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Tort Liability of Governmental Units

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§1. THE DOCTRINE OF SOVEREIGN IMMUNITY AND THE PATCHWORK OF LIABILITY

Of all deserving tort claims against federal, state and local governmental units, probably far more are paid today than are unpaid, despite the persistence of the basic doctrine that the sovereign cannot be sued without consent.

This somewhat startling statement is based upon a survey of the many methods, some rather subtle or concealed, of collecting on tort claims against governmental units; the statement is not based upon or susceptible to proof, for no one has collected statistics, and the limits of "deserving" claims are far from clear. Even so, sovereign responsibility for tort probably has already become the rule rather than the exception.

True, the Federal Tort Claims Act falls considerably short of compensating all deserving claimants. And the majority of the states have failed to enact general tort claims statutes that go even as far as the federal act. Legislation imposing liability upon municipalities and other local units is less common than legislation imposing liability upon states. Furthermore, such legislation as has been enacted to broaden liability of the various governmental units has often been construed away by the courts.

How, then, is it possible to say that far more deserving claims are paid than are unpaid?

The answer is that the payment of tort claims by the various governmental units is governed only in part by general statutes exemplified by the Federal Tort Claims Act. In addition to such general statutes are: (1) private laws enacted as a matter of legislative grace, (2) special or limited public legislation, and (3) indirect

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liability through such means as insurance, subsuming tort claims under constitutional provisions requiring compensation for the taking of property, indemnification of public employees, and (4) liability of municipalities under the judge-made doctrine concerning proprietary functions.

The movement toward sovereign responsibility has of course been preceded by a shift in philosophical attitudes. Following the masterful leadership of Professor Edwin M. Borchard, nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go. The Supreme Court in 1939 observed that "the present climate of opinion . . . has brought governmental immunity from suit into disfavor." The attitude that is now dominant was expressed nearly a century ago by President Lincoln in his first annual message to Congress: "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. The investigation and adjudication of claims in their nature belong to the judicial department."

Indeed, as of the 1950's, one may have difficulty understanding why the doctrine that the king can do no wrong ever found any acceptance in the American democracy. The men who wrote the Constitution did not adopt the doctrine. If, as Mr. Justice Frankfurter has said, "this immunity from suit is embodied in the Constitution," it has been put there by the judges (except for the Eleventh Amendment, which is limited to state immunity in federal courts), for the Supreme Court in 1793 was unable to find sovereign immunity in the Constitution.3

3. See Borchard, Government Liability in Tort, 34 Yale L. J. 1, 129, 229 (1924-25); 36 id. 1, 757, 1039 (1926-27); 28 Colum. L. Rev. 577, 734 (1928).
6. 7 Richardson, Messages and Papers of the Presidents 3245, 3252 (1896), quoted by Mr. Justice Frankfurter in dissent in Kennecott Copper Corp. v. State Tax Comm'n, 327 U. S. 573, 580 (1946).
7. Idib.
8. Chisholm v. Georgia, 2 U. S. (2 Dall.) 419 (1793). Not only is the holding of special significance, but especially interesting is the remark of
Of course, the doctrine stems from the *personal* position of the English king. A judgment of the king's court in 1234 proclaimed: "Our lord the king can not be summoned or receive a command from any one." Blackstone was on firm ground when he wrote in 1765 the much-quoted words: "The king can do no wrong . . . The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing: in him is no folly or weakness."10

Chief Justice Marshall gave no reasons in 1821 when he made his authoritative pronouncement: "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."11 By 1850 the Supreme Court was saying: "No maxim is thought to be better established or more universally assented to, than that which ordains that a sovereign, or a government representing the sovereign, cannot ex delicto be amenable to its own creatures or agents employed under its own authority for the fulfilment merely of its own legitimate ends."12

In 1882 the Supreme Court came forth with the astonishing acknowledgment that "while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."13

In modern times, perhaps the chief philosophical proponent of the sovereign immunity doctrine has been Mr. Justice Holmes, who in 1907 declared for a unanimous Supreme Court: "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 right depends."14 Today hardly anyone agrees that the

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Chief Justice Jay: "I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought to be thus collaterally and incidentally decided: I leave it a question." *Id.* at 477.

stated ground for exempting the sovereign from suit is either logical or practical.

Mr. Justice Holmes in a 1926 letter to Laski elaborated on his view:

"Do you know I really am bothered by the old difference between us, if there is one, as to sovereignty, because as I understand the question it seems to me one that does not admit of argument. . . . If you should say that the Courts ought in these days to assume a consent of the U. S. to be sued, or to be liable in tort on the same principle as those governing private persons, I should have my reason for thinking you wrong, but should not care, as that would be an intelligible point of difference. But what I can't understand is the suggestion that the United States is bound by law even though it does not assent. What I mean by law in this connection is that which is or should be enforced by the Courts and I can't understand how anyone should think that an instrumentality established by the United States to carry out its will, and that it can depose upon a failure to do so, should undertake to enforce something that ex hypothesi is against its will. It seems to me like shaking one's fist at the sky, when the sky furnishes the energy that enables one to raise the fist. There is a tendency to think of judges as if they were independent mouthpieces of the infinite, and not simply directors of a force that comes from the source that has given them their authority."\(^{15}\)

Today, of course, all will agree that judges cannot move contrary to the expressed legislative will in imposing liability on the government. But even though judges are not "independent mouthpieces of the infinite," they are, within the constitutional and statutory framework, independent architects of justice. They can and they should resolve doubtful questions in favor of sovereign responsibility, as the Supreme Court did in 1939 when it unanimously and avowedly contributed to what it recognized as "a steadily growing policy of governmental liability" and as "expanding conceptions of public morality regarding governmental responsibility."\(^{16}\)

We now know that neither legislative bodies nor framers of the Federal Constitution were responsible for the origin and development of the doctrine of sovereign immunity, and we now know that the judges who created and molded the doctrine were often actuated by misunderstanding. Perhaps the outstanding simple example of a mistake was the unanimous pronouncement of the Supreme Court in 1868: "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized

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15. 2 Holmes-Laski Letters 822 (1953).
exercise of power by its officers and agents. Professor Borchard has pointed out that the Court "overlooked the fact that practically every country of western Europe has long admitted such liability."  

Closer to the heart of the probable motivating reasons for the development of sovereign immunity is the misunderstanding exemplified by another Supreme Court statement in 1868: "It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government."  

Not only is this proposition not obvious, but the opposite of the proposition is rapidly becoming obvious. We know from experience that the Federal Tort Claims Act has not hindered the public service and has not endangered the public safety. True, the Act preserves a good deal of sovereign immunity through its many exceptions. But the British Crown Proceedings Act of 1947 has fewer exceptions and it has not hindered the public service or endangered the public safety. Furthermore, New York has gone all the way in renouncing sovereign immunity from suit and from liability, and the New York experience proves overwhelmingly that substituting sovereign responsibility for sovereign irresponsibility can be wholly beneficial and in no respect harmful.  

What is most needed now, aside from a general following of New York's leadership, is a focus upon the extremely difficult problems of what the limits of liability should be.

§ 2. PRIVATE LAWS AND LEGISLATIVE GRACE

Private laws, both in the federal government and in most of the states, are extremely important in the whole picture of payment of tort claims.

A statement that the federal government is today responsible for substantially all its torts is reasonably accurate. The chief infirmity of such a statement does not pertain to governmental failure to pay the kind of claims that a private corporation or individual could be forced to pay through legal process; the chief infirmity has to do

21. 10 & 11 Geo. VI, c. 44.
23. New York cases are discussed below, especially in §§ 14 and 15.
24. See especially § 17 below.
with problems with respect to what is a "tort" in the context of governmental action of the kind that has no counterpart in the activities of private corporations or individuals.\textsuperscript{26}

Of course, the Federal Tort Claims Act has big holes in it. It falls far short of making the government responsible for all its torts.\textsuperscript{26} It has many exceptions, including a list of deliberate torts, and including especially negligence in the performance of a "discretionary function."

But the extent to which the government pays tort claims against it cannot be determined by examination of the Federal Tort Claims Act.\textsuperscript{27} For one thing, other legislation also provides for government liability. Even more importantly, tort claims which are not covered either by the Tort Claims Act or by other legislation are usually taken care of as a matter of grace through the enactment of private laws. It is quite common for a private law in providing for payment of a tort claim to recite that the claim "is not a claim which is cognizable under the Federal Tort Claims Act."\textsuperscript{28}

\textit{Dalehite v. United States},\textsuperscript{29} the most celebrated case under the Federal Tort Claims Act, is an excellent illustration of the realities. Claims against the government totaling about two hundred million dollars grew out of the Texas City disaster, in which a ship loaded with fertilizer exploded and caused many deaths and much destruction. The Supreme Court in the \textit{Dalehite} case held that the government was not liable, because the negligence found by the district court occurred in the performance of a "discretionary function" and was therefore within an exception to the Act. But the crucial fact is that the claimants who lost the \textit{Dalehite} case in the Supreme Court later won in Congress. The statute enacted by Congress declares: "The Congress recognizes and assumes the compassionate responsibility of the United States for the losses sustained by reason of the explosions and fires at Texas City..."\textsuperscript{30} Especially interesting is the ease with which the congressional committees rejected the view taken by the Supreme Court. For instance, the House Committee reported that "the ammonium nitrate fertilizer, an inherently dangerous and hazardous explosive, was introduced into the flow of commerce by the United States Government without proper safe-

\textsuperscript{25} This problem is fully discussed below.
\textsuperscript{26} See the discussion of the Act below in §§ 8, 9 and 10.
\textsuperscript{27} See §§ 3, 4, 5 and 7 below.
\textsuperscript{29} 346 U. S. 15 (1953). See the full discussion of the case below in § 9.
guards and warnings. That fact alone, in the opinion of the committee, is sufficient to place responsibility on the Government...31

In the Tort Claims Act as interpreted, Congress did not provide for such responsibility. In the Texas City legislation, Congress did provide for such responsibility. Even though Congress provided for the payment of the Texas City claims, it did not amend the Tort Claims Act so that in the future similar claims will be taken care of through the machinery of that Act. For better or for worse—and most observers may say it is for worse—Congress continues to choose to pay through congressional action and not through more facile machinery pursuant to general legislation.32

Even so, however cumbersome the machinery, the government is assuming responsibility for its torts, whether or not the torts are covered by the Tort Claims Act. Indeed, the government is assuming responsibility for something more than its torts, for the private laws that are enacted often go beyond the liability that would be imposed if the government were treated like a private corporation or an individual. Through private laws the government is often assuming liability irrespective of fault. As the provocative studies by Messrs. Gellhorn and Lauer have shown,33 the committees and staffs that handle private bills tend to develop principles, and the tendency toward liability without fault is very pronounced in many cases, although it is too much to say that the government has fully adopted a principle of absolute liability. “A recurring test of governmental accountability, as one deduces it from the actions of the


32. “Congress, prior to the passage of the Tort Claims Act, repeatedly entertained claims and concerned itself with legislation which provided relief for parties in situations analogous to that submitted to the committee for investigation. In addition, since the passage of the Tort Claims Act, Congress has invariably exercised its jurisdiction to legislate when it was satisfactorily established that for compassionate reasons or in equity and in good conscience remedial legislation was necessary to fill a void created by existing law.” Id. at 8.


The first of these articles is devoted principally to the procedure for the handling of private laws, including administrative advice before committee action is taken and presidential approval or veto. The second includes a discussion of decisional principles in private laws, and also the direct administrative handling of damage claims.

Gellhorn and Lauer quote Senator Wiley as chairman of the Senate Judiciary Committee: “[M]any of these private bills establish a pattern of public policy—a kind of legislative common law if that were possible—which ultimately may emerge as public law.” Hearing Before the Senate Committee on Expenditures in the Executive Departments—Evaluation of Legislative Reorganization Act of 1946, 80th Cong., 2d Sess., 253 (1948).
Judiciary Committees, is not whether a federal employee caused loss while acting within the range of his assigned responsibilities, but is, rather, whether the United States controlled or was connected with the physical instrumentality through which damage was done.\textsuperscript{34}

Some of the claims recently paid through private laws were for such acts as these: a deputy sheriff was run over by an Army truck driven by a soldier attempting to escape from the custody of the deputy sheriff;\textsuperscript{35} the claimant was struck by an Army vehicle operated by an enlisted man who, according to a finding of the Department of the Army, "was not acting within the scope of his employment at the time of the accident;"\textsuperscript{36} the claimant was shot by an insane member of the Army.\textsuperscript{37}

The private laws for payment of tort claims almost always contain either a provision that "no part of the amount appropriated in this Act shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim" or a provision that not more than ten per cent shall be paid to any agent or attorney. In a recent discussion of these provisions on the floor of the Senate, some rather instructive observations were made:

"Some of us on the Committee on the Judiciary are beginning to suspect that attorneys are finding out that they can get bills calling for the payment of money passed by Congress with some ease... When Congress, more in a spirit of charity than anything else, or for any other reason, appropriates money for the payment of claims because equities are involved, there is no reason why attorneys should share in the payments which the Government makes to the claimants, particularly when all the work in connection with the claims is done by the staff of the Committee on the Judiciary.... If a lawyer can come before the Committee on the Judiciary and show that he had out-of-pocket expenses or the investment of some time, energy, and legal skill in connection with the case, there would be no reason at all for the Committee on the Judiciary to disallow a fair fee... The committee is now trying to scrutinize each claim bill and de-\textsuperscript{34} Gellhorn and Lauer, \textit{Federal Liability for Personal and Property Damage}, 29 N. Y. U. L. Rev. 1325, 1334 (1954). The authors give various examples, one of which is: "This expanded concept of governmental responsibility is exemplified by the case of several employees of the Alaska Railroad. Their work tools were lost in a fire that destroyed the federally owned and operated building in which they had been stored. The blaze that caused the loss was not attributable to any employee's negligence, nor had there been any lack of diligence. The Government was held responsible because the conflagration of its property was the source of the loss." \textit{Ibid.}
termine whether there is some justification for allowing a legal fee in each case. ... We are in the course of working with the staff on a series of firm rules establishing formulas to govern the whole subject, both as to claims and as to the fees.\[38\]

Whether by virtue of pressures from lawyers or others who earn their fees, or whether by virtue of compassion, Congress is often exceedingly generous in passing private laws for payment of claims; the degree of generosity can often be seen in the various messages giving reasons for presidential vetoes.\[39\]

In most of the states, the legislatures have power and are willing to exercise the power to enact private laws in some form to take care of tort claims. In some states, the legislatures consider the claims directly.\[40\] In some, the claims are presented to administrative authorities for recommendations or determinations before they are presented to the legislatures.\[41\] In others, the legislatures authorize suits in courts on particular claims or authorize administrative determination of the claims.\[42\] In at least a dozen states, the constitutions prohibit special acts.\[43\]

Most interesting is Kansas, where despite a constitutional provision that "in all cases where a general law can be made applicable, no special law shall be enacted," the legislature in 1955 enacted at least five bills, containing two hundred items, making appropriations to named parties, including, for instance, $3,124.43 for "flood damage to home occasioned by improper highway construction," and $15,000 to a widow in compensation for death of her husband, who was killed while on duty as a guard at the state penitentiary during an attempted escape of prisoners.

Apparently no information is readily available as to how far state legislatures have moved toward absolute state liability through special acts.\[44\]

40. E.g., Delaware, Georgia, Kansas, New Hampshire, Vermont, Virginia, Washington, and others.
41. E.g., Connecticut, Iowa, Nevada, Ohio, Rhode Island, South Dakota, Utah, West Virginia, and perhaps others.
42. E.g., Kentucky, Louisiana, Maine, Montana, Tennessee, and perhaps others.
43. Florida, Idaho, Indiana, Kansas, New York, North Dakota, Oregon, Pennsylvania, Texas, and others. In Nebraska and New Mexico, the constitutions prohibit legislative permissions to sue on particular claims, and in Oklahoma some special acts are permissible.
44. For an especially helpful collection of the law of all forty-eight states, see Leflar and Kantrowitz, 29 Tort Liability of the States, N. Y. U. L. Rev. 1363 (1954), from which a portion of the information presented here has been taken. Another such comprehensive study of all the states is Minnesota Legislative Research Committee, Payment of Claims against the State (1952).
§3. PIECEMEAL GENERAL LEGISLATION CREATING TORT LIABILITY

Much legislation, both federal and state, provides for payment of claims within limited areas. Indeed, except for the Federal Tort Claims Act and legislation in New York and a few other states, all the legislative inroads upon sovereign immunity from tort liability have been of a piecemeal character. Even so, the accumulation of piecemeal legislation, along with private laws and indirect means of creating liability, has gone so far that probably far more deserving tort claims are paid than are unpaid.

Other statutes in addition to the Federal Tort Claims Act confer administrative power to pay claims. Since 1922 the Small Tort Claims Act has permitted administrative payments for property damage, but not for personal injury, up to $1,000. Without limitation of amount, a 1928 statute provides for filing in the General Accounting Office of claims against the United States and provides that the Comptroller General shall submit a special report to Congress making a recommendation whenever in his judgment the claim "contains such elements of legal liability or equity as to be deserving of the consideration of the Congress." 

The Secretaries of the Army, the Navy, and the Air Force are authorized to pay claims up to $2,500 for losses of property of civilian and military personnel to pay up to $1,000 for property damage, personal injury or death caused by military personnel or civilian employees "while acting within the scope of their employment, or otherwise incident to noncombat activities . . ."; and to pay up to $5,000, upon a determination by a Claims Commission, for property, personal injuries, or death of inhabitants of a foreign country caused by military personnel and civilian employees, "or otherwise incident to noncombat activities of such forces." The Secretary of State may settle claims up to $1,500 for personal injury or death of any person, not an American national, in any foreign country, resulting from acts or omissions of any officer, employee, or agent of the Government of the United States. The Attorney General and the Postmaster General since 1921 have had power to settle claims up to

45. See the discussion below in this section.
$500 for damages to person or property caused by agents of the Federal Bureau of Investigation and by officers or employees of the Post Office Department, acting within the scope of employment.\textsuperscript{52}

Various statutes create government liability for action which is not necessarily classifiable as tortious. An interesting example is a statute providing for liability to one who has been wrongfully convicted of crime and has served all or any part of his sentence.\textsuperscript{53}

In 1855 Congress established the Court of Claims, allowing suits against the United States on claims founded upon laws of Congress, regulations of executive departments, or "upon any contract, express or implied."\textsuperscript{54} In 1863 the Court of Claims was authorized to render judgment against the United States.\textsuperscript{55} By the Tucker Act of 1887 the jurisdiction of the Court of Claims was enlarged to embrace claims for "damages, liquidated or unliquidated, in cases not sounding in tort," and concurrent jurisdiction was conferred upon district courts for claims of not more than $10,000.\textsuperscript{56} In 1910 suits against the United States for infringement of patents were allowed.\textsuperscript{57} In 1916 Congress provided workmen’s compensation for federal employees.\textsuperscript{58} During the First World War the government was liable for torts in operating the railroads.\textsuperscript{59} In 1920 Congress authorized suits against the United States for maritime torts, and extended this liability in 1925 to damage caused by any public vessel of the United States.\textsuperscript{60}

Most of the exceptions to the Federal Tort Claims Act do not apply to these various statutes, and some of these statutes provide for liability without regard to the usual limitations concerning scope of employment. The various statutes should be examined for the detailed provisions on such questions. Messrs. Gellhorn and Lauer have written an account of the administration of some of these statutes.\textsuperscript{61}

Before the enactment of the Federal Tort Claims Act, the Supreme Court asserted, with perhaps a bit of exaggeration, that "Congress has embarked upon a generous policy of consent for suits

\begin{footnotes}
\textsuperscript{53} 28 U. S. C. § 2513 (1952). The liability is limited to $5,000.
\textsuperscript{54} 10 Stat. 612 (1855).
\textsuperscript{56} 28 U. S. C. § 1346 (1952).
\textsuperscript{59} 40 Stat. 456 (1918).
\end{footnotes}
against the government sounding in tort even where there is no element of contract.\textsuperscript{62} The Court cited statutes providing for suits for patent infringement, compensation for disability or death of government employees, and damage to property by the Army Air Service. These liabilities may still exist, irrespective of exceptions to the Federal Tort Claims Act.

Although New York is the only state that is liable for all or nearly all state torts, a dozen other states have undertaken responsibility in most cases.\textsuperscript{63} Perhaps more important than the frequent liability of these thirteen states is the fact that only eight states undertake liability in no cases or in almost no cases.\textsuperscript{64} This means that forty states do undertake liability in a significant portion of the cases. Most states have statutes authorizing suits against the state or its subdivisions by all persons having claims against them, although seventeen such enactments have been interpreted as merely permitting the filing of suits or claims, but as having no effect upon substantive liability.\textsuperscript{65}

Perhaps more than half the states have enacted general statutes creating liability for negligence in the operation of state motor vehicles. A rather surprising type of legislation enacted by about half the states provides for municipal liability for mob damage, sometimes irrespective of fault on the part of the municipality;\textsuperscript{66} the purpose of such legislation is said to be "to impose a penalty upon the community in the form of additional taxes when its members participate" in mob action.\textsuperscript{67} Many other types of piecemeal statutes have been enacted in various states.\textsuperscript{68}

\begin{thebibliography}{9}
\bibitem{63} The information in this paragraph is taken entirely from Leflar and Kantrowitz, \textit{Tort Liability of the States}, 29 N. Y. U. L. Rev. 1363 (1954).
\bibitem{64} The dozen states are Alabama, Arkansas (the state, but not local units), Illinois, Iowa, Kentucky, Minnesota, North Carolina, Ohio, Oklahoma (interpretation of statute doubtful), Rhode Island (legislative discretion), Tennessee, and West Virginia. Michigan in 1943 completely waived its immunity but repealed the waiver in 1945. \textit{Id.} at 1407.
\bibitem{65} Arizona, Idaho, Maryland, Mississippi, Missouri, Nevada, Texas and Wyoming. \textit{Ibid.}
\bibitem{66} \textit{Ibid.} at 1408.
\bibitem{67} An example is Ill. Ann. Stat., c. 38, § 515 (Smith-Hurd 1935): "Any person so suffering material damage to property or injury to person by a mob shall have an action against the county, park district or city in which such injury is inflicted, for such damages as he may sustain, to an amount not exceeding ten thousand . . . dollars."
\bibitem{69} See generally the analysis of statutes by Leflar and Kantrowitz, supra note 63. Another such study of state legislation is Minnesota Legislative Research Committee, \textit{Payment of Claims against the State} (1982).
\end{thebibliography}
In addition to legislation directly imposing liability on the part of states and their subdivisions, legislation which indirectly creates liability in tort is becoming very common. To such legislation we now turn.

§4. INDIRECT METHODS OF CREATING GOVERNMENTAL TORT LIABILITY

Some of the indirect methods by which tort liability of governmental units is created are subtle or concealed and are therefore easy for the practitioner to overlook.

Much the most important of these methods is the use of liability insurance. Legislators who are wary of making state or local units liable for torts are increasingly willing to provide for payment of premiums for liability insurance—either insurance protecting the units and waiving immunity to the extent of the insurance coverage, or insurance protecting the officers or employees, who are theoretically liable but are seldom sued. The typical statute and policy provide that the insurer may not set up sovereign immunity as a defense, for in absence of such a provision some courts have held that the insurer is not liable unless the governmental unit would be. Because of cases holding that a governmental unit has no authority to insure a risk for which it is not legally liable, special statutes are usually required. At least two cases have held that

69. In Stephenson v. City of Raleigh, 232 N. C. 42, 59 S. E. 2d 195 (1950), the court held that the city could not waive its immunity, and that the insurance covered only indemnity against loss, although the plaintiff argued that “the company . . . intended to really insure and not have the defendant, City of Raleigh, pay a premium out of public funds for nothing.”

In Cushman v. Grafton County, 97 N. H. 32, 79 A. 2d 630 (1951), the county was the insured under a policy obligating the insurer to pay “all sums which the Insured shall become obligated to pay.” The court held that the tort was committed in exercise of a governmental function, that the county was not liable, and therefore that the insurance did not cover the tort. The court distinguished Arnold v. Walton, 205 Ga. 606, 54 S. E. 2d 424 (1949), where the insurer was held liable under a policy in which the insurer agreed not to plead sovereign immunity as a defense.

70. In Pohland v. City of Sheboygan, 251 Wis. 20, 27 N. W. 2d 736 (1947), the city took out a policy of liability insurance which provided that the insurer would not assert sovereign immunity as a defense. The court refused to give effect to this provision of the policy, because: “No statute is pointed out as conferring the power to make the agreement referred to. . . .” Then the court reasoned: “The Company is not liable unless the City is. The City not being liable the Company is not.” Id. at 27, 27 N. W. 2d at 739.

In Kensman v. School District, 345 Pa. 457, 29 A. 2d 17 (1942), the school district was insured against liability to passengers in the school bus. The court held that the school district was not liable and that the insurance did not have the effect of waiving the immunity.

Since the immunity does not attach to employees of the governmental units, one might expect that liability insurance protecting the employees would win judicial approval. But see Hartford Accident & Indemnity Co. v. Wainscott, 41 Ariz. 439, 449, 19 P. 2d 328, 331 (1933): “We think it is going too
presence of liability insurance may diminish the immunity that otherwise would be recognized.71

During 1954 Leflar and Kantrowitz wrote: “By far the most significant development in the state tort field in recent years is the use of liability insurance both as a substitute for and a supplement to governmental liability.”72 In 1955 legislative sessions alone, statutes were enacted or strengthened which authorized or required state agencies or subdivisions to insure against tort liability in California, Georgia, Montana, New Jersey, North Carolina, North Dakota, Oklahoma, and Oregon.73

Another indirect method of imposing liability on governmental units is through indemnifying officers and employees. Under the private law principles of agency and tort, an agent is personally liable for his own torts, whether or not they are within the scope of his employment.74 The Supreme Court has declared: “The liability of an agent for his own negligence has long been embedded in the law...[T]he principle is an ancient one and applies even to certain acts of public officers or public instrumentalities.”75 The reasons far to say that the county is authorized to insure any of its employees against liability to others for their own wrongful conduct.”


In the Thomas case, supra, the court analyzed reasons for the immunity, emphasizing protection of public funds and avoiding the diversion of moneys devoted to governmental purposes to the payment of tort judgments. Then the court concluded: “Liability insurance, to the extent that it protects the public funds, removes the reason for, and thus the immunity to, suit.” 348 Ill. App. at 575, 109 N. E. 2d at 640-41.

The court in the Bailey case, supra, reasoned: “Sovereign immunity means only that the sovereign may not be sued without its consent. Implied in that immunity is the power to consent. In this State, the carrying of liability insurance is construed as a limited consent, or waiver of the immunity.” 113 F. Supp. at 6. The opinion rests upon Tennessee cases cited by the court.

72. Leflar and Kantrowitz, supra note 63, at 1413.


74. Restatement, Agency § 343 (1933). Of course, if a principal is held liable for a tort of an agent, the principal is theoretically entitled to indemnity from the agent. Id. § 401. But the theory is seldom if ever carried into practice, for corporate policies generally oppose looking to employees for liability.

After the United States has been liable in tort under the Federal Tort Claims Act, it may not recover from the employee who committed the tort. United States v. Gilman, 347 U.S. 507 (1954).

The Federal Tort Claims Act makes a judgment against the United States a complete bar to any action by the plaintiff against the employee. 28 U. S. C. § 2676 (1952).

for holding agents liable are in many circumstances very much strengthened if the governmental principal indemnifies its agent for any such liability the agent may incur.

Federal law in general has not exploited this rather attractive idea of indemnifying officers and employees against loss. The Supreme Court made a start in that direction in 1836 when it held a collector of customs liable for damages to goods detained under instructions from the Secretary of the Treasury: "It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress . . . Some personal inconveniences may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship." The Supreme Court in 1871 abandoned the technique of the 1836 case, by holding that an officer who has "jurisdiction over the subject-matter upon which judgment is passed" is not liable even for a ministerial act "although serious errors may have been committed." Although the technique is not followed by the federal courts in tort cases, it is still followed in suits against tax collectors for tax money wrongly collected; the Supreme Court in modern times has explained the system of indemnification of tax collectors—a system based upon a statute providing for indemnification. Even a collector, however, is not liable in tort for illegal seizure and sale of property under an invalid warrant for distraint.

Indemnification of officers and employees is nevertheless important in some states. A good example is a Wisconsin statute which sets up a commission to provide "relief of law enforcement officers employed by the state who have judgments against them for damages caused while in their line of duty where they acted in good faith and who have incurred charges for counsel fees and costs in defending said action." An example at the municipal level is an

76. For torts involving ordinary negligence, the ultimate loss is borne by the government and not by the negligent employee, when liability is imposed under the Federal Tort Claims Act. Thus, in United States v. Gilman, 347 U.S. 507 (1954), the government was unanimously denied indemnity in a suit against the negligent employee.

77. Tracy v. Swartwout, 10 Pet. 80, 95, 98 (1836).
78. Erskine v. Hohnbach, 14 Wall. 613, 615 (1871).
80. Powell v. Rothensies, 183 F. 2d 774 (3d Cir. 1950).
Illinois statute applying to cities of 500,000 or more (Chicago), providing that the municipality shall indemnify a policeman for any judgment recovered against him for injury to the person or property of another while he is engaged in the performance of his duties as a policeman.\footnote{Ill. Ann. Stat. c. 24, § 1-15 (Smith-Hurd 1935).} Massachusetts has another type of statute, limited to operation of vehicles, but providing instead of mere indemnification that the attorney general shall defend the action against the officer or employee and that the damages shall be paid from the state treasury; liability is limited to $5,000 for death of one person and $1,000 on account of damage to property, and approval of the governor and council is required.\footnote{Mass. Ann. Laws c. 12, § 3B (1952).} Various kinds of arrangements for indemnification of state and local officers and employees seem to be increasingly common.

\section{§5. Bringing Property Damage Within Eminent Domain or Contract Concepts}

Tort claims involving adverse effects upon property may often be brought within federal and state constitutional provisions that property may not be taken without just compensation. A good example is \textit{United States v. Causby},\footnote{328 U. S. 256 (1946).} in which damages were collected by the owner of a chicken farm on account of low flying of military planes. The Court declared that “the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it . . . The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.”\footnote{Id. at 264-65.} The Court held that the claim was “founded upon the Constitution” and therefore within the jurisdiction of the Court of Claims to hear and determine.

\footnote{82. Ill. Ann. Stat. c. 24, § 1-15 (Smith-Hurd 1935).}
\footnote{83. Mass. Ann. Laws c. 12, § 3B (1952).}
\footnote{84. 328 U. S. 256 (1946).}
\footnote{85. \textit{Id.} at 264-65.}
The potentialities of the doctrine that affecting use of property may be a taking are considerable. In *Idaho Mines Corp. v. United States*, an order of the War Production Board closing a mine was held to be a taking of property supporting an action in the Court of Claims. In holding that taking of occupancy of a warehouse is within the fifth amendment, the Supreme Court asserted: "The constitutional provision is addressed to every sort of interest the citizen may possess." The permanent flooding of land may be a taking under the fifth amendment, and the intermittent flooding of land may be the taking of an easement for intermittent flooding.

Cases are often lost because the practitioners presenting them fail to see the theory of liability that could win. Suits against the government should not necessarily be brought under the Federal Tort Claims Act. A good example is *Thomas v. United States*. The plaintiffs alleged that members of the Corps of Engineers of the War Department "carelessly and negligently planned . . . the said revetment . . . to deflect and direct the flow of said current against and upon lands of the plaintiffs . . ." Damages were sought on the theory of negligence under the Tort Claims Act, and the court held that the action was within the exception of "discretionary" functions. If the case had been brought on the theory of a taking, apart from the Tort Claims Act, the plaintiffs probably would have recovered.

A temporary taking may be deemed a taking within the meaning of the fifth amendment, supporting an action in the Court of Claims. In *United States v. Pewee Coal Co.*, the Court so held, where the government took possession of a mine because a strike or stoppage had occurred or was threatened in most of the nation's mines. The Court divided three ways on the problem of damages, but was unanimous in holding the fifth amendment applicable.

In many or perhaps most states, tort claims involving damage to property may often be brought within constitutional and statutory

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89. 81 F. Supp. 881 (W.D. Mo. 1949). In *United States v. Ure*, 225 F. 2d 709 (9th Cir. 1955), the plaintiff sought damages under the Federal Tort Claims Act for the flooding of land, and lost for failure to prove negligence.
91. 341 U. S. 114 (1951).
arrangements for providing compensation for the taking of property. The range of possibility of this idea is shown by an extreme Louisiana decision, 92 in which the State Live Stock Board was sued by an owner of cattle which were killed, lost, or injured as a result of the Board’s action in dipping them in an anti-tick program. The cattle which were killed by swallowing the dipping solution were covered explicitly by the statutory provision, but the others were covered by the Louisiana constitutional provision conferring the right of adequate compensation for the taking of private property for public purposes. The court declared that a state agency which has taken or damaged private property for public purposes may be sued for compensation, and that the constitutional provision is self-executing. Another good illustration is a Vermont case 93 in which dynamiting done by a school district diverted a spring on which the plaintiff relied for water supply; an action founded upon alleged negligence might have failed on the theory that the activity was governmental, but the plaintiff succeeded on the theory property had been taken within the meaning of the constitutional provision for compensation for property taken for a public use. In Iowa an intermittent overflow of the plaintiff’s land by reason of highway construction conducted by the county is a taking which supports an action against the county for compensation. 94

Some state constitutions provide compensation not only for a taking but also for damage to property. The Nebraska constitution is an example: “The property of no person shall be taken or damaged for public use without just compensation therefor.” 95 This provision is interpreted to be self-executing, and it is “settled that one whose property is damaged without actual taking is entitled to just compensation.” 96 But under a similar provision of the Texas Constitution, the Texas Highway Department is not liable for damage done by a fire set by the Department’s employees to burn the grass along the shoulders of the highway, even though the Legislature has specifically granted permission to bring the suit. In so holding the Texas Supreme Court generalized: “If the state were suable and liable for every tortious act of its agents, servants, and employees committed in the performance of their official duties, there would

92. Pelt v. Louisiana State Live Stock Sanitary Board, 178 So. 644 (La. App. 1938). The case is interesting from the standpoint of the oft-recited proposition that one cannot sue the state without its consent. When property is deemed taken for public use, one can sue the state without its consent.
result a serious impairment of the public service and the necessary administrative functions of government would be hampered. A sovereign state ought not to be inconvenienced by the needs of fairness and simple justice!

Even so, the Texas decision is probably in accord with most state decisions over the nation, to the extent that the court held that the state is immune from liability for property damage caused by negligence, as distinguished from property damage caused by planned activity.

The contrast is a queer one between liability for harm to property under the eminent domain provisions of state constitutions and liability for harm to persons or property under the Federal Tort Claims Act. To a considerable extent, where the state is not liable under eminent domain, the federal government is liable under the Tort Claims Act, and where the federal government is not liable under the Tort Claims Act, the state is liable under eminent domain. Could such a result be based upon rational planning of a system?

Tort claims may sometimes be subsumed under contract liability in circumstances in which the governmental unit is liable on its express or implied contracts but not liable for its torts. A federal example before enactment of the Federal Tort Claims Act is the Keifer case, where a government corporation was held liable, despite the absence of a "sue and be sued" clause in its charter, for negligence in feeding and watering livestock. The Court acknowledged that "the common law fiction of waiving the tort and suing in assumpsit cannot be used as an evasion of the limited liability created by the Court of Claims Acts," but it declared that "where the wrong really derives from an undertaking, to stand on the undertaking and to disregard the tort is not to invoke a fictive agreement."

The overlap between contract and tort is a substantial one, and state courts often find that a suit may succeed as a contract action, even though it would fail as a tort action. The Michigan court, for instance, has found: "Although the facts developed at the trial might have justified a tort action, the claim may still properly be for damages for breach of the contract."

98. See the collection of cases in Annot., 2 A. L. R. 2d 677 (1948).
100. Id. at 395.

Judicial responsibility for sovereign irresponsibility in tort goes far beyond the original invention and elaboration of the immunity doctrine. Even when legislative bodies become convinced that tort plaintiffs should be allowed to sue the sovereign, and even when clear and unequivocal statutes are enacted authorizing such suits, the courts have characteristically nullified such legislation by interpreting it to mean that sovereign irresponsibility must continue!

An outstanding example is a Michigan case, *Manion v. State.* 102 A vessel owned and operated by Michigan collided with another vessel and injured the plaintiff. The statute set up a court of claims and gave it jurisdiction: "To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments . . ." But another section of the statute provided: "This act shall in no manner be construed as enlarging the present liabilities of the state and any of its departments . . ." The dissenting justices thought that the state had waived its immunity from suit and that all defenses were available except sovereign immunity. But the majority declared: "There is a distinction between sovereign immunity from suit and sovereign immunity from liability. The latter exists when the sovereign is engaged in a governmental function. The former may be waived without a waiver of the latter." 103 The court held that the statute waived immunity from suit but not immunity from liability.

California furnishes another good example. The statute provides: "Any person who has a claim against the State (1) on express contract, (2) for negligence, or (3) for the taking or damaging of private property for public use . . . shall present the claim to the board . . . If the claim is rejected or disallowed by the board, the claimant may bring an action against the State on the claim and prosecute it to final judgment . . ." 104 Another section provides that the Controller shall draw his warrant for the payment of judgments. 105 The California courts early interpreted this statute to mean that the state does not waive its immunity from tort liability. 106 The California Supreme Court recently explained: "Thus there was adopted in this state the doctrine that state consent to be sued for

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103. 303 Mich. at 19, 5 N. W. 2d at 528.
105. Id. § 16053, applying to judgments other than claims under a provision of the Vehicle Code.
106. The decisions of 1894 and 1899 are summarized in Talley v. Northern San Diego County Hospital Dist., 41 Cal. 2d 33, 37, 257 P. 2d 22, 26 (1953).
negligence did not waive sovereign immunity from liability for tort." 107 What an appalling proposition! The immunity continues even when the state expressly consents to be sued.

Not content with that extreme position, the California Supreme Court has gone one step further, by applying the immunity to a local hospital district, even though the governing statute provided that "Each hospital district shall have and exercise the following powers: . . . To sue and be sued in all courts and places and in all actions and proceedings whatever." In view of the fact that the traditional doctrine is that the sovereign may not be sued without consent, and in view of the explicit and clear enactment that the hospital district could be sued, the court's statement is indeed a strange one that "Whether the doctrine of sovereign immunity should be modified in this state is a legislative question." 108 A dissenting justice vehemently protested against "the archaic, outmoded, unfair and discriminatory doctrine of governmental immunity blindly followed by the majority . . . ." 109

Commentators have pointed out that "enactment of statutes authorizing suits against the state or its subdivisions by all persons having claims against them has very little bearing upon tort liability or responsibility. In at least seventeen states there are or have been such enactments which have been interpreted as merely permitting the filing of suits or claims, but as having no effect upon the substantive right to collect claims." 110 In some of the seventeen states, however, the statutes rather clearly were not intended to alter sovereign immunity. 111

Another form of statute specifically provides that municipalities "shall be liable." Such a statute, believe it or not, is sometimes read

109. Ibid.
111. E.g., the Massachusetts statute seems to go to jurisdiction and not to sovereign immunity or to consent to be sued: "The superior court . . . shall have jurisdiction of all claims at law or in equity against the commonwealth." Mass. Ann. Laws c. 258, § 1 (1952). The explanation of the occasion for the enactment, in Murdock Parlor Grate Co. v. Commonwealth, 152 Mass. 28, 24 N. E. 854 (1939) seems rather persuasive that the intent was not a general waiver of sovereign immunity.
to mean that a municipality shall not be liable. An outstanding example is a decision by the California Supreme Court. The statute provided:

"Counties, municipalities, and school districts shall be liable for injuries to persons and property resulting from dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing . . . board . . . or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition . . . and failed or neglected, for a reasonable time . . . to remedy such condition . . . ."

Plaintiffs alleged that the city officials failed to maintain certain fire-fighting equipment in condition for effective use, that the city officials knew of the condition and failed to correct it, and that as a result they suffered damages from a fire. The court held that a demurrer was properly sustained, because: "Upon analysis, it clearly appears that the gravamen of plaintiffs' complaint is the failure of a governmental function. Such failure involves the denial of a benefit owing to the community as a whole, but it does not constitute a wrong or injury to a member thereof so as to give rise to a right of individual redress, Restatement of Torts, §288, which right must be predicated upon the violation of a duty of care owed to the injured party."

The court quoted from American Jurisprudence the proposition that a municipality is not liable for negligence in failing to extinguish a fire. The court seemingly was indifferent to the simple fact that neither the Restatement nor the quotation from American Jurisprudence was written in the light of a statute specifically providing for liability. The court further pointed out that a private water company would not be liable in New York in the same circumstances, and declared that "it does not seem reasonable to construe the Public Liability Act as intended to impose a greater liability on the city than would prevail against an individual or a private corporation charged with negligence in the administration of a water supply."

113. Id. 489, 240 P. 2d at 982.
114. H. R. Moch Co. v. Rensselaer Water Co., 247 N. Y. 160, 159 N. E. 896 (1928). A dissenting opinion in the California case pointed out that the New York decision has been adversely criticized by Seavey, Cardozo and the Law of Torts, 52 Harv. L. Rev. 372, 392 (1939): "Cardozo speaks of the failure of the water company as if it were merely a failure to confer a benefit upon the injured household, and in denying liability relies upon the recognized principle that one is under no duty to confer a benefit upon another. Of course, the plaintiff did not complain of the failure to receive a benefit. His real ground was that, because of reliance upon the undertaking of the water company to maintain an adequate pressure at the hydrants, the city had failed to make other provision for the protection of its citizens, and the plaintiff, among others, being lulled into a false sense of security, had failed individually to take measures to protect his property."
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of its fire protection.”

A dissenting opinion emphasized that the statute provided that "cities shall be liable for any injuries to any person or property resulting from the dangerous or defective condition of its property or works."

Surely when a court construes away such an unequivocal statutory provision, the judicial responsibility for governmental irresponsibility is very grave indeed.

§7. THE GOVERNMENTAL-PROPRIETARY DISTINCTION

The central idea in the law of municipal tort liability is that a municipality is liable for its torts in the exercise of proprietary but not governmental functions. California applies the distinction to liability of the state; except for the patchwork of legislative changes, other states generally are immune from liability whether the activity is governmental or proprietary. To the extent that the governmental-proprietary distinction produces municipal responsibility that might not otherwise exist, the distinction makes for justice; liability for some municipal torts is to be preferred to liability for no municipal torts. One might easily assume, as the Supreme Court in a formal opinion recently assumed, that the distinction reflects an attempt to escape from sovereign immunity, but the historical fact is that before the judicial invention of the distinction, liability was usually imposed upon municipalities without regard to the distinction.

115. 38 Cal. 2d at 491, 240 P. 2d at 983.
116. Id. at 493, 240 P. 2d at 984. Two of the seven justices dissented.
117. The leading case is Green v. State, 73 Cal. 29, 14 Pac. 610 (1887). State liability for proprietary functions has been recognized in Guide v. State, 41 Cal. 2d 625, 262 P. 2d 3 (1953) (display at state fair); People v. Superior Court, 29 Cal. 2d 754, 178 P. 2d 1 (1947) (state-operated railroad).
118. The Court said in Indian Towing Co. v. United States, 350 U. S. 61, 65 (1955): "The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity."

The outstanding case initiating the distinction is Bailey v. City of New York, 3 Hill 531 (N.Y. 1842). For a sample of the older law, see Hoee v. Alexandria, 12 Fed. Cas. 461, Case No. 6,666 (Cir. Ct. D. C. 1802), assuming municipal liability for filling up and raising the street, so as to obstruct the doors and windows of plaintiffs' warehouse.

For further citations in support of the statement that "In the earliest reported American cases noticed it was simply assumed without argument, as a matter of course, that a [municipal] corporation was subject to action for tort," see Barnett, The Foundations of the Distinction between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations, 16 Ore. L. Rev. 250, 251 (1937). See also the several dozen old cases, id. at 259 n. 35, including Goodloe v. Cincinnati, 4 Ohio 500, 513-14 (1831): "When the corporation of a town grade the streets, the object is the benefit of the whole town. If an individual is injured, it is right he should have redress, against all upon whose account the injury was perpetrated."
The distinction is probably one of the most unsatisfactory known to the law, for it has caused confusion not only among the various jurisdictions but almost always within each jurisdiction. The Supreme Court of the United States declared in 1937:

"There probably is no topic of the law in respect of which the decisions of the state courts are in greater conflict and confusion than that which deals with the differentiation between the governmental and corporate powers of municipal corporations. This condition of conflict and confusion is confined in the main to decisions relating to liability in tort for the negligence of officers and agents of the municipality. In that field, no definite rule can be extracted from the decisions." 119

In 1955 a majority of five justices spoke of "the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations. 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 when courts try to apply a rule of law that is inherently unsound." 120

An especially good illustration of the distinction in action is Hoogard v. City of Richmond, 121 in which the Virginia court proceeded with unusual care and thoroughness. The plaintiff was injured when her hand struck a barbed-wire fence while in a swimming pool owned and operated by the city of Richmond. The court announced at the outset:

"The general law, as interpreted by the courts in all but two states (South Carolina and Florida), 122 is that a municipality is clothed with two-fold functions; one governmental, and the other private or proprietary. In the performance of a governmental function, the municipality acts as an agency of the state.

120. Indian Towing Co. v. United States, 350 U. S. 61, 65 (1955). The four dissenting justices, however, would have adopted the distinction under the Federal Tort Claims Act, as the majority of the Court had done in Dalehite v. United States, 346 U. S. 15, 28 (1953), when the Court said that "it was not contemplated [by the Tort Claims Act] that the Government should be subject to liability arising from acts of a governmental nature or function."
121. 172 Va. 145, 200 S. E. 610 (1939).
122. Later in the opinion the court said that South Carolina "recognized the confusion in its own jurisdiction and the confusion in other jurisdictions, and finally held that a municipality, in the absence of statute, was not liable for tort in any event." The court cited Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228 (1952). For a sample of the present South Carolina law under a special statute changing the result of the Irvine case, see Hicks v. City of Columbia, 228 S. C. 553, 83 S. E. 2d 199 (1954).

As to Florida the court cited cases to show full rejection of the immunity, including Wolfe v. Miami, 103 Fla. 774, 134 So. 539, 137 So. 892 (1931). Florida has later recognized the immunity; a city is not liable for the third degree administered by police officers, City of Miami v. Bethel. ... Fla. ..., 65 So. 2d 34 (1953). The concurring and dissenting opinions in this case are especially interesting.
to enable it to better govern that portion of its people residing with its corporate limits. . . . There is granted to a municipal corporation, in its corporate and proprietary character, privileges and powers to be exercised for its private advantage. In the performance of these duties the general public may derive a common benefit, but they are granted and assumed primarily for the benefit of the corporation."\textsuperscript{123}

This statement is about as clear a guide as any. The basic reason for the confusion can quickly be detected if this guide is used to determine whether operation of a swimming pool is governmental or proprietary.

The court accurately said: "While this distinction is generally recognized, the difficulty arises in the application of the rule to various municipal activities."\textsuperscript{124} The court, very naturally, turned away from an attempt to extract its conclusion from the guide it had laid down; instead, it made a survey of the previous Virginia cases, attempting to find the conclusion by analogy. It cited the various Virginia decisions for the propositions that a municipality acts governmental in operating a hospital, regulating the use of sidewalks and streets, maintaining a jail, maintaining a police force, operating the Eastern State Hospital "for the protection of society, and for the promotion of the best interests of the unfortunate citizens," removing garbage, and establishing a park and playground. Then the court cited the cases holding that a municipality acts in its proprietary capacity in construction, repair, improvement or maintenance of its streets and sidewalks; in the operation of a wharf; in changing the grade of its street level; in controlling surface water; and in conducting public utilities, such as water, sewerage systems, gas, and light.

Without making clear, except by the citations, where the line was drawn, the court observed: "This general line of demarcation between immunity and liability of a municipal corporation has been followed with more or less consistency in this jurisdiction for more than a century."\textsuperscript{125}

The court quoted from a Massachusetts opinion: "The underlying test is whether the act is for the common good of all without the element of special corporate benefit, or pecuniary profit. If it is, there is no liability; if it is not, there may be liability."\textsuperscript{126} No wonder this distinction causes confused law! If this "underlying test" is applied to the cases the court discussed, then garbage re-

\textsuperscript{123} 172 Va. at 147, 200 S. E. at 611.
\textsuperscript{124} Id. at 148, 200 S. E. at 611.
\textsuperscript{125} Id. at 150, 200 S. E. at 612.
\textsuperscript{126} Bolster v. City of Lawrence, 225 Mass. 387, 390, 114 N. E. 722, 724 (1917).
removal is "for the common good of all," but sewage removal is not; a hospital is "for the common good of all," but a waterworks is not. How could the Virginia court get any guidance from this test and these precedents on the question whether the swimming pool was "for the common good of all"?

After demonstrating its own earlier inconsistency, the Virginia court declared: "These quotations...illustrate the difficulty of basing the distinction of the two functions on any logical reasoning. The same inconsistent and illogical holding of courts from other jurisdictions is apparent from a study of the cases."127 The court discussed the cases, including an opinion of the Supreme Court that municipalities are not liable for negligence "in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities," but they are liable when they "build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited."128

Having developed this background, the Virginia court came to grips with its problem. Is a swimming pool governmental or proprietary? Is it like a hospital and "for the good of all," or is it like a waterworks and for "special corporate benefit?"

The only possibly correct answer to such a question as this is that the question is unanswerable — but the court unfortunately thought it had to answer. One might suppose that the closet analogy is to the park or playground, but the court found its analogy in the waterworks: "Furnishing water to the inhabitants of a municipality for domestic purposes, and furnishing water to inhabitants to be used for the purpose of public swimming and bathing, are closely allied activities. Each activity tends to promote the health and happiness of its inhabitants."129 Then is the swimming pool governmental or proprietary? The swimming pool promotes health and happiness, and what is "for the common good of all" is governmental. But the waterworks is proprietary.

The court held the swimming pool proprietary because operating

127. 172 Va. at 151, 200 S. E. at 613.
129. 172 Va. at 156, 200 S. E. at 615.
the pool is like furnishing water for domestic purposes and "To hold a municipality liable for tort when engaged in one of these activities, and immune from liability when engaged in the other, is obviously unsound." Two of the seven justices dissented, asserting that "the collection of garbage, being for the common good and without the element of pecuniary profit, is a governmental function. To my mind, the operation of free parks or playgrounds and swimming pools for the recreation and upbuilding of the health of our children is just as essential to the common good as the collection of garbage." If the test is, as the dissenters said, what is "essential to the common good," and if a swimming pool is essential to the common good, then all of the functions mentioned in the majority opinion are governmental—hospitals, jails, police, playgrounds, streets, waterworks, sewerage systems, gas and light facilities.

But if, as the Virginia court had previously held in various cases, streets, sidewalks, and sewerage systems are proprietary and therefore "of special corporate benefit," then surely parks and playgrounds, including swimming pools, must also be proprietary.

This single Virginia case is a fair sample of the utterly unsatisfactory distinction. The confusion reflected in the single opinion is multiplied many times by the plurality of cases in each state and by the plurality of states. Collections of the cases are readily available. So many law review articles have been written on the subject that one of the most useful articles is a survey of the literature.

130. *Id.* at 156, 200 S. E. at 615.
131. *Id.* at 159, 200 S. E. at 616.
132. *E.g.,* annotations on municipal liability for negligence in insect or vermin eradication, 25 A. L. R. 2d 1057 (1952); hospitals, 25 A. L. R. 2d 203 (1952); garage for maintenance and repair of municipal vehicles, 26 A. L. R. 2d 944 (1952); parking meters, 33 A. L. R. 2d 761 (1954); parking facilities, 8 A. L. R. 2d 397 (1949); flood protection measures, 5 A. L. R. 2d 84 (1949); cleaning and sprinkling streets, 156 A. L. R. 692 (1955); inspection of motor vehicles, 133 A. L. R. 1216 (1941); poor relief activities, 134 A. L. R. 763 (1941); municipal immunity, 120 A. L. R. 1376 (1939).
The survey shows that police and fire departments are almost always classed as governmental, and furnishing of water, gas, and electricity almost always proprietary. Sewers and garbage disposal are mixed and confused, and what is called “the undoubted weight of authority” classes streets, sidewalks and bridges as proprietary. But liability is generally denied for negligent operation of traffic signals. “A numerical majority of the cases” classify parks, swimming pools and recreation centers as governmental, but the later cases may be the other way. Education is generally governmental, and municipal airports are proprietary but legislatures are tending to curb liability for operation of airports, even though the broader tendency of legislation is said to be away from municipal immunity.

The absurdity of the classification is increased when proprietary or governmental characteristics of an activity are mixed. As one writer has observed, one state has both governmental electricity and proprietary electricity, and another state has both governmental manholes and proprietary manholes. But what if the same manhole serves both governmental purposes and proprietary purposes? That question arose concerning an elevator in a City-County Building which carried people to governmental and proprietary and mixed offices; the court despaired of its task of trying to “unscramble the mixed relations” and it held: “The fact that some of the activities centered in this building are exclusively of a purely governmental nature will not affect liability, when they are joined with business activities.” What a preposterous problem!

Municipal immunity from tort liability may possibly be shrinking as time goes on. The Texas Supreme Court has cited cases to support its statement that “This doctrine of immunity has been often criticized and questioned . . . and the present tendency of the courts

134. Repko, American Legal Commentary on the Doctrines of Municipal Tort Liability, 9 Law & Contemp. Prob. 214 (1942). See also the various other articles in the symposium in the same issue.
136. According to an old Michigan case, negligence in maintaining wires for lighting homes makes the city liable, but not negligence in maintaining wires for lighting streets and public buildings. Hodgins v. Bay City, 156 Mich. 687, 121 N. W. 274 (1909).
139. Compare Fordham, Local Government Law 1022 (1949): “For many years the tendency has been to constrict the area of immunity [of municipal corporations].”
is to restrict this doctrine of non-liability and construe it strictly against the city." Exceptions to the basic doctrine may signify some movement away from immunity. Thus, even if the activity is governmental, a city may be liable for nuisance. For instance, a city was liable for injuries caused by the fall of an ornamental cannon in a public park; the court quoted from an earlier case: "A municipality, while not liable for negligence of its agents and employees engaged in the exercise of its governmental functions, may be liable for a nuisance which they create."

Such exceptions and restrictions may be all to the good, but nothing short of complete excision of the governmental-proprietary distinction from the law can be wholly satisfactory.

§ 8. THE FEDERAL TORT CLAIMS ACT AND ITS EXCEPTIONS

The federal government has long been moving toward sovereign responsibility for tort, and the longest step of all was taken in the Federal Tort Claims Act of 1946, but a good bit of the distance to full responsibility is yet to be traveled, as the various exceptions to the Tort Claims Act make clear.

The key affirmative provision is: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior


A federal district court in Alaska, in holding a city liable for negligence in operating a hospital, declared somewhat optimistically in a good opinion: "Immunity from suit is in disfavor in the United States because it is an anomaly in a republic and because of the general recognition of the fact that it is unjust to make the innocent victims of negligence bear the entire loss rather than to distribute the burden among the members of the general public." Tuengel v. City of Sitka, 118 F. Supp. 399, 400 (D. Alaska 1954).


143. See the account of the piecemeal legislation in § 3 above.

144. The original statute is 60 Stat. 842 (1946). To begin with this reference and to find the statute in the code is bewildering, because the 1948 codification has distributed it rather widely. The Act is 28 U. S. C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-78, 2680 (1952).

The Act as it now reads provides that district courts "shall have exclusive jurisdiction of civil actions on claims against the United States...." 28 U. S. C. 1346(b) (1952). The original Act, 60 Stat. 843 (1946), provided in § 140 that the district courts "shall have exclusive jurisdiction to hear, determine, and render judgment on any claims against the United States...." The Court pointed out this change in observing that changes in language were made in the codification, and the Court said: "We attribute to this change of language no substantive change of law." Feres v. United States, 340 U. S. 135, 140 (1950).
to judgment or for punitive damages.”115 As we shall see, one of the large problems of interpretation is whether the government can be liable for governmental activities having no private counterpart, or whether the words “to the same extent as a private individual under like circumstances” limit substantive liability.

The key provision is supplemented with a provision conferring jurisdiction upon the district courts of civil actions on claims against the United States “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”140

This provision takes care of the great bulk of tort claims resulting from the operation of government vehicles. But plaintiffs hurt by government vehicles are not as well protected as plaintiffs hurt by corporations’ vehicles, for if the drivers are outside the scope of employment, the government usually is not liable, whereas in at least ten jurisdictions employers are liable if the vehicle is used with the employer’s consent,141 and the typical “omnibus clause” in a private and commercial accident liability policy insures the employee who drives with the consent of the employer.

The Act contains thirteen explicit exceptions,118 two of which are of major importance. The limited or minor exceptions relate to postal matter, collection of taxes and customs duties, admiralty, Trading with the Enemy Act, quarantines, vessels passing through the Panama Canal or in Canal Zone waters, fiscal operations of the Treasury or regulation of the monetary system, combatant activities during wartime, claims arising in a foreign country, activities of

148. All the exceptions are in 28 U. S. C. § 2680 (1952).
the Tennessee Valley Authority, and activities of the Panama Railroad Company. Some of these exceptions involve claims for which the government is otherwise liable.\textsuperscript{149} Others, such as claims for damages caused by quarantines, are hard to explain.\textsuperscript{150}

One of the major exceptions is for "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."\textsuperscript{151} Although statements have been often made that the Act does not subject the government to liability for willful or deliberate torts, the statements are inaccurate, for the list does not include such important torts as trespass and conversion. An illegal search and seizure by federal agents may involve both trespass and conversion, for which the government may be liable.\textsuperscript{152}

The government may be liable for the willful tort of invasion of privacy when federal agents unlawfully tap wires. The government may be liable for violation of a copyright.\textsuperscript{153} Plaintiffs' attorneys, with a little imagination, may discover a good many willful torts that are outside the exceptions. A claimant in Illinois alleged that he had been convicted of rape because the state's attorney had sup-

\textsuperscript{149} The exception for loss of mail should be read in the light of a provision for liability with respect to registered mail. 29 Stat. 559 (1897), 39 U. S. C. § 381 (1952). The exception with respect to admiralty is limited to claims for which remedies are otherwise provided. The exception concerning the Trading with the Enemy Act is at least to some extent offset by other remedies. The Panama Canal exception is offset by provisions of the Canal Zone Code allowing suit against the Governor of the Canal Zone.


According to a district court, the TVA was exempted from the Act "at its own request on the ground that it was already subject to suit and certain of the procedural aspects of the Act would be burdensome." Atchley v. TVA, 69 F. Supp. 952, 955 (N.D. Ala. 1947). The TVA has been held immune from liability for damage done by setting off explosives, on the theory that the acts were "in the performance of a discretionary governmental duty." Pacific Nat. Fire Ins. Co. v. TVA, 69 F. Supp. 978 (W.D. Va. 1950).

\textsuperscript{150} In its opinion in Dalehite v. United States, 346 U. S. 15, 44 (1953). the Court said: "To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease." The difficulty the Court evidently feels is in finding an affirmative legal duty. But if government agents act affirmatively and negligently inflict injury, no reason is apparent for not imposing liability—except the express provision of the Act.

\textsuperscript{151} 28 U. S. C. § 2680(h) (1952).

\textsuperscript{152} In Hatahley v. United States, 351 U. S. 173 (1956), the government was held liable for the deliberate and wrongful act of a range manager in destroying horses of the Indian plaintiffs. The Court pointed out that the Act provides for liability for "wrongful" as well as "negligent" acts, and declared that the acts were "wrongful trespasses not involving discretion." 351 U. S. 181.

\textsuperscript{153} See O'Donoghue, Some Possible New Fields in a Narrowing Act, 7 Vand. L. Rev. 180 (1954), an especially provocative article.
pressed evidence and had introduced false testimony; although the
Illinois Court of Claims denied the claim, the Federal Tort Claims
Act does not necessarily bar such a claim, for the tort alleged is
neither false arrest nor false imprisonment, but false conviction.
New York State has been held liable for unauthorized use of a pic-
ture of the plaintiff in advertising a state-operated ski resort; such
a tort is apparently not within the exceptions to the Tort Claims
Act.\footnote{5}

The legislative history contains a thoroughly unpersuasive
reason for excepting the specified willful torts. These torts were
called “a type of torts which would be difficult to make a defense
against, and which are easily exaggerated. For that reason it seemed
to those who framed this bill that it would be safe to exclude those
types of torts, and those should be settled on the basis of private
acts.”\footnote{5} Negligent acts are as hard to defend and are as easily ex-
aggerated. Juries are not used in any claims against the government.
A remark of commentators about the excepted willful torts seems
fully justified: “No persuasive reason has even been advanced for
their having been excluded from the reach of the Tort Claims
Act.”\footnote{157}

The provision concerning the specified willful torts exempts the
government not only from liability for committing the specified
torts but it exempts the government from liability for “Any claim
arising out of” the specified torts. A reasonable interpretation of
this may be seen in Duenges \textit{v.} United States.\footnote{158} The plaintiff, after
honorable discharge from the Army, was arrested and imprisoned
for desertion. In his suit he alleged that the government negligently
maintained its records, thereby injuring him. The court held that

1952).
156. Testimony of Alexander Holtzoff, representing the Department of
Justice, before Subcommittee of Senate Committee on the Judiciary, 76th
157. Gellhorn and Lauer, \textit{Federal Liability for Personal and Property

Another such case is Moos \textit{v.} United States, 118 F. Supp. 275 (D. Minn.
1954). The surgeon in the Veterans' Hospital operated on the wrong leg,
thereby delaying the needed operation a month. The court held the
government not liable because the action "arose out of" assault and battery.

In Morton \textit{v.} United States, 228 F. 2d 431 (D.C. Cir. 1955), the allega-
tion was that various high officers, including the Attorney General, con-
spired to hold plaintiff as a mental defective. The court denied relief under
the "discretionary functions" exception, and said that to the extent that the
complaint otherwise sounds in tort, it came within the exception of arising
out of false imprisonment. The plaintiff would have had a better chance of
winning by alleging negligence, not conspiracy, not willful action.
the claim "arises out of false imprisonment and false arrest" within the meaning of the Act and therefore the government was immune. The case shows the double need for amending the Act.

The remaining exception, far the most important, goes to the heart of the problem of government tort liability: "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." The principal difficulties of interpretation involve the last part of this exception, in combination with the provision for liability "in the same manner and to the same extent as a private individual under like circumstances." We shall explore these difficulties in the ensuing sections.

§9. The Dalehite Case

The two germinal cases are Dalehite v. United States and Indian Towing Co. v. United States. The whole body of law affected by these cases is necessarily somewhat unsteady, not only because Dalehite was four to three and Indian Towing five to four, but also because the two cases are to some extent inconsistent with each other. Many lower court decisions influenced by the earlier Dalehite case are questionable authorities to the extent that Indian Towing is inconsistent with Dalehite.

The Dalehite case held the government not liable for the Texas City disaster, which killed 560 people, injured 3,000, and caused property damage running into many millions of dollars. Claims were


Feres v. United States, 340 U. S. 135 (1950) is not a germinal case in its holding that injuries to military personnel "incident to the service" are not actionable because Congress has provided "systems of simple, certain, and uniform compensation for injuries or death of those in armed services," and because "We do not think that Congress, in drafting this Act, created a new cause of action dependent on Local law for service-connected injuries or death due to negligence." More general language in the Feres opinion had impact on other cases, but it is superseded by the holding in the Indian Towing case.


A statute now provides that workmen's compensation for federal employees "shall be exclusive, and in place, of all other liability of the United States...." 58 Stat. 312 (1944), 5 U. S. C. § 757(b) (1952).
presented aggregating two hundred million dollars. A ship loaded with fertilizer grade ammonium nitrate exploded in the harbor. The plaintiffs claimed negligence "substantially on the part of the entire body of federal officials and employees involved in a program of production of the material," which was being produced for foreign use as a part of a foreign aid program. The district court made findings of government negligence in planning, in manufacturing, in supervising storage, and in fire fighting. The Court held that even if the findings were correct, "it is our judgment that they do not establish a case within the Act." The Court reiterated: "One only need read § 2680 [the thirteen exceptions] in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions." These two statements seem to involve adoption of the governmental-proprietary distinction which has long confused the law of municipal liability. But the two statements are supported neither by the words of § 2680 nor by the legislative history. As we shall see, the Court took

162. 346 U. S. at 18.
163. Id. at 24.
164. Id. at 28.
165. Id. at 32.
166. See discussion of that distinction in § 7 above.
167. The concept of "governmental functions" is drawn from the law of municipal corporations, not from § 2680, which does not use the concept. Instead, § 2680 uses the concept of "a discretionary function."
The court said of § 2680(a): "It excepts acts of discretion in the performance of governmental functions or duty 'whether or not the discretion involved be abused.'" 346 U. S. at 33. The idea of "performance of governmental functions" is not expressed by § 2680(a); that provision excepts "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."
The term "governmental" and the term "discretionary" are far from synonymous, for the term "governmental" in the tort context signifies the concept used in the law of municipal liability.

168. See the Court's discussion of the legislative history, 346 U. S. at 26-27. Nothing the Court sets out says anything about "acts of a governmental nature or function." The principal ideas are that the government should not be liable for "a legally authorized activity," merely because "the same conduct by a private individual would be tortious," and that it was not "intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort."

What is perhaps the strongest support in the legislative history for the
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precisely the opposite position in the Indian Towing case.\textsuperscript{169}

The district court had found negligence in manufacture in four-respects — bagging temperature (cooling inside the bag is slow), type of bagging (paper), labeling (no warning of explosive character), and PRP coating (each granule covered with mixture of paraffin, rosin, and petrolatum, to insure against water absorption). The Supreme Court disposed of these findings by saying that the acts were “under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department.”\textsuperscript{170}

The Court’s reason for nonliability in this aspect of the case was: “The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government’s fertilizer program.”\textsuperscript{171} This pronouncement is especially important because it is substantially uncontradicted by the dissenting opinion and untouched by the Indian Towing case. The dissenting justices agreed with immunity at a high planning level when they said: “The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.”\textsuperscript{172}

The concept of “a planning rather than operational level” is important and may be destined to become a landmark in law development.

Court’s conclusion was not mentioned in the opinion. A statement was made in the hearings that the Act would “place the United States, in respect of torts committed by its agents, upon the same footing as a private corporate employer, with certain limitations required for the protection of important governmental functions.”\textsuperscript{173} But even this statement falls far short of an adoption of the governmental-proprietary distinction.

169. See the discussion below in § 10. The dissenting justices in the Indian Towing case asserted the position here taken by the majority.


171. Id. at 42.

172. Id. at 58. Later the dissenters said: “The Government’s negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper.”

\textsuperscript{173} Hearings before Committee on the Judiciary of the House on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 30 (1942).
Much less satisfactory was the Court’s disposition of the finding that the Coast Guard and other agencies were negligent in failing to prevent the fire by regulating storage or loading of the fertilizer in some different fashion. The Court somewhat summarily announced, on the basis of cases cited, that courts traditionally refuse to question judgments on which regulations rest.\textsuperscript{173}

The disposition of the finding of negligence in fighting the fire is both intrinsically unpersuasive and inconsistent with the Court’s later opinion in the \textit{Indian Towing} case. The Court asserted: “The Act did not create new causes of action where none existed before . . . It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. . . . [I]n fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire.”\textsuperscript{174} This language is highly vulnerable. The Court seems to be saying that it will not give effect to the statute because the common law is contrary to the statute. The statute provides that “The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .” In the sense in which the words are used in the \textit{Dalehite} opinion, the statute clearly did create new causes of action where none existed before. Before the enactment, one hurt by the negligence of the driver of a government vehicle had no cause of action against the government, but under the Act he does. Yet one could say equally of government vehicles, as the Court says of fire fighting, that if anything was doctrinally sanctified in the law of torts it was the immunity of government for injuries due to operation of government vehicles. What has been sanctified, both with respect to fire fighting and with respect to driving government

\textsuperscript{173} See the discussion below in § 17 on Some Musings about Long-Range Objectives.

\textsuperscript{174} 346 U. S. at 43-44.

The Court’s unfortunate language is based upon the opinion in \textit{Feres v. United States}, 340 U. S. 135, 141 (1950), where the Court quoted the provision that the United States “shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .” and said: “It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence. . . . Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.”

It is hardly “novel and unprecedented” if those who employ men to drive trucks or to fight fires are subject to liability for negligence of the men within the scope of their employment.

This language of the \textit{Indian Towing} case is superseded by the holding in \textit{Indian Towing Co. v. United States}, 350 U. S. 61 (1955), discussed in the next section.
vehicles, must yield to the enactment that "The United States shall be liable . . ." Fires are fought both by public employees and by private employees, just as vehicles are driven both by public employees and by private employees. When a corporation's employees fight a fire, the corporation is liable for their negligence in the scope of their employment. When the government's employees fight a fire, the government is liable for their negligence in the scope of their employment, because the statute provides that the government "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ."

This aspect of the Dalehite opinion seems clearly unsound. Happily, the Court in the Indian Towing case has either overruled this aspect of Dalehite or has limited it to its narrow facts, as we shall now see.

§10. The Indian Towing Case and Synthesis with Dalehite

The Indian Towing case was an action against the government for damages resulting from failure of a lighthouse light on account of negligent maintenance of the light by the Coast Guard. Citing Dalehite, the Court said that "The question is one of liability for negligence at what this Court has characterized the 'operational level' of governmental activity." The government conceded that the "discretionary function" exception was not involved, but argued that the provision imposing liability "in the same manner and to the same extent as a private individual under like circumstances . . ." must be read as excluding liability in the performance of activities which private persons do not perform. Whereas in Dalehite the Court was favorably disposed toward the governmental-proprietary distinction, the Court in Indian Towing spoke of "the 'non-governmental'-'governmental' quagmire" and said that "the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound."

The government argued that "there can be no recovery based on

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175. The Court's statement that the Act did not create new causes of action where none existed before, even though the very purpose of the Act was to make the government liable where it was not liable before, is reminiscent of a 1922 statement by Mr. Justice Holmes on behalf of the Court: "The United States has not consented to be sued for torts, and therefore, it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so." The Western Maid, 257 U.S. 419, 433 (1922).

176. Id. at 64.

177. Id. at 64.

178. Id. at 65.
the negligent performance of the activity itself, the so-called 'end-objective' of the particular governmental activity, but the Court rejected the argument on the ground that some negligence would be actionable and some not, without "a rational ground, one that would carry conviction to minds not in the grip of technical obscurities." The Court pointed out that the government's basis of differentiation would be gone if private lighthouses were established and said that "it is hard to think of any governmental activity on the 'operational level,' our present concern, which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed." (How about the task of the executioner?)

The Court held: "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

The dissenting opinion adds the important fact, not mentioned by the majority, that "navigators were warned this was an 'unwatched light.'" Aside from emphasis on the departure from the law declared in the Dalehite opinion, the main point of the dissent was: "Liability of governments for the failure of lighthouse warning lights is as unknown to tort law as, for example, liability for negligence in fire fighting excluded by the Dalehite ruling. Lighthouse keeping is as uniquely a governmental function as fire fighting." The first sentence is true, but a statute often calls for a result that has been unknown to the common law. The second sentence is true, but the test of liability under the Act does not depend upon what is governmental. Of the majority's holding, the dissenters suggest: "Logically it may cover negligence in fire fight-

179. Id. at 66.
180. Ibid.
181. Id. at 68.
182. Id. at 69.
183. 350 U. S. at 70. The opinion cites United States Coast Guard, Light List, Atlantic and Gulf Coasts.
184. Id. at 75.
ing, although the Dalehite holding on that point is not overruled. Perhaps liability arises even for injuries from negligence in pursu-
ing criminals.  

Logically the holding does cover negligence in fire fighting, and this may mean that Dalehite to that extent is overruled, or at least severely limited. No good reason is apparent why the Act should not be interpreted to impose liability for negligence of federal officers in pursuing criminals.  

Ten guiding principles seem to emerge from a synthesis of the Dalehite and Indian Towing cases. The principles are in some measure uncertain because of lack of clarity in the Court’s opinions, and they are in some measure unreliable because the two cases are inconsistent and because the Court divided four to three in one case and five to four in the other. Assuming that the view taken in the later Indian Towing case will endure and that that view prevails to the extent that it is inconsistent with the Dalehite opinion, the ten guiding principles are:

1. The government probably is not liable for negligence in planning “at a planning rather than operational level.”

2. The statutory concept of “a discretionary function,” with respect to which the government is not liable whether or not the discretion involved be abused, probably is limited to the planning level and probably does not include functions at the operational level even if those functions involve discretion.

185. Id. at 76.

186. In Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948), a civilian who had been arrested by a military guard tried to escape and the guard shot at him, hitting an innocent bystander. The court held the government liable. Indeed, when an innocent party is shot in a gun battle between police and fleeing bandits, the reasons for absolute liability of the governmental unit, irrespective of negligence, are especially strong.

187. The words are quoted from the majority in Dalehite, 346 U.S. at 42. The dissenters in Dalehite did not disagree with the legal formulation. The majority in Indian Towing, which included two of the three Dalehite dissenters, said that the negligence was “at what this Court has characterized the ‘operational level’ of governmental activity.”

The statement of the principle implies that planning may be done at the operational level, and this is intended. The lowest level of workmen, doing only physical work, may plan their work, but this does not mean that they are at the planning level as the Court uses the term.

188. The government was liable for negligence of the Coast Guard in the Indian Towing case. The negligence related to checking a battery and a sun relay system, examining electrical connections, checking the light, and failing to repair the light or give warning that it was not operating. These functions may have involved discretion in the ordinary sense of the term, but the holding based in this aspect on the government’s concession makes clear that they do not involve discretion in the sense in which the concept is used in the Tort Claims Act, for if they did the government could not have been held liable.
3. The location of the line between the planning and operational levels is yet to be worked out, but the government is probably immune from liability for negligence in “a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department.”

4. The line between the planning and operational levels may depend not merely upon the position of the actor in the government hierarchy but may depend in part on whether the negligence is “in policy decisions of a regulatory or governmental nature” or whether the negligence relates to “actions akin to those of a private manufacturer, contractor, or shipper.”

5. “When an official exerts governmental authority in a manner which legally binds one or many,” the government probably is not liable.

6. The test of government liability does not depend upon the governmental-proprietary distinction. The government may be liable


Even if at the planning level, pilots of a government plane are directed to fly at the level of the highest known obstructions in the area, in order to establish an instrument approach pattern for an airport, the government is liable if the pilots are negligent in flying one hundred feet above the plaintiff’s horses. Dahlstrom v. United States, 228 F. 2d 819 (8th Cir. 1956).

The dissenters in Dalehite did not disagree with the principle here stated but asserted: “We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.” Id. at 38.

This principle is quite uncertain in the present stage of law development. The words are quoted from the dissenting opinion in Dalehite. 346 U. S. at 60. The majority in Dalehite might well agree that the location of the line depends in part upon this factor, although the quoted words might be more carefully chosen to insure against slipping back into the governmental-proprietary quagmire.

Another test proposed by the dissenters in Dalehite is not likely to win future approval: “The exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official.” 346 U. S. at 60. The public official's purse often must be protected from liability in order that he may make determinations in the public interest without being influenced by thoughts of protecting his purse; this is the reason why the federal courts have consistently held officers immune even when their action is allegedly malicious. E.g., Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949). Furthermore, when an officer makes a reasonable mistake, the only way to avoid letting it rest on an innocent plaintiff or imposing it on an innocent officer is to have the government bear it: the government, after all, is the best of all possible loss spreaders.

That the government should ultimately bear a loss, and that a government employee should not, even when the employee is negligent, was recognized by a unanimous Court in United States v. Gilman, 347 U. S. 507 (1954).

The words are quoted from the Dalehite dissent, 346 U. S. at 59. When justices arguing for liability acknowledge an area of nonliability, the justices arguing for nonliability are likely to agree.
for negligence at the operational level, even if the function performed is governmental.\textsuperscript{182}

7. Negligence in regulating or in failing to regulate through resort to legislative power probably does not subject the government to liability.\textsuperscript{193}

8. Absolute liability without fault does not arise even if the government handles an inherently dangerous commodity or engages in an extra-hazardous activity.\textsuperscript{194}

9. The government may be liable for negligence in performing a function even if the function has no counterpart in the activities of private persons.\textsuperscript{195}

10. The government may be liable for negligence in performing a service which neither the government nor the agency nor the officers have an obligation to undertake.\textsuperscript{196}

\textsection{11. The Need for Limits on Liability of Governmental Units}

Clearly, governmental units should not be liable for all damage caused to private parties by their action. Indeed, they often should

\footnote{182. This principle is based upon the holding in the \textit{Indian Towing} case, but it is specifically opposed to unequivocal language of the \textit{Dalehite} majority. The \textit{Dalehite} majority were Vinson, C. J., Reed, Burton, and Minton, JJ. The \textit{Indian Towing} dissenters were Reed, Burton, Minton, and Clark, JJ., and they asserted the same view of the governmental-proprietary distinction that had been asserted by the majority in \textit{Dalehite}.}

\footnote{193. This is the holding of the majority in \textit{Dalehite} with respect to the finding of negligence of the Coast Guard "in failing to prevent the fire by regulating storage or loading of the fertilizer in some different fashion." 346 U. S. at 43. The dissenters did not specifically consider the point; the \textit{Indian Towing} case did not touch it.}

\footnote{194. The Court's holding to this effect in \textit{Dalehite} is unchallenged and seems solidly based on the statute.}

\footnote{Even so, something approaching absolute liability, or even something equivalent to absolute liability, still may result in some cases. Most lawyers know that the theory of negligence under the Federal Employers Liability Act often works out in practice as something hard to distinguish from absolute liability in many cases.}

\footnote{When a government airplane falls and injures the plaintiff, the government may be liable even if no one knows the cause of the crash. The court may resort to \textit{res ipsa loquitur}, as in United States v. Kesinger, 190 F. 2d 529 (10th Cir. 1951). Where a plane was flying below a safe altitude and crashed, no one knew why, the court found "a redressible wrong in the nature of trespass." United States v. Gaidys, 194 F. 2d 762, 765 (10th Cir. 1952). More spectacular is United States v. Praylou, 208 F. 2d 291 (4th Cir. 1953), \textit{cert. dened}, 347 U. S. 934 (1954), where liability was imposed on the government for the crash of a plane because South Carolina had enacted the Uniform Aeronautics Act, which provides for absolute liability.}

\footnote{195. This is the specific holding in the \textit{Indian Towing} case, for the Court rejected the government's argument that the government is not liable in the performance of activities which private persons do not perform.}

\footnote{196. In imposing liability in the \textit{Indian Towing} case, the Court recognized that "The Coast Guard need not undertake the lighthouse service." 350 U. S. at 69.}
be immune from liability even when their action is negligent, faulty, mistaken, or based upon abuse of discretion.

The general realization of the truth of these propositions explains why both legislators and judges have so long resisted the chorus of the commentators in favor of abolition of sovereign immunity. The gap between the uniform view advanced by the commentators and the prevailing attitude of both legislators and judges is a strikingly wide one. Something more than inertia accounts for it. The commentators have gone all out for sovereign responsibility, giving insufficient heed to problems of marking the outer limits of liability. Judges and legislators have rightly sensed that governmental units often should be immune from liability, even when their officers or agents are at fault.

The plain fact is that if sovereign responsibility is to win legislative or judicial adoption, someone at some stage is going to have to think through the extremely difficult problems of what the limits should be.

Judges and legislators are likely to continue to reject the excessive proposition that governmental units should be liable in damages whenever the fault of their officers or agents causes harm to private parties. Some of them have learned of the French decision in the Fleurette case. At the instance of the dairy industry, a statute was enacted forbidding manufacture and sale of cream substitutes. A manufacturer of cream substitutes, who was put out of business, recovered damages from the French government.

Are we prepared in this country to go so far? The legislator or the judge who has not given special study to the problem is likely to reflect that nearly all legislation harms someone, and that a system in which governmental units are liable in thousands or millions of cases for each statute will be unworkable. Surely it is understandable that American judges and legislators hold back from headlong adoption of the French system, especially when they are told, quite inaccurately, that "The rule now generally applied by the Council of State is that of absolute liability. The French State is responsible in every case where damage has been caused by its acts." What


Another such case is Caucheteaux et Desmont, Dall. Analytique, 1944, 1, 65, in which the Conseil d’Etat awarded damages to a sugar manufacturer compelled to close down his plant on account of a statute reducing the percentage of sugar in beer in order to encourage cereal producers.

198. Schwartz, French Administrative Law and the Common-Law World 302 (1954). The same writer softened the statement slightly later the same year: "The French State is responsible in practically every case where
they should be told is that even in France the government cannot conceivably be liable for all damage done by its acts. The *Fleurette* case is an extreme and limited one; the basic French law remains that the government may legislate for the public welfare without paying damages to those who are adversely affected.199

Responsible judges and legislators are fully aware of the utter impracticability of trying to make governmental units liable in damages for all the harm they do to the interests of individuals and corporations. A city should not be liable for damage done by a zoning ordinance, which necessarily reduces the value of some property. Nor should the state be liable to the seller of a harmful drug if it enacts a statute prohibiting further sale of the drug, thereby destroying a profitable business. To make the federal government liable to a public utility for the damage done by a rate reduction order would be absurd.

But the usual proposal of American commentators is not that governmental units should be absolutely liable; it is that liability should be imposed for negligence or fault. Even this proposal is clearly excessive. What a spectacle it would be if a court in a damage suit were to receive evidence designed to prove that congressmen were at fault in determining which way to vote on a bill! Or that the President and his assistants were negligent in the manner in which they considered an executive order!

A part of the problem here lies well beyond the relatively simple tort law about which the commentators are thinking. One aspect of the problem is the utterly impracticability of trying to make governmental units liable for all damage done by their acts. Schwartz, *Public Tort Liability in France*, 29 N. Y. U. L. Rev. 1432, 1454 (1954). If the statement were true, nearly every act of government would give rise to payment of thousands or millions of claims.

199. Both sides of the French law—immunity and liability—are presented by such writers as Street, *Governmental Liability* 56-80 (1953); Jacoby, *Federal Tort Claims Act and French Law of Governmental Liability: A Comparative Study*, 7 Vand. L. Rev. 246 (1954). Some of the cases of nonliability of the French Government that Jacoby discusses include statutory nonliability for war damages and for miscarriage of mail, and judicially created nonliability for arbitrary arrest, death of third person in police apprehension of criminals, error in declaring fit for military service a man suffering from hernia, ordinary fault (as distinguished from grave fault or "faute lourde") in collecting taxes or detaining goods for taxes.

On the problem of the *Fleurette* case, Jacoby says: "French law traditionally . . . has held that tort liability of the government cannot be predicated upon a statute or regulation. In 1838 the *Conseil d'Etat* rejected a claim by a tobacco manufacturer who was damaged by a law of 1835 establishing a governmental tobacco monopoly. More recently [citing only the *Fleurette* and the sugar-in-beer cases] damages were granted in some extreme cases, on the principle of equality, where the enactment was silent on the question of indemnity. But in most cases recovery is denied." For the last statement two cases later than *Fleurette* are cited, 7 Vand. L. Rev. at 258.

See also the broad observation that "No recovery is granted for injuries which affect, or are capable of affecting, everybody." *Id.* at 267.
of the problem involves intricate issues about proper distribution of governmental powers. Much of what is done by officers and employees of the government must remain beyond the range of judicial inquiry, as it always has been. For instance, if the Secretary of State miscalculates in getting too close to the brink of war, clearly we do not want the courts in damage suits to determine whether the Secretary was negligent in dealing with the problem of international relations. The government as an insurer, either with or without payment of premiums, might properly distribute war losses to all taxpayers—but surely not on the basis of a judicial finding of fault on the part of the government's officers.

Similarly, if the Federal Reserve Board is negligent in adjusting interest rates, thereby causing excessive inflation or excessive deflation, making the government liable to all who suffer business losses as a result would be out of the question.

If General X of the American Air Force negligently orders his men to bomb the troops of General Y of the American Army, and Private Z is maimed, we don't want courts to inquire into the negligence of General X in a suit by Z for damages, whether Z sues X or sues the government. Z is no more entitled to tort damages than his buddy who was hit by an enemy shell. The government should take care of both through generous use of taxpayers' money, but not through the medium of a damage suit in court.

In addition to necessary limitations upon control by courts of other branches of the government through the medium of suits for damages, many other reasons call for limits on public liability. For instance, should the government be liable for negligent failure of its officers to enforce the antitrust law, or to issue a passport, or to reduce a rate, or to apprehend a dangerous criminal? The problems are numerous, complex, and difficult—some of them extraordinarily difficult.

Even Professor Borchard, the leading advocate of government responsibility, recognized the need for limits on liability for negligence or fault in some kinds of governmental activity. On the first page of the first of eight articles in his series on Government Liability in Tort, he said: "Obviously the Administration cannot be held to the obligation of guaranteeing the citizen against all errors or defects, for life in an organized community requires a certain number of sacrifices and even risks."200 In attacking the governmental-

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200. Borchard, Governmental Liability in Tort, 34 Yale L. J. 1 (1924). For the series of eight articles, see 34 Yale L. J. 1, 129, 229 (1924-25); 35 id. 1, 737, 1039 (1925-26); 36 id. 577, 734 (1928).
proprietary distinction, he acknowledged: "There are certain public services which only the government can adequately perform, as for example, the administration of justice, the preservation of public peace and enforcement of the laws, and the protection of the community from fire and disease. It may hence be conceded that the principle of immunity for the torts of officers engaged in 'governmental' functions had some legitimate field of application."\(^{201}\)

When Borchard finally drafted a proposed statute for state liability in 1934\(^{202}\) and a proposed statute for municipal liability in 1942,\(^{203}\) he went very far—in all probability too far—in preserving sovereign immunity. He proposed various exceptions from liability, without explaining whether the exceptions were the product of expediency from the standpoint of winning legislative approval or whether they were the product of his own philosophical ideas of what the limits of liability should be. The exceptions included injuries to the militia where workmen's compensation applied (but not injuries to public employees subject to workmen's compensation), injuries to prisoners, negligence of physicians and nurses in public hospitals, specified willful torts and criminal acts, and "any claim on account of the defect or alleged defect of any act of the governing body of the municipal corporation or of any administrative order or regulation of any commission, department, board, institution, agent or employee of the municipal corporation." Except for the last provision, most of these exceptions seem unfortunate in some respect. Perhaps tort liability for negligence should normally give way to workmen's compensation when it is provided.\(^{204}\) No reason is apparent why prisoners should not have as much right to damages for tort as any other plaintiffs, as the New York courts have now recognized.\(^{205}\) The negligence of physicians and nurses seems to be as sound a basis for liability as the negligence of any other public

201. 34 Yale L. J. at 240. Borchard goes on to point out: "Not that such a principle is necessarily inherent in government, for as will be seen hereafter, not a few governments in the world assume responsibility for the torts of officers engaged in these functions."


204. Cf. Feres v. United States, 340 U. S. 135 (1950), where one of the grounds for nonliability of the government to injured soldiers was that Congress has provided "systems of simple, certain, and uniform compensation for injuries or death of those in armed services."

205. Scarnato v. State, 298 N. Y. 376, 83 N. E. 2d 841 (1949) (prisoner fell from ladder in prison yard; state liable for failing to provide belt or other safeguard); Washington v. State, 277 App. Div. 1079, 100 N. Y. S. 2d 620 (3d Dept 1950) (state liable for negligence of fellow inmate of plaintiff, under immediate supervision of guard).
employees, as the New York courts have held. No convincing reason has even been given for excepting the willful torts or torts which are criminal acts; since driving in excess of the speed limit is a misdemeanor, hardly anyone will agree that "criminal acts" ought to be excepted.

Borchard's proposal to continue the immunity for acts of the governing board and for administrative orders and regulations has much in common with the two clauses of §2680(a) of the Federal Tort Claims Act, which retain immunity for (1) exercise of due care in executing a statute or regulation even if the statute or regulation is invalid and (2) performance or nonperformance of discretionary functions even when discretion is abused.

Let us examine the merits of such exceptions as these.

§12. INVALIDITY OF GOVERNMENTAL ACTION SHOULD NOT BE A BASIS FOR LIABILITY

The Federal Tort Claims Act provides that the government is not liable for "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid."

Invalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action.

When the National Industrial Recovery Act was held invalid in 1935, the number of people whose businesses had been directly harmed by the Act and by the regulations issued under it probably numbered in the millions. Large numbers, for instance, were fined for selling goods below the minimum prices fixed; others complied with the minimum price orders and lost customers to whom they might have sold goods by cutting prices. Whether or not the general public gained by the overall program is a question that perhaps no one can answer. To make the government liable to any seller who could prove in court that he could have made more profit if his business had not been subjected to regulation would be obviously impractical. Furthermore, the enactment of a statute or the adoption

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208. Ibid.
of a regulation which a court later holds to be unconstitutional does not necessarily, from a realistic standpoint, involve fault; the best of lawyers and the best of judges, acting with the utmost of care, can be wrong in their prediction of what the highest court will hold on a constitutional issue. Invalidity is not the test of fault and it should not be the test of liability.

Supposing the governing authority of a city adopts a zoning ordinance which has the effect of reducing the value of land which X holds for sale, and after X sells for the reduced price, a court holds the zoning ordinance invalid. The fact of invalidity does not necessarily mean that the governing authority was at fault in adopting the ordinance. Indeed, even if the court holds that the ordinance is invalid for "abuse of discretion," the governing authority is not necessarily at fault, for the concept of abuse of discretion is often given a meaning other than the literal one. Even if the governing authority is at fault, one may doubt that the city should be liable.

A regulatory agency orders a utility to reduce rates and the utility complies while contesting the order. If a court holds the order invalid, should the government be liable for damages? The government has harmed the utility by an invalid order, but that is hardly a reason justifying governmental liability. Even if the utility should be entitled to relief, the relief probably should be drawn from the ratepayers, not from the taxpayers.

Another aspect of this exception to the Federal Tort Claims Act is more difficult. Should the government always be immune from liability for what is prudently done in carrying out a statute or regulation? If officers are authorized to take land for a flood-control or irrigation project, clearly the government must be liable for the taking. If officers are authorized to flood land, thereby in effect destroying or taking it, the government must equally be liable. What of damage resulting from authorized intermittent flooding, or intermittent damage of some other sort? Even under the adjudicated cases prior to the Tort Claims Act, the government is usually liable. How much in principle does injury to persons differ from injury to property? Might the present recognition of liability for taking or destroying or damaging property be allowed to grow into a more general liability for some types of harms specifically authorized by statute or by regulation? This is the course that French law

has taken. Opportunity for further movement of American law in this area probably should not be cut off.\textsuperscript{210}

\section*{§13. The Need for Immunity for Some Discretionary Functions}

The Federal Tort Claims Act provides for government immunity from liability for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Dean Stason has written that the Act "has shortcomings. It does not apply to injuries caused in carrying out 'discretionary functions . .' "\textsuperscript{211} If Dean Stason means that the government should be liable for injuries caused in carrying out discretionary functions—and not merely that the Act is too vague and susceptible to bad interpretation—then the reasons for disagreeing with him and for agreeing with Congress seem overwhelming.

Courts are not the only authority of government with competence to make final determinations of government policies and government action. Sometimes decisions made in the legislative or executive branches of the government should be beyond the area of judicial review. If an oil company wants to prove in a damages action against the government that the State Department was negligent in failing sufficiently to press its claim for compensation for a foreign government's expropriation of its oil property, the court probably should refuse to consider the evidence. If the Federal

\begin{itemize}
\item \textsuperscript{210} That § 2680(a) cuts off liability under the Tort Claims Act does not necessarily mean that the government is not otherwise liable. In Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955) suit was brought by sheep owners under the Tort Claims Act for damage to herds by nuclear tests at the Nevada proving ground. The allegation was made that the tests were "negligently performed." Surely the government should be liable whether or not negligence is proved. If the tests were to continue indefinitely, they might be brought within the principle of United States v. Causby, 328 U.S. 256 (1946).
\item \textsuperscript{211} Stason, \textit{Governmental Tort Liability Symposium}, 29 N. Y. U. L. Rev. 1321, 1322 (1954).
\item Compare James, \textit{Tort Liability of Governmental Units and Their Officers}, 22 U. Chi. L. Rev. 610, 655 (1955). Of the Tort Claims Act's exception of "a discretionary function," Professor James says with reference to the \textit{Dalehite} interpretation: "Since the millstone of this interpretation is now hung around its neck, and since it is not needed for the only purpose it should serve, this provision should be repealed." Perhaps the only sense in which the exception for "a discretionary function" is not needed is in the sense that nothing more is needed than an enactment that the government shall be liable in accordance with principles to be worked out by the courts. If Congress is to participate to the extent of marking out broad guides for adjudication, then some such exception as this one is needed.
\end{itemize}
Reserve Board restricts or expands credit by adjusting interest rates, thereby causing inflation or deflation and injuring the plaintiff, a court probably should refuse to inquire whether the Board was negligent or mistaken in making its calculations.

We must avoid the fallacy of Miller v. Horton. The Massachusetts court succumbed to that fallacy when it assumed that the horse did not have glanders because the jury so found, even though the members of the board of health who destroyed the horse and who may have been better qualified than the jury found that the horse did have glanders. The second guess of a court in a damages suit is about as likely to be wrong in an absolute sense as the first guess of the Federal Reserve Board in adjusting interest rates or of the President and State Department in conducting foreign relations. Much business of governmental units is beyond the competence of courts.

If abuse of discretion is found to be the basis of a rate reduction order, of a license revocation, of a cease and desist order, or of a denial of a zoning permit, the party injured by the abuse of discretion probably should not have a cause of action for damages against the governmental unit, even if the court is well qualified to make the determination. True, because the governmental unit's fault has in each instance harmed the plaintiff, perhaps an ideal system of justice in Utopia would compensate for every harm resulting from governmental fault. But in the practical world the machinery necessary to compute the damages and provide relief in all such cases might be too extensive, and losses of this type are in the long run normally rather well distributed over all who are subject to regulation. Probably for these reasons harms of this kind have to be regarded as one of the necessary costs of living in organized society.

Whether or not the Dalehite decision was sound, the Supreme Court may have been moving in the right direction in that part of the opinion which recognized a distinction between the planning level and the operational level. When the President or a cabinet officer, pursuant to a proper delegation, decides that justice or wisdom calls for a particular course of action, a court may well be bound by the determination in the same way that it is bound by legislation. The court thus may properly refrain from inquiring

212. 152 Mass. 540, 26 N. E. 100 (1891).
213. Dalehite v. United States, 346 U. S. 15, 42 (1953): "In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."
whether the action was negligent, for even if the court deems itself competent to inquire, the power may be committed to the officer to act unwisely or mistakenly or even negligently. Furthermore, the consequences of the type of action taken may be adequately spread among those affected. But if a janitor or truck driver or clerk acts negligently and hurts the plaintiff, the court is in no sense bound by the determination made by the public employee. The location of the precise line here seems to call for the method of case-to-case adjudication.\textsuperscript{214}

Perhaps the line is not between those who plan and those who operate (for all do some planning), nor between those who exercise discretion and those who do not (for all do), nor between high-salaried and low-salaried employees (for the government should be liable for negligence of a cabinet officer driving a government car on government business), nor between manual and mental workers, nor between those who affect economic interests and those who affect physical results. The line must be located on the basis of a judgment about the propriety of making adjustments through the medium of damage suits. The difference between the planning and the operational levels may be one of the criteria, but it is only one.

In the exercise of some types of discretionary functions, then, governmental units clearly should be immune from liability for damages on account of negligence, fault, mistakes, or abuse of discretion. This is not the same as saying that all applications that have been made of the "discretionary function" exception to the Tort Claims Act are sound. But some such exception is needed, and the provision of the Act is probably susceptible of interpretation to make it thoroughly sound.

\section{Nonfeasance}

Some of the problems of governmental nonfeasance are most intriguing. Even under the Tort Claims Act the government was

\textsuperscript{214} Compare Borchard, \textit{Government Liability in Tort}, 34 Yale L. J. 129, 135 (1924): "The distinction as a basis for liability, between (1) determining whether an act shall be done and (2) then acting upon and executing the determination, has justification only to the extent that deliberation and action as to policy is legislation and hardly an operative fact imposing legal duties, and for the exertion of power in determining policies it would therefore be inappropriate to predicate tort liability. On the other hand, to impose tort responsibility in connection with acts performed in execution of legislation would, if uniformly applied, do away with most of the alleged distinctions between governmental and corporate functions and would make the city responsible whenever there was a breach of legal duty running to the injured individual. This perhaps is the soundest basis for predicating legal responsibility and would render irrelevant a distinction between acts of omission and commission. . . ."
liable in the Indian Towing case\textsuperscript{215} for failure to check and repair
the lighthouse equipment, despite the lack of obligation to provide
a lighthouse service. The principle involved is broad enough to
impose liability for negligence in failing to replace a stop sign,\textsuperscript{216}
failing to keep traffic lights working properly,\textsuperscript{217} and marking
dangerous curves on highways with warning signs but failing to mark
one.\textsuperscript{218} Perhaps, as New York courts have held, the state should be
liable for negligence in failing to prevent one inmate from assaulting
another in a mental hospital,\textsuperscript{219} failing to prevent a suicide of an
inmate,\textsuperscript{220} failing to prevent the escape of a dangerous person,\textsuperscript{221}
failing to furnish a belt to a prisoner who worked on a ladder in a
prison yard,\textsuperscript{222} and failure of an instructor in a state school to in-
struct a student before the student did a headstand.\textsuperscript{223}

At the other end of the scale, perhaps, as courts have held, gov-
ernmental units should not be liable for failing to maintain water
pressure sufficient to prevent a fire and for failing to create a fire
department,\textsuperscript{224} failing to revoke the license of a driver who later
caused an accident,\textsuperscript{225} failure of police officers to prevent harm from

\textsuperscript{215} Indian Towing Co. v. United States, 350 U. S. 61 (1955).

\textsuperscript{216} Liability was imposed for failure to replace a stop sign in Gure-
vitch v. State, 285 App. Div. 863, 136 N. Y. S. 2d 702 (4th Dep't 1955), re-

\textsuperscript{217} Liability was imposed in Cleveland v. Town of Lancaster, 239 App.
Div. 267 N. Y. S. 673 (4th Dep't), aff'd, 264 N. Y. 568, 191 N. E. 568
(1934), and in other New York cases.

\textsuperscript{218} A dismissal of a complaint was reversed in Rugg v. State, 284
App. Div. 179, 131 N. Y. S. 2d 2 (3d Dep't 1954), where the claim was based
upon negligence of the state "in failing to provide the travelling public ade-
quate warning of the dangerous condition that existed on this curve and the
approach to the narrow bridge."

\textsuperscript{219} Scolavino v. State, 187 Misc. 253, 62 N. Y. S. 2d 17 (Cl. Ct.),
award increased 271 App. Div. 618, 67 N. Y. S. 2d 202 (3d Dep't 1946), aff'd,

The federal government is held not liable in such a case because the claim
arises "out of" assault and battery within the meaning of 28 U. S. C. §

\textsuperscript{220} Dow v. State, 183 Misc. 674, 50 N. Y. S. 2d 342 (Cl. Ct. 1941).

\textsuperscript{221} Jones v. State, 267 App. Div. 254, 45 N. Y. S. 2d 404 (3d Dep't
1943). The court said: "While the State is not an insurer of the public, it is
nevertheless called upon to protect the community from the acts of insane
persons under its care." Id. at 257, 45 N. Y. S. 2d at 406.

\textsuperscript{222} Scarnato v. State, 272 App. Div. 1085, 74 N. Y. S. 2d 535 (3d Dep't
1947), aff'd, 298 N. Y. 376, 83 N. E. 2d 841 (1949). The amount of damages
awarded the prisoner was $30,000.

Contrast the line of federal cases holding, without specific support in
the Tort Claims Act, that the government is not liable in tort to federal
prisoners. Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953); Van

\textsuperscript{223} Gardner v. State, 256 App. Div. 385, 10 N. Y. S. 2d 274 (3d Dep't).

\textsuperscript{224} Steitz v. City of Beacon, 295 N. Y. 51, 64 N. E. 2d 704 (1945).

\textsuperscript{225} Chikofsky v. State, 203 Misc. 646, 117 N. Y. S. 2d 264 (Cl. Ct.
1952).
a crowd in panic, failure to regulate, or failure to repeal an ordinance. Presumably a governmental unit would not be liable for negligent delay in issuing a passport or approving an increase in rates or granting a license.

The provocative problem case is whether the governmental unit should be liable for an omission with respect to a responsibility which it has to some uncertain extent assumed. A health officer negligently fails to establish a quarantine. A city council or a subordinate officer is careless in failing to establish a stop sign or a traffic light. A public inspector or examiner negligently fails to detect a dangerous condition in an elevator or bank or locomotive or building. A city assigns too few policemen to patrol an area where automobiles are allowed to race on a public highway. Police are tipped off that X's life may be threatened but they fail to provide adequate protection and X's enemies kill or injure him.

A New York court's generalization that "waiver of sovereign immunity ... does not create liability on the part of a City for failure to exercise a governmental function" is unsatisfactory, for even apart from uncertainty about the meaning of "governmental function" the city should be liable for failure to exercise governmental functions for which it has assumed the responsibility. For instance, the only obligation a state has for building highways and erecting traffic signs is a self-imposed obligation, but once the obligation is assumed the state should be liable for its negligent acts or omissions. When the state assumes the responsibility for marking dangerous elevators or banks or locomotives or buildings, it should be liable for their negligent acts or omissions.

229. The state was held not liable for inadequate inspection of elevators in Chastaine v. State, 160 Misc. 828, 290 N. Y. S. 789 (Ct. Cl. 1936).
230. Before the full New York waiver of liability, the state was held not liable for loss to depositors even assuming negligence of the bank examiners. Sherlock v. State, 198 App. Div. 494, 191 N. Y. S. 412 (3d Dep't 1921).
231. Liability was imposed in Saari v. State, 282 App. Div. 526, 125 N. Y. S. 2d 507 (3d Dep't 1953), where the duty to patrol was imposed by statute.
232. S identified a man wanted for bank robbery. Shortly thereafter S was shot and killed by persons unknown. S's son alleged that police failed to furnish S with proper protection and lulled him into a sense of security by telling him he had little to fear. The city was held not liable. Schuster v. City of New York, 207 Misc. 1102, 121 N. Y. S. 2d 735 (Sup. Ct. 1953), aff'd, 286 App. Div. 389, 143 N. Y. S. 2d 778 (2d Dep't 1955).
curves on highways, drivers know of and rely upon that responsibility. Therefore, the state should be liable when it fails to mark a dangerous curve, and a New York case so holds.234

A curious but practical problem is whether a governmental authority may assume only a part of the responsibility for protecting the public. The government may say, in effect: "We will have our ICC inspectors order out of service the locomotives they find unsafe, but we don't assume the responsibility for finding all the deficiencies that careful inspection would disclose." The city may say, in effect: "Our health inspector will impose a quarantine when an epidemic comes to his attention but not otherwise." Should such limitations on undertakings of public authorities mean immunity for omissions that might not have occurred if the program at the outset were intended to be more comprehensive? This question probably must be broken down into many parts before satisfactory answers may be discovered. The government in the Indian Towing case235 listed the lighthouse as "unwatched" but was held liable for failure adequately to watch it. Yet the government's undertaking to inspect food under the Food and Drug Act is obviously only a partial one, and perhaps the government should not be liable for negligent failure of an inspector to detect food that may cause harm. Similarly, the government can hardly be held liable for failure of the Weather Bureau to give warning of an impending flood.236

A most provocative case is Runkel v. City of New York.237 A city building inspector examined an abandoned dwelling, found that it was in imminent danger of collapse, and recommended to the owners that it be made secure or demolished at once. The following day the superintendent of buildings made a formal finding and posted a notice to the owner requiring immediate repair or demolition. Thereafter neither the city nor the owners took further action. Fifty days after the inspection, the building collapsed and hurt the plaintiff's children. The action was brought against the owners and the city. A divided Appellate Division held that it was error to dis-

236. In National Mfg. Co. v. United States, 210 F. 2d 263 (8th Cir.), cert. denied, 347 U. S. 967 (1954), suit was brought under the Tort Claims Act for the Weather Bureau's negligent assurance to plaintiff that the river would not overflow, and for negligent failure to give warning of the impending overflow. The court held the government immune under 28 U. S. C. § 2680(a).
237. 282 App. Div. 173, 123 N. Y. S. 2d 485 (2d Dep't 1953). The court later held that the owners were primarily liable and therefore that the city was entitled to recover against the owners. Runkel v. Homelsky, 286 App. Div. 1101, 145 N. Y. S. 2d 729 (2d Dep't 1955).
miss the complaint. The court asserted that "the surrender of sovereign immunity from liability with respect to a governmental function, is not limited to any act of misfeasance or nonfeasance—commission or omission. The surrender is broad, general and unqualified."238 The court stated the test of liability: "Whether... an individual or private corporation would be liable for the breach if the governmental duty were imposed upon him or it."239 The owners had the duty and the owners were liable; therefore the city was liable.

Is the Runkel decision sound? Should its doctrine be limited to cases in which the governmental unit is at fault after a specific dangerous condition becomes known to its agents? Is the court's opinion sound in asserting that the test of liability is whether a private party would be liable for the breach if the governmental duty were imposed upon the private party? If so, a governmental unit will be liable when its inspector negligently fails to discover the dangerous condition of a bank or an elevator or an airplane.

§15. Law Making as the Test

Mr. Justice Jackson, speaking for four dissenting Justices in the Dalehite case, thoughtfully suggested a creative interpretation of the "discretionary function" exception to the Tort Claims Act:

"We think that the statutory language, the reliable legislative history, and the common-sense basis of the rule regarding municipalities, all point to a useful and proper distinction preserved by the statute other than that urged by the Government. When an official exerts governmental authority in a manner which legally binds one or many, he is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such official shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits."240

Borchard proposed that governmental units should be immune from liability for legislative enactments, executive orders, acts of governing bodies of municipal corporations, and orders and regulations of administrative officers and employees.241

The idea that law making should be the test of immunity or liability is an interesting one and may turn out to be useful if it is

239. Id. at 178, 123 N. Y. S. 2d at 491.
properly qualified. But one may say with full confidence that the government should not be immune from liability for flooded land merely because the height of a dam is fixed by law. Whenever property is taken, the governmental unit should be liable even if the taking is done by the legislative body in enacting legislation, and the concept of taking should be at least broad enough, as the Supreme Court has held, to encompass low flights of government planes which destroy the value of a chicken farm.  

If an operator of an airport control tower negligently gives an order which causes two planes to collide, liability or immunity of the governmental unit for which the operator works probably ought not to depend upon whether or not violation of the order is a misdemeanor or whether the order otherwise has or does not have force of law. Similarly, if the ICC’s negligence in rerouting trains around a flood causes an accident, or if the negligence of a chemist of the Department of Agriculture produces the wrong formula for poisonous spray required by regulation to be used on certain fruit, or if an engineer of the CAB is negligent in preparing a regulation prescribing specifications for aircraft construction, perhaps government liability or immunity should not depend upon the question whether the act in each instance is deemed to involve law making. In the Dalehite case, prescribing the PRP coating (paraffin, rosin, and petrolatum) made the fertilizer more dangerous as an explosive, and yet government liability or immunity from liability ought not to depend upon whether the prescription happened to be by letter from a government officer to the private manufacturer or happened to be by regulation or order.

The suggested test may be questionable not only in leading to immunity when the government probably ought to be liable, but it may sometimes call for liability when the government ought to be immune. If probable cause exists for having X arrested and indicted, but if the United States attorney’s negligence is the only reason for his failure to discover evidence proving X’s innocence, the government probably should not be liable to X even though the United States attorney was not making law. If a superior officer negligently fails to recognize the merit of the work of a subordinate and gives him a lower efficiency rating than he deserves, the government probably ought not to be liable, even though the superior is not making law.

244. Yet the Court held in the Dalehite case that because the Coast Guard and other agencies regulated storage or loading of the fertilizer through regulations, the government was not liable. Id. at 43.
Even so, law making may often be a good test of liability or immunity, for a court frequently should refrain from overriding a law-making authority of the government which makes a determination that wisdom or justice requires a particular course of action or adjustment, but a court may often award damages for negligent harm caused by an officer or employee who is not engaged in law making.

§16. JUDICIAL AND QUASI-JUDICIAL ACTION

Negligence or fault of judges probably ought not to be the basis for tort liability of a governmental unit for two reasons: (1) We should not try each case twice, once between the parties and once between the losing party and the governmental unit. (2) For rather strong policy reasons, we do not want the shortcomings of judges to be the subject of litigation. Abstractly, awarding damages when a party is hurt by a serious fault of a judge would be justice, but practically that cannot be done without incurring all the disadvantages of allowing parties who are disgruntled by adverse decisions to make unwarranted charges against careful and conscientious judges.

But what of corrupt or malicious judicial action? Our system is clear—and probably wise—that suits against judges themselves must be forbidden if we are to avoid impairment of the judicial function. Judge Learned Hand has declared of prosecuting officers:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to 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."

How far are these remarks valid if the suit is against the governmental unit instead of against the judge or the officer? The question is by no means an easy one.


GOVERNMENTAL TORT LIABILITY

Even when judges and juries are guilty of nothing more serious than good faith mistakes, we do often hold the governmental unit liable for wrongful conviction of criminal defendants. For instance, a federal statute provides for payment of damages to one who is proved innocent after serving in a penitentiary, although the statute fixes an unreasonably low maximum of $5,000. Can we—and should we—find a way to correct other injustice stemming from proved miscarriage of the judicial process?

If one is arrested, accused, tried, convicted, and finally released by an appellate court on some grounds such as that the offense charged is not a crime under the applicable statute, the governmental unit has inflicted harm upon the accused person, and the system is designed for the protection of the public. Should the public pay for the harm done? Of course, our law clearly answers the question no, but as we become more accustomed to a system of sovereign responsibility, the question may become a live one. In one aspect the problem is whether it is practicable to try to compensate for such relatively small harms that are an inevitable product of any system of administering justice. A possible answer is that damages should be awarded only when either the loss is exceptional, as when an innocent person serves a penitentiary sentence, or when subordinate officers are at fault so that the governmental unit will be liable under the usual principles applying to false arrest and to false imprisonment. New York courts already have moved far into this area. The state has been held liable for an arrest and detention on a health officer’s certificate which failed to show that the health officer had personally examined the arrested person. When state troopers complied with a father’s request to pick up an eighteen-year-old girl who had left home without permission, the state was held liable for detaining her in jail overnight. When officers thought that one who was dazed by an accident was intoxicated, damages against the state in the amount of $3,500 were awarded for keeping the driver in jail overnight without medical attention.

An especially significant case is White v. State. While on parole from Sing Sing, White stole an automobile in New Jersey.

247. 28 U. S. C. § 2513 (1952). The plaintiff must show that his conviction has been set aside on the ground that he is not guilty, or that he has been pardoned on the stated ground of innocence and unjust conviction, and that he did not by misconduct or negligence bring about his prosecution.
for which he was there subsequently convicted and imprisoned. The New York parole authorities kept him imprisoned beyond the expiration date of his original sentence, under a statute authorizing such action when a felony is committed in another state. In an action against the state for damages, White satisfied the Court of Claims that stealing a motor vehicle was only a high misdemeanor in New Jersey, not a felony. The court held that the error of law of the parole authorities was a ground for liability: "Claimant having been illegally detained for a period approximating ten months beyond his maximum sentence, he is awarded the sum of $4,500 for his unlawful imprisonment and loss of earnings." The case could conceivably be the forerunner of developing law imposing liability upon governmental units for mistaken action of a somewhat judicial character.

Like judicial decisions, determinations in administrative adjudications ordinarily do not give rise to liability of the governmental unit, even when negligence or other fault is proved. Even though the statutory words waiving immunity are unqualified, a New York court has held that the state is not liable for wrongful suspension of a liquor license. A federal court has held a city immune from liability for a building inspector's alleged negligence and fraud in delaying the issuance of a building permit, and a state court holds a city immune where it condemned an uncompleted apartment building and then refused to give the owner a building permit or sufficient time to make repairs. But when a loss is exceptional and when the degree of injustice seems large, might not some future tribunal rely upon the White case as a precedent and impose liability?

252. Id. at 731, 101 N. Y. S. 2d at 706.
253. A French statute of 1895 provided that an appeal court setting aside a criminal conviction may grant damages against the state for the wrongful conviction. A leading French philosopher, Duguit, would impose liability on the state whenever it can be done without impairing the doctrine of res judicata. See Street, Governmental Liability 69-70 (1953).
254. Toyos v. State, 181 Misc. 761, 47 N. Y. S. 2d 322 (Ct. Cl. 1944). In Beaudrias v. State, 47 N. Y. S. 2d 509 (Ct. Cl. 1944), action of a state legal officer in handling litigation was regarded as quasi-judicial, and therefore the state was not liable in tort for dilatory and obstructive action.
256. Akin v. City of Miami, 65 So. 2d 54 (Fla. 1953).
§17. SOME MUSINGS ABOUT LONG-RANGE OBJECTIVES

The development of a full-fledged system of sovereign responsibility is a task of enormous difficulty and is not likely to be accomplished without the interaction of many minds over long periods. We shall nevertheless now open up a few questions, make some guesses, and express some subjective opinions.

As we have seen, governmental units cannot feasibly be made liable for all the harms that are caused by their negligence or fault. Something in the nature of the "discretionary function" exception to the Tort Claims Act is essential. The test ought to be neither the invalidity of the governmental action, nor the governmental-proprietary distinction, nor the difference between misfeasance and nonfeasance, nor the line between law making and action which does not involve law making, nor the difference between judicial and nonjudicial action, nor the liability or nonliability of the officer or employee whose act or omission causes the harm.

What, then, should be the test?

The conventional answer has been that a governmental unit should be liable whenever a private party would be liable in the same circumstances. This answer may be sound as far as it goes, but it does not go far enough to reach the most difficult problems. A large portion of the functions of governmental units have no private counterpart. Private parties do not draft men, administer prisons, conduct international relations on behalf of a general public, zone other people's property, enact statutes or ordinances, adjudicate cases, issue administrative orders or regulations that may have force of law, regulate economic life, or authoritatively determine policies that may be binding upon courts.

The task ahead that is easy to plan is to make governmental units liable in tort whenever a private party would be liable in the same circumstances. The task ahead that is especially difficult is to work out a satisfactory system of liability and immunity with respect to functions that have no private counterpart.

We still fall considerably short of accomplishing the first of these objectives. New York seems to be soundly on the road to a full

258. If Congress, or the President, or an agency is at fault in making a choice of policy, millions may be directly hurt, but a correction through damage suits may be clearly inappropriate.

259. Each of these possible tests is discussed in the foregoing pages.

260. The test becomes misleading if one reasons as did Mr. Justice Reed on behalf of the four dissenting Justices in the Indian Towing case when he assumed that the government must be immune from liability for any action having no private counterpart. Indian Towing Co. v. United States, 350 U. S. 61, 70 (1955).

For action having no private counterpart, the government should sometimes be liable and sometimes immune.
accomplishment of it. Legislation is needed in nearly all the other states. The Federal Tort Claims Act needs to be patched up in several respects. The limitation of liability to "negligent or wrongful" acts or omissions should be corrected. When an ammunition dump explodes, the government should be liable for all resulting damage, irrespective of negligence, just as a private corporation would be. When a military plane falls on a house, the government should be liable whether or not negligence can be proved.\textsuperscript{261} When a government employee is authorized to use a government vehicle, the government should be liable for the negligence of the employee, even if the employee is beyond the scope of his employment.\textsuperscript{262} Congress through private laws has already largely recognized the need for absolute liability in cases like these.\textsuperscript{263} The Act should be amended to make the government liable for willful torts. No longer should the government be immune from liability for such a tort as false imprisonment, as it was in the case in which one who had been honorably discharged from the Army was imprisoned by the Army for desertion.\textsuperscript{264}

To make all federal, state, and local governmental units liable for their torts to the same extent that private parties are liable in similar circumstances will be a significant accomplishment. Even so, in the long run the demands of justice will compel us to go much further. We shall have to work out principles to govern liability with respect to those activities which are uniquely governmental.

On this problem a good deal of thinking is needed. Messrs. Gellhorn and Schenck, recognizing the intricacy of the problem, have proposed: "The old Illinois statute, authorizing the hearing of 'all claims . . . which the State, as a sovereign commonwealth, should, in equity and good conscience, discharge and pay,' might furnish a sound basis for future federal legislation. It would, we think, be feasible and constructive to subject the Federal Government to liability wherever 'in equity and good conscience' payment should be made."\textsuperscript{265} Such a statute would merely pass the buck to the

\textsuperscript{261} The government was held liable in United States v. Praylou, 208 F. 2d 291 (4th Cir. 1953), \textit{cert. denied}, 347 U. S. 934 (1954), but the decision rested upon a South Carolina statute making the liability absolute.

In Williams v. United States, 218 F. 2d 473 (5th Cir. 1955), the government was held not liable when a jet bomber exploded in the air and the plaintiffs were hurt when flaming fuel fell.

\textsuperscript{262} A private employer would be liable in about ten states. But liability insurance commonly covers such a case, so that the injured party is protected when the employer is insured. See § 8, above.

\textsuperscript{263} See § 2, above.


\textsuperscript{265} \textit{Tort Actions Against the Federal Government}, 47 Colum. L. Rev. 722, 740-41 (1947).
courts. Possibly that is what is needed, for the problem is surely
difficult enough to require the development of law through case-to-
case adjudication. The trouble is, however, that the whole doctrine
of sovereign immunity is judge-made, and that the courts have often
clung to the immunity even when legislative bodies have asserted
that they want sovereign responsibility. Basic planning, if it is to be
sound and effective, must take into account the judicial attitude
that is exemplified by the holding that a city is not liable for defec-
tive fire-fighting equipment even though the city officials knew of
the defects and even though a statute provided for liability for in-
juries resulting from defects in equipment where the officials have
knowledge of the defects.\footnote{Stang v. City of Mill Valley, 38 Cal. 2d 486, 240 P. 2d 980 (1952).}

Let us not forget that most of the state
statutes consenting to suits against the state have been construed to
waive immunity from suit but not immunity from liability.\footnote{See the whole discussion in § 6, above.}
Let us not forget that as recently as 1955 four Justices of the Supreme
Court of the United States were still insisting that the Tort Claims
Act should be interpreted to retain immunity with respect to all
"governmental" functions.\footnote{Indian Towing Co. v. United States, 350 U. S. 61, 70 (1955).}

Even the New York courts, which
have been outstanding in the nation in catching the spirit of sover-
egn responsibility, have had to be prodded by further legislation at
several stages of the overall development.\footnote{For instance, compare Goldstein v. State, 281 N. Y. 396, 24 N. E. 2d 97 (1939), with N. Y. Ct. Cl. Act § 8-a, added by L. 1953, c. 343.}

The time will come when we shall perceive more clearly that
governmental units should often be liable where private parties
would not be and should not be liable. After all, a governmental unit
differs significantly from a private party: it is supported by taxa-
tion, and it is not dependent upon private investment or private
profit. A large enough governmental unit is the best of all possible
loss spreaders, especially, perhaps, if its taxes are geared to ability
to pay. This basic fact, which so far has been given too little heed,
will in time lead us to see that the basis for government liability
should not be fault but should be equitable loss spreading. The ulti-
mate principle may be that the taxpaying public should usually bear
the fortuitous and heavy losses that result from governmental activ-
ity. The key idea will be neither comparison with private liability
in the same circumstances, nor the extra-hazardous character of the
activity, nor authorized use of a government vehicle or other such
instrumentality, nor fault on the part of the governmental unit or its
agents; the key idea will be simply that a beneficent governmental

\footnote{Stang v. City of Mill Valley, 38 Cal. 2d 486, 240 P. 2d 980 (1952).}
\footnote{See the whole discussion in § 6, above.}
\footnote{Indian Towing Co. v. United States, 350 U. S. 61, 70 (1955).}
\footnote{For instance, compare Goldstein v. State, 281 N. Y. 396, 24 N. E. 2d 97 (1939), with N. Y. Ct. Cl. Act § 8-a, added by L. 1953, c. 343.}
unit ought not to allow exceptional losses to be borne by those upon whom the governmental activity has happened to inflict them.

A sample of the attitude which may become the law of the future is the assumption by the British government of liability for all damage done by German bombs during the Second World War, as well as the somewhat similar statute enacted by the United States Congress.\textsuperscript{270}

The basic principle for which we are searching may turn out to have a good deal in common with the present principle concerning governmental liability in eminent domain cases: just as the government has to pay for the property it deliberately takes, it should have to pay for the deliberate choices it makes to engage in activities which it knows in advance are sure to cause exceptional losses to private parties. The basic principle may turn out to resemble the government's liability to its own employees under workmen's compensation legislation: if government activities cause human wear and tear on government employees, the cost of which should be borne by the taxpaying public, then when government activities cause exceptional loss to those who are not government employees, the cost similarly should be borne by the taxpaying public. Even the law with respect to liability of private enterprises is tending to move away from a fault basis and toward the principle that the enterprise should bear the losses it causes. The law with respect to liability of public enterprises may soundly, perhaps, go even further in the same direction.

Of course, this is far from saying that governmental units should be liable for all private losses they cause. Most such losses, as now, will have to be regarded as a part of the necessary price for the benefits of living in organized society. Nearly all policy determination—legislative, executive, judicial, or administrative—hurts someone. The losses caused by policy choices are usually well spread, and even when they are not, as when a statute destroys a profitable business by prohibiting sale of a product deemed harmful, the governmental unit probably should usually be immune from liability. Many losses, as now, will have to be borne by those upon whom they fall even when the governmental unit is at fault in causing the loss; for instance, those whose property is reduced in value by a zoning ordinance probably should not have a cause of action against the city, even if a court finally holds that the adoption of the ordinance was

\textsuperscript{270} 56 Stat. 174 (1942), repealed by 61 Stat. 209 (1947), assumed government liability for war damage theretofore caused and provided for payment of premiums for government insurance against later war damage.
an abuse of discretion. Yet governmental units should often be liable for exceptional losses that are not otherwise sufficiently spread and that equitably should be spread through the medium of damage suits.

One may hope that future articles in legal periodicals will no longer restate the familiar reasons for governmental tort liability but will come to grips with the difficulties of trying to formulate a system of sovereign responsibility.