DANGERS, DUTIES, AND DETERRENCE: A CRITIQUE OF STATE SOVEREIGN IMMUNITY STATUTES

DANIEL J. KENNY*

Sovereign immunity statutes set the boundaries of liability for tortious conduct by state government actors. Legislatures can shield state entities and agents from liability for a wide range of tortious conduct. They can even—as some states have—waive immunity to the extent of liability insurance coverage. These restrictive statutory immunity schemes can facilitate discretion and prevent the overdeterrence of helpful conduct. But by preventing state courts from hearing certain claims of tortious conduct, such schemes effectively leave injured plaintiffs in the lurch and future misconduct undeterred. This Note argues that legislatures should allow courts more leeway to set the standard of care for state government tortfeasors. Stripping courts of their capacity to adjudicate cases of garden-variety misconduct by government actors is misguided. By applying the "public duty doctrine"—a default rule that the government owes no general duty of care in tort to the public at large—courts can negotiate the interests that animate restrictive sovereign immunity statutes. This court-centered approach would fill gaps in civil damages liability under federal constitutional law that otherwise leave government negligence unremedied and undeterred. Moreover, it would let courts adapt the common law to define the scope of the government's duties to the public.

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Introduction

A victim of domestic violence is killed by her abuser despite promises of police protection.[1] A child is mauled to death by a bear after receiving no warning from state agents who knew about the lurking danger.[2] An incarcerated person is stabbed to death inside a prison.[3] In situations like these, individuals who have suffered harm might seek to hold state government agents or entities liable for their injuries in tort.[4] But before courts can consider the merits of their claims, plaintiffs must untangle a complex web of restrictions imposed by state sovereign immunity statutes. In some states, they must ascertain whether and to what extent the government actors they are suing are covered by liability insurance. The result of this system is that there is effectively one law for government tortfeasors and another for private defendants. This Note critiques that scheme.

State legislatures have broad authority to shield state government actors from tort liability through sovereign immunity statutes. These statutes are usually conduct specific, meaning they specify certain conduct for which government actors can and cannot be liable in tort.[5] Restrictive immunity statutes are typically justified on the grounds that they reflect democratic preferences, judicial incompetence to decide some issues, and concerns about overdeterrence of helpful conduct.[6] This Note argues that they also reinforce majoritarian ideas about the

1 Williams v. Mayor & City Council of Baltimore, 753 A.2d 41 (Md. 2000).
2 Francis v. State, 321 P.3d 1089 (Utah 2013).
3 Sheffield v. Turner, 445 P.2d 367 (Utah 1968).
4 Throughout this Note, I will refer collectively to these as "government actors."
5 *See infra* Part I.
6 *See infra* Section I.A.

conduct at issue, to the detriment of politically powerless and unpopular plaintiffs.[7] Additionally, some state legislatures have waived sovereign immunity to the extent that government actors are covered by liability insurance.[8] This Note is the first effort to examine in any detail these insurance-dependent waivers of immunity. Taken together, conduct-specific and insurance-dependent statutory immunity provisions remove certain conduct from state courts' purview, meaning courts cannot hold government actors liable for tortious conduct, and in turn, courts cannot issue decisions that would deter government actors from acting tortiously in the future.

By contrast, when immunity statutes confer no special status on government tortfeasors,[9] or else allow suits related to the type of conduct at issue, it is up to courts to negotiate the interests that animate restrictive immunity statutes. This Note argues that courts can and should account for these concerns by applying some version of the "public duty doctrine." Essentially, the public duty doctrine is a judge-made default rule that the government does not owe an actionable duty of care to everyone.[10] Jurisdictions have formulated different tests to determine whether, in a particular case, the government's duty is an actionable one owed to the plaintiff, or a non-actionable one owed to the public at large. This Note typologizes the public duty doctrine and shows that all formulations of it can account for the same concerns that might otherwise justify statutory immunity for certain conduct.[11] Rather than endorsing any one version of it, this Note argues that courts should be empowered to use the flexible public duty doctrine to adjudicate the merits of injured plaintiffs' claims.

Lastly, by way of comparison to other areas of constitutional and tort law, this Note shows that restrictive immunity statutes are fundamentally misguided because they frustrate the deterrence of misconduct and arrest the development of the common law. First, gaps in constitutional sovereign immunity doctrine and heightened constitutional culpability standards mean that state tort law is often the best, and sometimes the only, means of remedying and deterring harms

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7 *See infra* Section I.A.

8 *See infra* Section I.B.

9 *See, e.g.*, WASH. REV. CODE ANN. § 4.92.090 (West 2023) ("The state . . . shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."); *id.* § 4.96.010 ("All local governmental entities . . . shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers . . . performing or in good faith purporting to perform their official duties . . . as if they were a private person or corporation.").

10 *See infra* Part II.

11 *See infra* Part II.

caused by state government actor misconduct.[12] Second, restrictive immunity statutes prevent the common law from developing to define the scope of the government's duties to the public.[13] This effect is similar to that of qualified immunity doctrine on substantive constitutional law,[14] and the means is similar to that of statutory immunity under Section 230 of the federal Communications Decency Act, which also turns the flexible common law into an inflexible matter of statutory interpretation.[15]

This Note proceeds as follows: Part I analyzes the problems posed by conduct-specific and insurance-dependent statutory immunity provisions. Part II proposes the public duty doctrine as a solution that accounts for democratic and deterrence-related concerns. Part III takes a step back and shows that restrictive immunity statutes exacerbate and share commonalities with issues plaguing constitutional and tort law. With deterrence of government actor misconduct in mind, this Note concludes by calling for reforms of state sovereign immunity statutes. State government actors should be held accountable for their misconduct, and the public duty doctrine shows that we need not sacrifice important policy interests to make this idealistic vision a reality.

I
Immunity, Insurance, and Deterrence

Government actors in a given state are only subject to tort liability to the extent the state legislature has waived sovereign immunity, and a majority of state legislatures have enacted tort claims statutes that waive blanket immunity.[16] Most of these statutes waive or retain immunity for

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12 *See infra* Section III.A.2.

13 *See infra* Section III.B.

14 *See infra* Section III.B.1.

15 *See infra* Section III.B.2.

16 *See* Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 342 (2d ed. 2023); *see also* Cassandra R. Cole & Chad G. Marzen, *A Review of State Sovereign Immunity Statutes and the Management of Liability Risks by States*, 32 J. Ins. Regul. 45, 48–49 (2013) (noting that state legislatures began to implement sovereign immunity waiver statutes after the passage of the Federal Tort Claims Act in 1946). The bounds of state sovereign immunity have for some time been determined not by state courts but by legislatures, as the vast majority of states have abolished the common law doctrine of sovereign immunity. *See, e.g.*, Pruett v. City of Rosedale, 421 So. 2d 1046, 1051 (Miss. 1982) (joining approximately forty-five other states in abolishing the judge-made doctrine of absolute sovereign immunity). This Note focuses on sovereign immunity statutes and tort liability under state common law and does not address the common law doctrine of sovereign immunity. Nor does it address civil liability under the federal Constitution, except insofar as Part III.A discusses the effects of the federal constitutional doctrine of sovereign immunity on "constitutional tort" and parallel state-law tort claims. Variations among states in their treatment of procedural issues, such as when plaintiffs must bring official versus personal capacity suits, are outside the scope

specified types of conduct.[17] Some statutes even waive immunity to the extent that government actors are covered by liability insurance.[18] As a consequence, state courts cannot decide certain tort actions on the merits because they are restricted by some combination of statutory immunity provisions, decisions to purchase liability insurance for certain conduct, and the content of liability insurance policies held by government entities. This scheme raises many questions: Why would legislatures waive immunity for certain types of conduct but not others? Why would they waive liability to the extent of insurance coverage? Are these decisions aimed at deterring misconduct, or are they aimed at accomplishing some other goal?

This Part will show that conduct-specific and insurance-dependent immunity waivers force courts to perform a statutory interpretation function in service of legislative intent. As a result, some plaintiffs are left without remedy for their injuries in an arbitrary, inflexible fashion. Rather than a categorical critique of sovereign immunity and its detrimental effect on deterrence,[19] this Part will present a critique informed by a desire to *optimally* deter government actor misconduct. That is, this Part will argue that these immunity provisions are precluding tort liability for nondeliberative misconduct[20] like the negligent operation of a motor vehicle or medical malpractice. This is the exact sort of misconduct that tort liability is best suited to deter. In addition to contradicting theoretical justifications for sovereign immunity statutes and failing to serve tort law's goal of deterrence, this Part will show how these provisions reinforce majoritarian ideas about which sorts of plaintiffs deserve to have their claims heard, and they dilute democratic accountability for decisions about the scope of government actors' duties to the public.

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of this Note. For an overview of the history of constitutional torts, see Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 5–11 (1980).

17 *See* DOBBS ET AL., *supra* note 16, § 342 ("[A]bout thirty states abolish the tort immunity generally, but retain it in specified circumstances. A second group works in reverse, retaining the immunity generally, but abolishing it for a list of cases in which liability is permitted."); *cf.* WASH. REV. CODE ANN. § 4.92.090 (West 2023) (waiving immunity for state government entities); *id.* § 4.96.010 (waiving immunity for local government entities).

18 *See infra* Section I.B.

19 *Cf.* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001) ("Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law."); *id.* at 1216 ("Sovereign immunity frustrates compensation and deterrence. Individuals injured by government wrong-doing are left without a remedy.").

20 *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1547–49 (1992) (defining "nondeliberative actions" of government officials as those which are neither discretionary nor subject to ex ante monitoring or deliberation).

A. Conduct-Specific Waivers and Retentions of Immunity

Why do state legislatures retain sovereign immunity for some types of conduct but not others? Although state legislatures want to protect the public fisc, that concern does not explain why waivers of sovereign immunity are so prominent and varied.[21] Rather, conduct-specific waivers and retentions of immunity can plausibly be justified on the grounds that legislatures are more democratically accountable and competent to decide certain issues than courts. Professor Harold Krent's democratic process theory,[22] as applied to the states by Professor Katherine Florey,[23] holds that decisions to waive or retain sovereign immunity are best made by the legislature because it is the most democratically responsive branch.[24] This theory explains variations in immunity statutes as the result of variations in democratic preferences among state bodies politic. The theory of relative judicial incompetence to decide a given issue[25] would explain immunity variations as decisions to prevent courts from interfering with matters outside their purview. Additionally, wariness about overdeterrence[26] of helpful or important conduct would explain decisions to retain immunity for claims related to, for example, negligent inspection as efforts to counteract a perverse incentive not to perform inspections at all.[27]

Plausible as they are, these theories cannot justify widespread decisions by state legislatures to immunize state actors from garden-variety misconduct. A survey of state sovereign immunity statutes reveals that legislatures routinely decide to immunize government actors from suit for conduct that would otherwise fit squarely inside the judiciary's wheelhouse. This practice impairs efforts to deter government actor misconduct, a goal implicit in the theoretical justifications discussed above. Furthermore, even if some conduct-specific waivers can be justified on democratic process, judicial incompetence, or

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21 *See* Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 788 (2008) ("[B]ecause the various sovereign immunity doctrines are riddled with so many exceptions . . . the [public fisc] rationale simply fails to hold up as a meaningful principle in most cases.").

22 *See* Krent, *supra* note 20, at 1531 (characterizing the federal doctrine of sovereign immunity as "not so much a barrier to individual rights as it is a structural protection for democratic rule").

23 Florey, *supra* note 21, at 791 ("Nearly identical logic applies to state sovereign immunity from common law tort . . . claims.").

24 *Id.*

25 *Id.* at 793.

26 Krent, *supra* note 20, at 1549.

27 *See id.* (noting, however, that this justification "cannot easily explain Congress's waiver of immunity for more garden variety torts, which also have the potential to overdeter").

overdeterrence grounds, none of these theoretical justifications account for the detrimental effect that conduct-specific immunity provisions have on politically unpopular plaintiffs, such as people in prison or victims of police misconduct.

From a deterrence perspective, the desirability of conduct-specific waivers and retentions of immunity varies according to whether the conduct at issue is subject to some form of ex ante regulation. Professor Krent argues that "retained immunity does not result inevitably in insufficient deterrence" because "political and administrative processes may serve as substitutes for private lawsuits" when it comes to matters of policy.[28] The same sort of blanket immunity does not make sense for "nondeliberative" activities like the negligent operation of a truck or medical malpractice, which "generally do not stem from any prior debate, have not been taken with an eye to future consequences, and are not subject to ex ante monitoring [by the legislature or an agency]."[29] According to Professor Florey, broad retentions of sovereign immunity limit the judiciary's ability to do "retail rather than wholesale justice" in areas where the purportedly competent legislature has eliminated the judiciary's power to set the standard of reasonable care.[30] When courts invoke such jurisdictional limits to dismiss a claim, it can lead to "unfairness to individual litigants" and a failure to weigh countervailing interests[31]—the very thing that courts are best-suited to do, and which leads to the deterrence of misconduct.

To be sure, the democratic process, judicial competence, and overdeterrence rationales could be said to justify legislative decisions to remove issues from the judiciary's purview in deference to the discretion or policy expertise of state agents or agencies. These include decisions to immunize government actors from liability for discretionary conduct generally,[32] as well as decisions to retain immunity for the design of

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28 *Id.* at 1532.

29 *Id.* at 1548 (considering nondeliberative activities in the context of federal law).

30 Florey, *supra* note 21, at 796 & n.166.

31 *Id.* at 796.

32 *See* Dobbs et al., *supra* note 16, § 344 (describing discretionary immunity for policy decisions and the performance of legislative, executive, or judicial functions); *see, e.g.*, Kan. Stat. Ann. § 75-6104(a)–(e) (West 2023) (immunizing government entities and employees from damages liability for legislative, judicial, and executive functions, as well as discretionary functions or duties); Me. Rev. Stat. Ann. tit. 14, §§ 8104-B(1)–(4) (2024) (immunizing government entities from claims arising from legislative acts, judicial acts, the performance of discretionary functions, and the performance of prosecutorial functions).

roads and highways,[33] decisions to issue, suspend, or revoke permits or licenses,[34] and claims related to the provision of emergency services.[35]

However, as these legislative decisions are necessarily products of the democratic process, they are colored by legislatures' perceptions about the political salience of the conduct at issue. Reliance on the democratic process reinforces majoritarian views about which conduct should be actionable, which is effectively a proxy for which injured plaintiffs are most deserving of recourse in tort. Consequently, for many claims, courts are stuck performing their statutory interpretation function and cannot consider the merits of an injured plaintiff's claims. Although this process can result in decisions that serve tort law's goal of deterrence, it can only do so for harms about which the legislative majority cares.

The virtue of the democratic process is that if the public wants to waive immunity and allow suits regarding a certain type of conduct, the legislature can respond by doing so. For instance, in 2013, Colorado high school student Claire Davis died after she was shot at point-blank range by a gunman who had infiltrated the school.[36] Her death became national news.[37] Prior to this tragic event, Colorado's Governmental Immunity Act precluded tort suits against school districts.[38] In response

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33 *See, e.g.*, IDAHO CODE ANN. §§ 6-904, 6-904(7) (West 2023) ("A governmental entity and its employees . . . shall not be liable for any claim which: . . . Arises out of . . . a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is . . . approved in advance . . . [by a government] agency, exercising discretion . . . ."); KAN. STAT. ANN. § 75-6104(a)(8) (West 2023) ("A governmental entity or an employee . . . shall not be liable for damages resulting from . . . the malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless it is not corrected . . . within a reasonable time . . . .")

34 *See, e.g.*, OKLA. STAT. ANN. tit. 51, § 155(12) (West 2022) (providing immunity for the "issuance, denial, suspension or revocation or failure to refuse to issue, deny, suspend or revoke" any license); UTAH CODE ANN. § 63G-7-201(4)(c) (West 2023) ("A governmental entity, its officers, and its employees are immune from suit [from injuries caused by] . . . the issuance, denial, suspension, or revocation of, or the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization . . . .").

35 *See, e.g.*, MINN. STAT. ANN. § 466.03(19) (West 2017) (providing immunity for "[a]ny claim based upon the acts or omissions of a 911 telecommunicator or dispatcher . . . acting in good faith in providing prearrival medical instruction based upon the emergency medical dispatch protocols adopted by the dispatching agency.").

36 *See* Zahira Torres, *Claire Davis Dies from Injuries in Arapahoe High School Shooting*, DENV. POST (Dec. 21, 2013, 10:20 AM), https://www.denverpost.com/2013/12/21/claire-davis-dies-from-injuries-in-arapahoe-high-school-shooting [https://perma.cc/A46M-93N3].

37 *See* Becky Bratu, *Colorado High School Shooting Victim Claire Davis Dies*, NBC NEWS (Dec. 21, 2013, 8:45 PM), https://www.nbcnews.com/news/us-news/colorado-high-school-shooting-victim-claire-davis-dies-flna2d11789992 [https://perma.cc/EX7L-ZU6C].

38 *See* COLO. REV. STAT. ANN. § 24-10-106 (West 2022) (immunizing public entities from tort claims but waiving immunity for specified conduct such as automobile accidents, dangerous conditions of public buildings, and dangerous conditions of roads, among a few others); *see also* Haley DiRenzo, Comment, *The Claire Davis School Safety Act: Why Threat Assessments*

to the shooting, in 2015, Colorado enacted the Claire Davis School Safety Act, which amended Colorado's immunity statute to waive immunity for claims "arising from an incident of school violence."[39] This is a prime example of how immunity provisions reflect democratic will to subject or not subject government actors to tort liability.

The glaring weakness of the democratic process is best illustrated by immunity reform provisions that *fail* to pass. For example, in Ohio, it is a full defense to injuries caused by negligent operation of a motor vehicle that a police officer was responding to an "emergency call" and was not operating the vehicle wantonly or recklessly.[40] The statute defines "emergency call" subjectively: It is "a call to duty, *including, but not limited to* . . . personal observations by peace officers of inherently dangerous situations . . . ."[41] Recently, there was public outcry after an Ohio news outlet's investigative report framed the emergency call exception as a legal loophole used by Ohio municipalities to avoid compensating people who suffered injuries or property damage in collisions with police cruisers.[42] In response, Ohio state representative Catherine Ingram introduced a bill to repeal the emergency call defense.[43] This provision did not make the version of the parallel Ohio Senate bill that was ultimately enacted. Instead, that version included an unrelated provision immunizing municipalities and counties from tort claims against police officers in hospitals.[44] Consequently, Ohio police officers are liable only for wanton or reckless operation of a vehicle in response to an emergency call, broadly and subjectively defined.

The failure of a provision like this to gain majoritarian support is not directly related to whether it is desirable from a deterrence perspective. After all, negligent operation of a motor vehicle is the exact sort of

in Schools Will Not Help Colorado, 93 DENV. L. REV. 719, 723 (2016) (noting that Colorado courts had historically interpreted the "dangerous conditions of public buildings" exception to apply to physical conditions, rather than dangerous activities, in public buildings).

39 COLO. REV. STAT. ANN. § 24-10-106.3(4) (West 2022).

40 OHIO REV. CODE ANN. § 2744.02(B)(1)(a) (West 2007).

41 *Id.* § 2744.01(A) (emphasis added).

42 *See* Bennett Haeberle, *10 Investigates: City Uses Immunity Law to Deny Paying for Damages in Crashes Involving Police*, WBNS (July 28, 2021, 10:31 PM), https://www.10tv.com/article/news/investigations/10-investigates/10-investigates-city-uses-immunity-law-to-deny-paying-for-damages-in-crashes-involving-police/530-02af2e01-d35b-47d4-a047-d29b17d1284e [https://perma.cc/8MTS-8H8H].

43 *See* Bennett Haeberle, *Ohio Lawmaker Weighs Re-Introducing Bill That Would Limit Government Immunity After 10 Investigates Report*, WBNS (July 29, 2021, 11:15 PM), https://www.10tv.com/article/news/investigations/10-investigates/ohio-lawmaker-weighs-re-introducing-bill-that-would-limit-government-immunity-after-10-investigates-report/530-0b3d5cf0-98b8-4bcf-a3e4-fb304cf3f8f3 [https://perma.cc/2XR5-JGKF]; H.B. 472, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (as proposed, repealing the emergency call defense).

44 S.B. 56, 134th Gen. Assemb., Reg. Sess. (Ohio 2022).

misconduct that ex post tort liability is best suited to deter.[45] Instead, the failure is likely a function of the legislature's bias in favor of the police and/or against litigious victims of misconduct. The majoritarian nature of statutory immunity provisions means that deterrence concerns are subordinate to the legislature's political calculus about a given issue. In other words, the perceived political consequences of waiving immunity predominate concerns about the impact of that waiver on deterrence of misconduct. As a result, politically unpopular plaintiffs are left without remedies for their injuries.

The same is true for plaintiffs who are politically powerless, i.e., plaintiffs who have few if any supporters in the state legislature. Consider incarcerated people. Several states have decided to retain immunity for injuries involving incarcerated people, both inside and outside correctional facilities. Confronted with such conduct, courts must interpret the meaning of the relevant statutory immunity provision before assessing the merits of any tort claim. When immunity provisions are especially broad, courts cannot reach a claim's merits. For example, in Utah, government entities and employees are categorically immune from suit for injuries arising out of "the incarceration of a person in a state prison, county or city jail, or other place of legal confinement . . . ."[46] This provision precludes recovery both for incarcerated people who have suffered injuries[47] and for those who have been injured by an incarcerated person.[48] Likewise, Idaho's provision immunizing the state from claims arising out of "providing or failing to provide medical care

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45 Despite the Ohio example, most states waive immunity for injuries sustained in motor vehicle collisions with government-operated motor vehicles, such as school buses. *See, e.g.*, COLO. REV. STAT. ANN. § 24-10-106(1)(a) (West 2022) (waiving sovereign immunity for "[t]he operation of a motor vehicle . . . by a public employee while in the course of employment"); MICH. COMP. LAWS ANN. § 691.1405 (West 2023) ("Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation . . . of a motor vehicle . . . ."); 42 PA. STAT. AND CONS. STAT. § 8522(b)(1) (West 2019) (waiving sovereign immunity for "[t]he operation of any motor vehicle in the possession or control of a Commonwealth party"); WYO. STAT. ANN. § 1-39-105 (West 2023) ("A governmental entity is liable for damages resulting from . . . the negligence of public employees while acting within the scope of their duties in the operation of any motor vehicle . . . .").

46 UTAH CODE ANN. § 63G-7-201(4)(j) (West 2023).

47 *See* Sheffield v. Turner, 445 P.2d 367 (Utah 1968) (dismissing negligent supervision action brought by an incarcerated plaintiff after he was stabbed by another incarcerated person); Lancaster v. Utah State Prison, 740 P.2d 261 (Utah 1987) (affirming dismissal on immunity grounds of claim by incarcerated plaintiff who was injured in a prison fire).

48 *See* Kirk v. State, 784 P.2d 1255 (Utah Ct. App. 1989) (precluding negligence action brought by court bailiff who was shot by a an incarcerated person he was escorting to a hearing); *see also id.* at 1257 ("Plaintiff urges us to adopt by judicial fiat the 'modern trend' in holding governments accountable for the negligent handling of prisoners. This is an argument best addressed to the legislature.").

to a prisoner or person in [custody]"[49] precludes medical malpractice claims by those in state prisons or jails.[50]

Narrower immunity provisions can allow for more tort claims to proceed but still subordinate the common law to statutory interpretation. For example, in South Dakota the state retains immunity for claims related to insufficient correctional facilities, equipment, or services,[51] and for injuries caused by incarcerated people or prison services.[52] When South Dakota's highest court decided to allow a prison food service worker's negligence action related to injuries sustained when an incarcerated person attacked him, it reasoned that the conduct fell outside the immunity provision.[53] Because the legislature did not broadly immunize the state from liability for all injuries arising out of these facilities, the court found that dismissal of the suit would "render the specific language in these two statutes mere surplusage."[54] In the court's view, the nature of the claim did not fit the plain meaning of "service" in either of the two relevant statutes.[55]

All in all, conduct-specific waivers and retentions of immunity make concerns about deterrence and the proper standard of reasonable care secondary to majoritarian decisions about the political salience of conduct. That means the courthouse doors are open or closed depending on the political salience and popularity of a given type of conduct and the plaintiffs associated with it. Legislatures understand that broad disclaimers of liability for frequent injuries that affect politically popular plaintiffs—such as schoolchildren—could lead to public outcry. However, as the immunity provisions related to incarcerated people show, legislatures care less about public outcry when tort claims involve politically unpopular plaintiffs. These restrictive immunity provisions force common law courts to interpret the language of immunity statutes

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49 IDAHO CODE ANN. § 6-904B(5) (West 2023).

50 *See* Williamson v. Ada Cnty., 509 P.3d 1133 (Idaho 2022) (dismissing an incarcerated person's negligence claim against the county under § 6-904B(5)).

51 S.D. CODIFIED LAWS § 3-21-8 (2023) ("No person, political subdivision, or the state is liable for failure to provide a prison, jail, or penal or correctional facility, or if such facility is provided, for *failure to provide sufficient* equipment, personnel, programs, facilities, or *services* in a prison or other correctional facility." (emphasis added)).

52 *See id.* § 3-21-9 ("No [government actor] is liable for *any injury resulting from* . . . (1) An escaping or escaped prisoner; (2) An escaping or escaped person; (3) A person resisting arrest; (4) A prisoner to any other prisoner; or (5) *Services or programs administered* by or on behalf of the prison, jail, or correctional facility." (emphasis added)).

53 Masad v. Weber, 772 N.W.2d 144 (S.D. 2009).

54 *Id.* at 151.

55 *Id.* at 152 ("[F]ailure to ensure an inmate is housed in a higher-security location, . . . failure to ensure an inmate does not leave a unit, . . . and failure to identify an inmate before permitting him access to an unauthorized location *do not equate with failure to provide a service* . . . .") (emphasis added).

instead of setting standards of reasonable care. As a result, misconduct by politically powerful government actors, which affects marginalized groups like incarcerated people, goes undeterred.

B. Insurance-Dependent Waivers of Immunity

Perhaps a saving grace comes in the form of statutory provisions that waive immunity to the extent that state government actors are covered by liability insurance, which several states have enacted.[56] These provisions seem to gesture at a wider range of actionable conduct because they mean that government actors can be liable for conduct for which they are otherwise immune if the applicable insurance policy covers the conduct at issue. In theory, this underexplored area of sovereign immunity law could provide a means of circumventing broad retentions of immunity by means of liability insurance, a well-theorized mechanism of deterrence.[57] In practice, however, waivers to the extent of liability insurance remove from democratic and judicial contestation the extent of harmful conduct for which the state can be liable. This Section will show that insurance-dependent waivers interpose between courts and injured plaintiffs another layer of abstraction and complexity that leads to the dilution of democratic accountability about decisions

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[56] *See* Cole & Marzen, *supra* note 16, at 61 (noting that twelve states have waived statutory damages caps on liability to the extent of insurance coverage, but that the issue of purchasing insurance in excess of sovereign immunity limits has not been thoroughly addressed); *see, e.g.*, GA. CODE ANN. § 33–24–51(b) (2020) ("Whenever [any] political subdivision of this state shall purchase the insurance . . . to provide liability coverage for the negligence of any duly authorized officer . . . greater than the amount of immunity waived . . . its governmental immunity shall be waived to the extent . . . purchased."); ME. REV. STAT. ANN. tit. 14, § 8116 (2007) ("[A]ny political subdivision may procure insurance . . . . If the insurance provides coverage in areas where the governmental entity is immune, the governmental entity shall be liable in those substantive areas . . . to the limits of the insurance coverage."); MINN. STAT. ANN. § 466.06 (2006) ("The procurement of [liability] insurance constitutes a waiver of the limits of governmental liability . . . only to the extent that valid and collectible insurance . . . exceeds those limits and covers the claim."); MO. ANN. STAT. § 537.610.1 (2009) ("Sovereign immunity . . . is waived only to the maximum amount . . . covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan . . . ."); NEB. REV. STAT. § 13-916 (1991) ("The procurement of insurance shall constitute a waiver of the defense of governmental immunity . . . to the extent and only to the extent stated in such policy."); N.C. GEN. STAT. § 160A–485(a) (2003) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability."); S.D. CODIFIED LAWS § 21-32A-1 (West 1987) ("To the extent that any public entity . . . participates in a risk sharing pool or purchases liability insurance . . . the public entity shall be deemed to have waived the common law doctrine of sovereign immunity and shall be deemed to have consented to suit . . . .").

[57] *See infra* Section III.A.1 (discussing liability insurance as a mechanism of how civil damages suits deter government actor misconduct).

regarding government liability and a failure to consider claims' merits. These legislative efforts to control the bounds of government actors' immunity for misconduct are at best tortured and at worst counterproductive.

1. How Courts Approach Insurance-Dependent Waivers of Immunity

Before addressing the merits of a claim, courts in states that have waived immunity to the extent of insurance must determine whether additional procedural requirements have been met, whether the government entity has purchased an insurance policy, and whether the conduct at issue is covered by the insurance policy. An analysis of how these statutes affect judicial decisionmaking will show how they exacerbate the problems associated with conduct-specific immunity provisions.

Insurance-dependent waivers add burdensome procedural steps to tort suits. Unlike sovereign immunity statutes, the existence and extent of liability insurance policies are less likely to be known to plaintiffs. Georgia, for example, imposes on plaintiffs the burden of proving both the existence of an insurance policy and that the plaintiff's claim falls within its scope.[58] In *City of Alpharetta v. Vlass*, the city produced its insurance policy during discovery, but the plaintiff forfeited an argument that the policy was ambiguous and should be construed liberally by failing to make that claim at the trial level.[59] The burden of proof is different under Maine law. In *Gomes v. University of Maine System*,[60] the court prevented the university defendant from asserting an immunity defense because "there [was] *no evidence of an absence* of [insurance] coverage."[61]

Whether and precisely how a government entity has purchased insurance frequently determines a case's outcome. If the relevant statute waives immunity to the extent of insurance, the absence of an insurance policy covering the claim can be dispositive.[62] Similarly, if a government entity does not purchase the precise type of insurance

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[58] *See* City of Alpharetta v. Vlass, 861 S.E.2d 249, 253–54 (Ga. Ct. App. 2021).

[59] *Id.* at 254–55.

[60] 304 F. Supp. 2d 117 (D. Me. 2004).

[61] *Id.* at 131 (emphasis added).

[62] *See, e.g.*, Maynard v. Comm'r of Corrections, 681 A.2d 19 (Me. 1996) (finding that the Department of Corrections was entitled to immunity in part because it had no commercial insurance policies relevant to claims asserted); Spalding Cnty. V. Blanchard, 620 S.E.2d 659, 660 (Ga. Ct. App. 2005) (dismissing plaintiff's claim of injury by a backhoe because plaintiff failed to meet his burden to prove that the county had waived sovereign immunity through the purchase of liability insurance for use of the backhoe).

required by a statute, it does not waive immunity. For example, in *Smith v. Chatham County*,[63] the Georgia Court of Appeals held that a county which paid claims from a judgment fund but had not purchased liability insurance from a third party had not waived sovereign immunity. Even though Georgia has a statute waiving immunity to the extent of liability insurance, the court determined that self-insurance fell outside of the statute's scope: "there is no statute [in Georgia] which provides that by establishing a self-insurance plan, a county waives sovereign immunity."[64]

If there is an insurance policy, courts must interpret both the statutory text and the policy's text before addressing the claim's merits. This process begins with statutory interpretation. For example, in *Unruh v. Davison County*,[65] South Dakota's highest court answered a certified question about whether a county could be liable for negligence claims arising out of the death of an incarcerated person at a hospital. It found that, despite participation in a risk pool, the government entities could not be liable for this kind of tortious conduct because "[t]he plain language of SDCL 21-32A-1 states that . . . the '*common law* doctrine of sovereign immunity' . . . is waived by procurement of liability coverage. Since immunity in [this] specific [subject] area . . . *was created through [statute]* . . . common law waiver provisions do not apply."[66] The concurrence correctly noted the oddity of this result when it said the "entire field of common law sovereign immunity regarding the operation of this jail (and the purchase of insurance) has been superseded by statutes rendering this question solely a matter of statutory interpretation."[67] Thus, a court's inquiry can end at the statutory interpretation stage before proceeding to the policy text.

If courts reach the text of the insurance policy itself, they must then determine whether the conduct at issue is covered. If they determine that the policy *does* cover the claim at issue, the case will proceed to the merits.[68] But it is sometimes a difficult inquiry. For example, in *City of Lincoln v. County of Lancaster*,[69] a Nebraska city sought to recover expenses paid on behalf of a city employee who had sued a county

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63 591 S.E.2d 388 (Ga. Ct. App. 2003).

64 *Id.* at 390.

65 744 N.W.2d 839 (S.D. 2008).

66 *Id.* at 848 (emphasis added).

67 *Id.* at 849 (Zinter, J., concurring).

68 *See, e.g.*, Parkulo v. West Virginia Board of Prob. & Parole, 483 S.E.2d 507, 526 (W. Va. 1996) ("[I]f the court [on remand] finds that the applicable insurance policy affords coverage with respect to the claims raised here . . . the court should allow the civil action to proceed to such result as may otherwise be proper . . . but only to the extent the policy extends coverage.").

69 898 N.W.2d 374 (Neb. 2017).

employee for battery. In Nebraska, government entities can purchase liability insurance covering claims from which government actors are otherwise immune.[70] Nebraska government entities are immune from claims arising out of "assault, battery," and other intentional torts.[71] The defendant asserted immunity because the claim arose out of the intentional tort of battery. But the city argued that the county had waived immunity by purchasing liability insurance which covered "occurrence[s]" of "bodily injury" such as battery claims.[72] After examining the policy's terms, Nebraska's highest court found that the policy did not cover battery claims because the policy defined "occurrence" to mean an "accidental happening" as opposed to an intentional act like battery.[73]

As in Nebraska, government entities in Missouri can waive sovereign immunity to the extent of liability insurance coverage. Regardless of insurance, the Missouri legislature has waived immunity for two types of tortious conduct: negligent operation of a motor vehicle and injuries caused by the condition of public property.[74] For all other torts, the legislature has waived immunity only to the extent a public entity is covered by liability insurance.[75] If a public entity procures insurance, it waives all immunities as to the types of claims covered.[76] If the entity's policy includes a disclaimer concerning the waiver of sovereign immunity, then immunity has not been waived.[77] This gives

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70 Neb. Rev. Stat. Ann. § 13-916 (West 1991) ("[A government entity] may purchase a policy of liability insurance insuring against . . . liability which might be incurred under the Political Subdivisions Tort Claims Act and also . . . those claims specifically excepted from the coverage of the act by section 13-910. . . .").

71 *Id.* § 13-910 ("The Political Subdivisions Tort Claims Act . . . shall not apply to: . . . [a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . .").

72 898 N.W.2d at 379.

73 *Id.*

74 *See* Mo. Ann. Stat. §§ 537.600.1(1)–(2) (West 2005); Holesapple v. Missouri Highway & Transp. Comm'n, 518 S.W.3d 836 (Mo. Ct. App. 2017) (affirming judgment in negligence suit based on the property condition exception). Waiver in these instances is "absolute" regardless of "whether or not the public entity is covered by a liability insurance for tort." Mo. Ann. Stat. § 537.600.2 (West 2005).

75 *Id.* § 537.610.1 ("Sovereign immunity . . . is waived only to the maximum amount . . . covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted . . . .").

76 *See* Kunzie v. City of Olivette, 184 S.W.3d 570, 574 & n.4 (Mo. 2006) (en banc).

77 State ex rel. Bd. of Trustees of City of North Kansas City Mem'l Hosp. v. Russell, 843 S.W.2d 353, 360 (Mo. 1992) (en banc); *see also* Langley v. Curators of Univ. of Mo., 73 S.W.3d 808, 813 (Mo. App. 2002) (finding the defendant's self-insurance policy did not waive sovereign immunity because it contained a provision stating as much); Conway v. St. Louis Cnty., 254 S.W.3d 159, 167 (Mo. App. 2008) (same).

an exceptional amount of discretion to Missouri public entities, and it raises additional questions about the practice in general: Who writes these policies? What conduct is typically included and why? And what are the implications for deterrence?

2. *Implications for Democratic Accountability and Deterrence*

Since the text of an insurance policy can be dispositive in a tort action, there is a great need to understand who decides what conduct is included and excluded in government liability insurance policies. To some, insurance-dependent waivers might seem like an undemocratic delegation of authority over the scope of the government's actionable duties to insurance firms. Then again, given the crucial role of liability insurance in tort law, these provisions might incentivize government actors to exercise reasonable care. For the sake of democratic accountability and deterrence of government actor misconduct, we need a fuller picture of how these liability insurance policies are written and adopted.[78] Since it is not feasible to establish such a comprehensive understanding of how they come to be, we can measure the effect of insurance-dependent immunity provisions by analyzing how they factor into judicial decisionmaking. The discussion below shows that the precise effect of insurance-dependent immunity provisions on democratic accountability and deterrence is difficult to discern.

It might be better from a democratic accountability perspective if decisions about the content of liability insurance policies were made by self-insurance risk pools, which are tied to the government entities that create them. Legislatures typically delegate decisions to procure insurance and decisions about the scope of coverage to risk management departments.[79] For example, the Missouri legislature has authorized the state commissioner of administration and the governing body of each political subdivision (including municipalities) to purchase liability insurance.[80] Missouri government entities can choose to purchase commercial insurance or self-insure through government risk pools. Indeed, many Missouri municipalities have opted to join the Missouri Intergovernmental Risk Management Association (MIRMA), a risk pool that describes itself as "not an insurance company or agency, rather a self-insurance pool, owned entirely by participating members."[81] It is

78 It is beyond the scope of this Note to explore in detail the legislative history and context of each insurance-dependent waiver of sovereign immunity. Instead, this Section will consider those in Missouri, Georgia, and North Carolina.

79 *See* Cole & Marzen, *supra* note 16, at 56.

80 Mo. Ann. Stat. § 537.610.1 (West 2009).

81 MIRMA, *About MIRMA*, https://mirma.org/about [https://perma.cc/MHV8-8TJS] .

governed by a board of directors "composed of ten members elected directly by the general membership of the association."[82] In contrast with commercial insurers, MIRMA says it does not take commissions and distributes any surplus through grants.[83]

In theory, when a risk pool like MIRMA authors a municipal insurance policy, it reflects the democratic will of its municipal members, who elect the board of directors. That could make risk pools more desirable than policies offered by commercial insurers. These firms might be incentivized to offer ready-made policies with standard language to various municipalities within a given state. Disconnected from particular municipalities, it is possible that commercial insurers are more likely to prioritize the bottom line over public safety. That would undermine democratic accountability by giving too much authority over the scope of the government's actionable conduct to private insurers who stand to gain by circumscribing it. Extensive further research would be necessary to test this proposition, meaning it is unfortunately outside the scope of this Note.

Consequently, we can only look to how courts have analyzed both types of insurance policies in the context of tort claims. In practice, it appears that commercial insurers and municipal risk pools both tend to insert blanket disclaimers of waiver into policies, which may indicate that they operate according to similar incentives. For example, Georgia's highest court found that a city did not waive immunity above the $700,000 statutory claim limit even though it purchased a commercial policy with a $5 million claim limit. The policy included a disclaimer which said the city did not waive any applicable sovereign immunity defenses, including the $700,000 statutory claim limit.[84] Self-insurance risk pools sometimes include disclaimers in their policies as well. A MIRMA policy was found to include the ultimately preclusive

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[82] *Id.*

[83] MIRMA, *The MIRMA Difference*, https://mirma.org [https://perma.cc/Y253-U87K].

[84] The relevant statute sets out that above $700,000, the waiver of sovereign immunity "shall be increased to the extent that: . . . (3) [t]he local government entity purchases commercial liability insurance in an amount in excess of the waiver set forth in this Code section." GA. CODE ANN. § 36-92-2(d)(3) (West 2005). *See* Atl. Special Ins. Co. v. City of College Park, 869 S.E.2d 492, 498–99 (Ga. 2022) (accordingly limiting recovery in a wrongful death action against the city for a fatal collision with an unknown driver during a police chase). The court noted that this disclaimer did not make the higher-than-$700,000 policy limit meaningless because it can apply to claims that are not subject to sovereign immunity, such as § 1983 claims involving police chases. *Id.* at 499. *See also, e.g.*, Sharma v. City of Alpharetta, 865 S.E.2d 287, 289 (Ga. Ct. App. 2021), *cert. denied* (June 22, 2022) (holding that the city did not waive sovereign immunity by purchasing an insurance policy which provided that "[f]or any amount for which the insured would not be liable under applicable governmental or sovereign immunity but for the existence of this policy . . . this insurance shall not be deemed a waiver of any statutory immunities . . . .").

disclaimer that "[t]he coverage provided by this protected self-insurance plan does not apply to any claim or 'suit' which is barred by the doctrines of sovereign immunity . . . ."[85] A similar risk pool in Georgia did not insert such blanket disclaimers into its policies: Georgia municipalities have been found to waive sovereign immunity by participating in a risk pool called GIRMA,[86] and GIRMA's policies do not appear to include the same kind of disclaimers as those provided by MIRMA.[87]

Ambiguous policy drafting poses another kind of threat to democratic accountability. For example, a North Carolina court found that, unlike in three other cases where insurance policies were found to disclaim coverage when sovereign immunity would otherwise be waived by purchasing insurance, the city defendant did not disclaim liability for the claim at bar because the waiver provision was unclear.[88] Such sloppy drafting can frustrate legislative intent to broadly retain immunity, and it might be a more common feature of ready-made commercial policies.

Both blanket disclaimers and ambiguous drafting can frustrate the deterrence of misconduct. The effect of blanket disclaimers is much like that of statutory provisions that disclaim liability (and retain immunity) for a large batch of conduct. Only the effect of blanket disclaimers on deterrence is potentially worse because they interpose *two* layers of textual interpretation—first of the statute, then of the policy—between the court and its consideration of the merits of the tort claim at bar. By making it more difficult to reach the merits, these blanket disclaimers in turn make it more difficult to deter future misconduct. Likewise, an ambiguously drafted insurance policy could wrest from a court its ability to adjudicate a claim that a municipality and the insurer actually intended the policy to cover, leaving misconduct undeterred.

Ultimately, the jury is out on the relative merits of risk pools and commercial insurers. Perhaps risk pools are better positioned than commercial insurers to turn insurance-dependent immunity waivers into

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[85] *See* Conway v. St. Louis Cnty., 254 S.W.3d 159, 167 (Mo. App. 2008) (precluding the wrongful death and negligence claims at bar because the defendant's MIRMA self-insurance policy included this disclaimer).

[86] CSX Transp., Inc. v. City of Garden City, 588 S.E.2d 688, 688 (Ga. 2003) ("[I]f the facts behind [plaintiff]'s cause of action against the City fall within the scope of coverage provided by the GIRMA policy and sovereign immunity would otherwise apply to that cause of action, the City's sovereign immunity is waived to the extent of such liability coverage.").

[87] *See, e.g.*, Weaver v. City of Statesboro, 653 S.E.2d 765, 769 (Ga. Ct. App. 2007) (finding the city waived immunity for a claim related to a police officer's negligent operation of a motor vehicle by purchasing insurance through GIRMA, which did not disclaim liability for the collision at issue).

[88] Meinck v. City of Gastonia, 823 S.E.2d 459, 465–66 (N.C. Ct. App. 2019) ("The ambiguous [disclaimer], strictly construed in favor of coverage and against the drafter, does not exclude the express coverage the City obtained when it purchased the liability insurance policy.").

tools of deterrence and democratic accountability because risk pools are tied to municipalities, more responsive to the public, and more willing to expand the scope of coverage. Or perhaps not. Regardless, the overall effect of insurance-dependent waivers is to hamper the judiciary's ability to set standards of reasonable care by adding procedural hurdles for injured claimants, and by turning cases of government actor misconduct into disputes about the meaning of insurance policy provisions. Even in situations where waivers to the extent of insurance coverage act as a saving grace by allowing claims related to misconduct for which government actors are otherwise immune, courts can only reach that outcome after years of additional litigation, interventions by insurance companies, and forays into contract law. Thus, the effect of insurance-dependent immunity waivers on democratic accountability and deterrence is at best unclear, and at worst negative.

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Conduct-specific and insurance-dependent statutory immunity provisions constrict the scope of government actor misconduct that is actionable in tort. Concerns about democratic responsiveness, judicial incompetence to decide some issues, and overdeterrence of helpful conduct could plausibly justify some of these statutory provisions. But when it comes to nondeliberative, garden-variety misconduct the likes of which common law courts are primed to adjudicate, these provisions stymie consideration of claims' merits. They do so by reinforcing majoritarian ideas about politically powerless and unpopular plaintiffs, adding procedural hurdles, and forcing courts to perform statutory interpretation and textual interpretation of insurance policies.

II
The Public Duty Doctrine

In the name of democratic accountability and administrative efficiency, legislatures enact restrictive immunity provisions to limit the judiciary's reach. Part II will argue that courts can walk and chew gum at the same time. To deter misconduct, the courthouse doors must remain open to plaintiffs injured by government actor misconduct. By applying the "public duty doctrine"—a judicial doctrine that aims to define the limits of government actors' duties to claimants—courts can adjudicate the merits of tort claims against state government actors while balancing the concerns that animate restrictive immunity statutes.

The "public duty doctrine," a default rule that the government has no duty to protect the public at large from harm, can shield state

government actors from liability for their tortious conduct.[89] The doctrine is usually invoked when claimants seek to hold government actors liable for injuries directly caused by third parties, as these situations test the limits of the government's duties to the public. Scholarly literature about the doctrine is highly critical and tends to focus narrowly on specific types of conduct in specific jurisdictions.[90] Consequently, little work has been done to reconcile courts' different approaches to the public duty doctrine,[91] and no one has put forward the doctrine as a solution to the problems that restrictive sovereign immunity statutes pose.

Part II will delineate and compare two approaches to the public duty doctrine—the "special relationship" approach and the "creation-of-risk" approach—and show that all formulations aim for a kind of optimal deterrence that accounts for important government interests while deterring misconduct. Jurisdictions that follow the special relationship approach are especially wary of overdeterring helpful conduct, while those that follow the creation-of-risk approach are more willing to allow recovery when government actors contribute to dangerous situations. The aim of this Part is not to endorse one formulation of the public duty doctrine. Rather, it is to show that regardless of which formulation a jurisdiction adopts, courts can and should negotiate the same policy and deterrence concerns that animate the restrictive sovereign immunity provisions discussed in Part I. When courts encounter statutes that preclude claims related to certain conduct or waive immunity to the extent of insurance coverage, the results are often arbitrary because judges' hands are tied. However, when courts are free to adjudicate claims and apply the public duty doctrine, they are free to shape the flexible doctrine in response to the facts of the cases they hear and in accordance with the deterrent function of tort law.

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89 *See* John Cameron McMillan, Jr., *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505, 506 (1987) (offering an overview of the public duty doctrine, which, absent a special relationship, "effectively provides a common law immunity for the negligent acts of government officials").

90 *See, e.g.*, Rachel Bruns, Note, *Resetting the Public-Duty Doctrine: Where Does the Duty Come From?*, 69 DRAKE L. REV. 201 (2021) (focused on Iowa); 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 (2011) (focused on Montana); Aaron R. Baker, Note, *Untangling the Public Duty Doctrine*, 10 ROGER WILLIAMS U. L. REV. 73 (2005) (focused on Rhode Island); G. Braxton Price, Comment, *"Inevitable Inequities": The Public Duty Doctrine and Sovereign Immunity in North Carolina*, 28 CAMPBELL L. REV. 271 (2006) (focused on North Carolina).

91 *But see* McMillan, *supra* note 89 (cataloging approaches to the public duty doctrine—the special relationship approach and abrogation of the doctrine—as of 1987 to argue that it should be eliminated).

A. "A Focusing Tool"

To begin, the public duty doctrine is not a species of sovereign immunity.[92] The doctrine is also distinct from immunity for discretionary decisions.[93] Rather, the public duty doctrine is an amalgam of a few tort principles, including the "no-duty-to-rescue" rule and the rules governing liability for third-party conduct. When courts invoke the public duty doctrine, they are effectively applying to government actors the familiar tort principle that one cannot be liable for failing to help another, but that one who undertakes to help another can be liable for failure to exercise reasonable care.[94] Likewise, there is generally no duty to control a third party's conduct absent a special relationship.[95] This general principle does not apply, however, to conduct that creates an unreasonable risk of harm,[96] as the foreseeable dangerous conduct

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[92] *Cf. id.* at 513 ("Although the main difference between sovereign immunity and the public duty doctrine is only theoretical, strict application of the public duty doctrine resurrects complete sovereign immunity as to public officers."). Furthermore, the public duty doctrine is a judge-made doctrine, while sovereign immunity is typically a creature of statute under state law.

[93] *See* DOBBS ET AL., *supra* note 16, § 344 (2d ed. 2011) (discussing how immunity for discretionary or policy decisions is usually meant to shield government entities from liability for performing legislative, executive, or judicial functions); *see also* Southers v. City of Farmington, 263 S.W.3d 603, 612 (Mo. 2008) ("Application of the public duty doctrine leaves the plaintiff unable to prove all the elements of his claim for negligence, whereas application of the doctrine of official immunity merely impacts liability, but does not destroy the underlying tort."); Shelton v. State, 644 N.W.2d 27, 30 (Iowa 2002) (finding that discretionary function immunity barred a claim of negligent failure to place and maintain guardrails on a state park hiking trail). This distinction is codified in the *Restatement (Second) of Torts*. *Compare* RESTATEMENT (SECOND) OF TORTS § 895B(2) (AM. L. INST. 1979) ("Except to the extent that a State declines to give consent to tort liability, it and its governmental agencies *are subject to the liability*." (emphasis added)), *with id.* § 895B(3) (providing that even state entities subject to tort liability are immune from liability for acts constituting judicial, legislative, or administrative policy functions).

[94] *See* RESTATEMENT (SECOND) OF TORTS § 314 (AM. L. INST. 1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); *cf. id.* § 323 ("One who undertakes . . . to render services to another . . . is subject to liability . . . for physical harm resulting from his failure to exercise reasonable care [if it increases the risk of harm or harm is suffered because of reliance on the undertaking].").

[95] *Id.* § 315 ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another person unless [a special relationship exists].").

[96] *See* DOBBS ET AL., *supra* note 16, § 405 (listing exceptions to the no-duty-to-rescue rule, including when the defendant or their instrumentalities have created risks or caused harm to the plaintiff); *see, e.g.*, Weirum v. RKO Gen. Inc., 539 P.2d 36, 41 (Cal. 1975) ("Liability is not predicated upon defendant's failure to intervene for the benefit of decedent but rather upon its creation of an unreasonable risk of harm to him."); Podias v. Mairs, 926 A.2d 859, 866 (N.J. Super. Ct. App. Div. 2007) (imposing a duty on passengers in a vehicle that struck a motorcyclist, who was then killed by another vehicle, because the passengers failed to summon help or take precautionary measures).

of a third party could be precisely what makes one's conduct tortious.[97] Courts applying the public duty doctrine borrow loosely from these tort principles and sometimes quote Restatement provisions in ad hoc ways.[98]

Rather than a coherent doctrine of tort or public law, the public duty doctrine is best conceived of as a kind of "focusing tool"[99] that directs courts' attention to whether a government actor owes a duty of care to the public in general (not actionable) or to the claimant in particular (actionable) in a given case. All jurisdictions agree that the government owes no general duty of care to the public at large. To determine whether it owes a duty of care to a particular claimant, jurisdictions use different approaches and tests, which in turn lead to different scopes of liability. Jurisdictions that apply the "special relationship" approach are more apt—though not necessarily so—to constrain the scope of actionable conduct, whereas those that apply what this Note calls the "creation-of-risk" approach find a broader range of conduct actionable. Although some jurisdictions reject the public duty doctrine, this merely leads them to adopt something resembling the creation-of-risk approach.

B. The "Special Relationship" Approach

The "special relationship" approach to the public duty doctrine is distinct from the affirmative duty of care imposed on an actor because of a pre-existing "special relationship,"[100] which is a question of the defendant's *status* relative to the plaintiff.[101] Rather, when courts conduct

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97 *See* RESTATEMENT (SECOND) OF TORTS § 449 (AM. L. INST. 1965) ("If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act . . . does not prevent the actor from being liable for harm caused thereby."); *see, e.g.*, Bell v. Bd. of Educ., 687 N.E.2d 1325, 1326 (N.Y. 1997) (holding defendant school board liable for plaintiff's harms despite the intervening act of a third party because after defendant negligently left plaintiff behind at a fair near her school, she was accosted by three boys, taken to the house of one, and raped).

98 *See, e.g.*, Cope v. Utah Valley State Coll., 342 P.3d 243, 253 & n.6 (Utah 2014) (comparing the special relationship exception to the state's public duty doctrine to the special relationship exception to the state's failure-to-rescue rule (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 37, 40 (AM. L. INST. 2012))).

99 *See* Ehrhart v. King Cnty., 460 P.3d 612, 618 (Wash. 2020) ("We use the public duty doctrine as a *focusing tool* in order to analyze whether a mandated government duty was owed to the public in general or to a particular class of individuals." (emphasis added) (internal citations omitted)).

100 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 41(a) (AM. L. INST. 2012) ("An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship."); *see also* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (finding a special relationship between the victims and defendant psychotherapists sufficient to create a duty of care, which was breached).

101 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 41(b) (AM. L. INST. 2012) (listing special relationship statuses that give rise to a duty, including parent/

a "special relationship" analysis to determine whether a government actor has breached a duty of care, they are asking whether the defendant's *conduct* created a special relationship between that actor and the plaintiff who suffered physical harm. Different formulations of the special relationship approach—such as those in Maryland, New York, and Utah, all discussed below—are capable of leading to findings of liability and no liability.

Maryland courts have adopted a strict special relationship test, which seems to circumscribe the scope of tortious conduct. In Maryland, a government official can be liable for physical harm only when the official has "affirmatively acted to protect the specific victim or a specific group of individuals like the victim, thereby inducing the victim's specific reliance . . . ."[102] Under this test, police officers have been found not liable for injuries to intoxicated passengers of arrested drivers;[103] injuries to motorists hit by intoxicated drivers whom officers decided not to detain;[104] and injuries to people who provided information about illegal drug activity to law enforcement,[105] among other conduct. The rationale for this test is a familiar wariness of "inserting into the response to every emergency call the consideration of potential liability on the part of the officer or operator . . . [which] might slow down, if not in some cases, stop, the emergency response to emergency situations."[106]

On the flip side, government actors in Maryland *can* be held liable for injuries suffered in reliance on specific promises made to plaintiffs, as courts consider these situations more worthy of sanction. A comparison of two cases will illustrate the required degree of specificity under Maryland law. In *Fried v. Archer*,[107] teenager Tiffany Fouts was sexually assaulted and left for dead in the woods. Her assailants

child, custodian/person in custody, employer/employee, and mental health professional/patient).

102 Ashburn v. Anne Arundel Cnty., 510 A.2d 1078, 1085 (Md. 1986).

103 *See* Holson v. State, 637 A.2d 871, 873–74 (Md. Ct. Spec. App. 1994) (finding no special relationship and thus no duty owed to an intoxicated passenger who was injured while walking home at night after a police officer arrested the intoxicated driver of the same car).

104 *See Ashburn*, 510 A.2d 1078 (finding no special relationship and thus no duty owed to a pedestrian who lost his leg after being struck by a car driven by an intoxicated driver whom an officer had earlier decided not to detain); Jones v. Md.-Nat'l Cap. Park & Plan. Comm'n, 571 A.2d 859 (Md. Ct. Spec. App. 1990) (finding no special relationship and thus no duty owed in a similar situation).

105 *See* McNack v. State, 920 A.2d 1097, 1110 (Md. 2007) (finding no special relationship and thus no duty owed to a family of seven who were killed in an arson attack after they reported illegal drug activity and were told by police that they would be placed on a special attention list, because the police's actions toward them were no different than the police's actions toward the general public).

106 *Id.* at 1111.

107 775 A.2d 430 (Md. Ct. Spec. App. 2001).

called 911 afterwards, but they gave the dispatcher the wrong address. The dispatcher said they would "send someone out." Unfortunately, responders did not find Tiffany, who died of hypothermia. Her mother, Sarah Fried, alleged that the dispatcher breached a duty owed to Tiffany and to her based on the apparent promise to "send someone out."[108] The court found no special relationship, and thus no duty, because neither Tiffany, nor her mother, nor the assailant-callers specifically relied on the dispatcher's promise.[109] By contrast, in *Williams v. Mayor of Baltimore*,[110] Valerie Williams had been involved in a physically abusive relationship with Gerald Watkins, who came to her house and killed her. Earlier that day, Valerie and her mother Mary Williams had called the police to report an instance of domestic violence. An officer arrived at their house, took a statement, and—according to Mary—told Valerie and Mary they should go back inside while he finished writing a report in his car. Instead, the officer drove away; it was during this time that Watkins arrived, killed Valerie, and shot Mary.[111] Maryland's highest court found that, if indeed the officer had promised Mary "that he would remain to protect them, *he may have created a special relationship further creating a duty* either to remain or inform them that he was leaving."[112] By doing so, the court signaled it would be comfortable sanctioning injuries incurred in reliance on this more specific kind of promise.

Reliance is but one element of New York's four-part special relationship test, which also asks whether the official assumed (through actions or promises) a duty to act on behalf of the injured party, knew their conduct could lead to harm, and had direct contact with the party.[113] In *Valdez v. City of New York*,[114] the state's highest court found that Carmen Valdez had relied on a police officer's promise to arrest her abusive ex-boyfriend "immediately." However, the court deemed her reliance unjustifiable—precluding recovery—because the ex-boyfriend's location was unknown, and too much time had passed

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108 *Id.* at 434–35.

109 *Id.* at 452–57.

110 753 A.2d 41 (Md. 2000).

111 *Id.* at 45–46.

112 *Id.* at 68 (emphasis added).

113 *See* Cuffy v. City of New York, 505 N.E.2d 937, 940 (N.Y. 1987). New York courts further distinguish a duty voluntarily assumed from a statutory duty, which requires courts to analyze whether the plaintiff is a member of the class for whose particular benefit the statute was enacted; whether recognition would promote the statute's legislative purpose; and whether recognition would be consistent with the legislative scheme. *See* McLean v. City of New York, 905 N.E.2d 1167, 1171–72 (N.Y. 2009) (distinguishing the two tests).

114 960 N.E.2d 356 (N.Y. 2011).

during which Valdez heard nothing from the police.[115] The court noted that a showing of justifiable reliance is necessary because, although "we should be able to depend on the police to do what they say they are going to do . . . it does not follow that a plaintiff injured by a third party is always entitled to pursue a claim against a municipality in every situation where the police fall short of that aspiration."[116] New York's highest court recently declined to change the special relationship test in a tragic case involving the killing of a developmentally disabled woman, noting that imposing liability would be too costly and would potentially deter government actors from taking necessary action in dangerous situations.[117]

Special relationship tests are not necessarily restrictive. And when courts apply broader special relationship tests, the goal of deterrence still animates their liability determinations. For example, Utah's highest court has held that an actionable special relationship can exist where, *inter alia*, a government agent "undertakes specific action to protect a person or property . . . ."[118] In *Francis v. State*,[119] the court found that state agents had created a special relationship with a group of campsite occupants, one of whom was mauled to death by a bear. Utah Department of Wildlife Resources agents knew that a group of campers had been attacked by a bear in the morning, performed a sweep of the campsite, and unsuccessfully tried to track down the bear. The agents were found to owe a duty of care to a different camper who was killed by the same bear at the same campsite later that day.[120] The court concluded that the "State's actions, specifically directed at the [c]ampsite, gave rise to a special relationship . . . ."[121] Despite the fact that the plaintiffs were not "individually identifiable" when the agents swept the campsite, it found

115 *Id.* at 366. For a critique of the reasoning in *Valdez* and its repercussions in New York, see Alisa M. Benintendi, Note, Valdez v. City of New York*: The "Death Knell" of Municipal Tort Liability?*, 89 St. John's L. Rev. 1345 (2015).

116 *Valdez*, 960 N.E.2d at 368. Even when there is a valid showing of justifiable reliance, lack of direct contact or lack of a specific assumption of duty can preclude recovery. *See McLean*, 905 N.E.2d at 1173 (concluding that the city was not liable for injuries to plaintiff's child caused by a daycare provider because there was neither sufficient direct contact nor an assumption to act on behalf of the child despite the fact a city child services "employee was negligent in answering the questions [about a daycare center] and that her negligence caused injury").

117 Maldovan v. Cnty. of Erie, 205 N.E.3d 393, 395 (N.Y. 2022) ("The rationale for this rule is that the cost to municipalities of allowing recovery would be excessive [and] the threat of liability might deter or paralyze useful activity, endangering the ability of government agencies to provide crucial services to the public . . . ." (citation omitted)).

118 Day v. State, 980 P.2d 1171, 1175 (Utah 1999).

119 321 P.3d 1089 (Utah 2013).

120 *Id.* at 1097.

121 *Id.* at 1095.

that they belonged to a "distinct group" which the agents had taken "specific action to protect . . . ."[122]

If it had focused narrowly on the agents' actions directed at the plaintiffs rather than their actions to protect the campsite, it might have found no duty owed to the camper, as the only interaction between the agents and the plaintiffs was a friendly wave.[123] Noting that its special relationship determination reflects the sum total of policy considerations,[124] the court concluded that imposing this duty was appropriate given the concrete steps that agents could have taken to warn the campers, and the narrow class of people to which this duty was owed.[125]

C. The "Creation-of-Risk" Approach

Jurisdictions can opt for a test that is, on paper, less strict. Courts in Washington and Iowa, for example, have recently adopted what this Note calls the "creation-of-risk" approach to the public duty doctrine. These frameworks impose liability on government actors for negligent conduct without paying close attention to issues like justifiable reliance, thus potentially broadening the scope of actionable conduct.

As previously discussed, the Washington Supreme Court has called the public duty doctrine an analytical "focusing tool" used to determine whether a duty was owed to the public at large (not actionable) or to the claimant (actionable).[126] Like Maryland and New York, Washington has enumerated some instances where the public duty doctrine does not apply.[127] But unlike high courts in those jurisdictions, the Washington Supreme Court has on several occasions said that an enumerated exception is not necessary to find a duty owed to an individual.[128] As the court said in *Norg v. City of Seattle*, if a "duty is based on the common law

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122 *Id.* at 1097.

123 *Id.* at 1093 ("The DWR agents did not stop the [plaintiffs] or warn them of the earlier attack but merely waved as they passed.").

124 *Id.* at 1095.

125 *Id.* at 1097.

126 *See* Ehrhart v. King Cnty., 460 P.3d 612, 618 (Wash. 2020).

127 *See* Munich v. Skagit Emergency Comm. Ctr., 288 P.3d 328, 332 (Wash. 2012) (finding that the government as a matter of law owes a duty to the plaintiff if any of the four exceptions apply: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; or (4) a special relationship); *see also* Beltran-Serrano v. City of Tacoma, 442 P.3d 608, 614 n.7 (Wash. 2019) (listing the same exceptions).

128 *See Beltran-Serrano*, 442 P.3d at 614 ("While there are four exceptions to the public duty doctrine . . . an enumerated exception is not always necessary to find that a duty is owed to an individual and not to the public at large."); *Ehrhart*, 460 P.3d at 619 ("The enumerated exceptions simply identify the most common instances when governments owe a duty to particular individuals, and they often overlap."); Norg v. City of Seattle, 522 P.3d 580, 585 (Wash. 2023) (making the same point about the enumerated exceptions).

and owed to [the plaintiffs] individually, then the public duty doctrine does not apply, [and] our [public duty] analysis ends . . . ."[129] In *Norg*, the court rejected the defendant city's argument that its duty to send an ambulance was owed to the public at large. Instead, the court found that by negligently sending an ambulance to the wrong address, the city had breached a common law duty of care owed to the plaintiff.[130]

Unmoored from both restrictive sovereign immunity statutes[131] and enumerated exceptions to the public duty doctrine, ordinary principles of tort law guide Washington courts' duty analysis. In *Norg*, the court applied to the government defendant the same rule it applies to private defendants: "At common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others."[132] Once government actors decide to undertake a course of action, they must exercise reasonable care, or else face tort liability for causing or contributing to plaintiffs' physical injuries. The *Norg* court was concerned about underdeterrence; it cautioned that barring the plaintiff's claim just because it was made against a public ambulance service "would mean that the governmental entity is subject to *less* tort liability than a comparable private entity . . . ."[133] That would contradict Washington's statutory waiver of sovereign immunity,[134] and it would exempt emergency responders from the deterrent effects of imposing a duty to exercise reasonable care.

The Iowa Supreme Court has followed a similar approach. In *Estate of Farrell v. State*,[135] it found that the public duty doctrine did not apply to the negligent design and premature opening of an interchange used by a driver to enter an interstate highway going the wrong way, leading to a deadly crash. The government defendants argued that they owed no duty to the decedent plaintiff, urging the court to focus instead on the instrumentality which caused the injury (the errant driver).[136] Extending similar holdings in two earlier cases,[137] the court

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129 522 P.3d at 585.

130 *Id.* at 588 (concluding that the city should be liable because a private ambulance service would be liable at common law for the same conduct).

131 *See* WASH. REV. CODE ANN. § 4.96.010(1) (West 2023) (municipal government entities "shall be liable for damages arising out of their tortious conduct . . . to the same extent as if they were a private person or corporation").

132 *Norg*, 522 P.3d at 587 (quoting *Beltran-Serrano*, 442 P.3d at 614).

133 *Id.* at 588.

134 *Id.*; *see* WASH. REV. CODE ANN. § 4.96.010(1) (West 2023).

135 974 N.W.2d 132 (Iowa 2022).

136 *Id.* at 136.

137 *See* Breese v. City of Burlington, 945 N.W.2d 12 (Iowa 2020) (finding that the public duty doctrine did not shield the city from liability for the hazardous design of a bike path); Fulps v. City of Urbandale, 956 N.W.2d 469 (Iowa 2021) (finding that the public duty doctrine did not shield the city from liability for a dangerously uneven sidewalk).

found that the existence of a superseding cause of harm did not shield the government defendants from liability for their affirmative acts of negligence, to wit, "the *danger they created* in their own confusing interchange."[138] The court found no reason to address whether there was a special relationship between the state and the decedent.[139] Additionally, it dismissed overdeterrence concerns by noting that, although government entities "have to balance numerous competing public priorities, all of which may be important . . . [t]his does not mean the same no-duty rule would protect that entity when it affirmatively acts and does so negligently."[140] Furthermore, the court indicated that Iowa might abandon the public duty doctrine altogether.[141]

If Iowa were to abandon the public duty doctrine, this would *not* mean that government actors have limitless liability for tortious conduct. Rather, states that reject the doctrine revert to ordinary tort law principles and balance the same interests as courts in other jurisdictions do. For example, the Colorado Supreme Court abolished the public duty doctrine in *Leake v. Caine*,[142] explaining that the doctrine "creates needless confusion in the law and results in uneven and inequitable results in practice."[143] Crucially, it noted that any plaintiff seeking to hold a government entity liable for tortious conduct would still have to "establish the existence of a duty using conventional tort principles" like foreseeability and proximate cause.[144] Similarly, Alaska's highest court rejected the public duty doctrine[145] and chose instead to determine government actors' liability "with recourse to the principles embodied by the tort concept of duty."[146]

As in states that have adopted the public duty doctrine, courts in states that have rejected it are free to adjust the aperture of government

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138 *Farrell*, 974 N.W.2d at 139 (emphasis added).

139 *Id.*

140 *Id.* at 138 (quoting Johnson v. Humboldt Cnty., 913 N.W.2d 256, 266–67 (Iowa 2018)).

141 *Id.* at 140 (Appel, J., concurring) ("I would accept the plaintiff's invitation to revisit the public-duty doctrine. . . . I think that unworkable factual hair-splitting . . . seems inevitable unless the doctrine is abandoned.").

142 720 P.2d 152 (Colo. 1986).

143 *Id.* at 159.

144 *Id.* at 160.

145 *See* Adams v. State, 555 P.2d 235, 242 (Alaska 1976) ("Where there is no immunity, the state is to be treated like a private litigant. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not."); City of Kotzebue v. McLean, 702 P.2d 1309, 1313 (Alaska 1985) (reaffirming rejection of the public duty doctrine).

146 Busby v. Mun. of Anchorage, 741 P.2d 230, 232 (Alaska 1987); *see also McLean*, 702 P.2d at 1313 ("While the public duty doctrine does protect the state from becoming the insurer of all private activity and from undue interference with its ability to govern, we believe that these concerns are better addressed by the tort concept of duty . . . .").

liability for tortious conduct. In *Dore v. City of Fairbanks*,[147] the Alaska Supreme Court relied on Section 319 of the *Restatement (Second) of Torts* to find that the police owed no duty to protect a plaintiff from injuries caused by a third party of whom the police had not taken charge.[148] By contrast, in *Division of Corrections v. Neakok*,[149] the court found that the state could be held liable for murders committed by a parolee because "[the parolee's] actions were within the zone of foreseeable hazards of the state's failure to use due care in supervising [him]."[150] Of course, these decisions are subject to restrictions imposed by each state's statutory sovereign immunity scheme.[151]

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When courts decide that government actors owe no duty of care to individual plaintiffs, they are limiting the scope of government liability in accordance with concerns about overdeterrence and the tort law principle that a duty to all is a duty to none. When they decide to impose liability, courts are treating government actors like private tortfeasors and incentivizing them to exercise reasonable care in the future. In response to Part I, which laid out the complex scheme of sovereign immunity provisions that frustrates deterrence and obscures democratic decisionmaking, Part II put forward a solution in the form of the public duty doctrine. It showed that courts are capable of balancing important policy considerations when adjudicating tort suits against government actors by applying some version of the public duty doctrine. Next, Part III will analyze the implications of this proposed solution for deterrence of government actor misconduct and the development of the common law.

147 31 P.3d 788 (Alaska 2001).

148 *Id.* at 795–96 (citing RESTATEMENT (SECOND) OF TORTS § 319 (AM. L. INST. 1965) (providing that one is under a duty to exercise reasonable care to control persons over whom one has taken charge)). Although the *Dore* court invoked the term "special relationship," it did not apply a test like Maryland's or New York's.

149 721 P.2d 1121 (Alaska 1986).

150 *Id.* at 1129; *see also* Dep't of Corrs. v. Cowles, 151 P.3d 353, 364 (Alaska 2006) (declining to overrule the finding in *Neakok* that the state has an actionable common law duty of care in supervising parolees).

151 *See, e.g.*, COLO. REV. STAT. ANN. § 24-10-106 (West 2021) (generally immunizing public entities from tort claims but waiving immunity for certain types of conduct); ALASKA STAT. ANN. § 09.50.250 (West 2008) (generally allowing tort actions against state government entities except for discretionary acts and a few other types of conduct, such as death or injury of a seaman employed by the state).

III
Parallel Constitutional Liability and the Common Law

In theory, allowing courts to adjudicate more tort claims against state government actors will further the goal of deterring misconduct. This Part will argue that, like constitutional tort suits, state-law tort suits are capable of deterring misconduct by putting government actors on notice, often through the mechanism of liability insurance. Furthermore, this Part will show how state-law tort suits can fill gaps in constitutional law that would otherwise leave negligent conduct by state government actors undeterred and unaccounted for in these overlapping schemes of civil liability. Lastly, it will argue that restrictive sovereign immunity statutes share common problems associated with the doctrine of qualified immunity (both effectively arrest the development of the substantive law) and Section 230 of the Communications Decency Act (both turn matters of common law into matters of statutory intepretation). A comparison to these much-discussed issues throws the problems posed by restrictive immunity statutes into sharp relief. Whereas Part II showed *how* courts can negotiate the important interests at stake in tort suits against state government actors, Part III makes the case for *why* common law courts must be empowered to adjudicate these suits.

A. Deterrence and Parallel Constitutional Liability

1. Deterrent Mechanisms of Civil Damages Liability

Thus far, this Note has taken for granted the proposition that civil liability (specifically tort liability) can deter government actors from future misconduct. There is a great wealth of legal scholarship in support of the deterrent effect (and goals) of imposing tort liability.[152] That deterrent effect carries over to suits involving government tortfeasors. Both constitutional tort suits under Section 1983 and common law tort suits against state government actors are actions seeking civil damages from government defendants. Scholarship suggests that constitutional tort suits[153] can have a deterrent effect on

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[152] *See generally* Guido Calabresi, The Costs of Accidents (1970); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 Harv. L. Rev. 1423 (2021). Of course, some scholars have cast doubt on the deterrent effect (and goals) of tort liability. *See, e.g.*, Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 Geo. L.J. 695 (2003); John C. P. Goldberg & Benjamin C. Zipursky, *Thoroughly Modern Tort Theory*, 134 Harv. L. Rev. F. 184 (2021). The point is just that the deterrence-based view of tort liability is prevalent in the legal academy.

[153] *See* Whitman, *supra* note 16 (giving an overview of constitutional tort suits).

government actor misconduct. The same theories apply to common law tort suits by dint of a shared deterrent mechanism: liability insurance.

Precisely how damages deter government misconduct is the subject of much debate. In the context of constitutional tort suits, Professor Daryl Levinson has argued that government actors like police officers do not respond to economic incentives; rather, they respond to political incentives, which civil damages suits do not capture.[154] The inapplicability of traditional economic models of optimal deterrence means that, in Professor Levinson's view, "the imposition of constitutional tort remedies is like throwing darts in the dark."[155] In response to Professor Levinson's critique, some scholars have undertaken to articulate exactly how, in theory, the threat of damages can deter government actor (usually police) misconduct. For instance, Professor Joanna Schwartz argues that damages suits can only serve a deterrent effect to the extent that police officers and their superiors are aware of them. A glaring information gap about the content of civil rights damages suits disrupts the deterrent value of suits that hold police officers liable for misconduct.[156] On the flip side, when government officials *do* consider information from lawsuits, Professor Schwartz finds that they "use that information to reduce the likelihood of future misbehavior."[157]

Professor John Rappaport offers a promising theory of how civil damages suits deter government official (again, focusing on police) misconduct, and one that bridges Professor Schwartz's information gap. Professor Rappaport argues that private insurance companies regulate police forces by offering municipal insurance policies, defining the scope of those policies, and then taking loss-prevention measures that serve to prevent and deter police misconduct (e.g., by requiring training sessions, exercising political pressure on police leadership, and sending insurance representatives to monitor police activities).[158] Notably, the Supreme Court has recognized the deterrent capacity of liability insurance in the context of Section 1983 suits.[159] Professor Rappaport

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154 *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 356–57 (2000).

155 Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845, 847 (2001) (citing Levinson, *supra* note 154, at 373).

156 Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023 (2010).

157 *Id.* at 1029.

158 John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1539, 1548–49 (2017); *see also id.* at 1593–95 (explaining why police officers respond to insurers' threats of increased premiums).

159 *See* Richardson v. McKnight, 521 U.S. 399, 411 (1997) (holding that, in the context of a decision to withhold the qualified immunity defense from private prison guards, liability

also offers an insurance-based typology of police misconduct. He argues that the frequency and cost (in damages) of certain types of misconduct affect how much insurers are incentivized to care about them, which in turn affects the deterrent capacity of civil damages suits.[160] For example, *Miranda* violations cannot be vindicated in Section 1983 actions and can usually be overcome in a criminal trial, meaning they are "outside insurers' purview."[161]

Professor Rappaport's scholarship helps bridge the theoretical gap between constitutional tort suits and common law tort suits against government defendants. The role of insurance as a deterrent mechanism in constitutional tort suits had been previously unexplored (especially with respect to police misconduct). Through the lens of Professor Rappaport's work, constitutional tort suits and common law tort suits are two sides of the same coin, both capable of deterring government misconduct. The next Section will show how these tools can work in tandem to remedy and deter negligent conduct by state government actors.

2. Inadequate Parallel Constitutional Liability

Statutory immunity provisions that bar recovery under state tort law interfere with the deterrent capacity of civil damages suits. These provisions could nonetheless fit into a scheme of optimal deterrence if there were adequate parallel constitutional remedies for state government actor misconduct. However, black-letter constitutional doctrine bars constitutional damages claims against certain government actors, and liability standards for violations of the Fourteenth, Fourth, and Eighth Amendments are prohibitively higher than that required for negligence. As a result, there is effectively no parallel constitutional remedy for negligent conduct by state government actors when state law bars such claims. This illustrates the need for less restrictive state sovereign immunity provisions.

Section 1983 provides a cause of action for damages caused by the deprivation of constitutional rights by persons acting under color

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insurance held by private companies "increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability"); *id.* at 420 (Scalia, J., dissenting) (noting that insurance is also available to public entities). Public entities almost always indemnify their employees. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014) (finding that municipalities indemnify police officers over 99% of the time).

160 John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. Chi. Legal F. 369.

161 *Id.* at 372.

of state law.[162] But constitutional sovereign immunity doctrine has developed to preclude Section 1983 claims for damages against certain state government actors. The Eleventh Amendment prohibits citizens from suing states for damages in federal court.[163] That is why, if a state-level official, a state-level agency, or a state itself deprives the plaintiff of a constitutional right, no damages action will lie against the state official (in their official capacity), the state-level agency, or the state itself.[164] However, if a plaintiff is injured by a *municipal* government official, a damages action will lie against the municipality itself, but *only if* the deprivation of the plaintiff's constitutional rights was the result of a "policy or custom" of the municipal government.[165]

In other words, constitutional sovereign immunity doctrine has developed to preclude damages actions against the entities best positioned to internalize the costs of their employees' misconduct: state and municipal entities. This is true even though the Supreme Court has recognized the deterrent value of holding municipalities liable for their employees' unconstitutional conduct. When the Court decided not to extend the defense of qualified immunity to municipalities in damages suits under Section 1983, the Court said its decision accorded with the principle of "equitable loss-spreading . . . in distributing the costs of official misconduct."[166] The Court believed this scheme—qualified immunity for individual officers who can be sued in their personal capacity for one-off violations, but no qualified immunity for municipalities which can only be sued for systematic violations—"properly allocates costs" among victims, individual officers, and "the public, as represented by the municipal entity."[167] But the Court's decision not to extend the qualified immunity defense did not change the fact that municipalities cannot be sued for damages for one-off instances of misconduct, nor the fact that state-level agencies cannot be sued for damages at all. Consequently, overly restrictive state sovereign immunity statutes mean that for some misconduct, there will be no damages remedy.

Even when a Section 1983 damages action can lie against a state government actor, constitutional liability standards—requiring

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162 42 U.S.C. § 1983 (allowing for individuals to bring civil actions for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by persons acting "under color" of state law).

163 *See* U.S. Const. amend. XI; Hans v. Louisiana, 134 U.S. 1 (1890) (holding that it is unconstitutional for an individual to sue her state in federal court).

164 *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983").

165 *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

166 Owen v. City of Independence, 445 U.S. 622, 657 (1980).

167 *Id.*

a heightened level of culpability—bar claims for physical harm that sound in negligence. If state law precludes liability for a given type of conduct, it will be nearly impossible for plaintiffs to cast their claims as constitutional rights deprivations. Attempts to litigate such claims as violations of the Due Process Clause of the Fourteenth Amendment, the Fourth Amendment, or the Eighth Amendment would, typically, fail.

Although liability under the Due Process Clause of the Fourteenth Amendment for "state-created danger" offers some hope to claimants who have been shut out of state court, heightened culpability standards mean that most tort-like claims will not survive in federal court either. In general, the Supreme Court has hesitated to extend the scope of due process liability to negligent conduct by government actors for fear that it would turn the Due Process Clause into "a font of tort law."[168] Indeed, the Court has explicitly held that negligent acts by state officials that cause unintended loss or injury to life, liberty, or property do not implicate due process.[169] The so-called "state-created danger doctrine" offers a narrow path to victory for due process claims arising out of negligent conduct. The Supreme Court in *DeShaney v. Winnebago County* indicated that, if a state actor creates or contributes to a dangerous situation that harms the plaintiff, there might be an actionable due process violation.[170] This comment spawned what has been called the "state-created danger doctrine," for which federal appellate courts have created distinct but related tests.[171] In general, these tests require plaintiffs to show that an affirmative act by a state government actor created or increased the plaintiff's risk of physical harm in *reckless or conscious disregard* of that

168 Paul v. Davis, 424 U.S. 693, 701 (1976) ("[Reading the Due Process Clause to include freedom from injury when the state is effectively a tortfeasor] would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."); *see also* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998) ("[W]e have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm."); Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) ("This result reflects our continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law . . . .'" (quoting Parratt v. Taylor, 451 U.S. 527, 544 (1981))).

169 Daniels v. Williams, 474 U.S. 327, 328 (1986) ("We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property."); Davidson v. Cannon, 474 U.S. 344 (1986) (finding that defendant's negligent failure to protect incarcerated plaintiff from a fellow incarcerated person did not amount to a deprivation of a liberty interest within the meaning of the Due Process Clause).

170 *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

171 *See* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 Touro L. Rev. 1 (2007); *see generally* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 Wm. & Mary Bill Rts. J. 1165 (2005) (tracing the development of the state-created danger doctrine).

risk of harm.[172] The need to show heightened culpability distinguishes these claims from negligence actions and ordinarily precludes claims that sound in negligence.[173] Only in rare circumstances, such as when state law immunizes an actor who has demonstrated heightened culpability, would it benefit plaintiffs to litigate a tort claim as a due process violation.

Plaintiffs fare no better by casting their claims as Fourth or Eighth Amendment violations. Although the Supreme Court has not definitively foreclosed the possibility of Fourth Amendment violations based on negligence, it has opined that, "if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment."[174] Negligent conduct *can* trigger the Fourth Amendment if it is accompanied by some intentional conduct. Thus, if a person is "stopped by the accidental discharge of [an officer's] gun with which he was meant only to be bludgeoned," the person has been seized within the meaning of the Fourth Amendment, *despite* the officer's negligence.[175] Even if an officer's partially negligent conduct triggers a seizure, the plaintiff must still prove it was "unreasonable" in order to state a Fourth Amendment violation.[176] As for the Eighth Amendment, the Supreme Court has said that negligence causing physical harm does not constitute cruel and unusual punishment.[177] The culpability standard for unconstitutional prison conditions is "deliberate indifference," which has been interpreted to "describe[] a state of mind *more blameworthy than negligence*."[178] The Eighth Amendment culpability standard is even higher for use-of-force claims, as plaintiffs

172 *See* Chemerinsky, *supra* note 171, at 15–18 (considering tests in the Sixth, Eighth, and Second Circuits). There is a good deal of variety in the application of the tests, but this Note will not explore that variety.

173 *See id.* at 11 ("First, it is necessary to note that negligence is not sufficient for state-created danger liability."); *see, e.g.*, Sanford v. Stiles, 456 F.3d 298, 311 (3d Cir. 2006) ("Mere negligence is not enough to shock the conscience. . . . Given that [the plaintiff] has failed to show that [the defendant] demonstrated the requisite level of fault, her [state-created danger] claim can go no further.").

174 Brower v. Cnty. of Inyo, 489 U.S. 593, 596 (1989).

175 *See id.* at 598–99.

176 *Id.* at 599.

177 *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *see also id.* at 105 (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (finding that it did not violate the Eighth Amendment to force plaintiff to undergo a second electrocution after a mechanical error thwarted the first electrocution attempt)).

178 Farmer v. Brennan, 511 U.S. 825, 835 (1994) (emphasis added).

must show that officers used force maliciously and sadistically for the purpose of causing harm.[179]

The perfect storm of constitutional sovereign immunity doctrine and heightened constitutional liability standards can leave plaintiffs who have suffered physical harm marooned with no remedy. In these situations, only state law offers shelter from the tempest. That is why it is necessary to allow tort claims against state government actors to be heard on the merits in state courts. If state legislatures do not allow state courts to hear these claims, conduct that all parties agree is negligent will go undeterred and injured plaintiffs will go uncompensated.

B. Arrested Development of the Common Law

Restrictive immunity statutes impede the ability of state common law to address these harms in ways that resemble other areas of constitutional and tort law. Federal courts and legal scholars have been grappling with similar issues posed by the doctrine of qualified immunity and the immunity granted to website operators under Section 230 of the Communications Decency Act. In all these areas, minor technicalities and statutory interpretation issues drown out any attempt to consider the merits of claims. This Section compares these areas of the law in an effort to show that the phenomenon this Note critiques is part of a larger trend in the realms of constitutional and state tort law.

1. Comparison to Qualified Immunity

The doctrine of qualified immunity shields individual government actors from damages liability if the actor did not violate a "clearly established" constitutional right.[180] Courts equate "clearly established" law with a prior ruling on similar facts.[181] That means, for example, that a claim of excessive force in violation of the Fourth Amendment will only be actionable when there is a controlling decision that is factually

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179 *See* Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (further holding that prison security measures taken to resolve disturbances only constitute unnecessary and wanton inflictions of pain in violation of the Eighth Amendment when the force is applied maliciously and sadistically for the purpose of causing harm).

180 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Anderson v. Creighton, 483 U.S. 635, 641 (1987) (precluding damages liability if a reasonable government official could have believed their actions were lawful in light of clearly established law).

181 John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?*, 62 Fla. L. Rev. 851, 863 (2010).

on point.[182] Minor distinctions between the facts of the case at bar and a prior case can lead to a dismissal on qualified immunity grounds.[183]

Defenders of qualified immunity, much like defenders of restrictive sovereign immunity statutes, argue that the doctrine deters frivolous lawsuits, protects the public fisc, prevents overdeterrence of helpful conduct, and encourages people to work for the government.[184] But prolific qualified immunity scholar and leading critic of the doctrine Professor Joanna Schwartz argues that it fails to achieve these goals and has other detrimental effects. Professor Schwartz argues that qualified immunity rarely shields officers from financial responsibility, almost never shields government officials from litigation costs, and does not protect against overdeterrence.[185] Although Professor Schwartz finds that qualified immunity is dispositive in a relatively small number of cases,[186] she claims that this "does not fundamentally undermine" critiques of the doctrine, namely that it is "incoheren[t], illogic[al], and overly protecti[ve] of government officials."[187]

Qualified immunity inhibits the development of constitutional law and hampers the deterrent capacity of constitutional tort suits. Although courts are technically allowed to rule on the merits of constitutional rights issues while shielding officers from damages through the application of qualified immunity, they rarely do so. Courts are more apt to apply qualified immunity without deciding the constitutional issue.[188]

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182 *Id.* at 863 (discussing Snyder v. Trepagnier, 142 F.3d 791 (5th Cir. 1998)).

183 *Id.* at 865 ("The search for a precedent specific to 'the circumstances presented in this case' sets an almost impossible standard for 'clearly established' law, effectively precluding vindication of constitutional rights through money damages.").

184 *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 315 (2020) [hereinafter Schwartz, *After Qualified Immunity*]; *see also* Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 Notre Dame L. Rev. 2093, 2108 (2018) (arguing that without qualified immunity, officers would be forced to choose between legal guidance they have been given and their own perception of the law, on pain of civil liability).

185 *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1799–800 (2018).

186 *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 9–10 (2017) (finding that defendants only raised qualified immunity in motions to dismiss in 13.9% of cases; courts only granted motions to dismiss on qualified immunity grounds 13.6% of the time; and, of all § 1983 cases against law enforcement defendants, only 2.6% were dismissed at summary judgment on qualified immunity grounds).

187 *Id.* at 11.

188 Schwartz, *After Qualified Immunity*, *supra* note 184, at 321–22. True, courts can extend constitutional rights while immunizing the defendant at bar. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (holding that whether or not to reach the constitutional issue is within a court's discretion). However, they "infrequently rule on qualified immunity motions in this manner." Schwartz, *After Qualified Immunity*, *supra* note 184, at 321 & 321 n.53 (citing Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37 (2015) ("[F]inding that, post-*Pearson*, 3.6% of circuit court qualified immunity decisions found constitutional violations but granted qualified immunity[.]")); Colin Rolfs, Note,

Even when courts reach constitutional issues, they "do not appear to dramatically expand the law. . . . [A]lmost ten percent [of circuit court decisions Professor Schwartz studied] had not developed the law at all."[189] Professor Schwartz argues that eliminating qualified immunity would clarify the scope of constitutional protections, in turn allowing governments to "translate that guidance to their officers in the form of policies and trainings; and those policies and trainings could influence officer behavior."[190] In other words, doing away with qualified immunity would allow constitutional tort suits to do what we know they can do: deter government actor misconduct.

In sum, qualified immunity blunts the impact of constitutional tort suits and arrests the development of constitutional tort law in much the same way that restrictive state sovereign immunity provisions stymie the development of the common law.

2. Comparison to Section 230 of the Communications Decency Act

A comparison to the effect of Section 230 of the Communications Decency Act on the common law is even more apt. Like restrictive sovereign immunity statutes, Section 230 forces courts to perform their statutory interpretation function at the expense of developing the underlying substantive law. Section 230 shields internet service providers and platforms from publisher liability for information created or developed by third parties.[191] Like conduct-specific immunity retention provisions, Section 230 is effectively a categorical grant of immunity to website operators for conduct that would otherwise be actionable.[192]

Qualified Immunity After Pearson v. Callahan, 59 UCLA L. Rev. 468, 494 & 493 fig.2 (2011) (finding that, post-*Pearson*, approximately 1.6% of qualified immunity decisions found constitutional violations but granted qualified immunity).

189 Schwartz, *After Qualified Immunity*, *supra* note 184, at 322.

190 *Id.* at 359.

191 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); *see also id.* § 230(f)(2) (defining "interactive computer service" to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . ."); *id.* § 230(f)(3) (defining "information content provider" to mean "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet").

192 *See* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 403 (2017) (arguing that § 230 "categorically immunize[s]" website operators from liability for certain activities, such as soliciting defamatory gossip and providing a forum for child sexual predation, "merely because [these activities] happen online"); Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008) ("We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content.").

Consequently, calls to reform Section 230 (short of repealing it) and courts' efforts to ascertain its scope are both centered on the proper interpretation of the statute, rather than the merits of any underlying claim.[193]

In other words, the operative question in a defamation action against a website operator is not whether the operator published material that defamed the plaintiff, but whether the operator's conduct constitutes "publisher" activity within the meaning of Section 230. For example, the Sixth Circuit's seminal decision in *Jones v. Dirty World Entertainment Recordings LLC*—a defamation action against an online tabloid—turned on the meaning of "development" within Section 230.[194] The court surveyed its sister circuits and decided to adopt the "material contribution test" meaning that website operators only lose Section 230 immunity when they materially contribute to the development of content.[195] In the case at bar, the court concluded that the defendant did not materially contribute to the defamatory content posted on its website.[196] Instead of considering the merits of applying publisher or notice liability to a website like Dirty World, the court simply used its statutory interpretation tools to serve the policy goals set forth by Congress in Section 230.[197]

It might well be that a categorical grant of immunity is good policy and prevents overdeterrence that would ultimately chill free speech on the Internet. But that does not justify near-total legislative control over this issue. The text of Section 230 includes congressional findings that the Internet has flourished due to minimal government regulation,[198] and it says that the policy of the United States is to "preserve the vibrant and competitive free market that presently exists on the Internet . . .

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193 *See, e.g.*, Citron & Wittes, *supra* note 192, at 408 ("[T]he broad construction of the CDA's immunity provision adopted by the courts has produced an immunity from liability that is far more sweeping than anything the law's words, context, and history support."); Yaffa A. Meeran, Note, *As Justice So Requires: Making the Case for a Limited Reading of § 230 of the Communications Decency Act*, 86 Geo. Wash. L. Rev. 257, 260 (2018) ("[T]he absolute immunity afforded to defendants based on § 230 is contrary to Congress's intent in enacting the statute."); *cf. Roommates.com*, 521 F.3d at 1167–68 (finding that § 230 immunity did not shield the defendant from liability for the design of its search and email systems—which forced subscribers to disclose protected characteristics—based on the definition of "development" in § 230(f)(3)).

194 755 F.3d 398, 409 (6th Cir. 2014) ("This case turns on how narrowly or capaciously the statutory term 'development' in § 230(f)(3) is read.").

195 *Id.* at 413–15.

196 *Id.* at 415–16.

197 *Id.* at 407–08 (noting that § 230 barred publisher and notice liability for interactive computer service providers to promote a competitive market and open communication on the Internet, shield providers from the chilling effect of liability, and encourage providers to self-regulate).

198 47 U.S.C. § 230(a)(4).

unfettered by [government] regulation"[199] and "remove disincentives" for website operators to moderate content.[200]

These concerns about perverse incentives and overdeterrence resemble the arguments in favor of sovereign immunity statutes.[201] But just as categorical grants of sovereign immunity prevent courts from adjudicating meritorious claims in an arbitrary, inflexible fashion, so does Section 230 prevent courts from adapting the common law to balance free speech concerns against the need to deter the spread of defamatory information online. In both areas of tort law, immunity statutes sacrifice the development of the common law at the altar of inflexible legislative control over what sort of conduct is actionable.

Conclusion

This Note has critiqued the detrimental effects of restrictive state sovereign immunity statutes on the deterrence of state government actor misconduct. It has offered a novel solution: allow courts to adjudicate a wider variety of claims and use some formulation of the public duty doctrine to balance the same concerns that animate restrictive immunity statutes. Courts need not hold state government actors liable for all incidents of physical harm; they can strike a balance, ideally holding government actors liable for the sort of nondeliberative, garden-variety misconduct that is primed for the beneficial effects of tort liability. Finally, this Note showed that the stakes are high by juxtaposing the problems posed by restrictive state sovereign immunity statutes against an inadequate parallel constitutional liability scheme, and by comparing these problems with those posed by qualified immunity doctrine and Section 230. That leaves one more issue to address: Where do we go from here?

For the sake of deterrence of government actor misconduct and democratic accountability for decisions about such harmful activities, state legislatures must reform restrictive sovereign immunity statutes. For better or worse, the legislature is the only viable means of reforming these statutes, as courts are unlikely to invalidate them on constitutional or other grounds.[202] The best course of action could

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199 *Id.* § 230(b)(2).

200 *Id.* § 230(b)(4).

201 *See supra* Section I.A (discussing the theoretical justifications for sovereign immunity statutes).

202 *See, e.g.*, Sealock v. Colorado, 218 F.3d 1205, 1212 (10th Cir. 2000) (rejecting an equal protection challenge to a sovereign immunity provision precluding actions brought by claimants who had been convicted and incarcerated in correctional facilities or jails because the provision was rationally related to a legitimate state purpose); *id.* at 1212–13 (finding

be for state legislatures to follow the lead of states like Washington by broadly waiving sovereign immunity and adopting a scheme that subjects government actors to the same liability as private tortfeasors. If state legislatures choose this path, they can take comfort knowing that the public duty doctrine—or, at least, ordinary tort law principles—will curb limitless liability and protect important state interests.

But states need not go that far. They can narrowly target for repeal conduct-specific immunity provisions that blanketly shield state government actors from liability for nondeliberative misconduct. That way, states can offer broad immunity for discretionary decisions about, say, the design of a prison or jail without precluding negligence claims that could not be brought under parallel constitutional causes of action. Additionally, it might be preferable for states to adopt a presumption of liability rather than a presumption of immunity. In theory, courts in states that generally permit tort suits against government actors with a few enumerated exceptions might be more flexible than courts in states that codify the opposite assumption.

At the very least, state legislatures should revise, if not repeal, insurance-dependent waivers of immunity. This Note has shown that these provisions lead to confusion about the scope of government actors' potential liability, extensive litigation about the meaning of insurance policies, and unpredictable outcomes for plaintiffs and defendants alike. Liability insurance plays an important role in the deterrence of government actor misconduct. In theory, insurance-dependent waivers could expand the scope of liability if policies were to cover a wide range of conduct. In practice, however, neither insurance providers nor government actors are incentivized to implement expansive policies. If legislatures decide to repeal insurance-dependent waiver provisions, they should correspondingly adapt their conduct-specific immunity provisions or adopt a Washington State-style scheme.

This Note, by preferring the judge-made public duty doctrine to sovereign immunity statutes, does not mean to overlook or dismiss criticisms of the public duty doctrine. It is true that courts can rely on the public duty doctrine to reach outcomes that can seem just as arbitrary and contrary to public policy as those dictated by restrictive immunity statutes. But that valid criticism ignores the great virtue of the public duty doctrine: its comparative flexibility and adaptability. It enables courts to do retail rather than wholesale justice. It widens the

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that a Colorado state constitutional provision did not prohibit the legislature from changing substantive law or placing valid limitations on remedies).

aperture of the government's duties to members of the public without exposing government actors to limitless liability. It serves the deterrent goal of tort law. And, compared to restrictive sovereign immunity statutes, it tells the public that the government can be held accountable for negligent conduct just like you or me.