The Public Duty Doctrine & State Governmental Tort Liability: A Brief History and a Solution for the Current Paradigm

COOPER HARRISON*

* Notes Editor, Volume 55, and Staff Member, Volume 54, *The University of Memphis Law Review*; Juris Doctor Candidate, University of Memphis Cecil C. Humphreys School of Law, 2025; B.A., University of Memphis. Thank you to Jeff Rosenblum for encouraging me to write this note and for introducing me to the topic. Thank you to Alton Smith and Phill Ruston for providing invaluable guidance and advice throughout the note-writing process, and to Prof. Ronnie Gipson for advising my note. I am immensely grateful for the enlightening conversations and comradery of my dear friends Ben Elliott, William Lockett, Ethan Pfister, Megan Stilwell, and Charlotte Collyer. Finally, thank you to my wonderful family—I wouldn't be who I am today without your unwavering love and support.

I. INTRODUCTION

"[T]he ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'"[1]

In the early morning hours of Friday, September 2, 2022, a young woman named Eliza Fletcher was jogging down Central Avenue in Memphis, Tennessee when a man violently abducted her.[2] Shortly after the abduction, the Memphis Police Department issued a city-wide watch for Mrs. Fletcher, volunteers searched wooded areas around town, and news outlets broadcasted the few known details of her abduction.[3] Mrs. Fletcher disappeared near the University of Memphis Campus just a few hundred feet from a local private school, providing police with a cache of surveillance footage that helped them quickly pinpoint a suspect.[4] On September 3, just thirty-six hours after Mrs.

1. Dalehite v. United States, 346 U.S. 15, 60 (1953) (Jackson, J., dissenting).

2. Stuart Rucker et al., *Timeline: The Eliza Fletcher Abduction and Murder*, WREG MEMPHIS (Sept. 6, 2022), https://wreg.com/news/eliza-fletcher/timeline-the-eliza-fletcher-abduction-and-murder.

3. *Id.*

4. *Id.*

Fletcher's abduction, police officers identified Cleotha Abston[5] as the likely perpetrator after matching DNA on a pair of shoes recovered at the abduction site to Abston's genetic information in the FBI's Combined DNA Index System ("CODIS").[6] The following day, while police continued to search for Mrs. Fletcher, local prosecutors charged Abston with especially aggravated kidnapping and tampering with evidence.[7] Finally, on Monday, September 5, police discovered Mrs. Fletcher's body at an abandoned house in South Memphis.[8]

Approximately one year before Abston killed Mrs. Fletcher, he kidnapped and raped a woman named Alicia Franklin.[9] The Memphis Police Department ("MPD") failed to adequately investigate Ms. Franklin's accusations against Abston.[10] Following Ms. Franklin's rape, "and to [her] horror and resulting emotional distress, [Abston] [was] suspected of abducting and murdering . . . Mrs. Eliza Fletcher."[11]

5. Sources refer to Cleotha Abston as Cleotha Abston-Henderson and Cleotha Henderson.

6. *Id.* Abston's DNA information was located in the FBI's CODIS system because of his prior criminal history, which included kidnapping a prominent Memphis attorney, Kemper Durand, when Abston was 16 years old. *Man Charged in Jogger Abduction Kidnapped Attorney in 2000*, ASSOCIATED PRESS (Sept. 5, 2022), https://tinyurl.com/mr3sr784.

7. *See* Rucker et al., *supra* note 2.

8. *Id.*

9. Abston pled guilty to murdering Mrs. Fletcher. *See Cleotha Abston Sentenced to Life Without Parole for Murder of Memphis Teacher Eliza Fletcher* SHELBY CNTY. DIST. ATT'Y (Oct. 28, 2024), https://www.scdag.com/news-releases/cleotha-abston-sentenced-to-life-without-parole-for-murder-of-memphis-teacher-eliza-fletcher; *see also* Kim Chaney & Gus Carrington, *Shelby County Jury Finds Cleotha Abston Guilty of 2021 Rape and Kidnapping*, ABC (Apr. 12, 2024), https://www.localmemphis.com/article/news/crime/trial-begins-2021-rape-case-against-cleotha-abston-charged-with-killing-eliza-fletcher-in-2022/522-034a3451-9c79-41ec-a409-d43a4df3fc91.

10. Adrian Sainz, *Memphis Prosecutors Seek Death Penalty Against Man Charged with Kidnapping and Killing Teacher*, ASSOCIATED PRESS (July 6, 2023), https://apnews.com/article/eliza-fletcher-jogger-abduction-memphis-013ffaa96bdba057d2dee873069e40b5.

11. Brief for Appellant at *2, Franklin v. City of Memphis, 2023 WL 8325336, at *1 (Tenn. Ct. App. Oct. 30, 2024) (No. W2023-01142-COA-R3-CV) [hereinafter Franklin Brief]. Abston's murder trial is slated for February 2025. Kim Chaney, *Trial Set for February 2025 for Cleotha Abston for the Murder of Eliza Fletcher*, ABC (June 17, 2024), https://www.localmemphis.com/article/news/crime/memphis-jogger-eliza-

It was not until Abston's arrest in the Fletcher case that Memphis police tested Ms. Franklin's rape kit.[12] Six months after Mrs. Fletcher's murder, Ms. Franklin sued the City of Memphis, claiming that MPD acted negligently when it failed to test her her rape kit or investigate Abston.[13]

Ms. Franklin's complaint posited the following theory: had police officers taken her allegations seriously and tested her rape kit, law enforcement agencies would have matched Abston's DNA information located in CODIS and arrested him before he could murder Eliza Fletcher.[14] An alternative explanation is that Ms. Franklin's rape-kit met the fate of thousands of rape-kits in Tennessee that go untested on shelves for months or even years due to an extensive testing backlog.[15] The trial court presiding over Ms. Franklin's lawsuit dismissed her claims in July 2023, citing a common, nearly insurmountable bar to such claims—the public duty doctrine.[16]

The public duty doctrine is a common-law defense available to municipalities, governmental entities, and public officials facing a tort

fletcher-murder-trial-set-february-2025-for-cleotha-abston/522-831fcd75-c3ae-4889-bbd8-080ff95bbe38.

12. *See* Sainz, *supra* note 10.

13. To bolster her negligence claim, Ms. Franklin offered the sworn affidavit of a witness, Gwendolyn Brown, in an amended complaint. *See* Aff. of Gwendolyn Brown, Franklin v. City of Memphis, No. CT-3860-22 (Tenn. Cir. Ct. Apr. 20, 2023) (on file with author). In her affidavit, Ms. Brown "demonstrated that although MPD referred to [Abston] as a 'key suspect' in Alicia Franklin's rape, MPD went out of its way not to arrest him for nearly a year until he abducted and murdered [Eliza Fletcher]." Brief of Plaintiff/Appellant at *20, Franklin v. City of Memphis, 2023 WL 8325336, No. W2023-01142-COA-R3-CV.

14. Lucas Finton, *Judge Will not Re-open Cleotha Abston-Henderson Rape Civil Case Against Memphis Police*, MEMPHIS COM. APPEAL (July 17, 2023), https://tinyurl.com/bdzn397b. In her brief, Ms. Franklin alleged that she identified Abston in a line-up and provided the MPD with several pieces of identifying information including his address. *See* Franklin Brief, *supra* note 11.

15. *See* Marc Perrusquia, *Rape Kit Reforms Loom as Alicia Franklin Heads Back to Court*, INST. FOR PUB. SERV. REPORTING (June 5, 2023), https://www.psrmemphis.org/rape-kit-reforms-loom-as-alicia-franklin-heads-back-to-court (reporting that "Franklin's rape kit sat on a shelf in a state crime lab for nearly a year before testing was completed.").

16. Franklin v. City of Memphis, No. CT-3860-22 (Tenn. Cir. Ct. Mar. 22, 2023) (granting Defendant's Motion to Dismiss) (on file with author).

lawsuit from a private citizen.[17] Unless an exception applies,[18] the public duty doctrine stands for the proposition that governmental defendants do not owe a duty to any individual in particular because they only owe a duty to the public at large.[19] Further, a state's Tort Claims Act influences tort claims against governmental actors in addition to the public duty doctrine. Tort Claims Acts generally provide a limited form of liability for the tortious acts or omissions of the state.[20] The proclaimed intention behind many states' Tort Claims

17. King v. Town of Selmer, 2024 WL 81516, at *3 (Tenn. Ct. App. Jan. 8, 2024) ("the public-duty doctrine provides an affirmative defense that may 'shield[] a public employee from suits for injuries that are caused by the public employee's breach of a duty to the public at large.'") (quoting Ezell v. Cockrell, 902 S.W.2d 394, 397 (Tenn. 1995)).

18. This statement references several exceptions. For example, Tennessee recognizes three exceptions to the public duty doctrine's "no duty" rule:

> (1) a public official affirmatively undertakes to protect the plaintiff and the plaintiff relies upon the undertaking;
>
> (2) a statute specifically provides for a cause of action against an official or municipality for injuries resulting to a particular class of individuals, of which the plaintiff is a member, from failure to enforce certain laws; or
>
> (3) a plaintiff alleges a cause of action involving intent, malice, or reckless misconduct.

Chase v. City of Memphis, 971 S.W.2d 380, 385 (Tenn. 1998) (citing Ezell v. Cockrell 902 S.W.2d 394, 402 (Tenn. 1995)).

19. *See, e.g.*, Lawson v. Hawkins Cnty., 661 S.W.3d 54, 68 (Tenn. 2023) ("'[T]he public duty doctrine shield[s] public employees from tort liability for injuries caused by a public employee's breach of a duty owed to the public at large.'") (Kirby, J., concurring) (quoting Chase v. City of Memphis, 971 S.W.2d 380, 385 (Tenn. 1998)); Maldovan v. Cnty. of Erie, 205 N.E.3d 393, 413 n.15 (N.Y. 2022) ("Our precedents establish that the police are not held liable in tort when they fail to protect the public at large.") (Wilson, J., dissenting in part) (citing Cuffy v. New York, 505 N.E.2d 937 (N.Y. 1987)); Houdek v. State, No. 20-1304, 2021 WL 5106040, at *2 (Iowa Ct. App. Nov. 3, 2021) ("The public-duty doctrine 'precludes liability to individuals based on breach of a duty the state owes to the public at large.'") (quoting Estate of McFarlin v. State, 881 N.W.2d 51, 58 (Iowa 2016)).

20. State Tort Claims Acts often keep the door closed to governmental liability for most tort claims, leaving it merely cracked for negligence claims. *See, e.g.*, GA. CODE ANN. § 50-21-24 (LexisNexis, LEXIS through 2024 Regular and Extraordinary Session of the General Assembly) ("The state shall have no liability for losses resulting from: . . . (7) [a]ssault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights.");

Acts is to depart from the sovereign immunity paradigm.[21] The sovereign immunity paradigm prevented private citizens from suing municipalities, governmental entities, and public officials in civil lawsuits without the government's consent.[22] Following this departure, many states entered a new era of governmental liability where private parties could reach the state in a civil suit in a narrow set of circumstances.[23]

As a creation of common-law, state high courts often sketch the contours and outer limits of the public duty doctrine.[24] Much litigation surrounding the public duty doctrine involves the viability of different exceptions to the doctrine.[25] In addition to defining the doctrine's exceptions, jurists often interpret a state's Tort Claims Act in tandem with the public duty doctrine.[26] Some state courts' interpretation of the

KAN. STAT. ANN. § 75-6104 (2023) (listing twenty-four exceptions to governmental liability, ranging from the "failure to provide, or the method of providing, police or fire protection," to "any claim based upon emergency management activities.").

21. *See, e.g.*, GA. CODE ANN. § 50-21-21(a) (LexisNexis, LEXIS through 2024 Regular and Extraordinary Session of the General Assembly) ("The General Assembly recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity."). *But see* MISS. CODE ANN. § 11-46-3 (2024) ("The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare . . . that the 'state' and its 'political subdivisions' . . . are not now, have never been and shall not be liable, and are . . . immune from suit at law . . . [for] any wrongful or tortious act or omission.").

22. *Sovereign Immunity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining Sovereign Immunity as "[a] government's immunity from being sued in its own courts without its consent.").

23. *See, e.g.*, GA. CODE ANN. § 50-21-24 (LexisNexis, LEXIS through 2024 Regular and Extraordinary Session of the General Assembly) ("The state shall have no liability for losses resulting from: . . . (7) [a]ssault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights.").

24. *See infra* Section II.*B*.2 (discussing the different approaches to the public duty doctrine throughout the fifty states).

25. *See supra* note 18 and accompanying text (noting examples of different exceptions to the public duty doctrine).

26. *See supra* notes 20–22 and accompanying text (describing briefly the history and purpose of state Tort Claims Acts). The public duty doctrine almost always arises in cases that involve application and interpretation of a state's Tort Claims Act, as the doctrine is applicable only to governmental actors, and state Tort

public duty doctrine is harmonious with the applicable Tort Claims Act.[27] However, litigants in many states encounter an incongruence between the doctrine and the state's Tort Claims Act.[28] A brief discussion of the public duty doctrine, its exceptions, and Tennessee's Governmental Tort Liability Act ("GTLA") will illustrate this disharmony.

Tennessee courts recognize three exceptions to the public duty doctrine: the special duty exception, the statutory exception, and the reckless misconduct exception.[29] The first exception applies "where a 'special relationship' exists between the plaintiff and the public employee, which gives rise to a 'special duty.'"[30] The second exception exists "where a statute specifically authorizes a cause of action for injuries resulting from a particular type of negligent conduct."[31] Finally, the third exception removes immunity when "the

Claims Acts define the scope of governmental tort liability generally. *See, e.g.*, King v. Town of Selmer, 2024 WL 81516, at *3 (Tenn. Ct. App. Jan. 8, 2024) (interpreting and applying both the public duty doctrine and Tennessee's Governmental Tort Liability Act).

27. *Compare* R.I. GEN. LAWS ANN. § 9-31-1(b)(2) (West, Westlaw through Chapter 457 of the 2024 Regular Session of the Rhode Island Legislature) (this statute, titled "Tort liability of state," removed liability "[f]or any malicious, willful, wanton, reckless or gross negligent acts or omissions."), *with* Verity v. Danti, 585 A.2d 65, 67 (R.I. 1991) (noting that an exception to the public duty doctrine exists when "the state has knowledge that it has created a circumstance that forces an individual into a position of peril and subsequently chooses not to remedy the situation, the public duty doctrine does not shield the state from liability."). Rhode Island is a good example of a state whose statutory language synergizes with its common law exceptions to the public duty doctrine because both the statute and caselaw reflect that public officials will not enjoy the benefits of immunity when their egregious or grossly negligent acts or omissions cause harm. This application employs common sense as well: why should a defendant have more immunity for behaving in a worse manner than another defendant who acted less culpably, for no other reason than the fact that the former defendant is a governmental employee and the latter defendant is a private citizen?

28. This leads to conflicting remedies offered by the Tort Claims Act and the common law. *See infra* Section II.*C*.

29. Chase v. City of Memphis, 971 S.W.2d 380, 385 (Tenn. 1998) (citing Ezell v. Cockrell 902 S.W.2d 394, 402 (Tenn. 1995)).

30. *Ezell*, 902 S.W.2d at 401.

31. *Id.*

plaintiff alleges a cause of action involving intent, malice, or reckless misconduct."[32]

Although the events surrounding the murder of Eliza Fletcher and Alicia Franklin's subsequent lawsuit became the subject of ongoing media reporting and public discourse,[33] the legal theory underlying the dismissial of Ms. Franklin's complaint[34] is incredibly common.[35] Although this Note discusses Tennessee in detail below,

32. *Id.* The "reckless misconduct" exception is functionally useless after the Tennessee Supreme Court's decision in *Lawson v. Hawkins County*, which rejected a prior interpretation by a lower court that allowed plaintiffs to sue for gross negligence and recklessness under Tennessee's Government Tort Liability Act. Lawson v. Hawkins Cnty., 661 S.W.3d 54, 64 (Tenn. 2023). Although this case did not focus on the public duty doctrine, the Court nonetheless rejected a prior case from the Tennessee Court of Appeals that interpreted the GTLA to remove immunity for reckless or grossly negligent actions. The majority did not properly address the impact this rejection has on the public duty doctrine ("PDD"). Justice Kirby, however, did address the impact, noting that:

> If the plaintiff's complaint alleges that the governmental entity's employee was reckless in order to qualify for the 'reckless misconduct' special duty exception to the [PDD], then dismissal under the GTLA is likely because immunity is not removed for reckless conduct. Conversely, if the complaint alleges that the governmental employee was negligent in order to avoid dismissal under the GTLA, the plaintiff risks dismissal under the [PDD] by making his claim ineligible for the special duty exception for reckless misconduct.

Id. at 69–70 (Kirby, J., concurring).

33. *See, e.g.*, Margaret Renkl, *The Killing of Eliza Fletcher is a Tragedy, Not a Morality Play*, N.Y. TIMES (Sept. 12, 2022), https://www.nytimes.com/2022/09/12/opinion/eliza-fletcher-memphis-violence.html (discussing the discourse surrounding Eliza Fletcher's murder, positing that the widespread coverage of her murder resulted from the fact that Eliza Fletcher was a white woman, allegedly murdered by a black man, and that a black woman would not have received the same nation-wide coverage); Frank Webster, *Tucker Carlson Exposes Dark Details About Eliza Fletcher's Kidnapping and Murder*, BUS. & POL. REV. (Sept. 7, 2022), https://www.bizpacreview.com/2022/09/07/tucker-carlson-exposes-dark-details-about-eliza-fletchers-kidnapping-and-murder-1281944 (discussing former Fox News anchor Tucker Carlson's opinion on the Eliza Fletcher case, as Carlson chided commentators for discussing the racial dimensions of the case and linked the discourse surrounding Eliza Fletcher to "children being castrated in the name of trans rights").

34. *See supra* note 11 and accompanying text.

35. *See infra* Section II.*C*.

Tennesseeans contending with the public duty doctrine do not benefit from the same exceptions that exist in many states due to Tennessee courts' interpretations of both the public duty doctrine and Tennessee's GTLA.[36]

This Note addresses several issues relating to the interaction between the public duty doctrine and states' Tort Claims Acts. A recurring aspect of this Note is the illustration of how, despite the purported public policy benefits of the public duty doctrine, the doctrine prevents plaintiffs like Ms. Franklin from bringing meritorious claims against public officials who caused egregious harm.[37] Part II describes the background and current landscape of Tort Claims Acts, including the development of the public duty doctrine, and also categorizes states' Tort Claims Acts with respect to their efficacy for plaintiffs.[38] Part III discusses the benefits of amending Tennessee's GTLA and posits that state Tort Claims Acts are inherently more malleable and flexible than common law concepts like the public duty doctrine that have endured as disembodied legal theories for centuries.[39] Part IV proposes amendments that would best promote the goal of harmony between the common law and the statutory law in Tennessee, while also presenting a model amendment that any state can use.[40] Part V concludes this Note.[41]

36. For a plaintiff's claims to fall within the "special relationship" exception, the plaintiff must show that the "official[], *by their actions*, affirmatively undertake to protect the plaintiff." Wells v. Hamblem Cnty., No. E2004-01968-COA-R3-CV, 2005 WL 2007197, at *4 (Tenn. Ct. App. Aug. 22, 2005) (emphasis added). The Court in *Wells* noted that Tennessee's "Supreme Court specifically chose not to adopt a standard that include promises, assurances, or any other verbal communication." *Id.* at *7. Frustratingly, plaintiffs regularly rely on the verbal assurances and promises of officers, often because they have no reasonable alternative. Under the current interpretation of the public duty doctrine, plaintiffs have no recourse when public officials' negligent acts or omissions cause harm, so long as the relationship between the two parties was based on verbal assurances.

37. *See infra* Section III.*A.*

38. *See infra* Part II.

39. *See infra* Part III. For this reason, commentators should shift focus from impassioned criticism of the public duty doctrine, to policy arguments that suggest legislative action.

40. *See infra* Part IV.

41. *See infra* Part V.

II. SOVEREIGN IMMUNITY, THE PUBLIC DUTY DOCTRINE, AND STATES' TORT CLAIMS ACTS

Beginning in the U.S. in 1795,[42] and lasting for nearly two-hundred years, private citizens could not sue state governments or governmental actors without the state consenting to litigation.[43] Consent to sue is the fundamental aspect of sovereign immunity, a defense to tort liability for state and federal governments and their agents and entities.[44] Since the mid-nineteenth century, the public duty doctrine has functionally preserved sovereign immunity.[45] The public duty doctrine states that governmental defendants do not owe a duty to any individual in particular but only owe a duty to the public at large.[46] In the 1970s and 1980s, states formally retreated from the era of sovereign immunity and its common law analogs by enacting Tort

42. U.S. CONST. amend. XI ("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."). This amendment followed a Supreme Court ruling that permitted private citizens to sue a state government in the Supreme Court. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 419 (1792).

43. Sovereign immunity has existed in the United Kingdom, our jurisprudential progenitor, from time immemorial. *See, e.g.*, 3 ARNOLD D. MCNAIR, STEPHEN'S COMMENTARIES ON THE LAW OF ENGLAND: OBLIGATIONS AND CIVIL PROCEDURE 739–740 (Edward Jenks, ed., 18th ed. 1925) ("Whatever the reason may be, whether it be the exalted position of the King, or the fear lest the King, being the fountain of justice, and present, in the person of one of his judges, in almost every court of justice . . . it is a general rule of our law that no action can be brought against the King, either in his personal or official capacity," therefore "a person who is knocked down by the King's motor-car while it is being negligently drive by his chauffeur . . . has no action against the King."). U.S. Courts have long extrapolated this general rule and applied it to governmental entities and officials. *See, e.g.*, Schmaltz v. United States, 4 Ct. Cl. 142, 147 (1868) ("It is a rule of civil action—alike applicable to all—and of necessity must be executed by human agents, who are liable to err, and often through negligence or misconduct fail to execute it with fidelity. Neither the law nor the government is responsible for such default, but the agents who fail to execute it.").

44. BLACK'S LAW DICTIONARY, *supra* note 22.

45. *See* South v. Maryland, 59 U.S. (18 How.) 396, 402–03 (1856) (establishing the public duty doctrine as a defense available for state governments in a tort action by a private citizen).

46. *See supra* note 17.

Claims Acts.[47] In general, Tort Claims Acts lift immunity in a limited fashion and provide specific tort actions that private citizens can bring against state governments.[48] States differ on how and whether their Tort Claims Acts address the public duty doctrine.[49] Some states maintain Tort Claims Acts that directly incorporate the public duty doctrine in the statutory scheme,[50] although other states allow jurists to define the contours of the public duty doctrine through appellate opinions.[51]

In the years following the widespread adoption of state Tort Claims Acts, plaintiffs still contend with the public duty doctrine,[52] despite state legislatures purportedly providing an answer to the problems posed by a governmental immunity landscape dominated by common law.[53] The answer provided by legislators lacks efficiency, efficacy, or clarity.[54] This Note posits that although the extent of a government actor's egregiousness is relevant, it sholuld not determine

47. RESTATEMENT (SECOND) OF TORTS § 895B cmt. b (AM. L. INST. 1979) ("Mounting opposition to governmental immunity in tort had the effect of broadening the number and scope of statutory grants of consent to liability, and changed the attitude of many courts toward a liberal construction of the statutes involved.").

48. *See, e.g.*, KAN. STAT. ANN. § 75-6104 (2023) (providing twenty-four detailed exceptions to liability, including "failure to provide, or the method of providing, police or fire protection").

49. *See infra* Section II.*B.*

50. *See infra* Section II.*B.*2.

51. *See infra* Section II.*B.*1.

52. *See, e.g.*, *supra* notes 2–17 and accompanying text (discussing Alicia Franklin's legal claims against the city of Memphis and their dismissal due to the public duty doctrine).

53. *See, e.g.*, GA. CODE ANN. § 50-21-21 ("The General Assembly recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity."); Catone v. Medberry, 555 A.2d 328, 333 (R.I. 1989) ("The primary purpose of the [Rhode Island Tort Claims] [A]ct is to provide effective relief for persons injured as a result of governmental negligence.").

54. Is it sensible that a private citizen cannot sue a police department, who, through its officers, failed to investigate a rape accusation which led to the death of another woman, but can sue a police officer for negligently handcuffing an arrestee? *Compare* Franklin v. City of Memphis, No. CT-3860-22 (Tenn. Cir. Ct. Apr. 20, 2023) (where an officer failed to investigate a rape accusation, which led to the death of another woman), *with* Timmons v. Metro. Gov't of Nashville & Davidson Cnty., 307 S.W.3d 735, 737–38 (Tenn. Ct. App. 2009) (where a plaintiff could proceed in a claim against a police officer for negligently handcuffing him).

whether a plaintiff may proceed with their claims.[55] To the extent that tort law's fundamental goals are to place plaintiffs in the same position that they occupied prior to a tortious act or omission, while also punishing tortfeasors and deterring civil misconduct, the current paradigm of state Tort Claims Acts fails miserably.[56] Today, in the majority of states, plaintiffs find themselves wading through a muddled landscape, made murkier by the persistence of the public duty doctrine—a doctrine fundamentally incongruous with the stated purpose of many Tort Claims Acts.[57] Like other areas of tort litigation, the public duty doctrine's role in tort law is that of "a vexing, crisscrossed morass."[58]

State courts' interpretations of both the public duty doctrine and Tort Claims Acts exist along a spectrum, from least to most helpful for

55. The line drawn by legislatures, between liability for ordinary negligence, and immunity for gross negligence, is arbitrary. This line also prevents a plaintiff—who often needs recovery the most—from proceeding with their claims.

56. *See* RESTATEMENT (FIRST) OF TORTS § 901 cmt. a (AM. L. INST. 1939) ("[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort. . . . [and] unlike the law of contracts or of restitution, the law of torts . . . has within it elements of punishment or deterrence."); RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. L. INST. 1979) ("[W]hen the plaintiff has been harmed in body or mind, money damages are no equivalent but are given to compensate the plaintiff for the pain or distress or for the deterioration of the bodily structure.").

57. To the extent that legislators intend state Tort Claims Acts to better address plaintiffs' meritorious claims, the public duty doctrine is at odds with this legislative intent. *Compare* GA. CODE ANN. § 50-21-21(a) (LexisNexis, through 2024 Regular and Extraordinary Session of the General Assembly) ("The General Assembly recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity."), *with* Lawson v. Hawkins Cnty., 661 S.W.3d 54, 68 (Tenn. 2023) (Kirby, J, concurring) (quoting Chase v. City of Memphis, 971 S.W.2d 380, 385 (Tenn. 1998)) ("[T]he public duty doctrine shield[s] public employees from tort liability for injuries caused by a public employee's breach of a duty owed to the public at large.").

58. Kim v. State, 622 S.W.3d 753, 761 (Tenn. Ct. App. 2020) (quoting W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 740 (2005)) (noting that "foreseeability represents 'a scourge, and its role in negligence cases is a vexing, crisscrossed morass.'"); Com. Painting Co. v. Weitz Co., 676 S.W.3d 527, 533 (Tenn. 2023) (noting that the economic loss doctrine, a bar to many tort claims, is "confusing morass" in application).

plaintiffs.[59] Although this Note focuses in part on Tennessee—a state whose Tort Claims Act is unhelpful for Plaintiffs—many problems concerning the interplay between the public duty doctrine and a state's Tort Claims Act emerge regardless of jurisdiction.[60] For example, most plaintiffs who have overcome the burden of fitting their claim into one of a few statutorily permissible claims where immunity will not lie,[61] must then defeat the public duty doctrine—overwhelmingly resulting in swift dismissals.[62]

59. *See infra* Section II.*B.*

60. *See infra* Section II.*C.*

61. Under Tennessee's GTLA, "[i]mmunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment." However, significantly, immunity remains if the injury arises out of:

> (1) The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
>
> (2) False imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;
>
> (3) The issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;
>
> (4) A failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property;
>
> (5) The institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
>
> (6) Misrepresentation by an employee whether or not such is negligent or intentional;
>
> (7) Or results from riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances; [or]
>
> (8) Or in connection with the assessment, levy or collection of taxes.

TENN. CODE ANN. § 29-20-205(1)–(8) (2024).

62. *See, e.g.*, 3Pak LLC v. City of Seattle, No. C23-0540 TSZ, 2023 WL 5576655, at *1, *6 (W.D. Wash. Aug. 29, 2023) (granting municipality's motion to dismiss based partly on its public duty doctrine defense and plaintiff's failure to "satisfy all elements of [an] exception" to the public duty doctrine); Jones v. United States, 484 F. Supp. 3d 1238, 1246 (S.D. Fla. 2020) ("Therefore, [plaintiff] cannot state a negligence claim based on his special duty [exception]" to the public duty.); Saade v. Dep't. of Health, No. C19-470 TSZ, 2019 WL 4464401, at *1, *5 (W.D. Wash. Sept. 18, 2019) (granting defendant's motion to dismiss in part because plaintiff

A. Negligence, Sovereign Immunity, and Tort Claims Acts: An Overview of the Public Duty Doctrine and State Tort Claims Acts

People often act negligently.[63] As state governments are comprised of people, it logically follows that governmental entities, municipalities, and public officials act negligently through their agents and employees.[64] For the majority of U.S. history, sovereign immunity insulated federal, state, and municipal governments from liability, until the widespread enactment of Tort Claims Acts.[65] Following the genesis of Tort Claims Acts, governmental entities enjoyed less protections under a more limited form of immunity for the tortious acts and

failed to meet any of the exceptions to the public duty doctrine: "(i) legislative intent, (ii) failure to enforce, (iii) the rescue doctrine, or (iv) a special relationship").

63. *See, e.g.*, CONF. OF STATE CT. ADM'RS, STATE CT. CASELOAD DIG., at 9–10 (2018), https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf (finding that in a survey of twenty-four states in 2017, plaintiffs filed roughly 350,000 tort complaints, many of which are "auto tort" cases, likely premised on negligence law).

64. *See* ROY T. COOK, A DICTIONARY OF PHILOSOPHICAL LOGIC 116 (Edinburgh Univ. Press 2009) (ebook) ("The fallacy of composition is the informal fallacy that occurs when the reasoner illicitly moves from a premise asserting that the parts of an object individually have a certain property to the conclusion that the object as a whole has that same property.") (emphasis omitted). *But see* Bennett v. United States, 803 F.2d 1502, 1503 (9th Cir. 1986) (FTCA case where Bureau of Indian Affairs boarding school hired a teacher who the school knew had prior charges of public indecency and who, under their employment, "kidnapped, assaulted, and raped several children who were enrolled at the BIA school."). Tennessee's government, its entities, and public officials typify this characterization. *See, e.g.*, City of Memphis v. Lasser, 28 Tenn. (9 Hum.) 757, 757–58 (1849) (affirming judgment for a plaintiff against the city for failing to cover a "twenty to twenty-five feet deep" hole its agents had dug, resulting in plaintiff's injuries); Davis v. City of Knoxville, 18 S.W. 254, 254 (Tenn. 1891) (plaintiff's negligence action failed against city for the injuries caused while he was jailed by city's failure to provide a "calaboose [that] was [ ] sufficiently commodious to permit a separation of prisoners.").

65. *See* RESTATEMENT (SECOND) OF TORTS § 895B, cmts. a–b (AM. L. INST. 1979) ("[S]overeign immunity of the British crown carried over to the [ ] American states [and] the Federal Government . . . [taking] the procedural form of a rule that a State could not be sued without its consent . . . . Mounting opposition to [that] governmental immunity [led to] broadening the number and scope of statutory grants of consent to liability, and . . . [more] liberal construction [by courts] of the statutes involved.").

omissions of the state.[66] In this new era of governmental liability, private parties could reach the state in more civil suits, albeit in a narrow set of circumstances.[67]

Following the advent of state Tort Claims Acts,[68] the landscape of municipal tort liability now allows more plaintiffs to pierce the centuries-old armor of governmental immunity.[69] Although the public

66. State Tort Claims Acts often close the door to governmental liability for most tort claims, leaving only a crack open for negligence actions. *See, e.g.*, GA. CODE ANN. § 50-21-24 (LexisNexis, Current through 2024 Regular and Extraordinary Session of the General Assembly) ("The state shall have no liability for losses resulting from: . . . (7) [a]ssault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights."); KAN. STAT. ANN. § 75-6104 (2023) (listing twenty-four exceptions to governmental liability from the "failure to provide, or the method of providing, police or fire protection," to "any claim based upon emergency management activities."); S.C. CODE ANN. § 15-78-60 (LexisNexis, LEXIS through 2024 Regular Session Act No. 250, not including changes and corrections made by the Code Commissioner) (listing forty exceptions to governmental immunity, as broad as the "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid."). The purpose of many Tort Claims Acts was to depart from the sovereign immunity paradigm. *See* GA. CODE ANN. § 50-21-21 (LexisNexis, Current through 2024 Regular and Extraordinary Session of the General Assembly) (recognizing strict sovereign immunity causes unfair and inequitable results).

67. *See, e.g.*, GA. CODE ANN. § 50-21-24 (LexisNexis, Current through 2024 Regular and Extraordinary Session of the General Assembly) ("The state shall have no liability for losses resulting from: . . . (7) [a]ssault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights."); KAN. STAT. ANN. § 75-6104 (2023) (providing twenty-four detailed exceptions to liability, including "failure to provide, or the method of providing, police or fire protection").

68. While many states enacted Tort Claims Acts around the same time, the statutes in one state can vary significantly from those in other states. *Compare* TENN. CODE ANN. § 29-20-205 (2024) (removing liability for "injury proximately caused by a negligent act or omission of any employee within the scope of his employment"), *and* Lawson v. Hawkins Cnty., 661 S.W.3d 54, 59 (Tenn. 2023) (concluding that "section 29-20-205 . . . removes immunity only for ordinary negligence, not gross negligence or recklessness."), *with* ARIZ. REV. STAT. § 12-820.02(A)(1) (removing immunity in any case where a "public employee acting within the scope of the public employee's employment intended to cause injury or was *grossly negligent* . . . [for] fail[ing] to make an arrest or . . . fail[ing] to retain an arrested person in custody.").

69. *See, e.g.*, Chapman v. City of Reno, 455 P.2d 618, 620 (Nev. 1969) (though since repealed, the statute allowed "that immunity is waived both as to the political

duty doctrine emerged within the sovereign immunity framework, it persists in a majority of states today.[70] Because the public duty doctrine stands for the proposition that governmental defendants do not owe a duty to any individual in particular but only owe a duty to the public at large,[71] the doctrine is often characterized as the "duty to all, duty to no one" rule.[72]

Critics assert that the public duty doctrine masquerades as a sound public policy directive,[73] while functioning identically to

subdivision and the policemen or firemen, if that act or omission of the employee amounted to gross negligence or he was guilty of willful misconduct."); Kelso v. City of Tacoma, 390 P.2d 2, 4–5 (Wash. 1964) (noting that litigants who have "urge[d] that the rule of immunity from liability for negligence by a municipal corporation while engaged in the exercise of a governmental function should be changed," failed repeatedly until the enactment of legislation that abolished the absolute immunity.).

70. Commentators and legal scholars point to a mid-19th century U.S. Supreme Court case for the origin of the public duty doctrine. South v. Maryland, 59 U.S. (18 How.) 396, 402 (1855) ("It is an undisputed principle of the common law, that for a breach of a public duty, an officer is punishable by indictment."). Later, the Supreme Court noted that "the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here." United States v. Lee, 106 U.S. 196, 207 (1882). The court followed this assertion by distinguishing the United States from monarchical England because "[u]nder our system the *people*, who are there called *subjects*, are the sovereign" and "[t]heir rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch." *Id.* at 208 (emphasis added). Despite the distinction drawn, the Supreme Court noted, seemingly as a foregone conclusion, that sovereign immunity was the law of the land.

71. *See supra* note 17 and accompanying text.

72. Adams v. State 555 P.2d 235, 241 (Alaska 1976) ("[W]e consider that the 'duty to all, duty to no-one' doctrine is in reality a form of sovereign immunity."); *see also* Brennen v. City of Eugene, 591 P.2d 719, 723 (Or. 1979) (en banc) ("To adopt [the public duty doctrine] would, in effect, restore the doctrine of sovereign immunity, which has been abolished."), *cited with approval in* Fulps v. City of Urbandale, 956 N.W.2d 469, 477 (Iowa 2021) (Appel, J., concurring).

73. *See, e.g.*, Ezell v. Cockrell, 901 S.W.2d 394, 398 (Tenn. 1995) (noting that one public policy consideration is that, according to the court, "individuals, juries and courts are ill-equipped to judge governmental decisions as to how particular community resources should be or should have been allocated to protect individual members of the public."). Other courts have commented that the public duty doctrine prevents the judicial system from disrupting the discretionary functions that many public officials, most notably police officers, exercise on a daily basis. Shore v. Town of Stonington, 444 A.2d 1379, 1384 (Conn. 1982). The position articulated by many

sovereign immunity.[74] In other words, the public duty doctrine is a modified version of sovereign immunity where, regardless of a statutory waiver of immunity, the "King" and his agents can do no wrong so long as the wrong complained of relates to a duty the "King" or his agents owe to the public at large.[75] Proponents of the doctrine argue that it simply recognizes a state "'government's need to exercise discretion [in allocating resources] without the pressures of potential tort liability.'"[76]

For several reasons, some states do not recognize the public duty doctrine at common law: some courts abrogated it following the

courts to justify the public duty doctrine operates at the level of strawman and *reductio ad absurdum*. While it is sensible to approach debates over the validity of a centuries-old common law doctrine with a healthy degree of skepticism, courts often justify its full-fledged retention with an uncritical obstinance.

74. To the extent that sovereign immunity stands for the proposition that "[t]he King can do no wrong," then the public duty doctrine stands for the proposition that "[t]he King can do only little wrongs." Dalehite v. United States, 346 U.S. 15, 60 (1953) (Jackson, J., dissenting).

75. *Id.*

76. Ryan Rich, *Seeing Through the Smoke and Fog: Applying a Consistent Public Duty Doctrine in North Carolina After* Myers v. McGrady, 85 N.C. L. REV. 706, 723 (2007) (quoting Anita R. Brown-Graham, *Local Governments and the Public Duty Doctrine After* Wood v. Guilford County, 81 N.C. L. REV. 2291, 2325 (2003)); Johnson v. Humboldt Cnty., 913 N.W.2d 256, 266 (Iowa 2018) ("We believe the limited resources of governmental entities—combined with the many demands on those entities—provide a sound justification for the public-duty doctrine."). *But see infra*, notes 221–24 and accompanying text (discussing incorporating certain claims, such as gross negligence, recklessness, and willful or wanton misconduct, as waivers to immunity).

enactment of a Tort Claims Act,[77] other courts refused to adopt it,[78] and some other legislatures directly incorporated it into the state's Tort Claims Act.[79] The public duty doctrine had a much neater and more logical place in tort law during the sovereign immunity paradigm.[80]

77. *See generally* DeWald v. State, 719 P.2d 643, 653 (Wyo. 1986) ("The public duty only rule, if it ever was recognized in Wyoming, is no longer viable."); Coffey v. City of Milwaukee, 247 N.W.2d 132, 139 (Wis. 1976) ("The 'public duty'—'special duty' distinction [is] just the type of artificial distinction . . . which this court sought to dispose of. . . [therefore] *[a]ny duty owed to the public generally is a duty owed to individual members of the public*.") (emphasis added); Brennen v. City of Eugene, 591 P.2d 719, 725 (Or. 1979) (en banc) ("any distinction between 'public' and 'private' duty is precluded by statute in this state."); Schear v. Bd. of Cnty. Comm'rs, 687 P.2d 728, 730 (N.M. 1984) ("The distinction between 'public duty' and 'private duty' or 'special duty' is no less arbitrary and no less a vestige of the doctrine of sovereign immunity than are the 'governmental-proprietary' and 'discretionary-ministerial' distinctions."); Coleman v. E. Joliet Fire Prot. Dist., 46 N.E.3d 741, 757 (Ill. 2016) ("[W]e conclude that the underlying purposes of the public duty rule are better served by application of conventional tort principles and the immunity protection afforded by statutes.").

78. Hudson v. Town of E. Montpelier, 638 A.2d 561, 566 (Vt. 1993) ("[D]efendants ask us to adopt the 'public duty doctrine' and its 'special relationship' exception . . . [w]e decline to adopt this doctrine."); Dore v. City of Fairbanks, 31 P.3d 788, 795 (Alaska 2001) ("[W]e [have] rejected the public duty doctrine, exposing a relatively undeveloped area of law: general tort duties of the state or local government. To facilitate development of this area, we initially adopted an *ad hoc* approach to duty analysis [however], [i]n the light of our recent decisions urging less fact-specific inquiries in duty analysis, [we] [now] impos[e] a duty of reasonable care on the police to respond to threats of imminent, life-threatening, assaultive conduct when given sufficient specific information to respond.").

79. *See, e.g.*, N.C. GEN. STAT. § 143-299.1A(a) (LexisNexis, Current through Session Laws 2024-45 of the 2024 Regular Session of the General Assembly) (retaining immunity for the "alleged negligent failure to protect the claimant from the action of others or from an act of God by a law enforcement officer . . . [or t]he alleged negligent failure of an officer, employee, involuntary servant or agent of the State to perform a health or safety inspection required by statute."); N.D. CENT. CODE § 32-12.1-03(3)(g) (LexisNexis, Current through all legislation from the 68th Legislative Assembly (2023), including the Special Session) (carving an exception to public duty for when "a special relationship can be established between the political subdivision and the injured party."); *see also* KAN. STAT. ANN. § 75-6104(a)(14) (2023) (retaining immunity for "failure to provide, or the method of providing, police or fire protection," which is a key component of the public duty doctrine.).

80. During the sovereign immunity era, the public duty doctrine was somewhat superfluous, as governmental entities had ample protection against civil litigation. *See*

State supreme courts that abandoned the public duty doctrine understood that legislatures intended for state Tort Claims Acts to weaken the impenetrable barrier of absolute sovereign immunity, and saw the doctrine as standing in the way of that goal.[81] However, most states still retain the public duty doctrine.[82]

B. State Tort Claims Acts: Major Groupings

Because state Tort Claims Acts are often lengthy, intertwined with other statutes, and exacting in detail, this section is limited to an analysis of the following: (1) whether the Tort Claims Act codifies the public duty doctrine; (2) whether the Tort Claims Act lifts immunity for recklessness, gross negligence, or similar tort theories; and (3) whether the Tort Claims Act conflicts with the public duty doctrine. Aside from Alabama and Arkansas, Group One states are the most

Jean W. v. Commonwealth, 610 N.E.2d 305, 307 (Mass. 1993) (Liacos, C.J., concurring) ("[H]aving reviewed our recent decisions on the [public duty doctrine], we note that the result has been to resurrect effectively the antiquated and outmoded concepts of sovereign immunity which we and the Legislature have sought to shed.") ; Natrona Cnty. v. Blake, 81 P.3d 948, 959 (Wyo. 2003) (Golden, J., dissenting) ("The public-duty/special-duty rule was in essence a form of sovereign immunity and viable when sovereign immunity was the rule[;] [however,] [t]he legislature has abolished sovereign immunity in this area[,] [leaving] [t]he public duty only rule . . . no longer viable.").

81. *See, e.g.*, Doucette v. Town of Bristol, 635 A.2d 1387, 1390–91 (N.H. 1993) ("[W]e hold that the public duty rule impermissibly conflicts with the abrogation of common law municipal immunity in this State, and, therefore, will no longer be a recognized defense against claims of municipal negligence.") (citing Adams v. State, 555 P.2d 235, 244 (Alaska 1976); Ryan v. State, 656 P.2d 597, 598 (Ariz. 1982); Leake v. Cain, 720 P.2d 152, 159 (Colo. 1986); Com. Carrier Corp. v. Indian River Cnty., 371 So. 2d 1010, 1015 (Fla. 1979); Jean W. v. Commonwealth, 610 N.E.2d 305, 312 (Mass. 1993); Maple v. City of Omaha, 384 N.W.2d 254, 260 (Neb. 1986); Schear v. Board of County Comm'rs, 687 P.2d 728, 731 (N.M. 1984); Brennen v. City of Eugene, 591 P.2d 719, 724 (Or. 1979); DeWald v. State, 719 P.2d 643, 653 (Wyo. 1986)).

82. *See, e.g.*, Ala. Dep't of Corr. v. Thompson, 855 So. 2d 1016, 1024 (Ala. 2003) (applying the doctrine to state correctional officers); Williams v. State of California, 664 P.2d 137, 140 (Cal. 1983); Torres v. Dep't of Corr., 912 A.2d 1132, 1140 (Conn. Super. Ct. 2006); Johnson v. Indian River Sch. Dist., 723 A.2d 1200, 1204 (Del. Super. Ct. 1998); Hoodbhoy v. Dist. of Columbia, 282 A.3d 1092, 1097 (D.C. 2022). However, a strong minority of states have abandoned the doctrine. *See supra* notes 77–78.

difficult for plaintiffs to succeed in their claims.[83] The states that abrogated the public duty doctrine at common law do not comprise a single group because they differ in other relevant factors.[84] The majority of states fall into Group One: their state Tort Claims Acts are underinclusive in terms of the amount and types of tort claims plaintiffs can bring, but the statutes do not conflict with the common law public duty doctrine and its exceptions.[85] States in Group Two have the public duty doctrine, or its functional equivalent, codified by statute and do not have recklessness or gross negligence exceptions to the doctrine.[86] Finally, states in Group Three do not codify the public duty doctrine and provide exceptions for tort theories based on gross negligence, recklessness, or similar claims that fit within the common law exceptions to the public duty doctrine.[87]

83. Alabama and Arkansas are not present in these groupings because it is virtually impossible under these two states' respective constitutions for a plaintiff to succeed in a tort claim against a state entity. ALA. CONST. art. I, § 14 (LexisNexis, Current through 2023 Second Special Session) ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."); ARK. CONST. art. V, § 20 (LexisNexis, Current through all legislation of the 2023 Regular Session and the 2023 First Extraordinary Session) ("The State of Arkansas shall never be made defendant in any of her courts.").

84. *See supra* notes 77–79. Whether a state's high court abrogated the common law public duty doctrine is not completely determinative in assessing the governmental liability landscape in terms of its effect on plaintiffs. This is why calls to abrogate the doctrine are often short-sighted, as ultimately, in a state without the doctrine at common law, states have plenary authority in providing the scope of governmental immunity. In some states, post-abrogation led to the state's legislature enacting its functional equivalent in a statute. *See* N.D. CENT. CODE § 32-12.1-03(3)(g) (LexisNexis, Current through all legislation from the 68th Legislative Assembly (2023), including the Special Session) (defining public duty and listing the special duty exceptions). In other states, while the legislature did not add the doctrine into its statutory scheme, its Tort Claims Act still fails to remove immunity for gross negligence or recklessness. *See* COLO. REV. STAT. ANN. § 24-10-106 (LexisNexis, Current through all legislation from the 2024 Regular Session and the Second Extraordinary Session) (establishing general immunity but carving out limited exceptions). Therefore, a potential solution to the problems plaintiffs often face will resemble, at least in part, statutory language that softens immunity.

85. *See infra* Section II.*B*.1.

86. *See infra* Section II.*B*.2.

87. *See infra* Section II.*B*.3.

1. Group One: The Majority Approach and Illustrative Caselaw

States in Group One, like New Hampshire, Connecticut, and Illinois, have not codified the public duty doctrine and have no exceptions for tort theories based on gross negligence or recklessness, but permit the state's respective common law exceptions to the public duty doctrine.[88] When a state's Tort Claims Act harmonizes with its common law exceptions to the public duty doctrine, courts can adjudicate claims more effectively and efficiently.[89] On the one hand, the Tort Claims Acts in Group One states are neither overinclusive nor underinclusive, allowing certain claims to proceed in these states that would not proceed in Group Two states, such as claims for gross

88. *See* N.H. REV. STAT. ANN. § 507-B:2–B:5 (LexisNexis, LEXIS through Chapter 378 of the 2024 Regular Session) (removing immunity for negligence specifically and stating that the statute, not common law, controls with respect to the scope of immunity); CONN. GEN. STAT. ANN. § 52-557n (LexisNexis, LEXIS through 2024 Regular Session approved on or before July 1, 2024) (removing immunity for negligence but providing ten exceptions to the waiver of immunity, from "the condition of natural or unimproved land," to "the condition of a reservoir"); 745 ILL. COMP. STAT. ANN. 10/2-201–211(LexisNexis, Current through 2024 Regular Session of the 103rd General Assembly); NEV. REV. STAT. ANN. § 41.032–.038 (LexisNexis, LEXIS through Regular and Special Sessions 2023 and revisions received from the Legislative Counsel Bureau in 2024); NEB. REV. STAT. ANN. § 13-901–928 (LexisNexis, LEXIS through 1st Special Session, 2nd Regular Session, and 2024 ballot proposals); OR. REV. STAT. ANN. § 30.265 (LexisNexis, Current through amendments effective on January 1, 2025); 42 PA. CONS. STAT. ANN. § 8542 (LexisNexis, LEXIS through 2024 Regular Session Act 95); TEX. REV. CIV. STAT. ANN. § 101.0215 (LexisNexis, LEXIS through 2023 Regular Session, 1st–4th C.S. of the 88th Legislature, and the November 7, 2023 general election results) (establishing liability for governmental functions, which the legislature defines to include thirty-six categories, ranging from "police and fire protection and control" to "firework displays"); KY. REV. STAT. ANN. § 65.2001 (LexisNexis, LEXIS through all 2024 regular session legislation); VA. CODE ANN. § 8.01-195.3 (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I); UTAH CODE ANN. § 63G-7-301 (LexisNexis, LEXIS through the 2024 4th Special Session) (notably, Utah's Tort Claim's Act removes immunity for "an injury resulting from a sexual battery," uncommon among the fifty states, with most states specifically exempting liability for intentional torts); WASH. REV. CODE ANN. § 4.96.010 (LexisNexis, Statutes current with legislation from the 2024 Regular Session); WYO. STAT. ANN. § 1-39-101–121 (LexisNexis, LEXIS through 2024 Budget Session).

89. *See, e.g.*, Shore v. Town of Stonington, 444 A.2d 1379, 1382–84 (Conn. 1982) (noting several exceptions to the public duty doctrine, none of which conflict with the scope of liability provided by the statute).

negligence.[90] On the other hand, because the Tort Claims Acts in this Group do not expressly provide a cause of action for gross negligence or reckless misconduct, courts in Group One states are free to bend the statutory scheme to the will of the public duty doctrine.[91] Therefore, like plaintiffs in Group Two, the likelihood of success for a plaintiff in Group One depends on the precision of the state Tort Claims Act's drafting, in conjunction with the state high court's interpretation of both the Tort Claims Act and the public duty doctrine.

Many Tort Claims Acts in Group One are contradictory. For example, these Tort Claims Acts permit liability for unintentional mistakes but strengthen immunity for intentional, reckless, and even egregious misconduct.[92] Or, a Tort Claims Act will place a seemingly unreasonable limit on claims.[93] For example, Texas courts have held that the Texas Tort Claims Act does not remove immunity for negligent hiring/supervision unless plaintiffs couple these claims with allegations that the government entity or employee also used tangible property in their negligent act.[94] This tangible property requirement is an arbitrary line the legislature drew to further its goal of providing limited immunity in form and sovereign immunity in effect. In a case from Texas, government employees sexually harassed and assaulted formerly incarcerated individuals receiving treatment at a substance

90. *Id.*

91. *Id.*

92. *See, e.g.*, Davis v. United States, 564 U.S. 229, 229 (2011) (noting that the value of deterrence is low when deterrence aims at "simple, isolated negligence."). *But see* Herring v. United States, 555 U.S. 135, 153 (2009) (Ginsburg, J., dissenting) (noting that "a foundational premise of tort law [is] that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care").

93. *See, e.g.*, Pecan Valley Mental Health v. Doe, 2023 678 S.W.3d 577, 587–88 (Tex. Ct. App. 2023) (noting that "[a]llegations of negligent hiring against a governmental unit are not actionable under the TTCA, and the unit's immunity is not waived, because such allegations do not implicate or involve the 'use' of tangible personal property."); Texas Dep't. of Crim. Just. Assistance Div. v. Campos, 384 S.W.3d 810, 815 (Tex. 2012) ("[E]ven if a claim is based on an intentional tort, a governmental entity may still be liable for negligence if that negligence is distinct from the intentional tort. . . . But a cause of action for negligent supervision or training must satisfy the TTCA's use of tangible property requirement.") (first citing Young v. Dimmitt, 787 S.W.2d 50, 51 (Tex. 1990); then citing Texas Dep't. of Pub. Safety v. Petta, 44 S.W.3d 575, 581 (Tex. 2001)).

94. *See supra* note 93.

abuse treatment facility.[95] After the plaintiffs brought claims of negligent hiring and supervision against governmental entities under the Texas Tort Claims Act, the Court dismissed the claims in full because the Texas Tort Claims Act provides immunity for intentional torts,[96] and requires a showing that harm caused by the government occurred with a tangible use of physical property for negligent hiring/supervision claims.[97]

In another case from Virginia, several women sued a municipality, its police department, and city social work services after a police officer repeatedly raped multiple women who sought the police officer's help.[98] The women reported the rape allegations to several municipal agencies, including social workers and mental health professionals, who all failed to act.[99] Even after the plaintiffs reported the rape allegations to the police department directly, the department did nothing.[100] The police department also retained the officer after the plaintiffs' alleged sexual abuse, allowing him to again rape one of the plaintiffs.[101] The plaintiffs sued for intentional torts committed by the police officer and for the city's negligence in failing to act in a timely manner.[102] The Virginia Supreme Court dismissed the plaintiffs' claims, holding that the municipality was immune from suit for both the intentional torts committed by the police officer and the

95. *Campos*, 384 S.W.3d at 812.

96. *Id.* at 816; TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(1)–(2) (LexisNexis, LEXIS through 2023 Regular Session, 1st–4th C.S. of the 88th Legislature, and the November 7, 2023 general election results) (stating that the Tort Claims Act does not allow claims "based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection, or rebellion; or . . . arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities.").

97. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (LexisNexis, LEXIS through 2023 Regular Session, 1st–4th C.S. of the 88th Legislature, and the November 7, 2023 general election results) (noting that immunity is waived for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.").

98. Niese v. City of Aexandria, 564 S.E.2d 127, 129–130 (Va. 2002).

99. *Id.* at 130.

100. *Id.* at 130–31.

101. *Id.* at 130.

102. *Id.*

municipality's negligence in retaining the accused officer.[103] The court also held that the municipality was not liable for the inactions of the social workers and mental health professionals because their failure to act constituted a discretionary decision.[104]

Many aspects of this case are patently pernicious.[105] For one, this case illustrates how the current paradigm of governmental tort immunity fails to incentivize governmental entites to improve their hiring, retention, or reporting protocols. Tragically, plaintiffs carry the brunt of the burden, especially those plaintiffs who have suffered sexual assault and lack a legal remedy.[106] Cases like this are common

103. *Id.* at 133 ("The decision to retain an individual police officer is an integral part of the governmental function of maintaining a police force. Accordingly, we hold that the City is immune from liability for any negligence associated with its decision to retain a specific police officer.").

104. Niese v. City of Alexandria, 564 S.E.2d 127, 134 (Va. 2002). All the inactions on the part of the municipality occurred in the face of a statute requiring social workers and mental health professionals to report allegations of abuse. Virginia's Supreme Court hung its reasoning on the assertion that plaintiffs could not maintain an action against the entities who failed to timely report the allegations because such a duty was discretionary and therefore the social workers and mental health professionals retained immunity.

105. The facts of this case demonstrate a high likelihood of long-lasting detriment, both mental and physical, to plaintiffs. Moreover, this case indicates an insidious inability to achieve justice for private citizens in our civil system. Courts dimissing other cases like this signals to plaintiffs that the hypothetical benefit of allowing police departments to function without liability outweighs the cost of "righting wrongs." Finally, these outcomes strain any credulity that governments will choose to protect their own constituents when these private citizens are pitted against the miscreants governments routinely employ.

106. Suffering a sexual assault by agents of the government and then having our legal system deny a remedy adds insult to injury and leaves a vulnerable group even less protected. One study found that nearly 75% of sexual assault survivors met the criteria for post-traumatic stress disorder at both one-month and twelve-months intervals following the sexual assault. Dworkin et al., *PTSD in the Year Following Sexual Assault: A Meta-Analysis of Prospective Studies*, 24 TRAUMA, VIOLENCE, & ABUSE 2, 497–514 (2023). This data indicate that sexual assault has an effect that is both immediately and durationally negative on survivors. Aside from the internal difficulties PTSD causes those who experience it, several external pressures are also associated with it. For example, PTSD is associated with low socio-economic status. Brewin et al., *Meta-Analysis of Risk Factors for Posttraumatic Stress Disorder in Trauma-Exposed Adults*, 68 J. CONSULTING & CLINICAL PSYCH. 5, 748–766 (2000). PTSD is also associated with increased risk of substance abuse. Leonard A. Jason et

and represent the norm for plaintiffs seeking a remedy after an agent or employee of a governmental entity causes real, palpable, life-altering harm.

2. Group Two: Effect on Plaintiffs Generally and Illustrative Caselaw

All states in Group Two share a simple through-line: plaintiffs will likely face more challenges bringing a tort claim against a governmental entity in these states than in the majority of other states. States in Group Two either codified the public duty doctrine,[107] provided the functional equivalent of the doctrine by statute,[108] or delineated so many exceptions to liability that successfully stating a claim was out of the question.[109] Although Group Two has the fewest

al., *How Type of Treatment and Presence of PTSD Affect Employment, Self-regulation, and Abstinence*, 13 NEW AM. J. PSYCH. 2, June 2011, at 175–186.

107. N.D. CENT. CODE § 32-12.1-03(3)(g) (LexisNexis, LEXIS through all legislation from the 68th Legislative Assembly (2023) (defining public duty and listing the special duty exceptions); OHIO REV. CODE ANN. § 2743.02(A)(3)(a)–(b)(iv) (LexisNexis, LEXIS through File 56 of the 135th General Assembly (2023-2024)) ("the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty," noting several exceptions codified by statute.); N.C. GEN. STAT. ANN. § 143-299.1A (LexisNexis, LEXIS through Session Laws 2024-45 of the 2024 Regular Session of the General Assembly) (titled "Limit use of [the] public duty doctrine as an affirmative defense.").

108. *See, e.g.*, GA. CODE ANN. §§ 36-33-2–3 (LexisNexis, LEXIS through 2024 Regular and Extraordinary Session of the General Assembly) (providing that "[w]here municipal corporations are not required by statute to perform an act, they may not be held liable for exercising their discretion in failing to perform the act[,]" and further providing that "[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.").

109. *See, e.g.*, KAN. STAT. ANN. § 75-6104(a) (LexisNexis, LEXIS through laws enacted during the 2024 Regular Session and Special Session of the Kansas Legislature) (providing twenty-four detailed exceptions to liability, including "failure to provide, or the method of providing, police or fire protection"); MO. REV. STAT. § 537.600(1) (LexisNexis, LEXIS through 102nd General Assembly, 2024 2nd Regular Session) (only removing immunity "for negligent acts or omissions" in the case of injuries arising out of "the operation of motor vehicles . . . within the course of their employment," and injuries arising out of the condition of a property.); IOWA CODE § 669.14 (LexisNexis, LEXIS through legislation from the 2024 Regular Session of the 90th General Assembly) (providing a list of sixteen detailed exceptions to the waiver of immunity); N.Y. CT. CL. ACT §§ 8–12 (LexisNexis, LEXIS through 2024 released

members, these states most need statutory attention. For example, in North Dakota, the public duty doctrine and legislatively approved exceptions are codified by statute,[110] leaving the success of a plaintiff's

Chapters 1-432) (establishing a Court of Claims for actions against governmental entities and leaving courts to determine the scope and nature of liability); CAL. GOV'T CODE §§ 815–818.9 (Deering, LEXIS through the 2024 Regular Session Ch. 268); FLA. STAT. ANN. § 768.28 (LexisNexis, LEXIS through the 2024 regular session) (providing multiple exceptions to the waiver of immunity); 42 PA. CONS. STAT. § 8542(b) (LexisNexis, LEXIS through 2024 Regular Session Act 95) (providing only nine fairly specific waivers of immunity); IND. CODE ANN. § 34-13-3-3(a) (Burns, LEXIS through P.L. 171-2024 of the Second Regular Session of the 123rd General Assembly) (listing twenty-four exceptions, and some exceptions to those exceptions); S.C. CODE ANN. § 15-78-60 (LexisNexis, LEXIS through 2024 Regular Session Act No. 250) (listing forty exceptions from the waiver of immunity); TENN. CODE ANN. § 29-20-205(1)–(8) (LexisNexis, LEXIS through the 2024 Regular Session). Tennessee's statute provides several exceptions; however, it is primarily problematic for the way state courts' interpretation of the public duty doctrine interplays with the statute. *See infra* notes 154–167 and accompanying text; S.D. CODIFIED LAWS § 21-32A-1 (LexisNexis, Current through the 2024 Regular Session of the 99th South Dakota Legislative Assembly) (stating that "[e]xcept insofar as a public entity participates in a risk sharing pool or insurance is purchased . . . any public entity is immune from liability for damages whether the function in which it is involved is governmental or proprietary. The immunity recognized herein may be raised by way of affirmative defense."). South Dakota relies primarily on state courts and judges to fill in the gaps left by its Tort Claims Act. This has led to use of the public duty doctrine and four recognized exceptions in the state. Tipton v. Town of Tabor, 567 N.W.2d 351, 358–67 (S.D. 1997). The exceptions are (1) "a violation of law constituting a dangerous condition" where constructive knowledge is not enough; (2) reasonable reliance "based on personal assurances[;]" (3) a legislative enactment designed to protect a specific class of individuals; and (4) a failure to avoid a risk of harm where "official action must either cause harm itself or expose plaintiffs to new or greater risks, leaving them in a worse position than they were before official action." *Id.*

110. N.D. CENT. CODE § 32-12.1-03(3)(g)(1)–(4) (LexisNexis, Current through all legislation from the 68th Legislative Assembly (2023)) (delineating four exceptions to the public duty doctrine, namely, (1) when "direct contact" exists "between the political subdivision and the injured party"; (2) when the political subdivision makes assumptions, via "promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured"; (3) "knowledge on the part of the political subdivision that inaction of the political subdivision could lead to harm"; or (4) "justifiable reliance on the political subdivision's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the political subdivision, or the political subdivision action increases the risk of harm.").

claim against a governmental entity dependent on the extent to which the legislature is mindful, forward-looking, and well functioning.[111]

Other states in Group Two whose statutes are either over or under inclusive present a similar challenge for plaintiffs. The underinclusive Tort Claims Acts do not provide many options for plaintiffs to bring claims against governmental entities and leave courts to apply the public duty doctrine however they see fit.[112] When courts

This statutory scheme does not remove the role of the courts in interpreting the reach of the exceptions—under the third exception, does knowledge mean actual or constructive knowledge? Does it mean either? Further, while codifying the doctrine provides some challenges to plaintiffs—the extent of a court's interpretation is bound to the words produced by the legislature, confining the ability of a court to modify the doctrine—it also addresses some of the problems plaintiffs in other states encounter. For example, in Tennessee, courts will not find a special relationship to exist when the plaintiff alleges that the foundation of the relationship between the public official and the plaintiff is based on "promises, assurances, or any other verbal communication." Wells v. Hamblen Cnty., No. E2004-01968-COA-R3-CV, 2005 WL 2007197, at *7 (Tenn. Ct. App. Aug. 22, 2005). In North Dakota, the statute resolves this issue by allowing a special duty exception to exist when "an assumption by the political subdivision" is based on either "promises or actions." N.D. CENT. CODE § 32-12.1-03(3)(g)(2) (LexisNexis, Current through all legislation from the 68th Legislative Assembly (2023)). While a hypothetical plaintiff in Tennessee whose injuries were proximately caused by a violent individual who police officers failed to investigate despite promising to do so would certainly fail after a motion to dismiss based on the public duty doctrine, a plaintiff in North Dakota might not meet the same fate. Thus, while North Dakota and Tennessee both fall into the same category, this does not mean that they are equally unhelpful to plaintiffs. North Dakota is unhelpful to plaintiffs because of the state's rigidity: the public duty doctrine, as well as its exceptions, are enshrined in statute, making it difficult for plaintiffs to argue for helpful interpretations of the statute or to navigate around its words. Although it is arguably easier in Tennessee for plaintiffs to request modification and charitable interpretation of the doctrine—state supreme courts are free to disregard, criticize, and distance themselves from their own prior rulings when those rulings relate to common law doctrines—Tennessee is also limited by its own adherence and deference to an expansive interpretation of the protection afforded by the public duty doctrine.

111. Tangedal v. Mertens, 883 N.W.2d 871, 875 (N.D. 2016) (noting that the purpose of the Tort Claims Act is, in part, to "limit exposure to potential liability."). Plaintiffs should be wary if limiting liability for municipal entities controls the extent of liability provided in the statute.

112. *See, e.g.*, S.D. CODIFIED LAWS § 21-32A-1 (LexisNexis, Current through the 2024 Regular Session of the 99th South Dakota Legislative Assembly) (stating that "[e]xcept insofar as a public entity participates in a risk sharing pool or insurance is

apply the public duty doctrine in a state with an underinclusive Tort Claims Act, the results for plaintiffs appear arbitrary.[113] For example, a Georgia court found that plaintiffs harmed by social services employees do not have to contend with the public duty doctrine, while those harmed by police officers must overcome the doctrine.[114] Converse to underinclusiveness, overinclusive statutes provide so many exceptions to the state's consent to lawsuits that the removal of immunity is mooted.[115]

Like states in Group One, courts in Group Two states have issued a number of opinions detailing egregious fact patterns where plaintiffs were left without recovery because of the harsh nature of the state's Tort Claims Act. For example, in a case from Georgia, the mother of a psychiatric patient, fearing for her own physical safety, plead with the Georgia Department of Behavioral Health and Developmental Disabilities not to discharge her mentally ill daughter.[116] Following her discharge from the facility, the daughter

purchased . . . any public entity is immune from liability for damages whether the function in which it is involved is governmental or proprietary. The immunity recognized herein may be raised by way of affirmative defense."); E.P. v. Riley, 604 N.W.2d 7, 9, 13 (S.D. 1999) (ruling that the public duty doctrine does not shield South Dakota's Department of Social Services from liability but retaining the doctrine for law enforcement officers).

113. *See supra* note 110.

114. *See supra* note 110. Whether a distinction between social services employees and police officers is wise is outside the scope of this Note. However, this Note assumes that the more plaintiffs who can overcome the public duty doctrine, the better for plaintiffs in remedying harm caused by governmental entities. Moreover, other arbitrary distinctions abound in the governmental immunity context. For example, is there any utility in statutes applicable to police officers, or policies governing the safest way to extinguish a fire, if negligent, grossly negligent, or reckless disregard of such policies does not affect the immunity afforded by the public duty doctrine? *See* Southers v. City of Farmington, 263 S.W.3d 603, 617 (Mo. 2008) (en banc) ("[p]ublic employees' conduct that is contrary to applicable statutes or policies . . . does not remove their negligence from the protections of the official immunity or public duty doctrines.").

115. *See, e.g.*, KAN. STAT. ANN. § 75-6104(a) (LexisNexis, LEXIS through laws enacted during the 2024 Regular Session and Special Session of the Kansas Legislature); IOWA CODE § 669.14 (LexisNexis, LEXIS through legislation from the 2024 Regular Session of the 90th General Assembly); OKLA. STAT. ANN. tit. 51, § 155 (listing thirty-seven exceptions to the doctrine); *see supra* note 108.

116. Chin Pak v. Ga. Dep't of Behav. Health & Developmental Disabilities, 731 S.E.2d 384 (Ga. Ct. App. 2012).

doused her mother in gasoline, set her on fire, and killed her.[117] The administrator of the decedent's estate, likely facing the prospect of an insufficient recovery from the mentally-ill daughter, had his lawsuit against the governmental agency dismissed.[118] The Georgia Court of Appeals dismissed the plaintiff's claims because the state's Tort Claims Act has an exception to the waiver of immunity for claims involving assault and battery.[119] This case exemplifies how a standard exception to the waiver of immunity—barring claims involving assault and battery—has pernicious results that protect negligent municipalities for the assault or battery of a non-governmental actor.

Other states impose similar restrictions on claims involving state Tort Claims Acts.[120] "In an Indiana case, the surviving spouse of a man who died from a heart attack sued the city providing emergency medical services for withholding those emergency services for nearly an hour."[121] The Indiana Supreme Court affirmed a lower court's dismissal of the spouse's claims after interpreting a statute that barred liability for loss "that 'results from' the operation or use of 'an enhanced emergency communication system.'"[122] Although the plaintiff's claim was ultimately dismissed, one Justice pointed out the manifestly unfair results of a reductive interpretation of statutory language:

> The plaintiff's claim is not for a loss that resulted from the failure of this communication system, but rather for a loss that separately resulted from the decision not to send an available ambulance due to . . . separate obligations favoring the Columbus Fire Department. The statutory

117. *Id.* at 386.

118. *Id.* at 387.

119. *Id.*; *see also* GA. CODE ANN. § 50-21-24(7) (LexisNexis, LEXIS through 2024 Regular and Extraordinary Session of the General Assembly) ("The state shall have no liability for losses resulting from: . . . [a]ssault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights.").

120. Giles v. Brown Cnty., 868 N.E.2d 478 (Ind. 2007).

121. *Id.*

122. *Id.* at 482 (Dickson, J., dissenting) (quoting IND. CODE ANN. § 34-13-3-3(19) (LexisNexis, LEXIS through P.L. 171-2024 of the Second Regular Session of the 123rd General Assembly)).

> immunity, in derogation of common law, must be strictly construed against limitations on the right to bring an action.[123]

Like plaintiffs in Group One, plaintiffs in Group Two will likely fail to recover, regardless of how governmental nonfeasance kills them.[124]

3. Group Three: States That Retain the Doctrine at Common Law but Offer More Waivers of Immunity

Tort Claims Acts in Group Three, like those found in West Virginia, Louisiana, and Arizona, currently represent the best situation for plaintiffs harmed by the acts or omissions of a state defendant by expressly waiving immunity when a public official acts with a mental state more culpable than ordinary negligence.[125] Interestingly, many of

123. *Id.*

124. *See supra* notes 104, 116–19.

125. *See, e.g.*, W. VA. CODE ANN. § 29-12A-5(b)(2) (Michie's, LEXIS through the 2024 regular session and the first extraordinary session) (specifying that if "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner," immunity is lifted); LA. STAT. ANN. § 9:2798.1(c)(2) (West, Current through the 2024 First Extraordinary, Second Extraordinary and Regular Sessions) (stating that immunity will not survive "acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct"); ARIZ. REV. STAT. ANN. § 12-820.02(A) (West, Westlaw through legislation of the Second Regular Session of the Fifty-Sixth Legislature (2024)) (providing immunity "[u]nless a public employee acting within the scope of the public employee's employment intended to cause injury or was grossly negligent"); R.I. GEN. LAWS ANN. § 9-31-9(2) (LexisNexis, LEXIS through Chapter 457 of the 2024 Session) ("[t]he attorney general may refuse to defend an action [if] . . . [t]he act or the failure to act was because of actual fraud, willful misconduct, or actual malice"); MISS. CODE ANN. § 11-46-9(1)(c) (LexisNexis, LEXIS with 2024 1st and 2nd Extraordinary Sessions and Regular Session legislation, including changes and corrections made by the Joint Legislative Committee on Compilation, Revision and Publication of Legislation) (exempting liability for "any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection," but removing immunity when "the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury"); MONT. CODE ANN. § 2-9-108(2) (West, Westlaw through the end of the 2023 Session of the Montana Legislature) ("The immunity granted by this subsection does not extend to serious bodily injury or

these Tort Claims Acts seemingly uproot the exceptions to the public duty doctrine and codify them as exceptions to governmental immunity generally.[126] Recall that the public duty doctrine, at its core, stands for the proposition that a duty to all is a duty to no one in particular.[127] Thus, rather than an official's "reckless misconduct" serving as an exception to the public duty doctrine's "no duty" rule, it instead serves as an exception to immunity generally.[128] This removes a step from the analysis: rather than first asking if the plaintiff's theory of negligence demonstrates a duty owed by the public official outside of her duty to the public generally, one instead must first ask whether the defendant owed the plaintiff a duty.[129]

The following example illustrates the practical effect of omitting this step in the analysis of a tort action against a government actor. Suppose a police officer, Ross, volunteered to drive a plaintiff-witness home after questioning the plaintiff-witness about a crime. Suppose

death resulting from negligence or to damages resulting from medical malpractice, gross negligence, willful or wanton misconduct, or an intentional tort."); MICH. COMP. LAWS ANN. § 691.1407(2)(c) (West, Westlaw through P.A.2024, No. 148, of the 2024 Regular Session, 102nd Legislature) (providing that a condition for immunity is that an "officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage"); MD. CODE ANN. CTS. & JUD. PROC. § 5-522(a)(4)(ii) (Michie's, LEXIS through all acts of the 2024 Regular Session) ("[I]mmunity of the State is not waived . . . for . . . [a]ny tortious act or omission of State personnel that . . . is made with malice or gross negligence.").

126. *Compare* W. VA. CODE ANN. § 29-12A-5(b)(2) (Michie's, LEXIS through the 2024 regular session and the first extraordinary session) (specifying that if "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner," immunity is lifted.), *with* Haynes v. Perry Cnty., No. M2020-01448-COA-R3-CV, 2022 WL 1210462, at *1–*2 (Tenn. Ct. App. Apr. 25, 2022) (allowing a claim to proceed for containing "sufficient factual allegations of reckless misconduct.").

127. *See supra* note 17 and accompanying text.

128. W. VA. CODE ANN. § 29-12A-5(b)(2) (Michie's, LEXIS through the 2024 regular session and the first extraordinary session) (specifying that if "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner," immunity is lifted.).

129. This squares with generally accepted negligence principles. *See*, *e.g.*, Turner v. Jordan, 957 S.W.2d 815, 818 (Tenn. 1997) (noting that the imposition of a legal duty is often the first step in a negligence analysis, and that the "imposition of a legal duty 'reflects society's contemporary policies and social requirements concerning the rights of individuals and the general public to be protected from another's act or conduct.'") (quoting Bradshaw v. Daniel, 854 S.W.2d 865, 870 (Tenn.1993)).

too that officer Ross had an alcohol problem and had become intoxicated on the job. Finally, suppose that the police department knew about officer Ross's alcohol problem but chose to ignore it because of workforce shortages. While driving the plaintiff-witness home, officer Ross's drunken state causes a horrible accident that renders the plaintiff-witness a quadriplegic. In a state that removes immunity for gross negligence, the plaintiff will surely establish a *prima facie* case of gross negligence against the police department and officer Ross. And, in that state, the plaintiff-witness need not show that officer Ross's duty to drive a passenger safely was a duty owed to the plaintiff rather than to the public at large. Therefore, plaintiffs in Group Three states, solely by virtue of where an alleged harm occurred, will state a claim under this hypothetical, where plaintiffs in Groups One and Two will fail.[130] First, Group One and Two states, like Tennessee, do not remove immunity for gross negligence, despite the likelihood that many of the plaintiff-witnesses' claims would sound in gross negligence. Assuming, however, that the plaintiff-witness claimed regular negligence in the alternative, the plaintiff-witness would still have to show that officer Ross's duty to her was different than his duty to the public at large, or that the plaintiff-witness can show an exception applies.[131]

The Tort Claims Acts in Group Three states repurpose common exceptions to the public duty doctrine and place them directly in the statute as general exceptions to governmental immunity.[132] However, despite helpful statutory language, some Group Three courts still interpret Tort Claims Acts in a manner that is unhelpful to plaintiffs.[133]

130. *See supra* Sections II.*B*.1–3.

131. The plaintiff-witness bringing the claim in Tennessee would automatically be unable to use the "reckless misconduct" exception, as Tennessee courts have interpreted Tennessee's Tort Claims Act as retaining immunity for acts or omissions that constitute more than negligence. *See infra* Section II.*C*.

132. *See supra* note 125.

133. *Compare* MISS. CODE ANN. § 11-46-9(1)(c) (LexisNexis, LEXIS with 2024 1st and 2nd Extraordinary Sessions and Regular Session legislation, including changes and corrections made by the Joint Legislative Committee on Compilation, Revision and Publication of Legislation) (exempting liability for "any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection," but removing immunity when "the employee acted in reckless disregard of the safety and well-being of any person

Ultimately, Tort Claims Acts in these states are most helpful for plaintiffs because the statutory exceptions represent a common-sense achievement: rather than having more immunity for recklessness, gross negligence, or wanton misconduct, state actors have less or no immunity for these egregious acts and omissions.[134]

Despite the comparative benefits plaintiffs in Group Three might expect, similar challenges emerge. Tort Claims Acts in Group Three, like those in Groups One and Two, often disfavor some of the most vulnerable plaintiffs. For example, in one West Virginia case, the parents of a transgender student sued a county board of education after an assistant principal trapped their child in a bathroom and harassed the transgender student.[135] The state's high court affirmed dismissal of plaintiff's claims for negligent hiring and supervision, but allowed its claim for negligent retention, demonstrating how states in Group Three are only marginally better for plaintiffs than states in Groups One and Two, as plaintiffs in Groups One and Two states would have faced total dismissal.[136] However, plaintiffs in Group Three do not always experience this marginal benefit. For example, the parent of a minor child who died from meningitis after the alleged medical malpractice of a government doctor had his wrongful death claims dismissed under Mississippi's Tort Claims Act.[137] Therefore, while states in Group Three might provide a partial model for some of the helpful elements to include in a proposed amendment to a state's Tort Claims Act, the caselaw demonstrates that a more complete template for a statutory amendment does not currently exist. Turning to a state that embraces

not engaged in criminal activity at the time of injury"), *with* Miss. Dep't of Wildlife, Fisheries, & Parks v. Webb, 248 So. 3d 772, 779 (Miss. 2018) (noting that certain violations of statute will not necessarily constitute reckless disregard because the analysis of the reckless disregard statutory exception requires a "totality of the circumstances" inquiry).

134. *See* R.I. GEN. LAWS ANN. § 9-31-1(b)(2) (LexisNexis, LEXIS through Chapter 457 of the 2024 Session) for an example of a statute providing government actors immunity for intentional, reckless, or grossly negligent acts or failures to act.

135. C.C. v. Harrison Cnty. Bd. of Edu., 859 S.E.2d 762, 766–67 (W. Va. 2021).

136. *Id.* at 776.

137. Mallery v. Taylor, 805 So. 2d 613, 622 (Miss. Ct. App. 2002) ("[N]o employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties.") (quoting MISS. CODE ANN. §11-46-7(2) (Rev. 1999)).

the public duty doctrine, Tennessee is a quintessential case study of a state ripe for statutory intervention.

C. The Public Duty Doctrine in Tennessee: A State in Desperate Need of Statutory Attention

Because of its long-standing place in common law, "the public duty doctrine [is] widely accepted by most state courts, including Tennessee."[138] Like many states,[139] Tennessee recognizes that if a Plaintiff meets one of the exceptions to the public duty doctrine, it will not shield a defendant from civil liability.[140] "Affirmative undertaking," "statutory duty," and "reckless misconduct" are the only

138. Ezell v. Cockrell, 902 S.W.2d 394, 397 (Tenn. 1995). The court in *Ezell* noted that "one of the earliest applications of the doctrine occurred," in the late 1800s in Tennessee. *Id.*

139. *See, e.g.*, Breese v. City of Burlington, 945 N.W.2d 12, 20 (Iowa 2020) ("[T]he special relationship exception to the public-duty doctrine . . . renders a governmental entity liable for the violation of what would otherwise be a duty to the general public if a special relationship existed between the entity and the plaintiff that gave rise to a special duty of care toward the plaintiff."); Prindel v. Ravalli Cnty., 133 P.3d 165, 175 (Mont. 2006) ("Under Montana law, it is well established that a duty may arise from a statutorily imposed obligation."); Vanasek v. Duke Power Co., 511 S.E.2d 41, 45 (N.C. Ct. App. 1999) ("[A] minority of jurisdictions have created an additional exception to the public duty doctrine for 'high risk' situations, allowing a negligence claim to proceed where the plaintiff shows that 'local government officials knew or should have known the plaintiff or members of his class would be exposed to an unusually high risk if care was not taken by local government personnel, even without proof of reliance by the plaintiff.'"). However, states are not uniform in their formulation of these exceptions, often applying them differently and formulating different tests for determining whether an exception has been met. *See* Ezell v. Cockrell, 902 S.W.2d 394, 401 (Tenn. 1995) ("While the 'special duty' exception is recognized by most jurisdictions applying the public duty rule, the test varies from jurisdiction to jurisdiction.") (citing 48 A.L.R.4th §§ 3, 6 (1986 & Supp. 1994)).

140. Chase v. City of Memphis, 971 S.W.2d 380, 385 (Tenn. 1998) (stating that the "exception, however, removes immunity when: (1) a public official affirmatively undertakes to protect the plaintiff and the plaintiff relies upon the undertaking; (2) a statute specifically provides for a cause of action against an official or municipality for injuries resulting to a particular class of individuals, of which the plaintiff is a member, from failure to enforce certain laws; or (3) a plaintiff alleges a cause of action involving intent, malice, or reckless misconduct.").

exceptions to the public duty doctrine in 2024.[141] A recent interpretation by the Tennessee Supreme Court of both Tennessee's GTLA and the public duty doctrine signals a difficult road ahead for plaintiffs hoping to bring a tort claim against a governmental entity or actor.[142] Unfortunately for Tennessee plaintiffs, government liability litigation is already rife with practical problems.[143] For example, plaintiffs in Tennessee injured by negligent, grossly negligent, or reckless misconduct by governmental employees cannot collect damages from the deeper coffers of the governmental entity due to the current interpretation of Tennessee's Tort Claims Act and the public duty doctrine.[144]

A common solution offered by commentators to address the problems associated with the public duty doctrine is outright abolition of the doctrine.[145] In Tennessee, abolition of the doctrine is impractical because the public duty doctrine still stands on sturdy public policy

141. *See, e.g.*, *supra* notes 16–17 (detailing the exceptions to the public duty doctrine in Tennessee); Lawson v. Hawkins Cnty., 661 S.W.3d 54, 68 (Tenn. 2023) (Holly, J., concurring) (noting the three exceptions identified by the Court in *Chase*.); *supra* note 139.

142. *See infra* notes 158–67 and accompanying text for a more in-depth discussion of the problems that surround tort claims against governmental actors in Tennessee. *See also Lawson*, 661 S.W.3d at 64 (rejecting a twenty-year-old case from the Tennessee Court of Appeals, *Brown v. Hamilton Cnty.*, 126 S.W.3d 43 (Tenn. Ct. App. 2003), when it found that an exception to the public duty doctrine applied for reckless misconduct by a public employee, because that analysis conflicted with the GTLA). A statutory amendment that allowed certain types of gross-negligence claims to proceed would remedy the problem for plaintiffs in a post-*Lawson* landscape.

143. *Compare* Haynes v. Perry Cnty., No. M2020-01448-COA-R3-CV, 2022 WL 1210462, at *1–2 (Tenn. Ct. App. Apr. 25, 2022) (allowing a claim to proceed for containing "sufficient factual allegations of reckless misconduct"), *with Lawson*, 661 S.W.3d at 68 (deciding that the reckless misconduct exception to the public duty doctrine would not apply because it conflicts with the GTLA, unless "a plaintiff adequately alleges a reckless-misconduct claim against [a governmental] *employee*.").

144. *See supra* notes 18–19.

145. Several law review notes and articles advocate for abolishing the public duty doctrine. *See, e.g.*, Lee C. Baxter, Note, Gonzales v. City of Bozeman: *The Public Duty Doctrine's Unconstitutional Treatment of Government Defendants in Tort Claims*, 72 MONT. L. REV. 299, 300 (Summer 2011) ("Montana public policy favors the doctrine's abolishment."); Catherine Voigt, *The Death of the Special Duty Exception of Statutory Governmental Immunity*, 86 ILL. BAR J. 372, 372 (1998) ("[T]he public duty rule [is] no longer [a] viable legal concept[]").

grounds—legislators fear the cost-shifting problems associated with reduced immunity for governmental actors.[146] Additionally, expecting the courts or the legislature to abrogate the doctrine is naïve[147] and unlikely.[148] On the other hand, leaving the landscape of governmental immunity, the public duty doctrine, and Tennessee's Tort Claims Act untouched is not a viable option.[149] Far too often, the public duty

146. *See, e.g.*, Morgan v. District of Columbia, 468 A.2d 1306, 1311 (D.C. 1983) ("[I]ndividuals, juries and courts are ill-equipped to judge 'considered legislative-executive decisions,' . . .[s]evere depletion of [governmental] resources could well result if every oversight, omission or blunder made by a police official rendered a state or municipality potentially liable in compensatory, let alone punitive damages.") (quoting Riss v. City of New York, 240 N.E.2d 860, 860 (N.Y. 1986)), *cited with approval in* Ezell v. Cockrell, 902 S.W.2d 394, 398 (Tenn. 1995); *see also* Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 833 (1981).

147. *Police Liability for Negligent Failure to Prevent Crime*, *supra* note 146 at 827. Courts in many states have re-affirmed the validity of the public policy objectives underpinning the public duty doctrine. *See* Lawson v. Hawkins Cnty. 661 S.W.3d 54, 69 (Tenn. 2023) (Kirby, J., concurring) (noting that in Tennessee, public policy supports retention of the doctrine); State *ex rel.* Mont. Bd. of Med. Exam'rs v. Mont. Second Jud. Dist. Ct., OP 19-0340, 2019 WL 6035043 at *6, *18 (Mont. Nov. 12, 2019) (Sandefur, J., dissenting) (noting the public policy justifications).

148. *Lawson*, 661 S.W.3d at 69 (Tenn. 2023) (Kirby, J., concurring) ("'the public duty doctrine survived enactment of . . . Tennessee['s] [GTLA], and . . . sound public policy supports' continued application of the public duty doctrine in Tennessee.") (quoting Ezell, 902 S.W.2d at404). The public duty doctrine has emerged repeatedly in the past three decades, offering the Tennessee Supreme Court numerous opportunities to abrogate or limit its role in the governmental tort immunity context. Earlier in 2023, the Supreme Court again re-affirmed its role in the governmental liability context, with only one justice hinting at a willingness to revisit whether Tennessee should continue to enforce it. *Id.* at 70.

149. *See, e.g.*, King v. Town of Selmer, No. W2023-00390-COA-R9-CV, 2024 WL 81516, at *1 (Tenn. Ct. App. Jan. 8, 2024) (reversing trial court's denial of defendant's motion for summary judgment on public duty doctrine grounds); Holt v. City of Fayetteville, No. M2014–02573–COA–R3–CV, 2016 WL 1045537, at *1 (Tenn. Ct. App. Mar. 15, 2016)) (affirming trial court's dismissal of plaintiff's claims on public duty doctrine grounds after plaintiff claimed that defendant police officer's failure to properly restrain suspect who stole a police car caused her injuries after suspect collided with plaintiff); Estate of McFarlin v. State, 881 N.W.2d 51, 52–53 (Iowa 2016) (affirming trial court's dismissal of plaintiff's claims on public duty doctrine grounds when plaintiff claimed that defendant state's failure to properly remove or identify a dredge pipeline in a state-owned lake resulted in the death of the

doctrine forestalls plaintiffs from having their claims litigated, as cases are decided on a motion to dismiss or motion for summary judgment.[150]

III. AMENDING TENNESSEE'S TORT CLAIMS ACT: HARMONY WITH THE COMMON LAW AND MORE EQUITABLE OUTCOMES FOR PLAINTIFFS

"In a future case, I hope we can look squarely at whether we should continue to adhere to Ezell*, limit application of the public duty doctrine and the special duty exception, or discontinue application of those common law principles in deference to the statutes governing immunity."*[151]

Assuming the Tennessee Supreme Court will eventually "look squarely" at whether the public duty doctrine continues to serve a purpose, this section anticipates a landscape where plaintiffs must rely more on the statutory scheme than the common law doctrine.[152] This section illustrates the specific problems that commonly arise when litigants must wrestle with both Tennessee's GTLA and the public duty doctrine. Additionally, this section focuses on the problems that would likely emerge in Tennessee if the GTLA as currently amended existed without the public duty doctrine. Ultimately, this section critiques the GTLA's utility for plaintiffs.[153] Having briefly delineated these

plaintiff's child when a speedboat in which the child was riding struck the pipe and the child died); Keiswetter v. State, 373 P.3d 803, 804 (Kan. 2016) (affirming trial court's dismissal of plaintiff's claims on public duty doctrine grounds after plaintiff claimed that defendant State failed to supervise a correctional inmate who escaped and murdered plaintiff's mother).

150. *See King*, 2024 WL 81516, at *1; *Holt*, 2016 WL 1045537, at *1.

151. Lawson v. Hawkins Cnty., 661 S.W.3d 54, 70 (Tenn. 2023) (Kirby, J., concurring).

152. *Id.*

153. It is difficult to imagine that the GTLA, a governing authority for tort cases in Tennessee, actually serves any of the foundational purposes of tort law. *See infra* note 177. But other issues with the GTLA abound. For example, the GTLA allows judges to award attorney's fees to the state. *See, e.g.*, Taylor v. Miriam's Promise, No. M2020-01509-COA-R3-CV, 2022 WL 1040371, at *10 (Tenn. Ct. App. Apr. 7, 2022); TENN. CODE ANN. § 29-20-113(a) (LexisNexis, LEXIS through the 2024 Regular Session) ("if a claim is filed with a Tennessee or federal court . . . against an employee of the state or of a governmental entity of the state in the person's individual capacity . . . and that employee prevails in the proceeding . . . then the court or other

problems, this section employs relevant caselaw to demonstrate the effect of the GTLA's many problems on specific plaintiffs. Then, this section juxtaposes a representative case from Tennessee with a representative case from a Group Three state to showcase the effect of the interaction between the GTLA and public duty doctrine. This juxtaposition demonstrates that Group Three Tort Claims Acts are an improvement, but not a solution in themselves.

A. Tennessee's GTLA and Public Duty Doctrine: Current Issues and Potential Problems in a Future Without the Public Duty Doctrine

Interplay between the GTLA and the public duty doctrine confronts plaintiffs with both substantive and procedural problems. Substantively, plaintiffs in Tennessee can only bring claims based on theories of negligence[154] and cannot bring claims arising out of gross negligence,[155] reckless misconduct, willful or wanton actions, or virtually any intentional tort.[156] Procedurally, the GTLA delays a plaintiff's road to recovery,[157] allows judges to award attorney's fees to successful governmental defendants,[158] and forces courts to determine whether a plaintiff can show proximate causation.[159] Although the substantive issues with the GTLA tend to provide a more significant obstacle for plaintiffs, some of the procedural hurdles add

judicial body on motion shall award reasonable attorneys' fees and costs incurred by the employee in defending the claim.").

154. TENN. CODE ANN. § 29-20-205 (LexisNexis, LEXIS through the 2024 Regular Session) ("Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment . . . .").

155. Lawson v. Hawkins Cnty., 661 S.W.3d 54, 59 (Tenn. 2023) ("[We] conclude that [the GTLA] removes immunity only for ordinary negligence, not gross negligence or recklessness.").

156. TENN. CODE ANN. § 29-20-205(2)–(10) (LexisNexis, LEXIS through the 2024 Regular Session).

157. TENN. CODE ANN. § 29-20-304 (LexisNexis, LEXIS through the 2024 Regular Session).

158. TENN. CODE ANN. § 29-20-113(a) (LexisNexis, LEXIS through the 2024 Regular Session).

159. TENN. CODE ANN. § 29-20-310(a) (LexisNexis, LEXIS through the 2024 Regular Session).

insult to injury.[160] To imagine a different future for plaintiffs reliant upon the GTLA, practitioners, lobbyists, and legislatures must rework the substantive and procedural hurdles to both address the government's concerns and to help achieve more equitable outcomes for plaintiffs. This section provides the foundation for amendments to the GTLA by discussing the problematic elements of the GTLA in more detail.

Several issues with the GTLA stem from its incongruence with the the public duty doctrine's common law exceptions. Following the Tennessee Supreme Court's ruling in *Lawson v. Hawkins County*, a plaintiff cannot sue a governmental entity or employee in his official capacity under any tort theory other than negligence.[161] In *Hawkins County*, Penny Lawson, the spouse of decedent Steven Lawson, sued Hawkins County and various county agencies after the death of her husband.[162] Steven Lawson was traveling on Highway 70 in Hawkins County located on Clinch Mountain adjacent to the Virginia-Tennessee border.[163] After a mudslide washed away part of the highway, local governmental employees tasked with maintaining highway safety failed to close the part of the highway impacted by the mudslide.[164] Nearly an hour after the initial report of the mudslide, and following the inaction of several governmental employees, Steven Lawson's car rolled down the mountain.[165] Steven Lawson was trapped inside his car for eleven hours before emergency services located his lifeless body.[166]

The Court limited its holding to address whether the GTLA allows private citizens to sue governmental entities for torts sounding in more than ordinary negligence, like recklessness or gross negligence.[167] The Court answered in the negative.[168] The *Lawson* Court reasoned that the GTLA precluded actions in gross negligence or recklessness because of the language used by the Tennessee legislature

160. *See supra* notes 157–59.

161. 661 S.W.3d at 59 (Tenn. 2023).

162. *Id.* at 57.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Lawson v. Hawkins Cnty., 661 S.W.3d 54, 58 (Tenn. 2023).

168. *Id.* at 59.

and past definitions employed by Tennessee courts.[169] Addressing the public duty doctrine, the Supreme Court attempted to allay any fear that the doctrine's exceptions were now moot:

> Relatedly, plaintiff argues that the public-duty doctrine's special-duty exception for cases involving "intent, malice, or reckless misconduct" could never apply if the Act removes immunity only for negligent employee acts. Not so. The exception would apply in at least one situation: when a plaintiff adequately alleges a reckless-misconduct claim against an employee.[170]

Therefore, two of the previously recognized exceptions to the public duty doctrine, the reckless misconduct exception[171] and the affirmative undertaking exception,[172] will almost always be moot. In addition to the problems delineated above with the reckless misconduct exception, the affirmative undertaking exception is nearly impossible to show in most fact patterns—for example, it will not apply when the

169. The GTLA lifts immunity for negligent acts, not grossly negligent or reckless acts. TENN. CODE ANN. § 29-20-205. The *Lawson* Court also noted that Tennessee "courts hav[ing] consistently defined gross negligence and recklessness in a manner distinct from ordinary negligence," bolstered the Court's reasoning. *Lawson*, 661 S.W.3d at 63.

170. *Lawson*, 661 S.W.3d at 68. While it is true that practitioners can still sue governmental employees, in their personal capacities, despite its holding in *Lawson*, this is never the goal of litigants seeking the deeper pockets of the government. Moreover, litigants' ability to have their day in court against a governmental actor who wronged them speaks to a lack of governmental accountability under the current paradigm.

171. *See supra* notes 18–19. To the extent that this exception would remove immunity for the reckless misconduct or gross negligence of a governmental agent, it now conflicts with the GTLA which only removes immunity for theories of negligence.

172. *See, e.g.*, Hurd v. Flores, 221 S.W.3d 14, 29 (Tenn. Ct. App. 2006) (holding that the plaintiffs were "unable to avail themselves of the special duty exception" because the harm alleged by the plaintiff related to the deputy's "refusal to enforce the applicable law."). Moreover, verbal assurances do not constitute an affirmative undertaking. Wells v. Hamblem Cnty., No. E2004-01968-COA-R3-CV, 2005 WL 2007197, at *24 (Tenn. Ct. App. Aug. 22, 2005) (Tennessee's "Supreme Court specifically chose not to adopt a standard that include promises, assurances, or any other verbal communication.").

governmental defendant fails to act rather than acting affirmatively.[173] Although the affirmative undertaking exception appears to mirror the general "no duty" rule in common law, it goes further than the common law in disallowing claims based on inactions.[174] This leaves Tennesse with only one exception to the public duty doctrine: the statutory exception, which requires the legislature to specifically provide plaintiffs with a remedy that supersedes the public duty doctrine's general prohibition on liability.[175]

Other issues with the GTLA exist independently of the public duty doctrine. First, removing immunity for ordinary negligence, which consists in asn unintentional wrongdoing, but not for more egregious forms of misconduct, which consists of a more intentional form of wrongdoing is counterintuitive.[176] Second, the Tennessee

173. *See Hamblem Cnty.*, 2005 WL 2007197, at *7 ("the relevant special duty exception expressly requires that the officers undertake to protect the plaintiff 'by their actions,'" meaning that failures to act are not sufficient to establish a special duty exception to the public duty doctrine).

174. Essentially, the affirmative undertaking exception is meant to mirror the common law exception to the general "no duty" rule. For example, when a plaintiff is in a perilous situation not caused by the defendant, but the defendant undertakes to aid the plaintiff, he owes the plaintiff a duty to undertake such aid carefully and not to leave the plaintiff in a worse position. Inexplicably, the same concept, when it applies to governmental agents, will not impose liability if the defendant governmental agent only promised to render aid, or if that defendant's failure to act caused harm. *See, e.g.*, Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 860 (Tenn. 1985) (exemplifying this discrepancy). While the court in *Lindsey* noted that the no-duty rule did not apply to defendant after he told others to wait a while before calling an ambulance for the plaintiff, and couched its reasoning in terms of an affirmative act, the act in question was a verbal statement, which Tennessee will not recognize to overcome the no-duty rule in the public duty doctrine context. *Id.*

175. Chase v. City of Memphis, 971 S.W.2d 380, 385 (Tenn. 1998) (the second exception requires that "a statute specifically provides for a cause of action against an official or municipality for injuries resulting to a particular class of individuals, of which the plaintiff is a member, from failure to enforce certain laws."). Ultimately, the statutory exception creates a losing situation: either the legislature fails to act or is underinclusive in creating remedies for plaintiffs.

176. *See negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining negligence as "The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . . except for conduct that is *intentionally, wantonly, or willfully* disregardful of others' rights.") (emphasis added). An act done intentionally generally means that the actor possessed some mental state

legislature's unwillingness to permit recovery for claims premised on intentional tort theories fails to comport with common sense understandings of how our civil legal system should treat tortfeasors.[177] Although broadening the scope of liability under the GTLA too much raises concerns among some commentators, the Act's current state is untenable.[178] The GTLA's flawed logic is best demonstrated through comparison.

B. Comparative Caselaw from the Current Paradigm

To fully understand the pernicious aspects of Tennessee's GTLA, a comparison of the Volunteer State's caselaw with that of

while doing the act that, in turn, suggests something about the actor's morality. For example, a negligent driver who crashes into another car and causes the driver harm might be liable to the driver for negligence, and to the passenger for negligent infliction of emotional distress. All things being equal, this tortfeasor would face less punishment than a driver who intentionally rams his car into another because of the negative feelings he holds towards the other driver, and due to his desire to inflict harm. While psychologists are uncertain why, the data indicate that "*intentional* harms make people want to blame, condemn, and punish more than unintentional harms." Daniel L. Ames & Susan T. Fiske, *Intentional Harms are Worse, Even When They're Not*, 24 PSYCH. SCI. 9, 1755, 1756–58 (2013). Therefore, intuitively, individuals who inflict harm purposely deserve more severe and frequent punishment in the context of civil liability.

177. By definition, negligent acts or omissions cannot be deterred, insofar as negligence is an accidental, but wrongful act or omission, and one cannot deter accidents. On the other hand, intentional torts are the perfect candidate for deterrence because acts done purposefully are acts that an individual can also purposefully not repeat. To the extent that the body of tort law is premised, in part, on deterring intentionally wrongful acts, the GTLA, as currently amended, subverts a critical goal of tort law. *See* RESTATEMENT (FIRST) OF TORTS § 901 cmt. a (AM. L. INST. 1939) ("[U]nlike the law of contracts or of restitution, the law of torts . . . has within it elements of punishment or deterrence.").

178. To the extent that opponents worry about opening the flood gates of GTLA cases, or worry about overwhelming municipalities and local governments with liability, advocates for amendment should balance these concerns without wavering in support of amendment. For example, one could plausibly argue that it would make more sense to allow theories of gross negligence and reckless misconduct, and retain the prohibition on more specific claims like false imprisonment, trespass, slander, or invasion of privacy. In this way, one could not bring a claim for false imprisonment, even if it involves conduct demonstrating recklessness, but could bring a non-false-imprisonment claim that indicates reckless misconduct on the part of the governmental actor.

jurisdictions with more permissive Tort Claims Acts offers clarity. No single case will demonstrate all of the flaws with the GTLA, or all of the benefits of another state's statute. Therefore, this section discusses one case from Tennessee and two cases from other jurisdictions. One case will demonstrate how Tennessee does not allow GTLA claims based on civil rights violations,[179] while other states, like West Virginia, allow such claims to proceed.[180] Another case will demonstrate how plaintiffs in other jurisdictions, unlike Tennessee plaintiffs, may succeed in defeating a motion to dismiss when the plaintiff brings a claim based on gross negligence.[181] These cases will crystalize some of the major problems associated with the GTLA and lead into a discussion of a model statutory amendment to any state's Tort Claims Act.[182]

Currently, the GTLA does not allow a plaintiff to proceed in an action against a governmental employee or entity alleging civil rights violations.[183] While the GTLA cannot stop a plaintiff from bringing a claim alleging civil rights violations under federal law,[184] the fact that plaintiffs cannot proceed strictly in a civil rights claim in state court remains problematic despite the availability under federal civil rights

179. TENN. CODE ANN. § 29-20-205(2) (LexisNexis, LEXIS through the 2024 Regular Session) ("Immunity from suit of all governmental entities is removed . . . except if the injury arises out of . . . civil rights.").

180. Maston v. Wagner, 781 S.E.2d 936 (W. Va. 2015).

181. Bottomlee v. State, 459 P.3d 493 (Ariz. Ct. App. 2020).

182. *See infra* Part IV.

183. TENN. CODE ANN. § 29-20-205(2) (LexisNexis, LEXIS through the 2024 Regular Session).

184. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."); 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.").

claims.[185] Civil rights claims under federal law are notoriously difficult[186] and present jurisdictional[187] challenges.[188]

Plaintiffs in other jurisdictions, like West Virginia, can bring civil rights claims under a state's Tort Claims Act. For example, in *Maston v. Wagner*, a middle-aged male plaintiff was walking home after a night out in a small town in West Virginia when, inexplicably, two police officers physically assaulted him.[189] Upon repeated questioning, the police officers changed their reasons for stopping and arresting the plaintiff.[190] Regardless, the facts in the appellate record

185. *See, e.g.*, Mosier v. Evans, 90 F.4th 541, 551–52 (6th Cir. 2024) (making an *Erie* guess, the Sixth Circuit Court of Appeals determined that the Tennessee Supreme Court, based on current Tennessee Court of Appeals caselaw, would rule that the GTLA does not permit civil rights claims based on the statutory language).

186. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION (Kris Markarian, Federal Judicial Center 3d ed. 2014). A brief summary illustrates why litigation under 42 U.S.C. § 1983 can be so difficult:

> Section 1983 litigation often requires courts to examine complex, multifaceted issues. Courts may have to interpret the federal Constitution, federal statutes (including § 1983 itself), and even state law. In addition, even if [plaintiffs] establish[ ] a violation of a federally protected right, [they] may not necessarily obtain relief. Courts may deny relief after resolving numerous other issues:jurisdictional questions, such as the *Rooker-Feldman* doctrine, the Eleventh Amendment, standing, and mootness; affirmative defenses, such as absolute and qualified immunity; procedural issues, such as the statute of limitations and preclusion; and the various abstention doctrines.

Id. at 3.

187. Consider the plaintiff residing in a small town or rural area who struggles to find attorneys admitted to practice in federal district court, but whose claim must be brought in such courts.

188. This section of the Note assumes that plaintiffs who cannot bring civil rights claims in state courts, and who must proceed under federal law to bring a civil rights claim, suffer a disadvantage that similarly situated plaintiffs in other jurisdictions do not face.

189. 781 S.E.2d 936, 943–44 (W. Va. 2015).

190. *Id.* at 944 ("The ostensible reasons for [defendant's] arrest shifted . . . . [One] [Officer] stated in his deposition that, initially, he orally advised [Defendant] that he was under arrest for two offenses: fleeing from a police officer on foot and disturbing the peace. [A different officer's] written report describing the arrest said [Defendant] was advised he was being arrested for fleeing on foot and for public intoxication.").

indicate that the police did not have a reason to use physical force against the plaintiff, let alone arrest him.[191] Although the criminal complaint listed four charges against the plaintiff, the prosecutor inexplicably dropped all of these charges.[192] In this case, because the state's Tort Claims Act allowed civil rights claims to proceed, the court reached the case on its merits, ultimately affirming the circuit court's denial of the defendant's motion for summary judgment.[193] The Court found genuine issues of material fact as to whether the police officers violated clearly established constitutional rights, holding that the facts in the record showed "that the deliberate or reckless policies and actions of both the State Police and the Tyler County Sheriff's Department may have caused or contributed to the violations of these established rights."[194]

Compare the West Virginia plaintiff, who seeks to formulate a legal complaint against a governmental agent or entity in state court for claims premised on something worse than negligence, with the Tennessee plaintiff who seeks to formulate a similar legal complaint.[195] To illustrate, consider *Betty H. v. Williamson County*, a recent case arising from a staff member at the Williamson County Juvenile Detention Center sexually assaulting a minor child in the County's custody.[196] The defendant municipality and detention center argued that the plaintiff's claims were barred by the GTLA insofar as they fell under the meaning of "civil rights," which the GTLA prohibits as a basis for imposing governmental liability.[197] Despite the plaintiff claiming that the municipality and detention center's negligent hiring

191. *Id.*

192. *Id.*

193. *Id.* at 956.

194. *Id.* In this way, the West Virginia approach differs from Tennessee's approach in two meaningful ways: allowing civil rights claims and allowing claims based on deliberate or reckless policies. In Tennessee, a similar claim could not proceed, both for its being a civil rights claim, and for its being premised on a tort theory more egregious than negligence.

195. *See, e.g.*, Pheap v. City of Knoxville, 687 F. Supp. 3d 807, 819 (E.D. Tenn. 2023) ("A claim of negligence falls within the civil rights exception when it 'arises out of the same circumstances giving rise to [the] civil rights claim under § 1983.'") (quoting Johnson v. City of Memphis, 617 F.3d 864, 872 (6th Cir. 2010)).

196. No. M2022-00300-COA-R3-CV, 2023 WL 5193537 at *1 (Tenn. Ct. App. Aug. 14, 2023).

197. *Id.* at *4.

and retention allowed a staff member to commit intentional torts, all of which seem only to incidentally infringe upon civil rights, the court found that the plaintiff's claims fell "within the ambit of 'civil rights[,]'" barring them from moving forward.[198] Assuming that a claim against a jailer for sexual assault does fall within the ambit of civil rights and should thus be barred under the current interpretation of the GTLA, it is spurious to also conclude the same of negligent hiring and supervision.[199] Ultimately, the plaintiff could not bring her claims against the municipality, and although local prosecutors charged the governmental employee with rape, even a successful prosecution would do little to alleviate the lasting repercussions of sexual assault.[200] This highlights a key issue in the governmental immunity context—accountability does not ensure recourse for severely impacted plaintiffs. Those defending the current state of governmental immunity should look squarely at the purposes of tort law and ask whether the existing paradigm supports or contradicts those foundational purposes.[201] For even when the individual is held criminally accountable, the victim is still left in a difficult, life-altering situation.

The GTLA also shows deficiency by preventing plaintiffs from proceeding in a claim against a governmental employee or entity on a theory of gross negligence. Unlike Tennessee, several states allow such claims to proceed under their state's Tort Claims Act.[202] For example, in *Bottomlee v. State*, the mother of an infant who died at a daycare facility sued the state because a state licensing inspector for childcare facilities recommended a corrective plan where infants would be placed on their stomachs to strengthen their upper bodies, leading to the death of the plaintiff's child.[203] The plaintiff-mother alleged that the state inspector violated the state's policies against placing children

198. *Id.* at *4–5 (citing Merolla v. Wilson Cnty., No. M2018-00919-COA-R3-CV, 2019 WL 1934829 at *5 (Tenn. Ct. App. May 1, 2019)).

199. It is contradictory to conclude that a negligent act or omission could violate one's civil rights. While not impossible, the vast majority of legal claims of a civil rights violation, especially in the § 1983 context, occur when a police officer intentionally acts or fails to act in such a way that is either designed, or recklessly performed, to achieve extra-legal punishment or physical restraint.

200. *See supra* note 106.

201. *See supra* note 56.

202. Bottomlee v. State, 459 P.3d 493, 495 (Ariz. Ct. App. 2020).

203. *Id.* at 494–95.

in "tummy time," a practice that the FDA warned against when a nursing pillow was also placed with a child.[204] While gross negligence is somewhat incidental to the other legal issues raised in the case, it is important to note that the plaintiff could proceed under a theory of gross negligence under the state's Tort Claims Act.[205] Significantly, the Court rejected defendant's argument that "no duty can be imposed under these circumstances absent an assurance of protection made directly to the plaintiff."[206] Implicitly rejecting the fundamental principle of the public duty doctrine,[207] the Court found that a governmental actor could owe a plaintiff a duty based on a representation to the plaintiff, even if that representation was also made to another.[208] Ultimately, like the civil rights cases discussed previously, the Arizona case is instructive when considering that the GTLA would completely forestall an identical plaintiff in Tennessee from bringing a claim sounding in gross negligence.[209]

There is currently a dearth of caselaw on the issue of governmental liability for gross negligence because the Tennessee Supreme Court recently ruled that plaintiffs cannot maintain an action against a state actor alleging anything more than ordinary negligence.[210] However, if Tennessee law controlled any of the

204. *Id.*

205. *Id.*

206. *Id.* at 496–97.

207. Insofar as the public duty doctrine is the *duty to all, duty to no one in particular* rule, the Court's determination that a duty could extend to a plaintiff under the duty to the public generally so long as the plaintiff is part of that public seemingly contradicts the doctrine. Adams v. State, 555 P.2d 235, 241 (Alaska 1976) ("[W]e consider that the 'duty to all, duty to no-one' doctrine is in reality a form of sovereign immunity . . . ."); *see also* Brennen v. City of Eugene, 591 P.2d 719, 723 (Or. 1979) (en banc) ("[T]o adopt [the public duty doctrine] would, in effect, restore the doctrine of sovereign immunity, which has been abolished . . . ."), *cited with approval* in Fulps v. City of Urbandale, 956 N.W.2d 469, 477 (Iowa 2021) (Appel, J., concurring).

208. 459 P.3d at 496–97 (citing Austin v. Scottsdale, 684 P.2d 151, 151–54 (Ariz. 1984)).

209. Lawson v. Hawkins Cnty., 661 S.W.3d 54, 64 (Tenn. 2023) (rejecting a twenty-year-old case from the Tennessee Court of Appeals, *Brown v. Hamilton Cnty.*, 126 S.W.3d 43 (Tenn. Ct. App. 2003), which found that an exception to the public duty doctrine applied for reckless misconduct by a public employee because that analysis conflicted with the GTLA).

210. *Id.*

aforementioned cases—either the mother who lost her infant child,[211] the law abiding citizen who was brutalized by police officers,[212] the minor child who was sexually assaulted numerous times by a government employee,[213] or the mother who was immolated by her mentally ill daughter released from the state's custody—a Tennessee trial court would have dismissed them early on in the process.[214] A simple and direct question should help the reader understand the importance of amending the GTLA: does it seem fair that if any of these aforementioned plaintiffs had filed their claims under Tennessee law, the claims would not have survived an initial motion to dismiss? In the next section, a proposed model statutory amendment to any state's Tort Claims Act answers the question in the negative, providing a tangible solution for plaintiffs in Tennessee and across the fifty states that will place tort law and governmental immunity law in a more equitable position.

IV. A MODEL STATUTORY AMENDMENT

This section provides a model statutory amendment to any state's Tort Claims Act, consisting of (A) Legislative Intent, Principles of Construction, and Statement of Public Policy; and (B) Waiver of Immunity. Establishing a model for legislative intent, principles of construction, and a statement of public policy is critical as courts often rely on this part of a statute's text when resolving inevitable ambiguities.[215] To the extent that courts often display a preference for providing more immunity in the case of an ambiguity, providing a clear and unequivocal statement of legislative intent will help prevent this reflexive judicial deference, as it often harms plaintiffs' claims. From

211. Bottomlee v. State, 459 P.3d 493, 494–95 (Ariz. Ct. App. 2020).

212. Maston v. Wagner, 781 S.E.2d 936, 941–44 (W. Va. 2015).

213. Betty H. v. Williamson Cnty., No. M2022-00300-COA-R3-CV, 2023 WL 5193537 at *1–*2 (Tenn. Ct. App. Aug. 14, 2023).

214. Chin Pak v. Ga. Dep't of Behav. Health & Developmental Disabilities, 731 S.E.2d 384 (Ga. Ct. App. 2012).

215. *See, e.g.*, Moreno v. City of Clarksville, 479 S.W.3d 795, 804–08 (Tenn. 2015) (looking to legislative intent to determine an issue with and the statute of limitations for a GTLA claim); Sneed v. City of Red Bank, 459 S.W.3d 17, 19 (Tenn. 2014) (examining the legislative intent of the GTLA to determine whether it applies to an age discrimination case).

there, the bulk of the model amendment will specify in greater detail when immunity is lifted and when it is retained, as an attempt to strike a balance between helping plaintiffs and limiting overexposure of governmental entities and actors.

A. A Model Statutory Amendment: Legislative Intent, Principles of Construction, and Statement of Public Policy

Some states with a marginally better waiver of immunity section in the Tort Claims Act lack statements of legislative intent,[216] while other states with a problematic waiver of immunity section have more plaintiff-friendly statements of legislative intent.[217] Assuming that a model statutory amendment shall not have deficiencies in either category, the following is a clear and unequivocal statement of legislative intent, principles of construction, and statement of public policy:

> (1) EFFECTIVE [INSERT DATE], THE PROVISIONS OF THIS SECTION SHALL GOVERN, WHEN APPLICABLE, ANY CASES AND CONTROVERSIES THAT INVOLVE ISSUES OF GOVERNMENTAL IMMUNITY IN THIS STATE.
>
> (2) THIS SECTION SHALL SUPERSEDE CONFLICTING STATUTORY PROVISIONS FOUND HEREIN OR IN OTHER STATUTORY CHAPTERS AND SHALL ALSO SUPERSEDE ANY COMMON LAW PRINCIPLES IF APPLICATION OF THE COMMON

216. *See, e.g.*, W. VA. CODE ANN. § 29-12A-2 (Michie's, LEXIS through the 2024 regular session and the first extraordinary session) ("The Legislature finds and declares that the political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost . . . [t]herefore, it is necessary to establish certain immunities and limitations with regard to the liability of political subdivisions and their employees . . . ."). This statute's statement of legislative intent is confined to the economic costs and benefits of liability insurance, which could lead an unfriendly court to only consider the costs on the state of a plaintiff's claims. While West Virginia ultimately has plaintiff-friendly waivers of immunity, a model statutory amendment will not lack in either the statement of legislative intent or the waiver of immunity.

217. *See, e.g.*, GA. CODE ANN. § 50-21-21(a) (LexisNexis, LEXIS through 2024 Regular and Extraordinary Session of the General Assembly) ("The General Assembly recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity.").

LAW WOULD RENDER THE STATUTORY LANGUAGE INAPPLICABLE, MOOT, SURPLUSAGE, OR IN CONFLICT WITH THIS SECTION.

(3) COURTS SHALL NOT INTERPRET THIS STATUTORY LANGUAGE IN A WAY THAT CONFLICTS WITH OR DISREGARDS ANY OF THE FOLLOWING GUIDING PRINCIPLES AND STATEMENTS OF PUBLIC POLICY:

a. THE PUBLIC POLICY IN THIS STATE IS THAT THIS STATE'S STATUTE SHOULD NOT REFLECT A DISPARITY IN THE LEVEL OF IMMUNITY AFFORDED TO ACTORS AND GOVERNMENTAL ENTITIES WHO COMMIT NEGLIGENT ACTS OR OMISSIONS AS COMPARED TO THOSE WHO COMMIT GROSSLY NEGLIGENT OR RECKLESS ACTS OR OMISSIONS. SIMPLY, THIS STATUTE IS MEANT TO PUNISH RECKLESS AND GROSSLY NEGLIGENT GOVERNMENTAL ACTORS, AS MUCH, IF NOT MORE, THAN ORDINARILY NEGLIGENT GOVERNMENTAL ACTORS.

b. REDUCING IMMUNITY FOR PUBLIC OFFICIALS, GOVERNMENTAL ENTITIES, AND "THE STATE" SERVES A PUBLIC POLICY OBJECTIVE OF BOLSTERING TRUST IN THIS STATE'S PUBLIC INSTITUTIONS, AS IT REFLECTS THIS STATE'S DESIRE TO ANSWER FOR ITS WRONGDOINGS AND BE HELD ACCOUNTABLE. ADDITIONALLY, REDUCING IMMUNITY HELPS THE STATE DETER BAD ACTORS, POOR PLANNING PROCEDURES, AND DEFICIENT HIRING AND RETENTION PROTOCOLS.

c. FOR DECADES, THIS STATE'S TORT CLAIMS ACT AND COMMON LAW DOCTRINES HAVE WORKED AGAINST PLAINTIFFS WHOSE CLAIMS, IF BROUGHT AGAINST PRIVATE CITIZENS, WOULD BE LITIGATED. RECOGNIZING THAT THE PUBLIC POLICY IN THIS STATE DEMANDS THAT LEGAL CLAIMS, BOTH CIVIL AND CRIMINAL, BE ADJUDICATED AND DECIDED BASED ON THEIR MERITS, WHENEVER PRACTICABLE, ANY COMMON LAW DOCTRINES THAT IMPERMISSIBLY CONFLICT WITH THIS PUBLIC POLICY OBJECTIVE MUST YIELD TO THIS STATUTORY ENACTMENT.

d. GOVERNMENTAL LIABILITY IS INHERENTLY WITHIN THE SCOPE AND PURVIEW OF THE LEGISLATIVE, RATHER THAN

> THE JUDICIAL, BRANCH OF THIS STATE. AS SUCH, THIS STATUTE SHALL OVERRIDE CONFLICTING COMMON LAW DOCTRINES.
>
> e. RECOGNIZING THAT THIS STATUTE WILL PROVIDE LESS IMMUNITY TO THE STATE AND ITS AGENTS, IT IS INCUMBENT UPON EACH MUNICIPALITY, TOWN, VILLAGE, LOCALITY, CITY, OR AREA OPERATING UNDER HOME RULE AUTHORITY, AS DEFINED IN TN CONST. ART. 11, § 9, TO MAINTAIN LIABILITY INSURANCE.
>
> (4) PRINCIPLES OF CONSTRUCTION:
>
> a. ANY AMBIGUOUS WORD OR PHRASE CONTAINED HEREIN SHALL BE CONSTRUED, IF APPLICABLE, TO LIMIT IMMUNITY.
>
> b. ANY AMBIGUOUS WORD OR PHRASE CONTAINED HEREIN SHALL BE CONSTRUED, IF APPLICABLE, IN FAVOR OF THE PLAINTIFF.

B. A Model Statutory Amendment: Waiver of Immunity

The most important component of a model statutory amendment is a waiver of immunity that realistically balances the need to help plaintiffs reach more equitable outcomes, with the reality that such a goal is starkly opposed by most legislatures.[218] Simply, this section would allow plaintiffs to proceed under theories other than ordinary negligence, something that several states' Tort Claims Acts already accomplish.[219] This section will also include language specifically aimed at remedying several of the problems previously discussed with Tennessee's GTLA.[220] First, this section states that the GTLA will not bar plaintiffs from bringing claims based on facts that sound in both

218. *See, e.g.*, W. VA. CODE ANN. § 29-12A-2 (Michie's, LEXIS through the 2024 regular session and the first extraordinary session) (noting that the legislative purpose is to provide no more waivers of immunity than are necessary, while focusing primarily on mitigating the cost to the state).

219. *See supra* Section II.*B*.3.

220. *See supra* Section II.*C* and Part III.

tort and civil rights.[221] Next, the model language waives immunity for gross negligence, recklessness, and wilfull or wanton misconduct.[222] Finally, the model language incorporates two of the exceptions to the public duty doctrine, in an attempt to avoid any further disharmony between the doctrine and a state's Tort Claims Act.[223]

The following model statutory language strikes a balance between those who wish to limit liability for the state, and those who wish to maximize it:

> (1) A GOVERNMENTAL EMPLOYEE AND/OR THE GOVERNMENTAL ENTITY WHOM THAT GOVERNMENTAL EMPLOYEE IS EMPLOYED BY OR ACTING UNDER, INCLUDING BUT NOT LIMITED TO THE HEALTH DEPARTMENT, FIRE DEPARTMENT, POLICE DEPARTMENT, SHERIFF'S OFFICE, OR SHERIFF OF ANY MUNICIPALITY, TOWN, VILLAGE, LOCALITY, CITY, OR AREA OPERATING UNDER HOME RULE AUTHORITY, SHALL NOT RETAIN IMMUNITY IF THE GOVERNMENT EMPLOYEE AND/OR THE GOVERNMENTAL ENTITY WHOM THAT EMPLOYEE IS EMPLOYED BY OR ACTING UNDER DOES ANY OF THE FOLLOWING:
>
> (A) ACT OR FAIL TO ACT IN A MANNER THAT CONSTITUTES GROSS NEGLIGENCE, RECKLESSNESS, OR WILLFUL AND WANTON MISCONDUCT
>
> (B) ACT OR FAIL TO ACT THAT RESULTS IN A CLAIM SOUNDING IN BOTH TORT AND CIVIL RIGHTS, EVEN IN SITUATIONS WHERE THE CIVIL RIGHTS CLAIM IS DISMISSED

221. This will avoid the situation described at *supra* note 185 (detailing Mosier v. Evans, 90 F.4th 541 (6th Cir. 2024)). Currently, if a plaintiff brings a claim premised on both 42 U.S.C. § 1983 and ordinary negligence, and the § 1983 claims are dismissed, the negligence claims often follow due to language in the GTLA prohibiting governmental liability for civil rights violations. *Id.*

222. *See supra* notes 172–73 and accompanying text (discussing how Tennessee courts will not remove immunity for tort claims sounding in gross negligence or reckless misconduct).

223. *See supra* notes 161–70 and accompanying text (discussing two of the exceptions to the public duty doctrine).

> (C) THROUGH ITS ACTS OR OMISSIONS, COMMITTS RECKLESS MISCONDUCT, EVEN IF THE GOVERNMENTAL ACTOR ONLY OWED A DUTY TO THE PUBLIC AT LARGE, AND ONLY TO THE PLAINTIFF AS A MEMBER OF THE PUBLIC
>
> (D) THROUGH ITS ACTIONS, VERBAL ASSURANCES, OR PROMISES, UNDERTOOK A DUTY TO THE PLAINTIFF, EVEN IF THE GOVERNMENTAL ACTOR ONLY OWED A DUTY TO THE PUBLIC AT LARGE, AND ONLY TO THE PLAINTIFF AS A MEMBER OF THE PUBLIC
>
> (E) ACTS IN A MANNER THAT CONSTITUTES AN INTENTIONAL TORT, EXCEPT IMMUNITY SHALL BE RETAINED BY A GOVERNMENTAL EMPLOYEE AND/OR THE GOVERNMENTAL ENTITY WHOM THAT PUBLIC OFFICIAL IS EMPLOYED BY OR ACTING UNDER FOR THE FOLLOWING INTENTIONAL TORTS:
>
> (I) FALSE IMPRISONMENT
> (II) FALSE ARREST
> (III) ABUSE OF PROCESS
> (IV) LIBEL
> (V) SLANDER
> (VI) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
> (VII) TRESPASS
> (VIII) MISREPRESENTATION
> (IX) INVASION OF PRIVACY
> (X) FRAUD
>
> (F) NONE OF THE EXCEPTIONS TO LIABILITY LISTED IN § (B)(I)–(X) SHALL LIMIT A PLAINTIFF FROM MAINTAINING AN ACTION FOR NEGLIGENT HIRING, RETENTION, OR SUPERVISION ON THE PART OF A GOVERNMENTAL EMPLOYER WHOSE EMPLOYEE COMMITS ANY OF THE INTENTIONAL TORTS LISTED IN § (B)(I)–(X).

Courts interpreting and upholding the public duty doctrine have spilled the most ink defending the doctrine and valorizing its sensible public

policy underpinnings.[224] The primary arguments in favor of the public duty doctrine posit that: (1) the doctrine protects public officials, like police officers, to use their discretion without fear of liability; (2) the doctrine safeguards municipal resources by preventing a flood of litigation; and (3) juries cannot, or should not, determine how municipalities ought to allocate resources.[225] The first argument, that worries about the ability of public officials to use their discretion, only makes sense if discretion means the ability to act negligently without consequence.[226] Moreover, the standard established by law for public official negligence differs from that of private citizen negligence, as public officials engage in conduct that is fully within the sphere of state and local government, like municipal policing.[227] Commentators and

224. *See, e.g.*, Ezell v. Cockrell, 902 S.W.2d 394, 397–99 (Tenn. 1995) (noting various policy objectives served by the public duty doctrine); Shore v. Town of Stonington, 444 A.2d 1379, 1384 (Conn. 1982) (justifying the public duty doctrine's continued application on public policy grounds); Landis v. Rockdale Cnty., 445 S.E.2d 264, 268 (Ga. Ct. App. 1994) ('"[A] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause or being mulcted in damages if he does."') (quoting Landis v. Rockdale Cnty., 427 S.E.2d 286, 293 (Ga. Ct. App. 1992) (Pope, J. dissenting)); Morgan v. Disrict of Columbia, 468 A.2d 1306, 1311 (D.C. 1983) (noting that juries are not equipped to consider how community resourcers should be allocated to protect individual members of the public) (quoting Riss v. City of New York, 240 N.E.2d 860, 860 (N.Y. 1968)).

225. *See supra* note 224.

226. *See, e.g.*, RESTATEMENT (FIRST) OF TORTS § 282 ("Negligence Defined") (1934) ("[N]egligence is any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm."); RESTATEMENT (SECOND) OF TORTS § 282 ("Negligence Defined") (1965) ("[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm").

227. *See, e.g.*, Haynes v. Hamilton Cnty., 883 S.W.2d 606, 608 (Tenn. 1994) (contemplating whether a police officer's decision to engage in high-speed pursuit of a suspect was unreasonable for purposes of establishing negligence). Determining whether a police officer acts negligently implicitly requires one to consider the discretion afforded to police officers, as the standard for reasonable conduct contemplates how an ordinarily prudent police officer would act using his discretion in a given situation. For example, a court would not consider the discretion of a private citizen who speeds through traffic and, while doing so, injures another, because this is not permissible conduct for a private citizen. On the other hand, a court determining

critics should cede ground on the second argument, which contemplates the need to safeguard public resources.[228] Undoubtedly, creating more liability for public officials and entities will increase cost to public entities, which local governments could offload onto taxpayers.[229] Finally, because determinations of liability for public entities often center on the actions of public officials, it is not necessarily the case that juries would have to make determinations about municipal resource allocation.[230]

These sections seek to accomplish two goals: (1) balancing the competing interests between the state and private actors; and (2) allowing a plaintiff to maintain an action against a governmental employer for an employee's intentional tort, but only if the plaintiff can maintain a cause of action for negligent hiring, retention, or supervision. In this way, governmental employers are not faced with the impossible situation of being held liable for the unforeseen intentional torts of their agents, while also permitting liability when their faulty hiring or retention protocols place dangerous individuals with vulnerable plaintiffs. Finally, nothing in this section limits a state from maintaining the public duty doctrine, and using it to judiciously temper the expansive liability this section proposes.

whether a police officer acted negligently when he sped through traffic to chase a fleeing suspect would inevitably consider what an ordinarily prudent police officer would have done in exercising his professional discretion, because the majority of acts and omissions by police officers are disrectionary. In other words, discretion will always remain a part of the analysis for police officer negligence because it is an intractable element of the job of policing.

228. *See supra* note 216.

229. Whether this increased cost is worthwhile is a different question. However, critics of the doctrine should recognize that an increase in liability will surely increase municipal budgets. It is also worth noting the other defenses available to public entities that would still limit litigation.

230. In many cases, the analysis would center on the acts and omissions of public officials, or whether it was reasonable for the public entity to hire that public official. *See, e.g.*, Part III, Section *B* (collecting cases). The only cases where juries would necessarily have to consider the allocation of municipal resources are cases where official allocation policies relate to a claim or defense in the case. Often, however, cases center on the acts or omissions of one or two public officials that are unrelated to resource allocation. Moreover, in cases where municipal resource allocation is relevant, having juries involved in assessing the legitimacy of such decisions would help increase public trust in the government. *See supra* note 226.

V. CONCLUSION

As the new kid on the block in the governmental immunity context, state Tort Claims Acts have understandably functioned more as sovereign-immunity-lite than a genuine removal of immunity. However, after roughly seventy-five years of caselaw, it is now clear that the majority of state Tort Claims Acts function almost identically to their sovereign immunity predecessor. In an era where public trust in government institutions is unsurprisingly declining with every news cycle, state governments must turn to the domains within their control to bolster public trust.[231] If Tennessee, or any state, hopes to rebuild trust in state governmental institutions, then the next step in governmental immunity ought to be a move away from the arcane notion that "the king can do no wrong," and toward an era of transparency and accountability for government actors.[232] To this end, individuals like Alicia Franklin and families like Eliza Fletcher's, will no longer have to contend with the impenetrable barriers created by outdated concepts like sovereign immunity and the public duty doctrine, premised on notions of sovereignty that no longer have a just role in American legal theory.

231. Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, GALLUP (July 5, 2022) ("Americans' confidence in institutions has been lacking for most of the past 15 years, but their trust in key institutions has hit a new low this year.").

232. Kendall v. U.S., 37 U.S. (12 Pet.) 524, 544 (1838).