# BLEEDING FROM THE HOLES IN THE THEORY: HOW FLAWED DETERRENCE IN FEDERAL TORT CLAIMS ENABLES POLICE BRUTALITY

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This note is dedicated to Heather Heyer, Michael Reinoehl, Anthony Huber, Joseph Rosenbaum, George Floyd, Breonna Taylor, Ahmaud Arbery, and every other victim of American fascism. Say their names.

## I. INTRODUCTION

Black lives matter. The killings of Ahmaud Arbery, Breonna Taylor, and George Floyd in the first half of 2020, as fatalities from the novel coronavirus remained stubbornly high and lopsided among America's Black and Brown communities, propelled a wave of protests demanding that the government and the country recognize this basic fact of human morality.[1] As of the time of writing, the official response to the killings has been lackluster. In Ahmaud Arbery's case, more than two months passed in that case without an arrest.[2] Breonna Taylor's killers collectively had a single charge leveled against them in connection with her murder.[3] This lone charge, for wanton endangerment of Taylor's neighbors, was announced in September of 2020, five months after Taylor's death.[4] The trial of Derek Chauvin for the killing of George Floyd is ongoing as of the time of writing, and the trials of the remaining three officers who participated in the killing are scheduled for August, 2021.[5]

In contrast to the earlier Black Lives Matter protests in the wake of the killings of Trayvon Martin, Tamir Rice, Eric Garner, Sandra Bland, and others, these new killings and subsequent protests occurred during the unabashedly pro-police presidency of Donald J. Trump. Trump, before his ascension to the highest seat of government, had publicly advocated for the execution of five young Black and Latino men wrongfully convicted of a

[1] For information on the killings, which were perpetrated by white police officers and former police officers against African-American victims, see Richard Fausset, *What We Know About The Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html; Richard A. Oppel Jr., Derrick Bryson Taylor, & Nicholas Bogel-Burroughs, *What We Know About Breonna Taylor's Case and Death*, N.Y. TIMES (Sep. 24, 2020), https://www.nytimes.com/article/breonna-taylor-police.html; Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. Times (Aug. 13, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html; for information on the disparate impact of the coronavirus *see* APM RESEARCH LAB, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, AMERICAN PUBLIC MEDIA (Feb 4., 2021), https://www.apmresearchlab.org/covid/deaths-by-race.

[2] Fausset, *supra* note 1.

[3] Oppel, Bryson Taylor, & Bogel-Burroughs, *supra* note 1.

[4] Oppel, Bryson Taylor, & Bogel-Burroughs, *supra* note 1.

[5] David K. Li, *Former Minneapolis Police Officer Derek Chauvin to be Tried Separately in George Floyd Death Case*, NBC NEWS (Jan. 12, 2021, 11:41 AM), https://www.nbcnews.com/news/us-news/former-minneapolis-police-officer-derek-chauvin-be-tried-separately-george-n1253905.

gang rape in Central Park in the 1980s.[6] He had, more recently, gone on the record with comments that appeared to endorse police brutality and praised foreign governments who exercised excessive brutality against their citizens.[7]

In response to the protests, Trump deployed federal law enforcement agents to multiple cities, including Portland, Oregon; Seattle, Washington; and Washington D.C.[8] These agents wore unmarked camo fatigues and carried military-grade weapons, and functioned using riot control tactics traditionally associated with state and local police.[9] These tactics included the use of tear gas, phalanx lines, and mass arrests.[10] It was later discovered that these agents were acting on the strength of an executive order from President Trump declaring Operation Diligent Valor, an initiative led by the Department of Homeland Security's Rapid Deployment Force and including personnel from the Federal Protective Services, Immigration and Customs Enforcement, the U.S. Marshals Service, and Customs and Border Protection, aimed at protecting monuments, memorials, and statutes, and "combating recent criminal violence."[11] It also became clear shortly after these protests reached their peak that the Department of Homeland Security ("DHS"), headed by then-Acting Secretary Chad Wolf, was the dominant agency in this action, in cooperation with the Department of Justice and the Department

[6] Rebecca Morin, *'They Admitted Their Guilt': 30 Years of Trump's Comments About the Central Park Five*, USA TODAY (June 19, 2019), https://www.usatoday.com/story/news/politics/2019/06/19/what-trump-has-said-central-park-five/1501321001/ .

[7] Jeremy Venook, *Trump's Record on Police Brutality and Peaceful Protests: Making the Problem Worse*, CENTER FOR AMERICAN PROGRESS ACTION FUND.

[8] Ledyard King, *Secret Service Admits It Used Pepper Spray to Clear Protestors Prior to Trump Photo Op at St. John's Church*, USA TODAY (5:44 p.m., June 13, 2020), https://www.usatoday.com/story/news/politics/2020/06/13/floyd-protests-secret-service-used-pepper-spray-trump-photo-op/3184223001/; Kevin Johnson & Kristine Phillips, *What You Need to Know on the Federal Response in Portland and the Legal Questions It Raises*, USA TODAY (2:04 PM, Jul. 22, 2020), https://www.usatoday.com/story/news/politics/2020/07/22/portland-protests-trump-administration-actions-raises-legal-questions/5486945002/; Bob D'Angelo, *Trump Administration Sends Tactical Team to Seattle*, KIRO 7 (6:14 PM, Jul. 23, 2020), https://www.kiro7.com/news/trending/trump-administration-sends-tactical-team-seattle/L2FF6X2IINCN7HFKZI2VDI4LIY/ .

[9] Alex Ward, *The Unmarked Federal Agents Arresting People in Portland, Explained*, VOX (Jul. 20, 2020, 6:30 PM), https://www.vox.com/2020/7/20/21328387/portland-protests-unmarked-arrest-trump-wold .

[10] Ward, *supra* note 9.

[11] Exec. Order No. 13,933, 85 Fed. Reg. 40,081 (June 26, 2020); Gabriella Borter, *Court Document Reveal Secretive Federal Unit Deployed for 'Operation Diligent Valor' in Oregon*, U.S. NEWS AND WORLD REPORT (July 22, 2020), https://www.usnews.com/news/top-news/articles/2020-07-22/court-documents-reveal-secretive-federal-unit-deployed-for-operation-diligent-valor-in-oregon.

of Defense.[12] Federal involvement in "restoring law and order" soon took a lethal turn, when on August 29, 2020, an altercation in Portland left a far-right militia member dead.[13] Police suspected Michael Reinoehl, an anti-fascist activist, of killing the militia member.[14] When the U.S. Marshals caught up to Reinoehl near Lacey, Washington, a few days later, they emerged from unmarked SUVs, shot at him without identifying themselves, and killed him.[15] A .380-caliber handgun was found in his pocket, and an AR-style rifle was found in a bag in his car.[16]

These incidents, in which federal agents unreasonably detained protestors engaged in an exercise of their First Amendment right to peacefully assemble, and in which federal agents impermissibly unleashed deadly force against a suspect who did not pose an immediate threat, underscore the necessity for lawmakers and activists to develop a zero-tolerance policy against extreme instances of police brutality directed by the executive branch. In particular, the sweeping police powers assumed by the executive branch must be recognized and counteracted by appropriate legislation in order to prevent excessive executive action from stifling civil liberties. Each of the potential existing remedies for the Trump administration's extreme and troubling government overreach either fall short of providing protections that recognize the kind of misconduct in these cases, or contain carveouts that render their remedies inadequate to providing an effective barrier against these problems reoccurring. These existing prospective civil remedies are actions against the government through the Federal Tort Claims Act,[17] and actions against officers in their individual capacities under the *Bivens v. Six Named Unknown Named Agents of Federal Bureau of Narcotics*[18] line of cases. With that in mind, this Note seeks to develop a new theory of behavioral deterrence through civil lawsuits at the federal level, taking inspiration from past proposals as well as novel developments in economic theory. Deterrence, in the parlance of civil actions, is the theory that "a monetary sanction will discourage the wrongdoer

[12] DEP'T. OF HOMELAND SECURITY, ACTING SECRETARY WOLF CONDEMNS THE RAMPANT LONG-LASTING VIOLENCE IN PORTLAND (2020), https://www.dhs.gov/news/2020/07/16/acting-secretary-wolf-condemns-rampant-long-lasting-violence-portland.

[13] Mike Baker, *One Person Dead in Portland After Clashes Between Trump Supporters and Protestors*, N.Y. TIMES (Aug. 30, 2020), https://www.nytimes.com/2020/08/30/us/portland-trump-rally-shooting.html.

[14] Evan Hill et al., *How the Fatal Shooting at a Portland Protest Unfolded*, N.Y. TIMES (Aug. 31, 2020), https://www.nytimes.com/2020/08/31/video/portland-protests-shooting-investigation.html.

[15] *Id.*

[16] *Id.*

[17] 28 U.S.C. § 2671 et seq.

[18] 403 U.S. 388 (1971).

and others in similar situations from engaging in the kind of misconduct which led to the punitive damage award."[19]

In short, this Note proposes that federal law enforcement actors—high- and low-ranking agency officials alike—are insufficiently constrained from acting wrongfully and therefore insufficiently deterred. This problem is compounded if not caused by the fact that, although actions in tort are recognized by courts against these actors in principle, they are completely ineffective in practice. In Part II, this Note will examine the existing factors that trigger tort-based accountability mechanisms. Part III will discuss how existing laws, government practices, and court doctrines have grown up around the practice of federal tort liability, and the utility of those practices in deterring or protecting individual federal officers. This Part will also explore whether and how traditional damages-based deterrence against the federal government is even possible, with an overview of tort litigation against large corporations and against municipal and state governments, and a comparison to the principles that govern those actors and their counterparts in the federal context. Finally, Part IV will propose disposing of the fictitious nature of individual liability for federal officers and imposing two correctives to prevent a lack of deterrence in the future: a rigorous and public-facing liability scheme, and a change in culture modeled after collective responsibility efforts in post-conflict countries.

An important caveat to this Note is that it does not examine criminal sanctions such as the Posse Comitatus Act, federal murder or assault statutes, or criminal sanctions rooted in state law. The reason for this is that there is little evidence of these sanctions being levied against federal agents for crimes resulting from their official capacities, and would necessitate a much more detailed analysis than this Note can accomplish. For similar reasons, as well as time limitations stemming from Freedom of Information Act delays and difficulties in cultivating sources of information regarding frequency and severity, this Note does not consider intra-agency disciplinary measures for their efficacy.[20]

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[19] Andrea M. Curcio, *Painful Publicity – An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 346-47 (Winter, 1996).

[20] The competing interests of the journal note turnaround process and the government's inability or unwillingness to timely produce FOIA answers would seem to present a systemic barrier to the development of student legal scholarship. Readers interested in addressing the issue should start with Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455 (Summer, 2015); Joshua Apfelroth, *Recent Developments in Information Regulation: The Open Government Act: A Proposed Bill to Ensure the Efficient Implementation of the Freedom of Information Act*, 58 ADMIN. L. REV. 219 (Winter, 2006); Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U.L. REV. 325 (Winter, 1994).

## II. BACKGROUND

At first blush, the problem of holding wrongful actors accountable would seem to be a basic one for any civilized society and would have to be baked into the federal system. Regrettably, this is not the case. A review of existing laws, government practices, and court doctrines reveals a broad regime of limited liability, immunity, and obfuscation that prevents victims of constitutional torts from receiving restitution under due process of law. This section will review existing legislation and Supreme Court precedent, and delve into the obstacles to deterrence that these represent.

### *A. The Federal Tort Claims Act*

The practice of bringing tort claims against the government is older than the country itself, having originated in Britain around the time of the English Civil War.[21] Initially, these claims were heard on an individual basis by the legislature, which then decided whether or not to issue surplus funds from the treasury.[22] This order persisted in the British-American colonies, although the judiciary was involved in a ministerial capacity, reviewing and certifying that the public claims had been filed correctly before forwarding the claims to the legislature.[23] After the ratification of the Constitution, Congress inherited the power to process claims against the government, and continued to guard this power against encroachment by the executive and the judiciary.[24] Two acts passed in the firstfirsts session of the First Congress set the tone for the next eighty years of private claims: First, Congress asserted final oversight over the Treasury Comptroller's duty to pay out private claims.[25] Second, Congress extended federal court jurisdiction in the Judiciary Act of 1789 only to situations where the United States was a plaintiff or petitioner at the expense of situations where the United States was a defendant or respondent.[26]

This approach persisted even as the country grew in population and territory, and by 1855 Congress was completely inundated with claims to the point of uselessness.[27] A report by the 1848 Committee on Claims described the private claim system as evil, unjust, and "wholly discreditable to any

[21] Floyd D. Shimamura, *The History of Claims against the United States: The Evolution from a Legislative toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 629-30 (1985).

[22] *Id.* at 628.

[23] *Id.* at 630.

[24] *Id.* at 644-46.

[25] William M. Wiecek, *The Origins of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 389 (1968).

[26] Shimamura, *supra* note 21, at 638.

[27] *Id*. at 650.

civilized nation."[28] Between 1838 and 1848, "out of 16,573 petitions of private claimants to the House of Representatives, and 3,436 bills reported, only 1,796 passed the House, and but 910 passed both Houses."[29] Thus Congress, faced with a rapidly ballooning number of claims and stymied by (at that point) unprecedented gridlock, created the Federal Court of Claims as an "advisory court" to help review the merits of claims against the United States.[30] However, Congress retained control over tort claims in this period, preferring to allow the courts to review contract claims and cases under the Fifth Amendment's Takings Clause.[31] This system broke down in 1932, when Congress insisted, without a basis in law, on a retrial of a claim that had been found in the plaintiff's favor, and was granted such a retrial.[32] This case, *Pocono Pines II*, shattered the assumption that Congress was in fact obligated to pay judgments against it, once again opening the floodgates of private bills.[33] This condition persisted for a decade, paralyzing and polarizing Congress as the country struggled to escape the effects of the Great Depression.[34] In a January 14, 1942, President Franklin Delano Roosevelt urged Congress to consider giving the federal judiciary binding statutory jurisdiction over claims against the United States below $7,500.[35] Congress resisted at first, but by 1945, the majority were swayed by the idea that there was no way to manage a nation which was poised to emerge as a world leader if the legislature continued to force itself to adjudicate minor claims in a country whose population and economy were booming in unprecedented fashion.[36]

The final catalyst for the Federal Tort Claims Act ("FTCA") emerged in 1945 in response to the Empire State Building crash, when an Air Force bomber crashed into the side of the Empire State Building, killing fourteen people, including eleven civilians, and causing significant damage to the structure.[37] In the aftermath, Congress finally enacted a waiver of sovereign

[28] *Id.* at 649.

[29] *Id.*

[30] *Id.* at 652.

[31] *Id.* at 653.

[32] *Id.* at 675-76.

[33] *Id.* at 683-684.

[34] *Id.* at 681.

[35] *Id.* at 683. The number proposed by President Roosevelt is not as modest as it seems, as $7,500 in 1942 has the purchasing power of $120,000 today. U.S. INFLATION CALCULATOR, https://www.usinflationcalculator.com/.

[36] Shimamura, *supra* note 21, at 683.

[37] James Barron, *Flaming Horror on the 79th Floor; 50 Years Ago Today, in the Fog, a Plane Hit the World's Tallest Building*, N.Y. TIMES, July 28, 1995, at B1.

immunity for negligent misconduct, allowing the United States to be sued in Article III federal courts.[38]

Initially, Congress also proved willing to address and revise the act to handle public sentiment. In *United States v. Muniz*, the Supreme Court noted that intentional misconduct by federal law enforcement officers was not covered by the FTCA, and refused to unilaterally alter the FTCA to cover these acts.[39] This case had two relevant repercussions, one of which, the Court's decision in *Bivens*, is discussed in Section 2 of this Part. The other result was an increase in federal use of force, culminating in the Collinsville Raids.[40] Beginning on April 19, 1972, eight federal officers and four St. Louis police attempted a series of illegal no-knock raids on residents of St. Louis, Missouri, East St. Louis, Illinois, and Collinsville, Illinois.[41] These raids were part of a pattern of raids that gained national attention for their profligacy and brutality.[42] Bowing to public pressure, the Senate Government Operations Committee passed an amendment to the FTCA to the effect that federal law enforcement officers would be liable, and that the United States would accept liability on their part (the so-called "law enforcement proviso," detailed in the next paragraph).[43] Another reform to the act, focused on civil asset forfeiture, was enacted in 2000, in order to better position the FTCA as a responsive instrument to public concerns over government malfeasance.[44] Congress's willingness to act in response to public opinion by amending the act is one of its chief strengths as a legal instrument, and is one of the keys to the feasibility of deterrence-based liability reform.[45]

The law enforcement proviso takes the form of an exception within the FTCA's exception to intentional tort liability. Under the FTCA, the United States is not liable for any intentional tort claim.[46] The proviso allows for liability to claims arising "out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" for "investigative or law enforcement officers of the United States Government," defined as "any officer who is empowered by law to execute searches, to seize evidence, or

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[38] Shimamura, *supra* note 21, at 638.

[39] United States v. Muniz, 374 U.S. 150 (1963).

[40] Walter Rugaber, *12 Law Officers Indicted for Mistaken Drug Raids*, N.Y. TIMES, Aug. 25, 1973, at 1.

[41] *Id.*

[42] *Id.*

[43] Pub. L. No. 93-253 (codified in 28 U.S.C. § 2680(h)).

[44] Reorganization Plan No. 2 of 1974, Pub. L. No. 93-253, 88 Stat. 50 (codified in 28 U.S.C. § 2680(h)).

[45] *See* Part IV, *infra*.

[46] 28 U.S.C. § 2680(h).

to make arrests for violations of Federal law."[47] This proviso extends, non-exhaustively, to any employee of the Bureau of Prisons, special agents of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the United States Secret Service, as well as some Postal Service, Indian Affairs, Environmental Protection Agency, and Federal Motor Carrier Safety Administration personnel.[48] It also, more obviously, extends to agents of the Federal Bureau of Investigation, Customs and Border Patrol, and Immigration and Customs Enforcement.[49] The language of the proviso, however, is an exhaustive list of enumerated intentional torts.[50] Under common law canons of statutory construction, therefore, the proviso does not extend to intentional tortious violations of constitutional rights in their capacity as constitutional violations (as opposed to their status as common law intentional torts).[51]

### *B. Bivens Actions*

In 1971, the Supreme Court developed another way for plaintiffs of tort claims against the federal government to assert their rights, this time by creating a remedy for violations of the Constitution by federal officials (so-called "constitutional torts") in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*.[52] In that case, a man was arrested and physically and emotionally abused by federal narcotics agents in his own home without a warrant or probable cause, in violation of the Fourth Amendment.[53] In criminal cases, violations of the Fourth Amendment are treated as an evidentiary concern, in which the outcome of a violation is the exclusion of the evidence that was procured by the violation.[54] In this case, however, Bivens's charges were dismissed before the case went to trial, meaning that the exclusionary rule would provide no remedy and that, in the words of Justice Harlan, it was "damages or nothing."[55] Had this been a case against state-level or local government officials, Bivens would have been able to pursue a claim under the Civil Rights Act of 1871, which provides a private right of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" when that deprivation is carried out by

[47] *Id.*

[48] 18 U.S.C. § 3050 et seq.

[49] 18 U.S.C. § 3052 (FBI); 8 U.S.C. § 1357 (CBP and ICE).

[50] 28 U.S.C. § 2680(h).

[51] Commissioner v. Clark, 489 U.S. 726, 739 (1989). An example of an intentional constitutional tort that is also a common law intentional tort would be any unlawful arrest involving the use of force, which would simultaneously be battery, false imprisonment, and a violation of the Fourth Amendment protection against unlawful seizure. *Bivens*, detailed in Subpart 2 of this section, involved just such an occasion.

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

[53] *Id.* at 389.

[54] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

[55] 403 U.S. at 410 (Harlan, J., concurring).

any official "of any State or Territory or the District of Columbia."[56] The fact that these were, as the case caption indicates, agents of the Federal Bureau of Narcotics (a precursor to the Drug Enforcement Administration), rendered the Civil Rights Act ineffective for the purposes of remedy under existing law.[57] The Court's solution cleaved the individual federal officer from the federal government's sovereign immunity protections and in so doing provided a remedy of money damages where rights had been violated.[58]

In the intervening years, the Court has operated under the understanding that *Bivens* is a truly individualistic remedy, divorced from any particular government responsibility and specifically attuned to the misuse of government power by individual officers.[59] Congress and the courts have taken this understanding seriously, limiting *Bivens* applicability to protect the normal course of government dealings, but affirming the degree to which personal liability was a defining feature of the *Bivens* action.[60] In *Carlson v. Green,*[61] the Court's holding rested on the efficacy of *Bivens*' deterrent factor on the individual level as compared to the more tenuous deterrent effect of the FTCA as alleged by the petitioners in that case.[62]

Yet new information suggests that *Bivens* claims have become unmoored from personal liability, and have been paid out by the federal government for at least the past 10 years.[63] It appears as if the government accomplishes near universal coverage of *Bivens* claims through several measures: Requesting dismissal of *Bivens* claims and resolving FTCA claims associated with the same case; settling *Bivens* claims in return for payment to be made by the United States through the nation's Judgment Fund, and

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[56] 42 U.S.C. § 1983.

[57] Bell v. Hood, 327 U.S. 678, 684-685 (1946) ("petitioners could not recover under the Constitution or laws of the United States, since the Constitution does not expressly provide for recovery in money damages for violations of the Fourth and Fifth Amendments and Congress has not enacted a statute that does so provide." The Court did not refute this proposition, but reserved the issue and returned to it in *Bivens*).

[58] *Id.* ("However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.")

[59] *See e.g.* Carlson v. Green, 446 U.S. 14 (1980).

[60] James E. Pfander, Alex Reinert, & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed,* 72 STANFORD L. REV. 561, 573-74, 76 (2020).

[61] 446 U.S. 14 (1980).

[62] 446 U.S. at 21 ("Petitioners argue that FTCA liability is a more effective deterrent [than *Bivens*] because the individual employees responsible for the Government's liability would risk loss of employment and because the Government would be forced to promulgate corrective policies. That argument suggests, however, that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights. The more reasonable assumption is that reasonable superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.").

[63] Pfander, Reinert, & Shwartz, *supra* note 60, at 579.

negotiating substitution of *Bivens* claims for FTCA claims in order to access the Judgment Fund after trial.[64] The Judgment Fund is "a permanent, indefinite appropriation that was created by Congress in 1956 to pay judgments entered against the United States."[65] The problem of the use of the Fund to pay out from institutional coffers what should be individual claims is discussed in Section III, below.

## III. PROBLEM

The above-mentioned avenues for litigation– the FTCA, and *Bivens* litigation – all contain serious weaknesses when it comes to using them to seek remedies against unlawful use of force by federal law enforcement. Because, as noted above, judgments against individual federal officers where such officers actually pay are exceedingly rare (averaging about 5 percent of cases and paying out about 1% of all settlements and judgments), this Note will proceed as if any judgment that might be obtained under the current regime would be made against the federal government.[66] Therefore, before getting to the issue of which method of liability is preferred or possible in this case, we must remember that deterrence, not mere remuneration, is the goal, and determine the threshold issue of whether it is even possible for liability to serve as a deterrent to the federal government. Richard Ausness, a Professor of Law at the University of Kentucky, sets forth three criteria that must be present in an offense and the subsequent punitive measure in order to achieve deterrence:

> First, the potential wrongdoer must know what sort of conduct is prohibited and what the potential penalty for violation will be. Second, the economic effect of the sanction must fall on the potential wrongdoer or on someone who can control the wrongdoer. Finally, the target of these punitive measures must be able to alter its conduct.[67]

To these factors I would add that the economic effect of the sanction must be such that the cost of misconduct is sufficiently high as to caution against the prospect of reoccurrence.

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[64] *Id.* at 584-86.

[65] VIVIAN S. CHU & BRIAN T. YEH, CONG. RES. SERV., REPORT R42835 THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE (Mar. 7, 2013).

[66] Pfander, Reinert, & Schwartz, *supra* note 60 at 566.

[67] Richard Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 Ky. L.J. 1, 81 (1985)

### *A. Punitive Damages Jurisprudence*

In general, a defendant is liable for punitive damages upon proof that it acted with conscious indifference to the rights and safety of others.[68] Because the federal government has never authorized courts to hold it accountable for punitive damages, this proposition must be examined through two parallel analogies: punitive damages against states and municipal governments, and punitive damages against large corporations.

#### State and Municipal Governments

In state and municipal contexts, the most readily apparent analogy for our purposes is whether punitive damages in civil rights litigation have been able to reduce instances of police brutality. The principle at work here is that the substance of the lawsuit will provide policymakers with an indication that the department needs to be reformed, and the large cash judgements will provide the incentive to police departments to accept changes to those policies.[69] In practice, however, most police departments exhibit little interest in adapting their policies in response to lawsuits.[70] A 2010 study found that over two-thirds of large police departments and four-fifths of large sheriffs' departments had no computerized system by which to track lawsuits brought against them, and the fraction of departments that had formal policies to gather data from lawsuits routinely faltered in implementing those policies.[71] In the vast majority of cases, "[t]he city attorney will defend these suits, any settlement or judgment will be paid out of the city's coffer, and the department will not keep track of which officers were named, what claims were alleged, what evidence was amassed, what resolution was reached, or what amount was paid."[72]

Nevertheless, the study found that when policymakers did successfully gather and consider this information, they used that information to reduce the likelihood of future misbehavior.[73] A separate study found that those departments–Los Angeles, Seattle, Portland, Denver, and Chicago–successfully combined lawsuit data with civilian complaints and use-of-force reports to identify officers, units, and practices that were generating policy violations and therefore litigation.[74] Officers in these systems who were found to have had engaged in serious and repeated misconduct were

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[68] Curcio, *supra* note 19 at 374.

[69] Joanna Schwartz, *Myths and Mechanics of Deterrence*, 57 U.C.L.A. L. REV. 1023 (2010).

[70] *Id.* at 1028.

[71] *Id.* Large police departments here are defined as those having over 1,000 sworn officers.

[72] Joanna Schwartz, *What Police Learn From Lawsuits*, 33 CARDOZO L. REV. 839, 844 (2012).

[73] Schwartz, *supra* note 69 at 1029 .

[74] Schwartz, *supra* note 72, at 844.

disciplined, retrained, or terminated.[75] In one highlighted case, an intervention into one station's repeated claims of misconduct consisted of mass reassignments and retrainings, and some terminations.[76] As a direct result of this data-oriented reorganization of the station, excess use-of-force claims dropped by 84%, although rates rebounded when the police department began reneging on its risk-management protocols.[77] This strict adherence to risk-management is a hallmark of deterrence-based decision-making.

Other police departments, however, have no such system, and suffer the consequences that come with a lack of oversight and an overwillingness to protect their officers. The New York Police Department provides a case study in the futility of achieving deterrence while indemnifying and holding harmless wrongdoers. In 2000, researchers identified a New York State statute, General Municipal Law Section 50-k, and a citywide practice of blanket liability coverage for intentional torts, that created a liability scheme whereby the city would indemnify and represent individual police officers in almost every circumstance.[78] They warned that, left alone, the indemnification regime would lead to officers feeling unaccountable for their conduct.[79] In point of fact, the subsequent decades proved their hypothesis completely. Tort claims against the NYPD (so-called "police action" claims) steadily increased from 1,781 in 2000 to a high of 5,640 in 2014.[80] Meanwhile, the amount of all claims against the NYPD as a percentage of all claims against the city rose from 19% in 2000 to 37% in 2013.[81] Even more troubling, police action claims surpassed other types of claims against the NYPD during this period. In 2000, police action claims represented 37% of all claims against the NYPD.[82] By 2014, that number had increased to 60%, a proportion that persists through 2019, the latest year for which there is available data.[83] These statistics suggest a police department in which overly broad immunity has fostered a culture that fails to punish negligence, recklessness, and willful wrongful actions. This, in turn, has presented a

[75] *Id.* at 857.

[76] *Id.* at 855

[77] *Id.* at 856, n.87.

[78] Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L. J. 587 (2000).

[79] *Id.* at 599.

[80] THE NEW YORK CITY OFFICE OF THE COMPTROLLER, ANNUAL CLAIM REPORT FISCAL YEAR 2000; OFFICE OF THE NEW YORK CITY COMPTROLLER, CLAIMS REPORT: FISCAL YEARS 2013 AND 2014. (Hereinafter, due to labeling disparities in the source material, Comptroller reports will be cited as COMPTROLLER CLAIMS REPORT [year(s)])

[81] COMPTROLLER CLAIMS REPORT 2000; COMPTROLLER CLAIMS REPORT 2013-2014.

[82] COMPTROLLER CLAIMS REPORT 2013-2014.

[83] COMPTROLLER CLAIMS REPORT 2013-2014.; COMPTROLLER CLAIMS REPORT 2019.

fiscal disaster for the city: In 1990, the city comptroller recorded $176 million in claim costs; by 2000, that figure reached $459 million, and in 2016 the city's claim costs exceeded one billion dollars for the first time, and stayed above one billion dollars until 2019, when the claim cost reached a mere $975 million.[84]

Large Corporations

The case is much clearer in the corporate context. The punitive damage system is designed to address corporate malfeasance, such as marketing unsafe products and trading public safety for profits.[85] The earliest punitive cases for products liability date to the mid 1960s: In *Toole v. Richardson-Merrell, Inc.*[86] and *Roginsky v. Richardson-Merrell, Inc.*[87], two courts, one in New York and one in California, found that Richardson-Merrell had seen test results that indicated that their product, an arteriosclerosis drug, could cause cataracts. While the courts differed in whether punitive damages were appropriate, they evaluated the proposition under similar criteria to one another. The Southern District of New York court concluded that punitive damages were inappropriate because the highest authorities at Richardson-Merrell did not participate in nor ratify the wrongful acts of the lower-level employees in charge of testing or marketing.[88] The California Court of Appeal held that the highest authorities had acted recklessly and in wanton disregard of harm, which was sufficient to support a finding of malice.[89] Later case law elaborated on justifications for punitive damages: They served a deterrence function where products caused diffuse minor injuries such that it was cheaper for the manufacturer to pay compensatory damages than to remedy the product's condition;[90] they prevented reckless or willful

[84] COMPTROLLER CLAIMS REPORT 2016; COMPTROLLER CLAIMS REPORT 2019. As a post-script to this section, it bears mentioning that the will of the New York City Council appears to be in agreement with the general principle of accountability On March 25, 2021, the City Council passed legislation to side-step the doctrine of qualified immunity for police officers by establishing a local civil right of action against unreasonable search and seizure and against excessive force that expressly eliminates "qualified immunity or any other substantially equivalent immunity. N.Y.C. Admin. Code § 8-801 et seq. (2006).

[85] Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damages Reform*, 46 AM. U.L. REV. 1573 (1997). Quoting Senator Ernest Hollings: "We could spend an afternoon pointing out the good that product liability has done. We do not get blown up by that Pinto gas tank. Cars all have antilock brakes. That elevator is checked. The steps are marked. Little children do not burn up in flammable pajamas. The women of America are not threatened with Dalkon Shields."

[86] 251 Cal. App. 2d 689 (1st App. Dist., 1967).

[87] 378 F.2d 832 (2d Circ., 1967).

[88] 378 F.2d at 844-845 ("there is no evidence that management was aware of this failure.").

[89] 251 Cal. App. 2d at 714 ("there is evidence from which the jury could conclude that appellant brought its drug to market . . . in reckless disregard of the possibility that it would visit serious injury upon persons using it.").

[90] Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979).

bad actor manufacturers from gaining unfair commercial advantages over competitors who took pains to design their products safely;[91] they bolstered federal product quality regulations; and they encouraged shareholders and corporate management to exercise closer control over company operations.[92] Since that time, litigation has centered around environmental and health damage related to large chemical dumping operations[93], unintentional use of harmful chemicals in insulation (i.e. asbestos)[94], and intentional use of harmful chemicals for public consumption (i.e. cigarettes and nicotine).[95]

The actual efficacy of this deterrence, which is to say whether punitive damages in corporate contexts lived up to the expected deterrent value, is a matter of deep debate. Evidence suggests that jurors excel at producing damages claims that accurately reflect the severity of the harm caused, the defendants' degree of culpability as reflected in their conduct, and the monetary figure required to deter and punish particular actors.[96] Each of these factors are approved by the Supreme Court for fair evaluation of a deterrence-based punitive damage claim.[97] At the same time, some studies have found that jurors are more predisposed to assessing damages through a retributive lens than in a way consistent with optimal deterrence theory.[98] A 1993 study of prospective jurors found that most participants would "assess the same punishment against the defendant company whether the effect of the punishment would be to cause the company to manufacture an even safer product or to cease making the product altogether (even though the product was safer than the alternatives)," and in fact participants explicitly intended the formulation of damages to serve a retributive end, not a deterrent one.[99] Another, more severe difficulty, is that the kind of group deliberations that characterize jury decision-making tends to favor the "liability result favored

[91] *Id.* at 47.

[92] Wangen v. Ford Motor Co., 294 N.W.2d 437, 451-52. (Wis. 1980)

[93] *Id.* at 453-54.

[94] *See e.g.* Fischer v. Johns-Manville Corp., 472 A.2d 577 (N.J. 1984)

[95] *See e.g.* Phillip Morris USA v. Williams, 549 U.S. 346 (2007).

[96] Jennifer K. Robbennolt, *Determining Punitive Damages, Empirical Insights and Implications for Reform*, 50 BUFFALO L. REV. 103, at 119, 21, 23 (2002).

[97] *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993). The Eighth Amendment bars "excessive bail," "excessive fines," and "cruel and unusual punishments." The Court's plurality opinion reasoned that a variety of factors must be considered in determining if a fine is excessive, with Justice Kennedy asserting in a concurrence that malice on the part of the tortfeasor and a lack of bias or passion on the part of the jury were the most important factors in judging a punitive damage award to be proper. Justice Scalia's concurrence simply stated that there was no federal right to evaluation of a state supreme court's affirmation of a punitive damages award through traditional procedure.

[98] Jennifer K. Robbennolt, *Determining Punitive Damages, Empirical Insights and Implications for Reform*, 50 BUFFALO L. REV. 103, at 119, 21, 23 (2002).

[99] *Id.* at 131.

predeliberation by the majority" of the group.[100] What this all means is that decision-makers in corporate leadership will be aware of this information and will, overall, be less likely to conduct activities in ways that assume that it will be a wholly rational, deterrence-focused actor who holds them accountable.[101] Their patterns of decision-making, therefore, may be bolder, less careful, and more interested in optimizing short-term profit: In short, more dangerous than a company that was the subject of deterrence-based oversight rather than less-rational retributive consequences.[102]

### *B. Structural Weaknesses in The Law*

Modern Monetary Theory, The Judgment Fund, and Tort Deterrence

A full accounting of why punitive damages against the government in the traditional sense are futile requires a brief introduction to Modern Monetary Theory ("MMT"). In the mainstream view of macroeconomics, the federal government's funds are inextricably and directly tied to its ability to tax, and the funds spent by the government may not exceed the funds that it collects through taxation (or other forms of revenue collection such as government bonds).[103] MMT, by contrast, asserts that taxation and bond sales are incapable of financing government spending, and that modern sovereign governments actually use a sophisticated system of monetary creation and destruction to control interest rates and finance spending.[104] What this means is that, while governments that issue their own currencies must follow certain rules in order to curb inflation, they are not constrained by the kind of dollar-in, dollar-out budgetary analysis that form the foundation of tort law and economics.[105]

The problem presented by Modern Monetary Theory is even more severe than it initially appears. MMT exacerbates transforms the worst-case scenario specter that Congress may grant agencies unlimited authority to pay out claims with little or no financial impact, but the reality that it has already

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[100] *Id.* at 137.

[101] James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 L. AND CONTEMPORARY PROBLEMS 1, 8 (Autumn, 1997) ("Moreover, entity liability places responsibility upon the party [the corporation] with the greatest knowledge and control of the risks of its activities…").

[102] *Id.* at 10 ("[privately-motivated attempts to detect and mitigate misconduct] will be imprecise . . . entail significant transaction costs by the parties [and . . .] is likely to prove inefficient.. . which will understate the harm actually caused by the agent who does misbehave.").

[103] Dylan Matthews, *Modern Monetary Theory Explained*, VOX.COM (Apr. 16, 2019, 1:00 PM), https://www.vox.com/future-perfect/2019/4/16/18251646/modern-monetary-theory-new-moment-explained.

[104] Stephanie Bell, *Can Taxes and Bonds Finance Government Spending?*, JEROME LEVY ECONOMICS INSTITUTE (July 1998), 3, http://www.levyinstitute.org/pubs/wp244.pdf.

[105] Matthews, *supra* note 103; Richard A. Posner & William M. Landes, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1980).

done so. In 1956, Congress enacted a statute to enable the creation of the Judgment Fund, a permanent and indefinite appropriation that made payments of up to $100,000 available for judgments against the United States.[106] The Fund's authority was expanded in 1961 to authorize payment for settlements negotiated by the Department of Justice, and it expanded again in the 1970s to remove the $100,000 per judgment cap.[107] Today, the Judgment Fund operates as a black hole of deterrence, absorbing $20 billion in litigation costs from 2016 to 2020.[108] FTCA claims play a substantial role in this calculus: Federal tort claim liability sits at an average of $261 million per year over the last ten years.[109] Although the U.S. Treasury releases a yearly accounting of expenditures under the FTCA, there is no comprehensive report of the claims behind these numbers, the merits to those claims, or the disposition of those claims, in any such similar manner as the Los Angeles Police Department lawsuit evaluation database.[110]

The Federal Tort Claims Act

Section 410 of the FTCA bars courts from ordering punitive damages from the government.[111] Because of this limitation, the FTCA cannot provide the deterrent necessary to ensure that federal bad actors will think twice before violating civil rights. During the George Floyd protests, news reports indicated that the targeted protestors were held in confinement for less than half a day, meaning that their ability to collect damages from the government will be severely restricted.[112] False imprisonment and assault claims routinely fall in the low five figures range for damages,[113] which is insufficient to deterring DHS, which had a $51 billion discretionary budget in the 2020 fiscal year.[114]

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106 31 U.S.C. § 1304; CHU, *supra* note 66.

107 CHU, *supra* note 66.

108 BUREAU OF THE FISCAL SERVICE: JUDGMENT FUND (2020). It should be noted that 2020 was a significant outlier year in which the Centers for Medicare & Medicaid Services paid out $5.6 billion in judgments for breach of contract. Without this outlier, the Judgment Fund's yearly average payout is a comparatively modest $2.8 billion.

109 *Id.*

110 Schwartz, *supra* note 72 at 850.

111 Pub. L. No. 79-601 ("Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, *or for punitive damages*.") (emphasis added).

112 Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protestors Off Portland Streets*, OPB (July 16, 2020, 5:45 PM), https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/ .

113 See e.g., Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978) (around $50,000); Scofield v. Critical Air Medicine, Inc., 45 Cal. App. 4th 990 (Ct. App. Cal., 2d App. Dist., 1996) ($60,000).

114 DEPARTMENT OF HOMELAND SECURITY, BUDGET IN BRIEF (2020) at 1; see also discussion of Modern Monetary Theory, *infra* Part III.2.a.

There is also some as-yet-undiagnosed significant barrier to recovery under the FTCA, which bears further study. For now, a quantitative analysis of successful FTCA claims reveals that plaintiffs prevail in just over a quarter of tort claims.[115] By comparison, a 2005 study by the Department of Justice found that approximately 68% of tort plaintiffs in the civil suits in the United States prevail in their claims.[116] Plaintiffs filing under the FTCA therefore have lower expectations of success as a result of filing, which may serve as a dampening effect on the filing of meritorious claims in the first place.

*Bivens*

The holding in *Bivens*, which expresses that individual federal officers may be held liable for damages from intentional constitutional torts, has been abrogated by government practice and procedure. The first obstacle to liability is that, for decades, it has been far more likely for a *Bivens* claim to fail than not.[117] Between 1971 and 1985, 12,000 *Bivens* claims were filed and in four cases was judgment found in favor of the plaintff.[118] From 1985 to 1999, unofficial estimates indicated that less than one percent of *Bivens* cases end in damages or a monetary settlement.[119] More recently, numbers have been slightly less dire: LexisNexis identifies 12,063 *Bivens* cases closed between 2007 and 2017.[120] A recent study determined that the Bureau of Prisons, only one of many federal agencies, had paid out 171 successful *Bivens* claims in that timeframe.[121] The second obstacle is that, in those rare cases where liability is determined in the plaintiff's favor, it is far more likely than not that the damages are paid by the federal government rather than the individual officer responsible for the misconduct.[122] Therefore, indemnification of *Bivens* awards is a critical problem in using damage awards to deter individual federal actors. The Bureau of Prisons study also revealed that, out of the $18.9 million paid to the plaintiffs in these cases,

115 U.S. ATTORNEY'S OFFICE, DEP'T OF JUSTICE, ANNUAL STATISTICAL REPORT, FISCAL YEAR 2018 20, https://www.justice.gov/usao/page/file/1199336/download.

116 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TORT BENCH AND JURY TRIALS IN STATE COURTS, 2005, 12, http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf .

117 Cornelia T. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 66.

118 *Id.* This claim, however, has been criticized for its accuracy and for the narrowness with which it defines success. *See* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (Mar. 2010).

119 *Id.*

120 Search result for "Bivens Action," LexisNexis, https://plus.lexis.com/zhome/ (enter "Bivens Action" in the search field, then check "Federal District Court" under jurisdiction).

121 Pfander, Reinert, & Schwartz, *supra* note 60 at 566.

122 Pillard, *supra* note 117 at 66.

individual state actors or their insurers were liable for only $61,163, which is less than half of a percent of the total.[123]

This staggering imbalance between cause and consequence is the result of doctrines and practices that have been put in place to protect and insulate federal officials from liability in a personal capacity: the doctrines of qualified immunity and heightened pleading, the court practice of interlocutory appeals, and the government practice of indemnification.[124] Of these factors, indemnification has the least force of law or precedent behind it, and is therefore the most assailable.

The presence of the FTCA, additionally, complicates attempts to hold the Federal government liable with a *Bivens* action. In *Ziglar v. Abassi*, the Supreme Court held that existing statutory processes for protecting rights are a significant barrier for courts to infer causes of action under *Bivens*.[125] As a result of this development in *Bivens* litigation, the existing statutory process of relief under the FTCA stands as the sole remedy, thereby barring punitive damages or other non-compensatory damages in general.[126]

### *C. The Culture Problem*

As noted throughout this piece, theories of deterrence presuppose rational actors who aren't guided by violent ideology.[127] This presupposition stands in stark contrast to the reality that many officers within the security state join for ideological reasons, having bought into a worldview that equates violent suppression of social movements with notions of law and order. One of the principal agencies involved in Operation Diligent Valor, Customs and Border Patrol, is the subject of extensive reporting regarding its culture of open antagonism against racial minorities, especially Latinx individuals.[128] Of course, the U.S. Border Patrol (the precursor to Customs and Border Patrol) has a long history of anti-Latinx and anti-Black violence, stemming from its earliest days as a haven for members of the Ku Klux Klan.[129] Contemporaneous with Operation Diligent Valor, Customs and

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123 Pfander, Reinert, & Schwartz, *supra* note 60 at 566.

124 Pillard, *supra* note 117 at 80-86, 95.

125 137 S. Ct. 1843, 1858 (2017) ("if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action").

126 *Id.*

127 See, e.g., Subpart II.A, *supra*.

128 A.C. Thompson, *After A Year of Investigation, the Border Patrol Has Little to Say About Agents' Misogynistic and Racist Facebook Group*, PROPUBLICA (Aug. 5, 2020, 5:00 A.M), https://www.propublica.org/article/after-a-year-of-investigation-the-border-patrol-has-little-to-say-about-agents-misogynistic-and-racist-facebook-group.

129 Katy Murdza & Walter Ewing, PhD., *The Legacy of Racism within the U.S. Border Patrol*, AM. IMMIGR. COUNCIL (Feb. 10, 2021), https://www.americanimmigrationcouncil.org/research/legacy-racism-within-us-border-patrol.

Border Patrol finalized a year-long internal investigation into 138 employees, which found that four had committed fire-able offenses, thirty-eight had committed offenses of sufficient severity to justify suspension without pay, and twenty-seven had committed lesser offenses.[130]

The investigation appears on its face to have been severely limited in order to give the appearance of due diligence without the requisite substance. It looks that way for two reasons: First, the investigation itself stemmed from involvement in a secret Facebook group which at one point had had 9,500 members, out of which only 69 people were current federal officers who had committed offenses.[131] Secondly, the internal probe refused to reveal the exact offenses which led to the punishments, even going so far as to refuse to cooperate with requests for information from the House Committee on Oversight and Reform and arguing in court that documents identifying Border Patrol agents accused of misconduct should not be released to the public.[132] This defiance and refusal to turn over information regarding cultural indicators of white supremacy within a government agency is troubling, and indicates that the Trump-era CBP believed that it should be free from oversight of the Democrat-controlled House and from judgment in the court of public opinion.

Closer to the top of the hierarchy, the Department of Homeland Security's then-Acting Secretary Chad Wolf refused to step down after courts held that he was holding the position in violation of the Administrative Procedures Act, and refused to respond to House subpoenas.[133] More troubling still is that the reason why Wolf was subpoenaed to appear before the House was that a whistleblower within DHS had reported that the Department had, among other things, held multiple meetings, the purpose of which was to "downplay[] the domestic threat posed by white supremacists and focus[] more on militant leftist movements like antifa."[134] These factors, taken together, indicate an institutional unwillingness to be held accountable, which may translate into top-down immunity from meaningful internal accountability.

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130 Molly O'Toole, *Border Agency Fires 4 for Secret Facebook Groups with Violent, Bigoted Posts*, L.A. TIMES (July 16, 2020), https://www.latimes.com/politics/story/2020-07-16/border-patrol-fired-for-secret-facebook-group-with-violent-sexist-posts .

131 *Id.*

132 Thompson, *supra* note 128.

133 Priscilla Alvarez & Geneva Sands, *Acting Homeland Secretary Chad Wolf Defies Subpoena and Skips House Hearing*, CNN (Sept. 17, 2020, 12:56 PM), https://www.cnn.com/2020/09/17/politics/chad-wolf-house-subpoena/index.html .

134 Greg Myre, *Whistleblower Alleges DHS Told Him to Stop Reporting on Russia Threat*, NPR (Sept. 9, 2020, 4:28 PM), https://www.npr.org/2020/09/09/911188416/whistleblower-alleges-dhs-tried-to-alter-intelligence-to-match-trumps-claims.

## IV. PROPOSAL

So far, this Note has illustrated the severe issues with federal intentional tort and constitutional tort jurisprudence, namely that: damages available under the FTCA are too limited to achieve the deterrent effect that punitive damages serve in business and personal tort contexts; damages available under *Bivens* litigation are not paid out with sufficient regularity to encourage plaintiffs to attempt to resort to the remedy; and the presence of the Judgment Fund and minimal oversight thereof threatens, as indemnification schemes do in municipal and state-level contexts, to fully dissolve the causal link between wrongful act and retributive or deterrent consequence.

This Note proposes that the federal government "commit to the bit" of liability and take tangible steps to guarantee 1) that specific agencies, through consequential indemnification, or individuals, through *Bivens* liability requirements, feel the budgetary impact of FTCA and *Bivens* claims; 2) that the public is aware, through publicity campaigns, Congressional hearings, and public service announcements, of the harm done and the steps that the government is taking to deter future misconduct; 3) that agencies are aware, through adequate record-keeping and data analysis, of the factors that led to litigation; and 4) that plaintiffs are incentivized to file suits, in order to provide an impetus for the federal tort system to function.

This Note also proposes the installation, perhaps under the auspices of the Office of the Inspector General, of a commission dedicated to investigating how the American culture of white supremacy might have contributed to the injustices that launched the Black Lives Matter movement and, subsequently, the decisions made during Operation Legend and Operation Diligent Valor. Above all else, policymakers reacting to this problem must recognize that limiting government harm to the freedom of assembly must be pursued ferociously and with immediacy, as attacks on unarmed protestors by government officers are catastrophic to the health of a democracy.[135]

### *A. Bivens Unchained*

As noted above, the federal government is far too well-funded to be vulnerable to the kinds of awards that would be constitutional under the Eighth Amendment.[136] Not only is the United States government well-funded, its ability to raise capital is, in the eyes of many economists,

[135] Protect Peaceful Assemblies; Limit Use of Force, AMNESTY INTERNATIONAL (October 21, 2020), https://www.amnestyusa.org/press-releases/protect-peaceful-assemblies-limit-use-of-force/

[136] *See* BMW of North America, Inc., v. Gore, 517 U.S. 559, 574-75 (1996) (explaining the Constitutional limitations on punitive damages).

effectively limitless.[137] Additionally, allowing plaintiffs to sue the United States for the amounts necessary to have an impact on the operations of the country would prove to be too lucrative of a target, and might give rise to a flood of frivolous litigation.[138]

The solution, then, is to remove the patina of legal fiction from *Bivens* actions. As illustrated by the 2020 study on *Bivens* outcomes,[139] this can be done through two means: Restoring and solidifying individual liability, or implementing departmental liability. At least one department involved in Operation Diligent Valor, the Bureau of Prisons, treats viable *Bivens* claims as payable under the FTCA and the Judgment Fund.[140] Removing these protections from the defendants would expose them to a degree sufficient to cause similarly situated defendants to question orders that flagrantly violate the Constitution.[141]

In the George Floyd context, these remedial measures would have immediate and salutary effect. In Portland, the ACLU has filed a complaint on behalf of eight named persons and two named organizations against Donald Trump, Chad Wolf, the DHS, United States Marshals Service, the Regional Director of the Federal Protective Service, and two hundred unnamed defendant employees who took part in Operation Diligent Valor. The complaint alleges that the plaintiffs were abducted by unidentified federal officials, shot at using impact munitions, shot in the head with tear gas cannisters, physically assaulted, blinded with flash-bangs and pepper-spray, and had their free speech rights severely curtailed by unlawful government intimidation and violence.[142] The complaint notes that, outside

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137 Matthews, *supra* note 103.

138 Theoretically, this would be accomplished by waiving the limitation on punitive damages in claims brought under the Federal Tort Claims Act. Allowing for effectively deterrent punitive damage awards against the United States may also violate Eighth Amendment restrictions on punitive damages such as those announced by the Supreme Court in *TXO,* 509 U.S. 443.

139 Pfander, Reinert, & Schwartz, *supra* note 60 at 561.

140 *Id.* at 622.

141 *Id.* at 566 (claimants received an average of $110,500 in either settlements or judgments – such judgments would be ruinous to most individual federal officials).

142 Complaint & Demand for Jury Trial at 27 (Plaintiff Mark Pettibone, "snatched off the stretet and put in an unmarked van by unidentified men in military-style uniforms who did not explain their actions, searched his possessions without consent, and help him in jail with no explanation"), 29 (Plaintiff Mac Smiff, "shot in the right side of his face with an indelible hard-cap paintball"), 30 (Plaintiff Andre Miller, "an unidentified federal officer shot him in the head with a tear gas canister, causing a gash in his head that required seven stitches and a concussion"), 31-32 (Plaintiff Nichol Denison, "approximately five. . . federal officers dressed in black with the label "DHS" on their chest came out from the Hatfield Courthouse. . . They had their weapons drawn and pointing directly at [Ms. Denison.] Without any warning, the officers then began firing at Ms. Denison and the other women through gaps in the fence. The weapons appeared to be shooting pepper balls or bullets the size of paint balls. . . [Denison] was then struck far more forcefully in the head by a tear gas cannister.", 35 (Plaintiff Maureen Healy, "hit in the head with a projectile that felt metallic and the size of a small can."), 38-39 (Plaintiff Christopher David, "[an] officer plowed into Mr. David to knock him back. . . Two federal officers then approached Mr.

of *Bivens*, the plaintiffs have no adequate alternative remedy for the intentional, malicious, and reckless violations of their federally protected civil rights.[143] However, as discussed in Part III, none of the 200 unnamed defendants are likely to spend a day in court or face any risk of personal liability for their actions that led to this complaint. Even former President Trump and former Director Wolf will be protected, because the Department of Justice's Constitutional Torts staff provides representation to current as well as former members of government.[144] Restoring universal individual liability to *Bivens* actions would expose hundreds of currently active federal officials to the consequences of their own actions at the stroke of a pen. The alternative, implementing departmental liability for *Bivens*, would cause a reckoning within the Department of Homeland Security as to whether and how certain federally mandated programs will be able to remain solvent, forcing DHS to appeal to Congress for an increase in funding. Either effort would doubtlessly send shockwaves of accountability through the federal government.

### *B. Show, Don't Tell: Public Accountability Hearings for Tortious Offenders*

Creating strict departmental limits on judgment amounts is another option: Under the proposed regime, taking inspiration from FDR's proposed legislation, departments could freely settle individual claims or pay out duly adjudged damages awards for amounts up to $100,000 (or, for example, $500,000 in total claims/awards within a calendar year) without Congressional authorization.[145] Any larger amount, following a final verdict, would necessitate a hearing before the relevant committees in the House and Senate, which would interrogate the officials as to their misconduct and authorize payouts against the department. This would mitigate the issue of flooding Congress with private bills while simultaneously providing the

David, one after the other, and struck him with their batons while one of them deployed a canister of chemical irritant spray directly into Mr. David's face. Mr. David was able to knock the cannister away in self-defense only to have another officer approach and spray him in the face again." 41 (Plaintiff Duston Obermeyer, "[the officer who struck Mr. David with a baton] then tried to strike Mr. Obermeyer. Other officers then approached and one pointed an automatic weapon in Mr. Obermeyer's face while another shot him at point-blank range with an orange chemical irritant. One of the officers also struck Mr. Obermeyer in the face and chest with a baton.", 43 (Plaintiff James McNulty, "A flash-bang grenade [went] off at Mr. McNulty's feet, and the area began to fill with tear gas, which was blowing towards Mr. McNulty. . . The federal officers then shot Mr. McNulty four times: three times with rubber bullets and one time with a pepper ball. He was given no warning and was not disobeying any orders or engaging in any violence before he was shot."), Pettibone v. Trump, No. 3:20-cv-1464 (D. Or. Aug. 26, 2020).

143 *Id.* at 48.

144 DEP'T OF JUST., JUSTICE MANUAL § 4-5.120 (2018).

145 *See* Subpart III.B., *supra*.

public with an accounting and sense of closure regarding government misconduct.

Additionally, this method of enforcement may be uniquely situated to succeed in the information age: the internet and mass communications have rendered greater access to congressional hearings than ever before.[146] These hearings are critical to informing the public and ensuring the public trust in government, factors which are vital to the satisfactory resolution of incidents involving excessive government force. It would be a simple matter to be able to take advantage of the renewed public interest in the workings of government by allowing Representatives and Senators to command the bully pulpit against constitutional tortfeasors before rendering a public ratification of the jury's verdict, with detailed instructions on how this award must be taken out of the agency's individual budget so as to minimize the probability that the behavior will reoccur.

The issue with this proposal is that divided committees may split across partisan lines, with elected officials lining up to defend employees of administrations that they share a party with, and their counterparts on the other side of the aisle using these hearings as sounding boards for pet issues and other irrelevancies. However, this process, coming as it would on the tail end of an adjudication and a finding of fact, might persuade representatives to limit their remarks only to the settled case at issue.

### *C. Implementing Tort-Tracking at The Federal Level*

Taking advantage of the rich information-flow provided by FTCA and *Bivens* lawsuits is also important to eliminating recurrence and backsliding by government actors. A centralized database of tort claims, modeled on the LAPD approach,[147] should be developed, and an overseeing agency appointed and charged with monitoring, analyzing, and reporting on said database. This overseer can coordinate with the different Inspectors General of the different departments and develop risk-management strategies that will safeguard constitutional and common law rights.

### *D. Easing the Violation-to-Lawsuit Pipeline*

The problem with this proposal is that lawsuits themselves are a deeply flawed means of effecting change in a community or legal system because they are not always a predictable means of redress.[148] As noted by Professor

[146] E.g. Wolfram Alpha reports that C-Span.org receives 220,000 visitors per day. WOLFRAMALPHA, WEB *Web statistics for all of c-span.org:* (Dec. 20, 2020) https://www.wolframalpha.com/input/?i=c-span.org.

[147] *See* Subpart II.B, *infra*.

[148] Schwartz, *supra* note 72 at 845.

Joanna Schwartz of the University of California in Los Angeles, "[a]ggrieved parties rarely file lawsuits and, when they do, plaintiffs win and lose for reasons . . . divorced from the merits of their claims. Cases drag on for years and are often brought against individual bad actors instead of the institutional players best positioned to address systemic harms."[149] This flaw is not fatal to the proposal but bears consideration and further study. Systemic changes like the universal right to counsel for civil claims may represent part of the solution to the first problem identified by Professor Schwartz.[150] This way, the potential universe of plaintiffs with meritorious claims would be expanded, thus creating more opportunities and more data points for the government to track bad actors and flawed agency procedures. The problem of bringing cases against individual bad actors can be mitigated in this case by hewing to the institutional liability solution proposed in the section above.

It is too early to say how many victims there are of violence in the federal response to the George Floyd uprising. At the height of the protests, tens of thousands of people marched in cities and town all across of America on a near-daily basis, and police responded with force in many of these cases.[151] Even if the number of protests violently policed by Diligent Valor operatives is a small fraction of the national total, and even if the number of protestors subjected to excessive and constitutionally violative use of force is a low percentage of the number of protestors in attendance, it's possible that hundreds of plaintiffs may be able to make colorable claims against the Diligent Valor agencies. The federal government should do everything in its power to develop a mechanism for swift, smooth, remunerative, and deterrent processing of claims against it, potentially using the public inquiry model addressed below.

### *E. Truth and Reconciliation for the Trump Era*

If one thing is clear from the behavior of federal officials and ground-level law enforcement during Operation Legend and Operation Diligent Valor, it is that a culture of impunity exists and pervades multiple federal agencies, including the Bureau of Prisons and the Department of Homeland Security. Without due caution, ratcheting up individual liability for renegade federal officers runs the risk of encouraging defiance to the rule of law within these agencies, creating a similar culture of silence to that which pervades

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149 *Id.*

150 For further reading on the Civil Gideon Movement, which advocates for a universal right to counsel in civil and criminal contexts, *see* Robert J. Derocher, *Access to Justice: Is Civil Gideon a Piece of the Puzzle?*, BAR LEADER (July-Aug. 2008).

151 Madeline Holcombe, *Tens of Thousands March in Largest George Floyd Protest So Far in the U.S.* CNN (June 6, 2020, 10:42 PM), https://www.cnn.com/2020/06/06/us/us-george-floyd-protests-saturday/index.html.

municipal police departments around the country. It is therefore necessary to empanel a commission or agency, with functional independence from the executive branch, that can handle the investigation of meritorious *Bivens* claims, especially those related to racially-motivated government use of force, in an impartial and professional manner.

These commissions can go further than merely overseeing claims, however. Some countries, such as South Africa and Tunisia, that have emerged from authoritarian regimes have instituted truth and reconciliation commissions in order to promote national harmony following periods of intense social and political strife.[152] The United States has also tried its hand at developing similar commissions, most prominently in response to the Greensboro Massacre of 1979.[153]

These commissions, however, are limited in scope and often cannot incorporate further developments. Another promising model is an ongoing commission: In Canada, "public inquiry" tribunals hold broad authority, hold hearings, and issue reports about miscarriages of justice, with causes, remedies, and compensation for the aggrieved.[154] In the United States, this investigatory model is already at work at the National Transportation Safety Board (NTSB), which inquires into what went wrong and how it can be fixed, and also has broad penalty-issuing authority.[155]

Multiple cities have already committed to developing localized commissions, which have been dubbed Truth, Justice, and Reconciliation Commissions, in the aftermath of local Black Lives Matter protests.[156] The

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[152] Noha Abdoueldahab, *The United States Needs a Truth Commission. It Should Be Televised.*, FOREIGN POLICY (July 24, 2020, 11:45 AM), https://foreignpolicy.com/2020/07/24/united-states-racism-truth-commission-televise-south-africa-tunisia/ .

[153] Olivia Ensign, *Speaking Truth to Power: An Analysis of American Truth-Telling Efforts Vis-à-vis the South African Truth and Reconciliation Commission*, 42 N.Y.U. REV. L. & SOC. CHANGE 1 (2018). The Greensboro Massacre was an incident in which members of the Ku Klux Klan and the American Nazi Party, with the cooperation of the Greensboro Police Department, descended on protestors in the town of Greensboro, North Carolina. Five protestors were killed, and none of the attackers were convicted of the murders. CITE. In 2004, following a court order for the city of Greensboro to pay $351,500 for the wrongful deaths of the deceased, local activists empaneled the Greensboro Truth and Community Reconciliation Project (GTCRP), composted of seven democratically-elected panelists whose mission was to examine the context, causes, sequence, and consequences of the Massacre, and to make recommendations for community healing. Alisha Ebrahimji, *Decades After Klansmen Killed 5 During Protest, a North Carolina City's Apology Comes Too Late for Some*, CNN (Oct. 14, 2020, 7:43 PM), https://www.cnn.com/2020/10/14/us/greensboro-historic-apology-trnd/index.html ; MUKHTA JOST ET AL., GREENSBORO TRUTH AND RECONCILIATION COMMISSION REPORT 2 (2006), https://greensborotrc.org/exec_summary.pdf .

[154] Barry Scheck, *Conviction Integrity Units Revisited*, 14 OHIO STATE J. CRIM. L. 706, 710-11. (2017).

[155] *Id.* at 710.

[156] *Three US Cities Pilot Truth, Reconciliation Push to Tackle Racism*, AL JAZEERA (July 2, 2020), https://www.aljazeera.com/news/2020/7/2/three-us-cities-pilot-truth-reconciliation-push-to-tackle-racism .

purpose of these commissions is to enable community-centered, localized efforts to address the harms of unaccountable, unjust, and racist policing and prosecution.[157] Such commissions could call attention to the consequences of slavery and how Black Americans have contributed to and been excluded from society to varying degrees since the beginning of American history, and how those social patterns are reflected today.[158] Other scholars as well as members of Congress have proposed the creation of a truth and reconciliation commission on racial injustice in the United States.[159] They suggest staffing the commission with elected commissioners with a reputable record of truth-seeking efforts in order to galvanize a national dialogue to complement the work of city- and state-level commissions.[160] These commissions should be developed at the national level post-haste, and should incorporate the no-fault principles enshrined in the NTSB inquiry model, which prioritizes developing a factual record of technical errors over the development of a fault-based narrative.[161] If America can undergo a national reckoning that acknowledges the immense racial pain and suffering caused by centuries of white supremacy that nevertheless forgoes blaming individual actors and instead focuses on the mechanics of how its institutions have shaped and perpetuated white privilege, the next round of racial justice protests may be informed by this effort and may involve less violence and more dialogue and reparations.

## V. CONCLUSION

The George Floyd round of Black Lives Matter protests exposed the willingness of certain actors within the federal government to use ruthless, public, well-documented violence against protestors in the name of law and order. The memory of armed and armored paramilitary police marching through Portland, Seattle, Washington D.C., and other cities will no doubt remain seared in the minds of a generation of Americans, long after the memory of the purported rationale for their actions (a handful of graffiti

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157 *Id.*

158 Richard Bammer, *Is a U.S. Version of South Africa's Truth and Reconciliation Commission Warranted?*, VACAVILLE REPORTER (Oct. 25, 2020, 6:00 A.M.), https://www.thereporter.com/2020/10/25/richard-bammer-is-a-u-s-version-of-south-africas-truth-and-reconciliation-commission-warranted/.

159 Noha Abdoueldahab, *The United States Needs a Truth Commission. It Should Be Televised.*, FOREIGN POLICY (July 24, 2020, 11:45 AM), https://foreignpolicy.com/2020/07/24/united-states-racism-truth-commission-televise-south-africa-tunisia/.

160 *Id.*

161 Scheck, *supra* note 154 at 710 (suggesting that federal or state entities could "investigate wrongful convictions like the [NTSB] investigates plane crashes or train derailments, asking only 'what went wrong and how can it be fixed?'").

incidents and smashed retail windows) has faded.[162] Where many have advocated for closure for the wrongs that ignited the Black Lives Matter protests by calling for greater police accountability,[163] limitations on the doctrine of qualified immunity,[164] and decreased funding for police,[165] comparatively few have sought to tie the loose ends of the wrongs that followed them. And yet, it is as imperative to hold the murderers – whose names are widely known – of Ahmaud Arbery, Breonna Taylor, and George Floyd accountable as it is to hold accountable the hundreds of federal officials who operated under a cloak of secrecy, with an unclear mission, and in many cases volunteered for operations of dubious legality – the vast majority of whom remain unknown to the public or to potential litigants.

The twin reforms outlined in the section above are necessary to bringing the stories of pain and injustice suffered under Operation Diligent Valor to light, to give plaintiffs and defendants alike a chance to share their narratives in a clear, impartial, public setting, and to stop the culture of militarization and polarization of our nation's civilian law enforcement agencies dead in its tracks. It is not enough to depend on President Trump's status as a historical outlier in defending against excessive uses of federal force. If these reforms are not adopted, the wounds that divide the American public will fester under cover of darkness, and the attacks on civil liberties which played out over the course of the summer of 2020 can only repeat.

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[162] DEP'T. OF HOMELAND SECURITY, ACTING SECRETARY WOLF CONDEMNS THE RAMPANT LONG-LASTING VIOLENCE IN PORTLAND (2020), https://www.dhs.gov/news/2020/07/16/acting-secretary-wolf-condemns-rampant-long-lasting-violence-portland.

[163] Stephen Joyce, *George Floyd Death Drives Police Accountability Laws Nationwide*, BLOOMBERG LAW (Mar. 18, 2021, 6:00 AM), https://news.bloomberglaw.com/social-justice/george-floyd-death-drives-police-accountability-laws-nationwide.

[164] Ed Yohnka et al., *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/ .

[165] *See, e.g.*, defundpolice.org, a collaboration between the Movement for Black Lives and multiple other community groups intended to serve as a comprehensive resource for organizers to procure resources, trainings, budget tools, and other information in pursuit of the campaign to defund the police.