

STATE AND LOCAL GOVERNMENT IMMUNITIES

I. 42 U.S.C. §1983¹

The immunities discussed below relate only to claims of *personal* liability in § 1983 actions. In an official-capacity action, a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). In an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). An official in a personal-capacity action may, depending on his position, be able to assert the personal immunity defenses discussed below. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment. *Id.* at 166-67.

A. Qualified/Absolute Immunity

In *Scheuer v. Rhodes*, 416 U.S. 232, 238; 94 S. Ct. 1683, 40 L. Ed. 90 (1974), a lawsuit against the Governor of Ohio and others arising from the Kent State massacre, the United States Supreme Court held that State officials are not shielded by the Eleventh Amendment from suits for damages brought under the

¹ 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Civil Rights Act of 1871, 42 U.S.C. § 1983, for deprivation of a federal right under color of state law. 416 U.S. at 237-38.²

After noting that 42 U.S.C. § 1983 did not abolish all immunities for public officials, 416 U.S. at 243-44, the *Scheuer* Court was called on to decide whether executive officials were entitled to absolute immunity. In deciding that executives had a qualified immunity, as opposed to the absolute immunity traditionally afforded judges, *Pierson v. Ray*, 386 U.S. 547 (1967),³ and legislators, *Tenney v. Brandhove*, 341 U.S. 367 (1951), the *Scheuer* Court looked at the history and purposes of executive immunity:

The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine -- that the "King can do no wrong" -- did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability. This official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good. . . .

These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable

² § 1983 suits against the State are barred by the Eleventh Amendment, *Edelman v. Jordan*, 415 U.S. 651 (1974), but municipalities and other local government units are included among those persons to whom § 1983 applies. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690 (1978).

³ It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

386 U.S. at 554.

grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 239-40, 247-48.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court concluded that state prosecutors had absolute immunity under § 1983 for “activities intimately associated with the judicial phase of the criminal process.”⁴ In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L. Ed. 895 (1978), the Court found that the same principles of immunity utilized in § 1983 actions against state officials should apply to a *Bivans* action against federal officials.⁵ Deciding that the Secretary of Agriculture should enjoy qualified, as opposed to absolute immunity, the *Butz* Court stated:

The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects -- including some which may infringe such important personal interests as liberty, property, and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of

⁴ “The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties.” 424 U.S., at 422-423. The prosecutor's role in the criminal justice system was likely to provoke “with some frequency” retaliatory suits by angry defendants. *Id.*, at 425. A qualified immunity might have an adverse effect on the functioning of the criminal justice system, not only by discouraging the initiation of prosecutions, see *id.*, at 426 n. 24, but also by affecting the prosecutor's conduct of the trial. *Butz v. Economou*, 438 U.S. 478, 510.

⁵ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official. *Butz*, *supra*, 438 U.S. at 486.

abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

438 U.S. at 505-06.

“Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, our decisions recognize that there are some officials whose special functions require a full exemption from liability.” *Id.* at 508. The *Butz* Court went on to determine that absolute “quasi-judicial” immunity applied to federal administrative hearing examiners who were subject to the constraints and safeguards of the APA,⁶ 438 U.S. at 513-14, that agency officials who initiate administrative proceedings (“performing certain functions analogous to those of a prosecutor”) had absolute immunity,⁷ 438 U.S. at 515, and that agency attorneys who conduct a trial and present evidence also had absolute quasi-prosecutorial immunity. *Id.* at 516-17.

⁶ The *Butz* Court placed considerable weight on the procedural safeguards available in hearings conducted under § 5 of the Administrative Procedure Act, 5 U.S.C. §554.

[Hearing examiners] may not perform duties inconsistent with their duties as hearing examiners. . . . When conducting a hearing under § 5 of the APA, 5 U. S. C. § 554, a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. 5 U. S. C. § 554 (d)(2). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. § 554 (d)(1). Hearing examiners must be assigned to cases in rotation so far as is practicable. § 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. § 7521. Their pay is also controlled by the Civil Service Commission.

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.

438 U.S. at 514.

⁷ The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding. An administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified. His claims that the proceeding is unconstitutional may also be heard by the courts. Indeed, respondent in this

In *Malley v. Briggs*, 475 U.S. 335; 106 S. Ct. 1092; 89 L. Ed. 2d 271

(1986), the Court restated its approach to questions of immunity under § 1983:

Although the statute on its face admits of no immunities, we have read it "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. *Tower v. Glover*, 467 U.S. 914 (1984). If "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Id.*, at 920. Thus, while we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form.

475 U.S. at 339-40. "Our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Id.* at 342.

The *Malley* Court considered the proper level of immunity for a police officer applying for a warrant. Rejecting the police officer's analogy of his actions to those of a prosecutor, the Supreme Court used a functional approach for its analysis.

We have interpreted § 1983 to give absolute immunity to functions "intimately associated with the *judicial* phase of the criminal process," *Imbler, supra*, at 430 (emphasis added), not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself. *Briscoe v. LaHue*, 460 U.S. 325, 334-335 (1983). . . .

Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking

case was able to quash the administrative order entered against him by means of judicial review. . . .

We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment."

438 U.S. at 515-16.

an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.

475 U.S. at 343.

As in *Butz v. Economou*, *supra*, the *Malley* Court also considered the procedural and practical safeguards available to guard against misconduct.

The organized bar's development and enforcement of professional standards for prosecutors also lessen the danger that absolute immunity will become a shield for prosecutorial misconduct. As we observed in *Imbler*, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 U.S., at 429 (footnote omitted). The absence of a comparably well-developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.

475 U.S. at 343, n.5.

The *Malley* Court noted that "it would be incongruous to test police behavior by the 'objective reasonableness' standard in a suppression hearing, see *United States v. Leon*, 468 U.S. 897 (1984), while exempting police conduct in applying for an arrest or search warrant from any scrutiny whatsoever in a § 1983 damages action." 475 U.S. at 344.

Accordingly, we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon*, *supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, *Leon*, *supra*, at 923, will the shield of immunity be lost.

475 U.S. at 344-45.

In *Buckley v. Fitzsimmons*, 509 U.S. 259; 213 S. Ct. 2606; 125 L. Ed. 209 (1993) the Supreme Court was called on to determine if absolute prosecutorial immunity would apply to claims under § 1983 that prosecutors fabricated false evidence during the preliminary investigation of a crime and made false

statements at a press conference announcing the return of an indictment. The Court noted that “[t]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question,” 509 U.S. at 269, and applied a “functional approach,” “which looks to the nature of the function performed, not the identity of the actor who performed it.” *Id.*⁸ Because the prosecutors’ involvement in the investigation was more akin to police work and “well before they could properly claim to be acting as advocates,” they were entitled only to qualified immunity. *Id.* at 275. Finding no historical precedent for immunity for a prosecutor’s out-of-court statements, and no functional tie to the judicial process, the Court also rejected the prosecutor’s argument that absolute immunity should apply. *Id.* at 276-78.

In *Kalina v. Fletcher*, 522 U.S. 118; 118 S. Ct. 502; 139 L. Ed. 2d 471 (1997), a King County deputy prosecutor commenced a criminal proceeding by filing (1) an unsworn information charging the suspect with burglary, (2) an unsworn motion for an arrest warrant, and (3) a certification for determination of probable cause, in which document the prosecutor summarized the evidence supporting the charge and swore to the truth of the alleged facts under penalty of perjury. The Court found that absolute immunity protected the deputy prosecutor’s preparation of the information and motion for the arrest warrant. 522 U.S. at 129. However, by personally attesting to the truth of the statements in the

⁸ The Court had previously ruled in *Burns v. Reed*, 500 U.S. 478, 114 L.Ed. 2d 547, 111 S. Ct. 1934 (1991) that a prosecutor was entitled to absolute immunity when appearing before a judge and presenting evidence in support of a motion for a search warrant, 500 U.S. at 491, whereas the prosecutor was only entitled to qualified immunity for giving legal advice to the police on the propriety of hypnotizing a suspect, and on whether probable cause existed to arrest that suspect. *Id.* at 492-95.

certification, she was assuming the role of a complaining witness, and was only entitled to qualified immunity. 522 U.S. at 131.

B. Good Faith/Objective Reasonableness

In *Wood v. Strickland*, 420 U.S. 308; 95 S. Ct. 992; 43 L. Ed. 2d 214 (1975), the Supreme Court applied a “qualified good-faith immunity” to school board members in determining liability for damages under § 1983:

A compensatory award will be appropriate only if the school board member has acted with such an **impermissible motivation** or with such **disregard of the student's clearly established constitutional rights** that his action cannot reasonably be characterized as being in good faith.

Id. at 322 (emphasis added).

In the seminal case of *Harlow v. Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396 (1982), the Court adjusted this “good faith” standard of qualified immunity because it had not been effective in weeding out insubstantial lawsuits prior to trial. An official’s subjective good faith had been considered a question of fact requiring resolution by a jury. 457 U.S. at 814-16.

[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that **government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.**

.....

On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to “know” that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary

circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

457 U.S. at 817-19 (emphasis added).

In *Anderson v. Creighton*, 483 U.S. 635; 107 S. Ct. 3034; 97 L. Ed. 2d 523 (1987), the Court applied the *Harlow* qualified immunity standard to a lawsuit against a federal law enforcement officer whose warrantless search of a home was alleged to have violated the Fourth Amendment. Justice Scalia opined for the Court:

It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable. See *Malley, supra*, at 344-345. The same is true of their conclusions regarding exigent circumstances.

It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials. But contrary to the Creighton's assertion, this does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize. See *Harlow*, 457 U.S., at 815-820. The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant.

483 U.S. at 641.

The Court also addressed the procedural context for deciding immunity:

[O]n remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to

discovery. Cf. *ibid.* If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.

483 U.S. at 646.

In *Staats v. Brown*, 139 Wn.2d 757, 991 P.2d 615 (2000), the Washington Supreme Court had to determine questions of qualified immunity in a § 1983 case brought under the Fourth Amendment on allegations of an unlawful arrest, the use of excessive force, and an illegal search. Plaintiff Staats had been arrested by fisheries patrol officer Brown for refusing to provide identification and information for a citation for commencing construction without a permit below the high watermark of the Snake River.

Brown stated that he had arrested Staats by grabbing his head and hair and pulling him to the ground. Staats claimed Brown had placed him in a choke hold, forced him to the ground, dragged him backward across the rocks and then threw him down face-first across a two foot boulder. Staats claimed that Brown then slammed his head down into the two-foot boulder, causing his forehead to bleed, that Brown had knelt on his back and, when Staats tried to get up, grabbed his head and pushed him back down into a rock. Brown also allegedly pulled Staats' ears straight out from his head causing extreme pain and suffering. *Id.* at 761-62. Staats claimed that after he was handcuffed, Brown entered his residence without authorization or permission and confiscated his wallet. *Id.* at 775-76.

Regarding the unlawful arrest claim, the Court found that it was unlawful for a fisheries officer to arrest a person without a warrant for commencing construction

without a permit outside the officer's presence. Nevertheless the Court concluded that, because no appellate court had previously applied the Fourth Amendment warrant requirement to an arrest for a misdemeanor committed outside the presence of an officer (or determined whether an arrest in violation of state law necessarily violated the Fourth Amendment), Staat's Fourth Amendment right to be free of such an arrest was not "clearly established" at the time, and qualified immunity applied. *Id.* at 775.

Regarding the excessive force claim, relying on the "objective reasonableness" test for determining a Fourth Amendment excessive force case that was set out in *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 443 (1989), and accepting Staats' allegations as true for purposes of summary judgment, the Court found that it could not say that, as a matter of law, Brown's actions were "objectively reasonable," and the Court denied application of qualified immunity. 139 Wn.2d at 775-76.

On the claim of an illegal search, the Court noted:

[T]he right to be free of a warrantless entry into one's home, except in rare circumstances, is not merely "sufficiently clear" under the Fourteenth and Fourth Amendments--it is crystalline. Warrantless searches are per se unreasonable and allowed only when a few specifically established and jealously guarded exceptions are present, the burden to establish same falling upon the party who conducted the warrantless search. *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

139 Wn.2d 776. Qualified immunity for the search was also denied. *Id.* at 777.

In *Saucier v. Katz*, 533 U.S. 194; 121 S. Ct. 2151; 150 L. Ed. 2d 272 (2001), the Court followed the *Anderson* decision in separating the preliminary inquiry regarding qualified immunity from the ultimate question of whether

“unreasonable” force was used in making an arrest under the Fourth Amendment. 533 U.S. at 200-01. The *Saucier* Court found that application of the *Graham* “objective reasonableness” test was not enough⁹. *Id.* at 202.

The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. See *Wilson v. Layne*, 526 U.S. 603, 615, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999) (“As we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established”).

The approach the Court of Appeals adopted -- to deny summary judgment any time a material issue of fact remains on the excessive force claim -- could undermine the goal of qualified immunity to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

Id.

Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes “hazy border between excessive and acceptable force,” *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (CA11 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.

Id. at 206. The *Saucier* Court set out the following framework for considering a qualified immunity issue:

Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v. Gilley*, 500 U.S. 226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991). In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. . . .

If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the

⁹ The issue of qualified immunity had not been raised in *Graham*.

right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

533 U.S. at 201.

The *Saucier* Court found that a military policeman who had seized an animal-rights protester after he had approached Vice-President Gore, then placed him into a military van with a “gratuitously violent shove,” was not violating a “clearly established rule that would prohibit using the force [that was used].” The officer “was entitled to qualified immunity, and the suit should have been dismissed at an early stage of the proceedings.” *Id.* at 208-09.

In *Hope v. Pelzer*, 536 U.S. 730; 122 S. Ct. 2508; 153 L. Ed. 2d 666 (2002), Alabama prison guards claimed they were entitled to qualified immunity from a § 1983 Eighth Amendment claim for gratuitously handcuffing a standing inmate to a “hitching post” for an extended period in the burning sun. The guards claimed that although previous cases finding Eighth Amendment violations were “analogous,” they were not materially similar to this situation.

The *Hope* Court looked to *United States v. Lanier*, 520 U.S. 259 (1997), had which interpreted § 1983’s criminal counterpart, 18 U.S.C. § 242, for guidance. The *Lanier* Court had held that the defendant was entitled to “fair warning” that his conduct deprived his victim of a constitutional right. 520 U.S. at 270-71.

In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional

law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'

536 U.S. at 740-41. The *Hope* Court had little problem finding that “fair warning” had been provided.

The use of the hitching post as alleged by Hope "unnecessarily and wantonly inflicted pain," *Whitley*, 475 U.S. at 319, and thus was a clear violation of the Eighth Amendment. See Part II, *supra*. Arguably, the violation was so obvious that our own Eighth Amendment cases gave the respondents fair warning that their conduct violated the Constitution. Regardless, in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

536 U.S. at 741-42.

In *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 1068 (2004), ATF agents had conducted a search of respondents' home pursuant to a warrant that failed to describe the "persons or things to be seized." U.S. Const., Amdt. 4. The questions presented were (1) whether the search violated the Fourth Amendment, and (2) if so, whether petitioner nevertheless was entitled to qualified immunity, given that a Magistrate, relying on an affidavit that particularly described the items in question, found probable cause to conduct the search. 540 U.S. at 553.

The Court found that the search was “clearly ‘unreasonable’ under the Fourth Amendment.” *Id.* at 563. “Because petitioner himself prepared the warrant, he may not argue that he reasonably relied on the [Magistrate].” *Id.* at 564. The Court further found that qualified immunity did not apply:

No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.

Id.

In *Brosseau v. Haugen*, 543 U.S. 194; 125 S. Ct. 596; 160 L. Ed. 2d 583 (2004), a § 1983 case alleging excessive force under the Fourth Amendment, a Puyallup police officer shot a felon, “set on avoiding capture through vehicular flight, when persons in the immediate area [we]re at risk from that flight.” 543 U.S. at 200. Finding that, at the time of her conduct, Brosseau’s actions fell in the “hazy border between excessive and acceptable force.” *Saucier v. Katz, supra*, 533 U.S. at 206, the Court held that qualified immunity should apply. 543 U.S. at 201.

II. Tort Suits Against the Government

Tort suits against the State were historically barred by the judicial doctrine of sovereign immunity, which was waived by the Washington Legislature in Laws of 1961, ch 136, §1.¹⁰ Tort suits against counties and other local government entities have been allowed since Washington was a Territory. *See* RCW § 4.08.120. The State’s waiver of immunity was without reservation. *See* Tardif & McKenna, Washington State's 45-Year Experiment in Governmental Liability, 29 Seattle Univ. L. R. 1, 2 (2005).

¹⁰ RCW § 4.92.090. Tortious conduct of state -- Liability for damages

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

A. Discretionary Function Immunity

In *Evangelical Church of Adna v. State*, 67 Wn.2d 246; 407 P.2d 440 (1965), over the strong dissent of Justice Finley, the Washington Supreme Court found that RCW § 4.92.090 only rendered the State liable for tortious conduct “analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation. Thus, the statute does not render the state liable for every harm that may flow from governmental action, or constitute the state a surety for every governmental enterprise involving an element of risk.” 67 Wn. 2d at 253.

The Court looked to cases interpreting the “discretionary function” exception, 28 U.S.C. § 2680, of the Federal Tort Claims Act, 28 U.S.C. § 1346, for guidance in formulating “where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins.” *Id.* “Essentially, the line of demarcation should present a question of law, although in some instances it may well give rise to a mixed question of law and fact.” *Id.*

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

67 Wn. 2d at 255.

The *Evangelical* Court drew a distinction between “acts or omissions that can properly be characterized as "operational," "ministerial," or "housekeeping" functions, as opposed to policy decisions embracing the exercise of purely executive or administrative discretion.” *Id.* at 259¹¹.

Though the acts may be said to involve some discretion in varying degrees, the acts primarily involve internal management functions, and do not involve decisions which are essential to the realization or attainment of the basic policies and objectives of the delinquent youth program of the state. If negligent performance of such functions proximately caused damage, the state would become subject to liability therefore under the provisions of RCW 4.92.090.

Id.

In *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974), the Court examined the purpose for protecting “discretionary” governmental activities, noting that the term “discretionary” gave little guidance. *Id.* at 245-46.

Immunity for "discretionary" activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision.

Id. at 246

In *Mason v. Bitton*, 85 Wn.2d 321, 327-29, 534 P.2d 1360 (1975), the Court clarified the scope of discretionary governmental immunity by stating the

¹¹ Contrary to the interpretation given to this case in the Tardif & McKenna article, *supra*, at p. 11, (“*Evangelical* was significant because it immunized not only policymaking, but also the operational steps taken by officials to implement policy,”) the *Evangelical* case characterized the decisions it immunized as “purely discretionary, if not in fact quasi-judicial in character.” 67 Wn. 2d at 259. On the other hand, the Court stated that the functions it chose not to immunize “can properly be characterized as ‘operational.’” *Id.*

exception applied only to "*basic policy discretion*." *Mason* involved damages caused by a high speed chase by police officers.

We are fully convinced that the initial decision to give or not to give chase, and the decision as to whether to continue the pursuit are properly characterized as *operational*, and not the "basic policy decision" discussed in *King*, at page 246. To now hold that this type of discretion, exercised by police officers in the field, cannot result in liability under RCW 46.61.035, due to an exception provided for basic policy discretion, would require this court to close its eyes to the clear intent and purpose of the legislature when it abolished sovereign immunity under RCW 4.96.010. If this type of conduct were immune from liability, the exception would surely engulf the rule, if not totally destroy it.

85 Wn.2d at 328-29.

In *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979), plaintiff challenged the design of a bridge and its lighting system. The State claimed the protection of "discretionary governmental immunity." The *Stewart* Court noted that "discretionary governmental immunity in this state is an extremely limited exception. *Haslund v. Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976)."

We believe that these facts do not justify discretionary immunity under tests 1 and 2 of *Evangelical* as refined in *King*. The decisions to build the freeway, to place it in this particular location so as to necessitate crossing the river, the number of lanes -- these elements involve a basic governmental policy, program or objective. However, these are not the elements which are challenged by appellant. Rather, appellant argues that once those governmental decisions were made they had to be carried out without negligent design of the bridge or of the lighting system. Negligent design was not essential to the accomplishment of the policy, program or objective.

The State argues that adoption of a design necessarily involves a judgmental choice. The *King* test requires more. There was no showing by the State that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering practices and whatever else was appropriate. The issues arising from the evidence as to negligent design should have been submitted to the jury.

92 Wn.2d at 294.

In *Bender v. Seattle*, 99 Wn.2d 582; 664 P.2d 492 (1983), the Washington Supreme Court was asked to apply discretionary governmental immunity in a case involving allegations of false arrest, false imprisonment, malicious prosecution, libel and slander by City of Seattle police officers. The Court started its analysis as follows:

By its enactment of Laws of 1961, ch. 136, § 1, p. 1680 (RCW 4.92.090), n1 and Laws of 1967, ch. 164, § 1, p. 792 (RCW 4.96.010), the Legislature effectively abolished the principle of sovereign immunity in Washington. Thereafter, we created the very narrow exception of discretionary governmental immunity in the case of *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). The purpose of our limited, court-created rule of immunity is to prevent the courts from passing judgment on basic policy decisions that have been committed to coordinate branches of government. Since the concept of discretionary governmental immunity is a court-created exception to the general rule of governmental tort liability, its applicability is necessarily limited only to those high level discretionary acts exercised at a truly executive level.

99 Wn.2d 587-88.

The City relied on two Court of Appeals cases to support its theory.¹² The *Bender* Court overruled *Clipse* and *Moloney* insofar as they purported to extend the limited doctrine of discretionary governmental immunity.

In neither *Clipse* nor *Moloney* did the courts determine whether the actions of those police officers were "basic policy decisions" or whether actual balancing of risks and advantages took place. Although police investigations and the disclosure of investigation information to the press are of a discretionary nature, we do not view those actions as the type of high level, policymaking decisions of a governmental entity that fall within the rule of discretionary governmental immunity. Instead, such conduct is more closely analogous to

¹² In *Clipse v. Gillis*, 20 Wn. App. 691, 582 P.2d 555 (1978), the Court of Appeals granted immunity to police officers in the investigation of criminal complaints because such activity was of a discretionary nature. The court stated that the officers were immune for their negligent conduct, but could be liable upon proof of corrupt or malicious motives. *Clipse*, at 696. In *Moloney v. Tribune Pub'g Co.*, 26 Wn. App. 357, 613 P.2d 1179 (1980), the Court of Appeals relied on the *Clipse* decision to grant immunity to police officers engaging in the discretionary act of releasing investigation information to the press.

the type of discretion exercised at an everyday operational level, such as whether or not to engage in a high speed chase.

99 Wn.2d 589-90.

In *Taggart v. Washington*, 118 Wn.2d 195, 822 P.2d 243 (1992), the Court rejected the State's argument that discretionary immunity should apply to claims of negligent supervision by parole officers.

[W]e hold that the discretionary immunity exception does not shield parole officers from claims alleging negligent supervision. We recognize that parole officers' supervisory decisions require the exercise of discretion. The crucial point, however, is that the discretionary immunity exception applies only to basic policy decisions. Parole officers' supervisory decisions, however much discretion they may require, are not basic policy decisions. Such decisions are ministerial in nature. Therefore, even if the discretionary immunity exception applies to the Board's release decisions, an issue we have found it unnecessary to resolve, the exception does not shield parole supervision decisions.

118 Wn.2d at 215.

According to the Tardif & McKenna article, “[t]he effect of [*King v. Seattle* and its progeny’s] interpretation of discretionary immunity was to limit immunity to adoption of laws, regulations, and policies by legislative bodies, and elected or appointed officials.” Tardif & McKenna, *supra*, 29 Seattle Univ. L. R. at 15-16.¹³

¹³ “The only significant governmental functions protected by discretionary immunity since *King* have been the Governor's issuance of an executive order on the Mount St. Helens volcano (*Cougar Bus. Owners Ass'n v. State*, 97 Wash. 2d 466, 647 P.2d 481 (1982); *Karr v. State*, 53 Wash. App. 1, 765 P.2d 316 (1988)), an agency director's decision to issue regulations (*Bergh v. State*, 21 Wash. App. 393, 585 P.2d 805 (1978)), and the Parole Board's decision to parole (*Noonan v. State*, 53 Wash. App. 558, 769 P.2d 313 (1989)).” Tardif & McKenna, *supra*, at p.16, n.85.

B. Qualified/Absolute Immunity

In order to decide whether absolute or qualified immunity applies, the Washington Courts have employed the same functional analysis used in § 1983 cases.

In *Babcock v. Washington*, 116 Wn.2d 596, 809 P.2d 143 (1991), the Court was called on to decide whether absolute quasi-judicial or quasi-prosecutorial immunity should apply to DSHS caseworkers for claims of negligent investigation and placement. Noting that the Legislature had only given caseworkers qualified immunity, even in cases of emergency removals, RCW 26.44.056(3), the Court stated that “it would be inappropriate for us to extend to politically unaccountable caseworkers an immunity traditionally granted judges.” 116 Wn.2d at 607. The Court was also compelled to reach this conclusion by binding state precedent. *Id.*

Our decision in *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983) controls this case. In *Bender*, we held that an officer who obtains an arrest warrant from a magistrate is nevertheless liable for false arrest. *Bender*, 99 Wn.2d at 592; *accord*, *Malley v. Briggs*, 475 U.S. 335, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986). The magistrate's warrant does not absolve the officer. The court explained that the officer "is not merely directed to fulfill the order of the court; he is in a position to control the flow of information to the magistrate upon which probable cause determinations are made." *Bender*, 99 Wn.2d at 592. Similarly, a caseworker cannot escape liability for negligent investigation because the juvenile court commissioner relies on the caseworker's recommendation to allow a caseworker's placement decision to stand. In the absence of a preplacement adversary hearing in which a predisposition study is entered into evidence, the caseworker controls the flow of information to the court. . . .

Id. at 207-08. “Had the court ordered the actions complained of, quasi-judicial immunity would attach.” *Id.* at 209.

“Because these caseworkers performed investigative, rather than quasi-prosecutorial functions, they cannot claim prosecutorial immunity.” *Id.* at 610.

We therefore hold that caseworkers are entitled to the qualified immunity defined in *Guffey* [*v. State*, 103 Wn.2d 144, 690 P.2d 1163 (1984)] for foster care placement decisions. In order to qualify for the immunity, the caseworker must (1) carry out a statutory duty, (2) according to procedures dictated by statute and superiors, and (3) act reasonably. *Guffey*, at 152.

We reverse the trial court's holding on qualified immunity because the trial court did not apply the *Guffey* standard to these caseworkers. It granted them immunity on the grounds that they did not act maliciously. Lack of malice is necessary but not sufficient to establish qualified immunity under *Guffey*.

Caseworkers cannot claim even a qualified immunity when they fail to follow statutory procedures. On remand, the caseworkers can only win immunity by establishing that the entire chain of events leading up to the placement at the Michael home was in accordance with statutory and regulatory procedures in every respect, that their actions were reasonable, and that their statutory duties required their actions.

116 Wn.2d at 618.

In *Taggart v. Washington, supra*, 118 Wn.2d 195 (1992), a tort action against the Indeterminate Sentence Review Board for negligent parole release and against parole officers for negligent supervision, the Washington Supreme Court looked to § 1983 cases for guidance in determining whether quasi-judicial absolute immunity should apply to the parole board (the Indeterminate Sentence Review Board) and a parole officer. The Court relied on a functionality test:

[W]hether a challenged administrative action is functionally comparable to judicial action depends on various factors, such as whether a hearing was held to resolve an issue or controversy, whether objective standards were applied, whether a binding determination of individual rights was made, whether the action is one that historically the courts have performed, and whether safeguards exist to protect against errors.

118 Wn. 2d at 205.

The Court found that “parole decisions are essentially judicial in nature and, like judges' decisions, require freedom from personal fears of litigation.”

118 Wn. 2d at 207.

[W]hen parole board members decide whether to deny, grant, or revoke parole, their action is essentially quasi judicial. Here, two members of the Board conducted a hearing to determine whether to parole Brock. The Board considered Brock's preparole plan, a parole officer's report, medical, psychological, and psychiatric evaluations, a history of Brock's institutional and criminal conduct, and reports from Department of Corrections staff. The Board then applied objective standards to the facts before it in order to arrive at the decision to parole Brock. *See* Washington State Board of Prison Terms and Paroles, *Guidelines for Reconsideration of Length of Confinement*, in WAC Title 381 (Supp. 1984-1985). Moreover, determining a prisoner's actual term of confinement is a task historically performed by courts. Furthermore, the rationale underlying judicial immunity applies forcefully to the Board's parole decisions. Like judges, board members make decisions that without immunity would leave them vulnerable to suits either from inmates or from members of the public injured by parolees. Immunity is necessary to preserve Board members' independent and impartial judgment just as it is necessary to preserve judges' independence.

*Id.*¹⁴

The *Taggart* Court also used a functional approach in deciding that a parole officer was not entitled to absolute quasi-judicial immunity under the facts that the case presented.

We hold that parole officers are entitled to quasi-judicial immunity only for those functions they perform that are an integral part of a judicial or quasi-judicial proceeding. Thus when a parole officer performs functions such as enforcing the conditions of parole or providing the Board with a report to assist the Board in determining whether to grant parole, the officer's actions

¹⁴ The *Taggart* Court expressed concern about the lack of safeguards to the public in a parole hearing, but found that the concerns were insufficient to outweigh the justifications for their finding.

We recognize that the absence of any mechanism by which the Board's decisions can be challenged [by members of the public] and reviewed represents a significant departure from the ideal form of quasi-judicial action. This departure, however, is not enough to warrant denying quasi-judicial immunity to the Board.

118 Wn. 2d at 208.

are protected by quasi-judicial immunity. But when the officer takes purely supervisory or administrative actions, no such protection arises.

Id. at 213.

The Court noted that “parole officers perform a difficult job under exacting decisions,” and held that “when parole officers act outside any judicial or quasi-judicial proceeding and so are not entitled to absolute immunity, they nonetheless may be shielded by qualified immunity.” *Id.* at 215-16. Recognizing the inherent differences between foster care placements and parole supervision, the Court set out a more limited test for allowing qualified immunity to parole officers:

[P]arole officers are immune from liability for allegedly negligent parole supervision if their action is in furtherance of a statutory duty and in substantial compliance with the directives of superiors and relevant regulatory guidelines. Unlike the immunity *Babcock* created for caseworkers, the immunity we announce here for parole officers does not require an additional showing that the parole officers' actions were reasonable once it has been shown that the officers performed a statutory duty in compliance with the directives of superiors and relevant guidelines. In addition, the immunity requires only that the parole officers' conduct must be in substantial compliance, not strict compliance, with the directives of superiors and regulatory procedures.

Id. at 216.

C. Extension of Immunity to the Government

In *Babcock v. State, supra*, the Washington Supreme Court considered whether the qualified immunity it had granted to caseworkers should be extended to DSHS (the State) for a claim of negligent supervision. Looking to the legislative intent in RCW 26.44.060(3), which provides qualified immunity to caseworkers for taking children into 72-hour protective custody while not extending that immunity to the State, the Court found that extending a

caseworker's personal qualified immunity to the State would be unwarranted.
116 Wn.2d at 619-20.

An agent's immunity from civil liability generally does not establish a defense for the principal. Restatement (Second) of Agency § 217 (1958). Accordingly, the immunities of governmental officials do not shield the governments which employ them from tort liability, even when liability is predicated upon respondeat superior. . . . Similarly, the qualified immunity granted government officials under 42 U.S.C. § 1983 is a personal defense which shields the official from suit in his or her personal capacity but not in his or her official capacity. Suits against individuals in their official capacity are treated like suits against entities and personal defenses do not apply to suits against entities.

Id. at 620-21.

The *Babcock* Court acknowledged, however, that in some cases “policy considerations control the question of whether a government agency can take advantage of its agent’s immunity defense.” *Id.* at 621.

In *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995), the Court closely examined the application of personal qualified immunities to the government, looking first at the Restatement (Second) of Agency § 217.¹⁵ The Court then looked at precedent:

¹⁵. Where Principal or Agent has Immunity or Privilege

In an action against a principal based on the conduct of a servant in the course of employment:

(a) The principal has a defense if:

(i) he had an immunity from liability to the person harmed, or

(ii) he had a delegable privilege so to act, or

(iii) the agent had a privilege which he properly exercised on his principal's behalf, or

(iv) the agent did not fall below the duty of care owed by the principal to the third person.

(b) *The principal has no defense because of the fact that:*

(i) he had a non-delegable privilege to do the act, or

Quasi-judicial immunity and personal qualified immunity are designed to serve different functions. The former "attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge's absolute immunity while carrying out those functions." *Lutheran*, 119 Wn.2d at 99.

Quasi-judicial immunity is designed to protect the government, not the individual employee, from suit.

The doctrine of exemption of judicial and quasi-judicial officers (the prosecuting attorney comes within the second classification) is founded upon a sound public policy, *not for the protection of the officers*, but for the protection of the public, and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property.

Anderson v. Manley, 181 Wash. 327, 331, 43 P.2d 39 (1935); see also *Taggart v. State*, 118 Wn.2d 195, 203, 822 P.2d 243 (1992) (the purpose of judicial immunity is not to protect judges as individuals but to safeguard the independence of the judiciary) (citing *Adkins v. Clark County*, 105 Wn.2d 675, 677, 717 P.2d 275 (1986)).

By contrast, personal qualified immunity, such as is granted to parole officers and caseworkers, is intended to protect the individual from the unduly inhibiting effect the fear of personal liability would have on the performance of his or her professional obligations. See *Babcock v. State*, 116 Wn.2d 596, 616-19, 809 P.2d 143 (1991); *Taggart*, 118 Wn.2d at 216.

It follows from the distinct purposes the two immunities serve that the extension of quasi-judicial immunity from the agent to the State does not compel such an extension where qualified personal immunity is at issue.

(ii) *the agent had an immunity from civil liability as to the act.*

(Italics ours.) RESTATEMENT (SECOND) OF AGENCY § 217 (1958). The commentary explains:

Immunities, unlike privileges, are not delegable and are available as a defense only to persons who have them. . . . On the other hand, where the principal directs an agent to act, or the agent acts in the scope of employment, the fact that the agent has an immunity from liability does not bar a civil action against the principal. Thus, where a servant in the scope of employment negligently runs over his wife, an action against the master by the injured wife is not barred. This result is in accordance with the rule stated in this Section and is the rule adopted in most of the states.

(Italics ours.) RESTATEMENT (SECOND) OF AGENCY § 217 cmt. b (1958). See also RESTATEMENT (SECOND) OF TORTS § 895D cmt. j (1979) (explaining that the immunity of a public officer is not necessarily coterminous with that of the government). 127 Wn.2d at 439-40.

127 Wn.2d at 441-42.

The Savage Court then looked to the purposes underlying the abrogation of sovereign immunity¹⁶ and found that “the different functions personal and governmental immunity are designed to serve support maintaining state liability in this context, even where the agent enjoys qualified personal immunity.” 127 Wn.2d at 445.

[T]he fundamental reasons for the two immunities differ; for the officer it is to encourage unrestrained execution of responsibility, while for the sovereign it is to prevent judicial scrutiny of basic policies formulated by coordinate branches of government. To insulate the Government from liability for the inevitable mishaps which will occur when its employees perform their functions without fear of liability not only is unjust, but also serves no purpose for which sovereign immunity need exist.

Downs v. United States, 382 F. Supp. 713, 750 (M.D. Tenn. 1974) (in a Federal Tort Claims Act case it was unnecessary to decide whether government agents were immune, because the government would not be immune even if they were), *rev'd on other grounds*, 522 F.2d 990 (6th Cir. 1975); see also *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 108, 829 P.2d 746 (1992), . The RESTATEMENT (SECOND) OF TORTS recognizes this notion:

With respect to some government functions, the threat of individual liability would have a devastating [sic] effect, while the threat of governmental liability would not significantly impair performance.

RESTATEMENT (SECOND) OF TORTS § 895D cmt. j, at 420 (1979).

A fact and policy specific inquiry also suggests the rationale underlying the grant of qualified personal immunity to parole officers does not apply with equal force to the State. Parole officers supervising parolees are called upon to make difficult decisions under difficult circumstances. *Taggart v. State*, 118 Wn.2d 195, 215, 822 P.2d 243 (1992). Given these conditions, the prospect of personal liability may reasonably be expected to have an unduly inhibiting effect on the performance of their professional duties.

As was the case in *Babcock v. State*, 116 Wn.2d 596, 616-19, 809 P.2d 143 (1991), the same cannot be said about state liability. On the contrary,

¹⁶ “[RCW 4.92.090] operates to make the State presumptively liable in all instances in which the Legislature has *not* indicated otherwise.” 127 Wn.2d at 445.

maintaining the potential of state liability, as established in RCW 4.92, can be expected to have the salutary effect of providing the State an incentive to ensure that reasonable care is used in fashioning guidelines and procedures for the supervision of parolees.

127 Wn.2d at 445-46.

In *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999), the Court endorsed the distinction drawn in *Savage* between qualified personal immunity, which does not protect the government, and quasi-judicial immunity, which does.

137 Wn.2d at 525-26.