BYU Law Review

Volume 47 | Issue 6 Article 9

7-12-2022

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INTRODUCTION

Few American legal doctrines have been as widely criticized as governmental tort immunity.[1] Perhaps prompted by critical scholarship, federal and state governments began to limit tort immunity in the late twentieth century. Following this trend, Utah waived some tort immunity by enacting the Utah Governmental Immunity Act of 1965 (the "Act").[2] This Act has three layers. First, it broadly extends state immunity to every "governmental function," which is defined to include almost everything government can do.[3] Then, the Act waives immunity for state actors' negligence and breaches of contract.[4] Finally, the Act carves from those waivers specific exceptions in which immunity is retained.[5]

One of these retentions of immunity is relevant here. The Act retains immunity (notwithstanding any waiver) for any injury that "arises out of or in connection with, or results from" the infliction of mental anguish.[6] This is a broad retention of immunity. It means that a citizen cannot sue government officials for torts of emotional distress (such as negligent infliction of emotional distress), other torts arising from mental anguish (such as a wrongful death claim based on suicide caused by a state actor), or for damages to remedy emotional distress caused by other torts of negligence. The net result? An individual who is physically harmed by a state official's negligence can recover in court while an individual who is only emotionally or mentally harmed cannot—even if, in the former, the state officials' actions were less negligent or the plaintiff's physical

1. *See, e.g.*, Edwin Borchard, *Government Liability in Tort*, 34 YALE L.J. 229, 229 (1925); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201, 1203 (2001) (critiquing sovereign immunity generally) ("Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law . . . . [T]his entire body of law is simply wrong and . . . should be banished from American law.").

2. UTAH CODE ANN. § 63-30-1 to -38 (1965).

3. *Id.* at § 63G-7-102(5) (2020) (defining "governmental function" to include "each activity, undertaking, or operation" or "failure to act" of any department, agency, employee, or agent of a governmental entity).

4. *Id.* at §§ 63G-7-201(1), 63G-7-301 (2020).

5. *Id.* at § 63G-7-201(4) (2020).

6. *Id.* at § 63G-7-201(4)(b) (2020).

injury harder to identify. Courts routinely dismiss suits brought against state actors because of this retention of immunity.[7]

Utah should eliminate or limit this retention of immunity for mental anguish. Tort immunity generally is largely indefensible, and Utah's scheme of retaining immunity is no different. Moreover, this Note argues that Utah's choice to retain immunity for mental anguish while waiving immunity for physical injuries (even when caused by the same negligent act) does not draw a sensible line. Waiving immunity for mental anguish damages would be more consistent with the concerns underlying the retention of immunity than Utah's current scheme, which therefore sends the message that mental anguish is simply not worth the risks of compensating. Finally, Utah is trending toward more expansive mental anguish recovery against private defendants, and waiving government tort immunity for mental anguish would be consistent with that trend.

Nonetheless, this Note concludes that immunity for mental anguish damages is likely here to stay. In recent years, the Utah Legislature has expanded, rather than contracted, governmental immunity. The Supreme Court of Utah has also suggested limiting immunity is the legislature's privilege, though there are arguments the court has authority to eliminate court-created immunity. And while there are good arguments that the retention of immunity for mental anguish is unconstitutional as applied in certain circumstances,[8] the court has distanced itself from the tools it would use to restrict immunity. Thus, though the mental anguish exception should be closed or narrowed, that seems unlikely to happen.

This Note proceeds as follows. Parts I and II briefly review governmental tort immunity in the United States and in Utah, respectively. Part III argues the Act's retention of immunity for mental anguish is unjustified and should be reconsidered. Part IV shows change is unlikely, and Part V concludes.

7. *E.g.*, Keller v. Alpine Sch. Dist., No. 2:19-cv-874DPB, 2021 WL 1087383 (D. Utah Mar. 22, 2021); Ottley v. Corry, No. 4:19-cv-87-DN-PK, 2020 WL 1939135 (D. Utah Apr. 22, 2020); Shively v. Utah Valley Univ., No. 2:20-cv-119, 2020 WL 4192290 (D. Utah July 21, 2020); Osterkamp v. Salt Lake Cnty., 2:20-cv-00032-DAO, 2020 WL 5298866 (D. Utah Sept. 4, 2020). The *Shively* case has an ongoing appeal. General Docket Letter, Shively v. Utah Valley Univ. (10th Cir. 2020) (No. 20-4088).

8. There are also good arguments that other portions of the Act, such as the expansive definition of "governmental function" are unconstitutional. *See infra* Section IV.

I. GOVERNMENTAL TORT IMMUNITY IN THE UNITED STATES

Utah's tort immunity is based on the same principles underlying every state's sovereign immunity. The typical account for American sovereign immunity dates to pre-revolutionary English common law, but the reality is more complicated—and much more uncertain. Even 200 years into our history, it still remains unclear why states have sovereign immunity.

A. Common Law

The classic explanation for sovereign immunity is that in England, "the King [could] do no wrong."[9] The theory is that, because the Crown could not be sued in its own courts without its consent, American sovereign states cannot either.

The reference to a King is enough to make one wonder whether this explanation has anything to do with American law.[10] In fact, it's not clear that the modern sovereign immunity doctrine has anything to do with English law either.

Immunity in England was more of a procedural "accident" stemming from the nature of feudal structure than a doctrine barring recovery.[11] Instead, the stronger tradition (rather than sovereign immunity) seems to have been that where there was a right, there was a remedy—even against government.[12] Indeed, as

9. *See, e.g.*, Niblock v. Salt Lake City, 111 P.2d 800, 804 (Utah 1941) (Wolfe, J., concurring) ("Governmental immunity is granted on the old theory that 'the king can do no wrong . . . .'"); Frederick F. Blachly & Miriam E. Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 L. & CONTEMP. PROBS. 181, 182–84 (1942) ("The maxim that 'the King can do no wrong' . . . has since continued in force.").

10. Langford v. United States, 101 U.S. 341, 343 (1879) ("It is not easy to see how [this] proposition can have any place in our system of Government. We have no King to whom it can be applied . . . . We do not understand that either in reference to the government of the United States, or of the several states, . . . the English maxim has an existence in this country."); Driggs v. Utah State Tchrs. Ret. Bd., 142 P.2d 657, 660–61 (Utah 1943) ("This antiquated idea has certainly never had any place in American jurisprudence.").

11. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3, 3 n.4 (1963) (quoting FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 518 (2d ed. 1898)) (noting immunity was an "accident" of the procedural conundrum of the King enforcing a "writ" against himself); Nevada v. Hall, 440 U.S. 410, 415 (1979) ("The King's immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong.").

12. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."); *id.* (noting the only time a remedy at law did not exist for a rights violation was when "the only possible legal remedy would

Professor Louis Jaffe argued, the maxim "the King can do no wrong" originally meant the King was not entitled to do wrong—the King's wrongs remained mostly actionable.[13]

In fact, prior to the American Revolution, sovereign immunity was less of a bar on recovery and more of a procedural rule about *how* the Crown could be sued.[14] The Crown's servants were not entitled to immunity and could be sued without consent.[15] In fact, common law suits against the Crown's servants were common,[16] at

be directed against the very person himself who seeks relief"); *Id.* at 55–56 (noting positive wrongs "in vain would . . . be declared . . . if there were no method of recovering and asserting those rights when wrongfully withheld or invaded") (grammar modernized); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress.") (citation omitted); Ashby v. White, 92 Eng. Rep. 126, 135–36 (K.B. 1703) (Holt, C.J., dissenting) (arguing, in an opinion that was upheld in the House of Lords, that an individual could have a suit against a Crown's official because "want of right and want of remedy are reciprocal").

13. Jaffe, *supra* note 11, at 3–4. Professor Jaffe concludes that main force of the maxim was largely procedural, since individuals could not proceed by writ against the Crown, instead proceeding via petition. *Id.* at 18.

14. *Id.* at 18–19; Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 878 (7th ed. 2015) [hereafter HART & WECHSLER] (noting "many scholars have argued that the doctrine of sovereign immunity . . . was less about *whether* the Crown or its agents could be sued than about *how*").

Much of the author's research in this paragraph was presented to the United States Supreme Court to make a similar argument. Brief of Project for Privacy & Surveillance Accountability and Protect the First Foundation as *Amici Curiae* Supporting Respondent at 6–11, Egbert v. Boule (No. 21-147) (U.S. argued Mar. 2, 2022).

15. Jaffe, *supra* note 11, at 1, 9–10 (noting such suits did "not require . . . consent"); HART & WECHSLER, *supra* note 14, at 880 ("While the King enjoyed at least a formal sovereign immunity, the officers did not."); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 4 (1972); 17A MOORE'S FEDERAL PRACTICE § 123App.01 ("[O]fficers could be sued personally for trespasses committed by them in the name of the Crown.").

Interestingly, according to Blackstone, officers' liability followed from the Crown's fictional perfection; since the King, personally inseparable from the office of the Crown, could do no wrong, any wrongs done in the Crown's name were assumed to be caused by the evil of the Crown's servants, who were held liable. 1 BLACKSTONE, *supra* note 12, at 237; 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 5–6 (3d ed. 1944). By the Seventeenth Century, parliamentary lawyers did not separate the King's personal and official capacities "because they thought of the King as a natural man subject to law." *Id.*

16. *E.g.*, Entick v. Carrington, 19 Howell's State Trials 1029, 1029–31 (C.P. 1765) (Camden, C.J.) (affirming damages award); Leach v. Money, 19 Howell's State Trials 1001, 1027–28 (K.B. 1765) (same); Huckle v. Money, 95 Eng. Rep. 768, 768–69 (K.B. 1763) (Murray C.J.) (same); *Ashby*, 92 Eng. Rep. at 135–36 (Holt, C.J., dissenting).

least against the local officers who most interacted with the people.[17] The Crown itself could also be sued in common law courts for infringing individual rights. Suit proceeded via a petition of right (suit was had via petition rather than via writ because of the anomaly of a King enforcing a writ against himself).[18] Unlike other petitions, the petition of right was granted as a matter of course once the petitioner established that he would have been entitled to proceed had his suit been against a private party rather than the King.[19] The King "could not refuse to redress wrongs when petitioned to do so."[20]

There was one partial exception to this. The petition of right could not be used to recover from the Crown for the torts of the Crown's servants.[21] However, scholars have attributed this irregularity to difficulty in how to apply *respondeat superior* against the Crown—not to a doctrine that either the Crown or its officials were immune in tort.[22]

Thus, in common law England, sovereign immunity did not mean what modern sovereign immunity doctrine takes it to mean today. Injured plaintiffs could recover from both the Crown and the Crown's servants for the wrongs they committed.

17. Jaffe, *supra* note 11, at 9–15 (noting suits were less common against higher officers) (quoting A.V. DICEY, THE LAW OF THE CONSTITUTION 189 (8th ed. 1923) ("The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages . . . .")).

18. HOLDSWORTH, *supra* note 15, at 12 (noting the petition of right became the primary means of suing the King).

19. *Id.* (noting petitions of right were granted "follow[ing] the nature of the ordinary remedies provided by law"); *id.* at 15 (noting the King "could not rightfully refuse to do what justice required . . . on a petition of right"); Jaffe, *supra* note 11, at 5 (noting petitions were granted "not on the basis of expediency, but of law").

Blackstone called recovery on petitions of right a "matter of grace." 1 BLACKSTONE, *supra* note 12, at 236. This was "historically inaccurate." Engdahl, *supra* note 15, at 5. By Blackstone's day, any requirement of the Crown's actual consent had been replaced by "fictional consent" or had been shifted from the Crown to the courts. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 912 (1997).

20. HOLDSWORTH, *supra* note 15, at 8.

21. Jaffe, *supra* note 11, at 8.

22. *Id.*

B. Early States

Sovereign immunity in America, on the other hand, is a bar to recovery. Here, the government cannot be sued without its consent.[23] Thus, "relief which in England was available only by petition of right could not be had as a rule in this country without legislative consent."[24]

While there is no question that sovereign immunity has been a part of American law since the Founding, there is little to no agreement about why American states have sovereign immunity. The disagreement probably stems from a lack of clear historical clues. Though the topic did arise in the ratification debates, sovereign immunity was not discussed by the Constitutional Convention.[25] Almost 100 years after the Founding, Justice Miller wrote that "the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."[26]

Scholars and jurists have given a variety of explanations for why American governments have sovereign immunity.

One explanation is that the colonial legislatures naturally and rightfully inherited sovereign immunity when they separated from England.[27] Unfortunately, though "some of the Framers assumed that States did enjoy immunity," whether states were immune if sued in their own courts "is not clear."[28]

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23. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 478 (1793) (assuming the United States could not be sued without its consent); THE FEDERALIST NO. 81, at 422–23 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent") (grammar modernized and emphasis removed).

24. Jaffe, *supra* note 11, at 20.

25. Chemerinsky, *supra* note 1, at 1206–07 (collecting antifederalist arguments that the Constitution would allow states to be sued without consent in federal court).

26. United States v. Lee, 106 U.S. 196, 207 (1882).

27. THE FEDERALIST NO. 81, at 422–23 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.") (grammar modernized and emphasis removed).

28. Seminole Tribe v. Florida, 517 U.S. 44, 101 (1996) (Souter, J., dissenting). *Compare* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 6–7 (1972) (asserting there was immunity before ratification), *with Seminole Tribe*, 517 U.S. at 101, 103 (Souter, J., dissenting) (concluding it "is not clear" whether pre-ratification states had sovereign immunity) (citing John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895–99 (1983)); Alden v. Maine, 527 U.S. 706, 764 (1999) (Souter, J., dissenting) ("The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the crown alone . . . .").

Other explanations are equally controverted. One argues that sovereign immunity was based "squarely" on the English system and that immunity was adopted both thoughtlessly and incorrectly.[29] Another points to the Eleventh Amendment as a source of some immunity,[30] while others interpret that Amendment to either not provide sovereign immunity[31] or to not accurately reflect pre-Ratification understanding (at least as it has since been applied).[32]

Another explanation is that courts have no jurisdiction over the sovereign.[33] Others include that the government representing a sovereign cannot be liable for the fulfillment of its legitimate ends,[34] or that the creator of the law upon which a right depends cannot be held liable for a violation of that right.[35] Some scholars tie immunity to practical concerns, pointing, for example, to the financial instability of the post-revolutionary states.[36] And still others have asserted that suits against the government are simply "subversive of the public interests."[37]

In short, the origin of sovereign immunity remains entirely unsettled.

29. Blachly & Oatman, *supra* note 9, at 187; ROBERT DORSEY WATKINS, THE STATE AS A PARTY LITIGANT 55 (1927) ("[S]overeign immunity was accepted without hesitation . . . [and] without considering whether it was valid, essential, or desirable.").

30. *See* Jaffe, *supra* note 11, at 20 ("As a result of the eleventh amendment individuals could no longer sue a state *eo nominee* . . . .").

31. *E.g.*, Chemerinsky, *supra* note 1, at 1205 (noting "a careful reading of the text does not support the claim" that the Eleventh Amendment provides sovereign immunity to states); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1034 (1983) (arguing "the amendment did nothing to prohibit federal court jurisdiction").

32. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 332–36 (Random House Trade Paperback ed., 2006) (arguing the Eleventh Amendment has been expanded to make it "harder for twenty-first-century Americans to achieve redress [against the states for constitutional violations] than it ever was in eighteenth-century England"); *see also* Hans v. Louisiana, 134 U.S. 1 (1890).

33. Alden v. Maine, 527 U.S. 706, 715–16 (1999) ("[N]o court can have jurisdiction over [the king.]") (quoting 1 BLACKSTONE, *supra* note 12, at 242).

34. Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850).

35. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

36. *See* Nevada v. Hall, 440 U.S. 410, 418 (1979); Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 722 (1947).

37. Gellhorn & Schenck, *supra* note 36, at 722 (quoting Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274 (1868)).

Whatever its rationale, state sovereign immunity was never absolute.[38] Like in England, sovereign immunity generally did not protect government officials in their personal capacities, protecting instead the governmental entity itself.[39] Local governments do not enjoy sovereign immunity.[40] Some Founders assumed federal courts would have power to enforce enumerated limits on state power.[41] and the Fourteenth Amendment's Enforcement Power allows Congress to waive sovereign immunity for states in other cases.[42]

Moreover, states can waive their own immunity through private bills or general statutes.[43] And states did so, including for tort suits. In so doing, they followed the lead of the federal government, which waived some tort immunity through the Federal Tort Claims Act in 1946.[44] By 1961, New York, Illinois, and California had each waived some tort immunity.[45] Every state has

38. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 527 (2003) ("The basic point is that 'sovereign immunity' has never been a complete immunity . . . .").

39. HART & WECHSLER, *supra* note 14, at 880 (noting suits against federal officers were "a fixture in American law") (citing Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804)) (allowing common law cause of action to proceed against a federal officer who purported to act in his official capacity); Chemerinsky, *supra* note 1, at 1218 ("The Supreme Court long has held that sovereign immunity prevents suits against the government entity, but not against the officers.") (citing, *inter alia*, Schneider v. Smith, 390 U.S. 17 (1968), and Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682 (1949)); *Larson*, 337 U.S. at 686 (noting "the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him" when the suit is brought to create a personal liability); *see also* Ex Parte Young, 209 U.S. 123 (1908) (allowing injunction to proceed against state officer who violated the federal constitution).

40. Lincoln Cnty. v. Luning, 133 U.S. 529 (1890).

41. THE FEDERALIST NO. 80 (Alexander Hamilton) (arguing federal courts had authority under the Constitution to enforce enumerated limits on state power). But Article III jurisdiction alone does not seem to suffice. *See* U.S. CONST. amend. XI (imposing immunity in citizen-state diversity cases); Hans v. Louisiana, 134 U.S. 1 (1890) (holding Eleventh Amendment immunity extends to arising-under cases).

42. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). This power is notable because Article I of the U.S. Constitution does not give Congress power to waive state sovereign immunity. Seminole Tribe v. Florida, 517 U.S. 44 (1996).

43. *See, e.g.*, Harold L. Mai, *Constitutionality of Special Bills for Private Relief*, 6 WYO. L.J. 261, 261–62 (1951) (discussing New Mexico's prior private bill procedure and a case that struck it in favor of general statutory waivers).

44. Pub. L. No. 79–601, 60 Stat. 812 (1946). Earlier, the federal government had enacted the Court of Claims Act, which authorized a legislative court to hear claims against the government and award judgments. Pub. L. No. 37-92, 12 Stat. 765 (1863).

45. *See* N.Y. CT. OF CLAIMS ACT § 12; ILL. REV. STAT. 37 §§ 439.1–.24 (1957); Muskopf v. Corning Hosp. Dist., 359 P.2d 457 (Cal. 1961); *see also* Stanley Mosk, *The Many Problems of Sovereign Liability*, 3 SAN DIEGO L. REV. 7, 8–9 (1966).

since followed suit.[46] Indeed, the supreme courts of some states, including California and Illinois, have abolished governmental tort immunity (though their legislatures have since acted to limit that).[47]

New York's waiver of immunity was very influential. That act gave consent for the state to be sued "in accordance with the same rules of law as apply to an action . . . against an individual or a corporation."[48] This scheme gave rise to the infamous governmental-proprietary distinction, under which immunity is waived for proprietary functions (i.e., those also engaged in by private corporations), but not for purely governmental functions; this distinction has influenced the scope of immunity waivers across the country, including in Utah.[49]

* * *

While the classic account traces sovereign immunity back to pre-Founding English common law, modern sovereign immunity—a harsh bar on suits not consented to—extends beyond its alleged predecessor, which was more of a procedural rule that allowed suits against both the Crown and the Crown's servants. In addition, it remains entirely unclear where American governments' sovereign immunity comes from. Sovereign immunity is an anomaly, but one that states have enjoyed since the Founding.

II. GOVERNMENTAL TORT IMMUNITY IN UTAH

"Sovereign immunity was a settled feature of common law when Utah became a state and adopted its constitution."[50] From the beginning, it was based on the doctrine underlying every other

46. See *State Sovereign Immunity and Tort Liability*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 8, 2010), https://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx, for a list of the statutes of each state.

47. *Muskopf*, 359 P.2d at 457; Molitor v. Kaneland Comm'y Unit Dist. No. 302, 163 N.E.2d 89 (Ill. 1959).

48. N.Y. LAWS 1929, c. 467 § 1 (amending N.Y. CT. OF CLAIMS ACT § 12-a).

49. Mosk, *supra* note 45, at 9–10 (noting the distinction in New York and California); John W. Creer, *The Utah Governmental Immunity Act: An Analysis*, 1967 UTAH L. REV. 120, 121 n.7 (noting the distinction in Utah); Gellhorn & Schenck, *supra* note 36, at 723 (noting the general assumption in the mid-1900s that governmental corporations should be suable to the same extent as private counterparts); *see also* Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939).

50. Tiede v. State, 915 P.2d 500, 504 (Utah 1996).

state's immunity.[51] Before passing its Governmental Immunity Act, Utah's approach to tort immunity closely tracked that of other states and the federal government. After passing the Act, the approach of the Utah legislature and courts to immunity has fluctuated considerably, leaving a confusing body of law that has trended toward increased immunity.

A. Pre-Act Immunity Jurisprudence

Drafted in an era of mistrust of government and adopted by a people particularly skeptical of strong government,[52] Utah's 1895 constitution created a board of examiners with (exclusive) authority to "examine all claims against the State."[53] Acting under this provision, the board would review tort claims against the state and submit recommendations to the legislature, which almost always acted in accordance with its recommendations.[54] Submitting a claim to the board was considered a plaintiff's exclusive means for tort remedies against the state. Thus, in *Wilkinson v. State*, the court set aside a verdict won against a state employee who had negligently created a canal that had caused water damage to the plaintiff's property because the constitution conferred unique power to hear such claims to the board.[55] As it did so, it suggested that immunity was a common law doctrine—meaning, today at least, that it was court-created doctrine.[56]

51. Wilkinson v. State, 134 P. 626, 630 (Utah 1913) (recognizing the "elementary" doctrine that "in the absence of either express constitutional or statutory authority an action against a sovereign state cannot be maintained"), for example, when recognizing sovereign immunity, cited no Utah authority and instead cited a string of judicial opinions from other jurisdictions.

52. *See* John J. Flynn, *Federalism and Viable State Government – The History of Utah's Constitution*, 1966 UTAH L. REV. 311, 314–15.

53. CONST. OF THE STATE OF DESERET, art. V § 18 (1872). This text was copied verbatim from the Nevada constitution, which Utah copied after three of its would-be seven constitutional drafts were not approved for statehood. *Compare id.*, *with* NEV. CONST., art. V, § 21; Flynn, *supra* note 52, at 317. This copied text was also carried over into the present constitution. UTAH CONST., art. VII, § 13.

54. Creer, *supra* note 49, at 125 n.37 (noting that of thirty-five claims recommended by the board in 1955, thirty-four were approved).

55. 134 P. 626 (Utah 1913).

56. *Id.* at 630. The Court affirmed Utah's immunity as a general principle of law, not as a statutory or constitutional command. *Id.* (noting the doctrine of immunity "is elementary and of universal application" and that "there is not a single authority to the contrary") (citing cases from other jurisdictions). While courts may have viewed common law principles as derived rather than created, *cf.* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), today common-law

Courts viewed municipalities differently.[57] As early as 1881, courts held municipalities liable when their negligence caused injury—if the injury was caused when carrying out a ministerial, as opposed to discretionary, function.[58] Thus, in a case factually reminiscent of *Wilkinson*, the court held Salt Lake City liable for water damage caused by the city's negligent maintenance of public waterways.[59] Over time, and by the 1950s, the ministerial-discretionary test evolved into the governmental-proprietary test,[60] the test used in other jurisdictions.[61] Municipalities could be liable for injuries caused during proprietary functions, but not for those caused during governmental functions.[62]

This shift increased government's liability. Under the new test, a municipality could be held liable if it caused injury during an activity that did not have "a public or governmental character, such as the maintenance and operation of public schools, hospitals, public charities, [or] public parks."[63] If the government financially benefited from the activity or competed with private business in the activity, it was more likely to be a proprietary function, during which the government could be liable for injuries caused.[64] As in other states, however, the distinction between propriety and governmental functions became messy, rife with incoherent decisions.[65]

principles are usually viewed as law created by courts, *see* Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527, 529–531 (2019) (discussing the prevailing modern conception before offering a contrary view).

57. DeBry v. Noble, 889 P.2d 428, 436 (Utah 1995) (overviewing municipal tort liability in Utah).

58. Levy v. Salt Lake City, 1 P. 160 (Utah 1881); *see also DeBry*, 889 P.2d at 437–38 (collecting cases).

59. *Levy*, 1 P. at 162–64.

60. *DeBry*, 889 P.2d at 439.

61. *See supra* notes 49–50 and accompanying text.

62. *Id.*

63. Ramirez v. Ogden City, 279 P.2d 463, 465 (Utah 1955) (internal quotation marks omitted).

64. *Id*.

65. *DeBry*, 889 P.2d at 439; s*ee also* Creer, *supra* note 49, at 127–29. For example, operating a golf course, Jopes v. Salt Lake Cnty., 343 P.2d 728 (Utah 1959), a sledding hill, Davis v. Provo City Corp., 265 P.2d 415 (Utah 1953), and a sewer system, Cobia v. Roy City, 366 P.2d 986 (Utah 1961), were governmental functions. However, operating a swimming pool, Burton v. Salt Lake City, 253 P. 443 (Utah 1926), and a waterworks system, Egelhoff v. Ogden City, 267 P. 1011 (Utah 1928), were proprietary functions. More poignantly, operating a public hospital was both proprietary, Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975),

Over time, courts began to apply the governmental-proprietary distinction in cases involving the state, contrary to the *Wilkinson* holding.[66] In so doing, courts relied on cases involving municipalities.[67] This caused the once-separate doctrines for state and municipality immunity to harmonize over time, both being governed by the messy governmental-proprietary distinction.[68]

B. The Utah Governmental Immunity Act

Utah passed the Utah Governmental Immunity Act in 1965 against this constitutional and common law backdrop.[69] The Act's purpose was to expand governmental tort liability. Indicative of that purpose and the general sentiment, legislators expressed worry that immunity was unfairly leaving plaintiffs injured by the government without compensation.[70] Those promoting the bill criticized the very idea of sovereign immunity, calling it an "ancient doctrine" that allowed government to remain an "[un]responsible agency."[71]

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and governmental, Madsen v. State, 583 P.2d 92 (Utah 1978). Other jurisdictions have had similar frustrations and incongruencies with the dichotomy. Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1233–34 (Utah 1980) (collecting cases); Gordon L. Roberts & Charles H. Thronson, *A New Perspective – Has Utah Entered the Twentieth Century in Tort Law?*, 1981 UTAH L. REV. 495, 513. One explanation for why the dichotomy has produced such incongruous results is that the underlying premise (sovereign immunity) is itself unsound. *Standiford*, 605 P.2d at 1234 (citing Indian Towing Co. v. United States, 350 U.S. 61 (1955)).

66. Sheffield v. Turner, 445 P.2d 367, 368 (Utah 1968) (applying the distinction to find operating a state prison a governmental function); White v. State, 579 P.2d 921, 923 (Utah 1978) (applying the distinction to find the activities of an industrial commission to be a governmental function).

67. *DeBry*, 889 P.2d at 439; *see also* Condemarin v. Univ. Hosp., 775 P.2d 348, 351 (Utah 1989).

68. *DeBry*, 889 P.2d at 440. It is not clear whether this shift had happened or was just about to happen when the Utah Governmental Immunity Act was passed. *See id.* (citing *Sheffield*, 445 P.2d at 368).

69. UTAH CODE ANN. § 63-30-1 to -38 (1965).

70. Taylor *ex rel.* Taylor v. Ogden City Sch. Dist., 927 P.2d 159, 167–69 (Utah 1996) (Durham, J., dissenting) (overviewing the legislative history of the Governmental Immunity Act). For example, a committee report noted "[t]here was virtual unanimity that immunity . . . should be waived . . . for the *negligent acts or omissions of employees*." *Id.* at 168 (Durham J., dissenting) (emphasis in original) (quoting Utah Legislative Council, Report of the Governmental Immunity Committee 67–68 (1964)).

71. *Id.* (quoting Floor Debate, Statement of Representative Ray Harding, 65th Utah Leg., Gen. Sess. (Feb. 11, 1965) (House Recording No. 2, Side 2) ("I believe that to allow a person to commit a wrong and . . . to hide behind the ancient doctrine of [sovereign

Despite this apparent skepticism of tort immunity, however, the Act did not waive all tort immunity. The Act is structured as follows. First, the Act retains immunity for "any injury that results from the exercise of a governmental function."[72] Immunity is then waived in general areas including for "any injury proximately caused by [the negligence] of an employee committed in the scope of employment."[73] Finally, the Act carves out of those waivers narrow areas in which immunity is retained.[74] One of these retentions of immunity is relevant here. Notwithstanding the waiver of immunity for employee's negligence, the Act retains immunity "if the injury arises out of or in connection with, or results from . . . infliction of mental anguish."[75] That retention of immunity is discussed more in depth in Section II.C.

Since the Act's three layers are consecutive, the first-layer definition of "government function" sets the baseline for the other two. Thus, if an injury caused during a "governmental function" does not fall within a specific waiver, the government is immune. And, since the Act does not specifically waive immunity for intentional torts, the government is immune against intentional torts as well, as long as they are committed during a "government function."[76] Further, if a cause of action falls within a specific retention of immunity, that retention controls even if the cause of action also falls within an enumerated waiver of immunity like negligence.[77]

C. Post-Act Immunity Jurisprudence

Since passing the Act, the legislature's view of immunity seems to have changed dramatically, as has the courts'. Along the way, the courts and legislature have created a confusing and turbulent body of law.

immunity] is to be but an ostrich and put your head in the sand . . . . I think that we must accept [our] obligations.").

72. UTAH CODE ANN. § 63G-7-201(1) (2020).

73. *Id.* at § 63G-7-301(2)(i).

74. *Id.* at § 63G-7-201(4).

75. *Id.* at § 63G-7-201(4)(b).

76. *See* Dettle v. Richfield City, No. 2:13-cv-357-DAK, 2014 WL 4354424, at *9 (D. Utah Sept. 2, 2014).

77. UTAH CODE ANN. § 63G-7-201(2) (2020) (applying the retentions "[n]otwithstanding" any wavier of immunity).

The original version of the Act did not define "governmental function," its baseline for immunity.[78] Nor did it mention the term "proprietary function," which was the common law counterpart in the governmental-proprietary distinction.[79] Courts and scholars took this silence as a signal that the legislature intended to give "the courts flexibility . . . in fashioning consistent and rational limits to governmental immunity . . . [having] the power to restrict the scope of governmental immunity."[80]

Using this assumed power, Utah courts applied the governmental-proprietary distinction until 1980, using the distinction to "limit the harsh results" of sovereign immunity.[81] Both before and after the Act, however, the distinction was nothing but incoherent and unworkable. The Utah Supreme Court described it variously as "one of the most unsatisfactory [tests] known to the law," "impracticab[le]," a "quagmire," and causing "inevitable chaos."[82] And the test did produce "irreconcilable" and "incongruous" results.[83] Selecting a sledding hill and operating a golf course were deemed governmental functions, while operating a swimming pool was proprietary.[84] And operating a city sewer system was governmental, while operating a city waterworks system was proprietary.[85] In the span of three years, operating a public hospital was characterized as first proprietary and then governmental.[86]

Citing this incoherence, the Utah Supreme Court soon jettisoned the governmental-proprietary distinction.[87] The court replaced the distinction with a test turning on whether the government's activity is so "unique" that it "can only be performed

78. UTAH CODE ANN. §§ 63-30-1, 3 (1965).

79. *Id.* at §§ 63-30-1 to -38.

80. Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1232 (Utah 1980) (citing Arvo van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. F. 970 (1966)); *see also id.* at 1235 ("This language gives this Court the power to define understandably and logically the term 'governmental function.'").

81. *Id.* at 1233–36.

82. *Id.* at 1233–34 (internal quotations omitted).

83. *Id.* at 1233 (internal citations omitted).

84. *Id.* (collecting cases) (internal citations omitted).

85. *Id.* (collecting cases) (internal citations omitted).

86. *Id.* (citing Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975); Madsen v. State, 583 P.2d 92 (Utah 1978)).

87. *Id.* at 1236–37.

by a governmental agency" or on whether the activity is "essential to the core of governmental activity."[88] Critically, change was motivated by the incoherence of prior doctrine, not a belief that government liability needed to be expanded.[89] In fact, when changing the test, the Utah Supreme Court openly criticized the doctrine of sovereign immunity as itself "largely unsound."[90] For the court, the reason the distinction had proved unworkable was because it was founded on a doctrine—sovereign immunity—that itself made little sense.[91]

Soon after the court developed its new test, the Utah Legislature stepped in to supersede it.[92] In a 1987 amendment to the Act, the Legislature defined "government function" to include essentially every action engaged in by government: "'Government function' means any act, failure to act, operation, function, or undertaking of a governmental entity."[93] The amendment specifically overruled the prior tests, noting that whether an activity qualifies as a governmental function does not depend on whether it is "governmental, proprietary, a core governmental function, unique to government . . . essential to a government . . . function, or could be performed by private enterprise."[94] In other words, the Legislature changed the baseline from immunity for some government activities to immunity for *all* government activities. Only if the State specifically waived immunity could suit proceed against it, in contrast to prior doctrine.

The Utah Supreme Court struck the amendment as unconstitutional under the state constitution's Open Courts Clause.[95] To do so, the court applied a substantive interpretation of that clause first introduced in *Berry ex rel. Berry v. Beech Aircraft Corp.*[96] that limited the legislature's power to abrogate common law remedies.[97] Under the *Berry* test, laws that eliminate previously

88. *Id.*

89. *Id.* at 1234.

90. *Id.*; *see also id.* at 1234 n.4 (calling the reason why American states enjoyed sovereign immunity "unclear").

91. *Id.*

92. UTAH CODE ANN. § 63-30-2(4)(a) (1987).

93. *Id.*

94. *Id.*

95. Laney v. Fairview City, 57 P.3d 1007 (Utah 2002); UTAH CONST., art. I § 11.

96. 717 P.2d 670 (Utah 1985).

97. *Laney*, 57 P.3d at 1022.

available remedies are presumptively unconstitutional and subject to a heightened level of scrutiny.[98] The court applied the test because the 1987 amendment eliminated a remedy that existed when the Open Courts Clause was ratified: before the 1987 amendment, the government was "not entitled" to immunity for proprietary functions and could be held liable in torts caused during those functions; after the 1987 amendment changed the baseline for immunity, the government gained immunity in those cases.[99] The court also found the law failed *Berry* heightened scrutiny.[100] With the 1987 amendment struck, Utah was not immune for proprietary functions.

The legislature responded by reenacting the same provision.[101] By so doing, the legislature made explicit it had changed its view on immunity. Whereas legislators supporting the original Act hoped to reduce sovereign immunity and criticized the very notion of sovereign immunity, legislators supporting the reenactment suggested the opposite.[102] One senator stated, "We are headed for a showdown with the [Utah] Supreme Court; . . . hopefully . . . the court will recognize the policy stand we are making."[103]

Though the same constitutional arguments are at play, the court has recognized the legislature's choice and has yet to strike the reenactment.[104] In so doing, the court has distanced itself from *Berry*'s substantive interpretation of the Open Courts Clause. Though it had used *Berry* to strike other immunity-related laws as

98. *Berry*, 717 P.2d at 680. Specifically, a law eliminating a previously available remedy is constitutional only if the government proves (a) the law provides a "reasonable alternative remedy" that provides "essentially comparable substantive protection" or (b) the law eliminates a "clear social or economic evil" and is a reasonable means of eliminating that evil. *Id.*

99. *Laney*, 57 P.3d at 1023.

100. *Id.* at 1023–27.

101. UTAH CODE ANN. § 63-30d-201(1) (Supp. 2004); Adam Goldstein, Comment, *IV.A. Governmental Immunity Act of Utah*, 2005 UTAH L. REV. 380 (discussing the reenactment).

102. Goldstein, *supra* note 101, at 385 (discussing legislative history).

103. *Id.* (quoting Floor Debate, 55th Leg., Gen. Sess. (Utah Feb. 25, 2004) (Senate recording tape no. 39, side A) (statement of Sen. Dave L. Thomas)).

104. Waite v. Utah Lab. Comm'n, 416 P.3d 635, 661 (Utah 2017) (noting *Laney*'s abrogation); Jenkins v. Jordan Valley Water Conservancy Dist., 283 P.3d 1009, 1041 (Utah Ct. App. 2012) (same).

well,[105] the court has criticized and limited *Berry* and its progeny to their facts.[106] Thus, the current Act retains a broad definition of "governmental function," one that encapsulates virtually every governmental activity.[107]

From Utah's constitutional commitment to a claim review board through the confusing governmental-proprietary distinction to an across-the-board grant of immunity subject to only specific waivers, Utah's path with immunity has been convoluted. Both the court and the legislature have fluctuated immensely in their approaches to immunity and have clashed with each other. In the process, the two together have left a body of law just as unsatisfactory as the original governmental-proprietary distinction. This uncertainty makes legal scholarship on Utah's immunity all the more interesting; with such a convoluted history to build on, the legislature and courts may see fit to reconsider tort immunity, including for mental anguish claims. This Note argues they should do just that.

As it stands today, the baseline for immunity analysis is across-the-board immunity for all government activities; only if the legislature specifically waives immunity can the government be sued. And though immunity is waived for officials' negligence, immunity is specifically retained for negligence resulting in mental anguish. As shown in Part III, this should change.

III. UTAH SHOULD WAIVE IMMUNITY FOR MENTAL ANGUISH

Under the Act, Utah has always retained immunity for mental anguish. The Utah Legislature should reconsider this. Both the legislature and the Utah Supreme Court should reconsider Utah's

105. McCorvey v. Utah State Dep't of Transp., 868 P.2d 41 (Utah 1993) (striking a damage cap because the state had prior immunity for negligently maintained public roads); Condemarin v. Univ. Hosp., 775 P.2d 348, 349–52 (Utah 1989) (striking another damage cap).

106. Gordon L. Roberts & Sharrieff Shah, *What is Left of* Berry v. Beech *– The Utah Open Courts Jurisprudence?*, 2005 UTAH L. REV. 677, 693 (noting judicial fluctuations in how to approach constitutional challenges to immunity); *see also, e.g.*, Judd v. Drezga, 103 P.3d 135 (Utah 2004) (modifying the *Berry* approach); Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1224 (Utah 1999) (Zimmerman, J., concurring) ("I would overrule *Berry*."); Laney v. Fairview City, 57 P.3d 1007, 1028 (Utah 2002) (Wilkins, J., concurring in part and dissenting in part) ("I would overturn *Berry* . . . ."); *Waite*, 416 P.3d at 646 (Lee, J., concurring) (*Berry*'s history "has been marked by confusion, inconsistency, and ongoing revisionism.").

107. UTAH CODE ANN. § 63G-7-102(5) (2020). The Act defines "governmental function" to mean "each activity, undertaking, or operation of a governmental entity," including those "performed by a department, agency, employee, agent, or officer of a governmental entity." *Id.*

retention of tort immunity generally. As discussed above (in Part I), there is clear historical rationale for sovereign immunity generally. In addition, and as shown here, Utah retains more tort immunity than is justified by the rationales given for immunity. This is especially true for mental anguish.

A. Rationales for Tort Immunity

Several rationales have been offered to explain governmental tort immunity. Some purport to justify categorical tort immunity, but these rationales fail. Others purport to justify only partial tort immunity (that is, immunity for some functions but not others), but these rationales are both qualified and questionable. They also do not justify the level of immunity that Utah currently retains, especially as it relates to mental anguish.

For ease of reference, this Note separates rationales into three categories: logical, legal, and practical rationales.

1. Logical Rationales

There are at least three logical rationales for governmental tort immunity (and immunity more broadly). First, an entity upon which a right depends cannot be held liable for violating that right.[108] Second, the state cannot break its own laws.[109] Third, government cannot be liable for the fulfillment of its legitimate ends.[110]

The first two rationales are closely related, and purport to justify a categorical immunity for any law or right whose existence depends on government. Both rationales rely on unstated premises that may not be true. For one, both rely on the premise that the relevant laws and rights depend on government for their existence. Many have believed—our Founders among them—that this premise is clearly false,[111] but in any case, it is not a self-evident assertion. Both rationales rely on an additional premise that either the creator of a law is not bound by a law it creates or that a law cannot be enforced against the entity with exclusive power to enforce it. Only if these premises are adopted will the conclusion

108. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

109. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 975 (4th ed. 1971).

110. Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850).

111. *E.g.*, Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1515–19 (2011).

follow that a law or right that government violates cannot be enforced against it.

The validity of these premises is far beyond the scope of this Paper, but some points bear noting. Initially, if presented categorically, the logic forces the conclusion that government can never do anything wrong that is enforced against it. This is an untenable conclusion for any system of popular sovereignty that features limited seats of government whose actions bind each other.[112] So, unless some rationale is given as to why government should be above some laws but not others,[113] the first rationale must fail.[114]

Next and similarly, if the government itself is a product of law, it is subject to law. For the same reason that government actions that conflict with law are not "law,"[115] government actors are accountable to law when they violate it. If the background law is that right implies a remedy, then government must provide a remedy for its wrongs.[116] This principle, of course, is nothing new; it dates long into English history.[117] For this reason as well, the first two logical rationales fail.

112. *E.g.*, AMAR, *supra* note 32, at 10–17 (discussing popular sovereignty); 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 230 (statement of James Iredell) (1876) ("[O]ur governments have been clearly created by the people . . . . The same authority that created can destroy"). THE FEDERALIST NO. 39, at 194 (James Madison) (George W. Carey & James McClellan eds., 2001) (defining a republic as "a government which derives all its powers directly or indirectly from the great body of the people").

113. One possible explanation is consent: government stands above all laws, except when it consents to being sued for violating a particular law. *See* Jaffe, *supra* note 11, at 3 (citing FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 518 (2d ed. 1905)). This explanation seems to fail. Consent comes about by law, or by changing law. How can the government's creation of a second law (that giving consent to suit on the first) make the first law enforceable against it? If the premise is that a creator of law is above every law it creates, the government would remain above both laws, neither being enforceable against it.

114. If the premises necessarily imply a false conclusion, at least one premise must be false per *modus tollens*.

115. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

116. *Id.* at 163 (quoting 3 BLACKSTONE, *supra* note 12, at 109) ("[F]or it is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress."); THE FEDERALIST NO. 43, at 225 (James Madison) (George W. Carey & James McClellan eds., 2001) ("[A] right implies a remedy . . . ."). According to Blackstone, the only exception to this was when "the only possible legal remedy would be directed against the very person himself who seeks remedy." 1 BLACKSTONE, *supra* note 12, at 23.

117. Fritz Schulz, *Bracton on Kingship*, 60 ENGL. HIST. REV. 136, 165, 168 (1945) (arguing, Bracton thought "law makes the king, [so] the king must make a return present to the law

Finally, in a system in which there are multiple branches, each having limited authority, "[i]t is hard to see…[why] the activity of either one of these bodies would compel its being above the law."[118] For any of these reasons, the first two logical rationales fail to justify tort immunity.

The third logical rationale is that government cannot be held liable for the fulfillment of its legitimate ends.[119] This has intuitive appeal. Members of the public cannot hold the government liable for the fulfillment of those activities that "the People" commissions government to do.[120] However, this rationale has a natural limit: it justifies immunity only for government actions that are legitimate ends. It does nothing to justify immunity for government actions falling without that scope—which of course is where all the action is. Government is not commissioned to commit torts. The government's grand commission surely does not include battery without public necessity or the color of authority, trespass without a proper warrant, or the failure to act as a reasonable person would in pursuit of otherwise legitimate ends. Thus, even if government were immune to suits arising from the fulfillment of its own ends, that would not justify tort immunity. Utah's retention of some tort immunity, including for negligence causing mental anguish, thus extends beyond the immunity that this rationale can justify.

None of the three logical arguments discussed here justify Utah's decision to retain some tort immunity.

2. Legal Rationales

Legal rationales in favor of tort immunity include that "no court can have jurisdiction" over the sovereign[121] and that a judiciary's order holding another governmental entity liable in tort offends

by subjecting himself to its rules"); Holdsworth, *supra* note 15, at 10 (calling it "well recognized" that the Crown was "subject to the law" and "morally bound to do the same justice to his subjects as they could be compelled to do to one another").

118. Jaffe, *supra* note 11, at 5.

119. Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850).

120. *Id.* This reasoning seems related to the separation of powers issues undergirding the political question doctrine.

121. Alden v. Maine, 527 U.S. 706, 715–16 (1999) (quoting BLACKSTONE, *supra* note 12, at 242 ("[N]o court can have jurisdiction over [the king].").

separation of powers.[122] Again, full analysis of these rationales is beyond the scope of this Note, but some points bear emphasizing.

The first rationale proves too much and mischaracterizes the nature of the judicial power. It proves too much because if courts have "no" jurisdiction over the sovereign, there can be "no" liability—ever. But all agree that immunity has never been a categorical rule.[123] The first rationale also seems to mischaracterize the nature of the judicial power, which is sovereign power.[124] This is a key innovation from both the English and Lockean systems,[125] and in both the federal government and in Utah, the judicial branch has power to enforce Constitutional limits on the other branches' actions.[126] The judiciary, wielding sovereign power, does have at least some jurisdiction over the sovereign. Moreover, the doctrine of tort immunity was created by the courts, so it may remain the courts' prerogative to determine whether the doctrine should continue or not.[127]

122. Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1232 (Utah 1999).

123. Jackson, *supra* note 38, at 527 ("The basic point is that 'sovereign immunity' has never been a complete immunity . . . ."). Of course, there is the counterargument that the courts gain jurisdiction over sovereign states upon the state's consent—including upon ratification of Article III. Principality of Monaco v. Mississippi, 292 U.S. 313, 324 (1934) ("in the plan of the convention," there was "a surrender of this immunity"); 4 ELLIOT, *supra* note 112, at 543 (statement of Patrick Henry) (interpreting Article III to allow a state to be sued without consent in a federal court sitting in citizen-state diversity); *id.* at 573 (statement of Edmund Randolph) (same); *id.* at 526–27 (statement of George Mason) (same). *But see* THE FEDERALIST NO. 81, at 422–23 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.") (grammar modernized and emphasis removed); Chisholm v. Georgia, 2 U.S. 419, 446 (1793) (Iredell, J., dissenting). However, consent does not create subject-matter jurisdiction. *But see* Hans v. Louisiana, 134 U.S. 1, 17 (1890) (while holding that federal courts lack jurisdiction over suits against a state by a citizen of the same state, noting that states may consent to jurisdiction). Even assuming that ratifying the Constitution did effectuate a waiver of immunity, this does not explain the state's pre-convention suability. Jackson, *supra* note 38, at 527.

124. THE FEDERALIST NO. 51, at 270 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[T]he power surrendered by the people is . . . subdivided among distinct and separate departments.").

125. *E.g.*, David Jenkins, *The Lockean Constitution: Separation of Powers and the Limits of Prerogative*, 56 MCGILL L.J. 543, 577–80 (2011) (discussing the impact of Locke, Montesquieu, and Blackstone on the Framers' separation of powers).

126. *See* U.S. CONST. art. III, § 1. This applies to Utah as well. *See* UTAH CONST. art. V, § 1.

127. DeBry v. Noble, 889 P.2d 428, 436 (Utah 1995) ("Governmental immunity . . . was created by the courts, not by the Legislature."); Nieting v. Blondell, 235 N.W.2d 597, 600 (Minn. 1975) ("Therefore, it is this court's duty and prerogative to determine whether it should adhere to its own rule of tort immunity . . . ."); *see also* Molitor v. Kaneland Comm'y

The second legal rationale fares only slightly better. Turning on separation of powers, it suggests that courts should not hold the legislature liable for harm caused by a legislative act, for to do so would be to pass judgment on the legislature's policymaking authority.[128] "Separation of powers never has been understood as insulating the activities of other branches of government from judicial review."[129] The United States Supreme Court has framed the separation of powers inquiry as whether an action "impermissibly interferes with the [other branch's] exercise of [its] constitutionally appointed functions."[130] Applying that analysis here, tort liability would only offend separation of powers if liability impermissibly interferes with the relevant branch's ability to perform its constitutionally mandated functions. It's hard to imagine tort liability that causes such an interference.

Indeed, holding an officer accountable for the tortious *manner* in which she exercises legislative or executive prerogatives is fundamentally distinct from judicial review over *whether* the ends she pursues are legitimate or advisable. Whereas the latter could implicate separation of powers concerns, the former does not. And tort law deals with the former.[131]

Moreover, even if this separation of powers rationale were taken at face value, it would not justify categorical tort immunity. At most, separation of powers concerns would justify immunity for legislative,[132] judicial,[133] prosecutorial[134] and, perhaps, discretionary functions for which liability for the tortious manner of executing the

Unit Dist. No. 302, 163 N.E.2d 89 (Ill. 1959) (limiting tort immunity); Muskopf v. Corning Hosp. Dist., 359 P.2d 457 (Cal. 1961) (same).

128. Mosk, *supra* note 45, at 15 (citing Barrett v. State, 116 N.E. 99 (N.Y. 1917)).

129. Chemerinsky, *supra* note 1, at 1218 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), for the proposition that separation of powers is judicially enforceable).

130. Morrison v. Olson, 487 U.S. 654, 685 (1988); *see also* CFTC v. Schor, 478 U.S. 833, 851 (1986) (framing the question whether Congress's decision to authorize non-Article III courts to hear Article III questions as whether the vesting "impermissibly threatens the institutional integrity of the Judicial Branch").

131. *See* Creer, *supra* note 49, at 135.

132. *E.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975) (recognizing absolute immunity for legislators acting in their legislative function).

133. *E.g.*, Stump v. Sparkman, 435 U.S. 349 (1978) (recognizing absolute immunity for judges acting in their judicial capacity).

134. *E.g.*, Butz v. Economou, 438 U.S. 478 (1978) (recognizing absolute immunity for prosecutors in certain prosecutorial functions).

function interferes with whether the function should be performed. Only rarely will that limit governmental tort liability.[135]

Thus, neither legal rationale justifies tort immunity. Even if the second rationale were taken at face value—which is debatable—it would justify tort immunity only when liability would offend separation of powers, a quantum of tort immunity so small that it is hard to imagine.

3. Practical Rationales

Finally, there are practical rationales for immunity. These include the following four rationales. First, government officials should not be held liable for doing that which they were elected or hired to do.[136] Second, the public should be protected from the inconvenience of paying to compensate emotional injuries caused by government actors—those funds could be used to serve the public interest elsewhere.[137] A third rationale is that the possibility of liability could make government officers overly cautious.[138] If they are too worried about being held liable in tort, they may refrain from fulfilling their duties vigorously. Fourthly and finally, liability could keep government from engaging in some activities for fear of being bankrupt or being hauled into court. This Note offers brief thoughts on the first three of these practical rationales, concluding they do not justify tort immunity. This Note does not analyze this fourth rationale because its strength rests on whether one believes government *should* engage in the tasks that tort liability would disincentivize it from doing—a policy question without a clear answer.[139]

135. Nieting v. Blondell, 235 N.W.2d 597, 603 (Minn. 1975) (distinguishing the "tort area" from "discretionary functions or legislative, judicial, quasi-legislative, and quasi-judicial functions").

136. Mosk, *supra* note 45, at 11.

137. Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 459 (Cal. 1961) (citing Mower v. Inhabitants of Leicester, 9 Mass. 247, 249 (1812)).

138. Creer, *supra* note 49, at 133–34. Another common argument is the sovereign tortfeasor, as a practical matter, must consent to be sued because the sovereign itself enforces the decree of liability. This is less relevant to state sovereign immunity, as the federal government—a separate sovereign—can impose and enforce liability.

139. If government *should* be involved in those functions, immunity may be a means of ensuring those functions are fulfilled. If government *should not* be involved in those functions, then liability is a means of keeping the government out. Or if government *should* be involved in fewer functions generally or more focused on other functions, then liability is

The first rationale—suggesting that officials should not be held liable for fulfilling governmental functions—is largely inapposite. At bottom, the rationale suggests that government officials should not be held liable for completing tasks legitimately engaged in. But tort immunity does not prevent officials from fulfilling tasks; rather, it prevents officials from fulfilling their tasks in a way that is negligently or intentionally harmful. No government official is hired or elected to fulfill tasks in a tortious manner. On the contrary, the public certainly expects reasonable prudence of public officials. Formally, then, this rationale does not justify tort immunity at all. Even assuming otherwise, this rationale could justify at most immunity for governmental functions, which, by construction, exclude proprietary functions.[140]

The second rationale—suggesting "it is better that an individual should sustain an injury than that the public should suffer an inconvenience"[141] only holds water if protecting the government's treasury "is more important than the benefits of liability," including compensating wrongs and deterring wrongdoing.[142] This claim is not self-evident.

Worse, however, the rationale poses a false dichotomy. The public "suffer[s] an inconvenience" whether or not government is immune in tort. The only question is on whom the government places that cost. Whenever government acts tortiously, it imposes a probabilistic cost (call it a "Tort Cost") on all citizens: the harm caused by a governmental tort multiplied by the probability of being an injured party. The public pays the Tort Cost whether government is immune or not—the only difference immunity makes is to shift the burden from the few that are injured to the tax base. If government does not enjoy tort immunity, taxpayers pay the Tort Cost by diverting tax dollars to compensating those whom government ultimately injures. If government does enjoy tort immunity, then the public shares the probabilistic Tort Cost as a *de*

a means of forcing the government to allocate resources only to those functions which are most important.

140. *See supra* notes 80–89 and accompanying text.

141. *Muskopf*, 359 P.2d at 459 (citing *Mower*, 9 Mass. at 249); *see also* Alden v. Maine, 527 U.S. 706, 749 (1999) (defending sovereign immunity because liability would make a state "face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury.").

142. Chemerinsky, *supra* note 1, at 1217.

facto tax: all citizens suffer a probabilistic injury, and those who become victims pay the actual Tort Cost themselves. Those that interact with the government more—who may be poorer—are the ones left to pay for the torts, a sort of regressive tax that concentrates the "public's inconvenience" on the unlucky few.[143] Either way, the public pays for government's torts.

Furthermore, this second rationale is inconsistent with the government's purpose. Government is charged with serving the public interest,[144] and one of those duties is to reallocate among citizens the cost of torts. Much of tort law itself can be explained as an exercise in allocating among society the accidental costs incident to a social world.[145] The proposition that government should reallocate these costs when caused by private individuals but not when caused by government requires explanation. That the government is charged with serving public interest suggests that it, more so than private tortfeasors, should compensate its victims.[146] "If the state is properly to serve the public interest, it must strive . . . to achieve the goals of protecting the people and of providing them with adequate remedies . . . ."[147] Failing to do so through tort immunity brings government in conflict with its own purpose.[148]

143. Of course, all pay in the sense that the probabilistic Tort Cost is distributed among all citizens, who adjust their conduct accordingly. But the unlucky victims pay more. This is concerning. If poor individuals are more likely to interact with government (and are therefore more likely to be the victims of governmental torts), then tort immunity places the Tort Cost disproportionately on the poor, when it could, through abolishing immunity, place the Tort Cost on the entire tax base.

144. THE FEDERALIST NO. 45, at 237–38 (James Madison) (George W. Carey & James McClellan eds., 2001) ("[N]o form of government whatever, has any other value, than as may be fitted for the attainment of th[e] object" of "advance[ing] the public happiness"); *see also* THE FEDERALIST NO. 2 (John Jay) (suggesting the same); THE FEDERALIST NO. 30, at 148 (Alexander Hamilton) (same). The authors of the Federalist Papers were not alone in asserting government exists for the happiness of the people. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 229 (C.B. McPherson ed. 1980) (1690) ("[T]he end of government is the good of mankind"); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 128 n.8 (George Sharswood ed. 1875) (1765) ("It has become a favourite maxim that it is the great duty of government to promote the happiness of the people. The phrase may be interpreted . . . well, but it is . . . inaccurate . . . . It is the inalienable right of the people to pursue their own happiness; and the true and only true object of government is to secure them this right."); DECLARATION OF INDEPENDENCE (U.S. 1776) (noting the "only legitimate purpose of government" is to protect, *inter alia*, the "pursuit of happiness").

145. Gellhorn & Schench, *supra* note 36, at 737.

146. *See* Nieting v. Blondell, 235 N.W.2d 597, 603 (Minn. 1975).

147. *Id.*

148. *Id.*

In Utah, this very idea animated its 1965 expansion of governmental liability; congresspeople stated it was unfair for one individual to bear a burden that society is responsible for.[149]

The second practical argument posits a false dichotomy and is inconsistent with government's purpose. It does not justify tort immunity.

The third practical rationale is that governmental liability impairs its effectiveness[150] because the threat of liability makes officials too cautious. As a preliminary matter, governmental liability could have little to no effect on an officer's care if government indemnifies officers for their tort liability.[151] Utah does so. In Utah, suit against the governmental entity is generally the plaintiff's "exclusive" remedy for injuries caused by officers.[152] This limits the impact liability has on the behavior of governmental employees, minimizing the worry that tort liability would impair officials' effectiveness.

The rationale boils down to an argument that government tort liability is inefficient. This seems wrong. Any threat of liability must create an incentive for governmental actors to be more cautious. As Justice Holt stated in a celebrated action in case for a parliamentary officer's rejection of his vote in an election, "to allow this action will make public[] officers more careful . . . ."[153] The incentive to exercise precaution is socially optimal for private actors,[154] and there is no reason why the precaution efficient for private actors would be too high for state employees, especially if the two are engaged in the same activity (as is the case for proprietary functions). In fact, governmental tort liability is inefficient only if a negligence duty is too high a bar.[155] Stated otherwise, government

149. Taylor *ex rel.* Taylor v. Ogden City Sch. Dist., 927 P.2d 159, 168 (Utah 1996) (Durham, J., dissenting) (quoting Floor Debate, Statement of Senator Charles Welch, 65th Utah Leg., Gen. Sess. (Feb. 11, 1965) (House recording No. 1, side 2)).

150. Creer, *supra* note 49, at 133–34.

151. *See* Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 495–500, 505–06 (2011) (discussing the impact of indemnification on incentives).

152. UTAH CODE ANN. § 63G-7-202(3).

153. Ashby v. White, 92 Eng. Rep. 126, 135–36 (K.B. 1703) (Holt, C.J., dissenting; JOHN CAMPBELL, 3 THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 1, 184–85 (James Cockcroft, New and Revised ed., 1894).

154. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 206 (6th ed. 2016).

155. *Id.*

tort liability is "too much" only if requiring public officials to act as reasonably prudent people is not socially optimal. That seems absurd.

Finally, governmental liability does not create governmental "negligence in the air." The alternative to governmental immunity is not strict liability.[156] The alternative may be negligence.[157] In negligence, tort liability would only exist where a duty was owed the plaintiff—and legislatures and courts can define the duties owed.[158] The too-much-liability rationale "assumes that . . . the courts would prove completely unable to apply general principles of tort liability in a reasonable fashion in the context of [governmental torts]."[159] Courts would apply general tort principles reasonably, undercutting significantly (if not eliminating) the worry that waiving immunity would lead to "too much" liability. Like the others, this practical rationale fails to justify tort immunity.

* * *

No rationale analyzed here justifies total tort immunity. The few rationales that can be construed to justify some tort immunity justify little to any. Each rationale analyzed here purports to justify immunity; additional rationales strongly justify liability.[160] In sum, "governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia . . . . None of the reasons for its continuance can withstand analysis."[161] The twentieth-century trend away from tort immunity was sensible, and Utah should reexamine its retention of some tort immunity.

156. Creer, *supra* note 49, at 134.

157. *Id.*

158. Riss v. City of New York, 240 N.E.2d 860, 860–61 (N.Y. 1968) (declining to recognize new duty of police protection to every citizen).

159. *Id.* at 863 (Keating, J., dissenting).

160. For example, Utah legislators supported decreased immunity in 1965, including tort immunity, "so as to make more justice" and because it is "not moral" to leave plaintiffs uncompensated and it is unfair that one individual should bear a burden that the public is responsible for. Taylor *ex rel.* Taylor v. Ogden City Sch. Dist., 927 P.2d 159, 168 (Utah 1996) (Durham, J., dissenting) (quoting Floor Debate, Statement of Senator Charles Welch, 65th Utah Leg., Gen. Sess. (Feb. 11, 1965) (House recording No. 1, side 2)).

161. Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 460 (Cal. 1961).

B. Waiving Immunity Would Be Consistent with Utah's Increased Recognition of Mental Anguish Recovery

Utah should reconsider its tort immunity, especially for mental anguish. Utah has trended toward greater emotional distress recovery from private parties, and waiving immunity for government-caused emotional distress would be consistent with that trend.

1. Early Pain-and-Suffering Doctrine

In the early twentieth century in Utah, there was no cause of action for emotional distress sounding in mere negligence.[162] Plaintiffs could recover damages for pain and suffering caused by another private party in only three circumstances. These were when a defendant acted willfully or wantonly,[163] when the emotional injury resulted proximately from a cause of action that existed independently of the emotional distress,[164] and, most importantly, when the emotional distress was concomitant to a physical injury.[165]

2. Later Expansion

In 1988, the Utah Supreme Court expanded plaintiffs' ability to recover damages for emotional distress from private parties by recognizing a tort of negligence for the infliction of emotional distress.[166] Originally, a plaintiff could invoke this tort when a defendant placed her in the zone of danger.[167] The Utah Supreme Court later allowed plaintiffs to assert this tort claim when a

162. Reiser v. Lohner, 641 P.2d 93, 100 (Utah 1982).

163. Jeppsen v. Jensen, 155 P. 429, 431 (Utah 1916) (emotional distress damages alone recoverable for willful and wanton conduct but not for mere negligence).

164. Lambert v. Sine, 256 P.2d 241, 244 (Utah 1953) (allowing emotional distress recovery for wrongful eviction). *But see* Webb v. Denver & R.G.W. Ry., 24 P. 616, 618 (Utah Terr. 1890) (pre-constitution, no mental anguish recovery in wrongful death action).

165. Dalley v. Utah Valley Reg'l. Med. Ctr., 791 P.2d 193, 201 (Utah 1990); *see also* Paul v. Kirkendall, 261 P.2d 670, 672 (Utah 1953) (leaving unchallenged a jury instruction allowing for compensation for "mental and emotional distress"); Picino v. Utah-Apex Mining Co., 173 P. 900, 902 (Utah 1918) (citing with approval rule that permits recovery for mental suffering).

166. Johnson v. Rogers, 763 P.2d 771, 783 (Utah 1988).

167. *Id.*

defendant inflicted emotional distress in a way that foreseeably caused physical harm.[168]

In creating this tort claim, the court recognized that plaintiffs have a protectable interest in mental tranquility.[169] At the same time, however, the court expressed concern about the predictability of courtroom results,[170] the verifiability of mental injury,[171] and unlimited liability.[172] Recognizing the claim despite these concerns, the court relied heavily on the fact that other jurisdictions had previously recognized similar causes of action.[173]

In 2018, the Utah Supreme Court again expanded recovery for mental anguish damages, extending recovery to "very limited circumstances" when a defendant owes a plaintiff a special duty.[174] To make this expansion, the court again relied heavily on the examples of other jurisdictions and American Law Institute recommendations.[175] And again, in expanding recovery, the court noted the same three concerns.[176] The first was a verifiability concern: a "need to ensure the genuineness" of mental injury and causation.[177] The second was a worry of unlimited recovery.[178] And the third was a concern that a plaintiff should only be able to recover emotional distress damages when a defendant owes a duty to him.[179] These concerns mirror those the court articulated in 1988, the last time the court had expanded emotional distress recovery, meaning the court's policy objections to mental anguish recovery have largely remained constant.[180]

168. Candelaria v. Ellis, 319 P.3d 708, 710–11 (Utah Ct. App. 2014).

169. *Johnson*, 763 P.2d at 779.

170. *Id.* at 785 (Zimmerman, J., concurring).

171. *See* Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 70 (Utah 1998).

172. Boucher *ex rel.* Boucher v. Dixie Med. Ctr., 850 P.2d 1179, 1182 (Utah 1992).

173. *See Johnson*, 763 P.2d at 779.

174. Mower v. Baird, 422 P.3d 837, 856 (Utah 2018).

175. *Id.* at 842–43.

176. *Id.* at 853.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Compare id.* at 853 (concerns of verifiability, unlimited recovery, and duty), *with* Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 70 (Utah 1998) (concern of verifiability), *and* Johnson v. Rogers, 763 P.2d 771, 785 (Utah 1988) (Zimmerman, J., concurring) (concerns of predictability and unlimited recovery).

3. Future Expansion

The 2018 expansion marks the latest step in a trend toward increased mental anguish recovery in Utah. It is highly probable this trend will continue because the court's concerns, which have remained constant over time, are likely to become less weighty.

The verifiability concern will likely become less weighty as scientific progress continues to make mental injury increasingly verifiable. In recent years, scientific understandings of mental anguish have improved, and mental anguish recovery has become increasingly accepted. Even now, some scholars have argued that emotional distress damages are no more difficult to quantify than some economic damages like future medical expenses.[181] fMRI processes can be used to accurately identify pain sensations;[182] future developments may mitigate exaggeration and related verifiability problems.[183] If courts continue to become less concerned about verifiability, as they have trended to this point, then a future court will have little reason to not permit greater emotional distress recovery (as long as the other two concerns do not become increasingly worrisome).

The second concern, that of unlimited recovery, will likely remain important even with improved verifiability of mental anguish. Scientific development can mitigate the concern of unlimited recovery only by objectifying mental suffering. But even if mental anguish were perfectly verifiable (a goal that science is far from),[184] it would not follow that all mental anguish should be actionable.[185] Thus, the unlimited recovery concern may remain important going forward. There is no reason to think, however, that

181. Ronen Avraham, *Does the Theory of Insurance Support Awarding Pain and Suffering Damages in Torts?*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW 94, 116–18 (Daniel Schwarcz & Peter Siegelman eds., 2015).

182. Tor D. Wager, Lauren Y. Atlas, Martin A. Lindquist, Mathieu Roy, Choong-Wan Woo & Ethan Kross, *An fMRI-Based Neurologic Signature of Physical Pain*, 368 NEW ENG. J. MED. 1388 (2013).

183. Ronen Avraham, *Estimating Pain-and-Suffering Damages*, *in* 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PRIVATE AND COMMERCIAL LAW 96, 97–99 (Francesco Parisi ed., 2017).

184. *See* Luis Garcia-Larrea & Roland Peyron, *Pain Matrices and Neuropathic Pain Matrices: A Review*, 154 PAIN S29, S38–39 (2013).

185. This would be much like the role of proximate cause—a line-drawing exercise between actionable and nonactionable but-for causes ("practical politics," as Judge Andrews terms the exercise. Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

the unlimited recovery concern will become weightier as science improves. As verifiability becomes less weighty and this second concern holds constant, a court should expand recovery.

The third concern, that of allowing recovery only when a duty was owed, is not weighty because it is merely a stated preference for the status quo—and one without additional substance. Whether mental anguish injuries should be recoverable in situations in which they currently are not is a question of duty—if the court expands mental anguish recovery, the court will be expanding and defining new duties. This is precisely what the court did in 2018. Then, deciding to expand recovery for mental anguish, the court framed the question as whether to "adopt a limited duty."[186] When mental anguish becomes increasingly verifiable, the court will likely consider expanding mental anguish recovery precisely by asking whether a new duty should be defined. This concern, therefore, will likely play little role in preventing future expansions of mental anguish recovery.

Taken together, the court's three main concerns are likely to become less weighty. Unless the court articulates additional reasons for hesitation, a future court should permit greater emotional distress recovery.

How quickly change will be implemented is a different question. As is evident in the 2018 decision, which expanded recovery in "very limited circumstances," the court implements change slowly.[187] If the future reflects our past, the Utah Supreme Court will expand recovery only after other jurisdictions (and the ALI) implement change.[188] The area of mental anguish recovery, nonetheless, is a candidate for future, expansive change.

The Act's retention of immunity for mental anguish injuries stands in contrast with this trend toward increased emotional distress recovery. Since its 1965 version, the Act has waived immunity for torts of negligence[189] but has retained immunity for any injury that "arises out of or in connection with, or results from . . . [the] infliction of mental anguish."[190] Relaxing this strict retention of immunity would be consistent with Utah's trend.

186. Mower v. Baird, 422 P.3d 837, 842 (Utah 2018).

187. *Mower*, 422 P.3d at 856–57.

188. *Id.* at 856; Johnson v. Rogers, 763 P.2d 771, 779 (Utah 1988).

189. UTAH CODE ANN. § 63G-7-301(2) (2020); § 60-30-10 (1965).

190. *Id.* at § 63G-7-201(4)(b) (2020); *id.* at § 60-30-10(2) (1965).

C. Waiving Immunity for Mental Anguish Serves the Policies Underlying Tort Immunity Better Than the Act's Current System

The Act currently waives immunity for negligence resulting in physical injuries but retains immunity for negligence resulting in mental anguish.[191] This distinction seems to follow from historical disfavor for emotional damages. Yet, especially given Utah's trend toward taking mental anguish more seriously, the Act's distinction between physical and mental recovery makes little sense. Waiving immunity for mental anguish could serve the policies underlying tort immunity better than waiving immunity for physical injuries does. That leaves the legislature with little reason to not retain immunity for mental anguish.

The legislature originally passed the Act to expand government liability in tort,[192] but some legislators "felt that it [was] in the best interest of the public" to retain immunity for certain injuries, including mental anguish.[193] Why? Likely because legislators (as most others) were skeptical of mental anguish generally and were worried waiving immunity for a not-well-understood injury would result in the government paying out far too much in tort compensation. Mental anguish was viewed with much greater skepticism than it is now.[194] Experts thought pervasive stigma of mental illness was caused by beliefs that the mentally ill were prone to violence, that the mentally ill were responsible for their behavior, and that mental illness prognoses were likely inaccurate.[195] These popular beliefs pervaded the law, causing a general belief that allowing any recovery for mental anguish would open the floodgates to contrived injuries that were impossible to identify

191. *Id.* at § 63G-7-201(4)(b) (2020).

192. Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1232 (Utah 1980).

193. Taylor *ex rel.* Taylor v. Ogden City Sch. Dist., 927 P.2d 159, 168 (Utah 1996) (Durham, J., dissenting) (quoting UTAH LEGISLATIVE COUNCIL, REPORT OF THE GOVERNMENTAL IMMUNITY COMMITTEE 61 (Dec. 1964)).

194. *E.g.*, Peter Hayward & Jenifer A. Bright, *Stigma and Mental Illness: A Review and Critique*, 6 J. MENTAL HEALTH 345 (1997). Hayward and Bright review the literature surrounding mental anguish stigma from the late 1950s to the early 1990s. *Id.* They conclude that in the late 1950s, mental anguish was viewed very negatively, with a largely uninformed public believing that the mentally ill were "dirty, unintelligent, insincere, and worthless." *Id.* at 346 (quoting J.C. NUNNALLY, JR., POPULAR CONCEPTIONS OF MENTAL HEALTH: THEIR DEVELOPMENT AND CHANGE 233 (1961)). Experts disagreed as to whether popular feelings about mental anguish had improved or worsened by the mid-70s. *Id.* at 347.

195. *Id.* at 350–52.

and quantify.[196] The 1965 Act's distinction between physical and mental injuries appears to be a product of this stigma and was likely viewed as a sensible way to ensure tort liability did not go "too far."

However, the distinction is not well-suited to serve this end. If the government wants to waive some immunity but wants to protect itself from "too much" liability, it may make just as much sense to waive immunity for emotional distress torts rather than physical torts. This is because recovery for emotional distress torts remains relatively restricted, is likely to expand in a predictable way, and implicates similar policy concerns as those supporting a retention of partial tort immunity. Waiving immunity for a relatively restricted set of claims that are likely to expand in a predictable way that is consistent with the policy concerns underlying immunity seems to be exactly what a government wanting to waive immunity but concerned about "too much" liability would want.

Though its recovery is expanding, emotional distress recovery is more limited than recovery for physical injuries or economic damage. This was especially true when the Act was passed. Even now, with mental anguish recovery at its high-water mark, the court has taken care to expand recovery in "very limited circumstances."[197] Unlike for physical injuries, recovery for mental anguish injuries is clearly delineated and has been expanded only when a special duty exists. The limited nature of emotional distress recovery makes it an apt choice for a waiver of immunity.

As evidenced by the court's expansion of recovery in "very limited circumstances,"[198] mental anguish is also the type of injury whose recovery will remain relatively certain. Since the court's concerns about mental anguish recovery have remained constant, the future of mental anguish recovery is more predictable, especially given the court's incremental approach. Though recovery will likely continue to expand, expansion will likely remain incremental and predictable, occurring only as emotional distress becomes more verifiable and other jurisdictions

196. *E.g.*, Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 629–38 (2003) (identifying what the author believes is continued stigma in the courts and the Equal Employment Opportunity Commission).

197. Mower v. Baird, 422 P.3d 837, 856 (Utah 2018).

198. *Id.*

adopt change. This factor too makes mental anguish a good candidate for an immunity waiver.

Finally, mental injuries implicate the same policy concerns that support tort immunity. One of the three concerns limiting the court's expansion of mental anguish recovery is the fear of unlimited recovery.[199] As discussed, this concern will likely remain relevant even as scientific progress mitigates the other two concerns. The negligence theory underlying emotional distress recovery therefore is—and likely will continue to be—constrained by the same policy that supports tort immunity. This makes waiving immunity for emotional distress more attractive than other injuries that are constrained by distinct concerns.

Emotional distress recovery is relatively limited, its future recovery is relatively certain, and it is—and likely will be—constrained by the same policies that support tort immunity. Waiving immunity for mental anguish would therefore serve the Act's purpose, which was to waive immunity without causing too much governmental liability.

* * *

Tort immunity is not justified—an anachronism without a good rationale. Waiving immunity for mental anguish torts would be consistent with Utah's ongoing legal trends, as well with the purposes of the Immunity Act itself. The legislature's concerns of "too much" liability are attenuated with respect to mental anguish because recovery for it will remain incremental, predictable, and tied to the legislature's concerns underlying tort immunity. Utah should reconsider its immunity for mental anguish. There is no reason not to.

IV. CHANGE IS UNLIKELY

Though Utah should waive immunity for mental anguish, neither the Utah Supreme Court nor the Utah Legislature is likely to do so.

199. *Id.* at 858–59.

A. The Utah Supreme Court Likely Will Not Reconsider Mental Anguish Immunity

Though immunity for mental anguish should be waived, the Utah Supreme Court is unlikely to reconsider it. The court has stepped away from its immunity-limiting tools and has shown greater deference to the legislature's decisions regarding immunity.

The courts have interpreted the retention of immunity for emotional injuries almost as expansively as possible, holding it to bar claims of negligent infliction of emotional distress,[200] claims based on injuries proximately caused by the infliction of mental anguish,[201] and mental anguish damages caused by non-emotional-distress torts sounding in negligence.[202]

The court's expansive interpretation of the mental anguish exception is not surprising, given the Act's expansive language and the legal profession's skepticism of mental anguish damages in the 1960s.[203] What is surprising is the court's back-and-forth approach to restricting immunity and its failure to scrutinize the mental anguish exception. There is no question the Act intended to retain immunity for mental anguish injuries, but the court has engaged in only limited analysis as to whether "mental anguish" meant something different in 1965 than it does today, whether the mental anguish exception violates the Open Courts Clause, and whether the retention of immunity for mental anguish can otherwise be restricted—in any way.[204]

200. Osterkamp v. Salt Lake Cnty., 2:20-cv-32, 2020 WL 5298866, at *5–6 (D. Utah Sept. 4, 2020).

201. Ottley v. Corry, No. 4:19-cv-87, 2020 WL 1939135, at *3 (D. Utah Apr. 22, 2020) (citing Larsen v. Davis Cnty. Sch. Dist., 409 P.3d 114, 122 (Utah Ct. App. 2017)) (retaining immunity for all injuries of which the infliction of mental anguish is "at least a proximate cause"); P.J. *ex rel.* Jensen v. Utah, No. 2:05cv00739, 2006 WL 1702585, at *3 (D. Utah 2006) (holding that UGIA bars causes of action arising out of the infliction of mental anguish).

202. Gabriel v. Salt Lake City Corp., 34 P.3d 234, 237 (Utah Ct. App. 2001) (holding waiver of immunity for negligence bars recovery for mental anguish damages but does not bar an entire negligence claim when other, non-emotional damages are pleaded). *But see* Cabaness v. Thomas, 232 P.3d 486, 505 (Utah 2010) (allowing recovery of emotional distress damages in breach of contract cause of action because mental anguish exception applies only to the waiver of immunity for negligence).

203. UTAH CODE ANN. § 63G-7-201(4)(b) (2020) (retaining immunity for "any" injury "arising out of or in connection with, or that results from" the "infliction of mental anguish").

204. *See, e.g.*, Shively v. Utah Valley Univ., No. 2:20-cv-119, 2020 WL 4192290, at *4 (D. Utah July 21, 2020) (dispensing with arguments that the 1960s meaning of "mental anguish"

Though the court originally interpreted the Act to give it "the power to restrict the scope of governmental immunity"[205] and wielded that power quite aggressively to strike portions of the Act as unconstitutional,[206] the court has since stepped back from that role to the extent of limiting away the precedential value of those prior opinions.[207]

Much of the stepping away has been necessitated by further legislative enactments, but the court has also failed to reassert constitutional arguments in response to the legislature. For example, after the court in *Laney v. Fairview City*, 57 P.2d 1007, 1027 (Utah 2002), applied a substantive interpretation of the Open Courts Clause first used in *Berry ex rel. Berry v. Beech Aircraft Corp.* to invalidate the Act's all-encompassing definition of "governmental function,"[208] the legislature reenacted the same provisions that had been invalidated.[209] Though the legislature merely reenacted unconstitutional provisions and though there is an additional argument that the legislature lacks the authority to trump common law's proprietary-governmental distinction in the first place,[210] the court has instead recognized *Laney*'s abrogation and has purposefully distanced itself from applying *Berry*.[211] Based on this example alone, it appears unlikely the court would reconsider limiting the Act's retention of immunity for mental anguish.

If the court were to apply *Berry* to the Act's retention of immunity for mental anguish, it would almost certainly be struck—*Berry*'s presumption of unconstitutionality and searching test make it difficult for any statute to survive scrutiny.[212] The retention of

did not include severe mental illnesses because the Utah court has not interpreted "mental anguish" in that context).

205. Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1232 (Utah 1980) ("the Legislature intended the courts to have the power to restrict the scope of governmental immunity.").

206. *See, e.g.*, Laney v. Fairview City, 57 P.2d 1007, 1026–27 (Utah 2002); Condemarin v. Univ. Hosp., 775 P.2d 348, 364 (Utah 1989).

207. Parks v. Utah Transit Auth., 53 P.3d 473, 476 (Utah 2002) (limiting *Condemarin* to University Hospital); Roberts & Shah, *supra* note 106, at 677–78.

208. The definition in turn being a response to *Standiford*, 605 P.2d at 1233–34.

209. UTAH CODE ANN. § 63-30d-102(4) (Supp. 2004); Goldstein, *supra* note 101, at 385.

210. *Laney*, 57 P.3d at 1028 (Russon, J., concurring).

211. Waite v. Utah Lab. Comm'n, 416 P.3d 635, 661 (Utah 2017); Jenkins v. Jordan Valley Water Conservancy Dist., 283 P.3d 1009, 1041 (Utah Ct. App. 2012).

212. I have explained the *Berry* test. *See* text accompanying *supra* note 98. For convenience, I repeat it here. *Berry* applied the Open Courts Clause to mean that an

immunity for injuries arising from mental anguish, moreover, is a clear case under *Berry*. There is no alternative remedy for those whose claims are barred by the mental anguish exception. There is no "clear" social or economic evil eliminated by the exception; all policies supporting immunity that have been analyzed herein either fail or are questionable. As shown, no policy supports total tort immunity—neither categorical immunity for all torts nor categorical immunity for any class of injuries, such as emotional distress injuries. Rather than being a social evil, vindicating a personal interest in mental tranquility is a social good, as evidenced by Utah's trend toward increased recovery of mental anguish damages. Finally, even if the mental anguish exception did eliminate a clear economic or social evil, it would do so arbitrarily and unreasonably by conditioning recovery on the character of the injury suffered, which is no fault of the victim, when allowing recovery for mental anguish, as discussed, would better serve the purposes of immunity and the Act.[213] If *Berry* were to be applied, the mental anguish exception would surely fail.

Yet, there are two reasons why the court would not even get to the *Berry* analysis. First, the current court has shown disfavor for *Berry*.[214] Second, *Berry* only applies to statutes that violate the Open Courts Clause by eliminating a remedy that existed at law.[215] As discussed, no cause of action for emotional distress existed at common law before 1965. However, emotional distress damages could be recovered if concomitant to physical injury, if defendant acted willfully or wantonly, or when resulting from an independently existing cause of action.[216] The Open Courts Clause

enactment abrogating a prior held right is valid only if it provides an effective a reasonable alternative remedy or if it eliminates a clear social or economic evil and the elimination of that evil is neither arbitrary nor unreasonable. Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 679–81 (Utah 1985). Justice Stewart has noted that the *Berry* test had been used to strike only two statutes by 1999 and is essentially the same test used in a substantive due process analysis by the United States Supreme Court. Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1216 (Utah 1999) (Stewart, J., concurring).

213. Waiving immunity for emotional distress serves the purposes of the Act better than waiving immunity for physical injuries. Furthermore, some economic damages are just as difficult to verify as emotional damages.

214. *See* cases cited *supra* note 106.

215. *Laney*, 57 P.3d at 1021 ("If no remedy was eliminated, there is no need to proceed with the *Berry* test.").

216. *See supra* notes 165–69 and accompanying text.

protects "remed[ies] by due course of law,"[217] although there is no clear consensus as to what exactly this entails.[218] In any case, to show that the Act's retention of mental anguish eliminated an existing remedy, a plaintiff would have to argue that, absent the Act, her emotional damages would have been recoverable against the government. The governmental-proprietary distinction was a well-established component of tort immunity before the Act.[219] Thus, before even getting to *Berry*, a plaintiff would have to show injury occurred while the governmental entity engaged in a proprietary function and her emotional distress would have been recoverable absent the Act (i.e., it was accompanied by physical injury, the government acted willfully, or her emotional distress was caused by a cause of action existing independently therefrom). It is not difficult to conceive of such a fact pattern. Yet, the court's current disfavor of *Berry*'s level of scrutiny, the court's stepping away from strong immunity challenges, and the court's expansive interpretation of the Act's retention of immunity for mental anguish together make it unlikely that the court will limit immunity for government-caused mental anguish.

B. The Legislature Likely Will Not Waive Immunity for Mental Anguish

The legislature also seems unlikely to waive immunity for mental anguish. The legislature seems to support immunity more than before. Since passing the original version of the Act, the legislature has amended it to expand immunity. For example, the legislature responded to the courts' early distinction between governmental and proprietary actions by amending the Act to apply to *all* government actions or inactions, whether proprietary or not.[220] After the court invalidated that definition as unconstitutional,[221] the legislature responded by reenacting

217. UTAH CONST. art. I, § 11.

218. Waite v. Utah Lab. Comm'n, 416 P.3d 635, 656–57 (Utah 2017) (Lee, J., concurring) (stating vested rights are protected); Puttuck v. Gendron, 199 P.3d 971, 978 (Utah Ct. App. 2008) (holding legal rights enforceable with known remedies are protected); Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1209 (Utah 1999) (Stewart, J., concurring) (stating remedies, not causes of action are protected—the legislature can still change the law).

219. DeBry v. Noble, 889 P.2d 428, 439 (Utah 1995).

220. UTAH CODE ANN. § 63-30-2(4)(a) (1987) (defining "governmental function").

221. Laney v. Fairview City, 57 P.2d 1007, 1027 (Utah 2002).

essentially the same amendment.[222] In so doing, legislators made clear they intended to increase governmental immunity beyond what the prior version of the Act allowed.[223]

Though the legislature has amended (many times) the parts of the Act that the court has interpreted narrowly to limit immunity, the mental anguish exception, which the court has interpreted broadly in favor of immunity, has remained unamended for fifty-five years.[224] Moreover, the legislature has preferred tort reform aversive to plaintiff's interests, if only because defense groups are inherently more successful in achieving reform than plaintiffs.[225] Thus, the legislature seems unlikely to waive immunity for mental anguish, even if such a waiver would be consistent with the Act's purpose and increased legal solicitude toward mental anguish generally.

CONCLUSION

Utah has expanded emotional distress recovery, and that trend is likely to continue. In contrast with this trend, the Utah Governmental Immunity Act retains governmental tort immunity for any injury arising from or connected to the infliction of mental anguish. Utah government should be liable for the emotional distress it causes because immunity in general is qualified and questionable, blanket immunity for mental injuries is inconsistent with current legal trends, and government tort liability for mental injuries would be consistent with the policies supporting immunity and the Act's purposes. Though immunity for mental anguish should be waived, neither the court nor the legislature appear likely to make that decision. Historical trends and relevant policies support governmental tort liability for mental anguish, but Utah's mental anguish immunity is likely here to stay.

222. UTAH CODE ANN. § 63-30d-102(4) (Supp. 2004).

223. *E.g.*, Floor Debate, 55th Leg., Gen. Sess. (Utah Feb. 25, 2004) (Senate recording tape no. 39, side A) (statement of Sen. Dave L. Thomas) ("We are headed for a showdown with the [Utah] Supreme Court[;] hopefully . . . the court will recognize the policy stand we are making.").

224. UTAH CODE ANN. § 63G-7-201(4)(b) (2020); § 60-30-10(2) (1965).

225. Condemarin v. Univ. Hosp., 775 P.2d 348, 367 (Utah 1989) (Zimmerman, J., concurring); Roberts & Shah, *supra* note 106, at 677–79.