* J. NAISBETT, MEGATRENDS: TEN NEW DIRECTIONS TRANSFORMING OUR LIVES (1982). One of the "megatrends" Naisbett suggests is the movement from an "either/or" dichotomized-option society to a "multiple option" society. The law certainly reflects that megatrend; there has been a movement from the harsher absolute immunity, to the multiple options of qualified immunity, which is precisely why the law has become more complex and balanced, though more unpredictable.

IV. Dichotomies and Degree in Law and Justice

John Stuart Mill noted that a term often "is best defined by its opposite."[106] Dichotomies often are defined by their opposites. If defined as in-kind opposites, liability is the absence of immunity and immunity is the absence of liability. The law provides its own terms for these two opposites on each end of the continuum: "absolute immunity" and "strict liability." Yet, the law also has terms to express varying degrees on the continuum between the extreme opposites: "qualified immunity" and "limited liability." Figure 1 attempts to illustrate the in-kind dichotomies and the degrees between the dichotomies.

Figure 1

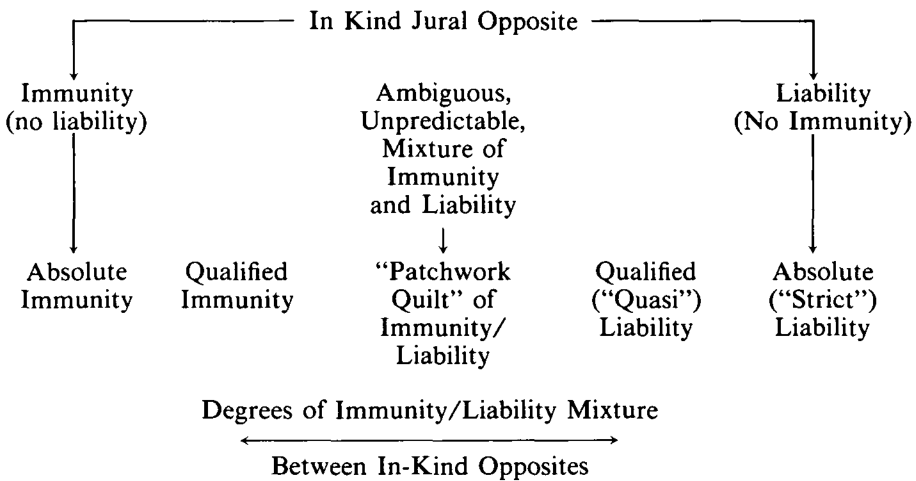

Figure 1 does not describe accurately the opposites and degrees between opposites in any present legal system. As Justice Brennan noted: "In actuality, the distinction . . . is better characterized not as a line, but as a succession of points."[107] However, Justice Cardozo may be even more accurate when he observed that often there is neither a continuum, nor a succession of points: "The continuum does not exist. Instead there are leaps from point to point. We have been beguiled by the ideal of harmonious progression."[108] Thus, the ideal is a continuum of degrees between dichotomous opposites and a logical progression on the continuum; the reality is more often a scattering, a patchwork quilt, a shifting, perhaps

106. Mill, *Utilitarianism* in 43 Great Books of The Western World 465 (R. Hutchins ed. 1952).

107. Owen v. City of Independence, Mo., 445 U.S. 621, 644 n.26 (1980).

108. B. Cardozo, *supra* note 3, at 4.

zigzagging, movement back and forth between the lure of immunity for the public interest and the tug of liability for individual justice.

This dynamic movement of the courts and legal systems back and forth between conflicting, yet fundamental, concepts has received many descriptions. Usually the analyses indicate dual poles and the oscillation between the polarities may be called an "ebb and flow,"[109] "yin and yang,"[110] "seesaw,"[111] "rise and fall,"[112] "zigzag,"[113] "periodic waves of reform."[114] As the former President of the ABA noted, there are many polarities in the law. "These dualities, if not eternal, have long appeared in Anglo-American history."[115] Meador notes that virtually every reform measure involves a shifting between the polarities, and reforms often meet defeat in the name of an absolute that fails to seek a balance or to recognize the need for diverse solutions along the continuum between the polar opposites. "[C]ourt reforms too often swing from one [extreme] to the other without an attempt to balance the interests involved."[116]

Justice Cardozo, like Hohfeld who isolated jural opposites and Mill who noted the tendency to define a term by its opposite, also observed this strong tendency in the law to dichotomize concepts into opposites. Cardozo suggested that these important dichotomies create the "paradoxes" inherent in law and justice. "Dichotomy is everywhere," wrote Cardozo, and these "unending paradoxes" create problems of law and justice in which "fundamental opposites clash."[117] Understanding and synthesizing conflicting opposites is the essence of doing justice.

> Our neural systems seem better adapted to the binary program of yes-no responses than to the responses of yes/but or no/but. . . . Learning the law is not merely learning principles. In fact, we do not really "know" a principle until we know its opposing principles. . . . Legal thinking requires a resolution in the individual mind and encourages the finding of solutions that transcend, as by synthesis, the polar opposites of a debate.
>
> This process is not easy, but on its cultivation may depend the

109. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980).

110. Meador, *supra* note 1, at 122.

111. I. JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 253 (1980).

112. Zalman, *The Rise and Fall of the Indeterminate Sentence*, 24 WAYNE L. REV. 45 (1977).

113. Spader, *supra* note 39; Spader, *Fundamental Value Conflicts in Law; The Search for the Golden Zigzag*, 7 A.L.S.A. FORUM 1 (1983).

114. M. COHEN, LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY 261 (1961).

115. Meador, *supra* note 1, at 122.

116. Nejelski, *The Jeffersonian-Hamiltonian Duality: A Framework for Understanding Reforms in the Administration of Justice*, 64 JUDICATURE 450, 460 (1981).

117. B. CARDOZO, *supra* note 3, at 132, 134.

pursuit of justice in society.[118]

A full understanding of justice, then, requires an understanding and resolution of fundamentally opposite and dichotomous principles.

Many areas of the law which involve the reconciliation of dualities or polarities, both of which are fundamental concepts representing important fundamental values, seem to possess an area between the extremes that results in inconsistent, ambiguous, or highly unpredictable law. When critics or dissenting judges perceive this lack of clarity in the law, they refer to it as "patchwork quilt,"[119] "a scatter-gun approach,"[120] "establishing various formulas."[121] When the law moves to an extreme on either end of the continuum (that is, toward absolute immunity or strict liability), the law obtains clarity and predictability, but at the cost of sacrificing extremely important policy considerations underlying the opposite pole of the duality. Conversely, if the law attempts to reconcile and balance both parts of the duality, thereby attempting to preserve both sets of opposite policy considerations, the law tends to become more unclear, unpredictable, and more like a patchwork quilt.[122] Again, Cardozo eloquently suggests how courts proceed in this patchwork quilt area of the law.

> We will leave it to be "pricked out" by a process of inclusion and exclusion in individual cases. That was to play safely, and very likely to play wisely. The question is how long we are to be satisfied with a series of *ad hoc* conclusions. It is all very well to go on pricking the lines, but the time must come when we shall do prudently to look them over, and see whether they make a pattern or a medley of scraps and patches.[123]

Unfortunately, when the *ad hoc* "pricking" involves the clarification and choice of the multiple options on a continuum between two fundamental dualities, the "pattern" Cardozo seeks to perceive will likely be a dynamic, shifting pattern. Jaffe, after analyzing U.S. Court cases on the immunity-liability issue, concludes: "A group of cases before and after *Lee* establishes a somewhat wavering pattern."[124] When fundamental opposites are involved, there is no golden mean (or if there is, it is only temporary), there is only a golden zigzag.[125] Cardozo describes this zig-

118. Freund, *Law in the Schools* in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY 159 (J. Tapp and F. Levine eds. 1977).

119. "In summary, the system of governmental liability resembles a patchwork, and a rather imperfectly constructed one, at that." W. GELHORN AND C. BYSE, *supra* note 24, at 377.

120. Nixon v. Fitzgerald, 457 U.S. 731, 765 (1982) (White, J., dissenting).

121. Jaffe, *supra* note 38, at 36.

122. Comment, *supra* note 34.

123. B. CARDOZO, *supra* note 3, at 96.

124. Jaffe, *supra* note 38, at 24.

125. *See* Spader, *supra* note 39.

zagging between the fundamental opposites of immunity and liability:

> Hardly a rule of today but may be matched by its opposite of yesterday. Absolute liability for one's acts is today the exception; there must commonly be some tinge of fault, whether willful or negligent. Time was, however, when absolute liability was the rule. . . . For every tendency, one seems to see a countertendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. . . . We are back with Heraclitus . . . [i]n this perpetual flux. . . .[126]

In this perpetual flux—here, between liability and immunity—the cherished values of stability, clarity, predictability, certainty, and uniformity which underlie precedent, rule of law, and the doctrine of *stare decisis*, give way to other fundamental values which outweigh maintenance of the status quo.

V. Drawing Lines Between Fundamental Opposites

It is not new to state that "no bright line can be drawn" between fundamental policy considerations.[127] Nor is it novel to suggest that there ought to be different rules for different points along the continuum.[128] Presumably, the oft-used phrase, "to distinguish a line of cases," means that given different facts, issues, parties, levels of government, levels of employees, policy considerations, and so on, the court will move to a different point on the continuum, sometimes granting more immunity and sometimes imposing more liability. Degrees of immunity or liability are implied in such terms as "varying scope" or "range of discretion." It then becomes very difficult to find a strict linguistic formula which summarizes the potentially infinite number of degrees and multiple options available for resolving any issue in the complex middle ground. Again, Cardozo summarized the problem of diversity and degree in a few eloquent sentences:

> Our survey of judicial methods teaches us, I think, the lesson that the whole subject matter of jurisprudence is more plastic, more malleable, the moulds less definitely cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some analysis, have been accustomed to believe. *We draw our little lines*, and they are hardly down before we blur them. As in time and space, so here. Divisions are working hypotheses, adopted for convenience. We are tending more and more toward an appreciation of the truth that, after

126. B. Cardozo, The Nature of the Judicial Process 26-28 (1921).

127. The courts often observe, but rarely analyze why, the bright line between two opposites is incapable of being drawn. *See, e.g.*, Owen v. City of Independence, Mo., 445 U.S. 622, 648 n.31 (1980).

128. "Fortunately, there seems to be no necessity to have a uniform rule. It should be feasible to apply the immunity doctrine differently in different areas. . . ." Jaffe, *supra* note 67, at 225.

> all, there are few rules; there are chiefly *standards and degrees*. . . . So also the duty of a judge becomes itself a *question of degree*. . . . If this seems a weak and inconclusive summary, I am not sure that the fault is mine.[129]

Human language and human symbols are not capable of the efficient and accurate categorization of all the degrees on the continuum. Dichotomies, however, are efficiency devices, and often in the zeal to be efficient we use dichotomies to lump immensely diverse social realities into two categories: right-wrong, good faith-bad faith, intentional-unintentional, subjective-objective, reasonable-unreasonable, within scope-without scope, discretionary-ministerial, governmental-proprietary, immunity-liability. Cardozo is correct: "Dichotomy is everywhere."[130] Conceptually, then, it helps to look at the dichotomies and their underlying rationales, before making the move into the complexity of degrees between the dichotomies.

1. Absolute Immunity

Absolute immunity is a defense that does not recognize degrees, whether in the harm caused by the government's action or the degree of intent with which the harm is caused.[131] Under absolute immunity, "even the most egregious, knowing, and malicious acts of certain state officers, producing perhaps incalculable harm to constitutional rights, nonetheless can create no officer liability as a matter of law."[132] When absolute immunity attaches, the courts apply neither a subjective standard ("known") nor an objective standard ("should have known") to an officer's conduct. The case does not reach the "merits," which involve degrees of intentionality or negligence, degrees of harm and responsibility, and many other traditional doctrines. If absolute liability imposes liability even in the absence of fault, absolute immunity grants immunity even in the presence of an allegation of fault and malice.[133]

Absolute immunity should not be confused with sovereign immunity, though historically it has been the sovereign or state that has possessed absolute immunity. Absolute immunity pertains to the extent of

129. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 161-62 (1921) (emphasis added).

130. B. CARDOZO, *supra* note 3, at 132.

131. *See* Jaffe, *supra* note 67.

132. Wolcher, *supra* note 36, at 222. Professor Prosser explains that immunity "avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970 (4th ed. 1971).

133. Barr v. Matteo, 360 U.S. 564, 575 (1959) (granting absolute immunity despite a claim of malice).

exception from liability; sovereign immunity pertains to the legal entity which possesses the exception from liability. Nor should absolute immunity or sovereign immunity be confused with the immunity contained in the eleventh amendment. Sovereign immunity protects states from liability suits in their own courts, while the eleventh amendment protects states from suits by a private citizen in the federal courts.[134]

Absolute immunity allows the holder "without liability, to deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured."[135] Because it contravenes traditional notions of individual justice, only the strongest reasons of public policy can justify it, even then it is constantly buffeted by advocates of liability, individual autonomy, and rights-based philosophies. The following brief survey indicates its availability for officials in the different branches of government.

A. The Executive Branch

Under present case law, the President of the United States enjoys absolute immunity,[136] as do state prosecuting attorneys,[137] but the governors as chief executives of the sovereign states do not have absolute immunity,[138] nor do high level cabinet officials or other officials in the executive branch when they are sued for constitutional violations.[139] It appears that if the violation is not a constitutional violation, governors and other executive branch officials may still have some of the near absolute immunity granted by previous cases.[140] However, Schwartz has noted that ordinary "tortious official conduct can easily be framed in

134. In federal courts, the eleventh amendment defense is jurisdictional, and questions of jurisdiction are preliminary to issues of merit. Therefore, if the defense prevails, the merits are not considered. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 677-78 (1974) (eleventh amendment bars relief even though not raised by the State in the trial court); Ford Motor Co. v. Dept. of Treas., 323 U.S. 459, 467 (1945).

135. Nixon v. Fitzgerald, 457 U.S. 731, 764 (1982) (White, J., dissenting to the grant of absolute immunity from civil damages to the President for official acts within the "outer perimeter" of the President's official responsibility). *But see* U.S. v. Nixon, 418 U.S. 683 (1974) (denying President the claim of executive privilege in refusing to respond to the Special Prosecutor's subpoena *duces tecum*).

136. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

137. Imbler v. Pachtman, 424 U.S. 409 (1976) (granting absolute immunity against § 1983 lawsuits in the initiating and prosecuting of a state's case).

138. Scheuer v. Rhodes, 416 U.S. 232 (1974).

139. Butz v. Economou, 438 U.S. 478 (1978).

140. Barr v. Matteo, 360 U.S. 564 (1959); U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 104 S. Ct. 2755 (1984) (granting discretionary function exception of Federal Tort Claims Act to actions of Government regulating conduct of private individuals); Sylvester, *Regulatory Agencies Better Shielded From Suit?* Nat'l L.J., July 2, 1984, at 5, col. 1.

constitutional terms."[141] For example, the common law tort of trespass can become a violation of the fourth amendment's privacy right to be free from governmental intrusions, and many wrongs can be couched in the accordian-like due process terminology. Therefore, absolute immunity has waned considerably for executive branch officers other than the President and prosecutors since its apex in the *Barr v. Matteo* era.[142]

B. The Judicial Branch

Since 1871, American judges have possessed absolute immunity from civil damages actions for judicial acts performed within the judge's jurisdiction.[143] A survey of recent cases reported that "recorded cases reveal virtual unanimous and unyielding support by both state and federal courts for the absolute quality of judicial immunity."[144] The Supreme Court reaffirmed the absolute immunity recently, after a lower federal court allowed a woman who was sterilized pursuant to a judge's order to sue the judge.[145] Judicial immunity does not bar, however, prospective injunctive relief against a judicial official acting within judicial capacity, nor is it a bar to an award of attorney's fees under 42 U.S.C. § 1988.[146]

Absolute immunity can extend to officials in the executive branch of government who exercise judicial, quasi-judicial, adjudicatory or prosecutorial-type powers. Administrative agencies are usually in the executive branch, as are prosecutors and parole board members. The Court has extended absolute immunity to administrative law judges or hearing examiners and decisionmakers who are on the prosecuting staffs of agencies.[147] A recent Supreme Court decision upheld a California statute which provided absolute immunity to parole board officials in their decisions to parole or revoke parole of a parolee, although this case included only a tort violation under state law and not a federal constitutional violation.[148] However, lower federal courts and some state courts have held that the Parole Board is an arm of the sentencing judge when it grants, denies, or revokes parole, thereby bringing the members under

141. B. SCHWARTZ, ADMINISTRATIVE LAW 563 (1984).

142. Some executive branch officials have "quasi-judicial" functions; the presence of these hybrid powers may grant absolute immunity. *See infra*, notes 147-49, and accompanying text.

143. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Pierson v. Ray, 386 U.S. 547 (1967).

144. Way, *A Call for Limits to Judicial Immunity: Must Judges be King in Their Courts?*, 64 JUDICATURE 390, 394 (1981).

145. Stump v. Sparkman, 435 U.S. 349 (1978).

146. Pulliam v. Allen, 104 S. Ct. 1970 (1984).

147. Butz v. Economou, 438 U.S. 478 (1978).

148. Martinez v. California, 444 U.S. 277 (1980).

the umbrella of judicial immunity.[149]

C. The Legislative Branch

Legislators clearly have absolute immunity for some of their functions. "The Federal Constitution grants absolute immunity to Members of both Houses of the Congress with respect to any speech, debate, vote, report, or action done in session."[150] Absolute immunity during legislative activities protects legislators from executive and judicial interference and preserves the separation of powers. The immunity protects the freedom of speech and debate from being subjected to scrutiny of other branches of government.

2. *Absolute Liability*

On its face, absolute liability, sometimes referred to as strict liability or blanket liability, may appear as unjust toward government as absolute immunity is toward individual victims of government action.[151] Absolute liability for a personal injury or property harm exists even if a) the government used all due care and thus was not negligent, or b) the government official acted in good faith and thus possessed no malicious intent, bad faith, or other *mens rea* to which blame, fault, or culpability is ascribed. If absolute immunity dismisses plaintiff's claims irrespective of the *mens rea* of the government official and the merits of the plaintiff's case, absolute liability does the opposite and imposes liability on the government's actions irrespective of blameworthiness. In short, absolute immunity grants immunity and absolute liability imposes liability without getting at fault. Both are no-fault doctrines because both look beyond the issue of fault (whether negligent or intentional) to the desired substantive result—immunity for public interests or liability for compensation and reparation.

Schwartz argues that "[o]ne of the important trends in modern tort law has been the movement to replace fault by the compensation principle of strict liability."[152] Advocates of absolute liability wish to forego the issue of who is at fault and rather address the issue of how to compensate injured parties. Schwartz believes that when governmental ac-

149. *See* R. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 184-85 (1977).

150. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); Gravel v. U.S., 408 U.S. 606 (1972); U.S. v. Brewster, 408 U.S. 501 (1972).

151. *But see* R. EPSTEIN, A THEORY OF STRICT LIABILITY (1980) (proposing a system based more on causation and compensation than on negligence and fault).

152. B. SCHWARTZ, *supra* note 141, at 571. *See also* B. SCHWARTZ, THE LAW IN AMERICA 194-285 (1974).

tion, even if in good faith and with due care, injures innocent individuals, the government should spread the loss of those injuries by compensating the injured through taxation. No-fault concepts have replaced fault-based tort in such areas as workman's compensation, unemployment insurance, no-fault insurance, products liability, and so on. Schwartz believes that public tort liability ought also to adopt the principle of compensation rather than fault:

> The trend toward compensation has only begun to penetrate the law of public tort liability. Compensation is based upon reparation rather than fault; it requires absolute liability under what amounts to a system of insurance of social risk, i.e., the risk arising from social activity carried on for the benefit of the insured. This social insurance theory is particularly appropriate to deal with injuries caused by governmental activities. Such activities are carried on for the benefit of the entire community, and the risks of injury involved should also be borne by the community as a whole. The state becomes the virtual insurer of its own activities. The risk that for a private entrepreneur is spread by liability insurance is apportioned by the state among the community as a whole by the working of the tax system. In this approach, public tort liability will be replaced by the ultimate principle that the taxpaying public should bear most of the injuries that result from governmental activity. Public tort liability will be replaced by what amounts to a governmental-operated system of mutual insurance for those damaged by administrative action.
>
> In other countries, notably France, the law has gone far in the direction just outlined. The trend has only just begun in American law, but the essential first step has been taken with the growing movement to abrogate sovereign immunity and the substitution of governmental liability for the common-law rule of officer liability. The essential next step is the replacement of the *Dalehite* prohibition by the principle of absolute liability, at least in those cases where there is comparable liability imposed upon a private tortfeasor. Ultimately the notion of absolute liability will spread as it has in other countries, with tort liability giving way to a risk theory of social insurance, whose key idea will be that a beneficent government should not allow exceptional losses to be borne by those upon whom governmental activity has happened to inflict such losses. The basis for governmental liability will be not fault but compensation, which works equitable loss-spreading.[153]

Advocates of absolute liability in the public tort area believe that the state should adopt the insurance principles of spreading the risk and should become a mutual insurance company against accidents, thereby evenly distributing the costs of governmental mishaps among all citizens rather than letting them fall unevenly and excessively on the particular victims incurring the losses.

153. B. SCHWARTZ, *supra* note 141, at 574-75 (footnotes omitted).

The Supreme Court has begun to adopt this social insurance theory by giving qualified immunity to governmental officials but imposing strict liability on the government.[154] This policy also acts as a basic liability insurance for government employees, who will not be sued if they act in good faith and reasonably, but whose governmental unit ("the deep pocket") will be absolutely liable. Although the governmental unit incurs strict liability, the official possesses qualified immunity.[155]

3. Qualified Immunity and Limited Liability

After listing the extremes of absolute immunity and liability on the continuum, it becomes apparent that a large majority of all governmental officials and governmental units possess only qualified immunity, or are subject to the many degrees which qualify their liability. The issue of qualified immunity always involves three questions, two of dichotomy and one of degree.

1. Question of dichotomy: Does immunity apply, or not?
2. Question of dichotomy: If immunity does not apply, is there liability?
3. Question of degree: If there is liability, how much liability exists?

The first question of dichotomy has only two answers: either the official and the government are immune or not immune. If immune, the case is dismissed. If not immune, the case proceeds past the motion to dismiss. If on the merits of the case, no liability exists, then the case can also be dismissed or judgment entered for the defendant at a number of points in the pretrial and trial process. This second question is also a question of dichotomy. Either liability exists, or it does not. If liability exists, then only does the question of degree arise: how much liability exists? Only if the first two dichotomous questions are answered affirmatively does the adjudication move to the question of degree. The following discussion deals only with the initial question of whether immunity applies. The courts use a number of factors to determine whether immunity exists; however, these can be summarized into four basic tests, all of which use dichotomous terminology. Figure 2 outlines the four tests used to determine the yes-no question pertaining to qualified immunity.

154. Owen v. City of Independence, Mo., 445 U.S. 622 (1980).

155. "Cities whose action is later held to violate a person's constitutional rights are now liable for damages, no matter how clear the law was at the time of their action that it was constitutional, and no matter what the degree of good faith of their officers." K. DAVIS, *supra* note 74, § 25.00-3 at 398.

Figure 2

Qualified Liability (Liability may exist) ←——→	Qualified Immunity (Immunity may exist)
1. Within Scope Authority ("intra vires")	1. Without scope of Authority ("ultra vires")
2. Discretionary Decision Policy-Making Discretion Planning Level	2. Ministerial Decision Enforcement Discretion Operational Level
3. Good Faith (Mens Rea) Subjective: "Didn't Know" Objective: Reasonable	3. Bad Faith (Mens Rea) Subjective: "Knew" Objective: Unreasonable ("Should Have Known")
4. Governmental Function	4. Proprietary Function

In the initial decision, the law judges in dichotomies, not degrees. Either immunity attaches or it does not. There may be some decisions of governmental officials which are immune and some which are not; however, if immunity, whether absolute or qualified, exists for any given action at any given point, then no liability attaches. The difficulty lies in knowing (perhaps predicting) beforehand or determining after the act whether immunity does or does not apply. Because all three tests are composed of broad, vague, and highly ambiguous terms, the task is not easy. However, an initial litmus test is simply to ask three questions:

1) Is the act or decision within or without the scope of authority?
2) Is the decision a policymaking, planning level, discretionary decision?
3) Is the decision made in subjective good faith and objective good faith?

If all appear to be affirmative, immunity likely will attach. If any are answered negatively, liability may be imposed. Or, in other words, if the action is outside the scope of authority of the official (and some officials have broad "outer perimeters"), or the decision is deemed an operational level ministerial decision, or is performed with guilty knowledge or malicious intent, or is deemed unreasonable in that the official should have known the law (or other relevant standard), or any combination of the above, then immunity may take flight and liability descend upon the official and/or governmental body. There are hundreds of cases providing specific examples of each test. Other than to provide specific examples where the tests have been applied, the law seems incapable of being more specific because the law uses abstract dichotomous terms which, by definition, are "chameleon-hued words."[156] The broader dichotomous concepts have bred a legion of more specific dichotomies.

156. W. HOHFELD, *supra* note 9, at 35. The presence of accordian-like terms leads some ana-

Finally, there are numerous other dichotomies and distinctions which are used to determine whether immunity or liability applies. These include:

1. Whether prospective (injunctions, declaratory orders) or retroactive (damages) remedies are sought;
2. Whether a constitutional tort or a common law tort is alleged;
3. Whether substantive due process or procedural due process is allegedly violated;
4. Whether the allegation is against state/local or federal government;
5. Whether it is a civil or criminal proceeding;
6. Whether the suit is against the government or the officer;
7. Whether the court must use statutory or nonstatutory review.

When all of these different spokes are factored into the balance wheel of justice, consistency and balancing becomes much more difficult. Davis concludes "The present system of liability for wrongs committed by federal, state, and local officers and employees is shot through with unsound complexities."[157] His suggestion for removing the complexities is to move out of the complex middle ground of qualified immunity toward a "simpler" system based primarily upon governmental liability, remedies for deliberate and negligent torts, retention of the essential discretionary function exception, disciplinary, perhaps monetary, remedies against offending officers by the governmental unit, and a few other "improvements."[158]

VI. Concluding Observations

We noted Cardozo's statement that "dichotomy is everywhere" and Hohfeld's analysis of four basic jural opposites (one of which is immunity-liability). It becomes apparent that jural opposites exist not only at the level of fundamental legal conceptions but they also pervade all subsets of legal terminology used to analyze and apply these fundamental legal concepts. The dichotomous subsets (discretionary-ministerial, good

lysts to the position that the myth of clarity and the reality of ambiguity is a smokescreen for judicial creativity. However, the author concurs with the following:

> It is fatally easy and has become increasingly common to make the transition from the exhilarating discovery that complex words like "cause" cannot be simply defined and have no "one true meaning" to the mistaken conclusion that they have no meaning worth bothering about at all, but are used as a mere disguise for arbitrary decision or judicial policy. This is blinding error, and legal language and reasoning will never develop while it persists.

H.L.A. Hart & A. Honore, Causation in the Law 3 (1959).

157. K. Davis, *supra* note 74, § 26.23 at 475.

158. *Id.* *See also* Administrative Conference of the United States, 1982 Report 58, Recommendation 82-86 (1982) (adopting essentially the same recommendation). Davis has been advocating more governmental unit liability since the 1958 publication of his treatise. *See* K. Davis, *supra* note 24, at 500-05.

faith-bad faith, reasonable-unreasonable, intentional-unintentional, governmental-proprietary, objective-subjective, within-without the scope of authority) flow from the more fundamental legal dichotomy.

Herein lies the limits of the law, rationality, and legal terminology. Legal reality is dichotomous; social reality is infinite degrees. In law, a set of facts leads either to immunity or liability, two very expansive categories (or pigeonholes depending upon one's perspective). On the continuum between the dichotomies of immunity and liability lie a potentially infinite set of varying fact patterns, all of which must be classified and reduced to either/or, either immunity or liability. At the extreme ends of the continuum, categorization is relatively easy. When a governmental official acts with malice and bad faith in an "unparalleled indeed aberrant, episode" which deprives an individual of a number of constitutional rights, then clearly immunity disappears and liability should be imposed.[159] However, like a color chart of the shades between black and white, the many degrees of grey make drawing a clear line between sets of dichotomies a very difficult, if not humanly impossible, task to accomplish. The Supreme Court itself, when discussing the governmental-proprietary dichotomy, spoke of

> the "nongovernmental"-"governmental" quagmire that has long plagued the law. . . . A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos. . . .[160]

When a number of judges as human decisionmakers apply broad dichotomous concepts which allow extensive discretion, the human result inevitably will be inconsistent, nonuniform, and unpredictable. The result is human, and decrying the result is human; yet, by definition, humans cannot find a solution to a human limitation using solely human means. The dichotomous constructs of the human mind are the source of the problems or paradoxes, and it takes more than logic and rationality to transcend them. Dichotomous sets of words are merely efficiency devices to classify and decide.

> Words only *represent (re-present)* something else. They are not real things. They are only symbols. . . . Paradoxes are common. . . . Paradoxes are the places where our rational mind bumps into its own limitations. . . . Opposites, such as good-bad, beautiful-ugly, birth-death, and so on, are . . . mental structures which we have created. These self-made illusions are the sole cause of paradoxes. To escape

159. Cruz v. Beto, 453 F. Supp. 905 (S.D. Texas 1977) (imposing governmental and personal liability).
160. Indiana Towing Co. v. U.S., 350 U.S. 61, 65 (1955).

> the bonds of conceptual limitations is to hear the sound of one hand clapping. . . . "Understanding" involves passing the barrier of paradox?[161]

The rational, logical, legal mind creates symbols (words) that are opposites. These symbolic opposites produce paradoxes which the rational mind cannot resolve because one opposite cannot make logical sense without the other (good faith is meaningless without the concept of bad faith). The logical, rational, legal mind cannot operate without opposites, for to do so is to try to hear the sound of one hand clapping. "Understanding" or wisdom is a human act that requires qualities beyond logic. Logic can not hear the sound of one hand clapping because it requires dualism. "Logic does not help us because it insists that if one thing is true its opposite cannot be true at the same time. It also insists that if a thing is good, more of it is better."[162]

Understanding transcends logic and passes the barrier of paradox. Understanding can hear the sound of one hand clapping. It moves beyond dichotomous symbols to unity; it is monistic. Logic is analysis (*ana*-breaking, *lysis*-apart); understanding is synthesis (*syn*-together, *tithenai*-to place) at a level different than the level of the analysis. Logic creates irreconcilable conflicts by creating dichotomous verbal symbols; understanding moves beyond the symbolic dichotomies to the reality (*rea*-thing, object, experience) re-presented by the symbols.[163] Logic alone leads to paralysis by analysis; understanding transcends logical opposites.

Pairs of opposites, then, are the result of legal analysis and these opposite constructs allow courts to classify an action as reasonable or unreasonable, a decision good faith or bad faith, and so on. Once the classification is made, then the ultimate decision whether liability or immunity attaches will follow from the classification. Opposing symbols are the tools to impose or not impose legal sanction. The process of making and imposing rules is the process of isolating dichotomous positions by logic and then transcending the logical opposites through higher understanding. From understanding comes wise judgment. "Again, the task of judging is found to be a choice between antithetical extremes."[164]

161. G. ZUKER, THE DANCING WU LI MASTERS 255, 205 (1979).

162. E. SCHUMACHER, *supra* note 2, at 123.

163. *See* T. PETERS & R. WATERMAN, IN SEARCH OF EXCELLENCE (1982). "The Belgian Surrealist René Magritte painted a series of pipes and entitled the series *Ceci n'est pas une pipe* (This is not a pipe). The picture of the thing is not the thing." *Id.* at 3. Likewise, the words describing a social "thing" are not the social event. Though obvious, the realization that a word describing an event is not the event is often forgotten. The process of reification, or the substitution of words for the reality, permeates human interaction.

164. B. CARDOZO, *supra* note 3, at 62.

Cardozo wisely observes that the final decision may be anywhere on the continuum, even the extremes.

> Like the Aristotelian mean between extremes, the path of compromise will not be found by figuring the mean proportional as in an exercise in mathematics. If two extremes present themselves as possible solutions of any given controversy, we do not reach the true solution by rejecting both extremes as certainly unacceptable, and seeking a middle course. There will be many situations in which one of the extremes will mark the course to be selected. . . . A choice is arrived at by a balancing of interests, an approval of their value with reference to jural ends.[165]

Sometimes the extremes of absolute immunity or strict liability are the "true solution." Depending on the "jural ends" to be sought, the final balancing may result in a movement toward the polar opposite. Law is the process of resolving the many paradoxes in society. Paul Freund capsulizes this theme:

> Rules of law are often accommodations between right and right rather than condemnations of obvious wrong. Legal thinking strives to resolve in an acceptably fair way, and in specific contexts, the *great antinomies* of freedom and constraint, privacy and the right to know, free press and fair trial, security of acquisitions and freedom of transactions, national citizenship and local autonomy. . . . These are the hard questions of justice that challenge the powers of creativity. Legal thinking requires a resolution in the individual mind and encourages the finding of solutions that *transcend, as by a synthesis*, the *polar opposites of a debate.*[166]

The first task of the law is to recognize the conflicts: "If life feels the tug of these opposing opposites, so also must the law which is to prescribe the rule of life."[167] And those who cannot or will not understand that dichotomous, divergent problems are human problems re-presented in human symbols (words) will forever mistake a temporary solution for an absolute answer, thereby slipping into complacency and false security. The price of democracy is eternal vigilance precisely because "everywhere society's health depends on the simultaneous pursuit of mutually opposed activities or aims. The adoption of a final solution means a kind of death sentence for man's humanity and spells either cruelty or dissolution, generally both."[168]

Some conflicts are ancient, enduring, inevitable, insoluble, necessary and productive of a healthy and dynamic system of laws.[169] The immu-

165. *Id.* at 56.

166. Freund, *supra* note 118, at 159 (emphasis added).

167. B. CARDOZO, *supra* note 3, at 7.

168. E. SCHUMACHER, *supra* note 2, at 127.

169. *See* M. DUETSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES (1973); R. KREBS, CREATIVE CONFLICT (1982).

nity-liability conflict is one of these unending paradoxes where fundamental opposites clash. What can be gained by openly recognizing, logically clarifying, and endlessly pursuing such irreconcilable conflicts? Insight and creative solutions. The cross-fertilization of perspectives becomes the source to divine a higher, more sophisticated and humane synthesis. "[T]he creative act is an encounter between two poles" and because it takes courage to forego certainty for dichotomy, it takes "courage to create."[170] Enduring conflicts require enduring creativity.

170. R. MAY, THE COURAGE TO CREATE 89 (1975).