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# A Plea for a Comprehensive Governmental Liability Statute

BY ROY KIMBERLY SNELL\*

## INTRODUCTION

Kentucky courts have long clothed the state's municipal corporations in some variety of the antiquated concept of sovereign immunity.<sup>1</sup> Uncomfortable with the harshness of absolute immunity, however, the courts have labored to achieve a just equilibrium between the interests of local governments and their injured citizens. Unfortunately, from the early "governmental/proprietary" distinction<sup>2</sup> to the "ultimate function" fiasco of

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<sup>1</sup> I will spare the reader a detour into the tortuous history of sovereign immunity in England and America. Others have exhausted the subject. See, e.g., 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 464-66 (3d ed.); Borchard, *Governmental Responsibility in Tort*, 36 *YALE L.J.* 1 (1926); Borchard, *Governmental Liability in Tort*, 34 *YALE L.J.* 1 (1924); Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 *HARV. L. REV.* 1 (1963); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 *LA. L. REV.* 476 (1953). The Kentucky Court of Appeals recently distinguished "sovereign" immunity from "municipal" immunity. *Inco, Ltd. v. Lexington-Fayette Urban County Airport Bd.*, 32 *Ky. L. SUMM.* 16, at 3 (*Ky. Ct. App.* Nov. 22, 1985) [hereinafter cited as *KLS*]. The distinction is a useful one, see notes 13 and 14 *infra* & accompanying text, but all forms of governmental immunity are historically related in Kentucky.

As for the sartorial metaphor, it is an obligatory feature of the subject. Sovereign or governmental immunity has been variously described as "armour," *Haney v. City of Lexington*, 386 *S.W.2d* 738, 741 (*Ky.* 1964), and a "cloak," *Frankfort, Variety, Inc. v. City of Frankfort*, 552 *S.W.2d* 653, 654 (*Ky.* 1977). In short, the government is "clothed with immunity from tort liability." *Hempel v. Lexington-Fayette Urban County Gov't*, 641 *S.W.2d* 51, 53 (*Ky. Ct. App.* 1982).

<sup>2</sup> Kentucky courts struggled with the distinction between "governmental" functions, which were immune from tort liability, and "proprietary" functions, which were not, until the Kentucky Supreme Court abolished the distinction in *Haney v. City of Lexington*, 386 *S.W.2d* at 742. The distinction produced a dizzying line of cases con-

more recent years,<sup>3</sup> none has worked. Thoughtful jurists, lawyers, and laymen have expressed concern over the inequities and uncertainty that have resulted,<sup>4</sup> but no one has proposed, nor has the judiciary concocted, a successful judicial standard for balancing these compelling but competing interests. Meanwhile the Kentucky General Assembly has elected to leave the struggle to the courts.

*Gas Service Co. v. City of London*<sup>5</sup> is merely the latest episode in the judicial struggle. The decision boldly purports to have disrobed municipalities once and for all, exposing them to legal liability of unknown dimensions.<sup>6</sup> Yet, as a vocal minority of the Court quickly observed, the opinion in fact leaves several scraps of material clinging to the municipal body.<sup>7</sup> Reviving an exception originally devised in *Haney v. City of Lexington*<sup>8</sup>—an ominous choice, since the Court in that decision also announced the destruction of municipal immunity over twenty years ago—the court preserved immunity for “the exercise of legislative or judicial or quasi-legislative or quasi-functions.”<sup>9</sup> As shall be seen, the illustrations offered by the Court to exemplify such functions promise to play havoc with its desire to restrict future reliance on traditional immunity.<sup>10</sup> *Gas Service* only assures that lawyers for plaintiffs and defendants alike will have their work cut out for them in stitching together or unraveling the fabric of this latest judicial exception.

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taining inconsistencies that the *Haney* Court attributed to “the fact that the courts for many years have been repelled by the injustice of the rule of municipal immunity and have attempted to soften its harsh application by seeking a few escape hatches.” *Id.* at 740. See also Antieau, *The Tort Liability of American Municipalities*, 40 Ky. L.J. 131 (1951-52).

<sup>3</sup> Tort immunity for “ultimate functions of government” originated with *City of Louisville v. Louisville Seed Co.*, 433 S.W.2d 638, 643 (Ky. 1968). See text accompanying notes 46-48 *infra*.

<sup>4</sup> See, e.g., *Cullinan v. Jefferson County*, 418 S.W.2d 407, 411-12 (Ky. 1967) (Palmore, J., dissenting); *Courier-Journal*, Aug. 29, 1985, at B1, col. 1.

<sup>5</sup> 687 S.W.2d 144 (Ky. 1985).

<sup>6</sup> See *id.* at 151 (Wintersheimer, J., concurring).

<sup>7</sup> See *id.* at 150-52 (Wintersheimer, J., concurring); *id.* at 152-53 (Stephenson, J., dissenting).

<sup>8</sup> 386 S.W.2d 738 (Ky. 1964).

<sup>9</sup> 687 S.W.2d at 149.

<sup>10</sup> See text accompanying notes 126-131, *infra*.

Although now revitalized, *Haney* stands as a solemn reminder to litigants that no judicially constructed standard can ever solve the perpetual problem of municipal immunity. Determining under what circumstances and to what extent a municipal corporation can assume responsibility for harm arising from its provision of services without jeopardizing those services is a complex task suitable only for legislative study and experimentation. The Kentucky Supreme Court might have served its purpose better by abolishing immunity without exception, not because local governments do not need protection in many areas, but because it appears that only total judicial abdication will ever prod the Kentucky General Assembly into confronting the problem. As it stands,<sup>11</sup> *Gas Service*, like *Haney*, threatens municipalities with a new era of wasteful combat over the boundaries of the "quasi-legislative/judicial" exception.

We can only hope that the General Assembly will avoid this needless repetition of the judicial turmoil of the last two decades by enacting a comprehensive governmental liability statute. In its regular session for 1986, the General Assembly permitted House Bill 120, which limited the tort liability of municipal and county governments in response to *Gas Service*, to die in committee on the last day of the session. The principal goal of this Article is to state the case for ending this course of legislative neglect. Section one traces the recent history of governmental immunity in Kentucky, a curious sequence of events that amply supports a plea for legislative action. Section two examines more fully the *Gas Service* decision and the way it compounds rather than solves the problems surrounding municipal immunity. Finally, section three offers a brief look at some of the issues that the Kentucky General Assembly should consider in devising a statutory solution. The inescapable conclusion is that Kentucky can no longer leave to the judiciary a critical task for which it is not equipped.

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<sup>11</sup> One of the principal theses of this Article is that the *Gas Service* Court preserved a workable exception to the rule of municipal immunity, but then took the unnecessary and unfortunate step of defining that exception too broadly. See text accompanying notes 120-136 *infra*.

## I. THE STRANGE CAREER OF GOVERNMENTAL IMMUNITY IN KENTUCKY

The doctrine of governmental immunity has developed differently at every level of political organization in Kentucky—state, county, and municipal. Ironically, it is the local governments, those with the most direct impact on the populace, that have enjoyed the broadest and most durable immunity.<sup>12</sup> More ironic still is the degree to which *municipal* immunity, purely a creature of the courts,<sup>13</sup> has evolved into the yardstick by which courts measure the liability of the *Commonwealth of Kentucky* itself, whose immunity is supposedly constitutional in origin.<sup>14</sup> The reader must have some familiarity with the immunity doctrine at the state, county, and municipal levels to understand the significance of *Gas Service Co. v. City of London*—the latest development in municipal liability.

### A. *The Origins and Course of Immunity at the State Level*

The present Kentucky Constitution provides that “[t]he General Assembly may, by law, direct in what manner and in what court suits may be brought against the Commonwealth.”<sup>15</sup> The provision closely follows a passage of the original constitution of 1792, but differs in one interesting, if now inconsequential, respect. The original document asserted that the legislature “*shall* direct” the manner of bringing suit.<sup>16</sup> The mandatory “*shall*” seems to have intended less a blanket immunity, the prerogative of a discarded king,<sup>17</sup> than a directive that the popular government control the procedure by which claims might be asserted against it. In those days of limited if not nonexistent government services, the matter must have appeared less than pressing. For whatever reason, the Kentucky General Assembly established a

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<sup>12</sup> See *Gas Service Co. v. City of London*, 687 S.W.2d 144 (Ky. 1985).

<sup>13</sup> See *Haney v. City of Lexington*, 386 S.W.2d 738, 739 (Ky. 1964).

<sup>14</sup> This strange and mistaken event occurred in *Commonwealth, Dep't of Banking and Securities v. Brown*, 605 S.W.2d 497, 499 (Ky. 1980), the *bete noire* of this tale. See text accompanying notes 24-27, 62-63 *infra*.

<sup>15</sup> KY. CONST. § 231.

<sup>16</sup> KY. CONST. of 1792, art. VIII, § 4.

<sup>17</sup> See W. HOLDSWORTH, *supra* note 1, at 464-66.

pattern of inactivity that permitted the doctrine of absolute immunity to put down roots.<sup>18</sup> Not until 1828 did the courts find occasion to consider the matter, by which time the General Assembly had fixed its course of neglect. "Although the constitution has declared, that 'The General Assembly shall direct by law in what manner and in what courts suits may be brought against the Commonwealth,' " the Court noted in barring a suit against the state, "that body has never complied with this direction. . . ."<sup>19</sup>

Once planted by legislative default, immunity flourished. To this day, the Commonwealth remains immune from suit at common law in both contract and tort, and only the Kentucky General Assembly has the power to waive immunity as a defense.<sup>20</sup> Not until 1946 did the passage of the Board of Claims Act ("the Act") finally provide some recourse against the state.<sup>21</sup> The Act originally provided only for claims arising from the negligent design and construction of highways,<sup>22</sup> but the legislature amended it in 1950 to offer compensation to "persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth or its departments or agencies, or any of its agents or employees while acting within the scope of their employment."<sup>23</sup> The current version of the Act does not permit compensation for pain and suffering, however, and single awards cannot exceed fifty thousand dollars exclusive of interest and costs.<sup>24</sup>

Although counties and municipal corporations have always been offshoots of the state government,<sup>25</sup> the Act did not include them by name. The question of their inclusion in the Act's limited abrogation of immunity arose in *Ginter v. Montgomery*

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<sup>18</sup> *Divine v. Harvie*, 23 Ky. (7 T.B. Mon.) 439, 441 (1828).

<sup>19</sup> *Id.*

<sup>20</sup> See *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. Ct. App. 1978).

<sup>21</sup> KY. REV. STAT. §§ 176.290-.380 (1948) [hereinafter cited as KRS] (renumbered KRS §§ 44.070-.160 (Bobbs-Merrill 1980)). See generally Richardson, *Kentucky Board of Claims*, 35 Ky. L.J. 295 (1947).

<sup>22</sup> KRS §§ 176.290-.380 (1948).

<sup>23</sup> KRS § 44.070 (1950) (current version at KRS § 44.070 (1980 & Supp. 1984)).

<sup>24</sup> KRS §§ 44.070(1)-(5) (1980 & Supp. 1984).

<sup>25</sup> See *Monroe County v. Rowe*, 274 S.W.2d 477, 478 (Ky. 1954).

County,<sup>26</sup> a wrongful death action against a county and its fiscal court. The Court declared that the Act "does not completely abrogate the doctrine of immunity even as to the state government, and as to the local government it does not purport to waive any immunity."<sup>27</sup> Following this reasoning, the Court in *Gnau v. Louisville & Jefferson County Metropolitan Sewer District*<sup>28</sup> insisted that the sewer district, a municipal corporation, "is not one of the branches of the government which is included in the waiver by the subject statute."<sup>29</sup> *Ginter* and *Gnau* seemed to ensure that counties and municipal corporations would remain immune pending further legislative action.

Even at the state level, constitutional immunity continued to be an absolute bar to breach of contract claims. Overruling precedent to the contrary, the Kentucky Supreme Court in *Foley Construction Co. v. Ward*<sup>30</sup> held that governmental immunity barred a contract claim against the Department of Highways both for the contract price and for consequential damages.<sup>31</sup> *Foley Construction* caused the Kentucky General Assembly to enact a statutory remedy for contract claims against the Commonwealth.<sup>32</sup> Again, however, the statute authorized only claims against the "Commonwealth of Kentucky and any of its departments or agencies,"<sup>33</sup> the same language construed by the

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<sup>26</sup> 327 S.W.2d 98 (Ky. 1959).

<sup>27</sup> *Id.* at 100.

<sup>28</sup> 346 S.W.2d 754 (Ky. 1961).

<sup>29</sup> *Id.* at 755.

<sup>30</sup> 375 S.W.2d 392 (Ky. 1963).

<sup>31</sup> *Id.* at 396.

<sup>32</sup> KRS §§ 45A.245-.295 (1980). Other statutes subsequently established remedies against the government in specific areas. For example, legislation passed in 1976 authorized the attorney general to undertake the defense of state employees in civil actions. KRS §§ 12.211-12.215 (1985). Regulations passed pursuant to the statute enable the state to insure the acts of its employees for up to \$50,000, 10 KY. ADMIN. REGS. 1:010 (1985), but the attorney general can decline to provide a defense for several reasons, the vaguest of which is a determination that "[d]efense of the action would not be in the best interests of the Commonwealth." KRS § 12.212(1)(d). See also Comment, *The Employee Defense Act: Wearing Down Sovereign Immunity*, 66 KY. L.J. 150 (1977-78).

Counties may elect to purchase liability insurance, thereby waiving immunity to the extent of coverage for motor vehicles, KRS §§ 67.180-185 (1980), and county-operated hospitals, KRS § 67.186 (1980). School districts similarly may insure their buses. KRS § 160.310 (1980).

<sup>33</sup> KRS § 45A.240 (1980).

Court in *Gnau* as inapplicable to county and municipal governments.<sup>34</sup>

The interpretation of the Act to exclude local governments from the legislative waiver of immunity was questionable but defensible. If the Kentucky General Assembly had meant to include counties and cities in its program, it certainly had chosen a mealy-mouthed way of doing so. Still, the separation of local governments from the "Commonwealth" contained an important implication. If counties and cities were not agencies of the state, was not the extension of immunity to them less a matter of constitutional mandate than judicial whim? This was the conclusion that the Court ultimately reached, at least with respect to municipalities.<sup>35</sup> Nevertheless, a startling decision by the Kentucky Supreme Court in 1980 inextricably linked the statutory liability of the Commonwealth to the common law of municipal immunity.

*Commonwealth, Department of Banking and Securities v. Brown*<sup>36</sup> began as a suit before the Board of Claims in which claimants alleged that examiners of the Department of Banking and Securities had performed negligently in the regulation of two building and loan associations. The Board of Claims found that the examiners had been derelict in not ascertaining and reporting the true condition of the associations' records, and two intermediate courts upheld this conclusion. A unanimous Supreme Court agreed. It observed, however, that the Act offers a remedy only for "such negligence . . . as would entitle claimant to a judgment in an action at law if the state were amenable to such action."<sup>37</sup> Reasoning that cities were the only units of government "amenable" to suit when the General Assembly

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<sup>34</sup> See 346 S.W.2d at 755.

<sup>35</sup> In *V.T.C. Lines, Inc. v. City of Harlan*, 313 S.W.2d 573, 578 (Ky. 1957), the Court described the doctrine of municipal immunity as a feature of common law. A majority of the Court in *V.T.C. Lines* declined to abolish the doctrine, resolving that "change addresses itself to legislative discretion and . . . we must content ourselves only with criticism of the rule which we have created." *Id.* The Court later changed course and abolished municipal immunity—temporarily—in *Haney v. City of Lexington*, 386 S.W.2d at 742. See text accompanying notes 79-87 *infra*.

<sup>36</sup> 605 S.W.2d 497 (Ky. 1980).

<sup>37</sup> KRS § 44.120 (1980).



passed the Board of Claims Act,<sup>38</sup> the Court divined in this phrase of Kentucky Revised Statutes (KRS) section 44.120 a legislative intent that the Commonwealth have no greater exposure to liability under the Act than municipalities have under the common law.<sup>39</sup>

*Banking and Securities* is an extraordinary example of judicial legislation in the guise of interpretation. The Court took a statute passed by the Kentucky General Assembly pursuant to section 231 of the Kentucky Constitution and, without any authorization from the statute itself, restricted its scope to an area controlled and regularly changed by the judiciary—the common law of municipal immunity. Of course, mere use of the word “negligence” in the Act gives the courts a voice in defining its scope; the judiciary alters the meaning of that word whenever it recognizes a new type of liability.<sup>40</sup> By importing the chaos of its decisions on municipal liability into the Act, however, the Court hitched the statute not to its traditional area of expertise—the common law of negligence—but to an area of public policy in which it was already usurping the role of the legislature with poor results.<sup>41</sup>

The Court’s decisions on municipal liability inevitably assumed added importance after *Banking and Securities*. Petition-

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<sup>38</sup> 605 S.W.2d at 499.

<sup>39</sup> *Id.* The Court’s explanation for its interpretation of KRS § 44.120 was so implausible that the absence of any dissent is remarkable. What did the General Assembly mean by the phrase “in an action at law, if the state were amenable to such action”? The plaintiffs in *Banking and Securities* suggested that the legislature intended for the Commonwealth to receive the same treatment as a private individual. *Id.* The Court found that insertion of the words “private individual” into the Act required “the straining of the language of KRS § 44.120.” *Id.* The Court, however, found no difficulty in inserting the word “municipalities.” *Id.* Ironically, the Court had indicated in an earlier opinion “that a municipality shall be liable in those situations where a private person would be liable.” See *City of Louisville v. Louisville Seed Co.*, 433 S.W.2d 638, 643 (Ky. 1968).

The Court tied the scope of the Act to its own ever-shifting concept of municipal immunity rather than to the law as it existed in 1950. Thus, inherent in *Banking and Securities* is the principle that the Kentucky Supreme Court can restore absolute immunity to the Commonwealth, effectively repealing the Board of Claims Act, simply by holding that municipalities are absolutely immune at common law. See 605 S.W.2d at 499. Surely the Kentucky General Assembly would have been more explicit in conferring such power on the judiciary.

<sup>40</sup> See 605 S.W.2d at 499.

<sup>41</sup> See *id.* at 499-500.

ers seeking relief in the Board of Claims must now look to the law of municipal liability to find whether they have a cause of action.<sup>42</sup> This was no small undertaking in 1980, and it is not an easy task today in the wake of *Gas Service*. Suddenly, the Commonwealth is not liable under the Act for claims arising from its exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions.<sup>43</sup> And what might they be? The Kentucky Supreme Court suggested in *Gas Service* that those in need of clarification or example look to none other than *Banking and Securities*,<sup>44</sup> a case that has assumed an inordinately fateful role in Kentucky's law of governmental immunity.

The Court's most recent decision on the liability of the Commonwealth itself is *Dunlap v. University of Kentucky Student Health Services Clinic*.<sup>45</sup> Addressing a suit for medical malpractice filed by a former patient at the University of Kentucky Medical Center, the Court interpreted the University of Kentucky Medical Center Malpractice Act of 1976<sup>46</sup> as a "partial waiver of governmental immunity for the hospital to the extent that this insurance fund has been provided for by the statute."<sup>47</sup> Whether the legislature intended this statute as a waiver of the state hospital's immunity or merely as a means of satisfying judgments against the hospital in the Board of Claims and judgments at law against hospital personnel is open to question. If the Court too liberally defined the legislative objective, however, the fault must lie with the General Assembly and its habit of enacting ciphers.

Whatever its merits, the Court's holding in *Dunlap* is unlikely to exert much influence in the law of governmental liability. The Court's reconciliation of its decision with the precedent of *Moores v. Fayette County*,<sup>48</sup> in which it had barred a slip-and-fall claim against a county despite the existence of insurance cover-

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<sup>42</sup> See *id.* at 499.

<sup>43</sup> See *Gas Service Co. v. City of London*, 687 S.W.2d at 149.

<sup>44</sup> *Id.* For a critique of this further intrusion of *Banking and Securities*, see the text accompanying notes 66-71 *infra*.

<sup>45</sup> No. 84-SC-679-DG (Ky. Feb. 27, 1986).

<sup>46</sup> KRS §§ 164.939-.944 (1980 & Supp. 1985).

<sup>47</sup> No. 84-SC-679-DG, slip op. at 9.

<sup>48</sup> 418 S.W.2d 412 (Ky. 1967). The Court's discussion of *Moores* in *Dunlap* appears at pages 7-8 of the slip opinion.

age, suggests that the Court is not prepared to read a waiver of immunity into every insurance policy purchased by government. Potentially much more important than the holding in *Dunlap* are the Court's rumblings on the scope of section 231 and, specifically, its application to counties.

### B. County Immunity

The law of county immunity has become a peculiar hybrid of state immunity, which clearly is constitutional in origin,<sup>49</sup> and municipal immunity, which the courts now view as a matter of common law.<sup>50</sup> Kentucky's highest Court established in 1967, for example, that counties remain immune from tort liability and that this immunity is constitutional.<sup>51</sup> In *Cullinan v. Jefferson County*,<sup>52</sup> the Court held that "Jefferson County is a political subdivision of the Commonwealth as well, and as such is an arm of the state government. It, too, is clothed with the same sovereign immunity."<sup>53</sup> The Court dutifully noted that the Kentucky General Assembly is free to waive this immunity, but insisted that "this Court should not invade the constitutional authority of the General Assembly by holding that the doctrine of sovereign immunity does not bar a court action against Jefferson County or the Jefferson County Board of Education."<sup>54</sup>

Justice Palmore, in an emotional dissent savaging the principle of local governmental immunity in general, argued that there is no legal or semantic basis for stretching the language of section 231 of the Kentucky Constitution to immunize counties or other local governmental units.<sup>55</sup> Nevertheless, the combined effect of *Cullinan* and *Ginter*<sup>56</sup> was to insulate completely Ken-

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<sup>49</sup> Ky. CONST. § 231.

<sup>50</sup> See *Haney v. City of Lexington*, 386 S.W.2d at 739.

<sup>51</sup> *Cullinan v. Jefferson County*, 418 S.W.2d 407, 409 (Ky. 1967).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 408. *But cf.* *Brown v. Marshall County*, 394, F.2d 498, 499-500 (6th Cir. 1968), a post-*Cullinan* federal decision holding that Kentucky counties are liable in tort for creating a nuisance. There is no way to reconcile *Brown* with *Cullinan* or subsequent decisions by Kentucky courts, but there it stands, a caveat to the complacent and an enticement to the forum shopper.

<sup>54</sup> 418 S.W.2d at 409.

<sup>55</sup> *Id.* at 411 (Palmore, J., dissenting).

<sup>56</sup> See text accompanying notes 26-27, *supra*.

tucky's county governments from tort claims. They became "arms of the state" under the constitution, but not "departments" or "agencies" under the Board of Claims Act. The Kentucky Court of Appeals not unexpectedly has extended this immunity to urban-county governments.<sup>57</sup>

*Cullinan*, however, may not be as firmly established a precedent as it appears. Although the Kentucky Court of Appeals recently concluded that *Gas Service* does not affect the immunity of counties,<sup>58</sup> the higher Court may be awaiting an opportunity to deal immunity yet another blow. One of the arguments asserted by the plaintiff in *Dunlap* was that the immunity created by section 231 should extend only to claims upon the state treasury. Justice Liebson's opinion for the Court recognized Justice Palmore's dissent in *Cullinan* as the source of this attack, but declined, for the present, to reconsider the validity of *Cullinan*. Opting for the argument on waiver, the Court did not take up what Justice Liebson described as "the larger question of whether to restrict 'claims against the Commonwealth' as used in Sec. 231 of the Constitution to claims 'upon the state treasury.'" <sup>59</sup> If this is foreshadowing, it does not bode well for county treasuries. Judicial restriction of section 231 to claims upon the state treasury probably would accompany the judicial abolition of county immunity along the lines of *Gas Service*. More importantly, it would severely weaken the power of the General Assembly to regulate claims against counties.<sup>60</sup>

Even more unsettled than the vitality of *Cullinan* as a shield against tort suits is whether and to what extent a county is subject to contract claims. The logic of *Cullinan* made this a constitutional question requiring a legislative waiver of immunity,<sup>61</sup> just as *Foley Construction* held that the state was immune

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<sup>57</sup> *Hempel v. Lexington-Fayette Urban County Gov't*, 641 S.W.2d 51, 53 (Ky. Ct. App. 1982). See also *Inco, Ltd. v. Lexington-Fayette Urban County Airport Board*, 32 KLS 16, at 3 (Ky. Ct. App. 1985). In *Hempel*, the court quoted section 231 of the Kentucky Constitution and reiterated that "[t]he county is a political subdivision of the state and is clothed with immunity from tort liability." *Id.* Lest one imagine that we have reached unassailable precedent at last, take a look at *Brown v. Marshall County*, 394 F.2d 498 (6th Cir. 1968).

<sup>58</sup> See 32 KLS 16, at 3.

<sup>59</sup> *Id.*

<sup>60</sup> See text accompanying notes 107-09, *infra*.

<sup>61</sup> 418 S.W.2d at 409.

from contract claims in the absence of a statute.<sup>62</sup> The Kentucky Supreme Court eventually adopted this reasoning in *George M. Eady Co. v. Jefferson County*,<sup>63</sup> a decision written, ironically, by Justice Palmore. Still obviously chagrined by the Court's *Cullinan* decision, Judge Palmore nevertheless adhered strictly to the logical command of that decision, concluding with a pointed aside to the legislature:

Observing that as a result of *Foley* the General Assembly in 1966 had responded with legislation authorizing suits against the Commonwealth for breach of contract, the *Cullinan* opinion . . . expressed confidence that the General Assembly would exercise the same discretion with respect to county immunity if and when so prompted by public sentiment. Thus far, however, it does not seem to have felt such a call, and counties continue to enjoy their singular protection from the inroads of justice.<sup>64</sup>

Just when the county treasury appeared to have been locked, however, along came *Illinois Central Gulf Railroad v. Graves County Fiscal Court*.<sup>65</sup> The Kentucky Court of Appeals concluded that a county was not immune from liability on a lawful contract requiring it to reimburse the plaintiff railroad for the erection of a flashing signal light. The court relied upon a line of pre-*Cullinan* decisions upholding the rule that "a county cannot be sued, unless there is a statute which expressly authorizes such an act to be maintained, or the right to do so can be necessarily implied from an express power given, or it may be sued upon an express contract which the county has authority to make."<sup>66</sup>

Unquestionably, the *Graves County* decision reached a just result; there is no reason for a county or any other governmental unit to escape responsibility for its breach of a contract into which it has lawfully entered. Like so many decisions on im-

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<sup>62</sup> 375 S.W.2d at 396.

<sup>63</sup> 551 S.W.2d 571 (Ky. 1977).

<sup>64</sup> *Id.* at 572.

<sup>65</sup> 676 S.W.2d 470 (Ky. Ct. App. 1984).

<sup>66</sup> *Id.* at 472 (quoting *Breathitt County v. Hagins*, 183 Ky. 294 (Ky. 1919)) (emphasis in original).

munity, however, *Graves County* reached a laudable objective only at the expense of precedent standing squarely in the way. Casually circumventing the Kentucky Supreme Court's dictates in *Eady*, the court of appeals explained that *Eady* "neither specifically overruled the long established precedent expressing the traditional rule with respect to the contracts of counties, nor did it appear to consider it."<sup>67</sup> While this may be a fair criticism of *Eady*,<sup>68</sup> it does not support the offhand conclusion that the Supreme Court's holding in that case "was intended to apply only to the specific kind of claim involved there"<sup>69</sup>—procurement of right-of-way titles<sup>70</sup>—"and not to an action such as this to recover the amount agreed by the parties to be paid upon the performance of a contract with a county."<sup>71</sup>

It is hazardous to predict what the current Kentucky Supreme Court would conclude in a case raising the issue of county immunity in contract or tort, although immunity clearly is out of favor once again. For now, *Gas Service* like *Haney* before it, stops short of serving as a license to sue counties.<sup>72</sup> Again, the result is ironic: *Gas Service* will set the boundaries for claims against the Commonwealth itself, but its effect on the liability of a county probably is nil. Again, the only remedy for this anomaly is a comprehensive statute establishing the liability of every governmental tier.

### C. Municipal Liability in Tort

In 1951, an article in the *Kentucky Law Journal*<sup>73</sup> conveniently summarized the status of municipal tort liability in most

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<sup>67</sup> 676 S.W.2d at 472.

<sup>68</sup> Actually, the result in *Eady* was inevitable unless the Court was willing to overrule *Ginter* and *Cullinan*. Only by confessing error and declaring that county immunity was purely a common law contraption, as it had for municipal immunity, could the Court have justified a different result in *Eady*.

<sup>69</sup> 676 S.W.2d at 472.

<sup>70</sup> See 551 S.W.2d at 572.

<sup>71</sup> 676 S.W.2d at 472.

<sup>72</sup> In *Cullinan* the Court firmly rejected an argument that *Haney* abolished immunity for counties as well as municipalities. "The decision in *Haney* was expressly limited to a municipal corporation and the sovereign immunity of the state was again recognized." 418 S.W.2d at 408. *Gas Service* merely reaffirms *Haney*, and the court of appeals already has confined *Gas Service* to the field of municipal liability. See 32 KLS 16, at 3.

<sup>73</sup> Antieau, *supra* note 2, at 133.

American jurisdictions. "Most frequently in determining the existence of municipal tort liability," Professor Antieau explained, "courts distinguish between 'governmental' or 'public' and 'proprietary' or 'private' activities, admitting civic liability for the latter but not for the former."<sup>74</sup> Professor Antieau noted that courts continued to apply these unserviceable distinctions despite criticism from innumerable courts and scholars. Kentucky was safely among the jurisdictions protecting all "governmental" functions from liability in tort.<sup>75</sup>

Seven years later, the Florida Supreme Court took the plunge and abolished municipal immunity along with the "governmental/proprietary" standard.<sup>76</sup> The decision was a landmark, inaugurating a nationwide trend.<sup>77</sup> The decisions abrogating municipal immunity were forceful, even passionate. A zealous concurrence to the decision overturning the common law doctrine in Michigan ranged from *Julius Caesar* to the *Prisoner of Zenda* in composing the elegy for immunity.<sup>78</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> Strangely, municipal liability in contract has never generated controversy. The germinal case on this subject is *Murphy v. City of Louisville*, 72 Ky. (9 Bush) 189 (1872), in which the Court, after discussing at length the difference between public and private corporations, concluded that a municipal corporation is liable on a contract executed in accordance with law:

When one has a valid and binding contract with a corporation through its agents, and has suffered loss by the neglect of the corporation to perform some act or discharge some duty with reference to contract of which the contracting party is not required to take notice, the corporation is liable; or where such a contract has been violated by the corporation the right of the contracting party injured by this non-compliance to recover damages is unquestioned.

*Id.* at 197. See also *Trustees of Bellview v. Hohn*, 82 Ky. 1, 3 (1884).

After the emergence of the "governmental/proprietary" distinction, the act of entering into a contract was construed as a nonexempt proprietary function of government. See, e.g., *Davis v. Comm'rs of Sewerage*, 13 F. Supp. 672, 678 (W.D. Ky. 1936). Numerous cases have tacitly recognized contract actions against municipal or quasi-municipal corporations. See, e.g., *City of Louisville v. Rockwell Manufacturing Co.*, 482 F.2d 159 (6th Cir. 1973); *Louisville & Jefferson County Metropolitan Sewer Dist. v. City of Strathmore Manor*, 211 S.W.2d 127 (Ky. 1948); *Bond Bros. v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 211 S.W.2d 867 (Ky. 1948).

<sup>76</sup> See *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

<sup>77</sup> See *Annot.*, 60 A.L.R.2d 1193 (1958).

<sup>78</sup> *Williams v. City of Detroit*, 111 N.W.2d 1, 10-20 (Mich. 1961) (Black, J., concurring). I should pause here, lest this Article seem to single out Kentucky's courts for harsh treatment, to note that Michigan's judicial abolition of municipal immunity

Kentucky courts followed these events fitfully. In *V.T.C. Lines v. City of Harlan*,<sup>79</sup> Chief Justice Moreman wrote an opinion harshly deploring the continued vitality of municipal immunity in Kentucky.<sup>80</sup> The Court declined to follow the Florida trend only because the rule of immunity had become "so embedded in the law of this state" that the desired change could flow only from legislative action.<sup>81</sup> Still, by 1963, when Justice Montgomery authored the decision in *Foley Construction Co. v. Ward*<sup>82</sup> barring contract claims against the state, immunity was back in favor. The *Foley Construction* decision recounted the historical basis of the rule in Kentucky and praised the sound fiscal policy behind it.<sup>83</sup> The Court's fidelity to tradition, plus the marked shift in tone since *V.T.C. Lines*, indicated that Kentucky's municipalities would continue to enjoy immunity until the General Assembly said otherwise.

The only rule to have survived throughout the years in this area is that prediction is impossible, reliance upon precedent a precarious venture. Seven months after *Foley Construction* came *Haney v. City of Lexington*,<sup>84</sup> in which Justice Moreman, author of *V.T.C. Lines* and lone dissenter in *Foley Construction*, led the majority in the judicial abolition of municipal immunity.<sup>85</sup>

was also the first step into a quagmire. *Ross v. Consumers Power Co.*, 363 N.W.2d 641 (Mich. 1984), is the most recent effort to untie the knot and provides the reader a quick study in Michigan's troubles with the subject. Without exception, governmental immunity has baffled the courts in every jurisdiction.

<sup>79</sup> 313 S.W.2d 573 (Ky. 1957).

<sup>80</sup> *Id.* at 578.

<sup>81</sup> *Id.*

<sup>82</sup> 375 S.W.2d 392. The Court in *Foley* emphasized the historical tradition of the doctrine in Kentucky and praised the sound public policy behind it, quoting *Taylor v. Westerfield*, 26 S.W.2d 557, 557-58 (Ky. 1930):

The reason for exempting a municipality or sovereign from damages for injuries inflicted in the performance of its governmental functions is one of public policy to protect public funds and public property. Taxes are raised for certain specific governmental purposes, and, if they could be diverted to the payment of damages claims, the more important work of government, which every municipality or sovereign must perform, regardless of its other relations, would be seriously impaired, if not totally destroyed. The reason for the exemption is sound and unobjectionable.

375 S.W.2d at 393.

<sup>83</sup> *Id.* at 393-94.

<sup>84</sup> 386 S.W.2d 738 (Ky. 1964).

<sup>85</sup> *Id.* at 742.



The decision permitted a damage suit by a father whose child had drowned in a city swimming pool. Lamely explaining that its deference to the legislature in *V.T.C. Lines* had been incorrect—“[a] great number of the legislators are not lawyers nor are they interested in the details of law”<sup>86</sup>—the Court announced the new rule in an ill-starred phrase: “Perhaps clarity will be afforded by our expression that henceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity.”<sup>87</sup>

Whatever clarity *Haney* afforded was short-lived. A mere four years later, in *City of Louisville v. Louisville Seed Co.*,<sup>88</sup> immunity once again became the rule. Rebuffing a business’s claim for damages suffered because of the city’s failure to install gates in its municipal flood wall system, the Court silently discarded its exception for “legislative/judicial” functions. Instead, it emphasized the “crushing burden” that could fall upon municipalities were the courts to permit tort suits for negligence arising from “a risk which is inherently part of the carrying on of the function of government, such as its failure to provide fire protection, police protection or, as here, flood protection.”<sup>89</sup> Perhaps sensing the enormity of the “exception” it had created so soon after *Haney*, however, the Court tried to limit its holding in a passage that was to sow much confusion:

Where the act affects all members of the general public alike, it would be unreasonable to apply to it the broad principle of tort liability for the reasons previously stated in this opinion. But, when the city, by its dealings or activities, seeks out or separates the individual from the general public and deals with him on an individual basis, as any other person might do, it then should be subjected to the same rules of tort liability as are generally applied between individuals. This, likewise, is true when the negligent act of the city perchance falls upon the isolated citizen as distinguished from the public. When that

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<sup>86</sup> *Id.* at 741.

<sup>87</sup> *Id.* at 742.

<sup>88</sup> 433 S.W.2d 638 (Ky. 1968). A previous decision held the City of Louisville liable for a city policeman’s negligent driving. *City of Louisville v. Chapman*, 413 S.W.2d 74, 77 (Ky. 1967).

<sup>89</sup> 433 S.W.2d at 643.

act does not involve the *ultimate function of government*, the city should be required to respond in damages.<sup>90</sup>

What did all of this mean? The last two quoted sentences are especially puzzling. They suggest that a negligent act falling on the individual citizen should be actionable so long as it does not implicate an "ultimate function" of government. But were not all "non-ultimate" functions open to liability anyway? Or was the Court really just trying to draw a line between torts for which the taxpayers could afford to pay and those for which they could not—what might be called an "expensive tort" test? Applying its new rationale to the facts before it,<sup>91</sup> the Court at least left the impression that cities would remain liable for losses falling on the "isolated citizen," even if the negligence in issue arose from an "ultimate function" such as police and fire protection.<sup>92</sup>

*Louisville Seed* probably furnishes the best example of judicial inadequacy at a legislative task. The Court's legislative instincts were sound, just as its brief dissertation on the hazards of unlimited liability for local governments was entirely convincing. True, "catastrophic liabilities from many suits might dissuade the public officials from engaging in beneficial functions to the general detriment of the public."<sup>93</sup> True, "there may be losses so great in numbers and size that they could consume the entire financial resources of even the largest municipality."<sup>94</sup> True, in many areas of risk "the citizen can more readily insure against the loss on an individual basis than can the community as a whole."<sup>95</sup> The only solution to such a multifaceted problem was—and is—a multifaceted statute specifically immunizing services that cities might prove unwilling or unable to provide in the

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<sup>90</sup> *Id.* (emphasis added).

<sup>91</sup> In immunizing the city, the Court emphasized that the victims' losses were part of a general catastrophe. "The effects of the failure were felt by a broad segment of the public alike. And, as the city did not single out or deal with the appellee herein on an individual basis, nor was its loss isolated from the loss occasioned by the general public, we are of the opinion that judgment shall be reversed." *Id.* at 643-44 (footnote omitted).

<sup>92</sup> *See id.*

<sup>93</sup> *Id.* at 642.

<sup>94</sup> *Id.* at 643.

<sup>95</sup> *Id.*

face of potential liability *and* eliminating the possibility of a "crushing burden" through a limitation on damages.

The Court could not realistically undertake such a task, however. Although it already was legislating up to a point, it could not plausibly create by judicial fiat, for example, a dollar limit on single injuries. It could only wade into the usual process of drawing conceptual lines, the true dimensions of which must be sharpened *ad hoc* through endless litigation. Thus, the Court fashioned its "ultimate function" text with its enigmatic "individual basis" corollary. The result was seventeen years of utter confusion. The only thing predictable about the Court's decisions over this period was the exculpation of the defendant municipality.<sup>96</sup>

In *City of Russellville v. Greer*,<sup>97</sup> for example, the Court nominally invoked its still recent *Louisville Seed* decision even while embarking on an entirely different track.<sup>98</sup> The plaintiff complained that he had suffered injuries in an automobile accident arising from the city's negligent failure to erect a stop sign at a dangerous intersection. The Court could have responded that the city's decision not to erect a particular stop sign was a "legislative" act (per *Haney*) or implicated a policy-making process that is an "ultimate function" of government (per *Louisville Seed*). Under either theory, the Court plausibly could have immunized the city government and resolved the issue before it without storming into a question that was not before it—whether a city is liable for negligent *maintenance* of an existing sign.<sup>99</sup> Instead, the Court declared flatly that "[t]he regulation of traffic is a function of government, initiated and implemented for the protection of the general public. . . . But a municipality *owes no legal duty* to individual members of the public to fully perform that function."<sup>100</sup>

This line of reasoning culminated in *Frankfort Variety, Inc. v. City of Frankfort*,<sup>101</sup> in which the Court decided that a city

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<sup>96</sup> See text accompanying notes 97-139 *infra*.

<sup>97</sup> 440 S.W.2d 269 (Ky. 1968).

<sup>98</sup> See *id.* at 270-71.

<sup>99</sup> See *id.* at 270.

<sup>100</sup> *Id.* at 271 (emphasis added).

<sup>101</sup> 552 S.W.2d 653 (Ky. 1977).

was not liable for the negligence of its fire department in insufficiently extinguishing a fire. The plaintiffs insisted that *Louisville Seed* had granted them a cause of action because, unlike the flood victims who had brought that suit, they were the victims of an inadequate firefighting effort that affected only their property.<sup>102</sup> Confronting the “isolated citizens” that it had conjured in *Louisville Seed*,<sup>103</sup> the Court blithely noted that the city had not dealt with the fire victims on an individual basis—“as a matter of law”—because firefighting is an ultimate function of government.<sup>104</sup> Then, by an act of judicial magic, the Court made municipal immunity disappear even while it ensured that municipalities would rarely, if ever, have to account for their negligence. Nonliability of the city did not really flow from the doctrine of governmental immunity, the Court now was convinced. “Being engaged in a municipal function which affects all members of the general public, the city *owed no duty* to appellants; consequently, there was no negligence on which liability could be predicated.”<sup>105</sup>

With *Frankfort Variety*, the judicial effort to solve the immunity problem degenerated into wordplay: municipalities were liable for their torts, because they were not immune; they were “nonliable,” however, because they had no duty for functions affecting all members of the public. *Frankfort Variety* not only restored municipal immunity—or “nonliability”—to an extent unknown prior to *Haney*, but also replaced the legitimate concerns expressed in *Louisville Seed* with the dubious proposition that a city has no duty to exercise ordinary care for the protection of the general public.<sup>106</sup> After *Frankfort Variety*, it became

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<sup>102</sup> *Id.* at 655-56.

<sup>103</sup> The Court had confronted them before. *City of Lexington v. Yank*, 431 S.W.2d 892, 894 (Ky. 1968), decided three months after *Louisville Seed*, involved allegations of assault against a police officer. The Court found that the officer “substantially separated Yank from the general public and dealt with him on an individual basis just as a private person might have done.” *Id.* In *Fryar v. Stovall*, 504 S.W.2d 701, 703 (Ky. 1973), the Court relied upon *Louisville Seed* in holding a city liable for an accident resulting from negligent direction of traffic by a city policeman. Compare these approaches to police misconduct with the rationale offered by the Court in *Frankfort Variety*, 552 S.W.2d at 655.

<sup>104</sup> *Id.* at 656.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

difficult to imagine any municipal function, with the possible exceptions of driving a car and owning property, that might be actionable in tort.

Certainly the courts themselves could not come up with any. A sorely perplexed Kentucky Court of Appeals applied *Louisville Seed* (and pointedly ignored *Frankfort Variety*) in holding a sewer district not answerable for the death of a child who had drowned in a culvert of allegedly defective design.<sup>107</sup> Obediently reasoning that provision of sewer services is an "ultimate function" of government, the court paused to observe that the higher Court's innovative rule "seems quite close to the earlier distinction based on whether the activity was governmental or proprietary."<sup>108</sup> In *Brown v. City of Louisville*,<sup>109</sup> however, the same court resorted to *Frankfort Variety*, concluding that a city could not be liable for the negligence of its police who burned a tavern by firing tear gas while quieting a disturbance. "[W]hen a city provides police and fire protection . . . the degree of success that should or will be obtained in any particular instance cannot be guaranteed," the court explained, "nor can it be defined in terms of duties."<sup>110</sup>

The Kentucky Supreme Court returned to the fray in *Grogan v. Commonwealth*,<sup>111</sup> in which the plaintiffs had alleged the negligence of city agents in conducting building and fire safety inspections. Declaring that the applicable law had been "carefully considered, clearly enunciated, and firmly settled"<sup>112</sup> in the distinguished triumvirate of *Louisville Seed*, *Greer*, and *Frankfort Variety*, the Court unblushingly observed that "[t]hese precedents do not restore the doctrine of sovereign immunity, nor do they evince a retreat toward it."<sup>113</sup> Nevertheless, the Court experienced little difficulty in applying those precedents to exonerate the city.<sup>114</sup>

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<sup>107</sup> *Richmond v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 572 S.W.2d 601, 604 (Ky. Ct. App. 1977).

<sup>108</sup> *Id.*

<sup>109</sup> 585 S.W.2d 428 (Ky. Ct. App. 1979).

<sup>110</sup> *Id.* at 430 (quoting 552 S.W.2d at 655).

<sup>111</sup> 577 S.W.2d 4 (Ky.), *cert. denied*, 444 U.S. 835 (1979).

<sup>112</sup> *Id.* at 5.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 6.

Not until *Commonwealth Department of Banking and Securities v. Brown*,<sup>115</sup> however, did the Court elevate its clearly enunciated and firmly settled principles to the pinnacle from which they now govern the Commonwealth's Board of Claims. While thus drastically expanding the importance of its municipal liability decisions, the Court delegated to others the menial task of deciphering those oracular messages. "We will not here indulge in the niceties of academic analysis to define whether there is duty upon the Commonwealth, the liability for which is shielded by common law immunity, or whether no duty exists for actions by the Commonwealth in its unique role," the Court announced. "We leave such niceties to the academicians."<sup>116</sup> Having dispensed with the niceties, the Court simply reiterated its "pragmatic" conclusion that the Commonwealth, like its municipalities, would have no common law liability "for the malfeasances of its agents in the performance of obligations running to the public as a whole."<sup>117</sup>

Such was the pragmatic state of the law when the Kentucky Supreme Court once more put its hand to the plow in *Gas Service*.

## II. GAS SERVICE AND THE EXCEPTION FOR QUASI-LEGISLATIVE AND QUASI-JUDICIAL ACTS

### A. *The Problem With Gas Service*

In *Gas Service Co. v. City of London*,<sup>118</sup> the Kentucky Supreme Court finally and frankly conceded that its opinions since *Haney*<sup>119</sup> had compromised the holding of that decision "with new language raising up the municipal immunity concept like Phoenix from the ashes, language which is at least as difficult to understand and apply as the old, discarded proprietary/governmental dichotomy."<sup>120</sup> The Court also took the important step of abandoning the discreditable notion of *Frankfort Variety*,

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<sup>115</sup> 605 S.W.2d 497 (Ky. 1980).

<sup>116</sup> *Id.* at 499-500.

<sup>117</sup> *Id.* at 500.

<sup>118</sup> 687 S.W.2d 144 (Ky. 1985).

<sup>119</sup> 386 S.W.2d 738 (Ky. 1964).

<sup>120</sup> 687 S.W.2d at 147.

*Inc. v. City of Frankfort*<sup>121</sup> that municipalities cannot be negligent because they have no duty. “[O]n occasion we excuse the nonperformance of this duty,” the Court recognized, “but no purpose is served by denying its existence.”<sup>122</sup>

The Court followed this laudable and long-awaited house-cleaning, however, with a new (or at least renewed) experiment in linedrawing. As if to restore the heady optimism of *Haney* in an unadulterated form, the Court preserved the exception for legislative, quasi-legislative, judicial, and quasi-judicial functions that was adopted in *Haney* and subsequently ignored by what can only loosely be described as *Haney*'s progeny.<sup>123</sup> In itself, the exception is unobjectionable. In fact, for reasons discussed later in this section, an exception for any type of legislative or judicial activity is not only historically and theoretically sound, but also is infinitely superior to its nearest counterpart, the “discretionary act” exception that has plagued the federal courts and those of several states for decades.

The potential for a replay of the post-*Haney* debacle lies not in the fortunately conceived exception preserved by the Court, but in the examples selected by the *Gas Service* Court to elaborate that exception. The Court pointed to *Grogan v. Commonwealth*,<sup>124</sup> the decision involving negligent enforcement of fire safety regulations, and none other than *Commonwealth Department of Banking and Securities v. Brown*,<sup>125</sup> which protected the state from a suit alleging a negligent inspection of building and loan associations. According to the Court, these cases are practical illustrations of “regulatory functions which have elements appearing quasi-judicial and quasi-legislative in nature.”<sup>126</sup> Any hope that the legislative/judicial concept would remain a narrow exception to a broad new rule of liability quickly evaporated with these words.

First, the “regulatory function” that formed the center of controversy in *Grogan* and *Banking and Securities* has no quasi-

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<sup>121</sup> 552 S.W.2d 653 (Ky. 1977).

<sup>122</sup> 687 S.W.2d at 148.

<sup>123</sup> *Id.* at 149.

<sup>124</sup> 577 S.W.2d 4 (Ky. 1979).

<sup>125</sup> 605 S.W.2d 497 (Ky. 1980).

<sup>126</sup> 687 S.W.2d at 149.

judicial or quasi-legislative aspects, or at least none ascertainable from the facts recited in those decisions. Those facts admittedly are slender, but it does not appear that the plaintiffs in those cases were alleging any failure to make policy or promulgate regulations, or even any misinterpretation of such policies or regulations. Rather, the plaintiffs alleged a negligent failure to enforce and follow regulations already in existence and, as all the facts given in those decisions show, quite clear in their directives. In *Grogan*, the city allegedly "failed to enforce laws and regulations, including its own, establishing safety standards for construction and use of buildings. . . ." <sup>127</sup> In *Banking and Securities*, the Board of Claims, two intermediate courts, and the Kentucky Supreme Court itself "found the examiners of the Department of Banking and Securities were derelict in not ascertaining and reporting the true condition of the records of the Associations." <sup>128</sup> In both cases, the conduct attacked was nothing more than the bungling of an established duty; nothing remotely resembling a legislative or judicial act occurred.

The Court's choice of language in *Gas Service* immediately immunizes negligent governmental inspections even though such misconduct exhibits no features plausibly construed as judicial or legislative. Establishment of safety rules undoubtedly is quasi-legislative; <sup>129</sup> application and interpretation of such rules by an administrative officer at a hearing would qualify, under certain circumstances, as quasi-judicial. <sup>130</sup> Even a failure to inspect might earn the quasi-legislative distinction if it arose from a governmental decision to limit the scope of inspections because of limitations on personnel or other resources. This is quite different, however, from the Court's implicit suggestion that an ordinary inspection undertaken and botched by an official is an immune act simply because inspections are "regulatory." <sup>131</sup>

Describing the negligent inspections of *Grogan* and *Banking and Securities* as quasi-legislative or quasi-judicial promises to spread much disorder amid future efforts to understand the

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<sup>127</sup> 577 S.W.2d at 5.

<sup>128</sup> 605 S.W.2d at 498.

<sup>129</sup> See text accompanying notes 88-98 *infra*.

<sup>130</sup> See text accompanying notes 99-102 *infra*.

<sup>131</sup> See 687 S.W.2d at 149-50.



meaning of those terms. If the courts are going to immunize a negligent building inspector, why not exempt a negligent truck driver as well? Both inflict harm through errors in judgment. Are all erroneous judgments by governmental officials "quasi-judicial," and, if so, what is likely to remain of municipal liability? The only answer derivable from *Gas Service* is that it is the "regulatory function," and not the exercise of judgment, that confers immunity. Given the Court's gloss on the term "regulatory function," however, this answer only spawns more troublesome questions.

*Grogan and Banking and Securities*, the Court explained in *Gas Service*, were cases in which the government assumed a regulatory function "which is different from any performed by private persons or in private industry, and where, if it were held liable for failing to perform that function, it would be a new kind of tort liability."<sup>132</sup> The potential of this single phrase for wrecking the Court's good intentions in *Gas Service* can hardly be overestimated. This is not a description of legislative, judicial, quasi-legislative or quasi-judicial acts. This is our old friend *City of Louisville v. Louisville Seed Co.*;<sup>133</sup> it is a resurrection of the "ultimate governmental function" test, which, having been freshly interred by the Court in the early pages of *Gas Service*, by the last pages is seen wiping the dirt from its hands as it walks from the grave. The Court's phrase arguably immunizes from tort

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<sup>132</sup> *Id.* at 149.

<sup>133</sup> 433 S.W.2d 638 (Ky. 1968). Consider the Court's remarks in fashioning the "ultimate function" test of *Louisville Seed*:

Public agencies engage in activities of a scope and variety far beyond that of any private business. These activities affect a much larger segment of the public than do the activities of private business. Private business carries on no activity even remotely comparable to a city street system which may cover many thousands of miles and is used by the entire public. With rare exceptions, private business carries on no function as hazardous or exacting in detail as the work of a city fire or police department. These activities are so inherently dangerous that private business would hesitate to undertake them. In addition, our cities and other sovereign governments must care for mental patients, keep jails, juvenile, and other detention services, control the spread of communicable disease, maintain sewers and flood facilities, and more recently, provide for control of riots.

*Id.* at 641 (footnote omitted). No capable advocate will ignore these words in arguing that *Gas Service* preserves immunity for all of these "non-private" services, which, taken together and extended by analogy, embrace the majority of municipal functions.

liability every governmental function that has no counterpart in private industry, an all too familiar "exception" that has been generating uncertainty since the days of the "governmental/proprietary" distinction.<sup>134</sup>

Surely this was not the Court's intention. Still, words are the lawyer's tools, and the tools for dismantling the new rule of municipal liability are conveniently racked in the final paragraphs of *Gas Service*.<sup>135</sup> One need not be much of a gambler to predict that city attorneys and (thanks to the aberrational *Banking and Securities* decision) the Kentucky Attorney General himself will soon vigorously insist that the conduct challenged by the injured citizen is immune because it arises from an activity that is "regulatory," which is to say that it is "different from any performed by private persons or private industry."<sup>136</sup> It is, in short, an ultimate governmental function.<sup>137</sup>

This self-contradictory finale of *Gas Service* is especially unfortunate since the Court's retention of the exception first announced in *Haney* otherwise offers Kentucky's courts the unique opportunity to fashion what is probably the only defensible and practical judicial exception to a broad rule of governmental liability. Because Kentucky's courts never developed the exception after *Haney*, the Court was unable to find in Kentucky law any useful exploration of those terms. Instead of resorting

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<sup>134</sup> The "governmental/proprietary" distinction was, in fact, little more than a distinction between "public" and "private" characteristics of government. Consider the following language from *Lampton & Burks v. Wood*, 250 S.W. 980 (Ky. 1923):

A municipality, in the exercise of certain of its corporate powers, does not perform governmental functions because such powers are exercised by it for the benefit of the public generally, and in their exercise it represents and is an arm of the state. For instance, in matters pertaining to the public health and to the maintenance of charitable, penal, reformatory, and similar public institutions it acts in its public capacity because the public generally is vitally interested in such activities. But when the municipality exercises only such powers and privileges as are peculiarly for its own benefit or the benefit of its own citizens or those of this immediate locality, it is acting in its *private or strictly corporate* capacity, as distinguished from its capacity as an arm of, and part of, the state.

*Id.* at 981 (emphasis added).

<sup>135</sup> See 687 S.W.2d at 152-53 (Stephenson, J., dissenting).

<sup>136</sup> See *id.*

<sup>137</sup> For a discussion of the ultimate governmental function test, see the text accompanying notes 46-50 *supra*.

to the inapplicable situations of *Grogan* and *Banking and Securities*, however, the Court could have looked to the experience of the Wisconsin Supreme Court in fleshing out the judicial/legislative exception. After all, the *Haney* Court drew the exception from a Wisconsin decision, *Holytze v. City of Milwaukee*.<sup>138</sup> Unlike Kentucky, Wisconsin never discarded the exception.<sup>139</sup>

If the Kentucky General Assembly chooses to ignore the problem of municipal immunity for another twenty years, Kentucky's courts will have to develop a workable interpretation of the legislative/judicial exception. For this reason alone, lawyers and judges facing issues of local governmental immunity can profit from a study of the Wisconsin experience. Just as importantly, Wisconsin's helpful but flawed experiment with the exception offers a convenient starting point for examining a subject that the General Assembly must confront if it decides to act—whether to include a general exception for the “discretionary acts” of governmental officials.

## *B. The Wisconsin Experience With Legislative/Judicial Immunity*

### 1. *Three Cases*

In *Coffey v. City of Milwaukee*,<sup>140</sup> the plaintiff complained that a city fire inspector negligently overlooked defects in water pipes serving an office building in which the plaintiff was a tenant. The building burned when the fire department was unable to summon an adequate water supply from the defective pipes. The city replied—what else?—that the functions of a building inspector are quasi-judicial and thus immune.<sup>141</sup>

In rejecting this contention, the court relied upon an earlier decision that held that the removal of a police officer from duty involved a quasi-judicial action.<sup>142</sup> In the earlier case, the court had listed three characteristics of a quasi-judicial act: (1) the exercise of discretion by a public officer to file or not file

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<sup>138</sup> 115 N.W.2d 618 (Wis. 1962).

<sup>139</sup> See text accompanying notes 140-164 *infra*.

<sup>140</sup> 247 N.W.2d 132 (Wis. 1976).

<sup>141</sup> *Id.* at 136.

<sup>142</sup> See *Solarno v. Racine*, 214 N.W.2d 446, 449-50 (Wis. 1974).

charges; (2) the requirement of a public hearing before a specially designated board; and (3) the imposition by that board of an appropriate penalty based upon the record of that hearing.<sup>143</sup> "When the procedures involved in a proceeding approach the judicial requirements of notice and hearing, the exercise of discretion, and a decision on the record," the *Coffey* court concluded, "then the action can be said to be quasi-judicial."<sup>144</sup>

Applying this reasoning to the function of a building inspector, the court inevitably found that a negligent inspection could not qualify for the exemption.

The duty to inspect is statutorily imposed. There is no discretion to inspect or not inspect. Violations exist or do not exist according to the dictates of the regulations governing the inspection and not according to the discretion of the inspector. As to the actual conducting of the inspection, no essentially judicial procedures are accorded to the building owner. Only when it is determined that violations do exist, might quasi-judicial actions take place involving enforcement procedures. But the actual inspection as is involved here does not involve a quasi-judicial function.<sup>145</sup>

*Lifer v. Raymond*<sup>146</sup> also addressed the issue of quasi-judicial immunity. A state road test examiner approved the issuance of a driver's license to an especially obese young woman despite a statute requiring denial of driving privileges to any persons afflicted with a disability "such as to prevent him from exercising reasonable control over a motor vehicle."<sup>147</sup> The young woman eventually wrecked her car, injuring a passenger who claimed that the driver's obesity had caused her to lose control of the vehicle. The passenger sued the state on the theory that the road test examiner had negligently performed a strictly "ministerial" function and thus deserved no quasi-judicial immunity.<sup>148</sup>

The Wisconsin Supreme Court in this instance closed the door. Posing the issue as "how fat is too fat?,"<sup>149</sup> the court

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<sup>143</sup> *Id.* at 448.

<sup>144</sup> 247 N.W.2d at 136.

<sup>145</sup> *Id.* at 136-37.

<sup>146</sup> 259 N.W.2d 537 (Wis. 1977).

<sup>147</sup> WIS. STAT. ANN. § 343.06(7) (West 1971).

<sup>148</sup> 259 N.W.2d at 539.

<sup>149</sup> *Id.*

noted that no rule or statute established any maximum weight for drivers.<sup>150</sup> Thus, “[a]ny determination by a road test examiner that by reason of excess poundage a particular applicant was unable to exercise reasonable control over a motor vehicle is entirely an exercise of judgment on his part.”<sup>151</sup> The court also pointed out that *state* officials in Wisconsin are immune from liability arising from their “discretionary acts,” whereas municipal officers, by statute, are exempt when acting in their legislative, judicial, quasi-legislative or quasi-judicial capacities. Since the state examiner’s decision to issue the license was clearly discretionary, he was immune. The court noted, however, that the distinction between state officers and municipal officers was not controlling.<sup>152</sup> “As applied, the terms ‘quasi-judicial or quasi-legislative’ and ‘discretionary’ are synonymous and the two tests result in the same findings.”<sup>153</sup>

Finally, in a factual progression from the bizarre to the ghoulish, the Wisconsin Supreme Court confronted in *Scarpaci v. Milwaukee County*<sup>154</sup> a claim to quasi-judicial immunity by a county medical examiner alleged to have ordered an unauthorized autopsy and to have performed the autopsy negligently. The court relied upon *Coffey* and *Lifer* in holding that the medical examiner’s decision whether to proceed with an autopsy was based upon his or her “subjective evaluation of the facts and the law.”<sup>155</sup> Consequently, it was quasi-judicial in nature.

Negligent performance of the autopsy, however, the court held to be actionable. Although conducting an autopsy undoubtedly involves acts of discretion, the court reasoned that the discretion “is medical, not governmental.”<sup>156</sup> It then resorted to a comment in the *Restatement (Second) of Torts*<sup>157</sup> to explain the difference between governmental and nongovernmental discretion: “It is only when the conduct involves the determination

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<sup>150</sup> *Id.* at 541.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 541-42.

<sup>153</sup> *Id.* at 542.

<sup>154</sup> 292 N.W.2d 816 (Wis. 1980).

<sup>155</sup> *Id.* at 826.

<sup>156</sup> *Id.* at 827.

<sup>157</sup> *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 895B comment d, 895C comment g, 895D comment d (1977)).

of fundamental governmental policy and is essential to the realization of that policy, and when it requires 'the exercise of basic policy evaluation, judgment and expertise' that the immunity should have application."<sup>158</sup> Since various judgments made during an autopsy certainly involve no "determination of fundamental governmental policy," the plaintiffs' claim of negligent performance was not barred.<sup>159</sup>

## 2. *A Criticism*

Superficially, *Coffey*, *Lifer*, and *Scarpaci* make sense and reach just results. On a closer inspection, however, they do not offer reliable guidance to the proper scope of the quasi-legislative/judicial exception. The problem begins in *Lifer*, when the court immunizes a road test examiner for his discretionary issuance of a license. Concededly, his action was discretionary; but what became of the court's definition in *Coffey* of a quasi-judicial proceeding as one "approach[ing] the traditional judicial requirements of notice and hearing, the exercise of discretion, and a decision on the record. . . ."?<sup>160</sup> The road test examiner's exercise of judgment involved the application of law to fact, but it otherwise carried none of the ordinary attributes of a judicial proceeding. A truck driver's decision to reduce his speed from fifty to forty miles per hour in response to a "slow curve" sign also involves an application of law to fact, but few would suggest that his skidding into another vehicle is an exempt quasi-judicial act.

Similarly, the medical examiner's decision to order an autopsy in *Scarpaci* was discretionary, but not identifiably quasi-judicial under the definition of *Coffey*. The defendant's decision to order the autopsy was not the result of an inquest.<sup>161</sup> It was just another local official making a decision in his office, home, or car. Additionally, the court's explanation of the distinction between governmental and nongovernmental discretion was not very intelligible when held to the light of its prior decisions.<sup>162</sup>

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<sup>158</sup> *Id.* at 827.

<sup>159</sup> *Id.* at 827-28.

<sup>160</sup> 247 N.W.2d at 136.

<sup>161</sup> 292 N.W.2d at 828.

<sup>162</sup> See text accompanying notes 77-83 *supra*.

Again, a medical examiner's discretionary acts during the performance of an autopsy obviously implicate no "determination of fundamental governmental policy"<sup>163</sup> but neither does a road test examiner's evaluation of an applicant's corpulence. Such a determination is, in fact, almost (quasi?) "medical."

The Wisconsin Supreme Court's biggest misstep lay in equating the quasi-legislative/judicial exception with the "discretionary acts" exception.<sup>164</sup> They are not, or at least should not be, synonymous. They arise from different motives and describe different types of activity. The former can be defined with some precision; the latter is so broad that it is practically useless until narrowed by "interpretation." Since the Kentucky judiciary has preserved the more precise exception, it should adopt and rigorously maintain a definition of the exception that both recognizes the limited purpose behind the exception and furnishes reliable guidance to those who must apply it.

### *C. A Suggestion for Defining the Quasi-Legislative and Quasi-Judicial Acts Exception*

#### *1. Quasi-Legislative Acts*

A quasi-legislative act should be analogous in some way to the activities of a legislature: the *making* of law or governmental policy. Legislatures now entrust vast lawmaking responsibilities to administrative officers and agencies at every level of government, and "when the officer or agency issues regulations or other general provisions having an effect similar to that of a statute or ordinance, this may be called a quasi-legislative function."<sup>165</sup> The exemption of such acts from judicial scrutiny in a tort suit arises from a concern for separation of powers.<sup>166</sup> It is

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<sup>163</sup> 292 N.W.2d at 827.

<sup>164</sup> See *id.* at 825-26.

<sup>165</sup> RESTATEMENT (SECOND) OF TORTS § 895B comment c (1979). The drafters of the Restatement would immunize at both the state and local level "acts and omissions constituting (a) the exercise of a judicial or legislative function, or (b) the exercise of an administrative function involving the determination of fundamental governmental policy." *Id.* §§ 895B, 895C.

<sup>166</sup>

[I]f the state legislature passes a statute that causes injury to a person, he cannot for that reason sue the State in tort and recover damages. The

thus a legitimate exercise of judicial restraint motivated by a deference to, rather than encroachment on, coordinate branches of government. Nevertheless, the exception need not, and should not, extend beyond the essential governmental act of making law or policy. Legislative and quasi-legislative acts merit judicial deference and insulation from damage suits, but, the law having been passed or the policy made, courts should hold the government and its agents to the same standard of compliance as that governing the private citizen.<sup>167</sup>

Admittedly, confining the exemption to policymaking will not automatically resolve at its threshold every dispute over immunity. In some cases, factual development will be necessary to know whether the claimant's injury arose from the making of a policy or faulty implementation of the policy. A useful discussion of this process occurs in *Stevenson v. State Depart-*

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courts respect the action of a coordinate branch of government. If the statute should happen to be unconstitutional that can be determined in other ways than a tort action against the state.

*Id.* § 895B comment c, at 402. McQuillan extends this rationale to the municipal level, explaining:

[T]o accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the governmental body has seen fit to entrust to experts.

18 E. MCQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.04(a), at 158 (3d ed. 1984) (footnote omitted). Note, however, that McQuillan discusses the immunization of government "planning," which is a broader term than "policymaking." McQuillan relies upon *Weiss v. Fote*, 167 N.E.2d 63 (N.Y. 1960), for the above quotation. The *Weiss* court immunized as a "planning function" a city's alleged negligence in providing too brief a clearance interval for a traffic light at a busy intersection. Compare this result with *Stevenson v. State Dep't of Transp.*, 619 P.2d 247 (Or. 1980), discussed in the text accompanying notes 91-96 *infra*.

For judicial discussions of separation of powers as the basis for exempting "discretionary" acts, see *Owen v. City of Independence*, 445 U.S. 622, 648-49, *reh'g denied*, 446 U.S. 993 (1980); *Johnson v. State*, 447 P.2d 352, 362 n.8 (Cal. 1968) (en banc).

<sup>167</sup> The most dogged advocate of confining immunity to policymaking has been Professor Kenneth Culp Davis. Davis has long criticized the "discretionary functions" exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1976), as a bottomless pit and suggests that Congress amend the statute to protect the government from liability on claims "based upon a determination of law or governmental policy by a federal agency or an employee of government." 5 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 27:45, at 247 (2d ed. 1984). See also his analysis of the reasons underlying immunization of policymaking functions, as distinguished from discretionary acts in general. *Id.* § 27:11.



*ment of Transportation*,<sup>168</sup> an Oregon Supreme Court decision. The plaintiff alleged that the state had negligently designed a traffic light system located at a busy highway intersection. The intermediate appellate court reversed a judgment for the plaintiff, relying upon earlier decisions by the Oregon Supreme Court holding that the state was not liable for defects in highways resulting from "planning and design," but only for defects in "maintenance."<sup>169</sup> Disowning this "mechanical or semantic approach," the Oregon Supreme Court explained that the inquiry should focus not on whether the alleged mistake occurred during the "planning and design" stage, but whether it involved the exercise of "governmental discretion or policy judgment."<sup>170</sup>

To exemplify its new approach, the court discussed cases in which the negligence alleged was the failure of highway authorities to install a cattle guard at a particular entrance to a controlled-access freeway<sup>171</sup> or a failure to design and construct a portion of highway so as to prevent vehicles from crossing into an oncoming lane.<sup>172</sup>

If the responsible officials had determined, for example, that their budgets would not permit them to provide all desirable safety features and that the public would be better served by facilities other than cattle guards or median barriers, that would constitute the immune exercise of governmental discretion. If, on the other hand, they had decided to install cattle guards or median barriers wherever certain kinds of conditions existed and the failure to install them in a particular location was the result of a failure to determine that those conditions did in fact exist at that location, no exercise of judgment about governmental policy would be involved.<sup>173</sup>

Turning to the case before it, the court held that the state had not met its burden of showing that the defect in its traffic control

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<sup>168</sup> 619 P.2d 247 (Or. 1980).

<sup>169</sup> *Stevenson v. State of Oregon*, 601 P.2d 854, 857-58 (Or. 1979), *rev'd*, 619 P.2d 247 (Or. 1980).

<sup>170</sup> 619 P.2d at 249, 251. The court was interpreting the "discretionary function" exception of the Oregon Tort Claims Act, OR. REV. STAT. § 30.265(3) (1981), modeled on the comparable provision of the Federal Tort Claims Act, 28 U.S.C. § 2680(a).

<sup>171</sup> See *State v. Webster*, 504 P.2d 1316 (Nev. 1972).

<sup>172</sup> See *Lewis v. State*, 256 N.W.2d 181 (Iowa 1977).

<sup>173</sup> 619 P.2d at 254.

system resulted from a determination of governmental policy instead of a mistake in engineering judgment.<sup>174</sup>

When applied to the circumstances in *Grogan* and *Banking and Securities*, this construction of the "quasi-legislative" exception would result in the denial of immunity. The government failed in those cases to show that the derelict inspections challenged by the plaintiffs arose from a considered allocation of scarce resources or any other decision on governmental policy.<sup>175</sup> The responsible agency had already expressed its policy by imposing a duty to inspect, and the responsible agents had failed to perform that duty. More ambiguous circumstances are presented by cases such as *Louisville Seed* and *Greer*.<sup>176</sup> Was the municipality's failure to install flood gates or to erect a stop sign the result of a decision on governmental policy or merely of footdragging or poor engineering? The facts given in those decisions do not answer the question, because the court never asked it.

## 2. *Quasi-Judicial Acts*

A quasi-judicial act is more easily identifiable than a quasi-legislative act. In determining whether a certain action is quasi-legislative, the court must discriminate between types of discretionary acts that may result from the same process. A city council meeting may produce an immune decision to restrict the number of automatic traffic signals because of scarce resources; the same meeting may result in a negligent and nonexempt failure to order the erection of a signal clearly required by existing city policy. With quasi-judicial acts, by contrast, the trappings of the process itself are the key to the exception.<sup>177</sup>

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The State has argued that there is immunity in this case because the arrangement of the traffic lights and the design of their shielding were appropriate matters for engineering judgment. It may be conceded that this is so, but there is nothing in the record to suggest that the responsible employees of the highway division made any policy decision of the kind we have described as the exercise of governmental discretion.

*Id.*

<sup>175</sup> See text accompanying notes 66-69 *supra*.

<sup>176</sup> See text accompanying notes 46-52 *supra*.

<sup>177</sup> See text accompanying notes 85-88 *supra*.

An exemption for quasi-judicial acts is but an extension of the long-established rule of judicial immunity.<sup>178</sup> In part, the exemption stems from a societal desire that all participants in the judicial process—judges, prosecutors, witnesses—pursue their necessary duties vigorously without fear of retribution.<sup>179</sup> This alone, however, is not enough to justify absolute immunity. Society desires that all of its officials pursue their duties conscientiously, but it cannot always afford to subsidize vigor by ignoring irresponsibility.

Absolute immunity is justified, however, because the judicial process contains certain checks on an individual official's discretion. The formalities of legal process make the occurrence of arbitrary and egregious errors less likely, and the conferral of immunity thereby becomes more affordable. Relying upon this rationale, the United States Supreme Court extended judicial immunity from suit under the civil rights laws to federal administrative hearing examiners:

The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error in appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertion will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process, there is a less pressing need for individual suits to correct constitutional error.<sup>180</sup>

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<sup>178</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976) ("The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges.").

<sup>179</sup> For a comprehensive examination of the subject, see *Imbler, id.*, in which the United States Supreme Court extended absolute immunity to prosecutors. See also *Pierson v. Ray*, 386 U.S. 547 (1967) (immunizing state judges sued on constitutional claims pursuant to 42 U.S.C. § 1983 (1981)).

<sup>180</sup> *Butz v. Economou*, 438 U.S. 478, 512 (1978). The Court found that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Id.* at 512-13.

This is also the logic that guided the Wisconsin Supreme Court in *Coffey* but escaped it in *Lifer* and *Scarpaci*.<sup>181</sup> Kentucky courts should not make the same mistake. The courts should limit the exception for quasi-judicial acts to those activities that are truly analogous to a judicial proceeding—those exhibiting the fundamental attributes of notice, a hearing, and a decision based upon the record.<sup>182</sup>

#### D. *After Gas Service*

If experience is our guide, Kentucky's courts may well have to proceed without legislative assistance<sup>183</sup> and develop the exception for quasi-legislative and quasi-judicial acts established by *Haney* and preserved by *Gas Service*. If so, the courts should limit the exception to serve two established judicial principles: reluctance to intrude upon the formation of governmental policy<sup>184</sup> and respect for the self-corrective attributes of the judicial process.<sup>185</sup> Should the courts proceed down the path perhaps inadvertently mapped by *Gas Service*, immunizing every "regulatory

<sup>181</sup> See text accompanying notes 77-86 *supra*.

<sup>182</sup> *Modlin v. City of Miami Beach*, 201 So. 2d 70 (Fla. 1967), is instructive on this point. The Florida Supreme Court had preserved an exception for quasi-judicial and quasi-legislative functions in its groundbreaking decision of *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133 (Fla. 1957). See text accompanying note 40 *supra*. Ten years later, the court considered in *Modlin* a claim to quasi-judicial immunity by a city whose building inspector had negligently inspected an overhead mezzanine that later collapsed. In defining "quasi-judicial," the court drew from standards governing the availability of common law certiorari for review of administrative "quasi-judicial" acts.

If the affected party is entitled by law to the essentially judicial procedures of notice and hearing, and to have the action taken based upon the showing made at the hearing, the activity is judicial in nature. If such activity occurs other than in a court of law, we refer to it as quasi-judicial.

201 So. 2d at 74.

It is interesting that the court denied the inspector quasi-judicial immunity upon these grounds, but immunized his negligence on other familiar grounds. "At the time he allegedly negligently performed the inspection," the Florida Supreme Court concluded, "he owed no duty to Mrs. Modlin in any way different from that owed to any other member of the public." *Id.* at 76. The Kentucky Supreme Court cited *Modlin* in *Grogan v. Commonwealth*, 577 S.W.2d 4, 5-6 (Ky.), *cert. denied*, 444 U.S. 835 (1979), its decision immunizing the city fire inspector.

<sup>183</sup> See *Gas Service*, 687 S.W.2d at 151-52, where the Court expressed the hope that the Kentucky General Assembly would resolve the issue.

<sup>184</sup> See note 89 *supra*.

<sup>185</sup> See text accompanying note 100 *supra*.

function" that is "different from any performed by private persons or in private industry."<sup>186</sup> they inevitably will subvert the Kentucky Supreme Court's intention to restore municipal liability as the rule rather than the exception.<sup>187</sup> Just as probable, they will emerge from this theoretical thicket twenty years from now oppressed by the need to restore *Haney* yet again.

The courts can safeguard their jurisprudential interests, but only the Kentucky General Assembly can address satisfactorily the fiscal concerns persuasively stated in *Louisville Seed*. Short of gradually restoring virtually absolute immunity as they did in the post-*Haney* era, the courts cannot protect local governments from the potentially crushing burden of unlimited tort judgments. Whatever course the courts may chart in the wake of *Gas Service*, the need for a comprehensive legislative solution will remain.

### III. TOWARD A COMPREHENSIVE GOVERNMENTAL LIABILITY STATUTE

#### A. *A Constitutional Question*

Any legislation limiting recoverable damages in Kentucky inevitably encounters sections fourteen and fifty-four of the state constitution. Section fourteen guarantees that "every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law. . . ."<sup>188</sup> Section fifty-four provides that the Kentucky 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."<sup>189</sup> These clauses preclude the General Assembly from abolishing or diminishing any such right of action that existed when the present constitution was adopted in 1891.<sup>190</sup>

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<sup>186</sup> 687 S.W.2d at 149.

<sup>187</sup> See *id.* at 157.

<sup>188</sup> KY. CONST. § 14.

<sup>189</sup> *Id.* at § 54.

<sup>190</sup> *Carney v. Moody*, 646 S.W.2d 40, 40 (Ky. 1982). Section 241 of the Kentucky Constitution also prohibits the legislature from denying a right of action for wrongful death. See *Britton's Adm'r. v. Samuels*, 136 S.W. 143 (Ky. 1911).

Section 231 is the ready answer to these obstacles at the state and county levels.<sup>191</sup> The Board of Claims Act already has survived a constitutional challenge under section fourteen. In *Rooks v. University of Louisville*,<sup>192</sup> the court explained that other constitutional sections do not "impinge on the right of the Commonwealth by its General Assembly under Section 231 to direct in what manner and in what court suit may be brought against it."<sup>193</sup> The same reasoning would counter any objection under section fifty-four.<sup>194</sup> Since counties and their boards of education also derive their immunity as political subdivisions of the state from section 231, at least pending any judicial tampering with the holding in *Cullinan v. Jefferson County*,<sup>195</sup> there is no basis for objection to a statute regulating claims against them.

The constitutional situation of municipal corporations is more problematical. There is precedent for the proposition that "since the right to sue a municipal corporation for tortious acts may be conferred or withheld at the pleasure of the Legislature, the latter may attach such conditions to the right to recover as it deems proper or expedient."<sup>196</sup> The Kentucky judiciary's habit of revamping municipal liability law every few years, however, rests uneasily beside its practice of viewing state and county liability as legislative preserves under section 231. If the Kentucky General Assembly alone can waive constitutional immunity, then judicial tinkering with municipal immunity suggests that section 231 does not extend to the municipal level. If section 231 does not apply to municipalities, the question arises whether the General Assembly has the power, in the face of sections

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<sup>191</sup> See notes 12-14 *supra* and accompanying text for a discussion of § 231.

<sup>192</sup> 574 S.W.2d 923 (Ky. Ct. App., 1978).

<sup>193</sup> *Id.* at 925 (quoting *Wood v. Board of Educ.*, 412 S.W.2d 877, 879 (Ky. 1967)). As the court further explained, "it is a basic rule of construction that the Constitution be interpreted whenever possible so as to harmonize various provisions. The present case offers just such a construction opportunity, and so it would seem that sovereign immunity does not contradict other parts of the state Constitution." *Id.*

<sup>194</sup> See *Commonwealth v. Daniel*, 98 S.W.2d 897 (Ky. 1936) (upholding against a challenge under § 54 a statute limiting damages recoverable from the state's Department of Highways).

<sup>195</sup> 418 S.W.2d 407 (Ky. 1967). See notes 53-60 *supra* and accompanying text.

<sup>196</sup> *Galloway v. City of Winchester*, 184 S.W.2d 890, 891 (Ky. 1944).

fourteen and fifty-four, to restrict by statute damage suits against municipal corporations.

Justice Palmore pointed out in his dissent to *Cullinan* that the plain wording of section 231 does not support its extension to suits against counties and other local governments "in which no recovery would or could constitute a claim upon the state treasury."<sup>197</sup> He could have observed that the plain language of section 231 does not require prohibition of suits at any level of government. Section 231 is a provision of enablement; the General Assembly "may"—that is, it is empowered to—direct the manner of bringing suit against the Commonwealth. As Justice Palmore's logic suggests, the provision was designed to give the legislature clear authority for regulating demands upon public funds.

Accepting this as the purpose of section 231, it makes little sense to discriminate among state, county, and municipal treasuries. The state has delegated the taxing power to subordinate political organizations, enabling them to offer services that the state might otherwise have to fund.<sup>198</sup> Thus, the tax pool—the "common wealth"—derives from a single source, and subjecting

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<sup>197</sup> *Id.* at 411 (Palmore, J., dissenting).

<sup>198</sup> Section 181 of the Kentucky Constitution empowers the Kentucky General Assembly to confer the taxing power on political subdivisions, and the General Assembly has exercised this power in KRS §§ 92.280, 92.281 (cities), 67.083 (counties), and 67A.060 (urban-county governments). See KRS §§ 92.80, 92.281, 67.083, 67A.60 (Bobbs-Merrill 1980). The Court explained this essential unity of the taxing power in *Commonwealth v. Citizens' Nat'l Bank*, 80 S.W. 158, 161 (Ky. 1904):

Taxes levied by counties, cities, towns, and taxing districts are imposed by authority of the state. Counties are but subdivisions of the state, created for governmental purposes. They derive their authority from the state, and can levy no taxes except such as the state authorizes them to levy. They levy taxes by authority of the state, and the levies they make are as fully the act of the state as those made by the Legislature itself. The only difference is that the Legislature, under the power vested in it, instead of levying these taxes itself, authorizes local legislative bodies better adapted to understand the local necessities to make the levies as the local exigencies require. This power of the Legislature, which is universally exercised, is recognized in section 157, 158, 159 and 180 of the Constitution, and is in words conferred on the Legislature by section 181. . . . Unquestionably, the state, in the distribution of the powers of the government, may commit to one body the power to levy certain taxes, and to another, the power to levy others; but when it does this all the taxes so levied are levied by the authority of the state.

any portion of it to destruction by damage claims can only shift the political burden to another portion. Looking to the function of section 231, then, it is nonsensical, at least in the absence of any legislative history to the contrary, to suppose that the Kentucky General Assembly has the authority to prevent the emptying of state and county chests but is powerless to interfere in the financial ruin of municipal corporations. Reversing Justice Palmore's logic and adapting it to the conclusion reached by the majority in *Cullinan*, there is no legal or semantic basis for *not* extending section 231 to authorize legislative protection for municipal, as well as county and state, tax dollars.

The danger, then, in a judicial rethinking of *Cullinan*—the “larger question” reserved by the present Court's majority in *Dunlap*<sup>199</sup>—is not the abolition of immunity for counties. It is the likelihood that restricting application of section 231 to claims upon the “state treasury” will undermine section 231 as a source of authority for legislative control over claims upon all other repositories of tax dollars. The long neglected but still promising power of the General Assembly to find a middle ground between the “crushing burden” of unchecked liability and the inequities of blanket immunity would suffer a serious reversal. Should the Kentucky Supreme Court undertake a review of the plain text of section 231, it should consider the proposition that section 231 does not *require* any kind of immunity, but confers power on the General Assembly to regulate claims upon state *and* state-sanctioned tax revenues.

Finally, there is a less theoretical answer to any fear that sections fourteen and fifty-four stand in the way of a statute regulating municipal liability: there were very few circumstances in 1891<sup>200</sup> in which a person might sue a municipal corporation, so there are very few “rights of action” that a governmental liability statute would abolish or diminish. Cities already enjoyed immunity from liability for their failure to exercise “governmental power.”<sup>201</sup> The few decisions memorializing successful suits against municipalities prior to 1891 generally arise from the duty

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<sup>199</sup> See notes 58-60 *supra* and accompanying text.

<sup>200</sup> The current Kentucky Constitution was adopted in 1891.

<sup>201</sup> See, e.g., *James' Adm'r v. Harrodsburg*, 3 S.W. 135 (Ky. 1887).



to keep streets and sidewalks in ordinary repair.<sup>202</sup> Kentucky's courts have exercised caution in applying sections fourteen and fifty-four to overturn legislation and have upheld statutory restrictions on rights of action absent a convincing demonstration that the restriction infringed a right of action available in 1891.<sup>203</sup> For this reason alone, sections fourteen and fifty-four should offer little hindrance to a governmental liability statute, which will create rather than destroy or diminish legal remedies.

### *B. Implications of Federal Civil Rights Statutes*

However the state may insulate its political organizations from liability under state law, state governments remain susceptible to damage suits in federal court for infractions of the United States Constitution. The United States Supreme Court's landmark decision in *Monell v. New York City Department of Social Services*<sup>204</sup> opened the door to civil rights suits against cities, and the Court since has denied to cities even a qualified immunity based upon the good faith of city officials.<sup>205</sup> In an even more striking development, the United States Supreme Court recently decided that a judgment under section 1983 of the Civil Rights Act of 1871<sup>206</sup> against a public officer in his "official capacity" imposes liability upon the governmental entity that he represents. Thus, local governments are now directly liable in

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<sup>202</sup> See, e.g., *City of Newport v. Miller*, 12 Ky. 422 (Ky. 1890); *Trustees v. Wagers*, 9 Ky. 51 (Ky. 1887).

<sup>203</sup> See, e.g., 646 S.W.2d 40 (upholding KRS § 413.135 (1972)); *Fireman's Fund Ins. Co. v. Gov't Employee Ins. Co.*, 635 S.W.2d 475 (Ky. 1982) (upholding KRS § 304.39-070(3), .39-070(4), and .39-140(3) (1981)).

<sup>204</sup> 436 U.S. 658 (1978).

<sup>205</sup> *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (The Court stated that "there is no tradition of immunity for municipal corporations.").

<sup>206</sup> Title 42 U.S.C. § 1983 is a codification from the Civil Rights Act of 1871 and provides:

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

42 U.S.C. § 1983 (Supp. III 1979). See generally Comment, *Police Misconduct: Municipal Liability Under Section 1983*, 74 Ky. L.J. 651 (1985-86).

federal court for the constitutional torts of their employees.<sup>207</sup>

While drastically expanding the vulnerability of local governments under the civil rights laws, the United States Supreme Court nevertheless has narrowed the scope of section 1983 and shifted much of the litigation arising from the acts of state officers back into state court. In *Parratt v. Taylor*,<sup>208</sup> the Court held that a prison inmate could not sue state officials under section 1983 for violation of his right to due process where state tort law provided him with adequate post-deprivation remedies. The Court was careful to note that state remedies are not inadequate to satisfy the requisites of due process just because they do not provide a claimant with all of the relief available under section 1983.<sup>209</sup> The lower federal courts have divided on the boundaries of *Parratt*. Some have confined the decision strictly to deprivations of property,<sup>210</sup> while others, including the Sixth Circuit, have interpreted the rationale of *Parratt* to include deprivations of liberty as well.<sup>211</sup> The most persuasive opinions have limited *Parratt* not on the basis of the type of interest asserted but on whether the alleged deprivation was substantive

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<sup>207</sup> According to Justice Stevens in *Brandon v. Holt*, 105 S. Ct. 873 (1985), prior decisions by the United States Supreme Court had "plainly implied" that a judgment against a public servant in his official capacity imposes liability upon the entity that he or she represents so long as it has notice and an opportunity to respond. "We now make that point explicit," Justice Stevens wrote. *Id.* at 878.

The eleventh amendment continues to bar damage suits against states and state officials in their official capacity. U. S. CONST. amend XI. State officials can be sued in their "individual" capacity, but neither the judgment nor the attorneys fees authorized by 42 U.S.C. § 1988 (1981) are collectible from the state. See *Kentucky v. Graham*, 105 S. Ct. 3099 (1985).

<sup>208</sup> 451 U.S. 527 (1981), *partially overruled*, *Daniels v. Williams*, 106 S. Ct. 662 (1986). In concluding that *Parratt* had not been deprived of property without due process because the state provided him an adequate post-deprivation remedy, Justice Rehnquist pointed to Nebraska's tort claims statute, NEB. REV. STAT. § 81-8209 (1976). 451 U.S. at 543.

The United States Supreme Court held in *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194 (1984), that the *Parratt* rule extends to intentional as well as negligent acts by state officials. More recently, the Court eliminated negligence altogether as a cognizable constitutional claim under the Due Process Clause. U.S. at , 106 S. Ct. at 663.

<sup>209</sup> 451 U.S. at 544.

<sup>210</sup> See, e.g., *Vail v. Board of Educ.*, 706 F.2d 1435, 1440-41 (7th Cir. 1983), *aff'd per curiam by equally divided court*, 466 U.S. 377 (1984).

<sup>211</sup> See *Wilson v. Beebe*, 770 F.2d 578, 584 (6th Cir. 1985) (en banc). See also *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd on other grounds sub nom.*, *Kush v. Rutledge*, 460 U.S. 719 (1983).

or procedural.<sup>212</sup> Meanwhile, the Supreme Court continues to tinker with *Parratt* and recently overruled it to the extent that it had held a claim for mere negligence to state a cause of action under the Due Process Clause.<sup>213</sup>

How the United States Supreme Court will resolve this controversy is conjectural, and a lengthy examination of the subject is well beyond the scope of this Article.<sup>214</sup> At a minimum, however, state legislators should be mindful that the availability of state remedies may determine whether an action for damages against a local government or its agents winds up in federal court or remains subject to state jurisdiction and state law. If the state actor's conduct falls within the *Parratt* rule, absolute immunization of that conduct under state law may actually defeat the state's interest in controlling claims upon local treasuries.

An outstanding example of this tension between state governmental immunity law and federal civil rights statutes is the subject of police liability. Kentucky courts have immunized local government from liability for negligent acts by policemen in the performance of their duties, reasoning that cities should not have to guarantee success in the provision of police protection.<sup>215</sup> At the same time, police officers and local governments have remained subject to suit within the Sixth Circuit under the civil

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<sup>212</sup> See, e.g., *Thibodeaux v. Bordelon*, 740 F.2d 329 (5th Cir. 1984); *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984); *Begg v. Moffitt*, 555 F. Supp. 1344 (N.D. Ill. 1983). Construing *Parratt* in conjunction with *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (state Fair Employment Practices Commission's error allowing appellant's cause of action to become extinguished was a deprivation of a property interest in violation of the fourteenth amendment due process clause), these decisions interpret *Parratt* as applicable to deprivations of liberty and property interests, but only when the plaintiff is alleging a deprivation of *procedural* due process and the nature of the challenged conduct is such that the provision of pre-deprivation procedural safeguards is impracticable. Deprivation of substantive due process remains actionable. The Sixth Circuit adopted this reasoning in *Wilson v. Beebe*, 770 F.2d 578, but took the additional step of concluding that only intentional conduct can constitute a violation of substantive due process. *Id.* at 586.

<sup>213</sup> 106 S. Ct. at 665.

<sup>214</sup> For a discussion on this subject, see Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L.Q. 545 (1982).

<sup>215</sup> See *Brown v. City of Louisville*, 585 S.W.2d 428, 430 (Ky. Ct. App. 1979).

rights laws for their negligent or intentional misconduct.<sup>216</sup> The federal statutes, of course, place no ceiling on recoverable damages, permit punitive damages against private individuals, and also authorize the award of attorney's fees to prevailing plaintiffs.<sup>217</sup> Should the Kentucky General Assembly tackle the task of framing a comprehensive governmental liability statute, it should be wary of following the example of those states that have chosen to immunize the action of police.<sup>218</sup> A limited but constitutionally adequate state statutory remedy for the tortious acts of policemen may compensate injured citizens while preserving tax dollars much more effectively than a total exemption, which can only funnel all claims against police officers into the federal forum.<sup>219</sup>

### C. Components of a Governmental Liability Statute

A review of the governmental liability statutes of other states quickly discloses the extent to which reasonable minds can differ

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<sup>216</sup> See, e.g., *Dunn v. Tennessee*, 697 F.2d 121 (6th Cir. 1982), cert. denied, 460 U.S. 1086 (1983); *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); *Taylor v. Canton, Ohio Police Dept.*, 544 F. Supp. 783 (N.D. Ohio 1982); *Melson v. Kroger*, 550 F. Supp. 1100 (S.D. Ohio 1982).

<sup>217</sup> Punitive damages are not recoverable against municipalities, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), although individual defendants are subject to them under 42 U.S.C. § 1983 on a finding that the defendant's conduct was reckless or callously indifferent to plaintiff's rights. *Smith v. Wade*, 461 U.S. 30, 51 (1983).

Attorneys fees may be awarded to a prevailing party under 42 U.S.C. § 1988, which provides, in part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

<sup>218</sup> See, e.g., GA. CODE ANN. § 36-33-3 (1982); ILL. ANN. STAT. ch. 85, § 4-102 (*Smith-Hurd* 1966); KAN. STAT. ANN. § 75-6104 (1984); OKLA. STAT. ANN. tit. 51, § 155(6) (*West Supp.* 1984-85).

<sup>219</sup> But at least one court has permitted police to enjoy both state-sanctioned immunity and the benefits of *Parratt*. See *Eberle v. Baumfalk*, 524 F. Supp. 515 (N.D. Ill. 1981). This result may offer comfort to some, but the chances for widespread acceptance of this illogical decision are poor. Compare *Eberle* with *Loftin v. Thomas*, 681 F.2d 364 (5th Cir. 1982), in which the court looked carefully to state remedial statutes before dismissing a claim under 42 U.S.C. § 1983. A petition for certiorari filed on May 29, 1985, from an unpublished decision by the Fourth Circuit, *Gillies v. Delozier*, 758 F.2d 647 (4th Cir. 1985), asks whether the court of appeals erred in holding that a meaningful state remedy was available to the claimant when the defendant official relied upon sovereign immunity and the court of appeals could not guarantee that sovereign immunity would not bar recovery in state court. See *Gillies v. Delozier*, 54 U.S.L.W. 3003 (U.S. July 2, 1985).

on the proper scope of such a statute. Arkansas took the most radically restrictive approach when, in the wake of a judicial decision abolishing municipal immunity in 1969,<sup>220</sup> its legislature declared an emergency and passed a statute immunizing counties, municipal corporations, and all other political subdivisions of the state.<sup>221</sup> At the other end of the spectrum is Alabama's brief statute, which imposes on local governments the same liability as that of a private person.<sup>222</sup> The statute contains no exemptions for any type of governmental conduct, although it does place a ceiling on damages. California weighs in with the most voluminous statute,<sup>223</sup> while Connecticut confines its idiosyncratic effort to a single section of its code.<sup>224</sup>

Somewhere between these extremes lie a variety of admirably concise yet thorough efforts toward regulating the liability of local governments.<sup>225</sup> The statutes vary on details, but contain four essential attributes: (1) a ceiling on damages, usually including a prohibition of punitive damages;<sup>226</sup> (2) an enumeration of certain governmental actions or services that remain im-

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<sup>220</sup> See *Parish v. Pitts*, 429 S.W.2d 45 (Ark. 1968).

<sup>221</sup> ARK. STAT. ANN. § 12-2901 (1979). The statute authorizes political subdivisions to provide for hearing and settlement of tort claims and requires them to carry motor vehicle liability insurance. *Id.* §§ 12-2901, 12-2902.

<sup>222</sup> ALA. CODE §§ 11-93-1 to 11-93-3 (1985). The limit is \$100,000 for bodily injury or death of one person in a single occurrence or for property damage arising from a single occurrence, and \$300,000 for claims by two or more persons for injury or death from a single occurrence.

<sup>223</sup> CAL. GOV'T. CODE §§ 810-996.6 (West 1980).

<sup>224</sup> CONN. GEN. STAT. ANN. § 7-465 (West Supp. 1985). The statute requires municipalities to indemnify an employee for liabilities incurred for acts "in the performance of his duties and within the scope of his employment," so long as the act was not willful or wanton. It is interesting that there is no limit on damages.

<sup>225</sup> See, e.g., FLA. STAT. ANN. § 768.28 (West Supp. 1985); IDAHO CODE §§ 6-901 to 6-928 (1979 & Supp. 1985); IND. CODE ANN. §§ 34-4-16.5-1 to 34-4-16.5-19 (Burns Supp. 1985); KAN. STAT. ANN. §§ 75-6101 to 75-6117 (1984); MINN. STAT. ANN. §§ 466.01-.15 (West 1977 & Supp. 1985); NEB. REV. STAT. §§ 23-2401 to 23-2420 (1982); OKLA. STAT. ANN. tit. 51, §§ 151-62 (West 1984 & Supp. 1985); TENN. CODE ANN. §§ 29-20-101 to 29-20-407 (1980 & Supp. 1985); UTAH CODE ANN. §§ 63-30-1 to 63-30-34 (1953 & Supp. 1985).

Some states, instead of abolishing immunity generally and carving out exceptions, have chosen to designate specific areas of liability amid general immunity. See, e.g., PA. STAT. ANN. tit. 42, §§ 8541-64 (Purdon 1982); WYO. STAT. §§ 1-39-101 to 1-39-119 (Supp. 1985).

<sup>226</sup> See, e.g., OKLA. STAT. ANN. tit. 51, § 154 (West Supp. 1985).

muned;<sup>227</sup> (3) a provision for the defense and indemnification of governmental employees acting in the scope of their employment;<sup>228</sup> and (4) an authorization for, or requirement of, the purchase of liability insurance by governmental units.<sup>229</sup> Because of the wide leeway that exists within this framework for discussion and selection of remedies, I will not undertake the task of proposing a model act. A proposed statute, House Bill 120, received the approval of the House in the last regular session of the General Assembly, but failed to get out of a joint committee on the final day of the session.<sup>230</sup> The following is a brief examination of the four basic attributes of a government liability statute and a basic list of options drawn from the experience of other jurisdictions for consideration by the General Assembly.

### 1. *Limitations on Damages*

A just damages ceiling lies at the heart of any statute addressing the "crushing burden" that tort claims might otherwise place on governmental entities. The ceiling should be high enough to compensate adequately a serious injury, and the \$50,000 limit<sup>231</sup> currently enacted in Kentucky for claims against the state and its employees is, to put it bluntly, unusually stingy. Several states have limited claims to \$100,000 for injuries arising from single accidents or occurrences and greater amounts for any

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<sup>227</sup> See, e.g., KAN. STAT. ANN. § 75-6104 (1984).

<sup>228</sup> See, e.g., IDAHO CODE § 6-903 (Supp. 1985).

<sup>229</sup> See, e.g., TENN. CODE ANN. § 29-20-403 (Supp. 1985).

<sup>230</sup> H.R. '86 BR 354, 1986 Leg., Regular Sess. (1986), sponsored by Representative Myers of Covington, Kentucky [reported out of committee and hereinafter referred to as House Bill 120]. As originally drafted, House Bill 120 applied only to municipal corporations. It suggested a limit of \$300,000 per person, with the aggregate per accident not to exceed \$1,000,000, to be apportioned among all defendants. It prohibited punitive damages, as well as damages for pain and suffering, emotional distress, loss of consortium, and loss of uncompensated services. It also provided for periodic payment of judgments where necessary, and it suggested specific exemptions, including ones similar to those listed in the text accompanying notes 156, 159, 160, 164 (riot only), 167, 168 *infra*. The bill ultimately was expanded to include county governments, but the provisions establishing limits on damages were dropped.

<sup>231</sup> KRS § 44.070(5) (1980). This ceiling is unusually, but not uniquely, low. See, e.g., TENN. CODE ANN. § 29-20-403 (permits insurance coverage of \$40,000 single injury, \$80,000 for two or more persons, more for auto accidents).

number of claims arising from a single accident or occurrence.<sup>232</sup> Others set the limit at \$300,000 for single injuries, which is the figure in the Kentucky proposal.<sup>233</sup> Many statutes establish lower limits for property damage claims, which is an effective way of reserving governmental revenues for the redress of more serious personal injuries.<sup>234</sup>

The Kentucky Supreme Court recently adopted comparative fault,<sup>235</sup> and the Kentucky General Assembly should incorporate this into any governmental liability statute. In fairness to the injured claimant, the statutes should require the factfinder to apportion actual damages before applying the limitation on recoverable damages. Thus, assuming the limit to be \$300,000, a claimant found to have suffered \$400,000 in actual damages and to have been fifty percent negligent would receive \$200,000 rather than \$150,000. The Kentucky Proposal follows this approach.<sup>236</sup>

The Kentucky General Assembly also must consider the nature of the damages that are to be compensable. Most states have prohibited governmental liability for punitive damages,<sup>237</sup>

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<sup>232</sup> See, e.g., FLA. STAT. ANN. § 768.28(5) (\$100,000 single injury limit, \$200,000 aggregate); IDAHO CODE § 6-926 (\$100,000 single limit, \$300,000 aggregate); OKLA. STAT. ANN. tit. 51, § 154 (\$100,000 single limit, \$1,000,000 aggregate); OR. REV. STAT. § 30.270 (1983) (\$100,000 single limit, \$300,000 aggregate); TEXAS REV. CIV. STAT. ANN. art. 62-52 19(b) (Vernon Supp. 1985) (\$100,000 single injury, \$300,000 aggregate).

<sup>233</sup> See, e.g., IND. CODE ANN. § 34-4-16.5-4 (Burns Supp. 1985) (\$300,000 single limit, \$5,000,000 aggregate). The Kentucky Proposal suggests a \$300,000 single person limit and a \$1,000,000 aggregate. See note 131 *supra*. North Dakota has set a \$250,000 single injury limit, with a \$500,000 aggregate for injuries to three or more persons. N.D. CENT. CODE § 32-12.1-03(2) (Supp. 1985). Utah uses the \$250,000 single limit with the \$500,000 aggregate applying to injuries to two or more persons. UTAH CODE ANN. § 63-30-34.

<sup>234</sup> See, e.g., OKLA. STAT. ANN. tit. 51, § 154(A)(1) (\$25,000 limit per claimant for property damage from single occurrence); TEX. REV. CIV. STAT. ANN. art. 6252-19(b)(2)d(b) (\$10,000 limit for single occurrence).

<sup>235</sup> *Hilen v. Hayes*, 673 S.W.2d 713 (Ky. 1984).

<sup>236</sup> Section 3 of House Bill 120 provides that recoverable damages shall not exceed the lesser of "[t]he total damages recoverable by plaintiff reduced by the percentage of fault including contributory fault, attributed by the trier of fact to other parties, if any."

<sup>237</sup> See, e.g., FLA. STAT. ANN. § 768.28(5); IDAHO CODE § 6-918; ILL. ANN. STAT. ch. 85, § 2-102; OKLA. STAT. ANN. tit. 51, § 154(B); UTAH CODE ANN. § 63-30-22. The exemption is not universal, however. North Dakota, for example, permits exemplary damages for malicious or willful conduct. N.D. CENT. CODE § 32-12.1-03(2).

probably reasoning that disciplining the irresponsible official is preferable to penalizing the taxpayer.<sup>238</sup> The Kentucky Court of Appeals recently held as a principle of common law that municipalities are not subject to punitive damages.<sup>239</sup> The legislature might also choose to absolve the government from any responsibility for the acts of codefendants by including a provision that the government's liability is several from that of any other person or entity.<sup>240</sup>

More controversial is the preclusion of recovery for noneconomic losses such as pain and suffering and emotional distress. The Kentucky General Assembly already has chosen to omit recovery for pain and suffering under the Board of Claims Act.<sup>241</sup> Advocates of plaintiff's rights can argue in opposition that such a preclusion in a comprehensive governmental liability statute is both unnecessary and unfair absent any empirical evidence that it is necessary to prevent unmanageable strains on governmental resources. House Bill 120 opted for elimination of any ceiling on damages in favor of a complete bar to recovery for noneconomic loss. Alternatively, the legislature could experiment with allowance of noneconomic recoveries subject to a dollar limitation. The General Assembly at least might investigate whether states electing to compensate noneconomic losses have found this expansion of liability overly burdensome.

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<sup>238</sup> Justice Blackmun discussed the principal rationale for exempting municipalities from punitive damages in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981):

In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. The courts readily distinguished between liability to compensate for injuries inflicted by a municipality's officers and agents, and vindictive damages appropriate as punishment for the bad-faith conduct of those same officers and agents. Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers. The courts thus protected the public from unjust punishment, and the municipalities from undue fiscal constraints.

*Id.* at 263.

<sup>239</sup> *City of Shively v. Craig*, 32 Ky. L. SUMM. 13, at 1 (Ky. Ct. App. Sept. 27, 1985). The court relied heavily upon the United States Supreme Court's reasoning in *Fact Concerts*, 453 U.S. 247.

<sup>240</sup> See, e.g., OKLA. STAT. ANN. tit. 51, § 154(E).

<sup>241</sup> See KRS § 44.070(1).



Finally, in addition to restricting damages, the Kentucky General Assembly can consider ways in which to limit litigation expenses. One way to reduce such expenses is to eliminate the jury trial, either by devising an administrative remedy or, preferably, by following the example of the Federal Tort Claims Act in requiring bench trials.<sup>242</sup> Another option is to ensure that a large percentage of the claimant's limited recovery winds up with the claimant, although any limitation on attorney's fees should not be so severe that it discourages lawyers from undertaking representation against the government.<sup>243</sup> Some states have sought to discourage both frivolous suits and dilatory defenses by authorizing the award of attorney's fees if the party seeking such fees demonstrates the bad faith of his adversary.<sup>244</sup>

## 2. *Specific Exemptions for Certain Governmental Functions*

As already suggested in section II(C),<sup>245</sup> the legislative, quasi-legislative, judicial, and quasi-judicial activities of government merit absolute immunization. Most states, following the lead of the Federal Tort Claims Act, have chosen instead to immunize "discretionary functions."<sup>246</sup> Indeed, so irresistible is the impulse to exempt the exercise of governmental discretion that courts in several states have militantly created such an exception when the legislature enacted a liability statute that omitted it.<sup>247</sup> However

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<sup>242</sup> See 28 U.S.C. § 2402 (1976). This is the course recommended by Professor Davis, although his idea has not gained much ground in the states. See K. DAVIS, *supra* note 90, at § 27:45.

<sup>243</sup> Florida, for example, limits attorneys to 25% of any judgment recovered. FLA. STAT. ANN. tit. 51, § 768.28(8).

<sup>244</sup> See IDAHO CODE § 6-918(A); IND. CODE ANN. § 34-4-16.5-19.

<sup>245</sup> See notes 90, 178-180 *supra* and accompanying text.

<sup>246</sup> The Federal Tort Claims Act is inapplicable to claims "based upon the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1976).

For examples of state statutes immunizing "discretionary functions," see ALASKA STAT. § 09.65.070(d)(2) (Supp. 1985); GA. CODE ANN. § 36-33-2; IDAHO CODE § 6-904(1); KAN. STAT. ANN. § 75-6104(d); MINN. STAT. ANN. § 466.03(6) (West 1977); N.D. CENT. CODE § 32-12.1-03(3)(c); TENN. CODE ANN. § 29-20-205(1); UTAH CODE ANN. § 63-30-10(1)(a).

<sup>247</sup> See, e.g., *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979); *Harris v. State*, 358 N.E.2d 639 (Ohio Ct. Cl. 1976); *Weiss v. Fote*, 167 N.E.2d 63 (N.Y. 1960); *Evangelical United Brethren Church v. States*, 407 P.2d 440 (Wash. 1965).

time-honored, the exception for discretionary functions is uselessly imprecise and invariably necessitates a wasteful course of “narrowing” through judicial experimentation. The Kentucky General Assembly should profit from its tardy entry into the field by learning from the mistakes of its predecessors. It should forego the exemption of “discretionary functions” in favor of a more exact immunity for (1) legislative and quasi-legislative acts, i.e., the making of law and governmental policy, and (2) judicial and quasi-judicial functions, i.e., those exhibiting the fundamental attributes of notice, a hearing, and a decision based on the record.<sup>248</sup>

Many less fundamental activities of government may need the protection of statutory immunity. As the court recognized in *City of Louisville v. Louisville Seed Co.*, “catastrophic liabilities from many suits might dissuade public officials from engaging in beneficial functions to the general detriment of the public.”<sup>249</sup> The limitation of recoverable damages can address sufficiently the spectre of financial catastrophe, but even this may not suffice to save from extinction what I would call “marginal” governmental functions—services that are beneficial but not essential to government. This description is unavoidably vague, but safety, health, and other types of inspections performed by governmental agents furnish a good example. Such inspections undeniably are desirable, but harried local governments may elect to abandon them if every fire or fall down a stairway results in the inclusion of the government as a defendant whose careless inspection may somehow have contributed to the loss.

What follows, then, is a shopping list of governmental services that other jurisdictions have immunized specifically by statute. Many of them hardly qualify as “marginal.” For example, several states have chosen to exempt from liability every form of police activity as well as the operation of jails, prisons, and

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<sup>248</sup> See text accompanying notes 88-102 *supra*. Probably the single greatest flaw of House Bill 120 was its retention of immunity for “[a]ny claim arising from the exercise of judgment or discretion vested in the local government . . . .” The bill went on to list specific functions that were included as discretionary, but it still invited and probably necessitated endless judicial interpretation of the “exercise of judgment or discretion.”

<sup>249</sup> 433 S.W.2d 638, 642 (Ky. 1968).

other institutions of confinement.<sup>250</sup> The wisdom of this is questionable, since these functions frequently are subject to damage suits in federal court anyway,<sup>251</sup> and exposure to suit has not driven government out of the business of opposing crime. With this in mind, each of these exceptions is worthy of consideration and discussion. No statute contains them all.

The Kentucky General Assembly could elect to immunize state and local governments from liability for injuries arising from:

1. The natural condition of unimproved property;<sup>252</sup>
2. The condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose that is not foreseeable;<sup>253</sup>
3. Any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury;<sup>254</sup>
4. The condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area;<sup>255</sup>
5. The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations);<sup>256</sup>
6. An act or omission performed in good faith and without malice under the apparent authority of a statute

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<sup>250</sup> See, e.g., GA. CODE ANN. § 36-33-3 (exempting torts of policemen); OKLA. STAT. ANN. tit. 51, § 155(6) (exempting failure to provide police, law enforcement, or fire protection); *id.* § 155(22) (exempting operation of jail or correctional facility, or injuries from escape of prisoner or by prisoner to prisoner).

<sup>251</sup> See text accompanying notes 112-23 *supra*.

<sup>252</sup> See, e.g., CAL. GOV'T CODE § 831.2; IND. CODE ANN. § 34-4-16.5-3(1); KAN. STAT. ANN. § 75-6104(o); OKLA. STAT. ANN. tit. 51, § 155(10); UTAH CODE ANN. § 63-30-10(11).

<sup>253</sup> See, e.g., CAL. GOV'T CODE § 831.8; IND. CODE ANN. § 34-4-16.5-3(2).

<sup>254</sup> See, e.g., ILL. ANN. STAT. ch. 85, § 3-106; KAN. STAT. ANN. § 75-6104(n); N.J. STAT. ANN. § 59:2-7 (West 1982).

<sup>255</sup> See, e.g., CAL. GOV'T CODE § 831.4; IND. CODE ANN. § 34-4-16.5-3(4).

<sup>256</sup> See, e.g., CAL. GOV'T CODE § 818.2; ILL. ANN. STAT. ch. 85, § 2-103; IND. CODE ANN. § 34-4-16.5-3(7); KAN. STAT. ANN. § 75-6104(a) & (c); MINN. STAT. ANN. § 466.03(5); N.J. STAT. ANN. § 59:2-4; OKLA. STAT. ANN. tit. 51, § 155(4).

- that is invalid, if the employee would not have been liable had the statute been valid;<sup>257</sup>
7. The act or omission of someone other than the governmental entity employee;<sup>258</sup>
  8. The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under the law;<sup>259</sup>
  9. Failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety;<sup>260</sup>
  10. Entry upon any property where the entry is expressly or impliedly authorized by law;<sup>261</sup>
  11. Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;<sup>262</sup>
  12. Theft by another person of money in the employee's official custody, unless the loss was sustained because

<sup>257</sup> See, e.g., IDAHO CODE ANN. § 6-904(1); ILL. ANN. STAT. ch. 85, § 2-203; IND. CODE ANN. § 34-4-16.5-3(8); NEB. REV. STAT. § 23-2409(1) (1983); OR. REV. STAT. § 30.265(f).

<sup>258</sup> See, e.g., CAL. GOV'T CODE § 820.8; ILL. ANN. STAT. ch. 85, § 2-204; IND. CODE ANN. § 34-4-16.5-3(9).

<sup>259</sup> See, e.g., ALASKA STAT. § 09.65.070(d)(3); CAL. GOV'T CODE § 818.4; ILL. ANN. STAT. ch. 85, § 2-104; IND. CODE ANN. § 34-4-16.5-3(10); N.J. STAT. ANN. § 59:2-5; OKLA. STAT. ANN. tit. 51, § 155(12); TENN. CODE ANN. § 29-20-205(3); UTAH CODE ANN. § 63-30-10(1)(c).

<sup>260</sup> See, e.g., ALASKA STAT. § 09.65.070(d)(1)(A); CAL. GOV'T CODE § 818.6; ILL. ANN. STAT. ch. 85, § 2-105; IND. CODE ANN. § 34-4-16.5-3(11); KAN. STAT. ANN. § 75-6104(j); N.J. STAT. ANN. § 59:2-6; OKLA. STAT. ANN. tit. 51, § 155(13); TENN. CODE ANN. § 29-20-205(4); UTAH CODE ANN. § 63-30-10(1)(d).

<sup>261</sup> See, e.g., ILL. ANN. STAT. ch. 85, § 2-209; IND. CODE ANN. § 34-4-16.5-3(12); OKLA. STAT. ANN. tit. 51, § 154(9).

<sup>262</sup> See, e.g., CAL. GOV'T CODE § 818.8 (misrepresentation); IDAHO CODE § 6-904(4); ILL. ANN. STAT. ch. 85, § 2-106 (oral promise and misrepresentation) and § 2-107 (liable and slander); IND. CODE ANN. § 34-4-16.5-3(13) (misrepresentation); NEB. REV. STAT. § 23-2409(5); OKLA. STAT. ANN. tit. 15, § 155(17) (misrepresentation); TENN. CODE ANN. § 29-20-205(2); UTAH CODE ANN. § 63-30-10(1)(b) & (f).

- of the employee's own negligent or wrongful act or omission;<sup>263</sup>
13. Civil disobedience, riot, insurrection or rebellion, or the failure to provide, or the method of providing, police, law enforcement, or fire protection;<sup>264</sup>
  14. Any claim based upon the theory of attractive nuisance;<sup>265</sup>
  15. Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather condition, unless the condition is affirmatively caused by the negligent act of a political subdivision;<sup>266</sup>
  16. Assessment or collection of taxes or special assessments, license or registration fees, or other fees or charges imposed by law;<sup>267</sup>
  17. Any claim covered by any workers' compensation act or any employer's liability act;<sup>268</sup>
  18. The absence, condition, location, or malfunction of any traffic or road sign, signal or warning device, unless the absence, condition, location or malfunction is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice, or the removal or destruction of such signs, signals, or

<sup>263</sup> See, e.g., CAL. GOV'T CODE § 822; IND. CODE ANN. § 34-4-16.5-3(14); OKLA. STAT. ANN. tit. 51, § 155(19).

<sup>264</sup> See, e.g., CAL. GOV'T CODE §§ 845 (police protection), 850-50.8 (fire protection); GA. CODE ANN. § 36-33-3 (torts of policemen); IDAHO CODE § 6-904(7); ILL. ANN. STAT. ch. 85, §§ 4-102 (police protection), 5-101 (failure to provide fire protection), 5-102 (failure to suppress or contain fire) (Smith-Hurd 1966); KAN. STAT. ANN. § 75-6104(m) (1984) (police and fire protection); OKLA. STAT. ANN. tit. 51, § 155(6); OR. REV. STAT. § 30.265(e) (riot); TENN. CODE ANN. § 29-20-205(7) (riots, demonstrations); UTAH CODE ANN. § 63-30-10(1)(g).

<sup>265</sup> See, e.g., OKLA. STAT. ANN. tit. 51, § 155(7).

<sup>266</sup> See, e.g., CAL. GOV'T CODE § 831; ILL. ANN. STAT. ch. 85, § 3-105; IND. CODE ANN. § 34-4-16.5-3(3); KAN. STAT. ANN. § 75-6104(k); MINN. STAT. ANN. § 466.03(4); OKLA. STAT. ANN. tit. 51, § 155(8).

<sup>267</sup> See, e.g., IDAHO CODE ANN. § 6-904(2); KAN. STAT. ANN. § 75-6104(e); MINN. STAT. ANN. § 466.03(3); NEB. REV. STAT. § 23-2409(3); OKLA. STAT. ANN. tit. 51, § 155(11); OR. REV. STAT. § 30.265(b); TENN. CODE ANN. § 29-20-205(8); UTAH CODE ANN. § 63-30-10(1)(h).

<sup>268</sup> See, e.g., KAN. STAT. ANN. § 75-6104(f); MINN. STAT. ANN. § 466.03(2); NEB. REV. STAT. § 23-2409(6); OKLA. STAT. ANN. tit. 51, § 155(14); OR. REV. STAT. § 30.265(a).

warning devices by third parties, action of weather elements or as a result of traffic collision except on failure of the political subdivision to correct the same within a reasonable time after actual or constructive notice;<sup>269</sup>

19. Any claim that is limited or barred by any other law;<sup>270</sup>
20. An act or omission of an independent contractor or his employees, agents, subcontractors, or suppliers or of a person other than an employee of the political subdivision at the time the act or omission occurred;<sup>271</sup>
21. Participation in or practice for any interscholastic or other athletic contest sponsored or conducted by or on the property of a political subdivision;<sup>272</sup>
22. Provision, equipping, operation, or maintenance of any jail or correctional facility, or injuries resulting from the escape of a prisoner or by a prisoner to any other prisoner;<sup>273</sup>
23. Injury to the person or property of a person under supervision of a governmental entity and who is on probation or assigned to an alcohol or drug services program or a minimum security release program or community corrections program;<sup>274</sup>
24. Any claim or action based upon the theory of manufacturer's products liability or breach of warranty, either express or implied;<sup>275</sup>
25. The imposition or establishment of a quarantine by a governmental entity, whether such quarantine relates to persons or property;<sup>276</sup>

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<sup>269</sup> See, e.g., CAL. GOV'T CODE § 830.4; ILL. ANN. STAT. ch. 85, § 3-104; KAN. STAT. ANN. § 75-6104(g); OKLA. STAT. ANN. tit. 51, § 155(15).

<sup>270</sup> See, e.g., KAN. STAT. ANN. § 75-6104(h); MINN. STAT. ANN. § 466.03(7); OKLA. STAT. ANN. tit. 51, § 155(16); OR. REV. STAT. § 30.265(d).

<sup>271</sup> See, e.g., OKLA. STAT. ANN. tit. 51, § 155(18). Cf. CAL. GOV'T CODE § 815.4 (public entity liable for act of independent contractor to same extent as private person).

<sup>272</sup> See, e.g., OKLA. STAT. ANN. tit. 51, § 155(20).

<sup>273</sup> See, e.g., CAL. GOV'T CODE §§ 845.2-846 (West 1980); ILL. ANN. STAT. ch. 85, §§ 4-103 (failure to provide or maintain jail) and 4-106 (determining parole or escape of prisoner); OKLA. STAT. ANN. tit. 51, § 155(23); UTAH CODE ANN. § 63-30-10(1)(J).

<sup>274</sup> See, e.g., OKLA. STAT. ANN. tit. 51, § 155(21).

<sup>275</sup> See, e.g., OKLA. STAT. ANN. tit. 51, § 155(24).

<sup>276</sup> See, e.g., IDAHO CODE § 6-904(3); NEB. REV. STAT. § 23-2409(4).

26. The activities of the state national guard when engaged in combatant activities in a time of war or when engaged in training or duty under 32 U.S.C. §§ 316, 502, 503, 504, 505, or 709,<sup>277</sup> where the claim arising therefrom is payable under the provisions of the National Guard Claims Act,<sup>278</sup> except that a claimant not compensated in whole or in part under the Nation Guard Claims Act may assert his claim under the state tort claims statute;<sup>279</sup>
27. The plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval and if the plan or design was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared.<sup>280</sup>

Obviously, inclusion of all of these "exceptions" in a single statute would restore governmental immunity more thoroughly than did *Louisville Seed and Frankfort Variety Inc. v. City of Frankfort*.<sup>281</sup> The Kentucky General Assembly must exercise caution in avoiding this result. One of the principal benefits of a statute is that it lends itself to experiment and adjustment. The legislature need not achieve the perfect equilibrium between protection and compensation at one stroke. Once the basic statute is in place, the legislature can add to or subtract from governmental liability as the effects of its effort become known. Certainly any serious miscalculations of the government's ability to support a new area of liability can be addressed swiftly. Instead of expecting the advent of the apocalypse and "overimmuniz-

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<sup>277</sup> 32 U.S.C. §§ 316, 502, 503, 504, 505, 709 (1985).

<sup>278</sup> *Id.* § 715 (1985).

<sup>279</sup> *See, e.g.*, CAL. GOV'T CODE § 816; IDAHO CODE ANN. § 6-904(5) & (6); OKLA. STAT. ANN. tit. 51, § 151(22); UTAH CODE ANN. § 63-30-10(1)(i).

<sup>280</sup> *See, e.g.*, CAL. GOV'T CODE § 830.6; IDAHO CODE ANN. § 6-904(8); KAN. STAT. ANN. § 75-6104(1).

<sup>281</sup> 552 S.W.2d 653 (Ky. 1977). *See* text accompanying note 53 *supra*.

ing," therefore, the General Assembly should begin by protecting only services that almost certainly would prove unaffordable if subjected even to limited liability.<sup>282</sup>

### 3. *Defense and Indemnification of Governmental Employees*

The Kentucky Employees Defense Act<sup>283</sup> serves as a tacit recognition that the state government has an obligation to defend and to protect financially, at least to some extent, employees who are subject to suit for their official acts.<sup>284</sup> The Kentucky General Assembly should extend this policy by statute to the county and municipal levels and should provide for indemnification of such employees up to the limits established for liability of the governmental entity itself.<sup>285</sup> Some states have simply immunized governmental employees, at least to the extent that recourse against the government itself is available.<sup>286</sup> Kentucky

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<sup>282</sup> My choice for a "minimal" statute of exemptions, a choice based mainly upon the frequency of their inclusion in statutes of other states, would be those exceptions enumerated 1, 5, 6, 8, 9, 15, 16, 17, and 18 in the text accompanying notes 152-78 *supra*.

<sup>283</sup> KRS § 12.211 (1985). See also Comment *The Employee Defense Act: Wearing Down Sovereign Immunity*, 66 Ky. L.J. 150 (1977-78).

<sup>284</sup> KRS §§ 12.211-220 (1985) and 10 Ky. ADMIN. REGS. 1:010 (1985) provide for defense, but reimbursement of the employee depends upon the "economic feasibility" of the state's obtaining insurance, maximum coverage being limited to \$50,000. *Id.* § 5.

<sup>285</sup> As Professor Davis has observed in the constitutional context, "[J]ust as the United States should be liable for damages for a violation of the Constitution by a federal employee within the scope of employment, a state or local government should be liable for damages for a violation of the Constitution by an employee within the scope of employment, and the employee should not be liable to the injured person." DAVIS, *supra* note 90, § 27:45, at 246. See also *id.* § 27:4. But cf. Justice Stephenson's dissent in *Gas Service*: "Let the case be tried against the individual or individuals committing the tort. Thus, the injured party is not precluded from obtaining judgment against the guilty party." 687 S.W.2d at 152-53 (Stephenson, J., dissenting).

For a simple but thorough indemnification provision, see OKLA. STAT. ANN. tit. 51, § 161. The governmental body must indemnify the employee for any judgment based upon an act within the scope of his employment, except for those involving fraud and corruption and so long as the employee cooperates in good faith in the defense of the claim. *Id.* § 161(B).

<sup>286</sup> See, e.g., FLA. STAT. ANN. § 768.28(9)(a); IND. CODE ANN. § 34-4-16.5-5; OKLA. STAT. ANN. tit. 51, § 160. The Oklahoma statute gives the state the right to recover funds spent in defending or paying a claim against an employee if the employee's conduct was outside the scope of his employment or if the employee failed to cooperate in his defense. *Id.*



probably does not have this option. In *Happy v. Erwin*,<sup>287</sup> the Court concluded that sections fourteen and fifty-four of the Kentucky Constitution invalidated a statute barring suits against municipal officers and employees for use of fire apparatus outside city limits.<sup>288</sup> Thus, officers and employees remain susceptible to claims, and the government can only cover the cost of defense and judgment.<sup>289</sup>

Normally, the government or its insurer will satisfy the judgment on behalf of itself and the culpable employee up to the limit of liability established by the Kentucky General Assembly. Because of the constitutional obstacle to immunizing employees, however, the employee will bear the burden of satisfying any judgment in excess of that limit.<sup>290</sup> More justifiably, governmental employees will bear the full risk of their willful, reckless, or malicious actions; they remain exposed to punitive damages even if their governmental employer may escape such liability by statute.<sup>291</sup>

A separate but related question is whether the government itself should be immune from all liability for the reckless or intentional acts of its agents. Although some states have adopted such an exemption,<sup>292</sup> government should assume responsibility for all actions of its employees so long as they have acted in

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<sup>287</sup> 330 S.W.2d 412 (Ky. 159).

<sup>288</sup> *Id.* at 413.

<sup>289</sup> The law of official, as opposed to governmental, immunity is a chamber of horrors in its own right. In *Thompson v. Hueckler*, 559 S.W.2d 488 (Ky. Ct. App. 1977), the court adopted RESTATEMENT (SECOND) OF TORTS section 895D, which confers absolute liability on an official "engaged in the exercise of a discretionary function." The comments to section 895D invite the courts to weigh no fewer than seven factors in determining whether a function is discretionary.

<sup>290</sup> Availability of insurance may ameliorate this risk in many instances. See text accompanying notes 188-92 *infra*.

<sup>291</sup> Punitive damages are recoverable in Kentucky "only when the circumstances surrounding a tortious act indicate malice, willfulness or a reckless or wanton disregard for the rights of others." *Island Creek Coal Co. v. Rodgers*, 644 S.W.2d 339, 347 (Ky. Ct. App. 1982).

<sup>292</sup> See, e.g., FLA. STAT. ANN. § 768.28(9)(a). New Jersey does not hold public entities liable for acts or omissions of public employees "constituting a crime, actual fraud, actual malice, or willful misconduct." N.J. STAT. ANN. § 59:2-10. Another way of accomplishing this is to remove governmental immunity only for "negligent" acts. E.g., TENN. CODE ANN. § 29-20-205. This is, in fact, the way The Kentucky Board of Claims Act reads. KRS § 44.070(1).

their official capacity. The law should not deprive a seriously injured person of adequate compensation merely because the government's agent was reckless or malicious rather than merely negligent. Preferable to an exemption would be a provision exacting payment of contribution or indemnity to the government by an employee who recklessly, deliberately, or maliciously injures another.<sup>293</sup>

#### 4. Insurance

Most statutes regulating governmental liability include a provision authorizing local governments to purchase insurance covering their liability and that of their employees.<sup>294</sup> States differ widely in their use of insurance to mitigate the financial burden accompanying the abolition of traditional immunity. North Carolina, for example, makes municipal liability contingent upon the purchase of insurance; immunity is "waived" only to the extent that indemnity is available under the insurance contract.<sup>295</sup> Colorado takes this approach a step farther. It abolishes immunity for narrow categories of acts, such as the operation of motor vehicles and dangerous conditions in public facilities,<sup>296</sup> but empowers public entities to waive immunity in other areas to the extent they are insured.<sup>297</sup>

The drawback of a policy equating insurance coverage with waiver of immunity is that it enables a municipality or other political body to "elect" immunity for all or most of its actions simply by neglecting to secure coverage. A more equitable solution is to combine a damages limitation with a provision authorizing an elective increase in exposure through the purchase of insurance. Thus, several states require a governmental body to pay claims up to the limits established by statute, but permit them to pay larger claims up to the limit of any applicable insurance contract.<sup>298</sup> The existence of insurance coverage may

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<sup>293</sup> See, e.g., IDAHO CODE § 6-903(d).

<sup>294</sup> See, e.g., KAN. STAT. ANN. § 75-6111; TENN. CODE ANN. § 29-20-403.

<sup>295</sup> N.C. GEN. STAT. § 160A-485 (1982). The statute also authorizes a city to purchase insurance to cover its officials and employees. *Id.*

<sup>296</sup> COLO. REV. STAT. § 24-10-106 (1982).

<sup>297</sup> *Id.* at § 24-10-104.

<sup>298</sup> See, e.g., IDAHO CODE § 6-926; KAN. STAT. ANN. § 75-6111; MINN. STAT. ANN. § 466.06; TENN. CODE ANN. § 29-20-403; UTAH CODE ANN. § 63-30-34.

even enable the local government to waive the immunity for services otherwise exempted specifically by statute.<sup>299</sup>

As a practical matter, of course, the scarcity or cost of available coverage may force a local government to confine its exposure as closely as possible to the limitations on liability established by statute. Nevertheless, for many ordinary risks, such as motor vehicle and premises liability, a local government may find it possible to effect higher limits of recovery through coverage in excess of statutory limits on damages. Certainly the Kentucky General Assembly can do little harm in giving local governments these options.

### CONCLUSION

The Kentucky General Assembly has turned its face too long from the ever-present problem of governmental liability. It has chosen the easier course of allowing the judiciary to stumble along in a doomed effort to draw a single, satisfactory line between the interest of those injured by government and those who must pay for and conduct government. The judiciary has borne this burden earnestly, but with the poor results chronicled in these pages. Although the Kentucky Supreme Court has announced a fresh start, the net result is that the law of governmental liability is no more settled than it was twenty years, or even a century, ago.

This is not a situation that reflects great credit on the orderly process of democratic government in response to public and private need. If state and local government in Kentucky cannot survive the assumption of financial responsibility for official acts, the General Assembly should at least announce this melancholy conclusion after study and reflection. If government in many circumstances can pay for injuries that it causes, as seems more likely, then further delay is inexcusable. More than two decades after the failed experiment of *Haney*, the answer to the problem is not a resurrection of that decision, but an end to the legislative indifference that necessitated it. Having once again

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<sup>299</sup> See, e.g., NEB. REV. STAT. § 23-2413 (constitutes a waiver only to such extent as stated in insurance policy).

allowed a regular session to slip by without taking any action, the General Assembly should confront the issue of local governmental liability at its next opportunity.

