

7-1-1963

Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History

Marshall S. Shapo

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Torts Commons](#)

Recommended Citation

Marshall S. Shapo, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. Miami L. Rev. 475 (1963)

Available at: <https://repository.law.miami.edu/umlr/vol17/iss4/3>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

MUNICIPAL LIABILITY FOR POLICE TORTS: AN ANALYSIS OF A STRAND OF AMERICAN LEGAL HISTORY

MARSHALL S. SHAPO*

INTRODUCTION	475
I. THE POLICEMAN'S LOT AND THE CITY'S IMMUNITY	476
A. <i>Factual Situations</i>	476
B. <i>Rationalizations</i>	478
C. <i>Cracks in the Wall of Immunity</i>	484
D. <i>A Trio of Case Histories</i>	486
1. FLORIDA	486
2. ILLINOIS	488
3. NEW YORK	489
II. A DOCTRINE UNDER FIRE: THE GUNS OF ACADEME	492
A. <i>Borchard: The Man and His Work</i>	492
B. <i>Points of the Intellectual Compass</i>	496
III. THE BARRIERS CRUMBLE: BREAKTHROUGH CASES	498
A. <i>Rumblings</i>	499
B. <i>The Flood Tide</i>	500
1. FLORIDA	500
2. ILLINOIS	500
3. NEW JERSEY	501
4. CALIFORNIA	502
5. MICHIGAN	502
6. WISCONSIN	503
7. MINNESOTA	504
C. <i>Legislation in Both Directions</i>	504
D. <i>Holders of the Maginot Line</i>	506
IV. THE GROWTH OF POPULATION AND THE GROWTH OF THE LAW	510
V. THE LAW SEEKS A NEW FOOTHOLD	513
CONCLUSION	517
APPENDIX	512

INTRODUCTION

This paper will analyze the development of a concept in the law of torts—the concept that a municipality should be responsible for the torts of its police officers. This story is part of a larger chronicle, the development of municipal tort liability in general. But the law, as well as history, is served better by sharp focus on the individual strand. The general survey may suggest truth, diffused. The spotlight exposes facets of the truth by its insistence on the particulars—the law of *cases*.

This is a five-part analysis. It will first examine the great volume of police tort cases which immunize the city from liability. It will spotlight the growth of legal reasoning in an historical context, noting the erosion of doctrinal barriers in some states and the petrification of the old ideas in others. Secondly it will analyze the scholarly attack on government

* Executive Editor, *University of Miami Law Review*; Student Assistant in Instruction for Freshmen, University of Miami School of Law; Formerly Instructor in History, University of Miami.

immunity in general, with special emphasis on the role of one scholar and his relationship to the intellectual currents of his time.

The third part of the paper will concern the explicit breaking of the old molds by a growing corps of states since 1957. This will include several police cases, but also it necessarily will include cases involving other governmental functions. We shall return exclusively to a policeman focus by posing as a counterpoint the maintenance of the status quo by several states in the last decade. The fourth part will present suggestions of a positive correlation between these recent developments and the demographic demands of urban society in the mid-twentieth century.

The analysis will then examine recent developments in Florida police tort cases, which present a fascinating picture of jurisprudence in search of a new foothold.

It will conclude with an examination of what the author believes are the lessons to be drawn from this story, for the analyst of the development of legal history, as well as for those concerned practically with decision making as advocates and judges.

I. THE POLICEMAN'S LOT AND THE CITY'S IMMUNITY

*Ah, take one consideration with another,
A policeman's lot is not a happy one.¹*

A. Factual Situations

The problems of municipal liability for the torts of officers are well represented by the hundreds of cases involving police torts since the middle of the last century. The policeman is *sui generis*, a unique kind of public official. His role in society is celebrated. He is the small boy's idol, the songwriter's vehicle. He is the omnipresent public official, touching all our lives. The citizen's intimate acquaintance with the cop on the corner² may have given way to a more impersonal relationship. But his role in the life of the ordinary citizen, enhanced by the weapons issued to him by his municipal employer, has remained significant for more than a century.

Municipal protection from liability for police torts began before the Civil War. It is perhaps indicative of the historical validity of the doctrine that two of the earliest cases involved the shooting of slaves by police officers.³ However, Northern courts meted out the same justice in

1. W. S. Gilbert, *The Pirates of Penzance*, Act II.

2. See Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28, 41 (1921).

3. *Dargan v. Mayor of Mobile*, 31 Ala. 469 (1858); *Stewart v. City of New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218 (1854). It is particularly remarkable that Delaware's case of first impression on the subject—in 1931—brought forth a decision which cited *Dargan*, *supra*, as its principal authority. *Kelley v. Mayor of Wilmington*, 35 Del. (5 W. W. Harr.) 9, 156 Atl. 867 (1931).

cases involving allegations of the seizure of a horse,⁴ and assault, battery and false imprisonment.⁵

Since that time the cases which immunize the municipality with respect to police torts have ranged over a wide variety of situations. The most frequent allegations have included false imprisonment⁶ and simple assault and battery.⁷ There are many cases involving shootings: A hospital patient shot by a policeman in the hospital furnace room after leaving his bed,⁸ a man shot by a policeman guarding a city dump,⁹ a killing by an officer trying to take a man into custody,¹⁰ and the wounding of a bystander by a policeman chasing robbers.¹¹ Another large group of cases involves police administration of jails. Plaintiffs have sued for a failure to provide needed medical attention,¹² for negligence in connection with jails that burned with prisoners inside,¹³ for being put with carriers of smallpox¹⁴ or venereal disease,¹⁵ and for other maltreatment.^{15a}

Another category involves the negligent operation of vehicles. This has included complaints of a police car which hit a truck and threw it against the plaintiff's decedent,¹⁶ and a strange factual situation in which the city apparently was doubly immunized in a collision of a patrol wagon and a fire truck.¹⁷ Recovery against the city has been refused on allegations that a policeman put a gun where a drunk man could reach it,¹⁸ that a rifle range was negligently supervised,¹⁹ and that land was damaged²⁰ or the flow of a river obstructed²¹ by police measures taken in

4. *Fox v. The Northern Liberties*, 3 W. & S. 103 (Pa. 1841).

5. *Buttrick v. City of Lowell*, 1 Allen 172, 79 Am. Dec. 721 (Mass. 1861).

6. *E.g.*, *Wilson v. Eberle*, 15 Alaska 260 (1954); *Town of Odell v. Schroeder*, 58 Ill. 353 (1871); *City of Lawton v. Harkins*, 34 Okl. 545, 126 Pac. 727 (1912).

7. *McSheridan v. City of Talladega*, 243 Ala. 162, 8 So.2d 831 (1942); *Craig v. City of Charleston*, 180 Ill. 154, 54 N.E. 184 (1899); *Brown v. City of Shreveport*, 129 So.2d 540 (La. App. 1961); *Simpson v. Poindexter*, 241 Miss. 854, 133 So.2d 286 (1961) (arrested for misdemeanor, plaintiff was beaten so badly that he "ambulates with hemiplegic gait").

8. *O'Quin v. Baptist Mem. Hosp.*, 184 Tenn. 570, 201 S.W.2d 694 (1947).

9. *Gonzales v. City of El Paso*, 316 S.W.2d 176 (Tex. Civ. App. 1958); see also *Kelley v. Mayor of Wilmington*, 35 Del. (5 W.W. Harr.) 9, 156 Atl. 867 (1931).

10. *Kingfisher v. City of Forsyth*, 132 Mont. 39, 314 P.2d 876 (1957).

11. *Evans v. Berry*, 262 N.Y. 61, 186 N.E. 203 (1933).

12. *Valdez v. Amaya*, 327 S.W.2d 708 (Tex. Civ. App. 1959).

13. *McAuliffe v. City of Victor*, 15 Colo. App. 337, 62 Pac. 231 (1900); *Gentry v. Town of Hot Springs*, 227 N.C. 665, 44 S.E.2d 85 (1947); *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 12 S.E. 707 (1890).

14. *Evans v. City of Kankakee*, 231 Ill. 223, 83 N.E. 223 (1907).

15. *Lewis v. City of Miami*, 127 Fla. 426, 173 So. 150 (1937) (municipality held liable).

15a. *City of Detroit v. Laughna*, 34 Mich. 401 (1876) (plaintiff forced to take cold bath under improper conditions and suffered exposure in cold cell).

16. *Taylor v. City of Berwyn*, 372 Ill. 124, 22 N.E.2d 930 (1939).

17. *Perez v. City & County of Honolulu*, 29 Haw. 656 (1927).

18. *Wynkoop v. Mayor of Hagerstown*, 159 Md. 194, 150 Atl. 447 (1930).

19. *Bucholz v. City of Sioux Falls*, 77 S.D. 322, 91 N.W.2d 606 (1958) (dictum).

20. *Gillmor v. Salt Lake City*, 32 Utah 180, 89 Pac. 714 (1907).

21. *Sehy v. Salt Lake City*, 41 Utah 534, 126 Pac. 691 (1912).

the search for a drowned boy. Cities also have escaped liability for slander²² and for the conversion of chattels.²³

B. *Rationalizations*

Municipal immunity for police torts did not develop as a rule without exceptions,²⁴ but the doctrine was applied quite consistently up to the last decade in almost every state which ruled on the issue. We may now examine the reasons which the courts have used to immunize the municipality. These reasons will be presented with close attention to decisional language and to the sources of precedent which the courts used. It is, of course, necessary to analyze the underlying currents which influence legal history, and it is well-known that judicial language is many times opaque with reference to judicial purpose. But for a starting point there can be no substitute for a close analysis of what the courts say they are doing.

The most popular group of reasons for immunity is really just a set of labels which display a fascination with the abstract political relationships of the municipal corporation. In a case which used typical language, it was alleged that the plaintiff's decedent died in jail because of negligent care when he became ill.²⁵ Liability was denied against the defendant city because, as the court said, a city taking temporary care of people who have been arrested is performing a "public duty" for which it receives no "pecuniary benefit"; the city derives no "corporate advantage" from the confinement.

This idea that there is a dichotomy in the functions of the city between the "governmental" and the "proprietary" runs all through the field of municipal tort law, and is recited in many policeman cases.²⁶ An interesting thing about this distinction is that it becomes accepted as almost an *a priori* category. The courts eventually find it unnecessary to recite the distinction between the city as a corporation which seeks profit,

22. *Owensby v. Morris*, 79 S.W.2d 934 (Tex. Civ. App. 1935) (circulation of pictures of the plaintiff to Rogues' Galleries).

23. *Tzatzken v. City of Detroit*, 226 Mich. 603, 198 N.W. 214 (1924); *Boorse v. Springfield Twp.*, 377 Pa. 109, 103 A.2d 708 (1954); *Fox v. The Northern Liberties*, 3 W. & S. 103 (Pa. 1841). See the comment by Pennsylvania's Justice Musmanno in another case: "[H]orse by horse, the fiction of governmental immunity for the tortious acts of its agents continues to raise its cacophonous clatter down the highway of law and justice." *Stouffer v. Morrison*, 400 Pa. 497, 505, 162 A.2d 378, 382 (1960).

24. See, e.g., text accompanying notes 58 through 63 *supra*.

25. *Kelly v. Cook*, 21 R.I. 29, 41 Atl. 571 (1898).

26. *City of Miami v. Bethel*, 65 So.2d 34 (Fla. 1953); *Elrod v. City of Daytona Beach*, 132 Fla. 214, 180 So. 378 (1938); *City of Nampa v. Kibler*, 62 Idaho 511, 113 P.2d 411 (1941); *Taylor v. City of Berwyn*, 372 Ill. 124, 22 N.E.2d 930 (1939); *Lamont v. Stavanaugh*, 129 Minn. 321, 152 N.W. 720 (1915); *Ulrich v. City of St. Louis*, 112 Mo. 138, 20 S.W. 467 (1892); *Lacock v. City of Schenectady*, 224 App. Div. 512, 231 N.Y. Supp. 379 (1928), *aff'd mem.*, 251 N.Y. 575, 168 N.E. 433 (1929); *Bucholz v. City of Sioux Falls*, 77 S.D. 322, 91 N.W.2d 606 (1958) (dictum); *Harman v. City of Lynchburg*, 74 Va. (33 Grat.) 37 (1880) (dictum); *Schultz v. City of Milwaukee*, 49 Wis. 254, 5 N.W. 342 (1880).

and the "governmental" agency.²⁷ A twentieth century tendency to rubberstamp this dichotomy is a compounded judicial error. It represents what might be called the tendency of the *nineteenth* century to make a principle a concrete thing with an independent existence.²⁸ Once the principle is thus frozen, it is a simple matter to retreat to the syllogism. An Arizona case provides a classic example: Immunity exists for the "governmental" function. Police work is a governmental function. Therefore, there is no liability.²⁹

The governmental-proprietary dichotomy is extended by a closely allied theory. Illustrative is the case of an Oklahoma peddler who brought an action for false imprisonment.³⁰ The court denied liability because, it said, police regulations were made and enforced not in the interest of the city in its "corporate capacity," but in the "interest of the public." The appointment of policemen was said to be devolved on cities by the legislature "as a convenient mode of exercising a function of government."³¹

This theory becomes exalted when the magic word "sovereignty" is invoked. The guns boomed at Fort Sumter the year that a Massachusetts court, in an oft-cited decision, told a plaintiff that he could not recover for assault and battery and false arrest because

The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to

27. The Tennessee cases are quite instructive in this respect. The landmark Tennessee decision, in a false imprisonment case decided in 1866, was *already* "satisfied from principle and authority" that a "municipal corporation is not liable for the wrongful acts of its officers." *Pesterfield v. Vickers*, 43 Tenn. 205, 213 (1866). The general doctrine here entered the Tennessee policeman cases. This *Pesterfield* case can be traced forward to a 1930 case, *Combs v. City of Elizabethton*, 161 Tenn. 363, 31 S.W.2d 691, which says that *Pesterfield* settled the issue, and then to a 1960 case, which cites the 1930 case, and says that "The choosing of agents for the enforcement of public laws is a governmental function, and a municipality cannot be held liable about such matters." *Mayor of Morristown v. Inman*, 47 Tenn. App. 685, 342 S.W.2d 71.

28. For one of the classic critiques, see William James' essay *Humanism and Truth* in *PRAGMATISM AND FOUR RELATED ESSAYS SELECTED FROM THE MEANING OF TRUTH* 375-77 (1947).

29. *City of Phoenix v. Greer*, 43 Ariz. 214, 29 P.2d 1062 (1934). Another good example is *Boorse v. Springfield Twp.*, 377 Pa. 109, 103 A.2d 708 (1954).

30. *City of Lawton v. Harkins*, 34 Okl. 545, 126 Pac. 727 (1912). The frequency of peddler cases in this area is another index to the antiquity of the rule from a standpoint of socio-legal history. See also text accompanying note 3 *supra*.

31. The same rationale was used in *Walker v. Tucker*, 131 Colo. 198, 280 P.2d 649 (1955); *McCain v. Andrews*, 139 Fla. 391, 190 So. 616 (1939); *Culver v. City of Streator*, 130 Ill. 238, 22 N.E. 810 (1889); *Calwell v. City of Boone*, 51 Iowa 687, 2 N.W. 614 (1879) (see also *Trescott v. City of Waterloo*, 26 Fed. 592 (N.D. Iowa 1885)); *Wynkoop v. Mayor of Hagerstown*, 159 Md. 194, 150 Atl. 447 (1930); *McConnell v. City of St. Charles*, 204 S.W. 1075 (Mo. 1918); *Tomlin v. Hildreth*, 65 N.J.L. 438, 47 Atl. 649 (1900); *Rusher v. City of Dallas*, 83 Tex. 151, 18 S.W. 333 (1892); *Gillmor v. Salt Lake City*, 32 Utah 180, 89 Pac. 714 (1907). See also *Grumbine v. Mayor of Washington*, 2 MacArth. 578, 29 Am. Rep. 626 (D.C. 1876).

such enactments the same force and effect as if they had been passed directly by the legislature.³²

Three years before, Alabama used the term "*imperium in imperio*" in a slave-killing case³³ to describe the municipal government's relation to the police power. The courtly flavor of the language bespeaks the antiquity of the concept, which was popular under various shades of labels, both North and South, and remains popular in our own time.³⁴

A fourth offshoot of the political-theory arguments, closely related to the "sovereignty" idea, is illustrated by an old Kansas false imprisonment case.³⁵ The court there reasoned that policemen were not agents or servants of the city, but "public servants of the state." This idea, with variations based on special circumstances in the formal distribution of power within a state, was quite popular before the turn of the century³⁶ and has survived into this decade.³⁷

The atmosphere of doctrine, the air of the nineteenth century intellectual structure that is created by this theorizing, is reinforced by the frank laissez-faire implications of a few decisions. A plaintiff in antebellum Pennsylvania complained that the chief of police of the defendant, an incorporated district, had seized his horse illegally. The court replied that the policeman "must be regarded as having done the trespass of his own will, and he alone must be looked to for compensation, by the party injured."^{37a} This atomistic view of society, emphasizing only the duty of the individual tortfeasor, refusing to recognize a responsibility in his governmental employer, pervades several decisions.^{37b}

32. *Buttrick v. City of Lowell*, 1 Allen 172, 174, 79 Am. Dec. 721, 723 (Mass. 1861).

33. *Dargan v. Mayor of Mobile*, 31 Ala. 469, 473 (1858).

34. One of the latest cases is *Kingfisher v. City of Forsyth*, 132 Mont. 39, 314 P.2d 876 (1957), which speaks of an "arm of the state." Other examples: *Stewart v. City of New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218 (1854); *Tzatzken v. City of Detroit*, 226 Mich. 603, 198 N.W. 214 (1924); *Kelly v. Cook*, 21 R.I. 29, 41 Atl. 571 (1898); *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 12 S.E. 707 (1890). See also *McAuliffe v. City of Victor*, 15 Colo. App. 337, 62 Pac. 231 (1900); *Pollock's Adm'r v. City of Louisville*, 13 Bush 221, 26 Am. Rep. 260 (Ky. 1877); *Woodhull v. Mayor of New York*, 150 N.Y. 450, 44 N.E. 1038 (1896). For Mr. Justice Holmes' articulation of this idea, and citation to an adverse view, see note 119 *infra*.

35. *Peters v. City of Lindsborg*, 40 Kan. 654, 20 Pac. 490 (1889).

36. *City of Detroit v. Laughna*, 34 Mich. 401 (1876) (state law adopted the house of correction as a public prison and there was a state representative on the governing board); *McKay v. City of Buffalo*, 9 Hun. 401 (N.Y. 1876) (police department responsible to a board of commissioners). See also *City of Lafayette v. Timberlake*, 88 Ind. 330 (1882); *Buttrick v. City of Lowell*, 1 Allen 172, 79 Am. Dec. 721 (Mass. 1861).

37. *Stouffer v. Morrison*, 400 Pa. 497, 162 A.2d 378 (1960).

37a. *Fox v. The Northern Liberties*, 3 W. & S. 103, 106 (Pa. 1841).

37b. *Pesterfield v. Vickers*, 43 Tenn. 205, 213 (1866) ("If they [police officers] violate the law, they are personally responsible"); *Harrison v. City of Columbus*, 44 Tex. 418 (1876) (court noted that those who performed arrest could have been held personally liable); *Franklin v. City of Seattle*, 112 Wash. 671, 192 Pac. 1015 (1920) (guilt on charge of confinement for more than a year on false charge of having contagious disease would be the guilt of the officers alone).

One particularly comfortable reason for immunizing the city has been to say that the law is "well-settled." That particular phrase occurs in surprisingly early decisions.³⁸ This approach inflicted perhaps its worst indignity in a 1905 West Virginia case involving an allegation that the plaintiff's seven-year-old son had died from incarceration in the city's "filthy and unsanitary prison." The court said that the whole affair was "difficult to conceive," but that "the hardship of the case cannot be permitted to overthrow *fundamental principles of law*."³⁹

Courts which lacked precedent in their own jurisdictions have found no pain in immunizing cities because of what other jurisdictions have said. Thus, an 1875 Georgia decision absolves the city of responsibility for its policemen's alleged false imprisonment by saying that the governmental-private distinction is "almost universal," and cites *Buttrick v. City of Lowell*, a landmark Massachusetts case of 1861.⁴⁰ This illustration compels an observation on the cross-sterilization of legal concepts from one state to another in our federal system. One is impressed, reading these cases, by the evolution of an interlocking directorate of precedents, laid down for the most part in the nineteenth century, which provided a ready-made haven for judges in search of certainty. Thus, we find the Oklahoma court in 1912 holding that a peddler cannot recover against the city for false imprisonment,⁴¹ with a citation to the Alabama slave-killing case,⁴² as well as to decisions from Georgia, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Missouri and Pennsylvania.⁴³

38. *Gullikson v. McDonald*, 62 Minn. 278, 64 N.W. 812 (1895); *McIlhenney v. City of Wilmington*, 127 N.C. 146, 37 S.E. 187 (1900). I say "surprisingly early"; but about a decade after these two cases, Dean Pound was noting a "certain ballast of mysterious technicality" in the law. *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908). If for Pound the hour was late for a change at that time, we may ask what he would say to the same use of "well settled" within the last decade. *Taulli v. Gregory*, 223 La. 195, 65 So.2d 312 (1953).

39. *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 12 S.E. 707 (1890) (Emphasis added). See also *Perez v. City and County of Honolulu*, 29 Haw. 656 (1927) ("It has too long been the law to be now questioned"); *Craig v. City of Charleston*, 180 Ill. 154, 54 N.E. 184 (1899) ("familiar rule of law").

40. *Cook v. Mayor of Macon*, 54 Ga. 468 (1875), citing *Buttrick v. City of Lowell*, 1 Allen 172, 79 Am. Dec. 721 (Mass. 1861). Similarly, see *Simpson v. City of Whatcom*, 33 Wash. 392, 74 Pac. 577 (1903) ("great weight of authority").

41. *City of Lawton v. Harkins*, 34 Okl. 545, 126 Pac. 727 (1912).

42. *Dargan v. Mayor of Mobile*, 31 Ala. 469 (1858).

43. *Cook v. Mayor of Macon*, 54 Ga. 468 (1875) (illegal arrest); *Culver v. City of Streator*, 130 Ill. 238, 22 N.E. 810 (1889) (negligence respecting enforcement of dog ordinance); *Town of Odell v. Schroeder*, 58 Ill. 353 (1871) (false imprisonment); *Blake v. City of Pontiac*, 49 Ill. App. 543 (1893) (false imprisonment and battery); *Calwell v. City of Boone*, 51 Iowa 687, 2 N.W. 614 (1879); *Peters v. City of Lindsborg*, 40 Kan. 654, 20 Pac. 490 (1889) (false imprisonment); *Pollock's Adm'r v. City of Louisville*, 13 Bush 221, 26 Am. Rep. 260 (Ky. 1877) (false imprisonment); *Buttrick v. City of Lowell*, 1 Allen 172, 79 Am. Dec. 721 (Mass. 1861) (assault and battery and false arrest); *Worley v. Inhabitants of Town of Columbia*, 88 Mo. 106 (1885) (false imprisonment); *Elliot v. City of Philadelphia*, 75 Pa. 347 (1874) (letting horse run away and be killed after plaintiff's arrest).

Over and over the courts drone the magic names of these cases, a litany which sounds well into the twentieth century.⁴⁴ And then we turn to a 1947 decision of the Municipal Court of Appeals for the capital of the nation. It cites *Buttrick v. City of Lowell*,⁴⁵ vintage Lincoln, for the proposition that there was no ratification when the District of Columbia authorized its corporation counsel to defend policemen against a charge that they broke into the plaintiff's house and placed another in possession!⁴⁶

A great historian has said that the American people rose admirably to the emergency presented by "the phenomenon of a great population everywhere clotting into towns," and that there developed in place of rural neighborliness a spirit of "impersonal social responsibility which devoted itself, with varying earnestness and success, to questions of pure water, sewage disposal and decent housing for the poor."⁴⁷ He has also noted, however, the "lack of unity, balance, planfulness in the advances that were made," and that urban progress was "experimental, uneven, often accidental."⁴⁸ An examination of the legal history of this time, centered on municipal responsibility for police torts, reveals that the "impersonal social responsibility" is lacking in this area, and that progress in the law was in fact stultified by the comfort provided by a rule.

It is not only because fresh thought has been choked by historical dust that liability has been denied. Missouri, prodded by a thoughtful plaintiff's attorney, took a critical look at immunity while considering an allegation based on a policeman's assault in the city jail.⁴⁹ But the court refused to abrogate the doctrine. It noted that immunity had begun with "the abhorrent theory that the king can do no wrong," but said that the old concept had new reasons, centered on the "unlimited possibilities of the wasteful and dishonest dissipation of public funds."

This financial argument was one of the oldest rationalizations for immunity. Indeed, it was one of those used by Lord Kenyon in the hoary English case of *Russell v. Men of Devon*,⁵⁰ which serves as a

44. For examples of cross-sterilization by the cases mentioned, on both sides of 1900, see the following: *Tzatzken v. City of Detroit*, 226 Mich. 603, 198 N.W. 214 (1924); *Hinds v. City of Hannibal*, 212 S.W.2d 401 (Mo. 1948); *McKay v. City of Buffalo*, 9 Hun. 401 (N.Y. 1876); *McIlhenney v. City of Wilmington*, 127 N.C. 146, 37 S.E. 187 (1900); *Kelly v. Cook*, 21 R.I. 29, 41 Atl. 571 (1898); *Owensby v. Morris*, 79 S.W.2d 934 (Tex. Civ. App. 1935); *Simpson v. City of Whatcom*, 33 Wash. 392, 74 Pac. 577 (1903).

The work probably most-cited in the cases is Dillon, *MUNICIPAL CORPORATIONS* (several editions, beginning 1872). Later, many courts cited *Shearman and Redfield, LAW OF NEGLIGENCE* (first published 1913).

45. *Supra* note 43.

46. *Savage v. District of Columbia*, 52 A.2d 120 (Mun. Ct. App. 1947). This case cited a District case of 1876, *Grumbine v. City of Washington*, 2 MacArth. 578, 29 Am. Rep. 626, which in turn cited *Buttrick*, *supra* note 43.

47. Arthur M. Schlesinger, *THE RISE OF THE CITY*, 1878-1898, at 120 (1933).

48. *Ibid.*

49. *Hinds v. City of Hannibal*, 212 S.W.2d 401 (Mo. 1948).

50. 2 Term Rep. 667, 100 Eng. Rep. 359 (K.B. 1788).

popular scapegoat for present-day attacks on immunity. It is very interesting, however, that Devon was an unincorporated area, and that Lord Kenyon emphasized that there was "no corporation fund." It is interesting because near the middle of the twentieth century we find the financial argument, presumably tacitly at the roots of many early American decisions, being stated baldly with reference to the modern municipal corporation.⁵¹ It is somewhat curious that the firm establishment of insurance, which has been utilized in some statutory areas to broaden municipal liability for certain torts,⁵² should have been paralleled in relatively recent decisions by such explicit declarations of the financial rationale for immunity.

An old Illinois decision exemplifies one of the neatest arguments against municipal liability. The plaintiff charged false imprisonment. The court impaled him on one horn of a dilemma by saying in effect that there were two kinds of acts which a town constable could commit—lawful and unlawful—and that the town was not liable for the "unauthorized, illegal and oppressive acts of the officer."⁵³ This sounds very much akin to the agency conception of "scope of the employment," although more often than not the courts do not speak explicitly in agency language. The other horn of the dilemma was fashioned by the Pennsylvania court when the plaintiff alleged that policemen had killed his valuable racing mare, stuck in a culvert, without giving him a chance to extricate her. The court first premised that if the policemen were not acting in the scope of their employment, the defendant townships would not be liable. Then it used the magic of subsuming the "police power" under the "governmental" label, and said that if the policemen were exercising that power, the townships would not be liable anyway.⁵⁴

It should be said that the courts recognized even during the early years of the reign of immunity that something seemed wrong. A series of prison cases reflects this recognition.⁵⁵ For instance, the Rhode Island

51. In addition to the *Hinds* case, *supra* note 49, see *Gentry v. Town of Hot Springs*, 227 N.C. 665, 44 S.E.2d 85 (1947). The *Gentry* court said that although there were "fine distinctions" in the decisions, "the doctrine itself is regarded as essential, else it would be impossible to say where the liability of a municipal corporation would end, or how heavy a burden might be imposed on those who sustain its existence." For a less obvious reference to this rationale, see *Lucas v. City of Los Angeles*, 10 Cal. 2d 476, 75 P.2d 599 (1938).

52. See, e.g., text with note 177 *infra*.

53. *Town of Odell v. Schroeder*, 58 Ill. 353 (1871).

54. *Q.E.D. Boorse v. Springfield Twp.*, 377 Pa. 109, 103 A.2d 708 (1954). Other decisions which use one or both horns of the dilemma: *Brown v. Town of Eustis*, 92 Fla. 931, 110 So. 873 (1926); *City of Nampa v. Kibler*, 62 Idaho 511, 113 P.2d 411 (1941); *Peters v. City of Lindsborg*, 40 Kan. 654, 20 Pac. 490 (1889); *Buttrick v. City of Lowell*, 1 Allen 172, 79 Am. Dec. 721 (Mass. 1861), *Connelly v. City of Sedalia*, 222 Mo. App. 109, 2 S.W.2d 632 (1928); *Elliott v. City of Philadelphia*, 75 Pa. 347 (1874); *Royce v. Salt Lake City*, 15 Utah 401, 49 Pac. 290 (1897).

55. *Kelly v. Cook*, 21 R.I. 29, 41 Atl. 571 (1898). To the same effect, see *Gray v. Mayor of Griffin*, 111 Ga. 361, 36 S.E. 792 (1900); and *Brown's Adm'r v. Town of Guyan-dotte*, 34 W. Va. 299, 12 S.E. 707 (1890).

court, confronted with a plaintiff who died in jail because of negligent care, "presumed" that "common dictates of humanity will prompt those in charge of municipal affairs . . . to properly provide for persons under arrest." But it said bluntly that liability in this kind of case had "not yet been incorporated into our law"—citing a Minnesota case⁵⁶ to prove its point. There is a particularly mournful quality about these cases. Imprisoned by a man-made conceptual structure, the courts possess the legal tools to break it down, but lack the intellectual climate to permit this. The problem becomes more explicitly recognized during the last twenty years, when the judicial riposte of the immunity courts is that the matter is for legislation, not judicial action.⁵⁷

C. *Cracks in the Wall of Immunity*

It is now relevant to consider inroads which have been made on municipal immunity from responsibility for police torts. Perhaps the earliest and most popular wedge was based on the idea that the *street* was a repository of "corporate" rather than "governmental" functions. Thus, well before 1900, Missouri granted recovery to a plaintiff who fell against the iron trapdoors which covered a cellar entering into a police station.⁵⁸ The court said that while the law was "well settled" that a municipal corporation is not liable for police torts committed in the exercise of governmental functions, this principle could not aid the defendant, for there is a "unique duty of the city to keep its streets and sidewalks in a reasonably safe condition." Although Missouri hairlined its distinction later at a police station elevator,⁵⁹ the talisman of the street has saved more than one plaintiff, for example, convicts working on streets.⁶⁰

56. *Gullikson v. McDonald*, 62 Minn. 278, 64 N.W. 812 (1895).

57. See text and notes 183-184 *infra*.

58. *Carrington v. City of St. Louis*, 89 Mo. 208, 1 S.W. 240 (1886).

59. *Pearson v. Kansas City*, 331 Mo. 885, 55 S.W.2d 485 (1932). *Accord*, *Wilcox v. City of Rochester*, 190 N.Y. 137, 82 N.E. 1119 (1907). See also *City of Bay Minette v. Quinley*, 263 Ala. 188, 82 So.2d 192 (1955) (no liability for negligent maintenance of stairs to police offices).

60. See three successive versions of the same Alabama case: *Hillman v. City of Anniston*, 214 Ala. 522, 108 So. 539 (1926); *Id.*, 216 Ala. 661, 114 So. 55 (1927); *City of Anniston v. Hillman*, 220 Ala. 505, 126 So. 169 (1930). *Accord*, *Ballard v. City of Tampa*, 124 Fla. 457, 168 So. 654 (1936). Compare *Shinnick v. City of Marshalltown*, 137 Iowa 72, 114 N.W. 542 (1908), the ancestor of another twist: Liability granted when a policeman stretched a rope across the street. *Accord*, *Crow v. City of San Antonio*, 157 Tex. 250, 301 S.W.2d 628 (1957) (helping children attend Bible class). See also the fascinating decision in *City of Austin v. Daniels*, 160 Tex. 628, 335 S.W.2d 753 (1960), wherein the tangents of "governmental" and "corporate" bump resoundingly, in a 5 to 4 decision (city liable for injuries from slip-and-fall on fresh paint on street parking line). *But cf.* *Crowley v. City of Raymond*, 198 Wash. 432, 88 P.2d 858 (1939) (immunity via governmental function when rope used to help children sled); and *Haney v. Town of Rainelle*, 125 W. Va. 397, 25 S.E.2d 207 (1943). In the latter case, the plaintiff police sergeant fell into a ditch at the end of a walkway leading from the police station to the street. The court rejected the idea that the walkway and approaches to the jail constituted a "street or sidewalk or alley."

Various courts have fashioned other exquisite distinctions to support plaintiffs' verdicts. One of the most remarkable of these was a Mississippi distinction which allowed recovery for injuries caused by the negligent driving of the city's police car, because the police were *required* by several ordinances to report street defects.⁶¹ The court said that it should not have to "unscramble" the governmental and proprietary ingredients of a policeman's duties. Iowa granted recovery when a city's police car injured the plaintiff while it was hauling policemen to their beats, saying that this activity partook of the "general or corporate business of the city," using the analogy of a policeman sweeping out headquarters.⁶² Further, two states have made the city liable in cases relating to the operation of garages to repair police cars.⁶³

Other courts, however, have drawn distinctions equally fine for immunity's sake. Thus, Alabama, having granted recovery to a convict killed by police brutality while working on the street,⁶⁴ dismissed the case of a convict shot by a prison guard while trying to flee a road gang. No longer was he engaged in the performance of his corporate work, but a "convict bent on escape."⁶⁵ Similarly, a policeman cleaning out his car who tosses out a chunk of wood which hits the plaintiff is performing a "governmental function,"⁶⁶ and city operations of a quarry⁶⁷ and a workhouse⁶⁸ have been called governmental.

61. *City of Meridian v. Beeman*, 175 Miss. 527, 166 So. 757 (1936). This case was distinguished in an immunity holding just two years ago, when the policeman was not required by ordinance to make reports on the street—even though he testified he looked for such defects just as an ordinary citizen would. *City of Hattiesburg v. Buckalew*, 240 Miss. 323, 127 So.2d 428 (1961).

62. *Jones v. Sioux City*, 185 Iowa 1178, 170 N.W. 445 (1919).

63. *Levin v. City of Omaha*, 102 Neb. 328, 167 N.W. 214 (1918). In this case the plaintiff's decedent was killed by a speeding car driven by a boy sent to get an inner tube by the foreman of the police garage, who was carried on the payroll as a police officer. *Levin* was found persuasive in *Oklahoma City v. Foster*, 118 Okl. 120, 247 Pac. 80 (1926) (police chief in charge of garage ordered officer to use motorcycle, though knowing it was defective; another officer hurt as a result). See also *City of Houston v. Wolverton*, 270 S.W.2d 705 (Tex. Civ. App. 1954), *aff'd*, 154 Tex. 325, 277 S.W.2d 101 (1955) (liability held on basis of "proprietary" function when car in which plaintiffs were riding was hit by milk inspector (normally "governmental" function) on way for repair at city garage).

64. The *Hillman* series of cases, note 60 *supra*.

65. *City of Birmingham v. Brock*, 242 Ala. 382, 6 So.2d 499 (1942).

66. *Sykes v. City of Berwyn*, 320 Ill. App. 440, 51 N.E.2d 587 (1943). Compare the word-splitting in *Berger v. City of New York*, 260 App. Div. 402, 22 N.Y.S.2d 1006 (1940), *aff'd*, 285 N.Y. 724, 34 N.E.2d 894 (1941). A statute provided that cities should be liable for the negligence of persons operating municipally owned vehicles while in the scope of their employment. See N.Y. MUNIC. LAW § 50-a (1954). The defendant's policeman saw an unoccupied auto with its keys in the ignition, commandeered it to chase suspects, and drove into the pushcart of the plaintiff's decedent, killing him. The court said that "municipally owned" did not include "commandeered," and denied recovery.

67. *Bell v. City of Cincinnati*, 80 Ohio St. 1, 88 N.E. 128 (1909) (police sergeant working in quarry had not been warned about what might happen when he broke open a box of caps).

D. *A Trio of Case Histories*

The analysis thus far has considered policeman cases by categorizing fact situations and by scrutinizing the reasons which the courts have used to immunize the municipality. It is useful now to examine the policeman strand as it has developed in three states which now have fully exorcised the immunity rule in police cases, or at least have broadened it considerably. This development is instructive because, set against the analytical approach which has occupied the first part of this paper, it presents in graphic focus a picture of functional jurisprudence at work. This section will bring these states up to the eve of the complete breakthrough against immunity, a story that is reserved for another section.

1. FLORIDA

Florida was the first state to eliminate explicitly the governmental-proprietary distinction, thus imposing liability,⁶⁹ and presents the story in its classic form. Florida policeman cases must be seen against a background which began with a finding of liability in 1850, an extremely early date for this kind of liberality, in a street defect case, decided on a "nuisance" theory.⁷⁰ The background also includes a fire-engine case in 1922 in which the court granted recovery, with the notation that under the commission plan, a city was "a large quasi-public corporation," concerned with the management of properties "not of the state, but of the people of the community or city, which are managed for financial advantage and profit."⁷¹

Now the battle lines formed for the policeman cases and the struggle began. A judgment was sustained in favor of a city in 1926 when a policeman was alleged to have struck the plaintiff while arresting him,⁷² but the "street" rationale supported a recovery a decade later when the plaintiff's decedent, a convict, was forced to work the streets while he was sick.⁷³ Following closely on this case, the bars of immunity dropped in a jail situation. The plaintiff claimed he had contracted a venereal disease because of the negligent failure of jailers to segregate another prisoner who was infected. He recovered on the basis of a venereal disease-control statute, but under a dictum which said that the keeping of a jail included "corporate as well as governmental functions."⁷⁴

68. *Ulrich v. City of St. Louis*, 112 Mo. 138, 20 S.W. 466 (1892) (plaintiff ordered to hitch up mules, one of which proved savagely uncooperative).

69. South Carolina also has rejected the distinction, for the sake of immunity—a sensible approach to categorization, if not to public policy. *Irvine v. Town of Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911).

70. *City of Tallahassee v. Fortune*, 3 Fla. 19 (1850).

71. *Kaufman v. City of Tallahassee*, 84 Fla. 634, 94 So. 697 (1922). The incineration of fire department immunity was officially completed by 1935, when the plaintiff's right to maintain a suit based on injuries from a high-pressure water hose was considered "well-settled." *Swindal v. City of Jacksonville*, 119 Fla. 338, 161 So. 383 (1935).

72. *Brown v. Town of Eustis*, 92 Fla. 931, 110 So. 873 (1926).

73. *Ballard v. City of Tampa*, 124 Fla. 457, 168 So. 654 (1936).

74. *Lewis v. City of Miami*, 127 Fla. 426, 173 So. 150 (1937).

However, the "governmental function" rubric bolstered judgments of immunity in a quick succession of three cases, two involving assault and false imprisonment,⁷⁵ and one for malicious prosecution.⁷⁶ It is interesting that in one of these cases the court remarked that its "sense of justice" was touched, but said that it must "follow the law as it is established."⁷⁷ And to prove just how well the law was established, the court followed with a short and almost genial review of the common-law origins of the doctrine in the theory that the king could do no wrong, without much indication that there was anything wrong with the doctrine as a legal creature. Nowhere are better represented the conflicting currents of agitation produced by inequity and of satisfaction engendered by a rule.

The police immunity front remained quiet in Florida over the span of World War II. But in 1946 the court said, without dissent, that a city must pay when a police car hits a child, while an officer is bringing a prisoner to the station.^{77a} Judge Barns, speaking for the court, emphasized that making the city liable would provide "adequate compensation" to the victim and also "spread the loss." He added that this result "may be sounder justice." The opinion also attacked "attempted classifications" which "failed to classify," and then indicated a possible new and valid classification—"an abandonment of any distinction between proprietary and governmental functions when the delict [is] by means of an automobile."^{77b} Thus, a fairly substantial precedent was added quietly to the rind of Florida law.

There then exploded a brace of cases in 1953, involving an alleged battery,⁷⁸ and negligence in allowing a prisoner to be burned to death.⁷⁹ These decisions involved bitterly divided courts.⁸⁰ The majority in *City of Miami v. Bethel*^{80a} sounded the old litany when it said that policemen alleged to have beaten the plaintiff were engaged in a purely governmental function under the "doctrine" as "derived from the common law which was adopted by the Legislature."⁸¹

The minority in both *Bethel* and *Williams v. Green Cove Springs*,^{81a}

75. *Kennedy v. City of Daytona Beach*, 132 Fla. 675, 182 So. 229 (1938); *Elrod v. City of Daytona Beach*, 132 Fla. 24, 180 So. 378 (1938).

76. *McCain v. Andrews*, 139 Fla. 391, 190 So. 616 (1939).

77. *Kennedy v. City of Daytona Beach*, *supra* note 75. See also note 55 *supra* and accompanying text.

77a. *City of Avon Park v. Giddens*, 158 Fla. 130, 27 So.2d 825 (1946). (four-man panel, no dissents).

77b. *Id.* at 133, 27 So.2d at 826, citing *Kaufman v. City of Tallahassee*, *supra* note 71.

78. *City of Miami v. Bethel*, 65 So.2d 34 (Fla. 1953).

79. *Williams v. City of Green Cove Springs*, 65 So.2d 56 (Fla. 1953).

80. Two dissents plus a special concurring opinion by Hobson, J., which amounted to a dissent on the point of immunity, in *Bethel*, *supra* note 78; four to three in *Williams*, *supra* note 79.

80a. 65 So.2d 34 (Fla. 1953).

81. *Id.* at 35.

81a. 65 So.2d 56 (Fla. 1953) (the majority opinion here was a per curiam, one para-

the jail case, set down in crisp outline a galaxy of reasons which now are becoming new law all over America:

1. The "distinguishing characteristic" of the common law is its adaptability to changing social and economic conditions—Justice Terrell, dissenting, in *Bethel*.

2. Courts may overturn court-made law "when the reasons for prior decisions are unsound and tend to defeat rather than administer justice"—Justice Hobson, concurring, in *Bethel*.

3. For every wrong there is a remedy—Justice Terrell, dissenting, in *Williams*.⁸²

4. The magic immunization of "governmental function" is explicitly attacked: "When a governmental function is performed in a negligent manner . . . the municipality may be held liable"—Justice Terrell, dissenting, in *Williams*.⁸³

5. Simple justice is emphasized, with the caustic remark that it is doubtful that a bereaved widow could "appreciate the justice of the law" which denies compensation because of the negligence of a "public, rather than a private, servant."—Justice Hobson, dissenting, in *Williams*.⁸⁴

When the smoke of battle had cleared in 1953, immunity still stood as Florida law, but⁸⁵ it was clear that the siege had begun.⁸⁵

2. ILLINOIS

Illinois presents a development interesting for both similarities and contrasts. The policeman cases from 1871 to 1939 sound a monotonous

graph affair, citing *Lewis v. City of Miami*, *supra* note 74, and *Elrod v. City of Daytona Beach*, *supra* note 75).

82. Justice Terrell was paraphrasing closely the language of FLA. CONST. DECL. OF RIGHTS § 4: "All courts in this state shall be open, so that every person for every injury done him . . . shall have remedy. . . ." However, he did not consider it necessary to decide that this provision was "self-executing" against the city, because of his belief that the negligent performance of a governmental function was sufficient to create liability.

83. Compare this with Justice Terrell's reasoning in *Bethel*, *supra* note 78, which involved the beating of a prisoner. Justice Terrell there emphasized that "by no stretch of the imagination" was the policeman "performing a governmental function," noting that the purpose of the Federal Fifth Amendment was to put an end to third degree confessions.

84. Compare the majority's admission that its "sense of justice" was touched in *Kennedy*, text accompanying note 77 *supra*. The development of these abstractions is fascinating to trace, as they move from balm for the pangs of judicial conscience of a majority (*Kennedy*, *supra*), to offensive weapons for dissenters (*Williams*, *supra* note 79), and finally to rationalizations for a new majority (*Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957), discussed in detail at notes 145-48 *infra*).

85. A short period of quiescence is indicated by *Britt v. City of Ocala*, 65 So.2d 753 (Fla. 1953), decided the same year as *Bethel*, *supra* note 78, and *Williams*, *supra* note 79. Justice Terrell wrote the short opinion for a four-man panel, citing *Williams* as controlling. In 1955, *Wilford v. City of Jacksonville Beach*, 79 So.2d 516 (Fla. 1955) cited *Bethel* as controlling. See also *Woodford v. City of St. Petersburg*, 84 So.2d 25 (1955).

leitmotif: First, a town cannot be liable for unlawful acts.⁸⁶ By the turn of the century, the defense of "governmental function" becomes a "familiar rule of law."⁸⁷ Then, the plaintiff is in effect told to complain to the legislature.⁸⁸ But by 1943, a factual situation arose close to the line between "governmental" and "proprietary,"⁸⁹ and an Illinois appellate court was sufficiently moved by the strength of the attack on immunity to note that the rule had, indeed, been criticized. However, because the rule was "old and well-established," it was retained. Thus stood Illinois policeman law by World War II: The doctrinal language remained firm as ever, but there were ideas abroad in the land, and the judges knew it.

3. NEW YORK

New York, an early parent of the governmental-proprietary distinction,⁹⁰ developed liability in a fascinating series of cases. The first policeman case worthy of note for these purposes denied recovery on the plaintiff's allegation that he was injured by a police bullet fired in an attempt to shoot a mad dog.⁹¹ The court noted in this case that other courts had been troubled in their attempt to articulate the rationale for immunity. The attempt to hold the city liable, the court said with reference to the usual interlocking directorate of precedents, was "denied by the common judgment of men, without, perhaps, the ability to put into clear language the grounds" of distinction from cases where the city is liable. The court's specific rationale for immunizing the city in this case apparently was the fact that the police department was responsible to a board of police commissioners, which led to the conclusion that police were "in no sense" the "agents or servants of the city."

Governmental function now stood as a bar to recovery in a variety of New York cases for half a century.^{91a} But then the Court of Appeals

86. *Town of Odell v. Schroeder*, 58 Ill. 353 (1871).

87. *Craig v. City of Charleston*, 180 Ill. 154, 54 N.E. 184 (1899). See also *City of Chicago v. Williams*, 182 Ill. 135, 55 N.E. 123 (1899), and *Evans v. City of Kankakee*, 231 Ill. 223, 83 N.E. 223 (1907). In the latter case, the plaintiff was a phone operator who was employed in the same building as the defendant city's calaboose. She alleged damages resulting from smallpox, which she said she contracted from the fumes of a victim's clothes, burned by police officers. The court's denial of recovery should be compared with the *Lewis* case in Florida, note 74 *supra* and accompanying text.

88. *Taylor v. City of Berwyn*, 372 Ill. 124, 22 N.E.2d 930 (1939) (no liability "unless such action is authorized by statute"). It should be pointed out that during this time span Illinois had granted recovery, *inter alia*, on a rather tangential tie-up between a trash-burner and streets and sidewalks, "not only because of our own decisions, but by the better reason," and because the result is "more just." *Roumbos v. City of Chicago*, 332 Ill. 70, 163 N.E. 361 (1928).

89. *Sykes v. City of Berwyn*, 320 Ill. App. 440, 51 N.E.2d 587 (1943) (police chief cleaning squad car tosses chunk of wood which hits plaintiff on sidewalk).

90. See *Bailey v. Mayor of New York*, 3 Hill 531 (N.Y. 1842).

91. *McKay v. City of Buffalo*, 9 Hun. 401 (N.Y. 1876).

91a. *Lacock v. City of Schenectady*, 224 App. Div. 512, 231 N.Y. Supp. 379 (1928), *aff'd mem.*, 251 N.Y. 575, 168 N.E. 433 (1929) (plaintiff's decedent killed by police motorcycle); *Wilcox v. City of Rochester*, 190 N.Y. 137, 82 N.E. 1119 (1907) (fall into elevator

upheld an award by the New York City Board of Estimate for a bullet wound sustained by a bystander from the revolver of a policeman chasing robbers.⁹² One may note the similarity of this case to the one in which liability was originally denied. It should be said that this case involved a statutory provision which empowered the city to "pay or compromise claims equitably payable . . . though not constituting obligations legally binding upon it." Judge Pound found that payment by the city under a resolution passed by its Board was not a gift, as the Appellate Division had found, but "the legitimate recognition of an equitable claim."

Apart from this holding of liability in a statutory context, the case is noteworthy for two reasons. One was the frank notation by the court of "the fact that in the crowded streets of a great city police officers may shoot at fugitives . . . and . . . accidental injuries to people on the street may result."⁹³ It was not too often at that time that the courts recognized, with such specific, graphic reference to urban reality, the need for an expanding concept of the law with respect to municipal tort liability. The second distinction of this case was that an amicus brief was written by Edwin M. Borchard of Yale, the great gadfly of municipal immunity whose contributions are discussed in Part II of this paper.

The destruction of immunity proceeded in instructive stages over the next quarter century in New York, aided by two statutes. One of these statutes provided for municipal liability when a "municipally owned vehicle" or "other facility" caused injuries, if the operator were acting in the scope of his municipal duties.⁹⁴ The court refused to find that a commandeered private car was a "municipally owned vehicle" in 1940,⁹⁵ but it had no qualms about finding a police horse to be a "facility" five years later.⁹⁶ And in the police horse case, the court noted that the plaintiff could have relied on another statute. This was the notable Section Eight of the Court of Claims Act, which provided:

The state hereby waives its immunity from liability and consents to have the same determined in accordance with the same

well in police building); *Woodhull v. Mayor of New York*, 150 N.Y. 450, 44 N.E. 1038 (1896) (false imprisonment).

92. *Evans v. Berry*, 262 N.Y. 61, 186 N.E. 203 (1933), *reversing* 236 App. Div. 334, 258 N.Y. Supp. 473 (1932). The Appellate Division's decision had prompted a New York-centered Comment, *Municipal Responsibility for the Torts of Policemen*, 42 YALE L.J. 241 (1932). The initials on the Comment are "E.M.B.," those of the premier attacker of immunity, Edwin M. Borchard, whose contributions are discussed in the next section.

93. *Evans*, *supra* note 92, 262 N.Y. at 70, 186 N.E. at 206.

94. Now N.Y. MUNIC. LAW § 50-a (1954). A discussion of analogous statutory material appears at notes 169-177 and accompanying text.

95. *Berger v. City of New York*, 260 App. Div. 402, 22 N.Y.S.2d 1006 (1940), *aff'd*, 285 N.Y. 724, 34 N.E.2d 894 (1941).

96. *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945).

rules of law as applied . . . against individuals or corporations

97

That statute was the basis for recovery, accompanied by a remarkable piece of dictum, in the factually spectacular case of *Schuster v. City of New York*,⁹⁸ celebrated with the proper bardic rites in innumerable law review notes. The plaintiff's decedent had supplied police with information leading to the capture of Willie "The Actor" Sutton. The court held that a cause of action was stated by an allegation of negligent police protection, exposing the informer to a revenge killing. It noted that Section Eight of the Court of Claims Act had "removed the bar that previously prevented actions based on the negligence of police." But it then proceeded to say that this kind of action was "not created by waiver of governmental immunity, but by the common law," citing *American Jurisprudence* as authoritative writ on the "capacity of common law for growth and adaptation to new conditions."⁹⁹

New York, then, had begun in the tradition of the *ancien regime*, standing foursquare for immunity, had proceeded with the aid of statutes to chop down the doctrine, and then had concluded that the rule of the development was common law, rather than statutory!

Thus far, jurisprudential progress has been shown under sharp focus in three states which eventually outlawed the immunity doctrine.¹⁰⁰

97. COURT OF CLAIMS ACT ANN., Book 16 (Gilbert-Bliss 1947). The court noted that the "gist of this waiver" had been operative since 1929.

98. *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534 (1958).

99. *Id.* at 83, 154 N.E.2d at 538-39.

100. New York has been selected because it broke the immunity barrier in several significant police cases; Florida, because its landmark decision was a police case. Although the Illinois Supreme Court eliminated the old distinctions in a school district case, this was followed within a month by an appellate court holding of liability in a police case.

NEW JERSEY's progression is also worthy of reference in some detail because of its partial destruction of immunity in a police case in 1960. An 1840 decision in a bridge situation had supplied the usual governmental-corporate dichotomy. *Freeholders of Sussex Co. v. Strader*, 18 N.J.L. 108 (1840). This idea was applied at the turn of the century in the police case of *Tomlin v. Hildreth*, 65 N.J.L. 438, 47 Atl. 649 (1900) ("public service . . . from which [the city] derives no special benefit or advantage in its creative capacity"). For a discussion of general New Jersey developments on the immunity front in the thirties, see Weintraub and Conford, *Tort Liability of Municipalities in New Jersey*, 3 MERCER BEAS. L. REV. 142, esp. at 172-73 (1934). For an example of the ferment in New Jersey law in this area in the mid-fifties, see *Kelley v. Curtiss*, 29 N.J. Super. 291, 102 A.2d 471 (1954), *rev'd*, 16 N.J. 265, 108 A.2d 431 (1954).

Capsule reference also should be made to a development in the fifties in WISCONSIN, which splintered governmental immunity by judicial decision in a non-police case last year. In 1953, the Wisconsin court held a city liable on an allegation of wounds received from a negligent shooting by a policeman, on the basis of a statute which said that

Where the defendant in any action . . . except . . . for false arrest, is a public officer and is proceeded against in his official capacity and the jury or the court finds that he acted in good faith the judgment . . . shall be paid by the state or political subdivision of which he is an officer. WIS. STAT. ANN § 270.58 (1958).

The case was *Matczak v. Mathews*, 265 Wis. 1, 60 N.W.2d 352 (1953). Although the statute is written in indemnification language, the court held the city of Green Bay directly liable. See *Larson v. Lester*, 259 Wis. 440, 49 N.W.2d 414 (1951), which held that a village could be "interpleaded" [sic] under the statute.

We have seen New York shatter the old structure by a combination of case law and statute, Florida on the verge of its crash through the barrier, and Illinois at least showing the effects of criticism of the doctrine. Before analyzing the recent judicial abrogation of immunity in several states, however, it is apposite to turn to a discussion of the creation of an intellectual climate in the law which has helped to produce these breakthroughs.

II. A DOCTRINE UNDER FIRE: THE GUNS OF ACADEME

A. Borchard: *The Man and His Work*

Legal scholarship has great potential for impact on the life of society, as well as making its more abstract contribution to that "eternal sifting and winnowing by which alone the truth may be found." The attack of Edwin M. Borchard on the problem of governmental immunity is a fine example of this impact. His *kind* of contribution was not unique. But his particularized attack on a single problem area symbolizes the best that legal scholarship offers, by showing how it brings to bear new ideas on specific problems. It also demonstrates anew the close relationship of the law and the social sciences, of which the law is properly counted as one. It is no accident that the historian Charles Beard, in the opening chapter of his heretic *Economic Interpretation of the Constitution* footnoted an article by the young Borchard as a notable exception to the neglect by legal scholars of the need for research into economic realities.^{100a}

The usual general treatments of United States intellectual history select Holmes and Pound as their symbols from the law.¹⁰¹ Edwin M. Borchard was a fit member of the phalanx which those giants led, a lawyer who directed original scholarship in practical paths. He, too, represents the ferment of American intellectual life in general and law in particular in the twentieth century.

Edwin Borchard began his attack on governmental immunity in 1924, a time by which he had already demonstrated impressive scholarly credentials. First educated as a lawyer, he served as law librarian of Congress over a five-year period, both before and after receiving his doctorate from Columbia in 1913. He interrupted his term in that position to serve for a year as assistant solicitor of the State Department. He was also chief counsel for Peru in an arbitration dispute before his appointment as professor at Yale Law School in 1917.¹⁰²

100a. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 7 & n.2 (1952) (first published 1913).

101. E.g., COMMAGER, THE AMERICAN MIND, ch. XVIII (1958); CURTI, THE GROWTH OF AMERICAN THOUGHT 571-72 (2d ed., 1951); PERSONS, AMERICAN MINDS, ch. 15 (1958); WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM, esp. ch. V (1949).

102. His degrees were: LL.B., New York Law School, 1905; A.B., 1908, Ph.D., 1913, Columbia. Biographical information from WHO'S WHO IN AMERICA, 1942-43.

Travel in "some twenty countries in which the civil law prevails,"¹⁰³ and deep study of comparative jurisprudence, notably that of Germany,¹⁰⁴ had confirmed to him the thesis of Pound that the common law was continuing to apply "archaic rules to modern economic conditions."¹⁰⁵ He had become convinced that it was German jurists who were bringing

to active realization Holmes' declaration that the true science of the law consists mainly in the establishment of its postulates from within, upon accurately measured social desires, instead of tradition.¹⁰⁶

In 1918, he had begun another major campaign, for "Declaratory Judgment—A Needed Procedural Reform,"¹⁰⁷ a work which was to be as monumental as his battle against immunity.

Borchard's attack on governmental immunity was not the first burst of academic fire against the doctrine,¹⁰⁸ but it was the first cannonade with a truly resounding effect. He poured out a total of eight articles in the Yale and Columbia Law Reviews from 1924 to 1928,^{108a} slashing away at immunity from his broad-gauged background. His articles encompassed a powerful and detailed survey of relevant political, philosophical and legal literature, both ancient and modern.

It is useful to examine this attack with brief reference to the remarks of two great thinkers whose work was begun while Borchard was still in college. One of the foundation blocks of modern physics was laid in 1900 when Max Planck formulated the Quantum Theory. Planck, who ranks with Einstein in the gallery of the heroes of physical science, later expressed part of the significance of his formulation¹⁰⁹ this way:

103. BORCHARD, *Some Lessons From the Civil Law*, 64 U. PA. L. REV. 570, 571 (1916).

104. See, e.g., Borchard, *Jurisprudence in Germany*, 12 COLUM. L. REV. 301 (1912). Borchard's books included his GUIDE TO THE LAW AND LEGAL LITERATURE OF GERMANY (1911); BIBLIOGRAPHY OF INTERNATIONAL LAW AND CONTINENTAL LAW (1913); THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915); COMMERCIAL LAWS OF ENGLAND, SCOTLAND, GERMANY AND FRANCE (Co-author 1915); GUIDE TO THE LAW AND LEGAL LITERATURE OF ARGENTINA, BRAZIL AND CHILE (1917). Other early articles included *Bibliography of German Law*, 1 A.B.A.J. 141 (1915), and *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. CRIM. L. REV. 684 (1913).

105. Borchard, *Jurisprudence in Germany*, 12 COLUM. L. REV. 301, 302 (1912). At this point Borchard cited half a dozen of Pound's germinal articles.

106. *Jurisprudence in Germany*, *supra* note 105, at 304.

107. This was the title of an article in 28 YALE L.J. 1, 105 (1918). The same year Borchard published the first edition of his book, DECLARATORY JUDGMENTS.

108. At least one earlier article deserves mention: Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921), which is cited today in some progressive decisions. However, it is generally true that "widespread interest" was "first . . . stimulated" by Borchard. See Repko, 9 LAW & CONTEMP. PROB. 214 & n.3 (1942).

108a. *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25); *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926-27); *Governmental Responsibility in Tort*, 28 COLUM. L. REV. 577, 734 (1928). These articles are cited hereafter only by volume and page number. Borchard borrowed from the language of the articles in 34 YALE L.J. for *Governmental Responsibility in Tort—A Proposed Statutory Reform*, 11 A.B.A.J. 495 (1925), in which he detailed a proposal for federal tort claims legislation.

109. Planck made the revolutionary assumption that radiant energy is "emitted not

The establishment of this hypothesis involved a *fundamental break* with the opinions hitherto held in physical science; because until then it had been an accepted dogma that the state of a physical picture could be indefinitely altered.¹¹⁰

Within a decade after Planck's publication of the Quantum Theory, William James published his series of lectures and essays on "Pragmatism." James said that the "pragmatist way of seeing things" owed "its being to the break-down which the last fifty years have brought in the older notions of scientific truth." It used to be said that "There is an eternal and unchangeable 'reason' So also of the 'laws of nature,' . . . so of natural history classifications." But now, James wrote, scientific laws were treated as so much "'conceptual shorthand,' true so far as they are useful but no farther. . . . [O]ur whole notion of scientific truth [is] more flexible and genial than it used to be."¹¹¹

With this *approach* in mind, we may more fully appreciate Borchard's opening salvo. The idea that the "king can do no wrong," he said, may have been somewhat mitigated by allowing an action against the officer, and against the corporation engaged in its "corporate function."

[But] no serious effort has been made to penetrate the mysticism encumbering this department of the law and to relieve it of its theological and metaphysical conceptions and misconceptions.¹¹²

Again, concluding the sixth article of the series, Borchard returns to this theme, speaking of the need for "emancipation from dogma and metaphysics."¹¹³

This concern with the constrictive nature of pre-conceived notions is underlined when Borchard zeroes in on municipal corporations:

In few, if any, branches of the law have the courts labored more abjectly under the supposed inexorable domination of formulas, phrases and terminology.¹¹⁴

We are given no more reason for the adoption of a maxim deriving from monarchical theory, he says, than the "antiquity of the legal result."¹¹⁵

in an unbroken stream but in discontinuous bits or portions which he termed *quanta*." Claiming no expertise in this most technical of subjects, I am indebted to the popular treatment of Lincoln Barnett, *THE UNIVERSE AND DR. EINSTEIN* 23 (Mentor 1957).

110. (Emphasis added.) PLANCK, *WHERE IS SCIENCE GOING* 58 (1933).

111. The quoted passages are from James' essay, *Humanism and Truth*, reprinted in *PRAGMATISM AND FOUR RELATED ESSAYS SELECTED FROM THE MEANING OF TRUTH* 375-77 (1947).

112. 34 YALE L.J. at 2.

113. 36 YALE L.J. at 1100.

114. 34 YALE L.J. at 129. Borchard devoted a section to police problems at 34 YALE L.J. 240.

115. 36 YALE L.J. at 41.

The "analytical jurist," as opposed to the "sociological jurist," seeks refuge in a word—"sovereignty." In doing so, he manifests the "elemental instinct to seek a First Cause behind the chain of human phenomena."¹¹⁶ But the "sociological jurist seeks to explain the behavior of society and its institutions, and for him form is subordinated in importance to substance."¹¹⁷

America lags, Borchard complained, while French and German jurists dissect their institutions and "vie with one another to find supporting theories consistent with modern legal and political conceptions."¹¹⁸ Throughout his writings there is this overriding, vigorous insistence on the idea that the twentieth century is demanding new solutions to new problems.

Borchard tied up his own academic watch on the Rhine with James' formulation of a Pragmatism for Americans:

*The problem in Europe is pragmatic—how far does public policy and social theory require that the state and other public corporations shall assume responsibility for the injuries inflicted by its agents on private individuals, a problem which requires no metaphysical speculations into the nature of sovereignty, of law and of the State.*¹¹⁹

Borchard was unconcerned with whether the theory used to justify recovery was respondeat superior, or social risk-spreading. Whichever one was selected,

[W]e should not be perverse in insisting upon our *defective social engineering* in the face of the experience of most other civilized countries. . . . The community . . . will meet the exigencies of modern organized life by discharging what the rest of the world recognizes as *just obligations*.¹²⁰

In these words the nub of the man's thinking is spelled out explicitly or clearly implied: History is not a deep freeze for the law. Legal concepts should not be sanctified. The lawyer deals not with a dead mechanism, but a live society which demands intelligent engineering.

116. 36 YALE L.J. at 1041.

117. *Id.* at 1040.

118. 28 COLUM. L. REV. at 773. See also 36 YALE L.J. at 804: "Jurists of France and Germany find it almost incredible that a civilized country should still act on the principle that the government is immune from the jurisdiction of its courts or that it assumes no responsibility for the torts of its agents."

119. (Emphasis added.) 36 YALE L.J. at 1100. Cf. Borchard, 36 YALE L.J. at 757, jumping with scholarly glee upon Mr. Justice Holmes' remark in *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) that

A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

120. (Emphasis added.) 34 YALE L.J. at 258. (Borchard had credited Dean Pound with the phrase "defective social engineering," 34 YALE L.J. at 3.

Implicitly, urban society presents a dramatic change in living conditions which demands dramatic solutions. Society should redress injuries inflicted by its agents. And, above all, problems should be solved *pragmatically*, without regard for the sorcery of old labels and ancient concepts.

B. *Points of the Intellectual Compass*

We have seen Borchard's debt to Pound¹²¹ and to Holmes.¹²² We may note also his strong intellectual kinship to the quasi-scientific method which Brandeis applied to the law,¹²³ and to the approach of Cardozo to creative jurisprudence.¹²⁴ But if it is obvious that Borchard's plea for governmental responsibility is a significant treatise in the development of American law, it should be noted briefly that it is something more. It is a document in the intellectual history of the United States.

By the 1920s, a wide-ranging "revolt against formalism"¹²⁵ was progressing across the spectrum of the social sciences. The nature of this revolt is emphasized by an analysis of just the articles in the two numbers of the *Yale Law Journal* for which Borchard mounted his attack on immunity. The impressive list of lawyers alone who contributed to these issues¹²⁶ is supplemented by such names as that of the economist John R. Commons.¹²⁷ Further, we find Borchard in one of his articles citing a

121. See note 105 *supra*.

122. See text with note 106 *supra*.

123. Borchard's awareness that other members of the Western family of nations were showing the way in many areas of jurisprudence bears an obvious relationship to the original "Brandeis brief." That technique had used data gathered from European as well as American committee reports, statistical compilations and statutes. See n.1 in *Muller v. Oregon*, 208 U.S. 412, 419 (1916).

124. There is significant historical coincidence in the publication of the first of Borchard's articles on governmental responsibility in tort in the same year as Cardozo's *THE GROWTH OF THE LAW*. Cardozo the judge speaks perhaps more judiciously than Borchard when he cautions that the jurist may not destroy "the patterns of history and reason." But the focus is the same when he stresses that the judge also must not bow to a "metaphysical concept" or an "historic datum," and "shut [his] eyes to living needs." *THE GROWTH OF THE LAW* 76 (1924).

125. The phrase is that of Morton White, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949). White describes the members of this movement as men who were convinced that

logic, abstraction, deduction, mathematics, and mechanics were inadequate to social research and incapable of containing the rich, moving, living current of social life. *Id.* at 11.

126. This list reads like a roster of a prep school for law school deans, judges and influential government officials: A.A. Berle Jr., Charles E. Clark, Walter Wheeler Cook, Arthur Corbin, Felix Frankfurter, Leon Green, Robert M. Hutchins, James M. Landis, David Lilienthal, Wesley Sturges. These men were unified by their attack on conceptualistically rigid ways of thinking, and by their insistence that the law keep pace with its environment. For a later political application of this dynamic new approach, a classic example is LILIENTHAL, *TVA: DEMOCRACY ON THE MARCH* (1944). The interrelation between the methods of these legal scientists and those of physical scientists is dramatized by the role of Cook, who had a scientific background. For an example of a bridge of the gap, see Cook's *Eugenics or Euthenics*, 37 *ILL. L. REV.* 287 (1943).

127. *Law and Economics*, 34 *YALE L.J.* 371 (1924).

book by Commons as well as an article by John Dewey in a contemporary issue of the *Yale Law Journal*.¹²⁸

This is of great interest because Dewey was at least the nominal leader of the muscular intellectual movement which was stripping away the old mumbo-jumbos from the social sciences, and Commons was a member in good standing of that movement. Dewey's gnarled but tenacious prose pointed out the necessary linkage between the new disciplines which were studying the problems of man in society.¹²⁹ He viewed the universe as one without "fixed ends," demanding revision, expansion and alteration of old rules.¹³⁰ These ideas reverberated in the pages of Cardozo,¹³¹ demonstrating the existence of a confederated elite of intellectuals, taking their text from the same font.

The same revulsion against dogma was evident in the writing of historians like Charles Beard¹³² and economists like Thorstein Veblen¹³³ and in the mordant criticism of H. L. Mencken.¹³⁴ This throbbing in the social sciences was matched by the recognition of the physicist that his research was forcing a "fundamental revision of the whole doctrinal structure," as Max Planck wrote in a remarkable passage, which is quoted in full in the margin.¹³⁵ A dynamic approach to research in

128. Borchard in 36 *YALE L.J.* at 779 n.59, citing Dewey, *Historical Background of Corporate Legal Personality*, 35 *YALE L.J.* 655 (1926), and COMMONS, *THE LEGAL FOUNDATIONS OF CAPITALISM* (1924).

129. [M]orals based upon concern with facts and deriving guidance from knowledge of them would at least locate the points of effective endeavor and would focus available resources upon them. . . . [This kind of study] would find the nature and activities of one person coterminous with those of other human beings, and therefore link ethics with the study of history, sociology, law and economics. DEWEY, *HUMAN NATURE AND CONDUCT* 12 (1922).

130. *Id.* at 232, 239-40.

131. For the lawyer as for the moralist, the generalizations that result from the study of social phenomena are 'not fixed rules for deciding doubtful cases, but instrumentalities for their investigation, methods by which the value of past experience is rendered available for present scrutiny of new perplexities.' . . . 'The problem,' in the words of Dewey, 'is one of continuous, vital readaptation.' *THE GROWTH OF THE LAW* 84-85 (1924), quoting Dewey, *op. cit. supra* note 129, at 240-41.

132. See, e.g., Beard's conclusions at 290 of his *ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1952) (first published 1913) (since "the holders of personalty saw in the new government a strength and defence to their advantage," this economic interest "must have formed a very considerable dynamic element" in ratification).

133. See, e.g., the sardonic reference to the "doctrinal consistency and loyalty to tradition" of the "certified economists." *THE ENGINEERS AND THE PRICE SYSTEM* 129 (1944 ed.).

134. See, e.g., Mencken's reference to the "slow accretion of ideas that somehow manage to meet all practicable human tests." It is risky to call even these ideas "absolute truths," Mencken crackled; "all that one may safely say of them is that no one, as yet has demonstrated that they are errors." *PREJUDICES, Third Series* 93-94 (1922).

135. [N]o doctrinal system in physical science, or indeed perhaps in any science, will alter its content of its own accord. Here we always need the pressure of outer circumstances. Indeed the more intelligible and comprehensive a theoretical system is the more obstinately it will resist all attempts at reconstruction or expansion. And this is because in a synthesis of thought where there is an all-round logical coherence any alteration in one part of the structure is bound to upset other parts also. . . . [S]trong pressure must come from a well-constructed body

physics begot the atomic age.¹³⁶ The same approach in the humanistic sciences wrought radical surgery on the old doctrines, and created proposals for reform on dozens of fronts.

This whole movement was led by a splendid corps of intellectuals, obviously united in a lucid, if loosely organized attack on dogma¹³⁷ and label-worship.¹³⁸ It is in the context of his broad intellectual battle that we should consider this single brilliant sortie of one man, Edwin M. Borchard, a symbol of the legal scholar at his best. The effects of his fight where judgments are won and lost supplies our next chapter. The battleground now shifts back from the law reviews to the courts.

III. THE BARRIERS CRUMBLE: BREAKTHROUGH CASES

A legal idea may be a truism to the scholar and at the same time a heresy to the "practical" lawyer. Borchard destroyed the immunity doctrine in print in the twenties, but there is a lag between scholarly proposal and judicial disposal. The leading subsequent articles of the thirties and forties indicate this lag by their impatient tone.¹³⁹ But a fully articulated judicial attack on the doctrine had to wait until the fifties.

We will now examine explicit judicial breakthroughs against govern-

of theory which has been firmly consolidated by the test of experimental research. It is only thus that we can bring about the surrender of theoretical dogmas hitherto universally accepted as correct. And thus only can we succeed in forcing a fundamental revision of the whole doctrinal structure. Following a reconstruction of this type there invariably arises a fresh series of problems for experimental research to tackle. It is in the tackling of these problems that new ideas are suggested which subsequently lead to the formulations of further theories and hypotheses. PLANCK, *WHERE IS SCIENCE GOING* 44-45 (1933).

136. For a cross-reference to literature, providing a poetic exercise in prophecy, see Henry Adams' articulation in 1907 of the demands made on both social and scientific ingenuity by the sudden revolution in human thought. Adams wrote then that thought was "caught and whirled about in the vortex of infinite forces," that "power leaped from every atom" and man "could no longer hold it off," and that "impossibilities no longer stood in the way." *THE EDUCATION OF HENRY ADAMS* 494 (Modern Library 1931) (first printed privately, 1907).

137. Compare Holmes' warning against "supposing, because an idea seems very familiar and natural to us, that it has always been so." *THE COMMON LAW* 2 (1945) (first published 1881).

138. See James' critique of the use of "solving names," *PRAGMATISM* 52-3 (1907). James wrote that pragmatists could not look on any word as "closing [the] quest. You must bring out of each word its practical cash-value, set it at work within the stream of your experience. It appears less as a solution, then, than as a program for more work, and more particularly as an indication of the ways in which existing realities can be *changed*." *Id.* at 53.

139. Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97, 120 (1932) ("consummation" of the elimination of "glaring inconsistencies" should not be "indefinitely delayed"); Casner & Fuller, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 462 (1941) ("Haven't we waited long enough for the elimination of this absurdity from the law?"); Green, *Freedom of Litigation (III): Municipal Liability for Torts*, 38 ILL. L. REV. 355, 379, 381 (1944) ("atrophy" of judicial process in courts "embarrassed and . . . even humiliated by doctrines that cannot be defended, yet hesitant to write them off as having served their day").

ment immunity in tort during the last decade. Several of these breaches in the wall of immunity have been made in policeman situations while others have come in non-police cases. Although this analysis uses police cases as a research vehicle to maintain a relatively sharp focus, it is best to analyze all of the breakthrough cases together, in order to compare factual situations and judicial techniques.

A. *Rumblings*

First, brief notation should be made of two older cases which seem to have abrogated the doctrine temporarily. In 1896, Kentucky found a town liable for an arrest and imprisonment under an unconstitutional peddler by-law. Although this seems a clear exercise of "police" and therefore, under the old rubric, "governmental" power, the court apparently thought that the power exercised was "corporate," because it said that the by-law was "enacted for the sole benefit of the municipal corporation . . . and of its citizens."¹⁴⁰ In any event, the case soon was overruled.¹⁴¹

An Ohio decision of 1919, *Fowler v. City of Cleveland*,¹⁴² held the city liable for the plaintiff's injuries when he was hit by the fire department's hose truck. The court noted a "growing dissatisfaction with any comprehensive rule (and its satisfactory and unjust results) which exempts municipalities from liability for all acts which have been loosely classified as governmental," and noted that this was a "purely ministerial act." It may be observed that this was five years before Borchard's first article on the subject. However, three years later the Ohio Supreme Court expressly overruled its *Fowler* decision in a case involving the alleged negligence of the city's patrol wagon driver. The court reverted to doctrinal language, saying that "all of the cases fall into two divisions"—governmental and proprietary—and that police functions are governmental.¹⁴³

140. *McGraw v. Town of Marion*, 98 Ky. 673, 680, 34 S.W. 18, 20 (1896). The court seemed primarily concerned with the idea that if the policemen were acting for the benefit of the town,

it would seem unjust to them that they alone should be responsible, and it would likewise be unjust to the injured party to require him to look alone to a few individuals for redress in such cases. *Id.*, at 678-79, 34 S.W. at 20.

Contrast the views analyzed in notes 37a-37b *supra* and accompanying text.

141. See *Hershberg v. City of Barbourville*, 142 Ky. 60, 133 S.W. 985 (1911).

142. 100 Ohio St. 158, 126 N.E. 72 (1919). See especially the concurring opinion of Wanamaker, J., who eschewed "ministerial" rationalizations, said frankly that here was a governmental function, and stressed that the issue concerned a struggle between the ideas of Louis XIV and those of the Declaration of Independence and the Ohio Bill of Rights. Section 16 of the latter document provided that "All courts shall be open, and every person, for any injury done him in his land, goods, person, or reputation shall have remedy by due course of law."

143. *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922). Wanamaker, J., dissented. The majority opinion in *Aldrich* was written by the lone dissenter in *Fowler*, *supra* note 142. This was Jones, J., who had said in *Fowler* that that case overruled "established legal principles heretofore enunciated by this court." *But cf.* *City*

Mention should also be made at this point of the progression, detailed earlier, of New York, which as early as 1945 had construed a statute to eliminate the claim of governmental immunity for police torts.¹⁴⁴

B. *The Flood Tide*

1. FLORIDA

Florida was the first state to shatter the old barriers explicitly. Its decision in *Hargrove v. Town of Cocoa Beach*¹⁴⁵ was a fitting cap to the liberal trend of decisions previously discussed.¹⁴⁶ The court here allowed recovery for the death of a prisoner suffocated because of a jailer's negligence. Making its bow to scholarly attacks on immunity,^{146a} it buttressed its decision with several reasons, including these: The city is analogous to a large business institution, an "incorporated organization which exercises . . . powers primarily for the benefit of people within the municipal limits who enjoy the services rendered pursuant to the powers."¹⁴⁷ There should be a remedy for every wrong, and to deny recovery against municipalities in this kind of case is to make a sham of that principle. The "interest of justice" compels the decision (the *Hargrove* court uses the word "justice" affirmatively at least three times). The theory that the "king can do no wrong" should be exorcised from the law as fully as the Declaration of Independence and the Revolutionary War removed it from political control over the colonies. The antiquity of the landmark case of *Russell v. Men of Devon*^{147a} defines the magnitude of the historical error of immunity. The law is not static, but rather the "product of progressive thinking which attunes traditional concepts to the needs and demands of changing times."¹⁴⁸

The reader is compelled to note the awareness of urban reality, the concern with justice, and the distrust of labels. *Hargrove* sounded a keynote for the nation.

2. ILLINOIS

Illinois joined the liability camp within two years, holding a school district liable for injuries to a child caused by a bus driver's negligence.¹⁴⁹

of *Hamilton v. Dudley*, 120 Ohio St. 127, 165 N.E. 713 (1929), construing OHIO REV. CODE ANN. § 723.01 (Baldwin 1958) (§ 3714 GEN. CODE) (statutory variation on the "street" doctrine, allowing recovery).

144. See notes 90-100 *supra*, and accompanying text.

145. 96 So.2d 130 (Fla. 1957).

146. See notes 70-85 *supra* and accompanying text.

146a. The court footnoted, *inter alia*, a Florida article which had demanded not only a comprehensive legislative policy for municipal responsibility, but a judicial reexamination of the old doctrine. Price & Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330, 353-54 (1953). *Hargrove* did not mention Professor Borchard, as many of the sister states which followed did, but the above-cited article paid him its respects in its first footnote.

147. *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 133 (Fla. 1957).

147a. 2 Term Rep. 667, 100 Eng. Rep. 359 (K.B. 1788).

148. *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 133 (Fla. 1957).

The court blistered the traditional monarchical scapegoat, noted that *stare decisis* was not "blindly inflexible," and said that school district immunity was "unjust, unsupported by any valid reasons, and has no rightful place in modern-day society." Although the court limited its holding to school districts, the opinion is a sustained attack on the whole concept of governmental immunity. It uses extensive citation from legal writings, which is a prime characteristic of several breakthrough decisions.¹⁵⁰ It also noted the statutory inroads which already had been made on immunity. This symbolizes another popular technique in this group of decisions, the reference to previous "prunings" on the fringes of immunity as a springboard for creative jurisprudence.¹⁵¹

The Illinois court added a new twist to the destruction of immunity. It used the technique of prospective overruling; however, it made an exception to grant recovery to the plaintiff in the instant case. This device was not without its kinks. It created several problems with reference to children injured in the same bus accident as the original plaintiff.¹⁵² It also caused a reversal of an appellate court judgment for a plaintiff in a police-assault case, rendered less than a month after the breakthrough decision.¹⁵³ However, as will be seen, the idea of prospective overruling has gained favor in other states.

3. NEW JERSEY

New Jersey added its name to the list the next year, but with an important reservation. *McAndrew v. Mularchuk*¹⁵⁴ concerned the negligent shooting of the plaintiff by a reserve policeman. The court held that "where negligent *acts of commission* form the basis of the claim against a municipal corporation," liability will be determined "on general principles of *respondeat superior*." This was a large step forward for New Jersey, which previously had limited liability to situations in which the wrongdoer occupied such a position of general authority to warrant the conclusion that the municipality itself acted. However, the case was to

149. *Molitor v. Kaneland Community Unit Dist.* No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

150. *E.g.*, the court cites the works of three authors, Professors Borchard, Green and Harno, several times apiece.

151. The "pruning" metaphor is that of the Florida court in *Hargrove*, 96 So.2d at 132.

152. *E.g.*, *Molitor v. Kaneland Community Unit Dist.* No. 302, 24 Ill.2d 467, 182 N.E.2d 145 (1962) (holding that the first *Molitor*'s sister stated a cause of action).

153. *Peters v. Bellinger*, 22 Ill. App. 2d 105, 159 N.E.2d 528 (1959) (policeman on thirty-day trial, with police record himself, beat plaintiff, destroying the sight of an eye). The Supreme Court reversed, 19 Ill.2d 367, 166 N.E.2d 581 (1960). Having fixed a date for immunity to fall against school districts in *Molitor*, *supra* note 149, the court said it would be "impractical" to fix one effective date to abolish immunity for schools and another for municipal corporations. The court did not reach the question of the "applicability of . . . *Molitor* . . . to this case. . . ."

154. 33 N.J. 172, 162 A.2d 820 (1960).

be criticized by at least one court which did not think it went far enough.¹⁵⁵

4. CALIFORNIA

California joined the new movement with the affirmance of a judgment against a hospital district for the negligence of a hospital's staff.¹⁵⁶ Emulating a now familiar pattern, the court quoted Borchard on the "mystery of legal evolution" which had produced governmental immunity in America, and briefly bombarded the historical problems of the rule. The opinion, significantly, was written by Justice Traynor, who ranks high in the eyes of legal scholars for his conscious struggles with the techniques and implications of creative jurisprudence. Justice Traynor noted that the old doctrine was "originally court-made," and that it had become riddled with exceptions.¹⁵⁷ He concluded, in approved Cardozoan fashion, with an explicit declaration of the techniques of judicial lawmaking:

[W]e make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend.¹⁵⁸

The California court immediately placed a limitation on this decision in a case decided the same day, indicating that immunity had fallen only with respect to "ministerial" functions.¹⁵⁹

5. MICHIGAN

Michigan now moved toward liability, but gingerly, and followed the move with an apparent leap backwards. The rather timid bellwether case was *Williams v. City of Detroit*,¹⁶⁰ involving the fall of the plaintiff's decedent down an unguarded elevator opening. The lower court held for the defendant city, thus setting the stage for a curious judicial lineup. Four members of the Michigan Supreme Court voted to reverse, three voted to affirm—and one voted to affirm but to overrule immunity prospectively. This four-to-four decision meant an affirmance for the defendant, although five judges had announced their opposition to the

155. The Wisconsin court called this an "unwise limitation" in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

156. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457 (1961).

157. He pointed out, for instance, that recovery previously had been granted when the defendant was a city-and-county hospital, but had been denied for county and hospital district hospitals. See *Beard v. City and County of San Francisco*, 79 Cal. App.2d 753, 180 P.2d 744 (1947).

158. *Muskopf*, note 156 *supra*, 55 Cal. 2d at 221, 359 P.2d at 463.

159. *Lipman v. Brisbane Elem. School Dist.*, 55 Cal. 2d 224, 359 P.2d 465 (1961). In this case, involving allegations of defamation by three of the defendant district's trustees, the court said that the *Muskopf* erasure of immunity did not apply to this specific "discretionary" function. However, it shied away from announcing full immunity for every "discretionary" act. Rather, the court set up certain test factors, *e.g.*, the extent to which the government's liability might impair the free exercise of the function.

160. 364 Mich. 231, 111 N.W.2d 1 (1961).

doctrine of immunity. In arriving at this bizarre result, the court followed techniques which were now becoming standard. Both the opinion which would have reversed and the "swing" opinion attacked the old distinctions and strict stare decisis, with the four-man opinion making picturesque reference to the "frozen compass of the ancient past." The outvoted majority made its bow to the law reviews, and particularly to the contribution of Borchard. It noted previous inroads on the doctrine in Michigan. It emphasized the possibility of public liability insurance for governmental units. And by this time it was able to add the bandwagon ingredient—it was able to talk of a "major trend," citing the landmarks from Florida, Illinois and California.

Whatever prospective effect *Williams* might have had was sharply limited the next year by a "reconstituted court," which denied liability against a school district for a child's injuries, caused by stepping into a construction hole on school grounds.¹⁶¹ The majority apparently founded its decision on the statutory reestablishment of school district immunity after its temporary elimination by statute. But Justice Souris argued in dissent that the majority was "reinstating the old common law doctrine."¹⁶² Michigan, to borrow a phrase, seemed at best stuck in mid-passage.

6. WISCONSIN

The next assault on the wall of immunity was mounted by a tiny plaintiff who fell into a trapdoor at a Milwaukee "tot-lot"—a playground. The Wisconsin court, which already had liberally interpreted a statute to allow a direct suit against a city for police torts,¹⁶³ held the city liable.¹⁶⁴ It explicitly declared that it considered the abrogation of immunity to apply to all subdivisions of the state. The decision reflected a deep sense of intellectual involvement in the immunity problem, which the court called "knee-deep in legal esoterica: *e.g.*, governmental function v. proprietary function; relationship of governor to governed." Because of the ingrained nature of the dogma, the court believed it necessary to consider the origins of the doctrine and the critical assault upon it made

161. *Sayers v. School Dist. No. 1*, 366 Mich. 217, 114 N.W.2d 191 (1962). The "reconstituted court" phraseology is that of Souris, J., dissenting.

162. The majority said that if it were "dealing with the obsolete 'king can do no wrong' edition of governmental immunity established by the courts we should not hesitate to strike it down," emphasizing that it was the legislature which had repealed and then reestablished the doctrine of immunity for school districts. The majority said that the fact that the school district had bought insurance did not allow a judicial waiver of immunity "in view of the intent of the legislature in reestablishing the defense."

However, Justice Souris said in dissent that those who signed the four-man opinion to reverse in *Williams*, text accompanying note 160 *supra*, were dealing with *governmental* immunity and not just *municipal* immunity. He said in effect that he could see the handwriting on the wall in a case which came after *Williams* and before *Sayers*, *supra* note 161, limiting the *Williams* holding to municipal immunity.

163. See note 100 *supra*.

164. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

by both scholars and cases. The court noted previous Wisconsin statutory and judicial exceptions to the doctrine, and emphasized that it had originated judicially.

The court limited its decision to prospective abrogation, except for the instant case, and stressed its concern that the "various public bodies" make financial arrangements. It also imposed a limitation used by Florida's *Hargrove* decision, *i.e.*, that liability should not be interpreted as having been imposed for legislative, judicial, quasi-legislative or quasi-judicial functions. Both of these limitations have proved to be sources of litigation as to interpretation in other states.¹⁶⁵

7. MINNESOTA

Minnesota dismissed the doctrine next—prospectively—and it was clear from an elongated list of amicus briefs submitted by governmental agencies that the trend begun by *Hargrove* had staggered the beneficiaries of immunity. The Minnesota court's vehicle was a suit against a school district for the injury of a kindergartner by a defective classroom slide.^{165a} With proper corsages to scholars and recent breakthrough cases, the court noted the antiquity of the origin of the immunity rule in the case of *Russell v. Men of Devon*,^{165b} and said that its continuance was due principally to "inertia." It stressed the "injustices" which had been perpetrated in the name of the governmental-proprietary distinction. It cited its own previous declaration that a change in policy must come "from the legislature," but now it said, in effect, that it had had enough "injustice." However, it made its own bow to the legislature. Its exact holding, in abrogating immunity prospectively, was that the doctrine would no longer be available to the various state subdivisions after the next adjournment of the legislature.

C. Legislation in Both Directions

Minnesota's limitation in this respect was noteworthy because by the time of that decision, the legislatures had struck back already in Illinois and California. Shortly after the Illinois court abrogated the doctrine, the legislature enacted a bill limiting school district liability to \$10,000 for each action, and granting complete immunity to counties, forest preserves and park districts.¹⁶⁶ And California "re-enacted" the

165. As to prospective abrogation in Illinois, see text with notes 152-153 *supra*. As to the limitation by function, see text with notes 207-208 *supra*.

165a. *Spanel v. Mounds View School Dist. No. 621*, ___ Minn. ___, 118 N.W.2d 795 (1962).

165b. 2 Term Rep. 667, 100 Eng. Rep. 359 (K.B. 1788).

166. (1) Counties: ILL. ANN. STAT. ch. 34, § 301.1 (Smith-Hurd 1960), amended in 1961 to provide for indemnification of sheriffs or deputies up to \$50,000 (Supp. 1962); (2) Forest preserve districts: ILL. ANN. STAT. ch. 57½, § 3a (Smith-Hurd Supp. 1962); (3) Park districts, including separate enactments for Chicago park district: ILL. ANN. STAT. ch. 105, §§ 12.1-1, 332a, 491 (Smith-Hurd Supp. 1962); (4) School districts and non-profit private schools: ILL. ANN. STAT. ch. 122, §§ 821-31 (Smith-Hurd 1962).

"doctrine of governmental immunity from tort liability . . . as a rule of decision in the courts of this State."¹⁶⁷ The California legislation was to remain in effect until 90 days after the final adjournment of the 1963 legislature, which presumably would take a long and thoughtful look at the subject.

Dean Pound's injunction four decades earlier seemed prophetic. Though many judges had made significant progress, he wrote in *The Spirit of The Common Law*, they

may not be asked to lead the present transition. They must go with the main body not with the advance guard, and with the main body only when it has attained reasonably fixed and varied conceptions.¹⁶⁸

Legislatures can emasculate creative jurisprudence. The Minnesota court's answer may be discreetly sensible, from the historical long view if not the needs of present plaintiffs.

It should be noted that several legislatures have enacted statutes dealing with the tort liability of the state or its subdivisions. These laws present a varied picture indeed, as the following examples will show. A grand old man of the family is, of course, the Federal Tort Claims Act.^{168a} The Washington legislature has consented that the state be sued in tort "to the same extent as if it were a private person or corporation,"¹⁶⁹ but this has been restrictively interpreted.¹⁷⁰ An *ejusdem generis* construction has limited the application of a North Carolina law setting up an Industrial Commission to hear claims against the State Board of Education, the State Highway Commission, "and all other departments, institutions and agencies of the State."¹⁷¹

Illinois carries on its statute books, concurrent with its present case law against immunity¹⁷² and the legislative reaction thereto,^{172a} a law which provides for the indemnification of policemen by municipalities for judgments recovered as a result of injuries to third persons, except

For discussions, see Comment, 54 NW. U.L. REV. 588, 593-94, 597, 600, 602-03 (1960), and Hickman, *Municipal Tort Liability in Illinois*, 1961 ILL. L.F. 475, 476.

167. CAL. CIV. CODE § 22.3 (Supp. 1962).

168. POUND, *THE SPIRIT OF THE COMMON LAW* 191 (1921).

168a. 28 U.S.C. §§ 1346(b), 2680 (1958). The claims authorized are for "negligent or wrongful act or omission" of employees acting within the scope of their governmental employment. The act specifically excludes acts done in connection with "discretionary" functions. It also excludes a list of intentional torts.

169. WASH. REV. CODE ANN. § 4.92.090 (1962).

170. See *Macy v. Town of Chelan*, 59 Wash. 2d 610, 369 P.2d 508 (1962). See also Comment, 36 WASH. L. REV. & ST. BAR J. 312, 321 (1961).

171. N.C. GEN. STAT. §§ 143-291 (1958), construed in *Turner v. Gastonia Bd. of Educ.*, 250 N.C. 456, 109 S.E.2d 211 (1959) (child struck by power mower operated by school maintenance man; demurrer sustained on grounds that he was not a state employee).

172. See discussion accompanying notes 149-153 *supra*.

172a. See note 166 *supra* and accompanying text.

when the injuries result from the policeman's "wilful misconduct."¹⁷³ Connecticut has a similar law for the indemnification of "any [municipal] employee" except a fireman.¹⁷⁴

The vehicle statutes are numerous. One group of states imposes liability on the political subdivision for negligent operation by an employee.¹⁷⁵ Another state provides for the state attorney general to take over the employee's defense, but with limitations on the government's liability.¹⁷⁶ Several states authorize the purchase of automobile liability insurance by the state or political subdivision.¹⁷⁷

D. *Holders of the Maginot Line*

This analysis has now considered the first wave of successful assaults on the immunity barrier. Eight states comprised this vanguard: Seven by case law and one, New York, by a hybridization of common law and statutory development. About half of these states have abrogated the old doctrine in cases involving the torts of employees other than policemen, so the focus has broadened temporarily to include those situations. It is time now to sharpen the focus on policeman cases, and to consider that strand of legal history as a reflection of the state of jurisprudence in this area in the states which have held the line for immunity. Sixteen states have done so in police cases over the decade 1952-1962—at least two jurisdictions with a statutory basis.

Wyoming and South Carolina offered the fullest discussions of the question with Florida's *Hargrove*¹⁷⁸ case as a judicial protagonist. The Wyoming case, *Maffei v. Incorporated Town of Kemmerer*,¹⁷⁹ concerned the death of a man who was directed by the defendant town's policeman to assist in the pursuit of a felon, without warning as to the danger of the situation.

173. ILL. ANN. STAT. ch. 24 § 1-4-5 (Smith-Hurd 1962) (indemnification limited by § 1-4-6 to \$50,000 including costs in cities under 500,000—i.e., cities other than Chicago). This section was originally enacted in 1941. Until 1945, it provided for indemnification only for injuries caused "by the negligent operation of a motor vehicle" by a policeman. *Id.* at 192.

174. CONN. GEN. STAT. ANN. § 7-465 (1960), *modified*, 1962 Supp. at 49.

175. CAL. VEHICLE CODE ANN. § 17001 (1959); MICH. STAT. ANN. § 9.1708(1), (2) (1960); PA. STAT. ANN. tit. 75 § 622 (1960) (municipality "jointly and severally liable" with its employee).

176. MASS. GEN. LAWS ANN. ch. 12, § 3B (1958).

177. IND. ANN. STAT. § 39-1819 (Burns, 1952); N.D. CENT. CODE § 39-01-08 (1960); WEST VA. CODE OF 1961 ANN. § 494(6). See also N.M. STAT. ANN. § 64-25-8, -9 (1960). The first named section authorizes the state board of finance to require "all officials . . . of all departments" to purchase insurance. The second named section provides that the action shall not be brought against the state or its political subdivision but the operator of the vehicle. The application of this section was limited in *City of Albuquerque v. Campbell*, 68 N.M. 75, 358 P.2d 698 (1960), in which the court said that the law was "not intended to open the doors" to suit against municipalities, "at least where they were not otherwise subject thereto."

178. *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957), discussed fully in text accompanying notes 145-148 *supra*.

179. 80 Wyo. 33, 338 P.2d 808 (1959).

The Wyoming court met *Hargrove* head on. It analyzed that decision closely, noting *Hargrove's* use of the English case of *Russell v. Men of Devon*^{179a} as a whipping boy. But, said the court, wrong scapegoat. *Devon* mentions a citation in *Brooke's Abridgement* which denies liability. Brooke died in 1558. Wyoming adopts English common law prior to 1607, therefore this is Wyoming's rule of decision, and "It is only by statute that the doctrine should be abrogated." Had the court stopped here, one could marvel only at its tragic waste of scholarship. But the court was more precise in defining the object of its opposition: Courts, it said, should not assume to base their decisions on "their own concept of 'sociological enlightenment' rather than await legislative reaction to such claimed modern advancement."¹⁸⁰ Thus, the statement of the father of "sociological jurisprudence" that the courts "may not be asked to lead the present transition"^{180a} is substantiated by a court, using his own affirmative phraseology as judicial profanity.

The South Carolina court specifically granted a plaintiff-appellant leave to argue against a long line of decisions, in a case concerning allegations of injuries suffered during a wrongful arrest, aggravated by a failure of the city's policemen to call a doctor.¹⁸¹ The court reviewed the history of immunity back to *Devon*, and up through its absorption into South Carolina case law. It recognized the existence of *Hargrove*, but said in effect that there was a place for the judiciary, and the judiciary should keep its place:

This Court is not invested with the power to make laws. . . . Since our Courts have over such a long period of time consistently followed the rule of immunity, it should not be changed except through legislative enactment.¹⁸²

The court salted away the decision with its consideration of the fact that the city had a bond contract to indemnify itself "for the use and benefit of the Police Department," against loss through failure of an employee "to perform faithfully his duties." The court said that since a municipal corporation can exercise only the powers expressly granted or those necessarily or fairly incident to them, and since no statute empowered the city to waive immunity, it could not be said that there existed an implied power of waiver.

The cry of "Leave it to the legislature" has proved a popular one with courts rationalizing their preservation of immunity during the last decade. When a plaintiff alleged brutal police treatment after arrest,

179a. 2 Term Rep. 667, 100 Eng. Rep. 359 (K.B. 1788).

180. 80 Wyo. at 53, 338 P.2d at 815.

180a. See the remark of Pound quoted at text with note 168 *supra*.

181. *McKenzie v. City of Florence*, 234 S.C. 428, 108 S.E.2d 825 (1959).

182. *Id.* at 435-36, 108 S.E.2d at 828. Compare Cardozo's reference to the "shock in the discovery that legislative policy has made the compound what it is." *NATURE OF THE JUDICIAL PROCESS* 117 (1921).

Oklahoma noted the argument that if the policemen could not pay damages "an inequity would result," but said that if this were the case, the remedy "lies with the legislature, not the judiciary."¹⁸³ Montana denied recovery for the negligent fatal shooting of the plaintiff's decedent while the policeman was trying to arrest him, on the ground that the immunity doctrine had become "fixed as a matter of public policy, *regardless of the reason upon which the rule is made to rest*," and that any change should come from the legislature.¹⁸⁴ The emphasis, which is supplied, indicates the frozen nature of doctrinal thinking, even in the second half of the twentieth century. The same argument is expressed in a different fashion, plaintively, by Justice Cohen, concurring in a decision for the defendant in a Pennsylvania assault case. Complaining that "no course has been charted to guide the courts," Justice Cohen said that the "confusion" surrounding the case demonstrated the "urgent need" for legislation.¹⁸⁵

The courts of at least two states have had a restrictive legislative course chosen for them in recent police cases. Ohio dismissed an allegation based on injuries sustained by a woman when a policeman removed her from a street in which she was lying at three o'clock in the morning and took her to a hospital. The basis for the decision was an Ohio Code provision that the defense that a municipal officer is "engaged in performing a governmental function shall be a full defense as to the negligence of . . . members of the police department engaged in police duties."¹⁸⁶ A Georgia appellate court struggled in two cases with its recognition that the "passage of time and changing conditions" could establish new causes of action which "should not be denied simply because they have not been previously enforced."¹⁸⁷ But it yielded in one case to the legislature,¹⁸⁸ and in the other, decided in 1962, to a 1900 case precedent, as well as to the same legislative provision.¹⁸⁹

Mississippi also indicated that it felt the pressure. It admitted that "some writers criticize the doctrine," though emphasizing that "the

183. *Grimes v. City of Henryetta*, 208 Okl. 217, 254 P.2d 980 (1953).

184. *Kingfisher v. City of Forsyth*, 132 Mont. 39, 45, 314 P.2d 876, 879-80 (1957), quoting *Hagerman v. City of Seattle*, 189 Wash. 694, 698, 66 P.2d 1152, 1154.

185. *Stouffer v. Morrison*, 400 Pa. 497, 502-03, 162 A.2d 378, 381 (1960).

186. *Lawson v. City of Campbell*, 71 Ohio L. Abs. 70, 129 N.E.2d 529 (Ct. App. 1953), *appeal dismissed*, 161 Ohio St. 172, 117 N.E.2d 598 (1954), construing OHIO REV. CODE ANN. § 701.02 (Baldwin 1958) (§ 3714-1 GEN. CODE).

187. *City of Cumming v. Chastain*, 97 Ga. App. 13, 102 S.E.2d 97 (1958) (assault by shooting of plaintiff in attempt to "make sport" of occupants of the auto in which he was riding).

188. *Ibid.*, following GA. CODE ANN. § 69-307 (1957): "A municipal corporation shall not be liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law."

189. *Thomas v. Williams*, 105 Ga. App. 321, 124 S.E.2d 409 (1962) (plaintiff burned to death in jail fire), citing as controlling *Gray v. Mayor of Griffin*, 111 Ga. 361, 36 S.E. 792 (1900), as well as the Code provision mentioned in note 188 *supra*.

overwhelming majority of courts" favor it. It held a municipality not liable for a policeman's assault and battery, with specific reference to the "problems of public finance" that municipal liability would bring.¹⁹⁰ As noted earlier, it is interesting that the financial argument crops out explicitly more in these days of insurance than it did a century ago. The Mississippi court said that any change would require legislation.

The other decisions for immunity, for the most part, are content to place a rubber stamp on the past. Thus, it is said that it is "established"¹⁹¹ and "well-settled"¹⁹² that there is no liability for torts committed in the performance of "governmental functions." An especially petrified variation on this theme is found in a Kansas decision, rendered the same year as *Hargrove*, holding the city immune from suit for false arrest and imprisonment. This is the question-begging technique: There can be no doubt, the court said,

but that the maintenance and operation of a police department is a governmental function as distinguished from proprietary, *thus* clothing the municipality with immunity for acts of negligence or misfeasance of its employees engaged in carrying out of such function.¹⁹³

The major premise of immunity is thus frozen into sanctified writ. All that is necessary for the city is to establish that the tortfeasor was a policeman, *i.e.*, that he was engaged in a "governmental function."

This technique is evident in several other police immunity cases of the last decade.¹⁹⁴ It is used in police cases even by states that have made thrusts into the land of liability. The Texas Civil Court of Appeals, for instance, denied recovery when the plaintiff's decedent, severely beaten by a third party, was imprisoned though in need of medical attention. The city's marshal was "exercising police power," said the court, and the city was not liable "for the damages caused by such negligence, under the doctrine of *respondeat superior*."¹⁹⁵ This is to be

190. *Anderson v. Vanderslice*, 240 Miss. 55, 126 So.2d 522 (1961). It may be noted that on the facts, this was more a case involving the negligence of the city rather than the application of respondeat superior. The policeman in question had been convicted of murder, and had been held liable for several other assaults.

191. *City of Bay Minette v. Quinley*, 263 Ala. 188, 82 So.2d 192 (1955) (allegation of negligence in maintenance of stairs leading to police offices).

192. *Taulli v. Gregory*, 223 La. 195, 65 So.2d 312 (1953) (malicious prosecution). *Accord*, *Brown v. City of Shreveport*, 129 So.2d 540 (La. App. 1961) (assault after imprisonment).

193. (Emphasis added.) *Wommack v. Lesh*, 180 Kan. 548, 550, 305 P.2d 854, 856 (1957).

194. *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky. 1952) (dictum); *Bucholz v. City of Sioux Falls*, 77 S.D. 322, 91 N.W.2d 606 (1958) (dictum); *Johnson v. City of Jackson*, 194 Tenn. 20, 250 S.W.2d 1 (1952); *Mayor of Morristown v. Inman*, 47 Tenn. App. 685, 342 S.W.2d 71 (1960).

195. *Valdez v. Amaya*, 327 S.W.2d 708, 709 (Tex. Civ. App. 1959).

compared with Texas Supreme Court language in other contemporary cases.¹⁹⁶ Similarly, Colorado used the label of "lawful governmental capacity" to immunize a town against a false imprisonment action in a colorful fact situation with an Old West flavor.¹⁹⁷ This case was decided only two years before the Colorado court made an apparent temporary recession from immunity in some non-police cases.¹⁹⁸

Several courts, then, have held the line for immunity in police cases without much comment. But others have indicated that they are feeling pressure. This pressure comes from without, as is evinced by references to cases such as *Hargrove*, as well as to the presence of scholarly lobbying for reform. It comes also from within, from the judicial conscience, as with the half-spoken admission of possible "inequity."¹⁹⁹

IV. THE GROWTH OF POPULATION AND THE GROWTH OF THE LAW

The history of the law in the United States bears an obvious close relationship to intellectual history in general. In analyzing the development of an attack on one legal problem, we have noted the relationship of one man to his fermenting intellectual environment. The impact of his writings and those of his colleagues has been explicitly recognized in a series of lighthouse decisions across the land in the last six years. It is, of course, obvious that there are many variables which have played upon these decisions. The author has selected one such variable, which is indicative of the pressure which *social* environment brings upon the courts. This is the phenomenon of urban population development, surely one of the great factors of our modern history, and one of the most salient considerations in the growth of our law.

The tables on page 512 suggest in a tentative fashion a dramatic relationship between certain facets of urban population and the question of governmental liability in tort. The tables include a profile for nearly half of the states of the Union. The eight states above the heavy dividing

196. See the decisions in *Crow v. City of San Antonio*, 157 Tex. 250, 301 S.W.2d 628 (1957) and *City of Austin v. Daniels*, 160 Tex. 628, 335 S.W.2d 753 (1960), both discussed briefly at note 60 *supra*.

197. *Walker v. Tucker*, 131 Colo. 198, 280 P.2d 649 (1955). In this case, Walker succeeded Tucker as town marshal. He got the town board to authorize the closing of the highway in front of Walker's home—which prevented Tucker's dairy trucks from taking the shortest route from the latter's home to the dairy. Although Tucker eventually secured an injunction against the barricades, he first had a truck driven through them, whereupon Walker arrested him. The action for false imprisonment was denied in a reversal of a verdict for the plaintiff, on the authority of a 1936 malicious prosecution case, *McIntosh v. City & County of Denver*, 89 Colo. 403, 55 P.2d 1337 (1936).

198. See, e.g., *Colorado Racing Comm'n v. Brush Racing Ass'n*, 136 Colo. 279, 316 P.2d 582 (1957). See also Note, 37 *DICTA* 133, 162 (1960), wherein the student author, although attacking the general concept of governmental immunity, does not object to "immunity being continued in the public safety areas," but says that it should not be granted when officials "exceed their powers," specifically citing *McIntosh*, note 197 *supra*.

199. See text with note 183 *supra*.

line have been selected because each has abrogated the doctrine of immunity in some significant fashion. As explained previously, several of these states have done so with reference to policemen, but others have acted concerning other subject matter. However, the illustration outweighs in significance what it lacks in this one area of perfect symmetry. The sixteen states below the line are the states which by common law (or common law based on statute in two instances) have continued in the last decade to immunize municipalities for police torts.

The story of Table I²⁰⁰ is that all but one of the states which have ruled for liability are in the top half of the nation today with respect to rank by percentage of population classified as urban. On the other hand, the states which have preserved immunity along the policeman strand of legal history rank predominantly in the bottom half. Ohio and Pennsylvania, immunity states in the top half, have sagged in relative rank since 1910. Texas, which has made a dramatic jump from 35th to 10th, and Colorado, which has stayed even at 14th, have both showed significant cracks in the wall of immunity. The table is particularly interesting because of the years it covers. The left-hand set of figures is from 1910, or the time of Pound's articulation of the ideas of sociological jurisprudence, and a decade and one-half before Borchard's articles. The year 1960 is three years after *Hargrove*, and finds breakthroughs being made all over the nation against immunity. Thus, the states which have ranked or risen high over the last half-century in their urban population percentage are those in which the seeds of heresy have bloomed.

A similar picture manifests itself in Table II.²⁰¹ All but one "liability" state have more than fifteen cities of more than 25,000 population, while all but three "immunity" states have less than fifteen. The immunity states which are out of line are Texas, Ohio and Pennsylvania. As noted, Texas is flirting with liability. It is perhaps unnecessary to rationalize the other two exceptions, except to point out that Pennsylvania has seen some savage intra-court battles over this issue recently,²⁰² and to note the decline which Pennsylvania and Ohio have shown in Table I ranking. It seems apparent that the more substantial cities a state has, the more tendency its court will show to break down governmental immunity.

200. U.S. CENSUS OF POPULATION: 1960, Vol. I: *Characteristics of the Population, Part A, Number of Inhabitants*, Table G, at xvi (Bureau of the Census 1961).

201. COUNTY AND CITY DATA BOOK, Table 6, Cities, 476-575 *passim* (Bureau of the Census 1962).

202. The steadfastness of a majority of the Pennsylvania court in the face of this progressive tort concept is matched by that court's refusal to allow recovery in another area of continuing ferment. For Pennsylvania's counterpunch to a long national trend for liability for negligence without impact, see *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958).

Table III²⁰³ focuses on number of municipal police employees. It virtually repeats the pattern of Table II. Cities in the liability states employ larger numbers of policemen, with the exception of Minnesota, than the immunity states, with the usual exceptions of Pennsylvania, Ohio and Texas.

APPENDIX

LIABILITY STATES	TABLE I: Rank, according to percentage of population classified as urban		TABLE II: Number of cities with more than 25,000 inhabitants	TABLE III: Full-time equivalent police employees of municipalities
	1910	1960		
CALIFORNIA	7 (61%)	4 (86%)	85	17,286
FLORIDA	31 (29%)	13 (73%)	22	4,684
ILLINOIS	8 (61%)	5 (80%)	41	15,114
MICHIGAN	16 (47%)	16 (73%)	37	10,079
MINNESOTA	22 (41%)	29 (62%)	11	2,704
NEW JERSEY	5 (76%)	2 (88%)	36	9,706
NEW YORK	4 (78%)	5 (85%)	36 (each borough of New York City counted singly)	34,605
WISCONSIN	19 (43%)	24 (68%)	19	4,333
IMMUNITY STATES				
ALABAMA	42 (17%)	35 (54%)	14	2,359
COLORADO	14 (50%)	14 (73%)	8	1,602
GEORGIA	38 (20%)	34 (55%)	11	3,104
OHIO	10 (55%)	15 (73%)	40	9,752
KANSAS	30 (29%)	30 (61%)	7	1,765
KENTUCKY	34 (24%)	42 (44%)	8	2,046
LOUISIANA	28 (30%)	25 (63%)	9	2,591
MISSISSIPPI	49 (11%)	50 (37%)	8	1,171
MONTANA	23 (35%)	40 (50%)	4	463
OKLAHOMA	40 (19%)	26 (62%)	8	1,784
PENNSYLVANIA	9 (60%)	18 (71%)	26	13,350
SOUTH CAROLINA	44 (14%)	44 (41%)	6	1,583
SOUTH DAKOTA	47 (13%)	26 (39%)	2	460
TENNESSEE	39 (20%)	38 (52%)	8	2,429
TEXAS	35 (24%)	10 (75%)	40	7,861
WYOMING	29 (29%)	32 (56%)	2	276

These tables may teach that courts lag behind the demands of social realities. However, they also indicate vividly that the courts are, after all, respecters of the forces abroad in society. The scholars were in the vanguard in the fight for governmental responsibility. But it appears that for the judges, the clincher has been supplied by sheer

203. U.S. CENSUS OF GOVERNMENTS: 1957, Vol. II, No. 2, *Summary of Public Employment*, Table 14, at 50-61 (Bureau of the Census 1958). These are the latest state-by-state figures which could be found in this particular category. Their relationship to the statistics in Table II makes it reasonable to assume that the later pattern is the same.

weight of urbanization.²⁰⁴ Naked demography may not be suitable for inclusion in appellate argument, but it would seem that it is at least one persuasive factor in judicial decision. If the attorney cannot mention it overtly, he should at least be aware of its implications.

V. THE LAW SEEKS A NEW FOOTHOLD

The vanguard courts had barely solved one set of problems by allowing actions where no action had existed, when new problems arose. It is useful to analyze Florida for an example of the kind of issues which the new solution posed. It will be recalled that the landmark Florida decision of *Hargrove v. Town of Cocoa Beach*²⁰⁵ found liability against a municipality in a fact situation concerning a jailer's negligence. So eager were plaintiffs' attorneys in Florida to test the ground under this case that in a little over five years, a remarkable total of ten cases involving intentional torts were decided at the appellate level. To analyze these decisions is to examine the problems and challenges of common-law jurisprudence in microcosm.

There are three intermediate appellate districts in Florida. THE FIRST DISTRICT originally attacked the intentional torts problem by dictum in a case involving allegations of assault and battery by an arresting officer.²⁰⁶ The court then proceeded to limit *Hargrove* to negligence, by indirection and strong dictum in two subsequent cases. It set down an indirect limitation in *Middleton v. City of Fort Walton Beach*,²⁰⁷ which concerned an allegation that the plaintiff was arrested on a warrant that both the issuing clerk and the arresting officer knew was void. Taking a small leaf from *Hargrove's* book, the court noted that the supreme court had said in *Hargrove* that its decision was not to be construed to apply to "quasi-judicial" acts, and said that the acts involved here came under that category.²⁰⁸ By its characterization of the suit as one to "recover

204. The author is of course aware of the dangers attending the selection of any variables as examples. Naturally, these particular tables include, sub silentio, a host of factors attendant on urbanization. One may note informally, for instance, that the liability states as a whole would be ranked as relatively sophisticated culturally. This factor would present obvious implications for the life of the mind in general, and the judicial mind in particular.

205. 96 So.2d 130 (Fla. 1957), discussed in text with notes 145-148 *supra*.

206. *Ragans v. City of Jacksonville*, 106 So.2d 860 (Fla. 1st Dist. 1958). The court affirmed a dismissal because of the plaintiff's failure to observe notice provisions. However, it took occasion to say that the Jacksonville Charter provision immunizing the city unless damage was attributable to "the gross negligence of the City" was void. The court said that the Supreme Court had "specifically held that a municipality is liable for the torts of its police officers under the doctrine of respondeat superior." It said that this "clearly" meant that "municipal tort liability cannot be validly restricted solely to suits . . . arising out of gross negligence." It would seem that more than one interpretation may be placed on this statement, but the problem is moot because of the subsequent decisions discussed in text accompanying notes 207-09 *supra*.

207. 113 So.2d 431 (Fla. 1st Dist. 1959).

208. This view is severely criticized in a thoughtful note, 14 U. MIAMI L. REV. 634 (1960).

damages for an alleged intentional tort," and its italicization of the fact that *Hargrove* involved a negligent tort, the court implied that this distinction also influenced its decision. This implication was made explicit in a subsequent decision in which the plaintiff charged that a Jacksonville policeman broke into his premises and searched them "with great and negligent disregard for the plaintiff's right of privacy."²⁰⁹ Holding the allegation sufficient on negligence—a holding perhaps worthy of extended comment in itself—the court said by dictum "again that . . . *Hargrove* . . . should not be extended to include . . . intentional torts." It reiterated its disagreement to such an extension, which it said it had expressed in *Middleton*.

THE SECOND DISTRICT examined the issue but did not cross swords with it, in two dicta involving, among others, allegations of malicious prosecution.²¹⁰ Both decisions made a detailed review of case law, both pre- and post-*Hargrove*, but the review concluded inconclusively. In *Gordon v. City of Belle Glade*,²¹¹ the court noted the plaintiff's contention that *Hargrove* had accepted the liability-oriented dissents in the previous *Bethel* and *Williams* cases.²¹² It admitted that if this argument were correct, those dissents "could be deemed controlling," because of the similarity of the fact pattern in *Bethel* to the instant case. However, the court said that *Hargrove* did not overrule these two predecessors. Therefore, the issue remained undecided.

THE THIRD DISTRICT then proceeded to spice the stew pungently. It first considered a complaint of malicious arrest and unlawful imprisonment, in *City of Miami v. Albro*.²¹³ Although reversing and remanding a verdict for the plaintiff on other grounds,²¹⁴ the court said baldly:

We . . . hold that a municipal corporation may be held liable for torts of the nature alleged in the complaint now before us.²¹⁵

Within one year, the court apparently had backed up a bit from this position. It reversed a plaintiff's directed verdict in the well-publicized case of *City of Coral Gables v. Giblin*,²¹⁶ which concerned the arrest and imprisonment of the wife of a Dade County circuit judge. The court

209. *Thompson v. City of Jacksonville*, 130 So.2d 105 (Fla. 1st Dist. 1961).

210. *Calbeck v. Town of South Pasadena*, 128 So.2d 138 (Fla. 2d Dist. 1961), and *Gordon v. City of Belle Glade*, 132 So.2d 449 (Fla. 2d Dist. 1961).

211. *Supra* note 210.

212. *City of Miami v. Bethel*, 65 So.2d 34 (Fla. 1953), and *Williams v. City of Green Cove Springs*, 65 So.2d 56 (Fla. 1953), both discussed at text with notes 78-84 *supra*.

213. 120 So.2d 23 (Fla. 3d Dist. 1960).

214. The plaintiff had contended that his action rested on the use of excessive force, regardless of the validity of the arrest. The court, reversing with leave to amend on that point, said in effect that the legality of the arrest was crucial.

215. *City of Miami v. Albro*, 120 So.2d 23, 27 (Fla. 3d Dist. 1960).

216. 127 So.2d 914 (Fla. 3d Dist. 1961).

based its decision on an old judicial saw, the idea that the city could not authorize an "illegal act," for example, an arrest outside its territorial limits.²¹⁷ The court was compelled to note both the city's contention that *Hargrove* did not extend to intentional torts, and Mrs. Giblin's contention that it did. It concluded that "Certainly some of the language of that decision supports the appellee's view!"²¹⁸ Judge Pearson's remark in dissent that *Hargrove* had created a new need for "markers"²¹⁹ seemed understatement.

The markers were not long in coming. The Third District veered initially toward the old ground of immunity. A two-man majority affirmed a judgment for the defendant per curiam in *Sherwood v. City of Miami Beach*.²²⁰ Judge Pearson dissented briefly, saying that the case involved "an intentional tort of a police officer for which the City can be held liable under the doctrine of respondeat superior." A Third District panel ostensibly confirmed this course in its refusal a few weeks later to answer a certified question regarding municipal liability for a police assault and battery.^{220a}

And then, just before this article went to press, the Third District resolutely declared for liability. The vote in *Simpson v. City of Miami*^{220b} was divided,^{220c} but the holding was unmistakable:

We hold, on the authority of *Hargrove v. Town of Cocoa Beach* . . . that the defendant municipality does not enjoy immunity from liability for the intentional torts of its police officers committed in the course or scope of their employment.^{220d}

The court pinpointed the broad policy base of *Hargrove*, noting that the supreme court in that decision had scorned the piecemeal "pruning" of immunity and had blasted the immunity concept as "archaic and outmoded." It quoted the statement in *Hargrove* that "the time has arrived to face the matter squarely in the interest of justice and place the responsibility for wrongs where it should be." It refused to find controlling significance in "a restatement of the holding in which [the *Hargrove* court] used the word 'negligence.'" The significant limitation,

217. For nineteenth century beginnings of this device, see text with notes 53-54 *supra*. The Supreme Court affirmed the Third District in *Giblin*, but on a different theory, based on the idea that there was a legal arrest and retaking. 149 So.2d 561 (Fla. 1963).

218. *City of Coral Gables v. Giblin*, 127 So.2d 914, 918 (Fla. 3d Dist. 1961).

219. *Id.* at 922.

220. 148 So.2d 293 (Fla. 3d Dist. 1963).

220a. See *Jaworski v. City of Opa-locka*, 149 So.2d 566 (Fla. 3d Dist. 1963). The court said that it "does not appear that the question is without controlling precedent in this state." It should be noted that the acts in question were alleged to have been committed after arrest without a warrant for a misdemeanor not committed in the presence of the arresting officer.

220b. Case No. 62-357 (Fla. 3d Dist., August 6, 1963).

220c. Judge Carroll wrote the majority opinion, joined by Judge Pearson. Chief Judge Barkdull dissented.

220d. *Simpson v. City of Miami*, note 220b *supra*, at 4.

the court said, is found not in "the nature of the tort, but in the nature of the act, as to whether it is within the course or scope of employment."^{220e}

The court emphasized that its holding was derived from *Hargrove* "read in full." It declared explicitly that there was now a conflict among the appellate districts,²²¹ thus inviting review at the supreme court level.²²² In the view of this writer, *Simpson* sailed the true course. For *Simpson* was the first time that *Hargrove* had been read as it was writ—"in full."

When *Hargrove* was decided, it set the appellate courts of Florida adrift on a lonely judicial sea; the old familiar landmarks were gone. However, within half a decade, two of the three districts had found harbors on opposite shores. The better port appeared at the confluence of two ideas, flowing from *Hargrove* and *Simpson*. One idea emphasized the demands of justice in the context of a realistic appreciation of the nature of the modern municipal corporation. The other argued the application of established principles of respondeat superior to intentional torts. Experience and logic both pointed to liability.

One other problem has arisen in connection with police cases—the provocative issue of municipal liability for a negligent failure to act. In Florida, a pre-*Hargrove* police case²²³ and a post-*Hargrove* fireman case²²⁴ indicate the scope of the problem. A dissenting opinion in an Illinois appellate decision may point the way to new municipal responsibility. In that case, *Adamczyk v. Zambelli*,²²⁵ the plaintiff charged that the city's policemen were negligent in failing to suppress the unlawful explosion of fireworks by participants in a church parade. The majority distinguished Illinois' breakthrough holdings in school district and

220e. *Id.* at 2. It may be noted that the blackletter law of RESTATEMENT (SECOND) AGENCY § 245 (1958) says: "A master is subject to liability for the intended tortious harm . . . done in connection with the servant's employment, although the act was unauthorized, if the act was not unexpected in view of the duties of the servant."

221. The court cited *Middleton*, text with notes 207-08 *supra*; *Thompson*, note 209 *supra*; *Calbeck*, note 210 *supra*; and *Gordon*, text with notes 210-11 *supra*. It said that "to the extent" that these cases "are decisions that *Hargrove* does not encompass intentional torts, our decision in this case is in conflict therewith."

222. See FLA. CONST. art. V § 4(2).

223. *Woodford v. City of St. Petersburg*, 84 So.2d 25 (Fla. 1955). The plaintiff was bowled over in his yard by some boys who organized a "flying wedge" to chase baseballs from the nearby Yankee training field. He claimed that the police force was negligent because it knew of the boys' custom and did not stop them. The pre-*Hargrove* court reversed a dismissal, apparently on the grounds that proprietary functions were involved in the keeping of a ball field. However, it said that its holdings at that time on strictly governmental functions dictated that "a municipality should not be liable for the negligent failure of its police force to act when action would appear to be indicated." *Id.* at 26.

224. *Steinhardt v. Town of North Bay Village*, 132 So.2d 765 (Fla. 3d Dist. 1961) (recovery denied on allegation of city's negligent failure to protect property from fire loss; refusal to extend *Hargrove*).

225. 25 Ill. App. 2d 121, 166 N.E.2d 93 (1960).

policeman cases²²⁶ by saying that they involved "affirmative negligent or wilful acts by municipal employees."

But the dissenter, Justice Kiley, said that the case "calls for a further step in the direction of the trend away from governmental immunity" shown by the Illinois breakthroughs. He did say that the fact that the policemen had "furthered the violation" of a fireworks permit by "policing the parade" made the case "something more than mere omission." Yet even if the case was not strictly a "failure to act," the dissent thrust in the direction of allowing recovery for this kind of negligence.

Another new outsider had appeared in the attempt to extend the frontiers of municipal liability for police torts.

CONCLUSION

We have now traced a single strand of legal history through more than a century of development. That strand began on a dark and lonely street in New Orleans when men were chattels. The law that was made then was perhaps worthier of those times, but it survived to rule different days and different conditions. The nationalizing forces of the Civil War, the quickening of industrialism and the coming of the city as a potent force in society were accompanied, ironically, by the acceptance all over America of the idea that municipalities should be immune from suit for the torts of police officers. With the coming of the twentieth century, a few courts repudiated the immunity doctrine in certain areas, here and there to recede but occasionally, as in the case of Florida, laying a solid foundation for future progress.

Then there came an awakening in the schools of law, even as the doctrine petrified into tradition. Bold men in those schools began to say that the law should be responsive to the powerful forces which had seized American life. This attack on the old legal ways was but a facet of the mighty revolt against doctrine which swept the intellectual community of this country and of the Western world, in all the social and physical sciences. Like many of their cohorts, teachers of law launched campaigns for reform in many areas. Their battles began in the legal publications. A sterling example was furnished by the attack on governmental tort immunity of Edwin M. Borchard, well-known where the great minds of the law came together, but relatively unsung in the general textual treatments of American intellectual development. He attacked this problem passionately, writing from a background of broad scholarship which encompassed the progress of European jurisprudence. Then he literally carried his attack to the courts. Thus, we find him presenting an amicus brief when a citizen is accidentally shot down by a New York City policeman. Advocacy combined with scholarship in this movement for reform.

226. See text with notes 149-153 *supra*.

Combined with this attack from academe there came an increasing urbanization. One may read between the lines of the cold census figures the requirements which arose for more municipal services of every kind, including police protection. The ramifications of this development inevitably must have set ablaze the fuel provided by the scholars. Thus, we find New York, largest state in the nation, with the largest city, quietly leading the way with an interesting amalgam of case and statute liability for police torts.

And then, half a century after Dean Pound's germinal articles, four decades after Borchard's focused attack, there begins a dramatic series of decisions, burning with brush fire effect, to wipe away the old immunity. Ideas and the pressure of people had broken through. If there remained a solid resistance movement, there were cracks even in the status quo states.

The courts of the breakthrough states recognized the proddings of scholars, the demands of simple justice and the trends of their own decisions, and took a step forward in the perpetual renewal process that is creative jurisprudence. It appears certain that the highest courts of the other jurisdictions must recognize the need for *judicial* initiative against governmental immunity. When the proper case presents itself, perhaps the Minnesota solution is best: Prospective abrogation with a stay of execution for the doctrine until the adjournment of the next legislature.

This technique presents legislators with a *fait accompli*, demanding action against a deadline. However, it recognizes the need for legislative consideration of the entire problem area,²²⁷ and its use may pay sufficient deference to the legislature to avoid the kind of severe reaction we have seen in California and Illinois. Failing legislative action, governmental units will at least be vouchsafed a period in which to make insurance arrangements. The use of this method would seem to outweigh in practical advantage what it may cost in individual hardship, one may even say injustice.

Finally, the courts which make the inevitable break with the old doctrines must look to the new problems which their decisions set boiling. These problems appear in sharp focus in Florida, where the courts have struggled valiantly for a new foothold, a new set of rules. A new sense of judicial responsibility has created a new judicial birth of freedom. In turn, freedom has produced more responsibility.

227. See POUND, *THE SPIRIT OF THE COMMON LAW* 190-91 (1921).