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WHO'S AFRAID OF THE HUMAN RIGHTS COMMISSION?

Burt Neuborne*

I. Introduction

An essay in honor of the fortieth anniversary of the New York City Commission on Human Rights (the "Commission") can take one of two forms—a celebration of the past or an inquiry into the future. When the editors of the Symposium asked me to attempt such an essay, I was sorely tempted to adopt a celebratory tone. As a past Commissioner\(^1\) and long-time admirer of the Commission's efforts, I wanted to tell the story of the Commission's often pathbreaking efforts in support of norms of decency and toleration. But I decided that an essay basking in past achievements would not keep faith with the Commission's difficult task. Instead, I have opted for a critical look at what Human Rights Commissions should be doing in the next forty years.

My decision to focus on the future is driven by four factors. First, the factual context in which human rights cases tend to arise these days is quite different from the factual context of forty years ago. Forty years ago, bigotry was blatant and open. Refusals to hire, rent or associate with one or another racial, religious, gender or ethnic group were proudly trumpeted as badges of honor and, in many jurisdictions, as formal governmental policy. Adjudication in those "first generation" cases consisted of applying norms of decency to relatively uncontested, egregious factual settings. It is sadly true, of course, that overt bigotry has continued into our day. But, increasingly, human rights cases arise in more complex factual settings requiring far more resources to adjudicate fairly. Because intentional discrimination is rarely acknowledged in today's society, difficult questions of fact are common in most cases. Relying on an adversary hearing process to resolve complex factual questions, while an excellent guarantee of procedural fairness, is enormously expensive and far from fool-proof. Adjudicating a human rights case is now such an unpredictable, resource intensive event

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1. I was appointed to the Commission in 1988 by then-Mayor Koch and served for two years as a holdover in the Dinkins administration. My first appearance before the Commission was in the late 1960's, in a case challenging the hiring practices of the New York Philharmonic.
that the question, whether scarce enforcement resources can be more effectively deployed, inevitably arises.

Second, unlike the world of forty years ago, Human Rights Commissions are no longer the only, or even necessarily, the most effective, human rights enforcement game in town. In the past half-century, an enormous body of constitutional, statutory and common law has evolved in the area of human rights. Not surprisingly, a public interest bar has evolved in symbiotic tandem with the complex law, aided by statutory fee shifting provisions. Much of the enforcement responsibility in human rights cases is now centered in the courts. Whether an adjudicative process in the Human Rights Commission that mirrors the judicial process is the best method of organizing Commission enforcement efforts is now a real question.

Third, we live in an era of shrinking governmental resources. I have no doubt that Human Rights Commissions will absorb more than their fair share of government cutbacks. In times of plenty, perhaps it would be possible to pursue multiple enforcement strategies, secure in the knowledge that each would be adequately funded. In the years to come, though, careful thought must be given to the best use of an increasingly scarce national resource—the enforcement capability of Human Rights Commissions.

Finally, the complexity and moral difficulty of third and fourth generation human rights issues has clouded the public’s level of support for the underlying norm of equality itself. In first generation human rights cases, where bigotry is blatant, the vast bulk of American society rallies to a norm of decency. As issues get more complex, especially when effective remedies will cause real pain to many, support tends to erode for human rights. Rather than plunge headlong into that maelstrom, Human Rights Commissions may have other important roles to play in enforcing human rights.

Driven by those factors, I want to pose a single, fundamental question about Commission enforcement efforts in the years to come: To what extent should the Commission focus on remedying past acts of discrimination, or concentrate on preventing future acts from occurring? As I hope to demonstrate, while the two functions are compatible, serious choices must be made between the two approaches.
II. The Pre-Event and Post-Event Functions of Law

In his classic effort to explain *Erie v. Tompkins*, Justice Harlan reminded us that we ask at least two things of law. First, we ask that law provide us with a means of dealing with unacceptable behavior that has already taken place. Whether by punishing the offender, compensating the victim, or both, we look to "post-event" law to provide a sense of closure by restoring the balance of a universe disturbed by an untoward act. Indeed, what we call "justice" in a particular case is often an intuitive belief that the balance disturbed by an untoward act has been restored by the imposition of an appropriate legal sanction. When, however, post-event sanctions appear disproportionately high or low or wildly erratic, or when compensation seems inadequate or a windfall, law does not fulfill its post-event function. Instead of delivering closure, it sends

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3. *See* *Hanna v. Plumer*, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring). Justice Harlan argued that *Erie* called for the application of state law in federal diversity cases only when application of the federal norm might affect pre-event behavior or cause unfair post-event consequences. *Id.* at 475. Justice Harlan used the phrase "primary activity" to describe pre-event behavior.


5. Inadequate legal sanction does not, ordinarily, give rise to legal redress, except when compensatory damages are woefully inadequate or when punitive damages are wrongfully withheld. Indeed, the Double Jeopardy Clause is designed to assure that the government does not take a second bite in an effort to increase punishment perceived as inadequate. Historically, the sense of injustice created by punishments perceived as inadequate has given rise to the adoption of mandatory minimum sentences.

6. The unacceptableness of significant disparities in punishment led to the promulgation of Federal Sentencing Guidelines.

7. For example, the courts failed to provide for mental anguish in pre-1992 Title VII cases. *See*, e.g., *Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989).

8. In extreme cases, damages that are too high or too low may be altered or set aside. *E.g.*, *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246,
the contrary message of continued imbalance that we perceive as injustice.

Second, we want law to provide a means of guiding human behavior so that untoward events do not occur at all. Whether by education, bribery, or fear, we look to "pre-event" law as a means of inducing people to behave in acceptable ways. When, however, because of need, ignorance, greed or impunity, important actors ignore pre-event law, all law becomes post-event.

At this point, of course, a natural bridge exists between the pre-and post-event functions of law: The punishment or compensation designed to restore a sense of balance and achieve post-event closure serves to frighten people into pre-event compliance. But the natural bridge is full of potholes.

Perhaps the biggest pothole is the fact that the intense relationship between post-event sanction and pre-event compliance tends to blot out everything else. Focus shifts to post-event enforcement activities precisely because they provide the promise of both closure and compliance. Instead of expending significant resources to alter pre-event behavior by education, inducement or amelioration, we often drift into a post-event mentality, expending huge sums on detection, adjudication, collection and human warehousing in the hope that fear of post-event sanctions will deter unwanted pre-event behavior. When obsession with the post-event function of law goes too far, the result is often disastrous. A perfect example is the nation's war on drugs, a failed enterprise that pours vast re-

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9. The most dramatic example of the educational function of law is its role in supporting the exclusionary rule. See Mapp v. Ohio, 367 U.S. 643 (1961).

10. American Aerial Lift, Inc. v. Perez, 629 So.2d 169, 171 n.3 (3d Dist. Fla. 1993) (strict liability serves as an incentive to safety); Amcast Industrial Corp. v. Detrex Corp., 822 F. Supp. 545, 552 (N.D. Ind. 1992) (law serves as an incentive to clean up hazardous waste), aff’d in part, rev’d in part, 2 F.3d 746 (7th Cir. 1993), cert. denied, 510 U.S. 1044 (1994); Rosenberg v. Comptroller of the Treasury, 1982 WL 2125 at *2 (Md. Tax Ct.) (assessing a penalty is improper if it serves no legitimate incentive purpose).

11. See, e.g., State v. Mayo, 915 S.W.2d 758, 762 (Mo. 1996) (sanctions serve as a deterrent to drunk drivers), cert. denied, 117 S. Ct. 61 (1996); In re Colorado Springs Air Crash, 867 F. Supp. 630, 634 (N.D. Ill. 1994) (joint and several liability serves as a deterrent to corporate defendants).

12. Examples include recent efforts to deal with illegitimacy by cutting off welfare payments. See Mike Royko, Analyzing the Welfare Debate, LAS VEGAS REV.-J., Aug. 29, 1996; William F. Buckley, Welfare Reform Can Work If It's Tried, SALT LAKE TRIB., Aug. 5, 1996.
sources into an effort to stop drug use by focusing almost exclusively on post-event sanctions.  

As the drug war’s failures demonstrate, at least two problems emerge when post-event law takes over a complex area of human behavior. First, significant constraints, such as scarce resources, a sense of proportion, or doubts about the underlying norm itself, place real-world limits on the extent to which post-event sanctions can be severe enough to provide the desired level of deterrence. In practice, reliance on post-event sanctions as an effective deterrent often proves impossible because detection is too difficult, adjudication is inherently unpredictable, and the required level of punishment is often unacceptably harsh; 14 needless to say, detection, adjudication, and punishment are all expensive undertakings.

Second, even when sanctions can be ratcheted to the necessary level, the emergence of Draconian post-event punishments, whether couched in the form of harsh prison sentences or extremely high compensatory or punitive damages, often inhibits the emergence of a sense of closure. Lack of closure leaves open the perception of imbalance that we call injustice and raises doubts about the legitimacy of the underlying legal norms themselves. Fear of Draconian sanctions may also provoke unwanted behavior designed to avoid even the possibility of a violation.

In short, what appears at first glance to be a natural symbiosis between pre- and post-event law, is often quite the opposite. The very effort to use post-event sanctions to achieve pre-event ends often winds up distorting both. Witness the war against drugs, where the effort to use post-event sanctions as the primary means of altering pre-event behavior has led to a distortion of law enforcement priorities, an explosion in the prison population, a perception of unjust sentencing and enforcement, and the expenditure of staggering sums—all without making a serious dent in the nation’s drug problem.

Despite the demonstrated weakness of over-dependence on post-event punishment as a means of altering pre-event behavior,


14. I will argue that these constraints are particularly powerful when we seek to enforce human rights norms, both in the courts and in Human Rights Commissions.
the technique is supported by two powerful constituencies: victims; and the bureaucracy needed to administer a post-event process. Victims naturally want (and often deserve) generous compensation and/or the sense that their tormentors have been severely punished. Moreover, to the extent that deterrence (and disablement) is actually effected by strong sanctions, the number of future victims is diminished.

The often legitimate victim-centered case for a strong post-event system of law is reinforced by the self-interest of the bureaucracy needed to operate it. Detection personnel, the apparatus of adjudication, including lawyers, and the agencies of enforcement and detention, coupled with the inherent strength of the desire to restore a lost sense of balance, create a potent tide that sweeps us toward a post-event approach to difficult issues of law. The failed war on drugs is only the most obvious example.

Enforcement of human rights norms, especially by specialized Human Rights Commissions, risks being caught up in the post-event tide. Increasingly, the attention and resources of the human rights enforcement community is being devoted to post-event remediation in an understandable effort both to compensate a few randomly selected victims and to frighten the general population into widespread compliance. I fear that Human Rights Commissions risk evolving into the human rights police, with the same law enforcement mentality and the same tendency to fixate on post-event sanctions at the expense of pre-event efforts. I hope to point out the very difficult hurdles that a post-event model of human rights enforcement must overcome in order to achieve pre-event success and to suggest two practical techniques for strengthening post-event enforcement by Human Rights Commissions, while placing increasing emphasis on pre-event approaches.

In large part, this article is driven by the extremely limited enforcement resources available to the human rights enforcement community in general, and the nation's Human Rights Commissions in particular. In a world of unlimited resources, perhaps the human rights enforcement community could pursue an aggressive post-event strategy, and couple it with powerful pre-event activity. In the real world, though, we must make painful choices about available resources. My broad question is, with particular emphasis on the resources available to Human Rights Commissions, to what extent should human rights enforcement resources be devoted to post-event remediation, or to pre-event compliance?
In order to narrow the discussion, I will concentrate on a single recurring issue, both because it is intrinsically important, and because it is a microcosm of the larger question: What approach should the human rights enforcement community take to derivative (often entity) employer liability for employee violations of human rights norms? Driven by traditional post-event concerns of compensation and deterrence, the human rights bar has understandably attempted to impose classic *respondeat superior* liability on employers for human rights violations committed by employees. The legal fallout of the strategy has been uneven. As we shall see, the rules governing derivative employer liability for human rights violations are hopelessly confused, whether in the area of violations committed under color of law, or private violations. Moreover, the practical consequences of the post-event strategy have been unfortunate. Instead of: (1) focusing credible sanctions on the individuals who actually commit the violations; and (2) rewarding employers who make genuine efforts to prevent human rights violations, the strategy has tended to seek a "deep pocket" entity-defendant capable of paying a large judgment, often ignoring the real culprit and paying no attention to the moral blameworthiness of the employer. Since in most cases (especially Human Rights Commission cases) the compensatory award is not nearly large enough to induce an employer to make fundamental structural changes, the principal effect of *respondeat superior* liability has been to free a guilty actor from any direct financial consequences. While the occasional large *respondeat superior* award may bring welcome relief to a randomly selected victim, it often

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15. Awards in human rights cases tend to lag behind damages in tort and contract cases. For example, compare the jury verdict in Liebeck v. McDonald's Restaurants, 1995 WL 360309 (N.M. Dist. Ct. 1994) (awarding $2.86 million to woman scalded by hot coffee), with the $450,000 award granted by the Commission in Ruiz v. Arcade Cleaning Corp., Compl. No. EM00465-08/29/88, Dec. & Ord. (N.Y.C.H.R. Feb. 28, 1995) (observing, in sexual harassment case, that "[n]o case has ever been brought to trial before this tribunal involving the level of abusive conduct found here"). Lacking power to award punitive damages, the Commission will rarely be able to make an award large enough to force an alteration in employer behavior. Occasional large awards by juries in Section 1983 or Title VII cases may force changes in behavior, but they are few and far between. Moreover, we may not like the new behavior any more than the old.

16. Of course, once an employer satisfies a *respondeat superior* judgment, it may recover over against the employee. In my experience, though, efforts to recover over are very rare. Either the employee is too valuable to offend, the employer does not view the violation as morally culpable, or the transaction costs of additional litigation are not worth the effort. Rather than seek to recover over, the employer will, more likely, dismiss the offending employee.
bypasses the truly guilty party, risks harming innocent persons, and sends a blurred message to an employer without providing much pre-event guidance.

Under a post-event respondeat superior approach, only Draconian awards can apply enough pressure to force most employers to act in a way that will have much pre-event effect. But truly Draconian awards are unlikely and, often, unfair. And, even when they occur, they are often as likely to provoke unacceptable alternatives as the desired ones. If the award is large enough to hurt, its pain will often be felt by innocent persons (co-employees, consumers, stockholders and taxpayers) who had nothing to do with the human rights violation. At that point, a rational employer will ask how to avoid similar pain in the future. Avoiding minority employees entirely is one unacceptable extreme. A quota system is the other. Adoption of careful preventive measures, such as thorough training programs and effective grievance procedures, is the obviously preferred alternative. But respondeat superior liability in human rights cases does nothing to reward an employer for adopting the preferred approach.

I will argue that focus should be shifted from the traditional post-event preoccupation with respondeat superior liability in human rights cases to two approaches designed to reward effective preventive behavior, while maximizing the deterrent effect of a Commission’s award. First, I would focus primary financial responsibility on the person who actually commits the human rights violation. From the dual standpoints of deterrence and moral responsibility, the guilty actor in a human rights drama should pay the financial price of restoring a sense of balance. Only after the financial resources of the guilty individuals have been exhausted would I look to the entity employer. At that point, I would give the employer a choice. In the absence of an effective preventive plan, I would impose strict respondeat superior liability, relying on Draconian post-event sanctions to induce pre-event compliance. If, however, an employer had adopted an effective pre-event compliance plan, I would release the employer from liability, in the absence of proof of actual moral culpability. Finally, rather than engage in ad hoc determinations of the quality of a preventive plan, I would shift a portion of the resources of the Human Rights Commission that are now being spent on post-event remediation to the task of designing, supervising and certifying preventive human rights plans established by employers. Only if the Human Rights
Commission certified a plan’s effectiveness, would the preventive safe harbor from *respondeat superior* liability exist.\(^{17}\)

### III. Respondeat Superior and the Enforcement of Human Rights

#### A. The Legal Quagmire

The Supreme Court has had only limited success in defining the appropriate level of liability for an entity that employs someone found guilty of a human rights violation. The issue generally arises in one of two contexts: suits against government actors under Section 1983,\(^{18}\) and suits against private actors under Title VII.

1. **Government Liability Under Section 1983**

   In the modern era, the issue of derivative employer liability first arose in the context of human rights violations committed by government employees. A plaintiff must overcome three procedural hurdles to establish liability for damages under Section 1983. First, the governmental defendant must be deemed a “person” as that word is used in Section 1983; second, imposition of liability by a federal court must satisfy federal standards governing the qualified and absolute immunities of certain categories of government defendants;\(^{19}\) and, third, the defendant’s conduct must be deemed

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17. I make two significant caveats about my proposal. First, I am not certain that my suggestions should necessarily be adopted in settings where victims use private lawyers to vindicate human rights norms in the courts without the help of a Human Rights Commission. While I believe that similar arguments can be made in the private enforcement sphere, my position has particular application to the use of limited enforcement resources available to Human Rights Commissions.

   Second, I do not suggest that adequate resources are currently available to Human Rights Commissions. But, in the real world, I see no likelihood that more resources will be forthcoming, requiring us to think carefully about how we deploy the enforcement resources available to us.

18. Two methods exist to enforce constitutional norms against the government. Most claims against state or local government are brought pursuant to 42 U.S.C. § 1983 in either state or federal court. See Monroe v. Pape, 365 U.S. 167 (1961). The Supreme Court has recognized, as well, a cause of action springing directly from the Constitution that can provide relief against the federal government. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). I assume that the same derivative liability rules apply to both causes of action. It is possible, however, that *Bivens* claims may be governed by different rules.

19. Significantly, a finding of qualified immunity for an employee does not immunize the employer from liability, if the other requisites exist. Palmerin v. City of Riverside, 794 F.2d 1409, 1415 (9th Cir. 1986), *citing* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
sufficiently culpable to warrant imposing fault-based liability under a statutory gloss imposed by the Supreme Court.

a. Who or What is a “Person” Under Section 1983?

Any flesh and blood defendant sued in an “individual” capacity is a 1983 “person.” The personal damage liability of such an “individual” defendant is determined by the interplay of the qualified immunity and good faith defense issues discussed below. Suits against local officials sued in their “official” capacities are treated as suits against the government entity itself.

Until 1978, all governmental entities were excluded from the term “person.” In Monell v. Dep’t of Social Servs., the Supreme Court ruled that local government entities were “persons” within the meaning of the statute, but declined to impose respondeat superior liability for damages. Instead, the Court ruled that local governmental entities were liable as “persons” under Section 1983 only for acts taken pursuant to “policy or custom.” During the 1988 Term, the Court ruled that state governmental entities were not “persons” under 1983 because Congress did not intend, in 1871, to impose monetary liability on states in light of the Eleventh Amendment. The Court had already held in Quern v. Jordan that Congress did not intend to override the Eleventh Amendment by enacting Section 1983. The curious result of the interplay between Quern and Will is that states can be sued under 1983 in both

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20. E.g., Brandon v. Holt, 469 U.S. 464 (1985); Monroe v. Pape, 365 U.S. 167 (1961). Whether a flesh and blood defendant sued in an “official” capacity is a “person” depends upon the employing agency and the relief sought. Employees of local governmental units sued in an official capacity are “persons” no matter what relief is sought. Brandon, 469 U.S. at 472. Employees of state governmental units sued in an official capacity are “persons” only to the extent that prospective injunctive relief is sought. Will v. Michigan Dep’t of State Police, 491 U.S. 58 n.10 (1989). A state employee sued in an official capacity for damages under Section 1983 is not a “person.” For the purposes of determining liability, a suit against a defendant in an official capacity is deemed to be an action against the government entity itself. Id. at 71.


22. Under current ground rules, a Section 1983 case for damages cannot be brought in state or federal court against a state official sued in an “official” (as opposed to an “individual”) capacity. Will, 496 U.S. at 66, 71. Whether the same constraints would apply to a Bivens claim founded directly on the constitution has not been explored. The Court’s narrow construction of the term “person” in Will may reawaken the attempt to develop parallel Bivens claims free from a restrictive construction of Section 1983.


24. Id. at 690.

25. Will, 491 U.S. at 64.

state and federal court for prospective injunctive relief, if the plaintifff is careful to name an appropriate flesh and blood state defendant in an individual capacity; but states may not be sued for damages under 1983 in state court even though no Eleventh Amendment issue would be raised.\textsuperscript{27}

b. Who or What is Immune From Liability Under Section 1983?

The Supreme Court has held that the passage of Section 1983 in 1871 was not intended to abrogate traditional common law immunities or to override Eleventh Amendment immunity.\textsuperscript{28} In approaching the surviving common law immunities, three points should be stressed. First, the Court's approach to immunity in recent years has been relentlessly functional. Mystical arguments about the inherent existence of immunities, or emotional arguments about the inherent unfairness of all immunities, get short shrift. Second, immunities (other than legislative immunity) ordinarily apply only to damage awards, generally leaving a 1983 court free to issue injunctive relief and to award attorneys fees. Third, a common law immunity should be distinguished from its cousin, the good faith defense,\textsuperscript{29} which is a fact-based affirmative defense.

Section 1983 immunities come in five flavors: judicial; legislative; executive; sovereign; and Eleventh Amendment.

\textit{Judicial Immunity}

Judges and executive officials performing adjudicative tasks (such as administrative law judges) are immune from damage liability arising out of the performance of their adjudicative functions, even if they perform the functions in bad faith.\textsuperscript{30} However, since the immunity is functionally based, judges are entitled to no immunity for acts performed outside their adjudicative capacity. Thus, in \textit{Forrester v. White},\textsuperscript{31} the Court held that judicial immunity did not attach to a judge's allegedly discriminatory personnel decisions.

\textsuperscript{27} State law on issues like sovereign immunity, \textit{respondeat superior} and suability is overridden by federal standards in Section 1983 cases. Martinez v. California, 444 U.S. 277 (1980).

\textsuperscript{28} E.g., Pierson v. Ray, 386 U.S. 547 (1967) (holding that Section 1983 does not abrogate common law tort immunities); Quern, 440 U.S. at 341 (explaining that Section 1983 was not intended to override Eleventh Amendment immunity).


\textsuperscript{30} See infra Part III.A.1.c.

\textsuperscript{31} 484 U.S. 219 (1988).
Lower courts have respected the limitation. Moreover, in Pulliam v. Allen, the Court ruled that judicial immunity did not apply to actions for prospective injunctive relief, or to statutory attorneys fees awarded in connection with the issuance of injunctive relief against a judge.

The functional nature of judicial immunity has led to its extension to non-judicial participants in the justice system who are necessary to the proper functioning of the process. Thus, prosecuting attorneys enjoy a quasi-judicial immunity for acts arising out of the actual prosecution of a case; however, there is no immunity for acts taken in an investigatory capacity. Similarly, prosecution witnesses are immune from damage actions for perjury. In contrast, court-appointed defense lawyers are not immune from state law malpractice liability or federal Section 1983 claims for conspiring with the prosecutor. State police officials are not entitled to absolute immunity in connection with applications for search warrants; nor are members of a federal prison disciplinary committee. Members of parole boards are probably immune from claims arising out of their adjudicatory functions, but may be liable for administrative decisions. The lower courts are divided on whether persons who initiate social service petitions in custody situations enjoy absolute immunity.

32. E.g., Archie v. Lanier, 95 F.3d 438 (6th Cir. 1996) (denying immunity to state court judge accused of stalking and sexually assaulting a litigant); Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988) (holding that judge was not entitled to judicial immunity for promulgation of an “English-only” rule), vacated as moot, 490 U.S. 1016 (1989).
35. E.g., Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), rev’d in part, 446 U.S. 754 (1980).
40. Compare Johnson v. Rhode Island Parole Board Members, 815 F.2d 5 (1st Cir. 1987)(holding that parole board officials are entitled to absolute immunity regardless of whether their duties are administrative or adjudicatory), with Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986)(granting immunity to parole board official performing a “plainly adjudicatory function”).
41. Compare Kurzawa v. Mueller, 732 F.2d 1456 (6th Cir. 1984)(holding that employees of the Department of Social Services were entitled to absolute immunity regardless of knowledge), with Doe v. New York City Dep’t of Social Servs., 709 F.2d 782 (2d Cir. 1983) (holding that supervisory personnel could be liable under § 1983
Unlike judicial immunity, which applies only to damage liability, legislative immunity, which derives from the "Speech or Debate" clause of the federal constitution for federal legislators and common law immunity for state legislators, shields the legislative process from any interference by the courts, either in the form of injunctions or damages. While it is theoretically possible to imagine differences between federal and state versions of the immunity, the Supreme Court has treated them as essentially coterminous. Like judicial immunity, the Court has applied a rigorous functional test to measure both the scope of the immunity and the identities of persons who may assert it. In *Gravel v. United States*, the Court ruled that the immunity was available to staff members who were working on core legislative activities. The correlative was recognized in *Davis v. Passman*, where the Court held that legislative immunity did not apply to discriminatory personnel decisions made by a member of Congress because those decisions were not part of the legislative process. One curious distinction between state and federal immunity involves the admissibility of legislative acts in criminal prosecutions against legislators, generally for bribery. The Supreme Court has held that the "Speech or Debate" clause renders legislative acts inadmissible in prosecutions against members of Congress, but that state immunity does not render such acts inadmissible in a federal prosecution of a state legislative officer.

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43. 408 U.S. 606 (1972).
44. 442 U.S. 228 (1979).
45. *Id.* at 246. Acts like arranging for the private publication of the Pentagon Papers, arranging for the public dissemination of embarrassing committee material, publishing newsletters and press releases have been held to fall outside the scope of the immunity. *See* Gravel v. United States, 408 U.S. 606 (1972); Doe v. McMillan, 412 U.S. 306 (1973); Hutchinson v. Proxmire, 443 U.S. 111 (1979). Voting, speeches on the floor of Congress and the holding of committee hearings, including the exercise of the subpoena power, have been deemed covered by the privilege. *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).
Legislative immunity applies to the acts of regional and, presumably, local legislators. However, a key distinction exists between the immunity granted to an agency to enunciate new rules, which is protected by legislative immunity, and the agency's attempt to enforce the rules, which is deemed an administrative act and, thus, outside the immunity. Consequently, in *Supreme Court v. Consumers Union*, the Supreme Court of Virginia was deemed to be acting in its immune legislative capacity when it enacted new rules governing attorney conduct, but lost its legislative immunity the moment it sought to enforce the new rules.

**Executive Immunity**

Executive officials are never immune from injunctive relief. Courts have been extremely cautious in extending absolute damage immunity to executive officials. The President is absolutely immune from damage liability for official acts taken while in office. A small group of Presidential aides may share Presidential immunity, but the Attorney General, members of the cabinet, governors and National Guard officials are not entitled to absolute damage immunity.

To the extent that members of the executive branch are insulated from damages under Section 1983, the insulation flows from notions of qualified immunity and good faith defense discussed below.

**Eleventh Amendment Immunity**

The Eleventh Amendment bars federal courts from imposing retrospective damage liability on states or state officials sued in their official capacities. It has no application to injunctive relief premised on a violation of federal, as opposed to state, law. Nor does the Eleventh Amendment have any application to suits against local governmental units, such as municipalities, counties or

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51. *See infra* Part III.A.1.c.
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School boards.53 Unique among constitutional provisions, the states' Eleventh Amendment immunity can be overridden by Congress when it legislates pursuant to the Fourteenth Amendment or the Commerce Clause.54 The Court has explicitly refused to read Section 1983 as intended to override Eleventh Amendment immunity,55 reasoning that, in 1871, Eleventh Amendment considerations led Congress to eliminate states from the coverage of the word "person" in Section 1983.56 The Court, at one time, used an energized concept of implied or constructive waiver to limit Eleventh Amendment immunity.57 In recent years, however, the Court has demanded a clear statement of an intent to waive.58 Similarly, the Court now requires strong evidence of a clear Congressional intent to override the Eleventh Amendment.59 In Hutto v. Finney,60 the Court ruled that Section 1988 authorized the award of attorneys' fees against states, despite the Eleventh Amendment; and in Missouri v. Jenkins,61 the Court applied Hutto to the award of an enhanced fee to reflect delay in payment. In Pennhurst State Sch. & Hosp. v. Halderman,62 the Court complicated litigation against state entities by ruling that the Eleventh Amendment bars federal courts from issuing injunctive relief against a state official to redress the violation of a pendent state claim. Thus, litigators seeking to raise both state and federal claims against state defendants are put to a difficult choice, because the federal forum will often be unable to act on the pendent state claim. The alternatives are to forego the federal forum or to file two actions, with the attendant inefficiency and preclusion risks.

Sovereign Immunity

It is unclear whether the Eleventh Amendment is intended to codify state sovereign immunity or whether judge-made common

53. Lincoln County v. Luning, 133 U.S. 529 (1890).
60. 437 U.S. 678 (1978).
law sovereign immunity continues in tandem with the Eleventh Amendment. Whatever the doctrinal formulation, the following two principles seem clear: state immunity law cannot prevent recovery under Section 1983 if federal standards are satisfied, and the Supreme Court’s approach to sovereign immunity law is likely to be rigorously functional in the future. Thus in *Westfall v. Ervin*, the Court rewrote traditional intergovernmental tort immunity to eliminate federal sovereign immunity from state tort actions for all federal “ministerial” as opposed to “policy-making” activity.

c. What Level of Fault Is Required in Order to Impose Damage Liability Under Section 1983?

When injunctive relief is sought under Section 1983, the sole question is whether the defendants are in violation of law and if so, whether an injunction is necessary to put an end to the violation. The “objective reasonableness” of the defendants’ illegal behavior and the place in the employment hierarchy of the unlawful actor are, ordinarily, irrelevant when prospective relief is at issue.

When, however, damages are sought, the Court has enunciated an elaborate set of rules in Section 1983 cases designed to allocate loss among the plaintiff, the individual defendant, and the government entity defendant. Briefly summarized, the rules provide that losses caused by an illegal “policy or custom” of the government entity should be borne by the government entity, losses caused by the illegal acts of a government employee that were performed in the absence of a “policy or custom” should be borne by the erring employee, and if the employee can establish that the acts were committed under an “objectively reasonable” belief that they were lawful, the loss falls on the plaintiff.

In many cases, the illegal acts giving rise to a Section 1983 claim are obviously the work of a “bad apple,” acting in clear violation of both federal and local law. In those settings, the Court’s scheme allocates loss to the potentially judgment-proof “bad apple” because the government entity has been guilty of nothing, except hiring a “bad apple.” Enormous resources are often expended in attempting to prove that the government entity failed to take ade-

66. O’Brien v. City of Grand Rapids, 23 F.3d 990 (6th Cir. 1994); Dartland v. Metropolitan Dade County, 866 F.2d 1321 (11th Cir. 1989).
quate steps to prevent the misbehavior, usually by failing to train adequately.

In many cases, the "objectively reasonable" belief in legality will have been created by the existence of a "policy or custom" of the government employer. Under those circumstances, the Court's system works beautifully to shift liability from an employee who was only doing his job to the government entity that is truly responsible for the loss.

When, however, no obvious "custom or policy" exists and the erring employee satisfies the requirement of objectively reasonable belief of legality, the Court's insistence that damage liability under Section 1983 be tied to individual or group fault creates a hole in the remedial scheme that leaves plaintiffs uncompensated, despite a finding that their constitutional rights have been violated. The size of the hole depends on the answer to two questions: (1) What constitutes a "policy or custom" of a government entity; and (2) What constitutes an "objectively" reasonable belief in legality? Neither question has been clearly answered by the Court.

What Constitutes a Policy or Custom?

Government entity liability in damages under Section 1983 begins with Monell v. New York City Dep't of Social Servs. In Monell, the Supreme Court ruled that municipalities were "persons" within the meaning of Section 1983, but rejected the imposition of respondeat superior liability for unconstitutional acts of their employees. Instead, the Court required a showing that the unlawful act had been done pursuant to a "policy or custom" that made it just to saddle the community with the consequences of the unlawful act. In Owen v. City of Independence, the Court ruled that once a "policy or custom" had been established, a municipality could not avoid liability by establishing a derivative good faith defense, based on the good faith of the people who adopted it. Owen is critical to the Court's loss-allocation scheme, since it makes possible the shift of liability from innocent employees to the municipality without destroying the plaintiff's ability to receive compensation. The medicine was sweetened by the insulation of the municipality from any punitive damage liability.

In the wake of Monell and Owen, courts have struggled with the concept of "policy or custom." Obviously, formal action by an en-

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tity constitutes its "policy." Whether action by a high ranking official constitutes policy has badly divided the Court. In *Pembaur v. City of Cincinnati*,70 the Court ruled that a single decision by a County Prosecutor to break into a doctor's office constituted the policy of the County, since he was the highest ranking law enforcement official and had power under local law to formulate policy. In *City of St. Louis v. Prapotnik*,71 the Court ruled that the transfer and layoff of a city employee by the head of his department did not constitute the policy of the City, since the agency head was not vested with formal authority to make policy under local law.

What is lacking in the fragmented opinions of the Court (there was no opinion of the Court in *Prapotnik*) is a sense of the purpose behind the requirement of "policy or custom." Until a consensus is reached on what values the "policy or custom" rule is designed to advance, it will be impossible for the lower courts to enunciate a principled body of law in the area.

In the absence of a formal policy or an established custom, action by a lower-ranking official will rarely, if ever, trigger entity liability. Plaintiffs have attempted to fill this void by arguing that failure to train and failure to supervise lower-level employees can rise to the level of a policy. In *City of Canton v. Harris*,72 the Court ruled that a failure to train could be so egregious as to give rise to Section 1983 liability, if the injury was related to the training deficiency. The *Harris* Court enunciated a demanding standard, requiring the failure to train to be so egregious as to constitute "deliberate indifference" to the foreseeable unconstitutional consequences.73 A similar analysis will probably be followed in the failure to supervise cases, as well.

**What Constitutes "Objectively" Reasonable Belief in Legality?**

The Court has consistently ruled that, unlike entities, individual government officials should not be saddled with personal liability for acts that they reasonably believed to be lawful at the time they performed them. The concept is often described as a "qualified immunity" available to executive branch officials, or as a "good faith defense" available to individual government defendants. The concept initially had both an objective and a subjective component. In order to escape liability, a defendant was obliged to prove both

70. 475 U.S. 469 (1986).
73. Id. at 390.
subjective and objective good faith. Such a standard made it virtually impossible for a defendant to avoid a full-scale trial, since subjective good faith was incapable of resolution on summary judgment. In *Harlow v. Fitzgerald*, the Court abandoned the subjective component in favor of an “objectively” reasonable standard. The critical issue under *Harlow* is whether, in view of the state of the law at the time the act took place, the defendant had objectively reasonable grounds for believing the act to have been legal. If such objectively reasonable grounds exist, the fact that the act was a clear breach of state law will not strip the defendant of his federal immunity, although the defendant may be liable under state law.

In *Mitchell v. Forsyth*, the Court ruled that to the extent a claim of qualified immunity rests on an issue of law, it is appealable immediately under 28 U.S.C. 1291, despite the lack of a final judgment. *Mitchell* is consistent with the desire in *Harlow* to free defendants from unnecessary trials. It has generated substantial confusion, however, since decisions about qualified immunity and good faith defense generally involve closely intertwined issues of fact and law.

The bottom line on 1983 liability is decidedly mixed. Injunctive relief is readily available, providing a potent mechanism for enforcing human rights norms against state and local governments. But damages are another story. Individual liability is complicated by absolute immunity, qualified immunity, and the good faith defense. Entity liability is even harder to establish, requiring a finding of policy or custom for compensatory damages, with no possibility of punitive damages. Unfortunately, plaintiffs whose constitutional rights have concededly been violated fall between the cracks in droves, caught between qualified immunity and the good faith de-

75. 457 U.S. 800 (1982).
76. Id. at 815.
79. See Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989) (filing of notice of appeal from denial of summary judgment on qualified immunity issue ordinarily ousts District Court of jurisdiction to proceed with trial).
fense on one hand and a narrow definition of policy and custom on the other.

As an exercise in both pre- and post-event law, Section 1983 fails to deliver reliable post-event relief to injured plaintiffs, and fails to generate the fear needed to induce pre-event compliance. How much better would it be if: (1) individual liability were more certain, with the amount of damages keyed to an individual defendant's moral fault; and (2) entity liability were to turn, not on the mysticism of policy or custom, but on whether the government employer had in place an effective pre-event plan to assure compliance with constitutional norms—a plan that must be certified as effective by the local Human Rights Commission.

2. Entity Liability for Private Violation of Human Rights Norms

Unfortunately, the Court's efforts to define private employer liability are scarcely less complex.\(^8^0\) Four different varieties of discrimination must be processed through two different categories of actors. Employers face potential liability for: (1) discriminatory decisions; (2) quid pro quo sexual harassment; (3) racial, ethnic, or religious harassment; and (4) hostile environment sexual harassment. Moreover, the individual acts giving rise to liability can be committed by co-workers, or supervisors of varying degrees of power. Under existing law, employers are strictly liable for discriminatory decisions. Employers are also strictly liable for quid pro quo sexual harassment.\(^8^2\) On the other hand, co-worker racial harassment triggers employer liability only if the employer had notice and failed to take steps to end it.\(^8^3\) Similarly, co-worker hostile environment sexual harassment requires a showing of notice in order to impose liability on the employer.\(^8^4\) When racial or hostile environment sexual harassment is committed by a supervisor, the courts are divided. Several courts adopt the EEOC's guidelines which treat the actions of a supervisor as the actions of the employer, thereby establishing respondeat superior liability.\(^8^5\) Others

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\(^{80}\) See generally J. Hoult Verkerke, Notice Liability in Employment Law, 81 Va. L. Rev. 273 (1995), for an excellent survey of the area. I owe much of the following discussion to the Verkerke article.

\(^{81}\) Id. at 281.

\(^{82}\) Id. at 282.

\(^{83}\) Id.

\(^{84}\) Id.

\(^{85}\) Id.
demand a showing of notice to higher officials and a failure to respond, especially when the supervisor is relatively low-level.86

The bar’s approaches to respondeat superior liability in the context of statutory human rights enforcement are predictable from a post-event perspective. Victims and their advocates—including the staff of the Commission—generally argue for a strict use of respondeat superior liability that would hold employers absolutely liable for the human rights violations of their employees. The need for a “deep pocket” defendant capable of compensating an injured victim, and the desire to impose incentives on employers to prevent employees from acting improperly combine to argue for strict derivative liability.

Advocates for defendants—who are usually retained by employers—argue that employers should be liable for the human rights violations of employees only when the employer is in some sense morally culpable. Employer advocates argue that respondeat superior in the human rights contexts is fundamentally different from its use in the tort context, since, unlike the usual negligence setting, employers gain no economic benefit from human rights violations. In settings where an employer did not know of the improper behavior, or otherwise contribute to it, advocates argue that it is morally wrong to saddle the “innocent” employer with the economic consequences of an individual’s morally unacceptable behavior. Two moral wrongs, they argue, do not make a moral right.

The result is the unstable doctrinal mixture described above that requires proof of employer culpability in some settings, but imposes strict derivative liability in others. Where the guilty parties are on the same hierarchical level as the victim, a showing of em-

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86. The employer liability rules can be summarized as follows:

<table>
<thead>
<tr>
<th>Discriminatory Decision</th>
<th>Strict liability when done by supervisor</th>
<th>Cannot be done by co-worker</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quid pro quo sexual harassment</td>
<td>Strict liability when done by supervisor</td>
<td>Cannot be done by co-worker</td>
</tr>
<tr>
<td>Racial, religious, or ethnic harassment</td>
<td>Unclear whether strict or notice if performed by supervisor</td>
<td>Employer must have notice and fail to respond if done by co-worker</td>
</tr>
<tr>
<td>Hostile environment sexual harassment</td>
<td>Unclear whether strict or notice if performed by supervisor</td>
<td>Employer must have notice and fail to respond if done by co-worker</td>
</tr>
</tbody>
</table>

See Verkerke, supra note 80, at 283-84.
ployer culpability is often required, under the rubric of "notice liability." Where, however, the guilty party is a supervisory employee, the employer is often strictly liable, regardless of moral fault.

The net result is to shift much liability from the offending employee to the employer, while sending a mixed message to the employer about the effectiveness of preventive measures. In a sense, the existing rules encourage a kind of "expense account" discrimination by passing the economic costs to the employer. But, as with 1983 liability, it is a post-event system without enough teeth to result in pre-event compliance. It results in the occasional compensation of a victim, but does little to induce significant pre-event compliance. I believe that it would be more effective to always require guilty employees to bear a significant share of the financial cost of their behavior, while conditioning an employer's liability, not on the vagaries of who commits the violation or whether anyone else knew of it, but on whether the employer had in place a Commission-certified plan to prevent the violations from occurring in the first place. If such a plan were in existence, I would free the employer from strict derivative liability. In the absence of such a plan, I would impose strict derivative liability for all human rights violations.

B. Entity Liability and the Human Rights Commission

Four recent decisions of the Commission illustrate the problem. Each involved appalling behavior by one or more individuals. Each quite properly resulted in a significant award of damages. But the financial pain of the awards will not, in all likelihood, be felt by the erring individuals. Instead, the entity employer was treated as a "deep pocket," resulting in effective compensation of the victim, but little real likelihood of pre-event impact. Theoretically, of course, as a result of the awards, the employers will be more careful in the future. But, with the possible exception of one award, the amounts involved are too small to cause real changes in employer behavior. Moreover, when the size of the awards are further discounted by the likelihood of future liability findings, the probability of a serious structural change in employer behavior is quite low.
In *Polster v. ASPCA*, a lesbian employee of the ASPCA was subjected to outrageous harassment and, finally, pretextual dismissal. The record of the hearing is replete with personal failure. Co-workers acted in an appalling manner. Supervisors did nothing to stop it. And, the president signed off by engaging in a pretextual dismissal. The substantial award of $60,000 for mental anguish and $10,000 back pay was more than justified. But the opinion fails to impose any financial responsibility on the cast of characters who actually committed the violations. Instead, the ASPCA must pay the award out of its corporate budget.

Putting aside the fact that the ASPCA is itself the recipient of charitable donations, I believe that the award was misdirected. The erring employees should have borne all, or at least a substantial part, of the award individually. Imposing financial sanctions on persons who actually commit human rights violations would increase the Commission's deterrent impact, while imposing a punishment on the truly guilty party. Instead, the "guilty" individuals suffered no financial pain.

In *D'Alessandro v. New York City Bd. of Educ.*, one of the first women to supervise school custodians for the New York City Board of Education was sexually harassed and, ultimately, improperly dismissed. Once again, the record teems with individual failures: co-worker harassment; supervisory inaction; and improper dismissal. Once again, the Commission quite correctly awarded substantial damages, both for back pay and mental anguish. Once again, however, the erring individuals escaped all liability. The damages must be paid from the budget of a radically underfunded public school system. Why should the damages in cases like *D'Alessandro* be even partially borne by schoolchildren? Will an award of $20,000 really cause the Board of Education to take structural steps to change its ways? The answer is that $20,000 will not make much of a dent in the Board's behavior, but it could be a genuine deterrent if employees credibly believed that they would be personally liable for at least a portion of the damages.

In *Rives v. 164 23rd St. Jackson Heights, Inc.*, a Latino male was denied the ability to buy a cooperative apartment because of his

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ethnic status. The record demonstrates that the prime mover in the discriminatory denial was the president of the cooperative. The Commission properly awarded a modest $7,500 for mental anguish. This time, the award was against the Board president and the coop itself. But such a common award will almost certainly be paid by the cooperative, thus penalizing many completely innocent tenants. Given the modest size of the award, and the clear personal responsibility of the Board president, would it not have been more effective to forego entity liability, and place the burden on the guilty party?

Finally, in *Ruiz v. Arcade Elevator Co.*, the complainant was the subject of *quid pro quo* sexual harassment that began with a rape at gunpoint and developed into a form of sexual bondage. The Commission justifiably imposed an enormous sanction of $450,000 for the extreme emotional distress caused by the grotesque behavior of several individuals. Once again, however, the award appears directed solely against the employer. Given the failure of the employer to take minimal steps to deal with the situation, employer liability is clearly justified. But is it wise to permit the individuals who engaged in dreadful behavior to escape individual financial sanction? Would it not be more effective to announce that individuals who behave abominably will suffer financially?

C. Two Modest Proposals

I believe that two relatively modest alterations in remedial policy could go a long way toward increasing the Commission’s ability to influence pre-event behavior without impeding its ability to provide meaningful compensation to victims.

The Commission should distinguish between the improper conduct of individuals that caused a violation, and the derivative liability of an employer. In every case, culpable individual behavior should result in a significant financial sanction. Only where the injury is so significant that the financial resources of the guilty individuals cannot make the complainant whole should it be necessary to consider employer liability. Once employer liability becomes

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relevant, either because the guilty individuals are unknown or financially unable to compensate the victim, employer liability should turn on three factors. If the employer is itself morally culpable, liability should follow as a matter of course. Where, however, an employer does not bear any moral responsibility for the events, I would distinguish between employers with Commission-certified plans designed to prevent discrimination, and employers who do not have such a plan in effect. The existence of a certified plan would operate as a safe harbor for purely derivative liability. The lack of a Commission-certified plan would result in automatic derivative liability. The net result would be increased deterrence of individual violations and a strong incentive for the adoption of Commission-certified plans designed to stop discrimination before it starts.

IV. Conclusion

The years to come may require a wrenching inquiry into whether the Commission should continue to expend significant resources on remedying past acts of discrimination, as opposed to seeking to prevent future discriminatory behavior. I fear that the current post-event enforcement model may do little more than compensate an occasional victim, without achieving significant changes in pre-event behavior. By narrowing its remedial focus to the guilty individuals, and providing an incentive for employers to adopt effective preventive plans, the Commission would increase deterrent impact and amplify its ability to induce employers to prevent discrimination before it occurs.