EXTENSION OF ABSOLUTE IMMUNITY TO COURT-APPOINTED COUNSEL

Minns v. Paul, 542 F.2d 899 (4th Cir. 1976)

In *Minns v. Paul*[1] the United States Court of Appeals for the Fourth Circuit extended to court-appointed defense counsel the doctrine of absolute judicial immunity from section 1983 suits. The defendant attorney had been appointed to assist indigent inmates on legal matters related to their incarceration.[2] Plaintiff requested assistance in preparing a writ of habeas corpus.[3] After defendant ignored several requests,[4] plaintiff brought suit under 42 U.S.C. § 1983[5] alleging that defendant, while acting under color of state law, had deprived plaintiff of constitutional rights secured by the fourteenth amendment.[6] The district court held the requisite state action lacking and dismissed the complaint.[7] The

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1. 542 F.2d 899 (4th Cir. 1976).
2. VA. CODE § 53.21.2 (1974).
3. Minns v. Paul, 542 F.2d 899 (4th Cir. 1976).
4. *Id.* at 900. Plaintiff requested defendant's assistance on four occasions. It is not clear from the opinion whether the defendant intentionally disregarded plaintiff's requests, whether his failure was due to negligence, or whether he had good cause for not assisting the plaintiff. A period of about forty-two to forty-seven days elapsed between the plaintiff's initial request and the filing of the complaint in this case.
5. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any 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.

Plaintiff was seeking a declaratory judgment as well as compensatory and punitive damages. 542 F.2d at 900. Actual damages do not have to be proven for a plaintiff to recover under § 1983 because nominal damages are available. For a discussion of damages, see C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS § 76 (1971).

6. To maintain an action under § 1983 the plaintiff must show: (1) that he was deprived of a right, privilege, or immunity secured by the Constitution, (2) that the defendant deprived or caused the plaintiff to be deprived of such a right, and (3) that the defendant acted under color of state law or customs. For a discussion of the pleadings and proof required, see C. ANTIEAU, *supra* note 5, at § 76. *But see* Williams v. Eaton, 443 F.2d 422, 429 (10th Cir. 1971).

7. Minns v. Paul, 542 F.2d at 900. The district court's position is followed by a majority of the courts. In Hill v. Lewis, 361 F. Supp. 813 (E.D. Ark. 1973) the court held: "[A] private attorney representing a defendant in a criminal case, whether

United States Court of Appeals for the Fourth Circuit affirmed on different grounds and *held*: Court-appointed defense counsel are absolutely immune from suits brought under 42 U.S.C. § 1983.[8]

Section 1983 makes civilly liable every person who, acting under color of state law, deprives or causes another person to be deprived of "any rights, privileges, or immunities secured by the Constitution . . . ."[9] The federal district courts have original jurisdiction under 28 U.S.C. § 1343(3).[10] The statute is designed to protect persons from state officials whose abuses are made possible because they are clothed with the authority of the state.[11]

Although neither the statute nor the legislative history mentions immunities,[12] courts generally have concluded that a literal application of the statute would subject state officials to liability without fault, a bizarre result that Congress could not have intended.[13] Accordingly,

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by employment or by appointment of the court, is not a State functionary, and his actions are not State actions so as to bring him within the reach of section 1983 . . . ." *Id.* at 818. *See* cases cited note 42 *infra* and accompanying text.

8. Minns v. Paul, 542 F.2d 899 (4th Cir. 1976).

9. 42 U.S.C. § 1983 (1970).

10. 28 U.S.C. § 1343(3) (1970).

11. The Supreme Court defined action taken "under color of" state law in United States v. Classic, 313 U.S. 299 (1941) and Screws v. United States, 325 U.S. 91 (1945). In *Classic* the Supreme Court stated: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. at 326. The Court in *Screws* stated:

> It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

325 U.S. at 111. Both *Classic* and *Screws* dealt with 18 U.S.C. § 242 (1970), the criminal counterpart of § 1983. In Monroe v. Pape, 365 U.S. 167, 183-87 (1961), the Supreme Court stated that the definitions given in *Classic* and *Screws* were applicable to § 1983.

12. CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871) (remarks of Senator Edwards). The legislative debates can also be found in A. AVINS, THE RECONSTRUCTION DEBATES (1967), a collection of relevant portions of the congressional debates during the Reconstruction period with cross references to official pagination in the CONGRESSIONAL GLOBE.

13. Francis v. Lyman, 216 F.2d 583 (1st Cir. 1954); *see* Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Tenny v. Brandhove, 341 U.S. 367 (1951); Bauers v. Heisel, 361 F.2d 581 (3d Cir.), *cert. denied*, 386 U.S. 1021 (1966); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953).

courts have largely incorporated the common law official immunity from suit into section 1983.[14] In confronting the question whether to grant immunity to a particular official, courts consider the immunity historically afforded the particular office,[15] the interests behind the immunity,[16] and whether section 1983 conflicts with those interests.[17]

At common law, and consequently in section 1983 actions, courts have developed two types of immunities—absolute and qualified.[18] Qualified immunity relieves state officials of liability if they act in good faith and have reasonable grounds for believing their actions to be lawful.[19] The doctrine of qualified immunity is predicated on the need to protect officials from time-consuming suits that deflect them from their official duties, the need to encourage officials in the fearless use of discretion, and the need to recruit and retain able public servants.[20]

Absolute immunity shields the state official from any liability for all acts within the scope of his official duties.[21] Because a grant of absolute immunity to all state officials would constitute judicial repeal of section 1983,[22] courts have allowed it only in special circumstances, and until recently, only when "necessary to protect the decision-making process in which the official is engaged."[23]

At common law, judges were absolutely immune from damage suits

14. *See* Imbler v. Pachtman, 424 U.S. 409 (1976); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Tenny v. Brandhove, 341 U.S. 367 (1951); C. ANTIEAU, *supra* note 5, at §§ 40-42; Kates, *Immunity of State Judges Under the Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 NW. U.L. REV. 615, 619-20 (1970); Comment, *The Civil Rights Acts and Mr. Monroe*, 49 CALIF. L. REV. 145, 156-57, 160-61 (1961); 1971 WASH. U.L.Q. 666, 667-68.

15. *See* note 13 *supra.*

16. *See, e.g.*, note 13 *supra*; notes 31-33 *infra* and accompanying text.

17. *See* note 13 *supra.*

18. *See* David, *The Tort Liability of Public Officers*, 12 S. CAL. L. REV. 127, 260, 368 (1939); Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130 (1943).

19. Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967).

20. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1937); Keefe, *supra* note 18, at 131.

21. *See* note 18 *supra.*

22. *See* cases cited note 13 *supra.* The Supreme Court's awareness of this problem is apparent from its approach to § 1983 immunities and its refusal to extend to an official a greater immunity than he had at common law.

23. Imbler v. Pachtman, 424 U.S. 409, 432 (1976) (White, J., concurring in judgment).

for action taken pursuant to their official duties.[24] In *Pierson v. Ray*,[25] the Supreme Court extended absolute judicial immunity to section 1983 suits as well, reasoning that fear of damage suits would intimidate judges and destroy the integrity of judicial decisions.[26] At common law, prosecutors also had absolute immunity from suits for malicious prosecution and defamation.[27] Such quasi-judicial immunity was designed to ensure the vigorous and fearless exercise of prosecutorial discretion in instituting criminal proceedings—a function essential to the judicial process.[28] In the 1976 case of *Imbler v. Pachtman*,[29] the Supreme Court held that section 1983 incorporated the common law immunity for prosecutors initiating a prosecution and presenting the state's case.[30] In so doing, however, the Court departed significantly from the common law rationale. Although relying in part on the need to protect prosecutorial discretion,[31] the Court also stressed such factors as the prospect of

24. Pierson v. Ray, 386 U.S. 547 (1967); Tenny v. Brandhove, 341 U.S. 367 (1951). There are a plethora of cases holding judges absolutely immune. *See* Schwartz v. Weinstein, 459 F.2d 882 (8th Cir. 1972); Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970); Kostal v. Stoner, 292 F.2d 492 (10th Cir.), *cert. denied*, 369 U.S. 868 (1961); Larsen v. Gibson, 267 F.2d 386 (9th Cir.), *cert. denied*, 361 U.S. 848 (1959); Kenney v. Fox, 232 F.2d 288 (6th Cir.), *cert. denied*, 352 U.S. 855 (1956); Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955). *But see* O'Shea v. Littleton, 414 U.S. 488 (1974) (judges not immunized against criminal liability); Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976) (judge liable for acting in clear absence of his jurisdiction); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (judge not absolutely immune when he physically attacked a citizen in courtroom); Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), *cert. denied*, 414 U.S. 143 (1974) (judge not immune from injunctive actions under § 1983).

25. 386 U.S. 547 (1967).

26. *Id.* at 554-55.

27. Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927); Smith v. Parman, 101 Kan. 115, 165 P. 663 (1917); Semmes v. Collins, 120 Miss. 265, 82 So. 145 (1919). *But see* Leong Yan v. Carden, 23 Hawaii 362 (1916) (qualified immunity).

28. Yaselli v. Goff, 12 F.2d 396, 399 (2d Cir.), *aff'd*, 275 U.S. 503 (1927); T. COOLEY, A TREATISE ON THE LAW OF TORTS § 312 (4th ed. 1932).

29. 424 U.S. 409 (1976).

30. *Id.* at 427-31; *cf.* Holton v. Bowman, 493 F.2d 1176 (7th Cir. 1974) (immunity does not extend to acts outside scope of prosecutorial duties); Hampton v. City of Chicago, 484 F.2d 602, 609 (7th Cir.), *cert. denied*, 415 U.S. 917 (1973) (afforded no greater immunity than police acting under his direction when participating in planning and execution of illegal raid); Littleton v. Berbling, 468 F.2d 389, 410-11 (7th Cir. 1972), *cert. denied*, 414 U.S. 1143 (1974) (not immunized when he acts as a police investigator); Hilliard v. Williams, 465 F.2d 1212 (6th Cir.), *cert. denied*, 409 U.S. 1029 (1972) (immunity does not extend to deliberate suppression of evidence); Robichaud v. Ronan, 351 F.2d 533, 536-38 (9th Cir. 1965) (liable as a policeman if he acts as one).

31. Imbler v. Pachtman, 424 U.S. at 421-26.

hindering appellate review of criminal convictions, the desire to protect innocent prosecutors from erroneous judgments, and the fear that appellate courts would not vigorously review criminal convictions if aware that reversal might subject the prosecutor to civil liability.[32]

A concurring opinion by Justice White sharply criticized the majority's consideration of these factors: such problems were relevant to qualified immunity, but the only rationale for absolute immunity, according to Justice White, was to avoid interference with the state official's decisionmaking process.[33]

The case law considering whether quasi-judicial immunity should attach to appointed defense counsel is relatively sparse. Courts facing this issue have no common-law tradition of immunity on which to rely because at common law the state had no obligation to provide counsel to criminal defendants.[34] Consequently, any litigation between attorney and client involved purely private parties, and the special immunities granted to state officers were irrelevant. Once the state is required to provide defense counsel to indigents, however, the attorney arguably becomes an agent of the state,[35] and the immunities attaching to state officers must be considered.

The courts that have addressed the question have reached varying conclusions on the appropriate rule. In *Brown v. Joseph*,[36] the Third Circuit granted absolute immunity to a state public defender sued under section 1983. The court analogized the public defender's role to that of a prosecutor, reasoned that defense counsel could not properly pursue his trial strategy without absolute immunity, and noted that exposure to damage suits could hinder recruitment of future public defenders.[37] On the other hand, the Seventh Circuit in *John v. Hurt*[38] concurred in both the analogy and the reasoning of *Brown*, but thought these factors warranted only a grant of qualified immunity.[39] The court in *United*

32. *Id.* at 425.
33. *Id.* at 435-37.
34. *See, e.g.*, Betts v. Brady, 316 U.S. 455, 466 (1942).
35. *But see* cases cited note 42 *infra* and accompanying text.
36. 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).
37. *Id.* at 1047-49; *accord*, Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975).
38. 489 F.2d 786 (7th Cir. 1973).
39. *Id.* at 788; *accord*, Morrow v. Igleburger, 67 F.R.D. 675 (S.D. Ohio 1974); *cf.* Midwest Growers Coop. Corp. v. Kirkemo, 533 F.2d 455, 464 & n.22 (9th Cir. 1976) (court found that I.C.C. agents and Department of Justice attorneys acted in good faith within the doctrine of qualified immunity and did not reach the issue of the availability of absolute immunity).

States ex rel. Wood v. Blacker[40] took yet a third approach, reasoning that defense counsel's duty was not essentially judicial and rejected the analogy to the prosecutor. Consequently, the court thought the rationale for judicial immunity inapplicable to the public defender and allowed no immunity.[41] Several courts have avoided the issue entirely by holding that court appointed counsel and public defenders do not act under color of state law and therefore are not subject to suit under section 1983.[42]

In *Minns v. Paul*,[43] the Fourth Circuit assumed that appointed counsel act under color of state law, and granted them absolute immunity from suits under section 1983. The court followed *Brown*'s legal analysis, reasoning that because the court-appointed counsel's function is similar to that of the public prosecutor, he should be entitled to the same immunity from civil liability.[44] The court also relied on several policy arguments to support an absolute rather than a qualified immunity. Of primary concern was the need to encourage and protect the exercise of professional judgment by court-appointed counsel—a particularly compelling problem given that indigents, undeterred by personal expense, can and do insist on instituting frivolous actions.[45] The court also recognized the need to recruit and retain able lawyers to represent indigents.[46] Finally, several civil and criminal remedies other than section 1983 are available to protect the interests of the inmate whose court-appointed counsel willfully deprives him of his constitutional rights.[47]

The *Minns* holding is unwarranted by either its legal or policy rationales. The court's legal analysis rested primarily on the immunity grant-

40. 335 F. Supp. 43 (D.N.J. 1971).

41. *Id.* at 45-46.

42. Dyer v. Rosenberg, 434 F.2d 648 (9th Cir. 1970); French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970), *cert. denied*, 401 U.S. 915 (1971); Hill v. Lewis, 361 F. Supp. 813 (E.D. Ark. 1973); *cf.* O'Brien v. Colbath, 465 F.2d 358 (5th Cir. 1972) (§ 1983 does not authorize malpractice suits against court-appointed attorneys); United States *ex rel.* Wood v. Blacker, 335 F. Supp. 43 (D.N.J. 1971) (no more reason for extending judicial immunity to state public defenders than to court-appointed counsel). *But cf.* United States v. Senak, 477 F.2d 304 (7th Cir. 1973), *cert. denied*, 414 U.S. 859 (1974) (indictment was sufficient to survive motion to dismiss; government allowed opportunity to prove that defendant acted under color of state law in prosecution under 18 U.S.C. § 242 (1970)).

43. 542 F.2d 899 (4th Cir. 1976).

44. *Id.* at 901-02; *see* notes 36-37 *supra* and accompanying text.

45. 542 F.2d at 901.

46. *Id.*

47. *Id.* at 902.

ed to the prosecutor, whose role in the judicial system was thought to be analogous to that of the court-appointed counsel. The two officials, however, perform functions so different that the analogy is entirely unsound. First, the decision to prosecute is a judicial one; the prosecutor must weigh the evidence and determine the probable guilt or innocence of the accused. Absolute immunity is appropriate to protect this quasi-judicial decisionmaking process. The court-appointed counsel, however, does not decide the guilt or innocence of his client, nor is he authorized to decide the merits of his client's case.[48] Thus, *Minns* extends judicial immunity to an officer who, if he acts in a judicial capacity, does so wrongly. Second, the two officials are likely to react to absolute immunity in different ways. Prosecutorial immunity from damage suits by disgruntled defendants will encourage the prosecutor to present the state's case forcefully and fully—it will improve his advocacy. Immunizing court-appointed defense counsel from such suits may produce precisely the opposite result. The malpractice action at common law played an integral role in the maintenance and preservation of the adversary system. The threat of tort liability serves not only to ensure that clients receive zealous and diligent representation, but also to hold the attorney to the required standard of care.[49] By insulating court-appointed defense counsel from personal liability, the *Minns* court has

48. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1974). In Ellis v. United States, 356 U.S. 674 (1958) (per curiam); Suggs v. United States, 391 F.2d 971, 973 (D.C. Cir. 1968); and Tate v. United States, 359 F.2d 245, 253 (D.C. Cir. 1966), the court stated that court-appointed counsel is not an amicus curiae but an advocate; he may not brief the case against his client. The court may permit appointed counsel to withdraw if satisfied that counsel has carefully investigated and found no nonfrivolous issue.

49. *See* note 57 *infra*; Heffernan, *Professional Malpractice Insurance: Let the Attorney Beware*, 48 CONN. B.J. 347, 350 (1947); Comment, *Liability of Court-Appointed Counsel for Malpractice in Federal Criminal Prosecution*, 57 IOWA L. REV. 1420, 1425 (1972).

The standard of care which an attorney is required to maintain is set forth in Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954):

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that 1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; 2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and 3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's case.

Id. at 519, 80 S.E.2d at 145-46 (citations omitted). *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY (1974).

deprived the judicial system of the client's peculiar perspective,[50] necessarily producing poorer legal representation for indigent defendants.

The court's policy analysis is equally deficient. The assertion that counsel immune from suit could better screen out frivolous claims rests on the unsound premise that the public defender owes primary allegience to society. Although an agent of the state, a court-appointed attorney's first loyalty is to his client, whom he should represent zealously and forthrightly. The *Minns* court's approach would convert the defense counsel from zealous advocate to amicus curiae.[51] Absolute immunity for court-appointed counsel thus perverts rather than protects their decisionmaking process.

The other rationales offered by the court at most justify a grant of qualified immunity. As Justice White correctly observed in *Imbler*, courts should only confer absolute immunity when necessary to protect the decisionmaking function of the state official.[52] The remaining interests underlying the common law's qualified immunities apply to practically all state officials. The policeman,[53] the governor,[54] the mayor,[55] the municipal legislator,[56] and the private attorney[57] could benefit equally from absolute immunity in civil actions. Each official would be encouraged in the vigorous and fearless exercise of his discretion; recruiting and retaining capable people for these offices would be no problem; frivolous suits would be unheard of. Considering these factors as a rationale for absolute immunity in every case could easily

50. The client is the closest person to his attorney, and is the most critical of his attorney's work. He, in effect, sits as judge of his attorney.

51. *See* cases cited note 48 *supra*; ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1974).

52. Imbler v. Pachtman, 424 U.S. 409, 432 (1976).

53. Pierson v. Ray, 386 U.S. 547 (1967) (only entitled to a good faith defense).

54. Scheuer v. Rhodes, 416 U.S. 232 (1974) (entitled to a qualified immunity).

55. Palmer v. Hall, 380 F. Supp. 120 (M.D. Ga. 1974), *modified*, 517 F.2d 705 (5th Cir. 1975) (mayor who urged police to "shoot to kill" liable to same extent as police officer who shot plaintiff).

56. Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958) (only entitled to a qualified immunity).

57. *See* Spangler v. Sellers, 5 F. 882 (6th Cir. 1881); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1961); Gambert v. Hart, 44 Cal. 542 (1872); Theoband v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954); Holmes v. Peck, 1 R.I. 242 (1849); Pitt v. Yalden, 98 Eng. Rep. 74 (K.B. 1767); Russel v. Palmer, 95 Eng. Rep. 837 (K.B. 1767); Baikie v. Chandless, 170 Eng. Rep. 1291 (Nisi Prius 1811). The private attorney has neither a qualified nor an absolute immunity.

immunize all state officials, effectively repealing section 1983.[58] These arguments warrant only a grant of the limited good faith immunity that attaches to most other state officials.

Even limited immunity may be unnecessary to protect the court-appointed counsel who acts reasonably and in good faith. To state a cause of action under section 1983, a complaint must allege a constitutional violation.[59] An appointed counsel is liable only if his representation is so egregious that it deprives the indigent of his sixth amendment right to counsel—mere allegations of tortious conduct do not suffice.[60] The most lenient test of a sixth amendment violation is that the attorney failed to act within the range of competence demanded of defense counsel.[61] A grant of limited immunity would not protect the court-appointed defense counsel whose conduct fell below this standard, because he would have acted without reasonable grounds for believing his conduct constitutional.[62] Limited immunity therefore provides the defense attorney no greater protection than does the initial requirement that plaintiff prove a constitutional violation.

From the foregoing analysis it is apparent that court-appointed counsel are not entitled to immunity under section 1983. The *Minns* court's reliance on the analogy to the prosecutor is faulty; it extends quasi-judicial immunity to an official who does not function in a quasi-judicial capacity.[63] The danger inherent in the *Minns* approach is that it could result in a broad grant of immunities that would effectively circumvent the statute.[64] The irony of the *Minns* decision is that the grant of absolute immunity to court-appointed defense counsel, ostensibly to protect their indigent clients, defeats the purpose of the court-appointed counsel and public defender systems.

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58. *See* cases cited note 13 *supra*. The Supreme Court's awareness of this problem is apparent from its approach to § 1983 immunities and in its refusal to extend to an official a greater immunity than he had at common law.

59. *See* note 6 *supra*.

60. O'Brien v. Colbrath, 465 F.2d 358, 359 (5th Cir. 1972); *accord*, Smith v. Clapp, 436 F.2d 590 (3d Cir. 1970).

61. *See* United States v. De Coster, 487 F.2d 1197, 1201-04 (D.C. Cir. 1973); 1976 WASH. U.L.Q. 503, 509-13.

62. *See* note 19 *supra* and accompanying text.

63. *See* text accompanying note 48 *supra*.

64. *See* note 58 *supra* and accompanying text.