COMMENT

PUSHING THE RESET BUTTON ON WISCONSIN'S GOVERNMENTAL IMMUNITY DOCTRINE

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The 1962 Wisconsin Supreme Court decision in *Holytz v. City of Milwaukee* seemed to sound the death knell for the "ancient and fallacious" doctrine of governmental immunity. In *Holytz*, the court unequivocally rejected broad immunity and embraced a general rule of governmental liability. The Wisconsin Legislature responded by promptly enacting a statute that essentially codified *Holytz*. Over the course of the next 50 years, however, the Wisconsin Supreme Court resurrected governmental immunity by shielding governmental actors from liability arising out of any "discretionary act." As a result, broad governmental immunity is once again the rule in Wisconsin. That result is inconsistent with the plain text of the governing statute and the court's decision to abrogate governmental immunity in *Holytz*. This Comment explores how the Wisconsin Supreme Court resurrected governmental immunity and suggests how to restore the doctrine to conform to the governing statute.

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INTRODUCTION

"There are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine."[1] The Wisconsin Supreme Court penned those words in 1962 just before abolishing governmental immunity.[2] Yet today, governmental immunity is once again thwarting injured parties in Wisconsin from obtaining redress against negligent governmental actors.[3] This Comment explores how the Wisconsin Supreme Court skirted precedent and legislative intent to resurrect the "anachronistic" doctrine of governmental immunity.[4]

Five decades ago, in the landmark case of *Holytz v. City of Milwaukee*,[5] a unanimous Wisconsin Supreme Court boldly abrogated governmental immunity for all public entities in the state.[6] The court allowed a narrow exception to its abrogation of immunity: governmental entities would retain immunity in the "exercise of [their] legislative or judicial or quasi-legislative or quasi-judicial functions."[7] The following year, the Wisconsin Legislature signaled its approval by partially codifying *Holytz*.[8] Read together, that statute and *Holytz* sanctioned a very limited form of governmental immunity. The *Holytz* court put it simply and clearly: "[H]enceforward, so far as governmental

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1. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 33, 115 N.W.2d 618 (1962).

2. *Id.* at 37.

3. *See, e.g.*, *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 37, 262 Wis. 2d 127, 663 N.W.2d 715 ("The outcome of this case is harsh, and the harshness of our holding is especially palpable because the negligence is so clear. Yet the doctrine of governmental immunity plays a significant role in our legal system.").

4. *Holytz*, 17 Wis. 2d at 34 (quoting *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957)).

5. 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

6. *Id.* at 37, 40. Interestingly, the Wisconsin Supreme Court had previously stated that any proposed change to governmental immunity should be "made to the legislature." *Britten v. City of Eau Claire*, 260 Wis. 382, 387, 51 N.W.2d 30 (1952). Yet, the *Holytz* court insisted that because the doctrine was judicially created, it could be judicially abrogated. *Holytz*, 17 Wis. 2d at 37. This Comment does not explore whether the *Holytz* court had the authority to abrogate governmental immunity.

7. *Holytz*, 17 Wis. 2d at 40.

8. *Compare* WIS. STAT. § 331.43(3) (1963) ("legislative or judicial or quasi-legislative or quasi-judicial functions"), *with Holytz*, 17 Wis. 2d at 40 ("legislative or judicial or quasi-legislative or quasi-judicial functions"). *See also Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 532, 247 N.W.2d 132 (1976) (discussing Wisconsin statute section 895.43 (1975), the renumbered version of section 331.43).

responsibility for torts is concerned, *the rule is liability—the exception is immunity*."[9]

Later courts spurned that directive. In the 50 years following *Holytz*, the Wisconsin Supreme Court breathed life back into the doctrine of governmental immunity, which now stands strong once again.[10] The court accomplished this feat in three steps. First, the court reintroduced concepts that predated *Holytz* in order to expand the immunity of state employees.[11] Second, the court stretched this newly-minted state employee immunity over municipal employees.[12] Third, the court blanketed municipal entities in immunity.[13] In short, the court shifted the focus from liability to immunity, flipping the holding of *Holytz* on its head.[14]

Today, governmental actors can claim immunity from liability arising out of any "discretionary act."[15] Yet, nearly every act involves some degree of discretion.[16] Thus, the "discretionary act" standard is effectively a general rule of immunity.[17] To recover against a governmental actor, an injured party has to try to "shoehorn" his cause of

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9. *Holytz*, 17 Wis. 2d at 39 (emphasis added).

10. *See Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 110, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring); J. Michael Riley, *Discretionary Immunity: The Exception That Swallowed the Rule*, VERDICT, Summer 1996, at 10; Linda M. Annoye, Comment, *Revising Wisconsin's Governmental Immunity Doctrine*, 88 MARQ. L. REV. 971, 987–88 (2005); *see also* Gabe Johnson-Karp, *Returning to First Principles? Governmental Immunity in Wisconsin*, WIS. LAW., Apr. 2014, at 31–32.

11. *See infra* Part II.A.

12. *See infra* Part II.B.

13. *See infra* Part II.C.

14. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 59, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring) ("Liability may be found only in narrow exceptions to general immunity."). As one commentator aptly put it, "[a]though *Holytz* has never been overruled, nor explicitly modified, it has been substantially eroded by subsequent decisions making immunity once more the rule and liability the exception." Riley, *supra* note 10, at 10.

15. *See Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 28, 262 Wis. 2d 127, 663 N.W.2d 715.

16. *Swanson v. United States*, 229 F. Supp. 217, 219–20 (N.D. Cal. 1964) ("In a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some discretion."); *Ham v. L.A. Cnty.*, 189 P. 462, 468 (Cal. Ct. App. 1920) ("[I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."); *see also* 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.13 (3d ed., rev. vol., 2013).

17. *See Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 109, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring). Courts now call public officer immunity "discretionary act immunity." *Pries v. McMillon*, 2008 WI App 167, ¶ 13, 314 Wis. 2d 706, 760 N.W.2d 174.

action into one of four narrow exceptions to this rule of immunity.[18] Justice Prosser aptly summarized today's doctrine: "So far as government responsibility for torts is concerned, immunity has become the rule and liability has become the rare exception. Justice has been confined to a crawl space too narrow for most tort victims to fit."[19]

Reflecting on the state of the doctrine in 2003, Justice Bablitch predicted that it could not and would not stand much longer.[20] The court is poised to fulfill Justice Bablitch's prediction.[21] Justices Prosser and Gableman have explicitly called on the court to overhaul the doctrine.[22] Justice Crooks agrees that the doctrine must be modified but wishes to do so "incremental[ly]."[23] Chief Justice Abrahamson and Justice Bradley have indicated that it may be time to revisit the "whole body" of governmental immunity.[24] Though the justices may differ on the degree of change necessary, there is near consensus that the doctrine must be reformed. The issue is ripe for consideration by the Wisconsin Supreme Court.[25]

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18. *Scott*, 2003 WI 60, ¶ 79 (Prosser, J., dissenting). For an in-depth discussion of these narrow exceptions to governmental immunity, see *infra* Part II.D.

19. *Umansky*, 2009 WI 82, ¶ 78 (Prosser, J., concurring).

20. *Scott*, 2003 WI 60, ¶ 62 (Bablitch, J., concurring). Justice Bablitch retired shortly after making that prediction. *See* WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN: 2003–2004 BLUE BOOK 569 (Lawrence S. Barish et al. eds., 2003).

21. In fact, Justice Crooks recently suggested that a transformation is already underway. *See Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, ¶ 63, 350 Wis. 2d 509, 835 N.W.2d 226 (Crooks, J., concurring) ("I am also concerned that . . . the majority opinion could be read as endorsing the type of fundamental change that Justice Gableman advocates in a concurrence in an unrelated governmental immunity case."); *see also* Johnson-Karp, *supra* note 10, at 31 (noting that recent case law "may be read as potentially indicating an incremental shift in Wisconsin governmental immunity law, reaffirming the fundamental principle that liability is the rule for governmental entities, with immunity being a limited exception under the language of Wis. Stat. section 893.80(4)").

22. *Bostco*, 2013 WI 78, ¶ 103 (Gableman, J., concurring); *Piers v. McMillon*, 2010 WI 63, ¶ 91, 326 Wis. 2d 37, 784 N.W.2d 648 (Gableman, J., dissenting); *Umansky*, 2009 WI 82, ¶ 39 (Prosser, J., concurring). Justice Prosser, in particular, has long been critical of Wisconsin's resurrected doctrine of governmental immunity. *See, e.g.*, *Umansky*, 2009 WI 82, ¶¶ 40, 78 (Prosser, J., concurring); *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 94, 277 Wis. 2d 635, 691 N.W.2d 658 (Prosser, J., concurring); *Scott*, 2003 WI 60, ¶¶ 75–82 (Prosser, J., dissenting); *Willow Creek Ranch, L.L.C., v. Town of Shelby*, 2000 WI 56, ¶¶ 120, 124–25, 235 Wis. 2d 409, 611 N.W.2d 693 (Prosser, J., dissenting).

23. *Showers Appraisals*, 2013 WI 79, ¶ 63 (Crooks, J., concurring).

24. *Bostco*, 2013 WI 78, ¶ 136 (Abrahamson, C.J., dissenting) (joined by Justice Bradley); *see also Scott*, 2003 WI 60, ¶ 58 (Abrahamson, J., concurring).

25. The Wisconsin Legislature already articulated its position on governmental immunity. *See* WIS. STAT. § 893.80(4) (2011–12). However, the legislature is always free to clarify, reaffirm, or alter its position. *Cf. Holytz v. City of Milwaukee*, 17 Wis. 2d 26,

This Comment argues that Wisconsin's current governmental immunity doctrine has no connection to the text of the immunity statute or the decision to abrogate the doctrine in *Holytz*; it must therefore be reset. Part I distinguishes the various forms of immunity in Wisconsin, examines *Holytz*'s abrogation of governmental immunity, and explains the resulting legislation. Part II details how the Wisconsin Supreme Court skirted precedent and legislative intent to resurrect governmental immunity. To conclude, Part III suggests how to restore the governmental immunity doctrine to conform to the immunity statute and *Holytz*.

I. HISTORICAL BACKGROUND

Wisconsin's governmental immunity doctrine is complex and confusing.[26] Two factors have exacerbated the problem. First, under Wisconsin law, there are several distinct forms of immunity that shield governmental actors, and courts often conflate or interchange these forms.[27] Second, the doctrine has developed haphazardly.[28] To untangle the doctrine, this Comment delineates the various forms of immunity and outlines the development of the doctrine.

40, 115 N.W.2d 618 (1962) ("If the legislature deems it better public policy, it is, of course, free to reinstate immunity . . . .").

26. Justices on the Wisconsin Supreme Court have been remarkably candid in acknowledging the confusion surrounding Wisconsin's governmental immunity doctrine. *See Legue v. City of Racine*, 2014 WI 92, ¶ 57, 849 N.W.2d 837 (recognizing the "criticisms of and inconsistencies in" Wisconsin's governmental immunity doctrine); *Bostco*, 2013 WI 78, ¶ 104 (Gableman, J., concurring) (discussing "our current governmental immunity quagmire"); *Id.* ¶ 135 (Abrahamson, C.J., dissenting) ("Governmental immunity is a complicated area of jurisprudence with 50 years of Wisconsin case law precedent that is not always easy to explain or justify."); *Willow Creek Ranch*, 2000 WI 56, ¶ 59 (Prosser, J., dissenting) ("Wisconsin law has become unintelligible in explaining what rights and remedies are available to persons who have been injured by state or local government.").

27. *See Bostco*, 2013 WI 78, ¶ 49 n.26 ("[T]he phrase 'governmental immunity' has been used interchangeably to apply to state officers, non-state governmental entities, and officers or employees of those entities."); *Hoskins v. Dodge Cnty.*, 2002 WI App 40, ¶ 13, 251 Wis. 2d 276, 642 N.W.2d 276 ("The immunity in question is sometimes referred to as 'municipal' or 'governmental' immunity, 'public officer' immunity, or even 'discretionary act' immunity.").

28. *See generally infra* Part II.

A. Sovereign Immunity Versus Governmental Immunity Versus Public Officer Immunity

Under Wisconsin law, there is a distinction between sovereign immunity and governmental immunity.[29] Sovereign immunity derives from Article IV, section 27 of the Wisconsin Constitution, which provides: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."[30] The court has interpreted this provision to mean that the state cannot be sued without giving its consent.[31] Sovereign immunity is thus procedural in nature; if properly raised as a defense, sovereign immunity deprives a court of personal jurisdiction over the state.[32] As its name suggests, sovereign immunity pertains only to the state and does not extend to municipalities.[33]

In contrast to sovereign immunity, Wisconsin's governmental immunity doctrine has its roots in common law[34] and is now partially codified in statute.[35] Broadly speaking, governmental immunity provides public entities—state and municipal—a defense of nonliaiblity for torts.[36]

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29. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 41, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring); *Fiala v. Voight*, 93 Wis. 2d 337, 341 n.3, 286 N.W.2d 824 (1980); *Apfelbacher v. State*, 160 Wis. 565, 573–75, 152 N.W. 144 (1915). This critical distinction is often overlooked. *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 89, 596 N.W.2d 417 (1999). As a result, many commentators say "sovereign immunity" when they really mean "governmental immunity." *See, e.g.*, Riley, *supra* note 10, at 10. This mixing of terms has magnified the confusion surrounding governmental immunity. *See supra* note 27.

30. WIS. CONST. art. IV, § 27; *see also Lister v. Bd. of Regents*, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976). Notably, the language in Article IV, section 27 of the Wisconsin Constitution differs significantly from the language in the Eleventh Amendment to the United States Constitution: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

31. *Lister*, 72 Wis. 2d at 291.

32. *Id.*

33. "[S]trictly speaking[,] municipalities, unlike states, are not sovereigns." MCQUILLIN, *supra* note 16, § 53:5; *see also Umansky*, 2009 WI 82, ¶ 18. For further discussion on why sovereign immunity has not traditionally extended to municipalities, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition against Jurisdiction*, 35 STAN. L. REV. 1033, 1099–1108 (1983).

34. *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 22, 253 Wis. 2d 323, 646 N.W.2d 314.

35. *See* WIS. STAT. § 893.80 (2011–12). Note that governmental immunity is sometimes referred to as municipal immunity, public officer immunity, or discretionary immunity. *See Hoskins v. Dodge Cnty.*, 2002 WI App 40, ¶ 13, 251 Wis. 2d 276, 642 N.W.2d 276.

36. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40–41, 115 N.W.2d 618 (1962).

Governmental immunity is thus substantive in nature; it provides a limitation on liability.[37] Governmental immunity was originally premised on the archaic notion that the "king can do no wrong."[38] More recently, however, governmental immunity has been justified through public policy considerations, for example, protecting the public purse.[39]

There are two forms of governmental immunity: state immunity and municipal immunity.[40] State immunity covers the state, its arms, and its agencies.[41] Municipal immunity covers a range of municipal-like entities.[42] It is important to view the two forms of governmental immunity separately because of how immunity functions in practice. When the state is not protected by governmental immunity, it is often still procedurally immune under sovereign immunity.[43] In contrast, when a municipality is not protected by governmental immunity, it has no protection under sovereign immunity.[44] For that reason, the bulk of the

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37. *Lister*, 72 Wis. 2d at 299.

38. *Britten v. City of Eau Claire*, 260 Wis. 382, 386, 51 N.W. 30 (1952). The maxim "the King can do no wrong" was first discussed in *Russel v. The Men of Devon*, (1788) 100 Eng. Rep. 359 (K.B.). There, Justice Ashhurst famously opined that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." *Id.* at 362. Strangely, this medieval concept that "the King can do no wrong" crossed the Atlantic and made it to the shores of the United States. *See Mower v. Leicester*, 9 Mass. 247, 250 (1812). Wisconsin joined its sister states and adopted the principle in *Hayes v. City of Oshkosh*, 33 Wis. 314 (1873). *See also Holytz*, 17 Wis. 2d at 30–31 ("It would seem somewhat anomalous that American courts should have adopted the sovereign immunity theory in the first place since it was based upon the divine right of kings."). Interestingly, some argue that "the maxim, the King can do no wrong" originally meant "the King was not privileged to do wrong." *Owen v. City of Independence*, 445 U.S. 622, 645 n.28 (1980).

39. *Lister*, 72 Wis. 2d at 299.

40. *See Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶¶ 22–24, 253 Wis. 2d 323, 646 N.W.2d 314.

41. *City of Kenosha v. State*, 35 Wis. 2d 317, 323–24, 151 N.W.2d 36 (1967). What qualifies as an "arm" or "agency" of the state has been a frequent target of litigation. *See, e.g.*, *Majerus v. Milwaukee Cnty.*, 39 Wis. 2d 311, 314, 159 N.W.2d 86 (1968). This Comment, however, does not examine this question.

42. *See* WIS. STAT. § 893.80(4) (2011–12) (extending municipal governmental immunity to "any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof"). For an in-depth discussion on municipal governmental immunity, see Andrea Dudding, Comment, *Reining in Municipalities: How to Tame the Municipal Monster in Wisconsin*, 2004 WIS. L. REV. 1741, 1744–54.

43. *See Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 49 n.27, 350 Wis. 2d 554, 835 N.W.2d 160; *Forseth v. Sweet*, 38 Wis. 2d 676, 684, 158 N.W.2d 370 (1968).

44. *See Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 18, 319 Wis. 2d 622, 769 N.W.2d 1.

governmental immunity doctrine has developed around municipal immunity,[45] where the stakes are much higher.

Public officer immunity is, to some extent, distinct from governmental immunity.[46] While governmental immunity shields public *entities*, public officer immunity shields public *officers*, *agents*, and *employees* from personal liability incurred in the scope of their official duties.[47] However, that conceptual distinction is somewhat artificial for two related reasons. First, public entities necessarily act through agents.[48] Second, public entities are generally liable for the actions of their officials via the doctrine of *respondeat superior*.[49] Consequently, when public officer immunity shields a public employee from personal liability, it also shields the public entity from liability. Thus, governmental immunity and public officer immunity are inescapably intertwined.

B. Abrogating Governmental Immunity: Holytz v. City of Milwaukee

In the landmark case of *Holytz v. City of Milwaukee*, a unanimous Wisconsin Supreme Court abrogated the doctrine of governmental immunity.[50] It is difficult to overstate the fervor with which the court disparaged the doctrine. To begin, the court noted that "few tenets of American jurisprudence . . . have been so unanimously berated" as governmental immunity.[51] The court then added its voice to the chorus. Quoting a litany of judicial and legal writers, the court derided governmental immunity as "ancient and fallacious," "mistaken and

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45. *See Bostco*, 2013 WI 78, ¶ 49 n.27; s*ee also* WIS. LEGIS. COUNCIL, REPORT OF THE JUDICIARY COMM. AND ITS ADVISORY COMM. ON THE CHILDREN'S CODE 27 (1967).

46. *Umansky*, 2009 WI 82, ¶ 60 (Prosser, J., concurring).

47. *Id.* ¶ 10.

48. *See SJL of Mont. Assocs. v. City of Billings*, 867 P.2d 1084, 1088 (Mont. 1993) (Trieweiler, J., dissenting) ("Local governments can only act through their employees."); *Lutheran Day Care v. Snohomish Cnty.*, 829 P.2d 746, 763 (Wash. 1992) ("A government entity cannot take independent action, but must necessarily act through its agents.").

49. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962); s*ee also* MCQUILLIN, *supra* note 16, § 53:77.3.

50. *Holytz*, 17 Wis. 2d at 37. Prior to *Holytz*, governmental immunity turned on "highly artificial judicial distinctions." *Id.* at 32. For example, a governmental entity was generally immune while performing "governmental" acts but could incur liability if it was engaged in a "proprietary" function. *Id.* Even more ambiguous, governmental entities enjoyed immunity when the relationship between the entity and the claimant was that of "governor to governed." *Id.* (internal quotation marks omitted); *see also Young v. Juneau Cnty.*, 192 Wis. 646, 651, 212 N.W. 295 (1927). The *Holytz* court aimed to sweep away these artificial distinctions. *Holytz*, 17 Wis. 2d at 37–39. For further discussion on the governmental/proprietary distinction see MCQUILLIN, *supra* note 16, § 53.70.

51. *Holytz*, 17 Wis. 2d at 33.

unjust," "inequitable and patently unfair," and an "absurdity."[52] The court agreed that governmental immunity "has been shot to death on so many different battlefields that it would seem utter folly now to resurrect it."[53] After this barrage, the court concluded that the time had come to disavow its past decisions and abolish governmental immunity.[54]

In an effort to dispel future confusion, the *Holytz* court carefully charted the scope of abrogation.[55] First, the court articulated the goal of abrogation: "[H]enceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity."[56] Second, the court clarified that the abrogation applied to all torts, whether by commission or omission.[57] Third, the court emphasized that the abrogation encompassed "all public bodies within the state," including the state itself.[58] Finally, the court noted that the doctrine of *respondeat superior* applied to public bodies.[59] Accordingly, each public body in the state would be liable for the tortious conduct of its "officers, agents and employees occurring in the course of the business of such public body."[60] In sum, the *Holytz* decision was thorough and clear.

The *Holytz* court stopped just shy of stripping public bodies of all governmental immunity. The court allowed one exception to the general rule of liability: governmental bodies would retain immunity over the "exercise of [their] legislative or judicial or quasi-legislative or quasi-judicial functions."[61] In what would prove to be a fateful decision,

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52. *Id.* at 33–35. In all, the court quoted over a dozen cases and commentaries that condemned governmental immunity. *Id.*

53. *Id.* at 33–34 (quoting *Fowler v. City of Cleveland*, 126 N.E. 72, 77 (Ohio 1919) (Wanamaker, J., concurring)). In an ironic twist, the Wisconsin Supreme Court proceeded to "resurrect" governmental immunity in the 50 years following *Holytz*. *See infra* Part II.

54. *Holytz*, 17 Wis. 2d at 37. The tragic facts of *Holytz* might have contributed to the court's decision to abrogate governmental immunity. In *Holytz*, the City of Milwaukee negligently allowed a steel trap door to remain ajar in a playground. *Id.* at 29. That fifty-pound door then fell on a three-year-old child, seriously injuring her. *Id.* at 28–29. In the resulting suit, the City of Milwaukee raised governmental immunity as a defense. *Id.* at 29.

55. The *Holytz* court even included a section in its opinion titled "Scope of Abrogation." *Id.* at 39.

56. *Id.*

57. *Id.*

58. *Id.* at 40.

59. *Id.*

60. *Id.*

61. *Id.* The *Holytz* court borrowed that language from a 1957 Florida Supreme Court decision, *Hargrove v. Town of Cocoa Beach*. *Id.* (citing *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133 (Fla. 1957)). In *Hargrove*, the Florida Supreme Court became the first state court to abolish the doctrine of governmental immunity. MCQUILLIN, *supra* note 16, § 53:6.

the court chose not to define or explain the terms "legislative, judicial, quasi-legislative, and quasi-judicial functions."[62] That determination was left to future courts. However, the court recognized that the legislature should have the final word and invited the legislature to reinstate governmental immunity if it deemed it "better public policy."[63]

C. The Legislative Response to Holytz

The Wisconsin Legislature did not deem it better public policy to reinstate governmental immunity.[64] A year after *Holytz*, the legislature enacted Wisconsin statute section 331.43,[65] which later became section 895.43[66] and is now section 893.80.[67] The pertinent language of the statute has remained unchanged throughout this renumbering.[68] The statute provides:

> No suit shall be brought against any political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor shall any suit be brought against such fire company, corporation, subdivision or agency or against its officers, officials, agents or employees for *acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions*.[69]

This statute is generally referred to as Wisconsin's "governmental immunity statute."[70] It is helpful to analyze the immunity statute in terms

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62. *See Holytz*, 17 Wis. 2d at 40.

63. *Id.* The court also noted that the legislature might impose ceilings on the amount of damages recoverable against governmental entities. *See id.*

64. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 45, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring) ("The Wisconsin Legislature did not deem it better public policy to go back to nineteenth century theories of immunity."). Chief Justice Abrahamson might disagree. The Chief Justice contends that "the legislature rendered government entities immune for broadly enumerated acts." *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 276, 350 Wis. 2d 554, 835 N.W.2d 160 (Abrahamson, C.J., dissenting).

65. WIS. STAT. § 331.43 (1963). The original statute was entitled "Tort actions against political corporations, governmental subdivisions or agencies and officers, agents or employes [sic]; notice of claim; limitation of damages and suits." *Id.*

66. WIS. STAT. § 895.43 (1975).

67. WIS. STAT. § 893.80 (2011–12).

68. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 53 n.13, Wis. 2d 635, 691 N.W.2d 658.

69. WIS. STAT. § 331.43 (1963) (emphasis added).

70. *See, e.g.*, *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 1, 262 Wis. 2d 127, 663 N.W.2d 715. The Wisconsin Legislature also took the *Holytz* court's

of its effect on four groups: the state, state employees, municipal entities, and municipal employees.

To begin, the immunity statute does not apply to the state and its agencies.[71] The statute expressly targets municipal entities but omits from its scope the state and its agencies.[72] Yet, *Holytz* abrogated governmental immunity for *all* public entities, including the state.[73] The Wisconsin Legislature was clearly aware of the scope of *Holytz*'s holding; it copied language from *Holytz* into the immunity statute.[74] As such, the legislature's election to remain silent on the issue of the state's governmental immunity constituted acceptance of *Holytz*'s decision that "[h]enceforward there will be substantive liability for the state . . . ."[75]

Similarly, the immunity statute does not apply to state officials and employees.[76] The statute encompasses municipal "officers, officials, agents or employees," not state officials.[77] Shortly after *Holytz*, the Wisconsin Supreme Court concluded that a state employee was liable for negligence incurred in the course of his employment.[78] The court stated: "[T]here is substantive liability imposed upon the state when its agents, in the course of their employment, commit a tort."[79] The court even marveled at the extent of liability imposed on the state and its employees,

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suggestion and capped municipal immunity at $25,000. *See* § 331.43(2); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962). That limit survived an equal protection challenge. *Stanhope v. Brown Cnty.*, 90 Wis. 2d 823, 836–44, 280 N.W.2d 711 (1979). For a critique of Wisconsin's caps on municipal liability, see Laurence M. Ulrich, *Wisconsin Recovery Limit for Victims of Municipal Torts: A Conflict of Public Interests*, 1986 WIS. L. REV. 155, 155.

71. *Townsend v. Wis. Desert Horse Ass'n*, 42 Wis. 2d 414, 423, 167 N.W.2d 425 (1969) (concluding that the immunity statute "does not apply to the state or its agencies"); s*ee also Lifer v. Raymond*, 80 Wis. 2d 503, 511, 259 N.W.2d 537 (1977).

72. *See* § 331.43. When the statute was renumbered, the legislature stated that the statute pertains to "claims brought against *local governments*." Assemb. B. 375, Gen. Assemb., Reg. Sess. (Wis. 1977) (emphasis added). Indeed, it was municipal governments that requested the bill that created the immunity statute. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 46, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring).

73. *Holytz*, 17 Wis. 2d at 40.

74. *Compare* § 331.43(3) ("legislative, quasi-legislative, judicial, or quasi-judicial functions"), *with Holytz*, 17 Wis. 2d at 40 ("legislative or judicial or quasi-legislative or quasi-judicial functions").

75. *Holytz*, 17 Wis. 2d at 41; *see also Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 52, 281 Wis. 2d 300, 697 N.W.2d 417 ("[G]enerally legislative silence with regard to new court-made decisions indicates legislative acquiescence in those decisions.") (internal quotation marks and citation omitted); *State v. Olson*, 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993).

76. *See* WIS. STAT. § 893.80(4) (2011–12).

77. *Id.*

78. *Forseth v. Sweet*, 38 Wis. 2d 676, 679–84, 158 N.W.2d 370 (1968).

79. *Id.* at 679 (emphasis omitted).

noting that "possibly there was a failure to appreciate the potential exposure that was to flow from . . . tortiously culpable employees."[80]

The immunity statute *does* define the immunity of two groups: municipal entities[81] and municipal employees. On its face, the immunity granted is limited.[82] First, the statute bars suit against municipal entities "for the intentional torts of [their] officers, agents, and employees."[83] Second, the statute bars suit against municipal entities and municipal employees "for acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions."[84] The latter circumstance mirrors *Holytz*'s narrow exception to liability.[85]

It is crucial to recognize that the Wisconsin Legislature enacted the immunity statute in the wake of *Holytz*, which jettisoned municipal immunity.[86] In the immediate aftermath of *Holytz* and with full knowledge of the decision, the legislature bestowed immunity on municipal entities and employees in just two narrow circumstances. By so doing, the legislature manifested its intent that municipal actors be liable in all other circumstances.[87] Put simply, the immunity statute states exceptions to a general rule of liability for municipal entities and employees, codifying *Holytz*'s general sentiment: the rule is liability—the exception is immunity.[88]

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80. *Id.* at 681. That is a somewhat ironic remark, considering that it was the Wisconsin Supreme Court that placed the state in that predicament. *Holytz*, 17 Wis. 2d at 40.

81. Specifically, the statute applies to "any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof." § 893.80(4).

82. *See Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F. Supp. 2d 800, 809 (W.D. Wis. 2007) ("On its face the immunity granted under this section appears limited."); *Hoskins v. Dodge Cnty.*, 2002 WI App 40, ¶ 14, 642 Wis. 2d 276, 642 N.W.2d 213 (noting that the immunity statute "might appear to encompass a relatively narrow range of official actions and decision making").

83. § 893.80(4).

84. *Id.*

85. *Compare* WIS. STAT. § 331.43(3) (1963) ("legislative, quasi-legislative, judicial, or quasi-judicial functions"), *with Holytz*, 17 Wis. 2d at 40 ("legislative or judicial or quasi-legislative or quasi-judicial functions").

86. *Willow Creek Ranch, L.L.C., v. Town of Shelby*, 2000 WI 56, ¶¶ 59–171, 235 Wis. 2d 409, 611 N.W.2d 693 (Prosser, J., dissenting) ("The legislation passed in 1963 was a direct response to the *Holytz* decision.").

87. In 1987, the Wisconsin Attorney General characterized these exceptions as "liability limitations," implicitly acknowledging that the statute announced a general rule of governmental immunity. 76 Op. Att'y Gen. 1, 2 (1987).

88. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39, 115 N.W.2d 618 (1962). *See* Annoye, *supra* note 10, at 987 ("Soon after the *Holytz* decision, the Wisconsin legislature adopted *Holytz*'s version of immunity."). Yet, at least two justices on the Wisconsin Supreme Court do not acknowledge that the legislature codified a general rule of liability. *See Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 276, 350

Read together, the immunity statute and *Holytz* established a general rule of liability for governmental entities and their employees, subject to narrowly drawn exceptions. The immunity statute shielded municipal entities and employees only for negligent acts done in the exercise of legislative, quasi-legislative, judicial, and quasi-judicial functions.[89] *Holytz* provided the state and its agents with immunity only for acts done in the exercise of legislative, quasi-legislative, judicial, and quasi-judicial functions.[90] Outside of these narrow exceptions, governmental entities and employees were liable for their tortious conduct. The spirit of *Holytz* was alive and well.

II. THE SLIDE BACK TO BROAD GOVERNMENTAL IMMUNITY

In the 50 years following *Holytz*, the Wisconsin Supreme Court reinstated governmental immunity.[91] The court undercut *Holytz* and the immunity statute in three steps. First, the court reintroduced concepts that predated *Holytz* in order to expand the immunity of state employees.[92] Second, the court stretched this newly-minted state employee immunity over municipal employees.[93] As a result of these two steps, the court had effectively replaced governmental immunity with "extremely broad public employee immunity."[94] The court did not stop there. In the third step, the court also blanketed municipal entities with immunity.[95] Throughout this process, the court paid lip service to the immunity statute and all but ignored *Holytz*. That strategy has proved quite successful, and, like the phoenix, a second iteration of governmental immunity has arisen from its apparent destruction.[96]

Wis. 2d 554, 835 N.W.2d 160 (Abrahamson, C.J., dissenting) (joined by Bradley, J.) ("The legislature never codified the mantra that 'the rule is liability.'").

89. § 331.43(3).

90. *Holytz*, 17 Wis. 2d at 40.

91. *See Bostco*, 2013 WI 78, ¶ 105 (Gableman, J., concurring) ("But while the legislature codified *Holytz*'s abrogation of governmental immunity, for the past five decades the court has been chipping away at *Holytz* and the immunity statute."); *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 80, 262 Wis. 2d 127, 663 N.W.2d 715 (Prosser, J., dissenting) (observing that the "court is responsible for several decades of backsliding"); Annoye, *supra* note 10, at 988.

92. *See infra* Part II.A.

93. *See infra* Part II.B.

94. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 59, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring).

95. *See infra* Part II.C.

96. In Greek mythology, the phoenix is a bird that obtains new life by arising from the ashes of its predecessor. R. VAN DEN BROEK, THE MYTH OF THE PHOENIX, ACCORDING TO CLASSICAL AND EARLY CHRISTIAN TRADITIONS 9 (E.J. Brill ed., I. Seeger trans., 1972).

A. The First Step: Expanding the Immunity of State Employees

In *Cords v. Ehly*,[97] the Wisconsin Supreme Court took its first step toward reinstating broad governmental immunity.[98] *Cords* involved a negligence suit against state employees.[99] In deciding the case, the *Cords* court revived a pre-*Holytz* distinction between "ministerial duties" and "discretionary" acts.[100] Prior to *Holytz*, governmental officers were immune when exercising discretion but were liable for the negligent performance of a ministerial duty.[101] Given that nearly any act involves "discretion," the ministerial/discretionary distinction was effectively a rule of immunity for governmental officers.[102]

The *Cords* court borrowed the ministerial/discretionary distinction from *Meyer v. Carman*,[103] a case decided in 1955.[104] The problem with relying on the *Meyer* distinction was that *Meyer* was decided seven years *before* the court abrogated governmental immunity in *Holytz* and eight years *before* the legislature affirmed that decision. Thus, it made little sense for the *Cords* court to revive a distinction "to a concept that had already been retired both judicially and legislatively."[105] Strangely, the *Cords* court reintroduced this rule of immunity for government officers without acknowledging *Holytz* or the immunity statute.[106]

Next, the Wisconsin Supreme Court built upon *Cords*' faulty foundation in *Lister v. Board of Regents*,[107] another case involving the immunity of state employees.[108] First, the court perpetuated the

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97. 62 Wis. 2d 31, 214 N.W.2d 432 (1974).

98. *Id.*

99. *Id.* at 35.

100. *Id.* at 40–41. The ministerial/discretionary distinction first appeared in Wisconsin in 1867. *See Druecker v. Salomon*, 21 Wis. 628, 630 (1867). The court immediately recognized the haziness inherent in the distinction: "It is sometimes difficult to draw the exact line of distinction between ministerial and discretionary or judicial authority. The same officer may act sometimes in one capacity, and sometimes in the other." *Id.*

101. *See Meyer v. Carman*, 271 Wis. 329, 331–32, 73 N.W.2d 514 (1955).

102. *See supra* note 16.

103. 271 Wis. 329, 73 N.W.2d 514 (1955).

104. *Id.*

105. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 107, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring). As Justice Prosser explained, "Wisconsin courts have taken the principle of 'ministerial duty' from a context in which it was valuable and necessary and employed it in a context in which it is unfair and absurd." *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 64, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring).

106. *See Cords v. Ehly*, 62 Wis. 2d 31, 39–41, 214 N.W.2d 432 (1974).

107. 72 Wis. 2d 282, 240 N.W.2d 610 (1976).

108. *Id.* at 298–99.

ministerial/discretionary distinction, citing *Cords* with approval.[109] The court then declared: "The general rule is that a public officer is not personally liable to one injured as a result of an act performed within the scope of his official authority and in the line of his official duty."[110] The *Lister* court could not point to a *single* Wisconsin authority to support this bold claim.[111] Rather, the *Lister* court suggested that this general rule of immunity rested on various "considerations of public policy,"[112] which derived from cases the court curiously failed to identify.[113]

Lister's so-called "general rule" of immunity contradicted *Holytz* and the immunity statute, which unequivocally established a general rule of governmental liability for torts.[114] *Lister* reached back in time, past *Holytz*, and pulled forward a superseded "general rule" of immunity. Astonishingly, the *Lister* court did so without mentioning *Holytz* or the immunity statute.[115] Justice Gableman aptly summarized the impact of

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109. *Id.* at 300–01 & n.18 (citing *Cords*, 62 Wis. 2d 31). The court explained that a ministerial duty is one that "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that *nothing remains for judgment or discretion*." *Id.* at 301 (emphasis added).

110. *Id.* at 300.

111. Instead, the *Lister* court cited to a provision in American Jurisprudence. *Id.* (citing 63 AM. JUR. 2D, PUBLIC OFFICERS AND EMPLOYEES § 295).

112. *Id.* at 299. Specifically, the court offered the following public policy justifications:

> (1) The danger of influencing public officers in the performance of their functions by the threat of lawsuit; (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service; (3) the drain on valuable time caused by such actions; (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates; and (5) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.

Id. For a compelling argument on why *Lister*'s five policy considerations cannot justify Wisconsin's governmental immunity doctrine see Annoye, *supra* note 10, at 989–91; Riley, *supra* note 10, at 14–15.

113. The one Wisconsin case that the court cited, *Bromund v. Holt*, 24 Wis. 2d 336, 129 N.W.2d 149 (1964), involved the immunity for prosecutors and court officials from malicious prosecution suits—not general tort immunity. *See Lister*, 72 Wis. 2d at 299 n.13. Notably, the *Bromund* case did not mention the specific public policy justifications that the *Lister* court manufactured. *Compare Bromund*, 24 Wis. 2d at 340–46, *with Lister*, 72 Wis. 2d at 299.

114. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 108, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring). Notably, "[n]one of the *Lister* justices had participated in the *Holytz* decision." *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 75, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring).

115. *See Lister*, 72 Wis. 2d 282.

Lister: "With sleight-of-hand, *Lister* cut the guts out of *Holytz* and essentially restored governmental immunity."[116]

In *Kimps v. Hill*,[117] the Wisconsin Supreme Court then expanded *Lister*'s rule of immunity to cover all state officers and employees.[118] The court stated: "Under the general rule as applied in Wisconsin, state officers *and employees* are immune from personal liability for injuries resulting from acts performed within the scope of their official duties."[119] By inserting "employees" into the rule, the *Kimps* court blanketed *all* state employees with broad immunity.[120] However, the *Kimps* court attempted to narrow the "general rule" with respect to municipalities, stating, "[t]he general rule of immunity for state public officers stands in contrast to that for municipalities, where 'the rule is liability—the exception is immunity.'"[121] That limitation proved fleeting.[122]

B. The Second Step: Conflating State Employee Immunity and Municipal Employee Immunity

The Wisconsin Supreme Court unveiled its next move in *Lifer v. Raymond*,[123] where "it firmed up the effective restoration of governmental immunity."[124] Though *Lifer* involved the immunity of state employees, the court, in dicta, compared the immunity of state officers and municipal officers. The court claimed the two were identical.[125] In making this comparison, the court equated the ministerial/discretionary distinction with the immunity statute's exception for quasi-legislative and quasi-judicial functions.[126] Suddenly, "quasi-legislative" and

116. *Bostco*, 2013 WI 78, ¶ 108 (Gableman, J., concurring).

117. 200 Wis. 2d 1, 546 N.W.2d 151 (1996).

118. *Id.* at 10 (citing *Lister*, 72 Wis. 2d at 300).

119. *Id.* (emphasis added).

120. *Umansky*, 2009 WI 82, ¶ 56 (Prosser, J., concurring) ("This sweeping statement was and is broad enough to cover *all* state employees.").

121. *Kimps*, 200 Wis. 2d at 10 n.6 (quoting *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39, 115 N.W.2d 618 (1962)). The *Holytz* court's general rule of liability, in fact, swept much more broadly: "[H]enceforward, so far as *governmental responsibility* for torts is concerned, the rule is liability—the exception is immunity." *Holytz*, 17 Wis. 2d at 39 (emphasis added).

122. *See infra* Parts II.B–C.

123. 80 Wis. 2d 503, 259 N.W.2d 537 (1977).

124. *Umansky*, 2009 WI 82, ¶ 76 (Prosser, J., concurring).

125. *Lifer*, 80 Wis. 2d at 511. ("To so hold is not to imply that the test for the immunity of a state officer set out in *Lister* is different from the test for the immunity of a municipal officer under [the immunity statute].").

126. *Id.* at 512.

"quasi-judicial" were deemed synonymous with "discretionary" acts.[127] Specifically, the court declared that "quasi-legislative" means "exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed" and that "quasi-judicial" means "exercise of discretion and judgment in the application of a rule to specific facts."[128] The court did not cite a single authority to support those twin definitions.

In subsequent cases, the Wisconsin Supreme Court formally adopted *Lifer*'s interpretation.[129] Since *Lifer*, the court has mechanically repeated that "quasi-legislative" and "quasi-judicial" are synonymous with "discretionary."[130] Yet, the court has never explained why these terms should be treated as synonymous. But, because the court considers them to be equivalent, the analysis in cases regarding state employees "applies with equal force" to cases regarding municipal employees under the immunity statute.[131] The court has suggested *Lister*'s "general rule" of immunity also applies to municipal employees.[132]

Lifer's interpretation is plainly wrong. For one, the *Holytz* court knew of the ministerial/discretionary distinction, as it pre-dated *Holytz*.[133] Yet, instead of using that distinction, the *Holytz* court employed the words "quasi-legislative" and "quasi-judicial."[134] The Wisconsin

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127. *Id.* Judge Crabb aptly described that interpretation as "a curious and expansive exercise of statutory construction." *Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F. Supp. 2d 800, 809 (W.D. Wis. 2007).

128. *Lifer*, 80 Wis. 2d at 512–13. Interestingly, the *Lifer* court did not adopt the definition of "quasi-judicial" that it had laid out just a year earlier. *See Lifer*, 80 Wis. 2d 1. In *Coffey v. City of Milwaukee*, the court defined "quasi-judicial" this way: "When the procedures involved in a proceeding approach the traditional judicial requirements of notice and hearing, the exercise of discretion, and a decision on the record, then the action can be said to be quasi-judicial." *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 534, 247 N.W.2d 132 (1976). The *Coffey* interpretation was, in fact, far more accurate. *See infra* Part III.

129. *See, e.g.*, *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 90, 596 N.W.2d 417 (1999).

130. *See, e.g.*, *Legue v. City of Racine*, 2014 WI 92, ¶ 63, 849 N.W.2d 837; *Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, ¶ 26, 350 Wis. 2d 509, 835 N.W.2d 226; *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 21, 253 Wis. 2d 323, 646 N.W.2d 314; *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶ 25, 235 Wis. 2d 409, 611 N.W.2d 693; *Kierstyn*, 228 Wis. 2d at 90; *Lifer*, 80 Wis. 2d at 511–12.

131. *See C.L. v. Olson*, 143 Wis. 2d 701, 716 n.9, 422 N.W.2d 614 (1988).

132. *Kimps v. Hill*, 200 Wis. 2d 1, 10 n.6, 546 N.W.2d 151 (1996) ("The concepts and theories articulated in *Lister* are generally applicable to both state and municipal officers and the tests for immunity are similar.").

133. *See Meyer v. Carman*, 271 Wis. 329, 331–32, 73 N.W.2d 514 (1955) (discussing the ministerial/discretionary distinction).

134. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962) ("This decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions.").

Legislature then copied that language into the immunity statute.[135] Notably, the word "discretion" does not appear once in *Holytz* or the immunity statute.[136] It makes little sense to interpret both the *Holytz* court and the legislature as saying something they knew how to say and consciously chose not to say.

Yet, there is a more glaring problem with *Lifer*'s interpretation: virtually any action requires some degree of discretion.[137] By equating "quasi-legislative" and "quasi-judicial" with "discretionary," *Lifer* exploded what was intended to be a narrow exception to immunity[138] into a gaping hole through which nearly any tortious act could march.[139] In enacting the immunity statute, the Wisconsin Legislature codified a *limited* form of immunity for municipal employees.[140] The Wisconsin Supreme Court, in post-*Holytz* decisions, effectively rewrote the immunity statute.[141]

In doing so, the Wisconsin Supreme Court has stubbornly insisted that *Holytz* and the immunity statute can be reconciled with expansive public employee immunity. Responding to a plaintiff's argument that under *Holytz* state employees should have the same liability as private citizens, the *Lifer* court curtly retorted: "That is not what *Holytz* says or means."[142] According to the *Lifer* court, *Holytz* only dealt with governmental entities and did not affect the immunity of public

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135. *Compare* WIS. STAT. § 331.43(3) (1963) ("legislative, quasi-legislative, judicial, or quasi-judicial functions"), *with Holytz*, 17 Wis. 2d at 40 ("legislative or judicial or quasi-legislative or quasi-judicial functions").

136. *See* WIS. STAT. § 893.80 (2011–12); *Holytz*, 17 Wis. 2d 26.

137. *See supra* note 16. Oddly, *Lifer* did not apply the cannons of statutory interpretation. *Lifer v. Raymond*, 80 Wis. 2d 503, 511–12, 259 N.W.2d 537 (1977). Most notably, the *Lifer* court never examined the plain meaning of the statutory terms. *Id. But see State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is given its common, ordinary, and accepted meaning.").

138. *See Holytz*, 17 Wis. 2d at 39 ("[H]enceforward, so far as governmental responsibility for torts is concerned, *the rule is liability—the exception is immunity*." (emphasis added)).

139. As Justice Crooks noted, "[o]ur ministerial duty analysis at times turns into a search to find any discretion that could have been exercised, and then declaring immunity is required." *Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, ¶ 68, 350 Wis. 2d 509, 835 N.W.2d 226 (Crooks, J., concurring); s*ee also Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 110, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring).

140. *See supra* Part I.C. *But see Bostco*, 2013 WI 78, ¶ 276 (Abrahamson, C.J., dissenting) ("The legislature never codified the mantra that 'the rule is liability.'").

141. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 77, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring) ("[I]n *Lifer v. Raymond*, . . . the supreme court rewrote history as it firmed up the effective restoration of governmental immunity.").

142. *Lifer*, 80 Wis. 2d at 510.

employees.[143] The court further elaborated: "[T]he *Holytz* case, although stating a new rule of law in respect to governmental immunity, did not restate or attempt to supersede the existing common law in respect to the individual liability of public employees."[144] Thus, according to the court, the distinction between public entities and public employees justified judicially crafting expansive public employee immunity.

This distinction is flawed for multiple reasons. First, because governmental entities necessarily act through employees, the immunity of entities and the immunity of their employees are inextricably intertwined.[145] Most notably, if negligent public employees enjoy broad immunity, governmental entities are absolved from paying the judgments for which they would otherwise be liable.[146] Second, the *Holytz* court explicitly noted that its abrogation of governmental immunity should expose entities to liability from their tortious employees: "By reason of the rule of *respondeat superior* a public body shall be liable for damages for the torts of its officers, agents and employees occurring in the course of the business of such public body."[147] Finally, the Wisconsin Legislature conferred the *same* limited immunity on municipal entities and their employees.[148] In sum, expansive public officer immunity cannot be justified by some hazy distinction between the immunity of public entities and their officers.[149]

C. The Third Step: Extending Broad Immunity to Municipal Entities

In *Willow Creek Ranch, LLC v. Town of Shelby*,[150] the Wisconsin Supreme Court wrestled with the question of municipal entity immunity.[151] The court began by faithfully invoking the words of the

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143. *Id.* at 510–11.

144. *Pavlik v. Kinsey*, 81 Wis. 2d 42, 49, 259 N.W.2d 709 (1977).

145. *See supra* Part I.A.

146. *See* WIS. STAT. § 895.46 (2011–12) (directing governmental entities to pay judgments against their employees in nearly all situations).

147. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962).

148. *See* WIS. STAT. § 893.80(4) (2011–12).

149. Justice Prosser's summary of this point is worth repeating in its entirety:

> Public employee immunity does not make good sense under the following circumstances: (1) substantive governmental immunity has been abrogated; (2) governments have accepted a respondeat superior relationship with their employees; and (3) public employee immunity is being used to evade liability for a public employee's obvious breach of a known standard of care.

Umansky v. ABC Inc. Co., 2009 WI 82, ¶ 63, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring).

150. 2000 WI 56, 235 Wis. 2d 409, 611 N.W.2d 693.

151. *Id.* ¶ 2.

immunity statute: municipalities are immune for "acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions."[152] However, the court then extrapolated *Lifer*'s erroneous interpretation—that those functions are "synonymous" with discretionary acts—to municipal entities.[153] By so doing, the court granted municipal entities the same broad immunity as municipal officers and employees.[154]

The Wisconsin Supreme Court has struggled to reconcile the plain words of the immunity statute with the broad immunity it has judicially created. That struggle was on display in *Lodl v. Progressive North Insurance Co.*[155] On one hand, the court stated, "[t]he governmental immunity statute . . . *confers broad immunity* from suit on municipalities and their officers and employees."[156] On the other hand, the court claimed, "[m]unicipal immunity differs from its state counterpart in that *liability is the rule and immunity is the exception*."[157] Thus, according to the Wisconsin Supreme Court, municipal entities enjoy broad immunity, but immunity is the exception.

Similarly, the court has struggled to reconcile broad governmental immunity with *Holytz*'s dictate that, "[h]enceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity."[158] The court has spun several adaptations of that dictate. Here is one version: "Municipal immunity differs from its state counterpart in that liability is the rule and immunity is the exception."[159] Here is another version: "For public officers, immunity is the rule and liability is the exception, unlike municipalities where liability is the rule and immunity is the exception."[160] Here is yet another: "[U]nlike governmental immunity as applied to state employees where immunity is the rule and liability is the exception, the opposite is true for municipal actors, i.e., liability is the rule and immunity is the

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152. *Id.* ¶ 25.

153. *Id.* (citing *Lifer v. Raymond*, 80 Wis. 2d 503, 511–12, 259 N.W.2d 537 (1977)).

154. *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 20, 253 Wis. 2d 323, 646 N.W.2d 314 ("The governmental immunity statute . . . *confers broad immunity* from suit *on municipalities* and their officers and employees." (emphasis added)). By expanding municipal immunity, the Wisconsin Supreme Court defied the judicial trend: "[T]he trend of judicial decisions has been, and still is, to restrict, rather than to expand, the doctrine of municipal immunity." MCQUILLIN, *supra* note 16, § 53:5.

155. 2002 WI 71, 253 Wis. 2d 323, N.W.2d 314.

156. *Id.* ¶ 20 (emphasis added).

157. *Id.* ¶ 22 (emphasis added).

158. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39, 115 N.W.2d 618 (1962).

159. *Lodl*, 2002 WI 71, ¶ 22.

160. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 84, 319 Wis. 2d 622, 769 N.W.2d 1 (Ziegler, J., dissenting).

exception."[161] Evidently, the court has felt free to restyle *Holytz*'s dictate as needed.

In 2003, the Wisconsin Supreme Court had the opportunity to revisit its expansion of municipal immunity in *Scott v. Savers Property & Casualty Insurance*.[162] In *Scott*, the plaintiffs forcefully argued that (1) the immunity statute conferred "a narrow slice" of immunity on municipalities and (2) the court "mistakenly broadened" municipal immunity.[163] In a telling response, the court stated simply, "we have struggled to define the proper scope of governmental immunity, considering the underlying policy goals."[164] Yet, it was never the role of the Wisconsin Supreme Court to decide the "proper scope" of governmental immunity; the Wisconsin Legislature clearly defined that scope in 1963 when it enacted the immunity statute.[165] By ignoring the strictures of the immunity statute, the court has lost direction. The court's common law tinkering, in disregard of the statute, explains the current state of the doctrine.

D. The Final Result: Wisconsin's Current Governmental Immunity Doctrine

Under today's governmental immunity doctrine, the threshold question is whether a particular act is "discretionary."[166] If so, governmental immunity shields the governmental tortfeasor from any liability stemming from that act.[167] Of course, almost *any* action requires some degree of discretion.[168] As a result, this rule applies to nearly every

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161. *Pries v. McMillon*, 2010 WI 63, ¶ 20 n.11, 326 Wis. 2d 37, 784 N.W.2d 648.

162. 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715.

163. *Id.* ¶ 34.

164. *Id.* ¶ 35.

165. Justice Gableman put it best: "We seem to have dispensed with the notion that the text of the statute should be our guide. Something here is amiss." *Pries*, 2010 WI 63, ¶ 90 (Gableman, J., dissenting); *accord State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110 ("It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature . . . .").

166. *See, e.g.*, *Pries*, 2010 WI 63, ¶¶ 21–22.

167. *Id.*

168. *Swanson v. United States*, 229 F. Supp. 217, 219–20 (N.D. Cal. 1964) ("In a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some discretion."); *Ham v. L.A. Cnty.*, 189 P. 462, 468 (Cal. Ct. App. 1920) ("[I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."); *see also* MCQUILLIN, *supra* note 16, at § 53.13.

action, conferring broad immunity over governmental entities, officials, and employees.[169]

Perhaps in recognition that such sweeping immunity is counter to the immunity statute, the Wisconsin Supreme Court has fashioned four "exceptions" to immunity.[170] Governmental tortfeasors are not shielded by governmental immunity—and are thus liable—where the activities performed are: (1) ministerial duties imposed by law; (2) duties to address a known danger; (3) actions involving professional discretion; or (4) actions that are malicious, willful, and intentional.[171] However, these exceptions are as narrow as the rule of immunity is broad.[172]

The ministerial duty exception bars immunity when a municipal actor negligently performs a "ministerial duty."[173] A duty qualifies as ministerial "only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that *nothing remains for judgment or discretion*."[174] Yet, because nearly every action requires some discretion, this exception rarely applies.[175] As Justice Gableman keenly observed, the ministerial exception is "excruciatingly narrow."[176]

The known danger exception is similarly narrow. It only applies when "there exists a known present danger of such force that the time, mode, and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion."[177] The

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169. *Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, ¶ 68, 350 Wis. 2d 509, 835 N.W.2d 226 (Crooks, J., concurring) ("Our ministerial duty analysis at times turns into a search to find any discretion that could have been exercised, and then declaring immunity is required.").

170. *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 16, 262 Wis. 2d 127, 663 N.W.2d 715. These exceptions are shaped "by a judicial balancing of the need of public officers to perform their functions freely against the right of an aggrieved party to seek redress." *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 300, 240 N.W.2d 610 (1976).

171. *Scott*, 2003 WI 60, ¶ 16.

172. *Id.* ¶ 79 (Prosser, J., dissenting) ("[A]n injured party is forced to try to shoehorn the negligent employee's conduct into one of the four narrow exceptions to governmental immunity, such as "ministerial duty," that have been grafted onto § 893.80(4)."). For further discussion of these exceptions see Dudding, *supra* note 42, at 1751–54.

173. *Lister*, 72 Wis. 2d at 300–01.

174. *Id.* at 301 (emphasis added). The discretionary/ministerial distinction was first articulated in *Meyer v. Carman*, 271 Wis. 329, 332, 73 N.W.2d 514 (1955).

175. *See* MCQUILLIN, *supra* note 16, at § 53.13.

176. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 110, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring).

177. *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 38, 253 Wis. 2d 323, 646 N.W.2d 314 (quoting *C.L. v. Olson*, 143 Wis. 2d 701, 717, 422 N.W.2d 614 (1988)). Justice Gableman colorfully explained, "[t]he ministerial duty exception is . . . the

Wisconsin Supreme Court itself has admitted that the known danger exception is "very limited" and has "rarely been asserted successfully."[178]

While the professional discretion exception has the potential for broad application, Wisconsin courts apply it only in limited circumstances. This exception was first recognized in *Scarpaci v. Milwaukee County*,[179] where the court determined that a county medical examiner was liable for negligently performing an autopsy.[180] The court conceded that the medical examiner's actions were discretionary but insisted that the discretion was "medical, not governmental," and thus not protected by governmental immunity.[181] However, Wisconsin courts have explicitly limited application of the professional discretion exception to the medical field.[182] By so doing, Wisconsin courts have relegated the professional discretion exception to limited application.

The final exception, for malicious, willful, and intentional actions, is restricted to actions that are "intentional acts of a harmful or pernicious character."[183] That is, the exception *does not* cover all intentional conduct of municipal employees.[184] Rather, for the exception to apply, the action must be intentional *and* "ill-intended" *and* committed with "malice."[185] These demanding requirements set a high hurdle for injured plaintiffs to clear; few do.[186]

In sum, governmental immunity today is defined by a broad rule of immunity subject to "excruciatingly narrow" exceptions.[187] This is the

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progenitor responsible for the illegitimate birth of the known danger exception." *Bostco*, 2013 WI 78, ¶ 111 (Gableman, J., concurring).

178. *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 95, 596 N.W.2d 417 (1999). The court has also inconsistently applied the known danger exception. *See Lodl*, 2002 WI 71, ¶¶ 64, 68–69 (Bradley, J., dissenting).

179. 96 Wis. 2d 663, 292 N.W.2d 816 (1980).

180. *Id.* at 688.

181. *Id.* at 686–87.

182. *E.g.*, *Stann v. Waukesha Cnty.*, 161 Wis. 2d 808, 818, 468 N.W.2d 775 (Ct. App. 1991). Wisconsin courts have never applied the professional discretion exception to a non-medial action. *See* Dudding, *supra* note 42, at 1752–53.

183. *See Bicknese v. Sutula*, 2003 WI 31, ¶ 19, 260 Wis. 2d 713, 660 N.W.2d 289.

184. *Id.*

185. *Id.* (quoting *Colon v. City of New Haven*, 758 A.2d 900, 902 (Conn. App. Ct. 2000)).

186. *Id.* ¶¶ 19–20.

187. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 110, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring). Here are a few examples of conduct the Wisconsin Supreme Court has immunized: a road test examiner's decision to issue a license to an applicant who was allegedly too overweight to drive, a university's construction of a volleyball net, and management of an intersection during a rain storm. *Id.* ¶ 109; s*ee also* Riley *supra*, note 10, at 13–14.

exact opposite of the rule established by *Holytz* and the governmental immunity statute. Yet, the Wisconsin Supreme Court has never overruled, modified, or even criticized *Holytz*.[188] Bizarrely, the court frequently cites to *Holytz* favorably.[189] Similarly, the court purports to apply the immunity statute faithfully.[190] In reality, the Wisconsin Supreme Court has consistently disregarded both *Holytz* and the immunity statute.

III. RESETTING WISCONSIN'S GOVERNMENTAL IMMUNITY DOCTRINE

The Wisconsin Supreme Court's resurrection of governmental immunity, though successful, has spawned unfortunate consequences. First, the doctrine is now a "quagmire"[191] and in "jurisprudential chaos."[192] Second, the doctrine is "untethered"[193] from the governmental immunity statute and thus stands "contrary to legislative intent."[194] Third, the doctrine is churning out "unjust"[195] and "harsh"[196] results. To put it mildly, as Chief Justice Abrahamson did, the current doctrine of governmental immunity "is not always easy to explain or justify."[197] At

188. *See* Dudding, *supra* note 42, at 1750 n.61.

189. *See, e.g.*, *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 22, 253 Wis. 2d 323, 646 N.W.2d 314; *Kimps v. Hill*, 200 Wis. 2d 1, 10 n.6, 546 N.W.2d 151 (1996).

190. *See, e.g.*, *Lodl*, 2002 WI 71, ¶ 22; *Kimps*, 200 Wis. 2d at 10 n.6.

191. *Bostco*, 2013 WI 78, ¶ 104 (Gableman, J., concurring).

192. *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 58, 262 Wis. 2d 127, 663 N.W.2d 715 (Abrahamson, C.J., concurring).

193. *Pries v. McMillon*, 2010 WI 63, ¶ 85, 326 Wis. 2d 37, 784 N.W.2d 648 (Gableman, J., dissenting) ("[O]ur case law is, troublingly, untethered from the governing statute . . . ."). Justice Gableman went on to explain: "My concern is rooted in the rule of law. The legislature has chosen to address the issue of governmental immunity directly. When the legislature has spoken, our obligation is to follow its intentions as expressed in the Wisconsin Statutes. Our current case law has strayed from this constitutional duty." *Id.* ¶ 91 (Gableman, J. dissenting).

194. *Scott*, 2003 WI 60, ¶ 82 (Prosser, J., dissenting).

195. *Id.* ¶ 62 (Bablitch, J., concurring). Justice Bablitch powerfully summarized the situation: "A doctrine of governmental immunity that has caused such injustice and inequity, in this case and others, cannot, and I predict, will not, stand much longer." *Id.* (Bablitch, J. concurring).

196. *Id.* ¶ 37 ("The outcome of this case is harsh, and the harshness of our holding is especially palpable because the negligence is so clear. Yet the doctrine of governmental immunity plays a significant role in our legal system.").

197. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 135, 350 Wis. 2d 554, 835 N.W.2d 160 (Abrahamson, C.J., dissenting); s*ee also Legue v. City of Racine*, 2014 WI 92, ¶ 57, 849 N.W.2d 837 ("In the face of the criticisms of and inconsistencies in the law of governmental immunity, our state nevertheless continues to operate under the doctrine of immunity for discretionary acts and liability for ministerial acts.").

its core, these problems all spring from the way governmental immunity was resurrected—by skirting precedent and legislative intent.

To remedy these ills, the court must take two dramatic steps. First, the court must disavow the current doctrine; it is beyond saving.[198] Second, the court must restore the doctrine to conform to the immunity statute and *Holytz*. Only these two steps can restore a sound doctrine.

Put simply, all governmental entities, officials, and employees should enjoy immunity only for "acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions."[199] Notably, the Wisconsin Supreme Court never engaged in statutory interpretation of what those statutory terms mean.[200] Nor has the court ever thoughtfully reflected on what the *Holytz* court meant when it used the same terms. Instead, the court essentially ignored those narrow terms to reintroduce the "discretionary acts" doctrine and reinstate governmental immunity.[201] That questionable approach thus stands at the heart of the problem. What do the terms "legislative, quasi-legislative, judicial, and quasi-judicial functions" actually mean?[202]

Statutory construction begins with the plain language of the statute.[203] The word "legislative" means "having the power to make laws."[204] The word "judicial" means "administering justice."[205] Finally, "quasi" means "having some resemblance usually by possession of certain attributes."[206] Applying those definitions, "quasi-legislative" means resembling the power to make laws; "quasi-judicial" means

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198. Ironically, in 1962, the *Holytz* court observed that governmental immunity "has been shot to death on so many different battlefields that it would seem utter folly now to resurrect it." *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 33–34, 115 N.W.2d 618 (1962) (quoting *Fowler v. City of Cleveland*, 126 N.E. 72, 77 (Ohio 1919) (Wanamaker, J., concurring)). In 2014, the revived doctrine of governmental immunity has once again been shot to death. It is time to let in rest in peace.

199. *See supra* Part I.C. Of course, municipal entities should also enjoy immunity for the intentional torts of their agents. *See* WIS. STAT. § 893.80(4) (2011–12).

200. *See supra* Part II.

201. *See supra* Part II.

202. To be sure, the terms "quasi-judicial" and "quasi-legislative" are difficult to define with precision. GEORGE WHITECROSS PATON, A TEXTBOOK OF JURISPRUDENCE 336 (G.W. Paton & David P. Derham eds., 4th ed. 1972) ("Quasi-judicial is a term that is . . . not easily definable.").

203. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("[W]e have repeatedly held that statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'") (quoting *Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659).

204. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 807 (David B. Guralnik ed., 2d College ed. 1970).

205. *Id.* at 763.

206. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1019 (11th ed. 2003).

resembling the administration of justice.[207] What is immediately apparent is that these terms mean something far different—and narrower—than "discretionary acts."[208] Admittedly, these definitions are not sufficient to answer all questions—namely, what does it mean to *resemble* the power to make laws or administer justice?[209]

Justice Gableman recently shed some light on that question in *Bostco LLC v. Milwaukee Metropolitan Sewerage District*,[210] when he endorsed a new way of interpreting "legislative, quasi-legislative, judicial, [and] quasi-judicial" functions.[211] Specifically, Justice Gableman championed the "planning-operational distinction."[212] Notably, this test has been adopted, in varying forms, by a majority of the states that have rejected governmental immunity.[213]

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207. Black's Law Dictionary supplies similar definitions. "Quasi-judicial" means "[o]f, relating to, or involving an executive or administrative official's adjudicative acts." BLACK'S LAW DICTIONARY 1364 (9th ed. 2009). "Quasi-legislative" means "([o]f an act, function, etc.) not purely legislative in nature." *Id.*

208. "Discretion" may be *part of* what constitutes a quasi-judicial or quasi-legislative function. However, it can hardly be argued that *every* act that involves discretion is quasi-judicial or quasi-legislative. *See* Riley, *supra* note 10, at 15 (comparing this argument "to saying that because all horses are animals with four legs, all animals with four legs are horses").

209. Interestingly, the Wisconsin Supreme Court began to flesh out the meaning of "quasi-judicial" before it turned to the ministerial/discretionary distinction. In *Coffey v. City of Milwaukee*, the court gave this interpretation of quasi-judicial: "When the procedures involved in a proceeding approach the traditional judicial requirements of notice and hearing, the exercise of discretion, and a decision on the record, then the action can be said to be quasi-judicial." 74 Wis. 2d 526, 534, 247 N.W.2d 132 (1976). In *Coffey*'s interpretation, discretion is a *part* of what constitutes "quasi-judicial," but discretion does not *define* "quasi-judicial."

210. 2013 WI 78, 350 Wis. 2d 554, 835 N.W.2d 160.

211. *Id.* ¶ 112 (Gableman, J., concurring).

212. *Id.* (Gableman, J., concurring). *But see Kimps v. Hill*, 200 Wis. 2d 1, 24, 546 N.W.2d 151 (1996) (declining to adopt the planning/operational distinction).

213. *See Indus. Indem. Co. v. State*, 669 P.2d 561, 563 (Alaska 1983); *Doe v. State*, 24 P.3d 1269, 1271 (Ariz. 2001) (en banc); *Steed v. Dep't of Consumer Affairs*, 138 Cal. Rptr. 3d 519, 528 (Cal. Ct. App. 2012); *Cooper v. Hollis*, 600 P.2d 109, 111 (Colo. App. 1979); *Dep't of Transp. v. Neilson*, 419 So. 2d 1071, 1077–78 (Fla. 1982); *Julius Rothschild & Co. v. State*, 655 P.2d 877, 880–81 (Haw. 1982) (per curiam); *Jones v. City of St. Maries*, 727 P.2d 1161, 1163–64 (Idaho 1986); *Peavler v. Bd. of Comm'rs*, 528 N.E.2d 40, 45 (Ind. 1988); *Fowler v. Roberts*, 556 So. 2d 1, 15 (La. 1989); *Jorgensen v. Dep't of Transp.*, 2009 ME 42, ¶¶ 15–16, 969 A.2d 912; *Whitney v. City of Worcester*, 366 N.E.2d 1210, 1216 (Mass. 1977); *Ross v. Consumers Power Co.*, 420 Mich. 567, 363 N.W.2d 641, 667–68 (Mich. 1984) (per curiam); *Conlin v. City of Saint Paul*, 605 N.W.2d 396, 400 (Minn. 2000); *Jasa v. Douglas Cnty.*, 510 N.W.2d 281, 288 (Neb. 1994); *Schoff v. City of Somersworth*, 630 A.2d 783, 787 (N.H. 1993); *Costa v. Josey*, 415 A.2d 337, 341–43 (N.J. 1980); *Enghauser Mfg. Co. v. Eriksson Eng'g Ltd.*, 451 N.E.2d 228, 232 (Ohio 1983), *superseded by statute*, Ohio's Political Subdivision Tort Liability Act, OHIO REV. CODE ANN. §§ 2744.01–10 (West 2013); *Nguyen v. State*, 1990 OK 21, ¶¶ 3–5, 788 P.2d 962; *Costopoulos v. Gibboney*, 579 A.2d 985, 988 (Pa.

The planning-operational distinction has intuitive appeal. Under this test, government entities are immune for "planning level conduct" but are liable for "operational level decisions."[214] Planning level conduct includes "upper-level legislative, judicial, executive and administrative policy and planning decisions."[215] Operational level decisions, by contrast, "concern the day-to-day operation of government."[216] Put simply, the decision to implement or not implement a policy is protected by immunity, but the actual implementation of that policy is subject to a traditional tort standard.[217]

The planning-operational distinction naturally synchronizes with the framework of the immunity statute and *Holytz*. "Legislative, quasi-legislative, judicial, and quasi-judicial functions" correspond to "planning-level conduct." All other actions—i.e., those not falling under the narrow exception—are "operational level decisions."

More importantly, the planning-operational distinction comports with the *purpose* and *intention* of the immunity statute and *Holytz*. First, it safeguards "'the essential acts of governmental decision-making' from 'judicial second-guessing or harassment by the actual or potential threat of litigation.'"[218] For example, budgetary decisions would be immunized, so that a government entity could not be liable for inadequately funding a project.[219] At the same time, the planning-operational distinction ensures that citizens are protected from the negligent acts of government employees "at the operational level, where there is no room for policy judgment."[220] Finally, it returns the burden to the government entity to

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Commw. Ct. 1990); *Bowers v. City of Chattanooga*, 826 S.W.2d 427, 430–31 (Tenn. 1992); *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 657–58 (Tex. 2007); *Johnson v. Utah Dep't of Transp.*, 2006 UT 15, ¶ 31, 133 P.3d 402; *Avellaneda v. Washington*, 273 P.3d 477, 482–83 (Wash. Ct. App. 2012); *Darrar v. Bourke*, 910 P.2d 572, 577 (Wyo. 1996).

214. MCQUILLIN, *supra* note 16, § 53:16.

215. *Id.* This approach closely tracks the plain meaning of "legislative, quasi-legislative, judicial, or quasi-judicial functions." *See supra* notes 204–05 and accompanying text.

216. *Id.* § 53:16 at 242–43. As McQuillin explains: "A decision resulting from a determination based on preexisting laws, regulations, policies, or standards usually indicates that its maker is performing an operational act." *Id.* § 53:16 at 239; *see also Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 504 (Minn. 2006); *Griggers v. Memphis Hous. Auth.*, 363 S.W.3d 500, 507–08 (Tenn. 2012); *Bowers*, 826 S.W.2d at 431.

217. *Bostco LLC v. City of Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 112, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring).

218. *Id.* ¶ 113 (quoting *Enghauser Mfg. Co.*, 451 N.E.2d at 232); *Legue v. City of Racine*, 2014 WI 92, ¶ 40, 849 N.W.2d 837 ("The court has explicated the purpose of the government immunity statute as protecting separation of powers and avoiding judicial intrusion into the policy decisions of the other branches.").

219. *Indus. Indem. Co. v. State*, 669 P.2d 561, 566 (Alaska 1983).

220. *Jasa v. Douglas Cnty.*, 510 N.W.2d 281, 288 (Neb. 1994).

demonstrate it is entitled to immunity, as opposed to the status quo, where the plaintiff must demonstrate that immunity was pierced.[221] In sum, the planning-operational distinction embodies the purpose and spirit of *Holytz* and the immunity statute.

However, in *Bostco*, Chief Justice Abrahamson criticized the planning-operational distinction as not being a "silver bullet."[222] That criticism is revealing. The Wisconsin Supreme Court's role is not to conjure up a "silver bullet" by weighing various policy concerns.[223] The Wisconsin Legislature already completed that task when it enacted the immunity statute. The Wisconsin Supreme Court's role is to interpret the words of the statute accurately and faithfully.[224]

The terms "legislative, quasi-legislative, judicial, and quasi-judicial functions" plainly do not mean "discretionary acts." That faulty interpretation must be discarded. In its place, the Wisconsin Supreme Court should adopt the planning-operational distinction, which closely tracks the meaning, purpose, and intent of the immunity statute. Of course, as the Wisconsin Supreme Court recognized in *Holytz*, the legislature is always free to reinstate a more robust form of governmental immunity.[225] But, until that happens, the Wisconsin Supreme Court must faithfully interpret the immunity statute.

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221. *Bostco*, 2013 WI 78, ¶ 113 (Gableman, J., concurring); MCQUILLIN, *supra* note 16, § 53.16 (Under the planning-operational test, "[t]he governmental entity seeking to establish immunity bears the burden of proving that the challenged act or omission was a policy decision made by consciously balancing risks and benefits."); *see also* Johnson-Karp, *supra* note 10, at 32 ("Thus, under the discretionary-ministerial approach, governmental immunity is effectively presumed, and a party alleging injury must overcome this presumption by showing that the allegedly injurious conduct violated a specifically defined obligation.").

222. *Bostco*, 2013 WI 78, ¶ 134 (Abrahamson, C.J., dissenting). Specifically, Chief Justice Abrahamson speculated that the planning-operational distinction would be difficult to apply. *Id.* (Abrahamson, C.J., dissenting).

223. Chief Justice Abrahamson might disagree: "[T]he court has struggled to define the proper scope of government immunity[;] . . . if this court should undertake such a task it should do so only with the benefit of full information." *Id.* ¶ 136 (Abrahamson, C.J., dissenting).

224. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110 ("It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature . . . .").

225. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962) ("If the legislature deems it better public policy, it is, of course, free to reinstate immunity.").

CONCLUSION

Wisconsin's current governmental immunity doctrine is squarely in conflict with the governing immunity statute.[226] That is no accident. The Wisconsin Supreme Court, over the past fifty years, has circumvented precedent and legislative intent to reinvigorate the doctrine—and succeeded.[227] Today, governmental immunity is alive and well, thwarting injured parties from recovering against government entities.[228]

The Wisconsin Supreme Court must realign and reset the governmental immunity doctrine. To accomplish this, the court must disavow the current doctrine and reinstate the limited form of governmental immunity that was sanctioned by the Wisconsin Legislature in 1964. Specifically, the Wisconsin Supreme Court should hold, consistent with *Holytz* and the immunity statute, that all governmental entities, officials, and employees should enjoy immunity only for "acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions."[229] By so doing, the court can finally capture the spirit of *Holytz* and the immunity statute: "[H]enceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity."[230]

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226. *See Pries v. McMillon*, 2010 WI 63, ¶ 85, 326 Wis. 2d 37, 784 N.W.2d 648 (Gableman, J., dissenting) ("I write separately, however, because our case law is, troublingly, untethered from the governing statute . . . ."); *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 82, 262 Wis. 2d 127, 663 N.W.2d 715 (Prosser, J., dissenting).

227. *See supra* Part II.

228. *See, e.g.*, *Scott*, 2003 WI 60, ¶ 37.

229. WIS. STAT. § 893.80(4) (2011–12).

230. *Holytz*, 17 Wis. 2d at 39.