Public Trauma: Why Utah Should Waive Immunity for Mental Anguish Injuries

Adam Reed Moore

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Public Trauma: Why Utah Should Waive Immunity for Mental Anguish Injuries

*Adam Reed Moore*

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*J.D. Candidate 2023, Brigham Young University Law School. B.A. Brigham Young University. The author thanks Aspen Moore, who reviewed the draft multiple times, and the BYU Law Review staff. He also thanks all his professors and BYU generally for providing such a stimulating and uplifting learning environment.*
INTRODUCTION

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

One of these retentions of immunity is relevant here. The Act retains immunity (notwithstanding any waiver) for any injury that “arises out of or in connection with, or results from” the infliction of mental anguish.\(^6\) This is a broad retention of immunity. It means that a citizen cannot sue government officials for torts of emotional distress (such as negligent infliction of emotional distress), other torts arising from mental anguish (such as a wrongful death claim based on suicide caused by a state actor), or for damages to remedy emotional distress caused by other torts of negligence. The net result? An individual who is physically harmed by a state official’s negligence can recover in court while an individual who is only emotionally or mentally harmed cannot—even if, in the former, the state officials’ actions were less negligent or the plaintiff’s physical injury harder to identify. Courts routinely dismiss suits brought against state actors because of this retention of immunity.\(^7\)

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1. See, e.g., Edwin Borchard, Government Liability in Tort, 34 Yale L.J. 229, 229 (1925); Erwin Chemerinsky, Against Sovereign Immunity, 53 Stan. L. Rev. 1201, 1201, 1203 (2001) (critiquing sovereign immunity generally) (“Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law. . . . [T]his entire body of law is simply wrong and . . . should be banished from American law.”).
3. Id. at § 63G-7-102(5) (2020) (defining “governmental function” to include “each activity, undertaking, or operation” or “failure to act” of any department, agency, employee, or agent of a governmental entity).
4. Id. at §§ 63G-7-201(1), 63G-7-301 (2020).
5. Id. at § 63G-7-201(4) (2020).
6. Id. at § 63G-7-201(4)(b) (2020).
Utah should eliminate or limit this retention of immunity for mental anguish. Tort immunity generally is largely indefensible, and Utah’s scheme of retaining immunity is no different. Moreover, this Note argues that Utah’s choice to retain immunity for mental anguish while waiving immunity for physical injuries (even when caused by the same negligent act) does not draw a sensible line. Waiving immunity for mental anguish damages would be more consistent with the concerns underlying the retention of immunity than Utah’s current scheme, which therefore sends the message that mental anguish is simply not worth the risks of compensating. Finally, Utah is trending toward more expansive mental anguish recovery against private defendants, and waiving government tort immunity for mental anguish would be consistent with that trend.

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

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

I. GOVERNMENTAL TORT IMMUNITY IN THE UNITED STATES

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

A. Common Law

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

The reference to a King is enough to make one wonder whether this explanation has anything to do with American law. In fact, it’s not clear that the modern sovereign immunity doctrine has anything to do with English law either. Immunity in England was more of a procedural “accident” stemming from the nature of feudal structure than a doctrine barring recovery. Instead, the stronger tradition (rather than sovereign immunity) seems to have been that where there was a right, there was a remedy—even against government. Indeed, as

9. See, e.g., Niblock v. Salt Lake City, 111 P.2d 800, 804 (Utah 1941) (Wolfe, J., concurring) ("Governmental immunity is granted on the old theory that 'the king can do no wrong. . . ."); Frederick F. Blachly & Miriam E. Oatman, Approaches to Governmental Liability in Tort: A Comparative Survey, 9 L. & CONTEMP. PROBS. 181, 182-84 (1942) ("The maxim that 'the King can do no wrong' . . . has since continued in force."); Langford v. United States, 101 U.S. 341, 343 (1879) ("It is not easy to see how [this] proposition can have any place in our system of Government. We have no King to whom it can be applied . . . We do not understand that either in reference to the government of the United States, or of the several states, . . . the English maxim has an existence in this country."); Driggs v. Utah State Tchrs. Ret. Bd., 142 P.2d 657, 660-61 (Utah 1943) ("This antiquated idea has certainly never had any place in American jurisprudence.").

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

11. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."); id. (noting the only time a remedy at law did not exist for a rights violation was when "the only possible legal remedy would be directed against the very person himself who seeks relief"); id. at 55-56 (noting positive wrongs "in vain would . . . be declared . . . if there were no method of recovering and asserting those rights when wrongfully withheld or invaded") (grammar modernized); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress.") (citation omitted); Ashby v. White, 92 Eng. Rep. 126, 135-36 (K.B. 1703) (Holt, C.J., dissenting) (arguing, in an opinion that was upheld in the House of Lords, that
Professor Louis Jaffe argued, the maxim “the King can do no wrong” originally meant the King was not entitled to do wrong—the King’s wrongs remained mostly actionable.\(^1\)

In fact, prior to the American Revolution, sovereign immunity was less of a bar on recovery and more of a procedural rule about how the Crown could be sued.\(^2\) The Crown’s servants were not entitled to immunity and could be sued without consent.\(^3\) In fact, common law suits against the Crown’s servants were common,\(^4\) at least against the local officers who most interacted with the people.\(^5\) The Crown itself could also be sued in common law courts for infringing individual rights. Suit proceeded via a petition of right (suit was had via petition rather than via writ because of the an individual could have a suit against a Crown’s official because “want of right and want of remedy are reciprocal”).

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

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

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

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

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


17. Jaffe, supra note 11, at 9–15 (noting suits were less common against higher officers) (quoting A.V. DICEY, THE LAW OF THE CONSTITUTION 189 (8th ed. 1923) (“The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages . . . .”)).
anomaly of a King enforcing a writ against himself). Unlike other petitions, the petition of right was granted as a matter of course once the petitioner established that he would have been entitled to proceed had his suit been against a private party rather than the King. The King “could not refuse to redress wrongs when petitioned to do so.”

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

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

B. Early States

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

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

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

Blackstone called recovery on petitions of right a “matter of grace.” 1 BLACKSTONE, supra note 12, at 256. This was “historically inaccurate.” Engdahl, supra note 15, at 5. By Blackstone’s day, any requirement of the Crown’s actual consent had been replaced by “fictional consent” or had been shifted from the Crown to the courts. James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 NW. U. L. REV. 899, 912 (1997).

20. HOLDSWORTH, supra note 15, at 8.


22. Id.

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

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

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

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

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

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

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

Whatever its rationale, state sovereign immunity was never absolute. Like in England, sovereign immunity generally did not protect government officials in their personal capacities, protecting instead the governmental entity itself. Local governments do not

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

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


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


39. HART & WECHSLER, supra note 14, at 880 (noting suits against federal officers were “a fixture in American law”) (citing Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804)) (allowing common law cause of action to proceed against a federal officer who purported to act in his official capacity); Chemerinsky, supra note 1, at 1218 (“The Supreme Court long has held that sovereign immunity prevents suits against the government entity, but not against the officers.”) (citing, inter alia, Schneider v. Smith, 390 U.S. 17 (1968), and Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682 (1949)); Larson, 337 U.S. at 689 (noting “the fact that the
enjoy sovereign immunity. Some Founders assumed federal courts would have power to enforce enumerated limits on state power, and the Fourteenth Amendment’s Enforcement Power allows Congress to waive sovereign immunity for states in other cases.

Moreover, states can waive their own immunity through private bills or general statutes. And states did so, including for tort suits. In so doing, they followed the lead of the federal government, which waived some tort immunity through the Federal Tort Claims Act in 1946. By 1961, New York, Illinois, and California had each waived some tort immunity. Every state has since followed suit. Indeed, the supreme courts of some states, including California and Illinois, have abolished governmental tort immunity (though their legislatures have since acted to limit that).

New York’s waiver of immunity was very influential. That act gave consent for the state to be sued “in accordance with the same rules of law as apply to an action . . . against an individual or a corporation.” This scheme gave rise to the infamous governmental-proprietory distinction, under which immunity is

40. Lincoln Cnty. v. Luning, 133 U.S. 529 (1890).
41. THE FEDERALIST NO. 80 (Alexander Hamilton) (arguing federal courts had authority under the Constitution to enforce enumerated limits on state power). But Article III jurisdiction alone does not seem to suffice. See U.S. CONST. amend. XI (imposing immunity in citizen-state diversity cases); Hans v. Louisiana, 134 U.S. 1 (1890) (holding Eleventh Amendment immunity extends to arising-under cases).
43. See, e.g., Harold L. Mai, Constitutionality of Special Bills for Private Relief, 6 WYO. L.J. 261, 261-62 (1951) (discussing New Mexico’s prior private bill procedure and a case that struck it in favor of general statutory waivers).
waived for proprietary functions (i.e., those also engaged in by private corporations), but not for purely governmental functions; this distinction has influenced the scope of immunity waivers across the country, including in Utah.49

* * *

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

II. GOVERNMENTAL TORT IMMUNITY IN UTAH

“Sovereign immunity was a settled feature of common law when Utah became a state and adopted its constitution.”50 From the beginning, it was based on the doctrine underlying every other state’s immunity.51 Before passing its Governmental Immunity Act, Utah’s approach to tort immunity closely tracked that of other states and the federal government. After passing the Act, the approach of the Utah legislature and courts to immunity has fluctuated considerably, leaving a confusing body of law that has trended toward increased immunity.

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


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

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

Courts viewed municipalities differently. As early as 1881, courts held municipalities liable when their negligence caused injury—if the injury was caused when carrying out a ministerial, as opposed to discretionary, function. Thus, in a case factually reminiscent of Wilkinson, the court held Salt Lake City liable for water damage caused by the city’s negligent maintenance of public

53. CONST. OF THE STATE OF DESERET, art. V § 18 (1872). This text was copied verbatim from the Nevada constitution, which Utah copied after three of its would-be seven constitutional drafts were not approved for statehood. Compare id., with NEV. CONST., art. V, § 21; Flynn, supra note 52, at 317. This copied text was also carried over into the present constitution. UTAH CONST., art. VII, § 13.
54. Creer, supra note 49, at 125 n.37 (noting that of thirty-five claims recommended by the board in 1955, thirty-four were approved).
55. 134 P. 626 (Utah 1913).
56. Id. at 630. The Court affirmed Utah’s immunity as a general principle of law, not as a statutory or constitutional command. Id. (noting the doctrine of immunity “is elementary and of universal application” and that “there is not a single authority to the contrary”) (citing cases from other jurisdictions). While courts may have viewed common law principles as derived rather than created, cf. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), today common-law principles are usually viewed as law created by courts, see Stephen E. Sachs, Finding Law, 107 CAL. L. REV. 527, 529–531 (2019) (discussing the prevailing modern conception before offering a contrary view).
58. Levy v. Salt Lake City, 1 P. 160 (Utah 1881); see also DeBry, 889 P.2d at 437–38 (collecting cases).
waterways.\textsuperscript{59} Over time, and by the 1950s, the ministerial-
discretionary test evolved into the governmental-proprietary test,\textsuperscript{60} the test used in other jurisdictions.\textsuperscript{61} Municipalities could be liable for injuries caused during proprietary functions, but not for those caused during governmental functions.\textsuperscript{62}

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

Over time, courts began to apply the governmental-proprietary distinction in cases involving the state, contrary to the Wilkinson holding.\textsuperscript{66} In so doing, courts relied on cases involving

\textsuperscript{59}. Levy, 1 P. at 162-64.
\textsuperscript{60}. DeBry, 889 P.2d at 439.
\textsuperscript{61}. See supra notes 49–50 and accompanying text.
\textsuperscript{62}. Id.
\textsuperscript{63}. Ramirez v. Ogden City, 279 P.2d 463, 465 (Utah 1955) (internal quotation marks omitted).
\textsuperscript{64}. Id.
\textsuperscript{65}. DeBry, 889 P.2d at 439; see also Creer, supra note 49, at 127–29. For example, operating a golf course, Jopes v. Salt Lake Cnty., 343 P.2d 728 (Utah 1959), a sledding hill, Davis v. Provo City Corp., 265 P.2d 415 (Utah 1953), and a sewer system, Cobia v. Roy City, 366 P.2d 986 (Utah 1961), were governmental functions. However, operating a swimming pool, Burton v. Salt Lake City, 253 P. 443 (Utah 1926), and a waterworks system, Egelhoff v. Ogden City, 267 P. 1011 (Utah 1928), were proprietary functions. More poignantly, operating a public hospital was both proprietary, Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975), and governmental, Madsen v. State, 583 P.2d 92 (Utah 1978). Other jurisdictions have had similar frustrations and incongruencies with the dichotomy. Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1233–34 (Utah 1980) (collecting cases); Gordon L. Roberts & Charles H. Thronson, A New Perspective – Has Utah Entered the Twentieth Century in Tort Law?, 1981 Utah L. Rev. 495, 513. One explanation for why the dichotomy has produced such incongruous results is that the underlying premise (sovereign immunity) is itself unsound. Standiford, 605 P.2d at 1234 (citing Indian Towing Co. v. United States, 350 U.S. 61 (1955)).

\textsuperscript{66}. Sheffield v. Turner, 445 P.2d 367, 368 (Utah 1968) (applying the distinction to find operating a state prison a governmental function); White v. State, 579 P.2d 921, 923 (Utah 1978) (applying the distinction to find the activities of an industrial commission to be a governmental function).
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municipalities. This caused the once-separate doctrines for state and municipality immunity to harmonize over time, both being governed by the messy governmental-proprietory distinction.

B. The Utah Governmental Immunity Act

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

Despite this apparent skepticism of tort immunity, however, the Act did not waive all tort immunity. The Act is structured as follows. First, the Act retains immunity for “any injury that results from the exercise of a governmental function.” Immunity is then waived in general areas including for “any injury proximately caused by [the negligence] of an employee committed in the scope of employment.” Finally, the Act carves out of those waivers narrow areas in which immunity is retained. One of these retentions of immunity is relevant here. Notwithstanding the

68. DeBry, 889 P.2d at 440. It is not clear whether this shift had happened or was just about to happen when the Utah Governmental Immunity Act was passed. See id. (citing Sheffield, 445 P.2d at 368).
70. Taylor ex rel. Taylor v. Ogden City Sch. Dist., 927 P.2d 159, 167-69 (Utah 1996) (Durham, J., dissenting) (overviewing the legislative history of the Governmental Immunity Act). For example, a committee report noted “[t]here was virtual unanimity that immunity . . . should be waived . . . for the negligent acts or omissions of employees.” Id. at 168 (Durham J., dissenting) (emphasis in original) (quoting Utah Legislative Council, Report of the Governmental Immunity Committee 67-68 (1964)).
71. Id. (quoting Floor Debate, Statement of Representative Ray Harding, 65th Utah Leg., Gen. Sess. (Feb. 11, 1965) (House Recording No. 2, Side 2) (“I believe that to allow a person to commit a wrong and . . . to hide behind the ancient doctrine of [sovereign immunity] is to be but an ostrich and put your head in the sand . . . . I think that we must accept [our] obligations.”).
72. UTAH CODE ANN. § 63G-7-201(1) (2020).
73. Id. at § 63G-7-301(2)(i).
74. Id. at § 63G-7-201(4).
waiver of immunity for employee’s negligence, the Act retains immunity “if the injury arises out of or in connection with, or results from . . . infliction of mental anguish.”75 That retention of immunity is discussed more in depth in Section II.C.

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

C. Post-Act Immunity Jurisprudence

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

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

Using this assumed power, Utah courts applied the governmental-proprietary distinction until 1980, using the

75. Id. at § 63G-7-201(4)(b).
77. UTAH CODE ANN. § 63G-7-201(2) (2020) (applying the retentions “[n]otwithstanding” any waiver of immunity).
78. UTAH CODE ANN. §§ 63-30-1, 3 (1965).
79. Id. at §§ 63-30-1 to -38.
80. Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1232 (Utah 1980) (citing Arvo van Alstyne, Governmental Tort Liability: A Decade of Change, 1966 U. ILL. L. F. 970 (1966)); see also id. at 1235 (“This language gives this Court the power to define understandably and logically the term ‘governmental function.’”).
distinction to “limit the harsh results” of sovereign immunity. Both before and after the Act, however, the distinction was nothing but incoherent and unworkable. The Utah Supreme Court described it variously as “one of the most unsatisfactory [tests] known to the law,” “impracticable,” a “quagmire,” and causing “inevitable chaos.” And the test did produce “irreconcilable” and “incongruous” results. Selecting a sledding hill and operating a golf course were deemed governmental functions, while operating a swimming pool was proprietary. And operating a city sewer system was governmental, while operating a city waterworks system was proprietary. In the span of three years, operating a public hospital was characterized as first proprietary and then governmental.

Citing this incoherence, the Utah Supreme Court soon jettisoned the governmental-proprietary distinction. The court replaced the distinction with a test turning on whether the government’s activity is so “unique” that it “can only be performed by a governmental agency” or on whether the activity is “essential to the core of governmental activity.” Critically, change was motivated by the incoherence of prior doctrine, not a belief that government liability needed to be expanded. In fact, when changing the test, the Utah Supreme Court openly criticized the doctrine of sovereign immunity as itself “largely unsound.” For the court, the reason the distinction had proved unworkable was because it was founded on a doctrine—sovereign immunity—that itself made little sense.

Soon after the court developed its new test, the Utah Legislature stepped in to supersede it. In a 1987 amendment to the Act, the

81. Id. at 1233–36.
82. Id. at 1233–34 (internal quotations omitted).
83. Id. at 1233 (internal citations omitted).
84. Id. (collecting cases) (internal citations omitted).
85. Id. (collecting cases) (internal citations omitted).
86. Id. (citing Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975); Madsen v. State, 583 P.2d 92 (Utah 1978)).
87. Id. at 1236–37.
88. Id.
89. Id. at 1234.
90. Id.; see also id. at 1234 n.4 (calling the reason why American states enjoyed sovereign immunity “unclear”).
91. Id.
Legislature defined “government function” to include essentially every action engaged in by government: “‘Government function’ means any act, failure to act, operation, function, or undertaking of a governmental entity.” The amendment specifically overruled the prior tests, noting that whether an activity qualifies as a governmental function does not depend on whether it is “governmental, proprietary, a core governmental function, unique to government . . . essential to a government . . . function, or could be performed by private enterprise.” In other words, the Legislature changed the baseline from immunity for some government activities to immunity for all government activities. Only if the State specifically waived immunity could suit proceed against it, in contrast to prior doctrine.

The Utah Supreme Court struck the amendment as unconstitutional under the state constitution’s Open Courts Clause. To do so, the court applied a substantive interpretation of that clause first introduced in Berry ex rel. Berry v. Beech Aircraft Corp. that limited the legislature’s power to abrogate common law remedies. Under the Berry test, laws that eliminate previously available remedies are presumptively unconstitutional and subject to a heightened level of scrutiny. The court applied the test because the 1987 amendment eliminated a remedy that existed when the Open Courts Clause was ratified: before the 1987 amendment, the government was “not entitled” to immunity for proprietary functions and could be held liable in torts caused during those functions; after the 1987 amendment changed the baseline for immunity, the government gained immunity in those cases. The court also found the law failed Berry heightened scrutiny. With the 1987 amendment struck, Utah was not immune for proprietary functions.

93. Id.
94. Id.
95. Laney v. Fairview City, 57 P.3d 1007 (Utah 2002); UTAH CONST., art. I § 11.
96. 717 P.2d 670 (Utah 1985).
97. Laney, 57 P.3d at 1022.
98. Berry, 717 P.2d at 680. Specifically, a law eliminating a previously available remedy is constitutional only if the government proves (a) the law provides a “reasonable alternative remedy” that provides “essentially comparable substantive protection” or (b) the law eliminates a “clear social or economic evil” and is a reasonable means of eliminating that evil. Id.
99. Laney, 57 P.3d at 1023.
100. Id. at 1023–27.
The legislature responded by reenacting the same provision.101 By so doing, the legislature made explicit it had changed its view on immunity. Whereas legislators supporting the original Act hoped to reduce sovereign immunity and criticized the very notion of sovereign immunity, legislators supporting the reenactment suggested the opposite.102 One senator stated, “We are headed for a showdown with the [Utah] Supreme Court; . . . hopefully . . . the court will recognize the policy stand we are making.”103

Though the same constitutional arguments are at play, the court has recognized the legislature’s choice and has yet to strike the reenactment.104 In so doing, the court has distanced itself from Berry’s substantive interpretation of the Open Courts Clause. Though it had used Berry to strike other immunity-related laws as well,105 the court has criticized and limited Berry and its progeny to their facts.106 Thus, the current Act retains a broad definition of “governmental function,” one that encapsulates virtually every governmental activity.107

From Utah’s constitutional commitment to a claim review board through the confusing governmental-proprietary distinction to an across-the-board grant of immunity subject to only specific waivers, Utah’s path with immunity has been convoluted. Both the court and the legislature have fluctuated immensely in their

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102. Goldstein, supra note 101, at 385 (discussing legislative history).
103. Id. (quoting Floor Debate, 55th Leg., Gen. Sess. (Utah Feb. 25, 2004) (Senate recording tape no. 39, side A) (statement of Sen. Dave L. Thomas)).
107. UTAH CODE ANN. § 63G-7-102(5) (2020). The Act defines “governmental function” to mean “each activity, undertaking, or operation of a governmental entity,” including those “performed by a department, agency, employee, agent, or officer of a governmental entity.” Id.
approaches to immunity and have clashed with each other. In the process, the two together have left a body of law just as unsatisfactory as the original governmental-proprietary distinction. This uncertainty makes legal scholarship on Utah’s immunity all the more interesting; with such a convoluted history to build on, the legislature and courts may see fit to reconsider tort immunity, including for mental anguish claims. This Note argues they should do just that.

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

III. UTAH SHOULD WAIVE IMMUNITY FOR MENTAL ANGUISH

Under the Act, Utah has always retained immunity for mental anguish. The Utah Legislature should reconsider this. Both the legislature and the Utah Supreme Court should reconsider Utah’s retention of tort immunity generally. As discussed above (in Part I), there is clear historical rationale for sovereign immunity generally. In addition, and as shown here, Utah retains more tort immunity than is justified by the rationales given for immunity. This is especially true for mental anguish.

A. Rationales for Tort Immunity

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

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

1. Logical Rationales

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

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

The validity of these premises is far beyond the scope of this Paper, but some points bear noting. Initially, if presented categorically, the logic forces the conclusion that government can never do anything wrong that is enforced against it. This is an untenable conclusion for any system of popular sovereignty that features limited seats of government whose actions bind each other.\textsuperscript{112} So, unless some rationale is given as to why government

\begin{footnotesize}
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\item \textsuperscript{108} Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).
\item \textsuperscript{109} WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 975 (4th ed. 1971).
\item \textsuperscript{110} Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850).
\item \textsuperscript{111} \textit{E.g.}, Diarmuid F. O’Scanlain, \textit{The Natural Law in the American Tradition}, 79 FORDHAM L. REV. 1513, 1515–19 (2011).
\item \textsuperscript{112} \textit{E.g.}, AMAR, supra note 32, at 10–17 (discussing popular sovereignty); 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 230 (statement of James Iredell) (1876) (“\textit{O}ur governments have been clearly created by the people . . . . The same authority that created can destroy”); \textit{THE FEDERALIST} NOS. 39, 194 (James Madison) (George W. Carey & James McClellan eds., 2001) (defining a republic as “a government which derives all its powers directly or indirectly from the great body of the people”).
\end{itemize}
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should be above some laws but not others, the first rationale must fail.

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

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

The third logical rationale is that government cannot be held liable for the fulfillment of its legitimate ends. This has intuitive appeal. Members of the public cannot hold the government liable for the fulfillment of those activities that “the People” commissions

113. One possible explanation is consent: government stands above all laws, except when it consents to being sued for violating a particular law. See Jaffe, supra note 11, at 3 (citing FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD 1518 (2d ed. 1905)). This explanation seems to fail. Consent comes about by law, or by changing law. How can the government’s creation of a second law (that giving consent to suit on the first) make the first law enforceable against it? If the premise is that a creator of law is above every law it creates, the government would remain above both laws, neither being enforceable against it.

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


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

117. Fritz Schulz, BRACTON ON KINGSHIP, 60 ENGL. HIST. REV. 136, 165, 168 (1945) (arguing, Bracton thought “law makes the king, [so] the king must make a return present to the law by subjecting himself to its rules”); Holdsworth, supra note 15, at 10 (calling it “well recognized” that the Crown was “subject to the law” and “morally bound to do the same justice to his subjects as they could be compelled to do to one another”).

118. Jaffe, supra note 11, at 5.

government to do.\textsuperscript{120} However, this rationale has a natural limit: it justifies immunity only for government actions that are legitimate ends. It does nothing to justify immunity for government actions falling without that scope—which of course is where all the action is. Government is not commissioned to commit torts. The government’s grand commission surely does not include battery without public necessity or the color of authority, trespass without a proper warrant, or the failure to act as a reasonable person would in pursuit of otherwise legitimate ends. Thus, even if government were immune to suits arising from the fulfillment of its own ends, that would not justify tort immunity. Utah’s retention of some tort immunity, including for negligence causing mental anguish, thus extends beyond the immunity that this rationale can justify.

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

2. Legal Rationales

Legal rationales in favor of tort immunity include that “no court can have jurisdiction” over the sovereign\textsuperscript{121} and that a judiciary’s order holding another governmental entity liable in tort offends separation of powers.\textsuperscript{122} Again, full analysis of these rationales is beyond the scope of this Note, but some points bear emphasizing.

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

The second legal rationale fares only slightly better. Turning on separation of powers, it suggests that courts should not hold the legislature liable for harm caused by a legislative act, for to do so would be to pass judgment on the legislature’s policymaking authority. “Separation of powers never has been understood as insulating the activities of other branches of government from judicial review.” The United States Supreme Court has framed the separation of powers inquiry as whether an action “impermissibly interferes with the [other branch’s] exercise of [its] constitutionally appointed functions.” Applying that analysis

v. Georgia, 2 U.S. 419, 446 (1793) (Iredell, J., dissenting). However, consent does not create subject-matter jurisdiction. But see Hans v. Louisiana, 134 U.S. 1, 17 (1890) (while holding that federal courts lack jurisdiction over suits against a state by a citizen of the same state, noting that states may consent to jurisdiction). Even assuming that ratifying the Constitution did effectuate a waiver of immunity, this does not explain the state’s pre-convention suability. Jackson, supra note 38, at 527.

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


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

127. DeBry v. Noble, 889 P.2d 428, 436 (Utah 1995) (“Governmental immunity . . . was created by the courts, not by the Legislature.”); Nieting v. Blondell, 235 N.W.2d 597, 600 (Minn. 1975) (“Therefore, it is this court’s duty and prerogative to determine whether it should adhere to its own rule of tort immunity . . . .”); see also Moliitor v. Kaneland Comm’Y Unit Dist. No. 302, 163 N.E.2d 89 (III. 1959) (limiting tort immunity); Muskopf v. Corning Hosp. Dist., 359 P.2d 457 (Cal. 1961) (same).

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

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

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

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here, tort liability would only offend separation of powers if liability impermissibly interferes with the relevant branch’s ability to perform its constitutionally mandated functions. It’s hard to imagine tort liability that causes such an interference.

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

Moreover, even if this separation of powers rationale were taken at face value, it would not justify categorical tort immunity. At most, separation of powers concerns would justify immunity for legislative,132 judicial,133 prosecutorial134 and, perhaps, discretionary functions for which liability for the tortious manner of executing the function interferes with whether the function should be performed. Only rarely will that limit governmental tort liability.135

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

3. Practical Rationales

Finally, there are practical rationales for immunity. These include the following four rationales. First, government officials should not be held liable for doing that which they were elected or hired to do.136 Second, the public should be protected from the inconvenience of paying to compensate emotional injuries caused by government actors—those funds could be used to serve the

131. See Creer, supra note 49, at 135.
135. Nieting v. Blondell, 235 N.W.2d 597, 603 (Minn. 1975) (distinguishing the “tort area” from “discretionary functions or legislative, judicial, quasi-legislative, and quasi-judicial functions”).
136. Mosk, supra note 45, at 11.
public interest elsewhere. A third rationale is that the possibility of liability could make government officers overly cautious. If they are too worried about being held liable in tort, they may refrain from fulfilling their duties vigorously. Fourthly and finally, liability could keep government from engaging in some activities for fear of being bankrupt or being hauled into court. This Note offers brief thoughts on the first three of these practical rationales, concluding they do not justify tort immunity. This Note does not analyze this fourth rationale because its strength rests on whether one believes government should engage in the tasks that tort liability would disincentivize it from doing—a policy question without a clear answer.

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

The second rationale—saying “it is better that an individual should sustain an injury than that the public should suffer an inconvenience” only holds water if protecting the government’s

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

139. If government should be involved in those functions, immunity may be a means of ensuring those functions are fulfilled. If government should not be involved in those functions, then liability is a means of keeping the government out. Or if government should be involved in fewer functions generally or more focused on other functions, then liability is a means of forcing the government to allocate resources only to those functions which are most important.

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

141. Muskopf, 359 P.2d at 459 (citing Mower, 9 Mass. at 249); see also Alden v. Maine, 527 U.S. 706, 749 (1999) (defending sovereign immunity because liability would make a state
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Treasury “is more important than the benefits of liability,” including compensating wrongs and deterring wrongdoing.\textsuperscript{142} This claim is not self-evident.

Worse, however, the rationale poses a false dichotomy. The public “suffer[s] an inconvenience” whether or not government is immune in tort. The only question is on whom the government places that cost. Whenever government acts tortiously, it imposes a probabilistic cost (call it a “Tort Cost”) on all citizens: the harm caused by a governmental tort multiplied by the probability of being an injured party. The public pays the Tort Cost whether government is immune or not—the only difference immunity makes is to shift the burden from the few that are injured to the tax base. If government does not enjoy tort immunity, taxpayers pay the Tort Cost by diverting tax dollars to compensating those whom government ultimately injures. If government does enjoy tort immunity, then the public shares the probabilistic Tort Cost as a de facto tax: all citizens suffer a probabilistic injury, and those who become victims pay the actual Tort Cost themselves. Those that interact with the government more—who may be poorer—are the ones left to pay for the torts, a sort of regressive tax that concentrates the “public’s inconvenience” on the unlucky few.\textsuperscript{143} Either way, the public pays for government’s torts.

Furthermore, this second rationale is inconsistent with the government’s purpose. Government is charged with serving the public interest,\textsuperscript{144} and one of those duties is to reallocate among

\textsuperscript{142}. Chemerinsky, \textit{supra} note 1, at 1217.

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

\textsuperscript{144}. \textsc{The Federalist} No. 45, at 237–38 (James Madison) (George W. Carey & James McClellan eds., 2001) (“[N]o form of government whatever, has any other value, than as may be fitted for the attainment of the object of advancing the public happiness”); see also \textsc{The Federalist} No. 2 (John Jay) (suggesting the same); \textsc{The Federalist} No. 30, at 148 (Alexander Hamilton) (same). The authors of the Federalist Papers were not alone in asserting government exists for the happiness of the people. \textsc{John Locke, Second Treatise of Government} § 229 (C.B. McPherson ed. 1980) (1690) (“[T]he end of government is the good of mankind”); \textsc{1 William Blackstone, Commentaries on the Laws of England} 128 n.8 (George Sharswood ed. 1875) (1765) (“It has become a favourite maxim that it is the great duty of government to promote the happiness of the people. The phrase may be
citizens the cost of torts. Much of tort law itself can be explained as an exercise in allocating among society the accidental costs incident to a social world. The proposition that government should reallocate these costs when caused by private individuals but not when caused by government requires explanation. That the government is charged with serving public interest suggests that it, more so than private tortfeasors, should compensate its victims. “If the state is properly to serve the public interest, it must strive . . . to achieve the goals of protecting the people and of providing them with adequate remedies . . . .” Failing to do so through tort immunity brings government in conflict with its own purpose. In Utah, this very idea animated its 1965 expansion of governmental liability; congresspeople stated it was unfair for one individual to bear a burden that society is responsible for.

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

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

interpreted . . . well, but it is . . . inaccurate . . . . It is the inalienable right of the people to pursue their own happiness; and the true and only true object of government is to secure them this right.”); DECLARATION OF INDEPENDENCE (U.S. 1776) (noting the “only legitimate purpose of government” is to protect, inter alia, the “pursuit of happiness”).

145. Gellhorn & Schench, supra note 36, at 737.
146. See Nieting v. Blondell, 235 N.W.2d 597, 603 (Minn. 1975).
147. Id.
148. Id.
150. Creer, supra note 49, at 133–34.
152. UTAH CODE ANN. § 63G-7-202(3).
The rationale boils down to an argument that government tort liability is inefficient. This seems wrong. Any threat of liability must create an incentive for governmental actors to be more cautious. As Justice Holt stated in a celebrated action in case for a parliamentary officer’s rejection of his vote in an election, “to allow this action will make public[] officers more careful . . . .” 153 The incentive to exercise precaution is socially optimal for private actors, 154 and there is no reason why the precaution efficient for private actors would be too high for state employees, especially if the two are engaged in the same activity (as is the case for proprietary functions). In fact, governmental tort liability is inefficient only if a negligence duty is too high a bar. 155 Stated otherwise, government tort liability is “too much” only if requiring public officials to act as reasonably prudent people is not socially optimal. That seems absurd.

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

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No rationale analyzed here justifies total tort immunity. The few rationales that can be construed to justify some tort immunity

155. Id.
156. Creer, supra note 49, at 134.
157. Id.
159. Id. at 863 (Keating, J., dissenting).
justify little to any. Each rationale analyzed here purports to justify immunity; additional rationales strongly justify liability.\textsuperscript{160} In sum, “governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia . . . . None of the reasons for its continuance can withstand analysis.”\textsuperscript{161} The twentieth-century trend away from tort immunity was sensible, and Utah should reexamine its retention of some tort immunity.

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

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

1. Early Pain-and-Suffering Doctrine

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

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


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

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

importantly, when the emotional distress was concomitant to a physical injury. 165

2. Later Expansion

In 1988, the Utah Supreme Court expanded plaintiffs’ ability to recover damages for emotional distress from private parties by recognizing a tort of negligence for the infliction of emotional distress. 166 Originally, a plaintiff could invoke this tort when a defendant placed her in the zone of danger. 167 The Utah Supreme Court later allowed plaintiffs to assert this tort claim when a defendant inflicted emotional distress in a way that foreseeably caused physical harm. 168

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

In 2018, the Utah Supreme Court again expanded recovery for mental anguish damages, extending recovery to “very limited circumstances” when a defendant owes a plaintiff a special duty. 174 To make this expansion, the court again relied heavily on the examples of other jurisdictions and American Law Institute recommendations. 175 And again, in expanding recovery, the court noted the same three concerns. 176 The first was a verifiability concern: a “need to ensure the genuineness” of mental injury and

167. Id.
170. Id. at 785 (Zimmerman, J., concurring).
173. See Johnson, 763 P.2d at 779.
175. Id. at 842–43.
176. Id. at 853.
causation.\textsuperscript{177} The second was a worry of unlimited recovery.\textsuperscript{178} And the third was a concern that a plaintiff should only be able to recover emotional distress damages when a defendant owes a duty to him.\textsuperscript{179} These concerns mirror those the court articulated in 1988, the last time the court had expanded emotional distress recovery, meaning the court’s policy objections to mental anguish recovery have largely remained constant.\textsuperscript{180}

3. Future Expansion

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

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

\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Compare id. at 853 (concerns of verifiability, unlimited recovery, and duty), with Harricher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 70 (Utah 1998) (concern of verifiability), and Johnson v. Rogers, 763 P.2d 771, 785 (Utah 1988) (Zimmerman, J., concurring) (concerns of predictability and unlimited recovery).
\textsuperscript{182} Tor D. Wager, Lauren Y. Atlas, Martin A. Lindquist, Mathieu Roy, Choong-Wan Woo & Ethan Kross, An fMRI-Based Neurologic Signature of Physical Pain, 368 NEW ENG. J. MED. 1388 (2013).
The second concern, that of unlimited recovery, will likely remain important even with improved verifiability of mental anguish. Scientific development can mitigate the concern of unlimited recovery only by objectifying mental suffering. But even if mental anguish were perfectly verifiable (a goal that science is far from),\textsuperscript{184} it would not follow that all mental anguish should be actionable.\textsuperscript{185} Thus, the unlimited recovery concern may remain important going forward. There is no reason to think, however, that the unlimited recovery concern will become weightier as science improves. As verifiability becomes less weighty and this second concern holds constant, a court should expand recovery.

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

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

How quickly change will be implemented is a different question. As is evident in the 2018 decision, which expanded recovery in “very limited circumstances,” the court implements change slowly.\textsuperscript{187} If the future reflects our past, the Utah Supreme Court will expand recovery only after other jurisdictions (and the


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

\textsuperscript{186} \textit{Mower v. Baird}, 422 P.3d 837, 842 (Utah 2018).

\textsuperscript{187} \textit{Mower}, 422 P.3d at 856–57.
ALI) implement change. The area of mental anguish recovery, nonetheless, is a candidate for future, expansive change.

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

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

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

The legislature originally passed the Act to expand government liability in tort, but some legislators “felt that it [was] in the best interest of the public” to retain immunity for certain injuries, including mental anguish. Why? Likely because legislators (as most others) were skeptical of mental anguish generally and were worried waiving immunity for a not-well-understood injury would result in the government paying out far too much in tort compensation. Mental anguish was viewed with much greater skepticism than it is now. Experts thought pervasive stigma of

188 Id. at 856; Johnson v. Rogers, 763 P.2d 771, 779 (Utah 1988).
189 UTAH CODE ANN. § 63G-7-301(2) (2020); § 60-30-10 (1965).
190 Id. at § 63G-7-201(4)(b) (2020); id. at § 60-30-10(2) (1965).
191 Id. at § 63G-7-201(4)(b) (2020).
192 Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1232 (Utah 1980).
194 E.g., Peter Hayward & Jenifer A. Bright, Stigma and Mental Illness: A Review and Critique, 6 J. MENTAL HEALTH 345 (1997). Hayward and Bright review the literature surrounding mental anguish stigma from the late 1950s to the early 1990s. Id. They conclude
mental illness was caused by beliefs that the mentally ill were prone to violence, that the mentally ill were responsible for their behavior, and that mental illness prognoses were likely inaccurate.\footnote{195} These popular beliefs pervaded the law, causing a general belief that allowing any recovery for mental anguish would open the floodgates to contrived injuries that were impossible to identify and quantify.\footnote{196} The 1965 Act’s distinction between physical and mental injuries appears to be a product of this stigma and was likely viewed as a sensible way to ensure tort liability did not go “too far.”

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

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

\footnotetext{195}{that in the late 1950s, mental anguish was viewed very negatively, with a largely uninformed public believing that the mentally ill were “dirty, unintelligent, insincere, and worthless.” Id. at 346 (quoting J.C. NUNNALLY, JR., POPULAR CONCEPTIONS OF MENTAL HEALTH: THEIR DEVELOPMENT AND CHANGE 233 (1961)). Experts disagreed as to whether popular feelings about mental anguish had improved or worsened by the mid-70s. Id. at 347.}


\footnotetext{197}{Mower v. Baird, 422 P.3d 837, 856 (Utah 2018).}
As evidenced by the court’s expansion of recovery in “very limited circumstances,” mental anguish is also the type of injury whose recovery will remain relatively certain. Since the court’s concerns about mental anguish recovery have remained constant, the future of mental anguish recovery is more predictable, especially given the court’s incremental approach. Though recovery will likely continue to expand, expansion will likely remain incremental and predictable, occurring only as emotional distress becomes more verifiable and other jurisdictions adopt change. This factor too makes mental anguish a good candidate for an immunity waiver.

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

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

* * *

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

198. Id.
199. Id. at 858–59.
IV. CHANGE IS UNLIKELY

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

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

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

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

The court’s expansive interpretation of the mental anguish exception is not surprising, given the Act’s expansive language and the legal profession’s skepticism of mental anguish damages in the 1960s. What is surprising is the court’s back-and-forth approach to restricting immunity and its failure to scrutinize the mental anguish exception. There is no question the Act intended to retain immunity for mental anguish injuries, but the court has engaged in only limited analysis as to whether “mental anguish” meant

202. Gabriel v. Salt Lake City Corp., 34 P.3d 234, 237 (Utah Ct. App. 2001) (holding waiver of immunity for negligence bars recovery for mental anguish damages but does not bar an entire negligence claim when other, non-emotional damages are pleaded). But see Cabaness v. Thomas, 232 P.3d 486, 505 (Utah 2010) (allowing recovery of emotional distress damages in breach of contract cause of action because mental anguish exception applies only to the waiver of immunity for negligence).
203. UTAH CODE ANN. § 63G-7-201(4)(b) (2020) (retaining immunity for “any” injury “arising out of or in connection with, or that results from” the “infliction of mental anguish”).
something different in 1965 than it does today, whether the mental anguish exception violates the Open Courts Clause, and whether the retention of immunity for mental anguish can otherwise be restricted—in any way.\textsuperscript{204} Though the court originally interpreted the Act to give it “the power to restrict the scope of governmental immunity”\textsuperscript{205} and wielded that power quite aggressively to strike portions of the Act as unconstitutional,\textsuperscript{206} the court has since stepped back from that role to the extent of limiting away the precedential value of those prior opinions.\textsuperscript{207}

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

\textsuperscript{204} See, e.g., Shively v. Utah Valley Univ., No. 2:20-cv-119, 2020 WL 4192290, at *4 (D. Utah July 21, 2020) (dispensing with arguments that the 1960s meaning of “mental anguish” did not include severe mental illnesses because the Utah court has not interpreted “mental anguish” in that context).

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


\textsuperscript{207} The definition in turn being a response to Standiford, 605 P.2d at 1233–34.

\textsuperscript{208} Utah Code Ann. § 63-30d-102(4) (Supp. 2004); Goldstein, supra note 101, at 385.

\textsuperscript{209} Laney, 57 P.3d at 1028 (Russon, J., concurring).

If the court were to apply *Berry* to the Act’s retention of immunity for mental anguish, it would almost certainly be struck—*Berry’s* presumption of unconstitutionality and searching test make it difficult for any statute to survive scrutiny.\(^{212}\) The retention of immunity for injuries arising from mental anguish, moreover, is a clear case under *Berry*. There is no alternative remedy for those whose claims are barred by the mental anguish exception. There is no “clear” social or economic evil eliminated by the exception; all policies supporting immunity that have been analyzed herein either fail or are questionable. As shown, no policy supports total tort immunity—neither categorical immunity for all torts nor categorical immunity for any class of injuries, such as emotional distress injuries. Rather than being a social evil, vindicating a personal interest in mental tranquility is a social good, as evidenced by Utah’s trend toward increased recovery of mental anguish damages. Finally, even if the mental anguish exception did eliminate a clear economic or social evil, it would do so arbitrarily and unreasonably by conditioning recovery on the character of the injury suffered, which is no fault of the victim, when allowing recovery for mental anguish, as discussed, would better serve the purposes of immunity and the Act.\(^{213}\) If *Berry* were to be applied, the mental anguish exception would surely fail.

Yet, there are two reasons why the court would not even get to the *Berry* analysis. First, the current court has shown disfavor for *Berry*.\(^{214}\) Second, *Berry* only applies to statutes that violate the Open Courts Clause by eliminating a remedy that existed at law.\(^{215}\) As discussed, no cause of action for emotional distress existed at common law before 1965. However, emotional distress damages

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212. I have explained the *Berry* test. See text accompanying *supra* note 98. For convenience, I repeat it here. *Berry* applied the Open Courts Clause to mean that an enactment abrogating a prior held right is valid only if it provides an effective a reasonable alternative remedy or if it eliminates a clear social or economic evil and the elimination of that evil is neither arbitrary nor unreasonable. *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 679–81 (Utah 1985). Justice Stewart has noted that the *Berry* test had been used to strike only two statutes by 1999 and is essentially the same test used in a substantive due process analysis by the United States Supreme Court. *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1216 (Utah 1999) (Stewart, J., concurring).

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

214. See cases cited *supra* note 106.

215. *Laney*, 57 P.3d at 1021 (“If no remedy was eliminated, there is no need to proceed with the *Berry* test.”).
could be recovered if concomitant to physical injury, if defendant acted willfully or wantonly, or when resulting from an independently existing cause of action.\textsuperscript{216} The Open Courts Clause protects “remed[ies] by due course of law,”\textsuperscript{217} although there is no clear consensus as to what exactly this entails.\textsuperscript{218} In any case, to show that the Act’s retention of mental anguish eliminated an existing remedy, a plaintiff would have to argue that, absent the Act, her emotional damages would have been recoverable against the government. The governmental-proprietary distinction was a well-established component of tort immunity before the Act.\textsuperscript{219} Thus, before even getting to \textit{Berry}, a plaintiff would have to show injury occurred while the governmental entity engaged in a proprietary function and her emotional distress would have been recoverable absent the Act (i.e., it was accompanied by physical injury, the government acted willfully, or her emotional distress was caused by a cause of action existing independently therefrom). It is not difficult to conceive of such a fact pattern. Yet, the court’s current disfavor of \textit{Berry}’s level of scrutiny, the court’s stepping away from strong immunity challenges, and the court’s expansive interpretation of the Act’s retention of immunity for mental anguish together make it unlikely that the court will limit immunity for government-caused mental anguish.

\textbf{B. The Legislature Likely Will Not Waive Immunity for Mental Anguish}

The legislature also seems unlikely to waive immunity for mental anguish. The legislature seems to support immunity more than before. Since passing the original version of the Act, the legislature has amended it to expand immunity. For example, the legislature responded to the courts’ early distinction between governmental and proprietary actions by amending the Act to apply to \textit{all} government actions or inactions, whether proprietary

\begin{thebibliography}{9}
\bibitem{216} See \textit{supra} notes 165--69 and accompanying text.
\bibitem{217} \textsc{Utah Const.} art. I, § 11.
\end{thebibliography}
or not. After the court invalidated that definition as unconstitutional, the legislature responded by reenacting essentially the same amendment. In so doing, legislators made clear they intended to increase governmental immunity beyond what the prior version of the Act allowed.

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

**CONCLUSION**

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

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221. Laney v. Fairview City, 57 P.2d 1007, 1027 (Utah 2002).
223. E.g., Floor Debate, 55th Leg., Gen. Sess. (Utah Feb. 25, 2004) (Senate recording tape no. 39, side A) (statement of Sen. Dave L. Thomas) (“We are headed for a showdown with the [Utah] Supreme Court[,] hopefully . . . the court will recognize the policy stand we are making.”).
224. Utah Code Ann. § 63G-7-201(4)(b) (2020); § 60-30-10(2) (1965).