RECOVERING THE TORT REMEDY FOR FEDERAL OFFICIAL WRONGDOING

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As the Supreme Court weakens the Bivens *constitutional tort cause of action and federal officers avoid liability for unlawful behavior through qualified immunity, we should recollect the merit of the common-law tort remedy for holding the federal government accountable for official wrongdoing. For more than a century after ratification of the Constitution, federal officers who trespassed on the rights of American citizens could be held personally liable under common-law tort theories, but then routinely were indemnified by the government.*

The modern Federal Tort Claims Act (FTCA) roughly replicates the original regime for official wrongdoing by imposing liability directly on the government. Through modest revisions to the FTCA, most claims for abuse of federal government power can be adequately addressed through a common-law tort cause of action. The FTCA should be reformed to put claims for intentional wrongdoing on a more secure footing.

Constitutional principles remain central to adjudication of tort claims against the federal government. First, ordinary tort elements and defenses, such as probable cause in false arrest cases and justified use of force in assault and battery cases, may be refuted by asserting constitutional-equivalent violations. Second, discretionary policy immunity under the FTCA is precluded when constitutional limits are transgressed, as no federal officer has discretion to bypass constitutional requirements. And, because the doctrine of qualified immunity is misplaced in a tort regime, the commands of the Constitution should be directly enforced, without the diluting appraisal of whether the constitutional directive was clearly established in prior court precedent.

INTRODUCTION 1790
I. THE PAST AND PRESENT OF LIABILITY FOR FEDERAL OFFICIAL WRONGDOING 1792
A. The Early Practice of Common-Law Tort Claims for Wrongdoing by Federal Officers 1792
B. The Rise of Common-Law Immunity for Federal Officers for Public Wrong Tort Suits 1794

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C. The Enactment of Expansive Statutory Immunity for Federal Officers from Tort Claims 1798
D. Judicial Birth and Partial Burial of a Constitutional Tort Claim Against Federal Officers 1800
E. Adoption of Limited Collective Government Liability in the Federal Tort Claims Act 1804
II. THE FUTURE OPPORTUNITY FOR A MORE ROBUST TORT REMEDY AGAINST THE FEDERAL GOVERNMENT 1806
A. The Virtues of a Tort Remedy Directly Against the United States for Official Wrongdoing 1806
B. Expanding the FTCA Remedy for a More Robust Response to Official Wrongdoing 1812
C. Clarifying the Exceptions to Tort Liability for Governmental Policymaking 1817
D. With a Tort-Based Remedy for Official Wrongdoing, Constitutional Norms Remain at the Heart of the Analysis .. 1823
1. For Many Common-Law Tort Claims, an Element or Defense of Probable Cause or Justification Runs Parallel to Constitutional Constraints 1823
2. For the FTCA's Discretionary Function Exception, Discretion Is Withdrawn When Constitutional Directives Are Violated 1828
CONCLUSION 1832
ADDENDUM: PROPOSED REVISIONS TO STATUTORY WAIVERS OF SOVEREIGN IMMUNITY 1833

INTRODUCTION

It didn't start out this way. When the American constitutional republic began more than two centuries ago, a remedy in damages for misconduct by federal officers was generally accepted and did not encounter obstacles of governmental immunity.[1] But by the late twentieth century, a regime of all-encompassing official immunity from tort liability,[2] together with the birth and then near-death of judicial implication of a constitutional damages remedy,[3] has nearly suffocated accountability in court for federal official wrongdoing. The promising substitute of a collective federal government liability through a statutory waiver of sovereign immunity has been neglected by Congress as circumstances change over the decades and now risks being sidelined by overly expansive applications of a policy immunity exception.[4]

1 *See infra* Section I.A.
2 *See infra* Sections I.B, I.C.
3 *See infra* Section I.D.
4 *See infra* Section I.E.

As the Supreme Court weakens the *Bivens* constitutional tort cause of action and federal officers avoid liability for unlawful behavior through qualified immunity,[5] we should recollect the merit of the common-law tort remedy for holding the federal government accountable for official wrongdoing.[6] For more than a century after ratification of the Constitution, federal officers who trespassed on the rights of American citizens could be held liable under common-law tort theories, uncomplicated by immunity for wrongful government actors.[7] Now is the time to return to the legislative branch to recover the tort-based solution for government wrongdoing.

And it doesn't have to stay this way. The modern Federal Tort Claims Act (FTCA)[8] roughly replicates the original regime for official wrongdoing by imposing liability directly on the government through the traditional medium of tort.[9] Through modest revisions to the FTCA, most claims for abuse of federal government power can be adequately addressed through a common-law tort cause of action.

When federal agents are negligent, the injured have a well-worn path to redress in court through the FTCA.[10] But when government officials deliberately impose harm on others, the road to recovery is muddy and covered with obstacles.[11] The FTCA presently excludes claims for assault, battery, false arrest, false imprisonment, and malicious prosecution, subject to a special proviso allowing such claims when the federal agent is a law enforcement officer.[12] The FTCA should be reformed to put claims for intentional wrongdoing by any federal employee on a secure footing.[13]

For this tort-based remedy to effectively cover "ordinary common-law torts,"[14] the Supreme Court must clarify the scope of the FTCA's justified immunity for policymaking discretionary functions.[15] When properly applied, this exception avoids "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[16] Unfortunately, in the lower federal courts, simple failures in public safety have regularly been levitated into imaginary policy meditations.[17] With acquiescence by the courts, govern-

5 *See infra* Sections I.B, I.C.

6 *See infra* Section II.B.

7 *See* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3–6 (2017).

8 28 U.S.C. §§ 1346(b)(1), 2671–2680 (2018).

9 *See infra* Section II.A.

10 *See* 28 U.S.C. § 1346(b)(1) (making the United States liable for the "negligent or wrongful act or omission" of a federal government employee).

11 *See infra* Section II.B. *See generally* Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731 (2019).

12 28 U.S.C. § 2680(h) (2018).

13 *See infra* Section II.B.

14 Dalehite v. United States, 346 U.S. 15, 28 (1953).

15 28 U.S.C. § 2680(a) (2018).

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

17 *See infra* Section II.C.

ment litigators have transformed the discretionary function exception into a sweeping immunity for official wrongdoing in areas of mundane activity and on matters that are far removed from the arena of policy judgment.[18]

Constitutional principles remain central to adjudication of tort claims against the federal government. First, ordinary tort claims, such as false arrest or false imprisonment, may be defeated by the presence of probable cause as a common-law equivalent to constitutional expectations.[19] Likewise, certain defenses, such as the justified use of force in response to a common-law assault and battery claim, may be refuted by asserting the equivalent of constitutional violations.[20] Second, the invocation of discretionary policy immunity under the FTCA is precluded when constitutional limits are transgressed, as no federal officer has discretion to bypass constitutional requirements.[21] By focusing attention on the collective liability of the United States government through the FTCA, rather than on individual liability of federal officers through constitutional tort claims, the defense of qualified immunity falls away.[22]

I. The Past and Present of Liability for Federal Official Wrongdoing

A. The Early Practice of Common-Law Tort Claims for Wrongdoing by Federal Officers

At the beginning of the American constitutional experiment, there was broad and authoritative acceptance of a common-law cause of action for damages caused by the misconduct of another person, including a federal official acting under official orders. In his definitive work on federal officer liability and indemnification for public wrongs, James Pfander explains that, from the early days of the republic, courts adopted "common-law norms to "appl[y] a fairly unyielding body of tort law in assessing the liability of government actors for invasions of rights to person and property."[23] During the nineteenth century, if a person suffered an injury at the hands of a federal government employee that was cognizable as a trespass by the common law, the plaintiff could recover damages in state or federal court against that government agent in his individual capacity.[24] As the Supreme Court confirmed recently in its unanimous decision in *Tanzin v. Tanvir*,[25] "These common-law causes of action [against government officials] remained available through the 19th century and into the 20th."[26]

18 *Id.*
19 *See infra* subsection II.D.1.
20 *Id.*
21 *See infra* subsection II.D.2.
22 *See infra* subsection II.D.1.
23 Pfander, *supra* note 7, at 3.
24 *Id.* at 1–17.
25 141 S. Ct. 486 (2020) (8–0 decision).
26 *Id.* at 491.

The Supreme Court established the framework for common-law federal official liability very early in the 1804 decision of *Little v. Barreme*.[27] When American trade with French ports was restricted by statute during cold war tensions between the United States and France, the commander of a United States naval ship ordered seizure of a cargo ship that he plausibly believed was American in origin and engaged in forbidden French trade.[28] After forfeiture proceedings against the vessel were initiated by the commander in Boston federal court, the owner of the ship counterclaimed for damages and asserted it was a neutral ship registered under the Danish flag.[29] On later review, the Supreme Court concluded the seizure violated the nonintercourse statute because it had been executed as the ship was departing a French port rather than arriving to one.[30]

Notwithstanding that the naval commander was acting pursuant to presidential orders, the Supreme Court held in *Little* that such directives "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[31] For the Court, Chief Justice Marshall explained that, despite his original inclination to bar damages against a federal officer who acted under "orders from the legitimate authority," he came to the conclusion that the claim for damages could proceed against the commander individually.[32]

Nor were individual federal officers protected by governmental immunity in this early period of the American republic.[33] As Justice Story explained in another ship seizure case, "matters of state" and "great public purposes," such as the need "to act on a sudden emergency, or to prevent an irreparable mischief," were beyond the proper purview of the judiciary.[34] Rather, Justice Story said, "this Court can only look to the questions, whether the laws have been violated."[35] And if the law had been violated, then "justice demands, that the injured party should receive a suitable redress."[36]

In a mid-nineteenth century treatise, Justice Story explained that the personal liability of federal officers for positive legal wrongs could not be excused by showing "that they have acted *bonâ fide*, and to the best of their

27 6 U.S. (2 Cranch) 170 (1804). On *Little*, see generally PFANDER, *supra* note 7, at 6–8.

28 *Little*, 6 U.S. (2 Cranch) at 170–73.

29 *Id.* at 172–75.

30 *Id.* at 177–79.

31 *Id.* at 179.

32 *Id.*

33 PFANDER, *supra* note 7, at 3. *But see* Andrew Kent, *Lessons for* Bivens *and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 NOTRE DAME L. REV. 1755, 1761 (2021) (arguing for qualification of the historical claims about a "'pure legality' model of early American judicial behavior in officer tort suits in which immunity was unavailable" and policy factors "were ignored").

34 The Apollon, 22 U.S. (9 Wheat.) 362, 366–67 (1824).

35 *Id.* at 367.

36 *Id.*

skill and judgment."[37] Good faith not being a legitimate defense, the officer could escape liability only by showing "there has been no misfeasance or negligence, and no excess of authority, by public agents, in the execution of their duty."[38]

In sum, as James Pfander says, "Nineteenth century jurists . . . assumed that civilian courts were the proper forum for claims brought against military, revenue, and postal officers who exceeded the bounds of their authority and inflicted injuries on innocent third persons."[39]

This is not to say that the federal officer was left to suffer alone the consequences of faithfully following a governmental policy or action directive that a court later found had wrongfully caused harm. Just as the Supreme Court assumed that a tort claim was properly allowed for the victim of the official wrongdoing, the Court assumed that the federal government would be "bound to indemnify the officer."[40] By enacting private bills indemnifying the federal officers held personally liable in these common-law trespass actions, the federal government was held accountable, if indirectly, for official wrongdoing.[41] As James Pfander and Jonathan Hunt concluded, "congressional indemnity contributed to a regime in which the Court imposed relatively strict official liability and Congress provided relatively routine indemnification for officers acting in good faith."[42]

B. The Rise of Common-Law Immunity for Federal Officers for Public Wrong Tort Suits

In the context of common-law tort suits against federal officers, the crucial issue has never been whether a cause of action is cognizable[43] (which is the threshold question for constitutional tort claims against federal officers[44]). Rather, the question that drew increasing attention during the course of the twentieth century was whether the individual government employee should be spared the purported hardships of being held to suit through a doctrine of immunity.

With Chief Justice Marshall's denial of any good faith defense to a common-law tort claim by a federal officer,[45] the courts in the nineteenth century proceeded directly to adjudication on the merits without any immunity com-

37 JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE § 320, at 398 (5th ed. rev. Boston, Little, Brown & Co. 1857).

38 *Id.*

39 PFANDER, *supra* note 7, at 16.

40 Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 98–99 (1836).

41 PFANDER, *supra* note 7, at 3.

42 *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1928 (2010).

43 *See supra* Section I.A.

44 *See infra* Section I.D.

45 *See supra* notes 31–32 and accompanying text.

plications.[46] At the same time, the sovereign immunity of the federal government itself was taken for granted.[47] However, as James Pfander and Jonathan Hunt note, "sovereign immunity in the early republic served less to authorize lawless conduct on the part of the federal government than to allocate responsibility for appropriations and adjudication as between the legislative and judicial branches of government."[48]

This approach reached its zenith with the Supreme Court's 1882 decision in *United States v. Lee*.[49] The case involved a post–Civil War suit for ejectment from the seized Arlington estate filed by the heir of Robert E. Lee against the federal officers who held the property in custody for the United States.[50] After expressing doubts about its validity but accepting the federal government's immunity as settled precedent,[51] a slim majority of the Court refused to extend sovereign immunity beyond a suit framed directly against the United States.[52] When the United States is not a party to the suit, the Court ruled, a doctrine of immunity "is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs" under the common-law claim for ejectment.[53] Citing the principle that "[n]o man in this country is so high that he is above the law," the Court allowed the ejectment claim to proceed.[54]

However, with the growth of the regulatory state, the suitability of common-law tort claims for resolving disputes about distinctly governmental functions came more directly into question. In contrast with the frontal and affirmative wrongdoing challenged as trespass claims in the nineteenth-century republic, courts became increasingly uncomfortable with personal liability for government officers who were exercising policy judgment toward peculiarly governmental ends. Toward the end of the nineteenth century and into the twentieth century, the courts began to draw a distinction between compensation for positive wrongs by federal officers and challenges to policy decisions.[55] And this occurred simultaneously with a parallel judi-

46 *See* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–19 (1972) (describing "[t]he substantial disfavor of governmental immunity" for government officers during the nineteenth century).

47 *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821) (accepting the principle that the United States cannot be sued without its consent as the "universally received opinion").

48 Pfander & Hunt, *supra* note 42, at 1868.

49 106 U.S. 196 (1882). For a general discussion of *United States v. Lee* in the evolution of the doctrine of federal sovereign immunity, see GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 2.3(b)(2), at 78–81 (2016). For more on the historical background to this case, a book-length treatment may be found in ANTHONY J. GAUGHAN, THE LAST BATTLE OF THE CIVIL WAR: UNITED STATES VERSUS LEE, 1861–1883 (2011).

50 *Lee*, 106 U.S. at 196–99.

51 *Id.* at 205–08.

52 *Id.* at 208–23.

53 *Id.* at 207–08.

54 *Id.* at 220.

55 *See infra* notes 64–79 and accompanying text.

cial shifting of the line between what was accepted as a suit directed against an officer and what was recognized as in substance a claim against the government itself.[56]

On the question of the proper party defendant to a claim, the Supreme Court retreated from the apparent ruling of *United States v. Lee*, which turned on denomination of the party (either the United States or a federal officer) in a pleading.[57] In the 1949 decision of *Larson v. Domestic & Foreign Commerce Corp.*,[58] the Court recharacterized *Lee* as a constitutional exception to federal sovereign immunity because the seizure of the land constituted a taking of property without compensation in violation of the Fifth Amendment.[59] Absent a constitutional transgression, the Court ruled that a suit seeking relief that would effectively be enforced against the government itself was in substance a suit against the sovereign.[60] The *Larson* Court was "unwilling to countenance the fiction that a suit against an officer invariably may be distinguished from one against the United States simply by the arrangement of names in the pleading."[61] In sum, an agent of the United States who is acting within the scope of authority conferred by statute may not be held personally liable for actions taken that substantively are the actions of the principal and for which the relief sought is in reality against the United States.

While *Larson* did not directly interrupt claims for damages for the positive wrongs of a federal officer, an expanding common-law doctrine of official immunity weakened (though did not eliminate) the tort remedy directed against a federal officer. Given the breadth of government activities that could give rise to ordinary tort suits against a government officer, the courts worried that indiscriminate lawsuits could severely impair the ability of government employees to do their jobs. Although judicial and legislative immunity had a long pedigree in the common law,[62] the courts newly fashioned immunity for executive officials as well during the twentieth century.[63]

The sharpest swing toward nearly complete immunity for federal officers appeared to come in the 1959 decision of *Barr v. Matteo*.[64] In that decision, involving a common-law libel claim against a government official for issuing a press release, a plurality of the Supreme Court gave greater weight to "protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded

56 *See infra* notes 58–61 and accompanying text.

57 *See supra* notes 52–54 and accompanying text.

58 337 U.S. 682 (1949). For a general discussion of *Larson* in the evolution of the doctrine of federal sovereign immunity, see SISK, *supra* note 49, § 2.3(b)(3), at 81–84.

59 *Larson*, 337 U.S. at 696–97.

60 *Id.* at 686–89.

61 SISK, *supra* note 49, § 2.3(b)(3), at 82.

62 *See* Kilbourn v. Thompson, 103 U.S. 168, 201–04 (1881) (recognizing legislative immunity for members of Congress under the Speech and Debate Clause); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1872) (recognizing absolute judicial immunity).

63 *See generally* SISK, *supra* note 49, § 5.6(b), at 364–66.

64 360 U.S. 564 (1959).

damage suits brought on account of action taken in the exercise of their official responsibilities."[65] Although the plurality opinion repeatedly referred to the exercise of "discretion,"[66] the opinion could be read to suggest an all-encompassing privilege for all federal officer actions "within the outer perimeter of [the officer's] line of duty."[67] Ann Woolhandler described the Court in *Barr v. Matteo* as giving "its explicit imprimatur to broad discretionary immunity for federal executive officials."[68]

If *Barr v. Matteo* cloaked federal officers with a thick blanket of immunity, the Supreme Court's 1988 decision in *Westfall v. Erwin*[69] pulled that blanket down at least partway. In a lawsuit by a government employee who alleged supervisors had negligently allowed him to be exposed to a toxic substance, the Court moved away from the absolute immunity arguably extended by *Barr v. Matteo* to every federal officer acting in the line of duty.[70] The *Westfall* Court unanimously turned away the argument that "effective government" demanded "shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature."[71]

Viewing official immunity from tort liability as protecting administrative "decisionmaking discretion,"[72] the *Westfall* Court held that "absolute immunity from state-law tort actions" should be granted only when both "the conduct of federal officials is within the scope of their official duties *and* the conduct is discretionary in nature."[73] While declining "to determine the level of discretion required before immunity may attach,"[74] the Court rejected the "wooden interpretation" that "some modicum of choice" sufficed to invoke the privilege.[75] By referring to "officials exercis[ing] decisionmaking discretion"[76] and by noting the argument that the officer in the case was not involved in "policy-making work,"[77] the Court plainly tied official immunity to the function of the executive in setting governmental policy.

With the *Westfall* decision, the period of judicial articulation of officer immunity from tort claims came to a close, before superseding legislative action.[78] The Supreme Court had drawn a rough line between (1) direct officer conduct that constituted a positive wrong and caused concrete personal harm, for which personal liability was proper and immunity was not

65 *Id.* at 565.
66 *Id.* at 573, 574.
67 *Id.* at 575.
68 Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 456 (1987).
69 484 U.S. 292 (1988).
70 *Id.* at 293–95.
71 *Id.* at 296.
72 *Id.* at 297.
73 *Id.* at 297–98.
74 *Id.* at 299.
75 *Id.* at 298.
76 *Id.* at 297.
77 *Id.* at 299.
78 *See infra* Section I.C.

afforded, and (2) officer participation in policymaking decisions on behalf of the United States government, for which personal liability was inappropriate and immunity attached. As the *Westfall* Court said in restricting the privilege to discretionary decisionmaking, to extend broad and absolute immunity would have meant that "[a]n injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official."[79]

C. The Enactment of Expansive Statutory Immunity for Federal Officers from Tort Claims

After the Supreme Court's *Westfall* decision had opened the door to personal tort liability of federal officers when engaged in routine activities,[80] Congress's enactment of the Westfall Act[81] slammed the door shut with a vengeance.[82] While the *Westfall* decision had largely restored the historical approach by which a federal officer was personally liable for traditional tort claims arising outside of distinctly governmental settings, the Westfall Act dramatically departed from longstanding practice to extend complete immunity for even garden-variety tortious conduct committed by government employees during their work.

As outlined below, the Westfall Act makes no distinction between tort claims for direct and positive tortious wrongdoing by a federal officer and those quasi-tort claims that object to the harmful effects of government regulation.[83] Both are swept under the rug of immunity. Nor does the shield of the Westfall Act for the individual government employee hinge on whether a substitute tort remedy is provided through a cognizable action against the government itself (although that often is the result).[84]

Congress responded to the *Westfall* decision with unusual alacrity, acting that very same year to overturn the Supreme Court's more limited officer immunity doctrine. In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act[85]—commonly known as the Westfall Act.[86] The Westfall Act grants immunity to individual federal employees from common-law tort claims if the employee was acting within the scope of employment.[87] Whether the federal officer is sued in state court or federal court, the Westfall Act converts a state common-law tort claim into a federal tort cause of action against the United States government itself and proceed-

79 *Westfall*, 484 U.S. at 295.

80 *See supra* notes 72–79 and accompanying text.

81 28 U.S.C. § 2679(b)–(d) (2018).

82 *See* Tanzin v. Tanvir, 141 S. Ct. 486, 491 (2020) ("[T]he Westfall Act foreclosed common-law claims for damages against federal officials . . . .").

83 *See infra* notes 90–91 and accompanying text.

84 *See infra* notes 92–95 and accompanying text.

85 Pub. L. No. 100-694, §§ 5–6, 102 Stat. 4564–4565 (1988) (codified at 28 U.S.C. § 2679(b)–(d) (2018)).

86 On the Westfall Act, see generally SISK, *supra* note 49, § 5.6(c), at 366–77.

87 28 U.S.C. § 2679(b)(1) (2018).

ing exclusively in the federal court.[88] With the United States substituted as the sole defendant, the former state tort claim against the officer now goes forward against the United States under the Federal Tort Claims Act (FTCA).[89]

When considering the adequacy of remedies for official wrongdoing, three distinctive aspects of the Westfall Act should be highlighted:

First, the immunity from state-law tort claims granted to the federal employee is astonishingly complete, shielding not only the work of policy decisionmakers but also the routine activities of every federal employee while on the job. The test for absolute immunity is not whether a federal officer is exercising policy discretion but only whether a federal employee is "acting within the scope of his office or employment."[90] The Westfall Act is not designed to protect the public interest in effective administration but rather to avoid the personal liability of every federal employee, so long as the alleged tortious wrongdoing falls within the scope of employment (as determined by state respondeat superior rules).[91]

Second, the substitution of the United States as the defendant under the FTCA is not a guarantee of an alternative remedy. To be sure, the federal government as a deep-pocket defendant often will prove to be a superior target of a plaintiff's tort claim. But the eliminated tort claim against the individual federal officer is replaced by an FTCA claim against the United States, subject to all the narrowing terms of that statutory waiver of federal sovereign immunity.[92] As I've written previously, "if the United States is found to be immune from liability under the FTCA due to the limitations or exceptions of that statute, the substitution of the United States as the sole defendant is not thereby undone nor may the individual employee be brought back into the lawsuit."[93]

Take, for example, a claim by a military dependent for medical malpractice against an Army doctor stationed abroad that is converted into a suit against the United States and then dismissed under the FTCA's exception for claims arising in a foreign country.[94] While the claim against the United States under the FTCA encounters a fatal obstacle, the Westfall Act immunity

88 28 U.S.C. § 2679(d)(1)–(2) (2018).

89 28 U.S.C. §§ 1346(b)(1), 2671–2680 (2018). On the FTCA, see *infra* Section I.E.

90 28 U.S.C. § 2679(b)(1) (2018).

91 *See* Lyons v. Brown, 158 F.3d 605, 608 (1st Cir. 1998); *id.* at 609 ("Federal law determines whether a person is a federal employee and defines the nature and contours of his official responsibilities; but the law of the state in which the tortious act allegedly occurred determines whether the employee was acting within the scope of those responsibilities."); *see also* Shirk v. United States *ex rel.* Dep't of Interior, 773 F.3d 999, 1005 (9th Cir. 2014); RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1143 (6th Cir. 1996). On the governing law and factual determination of the scope of employment question, see generally Sisk, *supra* note 49, § 5.6(c)(4), at 371–73.

92 On the FTCA, see *infra* Section I.E.

93 Sisk, *supra* note 49, § 5.6(c)(2), at 368.

94 United States v. Smith, 499 U.S. 160, 161–62 (1991).

for the individual physician nonetheless remained securely fastened, thus leaving the plaintiff without any remedy against any defendant in any court.[95]

Third, the Westfall Act by its express terms does not apply to a claim "brought for a violation of the Constitution of the United States."[96] Thus, the Westfall Act does not itself preclude a so-called constitutional tort through the judicially implied *Bivens* cause of action, as discussed next.[97] While scholars have argued that the explicit Westfall Act exception for constitutional claims amounts to a congressional ratification of the *Bivens* claim,[98] the provision could instead be read as acquiescing in then-existing precedent without endorsing it.[99] In any event, as discussed next, little remains today of an implied constitutional tort claim.

D. Judicial Birth and Partial Burial of a Constitutional Tort Claim Against Federal Officers

While the common-law tort remedy against the individual federal officer was being submerged beneath immunity in the last three decades of the twentieth century, the Supreme Court was experimenting with something of an alternative through an implied cause of action directly under the Constitution.[100] By the end of the second decade of the twenty-first century, however, this experiment came to a screeching halt,[101] mostly closing off personal liability of federal officers for wrongs committed in the course of public duties—whether defined by the common law or by the Constitution.

The Constitution does not speak clearly to the availability of a private cause of action, especially as to an individual officer as contrasted with the government itself.[102] Nor has Congress expressly provided for a civil rights action against federal officers for infringement on constitutional rights, as Congress did for officers acting under color of state law when it enacted § 1983 after the Civil War.[103] Indeed, more than 180 years passed after ratifi-

95 *Id.*

96 28 U.S.C. § 2679(b)(2)(A) (2018).

97 *See infra* Section I.D.

98 James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121–26, 137 (2009) (arguing that, through the Westfall Act exception, Congress has thereby acted "to preserve and ratify" and "solidify" the *Bivens* remedy); Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473, 1476 (2013) ("Congress codified *Bivens*, at least as it existed in 1988, when it passed the Westfall Act.").

99 SISK, *supra* note 49, § 5.7(b)(3), at 382 (describing the alternative picture that, through the Westfall Act exception, "Congress accepted the table as it had been set without thereby endorsing where the silverware and plates had been placed").

100 *See infra* notes 104–12 and accompanying text.

101 *See infra* notes 113–18 and accompanying text.

102 *See* SISK, *supra* note 49, § 5.7(a), at 377. Only a few constitutional provisions, such as the Fifth Amendment Takings Clause, expressly contemplate compensation for government conduct, with the expectation being payment by the government itself. *See* U.S. CONST. amend. V.

103 *See* 42 U.S.C. § 1983 (2018).

cation of the Constitution before the Supreme Court first recognized a private damages remedy against a federal government employee premised upon a constitutional violation.

In the 1971 decision of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[104] the Supreme Court held that a damage action should be afforded to plaintiffs against federal law enforcement officers for violation of the Fourth Amendment[105] right to be free from an unreasonable search and seizure.[106] Precisely because this constitutional cause of action had been formed through judicial implication, rather than legislative adoption, it has been controversial from the beginning.[107]

During the first decade of this experiment, the Supreme Court extended this *Bivens* constitutional tort claim to claims for federal employment discrimination[108] in violation of the equal protection component of the Due Process Clause of the Fifth Amendment[109] and for wrongful prison conditions[110] that constituted cruel and unusual punishment under the Eighth Amendment.[111] Looking at the landscape at this auspicious time, Peter Schuck described the *Bivens* remedy as "a powerful new string to a victim's bow."[112]

By the end of its second decade, however, the *Bivens* experiment had been suspended though not overturned. The Supreme Court proved reluctant to further extend this judicially implied cause of action into new contexts, tending instead to find that the *Bivens* remedy has been displaced by alternative statutory schemes or there were "special factors counselling hesitation."[113] Lamenting that the promise of a damages remedy for constitutional

104 403 U.S. 388, 389–90 (1971). For *The Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, see James E. Pfander's chapter by that title in FEDERAL COURTS STORIES 275 (Vicki C. Jackson & Judith Resnik eds., 2010).

105 U.S. CONST. amend. IV.

106 *Bivens*, 403 U.S. at 396–97.

107 For a recent argument that the judge-made remedies in *Bivens* comports with historical practice and originalist understandings of the Constitution, see Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869 (2021).

108 Davis v. Passman, 442 U.S. 228, 231, 234 (1979).

109 U.S. CONST. amend. V.

110 Carlson v. Green, 446 U.S. 14, 18–25 (1980).

111 U.S. CONST. amend. VIII.

112 PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 42 (1983).

113 Bush v. Lucas, 462 U.S. 367, 378, 388–90 (1983) (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)) (declining to extend *Bivens* to a claim by a federal employee that his First Amendment free speech rights had been violated by his superior); *see also* Schweiker v. Chilicky, 487 U.S. 412, 417, 419–20, 428–29 (1988) (declining to recognize a *Bivens* action for alleged violations of the Due Process Clause of the Fifth Amendment in the administrative process for Social Security disability benefits); United States v. Stanley, 483 U.S. 669, 671–72, 683–84 (1987) (refusing to allow a *Bivens* suit for a serviceman who had been the subject of secret medical experiments by the Army in supplying him with the hallucinogenic drug LSD without his knowl-

violations was eroding, Susan Bandes said "there is little left of the *Bivens* principle."[114]

The survival of the *Bivens* remedy fell under increasing doubt after the turn of the century. During the first decade of the twenty-first century, Justices Thomas and Scalia declared *Bivens* to be "a relic of the heady days in which this Court assumed common-law powers to create causes of action."[115]

Finally, a half-century after it began, the Supreme Court brought the experiment to a near end in *Ziglar v. Abbasi*.[116] A four-Justice majority (of six Justices participating) declared that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity."[117] While not overturning *Bivens* and its early progeny in their specific contexts, the Court is much less likely to recognize a *Bivens* remedy in any new context. As Stephen Vladeck writes, "*Abbasi* could be a huge nail in the coffin of *Bivens*."[118]

Even as recognition of the *Bivens* cause of action slowed, the defense of qualified immunity for officers, state and federal, emerged and accelerated as another obstacle to successful tort-like claims against federal government employees for constitutional wrongdoing.

In *Bivens* itself, Justice Black dissented for fear that creation of a damages remedy "might deter officials from the proper and honest performance of their duties."[119] Not long after the *Bivens* decision, the Supreme Court in its 1982 decision in *Harlow v. Fitzgerald*[120] ruled that qualified immunity protects a federal officer who is sued for a constitutional violation.[121] The *Harlow* Court held that a federal officer is liable only if he or she violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[122]

In recent years, the Court has demanded more and seemingly literal clarity in the prior judicial articulation of the constitutional rule before allowing liability, by calling for "existing precedent" that puts "the statutory

edge); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (rejecting a *Bivens* action for enlisted military personnel who alleged unconstitutional actions by superior officers).

114 Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293–94 (1995).

115 Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

116 137 S. Ct. 1843 (2017).

117 *Id.* at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

118 Steve Vladeck, *On Justice Kennedy's Flawed and Depressing Narrowing of Constitutional Damages Remedies*, JUST SEC. (June 19, 2017), https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies. On *Ziglar*, see generally Joanna C. Schwartz, Alexander Reinert & James E. Pfander, *Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based* Bivens *Claims*, 96 NOTRE DAME L. REV. 1835 (2021).

119 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 429 (1971) (Black, J., dissenting) (emphasis omitted).

120 457 U.S. 800 (1982).

121 *Id.* at 809.

122 *Id.* at 818.

or constitutional question beyond debate."[123] Regularly reversing lower court decisions, the Court has "reiterate[d] the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality'" and instead must "particularize [the law] to the facts of the case."[124] As Jay Schweikert puts it, a civil rights plaintiff can only avoid qualified immunity by "identify[ing] not just a clear legal *rule* but a prior case with functionally identical *facts*."[125] In the Court's words, only a "plainly incompetent" government official acting in clear disregard of constitutional expectations will lose the defense of qualified immunity.[126]

Some optimistic observers believe that qualified immunity jurisprudence may be in a transitional state in the Supreme Court. Several members of the Supreme Court "have authored or joined opinions expressing sympathy" with the theoretical and practical criticisms of a doctrine that allows a constitutional violation to be left unremedied because of supposed uncertainties in the law.[127] Nor is there any historical basis for a doctrine that qualifies a government official's duty to comply with constitutional standards. Speaking to the doctrine as it originally evolved in the context of § 1983 constitutional suits against state officers, William Baude observes that "there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment."[128]

The worry that public officials would be left personally liable for civil rights damages awards is now understood to be without empirical support. As Joanna Schwartz has found, the chance that a government officer will have to personally pay a damages award is vanishingly small, as officers who are

123 Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

124 White v. Pauly, 137 S. Ct. 548, 551–52 (2017) (per curiam) (first quoting *al-Kidd*, 563 U.S. at 742; and then quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

125 JAY R. SCHWEIKERT, QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE 1 (Cato Inst. Pol'y Analysis No. 901, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure?queryID=A186aeba6200645f78cd76d8e3f50627; *see also* Kisela v. Hughes, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting) (criticizing clearly-established-law doctrine as demanding "a factually identical case" precedent).

126 Stanton v. Sims, 571 U.S. 3, 6 (2013) (per curiam) (quoting *al-Kidd*, 563 U.S. at 743).

127 Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018); *see also Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (noting qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute.").

128 William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55 (2018); *see also* Schwartz, *supra* note 127, at 1801–02, 1801 nn.24–26.

personally sued for constitutional harms almost certainly will be indemnified by the government.[129]

Alas, this overdue transition remains unrealized as of the date of this writing. While ample opportunities have been presented each Term for reconsideration of qualified immunity principles, the Supreme Court has declined as of yet to accept review of a case that directly raises the question whether the standard should be modified or abandoned.[130]

As a counterpoint to the above-described eclipse of a constitutional tort remedy, an empirical study by Alexander Reinert found that plaintiffs bringing classic (and still surviving) *Bivens* claims achieve a substantial rate of success.[131] Suits alleging unlawful search and seizure by federal law enforcement in violation of the Fourth Amendment and by inmates alleging prison conditions that violate the Eighth Amendment prevailed more than twenty-five percent of the time.[132] *Bivens* claimants generally succeed up to nearly forty percent when represented by counsel.[133] In sum, *Bivens* claims appear to be working moderately well in the traditional areas where they remain cognizable, but that universe is now closed to new types of constitutional tort claims.

E. Adoption of Limited Collective Government Liability in the Federal Tort Claims Act

While the federal damages remedy against the individual federal officer has been in decline, Congress has waived sovereign immunity for many common-law tort claims to allow them to be brought directly against the federal government. As Vicki Jackson writes, while "Congress and the Court narrowed the availability of actions against federal government employees," so also "Congress has expanded the area of government liability for tort."[134]

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129 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014); *see also* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 566 (2020) (finding that federal officers held liable in *Bivens* claims were indemnified in 95% of cases and were covered for 99% of damages); David M. Shapiro & Charles Hogle, The Horror Chamber: Unqualified Impunity in Prison, 93 NOTRE DAME L. REV. 2021, 2058–59 (2018) ("[T]here is reason to believe that personal liability is just as mythical in prison cases as it is in police cases.").

130 *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020), *denying cert. to* Baxter v. Bracey, 751 F. App'x 869 (6th Cir. 2018); *see also* SCHWEIKERT, *supra* note 125, at 14.

131 Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010). *But see* Schwartz et al., *supra* note 118, at 1839 (expressing concern that "*Ziglar* appears to threaten the viability of even well-settled forms of *Bivens* liability"); Leah Litman, Keynote Address at the University of Notre Dame Law School Law Review Symposium (Jan. 15, 2021) (observing that courts are now "narrowing the heartland of *Bivens*").

132 Reinert, *supra* note 131, at 841 n.154.

133 *Id.* at 839 tbl.3.

134 See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 564 (2003) (emphasis omitted).

The Federal Tort Claims Act (FTCA) was enacted in 1946 to waive the sovereign immunity of the United States for state tort claims.[135] Each year, billions of dollars of claims are made against the United States under the FTCA, although the actual recoveries of course are much smaller.[136]

The FTCA does not create any new causes of action nor does it formulate federal rules of substantive tort law. Instead, as the Supreme Court stated in *Richards v. United States*,[137] Congress determined "to build upon the legal relationships formulated and characterized by the States" with respect to principles of tort law.[138]

The FTCA provides that the "United States shall be liable . . . [for] tort claims, in the same manner and to the same extent as a private individual under like circumstances."[139] In other words, the federal government is liable under the FTCA on the same basis and to the same extent as for a tort committed under analogous circumstances by a private person in that particular state.[140] "Although the federal government 'could never be exactly like a private actor, a court's job in applying the standard is to find the most reasonable analogy.'"[141]

The FTCA is not open-ended, however, excluding certain traditional tort claims from its purview and setting out several government-specific exceptions. In particular, two of these—the intentional tort exception and the discretionary function exception—leave many victims of federal government misfeasance and malfeasance without a remedy.

First, the intentional tort exception removes "a very considerable portion of the law of torts" altogether from the federal government's consent to suit.[142] The text of the exception bars "[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."[143] This exception includes most intentional torts (but not all, as tres-

135 Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.). The FTCA is one of about forty statutes waiving government immunity for torts, although the others tend to be narrow and involve specific programs, such as a provision for claims involving the Nuclear Regulatory Commission and a statute allowing property damage claims by government employees. 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 1.01 (2021).

136 SISK, *supra* note 49, § 3.2, at 110.

137 369 U.S. 1 (1962).

138 *Id.* at 7.

139 28 U.S.C. § 2674 (2018); *see also id.* § 1346(b)(1) (holding the United States liable "if a private person[ ] would be liable to the claimant in accordance with the law of the place where the act or omission occurred"). For further discussion of this private person limitation, see *infra* notes 233–37 and accompanying text.

140 United States v. Olson, 546 U.S. 43, 44 (2005).

141 Dugard v. United States, 835 F.3d 915, 919 (9th Cir. 2016) (quoting LaBarge v. Cnty. of Mariposa, 798 F.2d 364, 367 (9th Cir. 1986)).

142 2 JAYSON & LONGSTRETH, *supra* note 135, § 13.06[1][a].

143 28 U.S.C. § 2680(h) (2018).

pass, conversion, and intentional infliction of emotional distress are not listed).

There is an exception to the intentional tort exception, which eliminates some but not all injustices. The United States may be held liable for certain intentional torts when committed by "investigative or law enforcement officers" of the federal government, as defined in § 2680(h).[144]

Second, the discretionary function exception to the FTCA precludes liability based on a government employee's exercise or failure to exercise a "discretionary function or duty . . . whether or not the discretion involved be abused."[145] The exception is grounded in separation of powers concerns, preventing "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[146]

If wantonly applied, the discretionary function exception could swallow the general rule of generous liability under the FTCA. With ongoing confusion about whether the government may assert post hoc imagined policy justifications to cover over simple negligence, the risk remains that even mundane or garden-variety matters could be excluded from the FTCA tort remedy.[147]

Importantly, the discretionary function exception drops out of the case altogether if the government actor had no discretion to exercise because a statute, regulation, or policy directed the course of action. If "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," then no discretion remains and "the employee has no rightful option but to adhere to the directive."[148]

II. The Future Opportunity for a More Robust Tort Remedy Against the Federal Government

A. *The Virtues of a Tort Remedy Directly Against the United States for Official Wrongdoing*

The modern statutory approach of a common-law tort remedy directly against the United States[149] roughly replicates the early historical approach by which tort claims could be maintained against a federal officer who then was indemnified for liability by Congress.[150] As James Pfander writes, in the nineteenth century, common-law suits against individual government officials were "the cornerstone of government accountability."[151] This historically

144 *Id.*

145 *Id.* § 2680(a).

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

147 *See infra* notes 238–68 and accompanying text.

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

149 *See supra* Section I.E.

150 *See supra* Section I.A.

151 PFANDER, *supra* note 7, at 6.

grounded, jurisprudentially familiar, and commonly invoked use of ordinary tools of civil litigation to redress those who were wronged and hold the wrongdoer accountable can be recovered today with relatively modest reforms of the Federal Tort Claims Act.[152]

In the early republic, courts entertained common-law claims against federal officers for unlawful conduct that harmed individuals and then imposed damages on the wrongdoers, uncomplicated by sovereign immunity or by qualified immunity for officers.[153] Harkening back to this nineteenth-century practice, James Pfander urges our twenty-first-century federal courts to craft a revived and more powerful constitutional tort cause of action, one that directly adjudicates the constitutional legality of the government conduct and is not encumbered by the inappropriate political considerations and policy-justified hesitations that cloud current *Bivens* doctrine.[154] As James Pfander envisions it, this upgraded and enhanced *Bivens* constitutional tort claim would be a contemporary version of the nineteenth-century trespass action for official wrongdoing.

To get back to where we started in the early republic, James Pfander argues that we do *not* need "the passage of more laws,"[155] but rather that the courts "should fundamentally rethink the *manner* in which they enforce constitutional rights protections through their *Bivens* jurisprudence."[156] I am persuaded that James Pfander has identified a powerful prototype for governmental accountability. But I suggest that "the passage of more laws" is precisely what we should do to genuinely resurrect the nineteenth-century practice of government accountability for official wrongdoing through the simple format of an ordinary common-law tort action. As discussed in the next Section,[157] reform of the Federal Tort Claims Act can put claims against the federal government for, not only negligence, but intentional wrongdoing on more secure footing.

Those who advocate resurrecting or codifying the *Bivens* constitutional claim are traveling on the same road with me toward greater governmental accountability, even if we are traveling in different vehicles. I contend here that a legislative transport has greater promise and that we should drive on the more solid pavement of a tort remedy for official wrongdoing.

Reviving the nineteenth-century paradigm in the twenty-first century can authentically be realized through an expanded statutory waiver of sovereign immunity, by updating the existing remedy against the government through the FTCA. Rather than creating any new causes of action or adding complexity into the civil litigation process, the FTCA "build[s] upon the legal relationships formulated and characterized by the States" with respect to

152 *See infra* Section II.B.

153 *See supra* Sections I.A, I.B.

154 PFANDER, *supra* note 237, at 99–100.

155 *Id.* at 159.

156 *Id.* at xvii.

157 *See infra* Section II.B.

principles of tort law.[158] To be sure, as James Pfander correctly observes, the FTCA makes "no provision for constitutional suits against the federal government itself."[159] But neither did the nineteenth-century exemplar, which was grounded in the common law. By holding the federal government accountable for "ordinary common-law torts,"[160] the FTCA more closely resembles the common-law trespass remedy to curb governmental wrongdoing than does the judicially devised *Bivens* constitutional tort cause of action.

The advantages of ordinary tort law as the means to uphold accountability for wrongs may be overlooked for the very reason that, as John Goldberg and Benjamin Zipursky note, "tort law is almost annoyingly conventional, middle-of-the-road, and unexotic."[161] But, as they say, it is one of the great "strengths" of the tort law that "it stands ready to hold us to familiar and widely acknowledged responsibilities."[162] The consoling virtues of the established common-law tort approach for federal official accountability can be illustrated through the examples of sexual assault by a federal employee, an area where legislative attention to ensure a remedy is desperately needed,[163] and of prisoner injuries due to unsafe prison conditions.

A claim for sexual assault by a federal official likely could be folded into a constitutional tort claim under *Bivens*. As I've written previously, "the sexual violation of another" almost surely "crosses a constitutional line."[164] A constitutional proscription of government-imposed sexual violence may be located in the Fourth Amendment right to be free of unreasonable search and seizure,[165] the Eighth Amendment prohibition on cruel and unusual punishment,[166] the Fifth Amendment Due Process Clause,[167] protection of bodily integrity,[168] or the Fifth Amendment's equal protection component barring sexual violence that manifests gender discrimination.[169] As the Supreme Court has held, the Constitution plainly "withdraws from Government the power to degrade or demean."[170] Nonetheless, the federal courts

158 Richards v. United States, 369 U.S. 1, 7 (1962).

159 PFANDER, *supra* note 7, at 19.

160 Dalehite v. United States, 346 U.S. 15, 28 (1953).

161 JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 48 (2020).

162 *Id.*

163 *See* Sisk, *supra* note 11; *see also infra* Section II.B.

164 *See* Sisk, *supra* note 11, at 770.

165 *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

166 *See* U.S. CONST. amend. VIII ("nor cruel and unusual punishments inflicted").

167 *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

168 *See* Alexander v. DeAngelo, 329 F.3d 912, 916 (7th Cir. 2003) (holding that "a rape committed under color of state law" is a civil rights violation "as a deprivation of liberty without due process of law" under the Fourteenth Amendment).

169 *See* United States v. Windsor, 570 U.S. 744, 774 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.").

170 *Id.*

have declined to extend the weakened *Bivens* claim to sexual violence by federal officers.[171]

Still, while constitutional law might accommodate civil damages remedies for sexual violence, a direct claim for sexual assault and battery through the common-law cause of action requires no adjustment of existing principles of liability. Tort law has long recognized such claims and today affords capacious damage remedies for the physical and emotional harm that follow from this unique trespass on human dignity.[172] With appropriate revision of the FTCA to ensure that every sexual assault or battery at the hands of a federal officer within the scope of employment is cognizable,[173] that tort remedy offers a robust and confident answer to a longstanding problem.

Another example demonstrates the considerable power of the common-law remedy. To prevail in a prison conditions case through an Eighth Amendment claim for cruel and unusual punishment,[174] which is one of the continuing avenues for the now-limited *Bivens* constitutional tort cause of action,[175] a prisoner must establish that prison officials acted with "deliberate indifference."[176] By contrast, a federal prisoner injured by a careless correctional officer or attacked by another prisoner due to neglectful security measures or inattention by a correctional officer may pursue a claim under the FTCA for ordinary negligence under state tort law.[177] Under this "negligent guard theory" of tort liability, the FTCA tort plaintiff need show only a lack of reasonable care,[178] a standard well below deliberate indifference.

Another considerable practical advantage of the FTCA approach is that it bypasses the officer indemnity request and imposes liability directly on the United States. The nineteenth-century predecessor for addressing federal officer wrongdoing did not impose liability directly against the United States government, yielding to federal sovereign immunity.[179] However, as James Pfander writes, a "striking feature of the system [was] an expectation that the officers in question would be indemnified and held harmless by Congress" by enactment of private bills that covered the amount of any judgment against

171 *See, e.g.*, Doe v. Hagenbeck, 870 F.3d 36, 39–40, 44–47 (2d Cir. 2017); Klay v. Panetta, 758 F.3d 369, 376 (D.C. Cir. 2014); Cioca v. Rumsfeld, 720 F.3d 505, 516 (4th Cir. 2013).

172 Andrea Giampetro-Meyer, M. Neil Browne & Kathleen Maloy, *Raped at Work: Just Another Slip, Twist, and Fall Case?*, 11 UCLA WOMEN'S L.J. 67, 95 (2000) (concluding that "the long-term physical, psychological, and life-altering consequences of rape" demand damages such as are available through "the option of tort remedy").

173 *See infra* Section II.B.

174 *See* U.S. CONST. amend. VIII (prohibiting infliction of "cruel and unusual punishments").

175 Carlson v. Green, 446 U.S. 14, 18–25 (1980).

176 Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 302 (1991)).

177 *See* Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 476–77 (2d Cir. 2006).

178 *See id.*; Coulthurst v. United States, 214 F.3d 106, 109–10 (2d Cir. 2000).

179 *See supra* Section I.A.

the officer for damages.[180] Although the doctrine of federal sovereign immunity precluded vicarious employer liability of the federal government, the equivalent was achieved by judicial imposition of damages against individual federal officers who crossed legal lines followed by congressional award of indemnity to the officer. In the end, James Pfander reports, "Congress accepted financial responsibility for government wrongdoing."[181] In this way, as Richard Fallon and Daniel Meltzer observe, the indemnification practice "thereby convert[ed] what appeared to be a system of officers' liability into, for some if not all practical purposes, a regime of governmental liability."[182]

The FTCA enforces that governmental financial responsibility more forthrightly by shifting liability from the officer to the United States. The government is directly accountable, without the intermediary of an indemnification process. A true "regime of governmental liability" is forthrightly accomplished.

And the statute removes the risk of undue sympathy by a trier of fact toward a personally liable officer defendant. James Pfander and Jonathan Hunt explain that the nineteenth-century system of direct officer liability followed by congressional indemnification "protected the officer from ruinous liability, assured the victim of compensation, and overcame the doctrine of sovereign immunity by ensuring that, at the end of the day, the government paid for the losses its officials inflicted in the line of duty."[183] The modern FTCA arrives at these goals in a straighter line.

Nearly forty years ago, Peter Schuck outlined the many downsides to imposing damages liability on individual government officers rather than the government itself: "its propensity to chill vigorous decisionmaking; to leave deserving victims uncompensated and losses concentrated; to weaken deterrence; to obscure the morality of law; and to generate high system costs . . . ."[184] Likewise, Richard Pierce contends that "[e]xposing individual government employees to potential tort liability is particularly likely to produce socially undesirable decisionmaking incentives."[185]

After all, the government officer in the line of duty acts as an agent of the government. Indeed, the government can act only through a human agent. For those who suffer harm, whether described in terms of tort or constitutional injury, at the hands of a federal employee, the harm is likely to be experienced as a wrong by the responsible government itself. As Harold Lewis and Theodore Blumoff rightly remind us, "although a government acts through individuals, it is ultimately the government's conduct with which we

180 PFANDER, *supra* note 7, at xix.

181 *Id.* at 3.

182 Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1822 (1991).

183 Pfander & Hunt, *supra* note 42, at 1876.

184 *See* SCHUCK, *supra* note 112, at 100–02.

185 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.2, at 1765–73 (5th ed. 2010).

are concerned."[186] Accordingly, it is just that the financial responsibility for official wrongdoing be imposed on the federal government itself.

Moreover, a central goal is to hold the government itself accountable for a wrong and to deter ongoing wrongdoing. As Akhil Amar argues in support of state government liability:

> The state entity itself will often be the source and the unjustly enriched beneficiary of illegal conduct by individual officials. Furthermore, general principles of modern tort theory and enterprise liability suggest that the governmental entity will often be in a far better position than any individual officer to restructure official conduct in a way that avoids future violation of rights.[187]

Another virtue of the FTCA tort remedy is the removal of the complicating and diluting effect of the doctrine of qualified immunity that plagues the development of constitutional law.[188] By bringing damage claims about unlawful acts inside the FTCA and using the traditional vehicle of common-law torts to redress governmental wrongdoing, the goal of clarity in articulating legal limits would also be achieved. Here too we replicate the effective remedy provided in the early republic. Without any deflection by the doctrine of qualified immunity, nineteenth-century courts adjudicated the personal liability of a federal officer in tort and "increasingly came to understand that their duty was to apply the law and determine . . . the legality of official action."[189] The same follows under the common-law focused approach of the FTCA.

When the United States is the defendant to a state tort law claim through the FTCA, qualified immunity simply is not available as a defense.[190] Instead, the defenses available to the federal government in an FTCA suit "are defined by the same body of law that creates the cause of action, the defenses available to the United States in FTCA suits are those that would be available to a private person under the relevant state law."[191] And, again, because the government is directly liable under the FTCA, the concerns animating qualified immunity—about imposing personal liability for understandable legal errors by an individual—fall off the table.

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186 Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 828 (1992) (footnote omitted).

187 Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1487–88 (1987).

188 *See supra* Section I.D.

189 PFANDER, *supra* note 7, at 9.

190 Rivera v. United States, 928 F.2d 592, 609 (2d Cir. 1991) ("[Under the FTCA,] the United States does not have the advantage of any defense of official immunity that the employee might have had . . . .").

191 Vidro v. United States, 720 F.3d 148, 151 (2d Cir. 2013); *see also* Brownback v. King, 141 S. Ct. 740, 746, 748 n.7 (2021) (declining to address "the availability of state-law immunities" in the context of an FTCA claim against a law enforcement officer for assault and battery).

B. Expanding the FTCA Remedy for a More Robust Response to Official Wrongdoing

Some 150 years after ratification of the United States Constitution, Congress in 1946 took the then-bold step of generally consenting to common-law tort claims against the United States.[192] To be sure, a significant and self-interested motivation for Congress to enact the FTCA judicial remedy was to avoid the distracting work of considering a host of private bills to compensate the victims of injuries caused by government employees.[193] Yet, as the Supreme Court later explained, the FTCA was also "the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work."[194]

Unfortunately, under the present legal regime, intentional official wrongdoing at the federal level too often falls between the cracks of civil accountability regimes. When federal agents are negligent, the injured have a well-worn path to redress in court through the FTCA.[195] The FTCA makes the government itself liable for official carelessness under the tort law of the state in which the harm occurred.[196] But when government officials deliberately impose harm on others, the road to recovery is muddy and covered with obstacles. The answer to this persistent and worsening problem lies not in any hope for a judicial course correction, but rather in a legislative reform of official liability for intentional wrongdoing by the federal government and its agents.

When the FTCA was enacted three-quarters of a century ago, Congress moved forward cautiously with what was then a novel initiative in waiving federal sovereign immunity for tort claims.[197] At a 1940 committee hearing, Alexander Holtzoff, a Special Assistant to the Attorney General and regarded by the Supreme Court as "one of the major figures" in the FTCA legislative history,[198] suggested to Congress that

> [t]he theory of these exemptions is that, since this bill is a radical innovation, perhaps we had better take it step by step and exempt certain torts and certain actions which might give rise to tort claims that would be difficult to

192 *See supra* Section I.E.

193 *See* SISK, *supra* note 49, § 3.2, at 109–10; Paul Figley, *Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347, 348–51 (2011).

194 Dalehite v. United States, 346 U.S. 15, 24 (1953).

195 *See* 28 U.S.C. § 1346(b)(1) (2018) (making the United States liable for the "negligent or wrongful act or omission" of a federal government employee).

196 *See supra* Section I.E.

197 *See* William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1107 (1996); Comment, *The Federal Tort Claims Act,* 56 YALE L.J. 534, 547 & n.84 (1947); *see also supra* Section I.E.

198 *See* Kosak v. United States, 465 U.S. 848, 856 (1984).

> defend, or in respect to which it would be unjust to make the Government liable.[199]

Most significantly, at least in terms of holding the federal government to account for the most egregious wrongdoing, the FTCA originally excised from its waiver claims for most intentional torts, including "[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."[200] The breadth of these exceptions is stunning, both in their explicit terms and in application. Not only are direct vicarious liability/respondeat superior claims for assault and battery against the United States plainly barred per the terms of the statutory exception, but most courts have interpreted it to also preclude claims for negligent hiring or supervision of federal employees who have a propensity for violence or misconduct.[201]

In considering revisions to the FTCA, we might set claims for defamation and misrepresentation to one side. The Supreme Court early on recognized that, even with "the utmost vigilance," to bind the federal government based on improper statements by its many thousands of federal employees would risk tremendous liability because the government's "operations are so various, and its agencies so numerous and scattered."[202] Moreover, as Harold Krent has observed, protecting the government from liability based upon errors in communication "preserv[es] the government's policy decision to communicate information in the first instance."[203] Similarly, we should be careful before allowing tort claims against the United States for interference with contract and deceit ("deceit" denoting a common-law claim in a business or commercial sense).[204] Such claims are better addressed through the comprehensive statutory waivers for contract claims in the Contract Disputes Act[205] and the Tucker Act.[206]

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199 *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 76th Cong. 22 (1940).

200 28 U.S.C. § 2680(h) (2018). On the intentional tort exception, see generally SISK, *supra* note 49, § 3.6(d), at 165–74.

201 *See, e.g.*, CNA v. United States, 535 F.3d 132, 148–49 (3d Cir. 2008); Billingsley v. United States, 251 F.3d 696, 698 (8th Cir. 2001); Perkins v. United States, 55 F.3d 910, 916–17 (4th Cir. 1995); Franklin v. United States, 992 F.2d 1492, 1499 n.6 (10th Cir. 1993); Guccione v. United States, 847 F.2d 1031, 1033–34 (2d Cir. 1988); Stout v. United States, 721 F. App'x 462, 467 (6th Cir. 2018); Est. of Smith *ex. rel.* Richardson v. United States, 509 F. App'x 436, 442–43 (6th Cir. 2012); Reed v. U.S. Postal Serv., 288 F. App'x 638, 640 (11th Cir. 2008).

202 United States v. Kirkpatrick, 22 U.S. (9 Wheat.) 720, 735 (1824).

203 Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1553 (1992).

204 United States v. Neustadt, 366 U.S. 696, 706 & n.16 (1961) (quoting RESTATEMENT (FIRST) OF TORTS § 552 (AM. L. INST. 1938)).

205 Contract Disputes Act of 1978, 41 U.S.C. §§ 7101–7109 (2018). *See generally* SISK, *supra* note 49, § 4.8(b), at 305–21.

206 28 U.S.C. § 1491 (2018). *See generally* SISK, *supra* note 49, § 4.8(c), at 321–22 (discussing contract claims against the United States outside of the Contract Disputes Act).

But it is impossible to justify the continuing exception to federal government accountability for such traditional claims as assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process. The cautious and incremental approach reflected in the FTCA's initial waiver for tort claims in 1946 cannot explain Congress's ongoing silence. Claims against the United States in court are no longer novel and innovative.[207] Moreover, "a greater appreciation that responsible employers must be held accountable for employment-related misconduct by their employees, together with the social justice need to hold someone accountable to the victim [of an assault or battery] mandate legislative change."[208]

The first and most important step in legislative reform of the FTCA came a half century ago in the enactment of the so-called "Law Enforcement Proviso." In 1974, responding to notorious episodes of abuses of federal law enforcement power when mistakenly executing no-knock warrants on the homes of innocent people,[209] Congress revised the intentional tort exception of the FTCA to permit claims against the United States when the individual tortfeasor was a federal law enforcement officer. The Law Enforcement Proviso directs that, "with regard to acts or omissions of investigative or law enforcement officers of the United States Government," the general waiver of sovereign immunity in the FTCA applies "to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."[210]

And yet the assault-and-battery exception remains an insuperable obstacle for those who are not so "fortunate" as to be victimized by a law enforcement officer. If the perpetrator is a military officer who abuses a recruit[211] or a mail carrier who molests children on a postal route,[212] then the victim likely has no remedy against the United States. As I've written elsewhere, "Other than the accidents of history and momentary political attention to

207 For a summary list of the ever-expanding list of statutory waivers of federal sovereign immunity over the decades, see SISK, *supra* note 49, § 2.4, at 88–93.

208 Sisk, *supra* note 11, at 777–78.

209 S. REP. NO. 93-588, at 2 (1973). On the history behind the enactment of the Law Enforcement Proviso in 1974, see generally Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497 (1976).

210 28 U.S.C. § 2680(h) (2018); *see also* Sisk, *supra* note 11, at 746–49.

211 *See, e.g.*, Doe v. Hagenbeck, 870 F.3d 36, 38–40 (2d Cir. 2017); Klay v. Panetta, 758 F.3d 369, 370 (D.C. Cir. 2014); Gallardo v. United States, 755 F.3d 860, 862–63 (9th Cir. 2014); Olsen v. United States *ex rel.* Dep't of the Army, 144 F. App'x 727, 732 (10th Cir. 2005).

212 *See, e.g.*, LM *ex rel.* KM v. United States, 344 F.3d 695, 697 (7th Cir. 2003); Johnson v. United States, 788 F.2d 845, 847 (2d Cir. 1986); Hughes v. United States, 662 F.2d 219, 220 (4th Cir. 1981); West v. United States, No. EDCV 15-01243, 2016 WL 1576382, at *1–2 (C.D. Cal. Apr. 11, 2016); Hamburg v. U.S. Postal Serv., No. H-10-2186, 2010 WL 4226461, at *1–2 (S.D. Tex. Oct. 20, 2010).

particular abuses by federal law enforcement 40 years ago, these contradictory results are inexplicable and morally unsustainable."[213]

So why has nothing been done in the last half century? The heavy-lifting was already done with the enactment of the Law Enforcement Proviso, with one commentator saying that the door to eliminating the assault-and-battery exception to the FTCA was thereby "three-quarters open."[214] Indeed, the most difficult policy decision was already made by Congress. Because law enforcement officers are authorized to use force as a direct part of their jobs, unlike most federal employees, we may anticipate tort suits challenging that exercise of force to raise "contentious debates about the validity of a particular search [and] heated disputes about the appropriate amount of force properly exercised by armed police officers in conducting a specific arrest."[215] And yet, without great controversy or excessive damage awards, these FTCA tort claims have regularly been adjudicated in the federal courts under the Law Enforcement Proviso over the past forty years.[216] And still Congress has been derelict in acting.

To make matters surpassingly worse, when the federal government does escape liability through such exceptions to the FTCA as that for assault and battery, the injured party may be unable to pursue an alternative claim against the individual officer under state tort law. When the FTCA was enacted in 1946 with its intentional tort exception, Congress could not have anticipated the enactment some fifty years later of the Westfall Act. Remember that when a federal employee was acting within the scope of employment, the Westfall Act simultaneously substitutes the United States as the only defendant and immunizes the officer from personal liability.[217] If and when the common-law tort claim against the United States is cognizable under the FTCA, the substitution of one financially responsible defendant for another is unremarkable. But with the excision of entire categories of familiar torts from the FTCA, the government may escape accountability while the immunity of the individual federal employees remains intact.[218] As a consequence, in the words of the Supreme Court, the victim of an FTCA-excluded tort claim "may be left without a tort action against any party."[219]

When the FTCA was originally enacted in 1946, the exclusion of intentional torts from the FTCA tended to run parallel with state respondeat supe-

213 Sisk, *supra* note 11, at 740.

214 Jack W. Massey, Note, *A Proposal to Narrow the Assault and Battery Exception to the Federal Tort Claims Act*, 82 TEX. L. REV. 1621, 1636 (2004).

215 Sisk, *supra* note 11, at 780.

216 *See, e.g.*, Tekle v. United States, 511 F.3d 839, 854–55 (9th Cir. 2007); St. John v. United States, 240 F.3d 671, 675–78 (8th Cir. 2001); Washington v. Drug Enf't Admin., 183 F.3d 868, 874 (8th Cir. 1999); Red Elk v. United States, 62 F.3d 1102, 1104–07 (8th Cir. 1995); Dickey v. United States, 174 F. Supp. 3d 366, 373–74 (D.D.C. 2016); Moher v. United States, 875 F. Supp. 2d 739, 756–60 (W.D. Mich. 2012); Hanson v. United States, 712 F. Supp. 2d 321, 326–27 (D.N.J. 2010).

217 28 U.S.C. § 2679(b)(1) (2018); *see supra* Section I.C.

218 *See supra* notes 92–95 and accompanying text.

219 Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 420 (1995).

rior rules that generally held the intentional tortfeasor-employee outside the scope of employment and thus subject to personal liability.[220] Moreover, the Westfall Act had not yet been enacted, so claims against a federal employee, even for a wrong committed in the line of duty, were not automatically extinguished. Thus, while an assault or battery committed by a federal employee fell outside of the FTCA waiver for vicarious liability in tort against the United States, that claim could be pursued against the individual employee for personal liability.[221]

However, in the three-quarters of a century since the FTCA was enacted, and in the three decades since the Westfall Act was enacted, state respondeat superior rules have continued to expand to impose vicarious employer liability for more and more intentional conduct by employees.[222] Under modern principles of tort accountability, an employer may be vicariously liable for an intentional tort by an employee when the work assignment, the context of the employment activities, special relationships created with others, or other factors make even such outrageous misconduct by an employee a reasonably foreseeable harm from the enterprise activities.[223]

Translating that state doctrinal expansion of respondeat superior into the immunity directive of the Westfall Act means that a federal employee who commits an assault or battery might be held to have acted within the scope of employment, thereby immunizing that employee from personal liability *even* while the FTCA excuses the government for the same wrongdoing. And that may lead to the repugnant result that neither the government that employs the agent nor the agent him or herself is answerable to the victim of violence at the hands of that government agent. For all of these reasons, as I've described it elsewhere, "a dreadful delinquency has overtaken the law."[224]

As a morally indefensible example of how this horrifying possibility could unfold, I refer to my prior work seeking federal accountability for the degrading act of sexual violence by a federal employee:

> It is *intolerable* that the federal government should hold itself and its agents exempt from legal responsibility for sexually-motivated or other assaults and batteries against its own people. Indeed, it would be the height of *hypocrisy* for the United States to enforce new laws and legal initiatives against sexual assault in other contexts, while refusing to be held accountable for its own misconduct. It is *unthinkable* that the survivor of sexual violence would be left without any remedy in any court against either the government itself or its individual employees.
>
> And yet the intolerable, the hypocritical, and the unthinkable describe the reality. Under decades-old federal statutes that have gone unrevised even while the legal and cultural landscape has changed, the sovereign United States is absolutely immune from liability in tort for any assault and battery—sexual or otherwise. And the federal employee who commits sex-

220 *See* Sisk, *supra* note 11, at 765–66.
221 *See id.*
222 *Id.* at 766–69.
223 *Id.*
224 *Id.* at 739.

> ual violence may likewise obtain federal immunity from liability under state tort law.[225]

The only solution to this current unacceptable situation is a legislative repeal of the intentional tort exception to the FTCA. The words "assault" and "battery"—ideally also including the words "false imprisonment," "false arrest," "malicious prosecution," and "abuse of process"—should be stricken from the statutory exception to the FTCA.[226] This overdue legislative reform would simultaneously (1) hold the federal government itself appropriately accountable for unjustified acts of violence in the line of duty and (2) bring that governmental acceptance of responsibility into line with the extension of tort immunity to individual employees in the Westfall Act.[227]

The evolution of the law demands this repeal of the intentional tort exception to the FTCA lest the victims of intentional wrongdoing at the hands of government be left without any remedy in any court against any defendant. An enhanced Federal Tort Claims Act that provides a remedy not only for negligent misfeasance but also for intentional malfeasance would restore the clarity in legal accountability for governmental wrongdoing that prevailed for nearly a century in American courts.[228] This worthy goal would be accomplished by the most common of legal remedies and through the most familiar of civil litigation processes, simply by truly holding the federal government accountable for "ordinary common-law torts."[229]

C. Clarifying the Exceptions to Tort Liability for Governmental Policymaking

When contemplating government accountability for official wrongdoing, certain quintessentially governmental functions, notably policymaking deliberations, should not be second-guessed through the ill-suited vehicle of a tort suit. Richard Pierce offers the common-sense observation that "[t]he process of governing almost always helps some and hurts others, but those who are hurt should not necessarily be entitled to damages from the government."[230] While the processes of administrative law allow judicial review of policymak-

225 *Id.* at 734–35 (emphases added) (footnote omitted).

226 *See* 28 U.S.C. § 2680(h) (2018).

227 *See* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 578 (2013) (arguing that, if the Westfall Act entirely displaces common-law claims against a federal officer acting in contravention of constitutional rights, the courts must replace the preempted state-law remedies with equivalent federal remedies); James E. Pfander & David P. Baltmanis, Response, *W(h)ither* Bivens*?*, 161 U. PA. L. REV. ONLINE 231, 232, 247 (2013) (same). Because of other statutory provisions, the federal civilian or military employee who is the victim of sexual violence at the hands of another federal employee encounters additional obstacles to compensation, which require additional legislative reforms beyond eliminating the FTCA's intentional tort exception. *See* Gregory C. Sisk, *The Peculiar Obstacles to Justice Facing Federal Employees Who Survive Sexual Violence*, 2019 U. ILL. L. REV. 269. Those additional reforms are also set out in the Addendum to this Article.

228 *See supra* Section I.A.

229 *See* Dalehite v. United States, 346 U.S. 15, 28 (1953).

230 3 PIERCE, *supra* note 185, § 19.4, at 1819.

ing to ensure compliance with procedures and are subject to generally deferential standards of review,[231] the business of government ought not be adjudicated as a tort claim in court. Democratic governance demands that policy disputes proceed in public political venues.

Before Congress shifted hard toward the extreme of complete absolution through the Westfall Act for any misfeasance by a federal employee in the line of duty, the Supreme Court had been inching toward a sensible and nuanced approach of disallowing common-law tort suits only where government officers were exercising policymaking functions.[232] The Court endorsed immunity from tort liability for federal officers who exercised "decisionmaking discretion" such as "policy-making work."[233]

The Federal Tort Claims Act likewise was framed to shield certain aspects of government activity from tort liability, thus distinguishing *misgovernment* from *misfeasance* in the realm of common-law liability imposed on the United States. Two parts of the statute protect against undue intrusion into peculiarly governmental activities, although the second discussed below has mushroomed in the lower federal courts into a broad defense for the government that sweeps beyond any legitimate solicitude for policymaking judgment.

First, the federal government's amenability to tort suit under the FTCA applies to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[234] As Lester Jayson and Robert Longstreth write, this "private individual" or "private person" language "means . . . that the Act does not create new causes of action—in the sense of inventing new types of torts."[235] The Supreme Court has clarified that the mere fact the duties at issue are formally unique to the government is not sufficient to remove FTCA liability, as the statute refers to "like" rather than "same" circumstances.[236] The Court has emphasized that the standard of tort liability requires comparison of the government's conduct to that of private parties, meaning that the lower courts should have looked for a private counterpart.[237]

Even if a federal officer has negligently failed to uphold a public responsibility, the absence of a common-law claim that would apply to analogous conduct by a private person leaves the matter outside the FTCA. For example, where an agent of the Federal Bureau of Investigation negligently failed to

231 Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2018). *See generally* SISK, *supra* note 49, § 4.10, at 337–40.

232 *See supra* notes 69–77 and accompanying text.

233 Westfall v. Erwin, 484 U.S. 292, 297, 299 (1988).

234 28 U.S.C. § 1346(b)(1) (2018); *see also id.* § 2674 (directing that the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances"). On the private person limitation, see generally SISK, *supra* note 49, § 3.5(c), at 137–47.

235 2 JAYSON & LONGSTRETH, *supra* note 135, § 9.08[1].

236 United States v. Olson, 546 U.S. 43, 46 (2005); Indian Towing Co. v. United States, 350 U.S. 61, 64 (1955).

237 *Olson*, 546 U.S. at 47.

accept the surrender of a bank robber, thinking the call was a jest, the United States was not liable to the survivors of the person later murdered by this person.[238] Because the duty to apprehend a criminal suspect is a public duty, with no private counterpart, the FTCA is not the proper vehicle for objecting to the government's failure. Government action in a regulatory role is especially likely to have no persuasive private analogy for imposing FTCA liability.

Second, the discretionary function exception to the FTCA bars a claim against the United States when tort liability is based on a government employee's exercise or failure to exercise a "discretionary function or duty . . . whether or not the discretion involved be abused."[239] When properly applied, this exception avoids "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[240] When injudiciously applied, as too often has become the case in the lower federal courts, the discretionary function exception may make the FTCA an empty promise by shielding the federal government from liability for the ordinary failures of due care.

As Peter Schuck warned some time ago, federal courts should resist the temptation to broadly interpret the discretionary function exception "to immunize routine low-level implementation of high-level policy decisions."[241] To give effect to Congress's intent "to compensate individuals harmed by government negligence," the courts should liberally construe the FTCA and narrowly construes its exception.[242]

Unfortunately, in the lower federal courts, simple failures in public safety have regularly been levitated into imaginary policy meditations. With acquiescence by the courts, government litigators have transformed the discretionary function exception into a sweeping immunity for official wrongdoing in areas of mundane activity and on matters that are far removed from the arena of policy judgment.

The lower federal courts have bemoaned the "difficulty of charting a clear path through the weaving lines of precedent" on the discretionary function exception.[243] On occasion, courts have commendably rested on common sense to reject the government's attempt to clothe the most mundane or "garden variety" conduct in policy judgment immunity.[244] In addition, scientific and professional judgments on matters of safety should not be

238 McCloskey v. Mueller, 446 F.3d 262, 264–70 (1st Cir. 2006).

239 28 U.S.C. § 2680(a) (2018). On the discretionary function exception, see generally SISK, *supra* note 49, § 3.6(b), at 153–64.

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

241 SCHUCK, *supra* note 112, at 114.

242 Terbush v. United States, 516 F.3d 1125, 1135 (9th Cir. 2008) (quoting O'Toole v. United States, 295 F.3d 1029, 1037 (9th Cir. 2002)).

243 Whisnant v. United States, 400 F.3d 1177, 1181 (9th Cir. 2005); *see also* Shansky v. United States, 164 F.3d 688, 693 (1st Cir. 1999) (referring to "some disarray" in application of the discretionary function exception).

244 Cestonaro v. United States, 211 F.3d 749, 755–56 (3d Cir. 2000); ARA Leisure Servs. v. United States, 831 F.2d 193, 196 (9th Cir. 1987).

treated as exercises in policy deliberation.[245] With routine questions of safety measures taken for the protection of the public, the discretionary function exception should not be invoked whenever there is the "faintest hint of policy concerns."[246] Rather, the exception should be reserved for when governmental activities are "fraught with . . . public policy considerations."[247]

Similarly, some lower courts have been rightly skeptical that the minimal budgetary impact that underlies nearly any choice of action constitutes the type of economic policy that could trigger the discretionary function exception to the FTCA.[248] As a court said, "Were we to view inadequate funding alone as sufficient to garner the protection of the discretionary function exception, we would read the rule too narrowly and the exception too broadly."[249]

Unfortunately, sensible restraint has just as often been lacking in the lower federal courts. The government has proven adept at converting any failure to exercise due care, even on the most commonplace matters, into some policy premise that overrides public safety.[250] And yet balancing of efficiency, costs, and aesthetics against the risk of harm is the kind of analysis made regularly by private entities and that is grist for the mill of tort adjudication when the balance struck was unreasonable. As a dissenting judge sensibly observed, in a case asking whether government maintenance employees should have inspected and removed a tree that fell on a sleeping camper, "This case does not call on us to judge the wisdom of any social, economic, or political policy, but rather simply to perform the familiar role of determining whether the government agent exercised reasonable care."[251]

The most pernicious error in discretionary-function-exception jurisprudence has been the willingness of lower courts to accept "a few after-the-fact declarations [by government officials] submitted in litigation attempting to show why such a decision, had it been made, would have been justified by

245 S*ee Whisnant*, 400 F.3d at 1181.

246 Cope v. Scott, 45 F.3d 445, 449 (D.C. Cir. 1995).

247 *Id.* (alteration in original) (quoting Sami v. United States, 617 F.2d 755, 767 (D.C. Cir. 1979)).

248 Gibson v. United States, 809 F.3d 807, 813 (5th Cir. 2016) (citing O'Toole v. United States, 295 F.3d 1029, 1035–37 (9th Cir. 2002)) ("[B]udgetary constraints on their own are often an insufficient policy goal to trigger the exception's protections.").

249 *O'Toole*, 295 F.3d at 1037.

250 *See, e.g.*, Lam v. United States, 979 F.3d 665, 670–71, 681–82 (9th Cir. 2020) (applying discretionary-function-exception immunity for allegedly negligent failure to identify and remove a hazardous tree in a park that fell on a camper); Gonzalez v. United States, 851 F.3d 538, 541–42, 545–46 (5th Cir. 2017) (applying discretionary-function-exception immunity for allegedly negligent failure to inspect and maintain a bike path and warn of a hazard in a national forest resulting in injury to a biker); Chadd v. United States, 794 F.3d 1104, 1107–08, 1114 (9th Cir. 2015) (applying discretionary-function-exception immunity for allegedly negligent failure to destroy a dangerous mountain goat that gored and killed a hiker); S.R.P. *ex rel.* Abunabba v. United States, 676 F.3d 329, 330–31, 342 (3d Cir. 2012) (applying discretionary-function-exception immunity for allegedly negligent failure to warn swimmers near national monument of risk of barracuda attack).

251 *Lam*, 979 F.3d at 688 (Hurwitz, J., dissenting).

policy."[252] The courts are regularly asked to apply the discretionary function exception when the government cannot show that any genuine policy judgment was made, but argues that it *could* have been. When government litigators adduce minimally plausible post hoc policy rationalizations, then the courts are expected to pronounce the matter as "susceptible to policy analysis" and apply the exception regardless of whether the alleged tortious "conduct was 'the end product of a policy-driven analysis.'"[253]

In a startling departure from the animating purpose of the FTCA's discretionary function exception to bar judicial second-guessing of executive policy decisions, these courts say that it is "largely irrelevant" whether "government agents . . . did or did not engage in a deliberative process before exercising their judgment."[254] But the risk of judicial second-guessing of executive policymaking vanishes when the government action involved no actual policymaking judgment. The courts should not be asked to defer to the clever imaginings of government lawyers who postulate a hypothetical policy judgment that was never made.[255]

Empirical studies have found that the "susceptible to policy analysis" standard "has greatly restricted the federal government's tort liability for all but the most mundane transgressions,"[256] has proven so subjective as to allow federal judges to be influenced by political ideology in ruling on government motions to dismiss,[257] and has elevated the government's success rate for dismissal of FTCA cases to nearly seventy-five percent.[258] In sum, government lawyers have been effective in leveraging this malleable susceptibility standard to extend the discretionary function exception through post hoc rationalizations of policy factors that supposedly could have justified the government agent's action or inaction.

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252 *Chadd*, 794 F.3d at 1128 (Kleinfeld, J., dissenting).

253 Sánchez *ex rel.* D.R.-S. v. United States, 671 F.3d 86, 93 (1st Cir. 2012) (quoting Shansky v. United States, 164 F.3d 688, 692 (1st Cir. 1999)); *see also* Kiehn v. United States, 984 F.2d 1100, 1105 (10th Cir. 1993) (stating that, if policy was potentially implicated, then "it is unnecessary for government employees to make an actual 'conscious decision' regarding policy factors" (quoting Johnson v. U.S. Dep't of Interior, 949 F.2d 332, 339 (10th Cir. 1991)).

254 Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993).

255 I am presently at work on a larger study of this "susceptibility-to-policy-analysis" misadventure in interpretation of the FTCA's discretionary function exception, which I have tentatively titled "Immunity for Imaginary Policy Judgments Under the Federal Tort Claims Act."

256 Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 448 (1997).

257 Robert C. Longstreth, *Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?*, 8 U. ST. THOMAS L.J. 398, 405–06 (2011).

258 Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 290 (2009).

Lower court "jurisprudence in this area has gone off the rails"[259] because of a misunderstanding about a statement by the Supreme Court in *United States v. Gaubert*.[260] The *Gaubert* Court said the discretionary function analysis as applied to a complex regulatory action involving a troubled financial institution should focus on "the nature of the actions taken and on whether they are susceptible to policy analysis."[261] This key language in *Gaubert* cannot be divorced from its regulatory context, as the Court there directed that plaintiffs protesting a federal takeover and operation of the financial institution must show that "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."[262] Moreover, that contextual understanding of *Gaubert* fits comfortably within the Supreme Court's line of precedents, which have described the discretionary function exception as designed to prevent "liability arising from acts of a governmental nature or function"[263] and "to encompass the discretionary acts of the Government [when] acting in its role as a regulator of the conduct of private individuals."[264]

The Supreme Court in *Gaubert* was not inviting the government to envision a policy basis after the fact for careless behavior arising outside of the policy-permeated context of a complex regulatory regime. Nothing in the language of *Gaubert* "switches the foundational question from whether the decision *was* 'based on considerations of public policy' to whether it hypothetically could have been."[265] When the action involved did not involve peculiarly governmental responsibilities such as federal regulation of private activities that directly implicate "the policy of the regulatory regime,"[266] then the government cannot ask courts to close judicial eyes to government carelessness that only pretends to be policymaking.

Finally, it should be emphasized that the other part of the discretionary function exception, often overlooked because it is so rarely invoked, powerfully protects the central policymaking activities of the federal government. The first phrase in the exception excludes liability based on "an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . . ."[267] In this way, the wisdom of a statute enacted by Congress or a regulation codified by an executive agency may not be the subject of a common-law tort action. As I've written previously, "the enactment of a statute or

259 Chadd v. United States, 794 F.3d 1104, 1114 (9th Cir. 2015) (Berzon, J., concurring).

260 499 U.S. 315 (1991).

261 *Id.* at 325.

262 *Id.* at 324–25.

263 Dalehite v. United States, 346 U.S. 15, 28 (1953).

264 United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813–14 (1984).

265 Chadd v. United States, 794 F.3d 1104, 1114 (9th Cir. 2015) (Berzon, J., concurring).

266 *Gaubert*, 499 U.S. at 325.

267 28 U.S.C. § 2680(a) (2018).

promulgation of a regulation cannot be characterized as a negligent act of governance."[268]

Importantly, by the express terms of the statute, the negligent implementation of a statutory or regulatory directive—the failure to "exercis[e] due care" in doing so[269]—is not shielded from tort liability. Just as the failure by a federal employee to obey a statutory or regulatory directive deprives the government of immunity because there was no discretion available,[270] carelessness in carrying out a statutory or regulatory directive cannot be characterized as a policy choice.

D. With a Tort-Based Remedy for Official Wrongdoing, Constitutional Norms Remain at the Heart of the Analysis

Constitutional principles remain central to adjudication of tort claims against the federal government. First, ordinary tort claims, such as false arrest or false imprisonment, may be defeated by the presence of probable cause as a common-law equivalent to constitutional expectations.[271] Likewise, certain defenses, such as the justified use of force in response to a common-law assault and battery claim, may be refuted by asserting the equivalent of constitutional violations. Second, the invocation of discretionary policy immunity under the FTCA is precluded when constitutional limits are transgressed, as no federal officer has discretion to bypass constitutional requirements.[272]

Because the doctrine of qualified immunity is misplaced in a tort regime, these commands of the Constitution should be directly enforced, without the diluting appraisal of whether the constitutional directive was clearly established in prior court precedent. Indeed, because the question of legal authority in common-law claims and the discretionary function exception to the FTCA often are affirmative defenses, the government may bear the burden of proving that its conduct upheld constitutional norms.[273]

1. For Many Common-Law Tort Claims, an Element or Defense of Probable Cause or Justification Runs Parallel to Constitutional Constraints

When federal sovereign immunity is waived for common-law tort claims against the United States, the common law defines the elements of the cause of action and available defenses. By expressly providing that the liability of the United States is to be determined "in the same manner and to the same extent as a private individual,"[274] the FTCA speaks not only to the plaintiff's

268 SISK, *supra* note 49, § 3.6(b)(1), at 154.
269 28 U.S.C. § 2680(a) (2018).
270 *See supra* note 148 and accompanying text.
271 *See infra* subsection II.D.1.
272 *See infra* subsection II.D.2.
273 *See infra* notes 276–78 and 308–11 and accompanying text.
274 28 U.S.C. § 2674 (2018).

cause of action but also to the defendant's substantive defenses, including affirmative defenses of legal authority. As one court of appeals correctly observed, "As immunities and defenses are defined by the same body of law that creates the cause of action, the defenses available to the United States in FTCA suits are those that would be available to a private person under the relevant state law."[275]

Under the common law, those elements or defenses frequently include the equivalent of constitutional expectations. Accordingly, by adjudicating official wrongdoing through the means of a tort cause of action, constitutional norms are upheld. For example, probable cause is an element or affirmative defense to the common-law claims of false arrest, false imprisonment, and malicious prosecution,[276] the same concept to be found in the Fourth Amendment of the United States Constitution. [277] Similarly, a common-law claim of assault or battery may be defended by asserting that the force used was reasonable to make a citizen's arrest or prevent lawless conduct.[278] While the probable cause requirement or the justifiable use of force defense in tort claims draw life from the common law, rather than directly from the Constitution, the concepts are unsurprisingly the same.[279] After all, the Bill of Rights was designed to preserve the preexisting natural rights that had been recognized in the common law.[280]

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275 Vidro v. United States, 720 F.3d 148, 151 (2d Cir. 2013).

276 *See, e.g.*, Smith v. United States, 121 F. Supp. 3d 112, 122 (D.D.C. 2015) (describing District of Columbia law as providing that a lack of probable cause is an element of claims for false arrest, false imprisonment, and malicious prosecution); Taylor v. Collins, No. C-3-92-121, 1998 WL 1657173, at *3 (S.D. Ohio Aug. 6, 1998) (stating that, under Ohio law, "[p]robable cause is also an affirmative defense to the common law tort of false arrest"); Reed v. City & Cnty. of Honolulu, 873 P.2d 98, 109 (Haw. 1994) ("The determination of probable cause is a defense to the common law claims of false arrest, false imprisonment, and malicious prosecution."); Lewis v. Farmer Jack Div., Inc., 327 N.W.2d 893, 901 (Mich. 1982) (stating that, under Michigan law, a false arrest or imprisonment is an arrest or imprisonment "without legal justification"); *see also* Torres v. Madrid, 141 S. Ct. 989, 1000 (2021) (observing that the common-law tort of false imprisonment is the equivalent of an arrest without probable cause).

277 U.S. CONST. amend. IV.

278 *See, e.g.*, Gortarez *ex rel.* Gortarez v. Smitty's Super Valu, Inc., 680 P.2d 807, 814–15 (Ariz. 1984) (explaining that a shopkeeper may use "[r]easonable force" to detain a shoplifter and overturning a directed verdict for the store when a security guard used a chokehold (quoting RESTATEMENT (SECOND) OF TORTS § 120A cmt. h (AM. L. INST. 1965))); People v. Garcia, 78 Cal. Rptr. 775, 779 (Cal. Ct. App. 1969) (stating that a private citizen making a citizen's arrest is "justified in using such force as was reasonable for defendant's arrest and detention"); RESTATEMENT (SECOND) OF TORTS § 132 (AM. L. INST. 1965) ("The use of force against another for the purpose of effecting the arrest or recapture of the other, or of maintaining the actor's custody of him, is not privileged if the means employed are in excess of those which the actor reasonably believes to be necessary.").

279 *See Smith*, 121 F. Supp. 3d at 118 (applying the same probable cause concept to both the tort false arrest claim and the arrest-related Fourth Amendment *Bivens* claim).

280 ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 15–16 (rev. ed. 1954) ("[T]he common-law rights of Englishmen [became] the natural rights of man, intrenched as such in our bills of rights.").

In this way, the FTCA regime largely, but somewhat more straightforwardly, replicates the paradigm of the early republic by authorizing a common-law tort remedy against the government subject to constitutional or quasi-constitutional adjudication of the legal authority for the government action.[281] Akhil Amar relates the early nineteenth century practice in the context of an unauthorized search or seizure:

> Plaintiff would sue defendant federal officer in trespass; defendant would claim federal empowerment that trumped the state law of trespass under the principles of the supremacy clause; and plaintiff, by way of reply, would play an even higher supremacy clause trump: Any federal empowerment was ultra vires and void because of Fourth Amendment limitations on federal power itself. If, but only if, plaintiff could in fact prove that the Fourth Amendment had been violated, defendant's shield of federal power would dissolve, and he would stand as a naked tortfeasor.[282]

Importantly, under the FTCA, the defenses available to the United States are those that would be "available to a private person under the relevant state law."[283] The current provisions of the FTCA that permit intentional tort claims, particularly the Law Enforcement Proviso, view an action based on a state common-law tort through the lens of private liability. As the Supreme Court emphasized in *FDIC v. Meyer*,[284] state—not federal—law is "the source of substantive liability under the FTCA."[285]

For this reason, no qualified immunity or official defenses may be asserted to defend the actions of an executive branch employee, even if the pertinent state law accords special protections to government-employed police officers or correctional officers in that state.[286] By making the United States subject to suit for the acts of government employees acting within the scope of employment, "the United States stands in the shoes [of] a similarly-placed private employer" when answering for the allegedly tortious conduct of its employees.[287] From the earliest days of the FTCA, the courts have recognized that the doctrine of respondeat superior for tort liability of the

281 *See* Ann Woolhandler & Michael G. Collins, *Was* Bivens *Necessary?*, 96 NOTRE DAME L. REV. 1893, 1897 (2021) (explaining that the Framers expected that, in common-law trespass actions against government officials, "the Constitution would negate a defendant's plea of legal justification").

282 Amar, *supra* note 187, at 1506–07.

283 Vidro v. United States, 720 F.3d 148, 151 (2d Cir. 2013).

284 510 U.S. 471 (1994).

285 *Id.* at 478. *See generally* SISK, *supra* note 49, § 3.5(b)(2), at 135–37.

286 Rivera v. United States, 928 F.2d 592, 609 (2d Cir. 1991) ("[T]he United States does not have the advantage of any defense of official immunity that the employee might have had . . . ." (citing 28 U.S.C. § 2674)); Farag v. United States, 587 F. Supp. 2d 436, 452 (E.D.N.Y. 2008); *see also* Brownback v. King, 141 S. Ct. 740, 746, 748 n.7 (2021) (declining to address "the availability of state-law immunities" in the context of an FTCA claim against a law enforcement officer for assault and battery).

287 Lomando v. United States, 667 F.3d 363, 374–76 (3d Cir. 2011); *see also* Xue Lu v. Powell, 621 F.3d 944, 947–49 (9th Cir. 2010) (evaluating the FTCA liability of the United States as a private employer under state law).

United States under the FTCA does not permit the government to invoke the immunities of its officers. [288]

The Supreme Court's decision in *United States v. Muniz*[289] directly answers the question of governmental immunity under the FTCA. In *Muniz*, the Court held that state jailer defenses cannot be invoked by the United States under the FTCA:

> Jailers in some States are not liable to their prisoners. . . . And there are overtones in these decisions suggesting that liability is also denied because of the fear that prison discipline would otherwise be undermined. Such cases should not be persuasive. Just as we refused to import the "casuistries of municipal liability for torts" . . . , so we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity.[290]

For FTCA liability, the comparison is to a private person engaging in those activities, not to a state or local officer. In *United States v. Olson*,[291] injured mine workers claimed that the United States should be held liable under the FTCA for negligent inspection of the mine by federal mine inspectors, that is, failing to discover safety violations by the mine operator that resulted in an accident.[292] The Ninth Circuit looked to liability based on Arizona law making state or municipal entities liable for safety inspections.[293] The Supreme Court unanimously rejected the proposition that the United States may be held liable through the FTCA based upon state law standards that were designed for imposing liability upon state or municipal entities.[294] In language directly repudiating special governmental defenses, the *Olson* Court emphasized: "The Act says that it waives sovereign immunity 'under circumstances where the United States, if a *private person*,' not 'the United States, if a state or municipal entity,' would be liable. Our cases have consistently adhered to this 'private person' standard."[295]

In *Tekle v. United States*,[296] a court of appeals reversed the dismissal of intentional tort claims, including assault and battery, under the FTCA that arose from detention of a juvenile while federal law enforcement officers were making an arrest.[297] The lead opinion highlighted the Supreme Court decision in *Olson* as overturning a prior approach, which had mistakenly applied the unique law governing arrests by officials rather than the private law standard of citizen arrests to FTCA actions.[298] Ruling that law enforcement privileges could no longer be invoked by federal law enforcement

288 *See* Wright v. United States, 719 F.2d 1032, 1035 (9th Cir. 1983); United States v. Trubow, 214 F.2d 192, 196 (9th Cir. 1954).
289 374 U.S. 150 (1963).
290 *Id.* at 164.
291 546 U.S. 43 (2005).
292 *Id.* at 45.
293 *Id.*
294 *Id.* at 45–46.
295 *Id.* (citing 28 U.S.C. § 1346(b)(1)).
296 511 F.3d 839 (9th Cir. 2007).
297 *Id.* at 850–56.
298 *Id.* at 851–52.

agents, the opinion emphasized that "*Olson* states in broad terms that the words of the FTCA 'mean what they say, namely, that the United States waives sovereign immunity "under circumstances" where local law would make a "*private person*" liable in tort.'"[299] Other courts of appeals agree that the United States may not invoke special state-government immunities under the FTCA.[300] While a federal law enforcement officer has the authority to use reasonable force to effectuate an arrest, even when a citizen arrest could not be made, Congress did not intend to allow the United States the benefit of any state-law immunities available to only state employees.[301]

The proscription on invoking special governmental immunities is confirmed by the text of another provision of the FTCA, which states that the United States may raise "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, as well as any other defenses to which the United States is entitled."[302] The first clause departs from the general private person standard of the FTCA to preserve official immunity to judges and legislators under the traditional protections for exercise of the special judicial and legislative roles.[303] By the omission of parallel protection in the FTCA for official immunities for executive branch officials, the FTCA plainly directs that those "other defenses to which the United States is entitled" must be evaluated under the applicable state law for private persons.

For FTCA cases, appropriate "private person analogies for Government tasks of this kind" must be identified.[304] For law enforcement, in addition to the citizen arrest analogy, we may find counterparts through the tort standards for private security guards (such as those at a private college or business) and the traditional shopkeeper's privilege when upholding security in a facility or establishment.[305] Similarly, for correctional officers, the private analogy lies in the affirmative duty to protect when a party takes custody of

299 *Id.* at 852 (quoting *Olson*, 546 U.S. at 44).

300 *See, e.g.*, Villafranca v. United States, 587 F.3d 257, 263–64 (5th Cir. 2009); Castro v. United States, 34 F.3d 106, 111 (2d Cir. 1994).

301 *See Villafranca*, 587 F.3d at 263–64; *Castro*, 34 F.3d at 111.

302 28 U.S.C. § 2674 (2018).

303 *See, e.g.*, Richardson v. United States, 516 F. App'x 2 (D.C. Cir. 2013) (holding the United States entitled to judicial immunity under the FTCA for actions by court clerks in the judicial process); Lucore v. Bowie, No. 12-CV-1288, 2012 WL 5863248, at *2 (S.D. Cal. Nov. 16, 2012) (dismissing a claim under the FTCA based on a judge's alleged improper adjudication of a bankruptcy case).

304 *Olson*, 546 U.S. at 47.

305 *See* Transcript of Oral Argument at 4–10, *Olson*, 546 U.S. 43 (No. 04-759) ("[S]o if it's a police officer stopping somebody on a highway, it's the same as a private security guard stopping somebody . . . .").

person,[306] such as a nursing facility employee who has a duty to ensure the safety of those who reside at the facility.[307]

As discussed above, under an FTCA tort-based regime to address intentional wrongdoing at the federal level, constitutional-equivalent justifications for the federal agent's conduct such as probable cause or justified use of force sometimes must be raised as an affirmative defense under the pertinent state tort law.[308] In those jurisdictions, the affirmative defense to an intentional tort claim would turn on whether probable cause or justified use of force provided legal permission for the individual employee's conduct. Previous ambiguity in the law would not count as a valid justification for unlawful conduct. As also noted above, there is no legitimate basis for transplanting a qualified immunity doctrine that the law must have been clearly established into the common-law soil of the FTCA. As with the nineteenth-century regime, the FTCA approach should allow an individual plaintiff to obtain tort damages, leaving the "issue of whether the action was authorized by existing statutory or constitutional law [to be] introduced by way of defense and reply when the officer pleaded justification."[309]

2. For the FTCA's Discretionary Function Exception, Discretion Is Withdrawn When Constitutional Directives Are Violated

With regard to the policy-protecting exception to the FTCA, any discretionary-function-exception immunity is withdrawn when federal government officials transgress constitutional lines. As "[f]ederal officials do not possess discretion to violate constitutional rights,"[310] the discretionary function exception does not "shield conduct that transgresses the Constitution."[311]

While the constitutional barrier against claims of policymaking discretion may resemble the Supreme Court's direction that discretion is also lacking when a federal employee fails to follow a statute or regulation that specifically prescribes the course of action,[312] the analysis is not precisely the same. When a statute or regulation does not specifically set out the precise parameters, the federal employee continues to possess residual authority as an executive branch officer. By contrast, when the Constitution precludes the action, whether or not that constitutional command is precisely ascer-

306 RESTATEMENT (SECOND) OF TORTS § 314A (AM. L. INST. 1965).

307 Est. of Smith v. Shartle, No. CV-18-00323, 2020 WL 1158552, at *2 (D. Ariz. Mar. 10, 2020) (holding in FTCA case that duty of correctional officers is "[l]ike a nursing facility employee, . . . tasked with the care of persons who are dependent upon them to make daily housing and safety determinations"); *see also* Panion v. United States, 385 F. Supp. 2d 1071, 1089 (D. Haw. 2005) (holding the same).

308 *See supra* notes 276–79 and accompanying text.

309 Woolhandler, *supra* note 68, at 399.

310 Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001) (alteration in original) (quoting U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988)).

311 Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009).

312 *See supra* note 148 and accompanying text.

tained prior to application in the particular case, the discretion is removed entirely, and no remnant of general executive authority remains.[313]

The substantial majority of circuits has recognized that a discretionary function defense is incompatible with a constitutional prohibition.[314] A few judges have contended that policymaking discretion may somehow survive a constitutional collision and allow the United States to still evade liability under the FTCA. These contrary arguments range from the confused contention that the state-law focus of the FTCA affirmative claim somehow controls interpretation of the federal policy exception and over to the tired proposition that waivers of sovereign immunity are to be strictly construed in favor of the government.

First, judicial naysayers protest that "the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations."[315] This argument confusingly transports the correct observation that the FTCA, "applies to torts, as defined by state law"[316] (that is, the common-law nature of the cause of action) into an incongruous interpretation of the distinctly federal nature of the discretionary function defense, which is not at all "defined by state law." To be sure, the plaintiff's affirmative cause of action must be grounded in state tort law, not federal law, whether that federal law is constitutional or statutory.[317] But that point leads us nowhere when we turn to the meaning of the discretionary function exception as a special federal-government defense, which of course is found nowhere in state tort law. Moreover, contrary to this muddled argument, the Supreme Court has already emphasized that the boundary of the discretionary function exception is marked by *federal*, not state, law, when ruling that discretion is removed when "a *federal* statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[318]

313 *See* Castro v. United States, 560 F.3d 381, 389 (5th Cir. 2009) (explaining that proving a federal officer violated constitutional rights would "eclipse" the discretionary-function-exception analysis), *vacated on other grounds*, 608 F.3d 266 (5th Cir. 2010) (en banc) (per curiam) (affirming district court without addressing the constitutional limit on the discretionary function exception); Galvin v. Hay, 374 F.3d 739, 757–58 (9th Cir. 2004) (holding that individual defendants had qualified immunity on a *Bivens* claim because the law was not clearly established, but that the finding that the First Amendment was violated precluded application of the discretionary function exception to the FTCA claim against the federal government).

314 *See, e.g.*, Loumiet v. United States, 828 F.3d 935, 943–46 (D.C. Cir. 2016); *Limone*, 579 F.3d at 101; *Galvin*, 374 F.3d at 758; Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 254–55 (1st Cir. 2003); Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003); *Medina*, 259 F.3d at 225; Prisco v. Talty, 993 F.2d 21, 26 n.14 (3d Cir. 1993); *see also* Myers & Myers, Inc. v. U.S. 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.").

315 Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019).

316 *Id.*

317 *See supra* notes 283–85 and accompanying text.

318 Berkovitz v. United States, 486 U.S. 531, 536 (1988) (emphasis added).

Second, saying that "[i]t is difficult to conceive of a violation of a constitutional right that does not also give rise to a state cause of action," one judge complains that disallowance of the discretionary function exception when the government agent acts unconstitutionally effectively transforms the FTCA into a vehicle for a constitutional tort claim.[319] But this argument proves too much. To be sure, as discussed earlier,[320] common-law tort claims often include elements or defenses that parallel constitutional concepts. That hardly changes the important legal classification that the FTCA claim must be drawn from state tort law and cannot be founded on federal constitutional provisions.

As one court of appeals explains, this argument "miscast[s] the relationship between FTCA state-law torts and *Bivens* constitutional claims. The state-law substance of an FTCA claim is unchanged by courts' recognition of constitutional bounds to the legitimate discretion that the FTCA immunizes."[321] Acknowledging that a state tort cause of action, such as one for false arrest, incorporates a federal constitutional equivalent, such as probable cause,[322] as an element or defense is not at all the same as pronouncing that the claim may be pleaded directly under the Constitution. Moreover, that state common-law claims often provide relief through the FTCA for wrongs that also transgress the Constitution is a mark in favor of the FTCA as effectively holding the federal government to account for wrongful conduct.

In any event, this objection is lodged in the wrong forum. It is the Congress that has explicitly waived the sovereign immunity of the United States for state common-law tort claims that may well "overlap[ ] with [a] constitutional violation."[323] In particular, through the Law Enforcement Proviso, Congress has made the United States liable for such intentional torts as assault, battery, false arrest, and false imprisonment when committed by "investigative or law enforcement officers" of the federal government.[324] Thus, Congress, not the courts, has determined through the FTCA generally and the Law Enforcement Proviso in particular that it is quite appropriate to hold the federal government responsible in tort for that type of conduct that may well transgress the Constitution but which necessarily forms the elements or defenses of a state-law tort claim.

Third, the advocates for discretionary policy immunity even when the Constitution has been violated cite the hoary adage that limits on waivers of federal sovereign immunity must be construed strictly in favor of the government.[325] The rusty aphorism that the government should win every interpre-

319 Castro v. United States, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting), *vacated on other grounds*, 608 F.3d 266 (5th Cir. 2010) (en banc) (per curiam).

320 *See supra* subsection II.D.1.

321 Loumiet v. United States, 828 F.3d 935, 945 (D.C. Cir. 2016).

322 *See supra* note 276–80 and accompanying text.

323 *See Castro*, 560 F.3d at 394 (Smith, J., dissenting).

324 28 U.S.C. § 2680(h) (2018). On the Law Enforcement Proviso, see *supra* notes 209–10 and accompanying text.

325 *Castro*, 560 F.3d at 393 (Smith, J., dissenting).

tive debate involving a statutory waiver of federal sovereign immunity appears to have been retired by the Supreme Court. Today, the Court reserves strict construction to core questions about whether sovereign immunity has been expressly waived and the basic scope of that waiver.[326] For other statutory terms, definitions, exceptions, limitations, and procedures, ordinary rules of statutory interpretation suffice.[327] As I've written before:

> Having traveled away from a petrified regime of jurisdictional absolutes and wooden strict construction, the Supreme Court now directs a more nuanced reading of statutory waivers of federal sovereign immunity to both protect important government interests identified by Congress and to uphold the statutory promise of the judicial remedy, with careful attention to text, context, history, and statutory purpose elevated above mechanical application of presumptions.[328]

And in the very context of exceptions to the FTCA, the Supreme Court has repudiated strict construction, saying "this principle is 'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'"[329]

In sum, the discretionary function exception to the FTCA "does not shield decisions that exceed constitutional bounds, even if such decisions are imbued with policy considerations."[330] As the Supreme Court has said in another context, no government agency or official has "'discretion' to violate the Federal Constitution; its dictates are absolute and imperative."[331]

Finally, the United States as the defendant to an FTCA suit should bear the burden to prove that the discretionary function exception applies as an affirmative defense.[332] Thus, the government must show that its purported exercise of policymaking functions was not only genuine but did not transgress constitutional boundaries.

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326 *See* FAA v. Cooper, 566 U.S. 284, 290–91 (2012) (stating that the demand for an "unequivocally expressed" waiver of sovereign immunity extends to the "*scope* of that waiver" (first citing Lane v. Peña, 518 U.S. 187, 192 (1996); then citing United States v. Nordic Vill., Inc., 503 U.S. 30, 33 (1992); and then citing Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 95 (1990))); *see also* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1300–18 (2014).

327 *See* Gómez-Pérez v. Potter, 553 U.S. 474, 490–91 (2008); *Irwin*, 498 U.S. at 95–96.

328 Sisk, *supra* note 49, § 2.5, at 94.

329 Dolan v. U.S. Postal Serv., 546 U.S. 481, 491–92 (2006) (citations omitted) (first quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984); and then quoting United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)).

330 Loumiet v. United States, 828 F.3d 935, 944 (D.C. Cir. 2016).

331 Owen v. City of Independence, 445 U.S. 622, 649 (1980).

332 S.R.P. *ex rel.* Abunabba v. United States, 676 F.3d 329, 333 & n.2 (3d Cir. 2012); Myers v. United States, 652 F.3d 1021, 1028 (9th Cir. 2011); Parrott v. United States, 536 F.3d 629, 634–35 (7th Cir. 2008); Carlyle v. U.S., Dep't of the Army, 674 F.2d 554, 556 (6th Cir. 1982). On the exceptions to the FTCA as nonjurisdictional affirmative defenses, see generally Sisk, *supra* note 49, § 3.6, at 150–53.

CONCLUSION

From the time of the early republic, as Ann Woolhandler explains, "the historic role of suits against government officials was not to punish bad faith behavior, but rather to enforce constitutional and statutory limitations on government."[333] During the twentieth century, the federal government's sovereign immunity was waived for more and more remedies, including tort claims against the United States, holding the government directly to account for wrongdoing. The line between an official wrong and government accountability became straighter. As David Engdahl rightly reasons, "[I]f the onus is to rest ultimately upon the [government], it seems both more fair and more efficient to place it there directly."[334]

Unfortunately, the expansion of liability in tort by the federal government slackened in the twentieth century, right about the time that immunity for individual federal employees thickened into an impenetrable shield against tort claims. As a result, the gap widened between the statutory waiver for government liability in the Federal Tort Claims Act and the withdrawal of tort liability for federal officers in the Westfall Act. As a consequence, victims of the most egregious wrongdoing by federal agents are left without any remedy and the federal government refuses to accept accountability for many affirmative harms.

At this opportune moment in the early twenty-first century, all of the pieces are nearly in place and remain only to be assembled. By modest legislative reform of the Federal Tort Claims Act to cover intentional harms by all federal employees in the line of duty and by judicial clarification that discretionary function immunity protects only genuine policymaking deliberations, the existing tort-based framework will cover most harms suffered through official wrongdoing. Through a legislatively revised FTCA and a judicially confined policy immunity, the courts may more robustly protect individual rights and articulate fundamental limitations on justifiable government action.

333 Woolhandler, *supra* note 68, at 483.

334 Engdahl, *supra* note 46, at 58.

ADDENDUM: PROPOSED REVISIONS TO STATUTORY WAIVERS OF SOVEREIGN IMMUNITY[335]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That—

SEC. 1. Section 2680(h) of title 28, United States Code, is amended by (1) striking out the words "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process," in the first sentence; (2) striking out the second and third sentences reading "Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, '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"; and (3) inserting at the end of the section the following: "Further provided, That, a sexual assault or sexual battery on a military servicemember shall not be regarded as incurred incident to service."

SEC. 2. Section 2000e-16 of title 42, United States Code, is amended by inserting at the end of subsection (c) the following: "The remedy for personal injury arising from a sexual assault or sexual battery or negligent failure to prevent a sexual assault or sexual battery that is cognizable under chapter 171 of Title 28 is not preempted by other remedies available by law under this subchapter."

SEC. 3. Section 8116 of title 5, United States Code, is amended by inserting at the end of subsection (c) the following: "The remedy for personal injury arising from a sexual assault or sexual battery or negligent failure to prevent a sexual assault or sexual battery that is cognizable under chapter 171 of Title 28 is not preempted by other remedies available by law under this subchapter."

335 This proposed legislative reform includes additional changes to remove peculiar obstacles to federal employees in seeking recovery under the FTCA for sexual assault, as described in Sisk, *supra* note 227.