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Tort Justice Reform

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TORT JUSTICE REFORM

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ABSTRACT

This Article calls for a comprehensive reform of public tort law with respect to law enforcement conduct. It articulates an effective and equitable remedial regime that reconciles the aspirational goals of public tort law with the practical realities of devising payment and disciplinary procedures that are responsive to tort settlements and judgments. This proposed statutory scheme seeks to deter law enforcement misconduct without disincentivizing prudent officers from performing their duties or overburdening them with extensive litigation. Rather than lamenting the dissolution of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics *or the insurmountablility of qualified immunity, reform advocates should acknowledge that the very distinction between constitutional and common-law torts is arbitrary for purposes of individual officer deterrence and accountability. By examining the relationship between Fourth Amendment excessive force jurisprudence and the common-law torts of assault, battery, and negligence, this Article highlights that the analytical distinction between those legal doctrines imposes an improper demarcation for civil liability. If law enforcement agencies concern themselves solely with the constitutionality of their employees' conduct, training concentrates on the instant moment in which deadly force is used without substantial reflection on the conduct, including antecedent negligence, that led to the confrontation. At the same time, whether an officer can be held personally accountable should not be based on the intentionality of the conduct; rather, the reprehensibleness of the conduct is a more appropriate benchmark for individual liability. By acknowledging that tort law addresses various types of law enforcement activity that do not necessarily rise to the level of constitutional or criminal infractions, legislative bodies can begin conceptualizing public tort law as an important component of criminal justice reform. But to do so, we need tort justice reform.*

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TABLE OF CONTENTS

INTRODUCTION

Law enforcement accountability cannot be addressed solely through the criminal justice system. Remedial measures in the criminal arena, whether excluding unconstitutionally obtained evidence or prosecuting malicious police officers, center on establishing sufficient deterrent and punitive mechanisms to guard against public actor's misconduct. Since law enforcement officials are bestowed with unique privileges when performing their duties, these criminal safeguards are necessary countermeasures to such extraordinary authority. Yet, while many scholars call for reform in

the criminal justice system aimed at bolstering police accountability,[1] fostering institutional advancement and incentivizing better decision making cannot derive merely from the threat of prosecution. And, when officer misconduct does not involve the requisite criminal intent to initiate criminal proceedings,[2] their missteps can nevertheless result in catastrophic damages, including wrongful death. In such circumstances, the responsibility to compensate victims, deter future misconduct, and hold public officials accountable falls upon public tort law.

Tort jurisprudence has traditionally functioned as a form of public law, granting private citizens the ability to identify wrongful conduct and seek redress for their injuries. Like criminal law, tort law can serve a regulatory function by retroactively condemning injurious behavior. Indeed, tort law has a long history of fostering institutional and societal reform, from the emergence of seatbelts[3] to warning labels on cigarette packs.[4] One famous metaphor described tort law as an "ombudsman" that functions as a "weapon of social progress."[5] When prosecutors are unable or unwilling to bring criminal indictments against public officials, tort law can empower ordinary citizens to serve as "private attorneys general."[6]

The call to reform public tort law is not merely victim advocacy. Remedial regimes must recognize that not all wrongful conduct should be treated equally. Law enforcement officials err, sometimes negligently, sometimes intentionally, and sometimes nefariously. Public tort law should reflect this reality. Officials should not be forced to pay large judgments out of pocket because they were poorly trained or acted in good faith on reasonable, but ultimately

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1. *See, e.g.*, PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), https://perma.cc/TQ2Q-FRM9; ANGELA J. DAVIS ET AL., POLICING THE BLACK MAN (Angela J. Davis ed., Pantheon Books 2017); Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN L. REV. 398 (2006).

2. *See, e.g.*, Children v. Burton, 331 N.W.2d 673, 680 (Iowa 1983) ("In dealing with civil damage actions for false arrest, courts apply a probable cause standard less demanding than the constitutional probable cause standard in criminal cases. If the officer acts in good faith and with reasonable belief that a crime has been committed and the person arrested committed it, his actions are justified and liability does not attach.").

3. *See* Robert F. Cochran, Jr., *New Seat Belt Defense Issues: The Impact of Air Bags and Mandatory Seat Belt Use Statutes on the Seat Belt Defense, And the Basis of Damage Reduction Under the Seat Belt Defense*, 73 MINN. L. REV. 1369, 1378–80 (1989) (identifying states that have adopted a legal duty to wear seat belts).

4. See Altria Group, Inc. v. Good, 555 U.S. 70 (2008) (finding the Federal Cigarette Labeling and Advertising Act did not preempt a false advertising claim brought under the state consumer protection law); Izzarelli v. R.J. Reynolds Tobacco Co., 767 F. Supp. 2d 324 (D. Conn. 2010) (finding strict liability and negligent design action against cigarette manufacturer); Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (finding liability based on company's concealment of the health dangers of cigarettes).

5. John Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321, 326 (2011).

6. *Id.* at 327.

mistaken, facts. Moreover, good-natured officers should not have to persevere through the burdens and stresses of litigation in order to clear their names. Even when government employees are represented by their agencies, the litigation can have an emotional toll, as well as affect an officer's ability to secure home mortgages, obtain insurance, and fulfill other financial obligations. The doctrine of qualified immunity recognizes that a remedial scheme cannot be so burdensome that it creates a disincentive for officers to properly perform their difficult, and often dangerous, duties. Public tort law should ensure accountability but not at the risk of punishing earnest civil servants.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* and its progeny, the United States Supreme Court attempted to bolster law enforcement accountability by finding implied causes of action for constitutional wrongs committed by federal actors. Upon recognizing that no adequate remedy existed outside the exclusionary rule for Fourth Amendment infractions by federal agents, the Court found that compensatory measures were a necessary remedial avenue. In the immediate years following *Bivens*, the Court made clear that the intent of such implied actions is not merely to compensate, but to ensure accountability and deter misconduct of federal actors. In so doing, the Court opined that remedies must be aimed at the individual actor in order to actualize the perceived benefits of constitutional tort law.

Notwithstanding the laudable goals of the *Bivens* remedy, it has never fulfilled its promise. As the Court began to disfavor implied causes of action for constitutional wrongs, its case law placed tremendous strains on the ability of constitutional tort law to provide meaningful compensation, deterrence, and accountability. Two recent Supreme Court decisions represent the zenith of efforts to curtail *Bivens*' remedy. In *Ziglar v. Abbasi*, the Supreme Court relied on a long line of post-*Bivens* cases that disfavored the judicially created remedy to conclude that the slightest factual distinction from Court precedent constituted a new context. Absent substantial justification, such new contexts do not warrant finding an implied cause of action. While the separation-of-powers concerns surrounding the *Bivens* remedy are debatable, it is undeniable that the modern restriction on the remedial measure leaves parties that have been injured by constitutional violations without a remedy.

Even where an implied cause of action exists, the doctrine of qualified immunity creates intractable barriers to compensation and accountability. The *Abbasi* Court reiterated that implied actions remain cognizable for Fourth Amendment infractions by federal law enforcement officers. Yet, in *District of Columbia v. Wesby*,

the Court cited the rationale supporting the *Abbasi* decision to find that the law enforcement officers in that case were entitled to qualified immunity when entering a home without a warrant—the exact sort of Fourth Amendment violation the *Bivens* remedy was meant to correct.[7] In the wake of *Abbasi* and *Wesby*, it is difficult to conceive of *Bivens* as an effective safeguard against federal law enforcement misconduct.

Many scholars have lamented the *Abbasi* decision.[8] Others have railed against the doctrine of qualified immunity.[9] Rather than eulogize *Bivens* or advocate for the elimination of qualified immunity, this Article continues by questioning the very premise undergirding the *Bivens* decision—namely, constitutional torts require a separate and implied remedy in the law enforcement realm. By examining the relationship between Fourth Amendment excessive force jurisprudence and the common-law torts of assault, battery, and negligence, this Article highlights the limited nature of the *Bivens* remedy and argues that bolstering the common-law tort regime provides a more fruitful avenue for reform.

As the Supreme Court has noted, the popularity and perceived effectiveness of a police tactic cannot determine its constitutionality. Police techniques, such as broken windows theory[10] or concealment,[11] often fall in and out of societal favor. Although states can alter their approaches based on the changing times, and experts can opine on an officer's conformity with the communal standard of care, the constitutionality inquiry is limited to what the Constitution *permits* an officer to do, rather than what an officer *should* do. In that sense, the difference between constitutional and common-

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7. District of Columbia v. Wesby, 138 S. Ct. 577 (2018).

8. *See, e.g.*, Jules Lobel, Ziglar v. Abbasi *and the Demise of Accountability*, 86 FORDHAM L. REV. 2149 (2018); Benjamin C. Zipursky, Ziglar v. Abbasi *and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167 (2018); Case Comment, *Constitutional Remedies* — Bivens *Actions* — Ziglar v. Abbasi, 131 HARV. L. REV. 313, 313 (2017) ("If the Court wants to continue distinguishing *Bivens*, for the sake of judicial candor and litigative efficiency, it should hold that the *Bivens* cause of action is limited to the facts of *Bivens*, *Davis*, and *Carlson*.").

9. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

10. *Compare* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ (espousing the benefits of remedying minor legal infractions), *with* Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1620 (2012) (outlining the shortcomings of the policy), *and* Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006) (outlining empirical research challenging traditional perceptions of broken window techniques).

11. *See* James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, *in* CRITICAL ISSUES IN POLICING 466, 475–77 (Roger G. Dunham & Geoffrey P. Alpert eds., 2010) (suggesting that tactical knowledge and concealment would minimize the risk to officers and suspects and prevent tragic mistakes).

law tort analysis cannot be overstated. The former assesses the police conduct by establishing a floor for constitutional behavior; the latter examines the conduct by comparing it to standard police procedures.[12] If law enforcement agencies concern themselves solely with the constitutionality of their employees' conduct, training concentrates on the instant moment in which an officer uses deadly force without substantial reflection on the reasons such confrontations tend to escalate. Conversely, common-law tort cases often center on expert testimony concerning policing standards to assess whether law enforcement entities are employing comprehensive techniques aimed at effectuating their mission while attempting to avoid foreseeable harm. While tort remedies cannot, and should not, offer structural injunctive relief, monetary damages incurred at the proper governmental level can incentivize better decision making and encourage greater risk management.

Moreover, by delineating between excessive force and common-law torts, this Article suggests that many events anecdotally perceived as constitutional wrongs are, in fact, often more properly characterized as common-law tort infractions. *Bivens* claims are limited to constitutional violations, thereby focused solely on the public official's intentional acts or deliberate indifference. As the Supreme Court's excessive force jurisprudence directs courts to assess the reasonableness of the officer's conduct at the precise moment they exerted force, and the intentional force exerted, the analysis largely ignores preceding conduct that may have proximately caused the injury. While the plaintiff's intervening acts can sever the officer's preceding conduct from constitutional scrutiny, common-law tort jurisprudence can assess the broader array of wrongs, including the officer's antecedent negligence.

If the common-law tort remedial structure is to achieve what *Bivens* cannot, not only must it bolster meaningful compensation, but it must also encourage best practices and ensure accountability. In the federal context, the responsibility to meet these goals should fall upon the Federal Tort Claims Act (FTCA).[13] The FTCA is the statutory mechanism through which private citizens may bring actions against the federal government sounding in common-law tort. Several exceptions to the government's waiver of sovereign immunity—most notably, the discretionary function exception[14]—underscore that the statute was originally enacted merely as a compensatory measure for only certain types of negligence and

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12. *See* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211 (2017).

13. 28 U.S.C. §§ 1346(b), 2671–2680 (2018).

14. 28 U.S.C. § 2680(a) (2018).

wrongful acts. That paradigm changed in 1974, however, when Congress amended the statute to permit actions based on certain intentional torts committed by law enforcement officers—the so-called law enforcement proviso. In response to a string of illegal no-knock raids by Department of Justice (DOJ) agents, Congress created the proviso, in part, to deter future law enforcement abuses.[15] Today, the FTCA often plays a vital, complementary role to *Bivens* claims in cases involving federal officers.

Despite Congress's intent to use the FTCA to discourage future wrongful conduct by federal agents, the statute has never been equipped with the requisite remedial tools to incentivize change. Many courts and scholars view the discretionary function exception to the FTCA as an impediment to adjudicating claims based on law enforcement techniques and practices. As this Article explains, such judicial hamstringing potentially undermines the intent of the law enforcement proviso. Moreover, most settlements and judgments under the FTCA are paid through the Judgment Fund—a permanent, indefinite Congressional appropriation fund that neither the agency nor officer is required to reimburse based on their tortious conduct.[16] Absent monetary liability, agencies have no incentive to modify past practices and mitigate future damages. Indeed, the disconnect between the agency and the monetary award creates a perverse incentive for law enforcement officers to either not take the litigation seriously or view the general corpus as a hush fund to pay off aggrieved victims. If common-law tort jurisprudence becomes the only available avenue to address tortious police tactics, the remedial regime should force the relevant stakeholders to internalize monetary awards and promote behavioral modification. Certainly, when officers act with evil motive or intent, disciplinary action must be taken. But when tortious conduct stems from negligence or poor training, the internalization should be borne by the agency that trained the employee. Indeed, the economic model of tort law suggests that *respondeat superior* liability can encourage better decision making and foster reform.[17]

This Article calls for a comprehensive reform of public tort law with respect to law enforcement conduct. It articulates an effective and equitable remedial regime that reconciles the aspirational goals of public tort law with the practical realities of devising pay-

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15. *See* S. REP. NO. 93-588 (1973).

16. *See* 31 U.S.C. § 1304 (2018).

17. *See* Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 UCLA L. REV. 871, 886 (1991); Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2018–19 (1998).

ment and disciplinary procedures that are responsive to tort judgments. This statutory scheme better deters law enforcement misconduct without disincentivizing prudent officers from performing their duties or overburdening them with extensive litigation. In that sense, the distinction between constitutional and common-law torts is arbitrary. Rather than focusing on the intentionality of the conduct, deterrence and accountability regimes must assess the reprehensibleness of the action. If tort law is to remain one of the only available avenues to address substandard tactics, then legislatures must make it count. By acknowledging that tort law addresses certain types of law enforcement activities that do not rise to the level of constitutional or criminal infractions, legislative bodies can begin conceptualizing public tort law as an important component of criminal justice reform. To do so, we need tort justice reform.

This statutory remedy requires four concrete steps. First, Congress should amend the FTCA to make it the exclusive remedy for both constitutional and common-law torts. Drawing from a previous DOJ recommendation,[18] the amendment would render the United States, rather than the federal actor, the sole defendant in cases sounding in constitutional tort. In so doing, it would effectively overrule *Ziglar v. Abbasi* and eliminate the doctrine of qualified immunity as a viable defense in such actions.

The recommendation is a grand bargain. From a compensatory standpoint, removing those defenses would allow for payments to aggrieved parties whenever there is a constitutional violation. Given the recent *Abbasi* and *Wesby* decisions, it is difficult to conceive of many cases in which a cognizable remedy still exists. At the same time, it would unburden individual officers of the stress of litigation, which often takes a toll on personal morale and finances. Federal officers would no longer be sued in their personal capacity—even when they act maliciously. Accountability would have to come through the following measures.

Second, Congress should mandate that the department or agency that employed the tortfeasors pay all FTCA settlements and judgments arising from law enforcement activity. Since a tortfeasor and his or her agency are not currently required to reimburse the Judgment Fund, agencies do not have "skin in the game" that incentivizes a more critical examination of past tortious (if not criminal) conduct. Without a financial stimulus, the agency is not in-

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18. *See Amendments to the Federal Tort Claims Act: Hearing on S. 2117: Before the Subcomm. on Citizens and S'holders Rights and Remedies and the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 95th Cong. (1978) [hereinafter *Joint Hearing on Amendments to the Federal Tort Claims Act*].

vested in change. The Contracts Dispute Act,[19] the 2002 NO FEAR Act,[20] the Stored Communications Act, and the Foreign Intelligence Surveillance Act have similar reimbursement requirements.[21] Mandating agencies to pay directly for their tortious conduct encourages them to review the wrongful conduct and implement new techniques, rather than merely meet a constitutionally prescribed standard of minimally acceptable conduct.[22] Departments and agencies cannot be so financially hamstrung by tort awards that they are unable to perform core operational functions. At the same time, modest settlements and judgments often lack the necessary impact on large federal budgets to incentivize internal evaluation. Alternative regimes, such as internal risk management offices aimed at identifying high-risk departmental practices, should likewise be explored.

Third, to ensure that officers who act recklessly or with evil intent are held accountable, Congress should amend the FTCA to permit punitive damages for law enforcement activity and clarify that the discretionary function exception is not a barrier to redressability for claims arising from intentional torts listed in the law enforcement proviso exception. The fundamental problem with dispensing with *Bivens* actions in favor of lawsuits against the United States is the absence of an effective alternative scheme to punish bad actors. Certainly internal investigations, such as those conducted by Inspectors General and the Justice Department's Office of Professional Responsibility, provide critical oversight. But the lack of transparency, public input, and individual accountability for grave constitutional violations prevented Congress from adopting similar recommendations in the past.[23]

This Article proposes that Congress should amend the FTCA to allow for the award of punitive damages in law enforcement proviso cases. Punitive damages are awarded "to further the aims of the criminal law: to punish reprehensible conduct and to deter its future occurrence."[24] Invoking § 1983 standards, punitive damages would only be awarded in instances where the "conduct is shown to be motivated by evil motive or intent, or when it involves reckless

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19. 41 U.S.C. §§ 7101–7109 (2018).
20. *See* S. REP. NO. 107-143 (2002).
21. *See* 18 U.S.C. § 2712 (2018).
22. PETER H. SCHUCK, SUING GOVERNMENT 184 (1983).
23. *Joint Hearing on Amendments to the Federal Tort Claims Act*, *supra* note 18.
24. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part) (quoting Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted).

or callous indifference to the federally protected rights of others."[25] This legal standard better reflects when an individual officer, as opposed to the department's policies and procedures, should be the subject of judicial accountability.

If Congress seeks to guard against the "skyrocketing" nature of punitive damages,[26] the statute can cap the amount or provide for split-recovery, where a substantial portion of the award would be diverted to a social program such as a victim compensation fund[27] or indigent civil litigation program.[28]

Of course, under the proposed legal framework, individual officers are no longer defendants. While law enforcement officers will undoubtedly be involved in the litigation, as is the case with all FTCA matters, they would not face the same personal tribulations as named *Bivens* defendants. Therefore, the punitive damages cannot be levied directly against the tortfeasor—a due-process violation that would undermine the very purpose of folding constitutional torts into the FTCA. Rather, the punitive damages incurred by the department or agency serve as a normative springboard for the fourth recommendation.

Fourth, Congress should devise an effective disciplinary procedure that uses the judicial award of punitive damages as an automatic trigger for employment termination proceedings and the possible levy of fines against the tortfeasor. Aside from criminal prosecution, disciplinary procedures have historically been intra-agency procedures. Agency regulations dictated when such procedures were triggered and warranted disciplinary action. Such internal review lacks transparency and predictability. Instead, more formal requirements should trigger automatic disciplinary steps.

This recommendation is based on the statute that allows individuals to bring civil actions to recover money damages against the United States for willful violations of specified sections of the Stored Communications Act and the Foreign Intelligence Surveil-

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25. Duncan v. Wells, 23 F.3d 1322, 1324 (8th Cir. 1994) (quoting Walters v. Grossheim, 990 F.2d 381, 385 (8th Cir. 1993)).

26. *Browning-Ferris*, 492 U.S. at 282 (1989) (O'Connor, J., concurring in part, dissenting in part).

27. *See, e.g.*, MO. REV. STAT. § 537.675(2), (5) (2016).

28. *See, e.g.*, IOWA CODE § 668A.1(2)(b) (1998). Any concerns regarding the constitutionality of state statutory limits on punitive damages or split-recovery statutes simply would not exist in the context of a congressional statute wherein the United States, or its departments or agencies, would pay the punitive award. *See generally* Bethany Rabe, *The Constitutionality of Split-Recovery Punitive Damage Statutes: Good Policy but Bad Law*, 2008 UTAH L. REV. 333 (arguing split-recovery statutes are unconstitutional); Victor E. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to Be Shared with the State*, 68 MO. L. REV. 525 (2003) (arguing split-recovery statutes are unethical and unconstitutional).

lance Act.[29] In order to provide normative requirements to these disciplinary procedures, the award of punitive damages by Article III judges would automatically initiate employment termination proceedings. Officers would still be entitled to due process through the administrative process. Nonetheless, the mandatory trigger would inject a neutral arbiter into the equation and give the process regulatory standards while still affording officers a venue to argue that they acted in good faith.

This Article continues in four parts.[30] Part I outlines the legal framework surrounding constitutional and common-law tort cases based on the conduct of federal officials. Part II confronts the jurisprudential challenges of combating law enforcement misconduct through constitutional tort law. That Part focuses on the practical limitations of a *Bivens* remedy as an effective mechanism for compensation, deterrence, and accountability. It also assesses the capability of the FTCA to serve as an effective remedial regime by examining the extent to which constitutional and common-law tort law are coterminous with respect to law enforcement conduct. Specifically addressing use-of-force jurisprudence, this Part outlines how common-law torts are able to confront a broader array of conduct than constitutional law, thereby providing a more robust avenue for examining police techniques and training. Part III outlines the dispensation mechanism for paying FTCA settlements and judgments in an effort to demonstrate that the payment scheme thwarts deterrence efforts. Part IV offers concrete recommendations for legislation aimed at realigning public tort law with the aspirational goals of compensation, deterrence, and accountability.[31]

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29. 18 U.S.C. § 2712 (2018).

30. This Article does not offer a state-by-state tort law survey. To the extent that this Article references specific state statutes or jury instructions, the discussion serves as a guidepost through which to discuss legal principles. Otherwise, the Restatements of Torts are referenced. Nor is there a discussion of state payment schemes. Several states utilize general judgment funds to pay tort settlements and judgments, similar to the U.S. Judgment Fund. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016). Forcing departments or agencies to directly pay for the tortious conduct of their employees may be more effective at the state or local level, as such monetary damages would presumably constitute a larger percentage of their budgets than large federal bureaucracies. Moreover, as detailed below, states can provide citizens with greater protections from government intrusion than the federal constitution by enacting stricter privilege laws. Local municipalities would be served by examining these recommendations and tailoring them to their specific jurisdiction.

31. Criminal law is beyond the scope of this Article. For example, while the Article examines how antecedent negligence escapes constitutional scrutiny, such conduct may nevertheless be sufficient to indict on criminal negligence charges. Similarly, in some jurisdictions, criminal battery and tortious battery require analogous showings of intent. A side-by-side comparison of tort law and criminal law, however, requires a deeper analysis of criminal law than can be provided in this Article. The Article does not suggest that any newly devised

I. THE LEGAL FRAMEWORK OF FEDERAL PUBLIC TORT LAW: FTCA AND *BIVENS*

At the federal level, public tort law is comprised of two separate, yet often parallel, litigation avenues: the FTCA and implied causes of action pursuant to *Bivens v. Six Unknown Named Agents*. The FTCA provides a remedy for certain common-law torts while *Bivens* actions are limited to constitutional infractions. At their inception, both remedial regimes were created as compensatory mechanisms for aggrieved parties injured by federal actors. As they matured, however, their purposes evolved to include deterring law enforcement misconduct. Notwithstanding the aspirational goals of these remedies, bureaucratic realities and jurisprudential curtailments have rendered the current system incapable of effectuating institutional reform.

A. *Federal Tort Claims Act*

The Federal Tort Claims Act is the legal mechanism through which private citizens can bring civil actions against the federal government for claims sounding in tort.[32] The FTCA waives the government's sovereign immunity for claims arising from negligence and wrongful acts committed by federal employees while acting within the scope of their employment.[33] FTCA coverage is limited to circumstances where the United States, if acting like a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[34] Congress elected to use the "law of the place" language to avoid devising comprehensive federal tort jurisprudence. Instead, FTCA cases are adjudicated based on the substantive tort law of the state where the act or omission occurred. Actions cannot be brought against any person or entity other than the United States, and the only available remedy is money compensation. Punitive damages and injunctive relief are not available through the FTCA.

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employee disciplinary procedure should in any way interfere with the possibility of criminal proceedings against officials who engage in law enforcement misconduct. Any civil disciplinary procedures must be devised in a way that supplements, rather than supplants, criminal proceedings. The proposed amendment offers a concrete mechanism to initiate such proceedings by appropriately characterizing certain tortious behavior and identifying misconduct that warrants punitive damages. *Cf.* Monroe v. Pape, 365 U.S. 167 (1961); *see also* DAN B. DOBBS ET AL., THE LAW OF TORTS § 35 (2d ed. 2015).

32. 28 U.S.C. § 1346(b)(1) (2018).

33. *Id.*

34. *Id.*

Although the waiver of sovereign immunity appears to be quite broad, several exceptions limit a plaintiff's ability to sue the United States. With respect to law enforcement conduct, three jurisdictional limitations are particularly germane. First, under the "private person analogue" provision, the United States can be held liable only in instances where the local law would make a private person liable in tort.[35] If private parties do not engage in analogous conduct, the United States cannot be sued for engaging in such behavior.[36] Although the Supreme Court has urged courts to have an expansive reading of "like circumstances,"[37] as discussed in detail below, the notion of private person equivalence to law enforcement activities, as well as the privileges afforded to officials, causes significant confusion and often results in inconsistent rulings.

The second relevant limitation to the government's waiver of sovereign immunity is the discretionary function exception. The discretionary function exception bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[38] The theory undergirding the exception is that, pursuant to the separation-of-powers doctrine, the judiciary should guard against second-guessing decisions that are reserved for the other two branches of government. Indeed, some courts have opined that even if the discretionary function exception were not explicitly outlined in the text, the court would necessarily read it into the statute as a matter of constitutional comity.[39] Thus, the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United

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35. United States v. Olson, 546 U.S. 43, 44 (2005). Identifying the proper private person analogue for law enforcement conduct is the subject of significant debate between courts. *See, e.g.*, Washington v. DEA, 183 F.3d 868, 873 (8th Cir. 1999) (affirming judgment in favor of the Drug Enforcement Administration in an FTCA action because "the application process for, and execution of, a search warrant has no private analogue. Thus, there is no comparable situation to the instant case where a private individual could be held liable under state law."); Mayorov v. United States, 84 F. Supp. 3d 678, 700–01 (N.D. Ill. 2015) (using citizen's arrest as private person analogue); Watson v. United States, 133 F. Supp. 3d 502, 525–26 (E.D.N.Y. 2015) (using a "failure to act" negligence claim as private person analogue).

36. *See, e.g.*, Delta Sav. Bank v. United States, 265 F.3d 1017, 1025–26 (9th Cir. 2001); Williams v. United States, 242 F.3d 169 (4th Cir. 2001).

37. *Olson*, 546 U.S. at 46–47 ("As this Court said in *Indian Towing*, the words 'like circumstances' do not restrict a court's inquiry to the *same circumstances*, but require it to look further afield.").

38. 28 U.S.C. § 2680(a) (2018).

39. *See* McMellon v. United States, 387 F.3d 329, 335–38 (4th Cir. 2004).

States and its desire to protect certain governmental activities from exposure to suit by private individuals."[40]

The third limitation is the intentional tort exception. Section 2680(h) of the FTCA enumerates eleven intentional torts for which the United States cannot be held liable: "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[41] The original rationale for the intentional tort exception is murky at best.[42] In 1940, a representative of the Department of Justice testified before the United States Senate Subcommittee of the Committee of the Judiciary to advocate for the exception.[43] He explained:

> [The intentional tort exception] proposes to exclude from the cognizance of the law claims arising out of . . . a type of tort which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts.[44]

Given the perceived challenges in mounting a defense to alleged intentional torts, the Department of Justice recommended addressing such claims in the pre-FTCA fashion, whereby Congress would have to pass legislation for private individuals seeking redress[45]. In reality, however, private legislation has not been promulgated since the inception of the FTCA. Consequently, the enumerated intentional torts effectively are not compensable.

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40. United States v. S.A. Impresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984) (quoted with approval in Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

41. 28 U.S.C. § 2680(h) (2018).

42. LESTER S. JAYSON & ROBERT C. LONGSTRETH, 2 HANDLING FEDERAL TORT CLAIMS § 13.06[1][a] (2018) (referring to the legislative history as "scant and, to some at least, unconvincing as to justification").

43. The exclusionary section first appeared in a tort claims bill in 1931, though no explanation was provided for its inclusion. S. 211, 72nd Cong., 1st 206 (1931); *see also* JAYSON & LONGSTRETH, *supra* note 42, § 13.06[1][a] n.4. In its report accompanying the bill, the Senate committee merely noted, "This section [28 U.S.C. § 2680] specifies types of claim [sic] which would not be covered by this title. They include . . . deliberative torts such as assault and battery; and others . . . ." S. REP. NO. 79-1400, at 33 (1946); *see also* H. REP. NO. 79-1287, at 6 (1945).

44. *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 39 (1940) (testimony of Alexander Holtzoff, Special Assistant to the Att'y Gen. of the United States).

45. JAYSON & LONGSTRETH, *supra* note 42, § 13.06[1][a] n.4.

B. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics

Although the Federal Tort Claims Act provides a monetary remedy for certain claims based on the common-law torts of federal actors, there is no analogous statutory scheme for constitutional torts. Congress knew how to enact such a remedy. Indeed, it did so with respect to state officials as part of the Ku Klux Klan Act of 1871. During Reconstruction, Congress sought to protect citizens against state action intended to infringe upon their constitutional rights. Congress exercised its authority under section 5 of the Fourteenth Amendment to enact a statute through which private citizens could seek civil redress for constitutional violations committed by state actors. The law, 42 U.S.C. § 1983, provides a federal cause of action for constitutional infractions and supplements state law in circumstances where state remedies are insufficient to redress the federal infringement.[46] Section 1983 "'is not itself a source of substantive rights,' but merely 'provides a method for vindicating federal rights elsewhere conferred.'"[47] But to date, no such statute exists for constitutional torts perpetrated by federal officials.

In *Bivens*,[48] the Supreme Court addressed the question of whether federal actors could be personally sued for unconstitutional conduct committed while acting under color of their legal authority.[49] The case arose when federal law enforcement officers entered the plaintiff's apartment without a warrant and arrested him for alleged narcotics violations. The officers manacled him in front of his wife and children and threatened to arrest his entire family. When he was taken to the federal courthouse, he was interrogated and subjected to a strip search. The plaintiff sued for

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46. 42 U.S.C. § 1983 (2018) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or the other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."). *See generally* AM. JUR. 2D, CIVIL RIGHTS § 16 (2018).

47. Graham v. Connor, 490 U.S. 386, 393–94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

48. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

49. This is not to be confused with lawsuits against federal officials in their official capacity. As the Court has noted, "this distinction apparently continues to confuse lawyers and confound lower courts." Kentucky v. Graham, 473 U.S. 159, 165 (1985); *see also* Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 n.55 (1978) (clarifying that official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent") (quoted with approval in *Graham*, 490 U.S. at 165–66).

damages as a result of the great humiliation, embarrassment, and mental suffering incurred from the unconstitutional search and seizure.

The Court held that, although the Fourth Amendment did not provide for money damages "in so many words,"[50] there existed an implied cause of action. The *Bivens* decision was largely predicated on the belief that constitutional infractions mandate federal equitable relief. Importantly, the Court arrived at its conclusion, in part, by refuting the notion that state law provides an adequate remedy for constitutional infractions. Justice Brennan distinguished between a constitutional violation perpetrated by a federal agent and a tortious act committed by a private actor:

> An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.[51]

The parameters of federal conduct proscribed in the Fourth Amendment exist irrespective of any delineated prohibition at the state level. If conduct authorized by state law were found nonetheless unconstitutional, the federal actor must not be permitted to escape liability. Thus, remedies in state law may not adequately cover constitutional infractions. In addition to the unique proscriptions of the Constitution, it was the analytical distinction between constitutional torts and common-law torts that undergirded the Court's belief in the need for a remedy for federally protected rights.

C. *FTCA Law Enforcement Proviso*

In 1973—only two years after the *Bivens* decision—Justice Department agents raided the homes of two families in Collinsville, Illinois, without warning, based on tips from confidential informants. The agents kicked in the doors, ransacked the homes, shouted obscenities, and threatened the occupants with drawn weapons

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50. *Bivens*, 403 U.S. at 396.
51. *Id.* at 392.

before realizing they were at the wrong addresses.[52] Following *Bivens*, the families could sue the individual officers for the constitutional violations. However, due to the intentional tort exception to the FTCA, they were without a remedy against the United States.

Members of Congress were surprised to learn that the FTCA barred claims based on the narcotics officers' intentional conduct. The Judiciary Committee noted the absurdity that "a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a Federal narcotics agent intentionally assaults that same citizen in the course of an illegal 'no-knock' raid."[53]

Instead of leaving these aggrieved parties without a meaningful remedy, Congress amended the Federal Tort Claims Act to provide proper financial compensation and designed a proviso "to prevent future abuses of the Federal 'no-knock' statute."[54] Congress enacted the intentional tort exception proviso to permit actions against the United States for injuries "arising . . . out of assault, battery, false imprisonment, [and] false arrest" committed by investigative or law enforcement officers.[55] The exception to the exception is limited to any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.[56]

In carving out a proviso to the intentional tort exception, Congress understood the potential for law enforcement misconduct and devised a limited waiver aimed at preventing future abuse. In the words of one Senator, the proviso was created "to bring actions directly against the Federal government to recover for the damage [plaintiffs] sustained due to the intentional or willful misdeeds of Federal officers. This, it seems to me, is only right and fair under the circumstances."[57] The amendment was passed in response to public outcry regarding federal narcotics officers engaging in "abusive, illegal, and unconstitutional 'no-knock' raids."[58]

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52. For a more detailed description of the events, see Jack Boger et al., *The Federal Tort Claims Act Intentional Tort Amendment: An Interpretative Analysis*, 54 U.N.C. L. REV. 497, 500–02 (1976).

53. S. REP. NO. 93-588, at 2 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2791.

54. *Id.*

55. 28 U.S.C. § 2680(h) (2018).

56. *See* Millbrook v. United States, 569 U.S. 50 (2013) (not limiting the proviso to investigative activities).

57. S. REP. NO. 93-469, at 33 (1973) (individual views of Senator Charles H. Percy).

58. S. REP. NO. 93-588, at 2 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2790.

D. Carlson v. Green

Following the enactment of the FTCA law enforcement proviso, two critical issues arose: (1) whether the FTCA permitted constitutional tort actions, and (2) if the statute provided an alternative remedy to *Bivens* actions, whether the implied constitutional right of action remained available to plaintiffs. In enacting the law enforcement proviso, the House of Representative questioned whether the FTCA should be the exclusive remedy for constitutional infractions.[59] Although Congress decided that the proviso would serve as a parallel action, several courts interpreted that provision to permit constitutional tort claims under the FTCA.[60] As one court reasoned, "Congress altered section 2680(h) so that, from the date of amendment forward . . . Fourth Amendment violations would be actionable against the government, providing aggrieved persons actual relief, rather than worthless awards against 'judgment-proof' individual agents."[61] Other courts ruled that constitutional claims could be adjudicated through the FTCA if the state law recognized a remedy for such federal violations.[62]

The Supreme Court addressed the interplay between the FTCA and *Bivens* actions in *Carlson v. Green*.[63] The case turned on whether the *Bivens* remedy remained available even when tort law provided a remedy that could be pursued under the FTCA. The Court concluded that constitutional violations necessitate constitutional remedies, and absent Congress explicitly providing such protections through alternative means, *Bivens* remained the remedial safeguard.[64] The Court rejected the notion that the FTCA provided the exclusive remedy in such cases because the statutory scheme was enacted well before *Bivens*; rather, Congress intended the exception and *Bivens* to serve "as parallel, complementary causes of action."[65] Absent explicit congressional language rendering the

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59. Diana Hassel, *A Missed Opportunity: The Federal Tort Claims Act and Civil Rights Actions*, 49 OKLA. L. REV. 455, 463 n.59 (1996) (citing 120 CONG. REC. H5285, H5287 (1974)).

60. *See, e.g.*, Norton v. Turner, 427 F. Supp. 138, 140 (E.D. Va. 1977).

61. Birnbaum v. United States, 436 F. Supp. 967, 975 (E.D.N.Y. 1977), *aff'd in part, rev'd in part*, 588 F.2d 319 (2d Cir. 1978); *see also* Avery v. United States, 434 F. Supp. 937, 939 (D. Conn. 1977) (allowing action for the constitutional tort of invasion of privacy). *See generally* Hassel, *supra* note 59 (outlining law enforcement proviso progeny leading to *Carlson* decision).

62. *See, e.g.*, Norton v. United States, 581 F.2d 390, 393–94 (4th Cir. 1978) (permitting United States to assert good faith defense); Van Schaick v. United States, 586 F. Supp. 1023, 1031 (D.S.C. 1983) (permitting an FTCA action if state law "recognizes a private cause of action for damages for constitutional deprivations"). *See generally* Hassel, *supra* note 59.

63. 446 U.S. 14 (1980).

64. *Id.* at 18–20.

65. *Id.* at 20.

FTCA the exclusive remedy, the Court was disinclined to preemptively foreclose *Bivens* actions.

In providing additional rationale for its public tort law jurisprudence, the Court then outlined four factors, "each suggesting that the *Bivens* remedy is more effective than the FTCA remedy."[66] First, *Bivens* serves a more effective deterrent purpose because it "is recoverable against individuals . . . . It is almost axiomatic that the threat of damages has a deterrent effect, particularly so when the individual official faces personal financial liability."[67] Second, *Bivens* serves an additional deterrent impact because, unlike the FTCA, it made punitive damages available to plaintiffs. Acknowledging that punitive damages are not available in cases in which the defendant "did not act with a malicious intention to deprive respondents of their rights or to do them other injury,"[68] Justice Brennan nevertheless reasoned that the threat of punitive damages must be available against federal law enforcement officers to incentivize lawful conduct, just as they are against state actors in § 1983 actions. Third, the FTCA does not provide for jury trials. Although the government argued that the unavailability of jury trials did not harm plaintiffs because juries are often biased against *Bivens* claimants, the Court rejected that argument, believing that plaintiffs should nonetheless retain the choice of a bench trial or forcing law enforcement officers to stand trial before a jury of their peers. Fourth, the Court rejected the premise that remedies for constitutional infractions "should be left to the vagaries of the laws of the several States . . . ."[69] Because FTCA actions are based on state substantive law, rather than a federal jurisprudence, it cannot serve as a grand protectorate of constitutional rights. The Court concluded that "without a clear congressional mandate [it could not] hold that Congress relegated respondent exclusively to the FTCA remedy."[70]

As the *Carlson* Court made clear, FTCA and *Bivens* actions remain parallel, but separate, causes of action. FTCA claims are brought against the United States based on state tort law; *Bivens* claims are brought against federal actors for constitutional violations. Although plaintiffs may bring claims under both remedial regimes based on the same subject matter, the characterization of the legal claims are often interrelated but nonetheless distinct. The

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66. *Id.*

67. *Id.* at 21 (citing Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring in the judgment)).

68. Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978) (quoted with approval in *Carlson*, 446 U.S. at 22).

69. *Carlson*, 446 U.S. at 23.

70. *Id.*

extent to which they satisfy their parallel goals of compensation, deterrence, and accountability has been the subject of significant debate.[71]

II. THE JURISPRUDENTIAL LIMITATIONS OF *BIVENS* REMEDIES

Although *Bivens* and *Carlson* demonstrate the Court's early willingness to imply and support a cause of action against federal actors for constitutional violations, the Court has since curtailed the reach of those decisions. Section A discusses how the Court limited the implied cause of action to a narrow set of factual scenarios in which a *Bivens* action may lie. Section B notes that qualified immunity law often prevents courts from reaching the constitutional question that would prevent law enforcement abuses. Section C describes the ways in which the heightened pleading standard in *Iqbal v. Ashcroft* prevents plaintiffs from reaching discovery on otherwise colorable claims of constitutional violation. And Section D discusses how the Court's most recent decision, *Ziglar v. Abbasi*, may defeat any extension of *Bivens* actions once and for all.

A. *Limited Implied Causes of Action*

At its inception, the underlying rationale for *Bivens* actions against an individual official came from the concern that constitutional infractions require a constitutional remedy. The implied cause of action was conceptualized as a pragmatic safeguard because the Court did not believe constitutional wrongs could be properly adjudicated through state tort law. As Justice Harlan noted in his *Bivens* concurrence, "the appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct."[72] It was not until the Court subsequently rejected the premise that the FTCA could adequately remedy constitutional torts that *Bivens* actions were deemed necessary to serve a deterrent effect on public officials.

As a practical matter, the *Bivens* remedy can only serve its intended compensatory and deterrent function to the extent the ac-

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71. *See, e.g.*, Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 65 (1999) (denoting the *Bivens* remedy as a legal fiction and "a surreptitiously progovernment decision").

72. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407–08 (1971) (Harlan, J., concurring in judgment).

tion is cognizable for various constitutional infirmities. By the time *Carlson* was decided in 1980, the *Bivens* remedy had already been extended to include a remedy under the Fifth Amendment for an equal protection sex discrimination claim against a congressman.[73] In *Carlson*, the Court invoked the remedy for an Eighth Amendment claim of cruel and unusual punishment. The *Carlson* decision therefore should be read with the understanding that the Court at that time anticipated that implied causes of action would extend beyond the Fourth Amendment context.[74]

Yet, as the *Bivens* progeny developed, the Court became leery of creating constitutional remedies where Congress either declined to act or created alternative remedies.[75] Three years after *Carlson*, the Court refused to find an implied cause of action in a race discrimination suit against the military[76] and declined to extend the remedy to First Amendment violations.[77] The Court later found no *Bivens* remedy for the unconstitutional termination of welfare benefits.[78] Indeed, the Court expressed "caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades."[79] In *Wilkie v. Robbins*,[80] the Court held that plaintiffs may not seek federal relief where there exists an alternative remedial mechanism. Thus, in the decades following the *Carlson* decision, the Court's jurisprudence belied the axiom that where there is a constitutional wrong, there is a remedy.

B. *Qualified Immunity*

Even where the Court found an implied cause of action, the doctrine of qualified immunity proved a formidable obstacle to achieving the *Carlson* ideal of constitutional rectification.[81] The

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73. *See* Davis v. Passman, 442 U.S. 220, 228–29 (1979).

74. *See* Hassel, *supra* note 59, at 478 ("In deciding that *Bivens* was a superior remedy to the FTCA, the Court in *Carlson* apparently anticipated the continued expansion and strengthening of *Bivens* claims.").

75. *See, e.g.*, Minneci v. Pollard, 565 U.S. 118 (2012); Wilkie v. Robbins, 551 U.S. 537 (2007); Correctional Serv. Corp. v. Malesko, 534 U.S. 61 (2001); Bush v. Lucas, 462 U.S. 367 (1983).

76. Chappell v. Wallace, 462 U.S. 296 (1983).

77. *Bush*, 462 U.S. 367.

78. Schweiker v. Chilicky, 487 U.S. 412 (1988). *See generally Malesko*, 534 U.S. at 74 (declining to find a § 1983 remedy where alternative remedy exists, "including suits in federal court for injunctive relief"); Thompson v. Thompson, 484 U.S. 174, 182 (1988) ("[T]he Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action.").

79. *Malesko*, 534 U.S. at 74.

80. *Wilkie*, 551 U.S. 537.

81. *See, e.g.*, Butz v. Economouo, 438 U.S. 478 (1978).

Court initially adopted a subjective standard for qualified immunity to strike the proper balance between allowing compensation for the actions of ill-motived officers while not punishing those who acted in good faith. Two years after *Carlson*, however, the *Harlow* Court acknowledged the practical difficulties with the subjective standard—which required a fact-intensive investigation, extensive discovery, and, too often, a trial—by articulating a new, objective standard for qualified immunity in an effort to unburden public officials from expensive and time consuming litigation. Casting aside the subjective standard, courts would now inquire whether (1) an official was "performing discretionary functions" and (2) their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[82]

In determining if there is a clearly established constitutional right, courts examine the factual context of the case to ascertain whether "every reasonable official would have understood that what he is doing violates that right."[83] Such factual context of the legal precedent must be sufficiently specific so that officers are not confused about whether the legal precedent applies in their particular circumstances.[84] In other words, the fact that the conduct was unconstitutional must be "beyond debate."[85] As the Court has acknowledged, the qualified immunity doctrine protects "all but the plainly incompetent or those who knowingly violate the law."[86] In giving public officers the benefit of the doubt, the doctrine immunizes the defendant and prevents recovery even in instances when the plaintiffs' rights were violated.[87]

Not only did the legal standard for invoking qualified immunity change, but so too did the process. Qualified immunity should now be resolved at the "earliest possible stage in litigation."[88] Once the immunity is claimed, courts are instructed to resolve the issue before discovery commences in order to unburden defendants from the slog of litigation, in keeping with the underlying theory of

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82. Harlow v. Fitzgerald, 457 U.S. 800, 816, 818 (1982); *see also, e.g.*, Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); Pearson v. Callahan, 555 U.S. 223, 231 (2009).

83. *Mullenix*, 136 S. Ct. at 308 (quoting Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012)).

84. *Id.* at 308–09

85. *Id.* at 308 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741(2011)).

86. Morse v. Frederick, 551 U.S. 393, 429 (2007) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

87. *See* Wilson v. Layne, 526 U.S. 603, 614–15 (1999) (holding that presence of media was a Fourth Amendment violation but nonetheless granting qualified immunity because the right was not clearly established prior to the ruling).

88. Hunter v. Bryant, 502 U.S. 224, 227 (1991).

qualified immunity.[89] This protection thwarts all discovery in the case, not just discovery directed at the particular defendant.[90] In the event that evidence-gathering is needed to judge the immunity defense, the scope of discovery is limited to the immunity issue.[91] Judgments denying qualified immunity are reviewable through interlocutory appeal, as the pervasiveness of discovery cannot be remedied on appeal after final judgment.[92]

C. Iqbal *Pleading Standard*

The litigation burdens placed on *Bivens* defendants was a major impetus for the Court's reframing of the Rule 8(a) pleading standard in *Iqbal v. Ashcroft*.[93] The Court noted that a complaint requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[94] The Court reasoned that defendants should not be hauled into court based on threadbare factual allegations. Instead, the pleading must contain a sufficient factual basis to demonstrate facial plausibility.[95] The standard requires courts to use their "judicial experience and common sense"[96] before "unlock[ing] the doors of discovery."[97] The Court noted that the concern about disruptive discovery is particularly acute for government officials: "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditures of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."[98]

Despite the *Iqbal* Court's admonition of protracted *Bivens* litigation, the case lingered in the lower courts for eight more years—

89. *See* Anderson v. Creighton, 483 U.S. 635 (1987); Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

90. Ashcroft v. Iqbal, 556 U.S. 662, 685–86 (2009).

91. *Harlow*, 457 U.S. at 817–18 (deeming "broad-ranging discovery" to be "peculiarly disruptive of effective government" until the "threshold immunity question is resolved"); *see also* Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (requiring specific, nonconclusory facts to survive a pre-discovery motion to dismiss or summary judgment).

92. *Iqbal*, 556 U.S. at 672–73 (citing Behrens v. Pelletier, 516 U.S. 299, 307 (1996)); *see also* Nixon v. Fitzgerald, 457 U.S. 731, 741–43 (1982) (allowing interlocutory appeal for claims of absolute immunity).

93. *Iqbal*, 556 U.S. at 662 (2009).

94. *Id.* at 678 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

95. *See Twombly*, 550 U.S. at 555 (requiring sufficient facts "to raise a right to relief above the speculative level").

96. *Iqbal*, 556 U.S. at 679.

97. *Id.* at 678.

98. *Id.* at 685.

sixteen years after the events occurred.[99] Then, in the 2017 term, the Court heard the case for the second time, renamed *Ziglar v. Abbasi*. In so doing, the Court took the opportunity to pronounce its most substantial curtailment of the *Bivens* remedy.

D. Ziglar v. Abbasi

Following the terrorist attacks on September 11, 2001, the Federal Bureau of Investigations (FBI) received more than 96,000 tips from the general public, ranging from substantive suspicions of potential terrorists to unfounded fears of Arabs and Muslims.[100] While investigating these leads, the FBI encountered many aliens who were in the country without proper legal authorization. Although the majority of these illegal aliens were processed according to standard immigration procedures, eighty-four aliens were subject to a "hold-until-cleared" policy, meaning they would be detained until they were no longer a person "of interest."[101] "Of interest" aliens were housed in the Administrative Maximum Special Housing Unit at the Metropolitan Detention Center in Brooklyn, New York.[102]

When the case reached the Supreme Court for the second time, the remaining defendants were three high-level executive officers in the Department of Justice and two of the wardens at the Metropolitan Detention Center.[103] The detainees sued under *Bivens* alleging Fourth Amendment, Fifth Amendment Due Process, and Equal Protection violations. The Court reiterated that when Congress created a statute authorizing money damages against state officials for violations of federal constitutional rights,[104] the legislature declined to create an analogous statute for federal officials. The *Abbasi* Court emphasized its conservative view towards implied causes of action, underscoring that separation-of-powers principles preferred that Congress, rather than Judiciary, create a tort system that remedies constitutional infractions.[105] Such judicial restraint is particularly warranted when deciding a subset of litigation that embroils public officials in costly discovery and is "used to bring

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99. Turkmen v. Aschcroft, 915 F. Supp. 2d 314 (E.D.N.Y. 2013), *aff'd in part, rev'd in part sub nom.* Turkmen v. Hasty, 789 F.3d 218 (2d Cir. 2015), *rev'd in part, vacated in part sub nom.* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).
100. *Abbasi*, 137 S. Ct. at 1852.
101. *Id.*
102. *Id.*
103. *Id.* at 1854.
104. 42 U.S.C. § 1983 (2018).
105. *See Abbasi*, 137 S. Ct. at 1856–57.

about the proper formulation and implementation of public policies."[106] The Court found no prior context from which to find an implied cause of action against the executive officials.[107]

While the *Abbasi* Court's disapproval of implied causes of action was not surprising, its test for when such actions are cognizable went beyond any previous pronouncement. The Court held that, "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new."[108] Without attempting to create an exhaustive list, the Court then used examples to illustrate the types of difference that were significant enough to create a new context:

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.[109]

In the event the context is new, lower courts must refrain from creating a remedy in the event there are "special factors counselling hesitation."[110] Although the Court did not provide a declarative definition of the phrase, it guarded against the expansion of implied rights when Congress has created an alternative remedy to protect the interest at stake[111] or when there are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong."[112] Notably, the Court emphasized Congress's decision not to substitute the United States for the federal employee under the Westfall Act when an action is brought for a constitutional infraction.[113] In so doing, the Court underscored the continued schism

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106. *Id.* at 1858.

107. The Court instructed the lower court to perform a special factors analysis regarding the deliberate indifference claim against the Metropolitan Detention Center's warden, Dennis Hasty, to determine whether the claim was a meaningful extension of the remedy identified in *Carlson v. Green*. *Id.* at 1864–65.

108. *Id.* at 1859.

109. *Id.* at 1860.

110. *Id.* at 1857–58.

111. *See* Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

112. *Abbasi*, 137 S. Ct. at 1858.

113. *Id.* at 1856 (citing 28 U.S.C. § 2679(b)(2)(A) (2012)). In *Westfall v. Erwin*, the Court held that a federal official's absolute immunity was limited to situations where the official's

between constitutional torts and common-law torts and their corresponding redressability.

The *Abbasi* case serves as the most restrictive statement to date on the continuum of cases disfavoring *Bivens* remedies. The Court had previously counseled "hesitation before authorizing a new kind of federal litigation."[114] Still, the exceptional aspect of the decision stems from the fact that "new context" was essentially defined as any suit that even modestly differs from "previous *Bivens* cases decided by th[e] Court." As the Court curtailed the remedy over the past decades, its precedent leaves only a handful of cases in which the remedy exists.[115] Even where the Court has identified a constitutional right to be protected through the tort remedy, the specific facts in a case may nevertheless render it a "new context." For example, where the Court found a constitutional remedy for a Fourth Amendment violation by a lieutenant, such a remedy may no longer be available if a sergeant perpetrated the same violation. From a compensatory and accountability standpoint, the rank of the officer is a distinction without a difference. Yet the Court noted that "even a modest extension is still an extension" that could render a situation "new" and, therefore, outside the scope of the *Bivens* remedy.[116] Although the *Abbasi* Court emphasized that its decision should not "cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose"[117] and despite the Court's adherence to *Bivens* precedent in the law enforcement context, not all law enforcement cases provide the same context in which to consider whether a *Bivens*-style remedy is appropriate. Courts are therefore left to determine whether a Fourth Amendment violation constitutes a new context. Some courts have already declined to extend the *Bivens* remedy in new contextual cases involving law enforcement activities in which there is an alleged Fourth Amendment violation.[118]

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actions were "within the outer perimeter of an official's duties and . . . discretionary in nature." 484 U.S. 292, 300 (1988). Congress, however, thought *Westfall* overreached in limiting a federal employee's absolute immunity, so it passed the Westfall Act, amending the FTCA. *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 566–67 (2003). In passing the legislation, Congress allowed the United States to substitute itself as the defendant in common-law tort actions against a federal agent, but not for constitutional torts. 28 U.S.C. § 2679(b)(2)(A) (2018).

114. *Wilkie*, 551 U.S. at 550 (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)).

115. *Constitutional Remedies* – Bivens *Actions* – Ziglar v. Abbasi, *supra* note 8, at 313 ("If the Court wants to continue distinguishing *Bivens*, for the sake of judicial candor and litigative efficiency it should hold that the *Bivens* cause of action is limited to the facts of *Bivens*, *Davis*, and *Carlson*.").

116. *Abbasi*, 137 S. Ct. at 1864.

117. *Id.* at 1856.

118. Ochoa v. Bratton, No. 16-cv-2852 (JGK), 2017 WL 5900552 (S.D.N.Y. Nov. 27, 2017) (no Fifth Amendment claim for property seized by federal law enforcement officers); Jones

Moreover, even though the *Abbasi* decision focused on the availability of implied causes of actions, the Court has cited its reasoning in the context of qualified immunity to further curtail the efficacy of tort actions against public officials. In *District of Columbia v. Wesby*, the Court reiterated that specificity of precedent in finding a clearly established constitutional right is particularly important in the Fourth Amendment context. In almost tautological reasoning, the Court cited the very basis on which to find a new context under *Abbasi* as the same basis on which to find qualified immunity in cases where the context already existed. In the Court's estimation, standards, such as probable cause, "turn on the assessment of probabilities in particular factual contexts and cannot be reduced to a neat set of legal rules."[119] The Court underscored that the slightest factual distinctions could establish a different context, thereby immunizing the officers. The Court immunized officers who could have believed their conduct was lawful.[120] Thus, a government actor is shielded from civil liability when "officers of reasonable competence could disagree" on the lawfulness of an action. In such instances, even where a constitutional infraction may have occurred, the victim is without a remedy and the perpetrator is deemed immune. Thus, even in the law enforcement context, the *Abbasi* decision represents a significant curtailment of the remedial regime available through public tort law.[121]

No matter how one views the wisdom of implied actions and the doctrine of qualified immunity, from a purely compensatory standpoint, the legal standards and procedural hurdles serve as substantial impediments to constitutional remedies. Although the Court's simultaneous curtailment of implied actions and expansion of qualified immunity has developed over the past several decades, *Ziglar v. Abbasi* may yet prove to be the death knell of constitutional tort law.

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v. Hernandez, No. 16-CV-1986 W (WVG), 2017 WL 5194636 (S.D. Cal. Nov. 9, 2017) (dismissing without prejudice *Bivens* complaint alleging excessive force by CBP officer); Attkisson v. Holder, No. 1:17-cv-364 (LMB/JFA), 2017 WL 5013230 (E.D. Va. Nov. 1, 2017) (declining to permit *Bivens* remedy in claim by a reporter alleging unauthorized electronic surveillance); Perez v. Diaz, No. 13cv1417-WQH-BGS, WL 882229 (S.D. Cal. Mar. 6, 2017) (declining to extend *Bivens* to excessive force case against aliens attempting to cross the border).

119. District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

120. *See, e.g.*, Olmeda v. Ortiz-Quinonez, 434 F.3d 62, 65 (1st Cir. 2006).

121. *See, e.g.*, Gonzalez v. Velez, 864 F.3d 45, 53–54 (1st Cir. 2017) ("[P]laintiffs are seeking to extend the Bivens doctrine beyond acceptable limits"); Vanderklok v. United States, 868 F.3d 189 (3d Cir. 2017) (declining to extend *Bivens* remedy in First Amendment case involving airport security screeners); Doe v. Hagenbeck, 870 F.3d 36 (2d Cir. 2017) (declining to extend *Bivens* remedy to Fifth Amendment claim of discrimination against female West Point cadet).

III. RELATIONSHIP BETWEEN FTCA AND *BIVENS* ACTIONS IN THE LAW ENFORCEMENT CONTEXT

Legislative action could restore the *Bivens* remedy to mirror § 1983 claims against state actors. Congress can create a statutory remedy against federal officials for all constitutional infractions, rather than limiting awards to those contexts previously recognized by the Court. However, since the doctrine of qualified immunity evolved in § 1983 actions, concerns about protracted discovery and diverting government resources nevertheless would persist in a statutory constitutional tort scheme. Qualified immunity, likewise, could be addressed through the statutory scheme. But as Congress has not enacted legislation enabling constitutional tort actions against federal actors since *Bivens*, nor has it amended § 1983 to restructure qualified immunity for state actors, it is far from certain the legislative branch is discontented with the current state of affairs with respect to actions against public officials.

Neither returning to the pre-*Abbasi* status quo nor eliminating the doctrine of qualified immunity will rectify the underlying problems of the *Bivens* remedy. What is often perceived as a law enforcement violation cannot be adjudicated through the constitutional tort framework. Rather, as more fully explained below, the more fruitful remedial structure derives from the FTCA. The FTCA (and state equivalents) has the potential to provide remedies in circumstances where constitutional and criminal law are silent in order to deter injurious law enforcement tactics. By focusing on the legal distinctions between negligence, battery, and excessive force, this Part argues that common-law tort law has the capacity to address a broader array of conduct than constitutional tort law in the area of law enforcement conduct. The reason is twofold. First, law enforcement privilege law can govern police conduct in a more restrictive manner than the constitutional framework. Second, while excessive force jurisprudence focuses on the limited temporal and spatial relationship between the force and the injury, common-law tort jurisprudence can examine antecedent negligence that proximately causes the injury. Additionally, by focusing on funds from which the various damages awards are drawn, this Part dispels the notion that monetary remedies must be levied against the individual officer in order to deter misconduct. Finally, this Part will examine the characterization conundrum surrounding common-law tort jurisprudence, as well as the relationship between the law enforcement proviso and the discretionary function exception of the FTCA.

The parallel relationship between FTCA and *Bivens* claims is a byproduct of the coterminous symmetry between constitutional and common-law tort jurisprudence. *Bivens* actions were initially conceived as a necessary compensatory mechanism because state tort law failed to provide an adequate safeguard for constitutional infractions. Justice Brennan reasoned that state tort law and constitutional law were not perfectly harmonious; indeed, the interests protected by state law and the Fourth Amendment "may be inconsistent or even hostile."[122]

Certain allegations of constitutional violations outside of the Fourth Amendment, such as under the First, Fifth, Sixth, and Ninth Amendments, often do not have common-law equivalents. A First Amendment chill on the freedom of speech and assembly often does not have a common-law tort analogue.[123] Nor does the denial of due process as a result of discrimination.[124] Some torts that are cognizable both in constitutional and common law, such as libel and slander (alleged to interfere with the First Amendment right of speech), are not cognizable under the intentional tort exception to the FTCA.[125] At the same time, the Supreme Court has warned lower courts to not "constitutionalize" common-law torts:[126] "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[127]

Within the Fourth Amendment context, however, there exists a more symbiotic relationship between officer misconduct and traditional common-law jurisprudence.[128] For example, many constitutional tort lawsuits against individual federal and state law enforcement officers arise from allegations of excessive force. With respect to police officers' use of force, the constitutional standard derives from a line of cases, including *Tennessee v. Garner*,[129] *Graham*

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122. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

123. *Joint Hearing on Amendments to the Federal Tort Claims Act*, *supra* note 18, at 137 (letter from Department of Justice to Subcommittee recognizing analytical distinction).

124. *Id.*

125. 28 U.S.C. § 2680(h) (2018). *See generally Joint Hearing on Amendments to the Federal Tort Claims Act*, *supra* note 18, at 137.

126. County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.").

127. Daniels v. Williams, 474 U.S. 327, 332 (1986).

128. *Cf.* People v. Ray, 981 P.2d 928, 935 (Cal. 1999) (acknowledging the community caretaker exception to the Fourth Amendment because "[i]t would be anomalous to deny a police officer charged with protecting the citizenry a privilege accorded to every other individual who intercedes to aid or to protect another's property").

129. 471 U.S. 1 (1985).

v. Connor,[130] and most recently in *County of Los Angeles v. Mendez*.[131] The excessive force line of cases underscore the limited context in which constitutional infractions provide the basis for a tort remedy. In cases alleging both Fourth Amendment violations and common-law tort claims (assault, battery, false arrest, false imprisonment, and negligence), it is often the latter that provides greater remedial relief. Efforts to harness such common-law tort judgments in order to effectuate institutional change may ultimately provide a more fruitful avenue for reform.

A. *Constitutional Standards vs. Statutory Privileges*

On the evening of October 3, 1974, two Memphis police officers responded to a "prowler inside call."[132] When they arrived on scene, a woman was standing on her porch and notified the officers that the break-in was occurring next door. One of the officers then went to the back of the neighboring home. He discovered the fleeing suspect, Edward Garner. Garner was crouched at the base of a six-foot-high chain link fence enclosing the backyard. The officer was able to see Garner's face and hands and, although he could not be certain, was "reasonably sure" Garner was unarmed. The officer shouted "police, halt" and took steps towards Garner. Garner began climbing the fence. Believing Garner would escape if he made it over the fence, the officer fatally shot him in the back of the head.

At that time, the governing Tennessee statute permitted the shooting. The statute read, "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."[133] The Memphis Police Department policy likewise permitted the use of deadly force in cases of burglary. Neither the Memphis Police Firearm's Review Board nor a grand jury found fault with the shooting.[134] Garner's father then brought a civil action, alleging violations of his son's constitutional rights pursuant to 42 U.S.C. § 1983.

In *Tennessee v. Garner*, the Supreme Court addressed whether the shooting, and implicitly the statute, was constitutional. The Court clarified that apprehension by use of deadly force is necessarily a seizure and, consequently, must be evaluated pursuant to the

130. 490 U.S. 386, 393–94 (1989).
131. 137 S. Ct. 1539 (2017).
132. *Garner*, 471 U.S. at 3.
133. *Id.* at 4–5 (quoting TENN. CODE ANN § 40-7-108 (1982)).
134. *Id.* at 5.

Fourth Amendment. In so doing, the Court reiterated that the Fourth Amendment analysis "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[135] That balancing analysis centers on "whether the totality of the circumstances justified a particular sort of search or seizure."[136]

Applying that analytical framework, the Court concluded that it was unconstitutional to use deadly force to apprehend Garner.[137] The majority recognized the governmental interest in effective law enforcement and preventing felons from successfully fleeing capture and avoiding prosecution. Nonetheless, those interests could not outweigh "[t]he suspect's fundamental interest in his own life . . . ."[138] The Court reasoned that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[139] The majority further acknowledged that statutes permitting the use of deadly force to apprehend felons, as in Tennessee, were ubiquitous when the Fourth Amendment was adopted. However, such statutes had largely fallen out of favor by the time of the *Garner* decision, as social science had raised substantial concerns surrounding the theory that deadly force serves as a deterrent for escape attempts.

In her dissent, Justice O'Connor expressed sympathy for the "tragic and unfortunate" outcome of the case. Still, the Justice raised concerns about relying on evolving police procedures to articulate constitutional lines. The dissent balked at using social science and shifting notions of best practices to establish constitutional barriers:

> There is no question that the effectiveness of police use of deadly force is arguable and that many States or individual police departments have decided not to authorize it in circumstances similar to those presented here. But it should go without saying that the effectiveness or popularity of a

135. *Id.* at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).
136. *Id.* at 8–9.
137. *See id.* at 3–5.
138. *Id.* at 9.
139. *Id.* at 11.

> particular police practice does not determine its constitutionality.[140]

Tennessee v. Garner not only demonstrates the constitutional limits of permissible police force but underscores the potential for state privilege law to delineate favorable behavior. Privilege is an affirmative defense asserted to justify conduct that ordinarily may constitute a tort, but under particular circumstances does not subject the perpetrator to liability.[141] For example, the force necessary to effectuate an arrest would typically constitute an assault or battery, as well as false imprisonment. But, "[w]here a privilege to arrest exists, it justifies not only the confinement but also any conduct which is reasonably necessary to effect the arrest."[142] Thus, when an officer uses force that would typically constitute a battery if exerted by a private individual, the conduct may be privileged, thereby preventing recovery by the plaintiff.[143]

Still, law enforcement officers are not afforded absolute immunity when they use force during a legally valid arrest. State tort law recognizes that the amount of force used by a law enforcement officer must be reasonable under the circumstances.[144] When force exceeds reasonableness, it is no longer privileged, and may not serve as a defense against the claim of an intentional tort.[145]

Like most state ordinances when *Garner* was decided, the Tennessee Criminal Code prohibited the use of force to stop a fleeing misdemeanant, but permitted officers to use "all the necessary means to effect the arrest" in the event a felon attempted to flee or

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140. *Id.* at 28; *cf.* Spaziano v. Florida, 468 U.S. 447, 464 (1984) ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.").

141. RESTATEMENT (SECOND) OF TORTS § 890 (AM. LAW. INST. 1965).

142. *Id.* § 118 cmt. b.

143. *See id.* § 890.

144. Most jurisdictions examine force used by law enforcement officers as privileged conduct, which serves as an affirmative defense. The burden is on the defendant to prove the reasonableness of the otherwise tortious conduct. However, a minority of jurisdictions assume officers act lawfully and place the burden on the plaintiff to demonstrate the unreasonableness of the force. *See, e.g.*, Wall v. Zeeb, 153 N.W.2d 779, 786 (N.D. 1967) ("[T]he burden of proof is upon the plaintiff to prove that . . . the police officer[] used unnecessary or unreasonable force.").

145. *See, e.g.*, Raiche v. Pietroski, 623 F.3d 30, 40 (1st Cir. 2010) ("[A] plaintiff alleges both § 1983 excessive force claim and common-law claims for assault and battery, the determination of reasonableness of the force used under § 1983 controls the determination of the reasonableness of the force under the common-law assault and battery claims.") (quoted with approval in Niles v. Town of Wakefield, 172 F. Supp. 3d 429, 445 (D. Mass. 2016)); Topolski v. Cottrell, No. 5:11-CV-1216, 2012 WL 3264927, at *3 (N.D.N.Y Aug. 9, 2012) ("Assault and battery claims under New York law are analogous to excessive force claims under the Fourth Amendment."); Richard P. Shafer, Annotation, *When Does Police Officer's Use Of Force During Arrest Become So Excessive As To Constitute Violation Of Constitutional Rights, Imposing Liability Under Federal Civil Rights Acts of 1871 (42 U.S.C.A. § 1983)*, 60 A.L.R. Fed. 204 (1982).

forcibly resist.[146] Tennessee was in keeping with the common-law rule.[147] The Restatement (Second) of Torts negates the conditional privilege for officers when the means employed are "in excess of those which the actor reasonably believes to be necessary."[148] As a general proposition, the Restatement appears to mirror the reasonableness standard ingrained in Fourth Amendment case law.[149] However, the Restatement had been interpreted as permitting police officers to use deadly force during a felony arrest when such force is necessary to effect the arrest.[150]

Although such deadly-force statutes had not yet been deemed unconstitutional when the Court decided *Garner*, many states had taken it upon themselves to craft statutes that provided their citizens with greater protections. As noted by the Minnesota Supreme Court around the time of *Garner* decision, "[a]lthough the courts have overwhelmingly favored the common-law rule, commentators, law reformers, police department administrators, and legislatures increasingly tend to favor the more restrictive rule as to the scope of the privilege."[151] Eighteen states allowed for the use of deadly force "only if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested."[152] States began forbidding the use of deadly force for any reason but to prevent violent felonies.[153] In those states, the use of deadly force upon a fleeing felon would not have been privileged, and any officer who used such force would have committed a battery. Thus, before the Court articulated the constitutional prohibition on using deadly force against fleeing felons, states were using their privilege law to afford their citizens greater protection and to hold their officers more accountable.[154]

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146. *See* Tennessee v. Garner, 471 U.S. 1, 4–5, 5 n.5 (1985) (citing TENN. CODE ANN § 40-7-108 (1982)).

147. *See id.* at 12 (citing WILLIAM BLACKSTONE, COMMENTARIES *289).

148. RESTATEMENT (SECOND) OF TORTS § 132 (AM. LAW INST. 1965); *see also, e.g.*, Schumann v. McGinn, 240 N.W.2d 525, 534 (Minn. 1976) (In a battery and negligence action based on officer using deadly force against fleeing felon, the court acknowledged that "the Restatement is intended to describe what the law is, not what the law should be.").

149. RESTATEMENT (SECOND) OF TORTS § 132 cmt. a (AM. LAW INST. 1965) ("[T]he actor is privileged to use a means of effecting an arrest which is intended or likely to cause death if the offense for which the arrest is sought is of the serious character described in that Section.")

150. *See* Shafer, *supra* note 145.

151. *Schumann*, 240 N.W.2d at 535.

152. *Garner*, 471 U.S. at 17.

153. *Id.*

154. *See generally Garner*, 471 U.S. at 28 (1989) (O'Connor, J., dissenting) ("[T]he effectiveness or popularity of a particular police practice does not determine its constitutionality."); Spaziano v. Florida, 468 U.S. 447, 464 (1984) ("The Eighth Amendment is not violated

Rather than relying on constitutional decisions, tort law can invoke developing national practices and best practices to determine the proper standard of care in various scenarios. Tort law can strike the proper balance between the constitutional floor and the aspirational goals of states that aim to further curtail law enforcement overreach. As Justice Brennan once noted, "[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."[155] As states tailor their criminal codes to meet the unique challenges of their community, there should be an emphasis on the manner in which privilege law shapes law enforcement conduct.

Of course, this potential reform avenue is available only to the states. At the federal level, the extent to which the United States can be held liable in tort for conduct that may be privileged at the state level raises two intersecting issues of statutory interpretation: first, the FTCA private person analogue for law enforcement conduct and, second, the substantive law, including privileges, under which such cases should be adjudicated. Under the FTCA "private person analogue," courts must draw from like circumstances in which private citizens engaged in the type of conduct at issue.[156] In *United States v. Olson*, the Court reiterated that the statute must be read in its plain language: "namely, that the United States waives sovereign immunity 'under circumstances' where the local law would make a '*private person*' liable in tort."[157] Whether state law imposes liability on state or municipal entities is irrelevant to the sovereign immunity waiver; rather, the only relevant inquiry is whether private citizens in similar circumstances can be held liable.[158] The government cannot escape liability simply by arguing that the conduct at issue was uniquely governmental in nature. Rather, courts must "look further afield"[159] for private analogues, including Good Samaritan laws.[160]

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every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.").

155. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

156. United States v. Olson, 546 U.S. 43, 46 (2005).

157. *Id.* at 44.

158. *Id.* at 47–48.

159. *Id.* at 46.

160. *See* Indian Towing Co. v. United States, 350 U.S. 61 (1955) (rejecting argument that no analogue exists for uniquely governmental functions and instead looking to Good Samaritan law for operation of a lighthouse by the Coast Guard). *See generally* Feres v. United States, 340 U.S. 135, 141 (1950) ("The relationship between the Government and members of its armed forces is 'distinctively federal in character.'"); ERWIN CHEMERINSKY, FEDERAL

Although finding a private person analogue for claims of negligence is in keeping with the traditional notion of the FTCA as a compensatory mechanism, identifying analogous behavior in the law enforcement context, particularly where privileges are delineated specifically for police officers, often proves more problematic. The law enforcement proviso to the intentional tort exception to the FTCA would be nullified if the court were unable to find private analogues for federal law enforcement conduct. As the proviso was intended to allow for tort actions based on law enforcement conduct, the government cannot escape liability based on such circular reasoning that the lack of a private person analogue negates the proviso.[161] The Court has clarified that "under *like circumstances*" does not mean under "the *same circumstances*."[162] Still, for cases arising from law enforcement conduct unique to the federal government, such as immigration detention claims, courts are divided on whether the United States has waived sovereign immunity.[163]

Equally disconcerting, even when courts are able to divine a private person analogue such as equating law enforcement conduct to citizen's arrests, courts often employ the supposedly analogous state tort substantive law as the proper legal framework through which to judge federal law enforcement actions.[164] That analysis conflates the private person analogue with the issue of privilege law.[165] For example, most citizen's arrests are privileged only when

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JURISDICTION 674–75 (Wolters Kluwer 7th ed. 2016) ("Interestingly, the Court's explanation [for the *Feres* doctrine] has shifted over time. Originally, in *Feres*, the Court emphasized that the government could be held liable under the [FTCA] only for activities that also are undertaken by private entities . . . . But . . . the Supreme Court expressly discarded this limitation on recovery under the act [in *Indian Towing* and Rayonier Inc. v. United States, 352 U.S. 31 (1957)], permitting suits even for activities done solely by the federal government . . . . Subsequent to the *Feres* decision, the Court began emphasizing a different rationale for precluding recovery for injuries received incident to military service: the need to preserve military discipline.").

161. *See generally* Stanton R. Gallegos, *Are Police People Too? An Examination of the Federal Tort Claims Act's "Private Person" Standard as it Applied to Federal Law Enforcement Activities*, 76 BROOK. L. REV. 775 (2011).

162. *Olson*, 546 U.S. at 46 (emphasis in original).

163. *Compare* Liranzo v. United States, 690 F.3d 78 (2d Cir. 2012) (finding a private analogue through false imprisonment), *with* Doe v. United States, 58 F.3d 494, 502 (9th Cir. 1995) (Ferguson, J. dissenting) (citing Woodbridge Plaza v. Bank of Irvine, 815 F.2d 538, 543 (9th Cir. 1987), to suggest no private analogue exists), *and* Lippman v. City of Miami, 622 F. Supp. 2d 1337, 1341 (S.D. Fla. 2008) (finding no private person analogue under Florida law).

164. *See* Tekle v. United States, 511 F.3d 839 (9th Cir. 2007) (plurality opinion); *see also Liranzo*, 690 F.3d 78; Mayorov v. United States, 84 F. Supp. 3d 678 (N.D. Ill. 2015); Watson v. United States, 133 F. Supp. 3d 502 (E.D.N.Y. 2015). *But see Tekle*, 511 F.3d at 857 (plurality opinion) (refusing to read *Olson* "to support the conclusion that the law enforcement privileges should not be recognized in FTCA suits, and that federal officers are left only with those privileges available to private citizens").

165. *Liranzo*, 690 F.3d at 92–93 (reading a prior immigration hearing case as being "a case about the substantive standard by which immigration officers' acts are to be judged—

the arrest is correct in fact.[166] The analogue does not withstand scrutiny when officers perform certain law enforcement tasks, such as effectuating search warrants, performing *Terry* stops,[167] or detaining potential illegal immigrants at the border.[168]

Some courts engage in legal gymnastics by reasoning that state substantive law has incorporated federal standards for the performance of uniquely federal law enforcement functions and, consequently, assess the reasonableness of officer conduct through the prism of federal law enforcement privileges.[169] This approach reconciles the dueling private person analogue and state law provisions by merely citing citizen's arrest jurisprudence as a threshold recognition of a parallel universe of private activity before adjudicating the merits pursuant to relevant privileges.[170] Such privileges are assessed under federal law.[171]

Establishing uniformity of privileged federal law enforcement conduct would not merely insulate the officers by having their actions adjudged based on federal standards. It would also prevent courts from dismissing actions pursuant to state law based on conduct that would be actionable at the federal level.[172] For example,

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not about the presence or absence of a private analogue"); Rhoden v. United States, 55 F.3d 428, 431 (9th Cir. 1995).

166. *See, e.g.*, White v. Albany Med Ctr. Hosp., 542 N.Y.S.2d 834, 835 (N.Y. Ct. App. 1989) ("In New York, a private citizen who makes an arrest does so at his peril; if the person arrested did not in fact commit the crime for which he is arrested, the person who arrests him is liable even if he acts in good faith or has probable cause to make an arrest.").

167. Terry v. Ohio, 392 U.S. 1 (1968).

168. *See, e.g.*, Munyua v. United States, No. C-03-04538 EDL, 2005 WL 43960, at *4 (N.D. Cal. Jan. 10, 2005) ("The fact that the challenged activities took place at the border does not negate the analogy to law enforcement . . . ."); Boger et al., *supra* note 52, at 521 ("Such a variegated pattern of culpability may make sense in the context of negligent tort recovery, but its rationale in suits against law enforcement officials for intentional torts seems unjustified. The amendment seeks to establish a standard of appropriate conduct for all federal officials who are charged with the responsibility for ensuring constitutional rights. To make this demonstrably federal standard dependent upon state law turns the liability question on its head.").

169. *See, e.g.*, Caban v. United States (Caban II), 728 F.2d 68, 70 (2d Cir. 1984); *see also Liranzo*, 690 F.3d at 92–93 ("But other courts have—in our view correctly—read *Caban II* as a case about the substantive standard by which immigration officers' acts are to be judged—not about the presence or absence of a private analogue.").

170. *See Liranzo*, 690 F.3d at 96 ("The fact that New York law applies different substantive standards to citizens' and officers' arrests . . . is also of no significance for present purposes because, under *Caban II*—which provides the law of this Circuit—immigration detentions executed by federal immigration officers are judged under federal standards . . . .") (internal citation omitted).

171. *See* Cervantes v. United States, 330 F.3d 1186, 1188 (9th Cir. 2003) (applying California law to FTCA claims for false arrest and false imprisonment by customs agents, but federal law for determining probable cause).

172. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971) ("For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised. The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an

in *Washington v. DEA*,[173] Drug Enforcement Administration (DEA) agents broke down the Washingtons' front door using a battering ram, entered the home with their weapons drawn, and threatened to shoot the seventy-two-year-old Mr. Washington if he disobeyed their orders. The couple was detained while the agents conducted a thorough search of the house. The search failed to uncover any narcotics or drug paraphernalia. While assessing the plaintiffs' FTCA claims for assault and battery, the Eighth Circuit applied Missouri law to conclude that "while this show of force may have intimidated the [Washingtons] and offended their sensibilities, it was not unreasonable under the circumstances."[174] The damages in *Washington v. DEA* were nearly identical to the Collinsville raids that led to the enactment of the law enforcement proviso under the FTCA. Still, the Eighth Circuit found that the conduct was privileged under state substantive law.

Short of enacting federal tort law, an amendment to the FTCA should clarify that no precise private person analogue is necessary for law enforcement activity. Claims based on such conduct are cognizable under the FTCA. At the same time, the conduct of federal law enforcement officers must be judged based on federal privileges, including departmental policies and guidelines.[175] Although certain claims would continue to be brought based on common-law jurisprudence, if constitutional and statutory tort law were folded into the FTCA, adjudications would become more streamlined by examining conduct through the proper federal laws and privileges. For example, in *Washington*, the common-law tort

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independent claim both necessary and sufficient to make out the plaintiff's cause of action.") (internal citations omitted).

173. Washington v. DEA, 183 F.3d 868, 874 (8th Cir. 1999).

174. *Id.*; *see also* Casillas v. United States, No. CV 07-395-TUC-DCB (HCE), 2009 WL 735193, at *17 (D. Ariz. Feb. 11, 2009) ("Although the SWAT-style manner of execution of the search herein was undoubtedly shocking and frightening to Plaintiffs, there are no allegations that the officers used excessive force or improper tactics in conducting the search such that the officers' conduct was outside the scope of public policy concerns at issue under the given circumstances.").

175. Due to the FTCA private person analogue requirement, liability currently cannot be imposed based on the breach of a federal statute or regulation. It can only be based on a negligence standard devised by the state common law. *See, e.g.*, McGowan v. United States, 825 F.3d 118, 127 (2d Cir. 2016) (dismissing FTCA claim because plaintiff relied solely on allegations "that the BOP negligently failed to follow its own disciplinary regulations"); United States v. Agronics, Inc., 164 F.3d 1343, 1345 (10th Cir. 1999) ("It is virtually axiomatic that the FTCA does not apply 'where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs.'") (quoting Sea Air Shuttle Corp. v. United States, 112 F.3d 532, 536 (1st Cir. 1997)); Johnson v. Sawyer, 47 F.3d 716, 727 (5th Cir. 1995) (en banc) ("[T]he FTCA requires that the duty breached by the government employee be not simply one imposed by federal statute or regulation, but rather arise under state law. This requirement for a breach of state law duty is not met simply by invoking general state law principles of *respondeat superior* or failure to supervise.").

claims based on the conduct of the DEA agents would be judged based on 21 U.S.C. § 878, the statute outlining the arrest authority of DEA enforcement personnel. U.S. Customs and Border Protection officers' conduct would be judged, not under state privilege law, but pursuant to the federal statutes and regulations that reflect the plenary authority of the Executive to conduct routine searches and seizures at the border.[176] Provided the statute was facially constitutional, it would delineate the standard of care for FTCA claims sounding in both common-law and constitutional torts. If the conduct was wrongful, the question would become whether such conduct rose to the level of a constitutional violation, constituted an intentional tort, or was merely substandard. That analysis would largely center on the characterization of the conduct.

B. *Excessive Force vs. Antecedent Negligence*

Although the outcome of the *Garner* decision seems unassailable by today's policing standards, the dissenting opinion provided significant fodder against broader Fourth Amendment critiques of police tactics. In her dissent, Justice O'Connor cautioned against judicial second-guessing of police officers when they are confronted with volatile and dangerous situations: "The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances." Justice O'Connor emphasized "the difficult, split-second decisions police officers must make in these circumstances."[177] Although the majority was successful in striking down the Tennessee statute, this dissenting language served as a prevailing factor in the Court's subsequent excessive-force jurisprudence.

In *Graham v. Connor*,[178] the Court articulated a balancing test that focuses the excessive-force inquiry on the officer's objective reasonableness at the moment they exerted force. The Court rejected the premise that the officer's subjective intent should govern the analysis, such as whether the officer acted "maliciously and sadistically." The Court held that a subjective inquiry was irrelevant and reiterated that the focus must be on whether the use of force was objectively reasonable. Before remanding for reconsideration consistent with the objective standard, the Court reiterated that claims

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176. United States v. Flores-Montano, 541 U.S. 149, 152 (2004); *see* 19 U.S.C. §§ 482, 1461, 1499, 1581, 1582 (2018); 6 U.S.C. § 211 (2018); 8 C.F.R. pt. 287 (2003); 19 C.F.R. pt. 162 (1972).

177. Tennessee v. Garner, 471 U.S. 1, 24 (1985) (O'Connor, J., dissenting).

178. Graham v. Connor, 490 U.S. 386 (1989).

of excessive force under the Fourth Amendment require a careful balancing between the intrusive nature of the force and the government's interest in effectuating the seizure. In articulating the totality-of-the-circumstances test, the Court revived the concerns first articulated in Justice O'Connor's dissenting opinion in *Garner*. The Court emphasized that officers must be afforded deference when making quick decisions during precarious confrontations: "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[179]

As many scholars have written, the *Graham* decision is noteworthy not merely for articulating the objective reasonableness test, but for delineating a muddled totality-of-the-circumstances analytical framework. The Court listed several factors that play into the inquiry, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[180]Although the list was certainly not meant to be exhaustive, the absence of one particular factor has been a source of significant debate: the temporal and spatial relationship between the exertion of force and the injury.[181] The Court chose merely to highlight the split-second judgments officers often face without grappling with the question of whether the conduct preceding such judgments should factor into the analysis.

Absent a clear answer from the Court, lower courts and lawyers have been left to grapple with the issue. Seizing on the "split-second judgment" language, many courts ignore the events leading to a shooting and focus their constitutional inquiry on whether the officer acted reasonably at the precise moment they exerted force.[182] As one scholar wrote,

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179. *Id.* at 396–97.

180. *Id.* at 396.

181. *See, e.g.*, Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. L. REV. 1119, 1131 (2008) ("Timing is crucial to any meaningful account of what is reasonable force. If a threat to the officer or a state interest has not yet manifested itself, no force is justified. If force occurs after the threat terminates, it is excessive regardless of what took place before it. Although two of the four Graham factors imply that timing may be relevant . . . *Graham*'s vague 'totality of the circumstances' approach falls critically short in addressing this crucial matter because it suggests that timing is one factor to be considered among many, when it is often simply dispositive.").

182. *See* Garrett & Stoughton, *supra* note 12, at 285–86 ("The Supreme Court's Fourth Amendment doctrine exerts real pull on these police policies. About half of the policies relied upon the language from *Graham* and the Supreme Court's Fourth Amendment cases when setting out their general requirements for the use of force. The policies often paraphrase *Graham* to say that reasonableness of force must be assessed based on the 'totality of

> [s]ince the Supreme Court first introduced that description in 1989, federal district and circuit courts have repeated it on more than 2,300 occasions. It features widely in briefs and trial court documents and had made its way into federal and state pattern jury instructions. It is, by any measure, the accepted depiction of the environment in which police officers use force.[183]

By articulating a balancing test that focuses predominantly on the moment in which the officer exerts force, the Court left open the question of the extent to which preceding conduct should influence the constitutional analysis.

The extent to which preceding conduct factors into the *Bivens* analysis underscores the distinction between constitutional doctrine and traditional tort law. A Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*."[184] As the Constitution guards against "misuse of power,"[185] seizures perpetrated by government officials must derive from intentional or willful conduct.[186] Fourth Amendment excessive force jurisprudence necessitates a "temporal perspective of the inquiry."[187] Even when officers engage in a car chase for several miles, lasting several minutes, their conduct is only considered a seizure at the moment the officers intend to make contact with the suspect's vehicle.[188] Indeed, the temporal-spatial analysis between the wrongful conduct and the injury is often critical to prevent Fourth Amendment exceptions to the warrant requirement from extending beyond their legal limits.[189]

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the circumstances' known to the officer, who must make a split-second decision. Only departments that adopt a minimization or a de-escalation approach include additional factors and otherwise qualify the 'split-second approach' drawn from the constitutional case law."); *see also* Plumhoff v. Rickard, 572 U.S. 765, 777 (2014) (assessing threat "at the moment when the shots were fired"); Saucier v. Katz, 533 U.S. 194, 206 (2001) (denoting the "temporal perspective of the inquiry"); *id.* at 210 (Ginsburg, J., concurring) ("The proper perspective in judging an excessive force claims, *Graham* explained, is that of 'a reasonable officer on the scene' and 'at the moment' force was employed.").

183. Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 865 (2014).

184. Brower v. County of Inyo, 489 U.S. 593, 597 (1989) (emphasis added).

185. Byars v. United States, 273 U.S. 28, 33 (1927) (quoted with approval in *Brower*, 489 U.S. at 596).

186. *Brower*, 489 U.S. at 596 ("A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention of taking itself must be willful.") (citations omitted).

187. *Saucier*, 533 U.S. at 206.

188. *See* Scott v. Harris, 550 U.S. 372, 375 (2007).

189. *E.g.*, Arizona v. Gant, 556 U.S. 332 (2009) (recognizing that allowing officers to search a vehicle pursuant to the search-incident-to-arrest doctrine once the driver had already been handcuffed and placed in the back of a patrol car would extend the legal fiction past its breaking point).

Analogous to the willfulness requirement of the Fourth Amendment, assault and battery necessitate a showing of intent, such that a plaintiff must show that the officer acted with the purpose of producing the consequence or acted with the understanding that the consequence was substantially certain to result.[190] In cases where the actor desired to cause the very harm produced, courts have little difficulty characterizing the conduct as an intentional tort. Where a police officer desires to shoot a fleeing misdemeanant and does so, the requisite intent has been established for claims of both excessive force and battery.

Mere negligent governmental conduct, on the other hand, cannot constitute a constitutional violation.[191] Negligence is typically defined as a breach of a legal duty that proximately causes an injury.[192] In distinguishing between constitutional violations and mere negligence, the Supreme Court has reiterated:

> Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.[193]

The general tort rule is that a defendant can "be held liable only for harm that was among the potential harms—the risk—that made the actor's conduct tortious."[194] Liability attaches to one who sets in motion a chain of events in which "the danger of an intervening negligent or criminal act should have been reasonably anticipated and protected against."[195] Constitutional tort law likewise renders defendants liable only for the foreseeable consequences of their actions.[196] Even when an intervening act is the immediate trigger for the injury, the defendant's conduct may still be the proximate cause of the injury if the intervening act was a foreseea-

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190. RESTATEMENT (THIRD) OF TORTS § 1 (AM. LAW INST. 2010).

191. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 328 (1986) ("[T]he Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property.") (emphasis in original). *See generally* Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (en banc) ("Various other courts since [Parratt v. Taylor, 451 U.S. 527 (1981),] have also agreed that simple negligence does not suffice to state a claim under § 1983."), *aff'd sub nom.* Davidson v. Cannon, 474 U.S. 344 (1986).

192. RESTATEMENT (SECOND) OF TORTS § 281 (AM. LAW INST. 1965).

193. *Daniels*, 474 U.S. at 332; *see also* Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").

194. RESTATEMENT (THIRD) OF TORTS § 29 cmt. d (AM. LAW INST. 1998).

195. Hall v. District of Columbia, 867 F.3d 138, 150 (D.C. Cir. 2017).

196. *See* Malley v. Briggs, 475 U.S. 335, 345 (1986).

ble consequence of the initial conduct.[197] On the other hand, when the intervening act is so extraordinary that it was not reasonably foreseeable, it is said to be a superseding cause that breaks the causal link between the initial conduct and the injury. Among the factors to consider in determining whether a subsequent act is an intervening or superseding cause are whether the force "is operating independently of any situation created by the actor's negligence, or . . . is or is not a normal result of such a situation."[198]

The difficulty in properly characterizing conduct as either intentional or negligent is often personified in the surgeon who exceeds the scope of his or her patient's consent.[199] When the patient gives consent for the procedure (a form of privilege law), and the surgeon accurately performs the procedure (for example, removes the gangrenous leg), it is neither a battery nor negligence. However, in instances when consent for the procedure is granted, should the surgeon incorrectly execute the procedure (for example, by removing the wrong leg), courts agree that a tort has been committed. The characterization of that tort, however, remains somewhat contentious. Under traditional tort theory, the botched surgery constituted a battery.[200] The surgeon intended to make contact, and the fact that she did not intend for the contact to be harmful or offensive is irrelevant. However, modern tort law recognizes that the surgeon did not intend to harm or offend the patient.[201] Yet, the latter analysis is not complete. Although it is evident that the surgeon acted intentionally in the sense that she intended to remove the leg, courts tend to treat the case as one sounding in negligence, suggesting that the surgeon acted unreasonably by believing she was privileged to take such action. Surgeons who unreasonably exceeded the bounds of consent or intentionally act based on a substandard perception of fact are often liable for medical malpractice.[202]

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197. *See, e.g.*, Powers v. Hamilton Cty. Pub. Def. Comm'n, 501 F.3d 592, 609 (6th Cir. 2007).

198. RESTATEMENT (SECOND) OF TORTS § 442(c) (AM. LAW INST. 1979).

199. *See generally* Kenneth Simon, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1067–68 (2006) (suggesting that medical battery cases where the surgeon did not knowingly exceed consent are "impossible to explain under dual intent rule"); Stephen D. Sugarman, *Restating the Tort of Battery*, 10 J. TORT L. 197 (2017) (calling for the merging of the battery and negligence into a single new tort in order to resolve the confusion).

200. *See* Moos v. United States, 225 F.2d 705 (8th Cir. 1955) (dismissing an FTCA action under the intentional tort exception when VA surgeon operated on the wrong leg).

201. *See* Woods v. United States, 720 F.2d 1451, 1453 (9th Cir. 1983) (declining to find a battery where the surgeon grabbed a patient without intending to cause harmful contact).

202. DOBBS ET AL., *supra* note 31, § 35 ("Even if the jury believes that the defendant had no intent to offend, it might find him to be negligent and liable on the grounds if he causes actual harm.").

This analytical distinction is often difficult to parse when assessing law enforcement officials' conduct that leads to physical confrontation. Wrongful conduct that precedes an injury can constitute excessive force.[203] In *Brower v. County of Inyo*, the Court held that the erection of a police roadblock can constitute a Fourth Amendment seizure even though the injury occurred subsequent to the wrongful intentional action. The determinative factor was whether the officers possessed the requisite intent to effectuate the stop at the time of their conduct.[204] Any intervening act by the suspect must have been a reasonably anticipated response to the initial conduct. Provided that an officer acts intentionally, and that intentional conduct leads to the reasonably anticipated intervening act, constitutional tort actions are permissible. Thus, courts have held that an officer may not leap in front of a car, without leaving the suspect time to stop the car, and then justify the oncoming threat as justification to use deadly force.[205] Nor may an officer intentionally release an animal upon a surrendering suspect, then cite the fact that the suspect lowered his hands to justify the use of force.[206]

Those cases, however, depend upon a finding that the antecedent conduct was intentional or performed with deliberate indifference.[207] Such intentionality is not always so easy to determine.[208] For example, in *Young v. City of Killeen, Texas*, an officer killed a suspected drug dealer, Young, when he reached towards the floorboard of his vehicle.[209] At trial, the police procedure expert testified that the officer's conduct was inconsistent with standard practices in numerous ways:

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203. See Brower v. County of Inyo, 489 U.S. at 598–99 (1989) (finding a "seizure" under the Fourth Amendment when officers erected a roadblock well before the suspect crashed into it).

204. If the officers did not intend to restrain the suspect, but instead accidentally pinned him against the wall due to negligence, "it is likely that a tort has occurred, but not a violation of the Fourth Amendment." *See id.* at 596.

205. Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993); *see also* Sample v. Bailey, 409 F.3d 689, 697 (6th Cir. 2005) (finding objective unreasonableness where officer ordered suspect out of a closet then used his movements to justify force).

206. Kopf v. Wing, 942 F.2d 265, 268 (4th Cir. 1991) ("We believe that a jury could find it objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog bites his scrotum."); *see also* Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 286–88 (5th Cir. 2015) (Higginbotham, J., concurring in part and dissenting in part); *Sample*, 409 F.3d at 697.

207. *See, e.g.*, *Mason*, 806 F.3d at 286 (Higginbotham, J., concurring in part and dissenting in part) (disbelieving testimony that the release of the dog was accidental).

208. Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1588 (2012); *see e.g.,* Brzoska v. Olson, 668 A.2d 1355 (Del. 1995) (requiring only "the intent to make contact with the person, not the intent to cause harm"). *See generally* RESTATEMENT (THIRD) OF TORTS § 101 cmt. f (AM. LAW INST., Tentative Draft No. 1, 2015).

209. 775 F.2d 1349, 1351 (5th Cir. 1985).

> (1) failure to use his radio; (2) failure to utilize a back-up unit; (3) dangerous placement of his patrol car in a "cut-off" maneuver; (4) ordering the two men to exit their car rather than issuing an immobilization command to remain in the car with their hands in plain view; (5) increasing the risk of an incident by having two suspects getting out of a car; [and] (6) abandoning a covered position and advancing into the open, where the odds of overacting would be greater.[210]

The district court found Officer Olson liable on both constitutional and state tort grounds. The court reasoned that the officer acted negligently by creating a danger that "not only placed [himself] in a position of greater danger but also imperiled Young by creating a situation where a fatal error was likely."[211] Moreover, the officer violated Young's constitutional rights by using excessive force. On appeal, the Fifth Circuit reversed the lower court with respect to the civil rights claim because the lower court's "findings and conclusions demonstrate that the judge found fault only with the way the officer stopped and confronted Young and not with the shooting itself." Rather, "[t]he only fault against [the officer] was his negligence in creating a situation where the danger of such a mistake would exist. We hold that no right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts."[212] Although the Fifth Circuit reversed the constitutional decision, it nonetheless affirmed the lower court's negligence ruling because the officer violated police procedures, thereby creating a danger of foreseeable harm. In other words, while the preceding conduct was not sufficiently intentional to warrant a constitutional remedy, the antecedent negligence was nonetheless redressable under traditional tort law. The distinction "is necessary to avoid collapse of the jurisprudence of deadly force into a negligence action."[213]

The Supreme Court weighed in on how to assess antecedent conduct that proximately caused a police shooting in *County of Los Angeles v. Mendez*.[214] Deputies from the Los Angeles County Sheriff's Department received a tip that an armed and dangerous parolee-at-large, Ronnie O'Dell, was possibly living at a home in Lancaster,

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210. *Id.*
211. *Id.* at 1352–53.
212. *Id.* at 1353.
213. Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 286 (5th Cir. 2015) (Higginbotham, J., concurring in part and dissenting in part).
214. 137 S. Ct. 1539 (2017).

California. The sheriff's department devised a plan to apprehend O'Dell at the residence that included sending officers to approach the house from both the front and rear. During the briefing, the officers learned that a couple, including a pregnant woman, was living in the backyard of the home. Upon approaching the home, three officers knocked on the front door while Deputies Conley and Pederson went to the back of the property. The two deputies searched the backyard, which "included three metal storage sheds and a one-room shack made of wood and plywood." The couple living in the backyard had built the shack and kept a BB rifle to use on rats and other pests. The BB gun resembled a small caliber rifle.[215]

When the deputies opened the door to the shed, the couple awoke from a nap. The man thought it was the owner of the home and picked up the BB gun so he could stand up and place it on the floor. Upon seeing the BB gun, Deputy Conley yelled "Gun!" and the officer discharged fifteen rounds. The couple suffered severe injuries, including an amputation of the man's leg.

The couple brought an action against the individual officers, claiming three separate Fourth Amendment violations. First, the couple alleged that the deputies performed an unconstitutional search by entering the shack without a warrant. Second, they asserted that the deputies' failure to announce their presence before entering constituted an unreasonable search. Third, the couple claimed the officers used excessive force upon entering the shack.

The district court found the deputies liable on both the warrantless search and the knock-and-announce claims. Pursuant to *Graham v. Connor*, however, the lower court found that the two officers did not use excessive force because the act of pointing the BB gun was a superseding factor. The deputies reasonably believed "that a man was holding a firearm rifle threatening their lives."[216] The circuit court affirmed in part and reversed in part. The appellate panel affirmed the warrantless search liability but concluded that the deputies were entitled to qualified immunity for failing to knock on the shed and announce their presence. The court did not disagree with the lower court's determination that the shooting was reasonable under *Graham*. Still, the inquiry was not complete.

Given that the warrantless search was unconstitutional but the subsequent shooting was constitutional, the question was whether the deputies could be held liable for the couple's physical injuries.

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215. *Id.* at 1544.
216. *See id.* at 1545 (internal quotation omitted).

The Ninth Circuit answered in the affirmative under its "provocation rule" doctrine. The rule permitted a Fourth Amendment excessive force claim "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation."[217] Under the rule, even when force is justified under *Graham*, an excessive force claim is permissible if the officer committed an independent violation of the Fourth Amendment in the course of events leading up to the seizure.

The Supreme Court unanimously rejected the provocation rule. Justice Alito reasoned that the rule effectively transformed a reasonable use of force into an unreasonable use of force based upon a separate and distinct Fourth Amendment violation. As the Court explained, "Excessive force claims . . . are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred."[218] Implicit in this explanation is that the "conduct" at issue was the use of force rather than any preceding actions. And if the officer acted reasonably when using force, "there is no valid excessive force claim."[219] In rejecting the provocation rule, the Court dispelled the notion that a Fourth Amendment violation (excessive force) can be predicated on a *different* Fourth Amendment violation (warrantless search). The Court said, "[t]hey should be analyzed separately."[220]

The *Mendez* plaintiffs, however, did not merely seek to defend the Ninth Circuit's provocation rule. Rather, they sought affirmance based on the "totality of the circumstances" test articulated in *Graham*. They argued that the *Graham* progeny inappropriately narrowed the inquiry to the "final frame."[221] In their estimation, the test should be more holistic: "On respondent's view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it."[222] Ra-

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217. Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002) (quoted with approval in *Mendez*, 137 S. Ct. at 1546).

218. Saucier v. Katz, 533 U.S. 194, 207 (2001) (quoted with approval in *Mendez*, 137 S. Ct. at 1546–47).

219. *Mendez*, 137 S. Ct. at 1547.

220. *Id.*

221. *See id.* at 1547 n.2; Brief of Respondents at 34, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017), 2017 WL 696103; *see also* Plumhoff v. Rickard, 572 U.S. 765, 777 (2014) (assessing threat "at the moment when the shots were fired"); *Saucier*, 533 U.S. at 206 (denoting the "temporal perspective of the inquiry"); *id.* at 210 (Ginsburg, J., concurring) ("The proper perspective in judging an excessive force claim, *Graham* explained, is that of 'a reasonable officer on the scene' and 'at the moment' force was employed.") (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)); Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 491–92 (1994).

222. *See Mendez*, 137 S. Ct. at 1547 n.2 (internal citation omitted).

ther than viewing the warrantless search as a separate Fourth Amendment violation, the plaintiffs wanted the Court to view the search as preceding conduct that foreseeably led to the use of force. The Court noted that it did not grant certiorari on the question and, therefore, declined to address the merits of the argument.[223] Whether such preceding conduct is part of the analysis remains an open question.

To test the "totality of the circumstances" test espoused by the *Mendez* plaintiffs, I want to slightly change the fact pattern. Imagine that the officers still approached the home from both the front door and backyard. The two officers who committed the warrantless search by going through the backyard still came upon the man with the BB gun that resembled a small caliber rifle. However, in response to seeing the man holding the gun, imagine a newly-arrived officer, who originally entered the front door, fired in (perceived) defense of his fellow officers. Under the "final frame" Fourth Amendment analysis, the shooting would likely not be considered excessive force. Indeed, it is difficult to assign liability to the shooter where he did not act wrongfully. The officer did not conduct an unconstitutional search, as he entered through the front door. And, assuming (as the court found in *Mendez*) that the shooting was based on a reasonable belief of an imminent deadly threat, his conduct was privileged. Likewise, it is difficult to characterize the conduct of the officer who came through the backyard as excessive force when he did not fire his weapon. This is not to suggest that the officer was without fault. Certainly the officer's conduct was intentional insofar as it was a warrantless search.[224] But the intentionality of the conduct (*i.e.*, entering through the backyard) was not performed for the purpose of instigating the shooting. Under modern tort law, therefore, the search would not be considered an intentional tort for purposes of assessing the physical injury (as opposed to a trespass). Nonetheless, if the court found that the substandard care with which the officer entered the property proximately caused the physical injury, then the conduct is more appropriately characterized as antecedent negligence.

The analytical distinction between antecedent negligence and a continuum of intentional conduct in the law enforcement context is not easily discernable.[225] Indeed, in *Young*, the court found that

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223. *Id.*

224. *See, e.g.*, Fyfe, *supra* note 11, at 475–77 (suggesting that tactical knowledge and concealment would minimize the risk to officers and suspects and prevent tragic mistakes).

225. *See* Campbell v. White, 916 F.2d 421, 422–23 (7th Cir. 1990) ("To presume the existence of a seizure under the circumstances presented in this case ignores the distinction that has been made between an accidental or tortious act which happens to be committed by a government official and an intentional detention that rises to the level of a constitu-

the officer was negligent when he dangerously placed his patrol car in a "cut-off" maneuver. Could such a technique be considered an intentional roadblock, more analogous to *Brower*?[226] Does an officer who steps in front of a moving vehicle act intentionally or negligently? Do officers who drive upon a scene without taking proper precautions intentionally or negligently escalate a situation?[227] In a case where an officer released a dog (intentionally or otherwise) on the surrendering suspect, the court noted that the officers could not be liable for "rush[ing] into . . . the killing zone without a plan."[228] Yet, another court reasoned that while releasing a dog on a suspect was intentional, the decision may have been based on negligent reasoning, thereby creating a cause of action for negligent use of excessive force.[229] The fact that some courts still grapple with the fallacious concept of "negligent use of excessive force" underscores that, until the characterization conundrum for various types of government conduct is resolved, sustainable reform of the *Bivens* remedy will remain elusive.

The question then becomes, how do we devise a remedial regime that compensates without getting bogged down in the characterization conundrum? Tort liability should not rise and fall on such analytical nitpicking.[230] Unfortunately, under the current public tort law, wherein constitutional torts are siloed into *Bivens* ac-

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tional violation."); Apodaca v. Rio Arriba Cty. Sheriff's Dep't, 905 F.2d 1445, 1447 (10th Cir. 1990) ("Collisions between police vehicles and others caused by police negligence clearly falls on the 'tort' side of the line.").

226. *See, e.g.*, Brower v. County of Inyo, 489 U.S. 593 (1989).

227. *See, e.g.*, Dietzmann v. City of Homer, Case No. 3:09-cv-0019-RJB, 2010 WL 4684043 (D. Alaska Nov. 17, 2010) (negligence claims against United States for U.S. Marshal agents using vehicles to pin defendant to effectuate an arrest), *aff'd sub nom.* Dietzmann v. Hutt, 479 Fed. App'x 108 (9th Cir. 2012).

228. Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268 (5th Cir. 2015) (Higginbotham, concurring in part and dissenting in part) (internal quotation omitted).

229. Ryan v. Napier, 406 P.3d 330 (Ariz. Ct. App. 2017), *overruled by* 425 P.3d 230 (Ariz. 2018); *see also* Milcent v. City of Boston, No. 14-cv-13347-GAO, 2016 WL 845303, at *4 (D. Mass. Feb. 29, 2016) ("A public employer may be held vicariously liable for the negligent use of excessive force of one of its employees."); Reed v. District of Columbia, 474 F. Supp. 2d 163, 174 (D.D.C. 2007) (allowing case to go forward because "a distinct act of negligence, a misperception of fact, may have played a part in the decision to fire") (quoting District of Columbia v. Chinn, 839 A.2d 701, 709–10 (D.C. 2003)); John F. Preis, *Alternative State Remedies In Constitutional Torts*, 40 CONN. L. REV. 723, 750–55 (2008) (outlining numerous scenarios wherein a police officer acted reasonably but ultimately unconstitutionally that may not establish a prima facie case under state tort law because "this would entail holding that reasonable behavior can simultaneously be 'offensive,' clearly a discordant result"). *See generally* Hernandez v. City of Pomona, 207 P.3d 506, 517 (Cal. 2007) (explaining the difference between "the officers' alleged negligence in using deadly force" and "whether the officer were negligent in *creating* a situation in which it was reasonable for them to use deadly force.") (emphasis in original).

230. *See generally* Sugarman, *supra* note 199 (outlining the analytical difficulty between negligence and intentional actions to call for a single cause of action based on wrongfulness).

tions and common-law torts are siloed into FTCA actions, the delineation is dispositive. From a compensatory standpoint, wrongful conduct that proximately causes injury should provide an adequate remedy. Given jurists' and scholars' considerable struggles in distinguishing between intent and negligence, an ideal remedial regime would prevent such analytical parsing from becoming outcome determinative and instead focus on maximizing compensacompensation for wrongful conduct, incentivizing better decision making at the agency level, and focusing individual punishment towards ill-motived officers.

C. *Discretionary Function Exception vs. Law Enforcement Proviso*

Before endorsing the concept of tort justice, one must consider whether it should be the role of courts to scrutinize law enforcement practices. The fact that common-law tort jurisprudence has the capacity to scrutinize a broad array of law enforcement conduct beyond the immediate exertion of force does not answer the question of whether such judicial review is warranted, much less constitutionally permissible. Conservative tort theorists discredit such adjudications as judicial usurpation of the executive branch and its exclusive authority over law enforcement agencies.[231] Judicial assessments of the manner in which administrative agencies carry out their mandates arguably place the judicial branch in the role of *de facto* policy makers. This jurisprudential dilemma undergirds the core tension between the discretionary function exception and the proviso to intentional tort exceptions to the FTCA.

Law enforcement agencies are constantly faced with difficult judgments about the best way to fulfill their missions. Ensuring the safety and welfare of officers and the general public while performing law enforcement functions often depend on the specific facts on the ground and require a sober consideration of a multitude of factors. Given that agencies require discretion to perform core functions, actions arising from such decision making are often immune to judicial scrutiny. The discretionary function exception reflects this viewpoint.

The discretionary function exception provides that the United States may not be held liable based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

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231. *See* Goldberg, *supra* note 5, at 328 ("Not surprisingly, to combat the alleged evils of illicit regulation, reformers have sought and obtained measures whose main aim is to reduce the occasions for tort regulations.").

Government, whether or not the discretion involved be abused."[232] The United States Supreme Court has devised a two-prong test for determining whether an action is barred by the discretionary function exception. The first prong asks whether the conduct involves "an element of judgment or choice" by the federal agency or employee.[233] That inquiry focuses on whether any "controlling statute or regulation mandates that a government agent perform his or her function in a specific manner."[234] When a federal statute, regulation, or policy "specifically prescribes a course of action for an employee to follow . . . the employee has no rightful option but to adhere to the directive."[235] Absent any discretion in the employee's ability to perform the conduct, the exception does not apply.

Discretion alone does not invoke the exception. The second prong examines whether the action taken was the kind of conduct that the exception was intended to shield. The "focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis."[236] In determining whether an action is susceptible to policy analysis, courts assess whether they are "decisions grounded in social, economic, and political policy."[237] Even if such discretion is abused or leads to unfortunate results, the fact that such decisions are susceptible to judgment render them beyond review by the judicial branch.[238]

To date, the Eleventh Circuit is the only appellate court to hold that claims made under the law enforcement proviso cannot be categorically barred by the discretionary function exception.[239] In *Nguyen v. United States*, the Eleventh Circuit, citing a statutory canon of construction, reasoned that the more specific law enforcement proviso, which enumerates six specific intentional torts,

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232. 28 U.S.C. § 2680(a) (2018).

233. Berkovitz v. United States, 486 U.S. 531, 536 (1988).

234. Powers v. United States, 996 F.2d 1121, 1125 (11th Cir. 1993) (quoted with approval in Hughes v. United States, 110 F.3d 765, 768 (11th Cir. 1997)).

235. *Berkovitz*, 486 U.S. at 536 (quoted with approval in United States v. Gaubert, 499 U.S. 315, 322 (1991)); *see also* Nguyen v. United States, 556 F.3d 1244, 1250 n.2 (11th Cir. 2009).

236. *Gaubert*, 486 U.S. at 325.

237. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984).

238. *See Gaubert*, 499 U.S. at 325; Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993) (Courts are to look at "the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one we would expect inherently to be grounded in considerations of policy.") (internal citation omitted); Hughes v. United States, 110 F.3d 765, 768 (11th Cir. 1997) (granting immunity even if discretionary decision by the Postal Service failed to provide adequate security at the post office).

239. *See Nguyen*, 556 F.3d 1244.

trumps the more amorphous discretionary function exception. The appellate panel determined that Congress was aware of the discretionary function exception when it enacted the proviso, so Congress intended the newer provision to supersede the older prohibitor. Given that the proviso was written broadly to include all claims "arising out of" the enumerated torts, the *Nguyen* reasoning could extend to claims of antecedent negligence that lead to the use of force.[240]

Other circuit courts generally agree that "if the law enforcement proviso is to be more than an illusory . . . remedy, the discretionary function exception cannot be an absolute bar which one must clear to proceed under § 2680(h)."[241] Still, courts generally have

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240. In *United States v. Shearer*, 473 U.S. 52 (1985), the Court was confronted with the issue of whether that provision bars claims characterized as negligence even though the ultimate injury stemmed from an assault and battery. The Court avoided the issue by deciding the case based on the *Feres* doctrine. Still, a plurality noted that "Section 2680(h) does not merely bar claims for assault and battery; in sweeping language it excludes any claims arising out of assault and battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee." *Id.* at 55 (plurality opinion). The plurality opinion suggested that cases based on antecedent negligence, such as negligent supervision, are barred if the injuries arose from an intentional tort. In *Sheridan v. United States*, 487 U.S. 392 (1987), the Court again sidestepped the issue by deciding the case based on the employment status of the federal actor. *See id.* at 402. The opinion compelled a strong dissent, which invoked *Shearer* to conclude that the exception "encompasses all injuries associated in any way with an assault and battery." *Id.* at 409 (O'Connor, J., dissenting). Justice Kennedy wrote a concurrence in which he invoked traditional tort doctrines to distinguish between claims characterized as intentional torts and negligence. *Id.* at 408 (Kennedy, J., concurring). Yet, without clear guidance from the Supreme Court, most circuits have followed the *Shearer* plurality. *Cf.* Franklin v. United States, 992 F.2d 1492, 1499 (10th Cir. 1993); Westcott v. Omaha City, 901 F.2d 1486, 1490 (8th Cir. 1990); Garcia v. United States, 776 F.2d 116, 118 (5th Cir. 1985) (preventing negligent supervision claim in action arising from sexual assault); Thigpen v. United States, 800 F.2d 393, 394–96 (4th Cir. 1986) (adopting the broad interpretation advanced in *Shearer* plurality). *But see* Bennett v. United States, 803 F.2d 1502, 1503–03 (9th Cir. 1986) (declining to follow the *Shearer* plurality as dicta). Some scholars have pointed to this controversy, as well as the inherent injustice in denying compensation for assaults and batteries committed by non-law enforcement agents, as the basis for eliminating the intentional tort exception altogether. *See* Jack W. Massey, *A Proposal To Narrow The Assault and Battery Exception To The Federal Tort Claims Act*, 82 TEX. L. REV. 1621, 1644 (2004) ("Insofar as the majority application of the FTCA leaves a class of severely injured plaintiffs with poor chances of being made whole, and it treats some plaintiffs differently than others based on the vicissitudes of an assailant's employment, it is inequitable."). Of course, in previous examples, I argued that certain conduct may not constitute a battery if preceded by negligence. *See* discussion *supra* Section III.B. In such instances, it would be difficult to argue that the case "arose from" an intentional tort. Moreover, as the intentional tort exception does not prevent adjudications based on antecedent negligence for claims arising from intentional torts committed by law enforcement officers, this Article does not need to wade into the debate other than to note the general importance of properly characterizing public tort actions based on a broad array of government conduct. The Article highlights the controversy as further evidence of confusion surrounding public tort law in this important area and advocates that any amendment should address these issues comprehensively.

241. Sutton v. United States, 819 F.2d 1289, 1297 (5th Cir. 1987); Caban v. United States (*Caban I*), 671 F.2d 1230, 1234 (2d Cir. 1982) (understanding the provisions should not "be

found "no serious incongruity between the immunity afforded under section 2680(a) and the waiver of immunity under the proviso to section 2680(h)."[242] Courts instead have attempted to reconcile the provisions by assessing whether the conduct at issue involves the type of decisions traditionally immunized by the discretionary function exception or is more properly characterized as conduct that Congress intended to deter through the proviso.[243]

In reconciling the law enforcement proviso and the discretionary function exception, courts have looked to the claim's substance to properly characterize the alleged tortious conduct.[244] General claims that an agency should have initiated an investigation or acted upon warning signs are typically immune from judicial review: "Investigations by federal law enforcement officials . . . clearly require investigative officers to consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation."[245] The discretion has likewise been applied to prosecutorial determinations. As the Fifth Circuit has averred,

> [t]he federal government's decision concerning enforcement of its criminal statutes comprise a part of its pursuit of national policy. If the government could be held liable for prosecuting or failing to prosecute such a case, its choices in this area could quite conceivably be affected by such a suit. Thus, a policy decision of the federal government might be influenced by a plaintiff with no governmental responsibility.[246]

At the same time, the Supreme Court has warned that the discretionary-function exception does not distinguish between policy and operational decisions.[247] The level at which a decision is made—whether it concerns the planning or executing of an operation—is not the dispositive inquiry. Nor does the "routine or frequent nature of a decision" impact the analysis. The discretionary

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read to eviscerate each other"). *See generally* Wright v. United States, 719 F.2d 1032 (9th Cir. 1983) ("Our duty . . . is to reconcile them and give meaning to both if we are able.").

242. Gray v. Bell, 712 F.2d 490, 507 (D.C. Cir. 1983).

243. *See, e.g.*, Medina v. United States, 259 F.3d 220, 224–26 (4th Cir. 2001); Gasho v. United States, 39 F.3d 1420, 1435 (9th Cir. 1994); Garcia v. United States, 826 F.2d 806, 809 (9th Cir. 1987); Pooler v. United States, 787 F.2d 868, 871-72 (3d Cir. 1986).

244. Milligan v. United States, 670 F.3d 686, 692 (6th Cir. 2012) ("In determining whether the plaintiff's claim falls within the law enforcement exception to the intentional tort exception, we must look to the substance of the claim and not limit our review to how the plaintiff pleaded the cause of action.").

245. Sabow v. United States, 93 F.3d 1445, 1454 (9th Cir. 1996).

246. Smith v. United States, 375 F.2d 243, 247 (5th Cir. 1967).

247. United States v. Gaubert, 499 U.S. 315, 326 (1991).

function exception was not intended to be relegated to high-level decisions regarding whether to initiate an investigation or to prosecute. Rather, each decision must be examined to determine whether it is grounded in policy factors immune from judicial scrutiny.

That fact-specific approach is easier said than done. The difficultly in applying the discretionary function exception test in law enforcement cases is most pronounced in instances that blur the line between policy and operational decisions, such as the protection of informants in the witness protection program;[248] the use of interrogations;[249] the decision when to effectuate an otherwise lawful arrest;[250] and the decision to terminate an arrest or release someone in custody.[251] With respect to law enforcement techniques and practices, such as the decision to make an arrest or the amount of force to exert, courts have found that such conduct typically does not involve the type of decision making that the discretionary function exception was intended to protect.[252] Such decisions do not involve the type of political, social, or economic calculations that caution judicial restraint. As one court has suggested in cases involving "persons (such as police officers) whose jobs do not typically include discretionary functions, it will be rare that a suit permissible under the proviso to section 2680(h) is barred by section 2680(a)."[253]

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248. *See, e.g.*, Shuler v. United States, 531 F.3d 930, 934 (D.C. Cir. 2008) (failure to protect informant's identity); Fuller-Avent v. U.S. Probation Office, 226 Fed. App'x 1, 2–3 (D.C. Cir. 2006) (disclosure of criminal history to employer); Lawrence v. United States, 340 F.3d 952, 958 (9th Cir. 2003) (supervision of person placed in witness protection program); Piechowicz v. United States, 885 F.2d 1207, 1213 (4th Cir. 1989) (failure to provide witness protection); Pooler v. United States, 787 F.2d 868, 870–871 (3d Cir. 1986) (use of informant when conducting investigation); Jet Industries Inc. v. United States, 777 F.2d 303, 305–06 (5th Cir. 1985) (selection and supervision of participants in the federal witness protection program); Ostera v. United States, 769 F.2d 716, 718 (11th Cir. 1985) (selection and supervision of informant); Taitt v. United States, 770 F.2d 890, 893 (10th Cir. 1985) (admission into witness protection program); Bergmann v. United States, 689 F.2d 789, 794 (8th Cir.1982) (admission into witness protection program).

249. O'Ferrell v. United States, 253 F.3d 1257, 1266–67 (11th Cir. 2001).

250. *Shuler*, 531 F.3d at 934 ("Decisions regarding the timing of arrests are the kind of discretionary government decisions, rife with considerations of public policy, that Congress did not want the judiciary second-guessing.") (internal citation omitted).

251. Deuser v. Vecera, 139 F.3d 1190, 1195 (8th Cir.1998) (decision to terminate arrest of intoxicated person); Prelvitz v. Milsop, 831 F.2d 806, 810 (8th Cir. 1987) (decision to allow intoxicated person to drive in lieu of detaining all passengers); Flammia v. United States, 739 F.2d 202, 205 (5th Cir. 1984) (release of immigration detainee).

252. *See* Garcia v. United States, 826 F.2d 806, 809 (9th Cir. 1987) (use of force by border patrol agent in making arrest did not involve "the sort of generalized social, economic and political policy choices that Congress intended to exempt from tort liability") (internal citation omitted).

253. Gray v. Bell, 712 F.2d 490, 508 (D.C. Cir. 1983).

Still, other courts have refused to second-guess the conduct of law enforcement operations.[254] This deference occurs even in instances where the court simultaneously condemns the conduct of others who are part of or assisting with the operation.[255] Employing such logic, some courts have cited the discretionary function exception to dismiss cases with fact patterns eerily similar to the raids in Collinsville, Illinois—the no-knock raids that led to the law enforcement proviso. In *Mesa v. United States*, the court applied the discretionary function exception to bar claims based on DEA agents negligently or recklessly executing a valid arrest warrant upon the wrong person.[256] The court reasoned that "the execution of an arrest warrant is a fundamental discretionary investigative determination replete with policy choices . . . It is not for this Court to question the plain mandate of Congress."[257] In *Casillas v. United States*,[258] FBI agents wore black hoods and entered the plaintiffs' home brandishing assault weapons. The agents ordered the family, including their three-year-old daughter, to lie face down at gun point. After the officers handcuffed the father and questioned the parents, it was determined that the officers were not at their intended location despite having procured a search warrant for the address. The government agents blamed the mistake on an "error in proofreading the affidavit."[259] The court found that there was no private person analogue for seeking a search warrant, so the negligence claim could not proceed.[260] Moreover, the agents' actions in obtaining the search warrant fell within the discretionary function exception.

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254. *See, e.g.*, Mid-South Holding Co. v. United States, 225 F.3d 1201, 1205-1207 (11th Cir. 2000) (regarding the negligent performance of a search of vessel causing it to sink); Attallah v. United States, 955 F.2d 776, 784 (1st Cir. 1992) (regarding decisions about whether or not to make stops and searches at customs checkpoint); B&F Trawlers, Inc. v. United States, 841 F.2d 626, 631 (5th Cir. 1988) (regarding apprehension and transportation of drug-running vessels).

255. *See, e.g.*, Suter v. United States, 441 F.3d 306, 311–12 (4th Cir. 2006) (regarding FBI agent's participation in and approval of criminal activity during undercover investigation); Ga. Cas. & Sur. Co. v. United States, 823 F.2d 260, 263 (8th Cir.1987) (holding that a claim for financial losses arising from the FBI's undercover investigation of an automobile theft ring was barred because "[t]he FBI's decision to maintain secrecy . . . involved the balancing of policy considerations protected by the discretionary function exception"); Frigard v. United States, 862 F.2d 201, 203 (9th Cir. 1988) (per curiam) (holding that a suit alleging financial fraud by an investment company used by the CIA as a cover for its operations was barred by the discretionary function exception because "the alleged decisions by the CIA to use [the company] and to keep its use of the company secret are administrative decisions grounded in social and economic policy.").

256. 837 F. Supp. 1210, 1216 (S.D. Fla. 1993).

257. *Id.*

258. No. CV 07–395–TUC–DCB (HCE), 2009 WL 735193 (D. Ariz. Feb 11, 2009).

259. *Id.* at *5.

260. *Id.* (citing Washington v. DEA, 183 F.3d 868, 873 (8th Cir. 1999); Wright v. United States, 963 F. Supp. 7, 16–17 (D.D.C. 1997)).

Thus, taken to its logical endpoint, the discretionary function exception can lead to results that would effectively eviscerate the law enforcement proviso. If agencies were permitted to characterize the manner in which they effectuate arrest warrants as discretionary acts, the very type of raid that served as the impetus for the proviso would be shielded from judicial review. Yet, some courts view such decisions not as intentional torts, but as antecedent decisions that are immune to judicial second-guessing. The law enforcement proviso was enacted to permit compensation for tortious conduct committed by investigative or law enforcement officials,[261] and its purpose should not be obfuscated by an agency's assertion that the nature of their action was discretionary and therefore immune from legal scrutiny.

To understand the intent of the law enforcement proviso and, by extension, its relationship to the discretionary function exception, we need to examine the events that led to its enactment. When federal and state narcotics officers mistakenly raided the homes of two families in Collinsville, Illinois, they did so at the behest of the St. Louis Office of Drug Abuse Law Enforcement (DALE)—the federal agency that preceded the Drug Enforcement Administration.[262] As the investigation of the Collinsville raids unfolded, it became evident that the wrongful conduct was twofold: the failure to obtain valid warrants and the manner in which the officers performed the no-knock searches. This is not uncommon, as there are often multiple proximate causes for the same injury.[263] Those two activities—procuring a warrant (or the failure to do so) and executing a search warrant—are often characterized as separate and distinct torts.[264] By bifurcating the conduct as actions by two distinct groups, the analysis demonstrates how the intent of the law enforcement proviso is not fully realized simply by focusing on the last tortious conduct.

A law enforcement officer is privileged to arrest an individual under a warrant that is valid or fair on its face.[265] But what if the warrant was, in fact, not valid? What happens when the officers who exerted force were simply performing their duties under the reasonable, but ultimately mistaken, belief that a proper warrant

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261. For purposes of the law enforcement proviso, "'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h) (2018).

262. Boger et al., *supra* note 52, at 501.

263. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 703–04 (2004).

264. *Id.*; *see also Casillas*, 2009 WL 735193.

265. RESTATEMENT (SECOND) OF TORTS § 122 (AM. LAW INST. 1965).

had been procured?[266] Under constitutional tort law, individual officers have not committed a Fourth Amendment violation (and escape potentially paying damages out of pocket) when reasonably performing their duties. Officers are entitled to rely on the perceived validity of warrants and those responsible for procuring them.[267] If the officers who effectuated a search warrant were sued in their personal capacities, they would be entitled to assert the defense that they acted objectively reasonably under the circumstances.[268] Their conduct would not be considered a constitutional violation. In such instances, the physical contact with the plaintiffs was intentional, but privileged. Rather, the touching was the manifestation of an earlier "wrongful" conduct—the procurement (or lack thereof) of the warrant.

Similarly, the Restatement (Second) of Torts notes,

> "[w]hen the privilege is conditional, a person is sometimes protected by his reasonable belief in the existence of facts that would give rise to a privilege, even though the facts do not exist . . . [such as] a policeman is not liable for mistakenly arresting one whom he believes to have committed a felony."[269]

Officers cannot be said to have engaged in wrongful conduct when performing their duties based on their reasonable, but mistaken, belief that an arrest was justified.[270] If the arresting officer acted based on a warrant that was valid on its face, some jurisdictions do not characterize the tortious conduct as a false arrest or false imprisonment.[271] Of course, the officers carrying out a warrant may

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266. *Id.* §§ 124, 125.

267. *See* Panetta v. Crowley, 460 F.3d 388, 395 (2d Cir. 2006) ("When making a probable cause determination, police officers are 'entitled to rely on the allegations of fellow police officers.'") (quoting Martinez v. Simonetti, 202 F.3d 625, 634 (2d Cir. 2000)); Arnsberg v. United States, 757 F.2d 971, 981 (9th Cir. 1984) (stating that it would be "unreasonable to rule that the arresting officers . . . must take issue with the considered judgment of an assistant United States Attorney and the federal magistrate").

268. *See* Baker v. McCollan, 443 U.S. 137, 139–43 (1979) (no constitutional injury when the plaintiff was mistakenly arrested pursuant to a facially valid warrant).

269. RESTATEMENT (SECOND) OF TORTS § 890 cmt. f (AM. LAW INST. 1965).

270. *See, e.g.*, Bernard v. United States, 25 F.3d 98, 103 (2d Cir. 1994) ("Assuming the information Agent Clifford relied upon was wrong, probable cause exists even where it is based upon mistaken information, so long as the arresting officer was reasonable in relying on that information . . . . Thus, the determination of probable cause does not turn on whether Agent #1's observations were accurate, but on whether Agent Clifford was reasonable in relying on those observations.") (internal citation omitted).

271. *See, e.g.*, Wilcox v. United States, 509 F. Supp. 381 (D.D.C. 1981); Boose v. City of Rochester, 71 A.D.2d 59, 66 (N.Y. App. Div. 1979) ("An arrest made pursuant to a warrant valid on its face and issued by a court having jurisdiction of the crime and person is privileged."). If officers fail to use due diligence and arrest the wrong person based on a valid

commit an intentional tort in the event they exceed the scope of reasonable conduct—using a SWAT-style technique to arrest a misdemeanant or engaging in a "personal vendetta of wanton destruction."[272] But absent such overzealousness, the tortious conduct was not merely the intentionality with which the officers effectuated the raids, but their wrongfulness in failing to procure a proper warrant.[273] Such claims may be more appropriately characterized as a malicious prosecution or abuse of process.[274]

Malicious prosecution and abuse of process are two of the enumerated torts in the FTCA law enforcement proviso. As the Senate Report noted, "[t]he effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents [act] within the scope of their employment, or under color of Federal law . . . ."[275] The Supreme Court has concluded that the proviso covers more than tortious conduct committed in the course of executing a search, seizing evidence, or making an arrest.[276] The Court recognized that "Congress intended immunity determinations to depend on a federal officer's legal authority, not on a particular exercise of that authority."[277] In order to fulfill the intent of the law enforcement proviso, courts should look beyond the manifestation of the injury, often characterized as an assault and battery, and adjudge antecedent wrongful conduct that proximately caused the harmful touching. Thus, Congress intended to permit judicial review of antecedent conduct that led to wrongful searches and seizures to al-

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arrest warrant, a false arrest claims may still be brought. Dennis v. New York, 96 A.D.2d 1143 (illustrating "misnomer" cases of choosing between two possible arrestees).

272. Boger et al., *supra* note 52, at 502 (internal quotation omitted); *see also* Gasho v. United States, 39 F.3d 1420, 1435 (9th Cir. 1994) (declining to dismiss an intentional infliction of emotional distress claim due to alleged conduct of the officer at the time of the arrest); Wright v. United States, 963 F. Supp. 7, 17 (D.D.C. 1997) ("[T]here is no question that the FTCA creates a right of action for torts committed during the unreasonable execution of a search warrant.").

273. *See Gasho*, 39 F.3d at 1432; *see also* Cominotto v. United States, 802 F.2d 1127, 1130 (9th Cir. 1986) (recognizing that the tortious conduct was "not necessarily at the site of the injury or the place where the negligence has its 'operative effect'") (quoting Sami v. United States, 617 F.2d 755, 762 (D.C. Cir. 1979).

274. Johnson v. Kings Cty. Dist. Attorney's Office, 763 N.Y.S.2d 635, 641–42 (N.Y. App. Div. 2003) ("Generally, where there is an alleged unlawful arrest made pursuant to a valid warrant, the appropriate form of action is one for malicious prosecution, not false imprisonment . . . .") (internal citation omitted). Malicious prosecution requires "the commencement or continuation of a criminal proceeding by the defendant against the plaintiff." *Id.* at 641. Justification based on another state's arrest warrant "serves as a complete defense to a claim of false arrest and imprisonment and eliminates an essential element of a claim for malicious prosecution . . . ." Heath v. State, 645 N.Y.S.2d 366, 367 (N.Y. App. Div.1996) (quoted with approval in *Johnson*, 763 N.Y.S.2d at 639).

275. S. REP. NO. 93-588, at 2791 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2791.

276. *See* Millbrook v. United States, 569 U.S. 50, 56–57 (2013).

277. *Id.* at 56.

low for a claim of malicious prosecution under the law enforcement proviso.[278]

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278. *See* Milligan v. United States, 670 F.3d 686, 692 (6th Cir. 2012). Yet, courts are torn as to whether the application of a search warrant—the very antecedent conduct at issue in Collinsville—constitutes a discretionary act. *See* Wright v. United States, 963 F. Supp. 7, 17 (D.D.C. 1997); Patel v. United States, 806 F. Supp. 873, 876 (N.D. Cal. 1992); McElroy v. United States, 861 F. Supp. 585, 593 (W.D. Tex. 1994). Some courts have properly characterized claims stemming from effecting an arrest warrant, not as an assault and battery, but as a result of tortious activity in obtaining the warrant. In *Milligan v. United States*, the Sixth Circuit held that an administrative error leading to the arrest of an innocent person amounted to a claim of negligence. 670 F.3d 686 (6th Cir. 2012). The physical interaction was not an assault and battery; rather, it was simply the manifestation of the original wrongful conduct. Yet, after acknowledging that the conduct at issue concerned the same type of activity as the Collinsville raids—the procurement of a warrant—the appellate panel held that such conduct was immune from suit under the discretionary function exception. *Id.* at 695; *see also* Kerns v. United States, No. CV-04-01937-PHX-NVW, 2007 WL 552227 (D. Ariz. Feb. 21, 2007), *rev'd*, No. 07-15769, 2009 WL 226207 (9th Cir. Jan. 28, 2009); Doherty v. United States, 905 F. Supp. 54, 56 (D. Mass. 1995); *McElroy*, 861 F. Supp. At 593. But whether antecedent negligence can be the basis of the intentional tort of abuse of process is a different question than whether such conduct is beyond judicial scrutiny. Johnson v. Kings Cty. Dist. Attorney's Office, 763 N.Y.S.2d 635, 643 (N.Y. App. Div. 2003) ("It is not necessary to address the issue of whether the defendants' actions were justified or whether process was perverted to obtain a collateral objective; it is enough to note that the plaintiff's abuse of process claim is premised on negligence. It is self-evident that a claim of negligence cannot support this intentional tort."). Indeed, other courts have held that antecedent negligence concerning the procurement of a warrant was not the type of conduct that the discretionary function exception guards against. *Compare Milligan*, 670 F.3d 686 (characterizing the administrative error as negligent and applying the discretionary function exception), *with* Carter v. United States, 725 F. Supp. 2d 346 (E.D.N.Y. 2010) (characterizing clerical error leading to mistaken arrest as negligence and holding that discretionary function exception did not bar recovery), *aff'd in part, rev'd in part on other grounds*, 494 F. App'x 148 (2d Cir. 2012). Suggesting that procuring a warrant is immune from judicial scrutiny under the discretionary function exception ignores the fact that part of the "wrongful" conduct that led to the intentional tort exception was procuring a warrant. The conduct at issue was not merely the manner in which the DALE agents effectuated the search, but also the decision to do so without a valid warrant.

Of course, the decision not to procure warrants in Collinsville, Illinois, was not mere negligence; it was sufficiently intentional to result in *Bivens* actions. Congress enacted the law enforcement proviso to provide a parallel action against the United States. The problem arises for claims not amounting to a constitutional violation but nonetheless aimed at conduct beyond the mere manifestation of the injury (i.e., assault, battery, false arrest, false imprisonment, malicious prosecution, or abuse of power). As previously discussed, the analytical distinction between intentional torts and battery is often convoluted in the law enforcement context. *See* JAYSON & LONGSTRETH, *supra* note 42, § 9.05[2][h] ("[T]he test is whether the plaintiff has stated a valid negligence claim that is wholly independent of the excluded tort."). It would be odd to suggest that courts have the authority to examine the continuum of intentional conduct that leads to the use of force, therefore potentially constituting a Fourth Amendment violation, but lack subject matter jurisdiction when the officer approaches negligently. *See* Gibson v. United States, 457 F.2d 1391, 1396 (3d Cir. 1972) ("This is consistent with the strong public policy expressed in the statute to waive immunity for injuries caused by negligence of employees and to except claims arising out of assault or battery."). Similarly, it would be inequitable to suggest that courts may find that the intentional decision to procure a warrant was unconstitutional but the same conduct, when performed negligently, is immune from judicial scrutiny. Law enforcement activity that leads to arrests and searches, such as procuring a warrant, whether performed negligently or intentionally, should not be considered the type of conduct immune from judicial review under the discretionary function exception.

The discretionary function exception does not stand as an impediment to permitting constitutional tort claims under the FTCA.[279] Most courts have concluded that the discretionary function exception does not encompass actions by government agents that are "unconstitutional, proscribed by statute, or exceed the scope of an official's authority."[280] Simply put, the government does not have the discretion to violate the Constitution.[281] If law enforcement officers had probable cause to arrest, then their actions would not give rise to liability, thus obviating the need to assert the discretionary function exception. On the other hand, if the officers lacked probable cause, the decision to arrest is not protected by the discretionary function exception because the conduct is unconstitutional. Of course, to recover under the FTCA, the plaintiff must still demonstrate that the conduct violated a state law.[282] Cases often arise in which parallel *Bivens* and FTCA actions are brought and allege constitutional infractions by the individual officer and common-law torts by the government. In such cases, the United States typically will not assert the discretionary function exception unless it is clear that there was no constitutional violation. The FTCA claims and *Bivens* claims often address a common nucleus of operative facts, and should constitutional torts become cognizable under the statute, the discretionary function exception would not undermine the remedial restructuring.

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279. Indeed, for courts that have found that the discretionary function exception may apply even in instances where the plaintiff alleged constitutional violations, the reasoning stems from the need to mirror qualified immunity afforded to the tortfeasor. *See* Castro v. United States, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting), *vacated*, 608 F.3d 266 (5th Cir. 2010) (en banc). As qualified immunity would no longer be necessary under the FTCA constitutional tort law model, such an argument would become moot.

280. Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 254 (1st Cir. 2003).

281. *See* Galvin v. Hay, 374 F.3d 739, 758 (9th Cir. 2004) ("As [f]ederal officials do not possess discretion to violate constitutional rights . . . the discretionary function exception does not apply here.") (internal citations omitted); Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003) ("We must also conclude that the FBI's alleged surveillance activities fall outside the FTCA's discretionary-function exception because [plaintiff] alleged they were conducted in violation of his First and Fourth Amendment rights."); Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001) (In "determin[ing] the bounds of the discretionary function exception found in § 2680(a) . . . we begin with the principle that federal officials do not possess discretion to violate constitutional rights or federal statutes.") (internal citations omitted); Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir.1987) ("[W]e have not hesitated to conclude that [an] action does not fall within the discretionary function [exception] of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution."); Myers & Myers, Inc. v. United States Postal Serv., 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority."). *But see* Kiiskila v. United States, 466 F.2d 626, 627–28 (7th Cir. 1972) (holding that conduct by commanding officer of military base, although "constitutionally repugnant," fell within the discretionary function exception).

282. *See* FDIC v. Meyer, 510 U.S. 471, 477–78 (1994).

Nor should the discretionary function exception stand as an impediment to claims based on the antecedent negligence of law enforcement officers when such negligence leads to intentional torts.[283] The exception would still apply to the decision of whether and how to investigate, including prioritizing investigations and allocating resources. But the law enforcement proviso recognizes that society bestows unique authority onto public officials capable of performing searches of homes and arrests of citizens: "The intent of the [law enforcement proviso] is to provide recovery for injuries caused by the government even in instances in which the government believed such actions necessary to meet some misguided notions of internal security."[284] Courts have the institutional knowledge of law enforcement practices and are well-equipped to adjudge unconstitutional, as well as negligent, police conduct and misguided notions of internal security. Such decisions are not regarded as judicial overreach in other contexts. Indeed, such adjudications serve as the bedrock of criminal procedure jurisprudence.

There are numerous safeguards to prevent judicial overreaching into powers exclusively reserved to the other government branches. The discretionary function exception was conceived from the separation-of-power doctrine that requires courts to not interfere with authorities expressly bestowed upon the other branches of government.[285] As courts have recognized, such judicial inaction would be warranted in certain scenarios even if the discretionary function exception did not explicitly mandate restraint.[286] Nothing would prevent courts from using the traditional political question doctrine to determine whether the issue is beyond judicial scrutiny. Similarly, under the FTCA, the United States is "entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim."[287] These other defenses include absolute immunity from prosecutorial and judicial decision.[288] These immunities would continue even in the absence of the discretionary function exception.

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283. Berkovitz v. United States, 486 U.S. 531, 536 (1988).

284. Boger et al., *supra* note 52, at 532.

285. *See* United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 809–10 (1984).

286. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 760–61 (1984) (relying on separation of powers argument to limit judicial review); McMellon v. United States, 387 F.3d 329, 336–38 (4th Cir. 2004).

287. 28 U.S.C. § 2674 (2018); *see* Wise v. United States, No. 6:09-cv-0901-MBS, 2009 WL 5171215, at *4 (D.S.C. Dec. 18, 2009), *aff'd*, 393 F. App'x 112 (4th Cir. 2010) (per curiam).

288. *See* Bernard v. United States, 25 F.3d 98, 104 (2d Cir. 1994) ("Because the FTCA does not authorize suits for intentional torts based upon the actions of Government prose-

Other litigative hurdles prevent FTCA adjudications from becoming *de facto* judicial legislation. Under the *Twombly/Iqbal* pleading standard, a plaintiff still needs to provide sufficient factual specificity to give rise to a plausible inference of tortious behavior.[289] It is not enough to simply allege conclusory statements, such as to claim that an investigation was handled negligently. To withstand a motion to dismiss, plaintiffs must assert claims with sufficient factual specificity to allege plausible misconduct.

At the same time, in cases alleging tortious law enforcement conduct, factors that previously led to the assertion of the discretionary function exception are still available to contest the merits of the claim. Some jurisdictions do not recognize generalized notions of negligent or malicious investigation.[290] In applying the discretionary function exception, the Seventh Circuit reasoned, "[d]oing nothing may be the most constructive use of . . . resources." Similarly, under general tort law, a defendant's duty is more limited when the claim is based on an omission rather than an affirmative action.[291] Plaintiffs cannot simply cite the absence of conduct and their injuries to succeed in a negligence claim. The decision to "do nothing" would still be a valid defense on the merits. Even where the discretionary function exception would not shield law enforcement officers, a plaintiff would still need to demonstrate that the actor owed a duty of care[292] and any breach of that duty proximately caused the injury.

Expert testimony is often necessary to establish the appropriate standard of care and to determine whether a breach occurred in tort cases. Law enforcement experts factor the myriad of concerns facing officers as they confront a particular situation. Such experts have been trained to ignore hindsight bias and analyze the situation from the officer's perspective, including the various contin-

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cutors, plaintiff cannot support his malicious prosecution claim with facts that arose after his indictment.").

289. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

290. Johnson v. Kings Cty. Dist. Attorney's Office, 763 N.Y.S.2d 635, 640 (N.Y. App. Div. 2003) ("It is well settled that New York courts do not recognize claims for negligent or malicious investigation.").

291. *See, e.g.*, McCloskey v. Mueller, 446 F.3d 262, 268 (1st Cir. 2012) ("Generally speaking, a defendant's duty is more limited when negligence consists of an omission rather than an act of commission.") (citing Carrier v. Riddell, Inc., 721 F.2d 867, 868–89 (1st Cir. 1983)).

292. *See, e.g.*, Dugard v. United States, 835 F.3d 915, 919 (9th Cir. 2016) (concluding that private rehabilitation entities do not owe a duty of care to the public at large); Ochran v. United States, 273 F.3d 1315, 1317–15 (11th Cir. 2001) (similarly concluding the prosecutor did not owe the informant a duty of care because no special relationship was formed).

gencies that factor into decision making.[293] Even when factoring in the concerns for officer safety and split-second judgments, experts can provide testimony to a reasonable degree of certainty about whether there was a breach of the standard of care.

Such expert testimony also helps alleviate another concern voiced by Justice O'Connor's dissent in *Garner*—the use of social science and evolving police procedures to adjudicate constitutional matters. Expert testimony in excessive force cases "is neither required nor always appropriate."[294] It is the purview of the judiciary to delineate the contours of the Constitution. Consequently, courts alone assess the constitutionality of officer conduct. Such constitutional adjudications have the potential to be perceived as judicial decrees when the decision appears ill-conceived. In *Garner*, Justice O'Connor questioned whether weight should be given to the fact that many states were eliminating their statutes that permitted shooting fleeing felons when such statutes were ubiquitous when the Bill of Rights was ratified. Many judges and scholars balk at the notion of invoking changing social mores and emerging trends to adjudicate constitutional matters.

Tort law, on the other hand, can use developing practices to determine the proper standard of care in various scenarios. Of course, some of the judiciary's gatekeeping functions are necessary to ensure the testimony is generally accepted in the community.[295] But tort law can strike the proper balance between the constitutional floor and the aspirational ceiling of actions that could have been taken with the benefit of perfect hindsight.

Along the same lines, in § 1983 cases, claims of negligent training or supervision cannot be based on a municipal employee's unconstitutional act on a *respondeat superior* theory.[296] A municipality may only be held liable when its own actions, in the form of a government policy or custom, constitute willful indifference or callous disregard.[297] Similarly, a federal agency would not be found negligent for failing to train its employees to anticipate rare or unforeseen events; there has been no history of mishandling the situation; or the wrong choice would not foreseeably cause an injury.[298]

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293. *See, e.g.*, Adams v. Lab. Corp. of Am., 760 F.3d 1322, 1335 (11th Cir. 2014) ("Whether and, if so, the extent to which an expert's philosophical bent biases her review is a credibility determination that has always been within the province of the jury.").

294. Parker v. Gerrish, 547 F.3d 1, 9 (1st Cir. 2008).

295. *E.g.*, FED. R. EVID. 702 (affording judges authority to determine whether the putative expert uses techniques and theories that have been generally accepted in the law enforcement community).

296. City of Canton v. Harris, 489 U.S. 378 (1988).

297. Monell v. Dep't of Social Servs., 436 U.S. 658 (1978).

298. *Cf.* Walker v. City of New York, 974 F.2d 293, 297–98 (2d Cir. 1992) (outlining requirements to bring a failure to train claim under § 1983).

But, while such restrictions may be significant hurdles to meritorious claims, they do not remove the allegations of negligent training and supervision entirely from the realm of judicial scrutiny. Yet, it is axiomatic that claims of negligent hiring, training, and supervision are barred under the discretionary function exception.[299] Federal agencies cannot be sued under the FTCA for the manner in which they train their employees. But that immunity is illusory. When a court finds that an employee acts negligently, the ruling often serves as notice to the employer that its employee used substandard care. In order to prevent such damages in the future, the employee must be retrained. The negligent training claim and the underlying tort action are often two sides of the same liability coin.

That recognition also highlights the most important safeguard against the threat of tort law becoming *de facto* policy. Public tort law only allows for monetary damages. Injunctions, structural or otherwise, are not permitted through FTCA claims. Plaintiffs may not bring facial constitutional challenges against statutes or regulations through tort law.[300] Unlike lawsuits against federal employees in their official capacity, or actions under the Administrative Procedure Act, officers cannot be sued in their individual capacity for equitable or injunctive relief.[301] Without the availability of injunctive relief, FTCA judgments are viewed as modest judicial intervention.[302] Tort adjudications are confined to the particular case or controversy. Costly judgments may alert tortfeasors to modify future behavior. The judgment may intimate to the agency that an employee should be retrained, but it cannot mandate such remedial measures. The agency is free to take any action: reform to prevent future judgments, gamble that the controversy will never reoccur or a future case would yield a different outcome, or simply ignore the judgment based on larger policy considerations.[303] The decision remains squarely with the executive branch. If the discretionary function exception is designed to ensure that the authority over federal departments and agencies remains within the execu-

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299. *See* Gager v. United States, 149 F.3d 918, 921 (9th Cir. 1998); Flynn v. United States, 902 F.2d 1524, 1531 (10th Cir. 1990).

300. FDIC v. Meyer, 510 U.S. 471, 478 (1994).

301. *See, e.g.*, Kirby v. City of Elizabeth, 388 F.3d 440, 452 n.10 (4th Cir. 2004) (providing injunctive relief only against government employees in their official capacity); Wolfe v. Strankman, 392 F.3d 358, 360 n.2 (9th Cir. 2004) ("[T]he declaratory and injunctive relief Wolfe seeks is only available in an official capacity suit."); Frank v. Relin, 1 F.3d 1317, 1327 (2d Cir. 1993) ("[S]uch equitable relief [reinstatement] could be obtained against Relin only in his official, not his individual, capacity."); Scott v. Flowers, 910 F.2d 201, 213 (5th Cir. 1990) ("[T]he injunctive relief sought and won by Scott can be obtained from the defendants only in their official capacity as commissioners.").

302. SCHUCK, *supra* note 22, at 16.

303. *See* Goldberg, *supra* note 5, at 326.

tive branch, the limited remedial measures available when they act tortiously provide an equally vital protection.

Without usurping the authority of law enforcement agencies, FTCA adjudications still have a role to play in encouraging effective decision making and fostering best practices.[304] While only legislatures have the power to adopt criminal statutes, it is the court's role to delineate the scope of common-law torts.[305] FTCA judgments should remain limited to monetary damages awards. Still, without injunctive capabilities, it is all the more imperative to levy FTCA damages against the entity that either harbors the most liability or is capable of instituting reform.[306] Only through incurring the financial impact of the FTCA judgment will the tortfeasor initiate that calculus. Given the manner in which FTCA settlements and judgments are currently paid, no department or agency has any reason to concern itself with such damage awards.

IV. THE BUREAUCRATIC PAYMENT STRUCTURE

Before advocating for disbanding the *Bivens* remedy in favor of the FTCA model, the issue of deterrence must be more fully addressed. The *Carlson* Court reasoned that *Bivens*' survival was necessary to serve a deterrent function. In rejecting the argument that constitutional torts could be adjudicated through the FTCA, the Court reiterated its belief that the most effective deterrent stems from holding individual officers liable rather than governmental employers. The remedy is particularly necessary because the FTCA does not permit punitive damages or jury trials.[307]

As a practical matter, civil servants are typically not in a financial position to pay substantial *Bivens* judgments. Congress created the FTCA law enforcement proviso in response to that economic reality. In devising the proviso, Congress understood that the judicial remedy would often serve as a "hollow remedy" given the officers' likely inability to pay the substantial judgment.[308]

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304. *See* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 322 (1989) (suggesting that courts have an expansive role to play in policy).

305. Schumann v. McGinn, 240 N.W.2d 525, 537 (Minn. 1976) ("We could, of course, adopt the substance of the Model Penal Code rule to be applied in tort actions involving alleged assaults and batteries by a police officer. Though the legislature has the legitimate authority to define crimes and defenses, we retain the common-law authority to define torts and their defenses.").

306. *See generally* Lobel, *supra* note 8 (finding *Ziglar* unpersuasive based on the false dichotomy between injunctive relief and monetary damages).

307. Carlson v. Green, 446 U.S. 14, 22 (1980) (quoting Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978)).

308. Nguyen v. United States, 556 F.3d 1244, 1255 (11th Cir. 2009).

Indemnification polices further undermine the premise that a *Bivens* defendant will feel the financial impact of any judgment. Following an adverse verdict,[309] *Bivens* defendants may submit a written request for indemnification to the head of his employing component.[310] Then, the Department of Justice engages in a legal inquiry to assess whether the officer acted within the scope of employment[311] and whether "such indemnification is in the interest of the United States."[312] Although indemnification is not a foregone conclusion, given that the employing agency receives the request[313] and is responsible for the indemnification payment,[314] it is reasonable to assume its recommendation will be afforded significant weight in the decision-making process.[315] Moreover, in instances in which the plaintiff receives a judgment in an FTCA case, 28 U.S.C. § 2676 precludes a subsequent award sounding in constitutional tort, regardless of the individual officer's level of misconduct or whether the government was found liable.[316]

Practical limitations aside, certain remedies against individual officers must be available to safeguard against conduct "shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[317] In that sense, punitive damages, in addition to the threat of prosecution, persist as necessary deterrents. The plainly incompetent and nefarious should be held personally accountable,[318] and a mechanism should be in place to punish officers who knowingly violate constitutional rights. But in circumstances where the constitutional infraction is based on an agency policy or is the result of poor training or operation techniques, public tort law focused against the employer, rather than the employee, may prove a more effective deterrent and compensatory mechanism.[319]

Many commentators have opined that employer liability, through the doctrine of *respondeat superior*, serves as a more effec-

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309. 28 C.F.R. § 50.15(a)(8)(iii) (1990).

310. *Id.* § 50.15(c)(3) (providing pre-judgment indemnification to *Bivens* defendants only in "exceptional circumstances").

311. *Id.* § 50.15(c)(1).

312. *Id.*

313. *Id.* § (a)(8)(iii).

314. *Id.* § (c)(1)–(5).

315. *Id.* § (c)(4).

316. 28 U.S.C. § 2676 (2018).

317. Duncan v. Wells, 23 F.3d 1322, 1324 (8th Cir. 1994).

318. *See* Morse v. Frederick, 551 U.S. 393, 429 (2007) (quoting Malley v. Briggs, 475 U.S. 335, 431 (1986)).

319. Hassel, *supra* note 59, at 477 ("Indeed, in situations in which the source of the constitutional violation is based on an agency policy, *Bivens* might well provide no remedy against an individual official if he acted in good faith, while a claim under the FTCA could reach to the systemic source of the violation.").

tive deterrent mechanism than individual liability. In order to foster a more critical examination of past tortious conduct, actions based on any law enforcement activity must be internalized by the government decision-making component. Then, this places the financial burden on an entity that is both culpable and capable of effecting institutional change.[320] Tethering the financial liability to the employer through the doctrine of *respondeat superior* would increase the likelihood that decision-makers would institute best practices to minimize the possibility of such dire confrontations. As Yale law professor Peter H. Schuck noted in his groundbreaking work, *Suing Government*, by making the agency financial responsible for the tort judgment, and requiring them to justify the expense to the legislative body, agencies will "be pressed to anticipate and respond to low-level misconduct by deploying their stock of behavior-shaping resources—rules, training, discipline, incentives, information, organization support, and the like—in more imaginative and powerful ways."[321]

Notwithstanding his majority opinion in *Carlson*, Justice Brennan understood the leverage derived from employer-based liability, albeit in a slightly different scenario. The jurist embraced government employer liability as a more effective deterrent than individual liability in the civil rights context:

> The threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.[322]

Justice Brennan suggested that a city liability regime would be more advantageous than a remedy against the individual, which

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320. *See* Boger et al., *supra* note 52, at 541 (quoting Letter from Kenneth Culp Davis to Robert Sloan, Comm. on Gov't Operation, Nov. 26, 1973 ("What is needed is a deterrent that operates not only against the agents but also against the superiors. The superiors will respond to big money judgments, because the superiors have the responsibility for protecting their budgets.")).

321. SCHUCK, *supra* note 22, at 184.

322. Owen v. City of Independence, 445 U.S. 622, 652 (1980) (holding that municipalities could not assert qualified immunity or good faith immunity). *See generally* Hassel, *supra* note 59, at 474 ("On the issue of deterrence, several commentators have concluded that individual liability under *Bivens* is not effective at getting to the causes of unconstitutional behavior.").

could "paralyz[e] the governing official's decisiveness and distort[] his judgment on matters of public policy."[323]

Although the Court recognized the benefits of government liability, it subsequently declined to imply a *Bivens*-style cause of action directly against federal agencies. In *FDIC v. Meyer*,[324] the plaintiff argued that qualified immunity essentially rendered *Bivens* ineffective, and actions against the agency were necessary to provide adequate compensation for constitutional wrongs. The Court rejected that argument. Noting that "the purpose of *Bivens* is to deter *the officer*," the Court reasoned, "[i]f we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under [plaintiff's] regime, the deterrent effects of the *Bivens* remedy would be lost."[325] The decision suggests that the individual, rather than the agency, must ensure a meaningful deterrent. The irony of the *FDIC* decision lies in the fact that while it reads as an effort to aid plaintiffs in their attempt to hold officers accountable, in reality it leaves the plaintiff without any effective accountability mechanism.

If the most effective deterrent policy centers at the agency level, then neither *Bivens* nor the FTCA provides an adequate remedial structure. *Bivens* remedies are too provincial in that they punish the individual actor who may or may not have instituted the policy that led to the infraction. Indeed, scholars have opined that judges and juries are reluctant to award damages against federal law enforcement officials in their individual capacity when such defendants are viewed as mere proxies for the employer agency and its policies.[326]

FTCA liability is premised on *respondeat superior* tort theory. Although the awards have the potential to influence behavior, in reality they are incurred by the government at a level too general to internalize the cost. That lack of financial impact at the agency level is due to the Judgment Fund.[327] The Judgment Fund is "a permanent, indefinite appropriation," which means it is not part of Con-

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323. *Owen*, 445 U.S. at 655–56.
324. 510 U.S. 471 (1994).
325. *Id.* at 485 (emphasis in original).
326. Hassel, *supra* note 59, at 475 ("The reluctance of juries and judges to award damages against individual employees prevents victims of constitutional wrongs from receiving a meaningful remedy. . . . One reason courts and jurors may be reluctant to subject an individual defendant to significant liability is the understanding that the individual is merely a stand-in for the larger governmental entity, and that to punish an individual for a systematic problem is unfair.").
327. *See* 31 U.S.C. § 1304 (2018).

gress's budget.[328] Congressional review is not necessary prior to disbursing funds. In other words, Congress has virtually no oversight over a general appropriation that annually dispenses billions of dollars for tort[329] and other damages, and, as one scholar put it, "there is no practical way for Congress or the public to track where Judgment Fund money goes."[330] The Judgment Fund is the payment method for final judgments and most settlements under the FTCA.[331]

In tort judgments paid through the Judgment Fund, neither the tortfeasor nor the agency is obligated to provide reimbursement.[332] The agency is under no obligation to report payments to Congress. In *FDIC v. Meyer*, the Supreme Court did not outright reject the premise of requiring the federal government to shift funds previously used to indemnify *Bivens* defendants towards judgments resulting from constitutional actions against federal agencies.[333] Instead, the Court merely left it to Congress to determine whether such shifting of government liability was prudent. Any reform aimed at fostering greater accountability should ensure that the monetary awards for tortious conduct are levied at the government level at which decisions are made such that the damages are a factor in the bureaucratic decision-making calculus.[334]

V. REFORMING FEDERAL PUBLIC TORT LAW

Public tort law will never completely eliminate government misconduct. Just as criminal law cannot deter all future crimes, tort

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328. For a comprehensive overview of the Judgment Fund, see Paul Figley, *The Judgment Fund: America's Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145 (2015).

329. *See id.* at 146; Jenna Greene, *Feds paid billions in settlements last year*, NAT'L L.J. (Feb. 6, 2012, 12:00 AM), https://www.law.com/nationallawjournal/almID/1202541306088&Feds_paid_billions_in_settlements_last_year/.

330. Figley, *supra* note 328, at 147.

331. *Id.* at 161–65 (citing H.R. REP. NO. 84-2638, ch. 13, at 72 (1956); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 84th Cong. 885, 888–89 (1956)); *see also* H.R. REP. NO. 87-428, at 2–3, 5–6 (1961). In 1956, Congress created the Judgment Fund to be the source of payment of judgments under $100,000.00. The general fund proved successful, as it relieved Congress of the obligation to execute private bills and cut down on delays for waiting victims. The Fund has had various caps over the years. As it currently stands, the Judgment Fund is the method of payment by the federal government for most FTCA judgments and settlements for more than $2,500.00. *See* Figley, *supra* note 328, at 161–65, 178 n.256.

332. *But see* 39 U.S.C. § 409(h) (2018) (requiring the Postal Service to pay judgments out of its own agency appropriation).

333. 510 U.S. 471, 486 (1994).

334. *See generally* SCHUCK, *supra* note 22, at 104 (explaining the difficulty in tethering a deterrent policy to a particular governmental tier but opining that an appropriate target is more often "closer to the agency head than to the individual street-level official").

law cannot dissuade every public official from acting wrongfully. Public tort law should seek to compensate, deter, and incentivize, while acknowledging its practical limitations. The remedial regime should at times focus on incentivizing better decision making at the agency level, and at other times punish ill-motived and reckless officers. With that in mind, this Article offers four recommendations to reform federal public tort law. First, Congress should amend the FTCA to make it the exclusive remedy for both constitutional and common-law torts. Second, Congress should mandate all FTCA settlements and judgments arising from law enforcement activity to be paid through the department or agency that employed the tortfeasor. Third, Congress should amend the FTCA to permit punitive damages for law enforcement activity and clarify that the discretionary function exception is not a barrier to claims' justiciability. Fourth, Congress should require the judicial award of punitive damages to serve as a mandatory trigger for disciplinary procedures against the tortfeasor.

A. *Amend the FTCA to Permit Constitutional Tort Claims*

Congress should enact the 1978 proposed amendment to the FTCA, recommended by the DOJ, to fold constitutional tort claims into the statute, thereby eliminating *Bivens* implied causes of action. The DOJ conceived of the amendment as a way to "eliminate the need for the Government either to defend the individual employee or—where the official may be guilty of a criminal act—to obtain private counsel for him or her, at great expense."[335] Testifying before the Judiciary Subcommittee, then Attorney General Griffin Bell stated that the *Bivens* implied cause of action created "an unjust and counterproductive burden now weighing on the shoulders of Government employees, the possibility of being held liable for a sizable judgment in a civil suit brought for the way he performs his job."[336] Mr. Bell emphasized that civil litigation against individual officials is not only costly and destructive to morale, but discourages employees from taking challenging assignments for fear of financial ruin. The Attorney General questioned the premise of the deterrent effect created by employee liability. Mr. Bell noted that, irrespective of any intended benefits to individual liability, the reality was apparent: plaintiffs rarely recover substantial

335. *Joint Hearing on Amendments to the Federal Tort Claims Act*, *supra* note 18, at 2 (statement of Sen. Howard M. Metzenbaum, Chairman, Subcomm. On Citizens and S'Holders Rights and Remedies).

336. *Id.* at 5.

sums from the individual employee, and the remedy has no deterrent impact because "large judgments are so infrequent."[337] The unrealized promise of *Bivens*, in the Attorney General's estimation, was not worth the burdens placed on the individual employee and the Department, which often uses taxpayer money to hire private counsel to represent the employee. Still, Mr. Bell recognized that some disciplinary procedure should be established "to insure the fair and effective disciplining of a Government employee who has violated a citizen's constitutional rights."[338]

In exchange for making the United States exclusively liable for all constitutional torts, the 1978 proposal suggested that "the United States will not raise the immunity defenses now available to its employees who are sued personally."[339] The Attorney General recognized that the elimination of qualified immunity would substantially increase the likelihood of compensation: "As a practical matter, the liability of private citizens to recover damages for constitutional torts would be greatly increased if they need only prove violation of their constitutional rights regardless of the good faith of a Government employee."[340] The proposal also allowed for monetary recovery for constitutional violations even in instances where it was nearly impossible to prove a concrete injury. The Justice Department also affirmed its intention to make the discretionary function exception inapplicable to constitutional torts.[341]

The amendment did not pass. The contention surrounding the amendment centered on the absence of a sufficient deterrent mechanism against officer misconduct.[342] The 1978 amendment

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337. *Id.* at 6.
338. *Id.*
339. *Id.* at 7.
340. *Id.* at 8.
341. *Id.* at 24.
342. The Chairman of the Subcommittee questioned whether the proposed bill provided a meaningful safeguard against constitutional violations:

> [I]f damages can no longer be exacted from individuals who violate constitutional rights, what alternative sanctions can be imposed on such officials? . . . . Does this bill create a risk that there will be no sanctions at all to deter grave constitutional violations, no matter how outrageous or unjustified they are?

Id. at 2. Senator Abourezk went one step further:

> The major problem with the bill as drafted is that in immunizing Federal officials from any accountability through civil action, [the amendment] substitutes no effective alternative system of accountability. Instead, the bill relies on civil service disciplinary procedures which have proven to be so inadequate and ineffectual in the past. Perhaps if these civil service disciplinary proceedings had been adequate and effective, there would be no need for this bill today. At a minimum, therefore, the basic elements of an effective disciplinary procedure must be included in the bill.

Id. at 3.

should be re-proposed. Despite the passage of time, both sides stand to gain from the compromise. To whatever extent Congress believed the *Bivens* remedy was an effective deterrent at that time, it has not proven to be so. As detailed above, *Ziglar v. Abbasi* stands as the most restrictive judicial articulation of the *Bivens* remedy to date. Courts already cite that decision to decline finding an implied cause of action for constitutional violations, including alleged Fourth Amendment violations by law enforcement officers. Given that virtually any fact pattern not already adjudicated by the Court creates a new context, it is difficult to conceive of the *Bivens* implied cause of action serving as a robust deterrent mechanism in the future.

Moreover, when the amendment was proposed, the doctrine of qualified immunity was "greatly reduced in scope."[343] The good-faith immunity was limited in the extent to which it was able to shield officials from litigation. Under the *Harlow* objective standard, it has been expanded to immunize defendants in cases previously considered meritorious.[344] These jurisprudential developments thwart compensation in cases where there may have been a constitutional violation. Folding such claims into the FTCA would reinstate the basic tenet that when there is a constitutional wrong, there is a remedy.

At the same time, federal officials would gain a long sought-after immunity. While the Westfall Act immunizes federal actors for common-law torts committed while acting in the scope of their authority,[345] this amendment would shield them from constitutional tort actions. The Justice Department would benefit from cutting down on expenses related to obtaining private counsel for certain defendants.[346] As *Bivens* litigation can extend well beyond a decade, these expenses add up.

Allowing the FTCA to award damages based on constitutional torts would also come closer to creating a comprehensive tort adjudication process. Allowing for both constitutional and common-law tort claims based on law enforcement activity under the FTCA would streamline litigation and allow the dual theories to serve as complementary claims with equal remedial force. Absent qualified immunity, there could still be remedies even in instances where the constitutional violation was not clearly established prior to the misconduct. Similarly, without a federal tort jurisprudence, FTCA actions today often leave courts scrambling to find a private person

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343. *Id.* at 7.
344. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982).
345. 28 U.S.C. § 2679(b)(1) (2018).
346. *See supra* Part IV.

analogue for law enforcement activity. The statute should make clear that federal officers' conduct should be judged based on federal privilege law, including Fourth Amendment reasonableness standards for intentional tort claims, such as false arrest and false imprisonment. Further, allowing constitutional claims under the FTCA would better harmonize actions by allowing courts to properly characterize claims as either constitutional or common-law torts, and adjudicate appropriately. Given the difficult nature of distinguishing between negligence, intentional conduct, and privileged conduct, courts would no longer have to wade through the scattershot categories of various defenses and immunities based on the different causes of action; instead, a single statute would provide the basis for all claims and defenses.

Of course, the proposal is not without its drawbacks. The obvious concern is the lack of accountability for federal officials. Making the United States exclusively liable for constitutional torts would prevent action against the individual tortfeasor. In eliminating the *Bivens* remedy, aggrieved plaintiffs do not have the opportunity to hold even the most malicious officer accountable. The additional recommendations aim to create an accountability and deterrence regime that places liability on the responsible entity.

B. *Agency Payment Structure*

Congress should mandate that all FTCA settlements and judgments are paid directly out of the budgets of the employing department or agency instead of the Judgment Fund. Agencies have no incentive to modify past practices in order to mitigate future damages because they are not forced to dispense judgment awards directly from their own budgets. The disconnect between the agency and any potential award creates a perverse incentive for law enforcement officers to either not take the litigation seriously or view the general corpus as a hush fund to pay off aggrieved victims.

Many scholars have advanced similar proposals.[347] It was also advanced by Senator Charles H. Percy, a sponsor of the FTCA law enforcement proviso, as an alternative to the 1978 proposed amendment. In Senator Percy's estimation, the proposal

> would create more direct accountability by requiring successful claims to be paid from the appropriations of the

347. *See, e.g.*, SCHUCK, *supra* note 22, at 108; Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978); Joanna C. Schwartz, *Watching the Detectives*, N.Y. TIMES, June 16, 2011, at A35.

> agency whose employee committed the tort. Agencies would feel a strong incentive to prevent tortious misconduct by their employees. Congress could, and should, look into the operation of any agency which failed to do so.[348]

This is not to suggest the elimination of the Judgment Fund. Congress, in its wisdom, created the fund to eliminate the need for private compensatory bills and to unburden agencies from settlement payments. The pendulum should not swing so far back that it eliminates the many bureaucratic advantages gained through the streamlined payment scheme. But in the instance of law enforcement activity, the need for direct accountability at the agency level warrants a more precise remedial measure.

Of course, departments and agencies cannot be so financially hamstrung by tort awards that it impacts their ability to perform core operational functions. But that concern cannot also be an excuse to abdicate principled oversight. Requiring agencies to reimburse the Judgment Fund to ensure greater accountability already exists in other tort contexts. Under the Contract Disputes Act, agencies are required to reimburse the Judgment Fund for court judgments and monetary awards issued by the boards of contract appeals.[349] The reimbursements come from "available funds or by obtaining additional appropriations for such purposes."[350] The intent of the reimbursement program was to prevent agencies from viewing the Judgment Fund as a means of terminating litigation without internalizing the cost.[351]

Similarly, federal agencies are required to reimburse the Judgment Fund for payments made in equal employment opportunity and whistleblower cases. Before the No FEAR Act, claims resolved at the administrative level were paid through agency funds while litigated claims were paid through the Judgment Fund. The two-tiered system created an incentive for agencies to allow claims to lapse into litigation. In fiscal year 2000, agencies avoided paying almost $43 million in discrimination claims because of the Judgment Fund.[352] In a Senate hearing concerning the then-proposed

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348. *Joint Hearing on Amendments to the Federal Tort Claims Act*, *supra* note 18, at 358. Senator Percy's proposal centered on allowing plaintiffs to choose between bringing actions sounding in constitutional torts against the United States or, in cases where the employee acted in bad faith, maintaining an action against the individual official. As Assistant Attorney General Barbara Babcock noted, the proposal would effectively undermine the very objective of the amendment—namely, to eliminate claims against individual officers sounding in tort. *Id.* at 362.

349. 41 U.S.C. § 701(c) (2018).

350. Id. § 13(c).

351. *See* Figley, *supra* note 328, at 168.

352. S. REP. NO. 107-143, at 3.

No FEAR Act, Senator John Warner stated, "I firmly believe that because there is no financial consequence to their actions, Federal agencies are essentially able to escape responsibility when they fail to comply with the law and are unresponsive to their employees' concerns."[353] The 2002 NO FEAR Act addressed the problem by making agencies "more accountable for their violations of employment discrimination and whistleblower protection laws brought against the agencies."[354]

Such accountability mechanisms likewise exist in the federal law enforcement context. Individuals may bring civil actions to recover money damages against the United States for willful violations of specified sections of the Stored Communications Act and the Foreign Intelligence Surveillance Act.[355] The procedure for bringing such an action mirrors the Federal Tort Claims Act, and aggrieved parties must initially file a claim with the appropriate department or agency before bringing a lawsuit in United States district court.[356] The case is tried without a jury.[357] In the event of a judgment award, "[a]n amount equal to any award against the United States . . . shall be reimbursed by the department or agency . . . that is available for the operating expenses of the department or agency concerned."[358] While the statute recognizes that reimbursements cannot suppress the law enforcement capabilities of these departments of agencies, it nevertheless creates a mechanism whereby these entities incur the financial burden through their own operating expenses.

Perhaps the most intriguing aspect of the statute stems from the administrative discipline provision.[359] This provision attempts to

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353. *See* Figley, *supra* note 328, at 163 n.187.

354. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-295R, THE JUDGMENT FUND: STATUS OF REIMBURSEMENTS REQUIRED BY THE NO FEAR ACT AND CONTRACT DISPUTES ACT 1 (2008).

355. *See* 18 U.S.C. § 2712 (2018).

356. *Id.* § 2712(b)(1).

357. *Id.* § 2712(b)(3).

358. *Id.* § 2712(b)(5).

359. *Id.* § 2712(c). The provision reads,

> If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency

give teeth to the often-maligned intra-agency disciplinary process. By requiring departments and agencies to initiate proceedings when they receive a court's decision, the provision attempts to limit entities' discretion in disciplining their own employees. The disciplinary review is automatically launched upon a finding that the employee acted willfully or intentionally. Punitive damages are available when the employee's conduct was willful or intentional.[360] As the statute only permits actions against the United States based on "any willful violation," it is arguable that all judgments should trigger disciplinary review. Yet, the statute leaves it for the court to find "circumstances surrounding the violation" that suggest willfulness. Given the somewhat amorphous standard, it still provides discretion for the agency to read the court opinion and determine whether the court intimated such circumstances.

Paying tort settlements and judgments through agency appropriations should not be seen as a panacea for government misconduct. As one commentator noted, "agencies frequently failed to reimburse the Judgment Fund for [Contract Dispute Act] payments made from it on their behalf."[361] The Treasury Department does not have the authority to compel reimbursement.[362] Even when judgments are paid directly through agency appropriations, they can be viewed as little more than shifting taxpayer money around. As federal agencies have large operating budgets, most tort judgments would have minimal impact on their fiscal bottom line. And, if agencies are provided with more up-front money to pay judgments (whether through the Judgment Fund or elsewhere), then the agency may remain indifferent to remedial restructuring. One nationwide survey of jurisdictions that use a wide range of budgetary schemes to pay legal liabilities found that "[p]aying money from a law enforcement agency's budget does not necessarily impose financial burdens on that department."[363]

This is not to suggest that forcing agencies to pay settlements and judgments from their budgets would have no effect. Oftentimes, the oversight comes not merely from the payment, but when the agency is required to get additional funds to satisfy judgments[364]: "Additional pressure may be applied when a law en-

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concerned and shall provide the Inspector General with the reasons for such determination.

360. *Id.* § 2707(c).
361. Figley, *supra* note 328, at 168.
362. *Id.* at 169.
363. Joanna C. Schwartz, How Governments Pay: Lawsuits, Budgets, and Police Reform, 63 UCLA L. REV. 1144, 1150 (2016).
364. *Id.* at 1179–80.

forcement agency seeks additional appropriations to cover litigation costs that go beyond their budget. But this appears to be a political pressure, not a financial one."[365] Forcing agencies to go to Congress to justify their tort payments and explain how they have taken measures to ameliorate such tortious conduct may be an important step in reasserting oversight and creating accountability.

Congress historically required agencies to report annually on all the claims they paid through the FTCA administrative claims process. A report included a list of "the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim."[366] Congress repealed the reporting statute in 1965 as part of its effort to reduce superfluous reporting requirements.[367] As the statute focused on administrative claims, that is, settlements of $2,500.00 or less, it was understandable to eliminate such micro-oversight. But if law enforcement agencies were again required to pay FTCA judgments and settlements out of their appropriations, some reiteration of the statute would be an added tool to reintroduce congressional oversight to the public funds paid to compensate for law enforcement misconduct.[368] Otherwise, alternative regimes, such as internal risk management offices aimed at identifying high-risk departmental practices, should be explored as viable oversight policies.

C. *Allow for Punitive Damages in FTCA Law Enforcement Cases*

The *Carlson* Court reasoned that the availability of punitive damages in *Bivens* actions serves an additional deterrent impact. The Court believed that the threat of punitive damages must be available against federal law enforcement officers, just as they are against state actors in § 1983 actions. However, the extent to which punitive damages are permitted in *Bivens* actions remains questionable. Although punitive damages are available in § 1983 suits, the Supreme Court has never definitively declared as much for *Bivens* claims.[369] Still, the tacit acknowledgement in *Carlson* has permitted lower courts to award punitive damages in *Bivens* suits.[370]

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365. *Id.* at 1180.
366. 28 U.S.C. § 2673 (2018).
367. Figley, *supra* note 328, at 178.
368. *Cf.* Helen Hershkoff, *Missed Warning, Thirteen Chimes: Dismissed Federal-Tort Suits, Public Accountability, and Congressional Oversight*, 2015 MICH. ST. L. REV. 183, 226 (advocating for greater oversight of FTCA claims to assess practices of the Veterans Administration).
369. Smith v. Wade, 461 U.S. 30, 35–37 (1983).
370. Heinrich *ex rel.* Heinrich v. Sweet, 49 F. Supp. 2d 27, 46 (D. Mass. 1999); Kaufmann v. United States, 876 F. Supp. 1044, 1052 (E.D. Wis. 1995); Sanchez v. Rowe, 651 F. Supp. 571, 574 (N.D. Tex. 1986).

The FTCA does not provide punitive damages. Allowing for such damages under a theory of *respondeat superior* would appear antithetical to the purpose of such awards—namely, to punish the individual tortfeasor. Punitive damages are designed as punishment for the defendant's willful or malicious conduct.[371] To receive punitive damages, a plaintiff must demonstrate the requisite intent, *i.e.*, that the defendant's conduct was "motivated by evil motive or intent, or when it involves reckless or callous indifference to federally protected rights of others."[372] Punitive damages are never awarded as of right.[373] Instead, the factfinder must determine that the conduct warrants deterrence and punishment beyond mere compensatory damages.

By folding *Bivens* actions into the FTCA statutory framework and allowing for punitive damages, accountability at the individual officer level would no longer be predicated on the arbitrary constitutional versus common-law tort distinction. Rather, it could return to the subjective intent inquiry of pre-*Harlow* qualified immunity. It is difficult to reconcile inflicting a substantial monetary burden on the individual officer if the officer exercised substandard care because they were inadequately trained or improperly informed about the circumstances they confronted. In instances where officers lacked the subjective intent to cause harm, yet nonetheless engaged in behavior with that was deemed unconstitutional after the fact, the remedial measure should be targeted to their employers to prevent future recurrence. At the same time, officers should be held liable in instances where they engage the public with evil motives or intent.[374] In that sense, a subjective intent rule is preferable. Such a subjectively-based approach was historically the standard for qualified immunity.[375] Examining the law enforcement officer's subjective motives would restore the good-faith standard that was the pre-*Harlow* test for qualified immunity.[376]

Allowing for punitive damages would refocus the deterrence regime on a public official's subjective intent. While plaintiffs currently must demonstrate objectively unreasonable behavior to overcome qualified immunity, they must prove subjective intent to

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371. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 n.9 (1986).
372. *Smith*, 461 U.S. at 56.
373. *Id.* at 52.
374. *See, e.g.*, Wong v. United States, 373 F.3d 952, 975–77 (9th Cir. 2004); Bank of Jackson Cty. v. Cherry, 980 F.2d 1362, 1369–71 (11th Cir. 1993) (finding unconstitutional retaliatory action yet still applying qualified immunity).
375. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (recognizing that the Court's original articulation of "good faith" immunity included a subjective intent element); *see also* Moore, *supra* note 208, at 1636–37.
376. *See* Crawford-El v. Britton, 523 U.S. 574, 587 (1998).

be awarded punitive damages.[377] In the false-arrest context, punitive damages rest on the question of whether the officer arrested the individual "knowing that he lacked probable cause to do so, or, at least, with conscious indifference to the possibility that he lacked probable cause."[378] This test mirrors the pre-*Harlow* good-faith, subject-intent standard for qualified immunity.

As that standard more accurately reflects societal understandings about when officers should be held accountable, allowing the punitive damages inquiry in FTCA suits would permit the officer to escape the burdens of being a defendant while still allowing the plaintiff the ability to demonstrate that the officer's conduct was motivated by evil motives or intent.[379] Through the adjudication, the court would be in a position to assess the employee's conduct and assess not merely tortious conduct, but ill-intended conduct. The punitive damages would be awarded against the United States under a *respondeat superior* theory of liability. However, the ruling would be more than a heightened financial burden. Having a clear ruling on punitive damages would provide a normative trigger for agency response. The Article III judge's finding of evil motive or intent can be harnessed to punish the law enforcement officer.

Of course, a FTCA case awarding punitive damages would not terminate the officer's employment rights. Due process demands that the officer be a party to the litigation that deprives him of any substantive rights.[380] Under the doctrine of *res judicata*, a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."[381] Offensive collateral estoppel occurs when a "plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another ac-

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377. Iacobucci v. Boulter, 193 F.3d 14, 26 n.8 (1st Cir. 1999).

378. *Id.*

379. *See generally* Andrew Kent, *Are Damages Different?* Bivens *and National Security*, 87 S. CAL. L. REV. 1123 (defending *Bivens* limitations based, in part, on monetary damages extracted from individuals causing "overdeterrence").

380. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) (identifying "guideposts" for determining whether defendant had adequate notice of repercussions of punitive damages).

381. Allen v. McCurry, 449 U.S. 90, 94 (1980); *see also* Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 107–08 (1991) (the court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality . . . . The principle holds true when a court has resolved an issue and should do so equally when the issue has been decided by an administrative agency, be it state or federal, which acts in a judicial capacity."). This is not to be confused with collateral estoppel, which holds that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action . . . ." *Allen*, 449 U.S. at 94; *cf.* McDonald v. City of West Branch, 466 U.S. 284, 291–92 (1984) (declining to find § 1983 action estopped due to an arbitration award under a collective bargaining agreement).

tion against the same or a different party."[382] In order for the prior adjudication to have preclusive effect, the defendant must be afforded an opportunity to conduct discovery and mount a meaningful defense.[383] Under the proposed change, individual officers would likely be deposed and testify at trial, they would not be named parties in the lawsuit, lest it defeat the very purpose of encapsulating the *Bivens* remedy into FTCA statutory scheme. Because the officer would not have been a named party in the preceding FTCA case, the judgment would not have a preclusive effect on the subsequent disciplinary proceeding. In other words, an Article III court's punitive damages award cannot be dispositive of the issue of the officer's evil motive or intent. The agency would still be required to initiate removal proceedings and, if there is a final order on termination, that ruling would be appealable to the Merit Systems Protection Board.[384]

Still, creating clear statutory guidelines for disciplinary action would provide a level of accountability and transparency currently lacking in the purely intra-agency system. Inspectors General and the Justice Department's Office of Professional Responsibility are often tasked with investigating law enforcement conduct that give rise to *Bivens* and FTCA actions. Yet that level of intra-agency review was not sufficient to persuade Congress to adopt DOJ's previously proposed FTCA amendment. Under this recommendation, Article III judges could examine the tortious conduct and determine whether liability falls with the agency for institutional substandard practices or the employee for acting with willful motives. In the event the conduct was willful, the decision should automati-

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382. United States v. Mendoza, 464 U.S. 154, 159 (1984).

383. *See* Brockman v. Wyoming Dep't of Family Servs., 342 F.3d 1159, 1166–67 (10th Cir. 2003) (finding that action was precluded because, in a prior proceeding, plaintiff was represented by counsel and had an opportunity to conduct discovery); Travers v. Jones, 323 F.3d 1294, 1297 (11th Cir. 2003) (finding that First Amendment claim was precluded by a county merit system hearing in which plaintiff had the opportunity to present and cross-examine witnesses); Littlejohn v. United States, 321 F.3d 915, 923 (9th Cir. 2003) (requiring issue to have been fully litigated); Layne v. Campbell Cty. Dep't of Social Servs., 939 F.2d 217, 219–21 (4th Cir. 1991) (finding that county's grievance procedure provided employees with adequate opportunity to litigate, thereby precluding § 1983 action, despite fact that there was no opportunity for court review of adverse finding); *see also* Hall v. Marion School Dist. No. 2, 31 F.3d 183, 191–92 (4th Cir. 1994) (finding that the fact that the decision-makers had "ex parte knowledge of the dispute being adjudicated before them" suggested they were not acting in a judicial capacity); Wade v. Hopper, 993 F.2d 1246, 1252 (7th Cir. 1993) (issue that plaintiff "had the opportunity to litigate" in adverse bankruptcy proceeding precluded subsequent *Bivens* action on the same set of operative facts).

384. *See generally* Jacobs v. U.S. Dep't of Justice, 35 F.3d 1543, 1545 (Fed. Cir. 1994) ("Decisions of the Board are affirmed unless they are found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; [or] (3) unsupported by substantial evidence.").

cally trigger disciplinary action aimed towards termination and place ultimate liability where it belongs.

D. *Disciplinary Committee*

Congress's historic reluctance to merge *Bivens* claims into the FTCA is understandable given the lack of employee accountability within the statutory scheme. The Justice Department was amenable to creating a more robust disciplinary procedure for employees who violated individual's constitutional rights. That procedure included allowing injured persons to participate "in a meaningful way."[385] But without more than a mere concession to allow for citizen participation, Congress was unsure the disciplinary proceedings would be an adequate substitute for lawsuits.[386] By allowing for punitive damages in FTCA cases, Congress could mandate that any such award based on a finding of the officer's ill-intent automatically triggers a disciplinary proceeding against the tortfeasor. Such a judgment would not lead to an Inspector General report but automatic termination proceedings.

The skeletal framework for a more meaningful disciplinary procedure has been outlined in the civil action statutes of the Stored Communications Act and the Foreign Intelligence Surveillance Act.[387] The statute provides guideposts for agency action based on Article III court adjudications by requiring the department or agency to initiate a proceeding based on a judgment that an employee may have acted willfully or intentionally.[388] While the employee was not a direct defendant, the court's determination that his or her conduct was willful or intentional becomes the basis for disciplinary action. The statute mandates that the department "shall" initiate such proceedings.[389] The decision of whether to commence an investigation is not left to the agency.

The statute provides significant discretion. The proceeding is initiated only if the court decision "raise[s] a serious question" about whether the employee acted willfully or intentionally. Moreover, the court ruling does not automatically trigger a disciplinary action. Rather, it merely requires an investigation into whether such an action is warranted. The intra-agency investigation still affords

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385. *Joint Hearing on Amendments to the Federal Tort Claims Act*, *supra* note 18, at 6.
386. *Id.* at 353–55.
387. 18 U.S.C. § 2712 (2018).
388. *See id.* § 2712(c).
389. *Id.*

substantial discretion and leaves it to the bureaucratic institution to determine what warrants such discipline.

Punitive damages under the FTCA would provide the normative trigger for disciplinary action that removes the discretion from the administrative process. Parroting the civil action statute for the Stored Communications Act and the Foreign Intelligence Surveillance Act, Congress could amend the FTCA to mandate that any time a court awards punitive damages for law enforcement activity, the department or agency shall initiate disciplinary action against the appropriate employee or employees who committed the tortious conduct. In the event an agency fails to do so, the aggrieved party who brought the underlying civil action may initiate such a proceeding through the employing agency's Inspector General.

Devising special terms of employment that are unique for law enforcement officers has legal precedent. One statutory provision calls for mandatory removal from employment for law enforcement officers convicted of felonies.[390] Before the statute was enacted, agencies were permitted to fire law enforcement officers convicted of felonies, although such action was not required.[391] The statute, however, explicitly does not prohibit the individual from employment in any position other than as a law enforcement officer. Moreover, statutes provide for removing a public officer for legal cause.[392] Public officials also may be removed from office due to misconduct in performing their official duties.[393]

An FTCA claim settlement would likely not include punitive damages and, consequently, would not trigger disciplinary proceedings against the tortfeasor. The plaintiff would need to decide whether to accept the offered financial compensation or continue litigation in an effort to hold the individual officer accountable. Such litigation would not guarantee disciplinary repercussions against the officer, as the subsequent hearing would include sufficient due process procedures before termination or demotion. Still, given the limited capability of the current structure, this reform provides a concrete legal mechanism for greater compensation, agency-level deterrence, and tangible accountability.

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390. 5 U.S.C. § 7371 (2018).

391. Canava v. U.S. Dep't of Homeland Sec., 817 F.3d 1348, 1349 (2016).

392. *See, e.g.*, Phillips v. Dep't of Air Force, 145 Fed. App'x 371 (Fed. Cir. 2005) (per curiam) (affirming for-cause removal of employee under 5 U.S.C. § 7513 for failing to maintain security clearance); 67 C.J.S. OFFICERS § 232 (Westlaw 2018); *id.* § 233 ("Ordinarily, the term 'for cause' means for reasons that the law, and sound public policy, recognize as sufficient grounds for removal and not merely a cause that the appointing power in the exercise of discretion may deem sufficient.").

393. *See, e.g.*, Kentucky State Bd. v. Isenberg, 421 S.W.2d 81 (Ky. 1967); *see also* Foster v. Dep't of Public Welfare, 159 So. 2d 515 (La. Ct. App. 1st 1963).

CONCLUSION

The proposed legislation would amend the Federal Tort Claims Act to make the United States the exclusive defendant in cases against the government sounding in constitutional and common-law torts. Drawing on an amendment first proposed by the U.S. Department of Justice in 1978, this recommendation would provide for greater compensation to aggrieved parties by eliminating qualified immunity and permitting actions based on constitutional infractions. Although the FTCA and *Bivens* remedial regimes were devised to compensate different tortious conduct, their interrelated histories and immunities are integral to understanding how public tort law has failed to provide effective compensation, accountability, and deterrence in the law enforcement context. *Bivens* actions may have been perceived as a necessary deterrent for officer misconduct, but the implied cause of action lost the Supreme Court's favor within its first decade. To whatever extent it may have persisted, *Ziglar v. Abbasi* proved the death knell of the *Bivens* remedy. Even where actions are cognizable, qualified immunity has become a nearly insurmountable hurdle.

Rather than eulogize *Bivens* actions, we must recognize that common-law tort claims often address law enforcement activity beyond the scope of constitutional analysis. Law enforcement cases involving alleged excessive force often result from antecedent negligence rather than traditional notions of intentional misconduct. By bolstering the FTCA to make agencies more financially accountable, this proposed legislation shifts the deterrent focus onto to the agency by advocating that the employer is better able to modify future behavior and institute training and practices that focus on tortious, as well as unconstitutional, behavior.

The proposed legislation creates a deterrent mechanism at the agency level by requiring all settlements and judgments for claims arising from constitutional and intentional torts to be paid through agency appropriations. At the same time, effective disciplinary procedures must be established to ensure officer accountability. By allowing for modest punitive damages, FTCA judgments can provide a normative trigger for mandatory disciplinary action aimed at terminating employees who commit torts with willful or malicious motive. This adjudicative regime would permit courts to properly characterize the tortious conduct and place liability at the governmental level most responsible for the misconduct.