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# Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine

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# Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine

Timothy D. Lytton\*

*The free public services doctrine (also known as the municipal cost recovery rule) states that a government entity may not recover from a tortfeasor the costs of public services occasioned by the tortfeasor's wrongdoing. This Article traces the history of the doctrine and argues for its elimination. The Article criticizes case law supporting the doctrine and raises objections based on fairness, efficiency, and institutional concerns about the proper limits of judicial policy making.*

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## I. INTRODUCTION

According to the free public services doctrine, a governmental entity may not recover from a tortfeasor the costs of public services occasioned by the tortfeasor's wrongdoing. These costs must instead be borne by the public as a whole through taxation. As one court put it, "[t]he general rule is that public expenditures made in the performance of governmental functions are not recoverable."<sup>1</sup> The

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1. Koch v. Consol. Edison Co., 468 N.E.2d 1, 7-8 (N.Y. 1984) (rejecting a claim by New York City against a power company to recover "costs incurred for wages, salaries,

doctrine has been adopted in at least ten states, including New York and California,<sup>2</sup> and it has been embraced by federal courts.<sup>3</sup> Courts

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overtime and other benefits of police, fire, sanitation and hospital personnel from whom services . . . were required" in response to rioting that took place during a citywide blackout caused by the power company's gross negligence).

2. See, e.g., *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 760-61 (Alaska 1999) (allowing recovery of oil spill cleanup costs only where permitted by statute); *County of San Luis Obispo v. Abalone Alliance*, 223 Cal. Rptr. 846, 859 (Cal. Dist. Ct. App. 1986) (denying recovery of law enforcement costs); *Penelas v. Arms Tech., Inc.*, No. 99-1941CA-06, 1999 WL 1204353, at \*2 (Fla. Cir. Ct. Dec. 13, 1999), *aff'd on other grounds*, 778 So. 2d 1042 (Fla. Dist. Ct. App.), *cert. denied*, 799 So. 2d 218 (Fla. 2001) (denying recovery of law enforcement and emergency services costs); *Mayor & Council of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685, 687-88 (La. Ct. App. 1st Cir. 1984) (denying recovery of fire suppression costs); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 423 N.E.2d 997, 998 (Mass. 1981) (denying recovery of fire suppression costs); *Township of Cherry Hill v. Conti Constr. Co.*, 527 A.2d 921, 922 (N.J. Super. Ct. App. Div. 1987) (denying recovery for emergency services in response to rupture of natural gas main); *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49, 54 (N.J. Super. Ct. Law Div. 1976) (denying recovery of oil spill cleanup costs); *Koch*, 468 N.E.2d at 7-8 (denying recovery of costs due to citywide blackout); *In re James AA*, 594 N.Y.S.2d 430, 432 (N.Y. App. Div. 1993) (denying recovery of state attorney general counsel fees); *Austin v. City of Buffalo*, 586 N.Y.S.2d 841, 842 (N.Y. App. Div. 1992) (denying recovery of fire suppression costs); *State v. Long Island Lighting Co.*, 493 N.Y.S.2d 255, 257 (Nassau County Ct. 1985) (denying recovery of costs related to removing fallen power lines); *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83, 84 (Pa. Commw. Ct. 1986) (denying recovery of emergency response costs to a natural gas main explosion); *Bd. of Supervisors v. U.S. Home Corp.*, 18 Va. Cir. 181 (Va. Cir. Ct. 1989) (denying recovery of clean-up costs related to an oil spill); *Dep't of Natural Res. v. Wis. Power & Light Co.*, 321 N.W.2d 286, 289 (Wis. 1981) (denying recovery of fire suppression costs); *Town of Howard v. Soo Line R.R.*, 217 N.W.2d 329, 331-32 (Wis. 1974) (denying recovery of fire suppression costs). A recent article on the doctrine misleadingly cites additional cases in Arkansas, Hawaii, Maryland, and Michigan. The first three of these involve claims by individual plaintiffs, not government entities, and the fourth deals with limitations on a statutory right of recovery for nuisance abatement. None of them indicate the adoption of the free public services doctrine. See Sarah L. Olson, *The Free Public Services Doctrine: Government Cost Recovery Claims*, FOR THE DEFENSE, Sept. 2001, at 27, 28 (citing *Ouachita Wilderness Inst., Inc. v. Mergen*, 947 S.W.2d 780 (Ark. 1997) (individual plaintiff); *Thomas v. Pang*, 811 P.2d 821 (Haw. 1991) (individual plaintiff); *Crews v. Hollenbach*, 751 A.2d 481 (Md. 2000) (individual plaintiff); *Brandon Township v. Jerome Builders, Inc.*, 263 N.W.2d 326 (Mich. Ct. App. 1977) (denying a statutory claim for recovery)).

3. Acceptance of the doctrine in federal courts has been mixed. Some federal courts favor the doctrine. See, e.g., *United States v. Standard Oil Co.*, 332 U.S. 301, 313-14 (1947) (denying recovery for hospitalization and sick-pay benefits for a soldier injured by the tortfeasor); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1310 (7th Cir. 1992) (per curiam) (denying recovery of oil spill cleanup costs); *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) (denying recovery of disaster response costs following an airplane crash); *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983) (denying recovery of petroleum spill cleanup costs); *Bd. of Comm'rs v. Nuclear Assurance Corp.*, 588 F. Supp. 856, 864-65 (E.D. Ohio 1984) (denying recovery for expenses incurred in preparing for potential nuclear accident); *Allenton Volunteer Fire Dep't v. Soo Line R.R.*, 372 F. Supp. 422, 423 (E.D. Wis. 1974) (denying recovery of fire suppression costs); *In re Sincere Navigation Corp.*, 327 F. Supp. 1024, 1026 (E.D. La. 1971) (denying recovery of rescue costs arising from a maritime collision); *United States v.*

have employed the free public services doctrine in a variety of contexts, denying recovery of government expenditures necessitated by negligently caused fires, oil spills, and airline crashes.<sup>4</sup> Most recently, several courts have cited the doctrine as a basis for dismissing municipal lawsuits against the gun industry.<sup>5</sup> In these cases, the courts have held that taxpayers, not gun makers, should bear the costs of law enforcement and emergency medical services rendered in response to gun violence. While many courts do not refer to the rule as the free public services doctrine, it was given this name by the United States Court of Appeals for the Seventh Circuit in a 1991 case, *In re Oil Spill by the AMOCO Cadiz*.<sup>6</sup> The court borrowed the name from a similar French law principle, *gratuité des services publics*, but cited American cases as the doctrine's source in U.S. law.<sup>7</sup> When applied to cities, the doctrine is sometimes called the municipal cost recovery rule.<sup>8</sup>

In this Article, I argue that the free public services doctrine should be eliminated. The doctrine shields industrial tortfeasors from liability for cleanup costs, passing those costs on to the public. It constitutes a tort subsidy to industry and functions as an insurance scheme for industrial accidents paid for by taxpayers. As we shall see,

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Harleysville Mut. Cas. Co., 150 F. Supp. 326, 331 (D. Md. 1957) (denying recovery of healthcare and sick-pay benefits of an injured soldier).

Other federal court decisions either declare exceptions to, explicitly reject, or ignore the doctrine. See, e.g., *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 200-01 (1967) (allowing recovery of costs related to removing sunken vessels from a river); *Pennsylvania v. Gen. Pub. Utils. Corp.*, 710 F.2d 117, 121-23 (3d Cir. 1983) (allowing recovery of government response costs and productivity losses arising out of a nuclear accident); *City of Evansville v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979) (explaining the federal common law right of recovery for water pollution cleanup); *United States v. Denver & Rio Grande W.R.R.*, 547 F.2d 1101, 1105 (10th Cir. 1977) (allowing recovery of fire suppression costs); *United States v. Chesapeake & Ohio Ry. Co.*, 130 F.2d 308, 310 (4th Cir. 1942) (allowing recovery of fire suppression costs); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 651-52 (D.R.I. 1986) (allowing recovery of asbestos removal costs); *United States v. Ill. Terminal R.R.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980) (explaining the federal common law right of recovery for nuisance abatement costs); *United States v. Andrews*, 206 F. Supp. 50, 53 (E.D. Idaho 1961) (allowing recovery of fire suppression costs).

4. See, e.g., *In re Oil Spill*, 954 F.2d at 1310 (oil spill); *Air Fla., Inc.*, 720 F.2d at 1080 (airline crash); *New Bedford Wholesale Tire, Inc.*, 423 N.E.2d at 998 (fire).

5. See, e.g., *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 911 (E.D. Pa. 2000), *aff'd on other grounds*, 277 F.3d 415 (3d Cir. 2002); *Ganim v. Smith & Wesson Corp.*, 26 Conn. L. Rptr. 39, 46 n.7 (Conn. Super. Ct. 1999), *aff'd*, 780 A.2d 98 (Conn. 2001) (lawsuit by City of Bridgeport, Connecticut); *Penelas*, 1999 WL 1204353, at \*2 (lawsuit by Miami-Dade County); *City of Cincinnati v. Beretta U.S.A. Corp.*, [2000 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 15,880, at 55,181 (Ohio Ct. App. Aug. 11, 2000).

6. 954 F.2d at 1310.

7. *Id.* (citing *Air Fla., Inc.*, 720 F.2d at 1079-80; *Atchison*, 719 F.2d at 322).

8. See, e.g., *Beretta U.S.A., Corp.*, 126 F. Supp. 2d at 894.

the doctrine does not have particularly deep roots in the common law, dating back only to the 1970s. Moreover, the courts have failed to offer adequate justification for it. Case law concerning the doctrine is full of question-begging and misplaced arguments about judicial deference to legislative policy making. Furthermore, the doctrine is vulnerable to several objections based on fairness, efficiency, and institutional concerns that are not addressed in the case law. First, the doctrine unfairly shields from liability tortfeasors who harm governmental plaintiffs where they would otherwise be liable to private plaintiffs, and it passes the losses caused by those tortfeasors on to taxpayers. Second, it inefficiently externalizes the costs of tortfeasors' wrongdoing, costs that could easily be internalized by the purchase of liability insurance. Third, it is an improper exercise in judicial policy making, providing to negligent industries a hidden subsidy that courts should not support in the absence of explicit legislative approval. The most adequate response to these objections is to eliminate the doctrine altogether.

My argument proceeds as follows. Part II of the Article identifies some of the doctrine's antecedents and marks its appearance as a general rule in the 1970s. Contrary to the impression given by many courts, the doctrine does not have a long history as part of the common law. Part III delineates the scope of the doctrine, pointing out limitations and exceptions to the doctrine. Part IV further clarifies the doctrine by distinguishing it from more established doctrines with which it is often associated and sometimes confused. Part V exposes the inadequacies of judicial decisions that purport to justify the doctrine. Part VI raises several objections to the doctrine not addressed by the case law. Part VII discusses some of the implications of eliminating the doctrine altogether. Finally, Part VIII concludes with a brief summary of the argument.

## II. THE ORIGIN OF THE FREE PUBLIC SERVICES DOCTRINE

Determining the origin of the free public services doctrine is a somewhat tricky business. As a general rule of common law barring recovery of public expenditures, the doctrine first appears in the mid-1970s.<sup>9</sup> Prior to this time, however, one finds cases denying recovery

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9. The doctrine first appeared in two 1974 Wisconsin cases, *Allenton Volunteer Fire Department v. Soo Line Railroad*, 372 F. Supp. 422, 423 (E.D. Wis. 1974), and *Town of Howard v. Soo Line Railroad*, 217 N.W.2d 329, 330 (Wis. 1979). The doctrine next appeared in the 1976 New Jersey case, *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49, 54 (N.J. Super. Ct. Law Div. 1976), without citation to the earlier Wisconsin cases. Most subsequent cases

of specific types of public expenditures. For example, there are cases as far back as 1903 rejecting government claims against criminals for the costs of their capture and incarceration.<sup>10</sup> Similarly, a 1947 United States Supreme Court case denied the federal government the right to recover in common law tort the costs of medical care, wages, and loss of services from tortfeasors who injure soldiers.<sup>11</sup> In addition, cases from the 1950s and 1960s dealing with government recovery of fire suppression costs from tortfeasors based on statutory provisions are often cited in support of the free public services doctrine.<sup>12</sup> Although there is no common law question in this last group of cases, they are understood to imply, and dicta in one of them explicitly states,<sup>13</sup> that the government has no common law right to recover fire suppression costs and that any such recovery requires statutory authorization. All of these cases prior to the 1970s are indeed antecedents to the free public services doctrine, but they do not provide a solid precedential foundation for it.

In this Part, I analyze these antecedents to the free public services doctrine. I argue that none of them provides support for a general rule barring recovery of public service expenditures. While it would be an overstatement to claim that the free public services doctrine was made out of whole cloth, courts have been disingenuous in attempting to account for it by citing these doctrinal scraps.

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concerning the doctrine either directly cite one of these cases or cite cases that cite one of these cases.

10. See, e.g., *Dep't of Mental Hygiene v. Hawley*, 379 P.2d 22, 28 (Cal. 1963) (denying recovery of incarceration costs); *Napa State Hosp. v. Yuba County*, 71 P. 450, 452 (Cal. 1903) (denying recovery of incarceration costs); *County of San Luis Obispo v. Abalone Alliance*, 223 Cal. Rptr. 846, 853 (Cal. Ct. App. 1986) (denying recovery of law enforcement costs); *State Highway & Pub. Works Comm'n v. Cobb*, 2 S.E.2d 565, 567 (N.C. 1939) (denying recovery for costs related to apprehending escaped convict).

11. *United States v. Standard Oil Co.*, 332 U.S. 301, 313-14 (1947); see also *United States v. Harleysville Mut. Cas. Co.*, 150 F. Supp. 326, 330-31 (D. Md. 1957) (denying recovery of costs for hospital services to tort victim).

12. See *People v. Wilson*, 49 Cal. Rptr. 792, 794 (Cal. Dist. Ct. App. 1966) (recognizing statutory right of state to recover fire suppression costs and stating further that the right to recover fire suppression costs is a "creature of statute"); *Portsmouth v. Campanella & Cardi Constr. Co.*, 123 A.2d 827, 830 (N.H. 1956) (denying right of city to recover fire suppression costs based on statute); *State v. Boston & M. R.R.*, 105 A.2d 751, 754-55 (N.H. 1954) (recognizing statutory right of state to recover fire suppression costs from railroad that caused fire).

13. *Wilson*, 49 Cal. Rptr. at 794.

### A. Law Enforcement Costs Occasioned by Criminal Conduct

Cases rejecting government tort claims against criminals for the cost of their capture and incarceration are sometimes cited as a source for the free public services doctrine.<sup>14</sup> In these cases courts have held that the crimes involved did not constitute private wrongs against the state for which compensation is available in tort.<sup>15</sup> The principle established by these cases is that the affront to governmental authority entailed by the commission of a crime does not itself constitute a tort.

The 1939 case of *State Highway & Public Works Commission v. Cobb* provides a clear illustration of this principle.<sup>16</sup> In that case, the North Carolina State Highway and Public Works Commission sued Eddie Cobb, an escapee from the state prison, to recover expenses arising out of his recapture and return to prison.<sup>17</sup> The North Carolina Supreme Court reversed a judgment in favor of the state.<sup>18</sup> The court based its rejection of the state's claim on a two-step analysis of the right of government to recover in tort.<sup>19</sup>

As a first step, the court considered the peculiar nature of the state as a tort plaintiff:

If a tort is pursued by the sovereign, it must be with respect to the same sort of right and in the same way as may be allowed a private citizen. . . . A sovereign, who is also a natural person, may, of course, bring an action for tort in his individual capacity and with respect to his individual and proprietary rights. . . .

The State constitutes a sort of intangible sovereignty. Legally speaking, it cannot be assaulted, slandered, or injured as an individual with respect to a personality that it does not possess. But it does own property and has property rights which might be the subject of invasion. If a wrong is committed against it in the nature of a tort, it must be with respect to such a right.<sup>20</sup>

The court's analysis here rests on a conception of government as having a dual legal status of public entity and private person. The

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14. See, e.g., David C. McIntyre, Note, *Tortfeasor Liability for Disaster Response Costs: Accounting for the True Cost of Accidents*, 55 *FORDHAM L. REV.* 1001, 1008 n.44 (1987) ("The rule against common law liability for the cost of government services also has surfaced in a line of cases involving suits to recover from criminals or criminal suspects the costs incurred during their apprehension or detention.").

15. See, e.g., *Hawley*, 379 P.2d at 28; *Napa State Hosp.*, 71 P. at 452; *Cobb*, 2 S.E.2d at 567.

16. 2 S.E.2d at 567.

17. *Id.* at 566.

18. *Id.* at 568.

19. *Id.* at 567.

20. *Id.*



court explains that the state can sue in common law tort only as a private person.<sup>21</sup> Furthermore, as an "intangible" person, only certain categories of tort apply to it: the state has no physical integrity or personal dignity; the only common law rights it has are property rights.<sup>22</sup> Thus, the state can recover in tort only for violation of its property rights.<sup>23</sup>

As a second step, the court explained why the state's expenditure of public funds for the defendant's recapture was not recoverable in this case:

It does not appear that the defendant has invaded any property right of [the] plaintiff except that which may be involved in the expenditure of the State's public funds for his apprehension after his escape. Since his recapture was a public duty required by law under a general system which the State has established, the position of the sovereign towards such a public expenditure can scarcely be that of a private individual who has been compelled to spend money because of the tortious conduct of another. Indeed, in point of legal logic, defendant's yen for the open spaces and his heeding of the call of the wild was rather the occasion than the cause of the expenditure, or, at least, did not afford the compulsion. While his flight was contrary to the will of the sovereign, as expressed in its law, the expenditure for his recapture was voluntary.<sup>24</sup>

According to the court, although the defendant's escape from prison prompted the state to expend resources for his recapture, the defendant is not liable for this loss since the expenditure was "voluntary."<sup>25</sup> The court does not make clear, however, why the voluntary nature of the expenditure makes it unrecoverable.

The court explains that because the state's expenditure was voluntary, the defendant's conduct did not cause it.<sup>26</sup> Clearly, however, the defendant's escape did cause the expenditure insofar as it was a necessary condition for the expenditure. Perhaps the court means that the defendant's conduct was not a proximate cause of the expenditure, because the state's choice to recapture him constituted an intervening voluntary act that broke the causal chain. But the court itself seems to equivocate concerning the voluntary nature of the expenditure when it

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21. *Id.*

22. *See id.*

23. For a similar analysis of the dual legal status of municipal government, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1104 (1980).

24. *Cobb*, 2 S.E.2d at 567.

25. *Id.*

26. *Id.*

says that the state was duty bound to recapture the defendant under laws which the state itself established.<sup>27</sup> What the court might mean is that the defendant's conduct did not *wrongfully* cause the expenditure. His escape caused the expenditure in the same way a legitimate competitor causes a business owner to spend resources on advertising, rather than the way a careless driver causes a fellow motorist to spend resources on fixing a dent in his car. By asserting that the state's expenditure was "voluntary," the court might mean that it was not caused by any wrongdoing on the part of the defendant. The problem with this explanation is that the defendant's escape (unlike legitimate business competition) was a legal wrong, and this legal wrong caused the expenditure.

The key to understanding the court's reasoning lies in the first step of its analysis, according to which the state can recover in tort only for violation of its property rights. While it may be true that a wrong committed by the defendant (his escape from prison) caused the state's loss, this loss was not caused by the one kind of wrong for which government may recover in tort—the violation of a property right. The court explains that the defendant's escape was "a crime against the sovereignty of the State," which did not involve any violation of its property rights.<sup>28</sup> Thus, the state cannot recover in tort.

The refusal by courts to allow government recovery of law enforcement costs from criminals in cases like *Cobb* does not provide much of a precedential foundation for the free public services doctrine. As we shall see, the free public services doctrine rests on a very different basis. In *Cobb*, the court denied recovery because the defendant's criminal violation did not involve any private wrong against the state that would support recovery in tort. By contrast, the free public services doctrine bars recovery on the ground that public service expenditures are never compensable, even where the defendant's conduct constitutes a private wrong against the government. Cases rejecting recovery of law enforcement costs focus on the nature of the wrong, whereas the free public services doctrine focuses on the type of loss.

### *B. Federal Government Losses Resulting from Injury to Soldiers*

Another antecedent to the free public services doctrine is the 1947 United States Supreme Court decision in *United States v.*

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27. See *id.* at 566.

28. *Id.* at 567.

*Standard Oil Co.* holding that the federal government has no federal common law right to recover the costs of medical care and sick pay from tortfeasors who injure soldiers.<sup>29</sup> In that case, a negligent truck driver struck and injured a soldier.<sup>30</sup> The federal government sued the truck driver's employer for the costs of the soldier's hospitalization and his pay during the period of his disability.<sup>31</sup> In rendering its decision, the Court asserted that the issue of liability should be determined as a matter of federal, rather than state, common law.<sup>32</sup> It then went on to provide several grounds for rejecting the government's claim.<sup>33</sup>

To begin with, the Court viewed the government's claim as "novel," distinguishing it from well-established common law precedents concerning the liability of tortfeasors to their victims' employers and family members.<sup>34</sup> The Court noted that imposing liability would require "an exertion of creative judicial power" to place the government-soldier relation on the same legal footing as master-servant and family relations.<sup>35</sup> This the Court refused to do, asserting that the freedom of federal courts to "create new common-law liabilities" was more restricted than that of state courts.<sup>36</sup>

Next, the Court characterized the issue of whether the government should be allowed to recover as essentially "a question of federal fiscal policy" most appropriately settled by "congressional action" rather than judicial decision.<sup>37</sup> Additionally, the Court held that the creation of federal common law liability was unnecessary given that Congress could at any time create a statutory cause of action (which it subsequently did in the 1962 Federal Medical Care Recovery Act).<sup>38</sup> Finally, the Court expressed reluctance to upset settled expectations by creating a new liability. Thus, the Court concluded, the

exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a

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29. 332 U.S. 301, 313-14 (1947).

30. *Id.* at 302.

31. *Id.*

32. *Id.* at 310-11.

33. *Id.* at 311-12.

34. *Id.* at 302, 311-12.

35. *Id.* at 312-13.

36. *Id.* at 313.

37. *Id.* at 314.

38. *Id.* For the Federal Medical Care Recovery Act, see 42 U.S.C. §§ 2651-2653 (1994 & Supp. V 1999); see also Jeffrey F. Ghent, Annotation, *Validity and Construction of Medical Care Recovery Act (42 U.S.C. §§ 2651-2653), Dealing with Third-Party Liability for Hospital and Medical Care Furnished by United States*, 7 ALR FED. 289 (1971) (analyzing federal and state cases concerning the Federal Medical Care Recovery Act).

matter concerning which it has seen fit to take no action . . . [But] also would involve a possible element of surprise, in view of the settled contrary practice.<sup>39</sup>

These reasons for the Court's holding in *Standard Oil* are later employed as justifications for the free public services doctrine, and *Standard Oil* is cited by a 1983 case from the United States Court of Appeals for the Ninth Circuit that is itself cited by many courts as the origin of the doctrine.<sup>40</sup> One should be cautious, however, in relying too heavily on *Standard Oil* as precedent for the free public services doctrine. For one thing, the free public services doctrine's bar on recovery of government expenditures, including those required to protect the public or public property from harm, is far more expansive than *Standard Oil*'s specific rejection of reimbursement of healthcare services and sick pay provided to injured soldiers. For another thing, there is a certain irony in tracing the free public services doctrine back to federal common law, because, as we shall see below in Part III, federal common law is itself the source of several significant exceptions to the doctrine that are so broad as to make the doctrine inapplicable in most cases governed by federal common law.<sup>41</sup>

### C. *Recovery of Fire Suppression Costs Based on Statute*

A third antecedent to the free public services doctrine is cases concerning government statutory claims against tortfeasors for recovery of fire suppression costs. While these cases themselves do not involve common law claims, they are viewed as implying, and dicta in one of them explicitly states, that government has no common law right to recover fire suppression costs, and that any such right must be a product of statutory authorization.

In *State v. Boston & M. Railroad*, the State of New Hampshire, the City of Rochester, and the Town of Farmington sued a railroad to recover the costs of extinguishing a fire set by one of the railroad's locomotives.<sup>42</sup> The suit was filed pursuant to a statute imposing absolute liability on railroads to pay the expenses of extinguishing

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39. *Standard Oil*, 332 U.S. at 316.

40. See *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 322-24 (9th Cir. 1983) (citing *Standard Oil*, 332 U.S. at 301). The strength of these justifications will be considered *infra* Part V.

41. See, e.g., *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 207 (1967); *City of Evansville v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008, 1017-18 (7th Cir. 1979); *United States v. Chesapeake & Ohio Ry. Co.*, 130 F.2d 308, 310-11 (4th Cir. 1942); *United States v. Ill. Terminal R.R.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980).

42. 105 A.2d 751, 752 (N.H. 1954).

fires caused by them.<sup>43</sup> The trial ended in a jury disagreement necessitating a new trial, at which point the defendant appealed the trial court's denial of its motion for a directed verdict, arguing that the plaintiff's claim lacked sufficient evidence.<sup>44</sup> The New Hampshire Supreme Court ruled in favor of the plaintiffs, finding that they had provided adequate circumstantial evidence to reach the jury, and remanded the case for a new trial.<sup>45</sup> In an unrelated case, *Portsmouth v. Campanella & Card Construction Co.*, the New Hampshire Supreme Court denied the City of Portsmouth, New Hampshire recovery for fire suppression costs for extinguishment of a brush fire within the city limits under a statute allowing for municipal recovery of fire suppression costs related to forest fires.<sup>46</sup>

Although these cases deal exclusively with statutory claims, both have been cited in support of the proposition that there is no basis in common law for government recovery of fire suppression costs.<sup>47</sup> It seems that the existence of these statutes allowing recovery has been understood to imply that common law provides no such cause of action. The statutes in these cases, however, impose liability without fault and could just as easily be understood to imply that common law allows only for recovery based on negligence.

In one case dealing with a statutory claim for fire suppression costs, there at least appears to be dicta supporting the proposition that the common law provides no cause of action.<sup>48</sup> In *People v. Wilson*, the State of California brought a claim for fire suppression costs against a property owner who negligently set a fire that spread to land owned by neighboring property owners.<sup>49</sup> In support of its claim, the State cited three sections from the California Health and Safety Code providing that one who negligently sets a fire on or allows a fire to escape from his property to the property of another is liable both for damages to the

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43. *Id.* at 754.

44. The defendants emphasized the absence of eyewitness testimony concerning the fire's origin and the plaintiffs' failure to present evidence of other fires caused by the railroad under similar circumstances. *Id.*

45. *Id.* at 755.

46. 123 A.2d 827, 830-31 (N.H. 1956).

47. See, e.g., *Allenton Volunteer Fire Dep't v. Soo Line R.R.*, 372 F. Supp. 422, 423 (E.D. Wis. 1974) (citing *Campanella*, 123 A.2d at 827); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 423 N.E.2d 997, 998 (Mass. 1981) (citing *Campanella*, 123 A.2d at 827); *Town of Howard v. Soo Line R.R.*, 217 N.W.2d 329, 330 (Wis. 1974) (citing *Boston & M. R.R.*, 105 A.2d at 751).

48. See *People v. Wilson*, 49 Cal. Rptr. 792 (Cal. Dist. Ct. App. 1966).

49. *Id.* at 793.

neighboring property and for the expenses of fighting the fire.<sup>50</sup> The Code further specifies that courts are to treat liability for the costs of fire suppression as a charge to be paid on the same basis as "an obligation under contract, expressed or implied."<sup>51</sup>

The defendant responded by claiming that the State's claim, filed two years and three months after the incident, was barred by the two-year statute of limitations on contract actions.<sup>52</sup> The State replied that its action was governed by the three-year statute of limitations for actions based on liability created by statute.<sup>53</sup> In support of its position, the State cited authority to the effect that the three-year statute of limitations "applies . . . where the liability is embodied in a statutory provision *and* was of a type which did not exist at common law."<sup>54</sup> The California District Court of Appeal held that pursuant to the provisions of the Health and Safety Code, the State's action should be treated as a contract action and therefore subject to the two-year statute of limitations.<sup>55</sup>

In admitting the plausibility of the State's position that the three-year statute of limitations applied to its claim, the court stated: "No case has been cited, and we have found none, which permits, in the absence of a statute, the recovery of fire suppression expenses by one not protecting his own property. Thus, recovery for fire suppression expenses by a state or other public agency is a creature of statute."<sup>56</sup>

This passage from the opinion has been widely cited by courts seeking support for the free public services doctrine.<sup>57</sup> While it does support the doctrine, dicta from this lone intermediate appellate opinion hardly constitutes the robust precedential foundation that later courts have made it out to be.

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50. *Id.* (citing CAL. HEALTH & SAFETY CODE §§ 13,007-13,009 (Deering 2000)).

51. *Id.* (citing CAL. HEALTH & SAFETY CODE § 13009).

52. *Id.* at 793-94.

53. *Id.* at 794.

54. *Id.* (citing 1 B.E. WITKIN, CALIFORNIA PROCEDURE 654 (1954)).

55. *Id.*

56. *Id.* (citing R.P. Davis, Annotation, *Validity and Application of Statutes Imposing Upon the Owner or Occupant Liability for Expense of Fighting Fire Starting on His Land or Property*, 90 A.L.R.2d 873 (1963) (dealing with the Fireman's Rule)). The aptness of the Fireman's Rule will be questioned *infra* in Part V.

57. See, e.g., *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984); *Allenton Volunteer Fire Dep't v. Soo Line R.R.*, 372 F. Supp. 422, 423 (E.D. Wis. 1974); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 423 N.E.2d 997, 998 (Mass. 1981); *Town of Howard v. Soo Line R.R.*, 217 N.W.2d 329, 330 (Wis. 1974).

### D. *The Appearance of a General Rule*

The free public services doctrine as a general rule barring recovery of all public service expenditures first appears in Wisconsin in 1974<sup>58</sup> and New Jersey in 1976.<sup>59</sup> In support of the doctrine, the Wisconsin cases cite the decisions concerning statutory claims for fire suppression costs discussed above.<sup>60</sup> The New Jersey case cites no authority whatsoever for the doctrine.<sup>61</sup> The doctrine emerges in other jurisdictions throughout the 1980s and 1990s in cases citing the various antecedents that we have examined as well as the Wisconsin and New Jersey cases from the 1970s. As we have seen, these antecedents do not provide a solid precedential foundation for such a sweeping defense against tort liability. Thus, the free public services doctrine is essentially a judicial creation of the last thirty years.

A typical case involving the doctrine is *District of Columbia v. Air Florida, Inc.*<sup>62</sup> In that case, a passenger jet, shortly after taking off from Washington National Airport in a heavy snowstorm, struck the Rochambeau Bridge and then plunged into the Potomac River, killing seventy-eight people.<sup>63</sup> The cost of rescuing survivors, recovering the bodies of the deceased, and raising the airplane and its contents from the river exceeded three-quarters of one million dollars.<sup>64</sup> The District of Columbia, alleging negligence, sued the airline for these expenses.<sup>65</sup> The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the action based on the free public services doctrine.<sup>66</sup> The court held that "public funds expended in the 'performance of governmental functions such as the emergency service provided by plaintiff following the crash . . . are not

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58. *Allenton Volunteer Fire Dep't*, 372 F. Supp. at 423; *Soo Line R.R.*, 217 N.W.2d at 331.

59. *City of Bridgeton v. B.P. Oil, Inc.* 369 A.2d 49, 54 (N.J. Super. Ct. Law Div. 1976).

60. *See Allenton Volunteer Fire Dep't*, 372 F. Supp. at 423 (citing *Wilson*, 49 Cal. Rptr. at 794; *Portsmouth v. Campanella & Cardi Constr. Co.*, 123 A.2d 827 (N.H. 1956)); *Soo Line R.R.*, 217 N.W.2d at 330 (citing *Wilson*, 49 Cal. Rptr. at 794; *State v. Boston & M. R.R.*, 105 A.2d 751 (N.H. 1954)).

61. *See B.P. Oil*, 369 A.2d at 54-55. The only case cited in the court's discussion of the free public services doctrine is *Amelchenko v. Borough of Freehold*, 201 A.2d 726, 731 (N.J. 1964), a case dealing with the doctrine of governmental immunity.

62. 750 F.2d at 1077.

63. *Id.* at 1078.

64. *Id.*

65. *Id.*

66. *Id.* at 1086.

recoverable in tort.”<sup>67</sup> The court offered several justifications for the doctrine which are discussed in detail below in Part V.

Before examining justifications for the doctrine, two preliminary clarifications will be helpful. Part III, which follows next, delineates the scope of the doctrine, pointing out its limitations and introducing several exceptions to it. Part IV distinguishes the doctrine from related doctrines with which it is often confused. Part V then examines and critiques justifications for the doctrine offered by the courts.

### III. SCOPE OF THE DOCTRINE: LIMITATIONS AND EXCEPTIONS

Having examined the origin of the free public services doctrine, let us now consider its scope. Although the doctrine states broadly “that public expenditures made in the performance of governmental functions are not recoverable,”<sup>68</sup> it is subject to several important limitations and exceptions. For one thing, the doctrine does not bar recovery of public service expenditures where expressly allowed by statute. Additionally, federal common law, considered by some courts as a source for the doctrine, has produced two exceptions to the doctrine allowing recovery where government services are necessary to abate a nuisance or to protect public property. These two federal common law exceptions, if widely adopted by states, would drastically reduce the impact of the doctrine. Determining the precise contours of the doctrine is difficult insofar as it is unclear whether particular jurisdictions acknowledge these exceptions and, if they do, just how expansively courts would interpret them in particular cases.

#### A. *Statute and Contract*

The free public services doctrine does not bar recovery of public service expenditures where expressly authorized by statute.<sup>69</sup> For example, legislation in New York authorizes municipalities to recoup from a tortfeasor the medical benefits and sick pay awarded to a policeman injured by the tortfeasor.<sup>70</sup> Similarly, New Jersey imposes statutory liability for cleanup costs on those who discharge hazardous

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67. *Id.* at 1079 (alteration in original).

68. *Koch v. Consol. Edison Co.*, 468 N.E.2d 1, 8 (N.Y. 1984).

69. *Id.*

70. N.Y. GEN. MUN. LAW § 207(c) (McKinney 2001) (cited in *Koch*, 468 N.E.2d at 8). For another example, see *People v. Southern California Edison Co.*, 128 Cal. Rptr. 697, 704 (Cal. Ct. App. 1976) (applying California Health and Safety Code provisions allowing recovery of fire suppression costs from tortfeasors).



substances into waters within the state.<sup>71</sup> The doctrine also does not bar recovery of public service costs where provided for by contract, as when the government seeks reimbursement for cleanup costs against a polluter based on a land-use permit conditioned on the payment of such costs.<sup>72</sup> Thus, the doctrine is a common law default rule modifiable by statute or contract.

### B. *Nuisance Abatement*

Under federal common law, the free public services doctrine does not bar recovery of public service expenditures where government services are necessary to abate a nuisance. For example, in *United States v. Illinois Terminal Railroad*, a federal district court refused to dismiss a claim by the federal government seeking reimbursement of the costs of removing from the Illinois river two bridge piers left behind after the railroad abandoned the bridge.<sup>73</sup> The United States argued that the piers obstructed river traffic and constituted a public nuisance, and the court held that "[r]ecent federal court decisions reflect a growing recognition of suits by government agencies under federal common law for the abatement of public nuisances."<sup>74</sup> Similarly, in *City of Evansville v. Kentucky Liquid Recycling, Inc.*, a Kentucky company discharged toxic chemicals into the Ohio River, from which two Indiana municipalities drew their drinking water.<sup>75</sup> As a result of the discharge, the municipalities incurred unusual water-treatment expenses, and they sued the company to recover them.<sup>76</sup> In reversing the district court's dismissal of the action, the United States Court of Appeals for the Seventh Circuit held that the municipal plaintiffs could recover their water-treatment expenditures under the "federal common law . . . of interstate water pollution."<sup>77</sup>

A recent Massachusetts trial court decision offered a state common law variation of this nuisance abatement exception to the free public services doctrine. In *City of Boston v. Smith & Wesson Corp.*, the City sued gun manufacturers to recover the costs of municipal services occasioned by gun violence.<sup>78</sup> The defendants moved to

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71. See *Township of Cherry Hill v. Conti Constr. Co.*, 527 A.2d 921, 922-23 (N.J. Super. Ct. App. Div. 1987) (discussing the New Jersey Spill Compensation and Control Act).

72. *S. Cal. Edison Co. v. United States*, 415 F.2d 758, 759 (9th Cir. 1969).

73. 501 F. Supp. 18, 19 (E.D. Mo. 1980).

74. *Id.* at 21.

75. 604 F.2d 1008, 1010 (7th Cir. 1979).

76. *Id.*

77. *Id.* at 1017-19.

78. No. 199902590, 2000 WL 1473568, at \*1 (Mass. Super. Ct. July 13, 2000).

dismiss the claim based on the free public services doctrine.<sup>79</sup> In denying the motion, the court held that the doctrine barred recovery of service expenditures occasioned by “discreet” emergencies that the “municipality reasonably could expect might occur,” such as “[f]ires, fuel spills and ruptured gas mains.”<sup>80</sup> The doctrine did not apply, however, to recovery of expenditures resulting from “a repeated course of conduct causing recurring costs to the municipality.”<sup>81</sup>

### C. *Damage to Public Property*

While the free public services doctrine bars recovery of public services expenditures, it does not prevent government from recovering for damage to public property. Thus, government may recover from tortfeasors for damage to public lands, buildings, or equipment. Courts have found it difficult to maintain the distinction between public funds and these other forms of public property, and in several federal cases courts have allowed recovery of public service expenditures that are in some way connected to other forms of public property damage. For example, at least one court has allowed a government negligence claim for recovery of public service costs where the services were necessary to protect government land. In *United States v. Chesapeake & Ohio Railway Co.*, a railway company negligently failed to contain a fire that threatened a nearby national forest.<sup>82</sup> The United States Forest Service extinguished the fire, and the United States sued the railway to recover personnel costs and the value of the equipment destroyed in fighting the fire.<sup>83</sup> The United States Court of Appeals for the Fourth Circuit reversed the trial court’s dismissal of the case, holding that the government was entitled to sue in tort for recovery of public service expenditures “incurred in attempting to save [public] property.”<sup>84</sup>

Other courts, characterizing public service costs as economic losses, have allowed government recovery based on negligence and strict liability claims when the government can show physical harm to property. In *In re TMI Litigation*, the state of Pennsylvania and local municipalities near the Three Mile Island nuclear power plant sued the owner of the plant to recover personnel and equipment costs involved

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79. *Id.* at \*7.

80. *Id.* at \*8.

81. *Id.*

82. 130 F.2d 308, 309 (4th Cir. 1942).

83. *Id.*

84. *Id.* at 310.

in responding to an accidental release of radioactive gas into the air that threatened widespread contamination of the area.<sup>85</sup> A federal district court granted summary judgment against these claims, characterizing them as purely economic losses, for which no recovery was available in the absence of personal injury or property damage.<sup>86</sup> The United States Court of Appeals for the Third Circuit reversed, holding that the plaintiffs should have been granted an opportunity to provide evidence at trial that radioactive material released during the accident rendered city buildings unsafe and temporarily unusable, which would constitute property damage based upon which the plaintiffs could recover resulting economic losses.<sup>87</sup>

The nuisance abatement and property damage exceptions to the free public services doctrine have the potential to drastically restrict the doctrine's impact if the exceptions spread from federal to state courts. Much conduct that occasions public services can be fairly characterized as a public nuisance and could therefore serve as the basis for recovery of public service expenditures. For instance, oil spills could plausibly be construed as public nuisances. Similarly, many public services traditionally covered by the doctrine involve protecting public property. For example, fighting a fire usually involves protecting not only private citizens and their property, but also public infrastructure, such as streets, utility installations, and trees. Under *Chesapeake*, the costs of these services are recoverable, and under *In re TMI*, even rendering public buildings temporarily unusable qualifies as property damage.<sup>88</sup> Thus, negligent conduct that rendered city streets temporarily unusable might also serve as a basis for recovering public service expenditures as parasitic economic losses.

If widely adopted, these exceptions would reduce the doctrine to the proposition that public service expenditures are unrecoverable in tort where they are unrelated to nuisance abatement, public property damage, or protecting public property. At the present time, the doctrine's scope in a particular jurisdiction depends greatly upon whether the courts in that jurisdiction adopt these exceptions and how extensively they interpret them. I shall argue below that even in its

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85. 544 F. Supp. 853, 854 (M.D. Pa. 1982), *vacated sub nom.* *Pennsylvania v. Gen. Pub. Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983).

86. *Id.* at 856.

87. *Pennsylvania v. Gen. Pub. Utils. Corp.*, 710 F.2d 117, 122-23 (3d Cir. 1983); see also *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 649-50 (D.R.I. 1986) (discussing the relation between property damage and economic loss).

88. *United States v. Chesapeake & Ohio Ry. Co.*, 130 F.2d 308, 310-11 (4th Cir. 1942); *In re TMI*, 544 F. Supp. at 858.

narrowest form, the doctrine should be eliminated. Before that, however, further clarification of the doctrine is necessary.

#### IV. DISTINGUISHING THE FREE PUBLIC SERVICES DOCTRINE FROM REMOTENESS DOCTRINES

A clear understanding of the free public services doctrine requires not only examining the exceptions to it, but also distinguishing it from other doctrines with which it is often associated. Courts frequently employ the doctrine in conjunction with these other doctrines in order to provide multiple grounds for denying recovery. Thus, in addition to the doctrine's general rule against recovery of public service expenditures, courts often reject claims based also on the attenuated relation between government spending and the tortfeasor's conduct.<sup>89</sup> Courts raise this second concern under the doctrinal categories of standing, proximate cause, and pure economic loss. These doctrines are sometimes referred to as remoteness doctrines.<sup>90</sup> As we shall see, these three doctrines are themselves often functionally equivalent, but all of them are distinct from the free public services doctrine.<sup>91</sup>

The free public services doctrine has often been applied in conjunction with remoteness doctrines in the context of municipal lawsuits against the gun industry. A brief examination of this litigation will help clarify the relationship between all of these doctrines. Since 1999, over thirty cities have sued firearms manufacturers to recover the costs of municipal services rendered in response to gun violence.<sup>92</sup> The cities have alleged that this gun violence results from the gun

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89. See, e.g., *Ganim v. Smith & Wesson Corp.*, 26 Conn. L. Rptr. 39, 46 n.7 (Conn. Super. Ct. 1999), *aff'd*, 780 A.2d 98 (Conn. 2001) (dismissing municipal claim against gun manufacturers for lack of standing); *id.* (dismissing same claim based on "general rule prohibiting recoupment of municipal expenditures") (quoting *Koch v. Consol. Edison Co.*, 468 N.E.2d 1, 7-8 (N.Y. 1984)); *id.* at 44 (dismissing same claim based on lack of proximate cause).

90. See Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421, 427-30 (1999).

91. Some commentators fail to distinguish properly the free public services doctrine from remoteness doctrines. See, e.g., *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1762 (2000).

92. See Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1260 (2000) [hereinafter Lytton, *Lawsuits Against the Gun Industry*]; Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 54-61 (2000) [hereinafter Lytton, *Tort Claims Against Gun Manufacturers*]. For periodic updates on this litigation, see the GUN INDUSTRY LITIGATION REPORTER, published monthly by Andrews Publications.

industry's negligent marketing schemes, deceptive sales practices, and failure to design guns with adequate safety features.<sup>93</sup> Courts have dismissed these suits based on both the free public services doctrine and on remoteness grounds.

### A. *Standing*

Courts that have dismissed municipal lawsuits against the gun industry for lack of standing have held that the cities' losses are too far removed from any alleged wrongdoing by gun makers.<sup>94</sup> These courts rely on a direct injury test for standing, variations of which are used by both federal and state courts.<sup>95</sup> In order to better understand this test, it will be helpful to examine briefly some general principles of standing.

Federal courts often begin their standing analysis with Article III of the United States Constitution. Article III limits the jurisdiction of federal courts to "cases" and "controversies."<sup>96</sup> The United States Supreme Court has interpreted this as imposing three standing requirements on plaintiffs:

[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>97</sup>

Based on the second requirement, federal courts have held that in order to have standing, plaintiffs must suffer harm that directly results from a defendant's wrongdoing.<sup>98</sup> Injuries that are too remote are not sufficient to confer standing.<sup>99</sup> Most state courts have a similar direct injury standing requirement.<sup>100</sup>

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93. See, e.g., Complaint, *Ganim v. Smith & Wesson Corp.*, CV99-036-1279 (filed Jan. 27, 1999) at 16-42.

94. See, e.g., *Ganim*, 26 Conn. L. Rptr. at 41-42.

95. *Id.* at 44.

96. U.S. CONST. art. III, § 2.

97. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 180-81 (2000).

98. There is some disparity among courts as to whether the indirectness of a plaintiff's injury is relevant to the second prong of the standing rule concerning causation or the first prong concerning injury in fact. See *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 824-25 (N.D. Ohio 2000).

99. See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992). Courts often cite three reasons for denying standing to plaintiffs that do not suffer direct harm. First, the more indirect an injury is, the more difficult it is to determine the amount of the plaintiff's injury due to the wrongdoing of the defendant, as distinct from other contributing factors. *Id.*

In *Ganim v. Smith & Wesson Corp.*, the City of Bridgeport, Connecticut sued firearms manufacturers to recover the costs of municipal services associated with gun violence.<sup>101</sup> The court dismissed the City's complaint based on the free public services doctrine and for lack of standing, explaining:

One cannot rightfully invoke the jurisdiction of the court unless he has . . . some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy . . . .

....  
[A] plaintiff who complains of harm resulting from misfortune visited upon a third person is generally held to stand at too remote a distance to recover . . . . [S]tanding requires a colorable claim of direct injury to the complaining party.<sup>102</sup>

The court held that the City's claim was for losses that were entirely derivative of harms suffered by its citizens, and that the city therefore lacked standing.<sup>103</sup> The *Ganim* court also cited the free public services doctrine as a ground for dismissing the City's claim.<sup>104</sup>

While standing analysis and the free public services doctrine may overlap, as in *Ganim*, this is not true in all cases. In the *Air Florida* case, for example, the District of Columbia had standing to sue based on damage to the bridge struck by the airplane and the expense of removing the aircraft from the water, neither of which was derivative of injury to others.<sup>105</sup> Nevertheless, the free public services doctrine

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Second, recognizing claims of indirect injury would require courts to adopt complicated rules for apportioning damages among plaintiffs at different levels of remove from the initial wrongful conduct in order to avoid the risk of multiple recoveries for the same conduct. *Id.* Third, deterring injurious conduct can be more easily effected by directly injured victims, who can generally be counted on to bring suit, without the problems of causation and apportionment attendant to the claims of more remote victims. *See id.* at 269-70.

100. *See, e.g., Ganim*, 26 Conn. L. Rptr. at 44.

101. *Id.* at 39-40.

102. *Id.* at 40 (alterations in original) (quotations omitted).

103. *Id.* at 44-45. State courts in Ohio and Florida have followed the *Ganim* court in dismissing municipal lawsuits against gun makers for lack of standing. *Penelas v. Arms Tech., Inc.*, No. 99-1941CA-06, 1999 WL 1204353, at \*2 (Fla. Cir. Ct. Dec. 13, 1999), *aff'd on other grounds*, 778 So. 2d 1042 (Fla. Dist. Ct. App.), *cert. denied*, 799 So. 2d 218 (Fla. 2001); *City of Cincinnati v. Beretta U.S.A. Corp.*, [2000 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 15,880, at 55,181 (Ohio Ct. App. Aug. 11, 2000). Other courts, however, have rejected this comparison and declined to dismiss municipal suits against gun makers for lack of standing. *See, e.g., City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at \*1 (Mass. Super. Ct. July 13, 2000), discussed *infra* notes 169-171 and accompanying text.

104. *Ganim*, 26 Conn. L. Rptr. at 46 n.7 (citing *Koch v. Consol. Edison Co.*, 468 N.E.2d 1 (N.Y. 1984)).

105. *See* 750 F.2d 1077, 1077 (D.C. Cir. 1984).

barred the District from recovering the costs of its rescue operations.<sup>106</sup> Thus, the doctrine bars recovery of public service costs even where the government has standing to sue based on a direct injury.

### B. Proximate Cause

Lack of proximate cause is another ground for dismissal that has been employed in conjunction with the free public services doctrine. Consider the rejection of another municipal claim against gun makers. In *City of Philadelphia v. Beretta U.S.A., Corp.*, a federal district court dismissed Philadelphia's negligence claims against the gun industry based on the free public services doctrine and a finding that the City's injuries were "too remote from the defendant's alleged wrongful conduct."<sup>107</sup> In this case, the court framed the issue of remoteness as one of proximate cause.<sup>108</sup> While proximate cause, in contrast to standing, is often treated as a question of fact for the jury, the *Beretta* court explained that proximate cause also commonly functions as a vehicle for limiting liability based on policy considerations provided by the court.<sup>109</sup> Thus, the court's treatment of remoteness as a matter of proximate cause was functionally equivalent to the *Ganim* court's treatment of remoteness as matter of standing.<sup>110</sup> Like the *Ganim* court, the *Beretta* court also cited the free public services doctrine as a basis for dismissing the City's claim (the court referred to the doctrine as the "municipal cost recovery rule").<sup>111</sup>

If the policy considerations underlying a court's proximate cause analysis include the free public services doctrine, then lack of proximate cause and the doctrine will not only overlap; they will dictate identical outcomes in nearly all cases. This is, however, often not the case. Proximate cause analysis usually focuses on the closeness, in terms of directness or foreseeability, between a tortfeasor's conduct and a victim's loss. By contrast, the free public services doctrine excludes recovery based on the type of loss (i.e., public service expenditures) regardless of how directly or foreseeably related to the tortfeasor's conduct. Again, the *Air Florida* case is instructive. In that case, no one disputed the airline's liability for the

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106. *Id.* at 1080.

107. 126 F. Supp. 2d 882, 894-95 (E.D. Pa. 2000), *aff'd on other grounds*, 277 F.3d 415 (3d Cir. 2002).

108. *Id.* at 903.

109. *Id.*

110. *Id.*; *Ganim v. Smith & Wesson Corp.*, 26 Conn. L. Rptr. 39, 39-40 (Conn. Super. Ct. 1999), *aff'd*, 780 A.2d 98 (Conn. 2001).

111. *Beretta*, 126 F. Supp. 2d at 894.

cost of repairs to the bridge (in fact, this issue was settled by the parties).<sup>112</sup> By contrast, the District was denied recovery for its rescue and cleanup efforts, which were, if anything, more foreseeable consequences of the airline's negligently taking off in a heavy snowstorm than striking a bridge. Thus, the free public services doctrine bars recovery of public service costs even when they are proximately caused by negligence.

### C. *Pure Economic Loss*

Another doctrine that appears alongside the free public services doctrine is the rule against recovery for pure economic loss. In another municipal lawsuit against the gun industry, *City of Cincinnati v. Beretta U.S.A. Corp.*, an Ohio appeals court rejected the City of Cincinnati's claim "for police, emergency, health, corrections, prosecution and other services" occasioned by gun violence, holding that

[t]hese municipal costs are unrecoverable in this case because they are no more than economic loss, which is defined as "direct, incidental, or consequential pecuniary loss . . ." Economic loss is not . . . compensable where, as here, the injured party has not separately suffered from death, physical injury to person, serious emotional distress, or physical damage to property.<sup>113</sup>

The court also dismissed the City's claim based on the free public services doctrine.<sup>114</sup>

Both the pure economic loss rule and the free public services doctrine bar recovery based on the type of loss. Indeed, one might be tempted to interpret the free public services doctrine as no more than a particular application of the pure economic loss rule.<sup>115</sup> Public service expenditures, unrelated to public property damage, could be characterized as pure economic loss.

There are, however, important differences between the pure economic loss rule and the free public services doctrine. The two doctrines are justified by different underlying considerations. The rule

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112. See *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1079 n.1 (D.C. Cir. 1984).

113. *City of Cincinnati v. Beretta U.S.A. Corp.*, [2000 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 15,880, at 55,175 (Ohio Ct. App. Aug. 11, 2000) (first alteration in original).

114. *Id.* at 55,181.

115. See, e.g., MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 320 n.5 (7th ed. 2001) (citing *Koch* as an example of the rule against recovery for pure economic loss).



against recovery for pure economic loss seeks to limit liability for negligent conduct and to prevent the flood of litigation that would accompany unlimited liability. The rule responds to the same concerns about remoteness that are addressed by standing and proximate cause doctrines.<sup>116</sup> Based on these underlying concerns, courts grant recovery for economic loss where granting recovery does not threaten to leave courts without a bright line by which to limit liability or where the loss is not considered too remote. For example, courts normally grant recovery for economic loss where plaintiffs can show that it is related to physical injury or property damage.<sup>117</sup> In exceptional cases, courts have even allowed recovery for pure economic loss that is not considered too remote from the tortfeasor's conduct.<sup>118</sup>

If the free public services doctrine were construed as no more than a particular application of the pure economic loss rule, there would be good reason to believe that courts would regularly allow recovery of public service expenditures. Public service expenditures are a determinate, limited category of economic loss, and allowing recovery for them would not open the door to unlimited liability or unleash a flood of claims. Moreover, as we have seen, many public service expenditures, such as those involved in responding to the Air Florida crash, are not any more remote than other types of loss for which recovery is traditionally allowed.<sup>119</sup> Finally, the protection of public property exception to the doctrine in federal common law recognizes that public service expenditures are often related to actual or potential damage to public property. Thus, the free public services doctrine bars recovery of public expenditures that would be allowed under the pure economic loss rule. This is so because the doctrine is justified by concerns other than remoteness, examination of which will be the subject of Part V.

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116. See Schwartz, *supra* note 90, at 426-29; see also *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 109-11 (N.J. 1985) (justifying the rule against recovery for pure economic loss by the same fear of "mass litigation" and "limitless liability" that motivate the rules of duty and proximate cause, which serve to limit liability for negligent conduct).

117. See *People Express*, 495 A.2d at 109 (discussing the history and basis for the physical harm rule).

118. See, e.g., *id.* at 113.

119. See *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1079 n.1 (D.C. Cir. 1984).

#### D. Subrogation

Before turning to justifications for the free public services doctrine, it may be helpful to distinguish it from one last doctrine: subrogation. An insurer who suffers pure economic loss in the form of payments made to an insured injured by a tortfeasor may have a right to recover this loss from the tortfeasor by subrogation to the rights of the insured. Subrogation means that the insurer stands in the shoes of the insured and sues the tortfeasor under claims available to the insured. This is possible because the insured assigns his right to sue for his injuries to the insurer. Subrogation may be available by contract, statute, or common law principles of equity.<sup>120</sup>

It would be a mistake to view efforts by government entities to recover public service expenditures as subrogation actions.<sup>121</sup> First of all, the government provision of public services to tort victims does not involve any assignment to the government of the victims' rights to sue for their injuries. Government claims to recover the cost of these services have no effect on tort victims' rights. For example, in municipal lawsuits against the gun industry, claims by cities for the costs of law enforcement and emergency services do not affect the rights of gun violence victims to sue for their injuries. Second, in claims for public service expenditures, government entities sue in their own right for their own losses, which are distinguishable from the losses of their citizens. So, in the *Air Florida* case, the government sued for the costs of its rescue and cleanup operation, not the injuries suffered by the passengers. Third, government claims for public service expenditures are often made in cases where the services were necessary to *prevent* injury to citizens, and so there is no possibility of subrogation to the rights of an injured victim. In *Township of Cherry Hill v. Conti Construction Co.*, the Township of Cherry Hill sued for the costs of responding to the rupture of a natural gas main caused by the negligence of a construction company.<sup>122</sup> The expenses sought by the town were the costs of preventing harm to citizens.<sup>123</sup> Thus, the

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120. See Marjie D. Barrows & Susan A. Byron, *Subrogation v. Contribution: What's in a Name?*, BRIEF, Winter 2001, at 44, 45.

121. Cf. Peter Schuck, *Smoking Gun Lawsuits: Mass Tort Subrogation May Sound Like an Obscure and Rarified Litigation Technique, But It Could Be Far More Harmful Than That*, AM. LAW., Sept. 2001, at 81 (asserting that municipal lawsuits against the gun industry are subrogation actions).

122. 527 A.2d 921, 922 (N.J. Supp. Ct. App. Div. 1987).

123. *Id.*

claims to which the free public services doctrine applies do not involve issues of subrogation.

## V. A CRITIQUE OF JUSTIFICATIONS FOR THE DOCTRINE IN CASE LAW

Case law offers four justifications for the free public services doctrine. One is doctrinal: it asserts that tortfeasors owe government entities no duty of care that would support recovery. Two others are institutional: one claims that courts are preempted from granting recovery for public service expenditures, and the other asserts that courts should defer to legislatures in deciding questions of who pays the costs of public services. A fourth justification for the doctrine suggests that courts should avoid upsetting settled expectations.

Discussion of the doctrine in case law is rather spare. Most opinions merely refer to it as a generally accepted rule and cite prior cases. The few opinions that give justifications provide little more than merely the outlines of an adequate defense of the doctrine, and they suffer from question-begging and rely on misplaced arguments about judicial deference to legislative policy making. Thus, surveying the case law reveals that in imposing the doctrine, courts have failed to offer any convincing justification for it.

### A. *No Duty*

Some courts have rejected government negligence claims seeking to recover public service expenditures on the ground that tortfeasors owe government entities no duty that would support recovery. In *Mayor & Council of Morgan City v. Jesse J. Fontenot, Inc.*, the owners of an oil transport company and a fuel bulk plant negligently caused a fire during a fuel delivery.<sup>124</sup> In response, the city provided firefighting and law enforcement services to extinguish the blaze, which destroyed much of the surrounding area.<sup>125</sup> The city sued to recover for damage to city streets and to its firefighting equipment and for the cost of overtime pay for its emergency services personnel.<sup>126</sup> The trial court rendered a judgment granting the city's claim for damage to the streets and rejecting the city's claim for damage to equipment and the cost of services rendered in fighting the fire.<sup>127</sup> In affirming the judgment, a Louisiana appellate court recognized that the defendants "were under a

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124. 460 So. 2d 685, 686 (La. Ct. App. 1st Cir. 1984).

125. *Id.*

126. *Id.* at 686-87.

127. *Id.* at 687.

duty to carefully handle the combustible and/or flammable liquids in their control or possession so that an unreasonable risk of harm would not be created for others.”<sup>128</sup> The court held, however, that this duty “does not include within the ambit of its protection the risk that public property and funds will be expended to fight a fire caused by a breach of [the] duty.”<sup>129</sup>

In finding that the defendants owed the city no duty with regard to costs associated with providing emergency services, the *Fontenot* court compared the city to a professional rescuer.<sup>130</sup> The relevance of this comparison arises out of a common law doctrine that denies a firefighter the right to sue an owner or occupier of a premises for any injury incurred by the firefighter while fighting a fire caused by the owner/occupier’s negligence.<sup>131</sup> The reason for this doctrine, known as the “fireman’s rule,” is that courts have traditionally considered firefighters entering upon land to extinguish a fire to be licensees rather than invitees, because the firefighters’ primary purpose is to protect the public.<sup>132</sup> The rule has been extended beyond premises liability and firefighting to bar recovery by other emergency services personnel for injuries incurred in the course of rendering assistance arising out of risks inherent in their professional duties.<sup>133</sup> This broader bar to recovery is called the “professional rescuers’ doctrine.” No longer grounded in premises liability, the primary rationale for the doctrine is that professional rescuers are said to assume the risks inherent in their duties.<sup>134</sup> According to the *Fontenot* court, “[b]y assuming the responsibility of providing for such ‘rescue’ services, the City has placed itself in a situation analogous to that of the professional rescuer.”<sup>135</sup> In essence, the court held that cities, as a

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128. *Id.*

129. *Id.* at 688.

130. *Id.*

131. See Joseph B. Conder, Annotation, *Application of “Firemen’s Rule” to Bar Recovery by Emergency Medical Personnel Injured in Responding to, or at Scene of, Emergency*, 89 A.L.R.4TH 1079 (1991).

132. See Larry D. Scheafer, Annotation, *Liability of Owner or Occupant of Premises to Firefighter Coming Thereon in Discharge of His Duty*, 11 A.L.R.4TH 597, 601-02 (1982).

133. See Conder, *supra* note 131, at 1081-82.

134. See *id.*

135. 460 So. 2d at 688. At least one commentator has erroneously claimed that the free public services doctrine is merely another name for the fireman’s rule. See Andrew S. Cabana, Comment, *Missing the Target—Municipal Litigation Against Handgun Manufacturers: Abuse of the Civil Tort System*, 9 GEO. MASON L. REV. 1127, 1163 (2001) (arguing that municipal suits against the gun industry for the costs of emergency services and law enforcement run “afoul of the municipal cost recovery rule also known as the ‘Fireman’s

matter of law, assume the risk of property damage and personnel costs incurred while providing emergency services, and, for this reason, tortfeasors owe cities no duty of care with regard to this risk.<sup>136</sup>

The *Fontenot* court's justification of the free public services begs the question. According to the court, the government cannot recover the costs of public service expenditures from tortfeasors because tortfeasors owe the government no duty of care to prevent such losses.<sup>137</sup> Tortfeasors owe no duty because the government, like a professional rescuer, assumes the risk of losses incurred while providing services to tort victims.<sup>138</sup> The government can be said to assume this risk because such losses are inherent in the government's duty to provide public services. That is, the government is under a duty to provide public services free of charge. Thus, the government cannot recover the costs of public services from tortfeasors because they are under a duty to provide such services free of charge. The *Fontenot* court's duty analysis ultimately amounts to a restatement, rather than a justification, of the free public services doctrine: the government cannot recover public service costs from tortfeasors because it is under a duty not to.

Duty analysis, if properly developed, might well provide support for the free public services doctrine. Courts have failed, however, to offer thoughtful duty analysis when it comes to the free public services doctrine. A more complete analysis of the obligations of government to provide public services to tortfeasors free of charge would include considerations of fairness, deterrence, loss spreading, and the limits of judicial policy making. I shall argue below in Part VI that these considerations all weigh against the doctrine.

### *B. Legislative Preemption*

Some courts have cited legislative preemption as a basis for rejecting government claims for recovery of public service expenditures. In *City of Bridgeton v. B.P. Oil, Inc.*, a municipality sued two oil companies to recover costs incurred by the city fire department in a week-long effort to clean up an oil spill caused by the

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Rule"); see also Olson, *supra* note 2, at 28 (observing that the free public services doctrine is "doctrinally consistent with the common law bar against recovery by professional rescuers").

136. *Fontenot*, 460 So. 2d at 688.

137. *Id.* at 687.

138. See *id.* at 688.

defendants.<sup>139</sup> The trial court rejected the City's claim for recovery of these costs, reasoning:

It has been stated that "It cannot be a tort for government to govern." Neither is government a saleable commodity. [New Jersey statutory law] authorizes local government to establish fire departments. While at one time it was a private function, in 1976 one of governments [sic] duties is that of fire protection.

Governments, to paraphrase the Declaration of Independence, have been instituted among men to do for the public good those things which the people agree are best left to the public sector. Since our country was founded there has devolved a widening horizon of public activity. True, certain activities have developed in areas from which revenue has been derived, such as turnpikes, water or power supply, or postal services. Nevertheless, there remains an area where the people as a whole absorb the cost of such services—for example, the prevention and detection of crime. No one expects the rendering of a bill (other than a tax bill) if a policeman apprehends a thief. The services of fire fighters are within this ambit and may not be billed as a public utility.

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Thus, if the city were the owner of adjacent land damaged by escaping oil, it like all landowners, may recover damages caused by this escape. It cannot, however, recover costs incurred in fire prevention or extinguishment. That is the very purpose of government for which it was created.<sup>140</sup>

The court here offers a justification for the free public services doctrine based on preemption: because public services are authorized by statute, government entities have a duty to provide them free of charge except where service fees are explicitly contemplated by the legislature, and this statutory scheme preempts any attempt to charge tortfeasors for cleaning up oil spills by suing them in common law tort.

This statutory preemption argument applies with special force to claims by municipalities. Municipal governments are themselves creations of state legislatures and have no rights except those conferred by statute.<sup>141</sup> In order to recover public service costs from tortfeasors, cities must find some sort of statutory authorization.

Even so, it is unclear why the *B.P. Oil* court concludes from the absence of fees in statutes authorizing public services that the legislature intended the government to provide such services without

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139. 369 A.2d 49, 50 (N.J. Super. Ct. Law Div. 1967).

140. *Id.* at 54-55 (citation omitted).

141. Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REV. 1521, 1531 (2000).

compensation.<sup>142</sup> The absence of fees implies only that the legislature did not wish to charge those who benefit from public services, not that no one should ever be charged. It might well have intended to leave intact what it assumed were preexisting governmental rights to recover the cost of public services from tortfeasors. Such rights might be implicit in the general powers of the city to sue based on common law and statutory rights. Indeed, the court admits that the city can, "like all landowners," sue based on common law rights to recover for damage to its property without specific statutory authorization.<sup>143</sup>

In cases involving state or federal governmental entities, there is even less reason to think that the statutory creation of public services without explicit user fees preempts government cost-recoupment lawsuits against tortfeasors. Even statutes explicitly creating criminal penalties without mention of civil penalties have been held not to preempt civil recovery under common law. In *Wyandotte Transportation Co. v. United States*, the federal government sued a negligent shipping company for costs associated with removing a sunken vessel from an inland waterway.<sup>144</sup> The shipping company objected that the Rivers and Harbors Act of 1899, making it unlawful to carelessly sink vessels in navigable channels, imposed only criminal penalties for its violation and made no mention of any civil cause of action.<sup>145</sup> The United States Supreme Court rejected this argument, holding that "the general rule that the United States may sue to protect its interests . . . is not necessarily inapplicable when the particular governmental interest sought to be protected is expressed in a statute carrying [only] criminal penalties for its violation."<sup>146</sup> By allowing recovery where neither precluded nor provided for by statute, the Court seems to imply that recovery of public service expenditures has an independent basis in common law.

### C. Preference for Legislative Decision Making

Aside from arguments about preemption by statute, some courts have justified the free public services doctrine based on a general preference for legislative, rather than judicial, policy making. In *City*

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142. See *B.P. Oil*, 369 A.2d at 54-55.

143. *Id.* at 55.

144. 389 U.S. 191, 193 (1967).

145. *Id.* at 198-99.

146. *Id.* at 201-02. For a discussion of the difficulties of interpreting legislative silence, see John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737 (1984), and William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

of *Flagstaff v. Atchison, Topeka & Santa Fe Railroad*, four railroad tank cars carrying liquefied petroleum gas derailed, prompting local authorities to evacuate areas near the tracks to protect the public from a possible gas leak or explosion.<sup>147</sup> The City of Flagstaff sued the railway company to recover the expenses incurred in the evacuation.<sup>148</sup> The United States Court of Appeals for the Ninth Circuit affirmed a summary judgment against the City, holding that “the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.”<sup>149</sup> The court explained:

Here governmental entities themselves currently bear the cost in question, and they have taken no action to shift it elsewhere. If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns.<sup>150</sup>

The court here construes the question of the defendant’s liability in tort as a question of fiscal policy that is better handled by the legislature.

There are two problems with the *Atchison* court’s approach. First, it assumes that the legislature, by remaining silent, made a conscious choice to affirm the status quo—i.e., that the city has no right to recover public service costs from tortfeasors.<sup>151</sup> Even if one grants the assumption that the legislature’s silence amounts to an affirmation of the status quo, there is no reason to believe that the status quo is that the city has no right to recover. Indeed, whether the city has such a right in the first place is precisely the question on appeal!

Second, and more importantly, if the court’s concern is really that the issue be settled by the legislature’s “public deliberative process,” then the court would do better to grant recovery, leaving the legislature to overturn its holding.<sup>152</sup> The free public services doctrine, by shielding tortfeasors from liability for the cleanup costs of their misconduct, functions in cases like *Atchison* as a subsidy to industrial polluters. This type of subsidy, resulting from a little-known defense

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147. 719 F.2d 322, 323 (9th Cir. 1983).

148. *Id.*

149. *Id.*

150. *Id.* at 324.

151. *See id.*

152. *See id.*



against liability, is, contrary to the court's implication, unlikely to be the product of any public or deliberative process.<sup>153</sup>

Anticipating this second objection, the court asserts that the legislature's failure to explicitly overturn the doctrine amounts to an endorsement of it.<sup>154</sup> According to the court, the legislature is well aware of the doctrine and its effects: "We doubt judicial intervention is needed to call the attention of Arizona's legislative authorities to the cost allocation presented by what we find to be the existing rule, for the state and its municipalities presently feel the pinch when they pay the bill."<sup>155</sup> This observation, however, merely points out that municipal officials and state legislatures are likely to be aware of the subsidy, not that they have approved of it through a public deliberative process. The court is right that such a subsidy should be subject to public deliberation, but the burden of convincing the legislature to grant such a subsidy should fall on the beneficiaries of it, as it does with most other subsidies. In the case of the free public services doctrine, these beneficiaries include large business interests who have the financial and lobbying resources to mobilize, raise the issue publicly, and promote legislative consideration of it.<sup>156</sup>

#### *D. Protecting Settled Expectations*

The traditional reluctance of courts to upset settled public expectations is another argument for the free public services doctrine. As the *B.P. Oil* court put it, "No one expects the rendering of a bill (other than a tax bill) if a policeman apprehends a thief."<sup>157</sup> As the *Atchison* court stated, "Expectations of both business entities and individuals, as well as their insurers, would be upset substantially were we to adopt the rule proposed by the city."<sup>158</sup> It is unclear, however, whether liability in these cases would really upset commercial expectations, given that tortfeasors face liability if the same conduct harms private parties. As the *Atchison* court admitted, "the tortfeasor is fully aware that private parties injured by its conduct, who cannot spread their risk to the general public, will have a cause of action

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153. *See id.*

154. *Id.*

155. *Id.*

156. On interest group politics and the legislative process, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 53-97 (1994) and PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE 204-50 (2000).

157. 369 A.2d 49, 54 (N.J. Super. Ct. Law Div. 1976).

158. 719 F.2d at 323.

against it for damages proximately or legally caused.”<sup>159</sup> Furthermore, broad exceptions to the doctrine for nuisance claims and protection of public property introduce enough uncertainty that it is unclear whether individuals and business entities do, in fact, rely on it.<sup>160</sup>

An additional question, aside from whether individuals and business entities expect free public services, is whether such expectations are legitimate. Keep in mind that the business entities in *B.P. Oil* and *Atchison* expected free services not merely for routine needs such as police protection, but for cleaning up large-scale toxic chemical spills due to their negligence.<sup>161</sup> Whether the law should protect tortfeasors’ expectations of free public services depends, in part, on whether this makes for good public policy. Part VI provides reasons to believe that it does not.

## VI. OBJECTIONS TO THE DOCTRINE

As the previous discussion has revealed, the free public services doctrine is a recent judicial invention that lacks a solid precedential foundation. Furthermore, the justifications for it that courts have provided amount to little more than question begging and pro-industry bias. This part of the Article goes beyond the case law and raises objections to the doctrine based on fairness, efficiency, and institutional concerns.

### A. Fairness

The free public services doctrine is unfair in two ways. First, it unjustifiably favors tortfeasors who harm government as compared to those who harm private parties. Second, it imposes the losses caused by this favored class of tortfeasors on taxpayers. In many instances, the doctrine lets industrial tortfeasors off of the hook for forest fires, oil spills, and airline crashes and makes taxpayers pay the cleanup costs.<sup>162</sup>

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159. *Id.*

160. It is difficult to do more than speculate with regard to whether companies insure against the risk of paying for public services occasioned by their negligence because companies do not make this information available to the public.

161. See *Atchison*, 719 F.2d at 323; *B.P. Oil*, 369 A.2d at 50.

162. See, e.g., *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1310 (7th Cir. 1992) (oil spill); *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) (airline crash); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 423 N.E.2d 997, 998 (Mass. 1981) (fire).

# 1. Favoring Tortfeasors Who Cause Loss to Government

The free public services doctrine unfairly favors tortfeasors who harm government over those who harm private parties. For example, if an oil tanker negligently spills oil near a coast and the local municipality cleans it up, according to the free public services doctrine, the owner of the tanker is not liable in tort for the cleanup costs.<sup>163</sup> If, however, a private party, seeking to avoid damage to his private beach, cleans up the same oil spill, the free public services doctrine does not apply and the tanker owner is liable.<sup>164</sup> Case law concerning the doctrine provides no adequate justification for this favorable treatment of tortfeasors who harm government. Looking beyond existing case law, one might attempt to identify some reason that harming government, in contrast to harming a private party, should not give rise to liability.

Perhaps the distinction rests on the nature of government as a tort plaintiff. One might consider wrongdoing that harms only government as, in some sense, victimless. It is basic to the law of torts that persons whose wrongdoing harms no one are relieved of liability even if they would have been liable had their wrongdoing harmed someone. As an old common law dictum puts it, "Proof of negligence in the air, so to speak, will not do."<sup>165</sup> Tort liability attaches only where the defendant's carelessness finds a victim.<sup>166</sup> This argument, however, ignores the fact that whenever government is forced to expend resources on public services, taxpayers and the public at large suffer losses. Taxpayers lose when they pay to replenish public resources depleted by the tortfeasor, and the public at large loses whenever those resources are no longer available for other purposes. In this regard, government is analogous to a corporation, whose losses ultimately harm shareholders. Although government entities are not natural persons, they can, like private corporations, nevertheless be tort victims.

It is also possible that the distinction between government and private parties rests on the type of loss that each incurs. Perhaps public service expenditures ought to be, for some reason, unrecoverable. Maybe they should be unrecoverable because they are too remote.

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163. See, e.g., *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 760-61 (Alaska 1999).

164. See *United States v. Chesapeake & Ohio Ry. Co.*, 130 F.2d 308, 310 (4th Cir. 1942) (citing cases permitting private individual "recovery of damages in the form of expenditures incurred in attempting to save property").

165. *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

166. See *id.*

Contrary to the distinction between the free public services doctrine and remoteness doctrines set forth above in Part IV, maybe the free public services doctrine ultimately relies on the concept of remoteness.

One way to express this would be to assert that public service costs are pure economic losses, and, as such, are not recoverable in negligence actions.<sup>167</sup> The problem with this suggestion is that it fails to explain the favorable treatment accorded to tortfeasors who harm government rather than private parties. For example, in our offshore oil spill example, the free public services doctrine bars recovery of cleanup costs when incurred by government but does not block recovery of the same costs when incurred by a private party. As far as the pure economic loss rule is concerned, these losses are identical, and the rule provides no justification for treating them differently.

An alternative way to express the idea that public service costs are too remote is to argue that government losses, unlike private party losses, are entirely derivative of harms suffered by citizens. In essence, the government lacks standing to sue tortfeasors for the cost of public services because the need for these services does not result directly from the tortfeasor's wrongdoing, but rather is a consequence of more direct harms to citizens. There are several problems with this suggestion. First of all, government sometimes provides public services in the absence of any harm to citizens, as when it cleans up oil spills.<sup>168</sup> The costs of these services are neither remote nor derivative of harms to others.

Second, even public services associated with harm to citizens may not be derivative of harm to citizens. For example, government often provides services to prevent future harm that, while associated with past harms to citizens, do not derive from a discrete harm to a particular citizen. In *City of Boston v. Smith & Wesson Corp.*, the City of Boston sued the gun industry to recover the cost of city services associated with gun violence.<sup>169</sup> In response, the defendants moved to dismiss the suit for lack of standing, arguing that the City's losses were entirely derivative of harms to its citizens.<sup>170</sup> In rejecting the motion, the trial court held that the City's harm

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167. This theory was raised and rejected in *City of Manchester v. National Gypsum Co.*, 637 F. Supp. 646, 649 (D.R.I. 1986). See also McIntyre, *supra* note 14, at 1016.

168. See, e.g., *Exxon*, 991 P.2d at 759; *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49, 50 (N.J. Super. Ct. Law Div. 1976).

169. No. 199902590, 2000 WL 1473568, at \*1-\*3 (Mass. Super. Ct. July 13, 2000).

170. *Id.* at \*10.

is in large part not “wholly derivative of” or “purely contingent on” harm to third parties . . . . [H]arm to Plaintiffs may exist even if no third party is harmed. For example, Plaintiffs allege that Defendants’ conduct places firearms in the hands of juveniles causing Plaintiffs to incur increased costs to provide more security at Boston public schools. Thus, wholly apart from any harm to the juvenile (who may even believe himself to be benefited by acquisition of a firearm), and regardless whether any firearm is actually discharged at a school, to ensure school safety Plaintiffs sustain injury to respond to Defendants’ conduct. Even if no individual is harmed, Plaintiffs sustain many of the damages they allege due to the alleged conduct of Defendants fueling an illicit market (e.g., costs for law enforcement, increased security, prison expenses and youth intervention services).<sup>171</sup>

Thus, while costs like increased school security are associated with gun violence suffered by citizens, these costs do not derive from any particular gun violence injury.

Third, even public service costs incurred while assisting injured citizens should not be characterized as wholly derivative and therefore unrecoverable for lack of standing. Such a move would be inconsistent with the treatment of private individuals who assist tort victims. Most states allow private rescuers to sue tortfeasors for injuries and property damage suffered in the course of rendering assistance.<sup>172</sup> While it is true that they do not allow recovery for rescuers’ out-of-pocket losses nor for the injuries or the property damage of professional rescuers, these claims are not barred for lack of standing.<sup>173</sup> To clarify, this is not to say that government ought to be treated as a rescuer for the purpose of determining tortfeasor liability for public service expenditures, but only that for the purposes of standing analysis, government expenses in rendering emergency assistance to tort victims are no more derivative than losses borne by private and professional rescuers.

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171. *Id.* at \*6; *cf.* *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 822, 897-98 (E.D. Pa. 2000), *aff’d on other grounds*, 277 F.3d 415 (3d Cir. 2002); *Ganim v. Smith & Wesson Corp.*, 26 Conn. L. Rptr. 39, 44-45 (Conn. Super. Ct. 1999), *aff’d*, 780 A.2d 98 (Conn. 2001).

172. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 307-08 (5th ed. 1984) (discussing the rescue doctrine); Jeffrey G. Ghent, Annotation, *Rescue Doctrine: Liability of One Who Negligently Causes Motor Vehicle Accident for Injuries to Person Subsequently Attempting to Rescue Persons or Property*, 73 A.L.R.4TH 737 (1989); Joel E. Smith, Annotation, *Liability of One Negligently Causing Fire for Injuries Sustained by Person Other than Firefighter in Attempt to Control Fire or to Save Life or Property*, 91 A.L.R.3d 1202 (1979).

173. *See* Conder, *supra* note 131, at 1081 (discussing the professional rescuers’ doctrine).

Some types of government assistance to injured citizens, for example, rehabilitation or long-term care, are provided long after the injury occurs. These less immediate forms of government assistance do seem more remote than emergency services. Should courts wish to reject government claims for these types of costs, they should do so based on remoteness analysis, whether in terms of standing, proximate cause, or pure economic loss, that is focused on the particularities of these types of costs, not based on a broad assertion that all government losses sustained in providing public service are wholly derivative of harm to citizens.<sup>174</sup>

Thus, the concept of remoteness cannot justify the free public services doctrine. And to be fair, the courts have never said that it could. As the *Atchison* court reasoned, "it is the identity of the claimant and the nature of the cost that combine to deny recovery, not some concept of remoteness."<sup>175</sup> The courts have gotten it wrong, however, in failing to see that not even the identity of the claimant nor the nature of the cost justifies this doctrine: it is unfair to single out government claimants or public services costs for unfavorable treatment in the courts.

## 2. Imposing an Unfair Loss-Spreading Scheme on Taxpayers

The free public services doctrine spreads government losses occasioned by tortfeasors among all taxpayers. It functions as a type of liability insurance. While loss spreading is a widely recognized function of the tort system, the insurance scheme created by the free public services doctrine is unfair because, unlike most insurance schemes, it is involuntary and it allocates to tortfeasors more than their fair share of risk reduction.

Loss spreading elsewhere in the law of torts involves voluntary participation of those in the risk pool. For example, when courts impose liability for product defects, they regularly cite loss spreading as a justification.<sup>176</sup> Courts view the tort system as an insurance scheme in which manufacturers pass on the cost of injuries caused by product defects to their consumers. While the law compels manufacturers to administer this scheme, consumers—the members of the insurance pool—voluntarily join it when they choose to purchase

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174. For further discussion of healthcare cost-recoupment claims, see *infra* Part VII.C.

175. 719 F.2d 322, 324 (9th Cir. 1983).

176. For two classic examples, see *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 81 (N.J. 1960), and *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1962) (en banc).

the product. While most consumers may not consciously make this choice, the cost of purchasing the insurance is included in the price of the product, and, at the very least, they are free to opt out of the scheme by not purchasing the product. By contrast, when government passes public service costs on to taxpayers, they are not free to opt out of the insurance scheme. As long as government finances public services, the free public services doctrine will compel taxpayers to participate in a loss-spreading scheme that insures against liability for the cost of public services.

Not only is the free public services insurance scheme involuntary, it is also distributively unfair. The distributive fairness of risk pools can be analyzed by considering the ratio of the premium that each member of the pool pays to the level of risk reduction that he receives (in the form of potential coverage). While risk pools rarely in practice afford all members an equal premium-to-risk-reduction ratio, we might wish to consider them fair for practical purposes where the ratios are roughly equal, either because everyone pays equally and faces similar risks or because premiums are adjusted in accordance with the risk posed by each member. There is no such relation between taxes and risk reduction in the free public services doctrine insurance scheme. On the premium side, the premiums that taxpayers pay vary in accordance with their income and property (depending on how taxes are assessed). On the risk-reduction side, the level of risk that average citizens pose, and therefore the level of risk reduction that they receive, is, in most cases, much lower than that of most industrial members of the risk pool. Thus, industry tends to get far more risk reduction and pay proportionally less for it than average citizens. That is, citizens are cross-subsidizing industry.<sup>177</sup>

In response to this charge of distributive unfairness, one might point out the many ways in which industry cross-subsidizes citizens. For example, industry pays school taxes that disproportionately benefit individual taxpayers with school-age children. Similarly, industry taxes support public assistance that disproportionately benefits the

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177. For a discussion of cross-subsidization in insurance markets, see Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 139 (1990). One way to address this inequity is to set premiums based on risk, that is, to adjust tax rates to reflect the level of risk posed by taxpayers. See Hanson & Logue, *supra*, at 146-48; *infra* Part VI.B. Empirical data comparing public expenditures occasioned by industry to public expenditures occasioned by individuals is unavailable. Thus, claims of cross-subsidization are admittedly speculative. Such claims are, however, not unlikely given the relatively higher risk posed by industrial accidents when compared to accidents caused by individuals.

poor. While it is true that industrial taxpayers cross-subsidize individual taxpayers in these ways, these examples of cross-subsidization are products of legislative decisions, not tort subsidies created by common law judges. While the tax system's cross-subsidization of citizens by industry may be just as distributively unfair as the free public services doctrine's cross-subsidization of industry by citizens, the former, as a product of the legislative process, enjoys a level of democratic legitimacy that the latter lacks.

Despite the lack of choice and the lack of distributive equity in the free public services doctrine insurance scheme, we might wish to consider it fair if it would be chosen by individuals, were they given the opportunity to choose.<sup>178</sup> Were it the case that each individual had no way of reliably predicting who, including himself, would be a high-risk or low-risk member of the pool, individuals might choose to join the scheme despite its distributive inequalities.<sup>179</sup> Not even this condition, however, applies to the free public services doctrine insurance scheme because ordinary citizens can predict reliably that industrial members of the scheme will generally be high-risk members.

Given these difficulties, it would be fairer to abandon the free public services doctrine insurance scheme altogether, thereby encouraging potential tortfeasors to purchase private liability insurance that covers public service costs. Getting rid of the doctrine would replace an involuntary insurance scheme with a voluntary one. Industry would pass on the cost of private insurance to consumers, who, through their consumption choices, could choose to join or opt out of the loss-spreading scheme. And private insurers would adjust premiums to reflect risk.

### *B. Efficiency: Deterrence and Insurance Considerations*

Aside from being unfair, the free public services doctrine is an inefficient way to provide insurance. Eliminating the doctrine would encourage most high-risk entities to purchase private insurance. This

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178. For an example of such a theory of fairness based on hypothetical rational choice, see generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For an application of such a theory to tort law, see Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 357-60 (1988) (developing a "consumer sovereignty norm" based on a Rawlsian conception of hypothetical rational choice).

179. See RAWLS, *supra* note 178, at 136 (discussing rational choices "behind a veil of ignorance").



would be preferable from the perspectives of both optimal deterrence and efficient loss spreading.

Insurance coverage carries with it the danger of underinvestment in safety.<sup>180</sup> When insurance premiums fail to reflect the level of risk posed by each insured's activities, insureds will not fully internalize expected accident costs and will not invest efficiently in accident prevention. Tax rates based on income or property values, which function as insurance premiums against liability for public service costs, will give rise to underinvestment in safety. Because there is no relation between the tax rates of individuals and corporations and the costs of the public services that their activities occasion, they will fail to take these costs into account when determining how much to invest in accident prevention. While ordinary citizens are unlikely to make such self-conscious calculations with a high degree of detail, industrial entities commonly undertake this type of risk assessment.<sup>181</sup> Thus, the free public services doctrine will cause underinvestment in safety by industry.

Legislatures could address the problem of underinvestment in safety by adjusting tax rates to reflect risk. It is doubtful, however, that legislatures are well equipped to perform this kind of comprehensive risk assessment with the required level of accuracy. Furthermore, adjusting tax rates to reflect risk would entail a major reorientation of tax policy because tax rates are currently set based on income and wealth in order to serve various redistributive purposes.

Instead, the free public services insurance scheme should be abandoned in order to encourage the purchase of private liability insurance. By eliminating the free public services doctrine, potential tortfeasors would have incentive to purchase private liability insurance that covers the cost of public services. This change could easily be effected by judicial action, and private insurance carriers are well equipped to step in and set premiums that more accurately reflect risk. Private carriers have long been in the business of setting premiums, they have special expertise, and they have profit incentives to achieve a high degree of accuracy. While private carriers cannot eliminate the problem of underinvestment in safety, they can do a better job of mitigating it than either the current regime or legislative substitutes.

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180. See Hanson & Logue, *supra* note 177, at 138 (discussing the phenomenon of moral hazard).

181. See Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 693-96 (1985) (arguing that commercial enterprises pay more attention to risk than ordinary individuals).

### C. *Institutional Concerns: The Limits of Judicial Policy Making*

It is a common refrain in judicial opinions denying relief that the job of courts is to resolve controversies, not to make public policy.<sup>182</sup> However, common law adjudication often influences public policy, and in areas such as products liability, it does so with a great deal of self-consciousness.<sup>183</sup> I have argued elsewhere that courts should play a limited, complementary role in shaping public policy, working to support the efforts of legislatures and administrative agencies.<sup>184</sup> The free public services doctrine is an example of common law adjudication that exceeds the proper limits of judicial policy making.

Judicial policy making is well accepted where it is grounded in common law tradition, complements the efforts of legislatures and administrative agencies, and does not require courts to engage in complex statistical analysis.<sup>185</sup> For example, limiting the scope of liability by means of duty or proximate cause analysis involves just this kind of policy making.<sup>186</sup> By contrast, the free public services doctrine creates an insurance scheme that subsidizes insurance for high-risk industrial operations in a way that is not characteristic of the common law, that was created without any legislative guidance, and that fails to take into account complex efficiency concerns about which the court has no information. It is a great irony that courts have attempted to justify this doctrine—a clear example of judicial legislation—based on arguments about the superiority of legislative over judicial policy making.<sup>187</sup>

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182. See, e.g., Lytton, *Tort Claims Against Gun Manufacturers*, *supra* note 92, at 50 (citing cases denying claims against gun manufacturers on the ground that it is inappropriate for courts to attempt to influence gun control policy); see also Anne Giddings Kimball & Sarah L. Olson, *Municipal Firearm Litigation: Ill Conceived from Any Angle*, 32 CONN. L. REV. 1277, 1302-03 (2000) (arguing that courts should limit themselves to resolving individual disputes and should not engage in policy making); Peter H. Schuck, *The New Judicial Ideology of Tort Law*, in NEW DIRECTIONS IN LIABILITY LAW 4 (Walter Olson ed., 1988) (criticizing the policy-making activities of courts).

183. See, e.g., Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 65 (1995); Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 287-304 (1981).

184. Lytton, *Tort Claims Against Gun Manufacturers*, *supra* note 92, at 50-52.

185. See Bogus, *supra* note 183, at 65-66 (discussing the tradition of policy making by common law courts); Lytton, *Tort Claims Against Gun Manufacturers*, *supra* note 92, at 50-52 (advocating a complementary role for courts in policy making); Shuck, *supra* note 182, at 15-16 (asserting that common law courts lack the capacity for complex policy analysis).

186. For a recent example, see *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061-64 (N.Y. 2001), for an analysis of the question of whether gun manufacturers owe the public a duty of care in how they market and distribute their products.

187. See discussion, *supra* Part VB-D.

Eliminating the free public services doctrine will compel legislatures to be explicit about subsidizing public services occasioned by certain tortfeasors. If the legislature wishes to subsidize the cleanup costs of oil spills in order to support the oil industry, then it should do so through open deliberation, subject to public scrutiny. Special industrial subsidies provided by the free public services doctrine ought to be created by legislatures, not common law courts.

## VII. THE IMPLICATIONS OF ELIMINATING THE FREE PUBLIC SERVICES DOCTRINE

Having considered objections to the free public services doctrine, we now examine the implications of eliminating it. Getting rid of the doctrine would allow government entities to recover from tortfeasors the costs of services such as fire suppression, environmental cleanup, and rescue operations. It is against recovery of these types of expenditures that the doctrine has most often been deployed.

Eliminating the doctrine would not, however, open the way to recoupment of all types of public service expenditures. As we have seen in our discussion of remoteness doctrines, there are other obstacles besides the free public services doctrine to recovery of certain types of public service expenditures. For example, even without the doctrine, courts could decide to bar government claims for certain healthcare services provided to tort victims. Where the services are rendered long after the victim was injured, this type of claim might be dismissed for lack of standing, lack of proximate cause, or based on the rule against recovery for pure economic loss.<sup>188</sup> Thus, eliminating the free public services doctrine would not subject tortfeasors to limitless liability, nor is it likely to unleash a flood of government cost-recoupment litigation.

Aside from the implications for cost-recoupment litigation, eliminating the doctrine may also have implications for the way we view government. When we characterize government services as free and the government as an inexhaustible service provider, we fail to appreciate that ultimately we, as taxpayers, are paying for public services and that government expenditures occasioned by tortfeasors are our losses. By holding tortfeasors accountable for these losses, we might come to feel more of a personal stake in government and a greater sense of ownership of its resources.

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188. This is assuming, of course, that no statutory basis for recovery exists. *See supra* notes 163-175 and accompanying text.

*A. Fire Suppression, Environmental Cleanup, and Rescue Operations*

Eliminating the free public services doctrine would make it possible for government to recover the costs of what we might call containment, cleanup, and rescue services. Containment includes fire suppression<sup>189</sup> and riot control.<sup>190</sup> Examples of cleanup are mopping up oil spills<sup>191</sup> and removing fallen power lines.<sup>192</sup> Rescue refers to activities such as removing crash survivors from danger and administering immediate medical aid.<sup>193</sup> These categories are not mutually exclusive—different services may fall into more than one category. For example, cleanup of a toxic spill might also be characterized as containment. What is important for our purposes, however, is not the distinction between the categories, but what they have in common.

Containment, cleanup, and rescue services share two features that are especially relevant to our discussion. First, all of them protect the private interests of citizens or the private property interests of the government. Second, all of them are closely linked to preventing or mitigating injury to persons or property. As we shall see in the following sections, if either of these features is missing, then even in the absence of the free public services doctrine, recovery for the costs of a service will not be available. If the service is not related to protecting private interests, then tort law—which is private law—will not provide a cause of action that would support recovery. Similarly, if the service is not closely linked to preventing or mitigating injury, recovery will be blocked by remoteness. Thus, even without the doctrine, many types of public service expenditures will not be recoverable.

It is also worth noting that recovery for many types of public service expenditures might be possible even without eliminating the doctrine. Insofar as containment and cleanup services are required to protect public property or abate a public nuisance, recovery could in theory be available under existing federal common law exceptions to

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189. See, e.g., *Town of Howard v. Soo Line R.R.*, 217 N.W.2d 329, 330 (Wis. 1974).

190. See, e.g., *Koch v. Consol. Edison Co.*, 468 N.E. 2d 1, 3 (N.Y. 1984).

191. See, e.g., *City of Bridgeton v. B.P. Oil Co.*, 369 A.2d 49, 50 (N.J. Super. Ct. Law Div. 1976).

192. See, e.g., *State v. Long Island Lighting Co.*, 493 N.Y.S.2d 255, 256 (Nassau County Ct. 1985).

193. See, e.g., *District of Columbia v. Fla. Air, Inc.*, 750 F.2d 1077, 1079 (D.C. Cir. 1984).

the doctrine.<sup>194</sup> In practice, however, even many federal courts have refused to interpret these exceptions broadly enough to cover the costs of containment and cleanup services.<sup>195</sup> Moreover, retaining the doctrine with these exceptions would still obstruct recovery for rescue services in a way that, as we saw above in Part VI, is unfair, inefficient, and inappropriate from an institutional perspective.

### *B. The Liability of Criminals for Law Enforcement Expenditures*

The prospect of eliminating the free public services doctrine raises concerns about encouraging the government to behave like a money-minded plaintiff, filing tort claims against ordinary citizens for the expense of cleaning up litter or writing parking tickets and suing criminals for the costs of their apprehension, prosecution, and incarceration. The practice in China of billing the families of executed criminals for the cost of firing-squad bullets is a gruesome example of what happens when one mixes service fees with law enforcement.<sup>196</sup>

While these concerns are legitimate, panic is unwarranted. Even in the absence of the free public services doctrine, most types of law enforcement expenditures would remain unrecoverable. Government could recover only those law enforcement expenditures related to containment, cleanup, or rescue. For example, government could recover the costs of riot control necessitated by a tortfeasor's negligence<sup>197</sup> or the expenses of evacuating the area around a toxic spill.<sup>198</sup> By contrast, government could not recover law enforcement expenses that are closely bound up with its interest in maintaining public authority and are not primarily directed at protecting private interests with which tort law is concerned. As the *Cobb* case illustrates, recovery for the costs of recapturing an escaped convict is not available in tort, because in such a case, violation of the law involves no violation of a private right—neither the state's nor anyone else's—which could serve as the basis for a tort claim.<sup>199</sup> Similarly,

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194. See *supra* Part III.B-C.

195. See, e.g., *Air Fla., Inc.*, 750 F.2d at 1080; *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983).

196. See Nicholas D. Kristof, *Law and Order in China Means More Executions*, N.Y. TIMES, Jan. 15, 1991, at A2.

197. See, for example, *Koch*, 468 N.E.2d at 1, 3, in which the police were necessary to control the threat of rioting during a New York City blackout that was caused by a utility company's gross negligence.

198. See, for example, *Atchison*, 719 F.2d at 323, in which police services were necessary to evacuate the site of a petroleum spill caused by a railroad's negligence.

199. For a discussion of *State Highway & Public Works Commission v. Cobb*, 2 S.E.2d 565, 567 (N.C. 1939), see *supra* Part II.A.

remoteness considerations would bar recovery for the costs of public services not closely linked to preventing or mitigating harm to private interests. The costs of criminal prosecution and punishment, for example, are too remote from particular actual or potential private rights violations to support recovery in tort. These two boundaries—one between public and private interests and the other between remote and proximate relation to injury—are not simple to apply, and in many cases they would introduce significant ambiguity. For example, recovery of government expenses related to an arrest for criminal battery would require consideration of whether the arrest was primarily directed at protecting the battery victim's rights and whether it was closely linked to mitigating harm to the victim or protecting the victim from further harm. This kind of ambiguity, however, is typical of many doctrinal limits on tort liability, the most notorious being duty and proximate cause. Even the seemingly clearest rules give rise to ambiguities that courts must clarify, and resolving borderline cases is what common law adjudication is all about.

### *C. Recoupment of Healthcare Costs*

Whether eliminating the free public services doctrine would clear the way for government recoupment of healthcare costs occasioned by tortfeasors is uncertain for two reasons. First, it is possible that the doctrine does not apply to claims for healthcare costs, in which case, its elimination would have no effect on such claims in the future. Second, even if the doctrine does currently apply to claims for healthcare costs, it is possible that other obstacles to recovery—for example, remoteness considerations—would block these claims in the future so that elimination of the doctrine will still have no practical effect.

One place to look for clues as to how elimination of the doctrine would affect claims for recoupment of healthcare costs is state claims against the tobacco industry. In these claims, states sought recoupment of healthcare costs occasioned by tobacco-related illness.<sup>200</sup> Curiously, the free public services doctrine was not an issue in these cases. There

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200. For a general introduction to tobacco litigation, see Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 110 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). On claims by state attorneys general, see generally Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935, 935-77 (1999), and Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 897-940 (1998).

are several possible reasons for the doctrine's absence. One reason might be that all of the cases were settled relatively early in the litigation process, and so the doctrine simply never came up.<sup>201</sup> A second reason might be that many states based their claims on statutory provisions.<sup>202</sup> A third reason might be that the litigants and the courts did not consider the doctrine relevant because they did not consider healthcare payments to be services.<sup>203</sup>

Even more intriguing than the absence of discussion about the free public services doctrine, however, was the recognition in one case of a common law right of states to sue for healthcare costs occasioned by tortfeasors, which seems to contradict the doctrine.<sup>204</sup> In *State v. American Tobacco Co.*, the State of Texas sued tobacco companies "to recover costs incurred in providing medical care and other benefits to its citizens . . . as the result of the citizens' use of cigarettes and smokeless tobacco."<sup>205</sup> The defendants moved to dismiss the complaint, arguing that the State could not "proceed as a direct action, because the State's exclusive remedy is through assignment/subrogation pursuant to . . . the Texas Human Resources Code."<sup>206</sup> The defendants also asserted that the State suffered no direct injury and could not recover "because its injury [was] too remote."<sup>207</sup> The court refused to dismiss the State's complaint on these grounds.<sup>208</sup>

In response to the defendant's argument that the State's exclusive remedy was a subrogation action provided for by statute, the court held that the State had an independent common law right to sue directly, and that this common law right was not preempted by the Texas Human Resources Code.<sup>209</sup> According to the court, the State's right to sue directly derived from its "quasi-sovereign interests."<sup>210</sup> Citing a

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201. See Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354 (2000).

202. See *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 243 (2d Cir. 1999) (citing state tobacco claims based on statutory provisions).

203. Healthcare costs have, however, been included in municipal claims against the gun industry that have been barred by the free public services doctrine. See, e.g., *Ganim v. Smith & Wesson Corp.*, 26 Conn. L. Rptr. 39, 40-41 (Conn. Super. Ct. 1999), *aff'd*, 780 A.2d 98 (Conn. 2001).

204. *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962-63 (E.D. Tex. 1997). The case was subsequently settled. *Texas v. Am. Tobacco Co.*, No. 5:96CV91, 1998 U.S. Dist. LEXIS 17235 (E.D. Tex. 1998).

205. *Am. Tobacco Co.*, 14 F. Supp. 2d at 960.

206. *Id.* at 961.

207. *Id.*

208. *Id.*

209. *Id.* at 965.

210. *Id.* at 962.

1982 United States Supreme Court case, the *American Tobacco* court explained that:

Quasi-sovereign interests are to be distinguished from a state's general sovereign or proprietary interests. "They consist of a set of interests that the State has in the well-being of its populace." These interests can related [sic] to either the physical or economic well-being of the citizenry. It is without question that these interests can evolve and change with time, and as such, the Court made very clear its desire to maintain a definition that is conducive to a case-by-case analysis. The only hard and fast rule set forth by the Court is that a State may not invoke this doctrine when it is only a nominal party asserting the interests of another.<sup>211</sup>

The *American Tobacco* court concluded that the State, which "expends millions of dollars each year in order to provide medical care to its citizens," was not a nominal party, and that its interest in seeking cost recoupment was part of its quasi-sovereign interests in improving the health and welfare of its citizens.<sup>212</sup>

In the course of its analysis of the State's common law right to sue, the court distinguished the State's claim from that of the federal government in *United States v. Standard Oil Co.*, the 1947 United States Supreme Court case denying the federal government the right to recover medical expenses of soldiers injured by tortfeasors that I examined above in Part II.<sup>213</sup> First, the *American Tobacco* court pointed out that *Standard Oil* involved the rejection of a claim by the federal government, and that "quasi-sovereign interests have never been held to be the basis for a suit brought by the federal government."<sup>214</sup> Second, the court explained that "quasi-sovereign interests only arise when a significant portion of the populace is affected."<sup>215</sup> Because *Standard Oil* involved injury to only one citizen, quasi-sovereign interests did not arise.<sup>216</sup>

In holding that the State's common law right to sue was not preempted by statute, the *American Tobacco* court asserted that the subrogation provisions of the Texas Human Resources Code did not extinguish the State's common law rights to sue directly for

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211. *Id.* (citations omitted) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602, 607 (1982) (granting the government of Puerto Rico standing to sue for job discrimination against its citizens)).

212. *Id.*

213. *Id.* at 963 n.4 (discussing *United States v. Standard Oil Co.*, 322 U.S. 301 (1947)).

214. *Id.*

215. *Id.*

216. 332 U.S. at 302.



reimbursement based on its quasi-sovereign interests.<sup>217</sup> The defendants argued that the best explanation for creation of the statutory provisions is that the State had no preexisting common law right to reimbursement.<sup>218</sup> In response, the court countered that a better explanation is that the State passed the provisions because it was directed to do so pursuant to the mandatory provision of the federal Social Security Act requiring states to seek reimbursement of healthcare costs from tortfeasors as a condition of receiving federal healthcare grants.<sup>219</sup> The court went on to explain that interpreting the statute according to the principle that "the presence of a statutory right normally does not extinguish nonstatutory rights [was] more consistent with the spirit of the reimbursement provisions of [the Act]" than the defendants' assertion that the creation of statutory rights implies the absence of common law rights.<sup>220</sup>

The court also rejected the defendants' assertion that the State's injury was too remote.<sup>221</sup> The court held that the State's injury was direct enough to confer standing as a matter of law, and that the State's pleadings were sufficient to raise a question of fact regarding proximate cause that should be resolved at trial.<sup>222</sup> Because the case was settled, the issue of proximate cause never reached trial.

*American Tobacco* provides us with two lessons that are relevant to the free public services doctrine. First, the court's recognition of the State's common law right to sue based on quasi-sovereign interests implies that the free public services doctrine does not bar state claims to recoup healthcare costs occasioned by tortfeasors. We should treat this conclusion as tentative and limited. It is tentative because, due to the settlement, this novel aspect of the court's holding was never subjected to appellate review.<sup>223</sup> It is limited because quasi-sovereign

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217. 14 F. Supp. 2d at 963-65.

218. *Id.* at 963 n.5.

219. *Id.*

220. *Id.* at 965. It is interesting to compare the *American Tobacco* court's holding that statutory rights of recovery did not preempt the government's common law right to recover to the holding of the court in *B.P. Oil* that the absence of any statutory rights preempted any common law right of the government to recover. Compare *id.* at 962, with *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49, 53 (N.J. Super. Ct. Law Div. 1976). For a discussion of *B.P. Oil*, see *supra* Part V.B.

221. *Am. Tobacco*, 14 F. Supp. 2d at 967-68.

222. *Id.*

223. It has, however, been distinguished by courts involving claims by nongovernmental entities and municipalities. See, e.g., *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 436 (3d Cir. 2000) (recognizing that a charitable hospital does not have quasi-sovereign status); *Ganim v. Smith & Wesson Corp.*, 26 Conn. L. Rptr. 39, 46 n.6

interests provide a common law basis exclusively for *state* recoupment claims. In distinguishing *American Tobacco* from *Standard Oil*, the court held that quasi-sovereign interests would not support a federal common law right to sue for recoupment of healthcare costs.<sup>224</sup> The court in *Ganim*, dismissing the City of Bridgeport's claim against gun makers, held that municipalities, as creations of the state, do not have quasi-sovereign status.<sup>225</sup> Furthermore, according to the *American Tobacco* court, quasi-sovereign interests support state common law claims only in cases involving harm to a significant portion of the populace, not harms to single individuals or small groups.<sup>226</sup> Thus, even if the court's analysis of quasi-sovereign interests were widely accepted, the free public services doctrine might still bar healthcare cost-recoupment claims by federal, municipal, and local governments, as well as state claims involving injury to individuals or small groups. As we shall see in the next Part, the doctrine has been employed to deny recoupment of healthcare costs in claims by cities against the gun industry.

A second lesson from *American Tobacco* is that government healthcare costs occasioned by tortfeasors may not be considered too remote to confer standing or to support findings of proximate cause.<sup>227</sup> Thus, if the free public services doctrine is a bar to such claims, eliminating it may well clear the way to recovery. Again, we should be careful of making too much of this conclusion. Not only was the *American Tobacco* court's remoteness analysis not subject to appellate review, it has been rejected by a number of courts considering similar claims against the tobacco industry by union insurance funds<sup>228</sup> and by several courts in municipal claims against gun makers.<sup>229</sup>

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(Conn. Super. Ct. 1999), *aff'd*, 780 A.2d 98 (Conn. 2001) (recognizing that a municipality does not have quasi-sovereign status).

224. See *supra* notes 213-215 and accompanying text.

225. 26 Conn. L. Rptr. at 46 n.6.

226. 14 F. Supp. 2d at 963-64; see *supra* notes 215-216 and accompanying text.

227. 14 F. Supp. 2d at 967-68.

228. See, e.g., *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 926 (3d Cir. 1999) (rejecting union health and welfare fund suits against tobacco companies on remoteness grounds). But see *City of St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008, 1014 (E.D. Mo. 1999) (finding municipal plaintiff's claims against tobacco companies not too remote).

229. See, e.g., *Ganim*, 26 Conn. L. Rptr. at 43-45 (finding that a municipality lacked standing to bring a claim against a gun manufacturer based on remoteness); *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 903-06 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002) (rejecting a municipality's negligence claim against gun manufacturers for lack of proximate cause). But see *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 825-26 (N.D. Ohio 2000) (finding a municipal claim against gun manufacturers not

Thus, it is too early to tell how eliminating the free public services doctrine might affect the future of government efforts to recoup healthcare costs from tortfeasors. In the wake of the tobacco wars, it is still unclear whether and to what extent the doctrine would apply to government healthcare cost-recoupment claims. It is also uncertain whether, even if the doctrine were eliminated, these claims would still be blocked by remoteness.

#### D. *Municipal Gun Litigation*

The free public services doctrine has been relied upon to dismiss claims against gun makers brought by Miami,<sup>230</sup> Philadelphia,<sup>231</sup> Cincinnati,<sup>232</sup> and Bridgeport,<sup>233</sup> and is currently at issue in a number of other as yet unresolved city lawsuits.<sup>234</sup> Courts have declared the doctrine inapplicable to similar claims by Boston<sup>235</sup> and Cleveland.<sup>236</sup> Even without the doctrine, however, these municipal claims against the gun industry face formidable challenges based on remoteness. As it turns out, all of the courts that have rejected city suits based on the free public services doctrine have also dismissed the suits for remoteness.<sup>237</sup> Thus, while eliminating the doctrine would clear one obstacle facing many municipal gun claims, in order to be successful, cities would still have to convince courts that their claims are not too remote.

This may be easier with respect to some costs related to gun violence than others. Cities suing the gun industry are seeking to recover a wide variety of expenses, including, for example, in the

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barred by remoteness); *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at \*7 (Mass. Super. Ct. July 13, 2000) (same).

230. *Penelas v. Arms Tech., Inc.*, No. 99-1941CA-06, 1999 WL 1204353, at \*2 (Fla. Cir. Ct. Dec. 13, 1999), *aff'd on other grounds*, 778 So. 2d 1042 (Fla. Dist. Ct. App.), *cert. denied*, 799 So. 2d 218 (Fla. Dist. Ct. App.), *cert. denied*, 799 So. 2d 218 (Fla. 2001).

231. *Beretta*, 126 F. Supp. 2d at 894-95.

232. *City of Cincinnati v. Beretta U.S.A. Corp.*, [2000 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 15,880, at 55,181 (Ohio Ct. App. Aug. 11, 2000).

233. *Ganim*, 26 Conn. L. Rptr. at 46 n.6.

234. For a complete list of pending lawsuits by municipalities against the gun industry, see *Summary of Pending City and County Lawsuits Against Gun Manufacturers, Retailers and Distributors*, 3 ANDREWS GUN INDUSTRY LITIG. RPT., Dec. 2001, at 12, 12-14.

235. *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at \*8 (Mass. Super. Ct. July 13, 2000); see *supra* notes 78-81 and accompanying text.

236. *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 821-23 (N.D. Ohio 2000).

237. *Penelas v. Arms Tech., Inc.*, No. 99-1941CA-06, 1999 WL 1204353, at \*2 (Fla. Cir. Ct. Dec. 13, 1999), *aff'd on other grounds*, 778 So. 2d 1042 (Fla. Dist. Ct. App.), *cert. denied*, 799 So. 2d 218 (Fla. 2001) (lack of standing); *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 903 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002) (lack of proximate cause); *Beretta U.S.A.*, [2000 Transfer Binder] Prod. Liab. Rep. (CCH) at 55,175 (pure economic loss); *Ganim*, 26 Conn. L. Rptr. at 41 (lack of standing).

Boston case, "increased spending on law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability, and unemployment benefits, higher prison costs and youth intervention programs and lower tax revenues and lower property values."<sup>238</sup> Cities would stand a better chance of recovery if they focused on public service expenditures more closely linked to actual gun violence or the threat of gun violence, such as the law enforcement costs of responding to shooting incidents or patrolling high crime areas, or emergency medical services for gunshot victims. Recovery for expenditures such as those related to pensions and lost tax revenues due to lower property values are likely to be rejected as too remote, even in the absence of the free public services doctrine.

### *E. Politics, Cost-Recoupment Litigation, and Abuse of the Tort System*

Talk of eliminating the free public services doctrine sparks fears of a flood of politically motivated litigation that could drown legitimate industries in litigation costs. State claims for the healthcare costs of tobacco-related illness cowed the tobacco industry into an historic \$240 billion settlement.<sup>239</sup> Municipal lawsuits to recoup the costs of law enforcement and emergency services occasioned by gun violence have already driven several gun manufacturers into bankruptcy or out of business.<sup>240</sup> Who knows what unpopular industry will be the next target of government-sponsored cost-recoupment litigation?<sup>241</sup> Reflecting this fear, the *Ganim* court wrote in reference to Bridgeport's claims against the gun industry:

When conceiving the complaint in this case, the plaintiffs must have envisioned [the state tobacco] settlements as the dawning of a new age of litigation during which the gun industry, liquor industry and

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238. *Smith & Wesson*, 2000 WL 1473568, at \*3.

239. See Dagan & White, *supra* note 201, at 364-65.

240. See Mike Allen, *Colt's to Curtail Sale of Handguns*, N.Y. TIMES, Oct. 11, 1999, at A1; Fox Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*, N.Y. TIMES, June 24, 1999, at A14; *Smith & Wesson Sold at 'Fire Sale' Price*, 2 ANDREWS GUN INDUSTRY LITIG. RPT'R., June 2001, at 11.

241. For evidence that the paint industry is a leading candidate, see Jenny B. Davis, *A New Shade of Litigation: State Allowed to Proceed in Lead-Paint Damages Suit Against Manufacturers*, ABA J. 18, 18 (July 2001). For less serious speculation, see *Hershey's Ordered to Pay Obese Americans \$135 Billion*, available at [http://www.theonion.com/onion3626/hersheys\\_pay\\_obese.html](http://www.theonion.com/onion3626/hersheys_pay_obese.html) (Aug. 18, 2000) (on file with author), a satirical news release concerning potential liability of chocolate manufacturer for obesity of consumers of its snack foods.

purveyors of "junk" food would follow the tobacco industry in reimbursing government expenditures and submitting to judicial regulation.<sup>242</sup>

From this perspective, the free public services doctrine prevents government from misusing the tort system to bully unpopular industries.

While eliminating the free public services doctrine would indeed have implications for the future of government cost-recoupment litigation, fears of a flood of claims are exaggerated. It is possible that the free public services doctrine's bright-line rejection of all government claims for public service expenditures deters litigation and that in its absence such claims would increase. As we have seen, however, in the absence of the free public services doctrine, there will still be restrictions on government cost-recoupment claims. Remoteness doctrines such as standing, proximate cause, and the pure economic loss rule limit government claims, and they do so in ways that avoid the unfairness, inefficiency, and judicial overreaching that characterize the free public services doctrine. Moreover, eliminating the free public services doctrine will cause government plaintiffs to focus on the issue of remoteness, which may lead them to tailor their claims more narrowly, including only public service expenditures closely related to the defendant's allegedly tortious conduct. It is a mistake to imagine the doctrine as a judicial finger in the dyke holding back a sea of government tort claims against ordinary citizens and unpopular industries. A better image would be a clog in the filtration system through which tort claims must pass. Removing the clog will not unleash a flood; rather it will make the system work better.

One might object that even if eliminating the free public services doctrine would be a doctrinal improvement, it might still unleash a political disaster. The remaining limitations provided by remoteness doctrines might not be as effective at deterring politically motivated government lawsuits that, regardless of their prospects of success in the courts, can be used to blackmail unpopular industries into accepting "voluntary" restrictions on manufacturing, promotion, distribution, and sales practices. After all, state tobacco claims resulted in the imposition of extensive new regulations on the tobacco industry and billions of dollars of payments to state treasuries, without a single claim being decided by a court.<sup>243</sup> Similarly, municipal

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242. 26 Conn. L. Rptr. at 41.

243. See Dagan & White, *supra* note 201, at 365.

lawsuits against gun makers pressured Colt to scale back its production of handguns and Smith & Wesson to change its distribution and sales practices, months before courts began to dismiss the suits in Miami, Philadelphia, Cincinnati, and Bridgeport.<sup>244</sup> According to critics, tobacco and gun litigation provide a blueprint for misusing the tort system to impose regulations on industry in a way that circumvents the legislative process.<sup>245</sup> Perhaps the free public services doctrine, even with its flaws, provides an important deterrent to this type of litigation, which would proliferate if the doctrine were eliminated.

If the basis of this objection is true—that we should bar all government cost-recoupment lawsuits in order to prevent politically motivated misuse of the tort system—then the best way to do so would be by means of legislation, not the free public services doctrine. Especially if one is concerned about circumvention of the legislative process, one should be wary of relying on courts to create a general ban on government cost-recoupment suits, especially where there is inadequate common law precedent for such a policy. We should, instead, turn to legislatures. Thus, whether one is in favor of or against government suits to recover public service expenditures, there are good institutional grounds for favoring elimination of the free public services doctrine.

#### *F. Government as a Tort Victim*

Aside from the doctrinal and policy implications of eliminating the free public services doctrine, there may be implications for our political culture. Viewing the government as a tort victim undermines the idea that somehow public services are free, as the doctrine suggests. The costs of suppressing negligently started fires or cleaning up oil spills or rescuing airline crash victims are losses to society as a whole; they drain resources away from other private or government activities. They are, ultimately, our losses. Allowing government to sue for these losses in tort shows them to be real costs that someone must bear, not merely free services. If the tortfeasors whose conduct occasions these costs do not bear them, then all of us will. The free public services doctrine spreads government losses so thin, and in a way that is hidden from the view of ordinary citizens, that it creates the impression that government's losses are costless to society.

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244. See Lytton, *Lawsuits Against the Gun Industry*, *supra* note 92, at 1259-66.

245. See, e.g., Philip D. Oliver, *Rejecting the "Whipping-Boy" Approach to Tort Law: Well-Made Handguns Are Not Defective Products*, 14 U. ARK. LITTLE ROCK L.J. 1, 5 (1991).

Eliminating the doctrine would encourage litigation—well publicized in the case of industrial accidents—that portrays these losses as costs for which someone must take responsibility.<sup>246</sup>

The free public services doctrine is in some ways a mirror image of the doctrine of sovereign immunity. Just as the free public services doctrine claims that government may not sue in common law tort, the doctrine of sovereign immunity claims that government may not be sued in common law tort. Viewing government as altogether immune from tort liability—a doctrine rooted in the divine right of kings and the idea that the sovereign can do no wrong—fits poorly within our democratic political culture. Consequently, the Federal Tort Claims Act and state equivalents grant citizens the right, albeit limited by substantial exceptions, to sue the government in tort.<sup>247</sup> Similarly, a common law doctrine barring the government from recovering public service costs from tortfeasors—costs that must otherwise be borne by taxpayers—grates on democratic sensibilities. As was the better-established doctrine of sovereign immunity, the free public services doctrine should be replaced with a statutory scheme that generally allows government to sue in tort for public service expenditures subject to specific exceptions.

## VIII. CONCLUSION

In this Article, I have argued that courts should abandon the free public services doctrine. A judicial invention of the 1970s, the doctrine lacks solid precedential foundation. Moreover, judges have failed to offer adequate justification for it. Perhaps most importantly, the doctrine is bad public policy: it unfairly favors tortfeasors who harm government, it constitutes an insurance scheme that is distributively unfair and inefficient, and, in supporting it, courts are exceeding the limits of their legitimate policy-making role. Eliminating the free public services doctrine would leave in place more established remoteness doctrines that limit liability but do not suffer from these defects.

Simply overturning the doctrine in jurisdictions that have adopted it would be justified, easy, and well within the legitimate powers of the courts. If legislatures wished to reinstate the doctrine, they would be free to do so. Abandoning the doctrine

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246. For a discussion of the value of civic engagement for democratic culture, see ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK* 87-88 (1993).

247. For a detailed discussion of sovereign immunity, see DAN B. DOBBS, *THE LAW OF TORTS* 663-749 (2000).

would end an undesirable tort subsidy to careless industries and place an appropriate limit on judicial loss spreading in the law of torts.



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