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Untangling the Public Duty Doctrine

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Notes and Comments

Untangling the Public Duty Doctrine

I. INTRODUCTION

Rhode Island's public duty doctrine provides tort immunity for the state and its political subdivisions.[1] Under the public duty doctrine, as a general matter, when the state engages in governmental functions, as distinguished from proprietary functions, it is immune from tort liability.[2] There are, however, two exceptions: the special duty exception[3] and the egregious conduct exception.[4] The special duty exception provides that the state may be held liable if it owed a duty to the individual plaintiff, as opposed to the general public.[5] The egregious conduct exception provides that the state may be held liable if it had "knowledge that it [had] . . . created a situation that force[d] an individual into a position of peril and subsequently [chose] not to remedy the situation."[6] Although designed to ensure the effective administration of government, the public duty doctrine is no longer capable of doing so.

The purpose of governmental tort immunity is to strike a balance between two competing objectives: (1) allowing plaintiffs to recover for injuries caused by the state's tortious conduct; and (2) ensuring the "effective administration"[7] of government by protect-

1. Hereinafter "the state and its political subdivisions" is referred to simply as "the state."
2. *E.g.*, O'Brien v. State, 555 A.2d 334, 337 (R.I. 1989); *see also infra* Part II.C.2.
3. *E.g.*, Orzechowski v. State, 485 A.2d 545, 548 (R.I. 1984).
4. *E.g.*, Verity v. Danti, 585 A.2d 65, 67 (R.I. 1991).
5. *Orzechowski*, 485 A.2d at 548-49.
6. *E.g.*, *Verity*, 585 A.2d at 67.
7. *E.g.*, Catone, 555 A.2d at 333.

ing the state from liability for its discretionary, policy-making activities.[8] Rhode Island's public duty doctrine, however, disrupts this balance by allowing plaintiffs to recover regardless of whether the conduct in question is discretionary or policy driven. This is because the egregious conduct exception, despite its misleading label, has been inconsistently applied to require no more than is necessary to make out a standard negligence claim, thereby effectively rendering the public duty doctrine meaningless.

Adding to the doctrine's confusion and inconsistency is the requirement that the state's governmental and proprietary activities be distinguished – the doctrine and its exceptions applying in cases of the former, and ordinary negligence principles applying in cases of the latter. As a threshold matter to the doctrine's application, the distinction produces inconsistent, and therefore unpredictable and inequitable results, as the plaintiff who fails to characterize the state's activity as proprietary is left to convince the court that his case falls under one of the doctrine's exceptions.

This Comment addresses these inconsistencies and provides alternatives that will restore the original purpose of the public duty doctrine.[9] Part II discusses the evolution of governmental tort immunity in Rhode Island from sovereign immunity and its abrogation to the public duty doctrine and its exceptions. Part III argues that the public duty doctrine no longer serves the purpose for which it was originally created because, despite its name, the egregious conduct exception requires no more than a showing of ordinary negligence. Part IV explores alternatives to the public duty doctrine, which include a renewed emphasis on personal immunities and the adoption of a rule of immunity based solely upon the state's discretionary, policy-making decisions. These alternatives will better accomplish the goals for which the public duty doctrine was created, as well as provide greater consistency and predictability within the field.

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8. *See, e.g.*, Calhoun v. City of Providence, 390 A.2d 350, 354-55 (R.I. 1978).

9. It should be noted at the outset that the scope of this Comment is intended to go beyond simply addressing the various criticisms of the egregious conduct exception. "'To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.'" *Cf.* Tedesco v. Connors, No. 03-469 2005 WL 955030, at *7 (R.I. Apr. 27, 2005) (quoting Michelson v. United States, 335 U.S. 469, 486 (1948)).

II. THE EVOLUTION OF RHODE ISLAND'S PUBLIC DUTY DOCTRINE

A. *Sovereign Immunity*

Before falling out of favor, the doctrine of sovereign immunity was the majority rule in the United States.[10] It is generally accepted that the doctrine originated in England from the self-preserving monarchial idea that "the king can do no wrong," itself adopted from the Romans.[11] The notion manifested itself at English common-law in *Russell v. Men of Devon*,[12] upon the rationale that "'an infinity of actions' would arise and that 'it is better that an individual should sustain an injury than that the public should suffer an inconvenience.'"[13] From England the doctrine was exported to the United States where it was accepted by reasoning that "there can be no legal right against the authority that makes the law on which the right depends."[14]

Sovereign immunity first appeared in Rhode Island in *Wixon v. City of Newport*,[15] where the Rhode Island Supreme Court held a municipality immune for the actions of its employees who were engaged in a governmental function, defined by the Court as a matter in which the defendant municipality had "no private or corporate interest."[16] Thus began the practice of distinguishing between the state's governmental and proprietary functions to protect the state's financial resources in cases of the former, and ameliorate the harsh effects of immunity in cases of the latter. This distinction "led at worst to innumerable injustices and at best to a plethora of legislative and judicial exemptions,"[17] eventually leading to the downfall of sovereign immunity in Rhode Island.

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10. *See* EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.02.10 (3d ed. 2003).

11. MCQUILLIN, *supra* note 10, at § 53.02.10; Calhoun v. City of Providence, 390 A.2d 350, 353 (R.I. 1978).

12. 100 Eng. Rep. 359 (1788).

13. *Calhoun*, 390 A.2d at 353 (quoting *Russell*, 100 Eng. Rep. at 362).

14. MCQUILLIN, *supra* note 10, at § 53.02.10 (quoting Kawanabajia v. Polybank, 205 U.S. 349 (1907)).

15. 13 R.I. 454 (1881).

16. *Id.* at 459.

17. *Calhoun*, 390 A.2d at 354.

B. *Abrogation of Sovereign Immunity*

In *Becker v. Beaudoin,*[18] the supreme court abolished sovereign immunity as it applied to municipalities.[19] Consequently, any distinction between governmental and proprietary functions would no longer be recognized.[20] The court, however, did not intend to strip the state's municipalities of every protection from liability, holding that for "discretionary . . . [] judicial, quasi-judicial, legislative or quasi-legislative" activities the state's municipalities would continue to be immune from liability.[21] Additionally, the court preserved sovereign immunity for the state itself.[22] Finally, the court noted that its holding would be "subject . . . to any legislation which has been or may be enacted by the general assembly limiting or regulating . . . such claims."[23] In response to the court's invitation to legislate, the General Assembly shortly thereafter enacted section 9-31-1 of the Rhode Island General Laws,[24] which not only codified the court's holding in *Becker*, but also expanded it to apply to the state as well as its various municipalities.[25]

Calhoun v. City of Providence[26] was the first case to interpret the reach of section 9-31-1. In *Calhoun*, the plaintiff was arrested pursuant to an invalidated capias[27] that had failed to be cancelled.[28] The *Calhoun* court began by arguing the need to retain some form of immunity, referencing *Muskopf v. Corning Hospital*

18. 261 A.2d 896 (R.I. 1970).
19. *Id.* at 901.
20. *See id.*
21. *Id.* at 901 (quoting Spanel v. Mounds View Sch. Dist. No. 621, 118 N.W.2d 785, 803 (Minn. 1962)).
22. *Id.* 901-02.
23. *Id.* 901.
24. R.I. GEN. LAWS § 9-31-1 (2004).
25. Section 9-31-1(a) of the Rhode Island General Laws provides, in relevant part, that "[t]he state of Rhode Island and any political subdivision thereof, including all cities and town, shall . . . hereby be liable in all actions of tort in the same manner as a private individual or corporation." *Id.* § 9-31-1(a).
26. 390 A.2d 350 (R.I. 1978).
27. "The general name for several species of writs, the common characteristic of which is that they require the officer to take a named defendant into custody." BLACK'S LAW DICTIONARY 208 (6th ed. 1990).
28. *Calhoun*, 390 A.2d at 352.

District,[29] in which the California Supreme Court, led by Justice Traynor, had abolished sovereign immunity:

> [A]lthough convinced that sovereign immunity had no place in American jurisprudence, Justice Traynor was equally sure that public policy mandated that some vestige of the immunity be retained. For example, he considered basic policy decisions of government within constitutional limitations nontortious and, therefore, protected against claims for damages. Furthermore, abrogation of governmental immunity did not affect the well-settled rules of immunity of government officials for conduct within the scope of their authority.[30]

The court determined that "[t]here must be weighing of the injured party's demand for justice against the state's equally valid claim to exercise certain powers for the good of all without burdensome encumbrances and disruptive forces."[31] With this in mind, the court refused to "attribute to the Legislature the intent to wipe away all barriers to state liability and thereby radically depart from established conceptions of state tort responsibility without a clear statement regarding such a change."[32] In order to effectuate the protection of certain state activities in which "important societal interests are at stake,"[33] the court held that where the state actor who acted on the state's behalf enjoys personal immunity ("e.g., judicial, prosecutorial, and legislative immunities"[34]), the state would likewise be immunized from liability.[35] In adopting such an approach, the court eschewed adopting a formal distinction between discretionary and ministerial acts, determining that the interest advanced by either approach was the same: protecting the state from liability for its policy-making decisions.[36]

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29. 359 P.2d 457, 458 (Cal. 1961).
30. *Calhoun*, 390 A.2d at 354.
31. *Id.* at 355.
32. *Id.*
33. *Id.* at 356.
34. *Id.*
35. The court noted that "we do not believe that strict application of *respondeat superior* principles marks the best approach to the question." *Id.*
36. "Some courts express the limitation upon state tort liability in terms of the discretionary acts of state officials. It has been pointed out, however, that the use of the phrase 'discretionary acts' is merely a reference to the generally established requirements for personal government protection." *Id.*

The *Calhoun* court's application of its rule to the facts of the case was straightforward. If the negligent act occurred because of an error in the clerk's office, the state could be held liable because the clerk enjoyed no personal immunity.[37] If, on the other hand, the negligent act occurred because the judge had failed to recall the capias, the state would be immune from suit because the judge himself enjoyed judicial immunity.[38] Because the jury found that the error had occurred in the clerk's office, the court sustained and remanded the case with directions to enter judgment for the plaintiff.[39]

Thus, in a span of just two judicial decisions and one legislative enactment, governmental tort immunity in Rhode Island was transformed from a doctrine that had been characterized as "an anachronism[] without rational basis, . . . operat[ing] so illogically as to cause serious inequality,"[40] into a straightforward, logical rule of law in Rhode Island. In short, the state could be liable in tort unless the state actor enjoyed a personal immunity.[41] In subsequent decisions, however, the court limited the state's liability, not by revisiting the extent of the state's immunity from suit, but by limiting the duty owed by the state.

C. *Requirement of a Public Duty*

Ryan v. State[42] was the court's first opportunity to apply the *Calhoun* rule. *Ryan* involved two plaintiffs, one of whom had been injured by the negligent driving of one Eaton.[43] The plaintiffs alleged that the Registrar of Motor Vehicles had negligently issued Eaton a driver's license despite his numerous driving violations, thereby failing to comply with two separate statutes which should have prevented Eaton from obtaining a license.[44]

Under *Calhoun*, resolving any question of state immunity should have been clear. The mistake of issuing the license had

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n.5 (citations omitted).

37. *Id.* at 357.

38. *Id.*

39. *Id.*

40. Becker v. Beaudoin, 261 A.2d 896, 899 (R.I. 1970) (quoting Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 460 (Cal. 1961)).

41. *Calhoun*, 390 A.2d at 357.

42. 420 A.2d 841 (R.I. 1980).

43. *Id.* at 842.

44. *Id.*

been committed by the registrar, who lacked personal immunity; therefore, the state itself would likewise have been unable to assert any immunity. The court, however, came to a different conclusion. The court neglected to cite the *Calhoun* rule and instead cited to New York and Minnesota cases, proposing that "[i]n suits brought against the state, plaintiffs must show a breach of some duty owed them in their individual capacities and not merely a breach of some obligation owed the general public."[45] Holding that the statutes in question were enacted to protect the general public, the court affirmed the dismissal.[46]

The *Ryan* court's distinction of a public duty from a special duty has since been followed as the rule of law governing negligence suits against the state, subject, however, to three qualifications of the rule: the special duty exception, the governmental-proprietary distinction and the egregious conduct exception.[47]

1. *The Special Duty Exception*

Orzechowski v. State[48] was the first case in which the court articulated how the state might be held liable to an individual for the violation of a statute. In *Orzechowski*, a parolee who had been released from prison before being statutorily eligible shot the plaintiff, an on-duty patrolman.[49] The plaintiff and his wife filed suit against the state, alleging that the parole board had been negligent in releasing the parolee in contravention of a statute mandating another fifteen years before parole eligibility.[50] Affirming the superior court's dismissal, the supreme court held that the statute in question did not create a duty to any specific individual or class of individuals.[51] Thus, by reverse implication, a statute might, by its own terms, create a duty to a specific individual or a

45. *Id.* at 843 (citing Southworth v. State, 392 N.E.2d 1254, 1255 (N.Y. 1979) (per curium); Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979)).

46. *Id.*

47. *See, e.g.*, Quality Court Condo. Ass'n v. Quality Hill Dev. Corp., 641 A.2d 746, 750 (R.I. 1994) (special duty exception); Verity v. Danti, 585 A.2d 65, 67 (R.I. 1991) (egregious conduct exception); O'Brien v. State, 555 A.2d 334, 338 (R.I. 1989) (governmental-proprietary distinction).

48. 485 A.2d 545.

49. *Orzechowski*, 485 A.2d at 546.

50. *Id.* at 546-47.

51. *Id.* at 549-50.

specific class of individuals, as opposed to the general public.

The court held similarly in *Barratt v. Burlingham*,[52] in which the plaintiff had been pulled over for drunk driving by one of the town's police officers. After observing the plaintiff, the officer permitted him to drive home, in contravention of the state's criminal drunk driving laws. [53] Subsequently, the plaintiff injured himself in an automobile accident.[54] As in *Orzechowski*, the court held that the applicable statute created a duty owed to the general public, thereby insulating the town from liability under the public duty doctrine.[55] Additionally, the court determined that the plaintiff's interaction with the officer created no special duty owed to him as an individual.[56] In a concurring opinion, however, Justice Kelleher opined that the plaintiff's interaction with the officer did, indeed, create a special duty owed to the plaintiff, thereby distinguishing the case from previous cases in which no such special circumstances existed where the "'defendant[s] knew or reasonably should have known of a threat to the specific plaintiff.'"[57]

Justice Kelleher's position resurfaced as the majority opinion in *Quality Court Condo. Ass'n v. Quality Hill Dev. Corp.*,[58] where the court applied Justice Kelleher's vision of the special duty exception in the plaintiffs' favor. In *Quality Court*, the plaintiffs sued the City of Pawtucket alleging that the city's building inspectors had negligently inspected improperly constructed condominiums.[59] The city argued that issuing building permits and inspecting buildings created a duty to the general public rather than to specific individuals.[60] The court disagreed, holding that the facts of

52. 492 A.2d 1219 (R.I. 1985).
53. *Id.* at 1222.
54. *Id.* at 1221.
55. *Id.* at 1222.
56. *Id.*
57. *Id.* at 1223 (quoting *Orzechowski*, 485 A.2d at 549) (Kelleher, J., concurring). Justice Kelleher concurred in the judgment, believing that once the plaintiff had arrived safely home, the town's duty to him ended. It was only after leaving his house again later that morning that the plaintiff was involved in the automobile accident that resulted in his injuries. *Id.* at 1223-24. Justice Kelleher's position was vindicated writing for the majority in *Knudsen v. Hall*, 490 A.2d 976, 978 (R.I. 1985), in which the court held that because the state's duty was to the general public, and the plaintiffs were not specifically identifiable, the plaintiffs could not recover against the state. *Id.*
58. 641 A.2d 746 (R.I. 1994).
59. *Id.* at 747-48.
60. *See id.* at 750.

the case brought these plaintiffs "specifically into the realm of [the city's] knowledge."[61] Because the plaintiffs had been in contact with the city building inspectors at the time of the inspection,[62] the court reasoned that "the city's duty was to the individual owners of the condominium's units and 'not to some amorphous, unknown 'public','"[63] Thus emerged the rule of a special duty where "the plaintiffs have had some form of prior contact with government officials who then embark on a course of conduct which endangers the plaintiffs, or they have come within the knowledge of the officials so that the injury can be or should have been foreseen."[64] Accordingly, after *Quality Court*, a special duty could exist even if the statute in question created a duty to the general public, rather than to a specific individual.

2. *The Governmental-Proprietary Function Distinction*

To further obviate the possibly harsh effects of the public duty doctrine, the court, in *Catone v. Medberry*[65] and its companion case, *O'Brien v. State*,[66] further refined the application of the public duty doctrine. The facts giving rise to this distinction were an automobile accident in *Catone*,[67] and a trip-and-fall in *O'Brien*.[68] In both cases the superior court held that the state had owed the plaintiffs no specific duty under the public duty doctrine.[69]

The *Catone* court analyzed each context in which the public duty doctrine had previously been invoked,[70] and determined that "[i]n every case in which [the court has] applied the public duty doctrine, the government or its agent [had been] engaged in an activity inherently incapable of being performed by private individuals."[71] The court added: "[w]hen governmental employees

61. *Id.* at 751 (quoting Barratt v. Burlingham, 492 A.2d 1219, 1223 (R.I. 1985) (Kelleher, J., concurring)).
62. *Id.* at 748.
63. *Id.* (internal quotations omitted).
64. Chakuroff v. Boyle, 667 A.2d 1256, 1258 (R.I. 1995) (citing *Quality Court*, 641 A.2d at 750).
65. 555 A.2d 328 (R.I. 1989).
66. 555 A.2d 334 (R.I. 1989).
67. 555 A.2d at 329.
68. 555 A.2d at 335.
69. *Catone*, 555 A.2d at 330.
70. *Id.* at 331.
71. *Id.* at 333.

engage in activities normally undertaken by private individuals . . . there is no need to cloak them in the protection of the public duty doctrine."[72] Distinguishing between activity "inherently incapable" of being undertaken by private individuals and activity "normally" undertaken by private individuals, the court opined:

> The primary purpose of the public duty doctrine is to encourage the effective administration of governmental operations by removing the threat of potential litigation. This need to protect the government's ability to perform certain functions is particularly relevant when the activity in question involves a high degree of *discretion* such as governmental planning or political decision making. The state would be unable to function if liability [were] imposed each time an individual was deleteriously effected by such activities. We shall therefore continue to immunize the government for harm resulting from *discretionary* acts.[73]

In holding the public duty doctrine inapplicable, the court reasoned that it "[could] think of no conceivable *public-policy* consideration which would be furthered by liberating state-employee drivers from adherence to the rules of the road."[74] Additionally, the court specifically rejected any resurrection of the distinction between the state's governmental and proprietary functions.[75] Thus, it becomes apparent that the court intended "activities inherently incapable of being performed by private individuals" to mean those activities in which the state exercises some discretion or public-policy consideration.[76]

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72. *Id.*
73. *Id.* at 333 (emphasis added).
74. *Id.* (emphasis added).
75. *See id.*
76. *Id.* This interpretation of *Catone* is supported by the fact that the author of the opinion, Justice Murray, cited to *Catone* in his advisory opinion to the governor, written two years later, for the proposition that discretionary acts of the state are barred by the doctrine of discretionary immunity, for which he also cited to *United States v. Gaubert*, 499 U.S. 315 (1991), the principle case upon which modern discretionary immunity analysis is based. *See Advisory Opinion to the Governor (DEPCO)*, 593 A.2d 943, 953 (R.I. 1991). Additionally, and consistent with *Catone*, the doctrine of discretionary immunity rejects any distinction between governmental functions and nongovernmental, or proprietary, functions of government. *See, e.g.*, Berkovitz v. United States, 486 U.S. 531, 538-39 (1988).

The *Catone* analysis, however, was not applied in a case decided the very same day, *O'Brien v. State*.[77] The analysis in *O'Brien* began similar to that in *Catone* by noting that the state engages in some activities that a private person does not.[78] But whereas the *Catone* court qualified its distinction by reasoning that the state sometimes engages in discretionary decisions or policy-making considerations, the *O'Brien* court failed to do the same. The resulting distinction resembled the difference between governmental and proprietary functions found under the abrogated doctrine of sovereign immunity, the resurrection of which the *Catone* court specifically rejected.[79] Recognizing this distinction, the *O'Brien* court unequivocally declared that its new test was not a mere reincarnation of the old governmental-proprietary function test; whereas under the doctrine of sovereign immunity the relevant inquiry was whether the state had "[a] private or corporate interest,"[80] under the court's new test the inquiry would be "whether this is an activity that a private person or corporation would be likely to carry out."[81] Although the *O'Brien* court expressed otherwise, in fact the two tests are essentially the same.[82]

The public duty doctrine had been eroded to the extent that it would not apply to tortious acts committed in the execution of the state's proprietary functions; however, it would remain protective of the state's governmental functions. It remained, therefore, protective of some of the state's discretionary, policy-making actions, but only to the extent that such actions could be classified as governmental. The egregious conduct exception would remove even that protection.

77. 555 A.2d 334 (R.I. 1989).
78. *See id.* at 337.
79. *See* Catone v. Medberry, 555 A.2d 328, 333 (R.I. 1989).
80. Wixon v. City of Newport, 13 R.I. 454, 459 (1881).
81. *O'Brien*, 555 A.2d at 337.
82. Under the same chapter of the Rhode Island General Laws in the Tort Claims Act, R.I. GEN. LAWS §§ 9-31-1 – 9-31-3 (2004), the same test is used to determine whether the state's action was "proprietary." *Id.* §§ 9-31-2 – 9-31-3; *see* Hous. Auth. of the City of Providence v. Orepoza, 713 A.2d 1262, 1263 (R.I. 1998) (holding that in determining whether activity is proprietary, "[t]he appropriate inquiry is 'whether the activity [at issue] was one that a private person or corporation would carry out.'").

3. *The Egregious Conduct Exception*

The egregious conduct exception is a true exception to the public duty doctrine because it allows a plaintiff to recover from the state even though the negligent activity alleged is governmental, and even though the duty owed is to the general public.[83] *Verity v. Danti*[84] gave rise to this exception. In *Verity* an automobile struck and severely injured a thirteen-year old girl as she stepped off the sidewalk to navigate around an overgrown tree.[85] Her mother brought suit against the state for failing to maintain the sidewalk in a safe condition.[86] Consistent with *O'Brien v. State*[87] and *Knudsen v. Hall*,[88] the Providence County Superior Court dismissed the plaintiff's action.[89] Although the superior court had ruled correctly under existing precedent, the supreme court reversed, creating a new rule: "When the state has knowledge that it has created a circumstance that forces an individual into a position of peril and subsequently chooses not to remedy the situation, the public duty doctrine does not shield that state from liability."[90] The court reasoned that to give the state immunity for such egregious conduct would be enabling,[91] especially in a case such as this one where "the state's negligence in this instance [was] so extreme that to bar suit under the public duty doctrine would effectively excuse governmental employees from remedying perilous situations that they themselves have created."[92]

The court refined the egregious conduct exception in *Haley v. Town of Lincoln*[93] by requiring that three distinct elements be met in order to find state action egregious:

> (1) the state, in undertaking a discretionary action or in maintaining or failing to maintain the product of a discretionary action, created circumstances that forced a rea-

83. *See* Verity v. Danti, 585 A.2d 65, 67 (R.I. 1991).
84. 585 A.2d 65 (R.I. 1991).
85. *Id.* at 65-66.
86. *Id.*
87. 555 A.2d 334 (R.I. 1989) (governmental function).
88. 490 A.2d 976 (R.I. 1985) (holding maintenance of public sidewalks is a public duty).
89. *Verity*, 585 A.2d at 66.
90. *Id.* at 67.
91. *Id.*
92. *Id.*
93. 611 A.2d 845 (R.I. 1992).

> sonably prudent person into a position of extreme peril; (2) the state, through its employees or agents capable of abating the danger, had actual or constructive knowledge or the perilous circumstances; and (3) the state, having been afforded a reasonable amount of time to eliminate the dangerous condition, failed to do so.[94]

The second and third elements express merely that there must be a breach of duty.[95] When combined with the exception's disregard of a public or specific duty, it establishes that the state may be held liable pursuant to standard principles of negligence for even its governmental functions, which necessarily include discretionary, policy-making considerations, restricted only by the requirement that the plaintiff be placed in a "position of extreme peril,"[96] a question of duty.

The egregious conduct exception was still capable of protecting the state's discretionary, policy-making functions, but only to the extent that those functions would not force a person into a position of extreme peril. Recent permissiveness as to what constitutes extreme peril, however, has rendered the public duty doctrine all but meaningless by allowing the state to be held liable for what might be considered ordinary negligence.

III. AN END TO THE PUBLIC DUTY DOCTRINE?

A. *The Egregious Conduct Exception Revisited*

The egregious conduct exception has devolved to such a point where it allows a plaintiff to make his case using traditional negligence principles with little regard for whether the plaintiff was, indeed, forced into a position of extreme peril. Although the interpretation of extreme peril was initially restrictive in *Verity*,[97] subsequent decisions have expanded the egregious conduct exception beyond the restrictive language and compelling facts in that case, albeit inconsistently.[98]

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94. *Id.* at 849.

95. Tedesco v. Connors, No. 03-469, 2005 WL 955030, at *4 n.3 (R.I. Apr. 27, 2005) (addressing the third element only).

96. Haworth v. Lannon, 813 A.2d 62, 65 (R.I. 2000).

97. *See supra* PartII.C.3.

98. *See Tedesco*, No. 03-469, 2005 WL 955030, at *1 (holding that

Recently, in the Newport County Superior Court, a plaintiff prevailed against the state in a slip-and-fall suit for injuries resulting from the disrepair of its sidewalk.[99] The plaintiff brought the case under the egregious conduct exception, alleging that the state had notice of the defective condition based upon previous suits from injuries on the same sidewalk, and had taken no steps to alleviate the situation.[100] Thus, the necessity of "extreme peril" seems to have had little bearing on whether the egregious conduct exception would apply, the case turning merely on whether there was a breach of duty.[101]

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whether failure to install bicycle-safe sewer grates was egregious conduct is a question for the jury); Martinelli v. Hopkins, 787 A.2d 1158, 1168-69 (R.I. 2001) (holding that a grant of an entertainment license for a music festival on private property resulting in physical injury was egregious conduct); L.A. Ray Realty v. Town Council of the Town of Cumberland, 698 A.2d 202, 208-09 (R.I. 1997) (holding that the adoption and enforcement of an invalid ordinance which interfered with plaintiffs' "legitimate expectations regarding their property" was egregious conduct); DeFusco v. Todesca Forte, Inc., 683 A.2d 363, 365 (R.I. 1996) (holding that the opening of a highway exit ramp before construction was completed resulting in an automobile accident was *not* egregious conduct); Cornell v. Jan Co. Cent., Inc., 671 A.2d 1223, 1225 (R.I. 1996) ("no egregious conduct could be established by the placement of a functioning traffic signal on the sole ground that arrangements should have been made for a delayed light or a turning arrow."); Houle v. Galloway Sch. Lines, Inc., 643 A.2d 822, 827 (R.I. 1994) (holding that whether the location of a school bus stop resulting in an automobile accident is egregious conduct was question of fact for a jury); Catri v. Hopkins, 609 A.2d 966, 969 (R.I. 1992) (holding that the failure to install a traffic light, despite public demand, resulting in an automobile accident was *not* egregious conduct); Haley v. Town of Lincoln, 611 A.2d 845, 850 (R.I. 1992) (holding that the placement of unlit sawhorses in a roadway resulting in an automobile accident was egregious conduct if the state had notice and did not remedy the situation).

In a recent attempt to clarify the egregious conduct exception's application, the Rhode Island Supreme Court has held that each element of the exception, insofar as reasonable minds can differ, is essentially a jury question. *Tedesco*, 2005 WL 955030, at *3-4. This is likely to produce even more inconsistency by making the question of duty found in the exception's first element a question for the jury. *Cf.* Soave v. Nat'l Velour Corp., 863 A.2d 186, 188 (R.I. 2004) ("Whether . . . a duty of care runs from a defendant to a plaintiff is a question of law for the court to decide.").

99. John Cunningham, *Lawyer Wins Rare Slip & Fall Against State*, RHODE ISLAND LAWYER'S WEEKLY, Aug. 14, 2004, at 1.

100. *Id.*

101. *But see, e.g.*, Brady v. State, No. CIV. A. 99-0009, 2002 WL 1035431, at *10 (R.I. Super. Ct. May 10, 2002) (holding that a build-up of ice and snow resulting in a slip and fall outside the State House was *not* "so egregious as to rise to the level necessary to qualify for [the] exception"); Long v. State, No.

The consequence of this and repeated similar outcomes serves to remove from the state routine discretionary decisions. In *Verity*, the state had been extremely derelict in maintaining the sidewalk to the extent that it had become impassible.[102] It is unlikely that this inattention had been caused by any policy choice of the state, but rather by its egregious conduct. In the aforementioned Newport superior court case, however, the sidewalk was merely in disrepair.[103] The possibility of repeated liability in future cases may well force the state to keep its walkways in flawless repair, likely a costly chore. The choice of which walkways receive attention is a discretionary, policy-based, and, occasionally, political decision that should be left to agencies and elected bodies, not to courts. Under the public duty doctrine this discretion is preserved for the state because such action is governmental, to which a public duty would be owed.[104] The current application of the egregious conduct exception, however, has undermined this discretion by requiring only a showing of ordinary negligence.

The egregious conduct exception, has, in addition, not been limited to physical injury. In *L.A. Realty v. Town of Cumberland*,[105] the town adopted and enforced an invalid zoning ordinance which defeated the plaintiffs' "legitimate expectations regarding their property."[106] The court held that the town's actions were "egregious misconduct," so as to deprive the town of governmental immunity from the plaintiffs' tort claims.[107] Such a decision provides little confidence that the egregious conduct exception will continue to apply to the narrow class of cases for which it was originally intended. *Verity* involved serious bodily injury. It seems unlikely that the *Verity* court would have characterized egregious conduct as resulting in an "imperiling situation"

CIV. A. NC 99-0325, 2002 WL 1371049, at *4 (R.I. Super. Ct. June 13, 2002) (holding that dirt resulting in slip and fall on the Newport County Courthouse was *not* egregious conduct).

102. Verity v. Danti, 585 A.2d 65, 67 (R.I. 1991).

103. Cunningham, *supra* note 99, at 1.

104. *See, e.g.*, Torres v. Damicis, 853 A.2d 1233, 1239 (R.I. 2004).

105. 698 A.2d 202 (R.I. 1997).

106. *Id.* at 208.

107. *Id.* at 208, 209. *But cf. Haworth v. Lannon*, 813 A.2d 62, 65 (R.I. 2003) (holding that the alleged negligent inspection of plaintiffs' homes causing flooding did *not* amount to egregious conduct or create a situation of extreme peril).

had the court anticipated that the exception would later apply to damages arising out of the loss of property use as well. Those cases in which the egregious conduct exception has been interpreted to require evidence of a mere indicia of physical injury or, as in *L.A. Ray Realty*, simply property damage rather than egregious conduct resulting in an imperiling situation have ensured the public duty doctrine is no longer an effective means by which to strike a balance between a plaintiffs' and the state's competing interests. In addition, the exception has been inconsistently applied in similar cases resulting in dissimilar results for similarly situated plaintiffs.[108] Accordingly, it is time for the court to abolish the public duty doctrine.

B. *Rejection of the Public Duty Doctrine*

The difficulty encountered in applying the public duty doctrine's exceptions only to arrive at irreconcilable results has caused the Rhode Island Supreme Court, in recent decisions, to recognize the doctrine's increasing fragility.[109] Nevertheless, the court has expressed reservations about abandoning the public duty doctrine:

> Our holding rests on the policy that the public treasury should not be exposed to claims involving acts done for the public good as a whole, given that the exercise of these functions cannot reasonably be compared with functions that are or may be exercised by a private person.
>
> Additionally, the public duty doctrine continues to serve a pragmatic and necessary function because it can encourage the effective administration of governmental operations by removing the threat of potential litigation. Moreover, a governmental unit should not be held liable

108. *See supra* note 98.

109. *See* Tedesco v. Connors, No. 03-469, 2005 WL 955030, at *7 (R.I. Apr. 27, 2005) ("'[M]uch of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other.'" (quoting Michelson v. United States, 335 U.S. 469, 486 (1948))); Haworth v. Lannon, 813 A.2d 62, 66 (R.I. 2003) ("[W]e have observed that 'the doctrine verges on the brink of being a legal enigma because of its many exceptions.'"); Martinelli v. Hopkins, 787 A.2d 1158, 1166 (R.I. 2001) ("[T]he doctrine verges on the brink of being a legal enigma because of its many exceptions.").

> for activities it performs that could not and would not in the ordinary course of events be performed by a private person at all. Eliminating the public duty doctrine could subject the state to potential liability for each and every action it undertook. Even minimal insight reveals that this would lead to hesitation on the part of the state to undertake and perform duties necessary to the functioning of a free society.[110]

Despite similar reservations, however, numerous sister jurisdictions have abandoned the doctrine.[111] In fact, very few courts addressing the doctrine's continued validity have actually retained it.[112] These courts, in abandoning the doctrine, reason that the public duty doctrine is simply a resurrection of sovereign immunity.[113]

No aspect of the public duty doctrine more closely resembles the abrogated doctrine of sovereign immunity than the governmental-proprietary function distinction. For the same reason the doctrine of sovereign immunity was abrogated – the confused and irreconcilable results obtained in distinguishing between governmental and proprietary functions – the public duty doctrine

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110. *Haworth*, 813 A.2d at 66 (internal quotations and citations omitted). *See also Tedesco*, No. 03-469, 2005 WL 955030, at *7 ("'But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court.'" (quoting Michelson v. United States, 335 U.S. 469, 486 (1948))).

111. *See* Beaudrie v. Henderson, 631 N.W.2d 308, 309 (Mich. 2001); Drake v. Drake, 618 N.W.2d 650, 657 (Neb. 2000); Jean W. v. Commonwealth, 610 N.E.2d 305, 307 (Mass. 1993); Doucette v. Town of Bristol, 635 A.2d 1387, 1390 (N.H. 1993); Hudson v. Town of East Montpelier, 638 A.2d 561, 566 (Vt. 1993); Busby v. Municipality of Anchorage, 741 P.2d 230, 232 (Alaska 1987); Leake v. Cain, 720 P.2d 152, 160 (Colo. 1986); DeWald v. State, 719 P.2d 643, 653 (Wyo. 1986); Wood v. Milin, 397 N.W.2d 479, 482 (Wis. 1986); Schear v. Bd. of County Comm'rs, 687 P.2d 728, 734 (N.M. 1984); Ryan v. State, 656 P.2d 597, 599 (Ariz. 1982); Stewart v. Schmieder, 386 So.2d 1351, 1358 (La. 1980); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1015 (Fla. 1979); Wilson v. Nepstad, 282 N.W.2d 664, 667 (Iowa 1979); Brennen v. City of Eugene, 591 P.2d 719, 725 (Or. 1979); Macaluso v. Knowles, 775 A.2d 108, 110 (N.J. App. Div. 2001).

112. *See* Benson v. Kutsch, 380 S.E.2d 36, 41-42 (W.Va. 1989); Gordon v. Bridgeport, 544 A.2d 1185, 1198-99 (Conn. 1988).

113. *E.g.*, City of Kotzebue v. McLean, 702 P.2d 1309, 1311-12 (Alaska 1985); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1022 (Fla. 1979).

should be abolished as well. Rhode Island courts have experienced difficulty applying the distinction, resulting in inconsistent and contradictory outcomes.[114] It is for this reason that most jurisdictions, including Rhode Island, eliminated the distinction when abrogating sovereign immunity.[115]

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114. *See* Brady v. State, No. CIVA.99-0009, 2002 WL 1035431, at *5 (R.I. Super. Ct. May 10, 2002) (citing Kuhl v. Perrin, 706 A.2d 1328, 1329 (R.I. 1998) ("[O]peration and maintenance of a public school is a governmental function and not a proprietary one."); Hous. Auth. of the City of Providence v. Oropeza, 713 A.2d 1262, 1264 (R.I. 1998) ("[T]he function at issue here, namely, the providing of security within and by the housing authority is proprietary in nature."); Matarese v. Dunham, 689 A.2d 1057, 1058 (R.I. 1997) ("[M]aintenance of government buildings is plainly a governmental function."); L.A. Ray Realty v. Town Council of the Town of Cumberland, 698 A.2d 202, 208 (R.I. 1997) ("[W]e have no doubt that the adoption and application of a zoning ordinance is a governmental function."); Chakuroff v. Boyle, 667 A.2d 1256, 1258 (R.I. 1995) ("[T]he operation and the maintenance of a public school is a governmental function not a proprietary one."); Quality Court Condo. Ass'n v. Quality Hill Dev. Corp., 641 A.2d 746, 750 (R.I. 1994) ("[A]t the outset we note that the activities and the inspections that are required to ensure compliance with the state building code cannot be engaged in by private enterprise."); Custom Flight Sys. of New England, Inc. v. State, 641 A.2d 1324, 1324 (R.I. 1994) ("[R]unning a public airport is exclusively an activity performed by a public entity."); Longtin v. D'Ambra Constr. Co., 588 A.2d 1044, 1046 (R.I. 1991) ("[I]t cannot be disputed that the reconstruction of Mendon Road, a state highway, is an activity that is performed exclusively by the state."); DeLong v. Prudential Prop. & Cas. Ins. Co., 583 A.2d 75, 76 (R.I. 1990) ("[T]he operation of a beach is a function that many private persons or corporations have carried out in this state."); Polaski v. O'Reilly, 559 A.2d 646, 647 (R.I. 1989) ("[I]n placing or failing to place or maintain a traffic-control sign, the city of Warwick was acting in an area in which no private person could intrude."); R.I. Student Loan Auth. v. NELS, Inc., 550 A.2d 624, 627 (R.I. 1988) ("NELS's essential function was to collect the principle and interest on outstanding student loans and to maintain records on all transactions. These functions are proprietary in nature."); Lepore v. R.I. Pub. Transit Auth., 524 A.2d 574, 575 (R.I. 1987) ("[W]e do not believe that maintaining a public-transportation authority is a function that is so intertwined with governing that we will consider it a governmental function. Rather, we shall consider its operation proprietary in nature."). Whether applying the distinction to liability or damages under the Tort Claims Act, R.I. GEN. LAWS §§ 9-31-1 – 9-31-3 (2004), these cases demonstrate the inconsistency and confusion inherent in the distinction.

115. Becker v. Beaudoin, 261 A.2d 896, 902 (R.I. 1970); DeBry v. Noble, 889 P.2d 428, 444 (Utah 1995); Taylor v. Murphy, 360 S.E.2d 314, 316 (S.C. 1987); Guthrie v. N.C. State Ports Auth., 299 S.E.2d 618, 621 (N.C. 1983); Vanderpool v. State, 672 P.2d 1153, 1155-57 (Okla. 1983); Haverlack v. Portage Homes, Inc., 442 N.E.2d 749, 752 (Ohio 1982); Univ. of Alaska v. Nat'l Aircraft Leasing, Ltd., 536 P.2d 121, 128 (Alaska 1975); Hicks v. State, 544 P.2d 1153, 1161 (N.M. 1975); Long v. City of Weirton, 214 S.E.2d 832, 852

The case for abrogation of the public duty doctrine is most compelling in Rhode Island because of the egregious conduct exception, which is unique to Rhode Island law. The egregious conduct exception has sufficiently undermined the court's rationale that the state should not be held liable for functions performed in a governmental capacity, because the exception allows the state to be held to an ordinary standard of negligence for even its uniquely governmental activities.[116]

While the public duty doctrine no longer serves its purpose, there are some governmental functions which must necessarily be protected. These particular functions have, since the abrogation of sovereign immunity in *Becker v. Beaudoin*,[117] been a recurring theme for the court – namely, protecting the government's discretionary, policy-making decisions.

IV. ALTERNATIVES TO THE PUBLIC DUTY DOCTRINE

In order to better protect the state's discretionary, policy-making function, there are two alternatives to the public duty doctrine: (1) personal immunities and (2) a discretionary-ministerial distinction.

A. *Personal Immunities*

There are several firmly established immunities that may protect the state from suit for its actors' discretionary decisions.[118]

(W.Va. 1975); Ayala v. Philadelphia Bd. Of Pub. Educ., 305 A.2d 877, 889 (Pa. 1973); Campbell v. State, 284 N.E.2d 733, 737 (Ind. 1972); Parish v. Pitts, 429 S.W.2d 45, 53 (Ark. 1968); Haney v. City of Lexington, 386 S.W.2d 738, 742 (Ky. 1964); Stone v. Ariz. Highway Comm'n, 381 P.2d 107, 112 (Ariz. 1963); Spanel v. Mounds View Sch. Dist. No. 621, 118 N.W.2d 795, 803 (Minn. 1962); Holytz v. City of Milwaukee, 115 N.W.2d 618, 625 (Wis. 1962); Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 461-62 (Cal. 1961); Williams v. City of Detroit, 111 N.W.2d 1, 9 (Mich. 1961); Molitor v. Kaneland Cmty. Unit. Dist. No. 302, 163 N.E.2d 89, 95 (Ill. 1959); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).

116. *See supra* Part III.A.

117. *Supra* note 18 and accompanying text.

118. *See* Cronan ex. rel. State v. Cronan, 774 A.2d 866, 880-81 (R.I. 2001) (prosecutorial immunity); Petrone v. Town of Foster, 769 A.2d 591, 595-96 (R.I. 2001) (quasi-judicial administrative immunity); Estate of Sherman v. Almeida, 747 A.2d 470, 475 (R.I. 2000) (judicial immunity); Ensey v. Culhane, 727 A.2d 687, 691 (R.I. 1999) (qualified immunity for members of the executive branch); Maynard v. Beck, 741 A.2d 866,871 (R.I. 1999) (legislative im-

In *Calhoun v. City of Providence*, the Court expressed a desire to apply these personal immunities to the state, though not under a strict application of the doctrine of respondeat superior.[119] Such immunities may well protect the government from suit for its officials' discretionary acts – acts that must be engaged in without fear of suit.[120] A renewed emphasis on personal immunities may succeed in protecting officials' discretionary acts where the public duty doctrine has failed.

One example of the public duty doctrine's failure to protect discretionary decisions is *L.A. Ray Realty v. Town Council of the Town of Cumberland*,[121] in which the plaintiffs alleged and established at trial that certain town officials acted improperly in passing a zoning ordinance that negatively affected them.[122] The court held that the defendants had been involved in a governmental function;[123] however, they had engaged in egregious conduct. "[T]he town's adoption and enforcement of an invalid ordinance in order to interfere with plaintiffs' legitimate expectations regarding their property amounted to egregious misconduct," thereby denying the town immunity under the public duty doctrine.[124]

Yet, in *Maynard v. Beck*,[125] plaintiffs similarly alleged that municipal zoning and other town officials attempted to improperly rezone certain property.[126] The court, citing a recent United States Supreme Court decision,[127] held that the defendants "[were] entitled to invoke legislative immunity for their . . . discretionary and policy making decisions."[128]

If the court applied the *Maynard* court's holding to the facts of *L.A. Ray Realty*, that case would certainly have come out differently. The *L.A. Ray Realty* defendants' act of passing a zoning or-

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munity).

119. 390 A.2d 350, 356-57 (R.I. 1978).

120. *See id.*

121. 698 A.2d 202 (R.I. 1997).

122. *Id.* at 205.

123. *Id.* at 208.

124. *Id.* at 208-09.

125. 741 A.2d 866 (R.I. 1999).

126. *Id.* at 868. Specifically, town officials "altered specific portions of the proposed draft zoning ordinance, thereby rendering it inconsistent with the town's Comprehensive Plan." *Id.*

127. *Id.* at 869 (citing Bogan v. Scott-Harris 523 U.S. 44 (1998) (holding that absolute legislative immunity applies to municipal legislators)).

128. *Id.* at 872.

dinance would have afforded those defendants the protection of legislative immunity, and under the *Calhoun* rule the town as well.[129] Moreover, the immunity provided in *Maynard* would have more success than the public duty doctrine in accomplishing the public duty doctrine's stated rationale – namely, protecting the state from suit for its discretionary, governmental functions.

In addition to better protecting the state substantively, personal immunities provide better procedural protections as well. This superior procedural protection arises from the fact that personal immunities provide immunity from suit, not just immunity from damages; thus, it is appropriate for such claims against the state to be dismissed earlier in the litigation process.[130] Immunity under the public duty doctrine, on the other hand, is immunity from liability; therefore, dismissal of such claims becomes appropriate much later in the litigation process,[131] thereby imposing greater litigation costs on both parties for a claim that may ultimately be dismissed.

B. *The Discretionary-Ministerial Distinction*

While application of personal immunities provides distinct substantive and procedural advantages to the state over the public duty doctrine, it applies to the state through a narrow class of actors: those who themselves have personal immunity. This creates a disadvantage in that governmental actors may engage in discretionary, policy-making decisions but, because of their status, are themselves not privileged with immunity. Consequently, the state remains exposed to liability for a broad range of discretionary activities. Many jurisdictions have resolved this problem by adopting a discretionary-ministerial distinction,[132] with liability for a state's

129. *See* Calhoun v. City of Providence, 390 A.2d 350, 356 (R.I. 1978).

130. *See* Estate of Sherman v. Almeida, 747 A.2d 470, 474 (R.I. 2000) ("[J]udicial immunity is an immunity from suit, not just an immunity from an ultimate assessment of damages . . . . '[I]mmunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial.'").

131. *See, e.g.*, Bandoni v. State, 715 A.2d 580, 628 (R.I. 1998) ("a case in which the public-duty doctrine is asserted as a defense is not generally appropriate for disposition on a motion to dismiss . . . pursuant to Super. R. Civ. P. 12(b)(6) . . . .") (citing Haley v. Town of Lincoln, 611 A.2d 845, 850 n.1 (R.I. 1992)).

132. *See* Conlin v. City of Saint Paul, 605 N.W.2d 396, 400 (Minn. 2000);

ministerial acts, and immunity for its discretionary acts.[133]

Indeed, federal courts employ a discretionary-ministerial distinction under the Federal Tort Claims Act (FTCA).[134] The United States Supreme Court has developed a sophisticated test for determining whether an act is discretionary, thereby shielding the United States government from liability.[135] In analyzing whether an act is discretionary, a court should determine "whether the action is a matter of [judgment or] choice for the acting employee."[136]

Keystone Elec. Mfg., Co. v. City of Des Moines, 586 N.W.2d 340, 348 (Iowa 1998); Jungerman v. City of Raytown, 925 S.W.2d 202, 205 (Mo. 1996); Olson v. City of Garrison, 539 N.W.2d 663, 665 (N.D. 1995); Keegan v. State, 896 P.2d 618, 619-20 (Utah 1995); Linville v. City of Janesville, 516 N.W.2d 427, 433 (Wis. 1994); Gardner v. City of Concord, 624 A.2d 1337, 1340 (N.H. 1993); State v. Mason, 724 P.2d 1289, 1292-93 (Colo. 1986); McCall by Andrews v. Batson, 329 S.E.2d 741, 743 (S.C. 1985); Nunn v. State, 677 P.2d 846, 853 (Cal. 1984); Cansler v. State, 675 P.2d 57, 69-70 (Kan. 1984); Indus. Indem. Co. v. State, 669 P.2d 561, 566 (Alaska 1983); Julius Rothschild & Co. v. State, 655 P.2d 877, 881 (Haw. 1982); Brown v. Brown, 432 A.2d 493, 500 (N.J. 1981); Mason v. Bitton, 534 P.2d 1360, 1364 (Wash. 1975); *see also* Hughes v. City of Hartford, 96 F. Supp. 2d 114, 119 (D. Conn. 2000); Lorber v. Town of Hamburg, 639 N.Y.S.2d 607, 608 (N.Y. App. Div. 1996); Johnson v. Mers, 664 N.E.2d 668, 675 (Ill. App. Ct. 1996); Brown v. City of Delray Beach, 652 So.2d 1150, 1153 (Fla. Dist. Ct. App. 1995); State Dept. of Mental Health v. Allen, 427 N.E.2d 2, 4 (Ind. Ct. App. 1981); El v. State, 357 N.E.2d 61, 63 (Ohio Ct. App. 1976).

133. Some jurisdictions apply the discretionary-ministerial distinction as a planning-operational distinction, whereby discretion in planning activities will render the state immune, whereas operational activities, even though involving the exercise of discretion, may subject the state to liability. *See* 57 AM. JUR. 2D *Municipal, etc., Tort Liability* § 78 (2001). Section 78 of volume 57 in *American Jurisprudence* cites numerous state decisions in support of the assertion that

> [i]n administering the test distinguishing between discretionary acts and ministerial functions, the key factor is the presence of basic policy formulation, planning or policy decisions, which are characterized by an exercise of a high degree of official judgment or discretion, because most states' laws provide for immunity if the government was acting in that manner at the time of the injury.

Id. § 78 n.1.

134. Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. (2000). The Federal Tort Claims Act (FTCA) provides, in relevant part, that "[t]he United States shall be liable, respecting the provisions of this title to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

135. *See, e.g.*, United States v. Gaubert, 499 U.S. 315, 322-23 (1991); Berkovitz v. United States, 486 U.S. 531, 536 (1988).

136. *Berkovitz*, 486 U.S. at 536.

Where an employee's conduct is dictated by a statute, regulation, ordinance, or policy, the discretionary exception will not apply because the employee has exercised no judgment or choice.[137] If the employee's conduct is indeed a product of choice, the next relevant inquiry must be "whether that judgment is of the kind that the discretionary function exception [is] designed to shield."[138] This second inquiry is necessary because it is "Congress' desire to 'prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'"[139] Accordingly, the exception "protects only [those] governmental actions based on considerations of public policy."[140] And although the exception applies to governmental actions, there is no need under the exception to distinguish between governmental and non-governmental proprietary functions.[141]

To that end, the United States may not be held liable for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[142] Thus, the

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137. *Id.*

138. *Id.*

139. *Id.* at 536-37.

140. *Id.* at 537; *Gaubert*, 499 U.S. at 322-23. Even though an employee may be exercising discretion (or, as the term is more commonly used, choice), an employee may not be exercising discretion in a legal sense (i.e., where the employee's actions are not based on policy considerations. *See Gaubert*, 499 U.S. at 325.

> There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If [an] official[] . . . drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Id. at 325 n. 7.

141. *See Berkovitz*, 486 U.S. at 538-39 (rejecting the distinction between governmental and non-governmental functions); Rayonier, Inc. v. United States, 352 U.S. 315, 318-19 (1957) (same); Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955) (same).

142. 28 U.S.C. § 2680(a) (2000).

FTCA, in order to promote good decision making, protects even the government's poor decisions out of respect for the discretionary decision-making process, thereby ensuring the unobstructed administration of government by removing the fear of potential liability.[143]

1. *Application*

The discretionary function exception is well-suited to provide the state protection for its policy-making decisions in two categories of cases in which the public duty doctrine is poised for failure: licensing and law enforcement. In a third category of cases, signal maintenance, the discretionary function exception is consistent with results already achieved under the public duty doctrine.

a. *Licensing*

The discretionary function exception ensures greater respect for a legislature's licensing schemes by respecting any discretion granted by the legislature. If no discretion has been given, the state can be held liable for deviating from the licensing scheme. One example of liability imposed for deviating from a licensing scheme is *Berkovitz v. United States*,[144] in which the plaintiff contracted polio after ingesting a vaccine, the licensing of which had been approved by the United States.[145] The Supreme Court found that the agency responsible for issuing the license was required to comply with the applicable statute and regulations, which required the agency to receive manufacturer data, "examine the product, and to make a determination that the product complie[d] with safety standards."[146] The Court held that the discretionary function exception did not bar the plaintiff's cause of action because the agency had no choice under the statute and regulations other than to receive the data.[147]

143. In so doing, the discretionary function exception addresses the court's fear that by eliminating the public duty doctrine the resulting potential liability "would lead to hesitation on the part of the state to undertake and perform duties necessary to the functioning of a free society." Haworth v. Lannon, 813 A.2d 62, 66 (R.I. 2003).

144. 486 U.S. 531 (1988).

145. *Id.* at 533.

146. *Id.* at 542.

147. *Id.* at 542-43.

Comparatively, in *Martinelli v. Hopkins*,[148] the plaintiff was injured while attending an annual music festival held on private property.[149] The plaintiff sued the town of Burrillville for negligently issuing the landowner an entertainment license, despite knowing that in past years the festival's crowd had grown massive and unruly.[150] It would seem that the town unrestricted by statute or regulation, in granting the plaintiff an entertainment license, was exercising choice, unlike the defendants in *Berkovitz*. Moreover, it would seem that the town's decision to grant the entertainment license was, or conceivably could have been, grounded in social, economic, or political policy. Accordingly, the town's action would likely be held to be discretionary, and, therefore, the town immune from liability. Thus, where the public duty doctrine failed to respect the discretion given the town in granting entertainment licenses, the discretionary function exception would succeed.

b. *Law Enforcement*

In contrast to the modern public duty doctrine, the discretionary function exception respects the state's exercise of discretion in the area of law enforcement as well. In *Deuser v. Vecera*,[151] the decedent attended a fair on national park grounds in St. Louis, Missouri, run by the National Park Service. After arresting the decedent for urinating in public, park rangers turned him over to the St. Louis police. Overwhelmed by the fair, the St. Louis police elected not to process the decedent and, in conjunction with the park rangers, released the decedent away from the park. The decedent subsequently wandered onto a highway where he was struck and killed by a motorist.[152]

The Eighth Circuit found that the park ranger's handbook conferred discretion upon the officers.[153] Aside from the handbook, however, the court held that "[l]aw enforcement decisions of the

148. 787 A.2d 1158 (R.I. 2001).
149. *Id.* at 1161.
150. *Id.* at 1162. Under the framework of the public duty doctrine, the town was exercising a governmental function when it issued the property owner an entertainment license. *Id.* at 1167. The town was held liable to the plaintiff under the egregious conduct exception. *Id.* at 1168-69.
151. 139 F.3d 1190 (8th Cir. 1998).
152. *Id.* at 1195.
153. *Id.*

kind involved in making or terminating an arrest must be within the discretion and judgment of enforcing officers."[154] Accordingly, the court held that "terminating [the decedent's] arrest, that is, releasing him without charging him with a crime, was a discretionary function reserved to the judgment of the rangers."[155]

As to the second level of analysis required under the discretionary function exception, "whether [their] judgment [was] of the kind that the discretionary function exception was designed to shield,"[156] the court held that "the conduct of the rangers here [was] a classic example of a 'permissible exercise of policy judgment'"[157] because in releasing the decedent the rangers were preserving law enforcement resources for maintaining order at the fair.[158] The rangers' conduct satisfied both prongs of inquiry under the discretionary function exception; therefore, the court affirmed the district court's dismissal of the plaintiff's claim.[159]

Under the discretionary function exception, the result reached by the Rhode Island Supreme Court in *Barratt v. Burlingham*[160] would likely remain the same, although under the current public duty doctrine the case would likely come out differently. Assuming the officer's act of releasing the plaintiff was a matter of choice, the relevant inquiry would be whether the officer's decision was based on social, economic, or political policy:

> The evidence indicate[d] that [the officer] eventually allowed [the plainitiff] to drive, not because he believed [the plaintiff] to be sober, but because [the officer] – who had temporarily forsaken his traffic-control responsibilities to attend to [the plaintiff] and his drinking and traveling companions – decided it was time to untangle the traffic jam that had been created. [A witness] testified that the

154. *Id.*
155. *Id.*
156. Berkovitz v. United States, 486 U.S. 531, 536 (1988).
157. Deuser v. Vecera, 139 F.3d 1190, 1195 (8th Cir. 1998) (quoting *Berkovitz*, 486 U.S. at 539).
158. *Id.* at 1196.
159. *Id.*
160. 492 A.2d 1219 (R.I. 1985). The plaintiff was pulled over by one of the town's police officers who, after observing the plaintiff in a drunken state, permitted him to drive home. *Id.* at 1220-21. The plaintiff was subsequently injured in an automobile accident. *Id.* at 1221.

closing-time scene was lively and confusing . . . .[161]

Like the park rangers in *Deuser*, the officer's decision to release the plaintiffs was, rightly or wrongly, likely motivated from a desire to divert his resources to the traffic jam, "a 'permissible exercise of policy judgment.'"[162] Accordingly, the state would remain immune from liability for the officer's discretionary actions.

c. *Signal Maintenance*

The results under the discretionary function exception with regard to signal maintenance would likely achieve the same results under the public duty doctrine; however, under the discretionary function exception those results are based upon respect for the state's choice of policy rather than upon the anachronistic notion that there is "a duty to none where there is a duty to all."[163] In *Indian Towing Co., Inc., v. United States*,[164] the Supreme Court distinguished between the government's discretionary decision to operate a lighthouse and its obligation to use due care in maintaining the signal once the lighthouse had been established. The Court reasoned that "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."[165] Thus the Coast Guard had no choice in whether to maintain the light, though it did have a choice in whether to establish the lighthouse in the first place.[166]

Similar results are currently achieved under the public duty doctrine in Rhode Island with regard to traffic signals, though based upon a different rationale. Although the state is under no duty to install a traffic signal,[167] once a traffic signal has been installed, the state's failure to maintain it is held to be egregious conduct.[168]

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161. *Id.* at 1223 (R.I. 1985) (Kelleher, J., concurring).
162. *See Deuser*, 139 F.3d at 1195 (quoting *Berkovitz*, 486 U.S. at 539).
163. Leake v. Cain, 720 P.2d 152, 157 (Colo. 1986).
164. 350 U.S. 61 (1955).
165. *Id.* at 64-65.
166. *Id.* at 69.
167. *See* Hudson v. City of Providence, 830 A.2d 1105, 1106-07 (R.I. 2003); Catri v. Hopkins, 609 A.2d 966, 968-69 (R.I. 1992).
168. Bierman v. Shookster, 590 A.2d 402, 404-05 (R.I. 1991); *see Hudson*, 830 A.2d at 1107; *Catri*, 609 A.2d at 968-69.

2. *Critique*

Although the discretionary function exception is primarily concerned with protecting the policy-making function of government, it has received criticism for being too broad in its application.[169] This criticism has focused on the Supreme Court's decision in *Gaubert* to inject an objective standard of analysis into the discretionary function exception,[170] the practical implication of which is to create "a presumption that any discretionary act, as long as the actor's discretion has been granted by statute, regulation, or internal agency guidelines . . . [is] policy-driven, unless the plaintiff can demonstrate to the contrary . . . ."[171] Accordingly, the Supreme Court's interpretation of the FTCA provides the government with substantially greater substantive and procedural protection from suit.[172]

Substantively, the exception's protection applies not only to those actions *actually* based on considerations of public policy, but also to those actions *potentially* based on considerations of public policy as well.[173] Procedurally, the Court's interpretation makes it more likely that a plaintiff's claim will be dismissed on a Federal Rules of Civil Procedure Rule 12(b)(6) motion because "the government can now argue, as a general matter, and without any factual development, that the decision or decisions at issue in an FTCA claim are susceptible to policy analysis regardless of whether any such analysis actually took place."[174]

Although the Court's reformulation of the discretionary function exception expands protection for governmental actions, it nevertheless retains its advantages over the public duty doctrine. Applied in place of the public duty doctrine, the discretionary function exception would produce more consistent, predictable re-

169. *See* Mark C. Niles, *"Nothing But Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1281 (2002).

170. *See* United States v. Gaubert, 499 U.S. 315, 325 (1991) ("The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.").

171. Niles, *supra* note 168, at 1328.

172. *Id.* at 1331-32.

173. *Id.* at 1332 (citing Harold J. Kent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1549-50 (1992)).

174. *Id.* at 1329-30.

sults for plaintiffs and defendants alike while at the same time protecting the state's policy-driven decisions, thereby ensuring the effective administration of government. It is for this reason that, despite any criticism directed toward it, the Supreme Court's modern formulation of the discretionary function exception has been cited favorably by many state high courts when interpreting the extent of state governmental tort immunity,[175] and in Rhode Island as well.[176]

V. CONCLUSION

Sovereign immunity once provided the state and its political subdivisions with comprehensive governmental tort immunity.[177] Following the abrogation of sovereign immunity, the Rhode Island Supreme Court imported the public duty doctrine in order to protect the state from liability.[178] Finding such protections too broad and all-encompassing, however, the court limited the doctrine's application by carving out several distinctions and exceptions.[179] The last of these limiting exceptions, the egregious conduct exception, allows a plaintiff to make its case against the state merely by showing a breach of duty, regardless of whether that duty was

175. *See* Harris ex rel. Harris v. McCray, 867 S.2d 188, 195 (Miss. 2003); Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 85 (Tenn. 2001); Searles v. Agency of Transportation, 762 A.2d 812, 813-14 (Vt. 2000); *Ex parte* Cranman, 792 So.2d 392, 409-10 (Ala. 2000); Brantley v. Dept. of Human Res., 523 S.E.2d 571, 575 (Ga. 1999); Goodman v. City of Le Claire, 587 N.W.2d 232, 238 (Iowa 1998); D.K. Buskirk & Sons, Inc. v. State, 560 N.W.2d 462, 468 (Neb. 1997); Adriance v. Town of Standish, 687 A.2d 238, 241 (Me. 1996); Kimps v. Hill, 546 N.W.2d 151, 161 (Wis. 1996); Olsen v. City of Garrison, 539 N.W.2d 663, 666 (N.D. 1995); R.E. v. State, 878 P.2d 1341, 1349 (Alaska 1994); Simeon v. Doe, 618 So.2d 848, 856 (La. 1993); Harry Stoller & Co., Inc. v. City of Lowell, 587 N.E.2d 780, 784 (Mass. 1992); Rico v. State, 472 N.W.2d 100, 104 (Minn. 1991).

176. *See In re* Advisory Opinion to Governor (DEPCO), 593 A.2d 943, 953 (R.I. 1991) (citing United States v. Gaubert, 499 U.S. 315 (1991)) ("[A]ny [negligence] claims that do arise would be based on discretionary acts of the state and would therefore be barred by the doctrine of discretionary immunity.").

177. *See* Calhoun v. City of Providence, 390 A.2d 350, 353 (R.I. 1978); MCQUILLAN, *supra* note 10, at § 53.02.10.

178. *See* Ryan v. State, Dept. of Transp., 420 A.2d 841, 843 (R.I. 1980).

179. *See* Quality Court Condo. Ass'n v. Quality Hill Dev. Corp., 641 A.2d 746, 750 (R.I. 1994) (special duty exception); Verity v. Danti, 585 A.2d 65, 67 (R.I. 1991) (egregious conduct exception); O'Brien v. State, 555 A.2d 334, 337 (R.I. 1989) (governmental-proprietary distinction).

owed to the specific plaintiff or to the general public, and regardless of whether such duty arose from the state functioning in a governmental or proprietary capacity, thereby allowing the plaintiff to make a case of ordinary negligence against the state.[180] For this reason that the public duty doctrine no longer affords the state the substantive safeguards from liability that it was designed to provide.

Because the doctrine can no longer provide the state with protection, it is incapable of protecting the state's discretionary, policy-making decisions. Although protecting the state's policy-making ability was the goal of governmental tort immunity following the abrogation of sovereign immunity, under the public duty doctrine the focus has shifted to legal formalism and the ability to classify state activity. Under the public duty doctrine, when certain activities cannot be classified under the existing framework, the court creates exceptions.

In the process of distinguishing and excepting, the doctrine has become confusing in its application, resulting in inconsistent, irreconcilable, and ultimately inequitable results. It was for this same reason that sovereign immunity was abandoned in Rhode Island in 1970, with attention shifting away from legal formalism to focus on the underlying rationale of governmental tort immunity - the protection of the state's discretionary, policy-making decisions.

To attain that end, alternatives to the public duty doctrine exist - namely, personal immunities applied to the state, and the implementation of a discretionary function exception to general governmental liability. These alternatives are less confusing, produce more consistent and equitable results, and achieve a better balance between allowing plaintiffs to recover for the state's tortuous acts and providing absolute governmental immunity because they protect only the state's discretionary judgments and policy-based choices. Indeed, plaintiffs must be able to recover for their injuries consistent with the Rhode Island Tort Claims Act; however, the state must be protected from liability for its formulation of policy – not just from monetary damages, but from judicial review as well. This paradigm, although forgotten in Rhode Island,

180. *See supra* Part III.A.

is not foreign to it.[181] Authority currently exists for a more effective, predictable, and restrained approach to governmental tort liability, and it should be followed in this State.

Aaron R. Baker[182]

181. *See In re* Advisory Opinion to the Governor (DEPCO), 593 A.2d 943, 953 (R.I. 1991); Catone v. Medberry, 555 A.2d 328, 332-33 (R.I. 1989); *Calhoun*, 390 A.2d 350, 356 (R.I. 1978).

182. The author would like to thank Professor Richard Brunell for his assistance.