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scionability requiring proof of procedural abuse with respect to the class representatives and, as substantive unconscionability capable of presuming procedural abuse with respect to the non-testifying class members.

Conclusion

The broad relief granted in *Kugler* depends primarily on the premise that the doctrine of price unconscionability and the consumer class action device are compatible. The court hurdled traditional difficulties inherent in class actions by establishing gross price disparity in all of the sales transactions as the unconscionable common denominator. It acknowledged that an exorbitant price properly measured can be presumptive of procedural abuse in the contract formation process. The class action provides a means whereby numerous persons who are wronged by a common act are permitted to seek redress in a single action, and, the employment of price unconscionability in the consumer class action makes redress all the more possible. Admittedly, *Kugler* may be narrowly construed, but to do so would pervert its reasoning and totally disregard the controlling policy considerations it embraces as articulated in *ITM*:

> No longer do we believe that fraud may be perpetrated by the cry of caveat emptor. We have reached the point where 'Let the buyer beware' is a poor business philosophy for a social order allegedly based upon man's respect for his fellow man. Let the seller beware too! A free enterprise system not founded upon personal morality will ultimately lose freedom.[68]

William J. Britt

Municipal Tort Immunity: The Need for Legislative Reform

The doctrine of municipal immunity from tort liability has been firmly embedded in American jurisprudence since this country's inception. However, its erratic application and unclear foundation have together compelled the legal community today to question the wisdom of its continued exist-

68. 275 N.Y.S.2d at 303.

ence. Some of the factors that must be considered in such an analysis are the topics of this note. First, we will examine the history and development of the immunity rule in the United States as it bears on the questions of both the degree of modification needed and the governmental institution best suited to effect that change. Secondly, we will deal with the practical and political considerations which necessarily merit close scrutiny by that body charged with the duty of reforming the rule. Finally, we will assess the judiciary's and the legislature's respective capabilities to deal with the various issues which are indispensable to effectuate that long-awaited reform.

Early History

Sovereign immunity from tort liability was initially premised on the precept that "the king can do no wrong,"[1] a myth that reached its apex under the absolute monarchy of sixteenth century England.[2] This doctrine apparently had very little impact on the development of sovereign immunity in this country, however, since no reference is made to it in any of the early tort cases. The United States Supreme Court has stated that the maxim that a sovereign can do no wrong has no place in American jurisprudence since it is totally alien to the doctrine expressed in American federal and state laws and constitutions, i.e. that public officials shall be held accountable for their actions.[3] Rather, governmental immunity was transferred to the modern nation state for two reasons. First, to subject a sovereign state to suit was the very antithesis of sovereignty,[4] and secondly, there can be no legal right against the sovereign authority which itself makes the laws upon which that right depends.[5] As far as the incorporation of this doctrine into American law[6] is concerned, the reasons supporting that incorporation are, at best, unclear. The Supreme Court in 1793,[7] when it considered this very question, found no federal constitutional basis for the doctrine as applied to the states. This constitutional gap was subsequently filled by the passage of the Eleventh Amendment to the Constitution,[8] which immunizes the state from suit.

There are three prinicpal theories explaining the application of the immunity doctrine to municipalities and other local units of government, and

1. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01, at 436 (1958); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 (1925).
2. *See* W. PROSSER, LAW OF TORTS 996-97 (3d ed. 1964).
3. Langford v. United States, 101 U.S. 341, 343 (1879).
4. PROSSER, *supra* note 2, at 997.
5. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).
6. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821).
7. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 452, 458, 478 (1793).
8. Adopted in 1798.

depending on which explanation is adhered to, a state court may or may not have the power to modify or abrogate the doctrine. First, although not in unanimous agreement, many American state courts[9] trace the origin of the local immunity doctrine to the 1788 English case of *Russell v. Men of Devon.*[10] In that case, Russell sued all the male inhabitants of the unincorporated County of Devon for damages to his wagon as a result of a bridge being out of repair. It was undisputed that the county had the duty to maintain such structures. The court held that plaintiff's action would not lie because to permit it would lead to an "infinity of actions,"[11] because there was no fund to satisfy the claim, and lastly because only the legislature should impose a liability of this kind. The court also stated that although there is an equitable principle which permits a remedy for every injury resulting from the neglect of another, a more applicable principle is "that it is better that an individual should sustain an injury, than that the public should suffer an inconvenience."[12] It has been claimed that the *Russell* decision resulted primarily from the practical difficulty in awarding damages.[13] However, while this may have been a factor, there is no evidence to support a finding that, in the absence of a statute authorizing damages, liability would have been imposed even if the county had been incorporated and had funds to satisfy a judgment. The county's unincorporated status may have had little effect upon the decision. In its decision to abrogate local immunity, for example, the Wisconsin Supreme Court declared all local units of government liable regardless of whether they were incorporated,[14] and as a general principle, in the United States today, authority to institute suit against a governmental unit does not depend on that unit's corporate status. Consequently, it appears much more likely that the *Russell* court based its holding, not on the corporate character of the county, but rather on the belief that the legislature and not the court was charged with the responsibility of deciding whether to impose liability of this nature.[15] This view has been supported by the Minnesota Supreme Court.[16] In its

9. *See, e.g.*, Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).
10. 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788).
11. *Id.* at 362.
12. *Id.*
13. *See, e.g.*, Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 389, 381 P.2d 107, 110 (1963); Muskoph v. Corning Hosp. Dist., 55 Cal. 2d 211, 215, 359 P.2d 457, 459 (1961); Spanel v. Mounds View School Dist., No. 621, 264 Minn. 279, 282, 118 N.W.2d 795, 797 (1962).
14. Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
15. For a contrary view on the influence of the unincorporated status of the County of Devon on the *Russell* holding not to impose liability, *see Assault on the Citadel: De-Immunizing Municipal Corporations*, 4 SUFFOLK U.L. REV. 832, 832-35 (1969-70).
16. Spanel v. Mounds View School Dist., No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962).

decision on the local immunity question, while discussing the historical basis for the doctrine of municipal immunity, the court reviewed the reasons given by the *Russell* court and concluded by stating that "the court's [the *Russell* court] invitation to the legislature has a familiar ring."[17] For this reason today's state courts which adopt the view that the *Russell* case is the origin of the doctrine of local governmental immunity are therefore faced with the *Russell* warning that this question is more properly a legislative concern.

A second view regarding the origin of the doctrine of municipal immunity is that the doctrine merely became a settled principle of common law with the *Russell* case, but had its origin more than two centuries earlier. It is submitted that this interpretation is supported by a close reading of the *Russell* opinion itself. In Lord Kenyon's majority opinion, for example, reference is made to a case cited in *Brooke's Abridgement* as precedent for the decision to disallow the suit.[18] And Judge Ashurst, in his concurring opinion, states: "Thus this case stands on principle: but I think the case cited from *Brooke's Abridgement* is direct authority to show that no such action could be maintained."[19] This case, cited by both judges as authority for their decision, is an ancient one. The case is reported in *Brooke's Abridgement*, and Brooke died in 1588. With this reading of the *Russell* case, it is arguable that local immunity was a common law concept long before 1799 (the date of *Russell*), and that the *Russell* case was merely a formal embodiment of that rule.

This interpretation of the origin of municipal immunity raises an issue of critical importance for state courts which are now contemplating either modification or abrogation of the rule, since in several states there are either constitutional or statutory provisions which provide that the "common law" shall remain in force until repealed by the legislature.[20] The common law referred to in these provisions is generally considered to be that body of law in force in England prior to the American Declaration of Independence in 1776.[21] Consequently, if it is determined that the rule of municipal im-

17. *Id.* at 282, 118 N.W.2d at 797.

18. Lord Kenyon concluded his opinion with the statement: "[A]nd there is a precedent against it in *Brooke*." Russell v. Men of Devon, 2 T.R. at 673, 100 Eng. Rep. at 362.

19. *Id.* at 673, 100 Eng. Rep. at 362-63.

20. *See, e.g.*, FLA. STAT. ANN. § 2.01 (Supp. 1964); ILL. ANN. STAT. ch. 28, § 1 (Smith-Hurd Supp. 1964); KY. CONST. § 233; MINN. CONST. sched., § 2; WIS. CONST. art. 14, § 13.

21. *See* note 9 *supra*; Greenspan v. Slate, 12 N.J. 426, 97 A.2d 390 (1953); Loudon v. Loudon, 114 N.J. Eq. 242, 168 A. 840 (1933); Cawker v. Dreutzer, 197 Wis. 98, 221 N.W. 401 (1928).

munity was in existence prior to the *Russell* case (and hence before the American Declaration of Independence), and that a state does have a constitutional or statutory provision empowering only the legislature to change that law, then that state court is without jurisdiction to modify or abrogate the common law rule of municipal immunity.[22]

The third and last view regarding the origin of the doctrine of local governmental immunity is that such immunity is derived from the state's traditional sovereign immunity from tort liability. Local units of government, in the absence of state constitutional provisions to the contrary, derive not only their corporate existence but also their powers to govern from the legislature.[23] Thus, these creations of the sovereign necessarily share in the state's sovereignty.[24] When the New York State Legislature passed legislation waiving that state's immunity from tort liability,[25] the New York Court of Appeals subsequently ruled that by waiving the state's immunity the legislature had also waived the immunity of local governmental units.[26] The Court specifically stated that "none of the civil divisions of the State—its counties, cities, towns, and villages—has any independent sovereignty. . . . The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which

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22. Two courts which have adopted this view of the origin of local immunity and, as a result, have held that this interpretation precludes any action on their part in modifying or abrogating the immunity rule, are the Wyoming Supreme Court (Maffei v. Incorp. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959)), and the Tennessee Supreme Court (Coffman v. City of Pulaski, 220 Tenn. 642, 422 S.W.2d 429 (1968)). *See also* the dissenting opinion in Molitor v. Kaneland Community Unit School Dist., No. 302, 18 Ill.2d 11, 29, 163 N.E.2d 89, 98 (1959), recognizing the existence of the Illinois statutory "common law" provision, and urging that on that basis the court should not abrogate.

Many states have adopted the common law by statute or constitutions and many have authorized the legislatures, not the courts, to alter it. However, even though a state statute or constitution states that the English common law has been adopted, it is significant that the courts interpret the content and meaning of the common law, and this could nullify this potential obstacle to court action on the immunity question. *See, e.g., supra* note 9.

Other courts have circumvented these statutory and constitutional provisions on the theory that the nature of the common law has always been and must remain a "dynamic" body of law. This theory renders those statutes allowing only the legislature to alter common law meaningless. *See, e.g.*, Miller v. Monsen, 228 Minn. 400, 406, 37 N.W.2d 543, 547 (1949); Bielski v. Schulze, 16 Wis.2d 1, 11, 114 N.W.2d 105, 110 (1962).

23. 1 DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911); City of Clinton v. Cedar Rapids and Missouri River R.R., 24 Iowa 455 (1868).

24. As pointed out earlier, the state has historically been held immune from suit due to its sovereign nature.

25. N.Y. CONST. art. 6, § 23; LAWS OF NEW YORK ch. 467, § 1 (1929).

26. Bernadine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604, 605 (1945).

the state possessed."[27] The Supreme Court of the State of Washington followed this same rationale in a more recent case in which it held that the legislature's waiver of the state's immunity also waived the immunity of the local units of government.[28] The court noted that its holding was based on earlier decisions[29] which held that municipal corporations enjoy their immunity only insofar as they partake of the state's immunity. "They have no sovereignty of their own, they are in no sense sovereign per se."[30]

This view of the origin of local immunity raises three very important questions for those state courts presently considering the modification or abrogation of the immunity rule. First, it is significant that the Washington and New York courts referred to above abrogated the immunity rule only after their respective legislatures had taken the initial steps with regard to state immunity, thereby demonstrating two clear instances where state courts have deferred to the legislature the determination as to the propriety of existence or non-existence of governmental immunity. Secondly, it can be argued that these courts did not in fact "abrogate" the rule of local immunity, but rather "interpreted" the applicable state statute, in conjunction with the common law rule, and in so doing determined that the full meaning of those statutes applied also to local units of government. Third, if a court adheres to the view that municipal immunity derives from state sovereignty, it is inconsistent for that court to abolish the immunity rule as to the local units, while at the same time holding the state immune. Therefore, unless a court is willing to decide the question of the state's immunity, it should be precluded from modifying or abrogating the doctrine as it applies to local governmental units.

Each of these three views of the origin of the doctrine of local governmental immunity imposes some degree of restriction on the courts, and elicits a warning to the court considering the immunity question. The common element appearing throughout each of these views is that it is primarily a legislative prerogative to revise, abrogate or retain governmental immunity, and consequently, the judiciary should defer to the legislature the ultimate determination of this issue.

Incorporation and Development in America

It is generally agreed that the first American case holding in favor of the immunity of local governmental units from suit was *Mower v. Inhabitants of*

27. *Id.*
28. Kelso v. City of Tacoma, 63 Wash. 2d 913, 916, 390 P.2d 2, 5 (1964).
29. Riddoch v. State, 68 Wash. 329, 123 P. 450 (1912).
30. *Id.* at 334, 123 P. at 452.

Leicester.[31] Mower claimed that his horse was killed when it fell into a hole on the Leicester Bridge as a consequence of the defendant's failure to keep the bridge in good repair. Mower's attorney attempted to distinguish the *Russell* case on grounds that Leicester was an incorporated town and had a treasury out of which a judgment could be satisfied, while in *Russell*, the County of Devon was unincorporated and therefore had no such funds. The court nevertheless decided, on authority of *Russell*, that this "quasi-corporation" was not liable at common law, thereby engrafting upon American law the doctrine of local governmental immunity.[32]

Municipalities, however, were not able to convince the courts that they should have the benefit of immunity from tort liability in all cases. In 1842, the New York case of *Bailey v. Mayor of New York*[33] first enunciated the now familiar "governmental-proprietary" distinction as a criteria or standard to be used to determine when liability would attach to municipalities. The rationale giving rise to this standard is that in a variety of situations local units of government act as involuntary agents of the state, executing state public policies and thereby performing essentially state functions. In this capacity, a municipality is strictly an arm of the state, stretching into localities and performing state imposed duties, and, as such, partakes of the state's sovereign immunity from liability for any tortious conduct arising out of the performance of these functions. The functions that local units perform in this capacity are thus deemed "governmental" functions to which immunity attaches.[34] Eventually, however, municipalities undertook the performance of "proprietary" or businesslike functions, whereby the municipality itself (as opposed to the state) received either a benefit or a financial profit, or both. In this capacity, the local unit of government is placed on the same footing as a private corporation and, consequently, is not immune from suit. Municipalities were said to have stepped outside their governmental limits and entered the zone of private business or into activities which may be, or frequently are, carried on by private enterprise.[35] These activities

31. 9 Mass. 247 (1812).

32. Many commentators have stated that the *Mower* decision was clearly erroneous because there was a Massachusetts statute allowing for damages for this type of injury. MASS. STAT. ch. 81, § 1 (1786). Furthermore, the Massachusetts court, in a similar case eight years earlier, awarded damages on the basis of this same statute. Lobdell v. Inhabitants of New Bedford, 1 Mass. 153 (1804).

33. 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

34. Hayes v. Town of Cedar Grove, 126 W. Va. 828, 30 S.E.2d 726 (1944). One of the best definitions of the law on this point appears in Note, Carrington v. St. Louis, 23 CENT. L.J. 494 (1886). Although this was a very early comment, it accurately describes the law on the governmental-proprietary distinction.

35. City of Hazard v. Duff, 287 Ky. 427, 154 S.W.2d 28 (1941); Bailey v. Mayor of New York, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

have been deemed "proprietary," to which liability attaches as it does to any private person or corporation.

Before the "governmental-proprietary" standard gained widespread approval, some courts attempted a different explanation or definition of the functions which a municipalty performs, to use as a standard to determine liability. Basically, a city was suable if the tort was committed while an employee was discharging a "ministerial" duty, but it was immune from suit if the act was committed while exercising a "discretionary" right.[36] Courts defined a "discretionary" function as a city's power to decide whether or not to embark on a particular course of action. Thus, "discretionary" contemplated policy-making, while "ministerial" contemplated the execution of those policies.[37] This explanation of a city's activities proved too confusing in its application, and was therefore discarded at a very early stage in the development of municipal immunity.[38]

With the early rejection of the "discretionary-ministerial" standard, most states utilized the "governmental-proprietary" distinction to determine the liability of the city. However, this too has produced many unjust and inconsistent results, leaving this area of the law in a highly confused condition. The confusion is at its most obvious when certain municipal activities are classified by courts as "governmental" in one case, and these same activities deemed "proprietary" by another court in a similar case.[39] However, the inconsistencies resulting from the use of this distinction are not at all a result of the artificiality of the test itself, but rather the result, perhaps the inevitable result, of the case-by-case application by the courts of a loosely defined rule of law. The concept itself not only properly recognizes the dual nature of the municipal corporation, but can indeed serve as an effective tool in characterizing a specific city function for the purpose of determining whether immunity will attach in light of that dual nature. As one commentator[40] has pointed out, the fact that different courts in different jurisdictions

36. *See* Jones v. City of New Haven, 34 Conn. 1, 14 (1867), for an excellent explanation of this concept.

37. *See* Hitchins Bros. v. Mayor of Frostburg, 68 Md. 100, 11 A. 826 (1887), for an application of this test.

38. This standard did not remain dead for long. Today, it is the basic operating principle of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, and was also revived in the District of Columbia in two recent decisions, Elgin v. District of Columbia, 119 U.S. App. D.C. 116, 337 F.2d 152 (1964), and Thomas v. Johnson, 295 F. Supp. 1025 (D.D.C. 1968).

39. For example, maintaining a public park has been held to be both a "governmental" and a "proprietary" function, Claitor v. City of Commanche, 271 S.W.2d 465 (Tex. Civ. App. 1954) (proprietary); Vanderford v. City of Houston, 286 S.W. 568 (Tex. Civ. App. 1926) (governmental).

40. David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. REV. 1 (1959).

have disagreed as to which functions are proprietary and which are governmental, has no impact on the distinction's validity since the scope of a municipality's proprietary liability necessarily varies from jurisdiction to jurisdiction as the authority of the governmental unit to embark on enterprises varies. The fact that these local units derive their authority to engage in specific activities from their respective state legislatures clearly implies that functions performed by one unit may be governmental while the same function might be deemed proprietary in another state.

Consequently, the unjust and inconsistent results that the use of this test have produced over the years are not due to any inherent failings of the test, but rather to the lack of more precise and definite criteria on which to base the classification. The issue raised is that, if we want to retain municipal immunity insofar as a city's purely governmental functions are concerned, which even the strongest critic of the immunity doctrine advocates,[41] then a comprehensive and detailed analysis of the many functions a city performs is sorely needed in order to remove the uncertainty and inequities of the case-by-case application of this standard. The attempts at such analysis began in 1939 and continue to this day.

1939 to the Present

Beginning in the 1920's with the exhaustive critique by Professor Borchard, it became increasingly apparent that the entire doctrine of municipal immunity, including the reasons supporting its existence and the standards used to determine its application, needed serious re-thinking and modification. The first step in this direction was taken in 1939 by the New York Legislature with the Court of Claims Act, which waived the state's immunity from both suit and liability. The act was later extended to cover local political subdivisions of the state.[42] Congress then continued the momentum with the passage of the Federal Tort Claims Act in 1946,[43] and it appeared that the long-awaited reform of governmental immunity was well on its way.

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41. Professor Borchard, the leading advocate of governmental responsibility, in recognizing the limits of liability, has stated:

> There are certain public services which only the government can adequately perform, as for example, the administration of justice, the preservation of public peace and enforcement of the laws, and the protection of the community from fire and disease. It may hence be conceded that the principle of immunity for the torts of officers engaged in 'governmental' functions, had some legitimate field of application.

Borchard, *Government Liability in Tort*, 34 YALE L.J. 229, 240 (1925).

42. Holmes v. County of Erie, 266 App. Div. 220, 223, 42 N.Y.S.2d 243, 246 (1943), *aff'd*, 291 N.Y. 798, 799, 53 N.E.2d 369 (1944); note 26 *supra*.

43. 28 U.S.C. §§ 2671-80 (1970).

However, other state legislatures balked and failed to respond to the New York and Congressional initiatives. The resulting vacuum created by this legislative inaction was soon filled by the courts in a series of decisions which, if anything, created more problems than they purported to solve, and demonstrated the futility of attempting to deal with a policy issue of this magnitude within the confines of a courtroom. Indeed, in as many as seven instances where immunity was judicially abolished or modified, the situation has been satisfactorily resolved only by subsequent legislation.[44] In two jurisdictions where the judiciary acted in the form of total abrogation,[45] a subsequent retreat on the part of these same courts[46] was an unequivocal admission that the immunity question defied categorical solution. Noteworthy in this connection is the fact that in California[47] and Minnesota[48] judicial mandates to abrogate were delayed in order to allow the legislatures to construct the appropriate machinery needed to deal with the inevitable problems that would certainly attend any change in the immunity rule. In other states where judicial abrogation has occurred, typical examples of the uncertainties which arose include questions as to whether liability was being imposed retrospectively or prospectively, whether abrogation applied to civil disasters and other emergencies, and a host of other practical concerns relating to limits of liability, financing the payment of judgments, administrative procedures to deal with the newly allowed claims, etc. Yet, in spite of this increased confusion, or rather because of it, there is strong agreement today that in order to meet the needs of both society as a whole and the individual who is injured by the government's tort, comprehensive modification, not total abrogration, is where the answer lies. The words of Professor Van Alstyne are particularly appropriate here:

> It is all too easy for the uninformed observer to formulate an undiscriminating judgment on these issues—to propose that public entities be exposed to tort liability to the same extent as their private counterparts, or at the opposite extreme, to propose a complete restoration of governmental immunity. Intelligently con-

44. *See* ARK. STAT. ANN. §§ 12-2901-02 (Supp. 1969); CAL. GOV'T CODE §§ 810-996.6 (West 1966); ILL. ANN. STAT. Ch. 85, §§ 1-101, 10-101 (Smith-Hurd 1966); MICH. COMP. LAWS ANN. § 691.1401-.1415 (1968); MINN. STAT. ANN. §§ 466.01-.17 (1963); NEV. REV. STAT. Title 3, ch. 41 §§ 41.031-.039 (1967); WIS. STAT. ANN. § 895.43 (1966).

45. Colorado: Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 284-85, 316 P.2d 582, 585-86 (1957). Indiana: Klepinger v. Bd. of Comm'rs, 239 N.E.2d 160, 173 (Ind. App. 1968).

46. Colorado: City and County of Denver v. Madison, 142 Colo. 1, 7, 9, 351 P.2d 826, 829, 830-31 (1960). Indiana: Perkins v. State, 251 N.E.2d 30, 35 (Ind. 1969).

47. CALIF. STAT. 1961, ch. 1404.

48. Spanel v. Mounds View School Dist., No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962).

> ceived and pragmatically workable solutions, however, will emerge only by diligent and unremitting intellectual effort in the difficult policy-permeated areas which lie intermediate between such extremes.[49]

Three Approaches to Modification

> The basic problem is to determine how far it is desirable and socially expedient to permit the loss distributing function of tort law to apply to governmental agencies, without thereby unduly interfering with the effective functioning of such agencies for their own socially approved ends.[50]

The statement above aptly describes the need to strike a delicate balance between two potentially conflicting interests: the desire to compensate tort victims and the desire to allow local governments to perform vital services without fear of calamitous financial disruptions. Such a balancing test must of necessity be applied by anyone undertaking a modification of the doctrine of governmental immunity. Any modification of the doctrine can take one of three alternative forms.

First, the doctrine could be reinvigorated to its Middle Ages' level of strength, *i.e.*, all suits against the government by a private citizen claiming damages for tortious injury would be barred. Such an application is likely to benefit no one, for, while working an unreasonable hardship upon the injured parties,[51] it would at the same time encourage a lack of care on the part of public entities.[52]

The second alternative is at the opposite extreme, and would consist of a waiver of any and all immunity. This course of action would obviously benefit the individual tort victim. But, apart from the serious financial burden which would have to be borne by a municipality under such a plan, there are other likely effects which could be harmful to the community served by that government. One such result would be a reluctance on the part of municipal officials to act when there would be a concomitant risk of liability.[53] Secondly, there is the potential impairment of the efficient func-

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49. Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463, 532 (1963).

50. *Id.* at 469.

51. ". . . [T]he denial of recourse against the state to an individual who is injured or whose property is damaged by the officers, agents or employees of the state engaged in their official duties is . . . a glaring exception to the maxim that there must be a remedy for every wrong." Note, *Governmental Immunity from Tort Liability: Has the Rationale Disappeared?*, 39 U.M.K.C. L. REV. 252, 255 (1970-71).

52. "There can be little doubt that immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution." Rabon v. Rowan Memorial Hosp. Inc., 269 N.C. 1, 13, 152 S.E.2d 485, 493 (1967).

53. For an argument that the "blanket waiver" will have the opposite effect, *see*

tioning of local governments, in light of their inability to undertake long-range fiscal planning without fear of interference from large tort judgments.[54] What the California Law Revision Commission called the "blanket waiver approach"[55] attempts to equate governmental units with private persons for purposes of applying tort law concepts. That Commission in its *Sovereign Immunity Study* (hereinafter the *California Study*) listed some of the "striking differences between private entities and public entities."[56] The difference between the types of activities is clear, but it is important to remember that the difference exists primarily because many functions of municipal governments are avoided by private parties because the performance of such functions carries inherent risks, *e.g.*, administration of prisons and mental hospitals, law enforcement, fire prevention and control.[57]

Activities of governmental units have a much more profound effect on our lives than the activities of private entities. The government makes laws, establishes courts, levies taxes, and regulates through licensing and zoning. What activity of a private entity could compare with those listed above?[58] "Yet, it must be remembered that public entities charged with such duties and responsibilities cannot simply avoid the risk by refusing to act. . . ."[59] Not only must public entities, such as municipalities, perform certain functions, but in many cases they cannot even afford to hesitate to act.[60]

Thus, the "blanket waiver approach" would leave municipalities charged with the unavoidable duty to engage in inherently dangerous activities which must be performed for the good of the general public, and which cannot, or will not, be performed by any other, but which activity forces the municipality to risk tort liability unshielded by any special consideration or im-

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Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S. CAL. L. REV. 161, 178 (1963).

54. "Efficient and foresighted planning of governmental activities and their fiscal ramifications becomes extremely difficult, if not impossible, when the threat of possibly immense but unascertainable tort obligations hangs like a dark cloud on the horizon." Van Alstyne, *supra* note 49, at 467.

55. 5 CAL. LAW REVISION COMM'N REP., RECOMMENDATIONS AND STUDIES 269 (1963).

56. The major differences listed are the public entities' police powers and taxing powers. *Id.*

57. "Many of the activities carried on by government are of a nature so inherently dangerous that no private industry would wish to undertake the risk of administering them." Kennedy and Lynch, *supra* note 53, at 177.

58. "Both in scope and variety, public activities range far beyond those of private enterprise." Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888, 893 (1964). It has been argued that many private industries have risks as great as those in government activities. Ely, *Tort Liability of State Agents and Independent Contractors*, 35 U.M.K.C. L. REV. 119, 122 (1966-67).

59. Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. OF ILL. L. FORUM 919, 923 (1966).

60. Kennedy & Lynch, *supra* note 53, at 178.

munity. The resulting possibility of a proliferation of private litigation against municipalities is real. Though some commentators feel that a fear of nuisance suits is unfounded,[61] it requires no statistical survey to realize that a municipality could quite possibly be deluged with damage suits in the absence of immunity. The vast and expanding range of local government activity makes municipalities peculiarly susceptible to incurring tort liability,[62] and, (putting aside consideration of the cost of satisfying adverse judgments[63]) the cost of fighting a great number of damage suits is considerable on its own.

In light of what has been discussed above, the third alternative, the "selective approach,"[64] appears to be the best solution. The discussion of the "blanket waiver approach" pointed up some of the difficulties attendant to a complete removal of immunity. However, the "selective approach" required consideration of all of those difficulties, plus a great many more. It must also be decided whether the legislature or the judiciary is best suited to modify by this approach. In this regard, we will discuss the considerations relevant to devising a comprehensive scheme and the respective capabilities of the judiciary and the legislature. It seems the "selective approach" can be most effectively taken by the latter, as will be shown below.

Relevant Considerations

Most states have passed a statute waiving immunity in certain cases.[65] Within any one state the waiver provisions are likely to cover a wide range of activities, and as applied to local governments there may be substantial variations. In addition, there is likely to be case law in a state which in some way abrogates the immunity doctrine.[66] All of these extant modifications should be considered in developing a plan for immunity.[67] By em-

61. *Supra* note 51, at 255; Majure, Minick & Snodgrass, *The Governmental Immunity Doctrine in Texas—An Analysis and Some Proposed Changes*, 23 Sw. L.J. 341, 346 (1969).

62. For a sample of the range of activities, *see* Kennedy and Lynch, *supra* note 53, at 170.

63. "It is well known that a very substantial proportion of the cost of litigation goes for attorney's fees and court costs rather than for the payment of judgments. . . ." Kennedy & Lynch, *supra* note 53, at 182. Judge Greenhill said that in 1969 the City of Houston employed approximately forty attorneys, but if immunity were abolished that city would be required to hire an additional forty. Greenhill, *Should Governmental Immunity for Torts Be Re-Examined, And, If So, By Whom?*, 31 TEX. BAR. J. 1036, 1068 (1969).

64. *Supra* note 55, at 271.

65. Some examples can be found in Van Alstyne's article, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963).

66. *Supra* note 55, at 219-236.

67. *Id.* at 282.

ploying established principles, as much as possible, the new scheme will be more readily accepted and the transition will be smoother. A legislature can bring before it for consideration all existing law on the subject of immunity and use it as a starting point.[68] Rather than acting as a sturdy foundation upon which to build, existing law will act as a hurdle to a court attempting modification. The doctrine of stare decisis tends to restrict the courts' departures from prior case law,[69] while a necessary respect for legislative enactments makes courts reluctant to ignore statutory law.

The *California Study* provides an excellent outline of what the relevant considerations are in modifying the doctrine of governmental immunity.[70] The character and number of these considerations aptly point up the need for legislative rather than judicial modification.

The liability of a municipality should vary proportionately to the degree of fault on the part of the government. One would not be as offended by a statute protecting a public entity from liability for actions taken in good faith as one might be by a statute protecting it from negligent action resulting in harm to an individual. Since in many cases a public entity cannot refuse to perform a dangerous function, a modification of the immunity doctrine should be designed to protect actions taken in good faith.

The same consideration should be given to the degree of risk taken by a municipality in carrying out necessary functions. Law enforcement is the perfect example of a high risk activity. While it is vitally necessary to a community, it cannot be treated on a par with activities such as highway maintenance or housing regulation. In 1963, the Sheriff's Department of Los Angeles County made 74,132 arrests;[71] consider how many arrests must be made every year by New York City, Chicago and San Francisco police departments and the awesome range of this one governmental activity is clear. The risk involved is also clear, and so should be the need for protecting cities and counties from liability in this area.

The deterrent effect of the imposition of liability must also be considered an important inducement to abolish immunity. However, rendering the municipality liable takes the burden from city employees, with the result that we have a municipality deterred, with employees given no reason for caution. On the other hand, the result might be excessive caution in the performance of duties, a not altogether desirable end.[72]

68. *Id.* at 516-19.
69. *Supra* note 1, § 25.01, at 96 (Supp. 1965).
70. Those considerations include: degree of fault, degree of risk, deterrent effect, and means for assuring satisfaction of judgments. *Supra* note 55.
71. Kennedy & Lynch, *supra* note 53, at 170.
72. *Id.* at 178.

After having considered factors such as degree of fault, degree of risk, and deterrent effect, the framer of a comprehensive scheme must then establish standards of care. Judge David, writing in 1959, prior to California's radical revision of the immunity doctrine, emphasized the great difficulties which would be encountered in setting up standards of care.[73] He cited numerous examples of the failures of the judiciary in applying a standard of care to municipal activities.[74] A municipality generally controls more property, more vehicles, and more employees than most of its private citizens. Its duties of inspection, care, etc. must necessarily differ from the same duties imposed on the head of a two-car family.

Assessing the standards for liability and the limits of immunity is only a part, albeit a significant one, of the task facing anyone undertaking a comprehensive modification of the doctrine of governmental immunity. While that aspect of the relevant considerations could arguably be adequately handled by a court, the standards and rules prescribed would likely be of limited application. The second aspect of a comprehensive scheme must provide for financial coverage of any claims allowed; it is this problem, above all, that demonstrates the exclusive competence of the legislature in dealing with the immunity doctrine.

Not all governmental units are equipped, financially, to satisfy adverse tort judgments. As the *California Study* makes clear, there are a number of public entities with extremely small revenues,[75] and in some cases a substantial tort judgment could deal a crushing blow to these municipalities. Local government revenues are generally dependent upon the size of population. Throughout the country there is a significant disparity of size among units of local government.[76] A municipality's liability must be controlled so that it will not be faced with claims it cannot possibly pay. In California "[t]he total *annual* revenues of some public agencies are less than the *monthly* earnings of many private individuals of modest means."[77] If liability is not limited to specific dollar amounts, a plan must be devised to as-

73. David, *supra* note 40, at 16. "The City of Los Angeles has roughly 6,000 miles of public street. Laid end to end, the streets would stretch from San Francisco to New York and back, with a third traverse reaching Salt Lake City. Laid end to end, Los Angeles city sidewalks would reach from San Francisco to Tokyo and back; or from San Francisco to Cape Town, South Africa. What is the feasible duty of inspection?"

74. *Id.* at 17.

75. *Supra* note 55, at 289.

76. In 1967 there were 38,202 counties, municipalities, and townships in the United States, and while 255 of these had populations of 250,000 or more, the vast majority (31,009), had populations of less than 5,000. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1970*, at 404 (91st ed. 1970).

77. *Supra* note 55, at 289.

sure that claims will be paid. It is a hollow victory to win a judgment against a city which cannot pay.

The problem of a municipality's curtailing necessary public functions in the face of tort liability was dismissed by Mr. Ben Ely with this statement:

> Very few private corporations have been prevented from entering into a socially desirable field of activities because of the fear of tort liability. The corporation either sets aside out of its earnings a sufficient reserve to meet such contingencies or it insures against them in some private insurance company.[78]

Mr. Ely further states that municipalities can obtain liability insurance, and at the same time are "in an even better position than the private entrepreneur to spread the loss through the medium of taxation."[79]

As to the concept of spreading loss through taxes, Mr. Ely seems to have overlooked some very relevant data. The *California Study* is one of the most exhaustive treatments of the pragmatic problems of modification, and indicates that loss-spreading through taxes will not easily be accomplished in every municipality, at least in California.[80] Any taxing authority of a municipality is generally given by the state legislature and "Not only are there extreme differences in total assessed valuations of taxable property in various public entities, but the tax base itself is not uniform."[81] Not all municipalities impose income or sales taxes;[82] some do not even have property tax power. In 1960 there were 81,248 local governments, 70,726 of which had property taxing power and 10,522 of which had no such power.[83] The object of tort liability is to spread the loss, but without legislative enactments many municipalities cannot raise the money, and there is even some question as to whether money raised by legislatively approved tax levies can be used to satisfy judgments. This problem stems from the concept that tax revenues are held by the government in trust for certain uses, and that use of such revenue to satisfy tort claims would constitute a breach of trust.[84] A legislative enactment could most effectively eliminate this problem by specifically allowing municipalities to satisfy tort judgments with funds derived from taxes.[85]

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78. Ely, *supra* note 58, at 122-23.
79. *Id.* at 123.
80. "Finally, substantial variations in taxing power exist between public entities as reflected in the differing tax limits imposed by statute. But, even assuming that no tax limit was applicable . . . strong practical differences in taxing power would continue to be felt. . . ." *Supra* note 55, at 291.
81. *Id.* at 290.
82. *Supra* note 76, at 424.
83. *Id.* at 405.
84. O'Connell v. Merchants' and Police Dist. Telegraph Co., 167 Ky. 468, 470, 180 S.W. 845, 847 (1915).
85. *Supra* note 55, at 284-86.

Mr. Ely's second assumption is that municipalities can obtain liability insurance, a questionable reason for abrogation at best. As one eminent jurist has stated, "The necessity for insurance presents possibly the strongest argument for legislative rather than judicial abrogation of the doctrine of governmental immunity."[86]

Even when the doctrine of governmental immunity was at its peak, many municipalities were being held liable for certain tortious conduct, and many were carrying insurance authorized by the legislature. It can readily be seen how insurance premiums for municipalities would be lower when liability was the exception rather than the rule. Thus, a problem which a legislature must face in modifying the immunity doctrine is whether its plan will state specifically when the public entity is liable, leaving all other activities immune, or whether it will leave the government liable at all times except in those cases referred to in the statute. The former plan has been called "closed end" liability, the latter "open end" liability. Mssrs. Kennedy and Lynch have aptly described the effect of an "open end" plan on a government's ability to obtain liability insurance:

> However, it seems clear that if the "open end" approach to liability were used there would be a substantial problem in obtaining any insurance since companies would not wish to risk coverage of such a vague and indefinite area of liability except at a prohibitive cost.[87]

The California Law Revision Commission recommended a "closed end" approach to allow more efficient fiscal planning.[88] The Commission's Study also dealt with the insurance problem and found that "the obvious utility of insurance as a device for mitigating the adverse impact of tort liability warrants consideration of legislation to accomplish the following purposes:"

a. To expressly authorize all public entities to insure against the personal liability of their agents for any tort they might commit. (Only a few entities were so authorized at this time.)
b. To expressly authorize all public entities to insure against their own liability for any torts.
c. To expressly authorize entities to insure by purchasing coverage from a private company or by self-insurance.
d. To expressly authorize entities to pool their resources so as to purchase coverage without incurring a serious financial burden.[89]

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86. Greenhill, *supra* note 63, at 1069.
87. Kennedy and Lynch, *supra* note 53, at 179.
88. 4 CAL. LAW REVISION COMM'N REP., RECOMMENDATIONS AND STUDIES, 803, 811 (1963).
89. *Supra* note 55, at 296, 297.

Only a legislature could accomplish such purposes in most states. The "closed end" approach, which is most desirable, would require a careful examination of governmental activities so as to determine what activities should carry the risk of liability, but the "open end" approach would not.[90] On this basis, it appears that the legislature is best suited for devising a plan based on the "closed end" approach.

The problem of assuring that payment of authorized claims against a municipality will be forthcoming makes the modification of the immunity doctrine a peculiarly legislative problem. Self-insurance is equivalent to a direct payment, as if uninsured, and thus involves the problems of broadening the tax base and authorizing the use of tax revenues to pay tort judgments. The cost of purchasing insurance is likely to vary proportionately according to the extent of express liability and vague immunity. Moreover, the money to purchase insurance must come from a city's revenue, which, in many cases, must be authorized by the legislature.

Conclusion

As the foregoing strongly suggests, the judiciary is simply not designed to resolve the immunity problem.[91] Certainly, the courts can, and in a number of cases did, act as a spur to legislative action,[92] but the comprehensive, detailed scheme needed to settle the questions surrounding the immunity doctrine is not likely to be forthcoming from a single case or line of cases.[93] A court faced with an immediate conflict between a private citizen's right to recover for injuries and a municipality's need for protection is likely to be influenced by the "David and Goliath" aspects of the contest, and the judiciary relies for its decisions on facts submitted by the adversaries.[94] Not only are these facts likely to be colored according to the particular adversary's bias, but the court is dependent on this source of data since the judiciary is not designed for independent information gathering. And yet, independent data gathering is what is most essential in devising a scheme of liabilities and immunities. There must be a thorough, exhaustive assimila-

90. Kennedy & Lynch, *supra* note 53, at 179.

91. *See* Comment, Duke L.J., *supra* note 58, at 891; Note, *Municipal Corporations—Liability In Tort-Prospective Judicial Abrogation of the Sovereign Immunity Concept*, 60 MICH. L. REV. 379, 382 (1962).

92. *See* Moliter v. Kaneland Community Unit School Dist., No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Muskoph v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961). *See also* Van Alstyne, *supra* note 59, at 930 *et seq.*

93. *Accord*, Van Alstyne, *supra* note 49, at 466.

94. "Limitations of this type are characteristic of the very process of judicial lawmaking and are derived from the inherent nature of the adversary system of administering justice." Van Alstyne, *supra* note 65, at 163.