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ing may limit this expansion.[53] The explicit language of section 7502 should also act as a counterweight to any expansion of *Curry*. Indeed, the statute could only be made more explicit by Congress specifically forbidding the Tax Court from taking jurisdiction on the basis of equity or constructive delivery. Such an amendment should not be necessary since *Curry* will likely be the extraordinary exception.

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XV. TORTS

A. Attractive Nuisance Doctrine

The attractive nuisance doctrine, which allows a trespassing child to recover damages from a landowner for injuries caused by a dangerous condition on the land,[1] is an exception to the landowner's common law duty to refrain only from intentionally engaging in willful or wanton misconduct towards a trespasser.[2] This exception is derived from the legal

[53] *See* Shipley v. Commissioner, 572 F.2d 212 (9th Cir. 1977) (court refused to consider secondary evidence of timely mailing where petition cover bore untimely postmark).

[1] The attractive nuisance doctrine was first outlined in Keffe v. Milwaukee & St. P. Ry., 21 Minn. 207 (1875). *See also* Souix City & Pac. R.R. v. Stout, 17 U.S. (Wall.) 657 (1873). The *Keffe* court held that a landowner who maintains a dangerous condition on his land which is "alluring" to children will be liable to children injured by that condition. 21 Minn. at 210. In reaching this decision, the court reasoned that the landowner's act of maintaining such a dangerous condition on the land constituted an implied invitation to children to come on the land. *Id.* at 211. Therefore, the court concluded that a landowner has a duty to take reasonable action to render such a dangerous condition harmless to trespassing children. *Id.* at 212. During the early 1900's, text writers advocated abandoning the *Keffe* "allurement" concept of liability in favor of treating a child trespass case as an ordinary negligence case. Prosser, *Tresspassing Children*, 47 CAL. L. REV. 427, 432 (1959) [hereinafter cited as Prosser, *Trepassing Children]; see* Green, Landowner v. Intruder, Intruder v. Landowner: The Basis of Responsibility in Tort, 21 MICH. L. REV. 495, 505-13 (1923); Hudson, *The Turntable Doctrine in the Federal Courts*, 36 HARV. L. REV. 826 (1923). These writers argued that liability for a trespassing child's injury should be based on forseeability of harm and considerations of social policy rather than the theoretical concept of allurement. Prosser, *Trespassing Children, supra* at 432. The drafters of the Restatement of Torts reflected this change in thinking in the 1934 version of the Restatement. Prosser, *Trespassing Children, supra*, at 435; *see* RESTATEMENT OF TORTS § 339 (1934); Note, *Trespassing Children: A Study in Expanding Liability*, 20 VAND. L. REV. 139, 142-43 (1966) [hereinafter cited as *Expanding Liability].* Under §339, which remains substantially unchanged in the Restatement (Second) of Torts, a child may recover damages from a landowner by meeting four requirements. RESTATEMENT (SECOND) OF TORTS § 339 (1965); Prosser *Trespassing Children, supra* at 435-36. Prior to recovery, a child myst prove that the condition which caused his injury posed an unreasonable risk of harm to children, that he was incapable of appreciating the risk of harm posed by the condition, that the landowner knew or should have known that children trespassed on the property, and that the risk of harm to a child posed by the condition outweighed its value to the landowner. RESTATEMENT (SECOND) OF TORTS § 339 (1965); *Expanding Liability, supra* at 146. Many courts have adopted the 1934 Restatement's view of the attractive nuisance doctrine. E.g. O'Keefe v. South End Rowing Club, 64 Cal.2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966); Dean v. Wilson Constr. Co., 251 N.C. 581, 111 S.E.2d 827 (1960).

[2] *Expanding Liability, supra* note 1, at 140. The landowner's common law duty of care

presumption that a young child lacks the ability to understand dangerous conditions on the land and thus, should receive special protection from such conditions.[3] Since older children, like adults, are expected to understand dangerous conditions,[4] courts have attempted to formulate limitations based on age for the application of the attractive nuisance doctrine.[5] In furtherance of these limitations, many courts hold that children of a certain age no longer need this special protection and are presumed to be capable of understanding dangerous conditions.[6] Recently, in *Hashtani v. Duke Power Co.*,[7] the Fourth Circuit considered the availability of a waiver to such an age limitation when a child plaintiff suffers from mental retardation or mental deficiency.

Hashtani, a fourteen year old boy, and two companions trespassed on Duke Power Company (Duke) property by climbing an electric transmission tower owned by Duke.[8] While climbing the tower, one of Hashtani's companions heard a loud crackling noise. Looking downward, the companion discovered Hashtani hanging on a lower crossbeam of the tower, unconscious and injured. Although neither of the two companions witnessed the accident,[9] the nature of Hashtani's injuries indicated that he had come

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to trespassers is premised on the belief that a landowner should enjoy the free use of his land without the burden of watching for and protecting intruders. McPheters v. Loomis, 125 Conn. 526, 7 A.2d 437, 441 (1939); Eldredge, *Tort Liability to Trespassers*, 12 TEMP. L. Q. 32, 32-33 (1937); Prosser, *Trespassing Children, supra* note 1, at 428. The common law, however, recognizes three exceptions to the landowner's limited duty of care toward trespassers. When a landowner knows that trespassers frequently enter onto his property, the landowner must refrain from activities which might pose a hazard to such trespassers. *E.g.*, Southern R.R. v. Campbell, 309 F.2d 569, 571 (5th Cir. 1962); Cheslock v. Pittsburgh Ry., 363 Pa. 157, 69 A.2d 108, 111 (1949); RESTATEMENT (SECOND) OF TORTS § 334 (1966); PROSSER, THE LAW OF TORTS § 58 (4th ed. 1971). In addition, where a landowner regularly engages in an activity which poses a high degree of danger to entrants, he must exercise reasonable care to protect any entrant against the danger posed by such an activity. *E.g.*, Virginian Ry. v. Rose, 267 F.2d 312, 315 (4th Cir.), *cert. denied*, 361 U.S. 837 (1959); Pickett v. Wilmington & W. R.R., 117 N.C. 616, 23 S.E. 264, 265 (1895). Finally, if a landowner discovers the presence of a trespasser on his property, he must exercise reasonable care under the circumstances to prevent any harm to that trespasser. *E.g.*, Denver & Rio Grande W. R.R. v. Cling, 235 F.2d 445, 448 (10th Cir. 1956); Baltimore & O. R.R. v. State *ex rel.* Welch, 114 Md. 536, 80 A. 170, 172 (1911).

[3] Prosser, *Trespassing Children, supra* note 1, at 429. The courts do not impose the burden of protecting a trespassing child on the child's parents because neither custom requires nor practicality allows parents to constantly supervise their children. *Id.* Instead, when a landowner places an artificial condition on his land which poses an unreasonable risk of harm to children, the courts require the landowner to take reasonable steps to protect trespassing children from that condition. Prosser, *Trespassing Children, supra* note 1, at 428-29; *Expanding Liability, supra* note 1, at 144.

[4] RESTATEMENT (SECOND) OF TORTS § 339, comment c (1965); *Expanding Liability, supra* note 1, at 146-47.

[5] Prosser, *Trespassing Children, supra* note 1, at 439-40; *Expanding Liability, supra* note 1, at 146-47.

[6] *See, e.g.*, Garrett v. Arkansas Power & Light Co., 218 Ark. 575, 237 S.W.2d 895, 903 (1951); Dean v. Wilson Constr. Co., 251 N.C. 581, 111 S.E.2d 827, 832-33 (1960); Hanson v. Friegang, 55 Wash. 2d 70, 345 P.2d 1109, 1111 (1959).

[7] 578 F.2d 542 (4th Cir. 1978).

[8] *Id.* at 543.

[9] *Id.* Hashtani's second companion, who was below Hashtani at the time of the accident,

into contact with an electric cable while climbing the tower. Hashtani brought suit against Duke to recover for the injuries he had received while climbing the tower.[10] At trial, Hashtani contended that the court should apply the attractive nuisance doctrine to hold Duke liable for his injuries.[11] Alternatively, Hashtani claimed that under the facts of his case, Duke had acted negligently towards Hashtani.[12] Because of his age, Hashtani had to rebut the North Carolina judicial presumption that a fourteen year old child is capable of appreciating dangerous conditions before the court would submit an attractive nuisance doctrine instruction to the jury.[13] A child plaintiff in North Carolina may overcome this presumption only by proving the existence of a mental deficiency which causes the plaintiff to lack the normal mental ability which other children of the plaintiff's age possess.[14] To rebut the presumption, Hashtani asserted that his poor school

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looked up and saw Hashtani was on fire. *Id.* Hashtani, however, was unable to recall the accident. *Id.*

[10] Since Hashtani instituted his action in federal court pursuant to 28 U.S.C. § 1332, the district court applied the substantive law of the state in which the tort occurred, in this case, North Carolina. 578 F.2d at 543; *see* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); H. GOODRICH & F. SCOLES, CONFLICT OF LAWS § 92 (4th ed. 1964).

Although Hastani waited eight years to bring his action, his claim was not barred by the North Carolina statute of limitations. *See* 578 F.2d at 543. Under North Carolina law, a child under the age of eighteen is under a judicial disability and must bring suit by means of a guardian ad litem. N.C. GEN. STAT. § 1A-1, Rule 17 (Supp. 1977). However, the statute of limitations on an action by a person under a disability does not commence until the appointment of a guardian or the disability is removed. *Id.* § 1-17. Since there is no requirement that a guardian be appointed, a child may wait until his majority to begin his action without being barred by the statute of limitations. *Id.*, *see* Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964); Campbell v. Crater, 95 N.C. 156 (1886). Once a guardian is appointed or a child reaches majority, however, a tort action must commence within three years. N.C. GEN. STAT. § 1-17 (Supp. 1977).

[11] 578 F.2d at 543; *see* text accompanying notes 1-3 *supra.*

[12] Since Hashtani was a trespasser, the court held that he could not recover upon a negligence theory. 578 F.2d at 546. Instead, Hashtani could recover damages only upon proof of Duke's intentional or wanton misconduct toward him. *Id.* at 546; *see* text accompanying note 2 *supra.* Since Hashtani failed to prove that Duke had engaged in such conduct, the court dismissed Hashtani's negligence claim. 578 F.2d at 546. In addition, the court noted that even if Duke had been negligent towards Hashtani, Hashtani still would have been barred from a recovery because of his contributory negligence. *Id.*, *citing* Smith v. United States, 546 F.2d 872 (10th Cir. 1976); Van Brooks v. Boucher, 22 N.C. App. 676, 207 S.E.2d 282 (1974); *accord*, Slaysman v. Gerst, 159 Md. 292, 150 A. 728, 737 (1930); Hollman v. Atlantic Coast Line R.R., 201 S.C. 308, 22 S.E.2d 892 (1942); Grant v. Mays, 204 Va. 41, 129 S.E.2d 10, 13 (1963).

[13] 578 F.2d at 544. Under North Carolina law, a fourteen year old child is presumed to have the reasoning ability of an adult and to have no need for the special protection from dangerous conditions contained in the attractive nuisance doctrine. Graham v. Sandhill Power Co., 189 N.C. 381, 127 S.E. 429, 433 (1925); *accord*, Hollman v. Atlantic Coast Line R.R., 201 S.C. 308, 22 S.E.2d 892 (1942); Grant v. Mays, 204 Va. 41, 129 S.E.2d 10, 13 (1963); White v. Kanawha City Co., 127 W. Va. 566, 573, 34 S.E.2d 17, 20-21 (1945); *cf.* Slaysman v. Gerst, 159 Md. 292, 150 A. 728, 732 (1930) (child must exercise precaution for his own safety as ordinarily would be attributable to child of the same age).

[14] 578 F.2d at 544, *citing* Dean v. Wilson Constr. Co., 251 N.C. 581, 111 S.E.2d 827 (1960); *see* note 13 *supra.*

record demonstrated the existence of a mental deficiency.[15] In addition, Hashtani introduced the testimony of a psychiatrist that Hashtani's mental development was equivalent to that of a thirteen year old at the time of the accident.[16] The trial judge, finding that Hashtani had overcome the presumption, submitted the case to the jury which returned a verdict for Hashtani.[17]

On appeal, the Fourth Circuit reversed the decision of the district court, holding that Hashtani had failed to overcome the presumption that a fourteen year old child can appreciate dangerous conditions on the land.[18] The court reasoned that a mere showing of poor school performance is insufficient to support the existence of a mental deficiency.[19] Moreover, the court concluded that Hashtani's evidence of mental deficiency failed to satisfy the North Carolina test for the application of the attractive nuisance doctrine to a child over the age of fourteen.[20] The court reasoned that Hashtani's record in school, especially two average grades in difficult subjects, mitigated against a finding of mental deficiency.[21] In addition, the court discounted the efficacy of the testimony of Hashtani's psychiatrist because of the hasty manner in which the examination was conducted and the inconclusiveness of the psychiatrist's findings.[22] Therefore, the court concluded that there was no basis on which the jury could have found that Hashtani suffered from a mental deficiency and that Duke should have

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[15] 578 F.2d at 544-45. Hashtani had failed one grade while in elementary school but had earned average grades in many of his school courses. *Id.* at 545.

[16] *Id.*

[17] *Id.* at 543.

[18] *Id.* at 545-46.

[19] *Id.* at 544, *citing* Grube v. Baltimore, 132 Md. 355, 103 A. 948 (1918). The Fourth Circuit reasoned that lack of achievement in school could be attributed to laziness or lack of educational opportunity. 578 F.2d at 544. In addition, the court noted that Hashtani had achieved above average grades in arithmetic and science shortly before his accident. *Id.* at 545.

[20] In Graham v. Sandhill Power, Co., 189 N.C. 381, 127 S.E. 429 (1925), the North Carolina Supreme Court permitted a fourteen year old child, who was proven by expert and nonexpert testimony to have had a mental age of eight to ten years of age at the time of his accident and to have inherited insanity, to waive the age limitation on the attractive nuisance doctrine because of mental deficiency. 189 N.C. 381, 127 S.E. at 431-32. The *Hashtani* court reasoned that the level of proof offered in *Graham*, was a minimum standard against which Hashtani's proof of mental deficiency should be measured. *See* 578 F.2d at 545. Since Hashtani's evidence of mental deficiency was ambiguous in comparison to clear evidence of mental deficiency in *Graham*, the Hashtani court concluded that Hashtani had not sufficiently rebutted the presumption that a fourteen year old child can understand dangerous conditions. *Id.; see* text accompanying notes 21-22 *infra.*

[21] 578 F.2d at 545.

[22] *Id.* Hashtani's psychiatrist testified on the basis of a twenty minute interview with Hashtani conducted just before the trial, eight years after the accident. *Id.*; *see* note 20 *supra.* The court also noted that Hashtani's psychiatrist was very hesitant at trial to make an estimation of Hashtani's mental age at the time of the accident. 578 F.2d at 545. In light of the medical testimony introduced in *Graham*, Hashtani's medical evidence was insufficient to overcome the presumption of ability to appreciate dangerous conditions. *Id.* at 545-46; *see* note 20 *supra.*

received a directed verdict.[23]

Although several courts besides North Carolina recognize age based limitations on the application of the attractive nuisance doctrine and grant waivers of the limitation because of a plaintiff's mental deficiency,[24] the majority of jurisdictions have rejected the entire concept of an age based limitation.[25] This rejection is recognized in the Restatement (Second) of Torts which states that modern society presents many dangers which an immature adolescent may not be expected to understand although an adult will be expected to understand the dangers.[26] In addition, age based presumptions of a child's ability to understand dangerous conditions are criticized as being arbitrary and lacking in empirical support.[27] The Restatement does recognize, however, that some limitation is needed upon the application of the attractive nuisance doctrine.[28] Thus, the Restatement advocates the use of a sliding scale limitation which would increase the amount of dangerous conditions which a child is expected to understand as his age increases.[29] In considering whether the attractive nuisance doctrine applies to a particular child, age will be only one of several factors, including mental ability, which a jury should consider in deciding whether the child needs the special protection of the attractive nuisance doctrine.[30]

Regardless of the validity of the Restatement criticism of an age based limitation on the attractive nuisance doctrine, the *Erie* doctrine[31] prevents the Fourth Circuit from challenging the validity of the North Carolina limitation.[32] Thus, since all the states within the Fourth Circuit are in

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[23] 578 F.2d at 545-46.

[24] *E.g.*, Empire Dist. Elec. Co. v. Harris, 82 F.2d 48 (8th Cir. 1936); Garrett v. Arkansas Power & Light Co., 218 Ark. 575, 237 S.W.2d 895 (1951); Hollman v. Atlantic Coast Line R.R., 201 S.C. 308, 22 S.E.2d 892 (1942); Grant v. Mays, 204 Va. 41, 129 S.E.2d 10 (1963); White v. Kanawha City Co., 127 W. Va. 566, 34 S.E.2d 17 (1945).

[25] RESTATEMENT (SECOND) OF TORTS § 339, Comment c (1965). *See, e.g.*, Skaggs v. Junis, 27 Ill. App. 2d 251, 169 N.E.2d 684 (1960); Hoff v. Natural Refining Products Co., 38 N.J. Super. 222, 118 A.2d 714 (1955).

[26] *Id.* Several courts have recognized that electrical cables present a modern danger which children should not be expected to understand. *See, e.g.*, McKiddy v. Des Moines Elec. Co., 202 Iowa 225, 206 N.W. 815 (1926); Graham v. Sandhill Power Co., 189 N.C. 381, 127 S.E. 429 (1925).

[27] Prosser, *Trespassing Children, supra* note 1, at 440-41.

[28] RESTATEMENT (SECOND) OF TORTS, § 339, comment c (1965).

[29] *Id.*

[30] O'Keffe v. South End Rowing Club, 64 Cal. 2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966), *citing* RESTATEMENT (SECOND) OF TORTS § 339 (1965).

[31] *See generally*, Hanna v. Plumer, 380 U.S. 460 (1965); Guaranty Trust v. York, 326 U.S. 99 (1945); Erie R.R. v. Tompkins, 304 U.S. 64 (1938); C. WRIGHT, LAW OF THE FEDERAL COURTS § 55 (3d ed. 1976).

[32] In a diversity suit, a federal court must apply state law, either under a state statute or as determined by the highest court of the state. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Only when there is an absence of state action on the matter may a federal court be free to consider other data in determining what the applicable law of the state might be. Commissioner v. Bosch, 387 U.S. 456 (1967). The Fourth Circuit cannot undertake such an investigation because each state supreme court within the circuit has considered the question. *See* notes 12-14 *supra.*

accord with the North Carolina limitation, a child fourteen years old or older most likely will be denied the benefit of the attractive nuisance doctrine unless he can prove the existence of a severe mental deficiency.[33] Only by state court action or state legislative action can such a child receive the protection which a majority of courts in other jurisdictions[34] have granted to children over the age of fourteen years who have been injured by the dangers of modern technological society.[35]

WARREN L. JERVEY

B. Sovereign Immunity

Although based on the rationale that "the King can do no wrong,"[1] the common law doctrine of sovereign immunity survived the American rejection of the English monarchy in the eighteenth century.[2] Historically, American courts applying this doctrine prohibited suits against governmental entities, particularly the federal government.[3] The prohibition remained until congressional action in the form of the Federal Tort Claims Act (FTCA)[4] in 1946 sanctioned recovery against the federal government

[33] *See* text accompanying note 24 *supra.*

[34] *See* note 25 *supra.*

[35] *See* note 32 *supra.*

[1] W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 254 (15th ed. 1809); 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 458-59 (3d ed. 1927). The maxim that "the King can do no wrong" evolved from the notion that, as chief of the feudal system, no court superseded the King's authority. When feudalism passed to king-state rule, the cloak of immunity covered that ruling body as well, and the maxim came to mean that the sovereign could do no wrong. In Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1904), Justice Holmes developed the formulation that sovereign immunity meant "there can be no legal right as against the authority that makes the law on which the right depends." Today's meaning of the doctrine is simply that the federal government cannot be sued without its permission. 2 F. HARPER & F. JAMES, JR., THE LAW OF TORTS 1609-10, §§ 29.2-.3 (1956) [hereinafter cited as HARPER & JAMES].

[2] *See* Boger, Gitenstein & Verkuil, *The Federal Tort Claims Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. REV. 497, 507-08 (1976) [hereinafter cited as Boger, Gitenstein & Verkuil].

[3] *See, e.g.*, Larson v. Domestic & Foreign Corp., 337 U.S. 682, 688 (1949); United States v. Clarke, 33 U.S. 151, 154, 8 Pet. 436, 444 (1834); Cohens v. Virginia, 19 U.S. 82, 86, 6 Wheat. 264, 380 (1821). Until the passage of the Federal Tort Claims Act (FTCA) in 1946, special congressional legislation was the only method of obtaining federal compensation for torts by federal agents. Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROB. 311, 321-26 (1942). Beginning with its first session, Congress allowed individuals to appeal for relief and passed special bills to compensate these parties. *Id.* at 311-12. Naturally, this imposed a serious burden on the members of Congress as the number of appeals increased. *Id.*

[4] Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946). The original version of the FTCA permitted recovery against the government for the negligent actions of its employees and also for the intentional torts of invasion of privacy and trespass. *See* Boger, Gitenstein & Verkuil, *supra* note 2, at 518. The amended version of § 2680(h) applied all FTCA provi-

for the negligent torts of its agents.[5] This legislation, however, did not abrogate the doctrine of sovereign immunity where intentional torts were involved.

No federal recovery for the opprobrious actions of federal officers existed until the 1971 Supreme Court ruling in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.*[6] Under *Bivens*, victims of constitutional wrongs committed by federal agents may maintain damage suits against those agents directly under the fourth amendment.[7] While federal officers carry no absolute official immunity,[8] the Second Circuit on remand held in *Bivens* that a good faith belief in the legality of their actions would absolve the individual officers of any civil liability.[9] This good faith defense frees federal officers to discharge their duties in good faith without the fear of financial liability.[10] Broad protection for

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sions to any claim arising out of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution resulting from the acts or omissions of investigative or law enforcement officers of the federal government. 28 U.S.C. § 2680 (1976); *see* note 12 *infra*.

[5] Federal district courts have jurisdiction under 28 U.S.C. § 1346(b) (1976) to decide suits arising under the FTCA.

[6] 403 U.S. 388 (1971). Agents of the Federal Bureau of Narcotics arrested Bivens for alleged narcotics violations without first obtaining the necessary search warrants. The agents manacled him in front of his wife and children, threatened to arrest the whole family and otherwise used unreasonable force. *Id.* at 389. Upon arrival at the federal courthouse, Bivens was interrogated, booked and subjected to visual strip search. *Id.* Bivens subsequently sued the agents in federal district court claiming damages for the humiliation, embarrassment and mental suffering resulting from the agents' conduct. The Second Circuit affirmed the trial court's dismissal of the suit on the grounds that it failed to state a cause of action. *Id.* at 389-90.

[7] *Id.* at 397. In allowing claims against officers under the fourth amendment, the Court relied on language in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), to the effect that essential to civil liberty is the right of every individual to claim the protection of the laws for any injury. 403 U.S. at 397. This right entitles a party to recover money damages for any injury inflicted by governmental violations of the fourth amendment once a cause of action has been established under that amendment. *Id.*

[8] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972). While the doctrine of official immunity originated from the principles underlying sovereign immunity, the two doctrines must be distinguished. Sovereign immunity simply protects the government from suit. HARPER & JAMES, *supra* note 1, at 1609-10. Official immunity, on the other hand, protects the government officials from personal liability for wrongs committed in the course of their employment. Gregoire v. Biddle, 177 F.2d 579, 580-81 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Official immunity is supported by the rationale that the fear of damage suits should not hinder government officials in carrying out their duties. Official immunity takes two forms, absolute and qualified. Absolute immunity arises upon a judge's determination that an official is not amenable to suit by virtue of his status and constitutes grounds for dismissal of that suit. *See* Comment, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 TEMP. L.Q. 938, 940-41, 944, 962 (1976) [hereinafter cited as *Accountability for Government Misconduct*]. A qualified immunity attaches only if an official proves that he is entitled to it. By focusing on the reasonableness and good faith of an officer's belief as to the validity of his actions, *Bivens*, in effect, created a qualified immunity for law enforcement officers. *See id.*; text accompanying notes 58-67 *infra*.

[9] 456 F.2d at 1348.

[10] *Id.* at 1347-48. The *Bivens* rationale is premised upon the belief that federal law

federal officers, however, limits recovery by injured parties due to the relative ease with which officers can establish good faith. Furthermore, federal officers may be financially unable to satisfy large judgments.[11] To ameliorate these effects, section 2680 of the FTCA was amended in 1974 to compensate more adequately the innocent victims of law enforcement abuses.[12] Rather than drafting an independent comprehensive statutory provision, Congress relied on judicial legislation, and rendered the government liable for the intentional torts recognized in *Bivens*.[13] The Senate committee reviewing the amendment manifested this reliance by stating

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enforcement officers should be allowed to perform their duties without fear of redress in the event such actions may later be deemed unconstitutional. *Id. See generally* Article, Bivens *and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977) [hereinafter cited as Bivens *and Its Progeny*].

[11] S. REP. No. 93-469, 93d Cong., 1st Sess. 36 (1973) (remarks of Senator Percy).

[12] 28 U.S.C. § 2680(h) (1976) provides that

> with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrest for violations of Federal law.

The amendment followed the 1973 Collinsville drug raids in which agents of the St. Louis office of Drug Abuse Law Enforcement (DALE) mistakenly entered the homes of two Collinsville, Illinois families as part of their campaign against heroin and cocaine dealing. Boger, Gitenstein & Verkuil, *supra* note 2, at 501. The DALE officers, armed with pistols and sawed-off shotguns, tied up the citizens and ransacked the houses. *Id.* at 500-01. These illegal searches, made without a search warrant, involved outrageous and abusive conduct on the part of the agents and resulted in property damages and mental distress to the victims. *Id.* at 504-05. The injured parties brought suit against the federal agents involved in the raids. *Id.* However, the relative ease with which those officers could establish a good faith defense and the possibility that an officer would have such limited financial resources as to be judgment-proof potentially left the victims without relief. S. REP. No. 93-588, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2790. Congress reacted by developing a Justice Department proposal to amend the FTCA in order to make the government responsible for the tortious acts of its officers. *See* Boger, Gitenstein & Verkuil, *supra* note 2, at 507-17. As originally drafted, the amendment abolished immunity for the individual acts of all government employees, but was ultimately restricted to investigative or law enforcement officers. *Id.* at 513.

[13] The 1974 amendment to the FTCA was part of a bill making significant changes in various drug law enforcement agencies. Knowing the Administration was anxious for the drug law enforcement legislation to pass quickly, Senator Ervin appended the FTCA amendment to that legislation in order to speed its passage through Congress. Accordingly, the amendment passed quickly, receiving little discussion. From the beginning, the Justice Department and the House and Senate committees considered the proposed amendment from the *Bivens* standpoint. They apparently overlooked the fact that *Bivens* developed solely as a result of statutory inadequacies. *See* Boger, Gitenstein & Verkuil, *supra* note 2, at 498, 514-17. *See also Federal Tort Claims Amendments: Hearings on H.R. 10439 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974); S. REP. No. 93-533, 93d Cong., 1st Sess. (1973); S. REP. No. 93-469, 93d Cong., 1st Sess. (1973).

that the 1974 amendment was to be viewed as a "counterpart" to *Bivens*.[14] The amendment waives sovereign immunity and made the Government independently liable for damages where *Bivens* imposed liability upon the offending officer.[15] Reliance on *Bivens*, however, rendered the amendment inadequate as a means of implementing the policy of wider recovery by tort victims,[16] since the *Bivens* remedy had developed only in the absence of a statutory provision providing a cause of action for constitutional violations by federal officers.[17]

The Fourth Circuit discussed the extent of the government's liability under the amended FTCA in *Norton v. United States*.[18] Specifically, the court considered whether the amendment allowed the government to assert the good faith defense available to its officers under *Bivens*.[19] Perceiving the goal of Congress as providing relief in instances in which federal agents have immunity, the district court held that the United States could not avail itself of the good faith defenses asserted by its law enforcement officers.[20] The district court reasoned that denying relief to plaintiffs by permitting the government to avail itself of the defenses asserted by its agents would defeat the underlying purpose of the amendment.[21] In reversing on the liability issue, the Fourth Circuit held that "the liability of the United States under § 2680(h) is coterminous with the liability of its agents under *Bivens*."[22] Accordingly, the immunity available to a government agent would likewise absolve the United States from liability to innocent victims.[23]

The facts in the *Norton* case are similar to the events which initially generated interest in amending the FTCA.[24] In *Norton*, the FBI and local detectives, acting on an anonymous telephone tip that Patricia Hearst could be found in plaintiff's apartment in Alexandria, Virginia, went to the reported address.[25] The plaintiff refused the late night entry into her apart-

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[14] S. REP. No. 93-588, 93d Cong., 2d Sess. 3, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791.

[15] *Id.*

[16] According to commentators, a more comprehensive bill would have avoided any reliance on *Bivens* and thus prevented the confusion which resulted from varying interpretations of that case. As enacted, the amendment fails to define the extent of federal intentional tort liability. Boger, Gitenstein & Verkuil, *supra* note 2, at 515-16.

[17] *Id.* In his dissent in *Bivens*, Justice Burger suggested a statutory cause of action providing compensation from the government rather than the judicial legislation created by *Bivens*. 403 U.S. at 421-24 (Burger, C.J., dissenting).

[18] 581 F.2d 390 (4th Cir.), *cert. denied*, 99 S. Ct. 613 (1978).

[19] *Id.* at 391.

[20] Norton v. Turner, 427 F. Supp. 138 (E.D. Va. 1977). In reaching this result the district court equated the good faith defense with qualified immunity, the application of which is determined by factual findings. *Id.* at 145, 149; *see* note 8 *supra*. *See generally* text accompanying notes 57-67 *infra*.

[21] 427 F. Supp. at 145, 149.

[22] 581 F.2d at 393; *see* note 43 *infra*.

[23] 581 F.2d at 393; *see* note 12 *supra*.

[24] *See* note 12 *supra*.

[25] 581 F.2d at 391. Patricia Hearst was a federal fugitive, considered armed and danger-

ment since the officers had no warrant and her door had no peephole through which she could ascertain the officers' identity. When the officers attempted forcible entry, the plaintiff unlatched the door for fear it would be damaged.[26] The officers entered with weapons drawn and searched the apartment. Finding no trace of Ms. Hearst, they departed.[27] Based on these facts, plaintiff brought suit against local law enforcement agents under 42 U.S.C. section 1983,[28] while suing the federal agents directly under the fourth amendment. Suit against the United States was brought under the amended FTCA.[29] Both local and federal officers asserted a good faith defense. The United States asserted two defenses based on the officers' alleged good faith.[30]

Initially, the government claimed that the actions of its officers were not "wrongful" under the FTCA because the officers held a good faith belief in the legality of their actions.[31] The government theorized that the imposition of liability upon it, absent corresponding wrongful behavior on the part of the agents, would be inconsistent with case law prohibiting strict liability under the FTCA.[32] Second, under the notion of respondeat superior, the United States claimed the right to assert any defenses available to its officers in answer to plaintiff's FTCA claim.[33] The government asserted that the officers' good faith belief in the legality of their

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ous. Federal warrants for her arrest were outstanding and a nationwide search was under way. *Id.*

[26] *Id.* at 391-92.

[27] 427 F. Supp. at 142.

[28] 42 U.S.C. § 1983 (1976) provides that:

> 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.

[29] 581 F.2d at 392.

[30] 427 F. Supp. at 146.

[31] *Id.*

[32] *Id.* The Supreme Court in Dalehite v. United States, 346 U.S. 15, 44-45 (1953), held the government not liable for damages resulting from the explosion of two cargo vessels in the habor of Texas City, Texas. Finding no instance of negligence or wrongful conduct, the Court refused to hold the Government strictly liable for engaging in a dangerous activity. In regard to the FTCA, the Court said:

> [T]he Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity.

Id. at 44. In a similar suit for damages from a sonic boom caused by military planes, absent any negligence, the Court held that *Dalehite* was controlling and refused to impose strict liability against the government. *See* Laird v. Nelms, 406 U.S. 797, 798-803 (1972).

[33] 427 F. Supp. at 146-47. Respondeat superior, literally "let the master answer," is the term used to denote the practice of holding an employer responsible for the actions of an employee acting within the scope of his employment. J. HENDERSON & R. PEARSON, THE TORTS PROCESS 122-24 (1975).

actions extended to the United States, thereby insulating it from liability.[34] In spite of the clear violation of plaintiff's fourth amendment rights by the agents in *Norton*, the district court concluded that, under *Bivens*, no monetary relief could be awarded against the agents if they had acted in good faith.[35] In rejecting the government's initial contention that the agents' actions were not wrongful, the district court stated that a good faith defense does not obviate the fact that a tort has been committed; it merely affords the actor a defense to monetary liability. The wrongfulness of the conduct is not eliminated nor is the perpetrator's responsibility for the act removed.[36] Responding to the government's second argument, the district court determined that the absence of monetary liability of its offending officers did not similarly relieve the government of liability for those wrongful acts.[37]

Conceding that the structure of the FTCA, agency principles[38] and related case law supported the government's second contention, the district court nonetheless refused to dispose of the case on those grounds. Instead, the district court gave controlling weight to what it discerned as congressional intent to waive sovereign immunity in specified instances.[39] The government argued that the Senate report[40] accompanying the amendment indicated Congress' intent to incorporate *Bivens* in its entirety, including the immunity doctrines espoused therein.[41] In disagreeing, the district court interpreted the report as intending to provide victims a remedy for fourth amendment violations, regardless of the acting officer's motivation.[42] The district court concluded that, under this interpretation, Congress did not intend to permit the United States "to escape liability under the new statute by retreating behind various defenses that had been created under *Bivens*. . . ."[43] Therefore, the district court held that the

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[34] 427 F. Supp. at 146.

[35] *See id.* at 145. Summary judgment was denied as to the individual officers because unresolved factual issues made it inappropriate. *Id.* at 144-46.

[36] *Id.* at 146. The court was not attempting to impose liability without fault. It had already determined that fault existed and that finding was not contested. *See id.* Furthermore, conduct which would amount to a tort on the part of other defendants does not lose its tortious character by virtue of official immunity. Official immunity merely protects the defendant-officer by absolving him from liability. W. PROSSER, THE LAW OF TORTS 970 (4th ed. 1971) [hereinafter cited as PROSSER]. Regardless of the immunity of the individual officers, the issue actually concerned whether plaintiff could be compensated under the FTCA. 427 F. Supp. at 146.

[37] *See id.* at 152.

[38] A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Generally, a master has all the defenses open to the servant who committed the tort for which the master is being sued. RESTATEMENT (SECOND) OF AGENCY, § 219 (comment C) (1957). Thuš, the government claimed the defenses available to its officers individually on the basis of agency principles. 581 F.2d at 393.

[39] *See* 427 F. Supp. at 147.

[40] S. REP. No. 93-588, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789.

[41] 427 F. Supp. at 149.

[42] *See id.*

[43] *See id.* at 150, *quoting* Boger, Gitenstein & Verkuil, *supra* note 2, at 515. The district

United States was not allowed to assert an immunity defense available to its officers in a suit arising under the FTCA.[44]

In passing on the government's appeal, the Fourth Circuit also treated the case as one of statutory interpretation.[45] Although the theories advanced in the trial court by the United States could have supported a finding of no governmental liability,[46] the Fourth Circuit refused to base its decision solely on those grounds.[47] Instead, the majority looked to congressional policy at the time the amendment was enacted for interpretive guidelines. Proceeding within this interpretive framework, the Fourth Circuit reversed the district court and determined that the government would incur no monetary liability if its agents had acted in good faith.[48] The case was remanded to the district court for production of evidence on the issue of good faith.

Since *Bivens* had established a cause of action against federal law enforcement officers for their intentional torts, section 2680 was viewed by Congress as a counterpart to *Bivens*. But, the Fourth Circuit stated, examination of the legislative history did not clarify the extent of the government's liability under the amendment.[49] The history itself indicated only that the government would absorb the financial liability for its officers' actions in claims recognized in *Bivens*.[50] Nevertheless, the Fourth Circuit emphasized that the amendment of the FTCA occurred subsequent to outrageous conduct by law enforcement officers.[51] Such timing compelled the conclusion that governmental liability was not necessarily a remedy for every constitutional violation, but only for "innocent victims of federal law enforcement abuses."[52]

The majority further supported its decision by reliance on the principle of statutory interpretation that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sover-

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court and the government fundamentally disagreed over interpretation of the language in the Senate report referring to *Bivens* that, "this provision should be viewed as a counterpart to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved)." S. REP. No. 93-588, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791.

[44] *See* 427 F. Supp. at 152. The court granted plaintiff summary judgment action against the United States on the issue of liability. *Id.*

[45] *See* 581 F.2d at 395 n.7.

[46] *Id.* at 395 n.8.

[47] *See id.*

[48] *See id.* at 397.

[49] *See id.* at 395; Boger, Gitenstein & Verkuil, *supra* note 2, at 515-16. *See also Federal Tort Claims Amendment: Hearings on H.R. 10439 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974); S. REP. No. 93-588, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791; S. REP. No. 93-469, 93d Cong., 1st Sess. (1973).

[50] 581 F.2d at 395.

[51] *See id.* at 396.

[52] *See id.*; Boger, Gitenstein & Verkuil, *supra* note 2, at 530-31.

eign."[53] Imposing liability upon the government regardless of an officer's good faith defense suggested to the majority a sufficient departure from the principles of respondeat superior[54] to impose an undue burden upon the government.[55] Therefore, the Fourth Circuit refused to extend the government's vicarious liability beyond the liability of its officers and allowed the government to assert the good faith of its officers as a defense.[56]

In dissenting, Judge Butzner emphasized the Supreme Court's analysis of the good faith defense of federal officers, which treated that defense as a qualified immunity.[57] Since this immunity results solely from an official's status, it does not deny the tort;[58] this immunity merely removes monetary liability.[59] Judge Butzner noted that an officer's immunity had never been used as a defense by the government in any other instance. While waiving sovereign immunity, the FTCA amendment did not replace it with any personal immunity held by an officer. Instead, reasoned the dissent, the amendment protected both the offending officer and the innocent victim by providing recourse against the government. In other words, the public at large pays for officers' mistakes and in turn receives the assurance that federal officers will faithfully perform their duties.[60] The dissent supported this result by noting that agency principles preclude a principal's defense on the basis of an agent's immunity.[61]

Judge Butzner refused to accept the government's contention that qualified official immunity and sovereign immunity were interchangeable.[62] Sovereign immunity is always absolute and protects the government from suit unless it expressly consents to be sued.[63] Conversely, official immunity protects an officer in the event that he errs in performing his duties and assumes that the risk of error is less dangerous than no action at all.[64] Absolute official immunity arises solely from an officer's status, while qualified official immunity attaches only upon proof by the official that he is entitled to it.[65] Official immunity, either absolute or qualified, is personal to the official in the same manner that sovereign immunity is available only to the government.[66] In thus distinguishing official and sov-

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[53] *See* 581 F.2d at 396-97, *citing* McMahon v. United States, 342 U.S. 25, 27 (1951).

[54] *See* note 33 *supra.*

[55] *See* 581 F.2d at 397.

[56] *See id.*

[57] *See id.* In Scheuer v. Rhodes, 416 U.S. 232, 238-40, 247 (1974), the Court considered an official's good faith defense under 42 U.S.C. § 1983 a qualified immunity, resting in part on the rationale that, absent bad faith, subjecting an officer to liability for errors in exercising the discretion required in his job was particularly unjust. *Id.* at 239-40; *accord*, Wood v. Strickland, 420 U.S. 308, 313-22 (1975); Pierson v. Ray, 386 U.S. 547, 555-57 (1967).

[58] PROSSER, *supra* note 36, at 970.

[59] 581 F.2d at 397-98.

[60] *Id.* at 398.

[61] *See id.*; RESTATEMENT (SECOND) OF AGENCY § 217(b)(ii) (1957).

[62] *See* 581 F.2d at 398.

[63] *See* note 8 *supra.*

[64] Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974).

[65] *See Accountability for Government Misconduct, supra* note 8, at 940-44.

[66] 416 U.S. at 241-42 (official immunity); Kawananakoa v. Polyblank, 205 U.S. 349, 353

ereign immunity, Judge Butzner asserted that the amended FTCA preserved a qualified immunity to federal officers while making the public at large responsible for mistakes made by those officers in performance of their duties. This fundamental difference between official and sovereign immunity prohibits the substitution of one for the other in any instance.[67]

The Fourth Circuit's narrow resolution of the issue in *Norton* is significant because it restricts the remedies available to victims of torts committed by federal officers. While a need clearly exists for protecting officers in the performance of their duties, one must question whether that protection should be at the expense of the injured party. The Fourth Circuit's balancing of individuals' civil rights against the need for the efficient operation of government potentially fails to protect adequately the individuals' rights.[68] Under *Norton*, an individual harmed by a federal officer may be without any recourse. Thus, the injured parties are placed in essentially the same position they were in prior to the amendment; had Congress intended such a result, the FTCA need not have been amended.[69]

Determining the essential purpose of the FTCA amendment produced the major point of conflict between the district court and the Fourth Circuit. The Fourth Circuit criticized the district court for relying heavily on a memorandum from the Senate Committee on Government Operations insisting that the amendment did not allow the government to assert any defenses available to its agents.[70] The memorandum, however, was not

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(1907) (sovereign immunity). *See also* RESTATEMENT (SECOND) OF AGENCY § 217(b)(ii) (1957) (fact that agent has immunity provides no defense for principal); *Accountability for Government Misconduct, supra* note 8, at 940-46.

[67] 581 F.2d at 398.

[68] See Bivens *and Its Progeny, supra* note 10, at 542-43.

[69] The Fourth Circuit's decision in *Norton* denies effect to the FTCA amendment. Prior to *Bivens*, no recovery existed for the tortious acts of federal officers upon innocent persons. *See* Boger, Gitenstein & Verkuil, *supra* note 2, at 510. *Bivens* established a cause of action against federal officers; however, if the officer had acted in good faith, he was immune to suit and victims were again left unsatisfied. *See Accountability for Government Misconduct, supra* note 8, at 971. Section 1346 of the FTCA established a claim against the government for the tortious acts of its officers, but § 2680(h) excepted certain intentional torts from coverage, thereby preserving sovereign immunity to the United States. *See* Federal Tort Claims Act, Chap. 753, tit. IV, 60 Stat. 842 (1946) (codified at 28 U.S.C. § 2680(h) (1965)); note 13 *supra*. The FTCA amendment provided an exception to the § 2680(h) exception, and placed certain intentional torts back within the gamut of § 1345. 28 U.S.C. § 2680 (1976). *Norton* simply reinstates the government's sovereign immunity if the officer's action was in good faith. Therefore, if an officer acts in good faith, although violating someone's constitutional rights, neither he nor the government can be held financially liable.

[70] *See* 581 F.2d at 396. The Senate Committee on Government Operations clarified the proposed FTCA amendment in a memorandum on legislation to repeal the no-knock laws. Boger, Gitenstein & Verkuil, *supra* note 2, at 514 & n.82, *citing* Senate Comm. on Gov't Operations, Memorandum on No-Knock Legislation, Aug. 28, 1973 at 4, copy on file in the University of North Carolina Law library. Although the district court could not obtain a copy, it relied on this memorandum in interpreting the FTCA Amendment. The court quoted portions of the memorandum as found in the Boger, Gitenstein, & Verkuil article. 427 F. Supp. at 150. The memorandum was never made part of the legislative history, a point the Fourth Circuit found inexplainable in light of the commentators' contention that the memorandum was conclusive as to congressional intent. 581 F.2d at 396 n.11.

made part of the legislative history and the district court was unable to secure a copy of it, relying instead upon a commentary for proof of both its existence and contents.[71] The majority thought the memorandum improper authority owing to its unavailability. Though perhaps valid, this criticism from the Fourth Circuit failed to address the issue. Even if misplaced, the weight accorded the memorandum by the district court did not alter the basic policy behind the FTCA amendment. The Fourth Circuit's criticism did not camouflage its attempt to sidestep the intended result of the amendment. In fact, Senate Report 93-588, on which the *Norton* majority relied, states that the amendment's purpose is to "provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers."[72] Since the legislative history shows that Congress intended to grant a remedy for *Bivens*-type torts,[73] regardless of the agents' good faith intentions, the district court and the dissent in *Norton* appear correct.[74] The Fourth Circuit, however, analyzed the amendment as providing an action against the government only in cases of outrageous law enforcement abuses without specifying any criteria for determining outrageous abuses.[75] To the contrary, the legislative history suggests that the government's liability was intended to be much broader.[76] The Senate Committee's explanation of the amendment denoted the government's independent liability even in such borderline cases as trespass and invasion of privacy.[77] Thus, the governmental liability appears to be intended for the tortious acts of federal officers enumerated in section 2680, regardless of the officers' individual liability. While making the amendment dependent upon *Bivens*, the Senate Committee report did not equate the government's liability with the agents' nor did it equate their immunities as does the Fourth Circuit's holding.[78] Instead, the amendment made the United States independently liable in any situation in which a federal officer commits a tort while carrying out his regular duties,[79] assuring compensation to injured parties.[80]

Allowing the government to invoke the defenses of its officers would preclude recovery in instances where the offending agent is not amenable to suit. Suits against the government would be permissible only if a suit were maintainable against an agent. Essentially, plaintiffs could obtain financial recovery from the government only in successful suits against agents who are judgment proof due to lack of funds. This limitation would,

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[71] 581 F.2d at 396 n.11.

[72] S. REP. No. 588, 93d Cong., 1st Sess. at 1 (1973).

[73] *See id.* at 3. The report notes that a *Bivens* remedy alone is "rather hollow" as federal officers are frequently judgment-proof. *Id.*

[74] *See* Boger, Gitenstein & Verkuil, *supra* note 2, at 538, 540-41. *See also* S. REP. No. 588, 93d Cong., 1st Sess. at 3-4 (1973).

[75] *See* 581 F.2d at 396.

[76] *See* S. REP. No. 588, 93d Cong., 1st Sess. at 3 (1973).

[77] *See id.*

[78] 581 F.2d at 395.

[79] *See* S. REP. No. 588, 93d Cong., 1st Sess. at 3-4 (1973).

[80] *See* Boger, Gitenstein & Verkuil, *supra* note 2, at 537.

in effect, repeal the amendment, and would deny a remedy in cases where recovery was clearly intended.

Although Congress possibly intended only to provide tort victims a "deep pocket" when its agents lacked the funds necessary to satisfy a judgment, the unqualified waiver of sovereign immunity for constitutional torts indicates that the amendment should have an even broader scope.[81] Furthermore, if Congress intended only to provide plaintiffs an adequate recovery from "judgment proof" federal officers, a more direct method would have been a statute guaranteeing the satisfaction of the agents' liability rather than an amendment creating independent governmental liability. Accordingly, since the legislative history gives no indication that a narrow reading of the statute is required, a liberal reading would better carry out its intended purpose.

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[81] *See id.* at 512, 539.