

Spring 1974

Judicial Immunity under the Civil Rights Act: Here Come the Judge's Defenses, 7 J. Marshall J. of Prac. & Proc. 213 (1974)

Jay S. Judge

James R. Schirott

James I. Bliss

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Jay S. Judge, Judicial Immunity under the Civil Rights Act: Here Come the Judge's Defenses, 7 J. Marshall J. of Prac. & Proc. 213 (1974)

<https://repository.law.uic.edu/lawreview/vol7/iss2/1>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

JUDICIAL IMMUNITY UNDER THE
CIVIL RIGHTS ACT:
HERE COME THE JUDGE'S DEFENSES

by JAY S. JUDGE,*
JAMES R. SCHIROTT**
and JAMES I. BLISS***

INTRODUCTION

The body of the common law of torts is in an ever changing state of flux. Nowhere is this more apparent than in the area of municipal defense work. Many of the defenses which were open to defense attorneys no more than fifteen years ago have been emasculated or virtually eliminated by recent court opinions and legislation. Additionally, causes of action which were unknown to the common law have become commonplace on the dockets of our court systems.

One area in which a substantial change has occurred in the past fifteen years is that of litigation involving governmental bodies. Not long ago, the doctrine of sovereign immunity virtually barred a lawsuit against the federal government, a sovereign state or one of its political subdivisions. However, as sovereign immunity was waived by the various state legislatures, "Tort Immunity Acts" became commonplace. Under these "Tort Immunity Acts," the sovereign enumerated the instances in which suit would be allowed against the sovereign body.¹ These "Tort Immunity Acts" also reserved to the sovereign certain defenses which were not otherwise available to a defendant in a common law tort action.

However, following the general trend of the law, there has been a tendency to provide recovery to an injured person where the defendant had the opportunity to "spread the risk" for any injuries which might be incurred as a result of the activity engaged in. On this basis, the various state courts have found certain portions of their "Tort Immunity Acts" unconstitutional

* B.S., Marquette University; J.D., The John Marshall Law School.

** B.S., Indiana Institute of Technology, J.D., The John Marshall Law School. Mr. Judge and Mr. Schirott are members of the law firm of Judge, Hunter & Schirott. They co-author a column in the *Chicago Daily Law Bulletin* entitled "In Federal Courts."

*** B.S., University of Illinois; J.D., University of Illinois School of Law. Mr. Bliss is a member of the law firm of Bane, Allison, Saint & Bliss.

¹ See ILL. REV. STAT. ch. 85, §§ 1-101 *et seq.* (1971).

on different and varying grounds.² Always, however, it was obvious that the "deep pocket theory" was one of the prime movers in the emasculation of sovereign immunity.

One circumstance which had an effect on the demise of sovereign immunity was the advent, some years ago, of liability insurance which could be purchased by a municipal corporation. Of course, up until a few short years ago, insurance was not a necessity inasmuch as the major vestiges of sovereign immunity still protected the municipality. However, as it became apparent that sovereign immunity was increasingly becoming emasculated, public officials saw the need to provide the municipal corporation with some sort of indemnity.

Some courts have held that by purchasing municipal liability insurance, the municipality waives certain defenses which might otherwise be available to it under the respective "Tort Immunity Acts."³ One aspect of the increase in litigation involving municipal corporations which was not even contemplated twenty years ago is the increase in civil rights actions. Consider for instance, the startling statistics found in a footnote to *Negron v. Wallace*,⁴ wherein Mr. Justice Friendly provided the following illumination:

Actions under the Civil Rights Act have grown from 296 in the fiscal year 1961 to 3985 in the fiscal year 1970, an increase of 1246%. *In the past year alone there was a 62.5% increase, to 3985 in 1970 from 2453 in 1969. No other category of civil litigation . . . has shown anything like such explosive growth. See Ann. Rep. of Director of Adm. Office of the United States Courts, 1970, Table 12B.*⁵

Additionally illustrative of the dramatic increase in the number of civil rights cases is the footnote which appeared in *Gittlemacker v. Prasse*:⁶

There were 1195 civil rights actions filed in the United States district courts in 1967. This number increased to 2479 in 1969 Chevigny, Section 1983 Jurisdiction: A Reply, 83 Harv. L.Rev. 1352, 1354 (1970), reports that an examination of the first 100 private civil rights cases reported in the Federal Supplement

² See Comment, *New Interpretation of the 1965 Tort Immunity Act: The Effect of Liability Insurance*, 6 JOHN MAR. J. PRAC. & PROC. 189 (1972).

³ *Sullivan v. Midlothian Park District*, 51 Ill. 2d 274, 281 N.E.2d 659 (1972); *Housewright v. City of LaHarpe*, 51 Ill. 2d 357, 282 N.E.2d 437 (1972); *Fanio v. John W. Breslin Co.*, 51 Ill. 2d 366, 282 N.E.2d 443 (1972).

⁴ 436 F.2d 1139, 1141 (2d Cir. 1971).

⁵ *Id.* at 1141 n. 1 (emphasis added).

⁶ 428 F.2d 1 (3d Cir. 1970).

from December, 1966 to March, 1968 disclosed the following results:

Preliminary relief granted	12
Motion to dismiss denied	12
Trial or hearing ordered	2
Summary judgment for defendant or motion to dismiss granted	67
Judgment for plaintiff after hearing or trial	5
Judgment for defendant after hearing or trial	27

The dramatic rise in the number of civil rights cases filed against municipal corporations has given rise to an entirely new consideration which municipal corporations must take into account when deciding whether or not to purchase municipal liability insurance and which endorsements should be purchased. Indeed, the cost and complexity of defending civil rights actions is escalating at an ever growing rate. Formerly, it was a fairly simple matter to have a *pro se* complaint brought under the Civil Rights Act dismissed. However, under the doctrine of *Haines v. Kerner*,⁸ many federal courts are now allowing an evidentiary hearing before dismissing the complaint.

The number of such actions being filed against various members of the judiciary is also on the rise. The scope of this article is to examine the defenses which are available to judicial and quasi-judicial officers in actions brought under the Civil Rights Act.

IMMUNITY OF JUDGES

The common law principle that judges are immune from suits seeking money damages for acts performed by and within the scope of their official duties is well established.⁹ Inasmuch as there is nothing in the legislative history of the Civil Rights Act which abrogates or in any way impairs the common law

⁷ *Id.* at 2 n. 1.

⁸ 404 U.S. 519 (1972). In a *per curiam* opinion, the Court indicated that it would hold *pro se* plaintiffs, bringing civil rights actions, to less stringent adherence to the formal requirements of pleading than where the action is brought with the assistance of counsel. The practical effect of this decision has been that many actions, which were formally dismissed for failure to state a cause of action, are now entertained by the court at least until such time as it becomes apparent from affidavits that there exists no tort of constitutional dimension.

⁹ *Schwartz v. Weinstein*, 459 F.2d 882 (8th Cir. 1972); *Jacobson v. Schaefer*, 441 F.2d 127 (7th Cir. 1971); *Wilhelm v. Turner*, 431 F.2d 177 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); *E.g.*, *Pierson v. Ray*, 386 U.S. 547 (1967); *O'Bryan v. Chandler*, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926 (1966); *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965); *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964); *Harmon v. Superior Court of State of California*, 329 F.2d 154 (9th Cir. 1964); *Meredith v. Van Oosterhout*, 286 F.2d 216 (8th Cir. 1960), *cert. denied*, 365 U.S. 835 (1961); *Rudnicki v. Sullivan*, 189 F. Supp. 714 (D. Mass. 1960); *Oppenheimer v. Stillwell*, 132 F. Supp. 761 (S.D. Cal. 1955). See also, 32 AM. JUR. 2d *False Imprisonment* § 54 (1967).

doctrine of judicial immunity, it is generally held that the Civil Rights Act creates no exceptions to that doctrine.¹⁰ Therefore, logic dictates that judges acting in their official capacities are immune from actions brought under the Civil Rights Act.¹¹ With respect to the firm basis of the immunity as it existed at common law, the United States Supreme Court, in *Tenney v. Brandhove*,¹² posed the following queries and responses:

Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. . . . *We cannot believe that Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.*¹³

The principle that judges must be protected against civil liability for acts performed within the scope of their authority was recognized early in the development of the body of American common law. As early as 1871, the Supreme Court stated in *Bradley v. Fisher*:¹⁴

For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. *Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.* As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

...
If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated

¹⁰ See, e.g., *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965), *cert. denied*, 383 U.S. 913 (1966), *reh. denied*, 384 U.S. 914 (1966). *Accord*, *Hill v. Lewis*, 361 F. Supp. 813 (E.D. Ark. 1973); *Wilhelm v. Turner*, 431 F.2d 177 (8th Cir. 1970); *Rhodes v. Meyer*, 334 F.2d 709 (8th Cir. 1964).

¹¹ *Drusky v. Judges of Supreme Court*, 324 F. Supp. 332 (W.D. Pa. 1971); *Carpenter v. Oldham*, 314 F. Supp. 1350 (W.D. Mo. 1970); *Hagan v. State of California*, 265 F. Supp. 174 (C.D. Cal. 1967); *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965); *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964); *Hurlburt v. Graham*, 323 F.2d 723 (6th Cir. 1963); *Jennings v. Nester*, 217 F.2d 153 (7th Cir. 1954); C. J. ANTEAU, FEDERAL CIVIL RIGHTS ACTS § 40 (1971) [hereinafter cited as ANTEAU].

¹² 341 U.S. 367 (1951).

¹³ *Id.* at 376 (emphasis added).

¹⁴ U.S. (13 Wall.) 335 (1871).

to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.¹⁵

The developing case law has (sometimes without even expressing a knowledge of *Tenney v. Brandhove*¹⁶) reached conclusions consistent with that of the Supreme Court by holding that judicial immunity has not been modified by the Civil Rights Act.¹⁷ Consequently, judges acting in their judicial capacities have consistently been held immune from suit under the Civil Rights Act.¹⁸ That being the case, it would seem that judicial immunity exists even in the case of malice, for such was the case under the common law. In *Bradley v. Fisher*,¹⁹ the Court relied upon reasoning which mandated that the immunity be applied even where the judge is accused of acting maliciously and corruptly. The Court noted that:

[The immunity] is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.²⁰

The late commentator, William L. Prosser, recognized the basic principle that a judge may not be inhibited in his administration of justice. In this respect, Prosser, when discussing a judge's liability for libel, noted:

The judge on the bench *must be free* to administer the law under the protection of the law, independently and freely, without fear of consequences. No such independence could exist if he were in daily apprehension of having an action brought against him, and his administration of justice submitted to the opinion of a jury.²¹

This rule of protection for judges was adopted in the public interest to insure that judges have the freedom to discharge their judicial responsibilities without concern for the consequences. The judge should not have to fear that unsatisfied litigants may later hound him with litigation charging malice or corruption.²² Therefore, it is not surprising that in actions brought under the Civil Rights Act, judges are immune from liability for acts com-

¹⁵ *Id.* at 347-48 (emphasis added).

¹⁶ 341 U.S. 367 (1951). See quote in text accompanying note 12 *supra*.

¹⁷ *Savage v. United States*, 322 F. Supp. 33 (D. Minn. 1971); *Wilhelm v. Turner*, 431 F.2d 177 (8th Cir. 1970); *Drexler v. Walters*, 290 F. Supp. 150 (D. Minn. 1968); *Pierson v. Ray*, 386 U.S. 547 (1967); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966). *Accord*, *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965), *cert. denied*, 383 U.S. 913 (1966), *reh. denied*, 384 U.S. 914 (1966); *Harvey v. Sadler*, 331 F.2d 387 (9th Cir. 1964); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964); *Ray v. Huddleston*, 212 F. Supp. 343 (W.D. Ky. 1963), *aff'd*, 327 F.2d 61 (6th Cir. 1964); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963); *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963); *Kostal v. Stoner*, 292 F.2d 492 (10th Cir. 1961).

¹⁸ See cases cited at note 11 *supra*.

¹⁹ 80 U.S. (13 Wall.) 335 (1871).

²⁰ *Id.* at 350 n. † (emphasis in original).

²¹ W. PROSSER, *HANDBOOK OF TORTS* 777 (4th ed. 1971) (emphasis added) (footnotes omitted).

²² *Rousselle v. Perez*, 293 F. Supp. 298 (E.D. La. 1968).

mitted within their judicial capacity, even if a judge is accused of acting maliciously.²³

Recently, one court was quick to point out that there exists a basic distinction between the defense of good faith and the defense which is available to a judge or prosecutor because of his position. In this regard, the court noted with respect to judges and legislators that improper motive and bad faith should have no effect upon the invocation of the immunity. On the other hand, the immunity granted to a prosecutor was found to be far more vulnerable.²⁴

In *Drusky v. Judges of Supreme Court*,²⁵ the court recognized the doctrine of judicial immunity, citing *Bauers v. Heisel*²⁶ and *Lockhart v. Hoenstine*.²⁷ Members of the judiciary are afforded immunity from liability under the civil rights statutes for all facts which were not clearly outside their jurisdiction, and where the complaint fails to *contain* allegations that the judges acted outside of the scope of their jurisdiction, the complaint must be dismissed. Where a judge acts in his judicial role *pursuant to his jurisdiction*, he is isolated from suit under section 1983.²⁸ A judge becomes liable to suit for damages *only* when he acts in the complete absence of jurisdiction,²⁹ and this well established principle has not been changed by the passage of 42 U.S.C. § 1983.³⁰

It has been held that the Federal Constitution does not regulate the reading and research that a judge must accomplish or the mental processes he must follow in reaching a decision. The method by which decisions are made is within judicial discretion and cannot be, nor is it, regulated by a statute or by the United States Constitution.³¹ A trial judge cannot be accountable, under section 1983, for imprisoning a person who appeared before him on criminal charges, even though it be later ascertained that the criminal conviction might have been based upon a constitutional defect.³² Consequently, a jailer cannot be held accountable for an error in an order of commitment which, on its face, is proper.³³

²³ *Cross v. Bd. of Supervisors of San Mateo County*, 326 F. Supp. 634 (N.D. Cal. 1968). Cf. ANTIEAU, note 11 *supra*, § 40.

²⁴ *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973).

²⁵ 324 F. Supp. 332 (W.D. Pa. 1971).

²⁶ 361 F.2d 581 (3d Cir. 1966).

²⁷ 411 F.2d 455 (3d Cir. 1969).

²⁸ *Accord*, *Pierson v. Ray*, 386 U.S. 547 (1967).

²⁹ *Schwartz v. Weinstein*, 333 F. Supp. 1031 (E.D. Mo. 1971), *aff'd*, 459 F.2d 882 (8th Cir. 1972).

³⁰ *Larsen v. Gallogly*, 361 F. Supp. 305 (D.R.I. 1973).

³¹ *Griffin v. Seismic Services, Inc.*, 353 F. Supp. 989 (E.D. La. 1973).

³² *United States ex rel. Bailey v. Askew*, 486 F.2d 134 (5th Cir. 1973).

³³ *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969).

In *Pierson v. Ray*,³⁴ the Court stated:

We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court. Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335, [80 U.S. 335, 20 L. Ed. 646] (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interests it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (*Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher*, *supra*, 349, note, at 350 [20 L. Ed. 650]). It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.³⁵

Moreover, a civil rights action based upon adverse rulings by a state court judge in a criminal proceeding may not be maintained.³⁶

In *Kulyk v. United States*,³⁷ the court was confronted with the question of whether or not the failure to promptly arraign a defendant in a criminal case constituted a violation of his constitutional rights, so as to enable him to maintain a civil rights action. The court responded in the negative, holding:

The right under the federal rules to be promptly taken before a magistrate has not been given constitutional status and has not been applied to persons in state custody.³⁸

Such would be the case, even though the failure to take the plaintiff before a magistrate for arraignment constituted a violation of state statutory law.³⁹

³⁴ 386 U.S. 547 (1967).

³⁵ *Id.* at 553-54.

³⁶ *Salvati v. Dale*, 364 F. Supp. 691 (W.D. Pa. 1973).

³⁷ 414 F.2d 139 (5th Cir. 1969).

³⁸ *Id.* at 141-42.

³⁹ *Scarborough v. Dutton*, 393 F.2d 6 (5th Cir. 1968); *Bradford v. Lefkowitz*, 240 F. Supp. 969 (S.D.N.Y. 1965); *United States ex rel. Weber v. Ragen*, 176 F.2d 579 (7th Cir. 1949), *cert. denied*, 338 U.S. 809 (1949);

In *Anderson v. Nosser*,⁴⁰ the court stated that while a failure to properly arraign a defendant would not give rise to a civil rights action, that it did not, by itself, preclude the possibility of a state common law action for false imprisonment.

It has been indicated that at least in some circumstances, the judiciary is not a "person" within the meaning of the Civil Rights Act. Such was the import of *Zuckerman v. Appellate Div., Sec. Dept., S. Ct. of St. of N.Y.*⁴¹ In that instance, however, the plaintiff maintained an action against an entire court system. This is to be contrasted with the normal situation, where a disgruntled prisoner maintains an action against the trial judge who convicted him in a prior criminal proceeding.

In the instance in which the convicted and imprisoned defendant files suit against a single trial judge, it would seem that the defense that the court is not a "person" within the meaning of the Civil Rights Act would not have application. Indeed, such a defense may only have application where the action is maintained against the court in the sense that it is a branch of government. This is, of course, contrasted with the normal context in which the court is viewed; namely, that it is a single institution for the administration of justice, presided over by a single person.⁴²

In *Bransted v. Schmidt*,⁴³ the court indicated that if a plaintiff maintained a section 1983 action for damages against the judge of the trial court in the state court system, that judge was immune from liability for damages because of his judicial immunity, relying upon *Pierson v. Ray*.⁴⁴ The court in *Bransted* indicated that *Pierson* had established that section 1983 did not abrogate the common law immunity of judges for acts done *within the scope* of their jurisdiction. The *Bransted* court, however, did point out that it was important to know that judicial immunity did not extend to acts clearly *outside* a judge's jurisdiction.

The plaintiff in *Bransted* had contended that the judge's bias deprived the trial court of jurisdiction to hear the case initially. The reviewing court responded by saying that there was no authority for such a position and that the doctrine of judicial immunity had been applicable in situations *even where* a judge was accused of acting maliciously and corruptly, and on this basis, dismissed the complaint.

In addition to defenses predicated on traditional notions of

ANTIEAU, note 11 *supra*, § 82. *Accord*, *Baxter v. Rhay*, 268 F.2d 40 (9th Cir. 1959) [local ordinance].

⁴⁰ 438 F.2d 183 (5th Cir. 1971).

⁴¹ 421 F.2d 625 (2d Cir. 1970).

⁴² *Accord*, *Clark v. State of Washington*, 366 F.2d 678 (9th Cir. 1966).

⁴³ 324 F. Supp. 1232 (W.D. Wis. 1971).

⁴⁴ 386 U.S. 547 (1967).

judicial immunity, a civil rights action based upon alleged violations having taken place during a criminal trial for which the prisoner is still in prison would seem to be subject to defenses of ripeness or non-justiciability.⁴⁵ In *Smith v. Logan*,⁴⁶ the court stated:

[I]t would be improvident for a federal court to entertain a suit for damages inquiring into possible constitutional violations committed during the trial, *while the petitioner is imprisoned on that conviction*. See *Still v. Nichols* . . . [412 F.2d 778 (1st Cir. 1969)]; *Greene v. State of New York* . . . [281 F. Supp. 579 (S.D.N.Y. 1967)]; *Martin v. Roach*, 280 F. Supp. 480 (S.D.N.Y. 1968).⁴⁷

Therefore, until such time as the prisoner is released from custody resulting from the trial which he claims constituted a violation of his civil rights, his remedy would seem to lie in a habeas corpus action.

IMMUNITY OF PROSECUTORS

In a like vein, the courts have granted to prosecuting attorneys a similar, though perhaps somewhat narrower immunity. The reasoning supporting a grant of prosecutorial immunity seems to emanate from the realization that the job of a prosecuting attorney is quasi-judicial in nature.⁴⁸

Other courts have held, however, that the immunity enjoyed by a prosecuting attorney is coincident to that which may be invoked by a judge.⁴⁹ Like the immunity of a judge, the immunity of a prosecuting attorney is lost when he *completely* abandons his quasi-judicial role, for instance, to assume that of a policeman or an investigator. Under such circumstances, it is clear that the court will look to the act attributed to the prosecutor/defendant rather than look to the position or title he holds:⁵⁰

'The key to the immunity . . . held to be protective to the prosecuting attorney is that the acts, alleged to have been wrongful, were committed by the (prosecuting attorney) . . . in the performance of an integral part of the judicial process.' [*Robichaud v. Ronan*, 351 F.2d 533, 536 (9th Cir. 1965)].⁵¹

⁴⁵ *Moore v. Frazier*, 316 F. Supp. 318 (D. Neb. 1970).

⁴⁶ 311 F. Supp. 898 (W.D. Va. 1970).

⁴⁷ *Id.* at 899 (emphasis added).

⁴⁸ *Accord*, *Fanale v. Sheehy*, 385 F.2d 866 (2d Cir. 1967); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966); *Carmack v. Gibson*, 363 F.2d 862 (5th Cir. 1966); *Gabbard v. Rose*, 359 F.2d 182 (6th Cir. 1966); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963); *Phillips v. Nash*, 311 F.2d 513 (7th Cir. 1962); *Kostal v. Stoner*, 292 F.2d 492 (10th Cir. 1961), *cert. denied*, 369 U.S. 868 (1961); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1949); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965). See also, 32 AM. JUR. 2d *False Imprisonment* § 64 and *ANTIEAU*, note 11 *supra*, § 40.

⁴⁹ *Harmon v. Superior Court of State of California*, 329 F.2d 154 (9th Cir. 1964).

⁵⁰ *Friedman v. Younger*, 282 F. Supp. 710 (C.D. Cal. 1968); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963).

⁵¹ *Friedman v. Younger*, 282 F. Supp. 710, 715 (C.D. Cal. 1968).

To the same effect is the statement of the district court in *Link v. Greyhound Corporation*,⁵² wherein the court stated: "[U]nless defendants . . . acted beyond their jurisdiction and authority, no liability can be founded upon the Civil Rights Act. . . ."⁵³

On the other hand, the district court in *Wilhelm v. Turner*⁵⁴ took a more realistic approach by noting that a certain amount of investigatory activity is inherent in the role of a prosecutor and, therefore, within the quasi-judicial privilege. The court noted: "The Attorney General and his staff must of necessity conduct investigations in carrying out their official duties."⁵⁵

A reading of the cases reveals that a prosecuting attorney enjoys a privilege for acts done within the scope of his authority. There being no doubt that under existing law a prosecuting attorney is immune from suit under the Civil Rights Act for actions done within the scope of his authority, the question then becomes only whether his conduct falls within the scope of his jurisdiction.⁵⁶ If the prosecutor steps outside his official capacity, he may be liable for civil damages.⁵⁷

It does seem safe to say that a prosecuting attorney is acting in his quasi-judicial capacity when he recommends a warrant be issued upon a complaint.⁵⁸ This is true even where hindsight would tend to indicate that such a choice was poor judgment under the circumstances.⁵⁹ However, there is limited authority for the proposition that even if a prosecutor acts out of the scope of his jurisdiction, immunity will still be available to that prosecutor upon a showing of good faith and probable cause.⁶⁰

Under some circumstances, the quasi-judicial immunity of the state's attorney may be extended to a police officer working

⁵² 288 F. Supp. 898 (E.D. Mich. 1968).

⁵³ *Id.* at 900.

⁵⁴ 298 F. Supp. 1335 (S.D. Iowa 1969), *aff'd*, 431 F.2d 177 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1970).

⁵⁵ *Id.* at 1338.

⁵⁶ *Moore v. Buck*, 443 F.2d 25 (3d Cir. 1971); *Savage v. United States*, 322 F. Supp. 33 (D. Minn. 1971), *aff'd*, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); *Arensman v. Brown*, 430 F.2d 190 (7th Cir. 1970); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir. 1970), *cert. denied*, 400 U.S. 846 (1970); *Balistreri v. Warren*, 314 F. Supp. 824 (W.D. Wis. 1970); *Marlowe v. Coakley*, 404 F.2d 70 (9th Cir. 1968), *cert. denied*, 395 U.S. 947 (1969); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966); *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955); *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972).

⁵⁷ *Balistreri v. Warren*, 314 F. Supp. 824 (W.D. Wis. 1970); *Peterson v. Stanczak*, 48 F.R.D. 426 (N.D. Ill. 1969); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965); *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955).

⁵⁸ *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927); W. PROSSER, *HANDBOOK OF TORTS* § 113 (3d ed. 1964); 34 AM. JUR. *Malicious Prosecution* § 88 (1941); *RESTATEMENT (SECOND) OF TORTS* § 656 (1966).

⁵⁹ *Link v. Greyhound Corp.*, 288 F. Supp. 898 (E.D. Mich. 1968).

⁶⁰ *Wilhelm v. Turner*, 431 F.2d 177 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

under the direction of the state's attorney. Of course in such circumstances, the question may turn upon whether the police officer was acting in an investigative capacity or in a capacity wherein he was rendering a quasi-judicial opinion.⁶¹ Additionally, prosecutors have been found to be acting within the scope of their authority where they are appearing before a grand jury,⁶² drawing a complaint,⁶³ entering a *nolle prosequi*,⁶⁴ unlawfully searching a defendant and subsequently introducing that unlawfully obtained evidence at trial,⁶⁵ extraditing,⁶⁶ and failing to prosecute.⁶⁷

The immunity granted to judicial officers has not gone without criticism. One leading expert in the area has stated that this immunity lacks a foundation in the legislative history of the Civil Rights Act.⁶⁸ Despite such criticism, the immunity remains.⁶⁹

Federal prosecutors, like state's attorneys, are immune from prosecution for acts performed within the course of their official capacity.⁷⁰ Such immunity has not been withdrawn by *Bivens v. Six Unknown Named Agents*,⁷¹ wherein the court acknowledged a cause of action for violation of the fourth amendment by federal agents.⁷²

The overwhelming number of cases involving the defense of the non-applicability of the doctrine of respondeat superior have dealt with the question of whether a supervising police officer or other municipal officer is liable for the actions of subordinate police officers. This defense is *not*, however, limited to police officers.

There is no valid reason why the cases holding that vicarious liability has no place under the Civil Rights Act should be limited to cases involving police subordinates. Indeed, the reason for

⁶¹ *Burke v. McDonnell*, 358 F. Supp. 716 (S.D.N.Y. 1973).

⁶² *Cawley v. Warren*, 216 F.2d 74 (7th Cir. 1954); *Laughlin v. Rosenman*, 163 F.2d 838 (D.C. Cir. 1947).

⁶³ *Reilly v. United States Fidelity & Guaranty Co.*, 15 F.2d 314 (9th Cir. 1926).

⁶⁴ *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir. 1938); *Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959).

⁶⁵ *Jennings v. Nester*, 217 F.2d 153 (7th Cir. 1954).

⁶⁶ *Smith v. Dougherty*, 286 F.2d 777 (7th Cir. 1961).

⁶⁷ *Scolnick v. Winston*, 219 F. Supp. 836 (S.D.N.Y. 1963), *aff'd sub nom.*, *Skolnick v. Lefkowitz*, 329 F.2d 716, *cert. denied*, 379 U.S. 825 (1964).

⁶⁸ ANTIEAU, note 11 *supra*, § 39.

⁶⁹ *Boydston v. Perry*, 359 F. Supp. 48 (N.D. Miss. 1973).

⁷⁰ See *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir. 1938), *cert denied*, 305 U.S. 643 (1938), *reh. denied*, 305 U.S. 643 (1938), *2d reh. denied*, 307 U.S. 651 (1939); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

⁷¹ 456 F.2d 1339 (2d Cir. 1972).

⁷² See *Williams v. Halperin*, 360 F. Supp. 554 (S.D.N.Y. 1973); *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972).

extending the rule to cases involving state's attorneys seems compelling, inasmuch as the given reason for the rule is simply that liability under the Civil Rights Act presupposes "personal involvement."

A state's attorney is *not* liable under the Civil Rights Act for the actions of an assistant state's attorney where it is shown that the state's attorney had no direct participation in the activities of his assistant and, where there is such showing, there can be no liability predicated upon the doctrine of respondeat superior.⁷³

Where the complaint contains no allegations that prosecuting attorneys acted outside the scope of their jurisdiction or in a manner not authorized by law, the prosecutorial immunity applies and such defendants are immune from damages.⁷⁴ One commentator on prosecutorial immunity has recently stated the following with respect to discretionary acts within the scope of prosecutorial immunity:

The decision whether to prosecute allows a prosecutor his greatest area of discretion: he can decide to invoke the criminal process against particular individuals, he can choose among potential defendants, he can focus his attention on a particular geographic area or on a specific area of the law, he can choose to enforce certain laws only and, finally, he can decide the crime with which the defendant should be charged. A number of elements are involved in this decision and, hopefully, the paramount consideration is justice. The prosecutor, however, must also consider the likelihood of conviction, the availability of evidence, the social policy being advanced, and even the climate of public opinion.⁷⁵

The judicial or quasi-judicial immunity doctrine does not appear to be affected by the fact that a defendant is committed under a repealed statute. Such a judicial mistake does not remove the shield of immunity, the reason being that the court recognizes a distinction between a clear *absence* of jurisdiction and an *excess* of jurisdiction.⁷⁶

While, under the authorities hereinbefore cited, a state's attorney is immune from a civil rights action seeking damages for acts done within the scope of his duties, there is limited, questionable authority that a state's attorney is susceptible to an action seeking injunctive relief.⁷⁷ However, the better rea-

⁷³ Hampton v. Gilmore, 60 F.R.D. 71 (E.D. Mo. 1973).

⁷⁴ Accord, Smyl, Inc. v. Gerstein, 364 F. Supp. 1302 (S.D. Fla. 1973); Madison v. Gerstein, 440 F.2d 338 (5th Cir. 1971).

⁷⁵ Zulkey, *Prosecutorial Immunity, Its Past and Its Future*, 60 ILL. B.J. 946, 955 (1972).

⁷⁶ Robinson v. McCorkle, 462 F.2d 111 (3d Cir. 1972); Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971); Pritt v. Johnson, 264 F. Supp. 167 (M.D. Pa. 1967); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

⁷⁷ Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971); Buie v. Pigott, 439 F.2d 153 (5th Cir. 1971); Roth v. Board of Regents of State Colleges,

soned authorities, even before *Bruno v. City of Kenosha*,⁷⁸ have held that the doctrine of judicial immunity also applied to proceedings in which injunctive or other equitable relief was sought as well as to suits for money damages. The reasons for the judicial immunity rule seem to apply regardless of the nature of the relief sought.⁷⁹

One is likely to doubt the vitality of cases which hold that the nature of the relief sought determines whether the immunity may be invoked in light of the Supreme Court's utterance in *Bruno v. City of Kenosha*, where the Court, speaking through Mr. Justice Rehnquist, stated:

*We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.*⁸⁰

If, as the Supreme Court stated, there is no historical justification for the interpretation that section 1983 has a double meaning with respect to the courts' jurisdiction where a municipality is a defendant, it likewise seems untenable that such double meaning could be argued with respect to a type of common law immunity. Moreover, if the reason a municipality cannot be sued is because of a recognized immunity, rather than a jurisdictional defect, then the mandate of *Bruno* would seem to overrule *sub silentio* those authorities allowing the maintenance of a civil rights action against quasi-judicial officers where equitable relief is sought.

IMMUNITY OF COURT CLERKS

To a litigant, one of the most visible officers of the court and therefore one of the most likely to become a defendant in a lawsuit of this type is the court clerk. The authorities hold that the clerk of the court, like other quasi-judicial officers, is immune from liability under 42 U.S.C. § 1983 for the performance or non-performance of acts within the scope of his official duties.⁸¹ The nature and origin of the clerk's immunity, of course, ema-

310 F. Supp. 972 (W.D. Wis. 1970); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967). *Accord*, *Adamian v. University of Nevada*, 359 F. Supp. 825 (D. Nev. 1973); *accord*, ANTIEAU, note 11 *supra*, § 40.

⁷⁸ 412 U.S. 507 (1973). See text accompanying note 80 *infra*.

⁷⁹ *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973); *Stephen v. Drew*, 359 F. Supp. 746 (E.D. Va. 1973); *Mackay v. Nesbett*, 285 F. Supp. 498 (D. Alas. 1968); *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962), *aff'd*, 309 F.2d 959 (8th Cir. 1962), *cert. denied*, 383 U.S. 971 (1966); *Tate v. Arnold*, 223 F.2d 782 (8th Cir. 1955).

⁸⁰ 412 U.S. at 513 (emphasis added).

⁸¹ *Stephen v. Drew*, 359 F. Supp. 746 (E.D. Va. 1973); *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970); *Hamrick v. Norton*, 322 F. Supp. 424 (D. Kan. 1970); *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969); *Browne v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Sullivan v. Kelleher*, 405 F.2d 486 (1st Cir. 1968); *Steinpreis v. Shook*, 377 F.2d 282 (4th Cir. 1967),

nates from the immunity which is afforded to judges.⁸² The immunity of court clerks has been properly extended and held applicable to trustees in bankruptcy, as they are likewise officers of the bankruptcy court.⁸³

While it might arguably be negligence for the clerk of a court to lose a file, thereby preventing a prisoner from expediting his efforts to seek an appellate court reversal from a conviction, such negligence of the clerk is not actionable due to the clerk's judicial immunity.⁸⁴ This rule has been specifically applied to those circumstances in which the clerk of the court has misplaced files which were important to a prisoner who was seeking to attack the validity of his conviction.⁸⁵

As in other areas, there is a requirement that the tort complained of be of constitutional dimension if it is ever to find aid and comfort in section 1983. Therefore, the mere "garden variety" negligent conduct of a court clerk is not, by and of itself, sufficient to give rise to an action under section 1983 because the Civil Rights Act was never intended to be a vehicle for providing a federal forum for all torts done under color of state law.⁸⁶

For example, where a defendant pleads guilty in a prior judicial proceeding, he cannot later sue the clerk of the court for the clerk's failure to provide him with records in connection with the prior conviction.⁸⁷ However, it is quite possible that this rule is limited to those cases in which a defendant has no meritorious grounds for appeal. On the other hand, many states, by statute, now allow a defendant certain grounds for appealing a conviction based upon a plea of guilty.

The quasi-judicial immunity afforded to court clerks would seem to have application whether the action is brought under section 1983 or whether the action is brought instead under sec-

cert. denied, 389 U.S. 1057 (1968); *Pritt v. Johnson*, 264 F. Supp. 167 (M.D. Pa. 1967); *Rhodes v. Meyer*, 334 F.2d 709 (8th Cir. 1964), *cert. denied*, 379 U.S. 915 (1964); *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962); *aff'd*, 309 F.2d 959 (8th Cir. 1962), *cert. denied*, 383 U.S. 971 (1966); *Rudnicki v. McCormack*, 210 F. Supp. 905 (D.R.I. 1962); *Nicklaus v. Simmons*, 196 F. Supp. 691 (D. Neb. 1961); *Ginsburg v. Stern*, 125 F. Supp. 596 (W.D. Pa. 1954), *aff'd*, 225 F.2d 245 (3d Cir. 1955).

See also, *Carter v. Carlson*, *The Monroe Doctrine at Bay*, 58 VA. L. REV. 143 (1972) and ANTEAU, note 11 *supra*, § 40.

⁸² *Accord*, *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970).

⁸³ *Smallwood v. United States*, 358 F. Supp. 398 (E.D. Mo. 1973); *cf. In re Swartz*, 130 F.2d 229 (7th Cir. 1942); *Fish v. East*, 114 F.2d 177 (10th Cir. 1940).

⁸⁴ *Davis v. Quarter Sessions Court*, 361 F. Supp. 720 (E.D. Pa. 1973). See, *Lockhart v. Hoenstine*, 411 F.2d 455 (3d Cir. 1969).

⁸⁵ *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970).

⁸⁶ *Davis v. Quarter Sessions Court*, 361 F. Supp. 720 (E.D. Pa. 1973); *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84 (3d Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970); *Kent v. Prasse*, 385 F.2d 406 (3d Cir. 1967).

⁸⁷ *Cook v. Clerk, Rockingham County Circuit Court*, 360 F. Supp. 730 (W.D. Va. 1973).

tion 1985.⁸⁸ The clerk of the court could not be sued by a party who had been defeated in two state court civil actions where the clerk, pursuant to his statutorily created duties, had entered a judgment for damages.⁸⁹

Another of the duties sometimes delegated to the clerk of the court is the fixing of bail in misdemeanor cases.⁹⁰ The failure of the clerk to perform that duty, however, does not give rise to a civil rights action since such an action would tend to pierce the clerk's judicial immunity.⁹¹

The court in *Sullivan v. Kelleher*⁹² was confronted with a claim by a plaintiff seeking damages from a defendant on the grounds that the clerk of the court which entered a default judgment evicting the plaintiff from his rented residence did not give him legal notice of the action (although there was service of process at the last and usual place of abode). It was well known that, at the time, the plaintiff was away from his home on an extended business trip to Florida.

The court of appeals, affirming a motion to dismiss, correctly justified the dismissal by stating:

Since the plaintiff concedes that the Newburyport District Court had general jurisdiction over the subject matter of the action brought in that court to evict him from his home, and since the immunity accorded to judges 'extends to other officers of government whose duties are related to the judicial process,' *Barr v. Matteo*, 360 U.S. 564, 569, 79 S.Ct. 1335, 1338, 3 L.Ed.2d 1434 (1959), it follows that the defendant cannot be held personally liable for any defects in service of process, if indeed there were such defects. *The inclusion of opprobrious epithets, such as alleging that the judicial officer acted maliciously or corruptly, adds nothing of legal consequence to the complaint*, *Bradley v. Fisher*, supra 13 Wall 351, reaffirmed, *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), wherein the Court held that the settled common law principle of judicial immunity was not abolished by § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.⁹³

Furthermore, an action may *not be* maintained against an assistant calendar clerk who received a motion to vacate an order, previously entered, where the motion had been previously submitted and rejected by the judge, and the same judge again refused to consent to reargument. The clerk was not required

⁸⁸ *Barnes v. Dorsey*, 354 F. Supp. 179 (E.D. Mo. 1973); *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962), *aff'd*, 309 F.2d 959 (1962), *cert. denied*, 383 U.S. 971 (1966).

⁸⁹ *Grubbs v. Slater*, 144 F. Supp. 554 (W.D. Ky. 1955).

⁹⁰ See OHIO REV. STAT. § 2937.23 (1953).

⁹¹ *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973); *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969). *Accord*, *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970).

⁹² 405 F.2d 486 (1st Cir. 1968).

⁹³ *Id.* at 487 (emphasis added). *Accord*, *Steinpreis v. Shook*, 372 F.2d 282 (4th Cir. 1967).

to place such a motion on the calendar and his failure to do so gave rise to no cause of action.⁹⁴

In *Evans v. Prothonotary of Supreme Court of Pennsylvania, W.D., Pittsburgh, Pennsylvania*,⁹⁵ the court indicated that, where the prothonotary returned the petition for writ of mandamus to the prisoner after holding it for some twenty-five days due to the fact that there was not the required filing fee with the petition, such act would not give rise to a civil rights cause of action under section 1983. The court indicated that the acts done by the prothonotary were judicial or at the very least quasi-judicial in nature and that the prothonotary was engaged in the performance of his duties and was, therefore, immune from suit under the Civil Rights Act.⁹⁶

Similarly, in *Ginsburg v. Stern*,⁹⁷ a district court decision for the Western District of Pennsylvania, the court commented:

I cannot conceive of imposing civil liability upon the Prothonotary for his failure to file of record the petition in question, for *I am compelled to take judicial notice of the uncontroverted fact that the Prothonotary is the Clerk of the Supreme Court and is required to follow the instructions of the Court which he represents.* In this connection there existed no discretion on his part but to obey the order and mandate of the court.

Thus, assuming that the failure to file said petition was patently violative of complainant's civil rights, no basis in law exists whereby civil liability can be imposed upon a public official acting pursuant to court order and direction.

To the contrary, were the Prothonotary who holds his position by sufferance of the Supreme Court of Pennsylvania to refuse to obey its mandate, *he would be contemptuous of that court and subject to summary dismissal.*⁹⁸

PRIVATELY RETAINED COUNSEL

Recently, many disgruntled prisoners have initiated legal actions against an attorney who defended them in criminal proceedings, after the defense proved unsuccessful. In the past, the disgruntled prisoner often brought a malpractice action or attempted to initiate disciplinary proceedings before the appropriate bar association. Now, however, with the dramatic rise in the number of civil rights actions, prisoners unhappy with the defense presented on their behalf are maintaining civil rights actions.

While an attorney of record in an action at law is an officer

⁹⁴ DeWindt v. O'Leary, 118 F. Supp. 915 (S.D.N.Y. 1954).

⁹⁵ 324 F. Supp. 732 (W.D. Pa. 1971).

⁹⁶ See also, Pritt v. Johnson, 264 F. Supp. 167 (M.D. Pa. 1967); Harmon v. Superior Court of State of California, 329 F.2d 154 (9th Cir. 1964); Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964); ANTIEAU, note 11 *supra*, § 40.

⁹⁷ 125 F. Supp. 596 (W.D. Pa. 1954).

⁹⁸ *Id.* at 602 (emphasis added).

of the court, such a position does not, in and of itself, elevate an attorney to the status of an officer or agent of a governmental unit to the extent that his acts constitute state action.⁹⁹ However, in most cases, even if the requisite state action can be found, the most that the plaintiff can allege in this complaint, in good faith, is that his attorney was negligent. As with allegations of failure to provide adequate medical treatment to prisoners, malpractice is generally negligent conduct at most, and, therefore, not actionable under 42 U.S.C. § 1983, which requires more than mere negligence to give rise to a tort of constitutional dimension.

In *Christman v. Commonwealth of Pennsylvania*,¹⁰⁰ a habeas corpus proceeding, the court rebuffed plaintiff's argument that his attorney, as an officer of the court, denied him his civil rights under the cloak of state action. The *Christman* court stated:

The Civil Rights Act prescribes two elements as requisite for recovery: (1) The conduct complained of must have been done by some person acting under color of state or local law; and (2) such conduct must have subjected the plaintiff to a deprivation of rights, privileges or immunities secured to him by the Constitution and laws of the United States. In the instant action, plaintiff has not met either requirement.

The status of an attorney appointed by a state court to represent a relator in a habeas corpus action, *although he is an officer of the court, does not make him an officer of the Commonwealth of Pennsylvania or of any governmental subdivision thereof*. He is just another private individual for purposes of § 1983, and a professional act done by him while representing the relator in such habeas corpus action cannot be considered an act done under color of state authority.¹⁰¹

Therefore, attorneys who are privately retained and act in their professional capacity are immune from suit under 42 U.S.C. §§ 1983 and 1985 because they do not act under color of state law.¹⁰²

In *Myers v. Couchara*,¹⁰³ the court recognized that under certain circumstances, of course, privately retained counsel could act *in concert* with state officers so as to clothe their activities with the requisite state action. The court went on to note, however, that engaging in "plea bargaining" with a district attorney does not constitute a deprivation of a right secured by the fourteenth amendment. Implicit in the court's statement

⁹⁹ *Phillips v. Singletary*, 350 F. Supp. 297 (D.S.C. 1972). *Accord*, *Moore v. Frazier*, 316 F. Supp. 318 (D. Neb. 1970).

¹⁰⁰ 275 F. Supp. 434 (W.D. Pa. 1967) (emphasis added).

¹⁰¹ *Id.* at 435.

¹⁰² *Myers v. Couchara*, 313 F. Supp. 873 (E.D. Pa. 1970); *Peake v. County of Philadelphia*, 280 F. Supp. 853 (E.D. Pa. 1968); *Pugliano v. Staziak*, 231 F. Supp. 347 (W.D. Pa. 1964), *aff'd per curiam*, 345 F.2d 797 (1965).

¹⁰³ 313 F. Supp. 873 (E.D. Pa. 1970).

was the recognition that engaging in plea bargaining with a state official did not, by and of itself, constitute state action.

While in most instances an action for malpractice may not be maintained under section 1983 against privately retained counsel, arguably, the plaintiff should be able, under the proper circumstances, to predicate jurisdiction on diversity. However, in such instances, the court will dismiss any such claim, even where there is diversity, where it cannot fairly be said that, at the pleading stage, the plaintiff can prove a set of facts in support of his claim which would entitle him to relief.¹⁰⁴ Of course, in addition to all this, the privately retained attorney can still assert the quasi-judicial immunity afforded other officers of the court.¹⁰⁵

COURT APPOINTED COUNSEL

A private attorney representing a defendant in a criminal case, whether such employment is by choice of the defendant or by appointment of court, is not a state official so as to bring his actions within the ambit of section 1983. Of course, it must be remembered in this respect that section 1983 was not designed to provide a federal remedy for the redress of purely private wrongs.¹⁰⁶ However, whether an attorney's services are embued with the requisite state action so as to bring them within the purview of section 1983 may, in many instances, be an academic question. Indeed, an allegation of professional malpractice by court appointed counsel amounting to mere negligence is not actionable.¹⁰⁷ A cause of action arises under section 1983 *only* where a right, privilege or immunity secured by the Federal Constitution has been violated.¹⁰⁸

Therefore, to sustain an action under section 1983, the tort complained of must be of constitutional dimension. Such requirement would seem to exclude injuries caused by "garden variety" negligence *viz-a-viz* a higher or more conscious level

¹⁰⁴ Williams v. Halperin, 360 F. Supp. 554 (S.D.N.Y. 1973).

¹⁰⁵ 32 AM. JUR. 2d *False Imprisonment* § 65 (1967).

¹⁰⁶ See, Nelson v. Stratton, 469 F.2d 1155 (5th Cir. 1972); Szijarto v. Legeman, 466 F.2d 864 (9th Cir. 1972); Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972); Thomas v. Howard, 455 F.2d 228 (3d Cir. 1972); Fletcher v. Hook, 446 F.2d 14 (3d Cir. 1971); United States *ex rel.* Wood v. Blacker, 335 F. Supp. 43 (D. N.J. 1971); Dyer v. Rosenberg, 434 F.2d 648 (9th Cir. 1970); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968); Rhodes v. Meyer, 225 F. Supp. 80 (D. Neb. 1963). See also French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970). Accord, Jackson v. Hader, 271 F. Supp. 990 (W.D. Mo. 1967).

¹⁰⁷ See generally, Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973); Fletcher v. Hook, 446 F.2d 14 (3d Cir. 1971).

¹⁰⁸ Kregger v. Posner, 248 F. Supp. 804 (E.D. Mich. 1966); Mueller v. Powell, 203 F.2d 797 (8th Cir. 1953); Charters v. Shaffer, 181 F.2d 764 (3d Cir. 1950). See Egan v. City of Aurora, 365 U.S. 514 (1961).

of culpability.¹⁰⁹ Though an attorney may be appointed by the court, such an appointment does not transform the services of the appointed attorney into state action within the purview of section 1983, even if the tort committed were acknowledged to be of constitutional dimension.¹¹⁰

The courts have held that counsel appointed to represent an accused in a state criminal proceeding is not acting under color of state law and, therefore, is not subject to suit under the Civil Rights Act.¹¹¹ Under certain circumstances, legal aid societies may become so intertwined with state or local government as to actually become part of state government and thus satisfy the state action requirement.¹¹² In many instances, a determination of whether or not there is the requisite government control, regulation or interference with the manner in which the society conducts its affairs, will require a trial on the merits. On the other hand, it is equally clear that a legal aid society cannot be sued under section 1983 absent some showing that it is state-supported, on the basis that such a society is not acting under color of state law.¹¹³

In *Peake v. County of Philadelphia, Pennsylvania*,¹¹⁴ the plaintiff urged that the Voluntary Defenders Association refused to assist him in the institution of legal proceedings and that such refusal deprived petitioner of his civil rights within the meaning of 42 U.S.C. §§ 1983 and 1985. The court, in dismissing the complaint, commented:

For the defendants' action to be 'under color of' State law, there must be a '[m]isuse of power, possessed by virtue of state law'. *Monroe v. Pape*, 365 U.S. 167, 184, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1960) The fact that Attorneys Pepp and Hassett are members of the Voluntary Defenders Association, an organization which is, in part, subsidized by the State or local governments, does not mean that any power they possess is possessed by virtue of State law [280 F. Supp. at 854].¹¹⁵

In *Brown v. Joseph*,¹¹⁶ the question presented was whether a public defender could be liable for damages in an action brought

¹⁰⁹ *Accord*, *Christman v. Commonwealth of Pennsylvania*, 275 F. Supp. 434 (W.D. Pa. 1967).

¹¹⁰ *Accord*, *Pritt v. Johnson*, 264 F. Supp. 167 (M.D. Pa. 1967); *Hamrick v. Morton*, 322 F. Supp. 424 (D. Kan. 1970).

¹¹¹ *Brown v. Duggan*, 329 F. Supp. 207 (W.D. Pa. 1971); *but cf.* *United States ex rel. McClaughlin v. New York*, 356 F. Supp. 988 (E.D.N.Y. 1973).

¹¹² *United States ex rel. McClaughlin v. New York*, 365 F. Supp. 988 (E.D.N.Y. 1973); *Lefcourt v. Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971).

¹¹³ *Wallace v. Kern*, 481 F.2d 621 (2d Cir. 1973); *Lefcourt v. Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971).

¹¹⁴ 280 F. Supp. 853 (E.D. Pa. 1968).

¹¹⁵ *Id.* at 854 (emphasis added). *Kregger v. Posner*, 248 F. Supp. 804 (E.D. Mich. 1966); *Pugliano v. Staziak*, 231 F. Supp. 347 (W.D. Pa. 1964), *aff'd per curiam*, 345 F.2d 797 (3d Cir. 1965). *See Vance v. Robinson*, 292 F. Supp. 786 (W.D.N.C. 1968).

¹¹⁶ 463 F.2d 1046 (3d Cir. 1972).

under section 1983. The district court had held that the complaint failed to state a claim upon which relief could be granted, inasmuch as there *was an absence of state action*. On appeal, the circuit court held that a county public defender enjoys immunity from liability under the Civil Rights Act, and in so holding, avoided any question as to whether or not there was the requisite state action.

*Espinoza v. Rogers*¹¹⁷ presented the question of whether a Colorado state public defender was sufficiently clothed with state authority as to come within the scope of state action. The court noted that the office of public defender derived its existence from a Colorado statute. Nevertheless, the court held that an attorney does *not* act under color of state law simply because he has active public employment as a Colorado public defender.¹¹⁸

The underlying reason for this rule is said to be that although the attorney might be chosen from a pool of attorneys created by a county bar association for the purpose of defending indigents, once he is assigned such defense, he acts solely for the plaintiff to whom his professional canons *demand an absolute duty of loyalty*.¹¹⁹ Of course the immunity that public defenders enjoy, like all other judicial and quasi-judicial immunities, applies only to those acts done in the performance of their duties.¹²⁰ Therefore, it was not surprising that the Court in *United States v. Senak*¹²¹ held that the defendant enjoyed no immunity where he had been appointed to represent the plaintiff in a prior criminal proceeding, but had, through the use of extortion, obtained a fee in addition to that already having been paid by the county. Very simply, the Court noted that the activity engaged in was well outside the normal performance of the judicial function, to wit, the defending of a client and the facts necessarily incident thereto.

As with privately retained counsel, when a public defender enters into plea bargaining with the district attorney, such activity does not, in and of itself, deprive a defendant of any rights secured by the Constitution or laws of the United States.¹²² Therefore, the mere fact that the attorney enters into a plea bargaining arrangement does not color his activities with state action so as to bring them within the ambit of section 1983.¹²³

¹¹⁷ 470 F.2d 1174 (10th Cir. 1972).

¹¹⁸ *Accord*, *United States ex rel. Wood v. Blacker*, 335 F. Supp. 43 (D. N.J. 1971); *Peake v. County of Philadelphia*, 280 F. Supp. 853 (E.D. Pa. 1968); *Thomas v. Howard*, 455 F.2d 228 (3d Cir. 1972).

¹¹⁹ *Thomas v. Howard*, 455 F.2d 228 (3d Cir. 1972).

¹²⁰ *Accord*, *Brown v. Joseph*, 463 F.2d 1046 (3d Cir. 1972).

¹²¹ 477 F.2d 304 (7th Cir. 1973).

¹²² *Accord*, *Myers v. Couchara*, 313 F. Supp. 873 (E.D. Pa. 1970).

¹²³ *Peake v. County of Philadelphia*, 280 F. Supp. 853 (E.D. Pa. 1968); *Pugliano v. Staziak*, 231 F. Supp. 347 (W.D. Pa. 1964), *aff'd per curiam*,

MISCELLANEOUS QUASI-JUDICIAL OFFICERS

The state judicial systems, to be effective, require numerous individuals performing different functions. The case law as it has developed in recent years has revealed that litigation-conscious plaintiffs have shown a propensity for initiating civil litigation against each of those individuals who serve quasi-judicial roles and whose function is essential to the prompt administration of justice.

Developing case law has likewise revealed that the quasi-judicial immunity so well established at the common law still protects quasi-judicial officials from actions brought under the Civil Rights Act. For instance, the judicial immunity which protects other judicial officers seemingly protects court-appointed receivers.¹²⁴

An action growing more common, initiated by a prisoner incarcerated in a state prison, is a lawsuit seeking to obtain damages for the failure of a court stenographer to provide him with a free copy of the transcript of proceedings at the criminal trial which resulted in his conviction. Even if the prisoner in such a case is able to overcome whatever other obstacles might arise, he is entitled to a transcript of the proceedings only in response to an established and pleaded need.¹²⁵ A prisoner is *not* entitled to a free transcript merely for the purpose of searching the record in the hope of discovering some technicality, flaw or error in order to determine whether or not he wants to initiate some litigation, not connected with seeking relief from his conviction.¹²⁶

It is well settled that a sheriff is immune from liability for acts performed *while he is acting as an arm of the court*, carrying out judicial functions in his capacity as sheriff, such as the execution of a court order.¹²⁷ Where a sheriff acts pursuant to a court order and in accordance with a municipal ordinance and

345 F.2d 797 (1965); Zulkey, *Prosecutorial Immunity, Its Past and Its Future*, 60 ILL. B.J. 946, 955 (1972). *Accord*, Sires v. Cole, 320 F.2d 877 (9th Cir. 1963).

¹²⁴ Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir. 1968); Comment, *Carter v. Carlson: The Monroe Doctrine at Bay*, 58 VA. L. REV. 143 (1972); ANTIEAU, note 11 *supra*, § 40.

¹²⁵ United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964).

¹²⁶ Harlow v. Supreme Court of Appeals of Virginia, 328 F. Supp. 296 (W.D. Va. 1971); United States v. Glass, 317 F.2d 200 (4th Cir. 1963), Peckham v. Scanlon, 241 F.2d 761 (7th Cir. 1957). *Accord*, ANTIEAU, note 11 *supra*, § 40.

¹²⁷ Salvati v. Dale, 364 F. Supp. 691 (W.D. Pa. 1973). *Accord*, Boydston v. Perry, 359 F. Supp. 48 (N.D. Miss. 1973); Mississippi *ex rel.* Giles v. Thomas, 464 F.2d 156 (5th Cir. 1972); Godwin v. Williams, 293 F. Supp. 770 (N.D. Tex. 1968); Link v. Greyhound Corp., 288 F. Supp. 898 (E.D. Mich. 1968); Haigh v. Snidow, 231 F. Supp. 324 (S.D. Cal. 1964); Rhodes v. Houston, 202 F. Supp. 624 (D. Neb. 1962), *aff'd*, 309 F.2d 959 (1962), *cert. denied*, 383 U.S. 971 (1966); Steinpreis v. Shook, 377 F.2d 282 (4th Cir. 1967), *cert. denied*, 389 U.S. 1057 (1968).

there is and can be no allegation that he acted outside the scope of his authority or outside the scope of the ordinance or the court order, there can be no liability predicated on the Civil Rights Act.¹²⁸

Where there is no indication that the administrator of the court was personally responsible for the negligence of one of his employees, the court should properly dismiss the court administrator from an action maintained against him.¹²⁹

In *Pritt v. Johnson*,¹³⁰ the court indicated that a section 1983 action was not maintainable against the attorney, the witness or the judge involved in a case. Court stenographers and court reporters also enjoy this umbrella of judicial immunity.¹³¹

However, concurrently, it has been held that such court reporters derive no rights protectable under section 1983 from the performance of their duties as court reporters. For example, in *Lipman v. Commonwealth of Massachusetts*,¹³² the plaintiff court reporter sought an injunction against the sale of transcripts of a well publicized hearing conducted in the Commonwealth of Massachusetts. Plaintiff claimed both a property right and a common law copyright in the transcript. The court noted:

Without deprecating the mechanical skill necessary to become a stenotypist, we can recognize no ownership for that reason in a transcription of a judicial hearing. Since transcription is by definition a verbatim recording of other persons' statements, there can be no originality in the reporter's product.¹³³

The court then held that, inasmuch as the plaintiff had no property rights in the transcript, there were no rights that could be protected under 42 U.S.C. § 1983.

Law enforcement officers, acting as officers of the court, share the immunity afforded to judges and other members of the judicial process acting within the scope of their authority.¹³⁴ In *Mercedes v. Barrett*,¹³⁵ plaintiff brought a civil rights action against a courtroom bailiff alleging that the bailiff had committed a battery upon his person. The circuit court of appeals affirmed a dismissal of the complaint on the grounds of judicial immunity.¹³⁶ Just as a clerk in the trial court enjoys a quasi-

¹²⁸ *Salvati v. Dale*, 364 F. Supp. 691 (W.D. Pa. 1973).

¹²⁹ *Davis v. Quarter Sessions Court*, 361 F. Supp. 720 (E.D. Pa. 1973).

¹³⁰ 264 F. Supp. 167 (M.D. Pa. 1967).

¹³¹ *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957); ANTIEAU, note 11 *supra*, § 40.

¹³² 475 F.2d 565 (1st Cir. 1973).

¹³³ *Id.* at 568.

¹³⁴ *Boydston v. Perry*, 359 F. Supp. 48 (N.D. Miss. 1973); *Mississippi ex rel. Giles v. Thomas*, 464 F.2d 156 (5th Cir. 1972).

¹³⁵ 453 F.2d 391 (3d Cir. 1971).

¹³⁶ Comment, *Carter v. Carlson: The Monroe Doctrine at Bay*, 58 VA. L. REV. 143 (1972); ANTIEAU, note 11 *supra*, § 40. *Accord*, *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965).

judicial immunity, so also does a clerk in the supreme court.¹³⁷

A deputy sheriff charged with responsibility for maintaining security in the courthouse and acting pursuant to authorization of a judge of the court, is protected by the doctrine of judicial immunity for actions maintained under this section.¹³⁸

Physicians appointed by a court to conduct examinations on persons under the jurisdiction of that court are officers of that court and, as such, acting pursuant to and in the scope of such appointment, are afforded the same immunities from civil suit as other quasi-judicial officers.¹³⁹

It is likewise well established that members of a parole board are not "persons" within the meaning of the Civil Rights Act.¹⁴⁰ However, it appears that parole board members have an additional defense in that the judicial immunity afforded other judicial and quasi-judicial officers is also afforded them and that they may, therefore, invoke immunity in defense of civil rights actions.¹⁴¹ The general body of the grand jury, as well as its foreman, may also invoke a quasi-judicial immunity.¹⁴²

In some states, Wisconsin for instance, it is not uncommon to have writs served by private individuals or corporations. Despite his status, it would seem that the writ server is clothed with the requisite state action so as to make him susceptible to a section 1983 action.

However, it would seem that in many cases there would be an immunity to actions brought under section 1983. Thus, where a deputy sheriff acts pursuant to a replevin writ and does no act not specifically authorized by the replevin writ, it would seem that he enjoys immunity from suit, even though the replevin statute is later declared unconstitutional.¹⁴³

¹³⁷ *Ginsburg v. Stern*, 125 F. Supp. 596 (W.D. Pa. 1954), *aff'd*, 225 F.2d 245 (1955).

¹³⁸ *Kahermanes v. Marchese*, 361 F. Supp. 168 (E.D. Pa. 1973); *Henig v. Odorioso*, 385 F.2d 491 (3d Cir. 1967), *cert. denied*, 390 U.S. 1016 (1968); *Pierson v. Ray*, 386 U.S. 547 (1967); *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965).

¹³⁹ *Phillips v. Singletary*, 350 F. Supp. 297 (D. S.C. 1972); *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970); *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967); *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965), *cert. denied*, 383 U.S. 913 (1966), *reh. denied*, 384 U.S. 914 (1966); *Bartlett v. Duty*, 174 F. Supp. 94 (N.D. Ohio 1959); *ANTIEAU*, note 11 *supra*, § 40. See also Comment, *Carter v. Carlson: The Monroe Doctrine at Bay*, 58 VA. L. REV. 143 (1972).

¹⁴⁰ *Paige v. Pennsylvania Bd. of Parole*, 311 F. Supp. 940 (E.D. Pa. 1970); *Bennett v. California*, 406 F.2d 36 (9th Cir. 1969); *Gallagher v. Pennsylvania Bd. of Probation and Parole*, 287 F. Supp. 610 (E.D. Pa. 1968).

¹⁴¹ *United States ex rel. Pope v. Williams*, 326 F. Supp. 279 (E.D. Pa. 1971); *Lang v. Wood*, 92 F.2d 211 (D. D.C. 1937), *cert. denied*, 302 U.S. 686 (1937). *Accord*, *ANTIEAU*, note 11 *supra*, § 40.

¹⁴² *Martone v. McKeithen*, 413 F.2d 1373 (5th Cir. 1969); *Cawley v. Warren*, 216 F.2d 74 (7th Cir. 1954); *ANTIEAU*, note 11 *supra*, § 40.

¹⁴³ *Brother's Distributing Co. v. Heidtman*, 354 F. Supp. 203 (S.D. Fla. 1973).

CONCLUSION

The foregoing demonstrates that while the number of lawsuits which are filed against public officials is on the rise, the defenses which were available to those public officials in common law actions are also available in actions maintained under the Civil Rights Act.

The judicial immunity which was available to judges has survived the Civil Rights Act and is available not only to judges, but also to state's attorneys as well as to other quasi-judicial officials. The mere fact that the plaintiff seeks a statutory remedy under section 1983, rather than a common law action, does not in any way diminish the effect of that defense.