MISSION IMPOSSIBLE? THE CASE FOR MUNICIPAL TORT LIABILITY REFORM IN A POST-*VALDEZ* WORLD

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INTRODUCTION

Dora Howell had a serious problem. Her former boyfriend, Andre Gaskin, with whom she shared a child, was harassing her in violation of

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an active order of protection.[1] While Howell and Gaskin were no longer in a relationship, they lived in the same building.[2] On three separate occasions, Howell called the police to report that Gaskin was violating the order by harassing her and forcing himself into her apartment.[3] Every time she called, Officers Mosely-Lawrence and Meran responded.[4] On the first two occasions, instead of arresting Gaskin, the officers assured Howell that Gaskin would "be removed from the premises" and "[would not] be returning."[5] Unfortunately, Gaskin's behavior continued to escalate: he returned to Howell's apartment for a third time, but with a pipe, and used it to "bang[] on her door . . . and break[] off one of the locks."[6] When the same officers responded again, they asked Howell "why she did not move or stay somewhere else" and even "threatened to arrest her if she called them again."[7]

In New York, police officers are required to arrest a person violating an active order of protection.[8] Despite the mandatory arrest law,[9] at no time during these incidents did the officers arrest Gaskin, nor did they tell Howell that they were going to arrest Gaskin.[10] Several days later, Gaskin dragged Howell upstairs to his apartment and threw her out of the third-story window.[11] Howell survived. She sued the City of New York and the officers, alleging that the City negligently failed to protect her, among other claims.[12] Intuitively,[13] if an officer fails to arrest when they are mandated by law to do so, surely they should be held accountable.[14] Unfortunately, the legal standard has strayed from this intuition.[15]

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1 Howell v. City of New York, 142 N.Y.S.3d 81, 82–83 (App. Div. 2021), *aff'd*, No. 91, 2022 WL 17096862 (N.Y. Nov. 22, 2022).

2 *Id.* at 82.

3 *See id.* at 82–83.

4 *Id.*

5 *Id.* at 82.

6 *Id.* at 82–83.

7 *Id.*

8 *See* N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2023).

9 *See id.*

10 *Howell*, 142 N.Y.S.3d at 83.

11 *Id.*

12 *Id.*

13 Generally, we as a society believe that the role of the police is to enforce community safety. *See* Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 97 (2021).

14 Courts have recognized that the police are "obligated to respond and investigate" in some manner when they are advised that an order of protection has been violated. *See, e.g.*, Sorichetti v. City of New York, 482 N.E.2d 70, 76 (N.Y. 1985).

15 *See* Sarah Rogerson, *Domesticating Due Diligence: Municipal Tort Litigation's Potential to Address Failed Enforcement of Orders of Protection*, 21 J. GENDER SOC. POL'Y & L. 289, 329 (2012)

Ten years before *Howell v. City of New York*,[16] the New York State Court of Appeals in *Valdez v. City of New York* drastically narrowed the standard of duty that a plaintiff must establish, and made it nearly impossible to prevail on an individual tort action against a municipality.[17] Similar to Howell, Carmen Valdez had an active order of protection against her abuser, but the officers failed to arrest him when he violated the order even though they promised that they would do so "immediately."[18] Nevertheless, the Court of Appeals found that Valdez's reliance on the officers' promise to arrest was not "justifiable," reasoning that plaintiffs injured by a third party are not always entitled to bring a claim against the city every time the police do not accomplish what they said they would.[19] Valdez, therefore, could not establish that the city owed her a duty of care,[20] and neither could countless plaintiffs that brought similar claims after her.[21] Just as in *Valdez*, the court found that Howell could not establish a special relationship between her and the responding officers, and dismissed her complaint.[22] The holding in *Valdez* leaves survivors of domestic violence vulnerable to the negligence of officers who fail to comply with mandatory arrest laws, as survivors are left

("[S]tates that create a special relationship duty but shift the burden to the victim to prove her actions were reasonable essentially hold the victim accountable for the failed enforcement."); *see also* Howell v. City of New York, No. 91, 2022 WL 17096862, at *18 (N.Y. Nov. 22, 2022) (Wilson, J., dissenting) ("Are we to allow individual officers, by disobeying the law and threatening to arrest the victim holding an order of protection, to render reliance on the law unjustifiable? Sadly, that is precisely what the majority holds . . . .").

16 *See Howell*, 142 N.Y.S.3d 81.

17 *See* Valdez v. City of New York, 960 N.E.2d 356, 368 (N.Y. 2011).

18 *Id.* at 359.

19 *Id.* at 367–68 ("[I]n a colloquial sense, we should be able to depend on the police to do what they say they are going to do . . . [, but] it does not follow that a plaintiff injured by a third party is always entitled to pursue a claim against a municipality in every situation where the police fall short of that aspiration.").

20 *Id.*

21 *See, e.g.*, Devlin v. City of New York, 148 N.Y.S.3d 149 (App. Div. 2021); Coleman v. County of Suffolk, 192 A.D.3d 857 (N.Y. App. Div. 2021); Axt v. Hyde Park Police Dep't, 80 N.Y.S.3d 72 (App. Div. 2018); Alvarado v. City of New York, 57 N.Y.S.3d 3 (App. Div. 2017); Graham v. City of New York, 24 N.Y.S.3d 754 (App. Div. 2016); Citera v. County of Suffolk, 945 N.Y.S.2d 375 (App. Div. 2012); Doe v. Turnmill LLC, 63 N.Y.S.3d 200 (Sup. Ct. 2017); Golfinopolous v. City of New York, No. 11039/11, 2017 WL 1437278 (N.Y. Sup. Ct. Mar. 29, 2017); Bawa v. City of New York, 942 N.Y.S.2d 191 (App. Div. 2012).

22 *See* Howell v. City of New York, 142 N.Y.S.3d 81, 84 (App. Div. 2021), *aff'd*, No. 91, 2022 WL 17096862 (N.Y. Nov. 22, 2022). In Judge Wilson's dissent, he describes the horrific abuse that Howell endured, as well as the officers' callous indifference. *Howell*, 2022 WL 17096862, at *6 (Wilson, J., dissenting) (noting that the officers told Howell, as she was lying on the ground, that she "should have listened" to their advice, that "they did not go inside when Ms. Howell told them Mr. Gaskin was upstairs," and that they "told [responding EMTs] that Ms. Howell was 'fine,' that nothing was wrong with her").

without legal recourse or compensation.[23] This precedent could continue to have detrimental effects on survivors, especially since rates of reported domestic violence have increased during the COVID-19 pandemic.[24]

This Note examines the nearly impossible standard for municipal tort liability in New York and proposes that judicial remedies still hold the potential for reform. Part I of this Note contextualizes the *Valdez* decision by evaluating the history of state accountability and prior federal and state case law building up to *Valdez*. Part II examines the *Valdez* majority's reasoning with a critical lens, focusing on major flaws in the legal standard, and discusses the subsequent application of *Valdez*. The *Valdez* majority failed to adequately consider the harsh ramifications of narrowing tort liability for survivors of domestic violence, as it rendered orders of protection virtually meaningless if plaintiffs harmed by negligent officers could not realistically seek redress. Part III then makes comparisons to other state approaches to municipal liability and contends that judicial remedies can still ameliorate the effects of the *Valdez* holding. Although *Valdez* is currently still good law, the potential for judicial remedy leaves hope that perhaps municipal tort liability reform is not an impossible mission.

I. CONTEXTUALIZING *VALDEZ*: A HISTORICAL OVERVIEW

Valdez v. City of New York was decided in the aftermath of federal and state case law that generally limited state accountability and municipal liability. The following Sections situate *Valdez* in the context of several influential decisions.

A. *Federal Interpretations of Municipal Liability*

In 1989, the Supreme Court ruled out one legal theory for pursuing state accountability in *DeShaney v. Winnebago County Department of*

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23 *See* Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147, 180–82 (2012) ("When law enforcement fails to properly enforce orders of protection, a social norm is thus created that gives permission for batterers to continue the abuse of their victims undaunted by any potential sanctions.").

24 *See* Press Release, Kathy Hochul, Governor, State of New York, Following Spike in Domestic Violence During COVID-19 Pandemic, Secretary to the Governor Melissa Derosa & NYS Council on Women & Girls Launch Task Force to Find Innovative Solutions to Crisis (May 20, 2020), https://www.governor.ny.gov/news/following-spike-domestic-violence-during-covid-19-pandemic-secretary-governor-melissa-derosa [https://perma.cc/S74K-FTWG].

Social Services.[25] In *Deshaney*, a social services department received plausible complaints that a child was being abused by his father.[26] The child was temporarily removed from his father's custody, but after assessing the situation, the department recommended that the child be returned.[27] When the father regained custody, he continued to abuse the child and eventually beat the child into a vegetative state.[28] The mother brought suit against the state on the child's behalf, alleging that the state's failure to intervene and protect the child from abuse deprived the child of liberty without due process of law.[29] The Supreme Court did not find this argument persuasive, holding that because the child's injuries were a result of the father's private actions and not the state's conduct, the state could not have violated the child's rights.[30] The state's inaction, with no connection to the child or the child's injuries, could not be a basis for a due process claim.[31] *Deshaney* effectively closed the door on substantive due process claims against the state, except in cases where the plaintiff is in the state's physical custody, and narrowed the possibilities for state accountability through civil litigation.[32]

Sixteen years after *DeShaney*, the Supreme Court revisited questions of state accountability and duties of protection in *Town of Castle Rock v. Gonzales*.[33] In *Town of Castle Rock*, Jessica Gonzales's three children were abducted by their father, in violation of an active order of protection.[34] Gonzales called the police and notified them of the violation and of her missing children, but the responding officers told her not to worry, and briefly drove around the neighborhood looking for the father before

25 489 U.S. 189 (1989).

26 *See id.* at 191–92.

27 *Id.* at 192.

28 *See id.* at 192–93.

29 *Id.* at 193.

30 *Id.* at 201–03.

31 *Id.*; *see also* G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 116 (2005) ("[A]s an observer . . . no connection existed between the State and Joshua's injuries: no connection to the victim's injuries meant there was no tie or connection to the victim. Absent a connection to the plaintiff, the State could not have violated Joshua's rights.").

32 *See* Miccio, *supra* note 31, at 116 ("This crabbed notion of state action was the death knell for Fourteenth Amendment substantive due process claims, not only when battered women assert state failure to protect, but in cases where any person interposes such an argument. The [Rehnquist Court's distinction between public and private acts] affects not only our understanding of state action but also our notions of state accountability.").

33 545 U.S. 748 (2005).

34 *Id.* at 751–53; *see also* Respondent's Brief on the Merits at 5–8, *Town of Castle Rock*, 545 U.S. 748 (No. 04-278) [hereinafter Respondent's Brief].

leaving.[35] Colorado had a mandatory arrest statute,[36] but the police took no further action despite Gonzales's frantic and continued pleas for help over the course of eight hours.[37] Gonzales continued her search without their help, but she was unsuccessful in finding her children.[38] Later that night, the father drove to the police station and opened fire at the police, who returned fire and fatally wounded him.[39] When the police searched his car, they found the bodies of the three missing children.[40]

Despite the police department's clear lack of effort to enforce Gonzales's order, the Supreme Court refused to find a Fourteenth Amendment property interest in the enforcement of orders of protection.[41] The Court reversed the Tenth Circuit's decision, which held that inaction was not a valid choice for officers mandated by statute and the issuing court to enforce orders of protection.[42] The Court's rejection of a legislatively created interest in the enforcement of protection orders severely restricted constitutional remedies for vulnerable people that the state legislature explicitly sought to protect.[43] As a result, the Court

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35 *See* Miccio, *supra* note 31, at 113; *see also* Amy Senier, *Introductory Note to the Inter-American Commission on Human Rights:* Jessica Lenahan (Gonzalez) et al. v. United States, 51 INT'L LEGAL MATERIALS 54, 68 (2012).

36 *See* COLO. REV. STAT. § 18-6-803.5(3)(b)(I) (2022) ("A peace officer shall arrest . . . a restrained person when the peace officer has information amounting to probable cause that . . . [t]he restrained person has violated or attempted to violate any provision of a protection order . . . .").

37 *See Town of Castle Rock*, 545 U.S. at 753–54; *see also* Respondent's Brief, *supra* note 34, at 8. In fact, one officer went to dinner rather than responding to Gonzales's requests for assistance. *See id.*; Miccio, *supra* note 31, at 114.

38 Respondent's Brief, *supra* note 34, at 8.

39 *Town of Castle Rock*, 545 U.S. at 754; *see also* Respondent's Brief, *supra* note 34, at 9.

40 *See supra* note 39.

41 *Town of Castle Rock*, 545 U.S. at 768.

42 *Id.* at 768 ("In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations. [Both decisions] reflect[] our continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law.'" (quoting Parratt v. Taylor, 451 U.S. 527, 544 (1981))). The Court did leave open the possibility that state laws could create remedies for plaintiffs. *See id.* at 768–69 ("[I]t does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers . . . did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law."). According to the Tenth Circuit, the state's mandatory arrest statute for violators of orders of protection removed all options except arrest. Gonzales v. City of Castle Rock, 366 F.3d 1093, 1109 (10th Cir. 2004), *rev'd sub nom. Town of Castle Rock*, 545 U.S. 748. Inaction was not a valid choice for the officers. *See id.* ("For us to hold otherwise would render domestic abuse restraining orders utterly valueless.").

43 *See* Miccio, *supra* note 31, at 116. *See generally* Roger Pilon, Town of Castle Rock v. Gonzales*: Executive Indifference, Judicial Complicity*, 2005 CATO SUP. CT. REV. 101 (2005) (critiquing *Town of Castle Rock*, 545 U.S. 748).

further cemented obstacles against plaintiffs seeking remedies for states' failures or refusals to enforce their own legislation.[44]

The controversial holdings in *DeShaney* and *Town of Castle Rock* have never been overruled and provide authority for decisions like *Valdez* and *Howell*, in which courts appear to turn a blind eye to unenforced orders of protection. State actors, therefore, have legal insulation from accountability and can find support from the Supreme Court in protecting themselves from liability for inaction or failure to protect its citizens.[45]

B. *New York's Developments of Municipal Liability*

Sovereign immunity is the shield that protects the state from accountability in both federal and state courts.[46] However, states can waive immunity so long as it is "clearly expressed."[47] In 1929, New York's legislature explicitly waived sovereign immunity with the passage of the New York Court of Claims Act.[48] The state consented to having liability

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44 *See* Jill Laurie Goodman, *The Idea of Violence Against Women: Lessons From* United States v. Jessica Lenahan*, the Federal Civil Rights Remedy, and the New York State Anti-Trafficking Campaign*, 36 N.Y.U. REV. L. & SOC. CHANGE 593, 608–09 (2012) ("Justice Antonin Scalia said flatly, '[w]e do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory.'" (alteration in original)).

45 *See* Max D. Siegel, Note, *Surviving* Castle Rock*: The Human Rights of Domestic Violence*, 18 CARDOZO J.L. & GENDER 727, 737 (2012) ("Castle Rock . . . compromised the safety of survivors in the thirty-two jurisdictions that had mandatory arrest provisions for violations of restraining orders. . . . [Through its decision] declining to recognize mandatory arrest provisions, the Court simultaneously ignored and voided the accountability and security that sparked the early movement to improve the American response to domestic violence, recalling a recent time in the country's history when men could violate and beat their wives without legal consequence.").

46 *See* Brown v. State, 674 N.E.2d 1129, 1134 (N.Y. 1996). Sovereign immunity is a concept that dates back to early common law. *Id.*; *see also* Evans v. Berry, 186 N.E. 203, 205 (N.Y. 1933) (first citing Maxmilian v. Mayor of New York, 62 N.Y. 160, 164 (1875); and then citing Augustine v. Town of Brant, 163 N.E. 732, 733 (N.Y. 1928)). It is rooted in our Constitution, as the Eleventh Amendment preserves the right of states to raise sovereign immunity as a defense. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

47 *See* Maloney v. State, 144 N.E.2d 364, 365 (N.Y. 1957) ("It is a fundamental rule of jurisprudence that a State may not be sued without its consent[, but if a state were to consent, a] waiver of immunity from liability must be clearly expressed." (citations omitted) (first citing Hans v. Louisiana, 134 U.S. 1, 13 (1890); then citing *In re* New York, 256 U.S. 490, 497–500 (1921); then citing Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934); then citing Goldstein v. State, 24 N.E.2d 97, 100 (N.Y. 1939); and then citing Smith v. State, 125 N.E. 841, 842 (N.Y. 1920), *superseded by statute*, N.Y. CT. CL. ACT § 8 (McKinney 2023))); *see also* Easley v. N.Y. State Thruway Auth., 135 N.E.2d 572, 573 (N.Y. 1956) (citing Brown v. Bd. of Trs., 104 N.E.2d 866, 868 (N.Y. 1952)).

48 *See* N.Y. CT. CL. ACT § 8.

"determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations."[49] After the Act's passage, the New York Court of Appeals confirmed in *Jackson v. State* that the waiver would be recognized by courts, and that a plaintiff could hold the state liable for employee misconduct that caused injury.[50]

However, this waiver is not unconditional, and court-imposed limitations on liability soon followed. In *Steitz v. City of Beacon*, the Court of Appeals drew a sharp distinction between the state's duty owed to the general public and its duty owed to individuals, a delineation that would shape the rigid standards for contemporary municipal liability.[51] In *Steitz*, the city neglected to keep a water control valve in proper condition, resulting in an inadequate supply of water that could not extinguish a fire that broke out on the plaintiffs' property.[52] The plaintiffs sought to hold the city accountable based on the city's charter, which declared that the city would construct and maintain a system of waterworks as well as maintain the city's fire department.[53] Instead of determining that the city was liable, the Court of Appeals found that the city charter only established a duty to maintain these services for the general public, and not to individuals.[54] As a result, the city could not be held liable for damages suffered by an individual plaintiff to whom the city had no statutory duty.[55]

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49 *Id.*

50 184 N.E. 735 (N.Y. 1933). In *Jackson*, the court held that the state would no longer "use the mantle of sovereignty to protect itself from [the] consequences" of negligent individuals. *Id.* at 736. "[I]n such negligence cases the sovereign ought to and promises that in future it will voluntarily discharge its moral obligations in the same manner as the citizen is forced to perform a duty which courts and Legislatures have so long held, as to him, to be a legal liability." *Id.* The legislature "transform[ed] an unenforceable moral obligation into an actionable legal right and applie[d] to the State the rule *respondeat superior*." *Id.*

51 64 N.E.2d 704, 705–06 (N.Y. 1945); *see also* Alisa M. Benintendi, Valdez v. City Of New York*: The "Death Knell" of Municipal Tort Liability?*, 89 ST. JOHN'S L. REV. 1345, 1349 (2015). *See generally* Stewart F. Hancock, Jr., *Municipal Liability Through a Judge's Eyes*, 44 SYRACUSE L. REV. 925 (1993) (discussing the origin and development of the distinction between public duties and private undertakings).

52 *See Steitz*, 64 N.E.2d at 705.

53 *See id.* at 705.

54 *See id.* at 706 ("[T]he Legislature should not be deemed to have imposed such a risk when its language connotes nothing more than the creation of departments of municipal government, the grant of essential powers of government and directions as to their exercise. [The legislation does not] import intention to protect the interests of any individual except as they secure to all members of the community the enjoyment of rights and privileges to which they are entitled only as members of the public. Neglect in the performance of such requirements creates no civil liability to individuals.").

55 *See id.* at 707 ("[A] corporation under a positive statutory duty to furnish water for the extinguishment of fires is not rendered liable for damages caused by a fire started by another because of a breach of this statutory duty.").

Criticism about this distinction arose in subsequent cases where plaintiffs experienced harm as a result of negligent municipal employees.[56] Nonetheless, the Court of Appeals continued to uphold the distinction between liability to the public and liability to the individual in *O'Connor v. City of New York*.[57] In *O'Connor*, a city building inspector examined a building on three separate occasions but neglected to see or correct serious defects in a newly installed gas system.[58] The inspector certified that the gas system conformed to the city's rules and regulations, which allowed the building owner to turn on the gas.[59] Consequently, the entire building exploded, leading to numerous deaths and injuries, as well as the complete destruction of the building.[60] Despite these tragic results, the court sided with the city, finding that the substantial hardship to plaintiffs from being unable to receive compensation was outweighed by the detrimental impact that expanding liability would have on the city.[61] Since the gas pipes and regulations were created to benefit the plaintiffs as members of the community, and not as individuals—reinforcing the reasoning in *Steitz*—the city owed no duty to the plaintiffs as individuals.[62] Again, the court allowed a municipality to evade liability based on the separation between general and individual duties.[63]

Both *Steitz* and *O'Connor* set the stage for the Court of Appeals' continued decisions to rein in New York's waiver of sovereign immunity. The court's restrictions on municipal tort action were further developed through much of the contemporary case law leading to *Valdez*.

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56 *See, e.g.*, Riss v. City of New York, 240 N.E.2d 860, 862 (N.Y. 1968) (Keating, J., dissenting) ("If a private detective acts carelessly, no one would deny that a jury could find such conduct unacceptable. Why then is the city not required to live up to at least the same minimal standards of professional competence which would be demanded of a private detective?"); Motyka v. City of Amsterdam, 204 N.E.2d 635, 638 (N.Y. 1965) (Desmond, C.J., dissenting) ("[M]unicipal nonliability for injury-causing breaches of duty is archaic and unjust.").

57 447 N.E.2d 33, 36 (N.Y. 1983) ("[G]as piping regulations are designed to benefit the plaintiffs as members of the community, but the regulations do not create a duty to the plaintiffs as individuals. To hold otherwise would be to subject municipalities to open-ended liability of enormous proportions and with no clear outer limits.").

58 *Id.* at 34.

59 *Id.*

60 *Id.* at 33.

61 *Id.* at 36 ("[S]ome individuals will suffer substantial hardship as a result of their inability to recover for their injuries from a municipality that negligently fails to enforce its own regulations. The deleterious impact that such a judicial extension of liability would have on local governments, the vital functions that they serve, and ultimately on taxpayers, however, demands continued adherence to the existing rule. All the more is this so when there has been reliance for decades on this doctrine for purposes of municipal fiscal planning.").

62 *Id.* at 35–36 ("[I]n the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation. No such special relationship exists here.").

63 *Id.*; *see* Steitz v. City of Beacon, 64 N.E.2d 704, 706 (N.Y. 1945).

C. *The Road to* Valdez*: Development of the Current Legal Standard*

In New York, a plaintiff who sues a municipality for negligence cannot recover unless they demonstrate the existence of a "special duty" that runs from the municipality to the plaintiff.[64] As seen in *Steitz* and *O'Connor*, the duty breached must be more than what the municipality owes to the public in general.[65] Courts have recognized a special duty where: (1) "the plaintiff belonged to a class [of people] for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public" in general; or (3) the government entity took affirmative "control of a known and dangerous safety condition."[66]

Before *Valdez*,[67] a court had to first decide whether a government action was discretionary or ministerial before it could reach the question of whether a special duty existed.[68] Discretionary actions involve exercising "reasoned judgment" that could generally produce varying yet acceptable results, whereas ministerial actions involve "direct adherence to a governing rule or standard with a compulsory result."[69] This distinction is dispositive because if the action is deemed discretionary, the government cannot be held liable for any injuries resulting from the action, and the claim would be dismissed.[70] However, if deemed ministerial, the government would be held liable for any harm caused if

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64 *See* McLean v. City of New York, 905 N.E.2d 1167, 1171 (N.Y. 2009) ("We have long followed the rule that an agency of government is not liable for the negligent performance of a governmental function unless there existed 'a special duty to the injured person, in contrast to a general duty owed to the public.'" (quoting Garrett v. Holiday Inns, Inc., 447 N.E.2d 717, 721 (N.Y. 1983))); *see also* Kircher v. City of Jamestown, 543 N.E.2d 443 (N.Y. 1989); Lauer v. City of New York, 733 N.E.2d 184, 188 (N.Y. 2000); Pelaez v. Seide, 810 N.E.2d 393, 399 (N.Y. 2004), *overruled by McLean*, 905 N.E.2d 1167; Laratro v. City of New York, 861 N.E.2d 95, 96 (N.Y. 2006)).

65 *See Steitz*, 64 N.E.2d at 706 ("[T]hese [city charter] provisions were not in terms designed to protect the personal interest of any individual . . . [but rather] to secure the benefits of well ordered municipal government enjoyed by all as members of the community. There was indeed a public duty to maintain a fire department, but that was all . . . ."); *O'Connor*, 447 N.E.2d at 35–36; *see also McLean*, 905 N.E.2d at 1173 ("Even where an act is ministerial, we said, '[t]o sustain liability against a municipality, the duty breached must be more than that owed the public generally.'" (alteration in original) (quoting *Lauer*, 733 N.E.2d at 188)).

66 *See, e.g.*, Ferreira v. City of Binghamton, 975 F.3d 255, 283–84 (2d Cir. 2020) (quoting Applewhite v. Accuhealth, Inc., 995 N.E.2d 131, 135 (N.Y. 2013) (clarifying that a special duty can arise in only these three mentioned circumstances)).

67 *See infra* Section II.B (discussing how *Valdez* changed the legal standard).

68 *See* Tango v. Tulevech, 459 N.E.2d 182, 185–86 (N.Y. 1983).

69 *Id.* at 186.

70 *See id.* at 185.

the action is tortious and cannot be justified by a statutory command.[71] The New York Court of Appeals has emphasized that the question of whether a special duty exists must be analyzed on a case-by-case basis, and that lower courts should look to the context of how the action arose, the nature of the duty that the government was supposed to fulfill, and the actor's responsibility and position within the government.[72]

Tango v. Tulevech is one case illustrating a finding of governmental discretionary action and subsequent immunity, regardless of whether the government actor's judgment was "correct."[73] Tango, the plaintiff, shared two children with his former spouse, Childs.[74] Childs had permanent custody, but they entered into a new custody agreement where Tango would have sole custody for a year.[75] However, after Tango petitioned the family court to make the modified agreement permanent, Childs went to the children's school and, without Tango's permission, removed them from their school bus and drove away with the intent to take the children to South Carolina.[76] After the police intercepted Childs's car, the police returned the children to Childs instead of Tango.[77] Tango then sued the city, seeking damages for endangering his children's welfare and depriving him of the custody of his children.[78] Using *Tango* as an opportunity to clarify inconsistent decisions on discretionary and ministerial acts,[79] the Court of Appeals found that the government could not be liable because the officer had acted within her official capacity to release the children to Childs instead of Tango. As a result, the action was discretionary and neither she nor the city could be held liable, even if she made a mistake in judgment.[80]

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71 *Id.* ("[W]hen official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice. Conversely, when the action is exclusively ministerial, the officer will be liable if it is otherwise tortious and not justifiable pursuant to statutory command." (citing E. River Gas-Light Co. v. Donnelly, 93 N.Y. 557–60 (1883))).

72 *Id.* ("[E]ach case must be decided on the circumstances involved, the nature of the duty, the degree of responsibility resting on the officer, and his position in the municipality's table of organization. It must still be true that discretion is indicated if the powers are 'to be executed or withheld according to his own view of what is necessary and proper.'" (first quoting Rottkamp v. Young, 249 N.Y.S.2d 330, 376 (App. Div. 1964); and then quoting Mills v. City of Brooklyn, 32 N.Y. 489, 497 (1865))).

73 *See id.* at 185–86.

74 *Id.* at 183.

75 *Id.* at 184.

76 *Id.*

77 *See id.*

78 *Id.* at 183–84.

79 *See id.* at 185–86.

80 *See id.*; *see also* Brian J. Shoot, *Overruling by Implication and the Consequent Burden Upon Bench and Bar*, 75 ALB. L. REV. 841, 882 (2012).

The Court of Appeals continued down the path of narrowing municipal liability in *Lauer v. City of New York*.[81] Lauer's young child died suddenly, and the medical examiner issued an initial death certificate stating that the child's cause of death was homicide.[82] As the deceased child's father, Lauer became the subject of the intense scrutiny of a homicide investigation.[83] However, further study by the medical examiner revealed that the child had actually died of a sudden brain aneurysm.[84] Nonetheless, the medical examiner failed to correct the autopsy report or the death certificate, nor did he notify law enforcement or take any further action that would have stopped the homicide investigation into Lauer.[85]

When Lauer sued the city for defamation, the Court of Appeals found that the medical examiner's failure to correct the autopsy report and death certificate was an action that was "ministerial" in nature.[86] This meant that a government employee's conduct was required to "adhere[] to a governing rule, with a compulsory result."[87] An employee's failure, if ministerial, could therefore subject the government to liability for negligence.[88] However, the court held that duty, a key element to establishing a prima facie case of negligence, was missing.[89] As in *Steitz*[90] and *O'Connor*,[91] the court required Lauer to show that the government owed an individual duty, running directly from the government to Lauer, rather than a duty owed to the public in general.[92] Since Lauer could not prove that the medical examiner made any "promises," "assurances," or "personal contact" that would be potential evidence of a specific duty, the city could not be held liable and Lauer's claim was dismissed.[93]

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81 733 N.E.2d 184 (N.Y. 2000).

82 *Id.* at 186.

83 *See id.*

84 *Id.*

85 *Id.*

86 *Id.* at 187.

87 *Id.*

88 *Id.*

89 *Id.* at 187–88.

90 Steitz v. City of Beacon, 64 N.E.2d 704, 706 (N.Y. 1945).

91 O'Connor v. City of New York, 447 N.E.2d 33, 35–36 (N.Y. 1983).

92 *Lauer*, 733 N.E.2d at 188 (first citing Florence v. Goldberg, 375 N.E.2d 763, 766 (N.Y. 1978); and then citing Motyka v. City of Amsterdam, 204 N.E.2d 635, 637 (N.Y. 1965)).

93 *Id.* at 189 ("The Medical Examiner never undertook to act on plaintiff's behalf. He made no promises or assurances to plaintiff, and assumed no affirmative duty upon which plaintiff might have justifiably relied. Plaintiff alleges no personal contact with the Medical Examiner, and therefore also fails to satisfy the 'direct contact' requirement of the test. There is, moreover, no indication that the Medical Examiner knew that plaintiff, or anyone else, had become a suspect in the case. Nor do Medical Examiners generally owe a 'special duty' to potential homicide suspects."). *But see* Shoot, *supra* note 80, at 882–83.

Tango and *Lauer* are two examples of cases where the Court of Appeals restricted the ability of plaintiffs to pursue municipal liability. However, the Court of Appeals did establish an exception to an otherwise ironclad municipal immunity. Through *Pelaez v. Seide* and *Kovit v. Estate of Hallums*, the court provided that plaintiffs must prove a "special relationship" to recover from a municipality's tortious acts, which offered a potential gateway for recovery.[94]

In *Pelaez v. Seide*, plaintiff Pelaez and her two young children moved into a home owned by the Seide family.[95] After moving in, the children began to experience extensive health issues, and after undergoing diagnostic tests, the children were found to have extremely high levels of lead poisoning.[96] The city sent inspectors to the home, who found that there were no lead-safe rooms in the house.[97] However, Pelaez was never advised that lead poisoning was extremely dangerous or that she should move from the home.[98] The inspectors failed to emphasize the dangers of lead poisoning to the home owners or Pelaez, and instead opted to monitor the situation for improvement.[99] After realizing that the lead abatement was not improving fast enough, the inspector called for an administrative hearing, where the judge ordered the children to be relocated immediately.[100] At the time of the hearing, the children were found to have such high levels of lead in their systems that it constituted a medical emergency.[101] Pelaez then brought suit on behalf of her children, claiming that they suffered neurological injury as a result of the city inspector's negligence.[102]

While the court still concluded that Pelaez could not recover damages in this specific case,[103] it elaborated that even though a public

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94 Pelaez v. Seide, 810 N.E.2d 393, 395 (N.Y. 2004), *overruled by* McLean v. City of New York, 905 N.E.2d 1167 (N.Y. 2009); Kovit v. Estate of Hallums, 829 N.E.2d 1188, 1189–90 (N.Y. 2005), *overruled by Mclean*, 905 N.E.2d 1167.

95 *Pelaez*, 810 N.E.2d at 395.

96 *Id.*

97 *Id.*

98 *Id.* at 396.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 Unfortunately for Pelaez, the court did not find a special duty because, despite the government's affirmative actions to protect the public against lead poisoning, the court was concerned that holding the government liable for insufficiently protecting the plaintiff from a third party's misconduct would be too costly and would open the floodgates to litigation. *Id.* at 404. ("While, on occasion, the government's failure to act is so severe as to render it liable, no government could possibly exist if was made answerable in damages whenever it could have done better to protect someone from another person's misconduct. Illustrations (and damages) would be infinite, varying only in the degree of harm.").

employee's negligent discretionary acts cannot result in municipal liability, a municipality can still be held liable in cases where "a duty . . . runs from the municipality to the plaintiff."[104] This "special relationship" created the possibility for government liability even where the government actor(s) "did not directly cause the plaintiff's injuries."[105] The court found support for its more plaintiff-friendly approach in past decisions, establishing a pattern of special relationships between plaintiffs and police who were not directly responsible for a plaintiff's injuries.[106]

The Court of Appeals further defined this special relationship exception in *Kovit v. Estate of Hallums*.[107] In *Kovit*, a police officer had arrived at the scene of a car accident, where the driver was visibly distressed and hysterical, and asked the driver to maneuver the car out of the accident.[108] The driver, still visibly shaken, reversed and hit Kovit instead, causing serious injury.[109] Kovit sued the city, arguing that the officer was negligent in telling the driver to move her car while she was visibly unfit to drive.[110] The court found that the officer's decision was a discretionary act that municipalities could not be held liable for unless Kovit could establish a special relationship with the city.[111]

Despite the individual plaintiffs' inability to recover in *Pelaez* and *Kovit*, the Court of Appeals' continued affirmation of the special relationship exception provides some latitude for plaintiffs to make their case.[112] The crux of municipal liability cases now typically rises and falls based on whether there is a special relationship between a plaintiff and

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104 *Id.* at 399.

105 *Id.* at 403–04.

106 *See, e.g.*, Mastroianni v. County of Suffolk, 691 N.E.2d 613 (N.Y. 1997); Merced v. City of New York, 551 N.E.2d 589 (N.Y. 1990); Kircher v. City of Jamestown, 543 N.E.2d 443 (N.Y. 1989); Cuffy v. City of New York, 505 N.E.2d 937 (N.Y. 1987); Sorichetti v. City of New York, 482 N.E.2d 70 (N.Y. 1985); Yearwood v. Town of Brighton, 474 N.E.2d 612 (N.Y. 1984); De Long v. County of Erie, 457 N.E.2d 717 (N.Y. 1983); Weiner v. Metro. Transp. Auth., 433 N.E.2d 124 (N.Y. 1982); Malerba v. Incorporated Village of Huntington Bay, 429 N.E.2d 410 (N.Y. 1981); Florence v. Goldberg, 375 N.E.2d 763 (N.Y. 1978); Evers v. Westerberg, 296 N.E.2d 257 (N.Y. 1973); Bass v. City of New York, 300 N.E.2d 154 (N.Y. 1973); Riss v. City of New York, 240 N.E.2d 860 (N.Y. 1968); Schuster v. City of New York, 154 N.E.2d 534 (N.Y. 1958); Shinder v. State, 468 N.E.2d 27 (N.Y. 1984); Napolitano v. County of Suffolk, 462 N.E.2d 1179 (N.Y. 1984). *See generally* DAN B. DOBBS, THE LAW OF TORTS § 272, at 728–31 (1st ed. 2000); Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection From Crime*, 90 A.L.R.5th 273 (2001).

107 829 N.E.2d 1188 (N.Y. 2005).

108 *See id.* at 1190.

109 *Id.*

110 *Id.*

111 *Id.*

112 *See, e.g.*, Etienne v. N.Y.C. Police Dep't, 830 N.Y.S.2d 349 (App. Div. 2007); Bain v. City of Rochester, 497 N.Y.S.2d 785 (App. Div. 1985); Yearwood v. Town of Brighton, 475 N.Y.S.2d 958 (App. Div. 1984). *But see* Zibbon v. Town of Cheektowaga, 382 N.Y.S.2d 152 (App. Div. 1976).

the government.[113] The special relationship test is very fact specific,[114] which may help a plaintiff survive summary judgment.[115] Unfortunately for the plaintiff, however, establishing a special relationship is no easy task.[116]

The Court of Appeals limits the formation of a special relationship to circumstances where: (1) the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) a municipality voluntarily assumes a duty that creates a justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes control in the face of a known, obvious, and dangerous safety violation.[117] In addition, a plaintiff cannot assert a claim on the first or second basis without satisfying several additional elements.[118] In order to establish a violation of statutory duty under the first basis, a plaintiff must show that she is a member "of the class for whose particular benefit the statute was enacted," that the "recognition of a private right of action would promote the legislative purpose of the governing statute," and that "to do so would be consistent with the legislative scheme."[119]

To establish a violation under the second basis, where a plaintiff seeks to prove that a municipality voluntarily assumed a duty that led the plaintiff to justifiably rely and benefit from that duty, the plaintiff must

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113 *See generally* 1 THOMAS W. RYNARD, INSURANCE & RISK MANAGEMENT—STATE & LOCAL GOVERNMENTS § 9.06 (2021).

114 *See* Matthew Warren & Cristie Cole, Gipson v. Kasey*: The Beginning of a New Analytical Framework in Arizona for Duty Determinations?*, 49 ARIZ. L. REV. 785, 786 (noting that "roles traditionally left to the jury or factfinder are usurped by the judge" when courts "make additional factual inquiries to determine whether a special relationship exists among the parties"); Daniel J. Glivar, *Failure to Protect Witnesses: Are Prosecutors Liable*, 66 NOTRE DAME L. REV. 1111, 1126 (stating that the "special relationship doctrine is necessarily fact specific"); Jason S. Kanterman, *New Jersey Insurance Producer Liability: Attempting to Define the "Special Relationship" Theory of Liability*, 2016 RUTGERS U. L. REV. COMMENTS 92, 92 ("[S]pecial relationship theory, while sharing common themes with general tort law, has proven difficult to define and even more difficult to apply. In large part, this difficulty stems from the fact that the special relationship theory requires a fact-specific analysis . . . .").

115 *See, e.g.*, Tarnaras v. County of Nassau, 694 N.Y.S.2d 414, 416 (App. Div. 1999) (denying the municipality's motion for summary judgment because "[w]hether, under the instant circumstances, the plaintiffs reasonably relied upon the representations that [the accused] would be arrested constitutes a question of fact").

116 *See, e.g.*, Farley *ex rel.* Perez v. County of Erie, 791 N.Y.S.2d 251, 253 (App. Div. 2005) (finding that defendants met their initial burden of establishing a lack of justifiable reliance on the municipality's undertaking to protect plaintiff from her abusive husband, who fatally shot her).

117 *See* Pelaez v. Seide, 810 N.E.2d 393, 400 (N.Y. 2004) (citing Garrett v. Holiday Inns, Inc., 447 N.E.2d 717, 721 (N.Y. 1983)), *overruled by* McLean v. City of New York, 905 N.E.2d 1167 (N.Y. 2009).

118 *Id.* at 400–01.

119 *Id.* at 400.

still prove additional elements.[120] First, the plaintiff must show that the municipality assumed, through promises or actions, an affirmative duty to act on behalf of the plaintiff who was injured.[121] Next, the plaintiff must show that the municipality's agents knew that inaction could lead to harming the plaintiff.[122] Also, the plaintiff must establish direct contact between the municipality's agents and the injured party.[123] Finally, the plaintiff must show that they justifiably relied on the municipality's affirmative undertaking.[124] Failure to establish any of these elements would result in the plaintiff being unable to recover.[125]

These complicated hurdles a plaintiff must clear to establish a claim already seemed daunting, but the Court of Appeals added yet another obstacle in *McLean v. City of New York*.[126] Charlene McLean was a mother searching for licensed family daycare centers for her child.[127] She requested that the Administration for Children's Services (ACS) help her find a daycare center that was routinely investigated by ACS and had no complaints.[128] In New York, daycare centers are required to register with the state, and if any have violations, the state prohibits registration renewals.[129] ACS provided McLean with a list of centers and affirmatively told her that the list fit her criteria.[130] Unknown to McLean, one of the centers on the list had two violations but was still renewed for registration.[131] The plaintiff placed her daughter at this facility, and while in the center's care, her daughter fell from a bed and sustained a brain injury.[132] McLean brought suit against the city, arguing that the social services law regulating daycare centers "create[d] a statutory duty for the benefit of a class of which she and her daughter [were] members."[133]

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120 *Id.* at 401 (citing Cuffy v. City of New York, 505 N.E.2d 937 (N.Y. 1987)).

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* at 401–02; *see* Benintendi, *supra* note 51, at 1355 ("A plaintiff's failure to establish each element, in either scenario, will result in the plaintiff's inability to recover damages from the municipality.").

126 905 N.E.2d 1167 (N.Y. 2009).

127 *Id.* at 1170.

128 *Id.*

129 *Id.* at 1169–70.

130 *Id.* at 1170.

131 *Id.* ACS received two complaints: (1) the owner's husband had "dipped a child's hand into a bowl of hot oatmeal," and (2) "a child had been left alone for an hour and a half in a nearby store." *Id.* ACS investigated both complaints and found them to be substantiated: "There is no evidence that the home was later inspected and found to be in compliance, so it seems clear that [the owner] should not have been permitted to renew her registration . . . ." *Id.*

132 *Id.*

133 *Id.* at 1170–71.

Applying *Pelaez*, the court held that recognizing a private right of action under the social services law would be inconsistent with the legislative scheme, which did not contemplate creating a private right of action.[134] Since there was no explicit statutory provision for governmental tort liability in the social services law, McLean could not recover damages.[135]

The Court of Appeals likely could have ended its analysis there but went further to restrict the prospect of municipal liability.[136] The court overruled the more plaintiff-friendly standard set in *Pelaez* and *Kovit*,[137] opting instead to favor the harsher, more government-friendly standard set in *Tango* and *Lauer*.[138] *McLean* set forth a bright-line rule, holding that the government can never be held liable for discretionary actions, while ministerial actions can only be the basis for liability if the plaintiff can establish a special duty that the government owed her.[139] The court reasoned that this rule was still consistent with the results in *Pelaez* and *Kovit* because no special duty was found in either of the cases.[140] The court's justification for narrowing the scope was that expansive liability would render the government less effective at protecting citizens.[141] In addition, the court stressed that lawsuits should not be the only way to deal with government failure, and that the expansion of liability might even make the government "withdraw or reduce their protective services."[142] This was the beginning of the Court of Appeals' drastic narrowing of municipal tort liability. *McLean*'s holding paved the road for *Valdez*, providing precedent and ample justification for the iron-clad municipal immunity that *Valdez* would establish.

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134 *Id.* at 1171.

135 *Id.* at 1172.

136 *Id.* at 1173.

137 *Id.* ("If there is an inconsistency, we resolve it now: *Tango* and *Lauer* are right, and any contrary inference that may be drawn from the quoted language in *Pelaez* and *Kovit* is wrong.").

138 *See id.* at 1173–74 ("Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general."); Benintendi, *supra* note 51, at 1355 ("While *Pelaez* and *Kovit* would have limited the necessity of such proof to cases involving discretionary acts by the municipality, the Court of Appeals took a radically different approach in *McLean v. City of New York*.").

139 *McLean*, 905 N.E.2d at 1173.

140 *Id.* at 1174.

141 *See id.*

142 *Id.*

II. THE UNWORKABLE LEGAL STANDARD UNDER *VALDEZ*

Since the New York State Legislature explicitly waived sovereign immunity in 1939,[143] the New York Court of Appeals slowly developed case law over time to guard the state against tort liability.[144] However, while prior case law left open the possibility of liability under the specific circumstances,[145] the court essentially sealed the door on tort liability in *Valdez*.

A. *Carmen Valdez's Story*

Carmen Valdez had an active order of protection against her former boyfriend, Felix Perez.[146] Soon after the order went into effect, Valdez received a call from Perez, who threatened to kill her.[147] This was not the first time that Perez had threatened to harm her, but it was the first time he threatened to kill her.[148] Valdez feared for her life.[149] She immediately packed her belongings and left her apartment with her two young children, planning to stay at a family member's home.[150] On her way there, Valdez called the police and notified the Domestic Violence Unit. The officers in the unit were aware of Perez's history of domestic violence because they had served the orders of protection on Perez.[151] Valdez spoke to these same officers and told them that she received another threat from Perez and was now on her way to seek safety at a family member's home.[152] One of the officers told her to return to her apartment and that Perez would be arrested "immediately."[153] Valdez relied on the officer's statement, and went back to her apartment with her children.[154] She believed that, as the officer assured her, Perez would be arrested for violating the active order of protection.[155] The next day when she left her

143 *See* N.Y. CT. CL. ACT § 8 (McKinney 2023).

144 *See supra* Sections I.B–I.C.

145 *McLean*, 905 N.E.2d at 1173 (holding that a plaintiff can recover if they can establish that the government employee's actions were ministerial and that there was a special duty that the government owed them).

146 Valdez v. City of New York, 960 N.E.2d 356, 359 (N.Y. 2011).

147 *Id.*

148 *Id.*

149 *See id.*

150 *Id.*

151 *See id.*

152 *Id.*

153 *Id.*

154 *See id.* at 360.

155 *See id.*

apartment to take out the trash, believing that she was safe, Perez was waiting outside her door and shot her, injuring her face and arm.[156] Valdez survived and sued the city, arguing that she relied on the police officer's promise that Perez would be arrested immediately.[157] The jury found in her favor, awarding damages in the amount of $9.93 million, and determined that the city acted in reckless disregard of Valdez's safety.[158]

B. *Critiquing* Valdez*: Flaws in the Majority's Reasoning*

In a shocking reversal, the Court of Appeals overturned the jury's verdict, outright rejecting the special duty rule as an exception to the governmental function immunity defense,[159] and creating an impossible standard that provides ironclad immunity to the detriment of domestic violence survivors.[160] *Valdez* adopted *McLean*'s harsh reasoning but went even further by heightening the requirements for establishing a special relationship.[161]

First, instead of differentiating between discretionary and ministerial actions as prior cases had done,[162] the majority turned to the question of duty. If a plaintiff could not overcome the "threshold burden" of proving that the government owed them a duty, the government did not need to raise a government immunity defense, obviating the need for the government to argue that its actions were discretionary.[163] To prove whether the government owed a special duty to a plaintiff, the plaintiff must show that they had a special relationship with the government.[164] The dispositive issue here was whether the plaintiff justifiably relied on the government's affirmative undertaking.[165] Under the majority's analysis of justifiable reliance, it was unreasonable for Valdez to conclude

156 *See id.*

157 *Id.*

158 *Id.*

159 *Id.* at 363, 368; *see* John C. Cherundolo, *Tort Law*, 63 SYRACUSE L. REV. 923, 940 (2013).

160 *See Valdez*, 960 N.E.2d at 364.

161 *Id.* at 364–66.

162 *See supra* Section I.C.

163 *See Valdez*, 960 N.E.2d at 365.

164 Plaintiffs must show: (1) the municipality assumed "an affirmative duty to act on behalf of [the plaintiff]; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and [the plaintiff]; and (4) [the plaintiff's] justifiable reliance on the municipality's affirmative undertaking." *Id.* (quoting Cuffy v. City of New York, 505 N.E.2d 937, 940 (N.Y. 1987)).

165 *See id.* ("We have previously emphasized the importance of this factor, describing it as 'critical' because it 'provides the essential causative link between the "special duty" assumed by the municipality and the alleged injury.'" (quoting *Cuffy*, 505 N.E.2d at 940)).

that "she could relax her vigilance" based on the officer's assurances that Perez would be arrested "immediately."[166] Without justifiable reliance, there was no special relationship, and thus no causal link between the alleged duty assumed and Valdez's injuries. Therefore, the court did not need to reach the question of whether the officer's actions were discretionary or ministerial in order to dismiss Valdez's claim.[167]

In scathing dissents, Chief Judge Lippman and Judge Jones correctly articulated flaws in the majority's reasoning. First, the majority legally erred by arbitrarily requiring the plaintiff to meet a new, higher standard for proving justifiable reliance.[168] Next, the court overruled prior precedent by implication through its decision to analyze justifiable reliance as a question of law.[169] Finally, the court's holding has the effect of weakening, if not eliminating, the force of New York's mandatory arrest law, which could have lasting effects on efforts to protect survivors of domestic violence.[170]

Chief Judge Lippman voiced concerns that if a plaintiff like Valdez could not reasonably trust a police officer's assurances, then they would have to take confirmatory action to justifiably rely on the officer's acts and create a special relationship.[171] Such a requirement was never necessary to establish a special relationship and did not find support in prior case law.[172]

Domestic violence survivors must be able to rely on police officers to enforce orders of protection when they are violated.[173] To hold

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166 *Id.* at 366.

167 *See id.* at 368.

168 *See id.* at 368–71 (Lippman, C.J., dissenting).

169 *See id.* at 374 (noting that the majority "dispatched" the special duty doctrine, as it was previously applied pre-*Valdez*, "without explanation as if it had never existed"). *See generally* Shoot, *supra* note 80, at 878–83 (documenting the New York Court of Appeals' pattern of overruling prior holdings by implication, citing municipal liability cases prior to *Valdez* as examples).

170 *See* Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 161 (2003) ("Without the cooperation and activism of police officers, prosecutors, and judges, the state sends a message to would-be perpetrators and victims that battering is condoned by the state and that it will be permitted without repercussion."); *see also* Howell v. City of New York, No. 91, 2022 WL 17096862, at *18 (N.Y. Nov. 22, 2022) (Wilson, J., dissenting) ("The majority's holding—that despite the multiple orders of protection and emphatic action by the legislature and Governor requiring the arrest of violators of such orders, two officers are able to countermand all three branches of government and render the victim's reliance on the law 'unjustifiable'—is baffling.").

171 *See Valdez*, 960 N.E.2d at 369–70 (Lippman, C.J., dissenting).

172 *See id.*

173 *See Hearing on the Legislation to Reduce the Growing Problem of Violent Crime Against Women: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 71 (June 10, 1990) (statement of NOW Legal Defense and Education Fund) ("Encouragement of mandatory arrest policies deserves a prominent place in the federal effort to combat domestic abuse. The failure to enforce

otherwise would "fundamentally subvert[]" the purpose of these orders, as they "are intended to, and do, foster reliance" on law enforcement.[174] If a domestic violence survivor cannot rely on the police to enforce an order of protection without objective confirmation that the police would do as they say, victims might be inclined to call officers for confirmation or reassurance, instead of entrusting officers to do as promised and as mandated by law.[175] This would lead to inefficiency in law enforcement, which was the very result that the Court of Appeals sought to avoid in *McLean*.[176] A lack of reliance or trust in law enforcement additionally results in uncooperative witnesses, and survivors might be less willing to report instances of violence, which could jeopardize public safety goals.[177]

Additionally, the majority deemed the question of justifiable reliance an issue that could be decided as a matter of law,[178] which was inconsistent with prior precedent, where this factor was a question for the jury.[179] The majority supported this decision on the grounds that police officers "put themselves in harm's way" and are often required to make quick judgments that have the potential for life or death consequences.[180] Under this rationale, officers "should [not] be entitled to less protection from tort liability than other government employees [who have been deemed immune], such as the medical examiner in *Lauer* and the social services worker in *McLean*."[181] Further, the majority critiqued Chief Judge Lippman's opinion as limiting justifiable reliance to an exclusive question for the jury.[182] Chief Judge Lippman addressed this critique, noting that questions of special duty and justifiable reliance are detailed, incredibly factual, and generally not suitable for dispositions purely as a matter of law.[183] Judge Jones agreed that the special relationship inquiry

orders of protection once they have been granted is perhaps the weakest link the legal safeguards now available to battered women.").

174 *See Valdez*, 960 N.E.2d at 371 (Lippman, C.J., dissenting); *see also* Han, *supra* note 170, at 174 ("The novelty of the mandatory arrest laws, therefore, is that they remove discretion on the part of police officers who might be otherwise reluctant to arrest suspects in domestic cases.").

175 *See Valdez*, 960 N.E.2d at 369–70 (Lippman, C.J., dissenting).

176 *See* McLean v. City of New York, 905 N.E.2d 1167, 1174 (N.Y. 2009) ("[E]xposing municipalities to tort liability would be likely to render them less, not more, effective in protecting their citizens." (citing Laratro v. City of New York, 861 N.E.2d 95, 96 (N.Y. 2006))).

177 *See generally* Brown, *supra* note 23, at 179–82 (defining and describing the underenforcement of laws and its dangerous effects, especially on vulnerable communities of color).

178 *See Valdez*, 960 N.E.2d at 377 (Jones, J., dissenting) ("These facts do not support the conclusion that plaintiff's claim was insufficient as a matter of law.").

179 *See id.*

180 *Id.* at 363 n.5 (majority opinion).

181 *Id.*

182 *See id.* at 365 n.8.

183 *See id.* at 370 & n.2 (Lippman, C.J., dissenting).

is a question for the jury, and that, notably, the jury had already resolved the question of reliance in favor of Valdez.[184] The court therefore had "no basis" to disturb the jury verdict.[185] As questions of reasonableness generally require a fact-based analysis, juries are in a better position than judges to decide justifiable reliance.[186]

The majority also failed to consider that dismissing or weakening police officers' statutory duty under New York's mandatory arrest law has major social ramifications.[187] New York's mandatory arrest law, like that of states like Washington[188] and Oregon,[189] eliminates the discretion that police officers typically have and requires them to act, thereby creating a statutory duty to protect an individual with an active order of protection.[190] The statutory duty to protect is distinguishable from the ordinary duty a police officer owes to protect the general public, under which an officer would not have a duty to an individual.[191] The statute not only gives police officers the power to enforce orders of protection, but it also commands them to do so.[192] Mandatory arrest laws like New York's statute were passed because survivors of domestic violence were not receiving protection from law enforcement, due to a culture of law enforcement dismissing the seriousness of domestic violence.[193] However, while courts in Washington and Oregon have interpreted

184 *See id.* at 376 (Jones, J., dissenting); *see also* De Long v. County of Erie, 457 N.E.2d 717, 722 (N.Y. 1983) ("Whether a special duty has been breached is generally a question for the jury to decide.").

185 *See Valdez*, 960 N.E.2d at 376.

186 *See id.* at 370 (Lippman, C.J., dissenting); *De Long*, 457 N.E.2d at 722.

187 *See* N.Y. CRIM. PROC. LAW § 140.10(4)(b) (McKinney 2023) ("[A] police officer shall arrest a person, and shall not attempt to reconcile the parties or mediate, where such officer has reasonable cause to believe that . . . a duly served order of protection . . . is in effect . . . .").

188 WASH. REV. CODE § 10.31.100(2)(a) (2023).

189 OR. REV. STAT. § 133.310(3) (2022).

190 *See Valdez*, 960 N.E.2d at 370 (Lippman, C.J., dissenting).

191 *See id.* at 361 (majority opinion).

192 *See* N.Y. CRIM. PROC. LAW § 140.10(4)(b).

193 *See* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 274–75 (2005) ("Police arrest avoidance was the rule rather than the exception. New York, not unlike her sister states, rarely if ever arrested perpetrators of domestic violence, and if a case were to find its way into the criminal justice system, it was often removed from criminal court and placed within the family court system. The principle that guided these decisions was that intimate violence was a private matter best left to the family court." (footnotes omitted)); U.S. COMM'N ON C.R., BATTERED WOMEN: ISSUES OF PUBLIC POLICY 20–22 (1978) ("Perhaps the most serious problem for the individual who has suffered from assault is the failure of the police to respond to [a] call for help."). In the 1970s, police arrest avoidance was the norm, and advocates against domestic violence began to advocate for mandatory arrest laws because arrests were thought to prevent further violence. *See* Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 262, 270 (1984); EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 8–9 (3d ed. 2003).

mandatory arrest laws to impose a statutory duty, *Valdez*'s holding appears to send the opposite message: officers who fail to enforce orders of protection will not face legal consequences.

The message this decision sends to law enforcement could incentivize underenforcement, which often impacts domestic violence survivors the most. Underenforcement of orders of protection can result in hypervigilant behavior that can interfere with employment and education, making survivors more economically vulnerable.[194] It also hinders survivors "from engaging in fundamental functions such as . . . forming institutional relations," which subsequently creates obstacles to full societal participation.[195] The court's sanctioning of underenforcement is not only detrimental to domestic violence survivors but to communities at large.[196] Underenforcement can be linked to systemic "discrimination and deprivation" for "already vulnerable population[s]" living in low-income and high-crime areas,[197] which disproportionately affects Black and brown communities.[198] In such circumstances, underenforcement can lead to serious crimes going unsolved due to fewer services offered to victims and general distrust of law enforcement.[199]

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194 *See* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1753–54 (2006); Brown, *supra* note 23, at 181 ("A domestic violence victim can neither work nor educate herself without fear of looming violence. Basic life functions become maladjusted."); *see also* BUZAWA & BUZAWA, *supra* note 193, at 127 (discussing the traumatic effects of domestic violence on survivors' emotional well-being in general).

195 Natapoff, *supra* note 194, at 1754.

196 *See* Brown, *supra* note 23, at 179–80.

197 *Id.* at 179; *see also* Natapoff, *supra* note 194, at 1752 (noting that underenforcement can be determined by five triggering factors: "(1) official discriminatory intent, (2) group disadvantage, (3) interference with basic life functions, (4) undermining civilian relations with law enforcement, and (5) the lack of countervailing values").

198 *Id.* at 180.

199 *Id.* Brown also notes that "[m]any critical race theorists and criminologists have criticized the criminal justice system for overenforcement" and discusses the problems with overenforcement in communities of color. *See id.* at 178–79; *see also* Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 864, 884 (1997); Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 154 (1996); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 26–30 (1998); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 425–27 (1997); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 295–99 (1998); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigation Sphere,"* 94 CALIF. L. REV. 617, 618–21 (2006); Charles J. Ogletree, Jr., *The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219, 228 n.45 (1998); Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 646–47 (2003) (describing police picking on poor and minority suspects as targets for brutality).

C. *The Aftermath of* Valdez

The Court of Appeals' decision in *Valdez* has not resulted in consistent application by the lower courts and requires reform.[200] *Coleson v. City of New York* is one such case where the lower court grappled with applying the *Valdez* standard, resulting in the Court of Appeals revisiting the issue. Coleson had been previously abused by her husband, who was incarcerated for assaulting her several times.[201] At the time of the incident, Coleson did not have an active order of protection, and her husband forced himself into her building and threatened to kill her.[202] She called the police, and he fled the premises.[203] Coleson and the police searched for him through the neighborhood together, and he was subsequently arrested.[204] She then went to the police precinct and applied for an active order of protection.[205] The officer at the precinct told her that she should not worry anymore because they would protect her.[206] Later on that day, the same officer told her that her husband had been arrested, that he was in front of a judge, and that he would be sentenced.[207] The officer spoke to her for two hours over the phone and told her that everything was going to be okay.[208] Two days later, Coleson went to pick her child up from school, thinking that she would be safe, but her husband ambushed her and stabbed her in front of her child.[209] Coleson then sued the city and argued that she justifiably relied on the officer's reassurances, which gave her a false impression of security.[210]

The Appellate Division applied *Valdez* and held that the officer's statements were unspecified and too vague to be considered as creating a specific duty of care to the plaintiff.[211] According to the Appellate Division, there was no evidence that the city assumed an affirmative duty

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200 *See* Benintendi, *supra* note 51, at 1366 ("The holdings in *Valdez* and *Coleson* are difficult to harmonize and are likely to cause confusion for lower courts that seek to apply these decisions."). Even the Second Circuit has expressed confusion over the special duty doctrine, saying "it is impossible to discern from precedent which . . . view[] is favored by New York's highest court" because of the "conflicting guidance." Ferreira v. City of Binghamton, 975 F.3d 255, 262 (2d Cir. 2020).

201 Coleson v. City of New York, 24 N.E.3d 1074, 1075–76 (N.Y. 2014).

202 *See id.* at 1076.

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *See id.*

211 *See* Coleson v. City of New York, 106 A.D.3d 474, 474–75 (App. Div. 2013).

to protect the plaintiff because the officer's statements were still insufficient to constitute justifiable reliance.[212] The concurring opinion by the Appellate Division critiqued *Valdez* for its unrealistic standard of determining justifiable reliance, noting that if the officer's statements in this case were not specific enough to find that the city assumed an affirmative duty to protect the plaintiff, then there likely would never be a statement that could be sufficient for a plaintiff to rely.[213] No New York court would ever be able to find that a municipality had a special duty to a plaintiff under the *Valdez* standard unless the city were to consent to owe a duty to the plaintiff.[214]

In his concurrence, Judge Moskowitz expressed fears that in this post-*Valdez* world, police would be "permitted to lull a domestic violence complainant into a false sense of security" with reassurances without actual protection.[215] If tragedy were to occur to a complainant, as it did in *Valdez* and *Coleson*, the police would then be free to "disavow responsibility" for having misled the complainant.[216] A complainant would thus be left without remedy for this harm, even where she was entitled to the full enforcement of her court order and acted in reliance on explicit assurances from the police.[217] The concurrence further suggested that after *Valdez*, the standard for municipal liability indicates to domestic violence survivors that they cannot rely on what officers tell them regarding their safety, and that they have no reason to trust the police because the courts refuse to find any police statements grounds for justifiable reliance.[218]

On appeal, the Court of Appeals agreed with the Appellate Division's pessimism, but ironically disagreed with its outcome and reversed.[219] Unlike *Valdez*, here, the Court of Appeals found that the question of whether the plaintiff and the government had a special relationship was a triable issue of fact.[220] According to the majority, the jury could potentially conclude that the police made promises to protect the plaintiff.[221] Considering that the police knew the husband would harm

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212 *See id.*

213 *Id.* at 477 (Moskowitz, J., concurring).

214 *See id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.* ("[T]he law after *Valdez* suggests to domestic violence victims that they cannot rely on police statements regarding their safety, should not follow police instructions, and have no reason to place trust in the police. This legal framework will redound to no one's benefit—not the police and certainly not the citizens the police are sworn to protect.").

219 Coleson v. City of New York, 24 N.E.3d 1074, 1075 (N.Y. 2014).

220 *Id.* at 1078. *But see* Valdez v. City of New York, 960 N.E.2d 356, 365, 368 (N.Y. 2011).

221 *Coleson*, 24 N.E.3d at 1078.

the plaintiff if he were not arrested, the court concluded that it was a factual question whether the police knew their failure to act would lead to the plaintiff's harm.[222] A jury could have plausibly found it reasonable for the plaintiff to believe that her abuser was incarcerated and that the police would contact her if that were not the case, given her extensive conversation with the officer who provided her with several reassuring promises.[223]

The court also distinguished *Valdez* from the facts in *Coleson* on the grounds that the police department's activity here was significantly "more substantial, involved, and interactive than the police conduct in *Valdez*."[224] Unlike in *Valdez*, the police officer in *Coleson* told the plaintiff that her husband would "be in prison for a while and that they would stay in contact with" her, which provided substantially more information than Valdez's conversation with the officer, who vaguely promised that her abuser would be arrested "immediately."[225] The Court of Appeals also attempted to address the discrepancy between *Valdez* and *Coleson* by discussing the public policy implications. It noted that the court's intent was not to discourage law enforcement from being responsive to complainants, but that officers "should make assurances only to the extent that they have an actual basis for [them]."[226]

In Judge Pigott's dissent, he critiqued the majority opinion as creating a paradox through this unintuitive legal standard.[227] Judge Pigott characterized the majority's resulting standard as encouraging police officers "to forgo . . . meaningful communication" with complainants in order to avoid the possibility that their words could be "remotely construed as creating a special relationship."[228] Additionally, the majority did not explain how the plaintiff could have justifiably relied on the police officer's statements, or how a jury could answer that question without speculation as to how protection would have been provided to the plaintiff.[229] Judge Pigott argued that police statements in this case could not have lulled the plaintiff into inaction, and that this ruling has the effect of deterring police from providing any assurances to domestic violence victims.[230] This could result in domestic violence victims being

222 *Id.*

223 *Id.*

224 *Id.*

225 *See id.* (quoting *Valdez*, 960 N.E.2d at 366).

226 *Id.* at 1078–79.

227 *See id.* at 1079–80 (Pigott, J., dissenting) ("The majority does not explain how this plaintiff could have justifiably relied upon such a vague offer of 'protection' . . . .").

228 *Id.* at 1079.

229 *Id.* at 1080.

230 *Id.* at 1081.

less likely to cooperate with law enforcement, as they may be more likely to think that the police will not help them.[231] Consequently, abusers could be less likely to face legal consequences for their actions, causing the cycle of domestic violence to continue.[232] Judge Pigott rightfully took issue with the majority's messy attempt to both preserve the precedent set by *Valdez* and provide an equitable result for the plaintiff.[233] The majority decided paradoxically that the plaintiff could justifiably rely on the police statements in this case, even though the plaintiff in *Valdez* relied on similar statements.[234] The inconsistent holdings of *Valdez* and *Coleson* are difficult to reconcile and further support that justifiable reliance should be a question for the jury to determine.

III. MODEL APPROACHES: OTHER STATE STANDARDS

New York could benefit from adopting other states' approaches to interpreting the duty that the government owes domestic violence survivors with orders of protection. In Oregon, courts have held that the "discretionary function or duty" defense is unavailable for police officers where an order of protection creates a "specific duty" to protect the plaintiff.[235] Under Oregon's mandatory arrest law, enacted in 1977, officers "shall arrest" if they find probable cause to believe that a person

231 *Id.* ("The end result, of course, is that police will be deterred from providing any assurances to victims of domestic violence, those victims will be less than willing to cooperate in the prosecution of their significant others (or family members), and the cycle will continue, with victims in all likelihood returning to their abusers, all because the police were (justifiably) wary about making any comment that could be considered a promise of safety.").

232 *Id.*

233 *See id.* at 1079.

234 *See id.* at 1079, 1081.

235 *See, e.g.*, Nearing v. Weaver, 670 P.2d 137, 140–43 (Or. 1983) (recognizing that the mandatory arrest statute imposes a specific duty on police to enforce orders of protection for the benefit of the persons identified in the court orders); *see also* Buchler v. Or. Corr. Div. *ex rel.* State, 853 P.2d 798, 805 n.9 (Or. 1993) (citing *Nearing*, 670 P.2d 137); Paul v. Providence Health Sys.-Or., 273 P.3d 106, 113 (Or. 2012) ("We held that the law requiring arrest established a legal right independent of the ordinary tort elements of a negligence action and that the plaintiff could recover in negligence for emotional distress caused by defendant's violation of that right."); Philibert v. Kluser, 385 P.3d 1038, 1043 (Or. 2016) ("Among other circumstances, this court recognizes a plaintiff's legally protected interest when another party has a legal duty 'designed to protect plaintiff[] against the type of harm which . . . occurred.'" (alteration in original) (quoting *Nearing*, 670 P.2d at 141)); Diamond Heating, Inc. v. Clackamas County, 505 P.3d 4, 10 (Or. 2021) (James, J., dissenting) ("Duty can be created by statute or ordinance when such legislative action was 'intended to create a duty' beyond its goal of simply 'protecting the public interest.'" (quoting Loosli v. City of Salem, 170 P.3d 1084, 1086 (Or. Ct. App. 2007))).

has subjected a victim to domestic violence,[236] which is similar to the language in New York's mandatory arrest law.[237] In contrast to New York case law, however, the Oregon Supreme Court has interpreted its mandatory arrest law to create a statutory duty that allows for potential liability resulting from police negligence in *Nearing v. Weaver*.[238]

In *Nearing*, the plaintiff's husband broke into her home on several occasions, in violation of an active order of protection, damaged her home, and tried to take their children.[239] The plaintiff called the police to report these incidents, but despite confirming that her order was valid, the police did not arrest him because the responding officer "had not seen the husband on the premises" at the time.[240] The husband came back to harass the plaintiff on three more occasions, which the plaintiff reported to the police, who told her that they would arrest him but failed to do so.[241] Several days later, the plaintiff's husband returned, this time confronting the plaintiff and her friend in front of the plaintiff's home, and assaulting her friend.[242]

The plaintiff then brought an action against the City and the police department, alleging that the officers violated their duty to arrest her husband, resulting in emotional distress.[243] The defendants argued that they were immune from liability because a police officer's decision of whether there was probable cause for arrest is discretionary.[244] Under section 30.265(6)(c) of the Oregon Statutes, public employees are not liable for claims arising from "the performance of or the failure to exercise

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236 OR. REV. STAT. § 133.055(2)(a) (2022) ("[W]hen a peace officer responds to an incident of domestic disturbance and has probable cause to believe that an assault has occurred between family or household members . . . the officer shall arrest and take into custody the alleged assailant or potential assailant."); *see also id.* § 133.310(3) (2022) (stating that an officer "shall arrest" a person if they have probable cause to believe that the person is violating a protective order pursuant to §§ 30.866 or 107.095). Oregon was the first state to enact mandatory arrest laws. Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 157 (2004).

237 *See* N.Y. CRIM. PROC. LAW § 140.10(4)(a)–(b) (McKinney 2023) (mandating that "a police officer *shall arrest* a person" when they have "reasonable cause to believe" that a felony "has been committed by such person against a member of the same family or household" or that "a duly served order of protection . . . is in effect" (emphasis added)).

238 670 P.2d at 144 ("This statute demands more of officers than the exercise of reasonable judgment whether to respond to requests to enforce known court orders; it mandates that they respond.").

239 *Id.* at 139. Plaintiff and her husband were separated, and he had previously been arrested for assaulting her. *Id.*

240 *Id.*

241 *Id.* at 139–40.

242 *Id.* at 140. The husband had also previously assaulted the plaintiff's same friend, damaged his car, and threatened to kill him. *Id.* at 139–40.

243 *Id.* at 140.

244 *Id.* at 142.

or perform a discretionary function or duty, whether or not the discretion is abused."[245] The court rejected the defendants' argument, finding that because the officers are mandated to arrest when there is an active order of protection that has been violated, the mandatory arrest statute "negate[s] any discretion."[246] The statute's purpose is to require law enforcement to protect domestic violence victims as identified by court order as opposed to the general public; it clearly identifies a "legally protected interest" in this specific group of people.[247] Unlike in New York, where a similarly situated plaintiff must prove a "special duty" by satisfying multiple requirements,[248] the Oregon Supreme Court found that the statute and a plaintiff's protective order are together sufficient to establish that a specific duty arises.[249]

Like in Oregon, Washington courts have also held that its mandatory arrest statute imposes a specific duty to protect victims of domestic violence.[250] In *Donaldson v. City of Seattle*, a negligence action brought by the decedent's administratrix, the plaintiff sued the city after police officers failed to arrest the man who had a history of physically abusing the decedent.[251] Shortly after the police officers' failure to arrest, the decedent was murdered by the same man.[252] The court held that the state's mandatory arrest law is directed towards a specific class of people that the legislators identified and intended to protect.[253] The legislature identified the specific duties that police had in protecting these people, which therefore barred the public duty defense that New York courts

245 OR. REV. STAT. § 30.265(6)(c) (2022).

246 *Nearing*, 670 P.2d at 142.

247 *Id.* at 140 (quoting Crain *ex rel.* Norwest v. Presbyterian Intercmty. Hosp., 652 P.2d 318, 327 (Or. 1982)); *see id.* at 143 ("[The state legislature] identif[ies] with precision when, to whom, and under what circumstances police protection must be afforded.").

248 *See supra* note 164.

249 *Nearing*, 670 P.2d at 141.

250 *See* Donaldson v. City of Seattle, 831 P.2d 1098, 1101 (Wash. Ct. App. 1992); Allrud v. City of Edmonds, No. 66061-6-I, 2011 WL 6934508, at *10 (Wash. Ct. App. Dec. 27, 2011) ("As a general rule, a duty in tort arises from a statute only where there is language mandating, rather than merely authorizing, certain actions. For example, an officer may be liable in tort for failing to arrest a perpetrator of domestic violence, because the pertinent statute uses the phrase 'shall exercise arrest powers.'" (quoting WASH. REV. CODE § 10.99.030(6)(a) (2023))); Washburn v. City of Federal Way, 283 P.3d 567, 573 (Wash. Ct. App. 2012) ("[P]olice officers have a mandatory duty to arrest alleged abusers if there are legal grounds to do so under the domestic violence protection act . . . ."), *aff'd*, 310 P.3d 1275 (Wash. 2013).

251 *Donaldson*, 831 P.2d at 1099–1100.

252 *See id.* at 1100.

253 *Id.* at 1101.

frequently used.[254] Similar to Oregon courts,[255] the Washington court found that the legislature intended to better enforce the current laws protecting victims of domestic violence. Just as in *Nearing*,[256] *Donaldson* held that the mandatory arrest law does not allow an officer the discretion to not make an arrest.[257]

Like the mandatory arrest statutes in Washington and Oregon, New York's statute was enacted with extensive legislative findings detailing the destructiveness of domestic violence and the need to remedy its "far reaching" and "corrosive effect[s]."[258] The legislature intended to "strengthen materially New York's statutes by providing for immediate deterrent action by law enforcement officials and members of the judiciary."[259] Despite these intentions, the New York Court of Appeals found that the special duty doctrine is not an exception to the governmental function immunity defense, and that in order to find a municipality liable, a plaintiff must establish a special relationship before even reaching the question of whether the government's action is discretionary or ministerial.[260] This legal standard should be reinterpreted to indicate that "[w]here legislation or administrative directive mandates behavior, foreseeability of the harm is irrelevant. What controls is the existence of the harm and whether the plaintiff and defendant are members of the class defined by statute. Once harm and class are established, accountability is required and liability should be assessed" without the shield of municipal immunity.[261] If New York courts were to adopt the Oregon[262] or Washington[263] courts' interpretations of mandatory arrest laws, which allow for no police discretion, the issue of whether officers owe a plaintiff a duty to protect them might be resolved.

However, a barrier to adopting this standard would be prior precedent where New York courts have been reluctant to even reach the

254 *See id.* (explaining that the City's Domestic Violence Prevention Act "identifies the particular class of individuals to be protected and defines the specific duties of the police").

255 *See* Nearing v. Weaver, 670 P.2d 137 (Or. 1983).

256 *Id.*

257 *Donaldson*, 831 P.2d at 1103.

258 Family Protection and Domestic Violence Intervention Act of 1994, S. 8642, 1994 Reg. Sess. § 1 (N.Y. 1994).

259 *Id.*

260 *See* Valdez v. City of New York, 960 N.E.2d 356, 362–63, 368 (N.Y. 2011).

261 *See* Miccio, *supra* note 31, at 187–88.

262 *See* Nearing v. Weaver, 670 P.2d 137 (Or. 1983).

263 *See* Donaldson v. City of Seattle, 831 P.2d 1098, 1101–03 (Wash. Ct. App. 1992).

question of whether an officer's decision to arrest was discretionary,[264] despite the statute's language, commanding that police officers "shall arrest" a person when there is reasonable cause to believe that the person is violating an order of protection.[265] One potential factor that could affect the Court of Appeals' approach is the rising demand for police accountability and reform.[266] Judges might be more willing to craft or reinterpret current case law towards a more plaintiff-friendly legal standard, given the rise of public demands for accountability as a result of police misconduct or negligence. Previously, judicial sentiments in case law tended to favor government immunity at the expense of injured plaintiffs.[267] In 2022, several cases came before the Court of Appeals,[268] giving it the opportunity to modify its approach, but the court stayed steadfast in the doctrine spelled out in *Valdez*.[269] Still, neither *Howell* nor *Ferreira* were decided unanimously; Judge Wilson and Judge Rivera dissented in both cases,[270] which continues the debate over this issue and preserves the possibility that their minority viewpoints might someday become the majority. As Judge Wilson noted in his dissent in *Howell*, "[t]he genius of the common law is that it does not require [an] outcome, but allows our court to adjust the common law doctrines of negligence and special duty as fairness and justice require."[271] Despite barriers to reform,[272] judicial opposition against the current legal standard

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264 *See supra* Section II.B (discussing how the majority in *Valdez* changed the legal standard so that plaintiffs must prove the existence of a special duty before even reaching the question of discretionary or ministerial action). Since the court required the plaintiff to prove a special duty between the plaintiff and the municipality in *Howell v. City of New York*, the question of discretion was not analyzed. No. 91, 2022 WL 17096862, at *2–3 (N.Y. Nov. 22, 2022).

265 *See* N.Y. CRIM. PROC. LAW § 140.10(4)(b) (McKinney 2023).

266 *See generally* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021).

267 *See* O'Connor v. City of New York, 447 N.E.2d 33, 36 (N.Y. 1983) ("It is true that some individuals will suffer substantial hardship as a result of their inability to recover for their injuries from a municipality that negligently fails to enforce its own regulations. The deleterious impact that such a judicial extension of liability would have on local governments, the vital functions that they serve, and ultimately on taxpayers, however, demands continued adherence to the existing rule. All the more is this so when there has been reliance for decades on this doctrine for purposes of municipal fiscal planning.").

268 *See, e.g.*, *Howell*, 2022 WL 17096862; Ferreira v. City of Binghamton, 194 N.E.3d 239 (N.Y. 2022).

269 *See Howell*, 2022 WL 17096862, at *2 (applying "well-settled analysis," the court granted summary judgment because Howell could not prove a special relationship due to a lack of justifiable reliance).

270 *Id.*; *Ferreira*, 194 N.E.3d 239.

271 *Howell*, 2022 WL 17096862, at *21 (Wilson, J., dissenting).

272 *See supra* Section II.B.

persists,[273] which could gain traction as the composition of the Court of Appeals changes over time.[274] Although challenging, judicial remedy therefore continues to pose an opportunity to reshape New York's municipal liability doctrine.

CONCLUSION

The New York Court of Appeals began chipping away at municipal liability in *Steitz v. City of Beacon*,[275] before finally near eliminating the ability for plaintiffs to sue the government through *Valdez v. New York*. However, there may still be hope to reform the current unworkable legal standard. New York courts can salvage the possibility of municipal tort liability by leaving the issue of justifiable reliance to the jury, instead of allowing judges to decide on summary judgment whether a case with a particular set of facts can be decided as a matter of law. New York could also adopt other states' standards, like those of Oregon or Washington, which allow for no discretion from officers that are mandated to arrest where orders of protection are valid. Since the New York State legislature

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273 *See* Valdez v. City of New York, 960 N.E.2d 356, 373 (N.Y. 2011) (Lippman, C.J., dissenting) ("The special duty doctrine was conceived precisely to avoid such an inequitable and, frankly, regressive outcome."); *id.* at 377 (Jones, J., dissenting) ("[T]o conclude that this case involves unjustifiable reliance may be to remove claims based upon a 'special duty' from possibility"); Coleson v. City of New York, 106 A.D.3d 474, 477 (App. Div. 2013) (Moskowitz, J., concurring) ("This legal framework will redound to no one's benefit—not the police and certainly not the citizens the police are sworn to protect."); *Ferreira*, 194 N.E.3d at 264–65 (Wilson, J., dissenting) ("Where we could have revived the proud tradition of Chief Judge Cardozo's court in advancing tort law to meet modern needs . . . the majority has littered its opinion with unsound conclusions suggesting that police activity—or any nonproprietary governmental negligence—can proceed only by establishing a special duty."); *Howell*, 2022 WL 17096862, at *19 (Wilson, J., dissenting) ("Are we to allow individual officers, by disobeying the law and threatening to arrest the victim holding an order of protection, to render reliance on the law unjustifiable? Sadly, that is precisely what the majority holds . . . ."); *id.* at *37 (Rivera, J., dissenting) ("[W]e should realign the doctrine to serve the state's clear legislative objectives. . . . [and] make clear that since there is a statewide uniform arrest policy, leaving no room for discretion by the municipality and its agent, a plaintiff need not establish the 'critical' factor of reliance . . . .").

274 In July of 2022, Chief Judge Janet DiFiore, one of the four conservative judges on the court, announced that she would resign, leaving the court ideologically split between three conservative judges and three liberal judges. Governor Kathy Hochul nominated Judge Hector LaSalle for the vacancy, but his nomination has faced major opposition from Democrats who fear that LaSalle's conservative positions would affect contentious public policy issues. With Democrats in control of the state Senate, LaSalle appears unlikely to be confirmed, which could force Governor Hochul to nominate a more progressive candidate. *See* Ian Millhiser, *How New York's Governor Turned a Chance to Reshape the Courts into a Debacle*, VOX (Jan. 4, 2023, 12:30 PM), https://www.vox.com/policy-and-politics/2023/1/4/23537232/new-york-kathy-hochul-hector-lasalle-court-of-appeals [https://perma.cc/G98X-XPQ2].

275 64 N.E.2d 704, 705–06 (N.Y. 1945).

has not moved on this matter, judicial remedy can still be a viable option to change the legal standard in favor of plaintiffs who are often severely harmed and left without recourse.