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Modernizing Language in the California Government Claims Act to Enable Consistent Enforcement of Statutory Sovereign Immunity

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COMMENT

MODERNIZING LANGUAGE IN THE CALIFORNIA GOVERNMENT CLAIMS ACT TO ENABLE CONSISTENT ENFORCEMENT OF STATUTORY SOVEREIGN IMMUNITY

*THOMAS LANGTRY**

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"The past is never dead. It's not even past."[1]

INTRODUCTION

Petitioner Trent Taylor was an inmate in a Texas state prison.[2] Taylor attempted suicide while he was incarcerated and was transferred to a local hospital for treatment.[3] Upon his return to the correctional facility, Texas state correctional officers held him for a week, unclothed, first in a filthy cell smeared with human waste, and then in another similarly con-

[1] WILLIAM FAULKNER, REQUIEM FOR A NUN, Act I, Scene 3 (Vintage) (2015).

[2] Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam) [hereinafter *Riojas* in short form references].

[3] Taylor v. Williams, No. 5:14-CV-149-BG, 2016 WL 8674566, slip op. at *1 (N.D. Tex. Jan. 22, 2016), *report and recommendation adopted*, No. 5:14-CV-149-C, 2016 WL 1271054 (N.D. Tex. Mar. 29, 2016), *aff'd in part, vacated in part, remanded*, 715 F. App'x 332 (5th Cir. 2017).

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taminated cell with freezing temperatures.[4] The correctional officers made no effort to clean the cells or otherwise mitigate the health hazard even though other properly equipped cells were readily available.[5]

Taylor filed a civil rights action in federal district court pursuant to 42 U.S.C. § 1983, alleging, inter alia, that the correctional officers' deliberate indifference to his requests for medical care and intervention in his conditions of confinement caused permanent physical and psychological injuries.[6] Although the district court agreed that Taylor's complaint was sufficient to state a plausible Eighth Amendment violation, the court granted summary judgment for the correctional officers, all of whom cited qualified immunity defenses.[7]

Government officials who assert qualified immunity defenses, like the officers in Taylor's complaint, may be protected from liability if the court determines that they acted reasonably in their official capacities.[8] Such a qualified immunity defense under § 1983 has two prongs: (1) the officials' conduct must have violated a constitutional right of the plaintiff; and (2) the right must have been clearly established at the time of the violation.[9]

On appeal, the United States Court of Appeals for the Fifth Circuit agreed that the cell conditions in which Trent Taylor had been held violated the Eight Amendment.[10] Nonetheless, the court granted the correctional officers' qualified immunity defenses by constructing a narrow interpretation of the second prong.[11] Specifically, the court reasoned that the correctional officers could not reasonably have been expected to know that they had violated Trent Taylor's rights because they did not have "'fair warning' that their specific acts were unconstitutional."[12]

Taylor appealed to the United States Supreme Court, and in *Taylor v. Riojas,* the Court reversed.[13] Typically, the U.S. Supreme Court requires plaintiffs to cite a case directly on point to prove a civil rights violation.[14] That is, the plaintiff must cite a case with facts that are nearly

[4] *Id*.

[5] *See Riojas*, 141 S. Ct. at 54.

[6] *Williams*, slip op. at 1.

[7] Taylor v. McDonald, No. 5:14-CV-149-C, 2018 WL 10501648, slip op. at *5 (N.D. Tex. Sept. 14, 2018), *aff'd*, 978 F.3d 209 (5th Cir. 2020).

[8] Merritt v. Arizona, 425 F. Supp. 3d 1201, 1229 (D. Ariz. 2019), *aff'd*, No. 21-15833, 2022 WL 3369529 (9th Cir. Aug. 16, 2022).

[9] Taylor v. Stevens, 946 F.3d 211, 217 (5th Cir. 2019), *cert. granted, judgment vacated sub nom. Taylor v. Riojas*, 208 L. Ed. 2d 164, 141 S. Ct. 52 (2020).

[10] *Riojas*, 141 S. Ct. at 53 (2020) (quoting Hope v. Pelzer, 536 U. S. 730, 741 (2002)).

[11] *Id.*

[12] *Id*.

[13] *Id*. at 54.

[14] *See, e.g*, Erwin Chemerinsky, *Chemerinsky: SCOTUS Hands down a Rare Civil Rights Victory on Qualified Immunity*, A.B.A. J. (Feb 1, 2021, 9:11 AM CST). https://

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identical to the case at issue.[15] The Fifth Circuit used this standard when it granted the correctional officers' qualified immunity defense.[16] However, the U.S. Supreme Court uncharacteristically deviated from its otherwise strict adherence to this requirement of its well-established qualified immunity analysis.[17] Ultimately, the Court in *Riojas* found that any reasonable correctional officer confronted with the facts of Trent Taylor's cell conditions should have recognized an Eighth Amendment violation.[18] As a result, the Court denied the correctional officers' qualified immunity defense.[19] Although this decision seems to indicate the Court's willingness to relax the requirement that plaintiffs cite a case with nearly identical facts, scholars believe the extreme facts of *Riojas* mean that it will remain an outlier.[20]

In theory, sovereign immunity should encourage vigorous enforcement of laws by protecting public agencies and their employees from undue interference while also holding accountable public actors who act unlawfully.[21] In practice, judicial interpretations of the immunity doctrine do not always have the intended effect.[22] For example, *Riojas* illustrates how the U.S. Supreme Court had to intervene because the established framework in federal courts for analyzing qualified immunity defenses failed to hold accountable correctional officers who had committed obvious constitutional violations.[23]

Sovereign immunity defenses may arise under a number of circumstances.[24] This Comment discusses two types of sovereign immunity—absolute and qualified.[25] Absolute immunity is a complete exemption from civil liability that usually extends to public officials such as judges, legislators, and prosecutors.[26] Qualified immunity extends to public officials whose conduct does not violate the clearly established statutory

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www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity.

[15] Chemerinsky, *supra* note 14.

[16] *Riojas*, 141 S. Ct. at 53 (quoting Hope v. Pelzer, 536 U. S. 730, 741 (2002)).

[17] *Id*. at 54 (2020); Chemerinsky, *supra* note 14.

[18] *Id.*

[19] *Riojas*, 141 S. Ct. at 54.

[20] *See, e.g*., Chemerinsky, *supra* note 14.

[21] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 8 (2017).

[22] *Id*. at 7-8 (arguing that despite being informed by well-defined policy objectives, qualified immunity defenses are usually ineffective).

[23] *Riojas*, 141 S. Ct. at 53-54; Chemerinsky, *supra* note 14.

[24] *See, e.g.*, CAL. GOV'T CODE tit.1, div. 3.6 (1963) (setting out the scheme of statutory sovereign immunity in California); Chemerinsky, *supra* note 14 ("Any government officer sued for money damages for allegedly violating the Constitution has an immunity defense.").

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

[26] *Id*. (defining absolute immunity).

rights of others.[27] Not all sovereign immunity defenses are based in federal law or arise in federal courts; public employees who work for state agencies or county or municipal governments and who are charged in state courts may plead sovereign immunity defenses under state law.[28] Not all claims against government officials involve facts as extreme as those in *Riojas*; many complaints against employees of state agencies may be routine personal injury or property damage claims.[29] Regardless, even when plaintiffs file meritorious complaints against public entities or officials, they face the possibility that their claims will be barred by sovereign immunity defenses.[30] All but three states—Alabama, Arkansas, and Tennessee—have abolished common law sovereign immunity in favor of statutory sovereign immunity.[31]

This Comment focuses on the California Government Claims Act (GCA), California's statutory sovereign immunity scheme,[32] because California boasts the nation's largest administrative bureaucracy, with over 200 public agencies.[33] The immunity statutes throughout the GCA may shield from liability public entities and their employees across the entire range of this bureaucracy.[34] The number of possible scenarios under which immunity defenses may arise is virtually limitless, so courts must have guidance to ensure plaintiffs' claims are not barred by misapplication of sovereign immunity statutes.[35]

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[27] *Id*. (defining qualified immunity).

[28] *See, e.g*., tit.1, div. 3.6 (setting out the scheme of statutory sovereign immunity in California).

[29] *E.g*., Connelly v. Cnty. of Fresno, 146 Cal. App. 4th 29 (2006) (asserting a claim for personal injury and property damage when the plaintiff's vehicle was struck by a vehicle negligently driven by a county employee).

[30] *See* CAL. GOV'T CODE § 815.6 (1963) (imposing liability for mandatory duties unless the public entity establishes that it exercised reasonable diligence to discharge the duty); CAL. GOV'T CODE § 820.2 (1963) (extending absolute immunity to public employees for acts or omissions resulting from the exercise of the discretion within the scope of their employment); *see also generally* tit.1, div. 3.6 (setting out the scheme of statutory sovereign immunity in California).

[31] MATTHIESEN, WICKERT & LEHRER, S.C., *State Sovereign Immunity and Tort Liability in All 50 States*, https://www.mwl-law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART.pdf (last visited Jan. 21, 2023) (asserting that as of January, 2022, all but three states (Alabama, Arkansas, and Tennessee) have abolished common law sovereign immunity, replacing it with some form of statutory immunity).

[32] tit.1, div. 3.6 (setting out the scheme of statutory sovereign immunity in California).

[33] *State Agency Listing*, CA.GOV, https://www.ca.gov/agenciesall/ (last visited July 9, 2023); Kaia Hubbard, *The 10 Most and Least Heavily Regulated States*, U.S. NEWS AND WORLD REPORT, (Nov. 3, 2020, 7:00 AM), https://www.usnews.com/news/best-states/articles/2020-11-03/which-state-has-the-most-regulations.

[34] *See* CAL. GOV'T CODE § 815(a) (1963) ("Except as otherwise provided by statute [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."); *see also generally* tit.1, div. 3.6 (1963).

[35] *Id*.

The California legislature enacted the GCA after a 1961 decision abolished common law sovereign immunity.[36] When plaintiffs sue California state government entities or officials in civil court, the GCA now regulates whether defendants may plead an immunity defense or whether they may be held liable to the injured party.[37] Addressing immunity defenses under the GCA can pose challenges when plaintiffs sue public entities or employees.[38] Additionally, courts face additional challenges in their efforts to interpret the GCA's immunity statutes consistently.[39]

This Comment argues (1) that the GCA's use of common law language frustrates the ability of courts to establish a consistent understanding of the scope and proper application of absolute immunity defenses[40] and (2) that a lack of legislative guidance frustrates the ability of courts to determine whether state actions are discretionary acts protected by absolute immunity or mandatory duties protected by qualified immunity.[41] This Comment then suggests that revisions that would modernize language throughout the GCA would ensure more consistent enforcement of statutory sovereign immunity. Ultimately, both the GCA and the suggested revisions in this Comment may also serve as models for other states. Part I outlines the history of the doctrine of sovereign immunity and summarizes the public policy arguments for and against its continuation. Part II provides an overview of the GCA's architecture and how

[36] Quigley v. Garden Valley Fire Prot. Dist., 7 Cal. 5th 798, 803 (2019).

[37] tit.1, div. 3.6.

[38] *See* Arash Arjang & Joanna R. Allen, *Immunities for California Public Entities and Their Employees*, ADVOCATE MAG. (Nov. 2016), https://www.advocatemagazine.com/article/2016-november/immunities-for-california-public-entities-and-their-employees (explaining that once a litigant establishes a public entity's or employee's statutory liability for an act or omission, the public entity or employee must then identify a possible statutory source of immunity, determine how the immunity statute operates, and determine whether the specific facts of a given case will allow the public entity or employee to successfully raise the immunity defense).

[39] *See, e.g*., Frank J. Menetrez, *Lawless Law Enforcement: The Judicial Invention of Absolute Immunity for Police and Prosecutors in California,* 49 Santa Clara L. Rev. 393, 401 (2009); Stephen R. Oliver, *California Governmental Immunity from Malicious Prosecution Liability: There Oughta Be a Law*, 17 SANTA CLARA L. REV. 429, 450 (1977); Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*, 15 Stan. L. & Pol'y Rev. 267, 315-19 (2004); Samantha Lewis*, Notice and the Claim Presentation Requirements Under the California Government Claims Act: Recalibrating the Scales of Justice*, 53 San Diego L. Rev. 701, 736-42 (201) (each arguing how judicial interpretations have defeated to varying degrees the legislative intent of the GCA).

[40] *See, e.g*., Leon v. Cnty. of Riverside, 530 P.3d 1093, 1099-1100 (Cal. 2023) (Courts "generally presume that when the [l]egislature uses common law terms in its enactments, it intends to incorporate their settled common law meanings," especially with regard to the Government Claims Act, which was enacted against the backdrop of the common law.).

[41] *See* Johnson v. State, 69 Cal. 2d 782, 788 (1968) (rejecting arguments that would enmesh the court "deeply in the semantic thicket of attempting to determine, as a purely literal matter, 'where the ministerial and imperative duties end and the discretionary powers begin.'")

judicial interpretations have shaped its implementation. Part III analyzes statutory language and recommends amendments.

I. Background

Both federal and state sovereign immunity laws originate in English common law.[42] Public policy objectives for sovereign immunity at both the state and federal levels share much in common.[43] However, federal and state governments take divergent approaches to enforcing immunity laws.[44]

A. A History of Sovereign Immunity

Although sovereign immunity was originally based in English common law, the so-called American rule departed radically from historically established practice.[45] Despite contemporary notions of sovereign immunity as a doctrine that suspends accountability and precludes compensation, common law sovereign immunity began as a prerogative exercised by the king that allowed, rather than denied, substantial relief.[46] Like much of the common law that forms the basis of modern American law, the doctrine of sovereign immunity has since undergone considerable transformation.[47] Specifically, from an historical perspective, its utilization as a means of denying compensation has been more the exception than the rule.[48] Its eventual emergence as a rule that eliminates the accountability of state and federal governments for tortious conduct is "one of the mysteries of legal evolution."[49]

The seeds of this divergent evolution were first sown with the decision in *Russell v. Men of Devon*, an action for negligence in an English court.[50] In *Russell*, the court uncharacteristically held that a local govern-

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[42] *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 215-16 (1961).

[43] *See, e.g.*, Michael E. Benson, *Patent Litigators Playing Cowboys and Indians at the Ptab*, 94 Notre Dame L. Rev. Online 185, 187 (2019) ("Despite the differences between . . . types of sovereign immunity, the courts often analogize between the different types of sovereign immunity and generally keep the 'rules' regarding the different sovereign immunities the same or similar.").

[44] *Compare, e.g.*, Chemerinsky, *supra* note 14 (criticizing the federal approach to enforcing qualified immunity, which relies heavily upon judicial interpretation); *with, e.g.*, *In re* Taylor v. Barwick, No. 93C-02-010-WTQ, 1997 WL 527970, at *4 (Del. Super. Ct. Jan. 10, 1997) (illustrating how statutory qualified immunity in Delaware did not protect a corrections officer from a violation resulting in only nominal damages).

[45] *Muskopf*, 55 Cal. 2d 214-15.

[46] *Id*. at 214.

[47] *Id*. at 214-15.

[48] *Id*.

[49] *Id*. (quoting Borchard, *Governmental Responsibility in Tort*, 34 Yale L. J., 1, 4 (1924)).

[50] Russell v. Men of Devon, 100 Eng. Rep. 359 (1788).

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ment was not liable in tort for injuries sustained by an individual because the county he was suing was unincorporated and therefore lacked funds to pay a claim.[51] The *Russell* court reasoned that "it is better that an individual should sustain an injury, than that the public should suffer an inconvenience."[52] This decision represents an exception to English common law.[53]

Twenty-four years later, in 1812, the Supreme Court of Massachusetts cited *Russell* in *Mower v. Inhabitants of Leicester,* a decision that ultimately established the American rule of sovereign immunity that "public convenience" *can* outweigh an individual's right to compensation.[54] Although citing the reasoning in *Russell* that an unincorporated county should not be inconvenienced by a requirement to compensate losses resulting from injuries to individuals, the *Mower* court acknowledged that "[n]one of the objections, which prevailed in *Russell,*" applied in *Mower*.[55]

Mower had sued the town of Leicester after his horse sustained injuries and died due to a defective bridge that the town of Leicester had a duty to maintain.[56] Because the town of Leicester was under a legal duty to keep the bridge in repair, and because Mower himself had not been negligent as the driver of the coach, the trial court awarded him damages.[57] On appeal, the Massachusetts Supreme Court acknowledged that unlike the unincorporated county in *Russell*, the town of Leicester was incorporated, "capable of suing and being sued[,] . . . bound by statute to keep the public highways in repair," and in possession of a treasury from which judgments could be satisfied.[58]

Regardless, the court gave little weight to the factors distinguishing *Mower* from *Russell.*[59] Despite the absence of any legal precedent, the court explained first that at common law the plaintiff could not bring an action "without alleging any notice . . . of the defect in the bridge."[60] Further, despite having recognized that the town was under a legal duty to keep the roads in repair, the court explained further that the plaintiff had not charged the town with negligence.[61] Inexplicably citing *Russell*

[51] *Id*.; *Muskopf*, 55 Cal. 2d at 215.

[52] *Russell*, 100 Eng. Rep.; *Muskopf*, 55 Cal. 2d at 215-16.

[53] *Muskopf*, 55 Cal. 2d at 215-16.

[54] *Muskopf*, 55 Cal. 2d at 217; Mower v. Inhabitants of Leicester, 9 Mass. 247, 250 (1812). This Comment uses the term, "the American rule," to refer to the practice established in *Mower*.

[55] *Mower*, 9 Mass. 247 at 249.

[56] *Id*. at 248.

[57] *Id*.

[58] *Id*. at 249.

[59] *Id*. at 250.

[60] *Id*.

[61] *Id*.

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for support, the court held that "quasi corporations, [such as the town of Leicester,] created by the legislature for purposes of public policy," are not liable to an action for neglect of their duties "unless the action be given by some statute."[62] Although the facts distinguishing *Mower* from *Russell* should have led to a victory for the plaintiff, the Massachusetts Supreme Court reversed, allowing the town of Leicester to evade liability.[63]

In the years since *Mower* and leading up to the 1961 decision, *Muskopf v. Corning Hosp. District*, both the courts and the legislatures contributed to the demise of the doctrine of sovereign immunity as articulated in *Mower*.[64] Moreover, the common law doctrine from which the American rule arose tended more frequently to reach the opposite conclusion than what the court in *Mower* had decided.[65] Eventually, in 1961, the California Supreme Court held in *Muskopf* that public convenience does *not* outweigh an individual's right to compensation, especially where the governmental entity is legally and financially able to satisfy a judgment.[66]

In *Muskopf*, the California Supreme Court called the American rule an irrational anachronism that had sustained itself only through inertia.[67] The *Muskopf* court went on to criticize the reasons cited in support of the doctrine as defying legal analysis, stating that "no one defends total governmental immunity."[68] By 1961, the doctrine had become riddled with legislative and judicial exceptions, operating illogically, and frequently resulting in inequitable decisions.[69] It allowed some injured by governmental agencies to recover, while others similarly injured could not.[70] For example, in one decision, a person who had been injured while attending a community theater in a public park was compensated, but another person who had been similarly injured in a children's playground was not.[71] Ultimately, the *Muskopf* court pronounced that "governmental immunity for torts for which its agents are liable has no place in our law."[72]

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[62] *Id*.

[63] *Id*.

[64] Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 221 (1961).

[65] *Id*. at 216 (citing Hillyer v. St. Bartholomew's Hosp., 2 K.B. 820, 825 (1999)).

[66] *Id*. (citing Russel v. Men of Devon, 100 Eng. Rep. 359, 362 (1788)).

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*. at 216-17 (citing Rhodes v. City of Palo Alto, 100 Cal. App.2d 336, 341-42 (1950); Farrell v. City of Long Beach, 132 Cal. App.2d 818, 819-20 (1955)).

[72] *Id*. at 221.

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The California Legislature reacted immediately by temporarily suspending the *Muskopf* decision and directing the California Law Revision Commission (Commission) to complete its study of the governmental immunity issue.[73] The Commission ultimately issued a series of recommendations which gave rise to the California GCA.[74] The legislature enacted the GCA in 1963.[75] The legislative intent of the GCA is to provide a comprehensive statutory scheme regulating the liabilities and immunities of public entities and employees.[76] The Commission hoped the GCA would address the problems spotlighted in *Muskopf*, i.e., that claims of tort liability against public entities and employees were inequitably barred by the American common law rule.[77]

B. PROBLEMS WITH SOVEREIGN IMMUNITY IN FEDERAL COURTS

The public policy objectives of sovereign immunity are well-established.[78] The U.S. Supreme Court generally cites two primary public policy interests when considering whether to grant qualified immunity defenses: (1) the need to shield from undue interference those officials who perform their duties reasonably and (2) the need to hold accountable public officials who exercise power irresponsibly.[79] However, courts employing varying judicial interpretations have struggled to implement

[73] CAL. L. REVISION COMM'N, RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY NO. 1—TORT LIAB. OF PUB. ENTITIES AND PUB. EMPS., at 803 (1963), http://www.clrc.ca.gov/pub/Printed-Reports/Pub043.pdf [hereinafter COMM'N RECOMMENDATION NO. 1]; *see also* Quigley v. Garden Valley Fire Prot. Dist., 7 Cal. 5th 798, 803 (201). As of January, 2022, all but three states (Alabama, Arkansas, and Tennessee) have similarly abolished common law sovereign immunity, replacing it with some form of statutory immunity. MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 31.

[74] *Quigley*, 7 Cal. 5th at 803-04; COMM'N RECOMMENDATION NO. 1, *supra* note 73; NO. 2 CLAIMS, ACTIONS AND JUDGMENTS AGAINST PUB. ENTITIES AND PUB. EMPS. (1963), http://www.clrc.ca.gov/pub/Printed-Reports/Pub044.pdf; NO. 3 INS. COVERAGE FOR PUB. ENTITIES AND PUB. EMPS. (1963), http://www.clrc.ca.gov/pub/Printed-Reports/Pub045.pdf; NO. 4 DEF. OF PUB. EMPS. (1963), http://www.clrc.ca.gov/pub/Printed-Reports/Pub046.pdf; NO. 5 LIAB. OF PUB. ENTITIES FOR OWNERSHIP AND OPERATION OF MOTOR VEHICLES (1963), http://www.clrc.ca.gov/pub/Printed-Reports/Pub047.pdf; NO. 6 WORKMEN'S COMP. BENEFITS FOR PERSONS ASSISTING LAW ENF'T OR FIRE CONTROL OFFICERS (1963), http://www.clrc.ca.gov/pub/Printed-Reports/Pub048.pdf; NO. 7 AMEND. AND REPEALS OF INCONSISTENT SPECIAL STATUTES (1963), http://www.clrc.ca.gov/pub/Printed-Reports/Pub049.pdf [hereinafter COMM'N RECOMMENDATIONS NOS. 2 through 7].

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] *See, e.g.,* Schwartz, *supra* note 21 at 8 (stating that the U.S. Supreme Court's doctrinal approaches seek to balance "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably").

[79] *Id*. (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009) (arguing further that a third concern has begun to emerge—the desire to protect government officials from the burdens and demands of discovery and trial).

those objectives consistently.[80] Section 1983—a federal law which is not part of the GCA—imposes liability for injury on any person who, "under color of any statute, ordinance, regulation, custom, or usage" of the state, deprives a U.S. citizen of his or her rights, privileges, or immunities under the Constitution.[81] Thus, any federal or state government official who, acting within the scope of his or her employment, violates the civil rights of a U.S. citizen may be civilly liable under § 1983.[82] State actors so charged may cite a defense of sovereign immunity.[83]

The U.S. Supreme Court views sovereign immunity laws as an effective means of discouraging civil litigation against public entities, particularly against law enforcement officers.[84] For example, in a 1986 decision, the Court reasoned that qualified immunity defenses effectively protect "all but the plainly incompetent or those who knowingly violate the law."[85] More recently, the Court has reversed or vacated lower court decisions denying qualified immunity defenses for law enforcement officials in an apparent effort to further expand the doctrine's scope.[86] Specifically, in 2015 the Court scolded the United States Court of Appeals for the Ninth Circuit for applying a pro-plaintiff interpretation of a qualified immunity defense that ignored the societal importance of qualified immunity.[87]

Some observers regard the U.S. Supreme Court's recent decisions as guidance for lower courts that is intended to discourage lawsuits against public entities, particularly against police.[88] Again, scholars are uncertain whether *Riojas* reflects an increased willingness by the Court to find for plaintiffs in cases citing immunity defenses, or whether it will remain an outlier, distinguished by the extreme facts of Trent Taylor's confinement.[89] Regardless of how courts may interpret these decisions, critics note that the Court has struggled to achieve the intended objectives of sovereign immunity by failing to adequately address the concerns of liti-

[80] *See, e.g., id*. at 11 (stating that "qualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith").

[81] 42 U.S.C. § 1983.

[82] *See id*.

[83] 42 U.S.C. § 1983; Chemerinsky, *supra* note 14.

[84] *E.g.*, Schwartz, *supra* note 21 at 6 ("The United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers and appears to believe qualified immunity is the means of achieving its goal.").

[85] *Id*. (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[86] *Id*.

[87] *Id*. (citing City & Cnty. of S. F. v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982))).

[88] *Id*.

[89] Chemerinsky, *supra* note 14.

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gants or establish an analytical framework that is responsive to current trends.[90]

1. The Failure of Doctrinal Approaches to Adequately Address Concerns of Litigants

Despite acknowledging that sovereign immunity achieves worthwhile goals, legal scholars insist that current doctrinal approaches at the federal level often fail.[91] Recall that sovereign immunity's goals include protecting public officials from undue interference with vigorous enforcement of public policy and ensuring the accountability of public officials who act unlawfully.[92] However, a recent review of the dockets of 1,183 lawsuits against both state and local law enforcement defendants in five federal district courts showed that qualified immunity defenses rarely brought a formal end to cases seeking civil rights damages.[93] In fact, only 13.9% of cases in which a qualified immunity defense could have been raised were dismissed at the pleading stage.[94] Motions for summary judgment based on a defense of qualified immunity were more likely to succeed.[95] However, such motions did not always result in complete dismissal.[96] These outcomes left public employees exposed to discovery, trial, and liability to remaining parties and claims.[97] Ultimately, only 3.9% of the cases in which a qualified immunity defense could have been raised were dismissed on those grounds.[98]

Instead, the more substantial effect of immunity statutes is to change the way plaintiffs file cases or to discourage the filing of cases altogether.[99] For example, a potential immunity defense may either force plaintiffs to settle claims to avoid the uncertainty of discovery and trial, or discourage them from filing a government claim in the first place.[100] In addition, expenses and delays resulting from qualified immunity motion practice and interlocutory appeals[101] may discourage otherwise mer-

[90] *See, e.g.,* Schwartz, *supra* note 21; Chemerinsky, *supra* note 14.
[91] *Id.*
[92] Schwartz, *supra* note 21 at 8-9.
[93] *Id*. at 9.
[94] *Id*.
[95] *Id*. at 10.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Appeal*, BLACK'S LAW DICTIONARY (11th ed. 2019) (An interlocutory appeal "occurs before the trial court's final ruling on the entire case. . . . Some interlocutory appeals involve legal points necessary to the determination of the case, while others involve collateral orders that are wholly separate from the merits of the action.").

itorious claims.[102] Alternatively, plaintiffs' attorneys may recommend filing only claims against municipalities, claims seeking injunctive relief, or state law claims that cannot be dismissed on immunity grounds.[103] Thus, the general net effect of immunity defenses may indirectly aid vigorous enforcement of public policy by discouraging frivolous lawsuits against public employees and may also reduce time and money spent on trial and discovery.[104] However, the effectiveness of the Court's doctrinal approach comes at the high cost of limiting the ability of injured plaintiffs to hold accountable public actors who abuse their power.[105]

2. *Non-responsiveness of the U.S. Supreme Court's Analytical Framework*

Although holding public entities and employees accountable while providing them with some level of protection is important, the current approach has often proven unsuccessful.[106] Because current doctrinal approaches have failed to achieve these goals,[107] judges and scholars, regardless of political affiliation, have begun criticizing how the U.S. Supreme Court evaluates affirmative sovereign immunity defenses.[108]

The qualified immunity defense and evidence of qualified immunity are assessed by the U.S. Supreme Court under standards that are different from those used to judge evidence of the claim itself.[109] First, defendants raising an affirmative defense of qualified immunity assert an immunity from suit, which is fundamentally different from a defense to liability.[110] Next, plaintiffs challenging immunity defenses before the U.S. Supreme Court must establish beyond dispute that the defendant violated their civil rights by showing the Court that in a previous case, with facts as

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[102] Schwartz, *supra* note 21 at 10-11.

[103] *Id*. at 10.

[104] *See id*. at 6.

[105] *See id*.

[106] *See, e.g., id*. at 11 ("[Q]ualified immunity is not achieving its policy objectives.").

[107] *See generally id*.

[108] Chemerinsky, *supra* note 14 ("In recent years, the court's qualified immunity decisions have come under sharp criticism by both liberal and conservative judges and commentators.").

[109] *See* HARV. L. REV., LEADING CASES: III. FEDERAL STATUTES AND REGULATIONS, C: CIVIL RIGHTS ACTS, 112 HARV. L. REV. 303, 310. ("[Q]ualified immunity . . . is an 'immunity from suit rather than a mere defense to liability.' ") [hereinafter, LEADING CASES].

[110] *See id*. ("Unlike a defense, an immunity precedes and supersedes the case on the merits: a defense, which negates one of the elements of a cause of action or a criminal offense, is like a parry to the plaintiff's thrust, whereas an immunity is more like a bye in a fencing tournament. Therefore, the right to collect damages under § 1983—the absence of a viable *defense*—can co-exist with the absence of the power to sue certain defendants who have immunity from suit. Because an *immunity* can exist without a defense, it is illogical to equate immunities and defenses, or to suggest that the former implies the latter.) (emphasis added).

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nearly identical as possible to their own case, a government official was found to have knowingly violated someone's civil rights.[111] Thus, the plaintiff must establish "beyond debate" that the official's conduct was unconstitutional.[112] Under this standard, of the 31 cases involving a qualified immunity defense that the Court heard between 1982 to 2020, including the decision in *Riojas,* plaintiffs prevailed in only three.[113]

In sum, the federal courts have developed conflicting views about how to evaluate statutory immunity defenses.[114] The Supreme Court's doctrinal approach focuses on the dual aims of protecting public officials from undue interference with their duties and holding accountable those officials who abuse their discretion.[115] However, recent cases have shown that the Court's analytical framework has led to enforcement that occurs more frequently through unintended avenues of litigation.[116] Once again, partial dismissals, forced settlements, and the filing of alternative causes of action often replace direct litigation of claims by plaintiffs against government entities and employees.[117] In addition, plaintiffs rebutting immunity defenses under § 1983 face an unusually high burden of proof, which can result in denying relief to meritorious claims.[118] Recent decisions may indicate that the U.S. Supreme Court will provide better guidance for lower courts moving forward.[119] Nonetheless, the cir-

[111] Chemerinsky, *supra* note 14 (specifying that plaintiffs must satisfy three requirements to establish a civil rights violation: (1) cite a case that is directly on point (2) that proves the government official violated a clearly established law (3) that the official should reasonably have known existed); *see also* 2 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8:96, *Burden of Proof* ("[F]or defendants to establish [a qualified immunity] . . . defense . . . , each defendant must prove by a preponderance . . . the following: (1) At the time he acted the law upon which he acted was not clearly established and that he could not reasonably be expected to know that his conduct was unlawful; (2) If the law was clearly established at the time he acted, he must prove that he neither knew nor should have known of the relevant legal standard." . . . Moreover, "[t]he existence of clearly settled law [is not] an issue of 'legal facts'; rather, it [i]s an issue of law to be reviewed de novo on appeal. . . . A contrary 'approach d[oes] not aid in the primary purpose of qualified immunity—the protection of public officials from undue interference with their duties—because its operation is unpredictable in advance of the district court's adjudication. Nor does the rule further the interests on the other side of the balance: deterring public officials' unlawful actions and compensating victims of such conduct.'") [hereinafter NAHMOD, CIVIL RIGHTS].

[112] *Id*.

[113] *Id*.; *See* Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam).

[114] *See e.g.*, Schwartz, *supra* note 21 (arguing that current doctrinal approaches in the federal courts have failed to achieve the objectives of qualified immunity); Chemerinsky, *supra* note 14 (arguing that the U.S. Supreme Court's approach to sovereign immunity has drawn criticism).

[115] *See* Schwartz, *supra* note 21 at 13.

[116] *Id*. at 10.

[117] *Id*.

[118] *See, e.g*., Chemerinsky, *supra* note 14.

[119] *See, e.g*., *id*. ("In recent years, the court's qualified immunity decisions have come under sharp criticism by both liberal and conservative judges and commentators. Proposals have been introduced into Congress to modify the law in this area.").

cuit courts remain split over the proper standard for evaluating immunity defenses under § 1983, and the U.S. Supreme Court remains unreceptive to plaintiff-friendly interpretations of immunity defenses in lower courts.[120]

C. Different Approaches in Federal and State Courts

Although federal jurisprudence has only indirect relevance for courts interpreting state sovereign immunity laws, federal and state sovereign immunity doctrines for public employees and entities are interdependent.[121] The potential for individual state actors to be held liable under § 1983 means that state immunity defense laws should be responsive to the standards set by § 1983 and the federal courts.[122] For example, a federal § 1983 immunity defense may arise in response to an alleged violation by a state employee or entity, as when Trent Taylor filed his civil rights claim against Texas state correctional officers.[123] Because Taylor filed a complaint that arose under federal law in federal district court, the court applied the federal standard for determining whether a qualified immunity defense should apply, even though the defendants were Texas state officials.[124]

Regardless, even though § 1983 claims will always be adjudicated at the federal level, the likelihood of plaintiffs filing § 1983 claims relates directly to the ability of the sovereign immunity laws of the individual states to hold public officials accountable.[125] Because public employees at the state level are not governed by the same regulations as their federal counterparts, state courts and legislatures bear the burden of either creat-

[120] Schwartz, *supra* note 21 at 6, 19. ("[T]he Supreme Court has scolded lower courts for applying qualified immunity doctrine in a manner that is too favorable to plaintiffs and thus ignores the 'importance of qualified immunity "to society as a whole." . . . [C]ommentators believe that courts in [different] circuits vary in their approach to qualified immunity, with judges in the Third and Ninth Circuits favoring plaintiffs, and judges in the Eleventh Circuit so hostile to Section 1983 cases that they are described as applying "unqualified immunity."' ").

[121] *See, e.g*., Benson, *supra* note 43 at 187 (stating that despite the differences between state and federal sovereign immunity laws, courts generally keep the rules the same or similar).

[122] *See, e.g.*, Christopher J. Pettit, *The Evolution of Government Liability Under Section 1983*, 24 St. Mary's L.J. 145, 163 (1992) (explaining that although the U.S. Supreme Court has preserved the immunity of states in section 1983 claims, a state official "may be sued in his individual capacity for actions taken in his official capacity which infringe upon the individual civil rights of others").

[123] Taylor v. McDonald, No. 5:14-CV-149-C, 2018 WL 10501648, slip op. at *3 (N.D. Tex. Sept. 14, 2018), *aff'd*, 978 F.3d 209 (5th Cir. 2020); 42 U.S.C. § 1983.

[124] *McDonald*, slip op. at *3.

[125] *See, e.g*., Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam) (illustrating how ineffective enforcement of Texas state laws led to charges of civil rights violations in federal court); *see also, e.g*., Benson, *supra* note 43 at 187 (stating that despite the differences between state and federal sovereign immunity laws, courts generally keep the 'rules' the same or similar).

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ing workable solutions at common law or enacting their own statutory schemes of sovereign immunity.[126]

1. Federal and State Sovereign Immunity

Federal qualified immunity claims often arise when plaintiffs allege violations of their civil rights under 42 U.S. Code § 1983.[127] Congress enacted § 1983 as part of the Civil Rights Act of 1871 to enforce the guarantees of the Fourteenth Amendment.[128] Section 1983 imposes liability upon any person who acts in any official capacity to subject anyone within the jurisdiction of the United States to a deprivation of any rights, privileges, or immunities under the U.S. Constitution and state laws.[129] Notwithstanding the liability imposed by § 1983, government officials sued for money damages in cases alleging a constitutional civil rights violation can cite immunity as a defense.[130] Federal judges, legislators, prosecutors, and the president enjoy absolute immunity[131] for their official actions.[132] All other federal officials are protected by qualified immunity.[133]

By contrast, sovereign immunity defenses at the state level are decided according to the laws and constitutional provisions of the state wherein the violation is alleged to have occurred.[134] The Tenth Amendment to the U.S. Constitution reserves to the states those powers not expressly delegated to the federal government and those powers which the federal government is prohibited from exercising.[135] Because each state's constitution asserts powers in ways that are specific to the needs and

[126] U.S. CONST. amend. X; 13 CAL. JUR. 3D CONST. L. § 111 (2022) (asserting that the separation of powers doctrine is embedded in the California Constitution).

[127] 42 U.S.C. § 1983.

[128] Richard Briffault, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1135 (1977).

[129] 42 U.S.C. § 1983.

[130] Chemerinsky, *supra* note 14.

[131] BLACK'S LAW DICTIONARY, *supra* note 26 (defining absolute immunity as "[a] complete exemption from civil liability, usu. afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit.").

[132] Chemerinsky, *supra* note 14 (enumerating under the "Why It Matters" heading those government officials protected by absolute immunity).

[133] BLACK'S LAW DICTIONARY, *supra* note 27 (defining qualified immunity as "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights."); *see also*, Chemerinsky, *supra* note 14 (explaining under the "Why It Matters" heading that government officials not protected by absolute immunity are protected by qualified immunity).

[134] *See, e.g.*, CAL. GOV'T CODE tit.1, div. 3.6 (1963) (showing how California's sovereign immunity defenses are regulated by state statute); *see also* MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 31 (stating that as of January, 2022, only three states (Alabama, Arkansas, and Tennessee) have retained common law sovereign immunity).

[135] U.S. CONST. amend. X.

political will of its citizens, no single, consistent standard for adjudicating immunity defenses at the state level has emerged.[136]

For claims of tortious conduct by public entities and employees at the state rather than federal level, common law sovereign immunity has controlled for much of the country's history.[137] Recall that the American rule of common law sovereign immunity—under which the accountability of government entities for tortious misconduct was the exception rather than the rule—was abolished by *Muskopf* in 1961.[138] Again, in California, the GCA has replaced common law sovereign immunity with statutory sovereign immunity.[139] The GCA was enacted to address inconsistencies and abuses resulting from the common-law approach to sovereign immunity defenses raised by California state public employees or entities.[140]

However, since its enactment, many decisions have raised concerns that the GCA has led to inconsistent and unfair outcomes for plaintiffs.[141] Comparing the GCA with federal laws and the laws of other states can illuminate the relative effectiveness of statutory sovereign immunity under the GCA.[142] The following two sections provide such comparisons. The remainder of the Comment focuses exclusively on the GCA.

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[136] *See, e.g*., David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 Wash. & Lee L. Rev. 171, 189-94 (2015) (arguing that there is little consensus about how to ensure the dual sovereignty of state and federal governments under administrative federalism).

[137] *See, e.g*., Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 214-25 (1961); Quigley v. Garden Valley Fire Prot. Dist., 7 Cal. 5th 798, 811-12 (2019).

[138] *Muskopf*, 55 Cal. 2d at 214; COMM'N RECOMMENDATION NO. 1, *supra* note 73 at 803.

[139] *See generally* CAL. GOV'T. CODE tit. .1, div. 3.6 (1963) (encompassing the entirety of California's sovereign immunity regulatory scheme). Recall that as of January, 2022, only three states (Alabama, Arkansas, and Tennessee) have retained common law sovereign immunity. MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 31.

[140] *See, e.g., Quigley*, 7 Cal. 5th at 803.

[141] *See, e.g*., Menetrez, *supra* note 39 at 394 (arguing that inconsistent interpretations of Cal Gov't Code section 821.6 have given law enforcement authorities "a license to kill, destroy, and defame, maliciously and without probable cause"); Oliver, *supra* note 39 (arguing further that there is a need for the legislature to create a remedy when section 821.6 fails to protect against malicious prosecution); Parrish, *supra* note 39 at 273 (arguing that recent judicial interpretations of child welfare statutes have inappropriately conferred absolute immunity on social workers); Lewis, *supra* note 39 at 705 (arguing that the GCA's claim presentation statutes are often unfairly used as a way to dismiss claims against the government on mere technicalities).

[142] *See generally* tit.1, div. 3.6; *see also*, Chemerinsky, *supra* note 14 (arguing that the U.S. Supreme Court has made it too difficult for plaintiffs to challenge a qualified immunity defense); Schwartz, *supra* note 21 at 6 (stating that the U.S. Supreme Court's doctrinal approach closes the door to the courthouse for plaintiffs in civil rights claims); *In re* Taylor v. Barwick, No. 93C-02-010-WTQ, 1997 WL 527970 (Del. Super. Ct. Jan. 10, 1997) (showing how the Delaware Superior Court evaluates immunity defenses).

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2. *The Federal Standard and* Taylor v. Riojas

Immunity defenses under § 1983 are judicially created rather than statutory and therefore subject to varying interpretations that do not lead to predictable or consistent results.[143] Recall that in *Riojas*, the U.S. Supreme Court reviewed a decision by the Fifth Circuit granting prison officials a qualified immunity defense.[144] The district court had found that, under a narrow interpretation of the federal immunity provision, the correctional officers could not reasonably have been expected to know that their actions were illegal.[145]

On certiorari, the U.S. Supreme Court confronted the unworkability of its own high bar.[146] The Court's judicially created standard required the plaintiff to establish "beyond debate" that the prison guards' conduct was unconstitutional by showing that these government officials had (1) violated a clearly established law (2) that they should reasonably have known existed (3) by citing a case directly on point proving the defendants had violated the plaintiff's civil rights.[147] Despite the absence of any case directly on point, the Court nonetheless vacated the decision and remanded, holding that any reasonable correctional officer confronted with the particularly egregious facts in that case should have known that the conditions of Taylor's confinement violated the Eighth Amendment.[148] Thus, the effectiveness of the Court's judicially created provision, which fails to specify uniform standards of conduct that define the parameters of immunity for public actors, depends heavily on case-by-case interpretation.[149]

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[143] *See, e.g.*, Schwartz, *supra* note 21 (stating that statistical analysis shows how current doctrinal approaches in the federal courts do not effectively implement the policy objectives of qualified immunity).

[144] Taylor v. McDonald, 978 F.3d 209, 214 (5th Cir. 2020).

[145] Taylor v. McDonald, No. 5:14-CV-149-C, 2018 WL 10501648, slip op. at *3 (N.D. Tex. Sept. 14, 2018), *aff'd*, 978 F.3d 209 (5th Cir. 2020).

[146] Chemerinsky, *supra* note 14 (stating that plaintiffs brining civil rights claims must be able to cite a precedent with almost identical facts to ensure it is "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply"); Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam) (holding that any reasonable officer "[c]onfronted with the particularly egregious facts of this case . . . should have realized that Taylor's conditions of confinement offended the Constitution," even though the plaintiff had not cited a case on-point.).

[147] Chemerinsky, *supra* note 14; *Riojas*, 141 S. Ct. at 53-54 (summarizing how the Fifth Circuit cited the federal standard for determining the sufficiency of a qualified immunity defense); NAHMOD, CIVIL RIGHTS, *supra* note 111.

[148] *Riojas*, 141 S. Ct. at 53-54.

[149] *See* Chemerinsky, *supra* note 14; *see also, e.g.*, *Riojas*, 141 S. Ct.

3. *One State's Approach:* Taylor v. Barwick

By contrast, the Delaware Tort Claims Act (DTCA) uses well established legal standards that give courts uniform guidance about when sovereign immunity defenses should be granted.[150] For example, in *Taylor v. Barwick*, an inmate brought a state law battery claim against a Delaware state correctional officer.[151] The DTCA gave the Superior Court of Delaware sufficient guidance to adjudicate the dispute.[152]

Inmate Moses Bernard Taylor alleged that George Barwick, a Staff Lieutenant with the Delaware Department of Corrections, committed battery when he poked Moses Taylor with a tree branch, laughed at him, and made derogatory comments about his hairstyle.[153] Moses Taylor filed a motion for summary judgment.[154] Barwick filed a cross-motion raising a defense of qualified immunity under the DTCA.[155] Recall that in the Fifth Circuit decision preceding *Riojas*, not even the gravity of a violation of the Eighth Amendment prohibition of cruel and unusual punishment had prevented the Fifth Circuit from granting Texas prison officials a qualified immunity defense.[156] Conversely, even though Moses Taylor's injury was so minor that he was held to nominal damages, the Delaware court denied the correctional officer's immunity defense.[157]

The DTCA states in part that "no claim or cause of action shall arise . . . against the State or any public officer or employee" where the disputed act or omission (1) arose out of the performance of an official discretionary duty that was done (2) in good faith (3) without gross or wanton negligence.[158] Battery requires an intentional act, and Barwick raised questions of material fact about whether he had intended any contact with Moses Taylor.[159] The court reasoned that Moses Taylor's allegations, if proven at trial, would negate either the second or third element

[150] Del. Code Ann. Tit. 10, § 4001 (1988); *See also* Justia US Law, *Delaware Law*, available at https://law.justia.com/delaware/ (last visited August 3, 2023) (notably stating that unlike all other states, Delaware does not require a popular vote to amend its Constitution).

[151] *In re* Taylor v. Barwick, No. 93C-02-010-WTQ, 1997 WL 527970, slip op. at *4 (Del. Super. Ct. Jan. 10, 1997) [hereinafter *Barwick* in short form references].

[152] *Id.*

[153] *Id*. at *1.

[154] *Id.*

[155] *Id.*

[156] Taylor v. Stevens, 946 F.3d 211, 222 (5th Cir. 2019), *cert. granted, judgment vacated sub nom. Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam).

[157] *Barwick*, slip op. at *1, *4.

[158] DEL. CODE ANN. Tit. 10, § 4001 (amended 1988); *Barwick,* slip op. at *2.

[159] *Barwick,* slip op. at *2.

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of Barwick's immunity defense.[160] As a result, the court denied Barwick's motion.[161]

Thus, the highly interpretive federal approach to sovereign immunity in *Riojas* focused the Court's analysis there on a comparison of case-specific facts that delayed prosecution of an obvious Eighth Amendment violation.[162] On the other hand, Delaware's statutory scheme focused the Superior Court of Delaware on an objective analysis of whether a state official had conformed with a recognized, uniform, statutory standard of conduct, thereby more effectively implementing the goal of holding accountable a public official who may have abused his discretion.[163] Although a statutory scheme such as the DTCA may not offer public employees protection from the expense of trial and discovery, the uniformity and specificity of its immunity defense law prevents the type of systemic abuses on display in *Riojas*.[164]

4. Statutory Sovereign Immunity in California

In California, the GCA lies between the judicially created standards that govern § 1983 claims and the uniform legislative mandates of the DTCA.[165] The California legislature's 1963 enactment of the GCA represented what many considered a welcome reaction against a splintered common law approach to sovereign immunity.[166] Early decisions adhered closely to the new law's legislative intent.[167] Unfortunately, subsequent decisions strayed from these holdings or uncovered uncertainties in the law not apparent when the legislature enacted the GCA.[168] Calls for reform of sovereign immunity that began before *Muskopf* have continued since the passage of the GCA.[169] In California, the burden for addressing

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[160] *Id.*

[161] *Id.*

[162] Taylor v. Riojas, 141 S. Ct. 52, 53-54 (2020) (per curiam); Chemerinsky, *supra* note 14.

[163] *Barwick*, slip op. at *2.

[164] *Id.*; *Riojas*, 141 S. Ct. 52 (2020).

[165] CAL. GOV'T CODE tit.1, div. 3.6 (1963).

[166] *Id*.; *Muskopf* 55 Cal. 2d at 221 ("[T]he doctrine of governmental immunity . . . has no place in our law.").

[167] *E.g*., Sullivan v. County of Los Angeles, 12 Cal. 3d 710, 720-21 (1974) (citing the legislative record to hold that the absolute immunity of section 821.6 extends only to charges of malicious prosecution).

[168] *E.g.*, *Javor v. Taggart*, 98 Cal. App. 4th 795, 808 (2002), *as modified* (May 23, 2002), and *disapproved of by Leon v. Cnty. of Riverside*, 530 P.3d 1093 (Cal. 2023) (holding that, contrary to California Supreme Court precedent, section 821.6 is not limited to only malicious prosecution actions); *see also, e.g.*, Parrish, *supra* note 39 at 302-03 (arguing that judicial interpretations of child welfare statutes have inappropriately conferred absolute immunity on social workers).

[169] *See, e.g.*, Menetrez, *supra* note 39 at 394 (2009) (complaining that appellate court interpretations of section 821.6 have given law enforcement officers a "license to kill, destroy, and defame, maliciously and without probable cause."); Lewis, *supra* note 39 at 705 (complaining that

the problem of ineffective sovereign immunity statutes rests with the legislature, whose response may give both federal courts and other states a model to follow.[170]

II. The California Government Claims Act

The many sections of the GCA provide both liability and immunity provisions that regulate the conduct of public entities and employees.[171] However, judicial interpretation of these provisions is not always consistent.[172]

A. An Overview of the GCA

After *Muskopf*, the Commission resolved questions about the structure and language of proposed legislation that would become the GCA.[173] As for structure, the Commission had to determine whether there should be a rule of general immunity, with liability attaching only by specific exception; or whether the proposed legislation should grant general liability, with immunity allowed only by specific exception.[174] Ultimately, the Commission reasoned that specifying areas of liability would allow insurance companies to assess more accurately the cost of a public entity's potential exposure to liability, thereby reducing the cost of

application of claim presentment statutes in the GCA are unfairly used to bar meritorious claims against the government); Parrish, *supra* note 39 at 302-03 (arguing that judicial interpretations of child welfare statutes have inappropriately conferred absolute immunity on social workers); *see also* Schwartz, *supra* note 21 at 9-10 (citing the ineffectiveness of qualified immunity defenses to § 1983 claims across five federal districts).

[170] *See, e.g.*, Parrish, *supra* note 39 at 319 ("A court of appeal is simply not an appropriate forum to rethink what the legislature has done."); Oliver, *supra* note 39 at 447-450 (1977) (arguing that the legislature should intervene to provide for recovery by plaintiffs in claims currently precluded by absolute immunity); *see also* this Comment's discussion regarding the responsibility of state legislatures to create reform, *supra* section I(B)(3); U.S. Const. amend X.

[171] Cal. Gov't Code tit.1, div. 3.6 (1963).

[172] *See, e.g.*, Menetrez, *supra* note 39 at 394 (arguing that inconsistent interpretations of Cal Gov't. Code section 821.6 have given law enforcement authorities "a license to kill, destroy, and defame, maliciously and without probable cause"); Oliver, *supra* note 39 (arguing further that there is a need for the legislature to create a remedy when section 821.6 fails to protect against malicious prosecution); Parrish, *supra* note 39 at 273 (arguing that recent judicial interpretations of child welfare statutes have inappropriately conferred absolute immunity on social workers); Lewis, *supra* note 39 at 705 (arguing that the GCA's claim presentation statutes are often unfairly used as a way to dismiss claims against the government on mere technicalities).

[173] Leon v. Cnty. of Riverside, 530 P.3d 1093, 1099-1100 (Cal. 2023) (asserting that the GCA uses common law terms because it was "consciously enacted against the backdrop of the common law for the purpose of governing common law tort claims against public entities and employees"); Comm'n Recommendation No. 1, *supra* note 73 at 807-11.

[174] Comm'n Recommendation No. 1, *supra* note 73 at 811.

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insurance.[175] Accordingly, the GCA holds public entities immune from liability unless they are declared liable by a specific code section.[176] As for language, many of the sections of the GCA use terms representing the Commission's intention to codify common law sovereign immunity as it existed at the time.[177]

Enacted in 1963, the GCA has replaced common law sovereign immunity with a statutory regulatory scheme.[178] The GCA was previously known as the Government Torts Act.[179] In 2007, the legislature amended section 810, with the result that the GCA now applies to claims both in tort and in contract.[180] The GCA is organized into nine "Parts," some of which are further subdivided into "Chapters" and "Articles."[181] In addition, some statutes that provide for liability are not found within the nine parts of the GCA and may apply even where they do not state facially that they pertain to public entities.[182]

Plaintiffs alleging injury against public entities or employees must first establish statutory liability.[183] Statutory *qualified* immunity imposes liability on public employees or entities for negligent performance of ministerial duties.[184] Statutory *absolute* immunity shields public entities and employees from liability for injuries resulting from discretionary

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[175] *Id*.

[176] *Id*.

[177] *Id*. at 807-11.

[178] CAL. GOV'T CODE tit.1, div. 3.6 (1963); CAL. GOV'T. CODE § 810(b) (1963) (stating that title I, division 3.6 "may be referred to as the Government Claims Act"); *See also* Quigley v. Garden Valley Fire Prot. Dist., 7 Cal. 5th 798, 803 (2019) (stating that in 1963, after the 1961 decision in Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 216 (1961), abolished common law sovereign immunity in California, the California Legislature enacted the GCA, based on the work of the California Law Revision Commission, whose comments throughout help clarify legislative intent).

[179] CAL. GOV'T. CODE § 810 (1963), leg. comm'n cmt. (citing City of Stockton v. Sup. Ct., 42 Cal. 4th 730 (2007)).

[180] *Id*., (renaming the Government Torts Act as the Government Claims Act).

[181] The nine parts of the GCA are: Part 1, Definitions; Part 2, Liability of Public Entities and Public Employees; Part 3, Claims Against Public Entities; Part 4, Actions Against Public Entities and Public Employees; Part 5, Payment of Claims and Judgments; Part 6, Insurance; Part 7, Defense of Public Employees; Part 8, San Francisco–Oakland Bay Bridge and I–880 Cypress Structure Disaster Relief; Part 9, Lake Davis Northern Pike Eradication Project Relief Account. tit.1, div. 3.6.

[182] Arjang &Allen, *supra* note 38 (citing Rodriguez v. Inglewood Unified Sch. Dist. 186 Cal. App. 3d 707 (1986)) (explaining, for example, that Cal. Educ. Code section 44807 may provide a ground for liability for public school teachers who negligently fail to prevent assaults on students by third parties); Cnty. of Los Angeles v. Superior Ct., 102 Cal. App. 4th 627, 636-37 (2002) (identifying several statutes in the Cal. Welf. & Inst. Code that gave rise to an action for violation of mandatory duties under section 815.6, also discussed in this Comment, *infra* section II(C)(3).)

[183] *See* Arjang & Allen, *supra* note 38.

[184] *Ministerial duty*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A duty that requires neither the exercise of official discretion nor judgment."); *see also* the discussion in this Comment, *infra* section II (A)(2).

acts[185] within the scope of their authority, even where the plaintiff alleges malice.[186] Sovereign immunity is intended to protect public officials and entities from undue interference resulting from claims of carelessness, malice, bad judgment, or abuse of discretion.[187] Courts have not established a strictly careful, thorough, formal, or correct evaluation of immunity defenses to such claims because an inflexible standard would weaken the ability of immunity statutes to protect government entities and employees from meritless claims.[188]

1. Liability and Immunity Under the GCA

Within the GCA, generally applicable liability and immunity statutes for public entities and employees occupy Part 2, Chapter 1, "General Provisions Relating to Liability."[189] Section 815(a) establishes the GCA's basic architecture of liability and immunity for governmental entities.[190] This section states that, "[e]xcept as otherwise provided by statute[,] . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."[191] Thus, section 815 abolishes common law and judicially declared forms of liability for public entities, except where such liability may be required by the state or federal constitution.[192]

Instead, the GCA now imposes liability on public entities and their employees only where a statute expressly provides for such liability.[193] For example, section 815.2 states that public entities are liable for injuries proximately caused by acts or omissions of their employees acting

[185] *Discretionary act*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A deed involving an exercise of personal judgment and conscience."); *see also* discussion in this Comment, *infra* section II(A)(2).

[186] CAL. GOV. CODE § 820.2 (1963); CAL. GOV. CODE § 815.2 (1963), ed. n.; Arjang & Allen, *supra* note 38 (citing Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211 (1961)) (explaining the difference between sovereign immunity as applied to ministerial duties versus discretionary actions); Steinle v. City & Cnty. of San Francisco, 230 F. Supp. 3d 994, 1020 (N.D. Cal. 2017), *aff'd*, 919 F.3d 1154 (9th Cir. 2019) (stating that immunity for public employees for injuries resulting from exercise of discretion vested in the employee is a "discretionary act" that requires a conscious balancing of risks and advantages; whereas the same type of immunity does not protect against liability for operational or ministerial decisions that implement policies).

[187] Arjang & Allen, *supra* note 38 (citing Caldwell v. Montoya, 10 Cal. 4th 972 (1995)).

[188] *Id*.

[189] CAL. GOV'T CODE tit. 1, D. 3.6, Pt. 2, Ch. 1 (1963).

[190] CAL. GOV. CODE § 815 (1963); Quigley v. Garden Valley Fire Prot. Dist., 7 Cal. 5th 798, 803 (2019).

[191] CAL. GOV. CODE § 815(a) (1963).

[192] GOV'T. § 815, S. Legis. Comm. Comments.

[193] *Id*.

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within the scope of employment, where the act or omission would have given rise to a cause of action against that employee.[194]

Where plaintiffs establish governmental liability under a relevant statute, the GCA may provide public entities and employees statutory immunity to bar such claims.[195] Public entities and employees can raise an affirmative immunity defense when denying a claim, when answering a complaint, in a demurrer, or in a motion for summary judgment.[196] Some statutes provide for the immunity of public entities; others apply directly to the acts or omissions of employees.[197] In some cases, public entities may be required to indemnify public employees.[198] Analogously, "a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."[199] Thus, the GCA's general liability and immunity provisions attempt to resolve problems associated with common-law sovereign immunity by specifying the circumstances under which an immunity defense may be raised.[200]

Although an exhaustive list is beyond the scope of this Comment, many of the GCA's provisions address issues of specific rather than general immunity or liability.[201] For example, section 821.6 establishes ab-

[194] CAL. GOV. CODE § 815.2 (1963); *See also* CAL. GOV. CODE § 815.4 (1963) (mandating an analogous liability of public entities for injuries proximately caused by the tortious acts or omissions of their independent contractors).

[195] *See generally*, CAL. GOV'T CODE tit.1, div. 3.6 (1963); *see also* Arjang & Allen, *supra* note 38 (citing Davidson v. City of Westminster, 32 Cal.3d 197, 202 (1982)).

[196] Arjang & Allen, *supra* note 38.

[197] *See, e.g.*, CAL. GOV. CODE § 818.8 (1963) (stating that public entities are not liable for injuries caused by misrepresentations made by their employees, whether or not such misrepresentations were negligent or intentional); CAL. GOV. CODE § 822.2 (1963) (stating that public employees who may be immune from liability for injuries caused by misrepresentations under section 818.8 may still be held liable where they are "guilty of actual fraud, corruption, or actual malice"); *see also*, Arjang & Allen, *supra* note 29 (providing several additional examples of immunity provisions within the GCA).

[198] *See, e.g.*, CAL. GOV. CODE § 825(a) (1963) ("[I]f an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.").

[199] CAL. GOV. CODE § 815.2 (1963).

[200] *See, e.g.,* Quigley v. Garden Valley Fire Prot. Dist., 7 Cal. 5th 798, 803 (2019); *see generally* tit. 1, D. 3.6.

[201] *See, e.g*., CAL. GOV. CODE § 821.6 (1963) (providing public employees with absolute immunity from liability for charges of malicious prosecution); CAL. GOV. CODE § 835 (1963) (providing public entities with qualified immunity from liability for injuries caused by dangerous conditions of property); *see also, e.g*., CAL. GOV. CODE § 830.6 (1963) (providing design immunity to public entities seeking to avoid liability for injuries caused by dangerous conditions of public property); CAL. GOV. CODE § 818.2 (1963) and CAL. GOV. CODE § 821 (1963) (providing immunity from

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solute prosecutorial immunity by providing that public employees are not liable for injuries "caused by . . . instituting or prosecuting any judicial or administrative proceeding within the scope of [their] employment, even if [they] act[ ] maliciously and without probable cause."[202] This Comment discusses interpretations of this statute below in section II(B). Many other such provisions fall outside Part 2, Chapter 1, such as Section 835, which states that a public entity may be held liable for injuries caused by a "dangerous condition of its property."[203]

2. *Discretionary Acts and Ministerial Duties*

The availability of an immunity defense depends in part upon whether the public entity or employee is charged with acting in a discretionary[204] or ministerial[205] capacity.[206] Public employees who engage in discretionary acts within the scope of their employment are immune from liability, even where such discretion is abused.[207] By contrast, public employees who perform ministerial duties may be liable if they act negligently.[208] Accordingly, once a plaintiff establishes liability under a relevant statute, the public entity or employee must (1) cite an immunity statute addressing the type of conduct at issue, and (2) establish whether the alleged injury arose out of a discretionary act or a ministerial duty.[209]

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liability for injuries caused by enacting or failing to enact laws, or by failing to enforce any law); CAL. GOV. CODE § 820.4 (1963) (providing immunity from liability for injuries caused by executing or enforcing laws where the defendant exercises due care); CAL. GOV. CODE § 830.9 (1963) (providing immunity from liability for a public entity or employee for injuries caused by the operation of traffic control signals controlled by emergency vehicles); CAL. GOV. CODE § 845.8 (1963) (providing immunity for injuries caused by escaping or escaped prisoners, arrested persons, or persons resisting arrest, where the escape results from determinations relating to the issuance, terms, or revocation of parole or release).

[202] GOV'T. § 821.6.

[203] CAL. GOV'T CODE § 835 (1963). (stating that a plaintiff seeking to impose liability on a public entity must show an alleged injury was caused by a dangerous condition of public property that created a foreseeable risk of injury; and either that the injury resulted from a negligent or wrongful act or omission by the public entity or its employees or that the entity had actual or constructive notice of the dangerous condition and failed to correct the condition prior to the injury).

[204] BLACK'S LAW DICTIONARY, *supra* note 185.

[205] BLACK'S LAW DICTIONARY, *supra* note 184.

[206] Arjang &. Allen, *supra* note 38 (citing Muskopf v. Corning Hospital Dist. 55 Cal. 2d 211, 220 (1961)) (explaining the difference between sovereign immunity as applied to ministerial duties versus discretionary actions).

[207] CAL. GOV'T. CODE § 820.2 (1963); *see* Arjang & Allen, *supra* note 38 (citing *Muskopf*, 55 Cal. 2d at 220) (explaining that government officials "are not liable for their discretionary acts within the scope of their authority, even if it is alleged that they acted maliciously").

[208] *See* Arjang & Allen, *supra* note 38 (citing *Muskopf*, 55 Cal. 2d at 220 (1961)) (explaining that government officials are liable for negligent performance of their ministerial duties); *see also* Caldwell v. Montoya, 10 Cal. 4th 972, 981 (1995) ("[T]here is no basis for immunizing lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated.").

[209] *Id*. (citing Davidson v. City of Westminster 32 Cal.3d 197, 202 (1982)).

Discretionary acts[210] require the actor to make some type of "basic policy decision at the *planning stage* rather than at the *operational level* of government decision-making."[211] Consequently, a court may inquire whether the alleged governmental tortfeasor engaged in a "conscious balancing of risks or advantages."[212] For example, a discretionary act occurs where a local director of community development declares that a deteriorating residence is a nuisance.[213] Similarly, a school district that expels or readmits a student engages in discretionary policy considerations, so the district is not liable for injuries subsequently caused by the expelled student.[214] Thus, if a school district official abused his or her discretion by expelling a student without first determining whether expulsion was warranted, the school official would be immune from suit for damages caused by any retaliatory action on the part of the student.[215] However, the purpose of such an absolute immunity provision is not to encourage such abuses of discretion by school officials, but rather to empower school officials to balance the risks and advantages of expulsion without the constant fear of retaliatory lawsuits.[216]

On the other hand, courts regard as ministerial duties[217] those acts that amount to mere obedience to orders that do not afford the public officer any discretionary leeway because the act or omission is mandated by statute.[218] For example, immunity may not be a valid defense where a police officer is accused of excessive use of force because the officer's responsibility for performing such acts is mandated by law and therefore ministerial.[219] Recall that in *Riojas*, the Texas state prison officials who asserted defenses of qualified immunity were still exposed to liability when Trent Taylor showed they had been negligent in performing their duties, which were mandated by law and therefore ministerial.[220]

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[210] BLACK'S LAW DICTIONARY, *supra* note 185.

[211] Arjang & Allen, *supra* note 38 (citing Barner v. Leeds, 24 Cal. 4th 676, 685 (2000)) (emphasis in original).

[212] *Id*. (citing Scott v. Cnty. of Los Angeles 27 Cal. App. 4th 125, 140-41 (1994)).

[213] *Id*. (citing Ogborn v. City of Lancaster 101, Cal. App. 4th 448, 461 (2002)).

[214] *Id*. (citing Thompson v. Sacramento City Unified Sch. District, 107 Cal. App. 4th 1352, 1361 (2003)).

[215] *See id*.

[216] Andrew J. Cavo, *Weissman v. National Association of Securities Dealers: A Dangerously Narrow Interpretation of Absolute Immunity for Self-Regulatory Organizations*, 94 Cornell L. Rev. 415, 434 (2009) ("The purpose of absolute sovereign immunity is to afford government officials the discretion to perform their duties without the distraction of ongoing and recriminatory litigation.").

[217] BLACK'S LAW DICTIONARY, *supra* note 184.

[218] Arjang & Allen, *supra* note 38 (citing Scott v. County of Los Angeles 27 Cal. App. 4th 125, 141 (1994)).

[219] *See id*. (citing Robinson v. Solano County, 278 F.3d 1007, 1016 (9th Cir. 2002)).

[220] Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam).

B. Inconsistent Interpretations of Common Law Language in the GCA

Decisions following the enactment of the GCA illustrate some of the challenges courts face when interpreting sovereign immunity statutes that use common law language to define governmental actions.[221] Identifying every such occurrence of common law definitions throughout the GCA is beyond the scope of this Comment.[222] However, examining a line of decisions interpreting the immunity of section 821.6 is instructive.[223] Section 820.2 establishes generally the absolute immunity of public employees for their discretionary acts; section 821.6 extends that immunity specifically to state officials responsible for "instituting or prosecuting any judicial or administrative proceeding."[224] This Comment focuses on section 821.6 because its grant of absolute immunity from liability for claims of malicious prosecution is particularly powerful.[225] Despite early decisions that definitively limited the scope of section 821.6 immunity to actions for malicious prosecution, subsequent decisions expanded its immunity beyond legislative intent to include not only torts such as infliction of emotional distress,[226] but also ministerial duties.[227]

1. Sullivan v. County of Los Angeles

One of the most important decisions that provided an interpretation of absolute immunity under section 821.6 is *Sullivan v. County of Los Angeles,* which held that section 821.6 did not shield the county from liability for false imprisonment.[228] Jack Sullivan had been convicted of a misdemeanor and sentenced to fifty days in the city jail.[229] After he served his time, the sheriff held him in the jail for several days beyond his scheduled release date.[230] Sullivan filed a claim against the County of

[221] *E.g.*, Sullivan v. County of Los Angeles, 12 Cal. 3d 710 (1974); Javor v. Taggart, 98 Cal. App. 4th 795 (2002), *as modified* (May 23, 2002), and *disapproved of by* Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023); Garmon v. Cnty. of Los Angeles, 828 F.3d 837 (9th Cir. 2016); Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023) (all discussed *infra*, sections II(B)(1) through (3).

[222] *See* CAL. GOV'T CODE tit. 1, D. 3.6 (1963) (establishing the many liability and immunity provisions of the GCA).

[223] *Sullivan*, 12 Cal. 3d; *Javor*, 98 Cal. App. 4th; *Garmon*, 828 F.3d 837; *Leon*, 530 P.3d 1093.

[224] CAL. GOV'T CODE §§ 820.2, 821.6 (1963).

[225] GOV'T § 821.6.

[226] *E.g.*, *Sullivan*, 12 Cal. 3d 710; *Javor*, 98 Cal. App. 4th; *Leon*, 530 P.3d.

[227] *E.g.*, *Garmon*, 828 F.3d.

[228] *Sullivan*, 12 Cal. 3d at 722.

[229] *Id*. at 713.

[230] *Id*. at 714.

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Los Angeles alleging false imprisonment.[231] The county claimed immunity under section 821.6.[232]

The *Sullivan* court determined that the legislative intent of section 821.6 was to protect "public employees from liability only for malicious prosecution and not for false imprisonment," the scope of which the county had interpreted as extending to the custodial actions of the sheriff after prosecution, i.e., to the imprisonment of Sullivan.[233] The court reasoned that a narrow interpretation of section 821.6, which limited the scope of its immunity provision only to actions for malicious prosecution but not for actions for false imprisonment, aligned well with other immunity provisions.[234] Specifically, section 820.4 grants qualified immunity to public officials who execute or enforce laws but carves out an exception for false imprisonment.[235] Thus, by recognizing that section 821.6 provides immunity from liability for charges of malicious prosecution, while also recognizing the existing liability for false imprisonment pursuant to section 820.4, the court foreclosed the county's ability to extend the scope of 821.6 to actions that constitute false imprisonment.[236] Under *Sullivan*, then, section 821.6 codifies the common law immunity of prosecutors and law enforcement officials from charges of malicious prosecution to prevent interference with their discretionary responsibility for instituting and prosecuting enforcement proceedings.[237] Despite the clarity of the court's pronouncement, however, lower courts have strayed from *Sullivan*.[238]

2. Javor v. Taggart

Only a few days prior to the planned publication of this Comment, the California Supreme Court expressly disapproved *Javor v. Taggart* as

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[231] *Id*. at 713.

[232] *Id*. at 715.

[233] *Id.* at 719 ("[T]he history of section 821.6 demonstrates that the Legislature intended the section to protect public employees from liability only for Malicious prosecution and not for False imprisonment.").

[234] *Id*. at 721.

[235] *Id*. ("Our narrow interpretation of section 821.6's immunity, confining its reach to malicious prosecution actions, finds corroboration in . . . section 820.4[,] . . . [which] grants public employees immunity for their nonnegligent acts in executing or enforcing any laws but specifically provides that '(n)othing in this section exonerates a public employee from liability for false arrest or false imprisonment.' ").

[236] *Id*. at 721-22.

[237] *Id*. at 722.

[238] *See, e.g*., Javor v. Taggart, 98 Cal. App. 4th 795, 808 (2002), *as modified* (May 23, 2002), and *disapproved of by* Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023) (holding that section 821.6 "is not limited to only malicious prosecution actions); Menetrez, *supra* note 39 at 401-17 (tracing the expansion of section 821.6 through decisions in California courts of appeal).

part of its decision in *Leon v. County of Riverside*.[239] This Comment discusses *Leon* in more detail below in Section II(D)(2).[240] Regardless, understanding the holding in *Javor* is essential to understanding how California courts of appeal reinterpreted sovereign immunity after *Sullivan*.[241]

In *Javor*, the California Court of Appeals for the Second District held that the absolute immunity of section 821.6 protected employees of an administrative agency from charges of slander and clouding of title, intentional infliction of emotional distress, and negligence.[242] Perhaps more importantly, *Javor's* finding that section 821.6 "is not limited to only malicious prosecution actions"[243] expressly violated the California Supreme Court precedent established in *Sullivan*.[244]

Premiere Construction Services (Premiere), an uninsured construction business, had used Eddie Javor's contractor license number, without his consent, to hire a construction laborer who was injured on the job.[245] Because Premiere was uninsured, the California Uninsured Employers Fund (UEF) paid the $37,000 in expenses incurred by the laborer's injury.[246] While seeking reimbursement from Javor, UEF claims administrator Taggart negligently failed to comply with UEF's mandated procedures for verifying the identity of claimants and erroneously placed a $37,000 lien on Javor's home.[247] After the Workers' Compensation Appeals Board found that the UEF had violated Javor's right to due process and ordered a cancelation of the lien, Javor sued Taggart, alleging slander, clouding of title, and intentional infliction of emotional distress.[248] Javor had not included a charge of malicious prosecution in his complaint; *Sullivan* had established that section 821.6 extends immunity only to charges of malicious prosecution.[249]

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[239] *Javor*, 98 Cal. App. 4th at 808; Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023).

[240] *Id*.

[241] *Javor*, 98 Cal. App. 4th; *Sullivan*, 12 Cal. 3d.

[242] *Javor*, 98 Cal. App. 4th at 807, 810. *But see Sullivan*, 12 Cal. 3d at 721 (limiting the scope of governmental immunity only to actions for malicious prosecution).

[243] *Javor*, 98 Cal. App. 4th at 808 (quoting Jenkins v. County of Orange, 212 Cal. App. 3d 278, 283 (1989)).

[244] *Sullivan*, 12 Cal. 3d at 719 ("[T]he history of section 821.6 demonstrates that the legislature intended the section to protect public employees from liability only for [m]alicious prosecution.")

[245] *Javor*, 98 Cal. App. 4th at 800.

[246] *Id*.

[247] *Id*. at 801.

[248] *Id*. at 801-02.

[249] *Id*.; *Sullivan*, 12 Cal. 3d at 719 ("[T]he history of section 821.6 demonstrates that the legislature intended the section to protect public employees from liability only for [m]alicious prosecution.").

The appeals court focused its analysis on the policy objectives of section 821.6, i.e., "to encourage fearless performance of official duties . . . without fear of reprisal from the person or entity harmed thereby."[250] Sidestepping the issue that Taggart had not been charged with malicious prosecution, the court bolstered its argument by asserting that section 821.6 immunity extends even to actions such as investigations, which are an essential step toward institution of formal proceedings.[251] Although the court eventually acknowledged that the legislative intent of section 821.6 is to protect public employees from liability for malicious prosecution, the court went on to assert that such immunity extends not only to peace officers and prosecutors, but also to heads of state administrative agencies and others.[252] Disregarding the California Supreme Court precedent from *Sullivan,* the court then cited decisions from courts of appeal that had held that section 821.6 immunity is not limited only to malicious prosecution actions.[253]

Ultimately, the court seemed to resurrect the American rule of immunity from *Mower*, opining that even though state employees may sometimes "misidentify individuals, it is better to leave unredressed [such] wrongs than to subject [public employees] to the constant dread of retaliation."[254] In fact, the court reasoned that the importance of granting immunity could not be overstated where a "defendant is responsible for seeking reimbursement from scofflaws," even though Javor himself had not violated any laws.[255] This reasoning may align with the Supreme Court's criticism of the Ninth Circuit's plaintiff-friendly interpretation of sovereign immunity.[256] However, it seems attenuated in the context of *Javor*, where the defendant's negligent conduct had concededly violated the plaintiff's right to the due process of law.[257] Ironically, by insisting that the defendant's negligence was justified by a policy of encouraging fearless enforcement of public policy without fear of reprisal, *Javor's* misapplication of the law enabled precisely the kind of governmental impunity the GCA was intended to eradicate.[258]

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[250] *Javor*, 98 Cal. App. 4th at 808 (quoting Shoemaker v. Myers 2 Cal. App. 4th 1407, 1424 (1992)).

[251] *Id*. at 808 (citing Amylou R. v. Cnty. of Riverside, 28 Cal. App. 4th 1205, 1209-10 (1994), *disapproved of by* Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023)).

[252] *Id*. at 808.

[253] *Id*. at 808-09.

[254] *Id*. at 808-810 (2002) (quoting Amylou,, 28 Cal. App. 4t at 1213).

[255] *Id*. at 809.

[256] *See* this Comment's discussion, *supra* section I(B).

[257] *Javor*, 98 Cal. App. 4th at 801.

[258] *Id.* at 808*;* Charles F. Krause & Alfred W. Gans, 5 AMERICAN LAW OF TORTS § 17:23, GENERALLY; TYPICAL STATUTORY SYSTEMS ("The intent of the Government Claims Act is . . . to

3. Decisions Reaffirming Sullivan

a. Garmon v. County of Los Angeles

In 2016, the United States Court of Appeals for the Ninth Circuit decided *Garmon v. City of Los Angeles*, which held that absolute immunity does not protect a district attorney who presents false statements in a declaration accompanying a subpoena.[259] This decision not only provides insight into how federal courts evaluate claims under the GCA, but also lends weight to criticism[260] that California appellate courts have strayed from California Supreme Court precedent.[261]

Garmon, who was an alibi witness for her son's murder trial, had to undergo brain surgery before trial.[262] Attorneys for the prosecution deposed her before her surgery.[263] Garmon had authorized the hospital to disclose to the prosecutor all medical records related to her brain tumor.[264] However, the day following the surgery, the prosecutor issued a subpoena accompanied by a declaration falsely stating that Garmon was the murder victim and requesting all of her medical records, rather than only those related to her brain tumor.[265] When Garmon eventually testified at her son's trial, the prosecutor used those medical records to undermine Garmon's credibility.[266]

Garmon's complaint against the district attorney argued on two fronts that the prosecutor was not immunized from liability for presenting false statements in a declaration accompanying a subpoena.[267] First, although a district attorney's office enjoys absolute immunity for discretionary acts such as issuing a subpoena and using medical records at trial, absolute immunity does *not* apply to ministerial acts such as certifying that the facts alleged in an affidavit are true.[268] Second, the Ninth Circuit reaffirmed the California Supreme Court's holding in *Sullivan* that section 821.6 immunity for public entities applies *only* to actions for mali-

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confine potential governmental liability to rigidly delineated circumstances. Governmental immunity is waived only if the various requirements of the Act are satisfied.").

[259] Garmon v. County of Los Angeles, 828 F.3d 837, 848 (9th Cir. 2016).

[260] *E.g.*, Menetrez, *supra* note 39 (arguing that judicial intervention is required to restore an interpretation of section 821.6 that aligns with legislative intent).

[261] *Garmon*, 828 F.3d at 847 (9th Cir. 2016) (Although "the California Supreme Court interpreted section 821.6 as 'confining its reach to malicious prosecution actions,' . . . since *Sullivan*, California Courts of Appeal have interpreted section 821.6 more expansively.").

[262] *Id*. at 840-41.

[263] *Id*. at 841.

[264] *Id*.

[265] *Id*.

[266] *Id*.

[267] *Id*. at 844.

[268] *Id*. at 845.

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cious prosecution.[269] Because Garmon's claims alleged negligent performance of a ministerial duty but not malicious prosecution, section 821.6 immunity did not protect the district attorney from liability.[270]

Garmon sheds light on the inability of California courts to agree on a single interpretation of section 821.6.[271] The Ninth Circuit acknowledged that California courts of appeal have expanded the scope of section 821.6 beyond the California Supreme Court's narrow holding in *Sullivan*.[272] The court acknowledged further that other federal district courts within the same district regarded *Sullivan* as good law.[273] To resolve this split, the Ninth Circuit pronounced that it would base its determination of statutory interpretation on the meaning the state's highest court gives a statute.[274] Thus, *Garmon* not only highlights the tension between immunity defenses in state and federal courts, but also underscores the need for the California legislature to amend the GCA.[275]

b. Leon v. County of Riverside

Once again, immediately prior to the planned publication of this Comment, the California Supreme Court decided *Leon*, which held that the absolute immunity of section 821.6 does not broadly immunize police officers or other public employees for any and all harmful actions they may take during the course of an investigation.[276] *Leon* also expressly disapproved *Javor* and a related line of cases that attempted to extend the scope of actions to which section 821.6 immunity applies beyond the limits established in *Sullivan*.[277]

José Leon was shot and killed near his home in Riverside County.[278] Sheriff's deputies arriving on the scene heard additional shots.[279] The deputies dragged Leon's body behind a vehicle before leaving the scene to investigate the source of the additional gunfire.[280] For about the next

[269] *Id*. at 847.

[270] *Id*. at 848.

[271] *Id*. at 847.

[272] *Id*. (citing Kayfetz v. State, 156 Cal. App. 3d 491, 497 (1984); Amylou R. v. Cnty. of Riverside, 28 Cal. App. 4th 1205, 1211 (1994), *disapproved of by* Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023).

[273] *Garmon*, 828 F.3d at 844, 847 (citing Dinius v. Perdock, 2012 WL 1925666, slip op. at *8–9 (N.D. Cal. May 24, 2012); Williams v. City of Merced, 2013 WL 498854, slip op. at *17 (E.D. Cal. Feb. 7, 2013)).

[274] *Garmon*, 828 F.3d at 847.

[275] *See id*.

[276] Leon v. Cnty. of Riverside, 530 P.3d 1093, 1096 (Cal. 2023).

[277] *Id.* at 1106.

[278] *Id*. at 1096.

[279] *Id*.

[280] *Id*.

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eight hours while they investigated the shooting, the deputies left Leon's naked body lying by the vehicle, exposed and in plain view of the public and of his wife.[281] Ultimately, the deputies determined that the killer had committed suicide shortly after killing Leon.[282] The district attorney never filed charges.[283]

Leon's widow filed a complaint alleging negligent infliction of emotional distress because the deputies had failed to exercise reasonable care when they left Leon's uncovered body exposed to public view.[284] The County of Riverside moved for summary judgement, claiming that section 821.6 extended immunity to "all conduct related to the investigation and filing of charges," which, the county argued, included the deputies' actions in investigating the homicide.[285] The Court of Appeal affirmed summary judgement for the county, citing a line of cases that had consistently construed section 821.6 as immunizing public employees from liability "for any injury-causing act or omission in the course of the institution and prosecution of any judicial or administrative proceeding, *including an investigation that may precede the institution of any such proceeding*."[286]

On appeal, the California Supreme Court expressly rejected on several grounds the county's argument that policy considerations favored a broader interpretation of section 821.6.[287] Most relevant here, the court rejected the county's argument that *Sullivan* had established *only* that false imprisonment is not immunized under section 821.6 but left open the question whether its immunity may be applied to other torts such as negligent infliction of emotional distress or actions such as investigations preliminary to prosecution.[288] Specifically, *Sullivan* did *not* limit its holding only to a distinction between malicious prosecution and false imprisonment.[289] Instead, *Sullivan* addressed more generally the intended scope of section 821.6, concluding that the legislature had intended the statute to confer absolute immunity *only* for malicious prosecution.[290] In other words, the county in *Leon* had focused on the facts upon which *Sullivan* was based—a charge of false imprisonment—to erroneously conclude that section 821.6 immunizes officers as long as

[281] *Id*.
[282] *Id*.
[283] *Id*.
[284] *Id*.
[285] *Id*.
[286] *Id*. (emphasis in original).
[287] *Id*. at 1103-06.
[288] *Id*. at 1105-06.
[289] *Id*.
[290] *Id*. (citing *Sullivan*, 12 Cal.3d at 719–721).

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they are not charged with false imprisonment.[291] The Supreme Court expressly rejected this theory, holding that it was error to confer absolute immunity on the county for negligent infliction of emotional distress.[292] *Leon* also disapproved *Javor* and a related line of cases to the extent they were inconsistent with this reasoning.[293]

Sullivan, *Javor*, *Garmon*, and *Leon* illustrate that common law language in section 821.6 frustrates the ability of courts to implement the legislative intent of the GCA.[294] Although space limitations restrict this Comment's analysis to section 821.6, misinterpretation may occur with any section of the GCA that similarly utilizes common law terms to identify torts.[295]

C. Interpretations of "Discretion" for the Purposes of Establishing Immunity

Second, some decisions after the enactment of the GCA that have redefined ministerial duties as discretionary acts have eroded the ability of the GCA to hold negligent conduct accountable.[296] California courts have not formulated a bright-line rule to distinguish government actions that are ministerial duties subject to actions for negligence from discretionary acts that are shielded by absolute immunity.[297] Despite established California precedent, decisions reinterpreting "discretion" have barred negligence claims by effectively reclassifying ministerial duties as discretionary acts.[298] This section examines a line of decisions in which courts have considered whether certain actions in the context of foster care required "discretion" for the purposes of determining liability under section 815.6.[299] Examining every possible occurrence in which a public employee may exercise personal judgement or discretion is not possible and regardless is beyond the scope of this Comment.[300] Nonetheless,

[291] *Id*.

[292] *Id*.

[293] *Id*.

[294] *Sullivan*, 12 Cal.3d; Javor v. Taggart, 98 Cal. App. 4th 795 (2002), *as modified* (May 23, 2002), and *disapproved of by* Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023); Garmon v. Cnty. of Los Angeles, 828 F.3d 837 (9th Cir. 2016); *Leon*, 530 P.3d 1093 (Cal. 2023).

[295] *See generally* Cal. Gov't Code tit. 1, D. 3.6 (1963).

[296] *See e.g.*, Johnson v. State, 69 Cal. 2d 782 (1968); Elton v. Cnty. of Orange, 3 Cal. App. 3d 1053 (1970); Cnty. of Los Angeles v. Superior Ct., 102 Cal. App. 4th 627 (2002).

[297] *See, e.g.*, Parrish, *supra* note 39 at 290 ("California courts have struggled to define what a 'mandatory duty' is.").

[298] *See, e.g.*, *Cnty. of Los Angeles,* 102 Cal. App. 4th 627 (2002).

[299] *Johnson*, Cal. 2d 782; *Elton*, 3 Cal. App. 3d; *Cnty. of Los Angeles*, 102 Cal. App. 4th.

[300] *Johnson*, Cal. 2d 782 at 789 ("[I]t may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials.").

these decisions illustrate the challenges courts face in determining whether a given action is discretionary or mandatory, regardless of the specific legal context in which the question arises.[301]

1. Johnson v. California

In 1968, the California Supreme Court held in *Johnson v. State of California* that a parole officer's decision whether to warn a foster parent of the latent, homicidal tendencies of a youth being placed in foster care was a ministerial duty subject to actions for negligence.[302] Prior to placing a youth in foster care, a California parole officer had decided not to warn the foster parent about the foster youth's homicidal tendencies.[303] The foster mother later filed a negligence complaint against the state after the youth was placed with her and assaulted her in her home.[304] On appeal, the court denied the state's immunity defense, rejecting its literal interpretation of "discretion."[305] Although the decision whether to place the youth on parole was unquestionably a discretionary act protected by immunity, once that decision has been made, the determination whether to warn the foster parents of foreseeable dangers subjects the agency to liability for negligence.[306] Simply because the parole officer had leeway in deciding what information to disclose did not transform his duty to warn of foreseeable danger into a discretionary act protected by the absolute immunity of section 820.2.[307] Thus, under *Johnson,* the literal exercise of discretion is not a sufficient ground to extend absolute immunity to ministerial duties.[308]

2. Elton v. County of Orange

Similarly, in 1970, the California Court of Appeals for the Fourth District held in *Elton v. County of Orange* that the county was not immune from liability when it placed a dependent child with foster parents who beat her.[309] The complaint alleged that the county had carelessly and negligently placed and supervised the plaintiff in a foster home in which she had been "struck, battered, bruised, scalded, beaten, and phys-

[301] *Johnson*, Cal. 2d 782; *Elton*, 3 Cal. App. 3d; *Cnty. of Los Angeles*, 102 Cal. App. 4th.
[302] *Johnson*, Cal. 2d 782 at 786.
[303] *Id*. at 784-85.
[304] *Id*.
[305] *Id*. at 787-90.
[306] *Id*. at 795-96.
[307] *Id*. at 790.
[308] *Id*. at 787-798.
[309] Elton v. Cnty. of Orange, 3 Cal. App. 3d 1053, 1057 (1970).

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ically and mentally forced to submit to physical and mental atrocities."[310] Citing *Johnson*, the court reasoned that the county undoubtedly engages in basic policy functions that constitute discretionary acts and is therefore immune from liability when it declares that a child is dependent and eligible for foster care placement.[311] However, the actual placement of the child in a foster home remains a ministerial duty.[312] Moreover, the plaintiff in *Elton* had not complained about the county's decision to declare her a dependent child.[313] Instead, she had complained that the county was negligent when it placed her in a home in which she was subject to torture and abuse.[314] Even though actual placement in a particular home may require the literal exercise of discretion, such actions do not rise to the level of expert policy determinations that preclude judicial inquiry.[315] Therefore, the county was denied immunity from charges that it had been negligent in it placement duties.[316]

3. County of Los Angeles v. Superior Court

In 2002, the California Court of Appeal for the Second District departed from settled law in *Cnty. Of Los Angeles,* holding that social workers were immune from liability for harm to children caused by their placement in foster care because implementing such placements *literally* requires the exercise of discretion.[317] After the plaintiff in *Cnty. of Los Angeles* had been placed in foster care, his foster parent sexually molested him.[318] The social worker knew the owner of the foster home had not completed the legally required certification to become eligible to care for foster children.[319] The plaintiff sued the county for negligence.[320] Under *Johnson* and *Elton*, the court should have held the agency liable for the harm the plaintiff suffered.[321] However, the court determined that despite using obligatory language such as "shall" and "must," the relevant laws and regulations were mere recitations of policy goals that did not create mandatory duties.[322] Further, the social worker had leeway to

[310] *Id*. at 1056.
[311] *Id*. at 1058.
[312] *Id*.
[313] *Id*.
[314] *Id*.
[315] *Id*.
[316] *Id*. at 1060.
[317] Cnty. of Los Angeles v. Superior Ct., 102 Cal. App. 4th 627, 640-43 (2002).
[318] *Id*. at 645.
[319] *Id*. at 645.
[320] *Id*. at 635-36.
[321] *Parrish, supra* note 39 at 296; *Elton*, 3 Cal. App. 3d at 1057; Johnson v. State, 69 Cal. 2d 782, 797-98 (1968).
[322] *Cnty. of Los Angeles*, 102 Cal. App. 4th at 640-43.

use her discretion in determining how to fulfill those policy goals, even though such judgements took place long after the agency had made the policy decision to place the plaintiff in foster care.[323] By interpreting "discretion" literally, the court cloaked the agency with absolute immunity and denied the plaintiff's claim.[324]

The judicial interpretations of "discretion" evident in *Johnson*, *Elton*, and *Cnty. Of Los Angeles* illustrate how redefining "discretion" may preclude lawsuits by plaintiffs in many contexts.[325] Such a development in the law erodes the ability of the GCA to hold accountable agencies who fail to discharge their ministerial duties not only in foster care, but also across the entire span of California's administrative bureaucracy.[326]

III. Specific Recommendations: Analysis and Models

The Commission's recommendations that would become the GCA have presented courts with two challenges.[327] First, because the GCA codified language from the common law, courts sometimes struggle to interpret statutory language consistently.[328] Second, an absence of legislative guidance frustrates the ability of courts to determine whether governmental actions are discretionary or mandatory for the purposes of determining immunity.[329] As it has in the past, the California state legislature should provide the courts with guidance, this time by adding clarification throughout the GCA.[330] The legislature should modernize statutory language to clarify the degree and scope of statutory immunity

[323] *Id*. at 643 ("Placement and supervision are functions involving the exercise of discretion. A County is not the insurer of a child's physical and emotional condition, growth and development while in foster care placement.").

[324] *Id*. at 646.

[325] *Id*.; Johnson v. State, 69 Cal. 2d 782 (1968); Elton v. Cnty. of Orange, 3 Cal. App. 3d 1053 (1970).

[326] *See, e.g.*, Parrish, *supra* note 39; *Cnty. of Los Angeles*, 102 Cal. App. 4th; *Johnson* 69 Cal. 2d; *Elton,* 3 Cal. App. 3d; *see also* Cal. Gov't Code tit. 1, D. 3.6 (1963) (establishing the liability and immunity provisions of the GCA).

[327] *See* Comm'n Recommendation No. 1, *supra* note 73; *see also* Comm'n Recommendations Nos. 2 through 7, *supra* note 74.

[328] *See, e.g*., Garmon v. County of Los Angeles, 828 F.3d 837, 847 (9th Cir. 2016) (showing how a federal district court erroneously extended section 821.6 immunity to a ministerial duty); *see also, e.g*., Menetrez, *supra* note 39 at 394 (arguing that inconsistent interpretations of Cal Gov't. Code section 821.6 have given law enforcement authorities "a license to kill, destroy, and defame, maliciously and without probable cause"); Oliver, *supra* note 39 (arguing further that there is a need for the legislature to create a remedy when section 821.6 fails to protect against malicious prosecution).

[329] *See, e.g.*, *Johnson* 69 Cal. 2d; *Elton*, 3 Cal. App. 3d; *Cnty. of Los Angeles*, 102 Cal. App. 4th; Parrish, *supra* note 39.

[330] *See generally* tit.1, div. 3.6 (encompassing the entirety of California's sovereign immunity regulatory scheme since the decision in Muskopf v. Corning Hosp. District, 55 Cal. 2d 211 (1961)).

or liability. The legislature should also add clarifying language to help courts distinguish between discretionary acts and ministerial duties.

A. ABSOLUTE IMMUNITY

The doctrine of absolute immunity has roots in the common law.[331] "The liability of government cannot be unlimited," so the GCA extends absolute immunity from liability to public entities and their employees for their discretionary acts.[332]

1. Common Law Origins of Absolute Immunity

The purpose of common law absolute immunity was not to protect or defend malicious actions, but to guard from harassment those who act honestly in the discharge of some public function.[333] Freedom from vexatious litigation for those who did not abuse their discretion was considered important enough that the law would not risk subjecting such individuals to the risk of litigation, even if it meant a malicious individual escaped punishment.[334] In other words, the true doctrine of absolute immunity is not that there is some privilege to be malicious with impunity, but that the privilege of immunity should be exempt from all inquiry as to malice.[335] People such as judges and advocates must be able to exercise free and independent judgement without fear that they may be civilly liable for every allegation of malicious conduct.[336]

However, common law language in the GCA can pose challenges for modern courts.[337] Prior to enactment of the GCA, the common law doctrine of sovereign immunity—and of absolute immunity in particular—was recognized in every state, but statutes referencing this doctrine did not use the actual term "absolute immunity."[338] Whether a particular action was shielded by absolute rather than qualified immunity could be determined by reference in the law to the term, "malice."[339] For example,

[331] *See generally* Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Columb. L.Rev. 463 (1909).

[332] COMM'N RECOMMENDATION NO. 1, *supra* note 73 at 809.

[333] *Id*. at 469.

[334] *Id*.

[335] *Id*.

[336] *Id*.

[337] Leon v. Cnty. of Riverside, 530 P.3d 1093, 1099-1100, 1106 (Cal. 2023) (asserting the presumption that legislative uses of common law terms in enactments incorporate settled common law meanings, especially with regard to the GCA; and overruling a line of cases that had misinterpreted such language).

[338] *Id*. at 471-72.

[339] *Id*. at 472.

a code provision in Texas extended absolute immunity to charges of libel for "statement[s] made in the course of . . . legal or judicial proceeding[s], whether true or false, although made with intent to injure and from malicious purposes."[340] Similarly, when the Commission codified common law immunity into its legislative recommendations that would become the GCA, it used language that mirrored common law expressions of immunity that existed in California at that time.[341]

2. *Statutory Absolute Immunity*

The GCA's statutory language mirrors common law expressions of tort liabilities and immunities.[342] Again, common law references to absolute immunity were determined by reference to use of the term "malice,"[343] so the GCA uses similar language in statutes that have retained absolute immunity.[344] The most significant of these immunity provisions is section 820.2, which provides general immunity to public employees for discretionary acts within the scope of their employment, "whether or not such discretion [is] abused."[345] The degree of immunity is absolute because it applies even if a public employee is alleged to have acted with malice, i.e., by abusing his or her discretion.[346] This section restates the law in California when the Commission drafted the GCA and was specifically intended to continue the immunity of public employees for their discretionary acts.[347]

Despite the Commission's intent that the GCA would maintain the existing common law understanding of tort liabilities, its common law

[340] *Id*. (referring to Texas Penal Code, Art. 641, which was active at that time).

[341] *See, e.g*., Leon v. Cnty. of Riverside, 530 P.3d 1093, 1099-1100 (Cal. 2023) (asserting the presumption that legislative uses of common law terms in the GCA incorporate settled common law meanings); COMM'N RECOMMENDATION NO. 1, *supra* note 73 at 834-35 (explaining in the comments how GCA provisions are intended to continue preexisting common law immunities).

[342] *See, e.g*., *Leon*, 530 P.3d at 1099 ("[T]he 'literal,' dictionary-derived meaning of the language of section 821.6 echoes the common law usage of the same operative terms to describe the tort of malicious prosecution."); COMM'N RECOMMENDATION NO. 1, *supra* note 73 at 834-35 (explaining in the comments how GCA provisions are intended to continue preexisting common law immunities).

[343] Veeder, *supra* note 331 at 471-72.

[344] See, e.g., CAL. GOV'T CODE § 821.6 (1963) (providing absolute immunity by stating that public employees are not liable for injury caused by instituting or prosecuting "any judicial or administrative proceeding within the scope of [their] employment, even if [they] acts *maliciously* and without probable cause") (emphasis added).

[345] CAL. GOV'T CODE § 820.2 (1963); COMM'N RECOMMENDATION NO. 1, *supra* note 73 at 812; *Leon*, 530 P.3d at 1099-1100 (Cal. 2023) (asserting the presumption that legislative uses of common law terms in the GCA incorporate settled common law meanings).

[346] GOV'T § 820.2.

[347] COMM'N. RECOMMENDATION NO. 1, *supra* note 73 at 843.

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statutory language has frustrated courts.[348] For example, *Sullivan* illustrates how the common law language of section 821.6 failed to accurately convey the intent of extending absolute immunity from liability only for charges of malicious prosecution.[349] Section 821.6, the relevant provision in *Sullivan*, addresses two concerns—the degree of immunity (absolute) and the scope of its protection (liability for charges of malicious prosecution).[350] This immunity is expressed using the language of the common law.[351] First, recall that at common law, whether a statute extended absolute immunity could be determined by its reference to "malice."[352] Accordingly, section 821.6 extends absolute immunity to public employees by immunizing them even if they "act[ ] maliciously and without probable cause."[353] Second, at common law, the tort of malicious prosecution was defined as "'improperly instituting or maintaining' a legal action."[354] Thus, section 821.6 extends absolute immunity for liability for "injury caused by . . . instituting or prosecuting any judicial or administrative proceeding."[355]

In *Sullivan*, however, the dispute arose because of what the statutory language of section 821.6 did *not* expressly state, i.e., that public employees are absolutely immune from charges of malicious prosecution.[356] Although the sheriff in *Sullivan* had argued that the term, "judicial or administrative proceeding" encompassed actions constituting false imprisonment, the court asserted that the plain meaning of section 821.6 did not extend to the retaining of a person in jail beyond a mandated term.[357] Specifically, "'institute' means 'to originate and get established.'"[358] Further, "'prosecute' means 'to . . . accuse of some crime or breach of law or to pursue for redress or punishment of a crime or violation of law in due legal form before a legal tribunal.'"[359] Holding a person in jail

[348] *See, e.g.*, Sullivan v. Cnty. of Los Angeles, 12 Cal. 3d 710 (1974); Javor v. Taggart, 98 Cal. App. 4th 795 (2002), *as modified* (May 23, 2002), and *disapproved of by* Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023); Garmon v. Cnty. of Los Angeles, 828 F.3d 837 (9th Cir. 2016); Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023).

[349] *Sullivan*, 12 Cal. 3d at 720.

[350] CAL. GOV'T CODE § 821.6 (1963).

[351] *Leon*, 530 P.3d at 1099 ("[T]he 'literal,' dictionary-derived meaning of the language of section 821.6 echoes the common law usage of the same operative terms to describe the tort of malicious prosecution.").

[352] Veeder, *supra* note 331 at 471-72.

[353] GOV'T § 821.6.

[354] *Leon*, 530 P.3d at 1099 (quoting Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. 42 Cal.3d 1157, 1169 (1986)).

[355] GOV'T § 821.6.

[356] Sullivan v. Cnty. of Los Angeles, 12 Cal. 3d 710, 719 (1974).

[357] *Id*.

[358] *Id*.

[359] *Id*.

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beyond the term set at conviction falls outside this literal definition.[360] Indeed, the court in *Leon* noted that *Sullivan's* dictionary-derived interpretation of the language in section 821.6 echoes the common law expression of the tort of malicious prosecution.[361]

This lack of clarity about the meaning of statutory language in the GCA continued to frustrate courts long after *Sullivan*.[362] The court in *Javor* either failed to recognize or chose to ignore the common law reference in section 821.6 to charges resulting from "instituting or prosecuting any judicial or administrative proceeding."[363] The *Javor* court should have understood the reference and refrained from extending section 821.6 immunity to public employees who had not been charged with such a tort.[364] Similarly, the federal district court in *Garmon* erred when it granted the defendant section 821.6 immunity, even though the plaintiff had not brought an action for malicious prosecution.[365] Finally, the trial and appeals courts in *Leon* should have recognized that section 821.6 immunity does not extend to pre-prosecution investigatory actions of police officers.[366]

Complicating matters further, the common law language of absolute immunity seems to imply impunity for discretionary abuses.[367] For example, section 821.6 extends immunity to public employees even if they act "maliciously and without probable cause."[368] Interpreted literally, this broad grant of immunity seems to indicate that public employees such as the sheriff in *Sullivan* may disregard the rights of people who have been charged with crimes by simply citing section 821.6 as a "get out of jail free card."[369] Likewise, the prosecutor in *Garmon* may have believed he was above the law when he filed a subpoena supported by an application with statements he knew were false.[370] Finally, the law en-

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[360] *Id*.

[361] Leon v. Cnty. of Riverside, 530 P.3d 1093, 1099 (2023).

[362] *See e.g.*, Javor v. Taggart, 98 Cal. App. 4th 795 (2002), *as modified* (May 23, 2002), and *disapproved of by* Leon v. Cnty. of Riverside, 530 P.3d 1093 (Cal. 2023); Garmon v. Cnty. of Los Angeles, 828 F.3d 837 (9th Cir. 2016); *Leon*, 530 P.3d.

[363] *Javor*, 98 Cal. App. 4th at 808-09.

[364] *Id*. at 801-02.

[365] *Garmon*, 828 F.3d at 842.

[366] *Leon*, 530 P.3d at 1096-97.

[367] Recall that at common law, whether a particular action was shielded by absolute rather than qualified immunity could be determined by reference in the law to the term, "malice." Veeder, *supra* note 331 at 471-72.

[368] CAL. GOV'T CODE § 821.6 (1963).

[369] Sullivan v. Cnty. of Los Angeles, 12 Cal. 3d 710, 714-15 (1974); *see generally*, Sydney Merrell, *Get Out of Jail Free Card: Doctrine of Qualified Immunity*, 46 T. Marshall L. Rev. 95 (2021) (likening abuses of qualified immunity to a "get out of jail free card.").

[370] *Garmon*, 828 F.3d at 841.

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forcement officials in *Leon* all but admitted their negligence but believed they would be shielded by the immunity of section 821.6.[371]

These decisions illustrate the need for legislative intervention.[372] Thirty-nine years after *Sullivan*, *Leon* reaffirmed the California Supreme Court's holding that the scope of immunity under section 821.6 is limited to charges of malicious prosecution and disapproved *Javor* and a line of related cases.[373] However, every decision that strayed from *Sullivan* in the intervening years damaged plaintiffs whose otherwise meritorious claims may have led to legal victories.[374] Further, although this Comment focused on section 821.6, analogous misinterpretations of immunity statutes are possible in other legal contexts.[375] Recall also that an unintended effect of sovereign immunity is to discourage plaintiffs from filing claims when courts impose an unreasonable burden of proof.[376] Decisions that distort the law extend by analogy beyond the confines of the discussion in this Comment.[377] The GCA's use of common law language enables inconsistent judicial interpretations of absolute immunity.[378] Absolute immunity does not exist because malicious conduct should not be actionable; it exists because honest people would otherwise be subjected to the continual threat of unmeritorious litigation.[379] Therefore, the legislature should modernize language in the GCA to provide courts with clearer guidance that will ensure effective and consistent implementation of statutory sovereign immunity.

B. Qualified Immunity

Plaintiffs may sue public entities and their employees for negligent performance of ministerial duties.[380] Recall that under the GCA, qualified immunity is an affirmative defense.[381] Public entities or employees may avoid a trial on the merits of a complaint by showing they did not breach the relevant standard of care.[382] Of course, whether a governmental action is protected by either qualified or absolute immunity depends

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[371] *Leon*, 530 P.3d at 1096.

[372] *Sullivan*, 12 Cal. 3d; *Javor*, 98 Cal. App. 4th; *Garmon*, 828 F.3d; *Leon*, 530 P.3d.

[373] *Leon*, 530 P. 3d at 1106-07.

[374] *See id.*

[375] *See* this Comment's discussion, *supra* Section II(B).

[376] Schwartz, *supra* note 21 at 10.

[377] *See Leon,* 530 P. 3d at 1099 (asserting the judicial presumption that legislature use of common law terms is to incorporate their settled common law meanings.)

[378] *Id*.

[379] Veeder, *supra* note 331 at 469-70.

[380] Cal. Gov't Code § 815.6 (1963).

[381] Quigley v. Garden Valley Fire Prot. Dist., 7 Cal. 5th 798, 89-15 (2019).

[382] See Leading Cases, *supra* note 116 at 310.

on whether the action is classified as a ministerial duty or a discretionary act.[383] This section argues that courts lack the legislative guidance necessary to identify consistently which types of actions are ministerial duties subject to actions for negligence and which are discretionary acts shielded by absolute immunity.[384]

1. Common Law Origins of Qualified Immunity

Recall that at common law, the distinction between absolute and qualified immunity was determined by reference to whether an action was malicious.[385] For example, in an 1886 California case stemming from charges of libel during a proceeding to discharge debts, the relevant code extended immunity to publications made in any legislative or judicial proceeding with the requirement that such publications express "a fair and true report [made] without malice."[386] This language limiting the scope of immunity only to actions that alleged malice qualified the immunity, implicitly allowing the possibility of actions for negligence.[387]

2. Statutory Qualified Immunity

The GCA has codified common law qualified immunity with statutes that specify relevant standards of care.[388] For example, section 815.6 establishes the general liability of public entities that are negligent in the performance of ministerial duties.[389] It states that a public entity that is "under a mandatory duty . . . is liable for an injury . . . proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence."[390] The reference to a standard of reasonable care implies liability for negligence.[391] Nonetheless, whether section 815.6 applies to a disputed governmental action often turns on the court's determination of whether the action was a mandatory duty.[392] Determining whether a government action is a discretionary act

[383] Arjang &. Allen, *supra* note 38 (citing Muskopf v. Corning Hospital Dist. 55 Cal. 2d 211, 220 (1961)) (explaining the difference between sovereign immunity as applied to ministerial duties versus discretionary actions).

[384] *See generally* CAL. GOV'T CODE tit. 1, D. 3.6 (1963).

[385] Veeder, *supra* note 331 at 473.

[386] Hollis v. Meux, 69 Cal. 625, 627 (1886)

[387] *Id.*; Veeder, *supra* note 331 at 472-73.

[388] *See generally* CAL. GOV'T CODE tit. 1, D. 3.6 (1963).

[389] CAL. GOV'T CODE § 815.6 (1963).

[390] *Id*.

[391] *Id.*; *see* LEADING CASES, *supra* note 116.

[392] Arjang &. Allen, *supra* note 38 (citing Muskopf v. Corning Hospital Dist. 55 Cal. 2d 211, 220 (1961)) (explaining the difference between sovereign immunity as applied to ministerial duties versus discretionary actions).

or a ministerial duty still requires case-by-case adjudication.[393] Courts have struggled to determine definitively what types of actions constitute mandatory duties for the purposes of immunity.[394]

California courts have historically rejected literal interpretations of the term "discretion" for the purposes of determining immunity[395] Other jurisdictions may consider an action to be discretionary for this purpose if the public actor at issue merely uses his or her personal judgment and deliberation to carry out the disputed action.[396] For example, a fireman in Missouri who caused a fatal head-on collision while rushing in his personal vehicle to the scene of a fire was immune to charges of wrongful death because he had exercised his personal discretion in determining how fast he should drive.[397] Even the Federal Tort Claims Act may extend absolute discretionary act immunity to operational decisions involving the exercise of judgment.[398] However, almost every official act, no matter how obviously ministerial, allows at least some discretion on the part of the public employee.[399] A literal interpretation of "discretion" would therefore lead to too broad an immunity and would eviscerate the ability of the GCA to hold accountable the negligence of public entities and employees.[400] Under such a reading, government actors could simply raise a defense of absolute immunity simply by asserting that they were exercising discretion at the time of the alleged injury.[401] Therefore, the California Supreme Court has continued to acquiesce to *Johnson's* ruling that discretion should not be interpretated literally in the context of immunity determinations.[402] Lower courts do not have license to " 'casually decree governmental immunity' under the rubric of 'discretion.' "[403]

Tracing the evolution of judicial interpretations of what constitutes a mandatory duty within the meaning of section 815.6 in the context of the foster care system shows that courts do not always agree how to resolve this conflict.[404] Recall that the dispute in *Cnty. of Los Angeles* centered on whether social services agencies were bound by a duty of care pursu-

[393] Ogborn v. City of Lancaster, 101 Cal. App. 4th 448, 461 (2002).

[394] Parrish, *supra* note 39 at 290.

[395] Johnson v. State of California 69 Cal.2d 782, 790 (1968).

[396] 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT - ITS DIVISIONS, AGENCIES AND OFFICERS, § 4:11 DISCRETIONARY OR MINISTERIAL NATURE OF ACT (2023).

[397] Rhea v. Sapp, 2015 WL 965918 (Mo. Ct. App. W.D. 2015), *as modified*, (Apr. 28, 2015) and *reh'g and/or transfer denied*, (Apr. 28, 2015).

[398] Parrish, *supra* note 39 at 294.

[399] Johnson 69 Cal.2d at 790.

[400] *Id*. at 798.

[401] *See id.*

[402] Parrish, *supra* note 39 at 294-95; *Johnson*, 69 Cal. 2d at 798.

[403] *Id*.

[404] *See, e.g.*, *Johnson*, 69 Cal. 2d at 798; Elton v. Cnty. of Orange, 3 Cal. App. 3d 1053 (1970); Cnty. of Los Angeles v. . *Superior Ct.*, 102 Cal. App. 4th 627 (2002).

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ant to section 815.6 or were instead protected by absolute immunity for actions that were "discretionary" within the meaning of section 820.2.[405] The court there noted that county social workers are immune from liability for negligent supervision of a foster child "unless the social worker fails to provide specific services mandated by statute or regulation."[406] The plaintiff had argued, for example, that the obligatory language in an agency regulation stating that a social worker "shall [m]onitor the child's physical and emotional condition, and take necessary actions to safeguard the child's growth and development while in placement" created a mandatory duty that exposed the social worker to liability in the event of negligence.[407] However, the court found that the regulation did not specifically direct the manner in which the social worker was to attain such objectives.[408] Therefore, because the regulation allowed the social worker to exercise individual discretion, the regulation did not create a mandatory duty.[409]

By contrast, *Elton* had followed the precedent in *Johnson* that any governmental action that implements a policy decision is by definition a ministerial act subject to an action for negligence.[410] In the context of the foster care system, the decision to place a child in foster care itself was a discretionary act beyond the purview of judicial review because it required the specialized judgment of government administrators with the specialized knowledge necessary to make such judgments at the planning level of decision-making.[411] On the other hand, actually placing the child in foster care represented a ministerial duty that potentially subjected lower level employees of social services agencies to actions for negligence.[412]

These competing judicial interpretations illustrate how the absence of legislative guidance about distinctions between ministerial duties and discretionary acts frustrates the legislative intent of the GCA.[413] Not only *Cnty. of Los Angeles,* but also the U.S. Supreme Court's decision in *Riojas* highlight the potential impact that misinterpretations of qualified immunity statues can have on the ability of courts to hold negligent pub-

[405] *Cnty. of Los Angeles,* 102 Cal. App. 4th at 635-36.
[406] *Id*. at 644.
[407] *Id*. at 642-43 (quoting language from Cal. Dep't of Soc. Serv. Regul. 31–405.1(j)).
[408] *Id*.
[409] *Id*.
[410] Elton v. Cnty. of Orange, 3 Cal. App. 3d 1053, 1058 (1970).
[411] *Id*.
[412] *Id*.
[413] Lipman v. Brisbane Elementary Sch. Dist., 55 Cal. 2d 224, 230 (1961) ("[I]t may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials.").

lic officials accountable.[414] Further, the determination of whether a given governmental action is either discretionary or ministerial may arise in any case brought against any of the public entities and employees across the entirety of California's sprawling administrative bureaucracy.[415] Therefore, the legislature should amend the GCA by providing courts with guidance in this area.[416]

C. Recommendations for Revision

Litigation under the complex GCA presents challenges.[417] Decisions such as *Sullivan*, *Javor*, *Garmon*, *Leon*, and *Cnty. of Los Angeles* illustrate how California courts struggle to consistently implement its objectives.[418] The legislature now has an opportunity to fulfill the mission it initiated in 1963 by amending the GCA to avoid defeating the objectives stated in *Muskopf*[419] and to make this important California law responsive to the needs of its citizens.[420] This section suggests several approaches the legislature can take to provide clarification throughout the GCA.

1. Existing Sections and Proposed Legislation as Models for Revision

The legislature may find models for reform in both existing provisions of the GCA, many written after its 1963 enactment, as well as recommendations the Commission proposed but that were not enacted in 1963.[421]

[414] *Cnty. of Los Angeles*, 102 Cal. App. 4th; Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam); *see also, e.g.,* Chemerinsky, *supra* note 14.

[415] See Cal. Gov't Code § 815.6 (1963) (applying qualified immunity for mandatory duties generally to all public entities); Cal. Gov't Code § 820.2 (1963) (applying absolute immunity for discretionary acts generally to all public employees); *State Agency Listing*, supra note 33 (listing over 200 California state government agencies).

[416] *See generally* Cal. Gov't Code tit. 1, D. 3.6 (1963).

[417] *See* Arjang &Allen, *supra* note 38 (explaining that once a litigant establishes a public employee's or entity's statutory liability for an act or omission, the public entity or employee must then identify a possible statutory source of immunity, determine how the immunity statute operates, and determine whether the specific facts of a given case will allow the public entity or employee to successfully raise the immunity defense).

[418] *See, e.g.,* Sullivan v. Cnty. of Los Angeles, 12 Cal. 3d 710 (1974); Javor v. Taggart, 98 Cal. App. 4th 795 (2002), *as modified* (May 23, 2002), and *disapproved of by* Leon v. Cnty. of Riverside, 530 P.3d 1093 (2023); Garmon v. Cnty. of Los Angeles, 828 F.3d 837 (9th Cir. 2016); Leon v. Cnty. of Riverside, 530 P.3d 1093 (2023).

[419] *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 221 (1961).

[420] *See* Muskopf, 55 Cal. 2d at 213 (explaining that the legislature and the courts have contributed to the erosion of common law sovereign immunity and the establishment of statutory sovereign immunity); tit. 1, D. 3.6; Comm'n Recommendation No. 1, *supra* note 73 at 807-813.

[421] *See, e.g.,* Cal. Gov't Code §§ 820.21, 821.2 (1963); Comm'n Recommendation No. 1, *supra* note 73 at 841.

First, statutes that identify torts using common law language should be modernized using as models those absolute immunity provisions that state specifically the types of actions to which absolute immunity attaches.[422] For example, section 821.2 limits absolute immunity from liability for injuries caused by the "issuance, denial, suspension or revocation" or by the "failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization."[423] Among more modern additions to the GCA, section 820.21 specifies the parties to whom absolute immunity applies: "juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings."[424]

Following such guidance, the common law language of laws like section 821.6 should be modernized. Recall that section 821.6 currently states, "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." *Leon* made clear that inclusion of the phrase "even if" expands the scope of immunity from traditional common law notions of malicious prosecution, which required proof of malice, to include what the court termed "wrongful prosecution," which includes both malicious and negligent prosecution.[425] Modernizing the language of section 821.6 would allow the statute to state more directly the law's actual meaning under *Sullivan* and *Leon*.[426] Specifically, the revised statute could state, "A public employee acting within the scope of his or her employment to prosecute any judicial or administrative proceeding is absolutely immune from charges of wrongful prosecution."

Such a revision would provide better guidance in two ways. First, it would make clear that the statute extends absolute immunity, thereby eliminating the need to determine whether the actions of the defendants were discretionary acts or ministerial duties.[427] Second, such language would make clear that the immunity of section 821.6 extends only to charges of wrongful prosecution.[428] Such a revised section 821.6 would foreclose the possibility of defendants successfully invoking this section's immunity when they are charged with torts such as infliction of

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[422] *Id.*

[423] Gov't § 821.2.

[424] Gov't § 820.21.

[425] Leon v. Cnty. of Riverside, 530 P.3d 1093, 1100-1101 (2023).

[426] *Id.*; Sullivan v. Cnty. of Los Angeles, 12 Cal. 3d 710, 719-20 (1974).

[427] Parrish, *supra* note 39 at 289-90 (explaining how California courts have struggled to define "mandatory duty").

[428] *See Sullivan*, 12 Cal. 3d at 719-20; *Leon* 530 P.3d at 1096.

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emotional distress or negligence or with negligent performance of ministerial duties, as was the case in *Javor, Garmon,* and *Leon*.[429]

Second, the legislature should consider enacting new legislation modeled on the Commission's recommendations that would give plaintiffs a right of action against public entities or employees who actually abuse the privilege of absolute immunity.[430] The Commission had proposed including section 816, which would have held a public entity liable for the discretionary acts of public employees who act with actual malice.[431] Proposed section 816 states, "A public entity is liable for injury proximately caused by an employee of the public entity if the employee, acting within the scope of his employment, instituted or prosecuted a judicial or administrative proceeding without probable cause and with actual malice."[432] Coupled with revised statutory language, this affirmative limit would retain the ability of section 821.6 to encourage vigorous enforcement of public policy, while ensuring accountability for public actors who abuse the privilege.[433] Although this Comment and proposed section 816 are limited in scope to section 821.6, the legislature should consider similar revisions throughout the GCA.

2. *New Legislation to Clarify Existing Immunities*

Courts would benefit from guidance about whether the legislature intends certain acts or omissions of public entities and employees to fall within the scope of either qualified or absolute immunity defenses.[434] First, adding specifying language can help courts determine whether a government action is discretionary or mandatory for the purposes of determining immunity.[435] Some of the GCA's provisions specify exceptions that qualify their immunity.[436] For example, although section 850.8 does not expressly provide qualified immunity, it does append a list of excepted actions that are not protected by immunity.[437] Specifically, public entities and employees are *not* liable for injuries resulting from, "or in

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[429] Javor v. Taggart, 98 Cal. App. 4th 795 (2002), *as modified* (May 23, 2002), and *disapproved of by* Leon v. Cnty. of Riverside, 530 P.3d 1093 (2023); Garmon v. Cnty. of Los Angeles, 828 F.3d 837 (9th Cir. 2016); *Leon*, 530 P.3d 1093 (2023).

[430] See, e.g., COMM'N RECOMMENDATION NO. 1, *supra* note 73 at 834-86.

[431] *Id*. at 841.

[432] *Id*.

[433] *Id*.; CAL. GOV'T CODE § 821.6 (1963).

[434] *See, e.g*., Parrish, *supra* note 39 at 289-90 (explaining how California courts struggle to define "mandatory duty").

[435] *Id*. at 315-20 (suggesting a method of analyzing whether a government action is discretionary).

[436] *See, e.g*., CAL. GOV'T CODE § 850.8 (1993).

[437] CAL. GOV'T CODE § 850.8 (1993).

connection with . . . transportation or for any medical, ambulance, or hospital bills incurred by or in behalf of the injured person or for any other damages."[438] However, public employees *are* liable "for injur[ies] proximately caused by . . . willful misconduct in transporting the injured person or arranging for . . . transportation."[439] Because courts are less likely to misinterpret immunity provisions when exceptions are as explicit as in section 850.8,[440] the legislature should consider adding specifying language to all relevant provisions.

Second, adding a subdivision or subdivisions to section 820.2 would provide guidance for determining whether a government action is discretionary or ministerial.[441] Once again, section 820.2 states that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him."[442] Further subdivisions should add clarifying language. Specifically, this section should specify that "discretion" does not have a literal meaning for the purposes of determining immunity.[443] This section should also state the factors identified in *Johnson* for deciding whether to grant immunity: "the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."[444] Finally, with some exceptions, obligatory statutory language such as "shall" or "must" generally indicates a mandatory duty.[445] An additional subdivision should specify conditions under which such obligatory language does or does not create a mandatory duty.[446]

3. *The Statutory Schemes of Other States as Models for Revision*

Amending each section of the GCA is a time-consuming and potentially unending undertaking.[447] Therefore, the California legislature

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[438] *Id*.

[439] *Id*.

[440] *Id*.

[441] *See, e.g.*, Parrish, *supra* note 39 at 289-90 (explaining how California courts struggle to define "mandatory duty").

[442] CAL. GOV'T CODE § 820.2 (1963).

[443] See *id*.

[444] Johnson v. State, 69 Cal. 2d 782, 790 (1968).

[445] 35 CAL. JUR. 3D GOVERNMENTAL TORT LIABILITY § 11.

[446] Parrish, supra note 39 at 290-91.

[447] CAL. GOV'T CODE tit. 1, D. 3.6 (1963).

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should look to other states to model prospective amendments to the GCA.[448]

For example, section 4001 of the Delaware Tort Claims Act states in general terms the statutory limitations on liability for tort claims against state actors.[449] The first part of section 4001 qualifies tort immunity for specified state entities and employees by requiring that they show (1) that the entity's or employee's act or omission arose out of the performance of an official discretionary duty that was (2) performed in good faith (3) and without gross or wanton negligence.[450] The second part of section 4001 states that the immunity of judges, the Attorney General, Deputy Attorneys General, and members of the General Assembly for acts or omissions arising out of the performance of official duties is "absolute."[451] Further, part two places the burden on the plaintiff to show "the absence of 1 or more of the elements of immunity as set forth" in the first part of the section.[452]

This top-down approach contrasts with California's section-by-section regulatory scheme.[453] Reorganizing the GCA according to overarching sections that provide more uniform rules of liability and immunity using language that does not require interpretation from the common law may reduce, or even eliminate, the need to revise each individual section.

CONCLUSION

People place immense trust in public institutions to uphold and protect the public interest.[454] Immunity laws must shield government entities and employees from excessive litigation because of the exposure that accompanies public service.[455] Yet the same laws must also provide plaintiffs with a remedy when public entities and employees betray the

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[448] *See generally* tit.1, div. 3.6; *see also*, *e.g*., DEL. CODE ANN. tit. 10, § 4001 (amended 1988).

[449] *See generally* tit. 10, § 4001.

[450] tit. 10, § 4001.

[451] *Id*.

[452] *Id*.

[453] *Compare* tit. 10, § 4001 *with* tit.1, div. 3.6. Recall also that only three states have retained common law sovereign immunity. Although a survey of every state's sovereign immunity jurisprudence is beyond the scope of this Comment, the legislatures of all other states have enacted some type of statutory immunity. *See* MATTHIESEN, WICKERT & LEHRER, *supra* note 31 (asserting that as of January, 2022, all but three states (Alabama, Arkansas, and Tennessee) have abolished common law sovereign immunity, replacing it with some form of statutory immunity).

[454] *See, e.g.*, Parrish, *supra* note 39 at 283-85 (discussing two of the primary policy reasons that support sovereign immunity).

[455] *See, e.g.*, *id*. at 284-85 ("Without some limitation on litigation, a government official may become 'so inundated with civil claims that they would not be able to, or would at least be severely handicapped in, performing their normal duties.'").

public trust.[456] Immunity laws may state that public entities and employees are not liable for injuries whether they abuse their discretion or act negligently or maliciously.[457] However, the intent of such language is not to encourage impunity for abuses of discretion or for negligent or malicious conduct.[458] *Muskopf* stated the ideal intent of the doctrine of sovereign immunity:

> Although it 'is not a tort for government to govern,' and basic policy decisions of government within constitutional limitations are therefore necessarily nontortious, it does not follow that the state is immune from liability for the torts of its agents. These considerations are relevant to the question whether in any given case the state through its agents has committed a tort, but once it is determined that it has, it must meet its obligations therefor.[459]

The problem of inconsistent enforcement of sovereign immunity has plagued the courts since the American rule of common law sovereign immunity was formulated in 1812.[460] Using the lessons of the past, the legislature can help courts resolve this difficult challenge.

[456] See, e.g., *id*. at 286 ("[F]inding government liability in certain circumstances would further the traditional tort theory that a negligent actor should compensate the innocent victim, and promotes goals of corrective and distributive justice, loss spreading, and fairness.").

[457] *See, e.g.*, CAL. GOV'T CODE § 821.6 (1963) (A public employee is not liable for injury . . . even if he acts maliciously and without probable cause.").

[458] *See, e.g.*, Cavo, *supra* note 216 at 434 ("The purpose of absolute sovereign immunity is to afford government officials the discretion to perform their duties without the distraction of ongoing and recriminatory litigation.")

[459] *Muskopf*, 55 Cal. 2d at 220 (quoting Jackson, J., dissenting in Dalehite v. United States, 346 U.S. 15, 57 (1953)) (citing 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW 482, 489 (1958)).

[460] *Muskopf*, 55 Cal. 2d.