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NOTES


BY G. THOMAS BARKER∗

INTRODUCTION

On November 21, 2001, the Kentucky Supreme Court issued its latest attempt to establish a workable and fair standard to apply the doctrines of sovereign and official immunity. With Yanero v. Davis, the court completely overhauled the approach to these doctrines. The court faced a tremendous task in rewriting their application. Sovereign and official immunity are fraught with theoretical and practical issues that for many years have divided courts and perplexed jurists in their search for the decisive benchmark to resolve a case. However, in spite of valid jurisprudential and constitutional concerns, sovereign and official immunity have been a part of the laws of this Commonwealth even before the adoption of its first constitution, and they remain so today. Indeed, Yanero represents

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† Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

‡ One such critical issue advanced by opponents of a broad application for the immunity doctrines is that they cut against one of the fundamental purposes of utilizing a court system—the peaceful, equitable, and just resolution of a grievance or personal injury. They argue that the doctrines deny an individual’s right to bring an action to seek legal remedy, and thus should be limited in application. Cullinan v. Jefferson County, 418 S.W.2d 407, 411 (Ky. 1967) (Palmore, J. dissenting)). However, proponents of a more expansive shield respond that the doctrines are crucial in insulating government entities from legal action that would prevent them from efficiently and effectively carrying forward their official business. See, e.g., Yanero, 65 S.W.3d at 517-18; RESTATEMENT (SECOND) OF TORTS § 895D cmt. c (1977).

§ Wood v. Bd. of Educ., 412 S.W.2d 877, 879 (Ky. 1967).
the Kentucky Supreme Court's most recent endeavor to create a system that removes the guesswork from applying these doctrines. This case is an attempt to provide practitioners with a logical and uniform approach that balances fairness to injured plaintiffs with preservation of the sanctity of governing bodies.\(^4\)

Sovereign and official immunity have long stood as a liability shield protecting the state, its agencies, and the individual agents who perform the government's work.\(^5\) Kentucky common law recognized this defense as early as 1828.\(^6\) While Yanero discusses both sovereign and official immunity, this Note will focus solely on official immunity, the defense available for the actions of government agents.\(^7\) In so doing, the Note will examine the new immunity standard, both in its current application to the individual agents, and from a historical perspective, noting the impact of the changes to the previous structure.

Part I analyzes the Yanero decision and sets forth the new model outlining whether a government agent's actions qualify for immunity.\(^8\) Part II compares and contrasts the Yanero decision with the discarded immunity paradigm established in Franklin County v. Malone.\(^9\) Part III further examines Yanero by discussing its relationship with a competing theory regarding the immunity of government agents developed in Happy v. Erwin.\(^10\) Part IV continues this discussion by analyzing the Kentucky jural

\(^4\) Yanero, 65 S.W.3d at 510.

\(^5\) See id.

\(^6\) Id. (citing Divine v. Harvie, 23 Ky. (7 T.B. Mon.) 439, 441 (1828)).

\(^7\) Sovereign and official immunity are separate and distinct doctrines. Sovereign immunity refers to the immunity available for the actions of the state and its counties. Official immunity is a defense for the actions of individuals employed and operating on behalf of state, county, and municipal governments. See generally Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989) (stating that official immunity is based on function performed, not on status); Yanero, 65 S.W.3d at 510; Thompson v. Huecker, 559 S.W.2d 488, 494-96 (Ky. Ct. App. 1977) (discussing the application of official immunity); 63C AM. JUR. 2D Public Officers and Employees § 309 (1997).

\(^8\) See discussion infra Part I.

\(^9\) Franklin County v. Malone, 957 S.W.2d 195 (Ky. 1997), overruled by Yanero, 65 S.W.3d at 510; see discussion infra Part II.

\(^10\) Happy v. Erwin, 330 S.W.2d 412 (Ky. 1959); see discussion infra Part III. The Happy line of cases includes: Calvert Invs., Inc. v. Louisville & Jefferson County Metro. Sewer Dist., 805 S.W.2d 133 (Ky. 1991); Bd. of Trs. v. Hayse, 782 S.W.2d 609 (Ky. 1989), overruled by Yanero, 65 S.W.3d at 523; Gould v. O'Bannon, 770 S.W.2d 220 (Ky. 1989); Univ. of Louisville v. O'Bannon, 770 S.W.2d 215 (Ky. 1989); Carney v. Moody, 646 S.W.2d 40 (Ky. 1982); Saylor v.
rights doctrine and the impact of sections 14, 54, 231, and 241 of the Kentucky Constitution. Part V concludes with a discussion of how the Yanero decision will impact future cases, examining how several recent decisions would have been resolved differently under the Yanero doctrine.

The new official immunity standard is of great consequence to both the legal community and the individuals residing in the Commonwealth of Kentucky. This new approach impacts one of the most fundamental and sacred rights of an individual—the right to seek judicial remedy for the injurious actions of another.

I. **YANERO AND THE NEW OFFICIAL IMMUNITY APPROACH**

In Yanero v. Davis, Ryan Yanero, age fifteen, was injured when he was struck in the head by a baseball thrown by Ryan Coker, a teammate of Yanero's on the Waggener High School junior varsity baseball team. The injury occurred while Coker was pitching in the high school gym's batting cage. Yanero was not wearing a helmet while batting. Yanero brought suit in the Jefferson Circuit Court against the Jefferson County Board of Education; Robert Stewart, Waggener's athletic director; Allen Davis, a varsity assistant coach assigned to coach the junior varsity baseball team; Jeffery Becker, another varsity assistant coach assigned to help with the junior varsity team; and the Kentucky High School Athletic Association ("KHSAA"). This Note will consider only the claims made against the individual government agents—Stewart, Davis, and Becker. Yanero alleged that Stewart, Davis, and Becker negligently failed to require him to wear a helmet while participating in batting practice. The Jefferson Circuit Court granted summary judgment for the defendants, and the Kentucky Court of Appeals affirmed. In a unanimous decision, the Kentucky Supreme Court affirmed the summary judgments entered in favor of the Jefferson County Board of Education, Stewart, and the KHSAA, and

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11 See discussion infra Part IV.
12 See discussion infra Part V.
13 Yanero, 65 S.W.3d at 517.
14 Id.
15 Id.
16 Id.
17 Id.
18 Id. at 531. Stewart was treated differently from Davis and Becker because the court found that he acted in good faith and in his discretionary authority. As will be discussed in detail in the following pages, this finding entitled him to the official
reversed the summary judgments entered in favor of Davis and Becker. In its opinion, the court outlined the new application of official immunity to governmental officers and employees.

Essentially, Yanero holds that "public employees, while acting in their individual capacities, do not share the immunity of the governmental unit for which they work." Furthermore, "[r]ather than sharing their government employer's immunity, public employees acting in their individual capacities are entitled only to official immunity for their discretionary acts occurring within the scope of their employment and to no immunity for their ministerial acts." Official immunity is afforded to government officers and employees based on the action or function they perform, not because of their status as an officer or employee. Moreover, official immunity comes in two varieties—absolute and qualified. Absolute official immunity applies when a government officer or employee is sued in his official or "representative" capacity. When a government agent is sued in his official capacity, he qualifies for the same immunity for his actions as is afforded under the sovereign immunity doctrine to the state and state agencies.Qualified immunity is relevant when the officer or employee is sued in his individual capacity. It applies, negating the officer or employee's negligent actions when: (1) he performed a discretionary immunity defense. Id. at 528-29.

19 Id. at 531.
20 Id. at 521-23.
22 Id. at 899 (citing Yanero, 65 S.W.3d at 522).
23 Yanero, 65 S.W.3d at 521 (citing Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989)).
24 Id. at 522 (citing 63C AM. JUR. 2D Public Officers and Employees § 309 (1997)).
25 Id.
26 Id. There are several examples of government agents that clearly have absolute official immunity from suit: government prosecutors, judges, and state legislators. Id. at 518. The reason a government agent may receive absolute immunity flowing from the doctrine of sovereign immunity is that when he is sued in his official capacity, the suit is essentially considered an action against the entity itself. Thus, the government agent may receive absolute official immunity because of the sovereign immunity afforded to the government entity. Kentucky v. Graham, 473 U.S. 159, 164-66 (1985).
27 Yanero, 65 S.W.3d at 522 (citing 63C AM. JUR. 2D Public Officers and Employees § 309 (1997)).
action or function; (2) his action was taken in good faith; and (3) his action was within the scope of his authority as an employee or officer.28

The Yanero decision resolves a key inconsistency in Kentucky law regarding the application of official immunity. In 1989 the Kentucky Supreme Court held, in Board of Trustees v. Hayse, that "the 'official immunity doctrine,' which protects a government official in making decisions involving the exercise of discretion . . . . protects decision making by a public official only if his acts are not otherwise wrongful."29 This statement suggests that a public officer or employee acting within the scope of her employment can never qualify for immunity if she acted negligently or wrongfully in the performance of her official duties.30 Almost eight years after Hayse, the Kentucky Supreme Court reached the opposite conclusion in Franklin County v. Malone.31 Malone held that "[a]s long as the police officer acts within the scope of the authority of office, the actions are those of the government and the officer is entitled to the same immunity."32 This conclusion is in direct opposition to Hayse, since Malone says that a government officer or employee acting within the scope of her employment would always be immune from liability for negligent performance of her official responsibilities.33 Yanero overrules both of these cases.34

Yanero holds that government officials and employees do not qualify for official immunity for any negligent ministerial actions.35 The terms

28 Id. (citing 63C AM. JUR. 2D Public Officers and Employees § 309 (1997); RESTATEMENT (SECOND) OF TORTS § 895D cmt. g (1977)).
29 Bd. of Trs. v. Hayse, 782 S.W.2d 609, 615 (Ky. 1989), overruled by Yanero, 65 S.W.3d at 523, cited in Yanero, 65 S.W.3d at 521.
30 Yanero, 65 S.W.3d at 521.
31 Franklin County v. Malone, 957 S.W.2d 195 (Ky. 1997), overruled by Yanero, 65 S.W.3d at 523.
32 Id. at 202, cited in Yanero, 65 S.W.3d at 521.
33 See Yanero, 65 S.W.3d at 521. When the Kentucky Supreme Court decided Malone, it did not actually overrule Hayse. The court in Hayse found that official immunity did not apply in the case because the doctrine is not available to claims "grounded in constitutionally impermissible misconduct." Hayse, 782 S.W.2d at 615. Prior to Yanero, Malone outlined the applicable standard for official immunity. See Malone, 957 S.W.2d at 195. The court in Hayse, however, disqualified official immunity as a defense without ever fully discussing its standard of applicability. Hayse, 782 S.W.2d at 609. Justice Cooper, the author of Yanero, simply uses these holdings to create a paradox in order to demonstrate the overwhelming need to rewrite and clarify Kentucky law in this area. Yanero, 65 S.W.3d at 521-23.
34 Yanero, 65 S.W.3d at 523.
35 Id. at 522.
“discretionary” and “ministerial” are very difficult to define in application. In *Upchurch v. Clinton County*, the Kentucky Court of Appeals, the Commonwealth’s highest court at the time, defined “discretionary” as that which:

necessarily require[s] the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed.  

Conversely, a “ministerial” action is one that is “absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” Moreover, “an act is not necessarily taken out of the class styled ‘ministerial’ because the officer performing it is vested with a discretion respecting the means or method to be employed.” In fact, “that a necessity may exist for the ascertainment of [when an act is absolute, certain, and imperative] does not operate to convert the [ministerial] act into one discretionary in its nature.” Under the *Yanero* standard, discretionary actions taken by a government officer or employee can qualify for the official immunity defense, provided the actions were taken within the scope of his employment and in good faith. However, if the government agent is engaged in a ministerial action, he cannot be eligible for this defense.

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36 *Upchurch v. Clinton County*, 330 S.W.2d 428 (Ky. 1959).  
37 *Id.* at 430. See also *Kea-Ham Contracting, Inc. v. Floyd County Dev. Auth.*, 37 S.W.3d 703, 707 (Ky. 2001); *Commonwealth v. Frost*, 172 S.W.2d 905, 909 (Ky. 1943).  
38 *Upchurch*, 330 S.W.2d at 430 (quoting 43 AM. JUR. Public Officers § 258), cited in *Kea-Ham Contracting*, 37 S.W.3d at 707. See also *Frost*, 172 S.W.2d at 909.  
39 *Upchurch*, 330 S.W.2d at 430 (quoting 43 AM. JUR. Public Officers § 258), cited in *Franklin County v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997), overruled by *Yanero*, 65 S.W.3d at 523.  
40 *Upchurch*, 330 S.W.2d at 430 (quoting 43 AM. JUR. Public Officers § 258).  
41 *Yanero*, 65 S.W.3d at 522; see also *Ky. Bd. of Claims v. Harris*, 59 S.W.3d 896, 899 (Ky. 2001).  
42 *Yanero*, 65 S.W.3d at 522.
In Yanero, the Kentucky Supreme Court borrows the same basic good faith language used by the United States Supreme Court in *Wood v. Strickland*[^43] and *Harlow v. Fitzgerald*[^44]. The good faith requirement is defined as having both an objective and subjective element.[^45] The Kentucky Supreme Court notes that “[t]he objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights."”[^46] The subjective component requires “permissible intentions.”[^47] Ultimately, the Kentucky Supreme Court adopts a good faith standard referring to both these elements: “if an official ‘knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury,’” then the individual would not qualify for the defense.[^48] Thus, a government officer or agent may not claim immunity when he knowingly violated an individual’s clearly established right or if he willfully or maliciously intended to harm another or acted with a corrupt motive.[^49]

Another component to the new official immunity approach is a process for shifting the burden of proof.[^50] *Yanero* holds that “[o]nce the officer or employee has shown prima facie that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith.”[^51] Thus, if the defendant government agent is able to show that he acted within his discretionary authority, the plaintiff can defeat a summary judgment motion only if he can show the defendant acted in bad faith.[^52]

[^45]: *Yanero*, 65 S.W.3d at 523 (citing *Harlow*, 457 U.S. at 815).
[^46]: Id. (quoting *Wood*, 420 U.S. at 322).
[^48]: *Yanero*, 65 S.W.3d at 523 (quoting *Harlow*, 457 U.S. at 815).
[^49]: Id. (citing 63C AM. JUR. 2D Public Officers and Employees, § 333 (1997)).
[^50]: Id.
[^51]: Id. (citing Wegener v. City of Covington, 933 F.2d 390, 392 (6th Cir. 1991), as modified by, Cox v. Ky. Dept. of Transp. 53 F.3d 146, 152 (6th Cir. 1995)).
[^52]: Id.
The Kentucky Supreme Court’s decision in *Yanero* completely reformulates Kentucky’s approach to the application of official immunity to government agents. As noted earlier, the court reversed the Jefferson Circuit Court and the Kentucky Court of Appeals grants of summary judgment entered in favor of Davis and Becker, the government agents. The Kentucky Supreme Court found that the government agents acted according to their ministerial authority, and therefore did not qualify for the official immunity defense under the new standard. The *Yanero* decision attempts to remove the ambiguities from the application of sovereign and official immunity and create a system that can be uniformly applied to all future immunity cases. *Yanero* is of great importance because it overrules *Hayse* and *Malone*, two contradictory cases espousing polar opposite approaches to the official immunity defense. To further analyze the significance of this decision, Part II will outline the former approach to official immunity. This continued analysis will allow *Yanero*’s changes to be understood more clearly.

**II. HOW *YANERO* CHANGED THE STANDARD IN *MALONE***

In *Franklin County v. Malone*, a wrongful death action, the Kentucky Supreme Court held that the Franklin County Jailer, the members of the Franklin County Fiscal Court, the County Attorney, Kentucky State Trooper Dennis Stockton, the Commonwealth of Kentucky, and Franklin County, Kentucky, were all entitled to sovereign and official immunity. The court granted summary judgment for each of these entities and individuals, shielding them from potential negligence liability resulting from the suicide of Joseph Burns, an inmate in the Franklin County Jail. This Note will focus only on the government officials and employees named in the suit.

In *Malone*, the Kentucky Supreme Court established a three-step model to apply official immunity. In Step I, the court considered whether the government agent was being sued in his or her “official” or “individual capacity.” “Official capacity” and individual or “personal capacity” were

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53 *Id.* at 531. *See supra* note 20 and accompanying text.
54 *Id.* at 529.
55 *Id.* at 523. *See supra* notes 29-34 and accompanying text.
56 *Franklin County v. Malone*, 957 S.W.2d 195 (Ky. 1997), *overruled by Yanero*, 65 S.W.3d at 523.
58 *Malone*, 957 S.W.2d at 201.
defined in the United States Supreme Court decision *Kentucky v. Graham.* The court wrote that "[p]ersonal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law." However, "[o]fficial-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" The Court further noted that:

> [a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

If the plaintiff sued the defendant in his official capacity, then official immunity applied, provided the government employer passed the test set forth in *Kentucky Center for the Arts v. Berns.* The two-pronged Berns test (which is unaffected by the Yanero decision) holds that a government entity is entitled to sovereign immunity if it: (1) is under the "direction and control of the central State government," and (2) is "supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury." Additionally, the court must examine whether the entity was performing an integral state function. The *Berns* test is relevant under the *Malone* model because if an individual were sued in her official capacity, the immunity she could potentially receive would flow from the immunity afforded to the state entity. Thus, for the individual to qualify

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60 Id. at 165.
61 Id. (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 n.55 (1978)).
62 Id. at 166.
64 Ky. Ctr. for the Arts v. Berns, 801 S.W.2d 327 (Ky. 1991).
65 Id. at 331 (quoting Gnau v. Louisville & Jefferson County Metro. Sewer Dist., 346 S.W.2d 754, 755 (Ky. 1961)).
66 Id. at 332.
67 See Graham, 473 U.S. at 166 (An official-capacity suit "is not a suit against the official personally, for the real party in interest is the entity.").
for immunity, the government entity had to first satisfy the Berns test. If the agent were sued in his or her individual capacity, then the analysis proceeded to step II.\textsuperscript{68}

Step II of the \textit{Malone} test asked whether the agent acted in his discretionary or his ministerial authority.\textsuperscript{69} If the agent acted within his discretionary authority, and his actions were within the general scope of that authority, then absolute official immunity applied, absolving him from liability.\textsuperscript{70} However, if the agent acted within his ministerial authority, the analysis proceeded to step III.\textsuperscript{71}

Step III declared that a government agent can be cloaked with official immunity for ministerial actions, only if such actions were "within the scope of the authority of office," performing an operation within the "traditional role of government," whose dealings could only be performed by a government agent.\textsuperscript{72} With this step, the \textit{Malone} court announced another avenue that allows a government agent to escape liability for his actions. Even if the agent was acting within his ministerial authority, sovereign immunity could still apply if his actions were closely tied to the function of state government.\textsuperscript{73} Note that in \textit{Malone}, the court mistakenly referred to "sovereign" immunity given to government employees and agents, when it should have said "official" immunity was afforded to these individuals.\textsuperscript{74} Traditionally, ministerial actions were not entitled to sovereign or official immunity.\textsuperscript{75} However, \textit{Malone} held that if the ministerial actions met this final test, then such actions were sufficiently those of the state and thus entitled to immunity.\textsuperscript{76}

Given this model for determining when sovereign (i.e., official) immunity applied, the \textit{Malone} court found that the government agent, Kentucky State Trooper Stockton, was entitled to immunity pursuant to step III of the model.\textsuperscript{77} Stockton, in booking the decedent, Joseph R. Burns,

\textsuperscript{68} \textit{Malone}, 957 S.W.2d at 201.

\textsuperscript{69} Id.

\textsuperscript{70} Id.; \textit{see also} Gould v. O'Bannon, 770 S.W.2d 220, 221-22 (Ky. 1989); Thompson v. Huecker, 559 S.W.2d 488, 496 (Ky. Ct. App. 1977).

\textsuperscript{71} \textit{Malone}, 957 S.W.2d at 202.

\textsuperscript{72} Id.

\textsuperscript{73} Id.

\textsuperscript{74} \textit{See supra} note 7. Sovereign and official immunity are separate and distinct doctrines. One of the major problems with the \textit{Malone} decision is that the court used the terms interchangeably. \textit{See Malone}, 957 S.W.2d at 202.

\textsuperscript{75} Upchurch v. Clinton County, 330 S.W.2d 428, 431 (Ky. 1959).

\textsuperscript{76} \textit{Malone}, 957 S.W.2d at 202.

\textsuperscript{77} Id.
Jr., for incarceration, allegedly failed to adequately search his person and discover Burns’ concealed pocketknife.\textsuperscript{78} Burns committed suicide with the weapon in the bathroom of the Franklin County Jail while he awaited formal processing.\textsuperscript{79} The court held that even though the search of an individual was a ministerial act, Trooper Stockton was entitled to official immunity because his actions were closely tied to the functioning of state government, under step III of the model.\textsuperscript{80} As such, Trooper Stockton was found to have acted within the scope of his employment, and because a lawful search of an individual following an arrest can only be performed by an agent of the government, his actions satisfied the “traditional role of government” requirement.\textsuperscript{81} Thus, Malone, the administratrix and personal representative of the Joseph Burns estate, was unable to recover any damages from Trooper Stockton or any of the other named defendants.\textsuperscript{82}

The most significant change the \textit{Yanero} decision makes is the elimination of step III of the \textit{Malone} analysis.\textsuperscript{83} Under \textit{Yanero}, a government agent cannot qualify for official immunity if engaged in a ministerial action, regardless of whether the agent was acting in the traditional role of government.\textsuperscript{84} Additionally, the \textit{Yanero} approach requires further analysis into whether an agent’s discretionary actions should qualify for official immunity.\textsuperscript{85} Under \textit{Malone}, a government agent was entitled to official immunity for a discretionary action as long as his action was within the scope of his employment.\textsuperscript{86} Now, according to \textit{Yanero}, not only must a government agent act within the scope of his employment, but he must also satisfy the good faith requirement.\textsuperscript{87}

Also new is the burden shifting process. Under the \textit{Malone} model, the defendant carried the burden of proof to establish that he was entitled to the official immunity defense.\textsuperscript{88} Under \textit{Yanero}, the burden is still on the defendant to show that his actions were discretionary; the plaintiff, however, now may overcome the defendant’s showing that his actions were

\textsuperscript{78} \textit{Id.} at 199.
\textsuperscript{79} \textit{Id.} at 198-99.
\textsuperscript{80} \textit{Id.} at 202.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.} at 205.
\textsuperscript{83} \textit{Yanero v. Davis,} 65 S.W.3d 510, 522 (Ky. 2001).
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Malone,} 957 S.W.2d at 202.
\textsuperscript{87} \textit{Yanero,} 65 S.W.3d at 522-23.
\textsuperscript{88} \textit{Malone,} 957 S.W.2d at 202.
discretionary by proving that the government agent’s action was taken in bad faith.99

The major effect of these changes is to decrease the availability of the official immunity defense for the actions of government officers and employees. By disallowing any immunity for ministerial actions, the court prevents the defense from being used in numerous situations. For example, if the Malone facts were held to the Yanero standard to qualify for official immunity, the defense would not have been available for Trooper Stockton.100 This means that more negligence actions against government agents can proceed to trial rather than being disposed of by summary judgment based on official immunity. Yanero widens the courthouse doors for injured plaintiffs who otherwise would have no available legal recourse against a government agent. Moreover, the official immunity defense may be increasingly difficult to assert successfully because of the added requirement that the government agent must have acted in good faith.

Part III of this Note continues the analysis of the background and operation of official immunity by examining several issues left unresolved by the Yanero decision, as well as several factors that may have influenced the development of this approach.

III. YANERO’S RELATIONSHIP TO HAPPY V. ERWIN

While Yanero does remove the ambiguities in the law of official immunity caused by the conflicting Malone and Hayse decisions, it does not resolve all the uncertainties surrounding official immunity. There is another line of cases regarding the application of official immunity that the Yanero court does not address. This line of cases springs from the decision by the Kentucky Court of Appeals (then Kentucky’s highest court) in Happy v. Erwin.91 Interestingly, nowhere in the Happy court’s opinion was sovereign or official immunity discussed.92 However, plaintiffs opposed to the application of this defense have cited this case, or line of cases, frequently.93 The line of cases originating from Happy provides that the

99 Yanero, 65 S.W.3d at 523.
100 Trooper Stockton was held to have engaged in a ministerial act—performing a routine search of an arrested individual’s person. See supra notes 76-80 and accompanying text. Yanero clearly disallows the official immunity defense for any and all ministerial actions. Yanero, 65 S.W.3d at 522.
91 Happy v. Erwin, 330 S.W.2d 412 (Ky. 1959).
92 See id.
93 See, e.g., Calvert Invs., Inc. v. Louisville & Jefferson County Metro. Sewer Dist., 805 S.W.2d 133 (Ky. 1991); Bd. ofTrs. v. Hayse, 782 S.W.2d 609, 615 (Ky. 1989), overruled by Yanero, 65 S.W.3d at 523; Gould v. O’Bannon, 770 S.W.2d
application of official immunity should be limited, that an individual's right to suit should be protected,94 and that Kentucky Constitution sections 14, 54, and 241 serve to prohibit the abolition or diminution of legal remedies for personal injuries.95 They further support the argument that "[i]t was the manifest purpose of the framers of [the Kentucky Constitution] to preserve and perpetuate the common-law right of a citizen injured by the negligent act of another to sue to recover damages for his injury."96 Although Yanero and Happy seem to be theoretically opposed—Yanero clearly defends the doctrine of official immunity,97 while Happy argues for the preservation of an individual's right to suit98—Yanero does not overrule Happy or the line of cases supporting its conclusion.99

In Happy, the defendant, Erwin, was operating a fire truck owned by the city of Mayfield, Kentucky in response to a call by the city of Murray.100 En route to the call, Erwin was involved in a motor vehicle accident that caused injury to the plaintiff, Happy.101 The defendant argued that Kentucky Revised Statute ("K.R.S.") § 95.830(2) prevented the plaintiff from asserting a claim.102 At the time of the case, this statute provided,

Neither the city nor its officers or employees shall be liable in any manner on account of the use of the apparatus at any point outside of the corporate limits of the city. The apparatus shall be deemed to be employed in the exercise of a governmental function of the city.103

Based on this statute, the trial court dismissed the plaintiff's complaint.104


94 See supra note 93.
95 Blue, 793 S.W.2d at 825; see also Carney, 646 S.W.2d at 40; Saylor, 497 S.W.2d at 222-23; Happy, 330 S.W.2d at 413.
96 Saylor, 497 S.W.2d at 222-23 (quoting Ludwig v. Johnson, 49 S.W.2d 347, 351 (Ky. 1932)).
97 Yanero v. Davis, 65 S.W.3d 510, 521-23 (Ky. 2001).
98 Happy, 330 S.W.2d at 413.
99 See Yanero, 65 S.W.3d at 521-23.
100 Happy, 330 S.W.2d at 413.
101 Id.
102 Id.
103 Id. (quoting KY. REV. STAT. ANN. § 95.830(2) (Banks-Baldwin 1955) (amended 1966)).
104 Id.
On appeal, the plaintiff argued that he should be allowed to assert his cause of action against the defendant Erwin so that he could recover on insurance liability policies covering the defendant.\textsuperscript{105} The issue became the constitutionality of this statute limiting the firefighter's liability.\textsuperscript{106} The \textit{Happy} court held that this statute was not constitutional because it violated sections 14 and 54 of the Kentucky Constitution.\textsuperscript{107} Section 14 of the Kentucky Constitution provides that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."\textsuperscript{108} Section 54 of the Kentucky Constitution provides that "[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."\textsuperscript{109} Coupled with section 241,\textsuperscript{110} sections 14 and 54 have been construed to create the "open courts" or "jurial rights" doctrine, utilized to protect the rights of individuals to bring suit to recover damages.\textsuperscript{111}

The defendants in \textit{Happy} argued that "the liability of public servants is a matter of public policy for the legislature to determine."\textsuperscript{112} The court rejected this argument, concluding instead that the legislature's public policy cannot supersede the public policy expressed in the Kentucky Constitution.\textsuperscript{113} The court ultimately held that, based on sections 14 and 54 of the Kentucky Constitution, K.R.S. § 95.830(2) was an unconstitutional restraint on an individual's right to sue to recover damages for injuries done to her person or property.\textsuperscript{114} From this holding, a series of cases originated

\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. (quoting KY. CONST. § 14).
\textsuperscript{109} Id. (quoting KY. CONST. § 54).
\textsuperscript{110} Section 241 of the Kentucky Constitution probably would have been cited in \textit{Happy} also, but it only applies when death results from negligence. KY. CONST. § 241. No plaintiffs died in \textit{Happy}. \textit{See Happy}, 330 S.W.2d at 413.
\textsuperscript{111} \textit{See} Ludwig v. Johnson, 49 S.W.2d 347 (Ky. 1932). The doctrine of jurial rights is a legal theory first recognized by Kentucky courts in \textit{Ludwig}. This common law doctrine, based on sections 14, 54, and 241 of the Kentucky Constitution, holds that the legislature cannot limit or abolish an individual's right to seek, through the court system, legal remedy for damages to their person or property. \textit{Id.} at 351.
\textsuperscript{112} \textit{Happy}, 330 S.W.2d at 414.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
using this decision as precedent to bar the application of sovereign and official immunity. While this Note is primarily concerned with official immunity, it is important to observe that Happy has been cited in connection with both sovereign and official immunity doctrines.

Plaintiffs injured by a government agent have utilized the Happy decision to argue that sovereign and official immunity should be limited in scope. Several cases have reiterated the argument that the purpose of the Kentucky Constitution is to protect an individual’s right to remedy any damage to his person or property. In Blue v. Pursell, Gould v. O’Bannon and University of Louisville v. O’Bannon, the plaintiffs successfully argued that official immunity should not apply to doctors working for government institutions in medical malpractice actions. Interestingly, all three cases cite the same language from Saylor v. Hall regarding the desire to protect an individual’s right to suit.

In Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer District, the Kentucky Supreme Court held that the metropolitan sewer district was not entitled to the protection of sovereign immunity. Here, the court wrote that “as duty requires, we defer to the sovereign immunity of the central state government mandated by §§ 230 and 231 of the Constitution, but we reject extending sovereign immunity beyond ‘what the Constitution demands.’” Furthermore, it stated that “[i]t is as much the duty of Government to render prompt justice against

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115 See supra note 93.
116 See supra note 93.
118 Gould, 770 S.W.2d at 222; O’Bannon, 770 S.W.2d at 217; Blue, 793 S.W.2d at 825.
119 Saylor v. Hall, 497 S.W.2d 218, 222-23 (Ky. 1973).
120 Gould, 770 S.W.2d at 222; O’Bannon, 770 S.W.2d at 217; Blue, 793 S.W.2d at 825.
121 Calvert Invs., Inc. v. Louisville & Jefferson County Metro. Sewer Dist., 805 S.W.2d 133, 139 (Ky. 1991).
122 Id. at 138 (quoting Cullinan v. Jefferson County, 418 S.W.2d 407, 411 (Ky.1967) (Palmore, J., dissenting)).
123 Id.
itself in favor of citizens as it is to administer the same between private individuals.\textsuperscript{124}

In \textit{Speck v. Bowling}, the Kentucky Court of Appeals held that official immunity did not apply to a Kentucky State Trooper who negligently operated his vehicle, causing injuries to the plaintiffs.\textsuperscript{125} The court reasoned that,\textquoteright{}"[c]learly, individuals are not afforded immunity for their negligence merely because of their status as state employees."\textsuperscript{126} It stated further that \textquoteright{}"[w]hen the government or its agent engaged in an activity normally undertaken by private individuals in the course of their everyday lives, a duty arises under the common law to exercise reasonable care in the performance of the task."\textsuperscript{127} In this case, \textquoteright{}"[g]overnmental employees, like ordinary citizens, must operate their vehicles in a reasonable safe manner and avoid creating foreseeably unreasonable risks of harm to the motoring public."\textsuperscript{128}

It is critical to note that according to \textit{Turner v. Newport Board of Education}, an unpublished decision rendered by the Kentucky Court of Appeals ten months before \textit{Yanero}, \textquoteleft{}the Malone Court did not overrule any of the long line of cases [the \textit{Happy} line] holding that the immunity of the Commonwealth does not extend to the personal liability of its agents, servants, and employees.\textquoteright{}\textsuperscript{129} Although \textit{Yanero} clearly overrules \textit{Malone}, \textit{Yanero} takes a more restrictive stance on the application of official immunity.\textsuperscript{130} Thus, if \textit{Malone} did not overrule \textit{Happy}, then \textit{Yanero} does not either. The discrepancy between \textit{Yanero} and \textit{Happy} identifies the problem that in Kentucky law there exist two opposite theories regarding the application of immunity for negligent acts by government agents. Further complicating this issue is the doctrine of jural rights. Fortunately, these decisions can be harmonized to determine the status of Kentucky law in this area. Part IV will analyze the relationship between \textit{Yanero} and \textit{Happy} and consider the impact of the jural rights doctrine.

\textsuperscript{124} \textit{Id.} (quoting Abraham Lincoln, First Annual State of the Union Message (Dec. 3, 1861)).
\textsuperscript{126} \textit{Speck}, 892 S.W.2d at 311.
\textsuperscript{127} \textit{Id.} (quoting \textit{Letowt v. City of Norwalk}, 579 A.2d 601, 603 (Conn. 1989)).
\textsuperscript{128} \textit{Id.} (quoting \textit{Letowt}, 579 A.2d at 603).
\textsuperscript{130} \textit{Yanero v. Davis}, 65 S.W.3d 510, 523 (Ky. 2001).
IV. YANERO AND THE KENTUCKY JURAL RIGHTS DOCTRINE

The Kentucky Supreme Court's decision in Yanero can coexist with Happy because their holdings do not directly conflict with each other. The controlling issue in Happy was whether the statute exempting officers and employees of cities from personal liability in the use of fire apparatus was constitutional. As mentioned previously, the court found that this statute could not be squared with the Kentucky Constitution. Arriving at this conclusion, the court relied upon its prior decision in Ludwig v. Johnson. Citing the Ludwig decision, the court in Happy wrote that "the objective of section 14 [of the Kentucky Constitution] was to preserve those jural rights which had become well established prior to the adoption of the Constitution." Creating this concept of jural rights, the court in Ludwig sought to preserve common law causes of action by constitutionally validating them through sections 14, 54, and 241. The court in Happy stated that the individuals protected by this statute never had immunity in the common law. Thus, this legislative act was an overextension of immunity that unconstitutionally burdened an individual's right to recover damages.

In Yanero, the Kentucky Supreme Court reaffirms that there are certain types of individuals that should be entitled to immunity created by the performance of acts of the sovereign. In reaffirming this defense, the court determines that its decision reflects the proper extension of immunity based on the common law of Kentucky and an analysis of federal and other state law jurisprudence. Thus, while this particular approach is new to

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1. See id. at 510; Happy v. Erwin, 330 S.W.2d 412 (Ky. 1959).
2. Happy, 330 S.W.2d at 413. It is important to remember that the Kentucky Court of Appeals in Happy never applied or even mentioned the doctrine of sovereign or official immunity.
3. Id. at 414.
4. Id. at 413-14 (citing Ludwig v. Johnson, 49 S.W.2d 347 (Ky. 1932)).
5. Id. (emphasis added) (citing Ludwig, 49 S.W.2d at 350).
6. Ludwig, 49 S.W.2d at 351.
7. Happy, 330 S.W.2d at 414.
8. Id.
10. Id. at 521-23. By overruling Malone and limiting the application of official immunity, the Kentucky Supreme Court in Yanero is essentially arguing that Malone was an overextension of immunity that was not a true reflection of the common law. See id. at 523. Thus, all the cases that allowed official immunity to individuals performing ministerial actions were an overextension of immunity.
Kentucky law, *Yanero* reaffirms that some actions by government agents traditionally have always been entitled to the official immunity defense.\(^{141}\) The courts in *Ludwig* and *Happy* merely sought to prevent the overextension of immunity, reasoning that "if the Legislature could immunize certain classes of public officers, it could exempt all public officers and employees from liability, and if logically extended, could immunize private groups the Legislature determined to be entitled to immunity."\(^{142}\) *Yanero* signifies that official immunity has always been a part of Kentucky common law and recognizes that there are still classes of individuals that are entitled to immunity.\(^{143}\)

In *Williams v. Wilson*, the Kentucky Supreme Court wrote that the actual holding in *Ludwig* was that "the intention of the framers of the Constitution was to inhibit the Legislature from abolishing rights of action for damages for death or injuries caused by negligence."\(^{144}\) *Yanero* recognizes that in some cases there have never been rights of action for damages caused by certain individuals engaged in certain activities because in these cases official immunity has always existed to shield individuals from liability.\(^{145}\) Thus, the extension of official immunity in *Yanero* does not abolish a right to legal action, since injured parties never had this right from the beginning. The model developed in *Yanero* is an attempt to reassert the law regarding the proper extension of official immunity, not an attempt to destroy the jural rights doctrine.

However, even the jural rights doctrine has been sharply criticized by certain legal scholars. For example, Professor Thomas P. Lewis concluded that "the formal jural rights doctrine is founded on a misconception of Kentucky's 1891 constitution. It should be abandoned."\(^{146}\) All of the cases in the *Happy* progeny bolster their argument limiting official immunity's application to government agents by reliance on Kentucky Constitution sections 14, 54, and 241.\(^{147}\) These constitutional sections make up the foundation of the jural rights doctrine.\(^{148}\) Lewis writes that courts cite these

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\(^{141}\) *Id.* at 518.

\(^{142}\) *Williams v. Wilson*, 972 S.W.2d 260, 266 (Ky. 1998).

\(^{143}\) *Yanero*, 65 S.W.3d at 518-23.

\(^{144}\) *Williams*, 972 S.W.2d at 265 (quoting *Ludwig v. Johnson*, 49 S.W.2d 347, 350 (Ky. 1932)).

\(^{145}\) *Yanero*, 65 S.W.3d at 521-22.


\(^{147}\) See supra note 93.

\(^{148}\) *Ludwig v. Johnson*, 49 S.W.2d 347, 351 (Ky. 1932).
"open courts" provisions referring to their meaning in "spirit" when "read together."\footnote{Lewis, supra note 146, at 964.} However, when evaluated individually their language takes on a much narrower construction. Lewis states:

In combination, the role of section 14 is to guarantee a remedy for injury; the role of section 54 is to protect the remedy from diminution below what the court has deemed to be just; and the role of section 241 is to guarantee a remedy when injury results in death. Thus combined, the provisions appear as the legs of a tripod carefully constructed by our "founding fathers" to support a delegation of absolute power to the courts. History shows that nothing could be further removed from reality.\footnote{Id. at 268.}

Professor Lewis could find no evidence that these sections were intended to be read together as a "package," creating this expansive notion of "open courts" and jural rights.\footnote{Id. at 972.} However, regardless of his arguments, the Kentucky Supreme Court upheld the doctrine of jural rights in its recent decision, \textit{Williams v. Wilson}.\footnote{Williams v. Wilson, 972 S.W.2d 260, 269 (Ky. 1998).} The court relied on precedent in holding that these constitutional sections "render certain common law rights impervious to legislative dilution or destruction. Such rights are therefore subject to the same restrictions with respect to modification by the General Assembly as are constitutional provisions."\footnote{Id. at 267 (quoting Lewis, supra note 146, at 972).} Unconvinced by Lewis' arguments, the court concluded that "[t]he fact that these provisions might not have been 'conceived as some sort of package' does not prevent them from being construed together to arrive at a separate principle."\footnote{Id. at 268.}

Even though the doctrine of jural rights continues to exist in Kentucky law, the Kentucky Supreme Court in \textit{Wood v. Board of Education} held that constitutional sections that preserve remedies for injuries do not impinge upon section 231 of the Kentucky Constitution, the section that has been construed to recognize the applicability of sovereign and official immunity.\footnote{Wood v. Bd. of Educ., 412 S.W.2d 877, 879 (Ky. 1967); see also Ky. CONST. § 231.}

\begin{footnotes}
149 Lewis, supra note 146, at 964.
150 Id.
151 Id. at 972.
152 Williams v. Wilson, 972 S.W.2d 260, 269 (Ky. 1998).
153 Id. at 268.
154 Id. at 267 (quoting Lewis, supra note 146, at 972).
155 Wood v. Bd. of Educ., 412 S.W.2d 877, 879 (Ky. 1967); see also Ky. CONST. § 231.
\end{footnotes}
sovereign immunity, to have some meaning." The court further wrote that "[i]t is a cardinal rule of construction that the different sections of the Constitution shall be construed as a whole so as to harmonize the various provisions and not to produce a conflict between them." This implies that even if sections 14, 54, and 241 are read together, section 231's recognition of sovereign and official immunity still prevails. The court concludes that sovereign immunity must be recognized regardless of what may have been intended by the sections concerning an individual's right to suit.

The end result of this discussion of official immunity and jural rights is the recognition that there are two distinct theories in Kentucky's legal system with opposite goals. These theories can be harmonized in the same way that the Kentucky Supreme Court harmonized the holdings of Happy and Yanero. Both of these cases and legal theories are right in their defense of common law principles. Happy and the jural rights doctrine protect against the overextension of immunity by the legislature, while Yanero clarifies the official immunity defense to which certain government agents have been entitled throughout the common law. Part V continues this discussion of Yanero by demonstrating the impact of the new official immunity standard by applying it to several previously decided Kentucky Court of Appeals cases.

V. Yanero's Potential Impact on Future Kentucky Cases

This Part reviews a series of recently decided cases by the Kentucky Court of Appeals. All of these opinions were rendered prior to the Kentucky Supreme Court's decision in Yanero. These cases are valuable because they provide a set of facts and conclusions to demonstrate how Yanero will change the calculus and development of Kentucky official immunity case law. Prior to Yanero, one of the most troubling aspects of the official immunity doctrine was that litigants governed by the laws of the Commonwealth of Kentucky had claims dismissed or upheld by courts that applied different or conflicting standards. In the unpublished decisions discussed below, the Kentucky Court of Appeals applied official immunity inconsistently. Yanero will not solve all the problems inherent in the

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156 Wood, 412 S.W.2d at 879.
157 Id.
158 See id.
159 See Happy v. Erwin, 330 S.W.2d 412 (Ky. 1959); Ludwig v. Johnson, 49 S.W.2d 347, 351 (Ky. 1932) (setting forth the jural rights doctrine).
160 See Yanero v. Davis, 65 S.W.3d 510, 521-23 (Ky. 2001).
official immunity defense, but at least there is now a consistent standard that courts must apply.\footnote{161}

In *Carey v. Lexington-Fayette Urban County Government*, the first of these unpublished decisions, Carey, an inmate at the Fayette County Detention Center, fell and severely injured his leg while working in the Juvenile Detention Center.\footnote{162} Carey filed suit against the Lexington-Fayette Urban County Government ("LFUCG"); the Fayette County Jailer, Ray Sabbatine; and the Director of the Department of General Services, Robert Ramsey.\footnote{163} Here, the Kentucky Court of Appeals held that it was premature for the trial court to dismiss Carey’s claims against Sabbatine and Ramsey on the grounds of official immunity.\footnote{164} The court wrote that “even though it may later be determined that Sabbatine and Ramsey are immune from liability in their official capacity due to the discretionary nature of their actions, the doctrine of official immunity does not bar a claim based on their alleged personal negligence.”\footnote{165} Supporting this conclusion, the *Carey* court cited the *Happy* line of cases and the jural rights doctrine and stated that “[i]ndividual state employees are accountable for their actions and torts.”\footnote{166} The court completely disregarded the then-prevailing *Malone* test pertaining to the application of official immunity to government agents.

In *Pirtle v. Lexington-Fayette Urban County Government*, Pirtle suffered injuries while riding in a police transport vehicle to the Fayette County Detention Center.\footnote{167} Pirtle sued LFUCG and two police officers, Charles Massarone and Stephen Gahafer, for negligent transportation.\footnote{168} The court held that official immunity applied, barring the plaintiff’s claims

\footnote{161 One major advantage of *Yanero* over *Malone* and the previous cases dealing with sovereign and official immunity is that *Yanero* clearly sets forth the standard that courts must apply to resolve these issues. However, because of the inherent problems in the application and interpretation of the terms “discretionary” and “ministerial,” the sovereign and official immunity defense continues to be subject to great debate. See supra notes 35-42 and accompanying text. *Yanero* does nothing to communicate exactly what actions are “discretionary” and what are “ministerial.”


\footnote{163} *Id.* at 2.

\footnote{164} *Id.* at 3.

\footnote{165} *Id.*

\footnote{166} *Id.* (quoting Gould v. O’Bannon, 770 S.W.2d 220, 221-22 (Ky. 1989)).


\footnote{168} *Id.*}
against the government agents.\textsuperscript{169} This conclusion, rendered fourteen days before the Carey decision, did utilize the then-applicable Malone test.\textsuperscript{170} The Pirile court found that the police officers were engaged in a ministerial act, within the scope of the authority of their office, and within the traditional role of government.\textsuperscript{171}

In Clark v. Daviess County, the estate of Candice Clark, who was killed in an automobile accident, sued Daviess County, its present and former fiscal court members, the Daviess County road foreman, the Daviess County Road Department sign director, the present and former Daviess County engineer, and the assistant Daviess County engineer.\textsuperscript{172} The plaintiff alleged that these defendants negligently failed to exercise ordinary care to provide and maintain any notice or warning of the curved roadway or to provide an appropriate guardrail at the portion of the roadway involved in the accident.\textsuperscript{173} The Kentucky Court of Appeals found that official immunity applied to the government agents, shielding them from any liability.\textsuperscript{174} The court justified its conclusion by holding that the individuals acted within their discretionary authority.\textsuperscript{175} Interestingly, the opinion stated that under the former Malone standard, the doctrine of official immunity did not apply to ministerial acts.\textsuperscript{176} This is true now because of the Yanero decision,\textsuperscript{177} but it was a clear misstatement under the then-prevailing Malone test.\textsuperscript{178}

These three cases illustrate two critical points: first, they show that Malone was applied inconsistently, demonstrating the clear need for uniformity, and second, they demonstrate how Yanero will cause some cases to be decided differently, while leaving others unaffected. In three months, the Court of Appeals applied three different standards regarding official immunity in three separate cases. Although two of the outcomes were the same, the process that the court used was inconsistent, thus

\begin{itemize}
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id.
\item \textsuperscript{177} See Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001).
\item \textsuperscript{178} See Franklin County v. Malone, 957 S.W.2d 195 (Ky. 1997), overruled by Yanero, 65 S.W.3d at 523; see also supra notes 57-76 and accompanying text.
\end{itemize}
demonstrating a clear need for uniformity in the law. *Yanero* addresses this problem by clearly stating a standard that Kentucky courts must uniformly apply in official immunity cases.\(^\text{179}\)

If the *Yanero* approach were applied to these three cases, two of the three would likely be resolved differently. In *Carey*, the Kentucky Court of Appeals held that the *Happy* rationale applied, preserving the rights of injured citizens to bring suit.\(^\text{180}\) *Yanero* clearly decides that all official immunity suits should be channeled through the previously discussed approach that the opinion lays out.\(^\text{181}\) If *Yanero* applied, the defendants in *Carey* probably would be entitled to summary judgment on the grounds of official immunity. The *Carey* court specifically stipulates that the defendants acted within their discretionary authority.\(^\text{182}\) Discretionary acts qualify for immunity under *Yanero*, as long as the defendants acted within the scope of their employment and the plaintiffs are unable to show they acted in bad faith.\(^\text{183}\)

*Pirtle* would also be resolved differently under the *Yanero* analysis. In *Pirtle*, the defendants were found to have acted within their ministerial authority.\(^\text{184}\) They were entitled to official immunity under *Malone* through the "traditional role of government" exception created for ministerial acts.\(^\text{185}\) *Yanero* does not provide for such exception for ministerial acts.\(^\text{186}\) No action of this nature is afforded official immunity.\(^\text{187}\)

In *Clark*, the Kentucky Court of Appeals found that the defendants were entitled to the official immunity defense.\(^\text{188}\) Citing the *Malone* standard, the court found the defendants had immunity because they acted within their discretionary authority.\(^\text{189}\) Under *Yanero*, the result in *Clark* would be the same, then, as long as the government agents performed a discretionary action within the scope of their employment and did so in

\(^{\text{179}}\) *Yanero*, 65 S.W.3d at 521-23.


\(^{\text{181}}\) *Yanero*, 65 S.W.3d at 521-23.

\(^{\text{182}}\) *Carey*, 2 KY. APP. NON-PUBLISHED OPINIONS at 3.

\(^{\text{183}}\) *Yanero*, 65 S.W.3d at 523.


\(^{\text{185}}\) *Id.*

\(^{\text{186}}\) *Yanero*, 65 S.W.3d at 522.

\(^{\text{187}}\) *Id.*


\(^{\text{189}}\) *Id.*
good faith.' As long as the plaintiffs are unable to show bad faith, the defendants would be afforded immunity under the Yanero approach.

Clearly, the biggest change Yanero mandates is that ministerial actions will no longer be given any immunity. Furthermore, Yanero now provides a uniform standard that should remove some of the ambiguity and inconsistent application of the official immunity doctrine.

CONCLUSION

In deciding Yanero, the Kentucky Supreme Court clearly is attempting to rectify the status of Kentucky law regarding official immunity. In Yanero, the court states that prior to Malone, "no Kentucky case had ever held that a public employee was afforded absolute immunity for the negligent performance of a ministerial act simply because that act was a governmental function performed within the scope of the authority of the employee's office." Thus, Yanero serves to restore Kentucky official immunity law to its common law tradition before Malone.

The doctrine of official immunity is subject to a great deal of debate because it strikes at an individual's right to recover damages for her injuries, a right that many Americans hold as sacred in the justice system. Judge Learned Hand wrote eloquently in Gregoire v. Biddle about the problems regarding this debate:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause. . . . There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

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190 Yanero, 65 S.W.3d at 522.
191 Id.
192 Id.
193 Id.
194 Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).
In *Yanero*, the Kentucky Supreme Court attempts to create a model that will balance the interests of the people in recovering damages for their injuries and in protecting the government from harassing lawsuits. More importantly, the court eliminates the standard developed in *Malone*, replaces it with a model that more truly conforms to the weight of the Kentucky common law, and provides a uniform approach to apply the doctrine. The Kentucky Supreme Court’s unanimous decision in *Yanero* sends the resounding message that Kentucky now has an unvarying standard. However, the question remains how fundamental terms such as “discretionary” and “ministerial” will be interpreted so as to apply this defense in the future. Fortunately, now that there is a clear context and structure to apply official immunity, this highly debatable issue can be isolated, allowing the courts and practitioners to develop the law by providing fact patterns and analogies to help define these crucial terms.