Deficiencies in the Federal Tort Claims Act "Law Enforcement Proviso" and the Need for Reform

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ABSTRACT: The United States is generally immune from claims against it based on intentionally tortious conduct of its agents due to the doctrine of sovereign immunity. One provision, the "Law Enforcement Proviso," provides a waiver of sovereign immunity for claims arising from six intentional torts so long as they are committed by an "investigative or law enforcement officer." This Note describes and analyzes challenges plaintiffs face in bringing a claim pursuant to the Proviso. Two of these challenges inhere in the statutory text, while the third follows from competing interpretations of controlling case law. Although a minority of circuit courts are expanding the scope of this provision, this trend is limited.

This Note thus analyzes how congressional expansion of the scope of the Law Enforcement Proviso could better align the statute with primary principles and purposes of tort justice. It argues that the theory of enterprise causation and concept of foreseeability justify expansion of the scope of the Law Enforcement Proviso. In the interest of corrective justice and good social policy, this Note forwards a novel, narrowly tailored proposal to amend the Law Enforcement Proviso, situating that proposal among a spectrum of alternative solutions. Finally, this Note applies the proposal to five test cases to illustrate its potential impact.

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I. INTRODUCTION

The early 1970s featured several events that focused public attention on the actions of federal officers.[1] Bookending this period were two abuses of federal power. At the beginning of the decade, in May 1970, Ohio National Guardsmen killed four students and injured nine others by firing into a crowd of protestors at Kent State University.[2] At the other end of this period was the Watergate scandal, which culminated in the adoption of articles of impeachment

1. *See* Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497, 498–99 (1976) (describing periods from 1970–71).

2. Jerry M. Lewis & Thomas R. Hensley, *The May 4 Shootings at Kent State University: The Search for Historical Accuracy*, KENT STATE UNIV.: M4Y, https://www.kent.edu/may-4-historical-accuracy [https://perma.cc/SJ42-BNQF].

against President Nixon in 1974.[3] In the midst of this social tumult, in April 1973, government agents conducted a "no-knock" raid on two homes in Collinsville, Illinois.[4] The agents had the wrong homes. As a result, two families were assaulted, humiliated, had their personal property damaged, and were threatened with murder by federal agents.[5] After the dust cleared these families did not have any civil recourse for the damage to their property or the personal indignities they suffered.[6] They could not sue the individual officers, the federal agency employing the officers, or the United States because of the doctrine of sovereign immunity. And they thus could not be compensated for their injuries.

Congress recognized the need to provide a remedy for plaintiffs such as the Collinsville families.[7] After inviting the two families to testify about the raids in committee hearings, senators recognized that simply repealing the "no-knock" authority of the law enforcement agents would not go far enough to compensate the families for the abuse they suffered.[8] Congress thus enacted a remedy known as the Law Enforcement Proviso ("LEP").[9] The LEP provides a means for plaintiffs who are the victims of certain intentional torts to sue the United States for damages. The Senate Report accompanying the enactment of the LEP called it "a minimal first step in providing a remedy against the Federal Government for innocent victims of Federal law enforcement abuses."[10]

Over 45 years after the Collinsville incidents, an airline passenger named Denise Gesty was passing through an airport security checkpoint at Las Vegas International Airport.[11] After Gesty was informed she needed to be physically searched, a female agent of the Transportation Security Administration ("TSA") had Gesty lower her pants.[12] Gesty "state[d] that the [agent] 'put her hand under [Gesty's] underpants and sexually assaulted her by digitally penetrating her vagina.'"[13] Despite the seeming promise of a remedy provided through the LEP, Denise Gesty did not have an actionable claim for damages

3. *The Articles of Impeachment Against Nixon*, ASSOCIATED PRESS, http://academic.brooklyn cuny.edu/history/johnson/rnimparticles.htm [https://perma.cc/59KR-WYTJ].

4. Boger et al., *supra* note 1, at 500.

5. *Id.* at 500–02.

6. S. REP. NO. 93-588 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2790 ("There is no effective legal remedy against the Federal Government for the actual physical damage, must [sic] less the pain, suffering and humiliation to which the Collinsville families have been subjected.").

7. Boger et al., *supra* note 1, at 505–07.

8. *Id.*

9. 28 U.S.C. § 2680(h) (2018).

10. S. REP. NO. 93-588 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2792.

11. Gesty v. United States, 400 F. Supp. 3d 859, 861–62 (D. Ariz. 2019).

12. *Id.* at 862.

13. *Id.*

against the United States.[14] Because the remedy created by the LEP only applies to the wrongful actions of "investigative or law enforcement officers,"[15] the actions of the agents[16] in Gesty's story did not give rise to tort claims.[17]

The language of the LEP has not changed since Congress enacted it in 1974. This Note asks whether that "minimal first step" still suffices as a remedy for plaintiffs today. Moreover, since its enactment, new issues have arisen regarding the scope of the LEP. The primary issue is whether the actions of a government agent who is not *traditionally* considered a law enforcement officer is within the ambit of the proviso. Because cases like Gesty's feature government agents *at the margins* of the LEP—many of whom fill roles yet undefined in 1974 (such as TSA screeners)—this remedy is no longer sufficient in its current form.[18]

This Note focuses on those government agents at the margins. In particular, it addresses agents whose status under the LEP has been the subject of disagreement among courts and agents who are not covered under the LEP but likely should be. In Part II, this Note begins by examining how the LEP fits into the doctrine of sovereign immunity and the broader federal framework of tort remedies. Then, in Part III, this Note comprehensively examines the boundaries of the LEP with a focus on recent legal developments expanding its scope. In light of that expansion, however, this Note argues that the current potential for further evolution is necessarily limited. And from a broader perspective, this Note argues in Part IV that the LEP is outmoded at the margins because it no longer comports with principles of corrective justice or good social policy. Accordingly, in Part V, this Note proposes a novel solution for amending the LEP to provide a remedy based primarily upon the function a government agent performs.

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14. *Id.* at 867. In granting leave to amend the complaint, the District Court noted that Gesty might have a *Bivens* claim against the individual officers. *See infra* notes 62–64 and accompanying text.

15. 28 U.S.C. § 2680(h) (2018).

16. This Note repeatedly uses the term "agent" to broadly refer to any federal employee.

17. This Note addresses how plaintiffs *do* have an actionable claim in two Circuits that have addressed the question, specifically with respect to the actions of TSA screening agents. *See* Section III.B.1.

18. *See* Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731, 781 (2019). Professor Sisk, writing about tort reform specifically to address sexual assault committed by federal agents, writes:

> Ensuring that the federal government is accountable for a larger range of tortious harms also properly adjusts for the larger scope of federal government activities today. As government grows and the number of public employees increases, so the occasions expand for misconduct by federal agents to impact on individual members of the populace.

Id.

II. THE "WAIVE-ERING" DOCTRINE OF SOVEREIGN IMMUNITY AND ITS EXCEPTIONS

Victims of intentional torts perpetrated by federal investigative or law enforcement officers have virtually only one remedy.[19] That remedy, contained within the Federal Tort Claims Act, hangs on the Law Enforcement Proviso —a tenuous exception to an exception. This Part traces the contours of how the LEP came to be the exclusive remedy for plaintiffs who are victims of intentional torts committed by federal law enforcement. This Part begins by examining the doctrine of sovereign immunity and why that doctrine presents complications when the United States is a defendant in an intentional tort lawsuit. It then summarizes the Federal Tort Claims Act and how intentional torts fit into that congressionally created framework. Within that framework, it examines the pertinent exceptions to the general waiver of sovereign immunity.

A. THE DOCTRINE OF SOVEREIGN IMMUNITY

No plaintiff can sue the United States "without its consent."[20] This doctrine, known as sovereign immunity, distinguishes lawsuits against the United States from most other civil lawsuits. While the doctrine may be an "anachronistic" holdover "derived from the premise that 'the King can do no wrong,'" it is omnipresent in American jurisprudence.[21] And although the doctrine is criticized academically,[22] in federal courts the doctrine is axiomatic.[23] Over time sovereign immunity has been pared away,[24] but the core of the doctrine remains: In order to bring a tort claim against the United States as a defendant, Congress must first authorize the claim. Therefore, the doctrine provides either a foundation or a foil to suits against the United States.

Although the doctrine of sovereign immunity underscores tort claims against the United States, it is not an impenetrable bulwark. Congress, as the representative of the people and in place of the King, has consented to certain lawsuits against the United States. For much of the United States' history,

19. Fed. Deposit Ins. Corp. v. Craft, 157 F.3d 697, 706 (9th Cir. 1998) ("The FTCA is the exclusive remedy for tortious conduct by the United States, and it only allows claims against the United States.").

20. United States v. Mitchell, 463 U.S. 206, 212 (1983).

21. *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–02 (2001) ("[T]he Supreme Court is dramatically expanding [the doctrine's] scope.").

22. *See generally id.* (arguing that the doctrine of sovereign immunity should be reconsidered due to being "inconsistent with basic principles of the American legal system"); *id.* at 1201.

23. Price v. United States, 174 U.S. 373, 375 (1899) ("It is useless to cite all the authorities, for they are many, upon the proposition. It is an axiom of our jurisprudence."). *But see generally* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. REV. 1245 (2014) (discussing recent cases in which the Court declined to apply the canon of strict construction when construing statutory waivers of immunity).

24. *See generally* Sisk, *supra* note 23 (noting that the Supreme Court is applying canons of strict construction to cases involving the doctrine of sovereign immunity with less frequency).

however, congressional consent for a lawsuit came through the process of a tort victim petitioning Congress by means of a "private bill."[25] This process allowed an individual to directly petition Congress for relief, seeking "benefits in response to a specific request in an area such as immigration or private claims."[26] The practice, according to the Supreme Court, was "notoriously clumsy."[27] And in modern history the private bill process for tort claims is effectively dead—no private bills compensating tort victims have been introduced since at least 1946.[28]

B. WAIVING SOVEREIGN IMMUNITY: THE FEDERAL TORT CLAIMS ACT

Partially concerned with streamlining this "private bill" process, in the middle of the twentieth century Congress began providing its consent to tort lawsuits against the United States by way of statutory grants.[29] This approach generally transferred responsibility for dealing with grievances and claims from the legislative branch to the judicial branch.[30]

The primary waiver of sovereign immunity for tort claims against the United States is the Federal Tort Claims Act ("FTCA").[31] In a tort claim against the United States, the United States will be a defendant "in the same manner and to the same extent as a private individual under like circumstances."[32] This specification that the United States is situated under "like circumstances" means that the FTCA is predicated on, interacts with, and fills in the gaps of state tort law.[33] One commentator notes that "Congress elected to use the 'law of the place' language to avoid devising comprehensive federal tort jurisprudence."[34] While Congress consents to any waivers of the United States' sovereign immunity, courts must interpret that waiver. To that end, the FTCA

25. *See* Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1, 5 (1991).

26. David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 378 (2011).

27. *Id.* (quoting Dalehite v. United States, 346 U.S. 15, 25 (1953)).

28. *See* Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 662 (2019).

29. Sinclair & Szypszak, *supra* note 25, at 5–6.

30. *See id.*

31. 28 U.S.C. § 1346(b) (2018); *id.* §§ 2671–2680; *see also* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 217–18 (2008) ("In the FTCA, Congress waived the United States' sovereign immunity for claims arising out of torts committed by federal employees.").

32. 28 U.S.C. § 2674.

33. Richards v. United States, 369 U.S. 1, 6–7 (1962). ("It is evident that the Act was not patterned to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States. Rather, it was designed to build upon the legal relationships formulated and characterized by the States, and, to that extent, the statutory scheme is exemplary of the generally interstitial character of federal law.").

34. Stern, *supra* note 28, at 660.

contains a hook, granting jurisdiction over its application to the federal courts.[35]

The FTCA provides a basis for a variety of claims. Some members of Congress envisioned that the FTCA would provide a remedy for some of the more "mundane, common law torts" caused by federal employees.[36] The quintessential examples of these "'garden variety' negligence torts . . . [were] accidents involving government vehicles."[37] In the decades since the enactment of the FTCA, however, plaintiffs have used it to bring a remarkable range of claims.[38] And as a result of unfavorable judgments and settlements in these lawsuits, the government yearly pays out millions of dollars to the victims of the torts of federal employees.[39]

C. (UN)WAIVING SOVEREIGN IMMUNITY: EXCEPTIONS TO THE WAIVER

While the FTCA waives sovereign immunity for tort claims against the United States, it is not a complete waiver. Indeed, through the exceptions to the FTCA, the United States retains its sovereign immunity for many claims which might be brought against it. These exceptions include "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter,"[40] "[a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States,"[41] or "[a]ny claim arising in a foreign country,"[42] among others. Many of these exceptions are found in 28 U.S.C. § 2680. But additional exceptions are embedded in other sections of the FTCA, other statutes, or are "implied by the courts."[43] Injured parties who litigate their tort claims must frequently argue whether these exceptions bar their claims.[44]

The numerous express and judicially implied exceptions in the FTCA reflect a balancing of principles. On one hand, through enactment of the

35. 28 U.S.C. § 1346(b)(1); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475–76 (1994) ("Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" (alteration in original) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941))).

36. Sinclair & Szypszak, *supra* note 25, at 6.

37. Fuller, *supra* note 26, at 377.

38. Gregory C. Sisk, Foreword, *Official Wrongdoing and the Civil Liability of the Federal Government and Officers*, 8 U. ST. THOMAS L.J. 295, 298 (2011) ("Lawsuits under the FTCA have challenged the regulatory approval of the polio vaccine[,] . . . negligence of federal mine inspectors[,] . . . and . . . negligence of the Army Corps of Engineers . . . for exacerbating the damage caused by Hurricane Katrina." (footnotes omitted)).

39. *See generally* U.S. DEPT. OF THE TREASURY, BUREAU OF THE FISCAL SERV., JUDGMENT FUND TRANSPARENCY REPORT TO CONGRESS (2020) (listing damages the government has paid to victims of torts committed by federal employees).

40. 28 U.S.C § 2680(b).

41. *Id.* § 2680(f).

42. *Id.* § 2680(k).

43. Fuller, *supra* note 26, at 375–76.

44. *Id.* at 376.

FTCA, Congress expressed "a concern for fairness and equity in favor of aggrieved plaintiffs."[45] On the other hand, the exceptions express a belief that "collateral . . . consequences of vital or policy-oriented government operations . . . should be shielded from judicial review."[46] These principles are unique to tort claims when the United States is a defendant.[47]

One of the broadest exceptions to the FTCA—the exception of relevance to this Note—bars claims arising from intentional torts. The text of the intentional torts exception states that: "The provisions of [the FTCA] and section 1346(b) of this title shall not apply to . . . [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."[48] The 11 specific torts for which the United States is excepted from liability cover a wide range of potential intentional malfeasance by federal employees. Despite the breadth of this exception, some intentional torts, such as conversion or invasion of privacy, are excluded.[49] And while this exception is traditionally referred to as the "intentional torts exception," one commentator has argued that Congress "exclude[d] only a subset of intentional torts from the scope of the FTCA" on purpose.[50] Despite what is seemingly a clear enumeration of torts for which the United States cannot be held liable, courts struggle when actions giving rise to a claim blur the boundaries of the exceptions.[51]

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45. *Id.* at 377; *see also* Sisk, *supra* note 38, at 296 ("[I]t is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals." (quoting CONG. GLOBE, 37th Cong., 2d Sess., at 2 (1862))).

46. Sisk, *supra* note 38, at 296. This principle reflects the view 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." *Id.* (alteration in original) (quoting 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.4, at 1435 (4th ed. 2002)).

47. *Id.* ("If a private manufacturer provides or transports a dangerous product, while bypassing measures that could have made the product safer to avoid additional expense or delay in production, the manufacturer may be liable for injuries. The courts will not hesitate to question the economic efficiency choices made by the manufacturer and to instead elevate human safety. But if the federal government specifies how a product is to be manufactured, making production choices that are susceptible to analysis as policy decisions under exigent circumstances, the courts are not empowered to evaluate the wisdom of the judgments made by the government.").

48. 28 U.S.C. § 2680(h)(2018).

49. Fuller, *supra* note 26, at 379 ("Notably, at least four intentional torts are not included in this list: trespass, conversion, invasion of privacy, and intentional infliction of emotional distress.").

50. *Id.* ("Congress made clear its intent to exclude only a subset of intentional torts from the scope of the FTCA as the statute (a) does not contain the term 'intentional torts'; (b) fails to include all intentional torts in the list of excluded causes of action at § 2680(h); and (c) excludes some torts that courts have held need not always be intentional.").

51. *See* Sisk, *supra* note 18, at 756. This is especially the case for the tort of Intentional Infliction of Emotional Distress. As Professor Sisk notes:

It is not clear why Congress chose to carve out such a broad exception in the FTCA for intentional torts.[52] This lack of clarity is partially because there is not much recorded legislative history discussing this exception.[53] However, David W. Fuller notes three persistent themes in the legislative commentary.[54] First, some legislators believed that plaintiffs would "exaggerate" their claims and thereby fleece the government.[55] Second, because the FTCA marked a radical change for the doctrine of sovereign immunity and federal liability, Congress wanted to implement the changes gradually.[56] And third, some legislators wished to retain the process of passing private bills for intentional tort claims to maintain some control over the payment of damages.[57]

D. (RE)WAIVING SOVEREIGN IMMUNITY: THE LAW ENFORCEMENT PROVISO

Although the FTCA intentional torts exception generally precludes action based on intentional torts, it allows plaintiffs to sue the United States for six specific intentional torts when those torts are committed by investigative or law enforcement officers in the scope of their employment. The "patchwork" of liability created by the exceptions to the FTCA is thus further complicated by this "exception to the exception."[58] In 1974, following the Collinsville incidents, Congress amended the FTCA to include what has come to be known as the "Law Enforcement Proviso." The text of the Proviso

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> [M]ost federal Courts of Appeals have recognized the IIED cause of action as proper under the FTCA because it is omitted from the list of other excluded intentional torts and can be given meaning independent of those excepted claims. At the same time, the courts have struggled to ensure that an IIED claim does not become the alter ego of an excluded claim, such as assault and battery . . . . [C]onduct that would constitute another excluded tort, such as assault or battery, is barred, even if it could alternatively be framed as constituting a non-barred tort . . . . Because drawing these lines can be difficult, "courts have seemingly reached widely divergent conclusions on whether IIED claims fall within one of the many FTCA exclusions."

Id. (footnotes omitted) (quoting Fuller, *supra* note 26, at 393).

52. *See* Fuller, *supra* note 26, at 383.

53. *Id.* at 383–84.

54. *Id.* at 384–85.

55. *Id.* at 384 ("[T]here was a sentiment that exposing the public fisc to potential liability for assault, battery, and other listed torts would be 'dangerous,' based on the notion that these torts are both easy for plaintiffs to exaggerate and difficult to defend against.").

56. *Id.* ("Thus, in passing the 'intentional tort' exception, Congress took a 'wait and see' or 'step by step' approach to the scope of liability under the FTCA.").

57. *Id.* at 385 ("[C]laims arising under any of the excluded torts could and would be 'settled on the basis of private acts.' This is a reminder of what Congress intended to do in 1946 by enacting the FTCA—transfer decision-making authority concerning the payment of certain '[d]ebts of the United States' from the legislature to the federal courts. By indicating an ongoing willingness to entertain private bills for excepted torts, Congress made clear that this transfer was not meant to be complete." (second alteration in original) (footnotes omitted) (quoting U.S. CONST. art. I, § 8)).

58. *See* Hernandez v. United States, 34 F. Supp. 3d 1168, 1177 (D. Colo. 2014).

is concatenated to the Intentional Torts Exception at 28 U.S.C. § 2680(h). Its text reads:

> *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [The FTCA] *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.[59]

Thus, the Proviso "re-waives" the sovereign immunity of the United States for claims under these six torts for the actions of "investigative or law enforcement officers" arising in the scope of their employment.[60]

It is necessary to understand some of the LEP's preliminary limitations before engaging in a deeper analysis of the complex challenges that courts face when they determine who is an "investigative or law enforcement officer." First, the LEP is not a remedy for violations of constitutional rights.[61] If an individual's right to not be charged excessive bail is infringed, for example, the FTCA does not provide a cause of action by which they may sue the United States.[62] Instead, plaintiffs must bring these claims under what is known as a "*Bivens* action."[63] A "*Bivens* action" is a judicially created cause of action that predates the 1974 congressionally enacted LEP. Unlike a claim brought under the FTCA, a claim in a *Bivens* case is brought against an individual employee of the United States, for a violation of a constitutional right.[64]

Second, while the FTCA defines the cause of action for a victim of an intentional tort, it does not define the substantive law to be applied.[65] Instead, the elements of the tort are defined by state law. The application of state substantive law also affects the "scope of employment" inquiry inherent to the

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59. 28 U.S.C. § 2680(h) (2018) (second emphasis added).

60. Millbrook v. United States, 569 U.S. 50, 52–53 (2013) (quoting 28 U.S.C. § 2680(h)).

61. Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 478 (1994) ("[T]he United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims.").

62. *See* U.S. CONST. amend. VIII.

63. Diana Hassel, *A Missed Opportunity: The Federal Tort Claims Act and Civil Rights Actions*, 49 OKLA. L. REV. 455, 469 (1996) ("Judicial interpretations of the FTCA as a remedy for constitutional torts were brought up short by the Supreme Court's decision in *Carlson v. Green*.").

64. *Id.* at 458. In *Bivens v. Six Unknown Federal Agents*, "[t]he Court . . . determin[ed] that a claim for damages based on a violation of the Fourth Amendment against a federal law enforcement official was appropriate even in the absence of congressional action authorizing such a claim." *Id.*

65. Sisk, *supra* note 18, at 747 ("The Supreme Court has confirmed that the plaintiff invoking the Law Enforcement Proviso still must state a cause of action arising under state tort law . . . .").

LEP.[66] Because state law varies widely, the determination of whether an investigative or law enforcement officer is acting within the scope of their employment is not consistent from case to case.[67] Furthermore, state scope-of-liability laws are not especially clear.[68]

Third, the LEP does not act as a trump card over other exceptions in the FTCA. This limitation is especially relevant with respect to the "discretionary function exception," which excepts the United States from liability for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[69] The rationale for this exception is based on the doctrine of separation of powers and the deference the judiciary gives to the other two branches of government.[70] As many actions of investigative and law enforcement officers are discretionary, courts frequently must decide whether the discretionary exception or the LEP applies.[71]

The federal circuit courts do not agree whether the discretionary function exception or the waiver in the LEP dominates. The majority of circuits hold, however, "that *discretionary* acts by law-enforcement personnel remain outside the FTCA by virtue of § 2680(a)."[72] Only the Eleventh Circuit holds "that to the extent of any overlap and conflict between that proviso and [the discretionary function exception], the proviso wins."[73] Therefore, with the exception of cases in the Eleventh Circuit, if a plaintiff brings a suit against the United States for an intentional tort committed by an investigative or law enforcement officer, they must establish that the actions of the officer were not discretionary.

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66. Dianne Rosky, *Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. DAVIS L. REV. 895, 896 (2003) ("[C]ourts have applied state law to determine whether a law enforcement officer acted within the scope of employment when the tort was committed, which in turn determines the United States' liability.").

67. *Id.* ("Application of widely varied state *respondeat superior* law to claims under the 1974 Amendment has resulted in a random pattern of government liability lacking any coherent policy rationale.").

68. *Id.* ("[T]he United States' vicarious liability for the intentional torts of federal law enforcement officers is left to the vagaries of state *respondeat superior* law.").

69. 28 U.S.C. § 2680(a) (2018).

70. Stern, *supra* note 28, at 661. Even if the FTCA did not expressly include an exception for the discretionary actions of government actors, "some courts have opined that . . . the court would necessarily read it into the statute as a matter of constitutional comity." *Id.*

71. Sutton v. United States, 819 F.2d 1289, 1297–98 (5th Cir. 1987).

72. Linder v. United States, 937 F.3d 1087, 1089 (7th Cir. 2019) (citing Medina v. United States, 259 F.3d 220, 224–26 (4th Cir. 2001)); Campos v. United States, 888 F.3d 724, 737 (5th Cir. 2018); Gasho v. United States, 39 F.3d 1420, 1434–35 (9th Cir. 1994); Gray v. Bell, 712 F.2d 490, 507–08 (D.C. Cir. 1983)).

73. Nguyen v. United States, 556 F.3d 1244, 1252–53 (11th Cir. 2009).

III. JUDICIAL INTERPRETATION, APPLICATION, AND DEFICIENCIES OF THE LAW ENFORCEMENT PROVISO

While the LEP was initially implemented to expand the liability of the United States, this Note argues that several roadblocks illustrate how the Proviso is an under-inclusive remedy. The LEP clearly applies to actors who are unambiguously considered investigative or law enforcement officers, but at the margins courts disagree with respect to whom it applies. This Part begins by analyzing the current boundaries of the LEP and highlighting the aspects of the LEP that act as roadblocks for plaintiffs bringing claims against the United States.[74] Next, this Part addresses how some courts are moving in the direction of a functional analysis, but the functional definition these courts have provided is limited.[75] Finally, Part IV will argue that the current boundaries of the LEP do not support the goals of corrective justice or serve compelling social policy goals.[76]

A. THREE ROADBLOCKS IMPEDING BROADER APPLICATION OF THE LAW ENFORCEMENT PROVISO

Courts interpret and apply the LEP by using the common tools of statutory interpretation. Courts have found that the LEP clearly applies to many government agents who are unambiguously or traditionally considered "investigative or law enforcement officers," such as FBI agents, U.S. Marshals, and federal police officers.[77] However, at the margins, courts repeatedly disagree whether government agents such as TSA screeners or parole officers are "investigative or law enforcement officers."[78] While a small trend is coalescing in favor of deriving an agent's status as an investigative or law enforcement officer from the agent's functional role rather than statutory designation, this trend is likely limited.[79] Indeed, as one district court recently noted, "[t]he split within and among courts demonstrates that the issue presents a close call, and . . . [may] need to be resolved by the Supreme Court or Congress."[80]

There are three interpretative issues about which the federal courts routinely disagree: (1) the distinction between an "officer" and an "employee"; (2) the limitations of the functions enumerated in the Law Enforcement Proviso; and (3) the degree to which precedent necessitates a broad or narrow interpretation of the Law Enforcement Proviso. Because these issues present

74. *Infra* Section III.A.

75. *Infra* Section III.B.

76. *Infra* Part IV.

77. *See infra* notes 227–33 and accompanying text.

78. *See* Millbrook v. United States, 569 U.S. 50, 56 (2013) (noting that the Law Enforcement Proviso "focuses on the *status* of persons whose conduct may be actionable").

79. *Infra* Section III.B.3.

80. Frey v. Pekoske, No. 18-CV-7088, 2021 WL 1565380, at *4 (S.D.N.Y. Apr. 21, 2021).

legal questions, rather than factual determinations, clarity in the law is vital.[81] Furthermore, the outcome of these legal questions determines whether liability attaches to the actions of government agents and whether an injured plaintiff has a remedy. Therefore, these areas of disagreement, from the perspective of plaintiffs, each represent a roadblock to a remedy.

1. Roadblock One: The Arbitrary Distinction Between Officer and Employee

The first issue over which courts disagree is whether a government agent should be considered an "investigative or law enforcement officer." Courts uniformly begin with the definition of "investigative or law enforcement officer" contained in the LEP itself.[82] That definition states that "'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."[83] But, pointing to this statutory definition is only the first step in courts' analysis.

Because the LEP "defines 'investigative or law enforcement officer' [first as] 'any *officer of the United States*,'" some courts have held that an agent who is merely an employee of the United States is outside the ambit of the LEP.[84] The Eleventh Circuit noted that this distinction in the LEP is underscored by the text of the Federal Tort Claims Act as a whole.[85] The FTCA refers to "any employee" in its grant of jurisdiction to federal district courts in 28 U.S.C. § 1346(b)(1).[86] And where the FTCA excepts "discretionary action" from its waiver of sovereign immunity it refers to "an act or omission of *an employee* of the Government."[87] Therefore, the LEP's use of the phrase "any officer of the United States" "shows that the law enforcement proviso applies only when the person, whose conduct is at issue, is an 'officer of the United States.'"[88]

Courts also examine statutes or regulations outside the FTCA to determine whether an agent is considered an employee or an officer.[89] An agent may be

81. *See* Baggett v. Bullitt, 377 U.S. 360, 367 (1964) ("[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.").

82. *See* Iverson v. United States, 973 F.3d 843, 847–48 (8th Cir. 2020) (noting the court "begin[s] with the statute's text," then proceeding to examine the definition of "investigative or law enforcement officer" in 28 U.S.C. § 2680(h) (2018)).

83. 28 U.S.C. § 2680(h).

84. Corbett v. Transp. Sec. Admin., 568 F. App'x 690, 700–01 (11th Cir. 2014) (quoting 28 U.S.C. § 2680(h)) ("The TSA screeners are not subject to the law enforcement proviso for a simpler reason—they are not 'officers of the United States Government,' as required by § 2680(h)'s statutory language.").

85. *Id.* at 701 (discussing the FTCA's distinct usage of the terms "employee" and "officer").

86. 28 U.S.C. § 1346(b)(1).

87. *Id.* § 2680(a) (emphasis added).

88. *Corbett*, 568 F. App'x at 700–01.

89. *See id.* at 701.

inferred to be an employee if an agency's empowering statute creates a distinction between officers and employees and the agent fits into the latter role. For example, in *Corbett v. Transportation Security Administration*, the court reasoned that because the Aviation Transportation Security Act ("ATSA") distinguishes between employees and officers, an agent defined by the ATSA as an employee could not be considered an officer.[90] The court concluded that "[m]erely being a TSA employee does not make one an 'officer of the United States Government.'"[91] Likewise, in Title 5, the definitions section of the U.S. Code, while an "officer" is necessarily an employee, an individual may be an employee but not an officer.[92] Thus, the phrase "officers of the United States" could be construed to block claims against a wide swath of government agents. Where an agent clearly performs traditional law enforcement functions, but is otherwise classified by statute as an employee, the agent may be held outside the LEP.

Allowing the officer/employee distinction to preclude liability under the LEP is an incorrect approach because some government agents may be clearly empowered to conduct a function contemplated by the statute but may be deemed by courts to be only an employee. The distinction between employees and officers is a "distinction without a difference."[93] It is arbitrary and irrelevant for two reasons. First, the distinction between "officer" and "employee" in Title 5 of the United States Code is based on who has appointed the individual, not any functions that actor performs.[94] Second, since the officer/employee distinction is not based upon the function a government agent performs, there could easily be overlap between the functions performed by an "officer" and those performed by an "employee."[95] Since the LEP only applies to "officers," this distinction has broad implications for restricting liability of government agents at the margins of coverage under the LEP. Courts of appeal taking up the issue, and Congress should reevaluate whether it is a worthwhile distinction.[96]

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90. *Id.*

91. *Id.*

92. *Compare* 5 U.S.C. § 2104(a) (defining "Officer"), *with id.* § 2105(a) (defining "Employee").

93. *See* Rapanos v. United States, 547 U.S. 715, 748 (2006) (discussing how distinguishing ponds from wetlands would be "the ultimate distinction without a difference").

94. *Compare* 5 U.S.C. § 2104(a) (narrowly defining officer as one appointed by "the President; . . . a court of the United States; . . . the head of an Executive agency; or . . . the Secretary of a military department"), *with id.* § 2105(a) (defining "employee" as one appointed by a broader cast of government officials).

95. *See* Nicholas Henes, Case Comment, *The United States Supreme Court Interprets the Federal Tort Claim Act's Law Enforcement Proviso:* Millbrook v. United States, *133 S. Ct. 1141 (2013)*, 89 N.D. L. REV. 341, 355 & n.110 (2013) (noting that meat inspectors "are unquestionably vested with these types of powers," but are nevertheless employees and not officers).

96. *See infra* Part V.

2. Roadblock Two: The Limitations of the Enumerated Functions

The second point courts do not agree upon is whether the agent in question necessarily performs the functions contemplated by the LEP. That is, whether the agent "is empowered by law to execute searches, to seize evidence, or to make arrests."[97] Courts tend to read these functions narrowly, usually for one of two reasons. First, a court may interpret the functions listed in the LEP as covering only "traditional law enforcement" functions.[98] This is especially true when courts interpret the function "execute searches." Courts have thus distinguished consensual "administrative" searches, such as those performed by the TSA, from "traditional law enforcement" searches, holding consensual administrative searches outside the scope of the enumerated functions of the LEP.[99] Second, a court may determine that an agent's conduct is outside the scope of the LEP because that agent only indirectly performs a given function.[100]

i. The Enumerated Functions of the Law Enforcement Proviso and the Canon of Noscitur a Sociis

Courts have employed the canon of statutory interpretation known as *noscitur a sociis* ("a word is known by the company it keeps")[101] to determine that the functions in the LEP must be functions of traditional criminal law enforcement.[102] When this canon is applied, each term in a list is interpreted to match the breadth of the other terms in the list.[103] Under the LEP, "'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."[104] Because "seizing evidence" and

97. 28 U.S.C. § 2680(h).

98. Hernandez v. United States, 34 F. Supp. 3d 1168, 1179 (D. Colo. 2014) ("Each of the[] functions [in the LEP] are commonly understood to be traditional law enforcement functions . . . commonly performed by FBI agents, Bureau of Prison Officers, postal inspectors, and INS agents, all of which have broad investigative and law enforcement powers . . . .").

99. Weinraub v. United States, 927 F. Supp. 2d 258, 263 (E.D.N.C. 2012) ("[I]t would be unreasonable to interpret 'to execute searches' to include the TSA screener's performance of narrowly focused, consensual searches that are administrative in nature, when considered in light of the other traditional law enforcement functions . . . .").

100. Metz v. United States, 788 F.2d 1528, 1532 (11th Cir. 1986) ("[T]he provision permitting governmental liability on the basis of actions of law enforcement officers cannot be expanded to include governmental actors who procure law enforcement actions, but who are themselves not law enforcement officers.").

101. Dolan v. U.S. Postal Serv., 546 U.S. 481, 495 (2006) (Thomas, J., dissenting).

102. Iverson v. United States, 973 F.3d 843, 862 (8th Cir. 2020) (Gruender, J., dissenting) (The LEP "pairs 'execute searches' with other traditional law enforcement functions, 'seiz[ing] evidence' and 'mak[ing] arrests'" (alternations in original)).

103. *Dolan*, 546 U.S. at 495 (Thomas, J., dissenting).

104. 28 U.S.C. § 2680(h) (2018).

"making arrests" are unambiguously functions of criminal law enforcement, this canon is typically applied when interpreting the meaning of "execute searches." This canon has been employed by the Supreme Court in interpreting another exception to sovereign immunity under the FTCA.[105] Therefore, there is ample precedent for its applicability to the LEP. When courts have applied this canon to the LEP, the outcome is that the function of executing a search is held to be limited to a criminal law enforcement context.[106] Since some searches, such as in the TSA context, are not performed for the purpose of criminal law enforcement, this canon would hold them to be outside the ambit of the LEP.[107] Without invoking the canon, other courts have simply held that the LEP only pertains to "investigatory" searches (that is, for the purpose of law enforcement), not "administrative" searches.[108]

If a case were to come before the Supreme Court on the question of whether the LEP applies only to government agents who perform searches for the purpose of traditional criminal law enforcement, it is possible the Court would answer the question in a way which restricts the government's liability. Because the Court has used the canon of *noscitur a sociis* in the FTCA context before, it is possible they would continue to employ it to interpret the FTCA.[109]

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105. *Iverson*, 973 F.3d at 862–63 (Gruender, J., dissenting) (citing *Dolan*, 546 U.S. at 486). In *Dolan*, instead of applying the canon to *preclude* liability, the Supreme Court applied the canon to *allow a claim to proceed*. *Dolan*, 546 U.S. at 483. Had they determined that "negligent transmission" included leaving mail in a place where the homeowner could trip and fall on the package, then these facts would be excepted from establishing a prima facie case against the government. *Id.* at 486. Instead they determined "negligent transmission" was limited by its surrounding words and therefore the claim did not fall under an exception to the government's waiver of sovereign immunity in the FTCA. *Id.* at 486–87.

106. *Iverson*, 973 F.3d at 862–63 (Gruender, J., dissenting).

107. *Id.* at 852 (majority opinion); Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 174 (3d Cir. 2019) (en banc).

108. Weinraub v. United States, 927 F. Supp. 2d 258, 263 (E.D.N.C. 2012) ("[I]t would be unreasonable to interpret 'to execute searches' to include the TSA screener's performance of narrowly focused, consensual searches that are administrative in nature, when considered in light of the other traditional law enforcement functions (i.e., seizure of evidence and arrest) that Congress chose to define 'investigative or law enforcement officers.'"); Hernandez v. United States, 34 F. Supp. 3d 1168, 1180 (D. Colo. 2014) ("[W]hile TSA screeners do check passengers and their bags for items, such as explosives, that are contraband under federal law, screeners are primarily looking for items . . . which are prohibited on airplanes, but not illegal to possess. If a screener does find something that is illegal to possess under law . . . the screener is not authorized to arrest the person or seize the item, but instead must call a police officer to do so."); Gesty v. United States, 400 F. Supp. 3d 859, 864 (D. Ariz. 2019) ("[B]ecause [TSA screeners] do not search or seize materials that violate Federal laws, but rather collect items that are prohibited in carry-on luggage, they cannot generally be considered law enforcement officers . . . . [L]aw enforcement security functions . . . are carried out by the regulations stated in the Code of Federal Regulations, which require the utilization of state, local, and private law enforcement officers.").

109. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 4–5 & nn.41–47 (2018), https://sgp.fas.org/crs/misc/R45153.pdf [https://perma.cc/NCC4-SGJ9] (discussing the purposes of statutory interpretation). Because judges seek "to give effect to the intent of Congress," it follows that in interpreting the same statute, here namely

To say the canon is applicable to one part of the FTCA but not another would be inconsistent. Applying the canon would lead to excluding conduct from government liability, such as the screenings performed by the TSA, unless some other consideration outweighed application of the canon. On the other hand, there is also the possibility that the Supreme Court could follow other precedential definitions it has given to the meaning of "search."[110] Therefore, if—as this Note argues—conduct such as TSA searches is to be unambiguously within the bounds of the statute, Congress should amend the statute to provide absolute clarity on the matter.

ii. Indirect Performance of an Enumerated Function

Courts have determined that government agents are outside the limits of the LEP when an agent only indirectly causes a search, seizure, or arrest.[111] For example, a federal parole supervisor can only "recommend that the [U.S. Parole Commission] issue a warrant."[112] Even when an arrest warrant is issued and a parolee's arrest is effected on the parole supervisor's recommendation, the parole supervisor is not considered an "investigative or law enforcement officer" under the LEP.[113] Related reasoning has been applied to a parole supervisor's ability to effect seizure of evidence. Because a parolee's consent is required before a parole supervisor may seize evidence, "parole [supervisors] lack the seizure power contemplated by [the LEP], and thus cannot be considered law enforcement personnel."[114] Even when a government agent is responsible for directly "procuring" an arrest, government agents have been held to be outside the LEP.[115] Similar reasoning has been applied to the situation of TSA screeners conducting routine pre-boarding searches of airline passengers.[116] In arguing that TSA screeners are not investigative or law enforcement officers, courts note that "[s]creeners do not have the authority

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the FTCA, they would use the same tools as they have in the past. *See id.* at 4 (quoting United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 542 (1940)).

110. Terry v. Ohio, 392 U.S. 1, 16 (1968) ("[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'").

111. *See, e.g.*, Metz v. United States, 788 F.2d 1528, 1532 (11th Cir. 1986) ("[T]he provision permitting governmental liability on the basis of actions of law enforcement officers cannot be expanded to include governmental actors who procure law enforcement actions, but who are themselves not law enforcement officers."); Loumiet v. United States, 255 F. Supp. 3d 75, 98–99 (D.D.C. 2017) (holding that bank examiners are not investigative or law enforcement officers because they must apply to a district court in order to issue a subpoena), *rev'd*, 948 F.3d 376 (D.C. Cir. 2020); Biase v. Kaplan, 852 F. Supp. 268, 281–82 (D.N.J. 1994) (same).

112. Edwards v. United States, 211 F. Supp. 3d 234, 239 (D.D.C. 2016) (alteration in original) (quoting Ford v. Mitchell, 890 F. Supp. 2d 24, 35 (D.D.C. 2012)).

113. *Id.*

114. Wilson v. United States, 959 F.2d 12, 15 (2d Cir. 1992).

115. *Metz*, 788 F.2d at 1531–32.

116. Iverson v. United States, 973 F.3d 843, 864 (8th Cir. 2020) (Gruender, J., dissenting).

to detain individuals and must call law enforcement officers to search, seize, and arrest individuals if illegal items are found."[117]

While the language in the statute seems to clearly require an official to be able "to execute searches, to seize evidence, or to make arrests" to qualify as an "investigative or law enforcement officer," this logic is at odds with other aspects of the statute.[118] Before defining "investigative or law enforcement officer," the LEP states that "the provisions of this chapter . . . shall apply to any claim arising . . . out of" the six included intentional torts.[119] The Supreme Court has interpreted this language permissively to even allow claims for negligent supervision, for example, when those claims arise out of one of the six intentional torts.[120] In other words, the intentional tort need only provide the factual background for the claim. In light of that permissive reading of the statute, it is incongruent to distinguish between government agents who directly conduct a search, seizure, or arrest and those who indirectly cause a search, seizure, or arrest to occur. Furthermore, the Supreme Court has instructed that "the [LEP] extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the[y] . . . are executing a search, seizing evidence, or making an arrest."[121] Therefore, to limit the applicability of the LEP to only those *empowered* to make an arrest and not those agents who might *effect* an arrest is unnecessarily restrictive, especially if that arrest ultimately stems from an abuse of power by a government agent.

3. Roadblock Three: The Problems Presented by Precedent

The third focal point at which circuit courts of appeal have found disagreement is over how to interpret the LEP in light of Supreme Court jurisprudence addressing the LEP, as well as the FTCA more generally. These differences address two distinct questions. First, circuit and district courts disagree about the extent to which Supreme Court precedent instructs them to broadly construe the LEP. Second, courts disagree about how the LEP should be construed within the larger context of sovereign immunity.

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117. *Id.* (alteration in original) (emphasis omitted) (quoting Welch v. Huntleigh USA Corp., No. 04-663 KI, 2005 WL 1864296, at *5 (D. Or. Aug. 4, 2005)).

118. 28 U.S.C. § 2680(h) (2018).

119. *Id.*

120. Sheridan v. United States, 487 U.S. 392, 401 (1988) ("[T]he negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of [the plaintiff's] employment status.").

121. Millbrook v. United States, 569 U.S. 50, 57 (2013); *see infra* Section III.B.3.

i. Does Millbrook v. United States *Necessitate Broad Application of the Law Enforcement Proviso?*

The most recent Supreme Court case to shape the LEP is *Millbrook v. United States*.[122] In *Millbrook*, the Court addressed whether a cause of action to which the LEP applies necessarily required the tortious conduct at issue to have occurred in the course of an agent performing a search, seizure, or arrest.[123] *Millbrook* resolved a circuit split and clarified that the LEP applies even when the tortious conduct does not arise from one of the specified activities in the LEP.[124] In other words, *Millbrook* addressed *when* the LEP applies. However, the Court expressly left open the question of *to whom* the LEP applies.[125]

While the Court did not provide any further clarity on the question of to whom the LEP applies, the holding in *Millbrook* did expand the liability of the government for actions of its agents. In fact, *Millbrook* reversed the holdings of more than one circuit that had previously applied the LEP only if the tortious conduct arose in the course of performing the three activities specified in the text of the LEP.[126] Therefore, some courts interpret *Millbrook* as encouraging broad applicability of the LEP.[127] Other courts, however, have noted the express limitation of the holding in Millbrook to justify taking a narrower approach to the LEP.[128] Indeed, courts have cautioned against over-reading the holding of *Millbrook*.[129] Moreover, courts often cite their own

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122. *Millbrook*, 569 U.S. at 50.

123. *Id.* at 54.

124. *Id.*

125. *Id.* at 55 n.3 ("The Government conceded . . . that the named correctional officers qualify as 'investigative or law enforcement officers' within the meaning of the FTCA. Accordingly, we express no opinion on . . . the[] issue[]." (citation omitted)).

126. *Id.* at 55 (abrogating both the Third Circuit's holding in *Pooler v. United States*, which "applie[d] [the LEP] only to tortious conduct by federal officers during the course of 'executing a search, seizing evidence, or making an arrest,'" and the Ninth Circuit's holding in *Orsay v. U.S. Department of Justice* limiting application of the LEP to situations where "the tort was 'committed in the course of investigative or law enforcement activities'" (first quoting Pooler v. United States, 787 F.2d 868, 872 (3d. Cir 1986); and then quoting Orsay v. U.S. Dep't of Just., 289 F.3d 1125, 1135 (9th Cir. 2002))).

127. *See* Bunch v. United States, 880 F.3d 938, 945 (7th Cir. 2018) ("We are . . . influenced by the broad reading of the law-enforcement proviso that the [Supreme] Court adopted in *Millbrook*."); Iverson v. United States, 973 F.3d 843, 854 (8th Cir. 2020) ("In light of *Millbrook* . . . two of our sister circuits have adopted similarly broad interpretations of the law enforcement proviso."); Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 172 (3d Cir. 2019) ("[In *Millbrook*] the Supreme Court clamped down on a cramped reading of the proviso.").

128. *See Pellegrino*, 937 F.3d at 193–94 (Krause, J., dissenting) ("*Millbrook* concerned only 'the acts for which immunity is waived,' not, as here, 'the class of persons whose acts may give rise to an actionable FTCA claim.'" (quoting *Millbrook*, 569 U.S. at 56)).

129. *See* Linder v. United States, 937 F.3d 1087, 1089 (7th Cir. 2019) ("[W]e must apply [the LEP] to mean neither more nor less than what the language tells us.").

precedents to reach opposite conclusions.[130] Therefore, if the LEP is to be extended to a broader array of government actors and premise liability upon the function those actors perform, *Millbrook* cannot be relied upon to provide the basis for that extension. Instead, a better solution is for Congress to amend the LEP.[131]

ii. Must a Waiver of Sovereign Immunity Be Stated Unambiguously?

Interpretation and application of the LEP is further bound by precedent defining the doctrine of sovereign immunity and the interpretive rules governing the FTCA. Some of these precedential rules counsel a narrow application of the LEP in favor of the government. Others, however, counsel a broad application of the LEP in favor of plaintiffs. These dueling rules cannot be relied upon by plaintiffs seeking to hold government agents at the margins of the LEP accountable for their intentional torts.

In favor of the argument that the LEP must be narrowly applied, the Supreme Court has cited the rule that waivers of sovereign immunity must be unambiguously expressed by Congress.[132] That rule contains a further corollary: When a waiver of sovereign immunity is not unambiguously expressed, the waiver should be narrowly applied and construed in favor of the government.[133] A statute is considered ambiguous even when only the scope of the waiver it contains is in question.[134] When "there is a plausible interpretation of the statute that would not [authorize] money damages against the Government," sovereign immunity is not waived.[135]

However, the Supreme Court has also cited a counter-rule that instructs that an *exception* to a waiver of sovereign immunity need not be strictly construed.[136] In *Dolan v. United States Postal Service*, the Supreme Court noted that "this principle [of strictly construing a waiver] is 'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute.'"[137] The Court provides the further (somewhat unhelpful) instruction that "the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to

130. *See* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 930 (2016) (noting that the Supreme Court used its own precedent to support contrary opinions in over 63 percent of cases between 2005–2010).

131. *See infra* Part V.

132. Lane v. Pena, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text.").

133. *Id.*

134. Fed. Aviation Admin. v. Cooper, 566 U.S. 284, 291 (2012).

135. *Id.* at 290–91.

136. Dolan v. U.S. Postal Serv., 546 U.S. 481, 491 (2006).

137. *Id.* at 491–92 (quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984)).

identify those circumstances which are within the words and reason of the exception—no less and no more."[138]

The challenge courts must contend with in deciding between the applicability of these competing rules turns on whether they consider the LEP to be a waiver of sovereign immunity or whether they consider it to be *part of an exception* to a waiver. If a court views the LEP as only part of an exception —merely a subsection of 28 U.S.C. § 2680—then the LEP should be applied broadly to extend governmental liability to a broad array of agent conduct. This view interprets *Dolan* as counseling "against overextending the exceptions" that apply to the broad waiver of sovereign immunity wrought by the FTCA.[139]

But if a court views the LEP as a waiver, then it should be narrowly construed. In case the statute is ambiguous, the LEP should be construed in favor of the government in accordance with any other ambiguous waiver of sovereign immunity.[140] This view takes issue with the above analysis because it has "overread *Dolan*" and treated the waiver of sovereign immunity in the FTCA as distinct from all other waivers of sovereign immunity.[141]

As discussed above, the LEP allows suits against the government; if it were not for the LEP, sovereign immunity would prevent those lawsuits. The better reading, especially considering that the adoption of the LEP occurred 28 years after Congress enacted the FTCA, is that the LEP functions as a waiver of sovereign immunity. Thus, in cases of ambiguity, the Ninth Circuit explained the task it faced in interpreting the LEP with clarity: "We interpret not an exception to the FTCA's waiver of sovereign immunity, but instead interpret an exception to the exception. That is, our task is to interpret a waiver of sovereign immunity."[142] Although the Ninth Circuit has articulated the better interpretation, most "circuits still apply the strict-construction rule [in favor of the government] to waivers of sovereign immunity in the FTCA."[143]

The continuing dispute about which presumption wins out leaves this doctrine subject to significant uncertainty and the potential for further split among the circuits. Finally, as those arguing the waiver of sovereign immunity in the FTCA is ambiguous have simply noted, the amount of back and forth on this issue indicates that the statute must be ambiguous; the "reasonable

138. *Id.* at 492 (quoting *Kosak*, 465 U.S. at 853 n.9).

139. Bunch v. United States, 880 F.3d 938, 944–45 (7th Cir. 2018).

140. Iverson v. United States, 973 F.3d 843, 865–68 (8th Cir. 2020) (Gruender, J., dissenting).

141. *See id.* at 867.

142. Foster v. United States, 522 F.3d 1071, 1079 (9th Cir. 2008).

143. *Iverson*, 973 F.3d at 867 (Gruender, J., dissenting) (collecting cases and noting that "the majority of . . . circuits still apply the strict-construction rule to waivers of sovereign immunity in the FTCA, *Dolan* notwithstanding"). The First, Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits all apply the strict-construction rule. *Id.*

disagreement" on the issue is itself evidence that the statute is ambiguous.[144] Congress is in the best position to resolve this disagreement by expressly waiving sovereign immunity based on the function an actor performs.[145]

B. A Limited Trend Toward Broader Application of the LEP

Three circuit courts of appeals each recently skirted the above roadblocks and interpreted the LEP broadly.[146] By bypassing these roadblocks, each court has effectively imputed a functional interpretation to the LEP—that is, holding the government liable for the tortious conduct of its agents based primarily upon an agent's function. While these three cases represent a trend in expansion of federal liability, their holdings are likely limited to the circumstances of the agents at issue in each case. Therefore, they represent a significant but limited solution to the current problems presented by the LEP.

1. The Third and Eighth Circuits Expansively Apply the LEP to TSA Screeners

The government agent at issue in a Third Circuit and an Eighth Circuit case was a TSA screening agent. In *Pellegrino v. United States Transportation Security Administration*, the Third Circuit addressed whether the United States was liable for the actions of TSA screeners after an altercation at an airport checkpoint resulted in the plaintiff's claims of false arrest, false imprisonment, and malicious prosecution.[147] And in *Iverson v. United States*, the Eighth Circuit addressed whether the United States was liable for the conduct of a TSA screening agent who allegedly intentionally battered the plaintiff by pulling him off his crutches while he underwent an airport security screening.[148]

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144. Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 200 (3d Cir. 2019) (Krause, J., dissenting). Judge Krause, in her dissent, summarizes the extent of the disagreement on the issue and the implication under the rule addressing ambiguity:

> [T]he Majority cannot seriously argue that the original *Pellegrino* panel majority, the four dissenters here, and the unanimous panel in *Corbett* . . . all adopted an "implausible" view of the law enforcement proviso. Nor would I suggest as much of my colleagues in the Majority. But there's the rub: A "waiver of sovereign immunity must extend unambiguously," such that no "plausible interpretation of the statute" exists under which the United States would remain immune from suit. Our reasonable disagreement makes one thing clear: There is ambiguity in the scope of the proviso. In these circumstances, we may not impute to Congress so significant a waiver of sovereign immunity.

Id. (citations omitted) (first quoting Lane v. Pena, 518 U.S. 187, 192 (1996); and then quoting Fed. Aviation Admin. v. Cooper, 566 U.S. 284, 290–91 (2012)).

145. *See infra* Part V.

146. The three decisions are Bunch v. United States, 880 F.3d 938, 946 (7th Cir. 2018); *Pellegrino*, 937 F.3d at 168, 180–81; and *Iverson*, 973 F.3d at 845. This Note analyzes these cases as a trend because each majority opinion cites with approval the case or cases which chronologically precede it.

147. *Pellegrino*, 937 F.3d at 168–69.

148. *Iverson*, 973 F.3d at 845–46.

These two similar cases are excellent illustrations of each of the three roadblocks present in finding liability under the LEP. Moreover, both the *Pellegrino* and *Iverson* opinions featured a robust dissent. The see-saw history of *Pellegrino* and the dissents in these cases illustrate that "reasonable disagreement" over the proper analysis of this issue can result in conflicting outcomes for plaintiffs on this novel issue.[149]

The analytical differences between the majority and dissenting opinions fracture along the three dimensions described above: (1) whether a TSA screener is considered an "officer of the United States"; (2) whether the LEP only applies to searches conducted for the purpose of criminal law enforcement; and (3) whether the holdings of *Millbrook* and *Dolan* necessitate a broad application of the LEP in favor of government liability. Along each dimension, the majority adopted the more expansive, liberal position. First, the majority held that the distinction between officer and employee was irrelevant in light of the de facto authority the screener holds.[150] Therefore, a TSA screener must necessarily be considered an "officer of the United States."[151] Second, the majority found that because TSA screeners "may physically examine passengers and the property they bring with them to airports," the type of search performed by a TSA screener is within the ambit of the LEP.[152] Furthermore, the majority rejected narrowly applying the canon of *noscitur a sociis* by reasoning that if Congress had wanted to restrict the type of searches covered by the LEP they could have specified that agents execute "search warrants" instead of simply "searches."[153] Third and finally, the majority found the holdings of the Supreme Court in *Millbrook* and *Dolan* supported a broad application of the LEP.[154]

While taking the expansive approach to each of these issues, the *Pellegrino* majority ultimately rested its reasoning on the nature of the interaction TSA screeners have with the public. The court specified that TSA "searches" are "'searches' under the proviso because they are more personal than traditional administrative inspections—they extend to the general public and involve

149. *Pellegrino*, 937 F.3d at 200 (Krause, J., dissenting). In the original case heard in the Eastern District of Pennsylvania, the court followed Third Circuit precedent to dismiss the case, finding that TSA screeners were not "investigative or law enforcement officers" for purposes of the FTCA as a matter of law. Pellegrino v. U.S. Transp. Sec. Admin., No. 09-5505, 2014 WL 1489939, at *8 (E.D. Pa. Apr. 16, 2014). After a panel of the Third Circuit affirmed the finding that a TSA screener is not within the ambit of the LEP, and thus the plaintiff had no remedy, the Circuit reheard the case *en banc*. Pellegrino v. U.S. Transp. Sec. Admin., 896 F.3d 207, 209 (3d Cir. 2018). The Third Circuit *en banc* reversed the panel decision, ultimately concluding that TSA screeners are "investigative or law enforcement officers" for purposes of the FTCA. *Pellegrino*, 937 F.3d at 180–81.

150. *Pellegrino*, 937 F.3d at 170–71.

151. *Id.*

152. *Id.* at 180.

153. *Id.* at 174.

154. *Id.* at 172.

examinations, often intrusive, of an individual's physical person along with her property."[155] By circumventing each of the roadblocks, the *Pellegrino* majority effectively imputed a functional interpretation to the LEP. Indeed, the *Pellegrino* majority noted that liability lies where "any single duty [to execute searches, to seize evidence, or to make arrests] is statutorily present."[156]

In *Iverson v. United States*, the reasoning of the Eighth Circuit majority and dissenting opinions closely followed the reasoning of the Third Circuit.[157] While noting that the decision of the Third Circuit provides "persuasive authority only," the majority opinion then cites that decision over half of a dozen times.[158] If one difference is to be found between the two majority opinions, it is that the *Pellegrino* majority seems to place somewhat more emphasis on the "intrusive" nature of the type of search TSA screening agents perform. Regardless, the holding of the two cases is the same: TSA screening agents are within the extent of the LEP.[159]

2. The Seventh Circuit Expansively Applies the LEP to Forensic Chemists

The Seventh Circuit has also recently addressed whether the Law Enforcement Proviso applies to a government agent not typically considered "an investigative or law enforcement officer." In *Bunch v. United States*, the Seventh Circuit considered whether a forensic chemist employed by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") was within the definition of "the investigative or law-enforcement category" provided in the LEP.[160] Because the statutory authority and ATF regulations defined "officer" to include employees, the court focused its attention primarily on whether the forensic chemist performed searches or seized evidence as contemplated by the LEP.[161] While the Seventh Circuit did not definitively answer the question, it held that there was enough of a factual dispute to preclude summary judgment on the issue.[162] This holding correspondingly shifted the

155. *Id.* at 177.

156. *Id.* at 175.

157. Iverson v. United States, 973 F.3d 843, 849, 856 (8th Cir. 2020).

158. *Id.* at 847.

159. *Id.* at 854–55.

160. Bunch v. United States, 880 F.3d 938, 943 (7th Cir. 2018). After a fire destroyed the plaintiff's home and killed her son, investigators from the Indiana Fire Marshal's office suspected that the fire was intentionally set by the plaintiff. *Id.* at 940. To corroborate this suspicion the investigators sent samples from the alleged crime scene to be tested by the ATF for traces of petroleum-based chemicals—which would signal that foul play was involved. *Id.* The analysis performed by the ATF chemist did not support the theory of arson. *Id.* Unsatisfied, the investigators apparently convinced the forensic chemist "to fabricate findings in his official report." *Id.*

161. *Id.* at 941.

162. *Id.* at 946.

burden to the government to show that the forensic chemist *did not* have authority to conduct searches or seize evidence.[163]

After adopting the liberal position from *Dolan* that waivers of sovereign immunity need not be strictly construed in favor of the government in the FTCA context, the court considered the scope of the LEP.[164] It similarly viewed *Millbrook* as instructive of a broad reading of the LEP.[165] Finding that the LEP does not require an investigative or law enforcement officer to execute "search warrants," only "searches," the court held that forensic chemists are not precluded under the LEP.[166] Finally, the court further rejected making a distinction based upon the degree to which an employee performs law enforcement functions. The court rejected the notion that because another employee of the ATF is empowered to perform *a greater number of* law enforcement functions (such as carrying a weapon or making arrests) a forensic chemist is not within the ambit of the LEP.[167] Because the court rejected a limitation of government liability based on a technical statutory comparison with other ATF employees, the court effectively imputed a functional definition to the LEP.[168]

3. The Trend in These Circuits Is Necessarily Limited

While these three cases represent a trend of expansion of federal liability, their holdings are limited and do not represent complete solutions to the current deficiencies in the scope of the definition of "investigative or law enforcement officer" in the LEP. These cases offer insufficient solutions for two reasons. First, their holdings are generally limited to the factual situations they each specifically address. The TSA cases, *Pellegrino* and *Iverson*, would likely be difficult to extend to new fact patterns. *Pellegrino*, for example, implies this limitation by noting the particularly "intrusive" nature of searches performed on "an individual's physical person along with her property."[169] Therefore, the holdings of these cases may be difficult to extend to other government agents who do not perform similarly personal physical searches.

The court in *Pellegrino* expressly alluded to the narrow implications of its holding by distinguishing the type of searches performed by TSA screeners from those performed by a mine inspector, which the court had previously

163. *Id.* at 943–44.

164. *Id.* at 944–45 ("As we construe this language, we must bear in mind the Supreme Court's insistence that we not construe the waiver of sovereign immunity in the FTCA too strictly.").

165. *Id.* at 945.

166. *Id.* at 944–46.

167. *Id.* at 944.

168. *See id.* ("[The LEP] refers to both investigative *and* law-enforcement officers, and it defines both types of officer as a person with legal authority to 'execute searches, to seize evidence, *or* to make arrests.' Any one of those three powers will do." (citation omitted) (quoting 28 U.S.C. § 2680(h) (2018))).

169. Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 177 (3d Cir. 2019).

held was outside the extent of the LEP.[170] Seemingly conceding that the screenings performed by TSA screeners might be "administrative searches," the court distinguished these searches as posing greater "risk of abuse . . . than . . . most other administrative searches."[171] The court opined that, "[b]ecause TSA searches affect the public directly, the potential for widespread harm is elevated."[172] Therefore, while the holdings of the TSA cases do indeed seem limited, one pathway for their extension could be based upon the possibility of widespread harm posed by a government agent. Congress should adopt this reasoning when considering the extent to which the LEP should be extended to consider a broader array of government agents.[173]

The holding in *Bunch* similarly suffers from limits on the extent to which it may be extended. Because the Seventh Circuit was procedurally limited to addressing whether the district court had improperly dismissed the case, the holding does not fully reach the merits of the issue.[174] And while the reasoning in the decision is supportive of a broad interpretation of the LEP, its limitations mean that liability for the intentional torts of government agents will need to be decided on a case-by-case basis. In other words, the holding in *Bunch* does not advance a new broad rule of law by which the scope of the LEP could be easily extended to include other government agents at its margins.

IV. THE CURRENT INTERPRETATION OF THE LAW ENFORCEMENT PROVISO IS THEORETICALLY DEFICIENT

The previous Part identified various "roadblocks" plaintiffs face in finding a remedy against government agents at the margins of the LEP. This Part focuses on how those roadblocks misalign the current liability scheme with the principles of corrective justice and social policy that undergird tort law. As this Note has described, the LEP provides a narrow waiver of sovereign immunity.[175] However, the LEP is by no means a direct path to a remedy for plaintiffs; the LEP instead winds its way through the thicket of exceptions and qualifiers in the broader statutory framework of the FTCA. Moreover, before the plaintiff can present their *prima facie* intentional tort case, they must show that the actor who wronged them is within the bounds of the definition in the

170. *Id.* at 176. In *Matsko v. United States*, the Third Circuit "held that an inspector of the Mine Safety and Health Administration, who had the 'authority to inspect mines and investigate possible violations,' was not covered by the proviso." *Id.* (quoting Matsko v. United States, 372 F.3d 556, 560 (3d Cir. 2004)).

171. *Id.*

172. *Id.*

173. *See infra* Part V.

174. Bunch v. United States, 880 F.3d 938, 946 (7th Cir. 2018) ("We conclude that there are too many disputed issues about the scope of the duties that an ATF forensic chemist . . . performs. It was therefore error for the district court to grant summary judgment in the government's favor.").

175. *See supra* Section III.A.

LEP. To that end, the LEP functions as a gatekeeper, precluding plaintiffs' otherwise meritorious claims. Therefore, the question which must be addressed is whether the LEP, as gatekeeper, serves a valid purpose. The next two Sections examine why the existing liability framework is deficient under the principles of corrective justice and social policy. This Note then argues that, under these frameworks, the scope of government liability should be expanded to include the instances of agents at the margins.[176] Finally, it should be noted that holding the government liable for the intentional torts of its agents serves as more than a tool of corrective justice or good policy. It also serves as a social anchor of morality. As torts scholar Marshall Shapo notes, "tort law sends a moral message to defendants and to the community at large. Often this is that the defendant should not have acted as it did. That message is significant in its own right as well as being an offshoot of any award of compensatory damages for torts."[177]

A. THE CURRENT INTERPRETATION DOES NOT ACCORD WITH PRINCIPLES OF CORRECTIVE JUSTICE

Principles of corrective justice address what is morally responsible with respect to individuals' actions toward one another.[178] When one individual wrongs another, "the notion of corrective justice envisions an individual injurer who directly compensates an individual victim, with the injurer's own money."[179] This theory of justice raises two concerns. First, corrective justice is only realized when a victim is compensated.[180] Second, as the source of the victim's compensation is increasingly removed from the wrongdoer, the principles of corrective justice become "more attenuated and indirect."[181] In other words, if the source of a victim's compensation was not the cause of the victim's harm, the principles of corrective justice may not be served. Expanding the liability of the government for the conduct of a greater array of its agents would compensate a greater number of victims. Therefore, this Section pushes back on the attenuation concern by examining two concepts that help form a causal justification for the government compensating victims of its agents' intentional torts. This Section first examines the theory of enterprise causation and argues that this theory justifies expanding the scope of liability under the LEP. It then argues that the concept of foreseeability also justifies the connection between government and victim. These two rebuttals

176. *See infra* Part V.

177. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW § 1.03 (4th ed. 2016).

178. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 2.1 (2d ed. 2016).

179. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 17 (5th ed. 2017).

180. Sisk, *supra* note 18, at 781 ("Whether conceived of as corrective justice to right individual wrongs or as part of distributive justice to promote general social well-being, compensation of the injured has always been a primary purpose of tort law." (footnote omitted)).

181. ABRAHAM, *supra* note 179, at 17.

provide the link between victim, wrongdoer, and the United States as employer of its agents.

1. The Theory of Enterprise Causation Justifies Amending the Law Enforcement Proviso

Although "the FTCA's 28-year legislative history contains scant commentary on the intentional-tort exception,"[182] one argument in favor of disallowing plaintiffs to recover against the government is that the government was not the cause of the victim's harm. An intentional tort necessarily requires an actor's individual volition. Requiring the government to compensate victims, the argument goes, would not serve principles of corrective justice "because the injurer does not necessarily end up actually shouldering the burden of correction."[183] This argument is further strengthened by the fact that the ultimate payors of the compensation are the taxpayers.

The theory of "enterprise causation" can help close this "attenuation gap." This particular flavor of vicarious liability "captures the relationship between the existence of an employer's business and the occurrence of a wrong by an employee."[184] The theory states that where "the employment relation increases the probability of each wrong," enterprise causation either "fully causes" or "partially causes" the wrong committed by the employee.[185] As it relates to intentional torts, the theory posits that where an occupation is especially stressful, the employee is more likely to negatively act on that stress and engage in socially harmful conduct.[186] Besides providing the causal link necessary to corrective justice, basing vicarious liability on enterprise causation achieves economically efficient outcomes in most circumstances. That is, it helps balance social costs and social benefits so that the greatest net social benefit is realized. This is true when the employment relationship either fully or partially caused the tortious behavior.[187]

182. Fuller, *supra* note 26, at 383–84.

183. ABRAHAM, *supra* note 179, at 17.

184. Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 571 (1988). For this analysis, it makes no difference whether the employer is a profit-seeking enterprise or the federal government. *Id.*

185. *Id.* at 572 ("An enterprise 'fully causes' the wrong of an employee if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong to zero . . . . An enterprise 'partially causes' the wrong of an employee if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong but not eliminate it.").

186. *Id.*

187. *Id.* at 588–89.

Traditional tort theories typically do not advocate for vicarious liability when an agent's conduct follows from the agent's own volition.[188] That the traditional theories eschew vicarious liability in these cases may help explain Congress's exclusion of intentional torts from government liability. Enterprise causation justifies extending the LEP to the broader array of government actors because it provides the necessary causal connection between the government and their agents as well as leads to economically efficient outcomes. Government agents perform a variety of functions that are primarily public, rather than private. Airport screenings, federal parole supervision, and bank oversight would not occur if not for federal law *mandating* their performance and *empowering* government agents to perform them. Therefore, the action taken in the scope of the employment of those government agents is at least partially, if not fully, attributable to the existence of the employment relationship. This rationale applies with equal force regardless of whether the agents at issue fall squarely within the bounds of the LEP or near its margins. Either way, the harm arises from the employment relationship, and this causal link justifies government liability for the intentional torts of its agents.

2. The Concept of Foreseeability Also Justifies Amending the Law Enforcement Proviso

The concept of foreseeability can also link an agent's conduct to government liability to ensure corrective justice is realized. Foreseeability already plays a role in many liability determinations.[189] Important to this discussion is the fact that determinations of vicarious liability are premised on state *respondeat superior* law.[190] Since the concept of foreseeability is incorporated into *respondeat superior* doctrine in some states, it has already been used by some federal courts to justify vicarious liability for the intentional torts of government agents. One such example is the case of *Red Elk v. United States*.[191]

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188. *See id.* at 589 ("Most hornbook statements of the law suggest that vicarious liability will not apply if an agent acts out of personal ill will. Rather, the employee must act out of a purpose to serve the employer.").

189. For example, in cases premised on negligence, the concept plays a pivotal role. *See* Andrews v. United Airlines, Inc., 24 F.3d 39, 40 (9th Cir. 1994) (United was "responsible for any, even the slightest, negligence and [is] required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances" (alteration in original) (quoting Acosta v. S. Cal. Rapid Transit Dist., 465 P.2d 72, 77 (Cal. 1970) (en banc))).

190. Sisk, *supra* note 18, at 765 ("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." (quoting Lyons v. Brown, 158 F.3d 605, 609 (1st Cir. 1998))). Some commentators argue that the diversity of respondeat superior law across the country presents serious problems and is in itself unjust. *See generally* Rosky, *supra* note 66 (making a strong argument in favor of creating a federal *respondeat superior* rule for the purposes of federal liability under the FTCA).

191. *See generally* Red Elk *ex rel.* Red Elk v. United States, 62 F.3d 1102 (8th Cir. 1995) (discussing the liability of a federal office who committed rape while on duty).

In this case, a federal law enforcement officer abused the power of his office, committing rape while on duty.[192] Since he was a federal law enforcement officer, the plaintiff brought a claim under the FTCA.[193] On appeal, the government tried to argue that the rape occurred "outside the scope of [his] police employment," and therefore the government could not be vicariously liable for the officer's actions.[194] However, the court reasoned that "it was . . . foreseeable that a male officer with authority to pick up a teenage girl out alone at night in violation of the curfew might be tempted to violate his trust."[195] Furthermore, the officer "had that opportunity because of his employment, the trappings of his office, and the curfew policy he was to enforce."[196]

The court thus observed that employers of agents in social positions predicated on trust bear even greater responsibility for the actions of their agents, even when the conduct is seemingly unrelated to their job duties: "A police officer is a public servant given considerable public trust and authority . . . . [W]here excesses are committed by such officers, their employers are held to be responsible for their actions . . . because of the position of such officers in our society."[197] With respect to positions of public trust, therefore, foreseeability of wrongdoing must be a paramount consideration.

Many of the same concerns for public trust and authority extend to the activities performed by government agents currently at the margins of the LEP.[198] The principle of foreseeability is already incorporated into the LEP for the cases that clearly fall within the sweep of the statute. But, lawmakers must recognize that "the work assignment, context, special relationships created with others, or other factors make even outrageous misconduct by an employee a reasonably foreseeable cost of doing business" for a greater number of government agents than merely traditional law enforcement officers.[199] While the concept of "foreseeability" may more directly apply to considerations of the "scope of employment" determination, it also justifies the limited extension of the LEP to agents at the margins for which this Note is arguing. So long as an argument can be made that those actors included in the expansion could foreseeably abuse the power the government has vested

192. Rosky, *supra* note 66, at 897.

193. *Red Elk*, 62 F.3d at 1103.

194. *Id.* at 1104.

195. *Id.* at 1107.

196. *Id.*

197. *Id.* (quoting Applewhite v. City of Baton Rouge, 380 So. 2d 119, 121 (La. Ct. App. 1979)).

198. *See* Rosky, *supra* note 66, at 896–98. Discussing the changing landscape of federal law enforcement, specifically with respect to the USA Patriot Act, Rosky notes that "recent legislation increasing federal law enforcement powers heightens the already pressing need for an effective means to remedy the inevitable abuses of those powers." *Id.* at 897 & n.7.

199. Sisk, *supra* note 18, at 766.

in them, the concept creates the necessary connection between the liability of the government and the agents' intentionally tortious conduct.

B. THE CURRENT INTERPRETATION DOES NOT ACCORD WITH GOOD SOCIAL POLICY

In contrast to asking what remedy is necessary to make a wronged plaintiff whole again, considerations of social policy ask what is best for society.[200] These considerations recognize there are trade-offs between the costs and the benefits when liability is imposed upon the government for the conduct of its agents. Because these questions involve policy considerations, lawmakers are in the best position to make the choice. This Section addresses two policy considerations which may be critical of the idea that the government should foot the bill for the tortious conduct of its agents. It then rebuts each argument, concluding that the current limitations of the LEP are not justified by compelling social policy considerations.

1. Does Holding the Government Liable Have Only a Limited Deterrent Effect on Conduct?

The first policy-based counterargument to the idea that government should be liable for the tortious conduct of its agents is the theory that this liability scheme has only a limited effect on deterring agent malfeasance. Because the government—and not the individual tortfeasor—pays the damages, vicarious liability is not an effective deterrent against further wrongful conduct of other government agents. All judgments under the FTCA are paid from a Judgment Fund.[201] These payments are "general appropriation[s] [which are] not levied against the individual federal employees or even the specific agencies at fault."[202] Commentators note that, "[a]lthough the awards have the potential to influence behavior, in reality they are incurred by the government at a level too general to internalize the cost."[203]

To rebut the claim that government liability has an insufficient deterrent effect on malfeasance, commentators have made various proposals. One proposal suggests bringing the source of liability payment closer to the agent by requiring the supervising administrative agency—the Department of Homeland Security, for example—to make the payment rather than the general U.S. Treasury.[204]

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200. DOBBS ET AL., *supra* note 178, § 2.2.

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

202. Sisk, *supra* note 18, at 782.

203. Stern, *supra* note 28, at 715.

204. *See id.* at 717–24 (arguing in favor of Congress amending the FTCA so that "all FTCA settlements and judgments arising from law enforcement activity [should] be paid through the department or agency that employed the tortfeasor").

Another option that would have a deterrent effect and still allow payments to be made from the Judgment Fund would be for Congress to bolster agency reporting requirements and its oversight of agency conduct subject to tort claims.[205] If agencies were required to internally study and report to Congress the reasons various tort claims are brought against an agency, the agency may feel political pressure to deter the malfeasance of its agents.[206]

2. Is It Cost-effective for the Government to Provide Additional Supervision and Training?

A second policy argument counseling against holding the government liable for the actions of its agents is that it is simply more cost-effective for the government to pay judgments against it than to prevent the misconduct in the first place. The government, just like any enterprise, must make cost-effective decisions. Accordingly, the choice between providing additional training and supervision of its agents or covering the costs of liability payments becomes a choice of cost effectiveness, not corrective justice. Even if the LEP were amended to cover a broader array of government agents, if the costs of training and supervision to prevent tortious conduct exceeds what the government would pay in liabilities for that conduct, the government could choose to forego the training and supervision. In other words, the government may determine it is cost effective to allow the tortious conduct and simply pay the resulting judgments. This consideration may especially ring true at the margins of the LEP, where the probability of tortious conduct is lower.

Two points rebut the cost-effectiveness argument. First, the cost-effectiveness calculation cannot properly account for the value of an erosion of public trust. If the public loses faith that the government will not prevent its agents from abusing their power, there could be negative economic repercussions. For example, if the public expects it may suffer even limited abuse while undergoing an airport screening, they may choose to reduce their use of the airlines. Furthermore, as Professor Sisk notes, this erosion of trust toward a particular agency can bleed over into general distrust of federal employees: "When the very public institutions charged with public safety, social security, and upholding the law are exempted from tort liability . . . the public

205. *See generally* WILLIAM T. EGAR, CONG. RSCH. SERV., CONGRESSIONALLY MANDATED REPORTS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS (2020), https://sgp.fas.org/crs/misc/R46357.pdf [https://perma.cc/RX92-UACW] (describing common features of reporting requirements established by Congress).

206. *See* TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 36 (2021), https://crsreports.congress.gov/product/pdf/R/R45442 [https://perma.cc/2FAF-SF6Z] ("Report language draws its ability to influence not from the law, but from the committee's relationship with the agencies it oversees. This tool may be used to direct the use of appropriated funds, as well as to guide an agency in implementing delegated authority." (footnote omitted)).

unavoidably will feel less safe in general and especially when interacting with federal employees."[207] This potential distrust of the government must outweigh the cost of preventing misconduct in the first place.

Second, the cost-effectiveness calculation does not account for the social harm following on the consequences of intentional torts. By not implementing oversight and training, the government is risking incurring secondary costs resulting from malfeasant actors. For example, when an investigator commits the intentional tort of falsifying evidence that causes the wrong defendant to be charged, the investigation comes to an end.[208] The true culprit remains at large and is never identified, which is effectively a social harm. Therefore, the cost of this malfeasance must be added to the cost of paying only compensatory damages when calculating trade-offs between oversight and training or making liability payments.

V. THE LAW ENFORCEMENT PROVISO SHOULD BE AMENDED TO PREMISE LIABILITY UPON A FEDERAL AGENT'S FUNCTION

A. SEVERAL ALTERNATIVE OPTIONS ADDRESS THE CURRENT DEFICIENCIES

As this Note has demonstrated, the scope of the LEP is limited at the margins by its own terms and the precedential rules by which the LEP is bound.[209] Because the LEP is thus limited, it fails to provide an adequate remedy grounded in principles of corrective justice or compelling social policy.[210] Any proposed solution should aim to better align the statute with these principles. This Section considers the tradeoffs with respect to these considerations for various amendments Congress could make to the LEP or FTCA.[211] It then argues that the best available solution is for Congress to base government liability for the intentional conduct of its actors on the function such actors perform.[212]

1. Broad Solutions

i. Completely Remove the Intentional Torts Exception

One solution painted in broad strokes would be for Congress to remove the intentional torts exception from the FTCA.[213] By way of the jurisdictional hook in 28 U.S.C. § 1346(b), this would make the government liable "for injury or loss of property, or personal injury or death caused by the negligent

207. Sisk, *supra* note 18, at 784.

208. *See generally* Bunch v. United States, 880 F.3d 938 (7th Cir. 2018) (discussing the 17-year conviction of an innocent defendant after a federal forensic chemist fabricated evidence).

209. *See supra* Section III.A.1.

210. *See supra* Section III.B.

211. *See infra* Section V.A.1.

212. *See infra* Section V.A.2.

213. The Intentional Torts Section is fully contained in 28 U.S.C. § 2680(h) (2018).

or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[214] Notably, the liability of the government would still be limited to conduct occurring in the scope of an agent's employment.[215] It would also be generally limited to claims available under state tort law.[216]

Removing the intentional torts exception would better align the government's liability for its agents conduct with principles of corrective justice and social policy. First, this solution would provide plaintiffs a remedy who would otherwise generally be denied one if their cause of action "ar[ose] out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[217] This covers a broad range of potentially harmful conduct not previously covered. Second, the "scope of employment rule" generally reflects the principle of enterprise causation.[218]

While perhaps a theoretically optimal solution, deleting the intentional torts exception would likely have high absolute costs. In terms of absolute costs, the government might feel obligated to spend additional money on training its agents and monitoring their conduct. This option might also be politically difficult, as it is a sweeping change to federal liability.

ii. Remove the Six Enumerated Torts from the Intentional Torts Exception

A variation on removing the intentional torts exception would be to remove only the six intentional torts currently covered by the LEP from the intentional torts exception. This would create liability for the government for the torts of assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution committed by any of its employees.[219] This liability would no longer be subject to the qualification that it arise from conduct of investigative or law enforcement officers.

By waiving sovereign immunity for these six torts, Congress would be acknowledging that these torts are especially injurious to persons and property or result in personal detriment (as is the case with false imprisonment). In contrast, the remaining torts (libel, slander, misrepresentation, deceit, or

214. *Id.* § 1346(b)(1).

215. *Id.*

216. *Id.* (limiting claims 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"); *see also supra* notes 65–68 and accompanying text (addressing how state law defines the substantive causes of action available in tort against the federal government).

217. 28 U.S.C. § 2680(h).

218. *See supra* Section IV.A.1.

219. The liability of the United States would still be subject to the other exceptions in 28 U.S.C. § 2680.

interference with property rights) have primarily reputational or economic consequences.

This option would not serve the principles of corrective justice or social policy to the degree that completely removing the intentional torts exception might, as many victims of the remaining torts would still be left without a remedy. However, this option may be less costly to implement.

iii. Expressly Identify Every Actor to Whom the Law Enforcement Proviso Applies

One alternative that would not require revising the LEP or FTCA would instead focus on the statutes designating the duties and responsibilities of government agents. Congress could amend the empowering statutes, such as the Air Transportation Safety Act ("ATSA"), to expressly clarify that an actor's intentionally tortious conduct creates a liability for the government under the FTCA. For example, Congress could amend the ATSA to include a provision stating that the provisions of the FTCA apply to the intentionally tortious conduct of TSA screeners. With this alternative, Congress would need to broadly review the catalog of agents employed by the federal government. This could prove an exhausting and costly task, which may also be prone to error due to the vast landscape of functions the federal government performs. While there are several foreseeable disadvantages to this approach, its primary advantage is its ultimate clarity on the issue of which actors do and which actors do not create liability for the federal government.

2. A Novel Proposal: Amend the Law Enforcement Proviso

While the above alternatives would each sufficiently improve the LEP and FTCA, this Note proposes a solution narrowly tailored to the contours of the problem it has analyzed. Congress should expand the scope of the LEP by amending the text of the statute itself. This proposal takes a position of compromise. It balances concerns about the potentially unfeasible costs of monitoring agents who pose a low risk for abuse of power, with the need to compensate victims in cases where abuse of power is more likely due to the function a government agent performs. By keeping the functions already enumerated in the LEP, this proposal recognizes the purposes for which the LEP was enacted.[220] It seeks to provide a limited update to the proviso to better reflect the wide array of agents who now perform law enforcement or *quasi* law enforcement functions. Regardless of how Congress might change the wording, the determinative factor for liability of the United States for the intentional torts of its agents should be the function an agent fulfills. To that end, this Note proposes the following changes to 28 U.S.C. § 2680(h). For visual ease, a comparison between the current code and the proposed

220. *See* S. REP. NO. 93-588, at 2789 (1974).

changes, with strikethrough text for removed text and emphasized text for additions is included in Appendix A.

(1) Replace "investigative or law enforcement officers" with "employees."

This change would broaden the scope of the LEP by removing any ambiguities caused by arbitrary distinctions between the title of officer and employee.[221] And because the "[w]ell-established . . . distinctions between federal 'officers' and federal 'employees' . . . invoked by the amendment's definition . . . w[ere] apparently not . . . inten[ded]," it would further clarify the original intention of Congress.[222] The effect of this change would be to preclude courts from holding a government agent who otherwise fits the LEP's criteria outside of the statute's scope simply because they are designated an "employee" and not an "officer."

If this were the only change made to the LEP (and provided that this change also deleted the definition attached to "investigative or law enforcement officer"), this change would be no different than the alternative discussed above, whereby the six LEP torts are removed from the intentional torts exception. Therefore, further changes to the LEP are required.

(2) Retain the enumerated functions, such that they limit "employees of the United States Government."

This change retains the original functions enumerated by Congress—"to execute searches, to seize evidence, or to make arrests for violations of Federal law"[223]—and therefore effects a narrowly tailored modification of the LEP. Thus, this change does not seek to expand the functions which cause waiver of the United States' sovereign immunity.

This proposal leaves at least one unanswered question: are there other functions that should be included under the LEP? One possible answer to this question would be for Congress to include a "catch-all" clause after the three enumerated functions. This "catch-all" clause could significantly broaden the reach of the LEP but could also introduce unnecessary vagueness into the statute. Because such a clause (and the wording of such a clause) is beyond the scope of the issue analyzed here, this Note leaves this question for future research by legal scholars.

221. *See supra* Section III.A.1.

222. Boger et al., *supra* note 1, at 519; *see also* Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 171 (3d Cir. 2019) (noting reluctance to apply statutory distinctions between the two terms).

223. 28 U.S.C. § 2680(h).

(3) Introduce wording that clarifies the scope of the enumerated functions: "execute or effect searches, seize or effect the seizure of evidence, or make or effect arrests."

This change does not introduce new functions under the ambit of the LEP. Instead, it clarifies the scope of those functions. One problem inherent in the current LEP is that courts have held actors who cause an arrest, but do not directly make the arrest (e.g., a parole officer) to be outside the limits of the LEP.[224] This change thus clarifies that those actors who initiate an action that results in a search, seizure, or arrest are within the scope of the LEP.[225] Therefore, sovereign immunity would be waived for the intentionally tortious conduct of a broader array of government agents as a result of this change.

(4) Change "empowered by law" to "who in the scope of their employment."

This change precludes an agency's ability to "write itself out of the proviso" through the process of administrative rulemaking or agency interpretation. In other words, because courts defer to agency interpretation of statutes and federal regulations, an agency can argue that under its own interpretation of the statute, its agents do not have statutory authority to perform a function that would subject them to the LEP.[226] This change shifts the analysis so that courts place less emphasis on the statutory designation of authority—or an agency's interpretation of that authority—and more emphasis on the actual function *performed* in fact by the agent.

B. APPLYING AN AMENDED LAW ENFORCEMENT PROVISO TO FIVE TEST CASES

As this Note has already argued, the LEP—unaltered since its enactment in 1974—does not present a "close call" for most government agents who fit the traditional definition of Law Enforcement Officer. Therefore, FBI agents,[227] U.S. Marshals,[228] federal corrections officers,[229] and Veterans'

224. *See supra* Section III.A.

225. Note that those actors who are otherwise immune for their role in the law enforcement process, such as federal judges under the doctrine of judicial immunity, would still be immune under this proposed change to the LEP. *See generally* Stump v. Sparkman, 435 U.S. 349 (1978) (holding that the actions of judges acting within their jurisdiction are absolutely immune even if errant).

226. *See* Wilson v. United States, 959 F.2d 12, 15 (2d Cir. 1992) ("Where an agency interprets a statute within the agent's area of expertise, however, courts will defer to that reading if it is 'sufficiently reasonable.' As the . . . authorizing statute does not vest parole officers with any of the law enforcement powers identified in section 2680(h), . . . the district court properly deferred to the agency interpretation . . . .").

227. Brown v. United States, 653 F.2d 196, 198 (5th Cir. 1981).

228. Hoston v. Silbert, 681 F.2d 876, 878–80 (D.C. Cir. 1982).

229. Hernandez v. Lattimore, 612 F.2d 61, 64 n.7 (2d Cir. 1979).

Affairs police officers[230] have all been found to be within the ambit of the LEP. Even postal inspectors (who have the power to make arrests),[231] ICE agents,[232] and customs officers[233] have been included under the LEP. If Congress were to amend the LEP to reflect governmental liability based primarily upon the function a government agent performs, none of these already covered agents would be precluded from liability. Each of these agents already unambiguously performs arrests, seizures, or searches.

To better analyze the boundaries of an amended LEP, this Section presents various test cases against which its projected scope can be measured. This Section begins with the test cases that currently sit at the fringe of the current interpretation of the LEP: TSA screeners and forensic chemists.[234] This Section then proceeds to apply the proposed amended LEP to government agents currently held outside the LEP: parole officers and bank examiners. Finally, this Section tests the proposal against government agents who would remain outside of the LEP.

1. Airport Screening Agents

The experience of going through airport security is a familiar one for many people. The security screening is typically performed by a TSA screener. By the statutory definition, a TSA screener is distinct from a TSA "law enforcement officer." While TSA "law enforcement officers" can "carry firearms, make arrests, and seek and execute warrants for arrest or seizure of evidence," TSA screeners are not empowered to do any of those things.[235] Nevertheless, "the TSA itself calls [TSA screeners] officers, and . . . '[TSA screeners] wear uniforms with badges that prominently display the title [officer].'"[236]

TSA screeners represent the quintessential example of a government agent at the margins of the current LEP. Each of the roadblocks analyzed in Section III.A applies to these actors.[237] TSA screeners are not unambiguously "officers of the United States," nor do they perform the types of searches, seizures, or make arrests which fit the form of traditional law enforcement activities. Unsurprisingly, then, courts have arrived at a variety of determinations about the status of TSA screeners under the current LEP.[238]

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230. Celestine v. United States, 841 F.2d 851, 852–53 (8th Cir. 1988).

231. Moore v. United States, 213 F.3d 705, 708–10 (D.C. Cir. 2000).

232. Caban v. United States, 671 F.2d 1230, 1234 (2d Cir. 1982).

233. Nurse v. United States, 226 F.3d 996, 1002–03 (9th Cir. 2000).

234. *See supra* Section III.B.1–.2.

235. Iverson v. United States, 973 F.3d 843, 857–58 (8th Cir. 2020) (Gruender, J., dissenting).

236. *Id.* at 848 (majority opinion) (emphasis omitted) (quoting Pellegrino v. U.S. Transp. Sec. Admin., 937 F.3d 164, 170 (3d Cir. 2019)).

237. *See supra* Part III.A.

238. This Note discussed the positive cases in Part III.A.2.i. For the negative cases, see, e.g., Weinraub v. United States, 927 F. Supp. 2d 258 (E.D.N.C. 2012) (holding that the LEP to intentional torts exceptions in the FTCA did not apply to TSA screeners); Corbett v. Transp. Sec.

Applying the amended version of the LEP, however, results in TSA screeners unambiguously being within the scope of the LEP. Because TSA screeners functionally perform searches, amending the LEP to apply to all employees of the United States who perform searches would generally bring TSA screeners within the extent of the statute. Notably, courts could no longer rely on the distinction between officers and employees as a determinative factor for TSA screeners, who are statutorily defined as employees, not officers.

2. Forensic Chemists

Even when the "search" performed by a government agent is not the type of physical, intimate, and intrusive search performed by a TSA agent, the actions of a government agent performing functional searches and seizures may still have personal consequences intimately affecting victims' lives. Such is the potential case with a forensic chemist working for the ATF.[239] Forensic chemists will occasionally collect physical evidence pertinent to an investigation from the scene of an alleged crime.[240] After analyzing the evidence, a chemist will draft a report of their findings, and that report will often be used as direct or supplementary evidence in the trial of the alleged crime.[241] Therefore, if the ATF forensic chemist were to commit malfeasance by falsifying a crime scene report, the consequences to a defendant at trial could be dire. A falsified report could in fact form the basis of a defendant's conviction.

This relationship with potential plaintiffs is different from the interaction a TSA screener has with a potential plaintiff. There is no direct interaction, much less any potential for direct physical contact between the forensic chemist and the plaintiff. [242] Moreover, a forensic chemist, performing work in a lab, is not typically thought of as a traditional law enforcement officer. Nor is a forensic chemist empowered to "seize evidence" in the same way an FBI agent would. Just as in the case of the TSA screener, the ATF empowers a different class of employees, termed "Special Agents," with the traditional functions of carrying weapons, executing warrants, and seizing property.[243] Yet, forensic chemists have the power to dramatically influence the outcome

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Admin., 568 F. App'x 690 (11th Cir. 2014) (same); Hernandez v. United States, 34 F. Supp. 3d 1168 (D. Colo. 2014) (same); Gesty v. United States, 400 F. Supp. 3d 859 (D. Ariz. 2019) (same).

239. The facts of this hypothetical are based on Bunch v. United States, 880 F.3d 938, 940–41 (7th Cir. 2018).

240. *Forensic Chemists*, ATF (Sept. 9, 2021), https://www.atf.gov/careers/forensic-chemists [https://perma.cc/247Z-W2AE].

241. *See Bunch*, 880 F.3d at 940–42.

242. *Id.* at 943 (noting that an authorized ATF officer or employee may "inspect the site of any accident or fire in which there is reason to believe that explosive materials were involved or to enter into or upon any property where explosive materials have been used, are suspected of having been used, or have been found in an otherwise unauthorized location" (internal quotation marks omitted) (quoting 27 C.F.R. § 55.31 (1995))).

243. *Id.* at 944.

of criminal proceedings by identifying "relevant evidence for colleagues during crime-scene investigations."[244] Because they have this power, the possibility that they are within the ambit of the LEP should not be precluded.

Amending the LEP to premise government liability based on the functions a government agent performs would cover an actor such as a forensic chemist who effectively certifies the validity of potentially dispositive evidence. The act of certifying dispositive evidence is a precursor to executing a search or arrest for violation of Federal law. This direct relationship with searches and arrests justifies the inclusion of ATF forensic chemists within the bounds of the LEP. Under the amended statutory text, these actors *effect searches* or *effect arrests*. Therefore, they should be considered within the amended statute when they abuse their power by falsifying evidence.

3. Parole Supervisors

Parole Supervisors also have the ability to significantly affect their supervisees' lives, and they represent a test case of actors not currently within the scope of the LEP.[245] Moreover, because they have personal interactions with vulnerable populations and serve a broader purpose within the vein of law enforcement, they represent an interesting comparator with TSA screeners.

Under an amended LEP parole supervisors would be within the bounds of the statute because they *effect arrests*. Upon finding an alleged violation of parole, a supervisor can recommend the parolee's arrest. The U.S. Parole Commission will then issue a warrant for the parolee's arrest. As officers of the court there is little reason to believe a supervisor's recommendation will not be followed by the U.S. Parole Commission. The function of *recommending* arrest is too attenuated under the current language; yet under the amended language, the government would unambiguously be liable for intentionally tortious actions of parole supervisors.

4. Bank Examiners

Unlike the government actors whose role is most relevant in the course of an investigation—such as an FBI agent or forensic chemist—bank examiners and regulators perform a primarily regulatory function.[246] No

244. *Id.* at 945.

245. *See* Edwards v. United States, 211 F. Supp. 3d 234, 236 (D.D.C. 2016). The plaintiff in *Edwards* was held for 30 days *after* "a court found that there was no probable cause to support a finding that Plaintiff had violated his parole and ordered his immediate release." *Id.*

246. However, consider that TSA screener functions are performed in the regular course of business, not pursuant to any specific investigations. This hypothetical is based on the facts of Loumiet v. United States, 255 F. Supp. 3d 75 (D.D.C. 2017), *rev'd*, 948 F.3d 376 (D.C. Cir. 2020); and Biase v. Kaplan, 852 F. Supp. 268 (D.N.J. 1994). *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK EXAMINATION PROCESS: BANK SUPERVISION PROCESS 1 (2018), https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files bank-supervision-process/pub-ch-bank-supervision-process.pdf [https://perma.cc/A8SA-5VAY] (providing an introductory overview of the responsibilities of the OCC).

court has held bank examiners to be "investigative or law enforcement officers" under the current LEP.[247] Yet, bank examiners could be covered under an amended LEP which bases liability on the function bank examiners perform.

Bank examiners, in general, can: "(i) examine a bank; (ii) inspect a bank's books and records; (iii) regulate and supervise the bank; and (iv) enforce compliance with any applicable federal or state laws concerning those activities."[248] They also have the power to "engage in comprehensive investigations."[249] Through these investigations they can issue subpoenas and conduct depositions.[250] However, in issuing subpoenas, bank examiners must act through the district courts.[251]

With respect to their investigatory powers to examine, inspect, and regulate banks, it seems that—in the abstract—the function of a bank examiner is not significantly different than the function performed by a forensic chemist. That is, a bank examiner analyzes data or evidence that could potentially form the basis for "violations of Federal law."[252] However, central to the holdings of the courts that have examined the issue is the fact that bank examiners use the district courts as an intermediary in carrying out their full investigatory powers.[253]

Nevertheless, when an actor procures a law enforcement action, the effect on the victim is the same as if the actor directly caused the effect herself.[254] The principles of corrective justice and social policy do not provide any exception for these actors just because they are further removed from the specific seizure, search, or arrest.[255] Thus, under the proposed amendment bank examiners and regulators would be brought within the scope of the statute because they can "execute *or effect* searches, seize *or effect the seizure* of evidence, or make *or effect* arrests."[256]

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247. *See, e.g.*, *Loumiet*, 255 F. Supp. 3d at 98 (holding bank examiners of OCC are not investigative or law enforcement officers); *Biase*, 852 F. Supp. at 281 (holding bank regulators of the now dissolved Office of Thrift Supervision are not investigative or law enforcement officers); Saratoga Sav. & Loan Ass'n v. Fed. Home Loan Bank of S.F., 724 F. Supp. 683, 689 (N.D. Cal. 1989) (holding that bank examiners of the Federal Home Loan Bank are not investigative or law enforcement officers).

248. *Loumiet*, 255 F. Supp. 3d at 98; *see also* 12 U.S.C. §§ 481, 484, 1820 (2018) (codifying these duties).

249. *Loumiet*, 255 F. Supp. 3d at 98.

250. *Id.*; *see also* 12 U.S.C. § 1818(n) (codifying these powers).

251. *Loumiet*, 255 F. Supp. 3d at 98 (noting that bank examiners "can only enforce witness and document subpoenas by application to a United States District Court").

252. 28 U.S.C. § 2680(h).

253. *See Loumiet*, 255 F. Supp. 3d at 99 ("Obtaining evidence by subpoena is the antithesis of obtaining it through search and seizure." (quoting Art Metal-U.S.A., Inc. v. United States, 577 F. Supp. 182, 185 (D.D.C. 1983))).

254. *See supra* Section IV.A.

255. *See supra* Section IV.A.

256. *See supra* Section V.A.2.

5. Actors Remaining Outside an Amended Proviso

The recommended revisions to the LEP would not create unlimited liability for the United States. For instance, if a federal employee with no authority to perform an investigation falsely imprisoned his supervisee, this would be outside the bounds of the proposed amendment. To illustrate, an employee at an Army Exchange store was suspected of participating in an "employee theft ring."[257] Her supervisor, also a federal employee, confronted the employee about his suspicions, interrogating her for approximately 45 minutes. Then, the employee was further interrogated for another 45 minutes by the Exchange "Safety and Security Manager," who "threatened [her] with investigation by the FBI."[258] The employee alleges she was harassed "in complete disregard for her pregnant condition" and ultimately coerced into signing a typewritten statement.[259] She was subsequently fired but never charged with any wrongdoing.[260]

Because the FTCA bars claims of false imprisonment, the plaintiff in this example does not have a cause of action against her employer, the government, unless her claim is "saved" by the LEP.[261] Neither a supervisor of a military exchange store, nor a safety and security manager, are considered investigative or law enforcement officers under the current LEP.[262] And while this scenario illustrates the broader issues many plaintiffs face when the intentional tort exception bars their cause of action against the government, these facts would not support a cause of action under the amended LEP this Note proposes. Even if the LEP is amended to apply to "any employee empowered by law to execute or effect searches," the type of "investigation" conducted by a store supervisor of his own employees is not the type intended to give rise to a cause of action. While the supervisor would certainly be acting within the scope of their employment, their *function* as a government actor is primarily to operate a government retail facility, not search, seize, or arrest. Moreover, they are not "empowered by law" to take these actions "for violation of federal law." In contrast, a TSA screener, a forensic chemist, a parole officer, and even a bank examiner each perform these functions as a primary duty of their position and in enforcement of federal law. The functional test

257. The facts of this example are based upon the facts in Santiago-Ramirez v. Sec'y of Dep't of Def., 984 F.2d 16, 17 (1st Cir. 1993).

258. *Id.*

259. *Id.*

260. *Id.*

261. 28 U.S.C. § 2680(h) (2018). Because claims for Intentional Infliction of Emotional Distress are not barred by the FTCA, plaintiff could potentially base a claim on this cause of action. However, a claim for IIED is fundamentally a different claim than one based upon false imprisonment.

262. *See Santiago-Ramirez*, 984 F.2d at 20 (holding that plaintiff did not have a claim for false imprisonment against either of these government agents under the FTCA).

thus remains an overarching limit to the LEP, ensuring the exception stays within the bounds of its original purpose.

VI. CONCLUSION

In Conclusion, this Note has adopted a narrowly tailored proposal for congressional amendment of the Law Enforcement Proviso. After analyzing the general limitations of the LEP, this Note comprehensively examined the ambiguities present in its text and interpretation. Recognizing that these ambiguities create roadblocks for plaintiffs bringing claims pursuant to the LEP, this Note set forth various justifications for why an extension of the Law Enforcement Proviso would better accord with principles of corrective justice and good social policy. While acknowledging the spectrum of solutions to these issues, this Note suggested that the solution most tailored to the contours of the problem analyzed would be for Congress to amend the Law Enforcement Proviso. The amendment should aim to ensure that government liability follows primarily from the function a government agent performs. Finally, this Note applied the proposed amended LEP to five test cases. The amended LEP would unambiguously expand the scope of government liability for the intentionally conduct of its agents in many, but not all, cases.

APPENDIX A

28 U.S.C. § 2680 (2018) [Current]	28 U.S.C. § 2680 [Proposed]
The provisions of this chapter and section 1346(b) of this title shall not apply to— [. . .] (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: 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,	The provisions of this chapter and section 1346(b) of this title shall not apply to— [. . .] (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of ~~investigative or law enforcement officers~~ ***employees*** of the United States Government ***who in the scope of their employment*** execute ***or effect*** searches, seize ***or effect the seizure of*** evidence, or make ***or effect*** arrests for violations of Federal law, the provisions of this

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.

[. . .]

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.~~

[. . .]