Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials

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INTRODUCTION

Under current law, the United States' vicarious liability for the intentional torts of federal law enforcement officers is left to the vagaries of state *respondeat superior* law. A 1974 amendment to the Federal Tort Claims Act (FTCA) created government liability for the intentional torts of federal law enforcement officers acting within the scope of their employment.[1] But courts 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. 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.

As an example of the jarring inconsistencies of applying state law, consider the following decisions. In *Flechsig v. United States*, a female federal inmate in Kentucky filed a claim under the 1974 Amendment alleging that a male corrections officer had raped her while transporting her to a medical appointment.[2] The United States was held not vicariously liable because the officer's sexual assault was not intended to benefit his employer, and was therefore not within the scope of

[1] The FTCA originally waived sovereign immunity for claims arising from the negligence of federal government employees, but excluded most intentional torts from the waiver. *See* Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.); 28 U.S.C. § 2680(h) (1970) (excluding intentional torts of federal employees from list of exceptions). The 1974 Amendment preserved the general exclusion of intentional torts, but carved out an exception for the intentional torts of law enforcement officers, bringing these within the FTCA's ambit. *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (codified at 28 U.S.C. § 2680(h) (1994)).

[2] 991 F.2d 300, 302 (6th Cir. 1993).

employment under Kentucky law.[3] In *Red Elk v. United States*, a federal law enforcement officer in South Dakota likewise committed rape while on duty.[4] In *Red Elk*, however, the federal government was held vicariously liable for the officer's misconduct. Under the broader vicarious liability rule adopted in South Dakota, the rape was considered a foreseeable abuse of law enforcement power and was therefore held within the officer's scope of employment.[5]

Application of varied state *respondeat superior* rules makes a mockery of meaningful federal accountability for official misconduct. Adherence to these rules undermines a significant federal interest in determining the extent of government liability for law enforcement abuses based on uniform standards of liability. State rules, developed in the private employment context, do not take into account the government's exclusive law enforcement powers and the unique authority vested in law enforcement officers.[6] These considerations are central to the policy determination of what vicarious liability rule best balances the competing federal purposes the 1974 Amendment serves. These purposes include providing a fair remedy to those injured by federal law enforcement abuses and deterring future misconduct while protecting the federal treasury and ensuring officers' ability to function without undue interference.

Despite numerous proposed reforms, the 1974 Amendment remains the only available means for victims of federal law enforcement abuse to seek money damages from the United States. Without a uniform federal rule governing the United States' liability for claims under the 1974 Amendment, the only remedy for federal abuses is rendered haphazard and ineffectual. Recent legislation increasing federal law enforcement powers heightens the already pressing need for an effective means to remedy the inevitable abuses of those powers.[7] Commentators have

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[3] *Id.* at 303.

[4] 62 F.3d 1102, 1103 (8th Cir. 1995).

[5] *Id.* at 1107-08.

[6] *See infra* Part I.A.

[7] *See* Pub. L. No. 107-56, 115 Stat. 272 (2001). The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, commonly referred to as the USA Patriot Act, was signed into law on October 26, 2001. "The legislation grants additional wiretapping and surveillance authority to federal law enforcement, removes barriers between law enforcement and intelligence agencies, adds financial disclosure and reporting requirements to combat terrorist funding, and gives greater authority to the Attorney General to detain and deport aliens suspected of having terrorist ties." Michael T. McCarthy, *Recent Development: USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 435 (2002).

articulated the need to increase the federal government's accountability for law enforcement abuses, and have noted the possibilities for using the FTCA as a vehicle for such reform.[8] But the possibility of applying federal, rather than state, rules to determine the scope of employment in claims under the 1974 Amendment has not been studied as a potential means of achieving the needed reform.

Part I of this Article argues that a federal rule is needed to determine the scope of federal law enforcement officers' employment under the 1974 Amendment. A federal rule makes more sense even though state law governs the underlying liability determination, as it does in all FTCA claims. Part II explores whether the need for a federal scope of employment rule is limited to intentional tort claims brought under the 1974 Amendment or whether there is a need for a broader federal rule governing negligence claims brought under the FTCA. Courts have long applied state law to determine whether federal employee negligence was within the scope of employment for purposes of determining the United States' liability under the FTCA.[9] While there would be some benefit to a federal rule in the negligence context, such benefit is relatively small compared to the benefit in the intentional tort context. However, in the special case of FTCA negligence claims arising from the conduct of members of the military, there is a significant need for a federal scope of employment rule. Only a federal rule can take into account the government's exclusive power to define the military employment relationship, and the uniquely all-encompassing quality of military employment.

Part III explores the possibility of fashioning a federal scope of employment rule — either for intentional tort claims brought under the 1974 Amendment, for military negligence claims, or for FTCA negligence claims generally — under the current statutory scheme. Federal law presumptively governs federal statutory terms, absent clear congressional intent to the contrary. Congress has not expressed a clear intent for state *respondeat superior* rules to govern liability under the FTCA.[10] There is a sound argument that the existing FTCA statutory

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[8] *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983); Diana Hassel, *A Missed Opportunity: The Federal Tort Claims Act and Civil Rights Actions*, 49 OKLA. L. REV. 455, 455 (1996) (arguing that the 1974 Amendment could and should have been used as vehicle for creating government liability for federal officers' constitutional torts); Thomas J. Madden et al., *Bedtime for* Bivens*: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 469-70 (1983).

[9] *See infra* note 125 and accompanying text (discussing use of state *respondeat superior* law to determine United States' liability for federal employee negligence).

[10] *See infra* Part III.B.

scheme permits and even contemplates a federal scope of employment rule governing negligence claims generally, and in particular, contemplates such a rule for claims arising from military negligence.[11] With respect to intentional tort claims, legislative history provides powerful evidence that, in passing the 1974 Amendment, Congress intended to create government accountability for a broad range of law enforcement abuses according to uniform federal standards.[12] Notwithstanding the policy reasons in support of a federal scope of employment rule and the lack of clear congressional intent to apply state *respondeat superior* law, courts have consistently decided liability under the 1974 Amendment according to state scope of employment rules. Courts have justified application of state law based on the United States Supreme Court's 1955 decision in *Williams v. United States*.[13]

Part IV examines the *Williams* decision closely, and concludes that continued reliance on this two-sentence opinion is particularly unwarranted based not only on the need for federal scope of employment rules, but based on flaws in the opinion itself. This wholly unreasoned decision, which was likely influenced by an overly apprehensive view of *Erie's* prohibition against federal common law, disregarded relevant Supreme Court precedent and Congress' own definition of the scope of employment requirement.[14] Finally, Part V argues that, given *Williams* flawed but controlling interpretation of the existing FTCA scope of employment requirement, additional legislative amendment is needed to implement federal scope of employment rules for claims under the 1974 Amendment and for claims arising from military negligence.

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[11] *See infra* Parts III.A. & B.

[12] *See infra* Part III.C.

[13] 350 U.S. 857 (1955) (per curiam) (holding that California's doctrine of *respondeat superior* governed scope of employment determination under FTCA).

[14] *See infra* Part IV.B.2.

I. THE NEED FOR A FEDERAL RULE GOVERNING THE SCOPE OF EMPLOYMENT DETERMINATION UNDER THE 1974 AMENDMENT[15]

State *respondeat superior* doctrine, which is largely derived from the private employment context, is an inappropriate source for determining the scope of employment under the 1974 Amendment. State rules vary widely and do not take into account the basic federal interests at stake in determining the scope of federal law enforcement officers' employment under the 1974 Amendment. These interests include defining the breadth of the waiver of sovereign immunity, delineating the extent of federal liability for inevitable law enforcement abuses, creating a coherent system of accountability that provides fair remedies for victims of misconduct, and managing federal law enforcement agencies according to uniform federal standards. A uniform scope of employment rule is needed even though state rules govern underlying liability, as application of state underlying liability rules does not subvert the federal interests at stake in the scope of employment determination.

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[15] In the broadest sense, the assessment of whether federal courts should apply a federal or state law to a particular rule depends on analysis of the federal interests at stake in the application of the rule. *See* Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 953-62 (1986) [hereinafter Field, *Sources of Law*] (discussing factors that guide federal courts in choosing between state and federal law); Paul Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 811-14 (1957) (discussing factors that guide federal courts in choosing between state and federal law). The choice between federal and state law also depends on a more specific analysis of whether nationwide or intra-state uniformity is more important in implementation of the rule, and whether the content of state law would impair the federal purposes at stake. *See* Field, *Sources of Law*, *supra* at 953, 958-59; Mishkin, *supra* at 813-14. These considerations have guided federal courts' choice between federal and state law in the federal common lawmaking context and the statutory interpretation context alike. Field, *Sources of Law*, *supra* at 895; Mishkin, *supra* at 811-12. In this Part and in Part II, I assess these considerations — federal interests, need for uniformity, and content of state law — in a broader discussion of the need for a federal rule governing the United States' vicarious liability for employee torts, putting aside the question of whether such a rule would constitute permissible federal common law making or federal statutory interpretation. Thus, the discussion in Parts I and II assumes that federal courts are empowered in this particular instance to choose between federal and state law — that is, that no statutory or other authority prohibits application of federal law or preordains which law should govern the FTCA scope of employment rule. In Parts III and IV, I address whether there currently exists specific authority for applying a federal scope of employment rule to claims under the Amendment, or to FTCA claims more generally.

A. State Scope of Employment Law

State *respondeat superior* law is an inadequate and inappropriate source for the scope of employment determination under the 1974 Amendment.[16] State rules governing private employer liability for intentional torts by definition do not take into account the specific considerations relevant to this federal policy decision, in particular the unique power and authority of law enforcement officials. Relevant state precedents arising from the private sector are consequently inadequate or simply non-existent. Existing state law, therefore, provides little guidance to courts addressing claims under the 1974 Amendment. To the extent state rules address state or local government liability for law enforcement officers' intentional torts, those rules reflect the state's individualized assessment and balancing of relevant considerations, which cannot substitute for a federal determination of what rule best embodies federal policy concerns. Finally, application of widely varied state rules undermines the federal interest in a uniform rule governing federal liability for official misconduct.

The inadequacy of state law is starkest in those states that lack a body of law addressing the vicarious liability of employers for the intentional torts of law enforcement officers. Individual states' sovereign immunity doctrines bar suits against the state (or municipalities) absent an immunity waiver by the state legislature. While many states have passed legislation waiving sovereign immunity to allow suits based on the negligence of employees, a number of states have specifically excluded intentional torts from their immunity waivers.[17] In such states,

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[16] The existence of a well-developed body of state law has been recognized as supporting application of state rather than federal law as the better source for a particular rule. *See* Field, *Sources of Law*, *supra* note 15, at 958-59. Thus, absence of well-developed state rules weighs in favor of application of a federal rule. Moreover, even where state law is well-developed, its application is warranted as a policy matter only where the result is "consistent with federal purposes." *Id.* at 974-75; *see also* DeSylva v. Ballantine, 351 U.S. 570, 581 (1956) (state law determines who is a "child" under federal copyright law, as long as definition falls within "permissible variations"); Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 208 (1946) (state law determines definition of real property under federal statute allowing non-discriminatory state taxation of real property, where purpose of statute was to create uniform treatment of real property within states); RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 896-901 (4th ed. 1996) [hereinafter HART & WECHSLER]. Here, the application of state law is inconsistent with the purposes of the Amendment and the federal interests it implicates. *See infra* Parts I.B. & III.C.

[17] *See, e.g.*, GA. CODE ANN. §§ 50-20-21 et seq., 50-21-24(7) (2002) (excluding from immunity waiver claims resulting from enumerated intentional torts, including "assault, battery, false imprisonment, false arrest, malicious prosecution, [and] abuse of process . . ."); MASS. GEN. LAWS ch. 258, §§ 2, 10(c) (2003) (creating state and local liability

there is no state law addressing when intentional torts are within the scope of law enforcement officers' employment.[18] In these states, federal courts adjudicating claims under the 1974 Amendment must follow general state precedents governing private employers' vicarious liability for employees' intentional torts.[19] Among those precedents, private analogues for law enforcement activities are scarce, or simply nonexistent.[20] By definition, private employees generally do not engage

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under Massachusetts law for "negligent or wrongful" acts of employees acting within scope of employment, and excluding "any claim arising out of an intentional tort"); TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021, 101.057(2) (Vernon 1997) (excluding from Texas immunity waiver claims "arising from assault, battery, false imprisonment, or any other intentional tort"); Medrano v. City of Pearsall, 989 S.W.2d 141, 144 (Tex. App. 1999) (holding citizen beaten by police officer may not sue city because, under Section 101.057(2), Texas' "waiver of immunity does not extend to intentional torts").

[18] Such states may have statutes providing indemnity for law enforcement officers' liability arising from intentional torts committed within the scope of employment conduct. However, these statutes have not given rise to a body of case law to guide federal courts adjudicating claims under the 1974 Amendment. In any event, scope of employment rules developed in the indemnity context should not necessarily govern the scope of employment determination for vicarious liability purposes. A state may be willing to accept vicarious liability for egregious misconduct but may deem it inappropriate to indemnify an officer for personal liability judgments based on such misconduct, effectively immunizing the officer from individual liability.

[19] Notwithstanding the FTCA's reliance on state law for underlying liability rules, a state's decision to preserve its own immunity from intentional torts is not considered a bar to FTCA claims under the Amendment. *See, e.g.*, United States v. Muniz, 374 U.S. 150, 164-65 (1963) (allowing action for negligence of federal prison officials under FTCA even in states where immunity doctrine bars analogous claim against state officials).

[20] In deciding whether the FTCA creates liability for negligence in the performance of uniquely governmental activities, the Supreme Court has held that the absence of a specific private analogue is not a bar to FTCA liability. In *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65, 69 (1955), the Court held that the United States was liable under ordinary negligence principles for the Coast Guard's failure to exercise due care in the maintenance of a lighthouse. The Court rejected the government's attempt to avoid liability based on the lack of a specific private analogue, and held that "it is hornbook law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Id.* at 65. *Indian Towing* thus stands for the proposition that ordinary tort principles developed in the private context are an appropriate source of liability under the FTCA, even where those rules have not yet been applied to the particular government activity at issue. The *Indian Towing* principle does not, however, support application of state *respondeat superior* law in the intentional tort context. The decision was based largely on the existence of a widely accepted general negligence rule, and no such widely accepted rule exists for determining vicarious liability for intentional torts generally, or for the intentional torts of law enforcement officers. Moreover, the Coast Guard's lighthouse operation may be uniquely governmental in the sense that private entities did not perform that task, but it nonetheless did not involve the exercise of the government's unique powers to use force in connection with its law enforcement function. The unique policy considerations that arise from liability for this aspect of the government's exclusive law enforcement function make application of general private sector-based *respondeat superior* principles impractical and undesirable.

in the activities that may give rise to liability under the 1974 Amendment. In these states, there are not, and could not be, state precedents arising from private employment that establish when law enforcement conduct — whether relating to search and seizure, arrest, detention, interrogation or imprisonment — is within the scope of employment.

Instead, such precedents typically arise from incidents where a private employee, such as a bouncer or security guard, was authorized to use force as part of the employment, or where an employee's intentional tort, such as a dispute with a customer, was closely related to employment activities.[21] Most states have adopted one of two general scope of employment rules[22] governing vicarious liability for these intentional torts: the stricter purpose test or the broader foreseeability test.[23] The purpose test holds the employer liable for intentional torts if they were "actuated, at least in part, by a purpose to serve the master."[24] States that

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[21] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 505-06 (5th ed. 1984).

[22] Scope of employment rules are one type of *respondeat superior* rules. *Respondeat superior* refers generally to the doctrine imposing vicarious liability on employer or principal for the tort of an employee or agent. *Respondeat superior* liability may also be based on theories distinct from scope of employment, such as apparent authority. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998); RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

[23] Each of these modern tests represents a shift away from the traditional view that intentional torts are by definition excluded from the scope of employment. This exclusion was based on the "implied command" theory under which *respondeat superior* liability was appropriate only where the tort was committed in the course of conduct authorized by the employer. Because intentional torts could not have been authorized by the employer, they historically could not give rise to employer liability. *See* PROSSER AND KEETON ON TORTS, *supra* note 21, § 70, at 505. As the justification for *respondeat superior* shifted toward a broader theory of risk allocation, courts gradually expanded employer liability to include intentional torts under certain circumstances. *See id.* While modern *respondeat superior* doctrine generally defines some intentional torts as within the scope of employment, many states have departed only slightly from the traditional rule, and continue to limit such liability to circumstances where the employee was motivated, at least in part, by a desire to serve the employers' interests. *See id.* at 505-06; *see also* DAN B. DOBBS, THE LAW OF TORTS § 335, at 913-14 (2000).

[24] RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1958). The Restatement provides: [that an employee's conduct] is within the scope of employment only if:

> (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Id. § 228. The Restatement test is applicable to claims based on negligence or intentional torts. *See also* LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS § 9.07, at 9-159 (1995) (noting that for FTCA purposes an employee is acting within the scope of employment as

have adopted the broader foreseeability test shift the focus away from the employee's intent to the foreseeability of the conduct, which is determined by the link between the tort committed and the employee's job duties. Under this approach, an employer is liable for torts that are either incidental to job-related duties or foreseeable to the employer because of the nature of the job duty.[25] This approach results in employer liability "for torts occurring in a 'zone of risk' within which the servant might reasonably be expected to deviate, even for purposes entirely" personal.[26]

State precedents applying these tests to claims against private employers are inherently inapposite, as they do not take into account the unique governmental status and power of law enforcement officers.[27] Assaults committed by law enforcement officers vested with specific powers and responsibilities are not analogous to assaults committed by

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long as the employee is performing the employer's work rather than acting out of personal motives unrelated to the furtherance of the employer's business). Generally, under the purpose test, even a partial motivation to serve the employer is sufficient to place conduct within the scope of employment, even where the conduct was also motivated in part by personal animus.

[25] *See, e.g.*, Primeaux v. United States, 181 F.3d 876, 887-91 (8th Cir. 1999) (holding that under South Dakota law, intentional conduct is within scope of employment, regardless of personal motive, if sufficient nexus exists between employment and conduct, such that conduct is foreseeable); Marsten v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 310 (Minn. 1982) (holding that it is irrelevant to scope of employment determination whether assault motivated by intent to serve employer). *But see* Baumeister v. Plunkett, 673 So. 2d 994, 996 (La. 1996) (conflating foreseeability and purposes tests by holding conduct is within scope of employment if "so closely connected in time, place, and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business, as compared with conduct instituted by purely personal considerations entirely extraneous to the employer's interests").

[26] PROSSER AND KEETON ON TORTS, *supra* note 21, § 70, at 504. This shift to the broader test is based on the premise that a "business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities," including employee conduct that is generally foreseeable but not necessarily in furtherance of the employer's interests. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968). This approach was pioneered by Judge Friendly, writing for the Second Circuit in *Ira S. Bushey & Sons, Inc. v. United States*. *Ira S. Bushey & Sons* has been cited as an FTCA case. *See* JAYSON, *supra* note 24, § 9.07[4], at 9-203 n.106. However, the court was able to craft an innovative federal rule of *respondeat superior* only because the court found the case was properly decided not under the FTCA (which would have required application of state *respondeat superior* law) but under the federal common law of admiralty. *See Ira S. Bushey & Sons, Inc.*, 398 F.2d at 168.

[27] *See, e.g.*, Caban v. United States, 728 F.2d 68 (2d Cir. 1984). In *Caban*, the Second Circuit was faced with an FTCA claim against INS officials arising from the government's "inherently federal" function of border protection. *Id.* at 77. The court held, "[t]he New York principles to be applied to a private person cannot be applied to the government because the circumstances surrounding this detention by government agents are materially different." *Id.* at 74.

ordinary private employees, even those, such as bouncers or security guards, whose job duties include occasional uses of force. Such private actors may have employer authority to use force when needed, but that authority is distinct from the unique authority and status of a federal officer empowered to carry out the government's exclusive responsibility for law enforcement. The Supreme Court recognized this crucial difference, and the consequent inadequacy of state law, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[28] The Court held, "one who demands admission [to a home] under a claim of federal authority stands in a far different position [from a private person]. . . . Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government."[29]

Absent a body of relevant case law, federal courts in search of a state rule must strain to find state precedents to follow in determining when law enforcement officers' intentional torts are within the scope of employment. The difficulty of that task is illustrated by the lengths to which federal courts have gone in drawing analogies with existing state precedents. In *Daniels v. United States*, the district court sought to determine whether a federal officer acted within the scope of employment under North Carolina law when he detained a husband and wife allegedly based on his personal animosity towards them.[30] Finding no cases arising from similar circumstances, the court looked to case law addressing the liability of a restaurant owner for a busboy's dispute with a patron, and the liability of an insurance company for threats made by a premium collector.[31] Although the court found it possible to draw from these cases a very broad principle and apply it to the claim under the 1974 Amendment, the court's reliance on precedents developed in the private context resulted in a decision that disregards the important federal interests at stake in the determination of liability under the 1974 Amendment.

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[28] 403 U.S. 388 (1971).

[29] *Id.* at 394-95. Justice Harlan's often-cited concurrence in *Bivens* also recognized that, because of the special powers wielded by federal law enforcement officers, the injuries inflicted by abuse of those powers are "substantially different in kind" from injuries inflicted by non-government actors. *See id.* at 409 (Harlan, J., concurring). This substantial difference warranted application of federal law to determine individual officers' liability for damages.

[30] 470 F. Supp. 64 (E.D.N.C. 1979).

[31] *Id.* at 69. The court noted that North Carolina courts applying *respondeat superior* principles to cases involving indistinguishable facts nonetheless came to opposite conclusions. *Id.*

In *Flechsig v. United States*, the plaintiff, a female federal inmate, filed a claim under the 1974 Amendment alleging that a federal corrections officer had raped her while transporting her to a medical appointment.[32] The court struggled to determine whether, under Kentucky law, the corrections officer's conduct was within the scope of his employment. The court noted that employers are not generally liable under Kentucky law for assaults by employees on third persons, unless the tort was reasonably incidental to the service the servant was employed to render.[33] The court then addressed the plaintiff's contention that such law should not apply because it did not take into account the special relationship of care between federal corrections officers and those in their charge.[34] Plaintiff argued for application of Kentucky common carrier law, which defines the scope of employment more broadly based on the carrier's broad duty to protect passengers.[35] The court rejected the analogy to common carrier law, because the "breadth of common carrier liability comes from the role of the carrier and its employees in protecting passengers from external threats."[36] The court held that the "role of a prison and its guards is more similar to" the role of security guards hired to control the crowd at a racetrack.[37]

Because no cases involving a comparable situation had been decided under Kentucky law, the *Flechsig* court was unable to identify and apply a Kentucky rule that takes into account the unique, multifaceted relationship of a prison and its guards to its inmates.[38] That relationship shares some characteristics with the common carrier role and some characteristics with the relationship between private security forces and patrons. But the prison relationship is largely defined by unique characteristics derived from the government's exclusive authority to imprison, and to take on responsibility for inmates' basic human needs.[39]

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[32] 991 F.2d 300 (6th Cir. 1993).

[33] *Id.* at 303.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 302-04.

[39] Notwithstanding the recent trend toward privatization of prisons, the punishment function can still be characterized as uniquely governmental. Unlike private industries generally, private prisons exist only to the extent that the state agrees to temporarily delegate its exclusive powers of punishment. That private prisons operate as de facto governmental entities is demonstrated by the assumption underlying two recent Supreme Court decisions regarding private prisons — that Section 1983 or *Bivens* claims may be brought against private prison employees because they act under color of state or federal law. *See* Corr. Serv. Corp. v. Malesko, 534 U.S. 61 (2001) (holding immunity available to

Those characteristics are simply not taken into account by Kentucky or other state law governing private employers' vicarious liability for their employees' intentional torts.[40] Thus, application of state scope of employment law to claims arising in the prison context results in random outcomes lacking any valid policy justification.

In *Red Elk v. United States*, the Eighth Circuit sought to determine whether a federal officer acted within the scope of employment under South Dakota law when he committed sexual assault while on duty.[41] The court noted the lack of relevant precedents[42] and reviewed a string of South Dakota cases arising from intentional torts committed by private employees, including a ranch hand's mistaken shooting of a hunter and a bank employee's embezzlement of customer funds. Although the court purportedly applied the foreseeability principle articulated in those cases, the court nonetheless found it necessary to discuss more relevant cases from other states. The court relied on California and Louisiana cases that explicitly addressed the specific concerns implicated in the determination of government liability for sexual assault by law enforcement officers.[43] The court thus implicitly recognized the difficulty of relying on existing South Dakota precedents to make its determination.

Among those states that have waived sovereign immunity for the intentional torts of state and local law enforcement officers, a few have developed specialized rules governing vicarious liability for those torts. As the Eighth Circuit noted in *Red Elk*, California and Louisiana courts have developed doctrines that take into account the specific policy considerations implicated in the imposition of vicarious liability on a governmental entity for intentional torts committed by law enforcement officers.[44] Based on those considerations, courts in these states have

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prison officials sued under Section 1983 not available to private prison employees subject to suit under Section 1983); Richardson v. McKnight, 521 U.S. 399 (1997) (holding that private corporation operating federal prison is not proper *Bivens* defendant under *FDIC v. Meyer*, 510 U.S. 471 (1994), which held federal agencies cannot be sued under *Bivens*).

[40] In spite of the recent increase in private prisons, states have not developed bodies of law addressing vicarious liability of private prison corporations for intentional torts committed in the prison setting. This is due in part to the fact that many claims arising in the private prison context are filed as Section 1983 or *Bivens*, rather than as state tort claims.

[41] 62 F.3d 1102 (8th Cir. 1995).

[42] *Id.* at 1105 (noting that "each party has the same problem in trying to find adequate support under South Dakota law").

[43] *Id.* at 1105-08.

[44] *Id.* In *Mary M. v. City of Los Angeles*, the California Supreme Court held that local governments are liable for the intentional torts, including sexual assaults, of police officers as long as these torts were made possible by job-created authority. 814 P.2d 1341 (Cal.

imposed vicarious liability on employers for a wide range of intentionally tortious conduct that would not lead to employer liability under either the purpose test or the foreseeability test.

Of course, the existence of a relevant body of law in only a few states does not support the application of state law generally. In the 1974 Amendment claims arising in these few states, application of state law to the scope of employment determination does not pose the problem of applying rules that do not take into account law enforcement-related policy considerations. Nonetheless, application of state law even in these few states does not constitute an independent federal policy determination. Indeed, the existence of specialized rules in some states addressing municipal liability for law enforcement abuses demonstrates the need for a federal rule governing the United States' liability for such abuses. In crafting specific rules that address the policy concerns implicated in the imposition of governmental vicarious liability for law enforcement abuses, these states recognized the inadequacy of general scope of employment rules as a basis for deciding whether to impose such liability. What is needed is a federal rule establishing parameters for government liability based on a weighing of the analogous policy considerations in the federal context. This rule may or may not resemble the broad liability rules in California and Louisiana, but if it does it must be as a result of an independent policy decision.

B. The Federal Interests at Stake

Continued reliance on state *respondeat superior* law will result in decisions lacking any coherent federal policy rationale. Only a uniform federal rule governing the scope of employment determination under the

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1991). The court based its decision on the special trust and authority placed in police officers by the public. *Id.* at 1350. The broadened liability imposed under this test is based on the theory that, given the considerable public trust and authority placed in certain employees, their employers must be held liable for their job-enabled excesses, even when they are not related to the performance of job duties. *Id.* at 1351 (citing Applewhite v. City of Baton Rouge, 380 So. 2d 119, 121 (La. Ct. App. 1979)).

> Society has granted police officers extraordinary power and authority over its citizenry.... Inherent in this formidable power is the potential for abuse. The cost resulting from misuse of that power should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power.

Id. at 1349. In *Applewhite v. City of Baton Rouge*, the city was held liable for a police officer's rape of a woman whom the officer had picked up in his patrol car for alleged vagrancy. 380 So. 2d at 121.

1974 Amendment can effectuate the significant federal policy interests at stake in determining the extent of the United States liability for law enforcement abuses.

The scope of employment determination under the 1974 Amendment implicates the significant federal interest in defining the sweep of the waiver of sovereign immunity. Sovereign immunity prohibits suits against the United States, unless Congress specifically authorized the suit.[45] Central to the doctrine of sovereign immunity is the notion that only the sovereign can waive immunity.[46] Given the federal government's exclusive power to waive sovereign immunity, there is a powerful federal interest in determining the sweep of congressional waivers of immunity. Because the FTCA waives immunity only for acts or omissions committed within the scope of employment, the scope of employment requirement effectively defines the breadth of the immunity waiver.[47] The application of state *respondeat superior* law to the scope of employment requirement thus leaves a uniquely and exclusively federal question — the extent of the waiver of sovereign immunity — to the workings of state law.[48]

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[45] *See, e.g.*, United States v. Shaw, 309 U.S. 495, 501 (1940); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 589 (3d ed. 1999); HART & WECHSLER, *supra* note 16, at 1003 (4th ed. 1996); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 774 (1995).

[46] The doctrine derives from the notion in English law that the Crown of England cannot be sued without its consent. Although the justification for the importation of the sovereign immunity doctrine from England to the United States is unclear, the doctrine unquestionably took root here. *See, e.g.*, United States v. Lee, 106 U.S. 196, 205-06 (1882) (discussing English notion of petition of right and its link to Congress' limited authorization of suit against United States); CHEMERINSKY, *supra* note 45, at 589.

[47] *See* United States v. Campbell, 172 F.2d 500, 503 (5th Cir. 1949) (calling the scope of employment requirement the "very heart and substance" of the FTCA because it determines the sweep of the immunity waiver).

[48] This broad and basic federal interest in determining the sweep of the waiver encompasses a more specific interest — the government's fiscal interest in the outcome of claims brought under the Amendment. Payment of judgments obtained under the Amendment comes from the United States' purse. Because of the gatekeeping function of the scope of employment requirement, its definition impacts directly on the fiscal interest of the federal government. The Supreme Court has recognized fiscal impact as justification for the application of federal law. *See* United States v. Standard Oil Co., 332 U.S. 301, 306 (1947) ("[S]ince also the government's purse is affected," the governmental fiscal interest justifies creation of federal common law); Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943). The Court has cited the United States' fiscal interest as a justification for application of federal law in cases where that interest is far more attenuated than the interest here. *See, e.g.*, Boyle v. United Tech. Corp., 487 U.S. 500, 507 (1988) (justifying immunity of defense contractors from tort claims on the basis that liability could increase prices government is charged).

The general federal interest in determining the sweep of the immunity waiver is implicated by the scope of employment determination in negligence claims brought under the FTCA, but that interest is heightened in claims brought under the 1974 Amendment. The 1974 Amendment creates government liability for the conduct of those empowered to carry out exclusively governmental powers. Law enforcement is an exclusively governmental function, and the government vests unique authority and power in federal law enforcement officers to carry out that function. Law enforcement officers are the only government employees authorized to invade homes and businesses, and to exercise physical control over members of the public. Federal arrestees, suspects, or inmates are involuntarily made dependent on federal law enforcement officers for their basic human needs.[49]

The governmental authority vested in federal law enforcement officers, and the potential for abuse of that authority, gives rise to a powerful federal interest in determining when official abuses or excesses give rise to government liability. Ultimately, that determination depends on a complex assessment and delicate balancing of a range of considerations. These considerations include: which liability rule would most effectively deter intentional misconduct yet preserve officers' ability to carry out their duties without undue apprehension or loss of morale, which rule would promote efficient and effective management of federal law enforcement agencies, and which rule would strike the right balance between compensating abuse victims and protecting the federal treasury.[50]

Thus, in the context of the 1974 Amendment, the determination of the sweep of the waiver requires a complex and sensitive policy determination of precisely what category of law enforcement misconduct should give rise to government liability. The interest at stake in determining the sweep of the waiver under the 1974 Amendment is heightened by the federal government's particular interest in responsibly

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[49] In making federal law enforcement officers the only federal employees whose intentional torts may give rise to government liability, Congress recognized that federal law enforcement officials' unique power to exert physical power over the public sets them apart from other government employees, for whom intentional torts are presumptively unrelated to their employment and therefore an inappropriate basis for vicarious liability.

[50] Commentators have written extensively about the policy considerations implicated by different rules of government versus individual officer liability for unconstitutional and tortious conduct. *See, e.g.*, George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1178 (1977) (discussing policy considerations for officer immunity); *supra* note 8. Assessment of these policy issues, and thorough analysis of what rule is best, is beyond the scope of this Article.

carrying its exclusive law enforcement powers, and in overseeing the conduct of those empowered to carry out those powers. The federal interest in making this determination can only be satisfied by creating and applying a federal scope of employment rule to govern claims under the 1974 Amendment.

C. The Need for Nationwide Uniformity

Like the assessment of the federal interests at stake, the need for nationwide uniformity in applying a particular rule is central to determining whether federal or state law should serve as the source for that rule.[51] Indeed, uniformity can be seen as itself a "federal interest." Here, nationwide uniformity serves significant federal purposes. By definition, a federal rule based on pertinent policy considerations would be uniformly applied to claims arising throughout the country. In addition, uniformity serves independent federal interests, such as the managerial interest in efficiently operating federal law enforcement agencies and the interest in creating a remedy that is fair to victims of law enforcement abuse. These interests are undermined by the application of widely divergent state rules that govern vicarious liability for intentional torts generally, and for law enforcement officers' intentional torts in particular.[52]

Application of state rules results in inconsistent holdings in a significant portion of intentional tort claims brought under the 1974 Amendment. Where the plaintiff alleges she is the victim of a sexual assault, she will almost certainly be denied recovery if the assault occurred in a state that has adopted the purpose test. However, she may well be able to recover in a state that has adopted the foreseeability test or the job-related authority test. Likewise, the purpose test excludes from the scope of employment non-sexual assaults allegedly motivated by personal malice rather than by a legitimate law enforcement purpose. This inconsistency infects nearly all colorable claims brought under the 1974 Amendment. If a law enforcement officer inflicts injury motivated by a legitimate law enforcement purpose, the officer's conduct will most likely not constitute an intentional tort at all, or it will be protected based on state law privileges and defenses.[53] Thus, the bulk of sustainable

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[51] Field, *Sources of Law*, *supra* note 15, at 953 ("A dominant consideration is whether there is a need for a uniform federal rule."); Mishkin, *supra* note 15, at 813 ("an important question relates to the advantages of a 'uniform' federal rule").

[52] *See supra* Part I.A.

[53] *See, e.g.*, Washington v. Drug Enforcement Admin., 183 F.3d 868, 873 (8th Cir. 1999).

actions under the 1974 Amendment involve claims of illegitimate, malicious or personal abuses — precisely those claims subject to inconsistent results under application of the two main tests that states have adopted. This significant lack of uniformity undermines federal policies and interests.

The United States has a managerial interest in operating federal law enforcement agencies according to uniform rules and standards. Application of a uniform federal rule would allow federal agencies to take that rule into account in fashioning and amending their own employment regulations, in training federal officers, and in more accurately anticipating on a regional or national level the extent of liability for employee conduct. Such a rule would also enable agencies to take steps to reduce that liability by identifying and reducing tortious conduct uniformly understood to be within the scope of employment. The need for a uniform rule governing the scope of federal employment is thus basic to the ability to run a federal agency, department, or program. That ability is undermined when the rule governing the government's liability for employee conduct varies from state to state in a way that federal agencies cannot realistically anticipate.

In his celebrated concurrence in *Bivens*, Justice Harlan recognized the need for uniform standards governing compensation for injuries resulting from federal law enforcement misconduct.[54] According to Harlan, it is "entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability."[55] Likewise, a uniform federal rule is needed here in part because such a rule is uniquely capable of incorporating and recognizing the federal regulations and laws that actually impact on that determination.[56] The scope of employment determination depends in large part on the nature, duties, and parameters of the particular employment. A court cannot assess whether an employee's tortious

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(holding that where search warrant not obtained for collateral or ulterior purpose, no abuse of process committed under Missouri law); Jackson v. United States, 77 F. Supp. 2d 709, 715 (D. Md. 1999) (holding that law enforcement officer not liable for assault under Maryland law unless officer acted with "'actual malice,' i.e., ill will or evil purpose, towards the plaintiff").

[54] 403 U.S. 388 (1971).

[55] *Id.* at 409 (Harlan, J., concurring).

[56] This argument is not necessarily specific to federal law enforcement officers. It applies with equal force to federal employees generally. All federal employees' relationships to the government as employer are subject to federal laws and regulations not applicable to private employees. *See infra* Part II.A.

conduct furthered an employer's interests or was related to the employee's job duties, without an understanding of those interests and duties.[57] For federal law enforcement officers, federal laws and regulations define all aspects of their employment.[58] Federal law enforcement agencies and officers are inherently creatures of federal law and regulation. Federal laws and regulations govern the agencies' existence and powers, and the officers' duties and powers. Federal sources and authorities exclusively govern the scope of officers' duties within federal law enforcement agencies and their relationships with the government.

These federal authorities apply uniformly to federal law enforcement officers or, with respect to agency-specific regulations, to that agency's officers operating throughout the country. To the extent there is more localized governance within a federal law enforcement agency, that governance is organized by regions encompassing several states rather than by individual states.[59] Federal officers frequently are assigned to work in a region that encompasses several states, and may regularly cross state lines in the course of their employment. Federal officers also frequently work in different states or regions throughout their careers. Application of state scope of employment rules interferes with the administration of federal law enforcement agencies according to federal standards, and disregards the authoritative federal sources that determine the scope of federal law enforcement officers' employment.

The need for a uniform rule determining the federal employment relationship is demonstrated by the widely held understanding that federal law governs employee status under the FTCA.[60] Federal

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[57] *See, e.g.*, Caban v. United States, 728 F.2d 68, 77 (2d Cir. 1984) (Cardamone, J., concurring) ("[T]he Supremacy clause requires that the INS regulations govern here where the INS officials were acting pursuant to federal statutes in the exercise of an inherently federal function (border protection).").

[58] *See* Irvin M. Gottlieb, *State Law Versus A Federal Common Law of Torts*, 7 VAND. L. REV. 206, 226-27 (1954) [hereinafter Gottlieb, *State Law*].

[59] For example, the Bureau of Prisons is organized according to six regional offices, each of which is responsible for administration of federal corrections facilities in numerous states. Likewise, the Federal Bureau of Investigation, the country's largest federal law enforcement agency, is organized by nationally based branches and divisions, which are responsible for activities of agents within those divisions throughout the country. *See* Press Release, FBI National Press Office, Expanded Breakdown of Reorganization (Dec. 3, 2001) (describing post September 11 FBI reorganization), *available at* http://www.fbi.gov//pressrel/pressrel01/reorg120301.htm.

[60] *See* JAYSON, *supra* note 24, § 9.08, at 9-220 (noting that employee status under FTCA governed by federal law). Although the Supreme Court has never explicitly held that federal law governs employee status under the FTCA, the Court has on several occasions implicitly applied federal law to the question of who is an employee under the FTCA. *See*

employee status cannot be determined without recourse to federal sources, which determine the nature and extent of government supervision of the individual, the regulations governing the individual's hiring, status and duties, the nature of compensation, and whether the individual is subject to laws governing federal employees.[61] The scope of federal employment, like employee status, is likewise inseparable from governing federal sources and authorities.[62] Only a federal rule governing the scope of law enforcement officers' employment can fully recognize those federal sources.[63] The imposition of state definitions of when an employee acts within the scope of employment nullifies the federal authorities that in fact govern the federal employment relationship, and may violate the Supremacy Clause.[64]

A uniform nationwide scope of employment rule is also needed to advance the federal interest in a liability rule that is fair to victims of law enforcement officers' intentional torts.[65] Without a uniform rule, significant differences among states' scope of employment rules create a random pattern of government liability. As the government is generally far more able to pay money damages than an individual defendant, application of state law to claims under the 1974 Amendment makes victims' only potential remedy dependent on the happenstance of where the abuse occurred. With application of state scope of employment rules, claims based on similar or identical incidents that occurred in different states result in different and, therefore, inherently unfair outcomes.[66] Indeed, an officer's conduct in one state may give rise to

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United States v. Orleans, 425 U.S. 807, 813-14 (1976); Logue v. United States, 412 U.S. 521, 528 (1973). *Orleans* and *Logue* have been cited by federal appellate courts for the proposition that federal law governs employee status under the FTCA generally. *See, e.g.*, Williams v. United States, 50 F.3d 299, 305-06 (4th Cir. 1995) (citing *Logue*, 412 U.S. at 528); Ezekiel v. Michel, 66 F.3d 894, 899 (7th Cir. 1995) (citing *Orleans*, 425 U.S. at 813-14); Leone v. United States, 910 F.2d 46, 49 (2d Cir. 1990) (citing *Logue*, 412 U.S. at 528); Lurch v. United States, 719 F.2d 333, 336-37 (10th Cir. 1983) (citing *Orleans*, 425 U.S. at 813-14).

[61] *See* Gottlieb, *State Law*, *supra* note 58, at 215.

[62] *See* Garcia v. United States, 799 F. Supp. 674, 677-78 (W.D. Tex. 1992), *aff'd on other grounds*, 22 F.3d 609 (5th Cir. 1994) (holding that because "the concept of course or scope of employment is enmeshed within the employer-employee relationship and the same general principles of agency law," federal law should apply to the scope of employment determination as it does to the question of who is an employee under the Act).

[63] *See* Gottlieb, *State Law*, *supra* note 58, at 226.

[64] *See* JAYSON, *supra* note 24, § 9.08, at 9-211 to 9-212, 9-214 to 9-220; *supra* note 57; *infra* note 94.

[65] This interest can be seen as a component of the interest in defining when law enforcement abuses should give rise to government liability, which itself is encompassed within the broader sovereign interest in defining the sweep of the immunity waiver.

[66] *Compare* Flechsig v. United States, 991 F.2d 300 (6th Cir. 1993), *with* Red Elk v.

government liability, while the same conduct by the same officer could be held outside the scope of employment in another state. Given the nationwide reach of federal law enforcement agencies, the only fair remedy for officers' abuses is one that provides consistent remedies to victims of similar abuses throughout the country.

Nationwide uniformity is important in the scope of employment context despite the lack of nationwide uniformity as to the underlying intentional tort liability rule under the 1974 Amendment.[67] First, there are not likely to be significant differences among various states' definition of intentional torts like assault and battery. Unlike scope of employment, a term renowned for its varied interpretations,[68] assault and battery and the other intentional torts actionable under the 1974 Amendment enjoy a relatively stable meaning across jurisdictions.[69] Moreover, any significant variations among states' liability rules that would affect government liability under the 1974 Amendment may be disregarded by courts, based on pre-Amendment precedents establishing that what constitutes a particular intentional tort under the FTCA is governed by federal rather than state law.[70] The Supreme Court has held that impermissible variations in underlying substantive liability rules may be disregarded by courts adjudicating FTCA claims.[71] In any

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United States, 62 F.3d 1102 (8th Cir. 1995).

[67] *See infra* Part III.A.

[68] *See* PROSSER AND KEETON ON TORTS, *supra* note 21, at 502.

> This highly indefinite phrase . . . is so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions. It is obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not.

Id.

[69] *See* DOBBS, *supra* note 23, § 33, at 63-64, § 36, at 67-69.

[70] *See* Woods v. United States, 720 F.2d 1451, 1453 n.2 (9th Cir. 1982) (stating scope of assault and battery exemption governed not by California law but by the meaning of the FTCA); Stepp v United States, 207 F.2d 909, 911 (4th Cir. 1953). In *Stepp*, the court stated:

> We think, however, that where the United States excepts itself from certain liabilities, as in Section 2680 of the Federal Tort Claims Act, such exceptions must be interpreted under the general law rather than under some peculiar interpretation of a State or Territory. Stated differently, we do not think that a State may circumvent this intended exception to Government liability by merely abolishing the crime commonly known as an assault and battery and entitling such acts, instead, as a 'hurting.'

Id.

[71] *See* United States v. Muniz, 374 U.S. 150, 164-65 (1963) (noting that states' particular

event, because only minor variations are likely to occur among states' underlying liability rules, the impact of applying those rules is unlikely to result in inconsistent and unfair outcomes.

To the extent minor variations persist in underlying intentional tort liability rules, these variations are less disruptive of government functioning than are variations in scope of employment rules. The determination of whether an officer's conduct constituted assault and battery or false imprisonment under state law depends on the interaction between the officer and the plaintiff, and not on the relationship between the officer and the government. Thus, the underlying tort liability determination, unlike the scope of employment determination, does not directly implicate the federal employment relationship.[72] Because variations among states' underlying tort rules are minor and removed from the employment relationship, application of the underlying state liability rules is less likely to impact the government's managerial interest in operating law enforcement agencies according to uniform nationwide standards. For the same reasons, application of state underlying liability rules is also less likely to result in significant unfairness.

Finally, although applying underlying state tort rules to claims under the 1974 Amendment may in rare circumstances produce inconsistent results based on identical incidents, that relatively unlikely occurrence is acceptable given the benefit of applying state liability rules to all tortfeasors within a state. Intra-state uniformity as to substantive tort liability ensures that an alleged tortfeasor's status as a government employee does not affect whether conduct is considered tortious, and allows citizens of a state to rely on well-settled law governing what constitutes tortious conduct. Application of state law to liability rules simply ensures that government employees are held to that state's rules of what constitutes an intentional tort. Intra-state uniformity with respect to underlying tort rules has the benefit of holding federal employees' interactions with the public to the same standards that govern conduct generally in the states in which they work.

The benefits of intra-state uniformity as to the substantive liability rule, however, do not transfer to the context of the scope of employment

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substantive liability rules governing negligence of prison officials may be superceded by federal standard of care).

[72] *But see* Jack Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 508 (1976) (arguing that substantive as well as vicarious liability rule under Amendment should be federal).

rule under the 1974 Amendment.[73] First, the intra-state uniformity arguments in the FTCA context are generally weakened by the impossibility of achieving genuine uniformity between FTCA claims and state tort claims. Because federal courts have exclusive jurisdiction over FTCA claims, one of the benefits of intra-state uniformity — the avoidance of forum-shopping — is irrelevant in the FTCA context.[74] In addition, as between FTCA claims and state intentional tort claims, genuine intra-state uniformity as to the vicarious liability rule is not possible. The FTCA is subject to significant exceptions and exclusions, and the government is exempt from liability under many circumstances where private employers are not.[75] Finally, state sovereign immunity doctrines, which determine the extent of state government liability for the intentional torts of law enforcement officers, are not applicable to FTCA claims.[76] Thus, there can be no intra-state uniformity with respect to the vicarious liability rules governing the intentional torts of federal, state, and local law enforcement officers.

Second, the arguable fairness and expectation-based advantages of intra-state uniformity rules in the context of the vicarious liability rule are far outweighed by the sovereign immunity concerns implicated in that context. While it makes sense for government employees to be held to the same standards that generally govern conduct in a state, the determination of when the government becomes liable for employee actions is a particularly federal question that should not be left to state law. Nor are other interests, apart from intra-state uniformity, advanced by applying state *respondeat superior* law to claims under the 1974 Amendment. As Justice Harlan noted, "there is very little to be gained

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[73] Even in the substantive liability context, the interest in intra-state uniformity is weakened by the impossibility of truly achieving such uniformity. Federal courts have exclusive jurisdiction over FTCA claims, and there are significant substantive differences between FTCA claims and analogous state tort claims. *See infra* Part III.B.2. Thus, the only intra-state uniformity possible in the FTCA context is more limited: federal courts may decide certain issues in FTCA cases as analogous issues would be decided in a non-FTCA case by a state court.

[74] Intra-state, or vertical, uniformity often refers to sameness in adjudication of cases over which federal and state courts have concurrent jurisdiction, such as diversity cases. In such cases, intra-state uniformity has significant benefits: application of state substantive law in federal court prevents forum shopping by ensuring that identical substantive issues will be treated identically in federal or state court. In the FTCA context, there is no such benefit because the federal courts' exclusive jurisdiction precludes the possibility of forum shopping by plaintiffs with potential FTCA claims. *See* 28 U.S.C. § 1346(b)(1) (1994).

[75] *See infra* note 119 and accompanying text; *infra* Part III.A.

[76] *See, e.g., Muniz*, 374 U.S. at 164-65; Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955); JAYSON, *supra* note 24, § 9.08[2], at 9-213 to 9-214.

from the standpoint of federalism by preserving different rules of liability . . . dependent on the State where the injury occurs."[77]

II. IS THE NEED FOR A FEDERAL RULE LIMITED TO INTENTIONAL TORT CLAIMS?

The preceding analysis explores the need for a federal scope of employment rule in a specific subset of FTCA claims — those based on intentional torts of law enforcement officers. The original, pre-Amendment FTCA waived sovereign immunity more generally for claims based on the negligence of federal employees.[78] The FTCA creates government liability for the negligence of both civilian and military federal employees.[79] It is therefore important to explore to what extent the preceding analysis of the need for a federal scope of employment rule applies outside the specific context of the 1974 Amendment to FTCA claims arising from civilian or military negligence.

A. Claims Arising from Federal Employee Negligence

To determine employer liability for employee negligence, most states have adopted one of the two scope of employment tests: the purpose test or the broader foreseeability test.[80] Thus, those injured by acts of federal employee negligence that were foreseeable but not intended to serve the employer's purposes will be entitled to recovery from the United States in some states, and denied recovery in others. For example, someone injured by an employee driving a government vehicle for personal purposes, such as having lunch, would likely be denied recovery in states where the purpose test governs, and would likely be able to recover in states where the foreseeability test is used.[81] Although applying state *respondeat superior* rules in the negligence context yields inconsistent results in some instances, negligence claims more often than intentional torts claims arise from employee conduct that would clearly

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[77] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409 (Harlan, J., concurring).

[78] *See infra* Part III.A.

[79] *See id.*

[80] PROSSER AND KEETON ON TORTS, *supra* note 21, § 70, at 504.

[81] *Compare* Taber v. Maine, 67 F.3d 1029, 1033-37 (2d Cir. 1995) (finding negligent employee driving for recreation held within scope of employment under foreseeability test applicable under Guam law), *with* Cuevas v. Harris, 2 F. Supp. 2d 189, 191 (D.P.R. 1998) (finding employee traveling for purposes of having lunch not within scope of employment under purpose test applicable under Puerto Rico law).

meet either the purpose or the foreseeability test. This is because in the negligence context there is no inherent tension between intentionally tortious conduct and the purpose test's requirement that conduct serve the employer's purposes.

Although the inconsistent results in the negligence context are less dramatic and less frequent, certain policy reasons set forth in Part I in support of a federal scope of employment rule are applicable to FTCA claims arising from employee negligence as well as to claims arising from the intentional torts of a law enforcement officer. But the most compelling reasons supporting a federal scope of employment rule are specific to the intentional tort context, as they relate to the exercise of the exclusively governmental law enforcement function. Thus, in the context of FTCA negligence claims, there would be some, but relatively little, benefit from applying a federal rule to the scope of employment determination.

Among the reasons favoring a federal rule that applies to negligence as well as intentional tort claims are the general interest in defining the sweep of the immunity waiver, and the need for a uniform rule to serve managerial and fairness interests. The federal interest in defining the sweep of the waiver of sovereign immunity is implicated by the scope of employment rule applicable to negligence claims just as it is implicated by the scope of employment rule applicable to claims based on law enforcement officers' intentional torts. In either context, the scope of employment rule largely determines the degree to which the government is liable for its employees' torts. Thus, in either context the rule effectively defines the sweep of the immunity waiver. There is a federal policy interest in controlling the expenditure of federal funds to pay money damages to those injured by federal employee negligence. In the negligence context, however, this interest is both less compelling and more readily served by application of state law.[82]

In the intentional tort context, the interest in defining the sweep of the waiver is heightened by the fact that liability arises from the exercise of government-sanctioned authority and force pursuant to the government's exclusive law enforcement powers. In the negligence

[82] The federal interest in determining the breadth of the immunity waiver could be satisfied by federal adoption of either of the scope of employment tests that states have developed for determining the vicarious liability of private employers for negligence: the narrower, purpose-oriented scope of employment test, or the broader foreseeability test. The choice between the two would depend, of course, on assessment of the relative importance of other federal interests, such as the fiscal interest in limiting liability, on the one hand, and the interest in providing a remedy for a broad range of injuries, on the other.

context, liability generally arises from ordinary employee negligence that is indistinguishable from, and readily analogous to, the negligence of private employees, such as the negligent driving of a federal postal worker.[83] A postal worker driving a government vehicle interacts with the public in much the same manner as does an employee of a private delivery service driving a company vehicle. In this context, the government employee's conduct is not enabled by a uniquely governmental power, as it is in the intentional tort context. Thus, in the negligence context, private and government employees are appropriately subjected to similar rules governing whether they acted within the scope of employment in a particular instance, and what constitutes a deviation from employment. Unlike the intentional tort context, there are ample state law precedents that take into account the considerations relevant to determining when vicarious liability should be imposed for employee negligence. Because the employee's negligence giving rise to FTCA liability is indistinguishable from that of private employees, those considerations do not significantly change because the employer happens to be the federal government.[84]

In the negligence context, however, a uniform federal scope of employment rule would serve managerial and fairness interests as it would in the intentional tort context. All federal agencies, including law enforcement agencies, operate on a nationwide or regional basis. Thus, all federal agencies have an interest in training and supervising their employees with an eye toward what employee conduct might give rise to government liability, and that interest is undermined by application of state rules. Moreover, like federal law enforcement officers, federal employees' employment is generally governed exclusively by federal statutes and regulations, and a uniform scope of employment rule would

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[83] Although the typical FTCA claim finds many analogies in the private sector, some federal employee activities that could give rise to FTCA negligence claims are uniquely governmental. Even in the civilian context, "the complex and various activities of government and the activities of private enterprise are as different as they are alike, and the application of respondeat superior to government raises a host of problems for which the private law provides doubtful analogies." Louis Jaffe, *Suits Against Governments and Officers: Damages*, 77 HARV. L. REV. 209, 211 (1963); *see, e.g.*, Louis Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 14 (1963) (describing English law precedent involving post office employee's negligence, where employee was deemed servant of king).

[84] Of course, the protection of the federal treasury is at issue in FTCA negligence claims and not in analogous claims arising from private employee negligence. Nonetheless, the decision to make payments from that treasury, based on the extent such payments would be required of private employers, makes sense in light of the close analogy between the activities of private and federal employees in this context.

recognize and incorporate those authorities.[85] Indeed, this general interest in defining the federal employment relationship is the basis for courts' recognition that under the FTCA, employee status of all federal employees, including civilian employees, is governed by federal law.[86] Fairness toward victims of government employee negligence is likewise undermined by application of state law, to the extent such application produces inconsistent results based on the same or very similar incidents of negligence.

Nonetheless, the need for a federal rule governing the scope of employment determination for negligence claims is considerably weaker than the need for a federal rule in the intentional tort context. This is because, as a general matter, FTCA negligence claims arise from government employee negligence that is easily analogized to private employee negligence. Although there are fiscal and managerial interests that would be served by a federal scope of employment rule for negligence actions, the application of state law in this context does not implicate the government's weightier interest in responsibly executing its unique powers of law enforcement.

B. The Special Case of Military Members' Negligence

Although application of state scope of employment rules to FTCA negligence claims generally poses relatively few significant policy concerns, application of those rules to claims arising from military negligence presents more serious problems.[87] These problems arise from the military's unique status as an exclusively federal function, and from the uniquely all-encompassing nature of military employment. Although these problems are similar to those that arise in the context of law enforcement officers' intentional torts, there are important

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[85] *See* Gottlieb, *State Law*, *supra* note 58, at 226.

[86] *See supra* notes 60-61 and accompanying text.

[87] Like civilian negligence claims under the FTCA, claims arising from military negligence often involve negligent driving by members of the military who are on duty, on leave, or on travel status. *See* JAYSON, *supra* note 24, § 9.07, at 9-167 to 9–168, 9-195; Lieutenant Philip A. Faix, Jr., *Althea Williams Revisited: "Line of Duty" Cases — Need for Reconsideration*, 26 Fed. B.J. 12, 12-13 nn.5 & 7 (1966). In the military context, application of state scope of employment rules has resulted in divergent outcomes in cases arising from nearly identical circumstances. This is due in part to the same differences among state scope of employment rules that create divergent outcomes in civilian employee negligence claims. *See, e.g.*, JAYSON, *supra* note 24, § 9.08, at 9-218. In the military context, however, the divergent outcomes also arise from courts' disagreement over the appropriate role of military regulations in the FTCA scope of employment analysis. *See infra* notes 102-13 and accompanying text.

differences in the analysis of the use of state law in the military and law enforcement contexts.

Like the scope of employment determination in the general negligence context, the scope of employment determination in the military negligence context implicates a federal interest in determining the sweep of the immunity waiver. In the military negligence context, unlike the intentional tort context, there is no heightened interest in determining the sweep of the waiver. This is because the waiver of sovereign immunity for military negligence claims, unlike the waiver effected by the 1974 Amendment, does not create government liability for torts that arise from the exercise of United States' uniquely governmental powers, or from the unique power and authority vested in particular government employees. While the military and its members clearly exercise uniquely governmental powers, torts arising from the exercise of those powers are excluded from the FTCA.[88] The military negligence claims actionable under the FTCA largely arise from automobile accidents and other ordinary incidents of negligence that are closely analogous to those involving private employees.[89] Therefore, the policy decision as to what range of military negligence should give rise to government liability is not as complex and sensitive as is that decision in the intentional torts context.

Because of the existence of private analogues for many instances of military negligence, scope of employment principles developed in the private context provide an appropriate starting point for determining whether a military employee acted in the scope of employment in committing a particular act of negligence. These rules take into account the policy considerations relevant to the determination of whether the ordinary negligence of an employee, who happens to be a member of the military, gives rise to employer liability. Nonetheless, the powerful federal interest in defining the military employment relationship, and the uniquely all-encompassing circumstances of military employment, make adherence to state scope of employment rules undesirable and impractical.

The scope of employment determination in the military negligence context squarely implicates the United States' established interest in defining the military employment relationship. The military function is even more quintessentially federal than the federal law enforcement

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[88] The FTCA expressly excludes claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j) (1994).

[89] *See generally* JAYSON, *supra* note 24, § 9.07, at 9-167 to 9-168.

function because the military not only has no private analogue, it also has no analogues in the individual states. The uniquely and exclusively federal character of the military requires that the military employment relationship be defined exclusively by federal sources. The Supreme Court has recognized this in two major rulings. In *United States v. Standard Oil Co.*, the Court held:

> Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. [T]he Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers.[90]

In *Feres v. United States*, the Court again emphasized the "distinctively federal" nature of the relationship between the United States and military personnel, stating that "[w]ithout exception, the relationship of military personnel to the Government has been governed exclusively by federal law."[91]

These holdings bear directly on the scope of employment determination under the FTCA. The FTCA scope of employment assessment depends entirely on "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government" [92] — precisely the questions the Supreme Court held to be "fundamentally derived from federal sources and governed by federal

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[90] 332 U.S. 301, 305-06 (1947) (holding that a tort suit brought by the United States against a private tortfeasor to recover for loss of a soldier's services due to the tortfeasor's negligence was appropriately determined by federal common law rather than state law, because of the significant federal interests implicated by the action).

[91] 340 U.S. 135, 146 (1950). The Court cited the federal nature of this relationship as a basis for excluding from the FTCA actions for injuries incurred by armed forces personnel incident to service. *Id.* The court also found that allowing service members to bring state tort claims against the United States would disrupt military discipline and order. *Id.* Commentators have criticized the *Feres* doctrine as an unwarranted addition to the statutorily enumerated exceptions to the FTCA's waiver of sovereign immunity. *See* CHEMERINSKY, *supra* note 45, § 9.2, at 603, 605; DOBBS, *supra* note 23, § 266, at 711-13; Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597, 1606-13 (1989).

[92] United States v. Sharpe, 189 F.2d 239, 241 (4th Cir. 1951).

authority."[93] Even though torts arising from military negligence do not directly arise from exercise of the military power to wage war, the determination of when a member of the military is acting in the scope of employment nonetheless implicates the significant federal interest in defining the military employment relationship. That interest can only be met by a federal rule that takes into account the unique and all-encompassing quality of military employment, and the array of military regulations that govern that relationship.[94]

The need for a federal rule governing the military scope of employment determination is demonstrated by the difficulty courts have encountered in applying state rules to this question. Because federal courts have exclusive jurisdiction over FTCA claims, state courts have never, and will never, address issues unique to military employment that regularly arise in the FTCA context.[95] The lack of private analogues to the military, and the consequent lack of applicable state law, has left courts uncertain as to how to make the scope of employment determination in military cases. Courts have recognized, and indeed bemoaned, the lack of useful state precedent available to them in deciding military scope of employment questions. In *Platis v. United States*, a federal district court in the Tenth Circuit sought to determine whether a military airman was acting within the scope of his employment when he negligently injured plaintiffs in an automobile accident that occurred in Utah.[96] The court held it must apply Utah law, even though cases involving the United States' liability "in this type of situation can never arise in the state courts. This is due to the singular

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[93] *Standard Oil*, 332 U.S. at 305-06.

[94] The Tenth Circuit has held that in the military context, the question of federal employment is a matter of constitutional as well as statutory law, and must, therefore, be governed by federal law under the Supremacy Clause. The court explained:

> The States may not decide for the United States who are and who are not Federal employees because the existence of Federal employment is a Federal question to be answered by application of Federal Law. In the case at bar both the Federal Constitution and statutes bear on the fact of employment. The supremacy of Federal law requires the determination of Federal employment by Federal law.

Pattno v. United States, 311 F.2d 604, 606 (10th Cir. 1962) (citing Article 1, section 8, clause 16 of the United States Constitution: "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress").

[95] In a sense this endeavor is not so different from any instance in which a federal court applies state law to a new factual situation. But, normally, federal courts applying state law to an issue not yet addressed by state courts are called upon to assess how state courts will resolve that issue. Federal courts in FTCA claims are in the position of deciding how state courts would decide *respondeat superior* issues that they never will decide.

[96] 288 F. Supp. 254 (D. Utah 1968).

relationship of the United States to its military personnel, and, to the provision of the Tort Claims Act conferring exclusive jurisdiction upon the federal courts."[97] The court further complained that those state law cases that do exist are not particularly useful. The court stated:

> It is, of course, obvious that state court *respondeat superior* decisions in areas of the law other than those involving the military do not produce precedents which are apposite. Consequently the federal courts must search in the reports of decisions from the state courts for cases, which are as nearly comparable as may be. None, ever, will be directly in point. The process is one of trying to match up sets of dissimilar facts, and applying to the facts of the case at hand the principles announced by the high court of the place where the accident occurred.[98]

The inadequacy of state law precedents as a basis for determining the scope of military employment is evidenced by courts' implicit or explicit reliance on obviously relevant federal military regulations while purporting to apply state law to the FTCA scope of employment determination.[99] The Fifth Circuit has expressly held that the scope of

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[97] *Id.* at 265-66.

[98] *Id.* at 266. Likewise, in *McSwain v. United States*, 422 F.2d 1086 (3d Cir. 1970) the Third Circuit noted:

> [b]ecause the Federal Tort Claims Act requires that suits be brought in the federal courts, there cannot be a state case directly in point. Federal courts, however, have considered many similar suits and apply the most analogous state law. As a result, there are diverse views in the Courts of Appeals depending basically on the applicable state law, and to some extent on the particular factual situation. Although the traditional doctrine of *respondeat superior* may not be appropriate to the relationship between military personnel and the armed forces, we are constrained by legislative mandate to apply this concept.

Id. at 1088; *see also* Cooner v. United States, 276 F.2d 220, 223-24 (4th Cir. 1960) (because of the lack of state cases "exactly in point as to the factual situations involved" courts adjudicating military negligence claims under the FTCA "have attempted to find light in decisions of the state courts where the accidents happened, [but] they have also felt it necessary to look to general agency principles") (internal citations omitted); Badger State Mut. Cas. Co. v. United States, 383 F. Supp. 1226, 1229 (E.D. Wis. 1974) ("The task of the federal courts in determining the state's concept of *respondeat superior* is made difficult when military personnel are involved. While the state law is to be applied, there can never be state cases exactly in point because of the lack of state precedents covering military situations which are unique compared to any civilian counterpart."); Marquardt v. United States, 115 F. Supp. 160, 162 (S.D. Cal. 1953) (stating that Arizona cases shed little light on problem presented by a military FTCA claim).

[99] *See, e.g.*, Leonard v. United States, 235 F.2d 330, 334 (10th Cir. 1956) (holding that a search of Wyoming law "reveals that there is a dirth of authority on the question [of federal employees' scope of employment], but such cases as have been decided by the Supreme

employment determination in the military context "is generally to be equated with the traditional notions of scope of employment" but must also take into account "the special factors characteristic of military activity and discipline."[100] Indeed, significant confusion and disagreement has arisen over the effect of military regulations governing base life on the FTCA scope of employment analysis.[101] The Ninth and Fifth Circuits have held that where activity that takes place on a military base, such as owning a dog or mowing one's lawn, is governed by military regulations, that activity is within the scope of military employment for purposes of FTCA liability.[102] In *Lutz v United States*, the Ninth Circuit held that the government was liable for an injury inflicted by a dog owned by a serviceman living on an Air Force base.[103] The court relied on Air Force regulations requiring pet-owning base residents to maintain control over their pets, and held that this regulation imposed an affirmative duty on the pet owner to protect the safety of all base residents by controlling the animal. The court concluded that the owner's negligent failure to fulfill this regulation-based duty was conduct within the scope of employment, and gave rise to FTCA liability.[104] The court reasoned that, given the unique context of military life, in which the employment relationship continues even during off-duty hours, the owner's responsibility to control the dog fell within the scope of employment.[105] Likewise, in *Craft v. United States*, a soldier

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Court of Wyoming, are in harmony with the body of the Federal Case Law, and the general rules prevailing among the various States of our Union"); Bach v. United States, 92 F. Supp. 715, 716-17 (S.D.N.Y. 1950) (holding that New Jersey law governs FTCA scope of employment, but citing non-New Jersey cases that had applied federal law); Parrish v. United States, 95 F. Supp. 80, 82-83 (M.D. Ga. 1950) (finding army member was not acting in scope of employment where use of vehicle involved in accident was unauthorized and contrary to binding Army regulations); Rutherford v. United States, 73 F. Supp. 867, 868-69 (E.D. Tenn. 1947), *aff'd per curiam*, 168 F.2d 70 (6th Cir. 1948) (holding that member of Navy who had completed duty was not acting in scope of employment when accident occurred); JAYSON, *supra* note 24, § 9.08, at 9-205 to 9-211; Faix, *supra* note 87, at 26 (citing cases); Gottlieb, *State Law*, *supra* note 58, at 218.

[100] Bettis v. United States, 635 F.2d 1144, 1147 (5th Cir. 1981); *see also* Craft v. United States, 542 F.2d 1250, 1255 (5th Cir. 1976); Hinson v. United States, 257 F.2d 178, 182-83 (5th Cir. 1958); Holloway v. United States, 829 F. Supp. 1327, 1328 (M.D. Fla. 1993) (considering special factors of military service to determine scope of employment).

[101] For a thorough discussion of this disagreement, see Michael P. Frederick, *Scope of Employment Under the Federal Tort Claims Act and Attempts to Expand the Limits*, 33 A.F. L. REV. 69 (1990) (criticizing Ninth Circuit's position on role of military regulations in scope of employment determination).

[102] *See* JAYSON, *supra* note 24, § 9.07[4], at 9-203 to 9-204.

[103] 685 F.2d 1178 (9th Cir. 1982).

[104] *Id.* at 1183-84.

[105] *Id.* *Lutz* has been followed in other Ninth Circuit decisions. *See Doggett v. United*

operating a power lawn mower on the lawn of his Army base quarters injured a child.[106] The Fifth Circuit found the soldier's negligent operation of the lawn mower fell within the scope of his employment and gave rise to federal liability, because Army regulations and orders required the soldier to mow his lawn.[107]

The District of Columbia and Eighth Circuits came to the opposite conclusion under similar circumstances, and held that whether conduct implicated military regulations is irrelevant to the determination whether that conduct falls within the scope of employment under state law. In *Nelson v. United States*, the District of Columbia Circuit applied District of Columbia *respondeat superior* law to the question raised in *Lutz* — whether the government is liable for injuries resulting from an Air Force serviceman and base resident's failure to control his dog.[108] The court emphasized the requirement that an employee acts in furtherance of the employer's interests in order for conduct to be considered within the scope of employment.[109] The court recognized, as the *Lutz* court did, the "unique context of life on a military base," but found that the "multi-faceted relationship" between the military and its personnel includes duties other than those imposed by the government in its role as employer.[110] In the *Nelson* court's view, regulations such as those governing pet maintenance are "not imposed by the military in its role as an employer" and "do not run to the employer's benefit."[111] The court found that such incidental regulations governing base life benefit the community at large, and that the duties that arise under these regulations therefore "cannot be said to be discharged within the scope of employment."[112] The Eighth Circuit has followed the reasoning of the District of Columbia Circuit and held that conduct does not fall within the scope of employment merely because it implicates regulations

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States, 875 F.2d 684, 687-88 (9th Cir. 1989) (holding government liable for officer's failure to detain serviceman drinking in Navy-operated club, because regulations governed supervisory personnel's duty to respond to observation of persons under influence of alcohol); *Washington v. United States*, 868 F.2d 332, 334 (9th Cir. 1989) (applying local law but finding that off-duty servicemen acted within scope of employment based on Navy housing regulations that impose duty to prevent fire hazards).

[106] 542 F.2d 1250 (5th Cir. 1976).

[107] *Id.* at 1251.

[108] 838 F.2d 1280 (D.C. Cir. 1988).

[109] *Id.* at 1283.

[110] *Id.*

[111] *Id.* at 1283-84.

[112] *Id.* at 1284.

designed to enhance community life and benefit all base residents.[113]

The disagreement among circuits regarding the role of military regulations in the scope of employment determination has resulted in a sharp disparity in the outcome of FTCA negligence claims arising from the military context. This disparity can be remedied by application of a federal scope of employment rule adapted for the military context. The need for nationwide versus intra-state uniformity also points to a need for a federal scope of employment rule in the military context. As in the intentional tort context, only a uniform rule governing vicarious liability can meet the United States' managerial interest in efficient operation of the armed services. The military, like federal law enforcement agencies, is organized not within particular states but by departments, commands, and divisions that operate nationally and internationally. A uniform federal vicarious liability rule is needed to allow armed service branches to factor that rule into their own nationally organized regulations, training, and liability reduction efforts. This managerial interest takes on a heightened importance in the military context, given the interests articulated in *Standard Oil* and *Feres*.

Fairness to those injured likewise requires a nationwide rule governing the United States' vicarious liability for military negligence. Although there is less extreme deviation among states' *respondeat superior* rules governing negligence than there is in the intentional tort context, there are still significant differences among various state rules. In states that follow the foreseeability scope of employment test, liability for negligence will be imposed on the government in a broader range of circumstances than in states adopting the purpose test. As a result, the ability to recover for injuries arising from identical accidents varies depending on where the accident occurred, resulting in arbitrary and unfair differences among available remedies. Moreover, as in the intentional tort context, the benefits of a uniform scope of employment rule outweigh the minimal benefits of intra-state uniformity as to the vicarious liability rule. Here too, the relatively minimal interest in intra-state uniformity is met by imposing state law to the underlying

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[113] *See* Piper v. United States, 887 F.2d 861, 863 (8th Cir. 1989). The Eleventh Circuit has expressed ambivalence about the relevance of military regulations to the scope of employment determination under local law. In *Bennett v United States*, 102 F.3d 486 (11th Cir. 1996), the court held that the mere fact that conduct implicated military regulations was not enough to bring the conduct within the scope of employment. However, the court implied that if conduct were required by those regulations, that may indicate the conduct was within the scope of employment. *See id.* at 493 (distinguishing *Craft* on the grounds that the conduct giving rise to the injury in *Craft* was required by governing military regulations).

negligence determination.

III. CAN THE EXISTING STATUTORY SCHEME SUPPORT A FEDERAL RULE?

Bearing in mind the need for federal scope of employment rules governing claims under the 1974 Amendment and claims arising from military negligence, the next inquiry is how best to implement such rules. Can the existing statutory scheme support a federal scope of employment rule, either in the 1974 Amendment context alone, more generally for negligence claims as well, or for military negligence claims? Or is an additional amendment of the FTCA necessary to achieve such a rule? The answer turns largely on whether Congress intended the scope of employment determination under the 1974 Amendment to be governed by federal or state law. According to basic principles of federal statutory interpretation, federal statutory terms are presumptively governed by federal law absent clear congressional intent for state law to govern.[114]

Following a brief summary of the relevant provisions of the FTCA in Part III.A, this Part proceeds to analyze whether the existing statutory scheme supports presumptive application of federal law to the scope of employment determination. Part III.B argues that the language and legislative history of the original FTCA do not demonstrate clear congressional intent for state law to govern the general scope of employment requirement, or the military scope of employment determination. Part III.C argues that application of state scope of employment law to determine federal liability for intentional torts under the 1974 Amendment is contrary to Congress' intent, as demonstrated by the Amendment's legislative history, to create a federal scope of employment rule for claims under the Amendment. Part III.D concludes that in spite of the lack of clear congressional intent to apply state

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[114] *See, e.g.*, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989); Jerome v. United States, 318 U.S. 101, 104 (1943); Nyhuis v. Reno, 204 F.3d 65, 75 n.10 (3d Cir. 2000); HART & WECHSLER, *supra* note 16, at 768 ("[m]any cases articulate the view that" federal law presumptively governs federal statutory terms). In a dissenting opinion in *Jansen v. Packaging Corporation of America*, which addressed employer liability under Title VII, Judge Easterbrook posited the contrary view that "[w]hen a federal statute is silent, we obtain the necessary rule from state law, unless application of state law would undermine a federal norm." 123 F.3d 490, 553 (7th Cir. 1997) (en banc) (Easterbrook, J., dissenting); *see also id.* at 570-71 (Wood, J., dissenting) (accord). Judge Coffey's concurrence called Easterbrook's approach "curious and novel (indeed unprecedented)." *Id.* at 523 (Coffey, J., concurring in part and dissenting in part). The Supreme Court also rejected Easterbrook's approach and held that employer liability was to be determined according to federal law. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 750, 754-55 (1998).

respondeat superior law to the FTCA scope of employment determination, the Supreme Court's 1955 decision in *Williams v. United States* prevents presumptive application of a federal rule.

A. The Statutory Scheme: The Original FTCA and the 1974 Amendment

The FTCA was passed in its original version in 1946 to provide a remedy against the United States for torts committed by federal employees acting within the scope of their employment.[115] The broad waiver of sovereign immunity created by the FTCA was seen as necessary to allow those injured by the torts of federal employees to recover from the United States.[116] The principle focus of the FTCA was the ordinary negligence of government employees carrying out their duties; the example repeatedly invoked is that of an automobile accident caused by a negligent postal worker.[117] Although the FTCA generally sought to make the government liable for such incidents where a private employer would be liable, the government's liability under the FTCA was made subject to significant exceptions.[118] Most notably, the original FTCA excluded significant areas of liability from the waiver of immunity, including discretionary acts and most intentional torts.[119]

Section 1346(b) of the FTCA sets forth the basic parameters of government liability. This provision creates exclusive federal jurisdiction over claims against the United States for money damages . . . for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the

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[115] For a thorough discussion of the history of the FTCA's passage, see Irvin M. Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 GEO. L.J. 1, 1-9 (1947) [hereinafter Gottlieb, *FTCA*].

[116] *See* Dalehite v. United States, 346 U.S. 15, 24-25 (1953) (calling the private bill process, which previously provided the only remedy to victims of government employee torts, "notoriously clumsy"); Boger, *supra* note 72, at 508.

[117] *See, e.g.*, S. REP. NO. 93-588 (1973), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2791.

[118] *See infra* note 149 and accompanying text.

[119] The exclusions from the FTCA are contained in 28 U.S.C. §§ 2680(a)-(k) (1994). Section 2680(a) excludes claims "based upon the exercise or performance [of] . . . a discretionary function or duty . . . ". 28 U.S.C. § 2680(a). Section 2680(h), the intentional tort exception, originally excluded claims for "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" but not claims for trespass or invasion of privacy. 28 U.S.C. § 2680(h).

law of the place where the act or omission occurred.[120] Thus, in order to recover under the FTCA, a plaintiff must make three showings: (1) that the alleged tortfeasor was a federal employee; (2) that the employee acted in the scope of employment; and (3) that the employee's negligence caused the plaintiff's injuries.

The language of Section 1346(b) links liability rules to the law of the place. Thus the third showing — whether the actions giving rise to the claim constituted a tort — is determined by the tort law of the state where those actions occurred. The statute as written, however, is unclear as to whether federal or state law governs the first and second showings. With respect to the first showing — whether the tortfeasor is a federal employee — courts initially disagreed, but now widely recognize, that federal law governs this uniquely federal question.[121] Courts also initially split over whether the scope of employment determination should be governed by state or federal law.[122] The statute itself does not define scope of employment, except to indicate that, for United States military personnel, the phrase means "in line of duty."[123] In 1955, the Supreme Court resolved the split by holding in *Williams v. United States*, a case arising from military negligence, that the scope of employment clause in Section 1346(b) is governed by state law of *respondeat superior*.[124] The *Williams* rule has been applied throughout the federal circuits to FTCA claims arising from government employee negligence.[125]

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[120] 28 U.S.C. §1346(b)(1) (1994).

[121] *See supra* note 60 and accompanying text; *infra* notes 261-63 and accompanying text. The FTCA defines an employee of the government as follows:

> officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently, in the service of the United States, whether with or without compensation.

28 U.S.C. § 2671 (1994).

[122] *See, e.g.*, United States v. Lushbough, 200 F.2d 717, 720 (8th Cir. 1952) (noting split among circuits as to whether federal or state law governs FTCA scope of employment determination); Marquardt v. United States, 115 F. Supp. 160, 161 (C.D. Cal. 1953) (describing split among circuits); *see also* Gottlieb, *State Law*, *supra* note 58, at 216-26 (describing pre-*Williams* cases applying federal law to FTCA scope of employment determination); *infra* notes 194-212 and accompanying text (describing pre-*Williams* cases addressing what law governs the scope of employment determination).

[123] 28 U.S.C. § 2671.

[124] 350 U.S. 857 (1955) (per curiam).

[125] *See, e.g.*, McSwain v. United States, 422 F.2d 1086, 1088 (3d Cir. 1970) ("liability for the acts or omissions of a . . . federal employee is determined by the law of *respondeat superior* of the state in which the act or omission occurred"); Voytas v. United States, 256

In 1974, Congress amended the FTCA to allow claims based on the intentional torts of law enforcement officers. The 1974 Amendment preserved the general exclusion of intentional torts contained in Section 2680(h) of the FTCA, but amended that provision to create a law enforcement exception to that exclusion.[126] The 1974 Amendment added the following language to Section 2680(h): "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 . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."[127]

Because the amended Section 2680(h) makes intentional tort claims actionable through Section 1346(b), the latter provision's law of the place and scope of employment clauses are applicable to claims brought under the 1974 Amendment. Relying on *Williams*, courts adjudicating intentional tort claims under the 1974 Amendment have applied state law to determine whether a law enforcement officer acted within the scope of employment.[128]

F.2d 786, 789 (7th Cir. 1958) ("As we interpret the decision of *Williams v. United States*, 350 U.S. 857 the law of the state of Illinois is controlling as to the doctrine of respondeat superior."); United States v. Taylor, 236 F.2d 649, 653 (6th Cir. 1956) ("It has been conclusively settled, however, as the district court correctly held, that . . . the standard of governmental liability under the Federal Tort Claims Act is with respect to . . . employees that imposed by the respondeat superior doctrine of the state."); United States v. Kennedy, 230 F.2d 674, 674 (9th Cir. 1956); Leonard v. United States, 235 F.2d 330, 333 (10th Cir. 1956); Baker v. United States, 230 F.2d 831, 831 (D.C. Cir. 1956) (remanding for reconsideration in light of *Williams v. United States*); JAYSON, *supra* note 24, § 9.07, at 9-157 to 9-160 (citing cases); Donald T. Kramer, Annotation, *Federal Tort Claims Act: When Is Government Officer or Employee "Acting Within the Scope of His Office or Employment" For Purpose of Determining Government Liability Under 28 U.S.C.A. § 1346(b)*, 6 A.L.R. FED. 373, § 3 (1971) (citing cases).

[126] *See supra* note 1.

[127] The full text of the Amendment states:

> *Provided*, [t]hat, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. 2680(h) (Supp. 1976), amending 28 U.S.C. § 2680(h) (1970).

[128] *See, e.g.*, Flechsig v. United States, 991 F.2d 300, 302 (6th Cir. 1993); Kennedy v. United States, 585 F. Supp. 1119, 1122 (D.S.C. 1984); Daniels v. United States, 470 F. Supp. 64, 69 (E.D.N.C. 1979); Lucas v. United States, 443 F. Supp. 539, 543 (D.D.C. 1977), *aff'd*, 590 F.2d 356 (D.C. Cir. 1979).

B. Congressional Intent and the Original Scope of Employment Requirement

1. Textual Analysis

As noted, the source of the scope of employment requirement applicable to claims brought under the 1974 Amendment is Section 1346(b), which creates a remedy for injuries

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under 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.[129]

What law Congress intended to govern the scope of employment clause essentially depends on how much of Section 1346(b) Congress intended the "law of the place" clause to modify. Put another way, the question turns on exactly what Congress meant by "circumstances."

While Section 1346(b) can be read to support application of state *respondeat superior* law to determine the scope of employment, this reading violates the rule against surplussage, the basic canon of statutory construction that expresses the presumption that every statutory term adds something to the law's meaning.[130] This reading is based on the premise that the "circumstances" under which private employers are held liable under state law include both the underlying state tort liability rules and the state vicarious liability rules. Both bodies of state law do apply to private employers, and Congress' use of the broad term "circumstances" is powerful evidence of an intent to make state vicarious liability rules applicable to claims under the FTCA. But interpreting Section 1346(b) to require application of those rules to the United States makes the provision's separate scope of employment clause superfluous.[131] If "circumstances" includes the state's vicarious liability rules, the separate "scope of employment" clause adds nothing to Section 1346(b). The only way to give meaning to the FTCA scope of employment clause is to interpret it as an independent requirement, separate from the general provision that the United States is liable under circumstances where a private person would be under state law, and not

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[129] 28 U.S.C. § 1346(b)(1) (1994).

[130] *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 266 (2000).

[131] 28 U.S.C. §1346(b)(1). The surplussage problem is even more pronounced in the military context. *See infra* Part III.B.3.

governed by the law of the place clause.[132] Separation of the scope of employment requirement from the law of the place clause still gives ample meaning to the latter, as that phrase unquestionably applies to the rules governing underlying liability.

Reading the law of the place clause as applicable only to the underlying liability rule also avoids an internal inconsistency problem that arises if law of the place governs the scope of employment clause. The scope of employment clause is contained in the larger phrase "an employee of the government acting within the scope of his office or employment." There can be no basis for applying the law of the place to the scope of employment clause, but not to the rest of the unified phrase in which that clause is found. No punctuation separates the "employee of the government" requirement from the "scope of . . . employment" requirement. It is widely accepted that the determination of who is an employee under the FTCA is not governed by the law of the place clause, and is a matter of federal law.[133] The only way to reconcile the FTCA's law of the place clause with the accepted reading of "employee" status under the FTCA is to limit application of the "law of the place" to underlying tort liability rules.

Interpretation of the "employee of the government acting within the scope of . . . employment" clause as separate from, and not modified by, the law of the place clause is supported by two additional canons of construction. The rule of the last antecedent provides that qualifying words are presumed to modify only the provisions immediately preceding them.[134] In light of this canon, the grammatical structure of Section 1346(b) indicates the law of the place clause modifies only the clause immediately preceding it ("under circumstances where the United States, if a private person, would be liable to the claimant"), and not the first half of the provision, where the scope of employment clause is located.[135] Likewise, the canon of *inclusio unius* provides that inclusion of particular language in one section of a statute and omission of that language in another creates a presumption that Congress intended that

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[132] *See* Garcia v. United States, 799 F. Supp. 674, 678 (W.D. Tex. 1992) (inclusion of the scope of employment clause in section 1346 "would be unnecessary if the state law of *respondeat superior* is interpreted to apply . . . . By expressly including the scope of employment language in this provision, Congress has indicated that this element should be determined separately and distinctly from the law of the place.").

[133] *See id.* at 677-78; *supra* note 60 and accompanying text.

[134] *See* ESKRIDGE, *supra* note 130, at 258.

[135] Of course, this argument begs the question of whether "circumstances" includes vicarious liability rules.

language to apply only to the section in which it was expressly included.[136] Under this canon, given Congress' failure to include an express provision indicating that the scope of employment requirement is governed by law of the place; such a provision should not be inferred.

In sum, the language of Section 1346(b) may be read to support application of federal law to the scope of employment clause. That said, the canons of statutory construction are notoriously malleable, and there is a powerful argument that the plain meaning of Section 1346(b), given Congress' use of the word "circumstances," makes state vicarious as well as underlying liability rules applicable to FTCA claims.[137] Nonetheless, this analysis demonstrates that, at a minimum, the statutory text alone does not evidence the clear intent to apply state law necessary to overcome the presumption that this federal term is governed by federal law. Instead, there is a genuine ambiguity in Section 1346(b) as to whether the law of the place clause refers only to underlying tort liability rules, or whether it was intended to modify the scope of employment requirement as well. Given this ambiguity, this article turns to the FTCA's legislative history for further evidence of Congress' intent in passing the FTCA.[138]

2. Legislative History

The legislative history of the original FTCA is likewise ambiguous as to what law Congress intended to govern the scope of government

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[136] *See* ESKRIDGE, *supra* note 130, at 255.

[137] In addition to section 1346(b), section 2674 of the FTCA may be seen as supporting the application of state *respondeat superior* law to the scope of employment determination. Section 2674, however, does not address the scope of employment issue. Section 2674 provides that the United States shall be liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674 (1994). An isolated reading of the language providing that the United States is liable "in the same manner and to the same extent as a private individual under like circumstances" may appear to support application of state law to the scope of employment determination. But that language is immediately followed by the words, "but shall not be liable for interest prior to judgment or for punitive damages." The remainder of Section 2674 is likewise devoted to other damages-specific provisions and to the applicability of certain immunity defenses to FTCA claims. Read in the context of Section 2674 as a whole, the provision that the United States is liable in the same manner as "private person" serves a narrow purpose — to establish that state damages law is generally applicable to the United States but is subject to the enumerated exceptions.

[138] While commentators and judges may disagree over whether legislative history should be consulted to interpret an unambiguous statute, all but the strictest textualists would concede that legislative history is an important source for interpreting a facially ambiguous statutory provision. *See, e.g.*, ESKRIDGE, *supra* note 130, at 309-10.

employment under Section 1346(b). That history is "silent as to the meaning [of the scope of employment] clause."[139] And, while it is often stated that the FTCA was generally intended to create government liability similar to that imposed on private employers, this general intent is insufficient to support a finding of clear intent for state law to govern the scope of employment requirement.[140] First, the requirement that liability be imposed on the government as it is imposed on private employers is not absolute. The FTCA itself requires application of federal rather than state law to certain issues in FTCA claims, creating significant differences between FTCA claims and analogous claims brought under state tort law. Most notably, under the FTCA, plaintiffs are not entitled to a jury trial or punitive damages, and federal law

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[139] Gottlieb, *FTCA*, *supra* note 115, at 19. A prior Congress addressed a similar scope of employment requirement during a 1940 Senate Judiciary Committee hearing on a failed FTCA-like bill, one of many failed pre-FTCA attempts to establish government liability. *Id.* The bill being considered at the hearing contained the scope of employment language that was later included in Section 1346(b). *See Hearings Before a Subcomm. of the S. Comm. on the Judiciary on S. 2690*, 76th Cong. 41-42 (1940) [hereinafter *1940 Hearings*]; Gottlieb, *FTCA*, *supra* note 115, at 2. To the extent this precursor's legislative history is even relevant, it is impossible to discern from the transcript what law those present intended to govern the scope of employment requirement. The transcript demonstrates that those Senators present were made aware that some states' *respondeat superior* laws imposed broader liability than others, and that choosing whether to limit the statute's language to reflect the narrower scope involved a "question of policy." *1940 Hearings*, *supra* at 41-42. Congress' knowledge of the variation among states' rules and its ultimate failure to explicitly choose between the broader and narrower state rules is indeterminate. On one hand, it may indicate an intent to allow the rule to vary according to the state where the tort occurred. *See* Gottlieb, *FTCA*, *supra* note 115, at 19 n.60 (interpreting Congress' failure to restrict scope of employment language as intent to leave determination to state law). *But see* Gottlieb, *State Law*, *supra* note 58, at 226 (reversing position on what law governs FTCA scope of employment determination and concluding federal law must govern, based on survey of early FTCA cases). On the other hand, the discussion at the hearing of whether to "narrow the scope" of the rule seems to indicates the view of those present that the failure to restrict the language would result in application of the broader standard. *See 1940 Hearings*, *supra* at 42. This is supported by testimony from Judge Alexander Holtzoff, who represented the Department of Justice official at the hearing. After the discussion of the possibility of adopting the narrower standard, Judge Holtzoff was asked whether he "construe[d] the decisions of the courts as affecting the various situations of that kind" (presumably referring to situations involving torts committed by employees under either standard). *Id.* He responded "I do not think so. I think they would not." *Id.* Although it is not clear, the speakers presumably referred to state court *respondeat superior* decisions, and the witness' response indicates he did not understand the legislation to make such decisions applicable to FTCA claims. *Id.* at 41-42. Given the attenuated link between this hearing and the legislation ultimately passed, and the ambiguity of the colloquy at the hearing, the legislative history cannot be seen as evidence that Congress clearly intended for state *respondeat superior* law to govern the FTCA scope of employment requirement in the original FTCA.

[140] *See, e.g.*, JAYSON, *supra* note 24, § 3.02[3], at 3-9.

governs the statute of limitations in FTCA claims.[141] Federal courts have held that application of federal law is not limited to those areas specified in the statute itself; additional questions under the FTCA, including when a claim accrues,[142] whether a claim is barred by res judicata[143] and who is an employee under Section 1346(b),[144] are also governed by federal law.[145] The Supreme Court has held that the exceptions to the FTCA must be interpreted according to federal law, "[w]hether or not this analysis accords with the law of States which have seen fit to allow recovery under analogous circumstances."[146] In *Dalehite v. United States*, the Supreme Court created a "uniform federal limitation" on FTCA claims based on strict liability, "[r]egardless of state law" allowing such actions.[147] And in a series of cases, the Supreme Court has recognized

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[141] *See* 28 U.S.C. § 2402 (1994) (no jury trial); *id.* § 2674 (no punitive damages); *id.* § 2401(b) (statute of limitations).

[142] *See* Wehrman v. United States, 830 F.2d 1480, 1482-83 (8th Cir. 1987) (stating that federal law determines when tort claim against United States accrues, based on when plaintiff actually knew, or should have known, cause and existence of injury); Quinton v. United States, 304 F.2d 234, 235 (5th Cir. 1962) ("[F]ederal law fixes the date upon which the Tort Claims period of limitations commences to run . . . .").

[143] *See* Johnson v. United States, 576 F.2d 606, 612 (5th Cir. 1978) (stating that under the FTCA a federal court should apply federal principles of res judicata and collateral estoppel in considering the preclusive effect of a prior federal judgment).

[144] *See supra* note 60.

[145] *But see* Richards v. United States, 369 U.S. 1 (1962). In *Richards*, the Supreme Court held that the FTCA's reference to "law of the place" incorporates the "whole law" of the state, including the state's choice-of-law provisions. *Id.* at 11. The Court's opinion includes language implying that state law should be assumed to govern the FTCA generally, given the "law of the place" clause and the "interstitial" nature of federal law. *Id.* at 6-7. The Court held, "We should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act . . . so intimately related to state law." *Id.* at 11. The Court held that Congress "has been specific in those instances where it intended the federal courts to depart completely from state law" and that it had not specified that choice-of-law provisions should be governed by federal law. *Id.* at 13-14.

[146] United States v. Neustadt, 366 U.S. 696, 705-06 (1961) (footnote omitted); *see also* Woods v. United States, 720 F.2d 1451, 1453 n.2 (9th Cir. 1983) (stating that scope of assault and battery exclusion is governed not by California law but by the meaning of the FTCA); Ramirez v. United States, 567 F.2d 854, 856 (9th Cir. 1977) ("Questions of interpretation under the exclusion provisions are controlled by federal law.") (citations omitted); Stepp v. United States, 207 F.2d 909, 911 (4th Cir. 1953) ("We think, however, that where the United States excepts itself from certain liabilities, as in Section 2680 of the Federal Tort Claims Act, such exceptions must be interpreted under the general law rather than under some peculiar interpretation of a State or Territory. Stated differently, we do not think that a State may circumvent this intended exception to Government liability by merely abolishing the crime commonly known as an assault and battery and entitling such acts, instead, as a 'hurting.'").

[147] *See* Laird v. Nelms, 406 U.S. 797, 799 (1972) (describing Dalehite v. United States, 346 U.S. 15, 45 (1953)).

that the requirement that the United States be held liable under circumstances where a private employer would be liable is not a literal one.[148] Liability under the FTCA is not limited to precisely the circumstances where a private employer would be liable. Rather, the United States is liable if a private employer would be liable "under *like* circumstances."[149]

3. The Military Scope of Employment/Line of Duty Requirement

The foregoing discussion of the text and legislative history of Section 1346(b) address congressional intent regarding the general scope of employment determination, applicable to claims arising from military or civilian negligence alike. For FTCA claims arising from military negligence, there is additional, more specific evidence of Congress' intent to create federal vicarious liability rules. As noted, the only definition Congress provided for the scope of employment requirement was that, for members of the military, scope of employment means "acting in line of duty."[150] Thus the surplussage problem presented by application of state law to civilian negligence claims is even more pronounced in the military context. Application of state *respondeat superior* law to military negligence claims not only makes the scope of employment clause superfluous, it also makes superfluous Congress' "line of duty" definition. The fact that Congress had specifically defined scope of employment for members of the military and for no other federal employees indicates a desire to apply a specialized rule — distinct from the generally applicable scope of employment requirement — to claims arising from alleged negligence by members of the military. Moreover, Congress' choice of the phrase "line of duty," which is defined exclusively by federal sources, further indicates that Congress did not intend the military scope of employment question to be governed by state law.[151]

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[148] *See* United States v. Muniz, 374 U.S. 150, 164-65 (1963) (noting that, notwithstanding state sovereign immunity law barring suit against prison officials, federal prison officials can be held liable under FTCA based on federal statutory duty of care standard "independent of an inconsistent state rule"); Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955); JAYSON, *supra* note 24, § 9.08, at 9-213.

[149] *See Indian Towing Co.*, 350 U.S. at 64 (emphasis added).

[150] *See supra* note 123 and accompanying text.

[151] Faix, *supra* note 87, at 12-13, nn.5 & 7 (citing Air Force regulation defining line of duty). The Fifth Circuit, in *Williams v. United States*, 352 F.2d 477 (5th Cir. 1965), noted the logical inference that Congress intended to federalize the definition of scope of employment at least with respect to the military when it defined that term to mean in the

The original FTCA is at best ambiguous as to whether federal or state law governs the generally applicable scope of employment requirement. The language and legislative history of Section 1346(b), and the general purpose behind the FTCA do not indicate clear congressional intent for state law to govern this determination. With this background in mind, this article turns to a more specific analysis of Congress' intent regarding the scope of employment determination for claims brought under the 1974 Amendment.

C. Legislative History of the 1974 Amendment

The legislative history of the 1974 Amendment is devoid of evidence that Congress intended the scope of employment determination to be governed by state law.[152] Indeed, the Senate Committee Report contains affirmative evidence that Congress intended the federally defined "color of law" standard to govern FTCA claims in the intentional tort context. Moreover, the circumstances that gave rise to the 1974 Amendment demonstrate that Congress did not intend to limit government liability to acts committed within the scope of employment as defined under traditional common law principles, much less as defined by individual states.

Congress' passage of the 1974 Amendment reflected a growing awareness of the need for the government to provide a monetary remedy to those injured by the abuses of federal law enforcement officers. The Amendment was "passed during a period that witnessed a remarkable series of events urgently demonstrating the need for increased government responsibility for the tortious . . . acts of its officials."[153] These events included the Kent State tragedies in May 1970 and the Attica uprising in September 1971.[154] The Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which created a remedy against individual officers for their constitutional violations, drew attention to the inability to sue the government directly to remedy official misconduct.[155]

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line of duty. *Id.* at 479. "The reference to members of the military forces 'acting in line of duty' could suggest an intention to incorporate federal law." *Id.*

[152] The legislative history of the Amendment contains no evidence that Congress was aware of the Supreme Court's decision in *Williams*, or that ruling's potential applicability to claims under the Amendment. For a discussion of *Williams* and its impact on the analysis of Section 1346(b), see *infra* Parts III.D., IV.

[153] Boger, *supra* note 72, at 498.

[154] *Id.* at 498-99.

[155] 403 U.S. 388 (1971).

The need for a remedy against the government for federal law enforcement abuses became widely apparent after two well-publicized raids carried out by federal agents acting under the Drug Abuse Law Enforcement (DALE), a Department of Justice division that was the precursor to the Drug Enforcement Agency.[156] On April 23, 1973, teams of agents conducted drug raids in two different homes in Collinsville, Illinois. The first team smashed the door of Herbert and Evelyn Giglotto's home at 9:30 p.m. and entered the home with drawn guns. The agents forced Mr. Giglotto into his bedroom, pushed him onto the bed face down, tied his hands behind his back, put a pistol to his head and screamed obscenities at him. Mrs. Giglotto, dressed in her night clothes, was also forced onto the bed face down. It was only at this point that the agents identified themselves as federal officials, and informed the Giglottos that their house had been under surveillance for several weeks. After ransacking the house, one of the agents announced, "we have the wrong people." The agents untied the Giglottos and left, leaving behind significant damage to the Giglotto's possessions.

That same evening, a team of DALE agents conducted a raid at the home of Donald Askew and his family. After seeing two men at his door, one holding a sawed off shotgun, Donald Askew unlocked his door when they identified themselves as special agents. They and other agents entered and rummaged through the house while Donald Askew and his wife, who had fainted when she first saw the armed men through the window, sat in their living room. The agents eventually admitted they had acted on a "bad tip" and left, leaving a phone number for the Askews to call.

The Collinsville raids and the public outrage they ignited attracted the attention of Senators Charles Percy of Illinois and Sam Ervin of North Carolina, both of whom had worked on law enforcement issues.[157] Of particular concern to the Senators was the inability of people like the Giglottos and the Askews to recover damages from the federal government for the psychological and property injuries caused by the

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[156] The following account of the Collinsville raids is drawn largely from Boger, *supra* note 72, at 500-02, and from testimony given at Senate subcommittee hearings following the raids. *See Reorganization Plan No. 2 of 1973: Hearings Before the Subcomm. on Reorganization, Research and Int'l Org. of the S. Comm. on Gov't Operations*, 93d Cong. 461-75 [hereinafter *1973 Hearings*]; *see also* JAYSON, *supra* note 24, § 13.06[1][b], at 13-51 (noting that Collinsville raids were impetus for passage of 1974 Amendment).

[157] *See* Boger, *supra* note 72, at 505-07. Senator Percy invited the Giglottos and the Askews to testify at a subcommittee hearing in Illinois on a proposal to change the administration of federal drug control agencies and create the Drug Enforcement Agency. *See 1973 Hearings*, *supra* note 156, at 461, 475.

tortious acts of government agents. This concern was based on the recognition that the Supreme Court's decision in *Bivens*, which created a private right of action against individual officers who had committed constitutional torts, provided "a rather hollow remedy" given that individual officers can readily establish good faith defenses, and are in any event often unable to pay even reasonable money damages.[158]

The Justice Department, faced with the threat of Bivens' litigation involving its employees and aware of Senate interest in increasing government accountability of abuses, proposed to expand the ability of parties injured by governmental torts to collect from the government, while ensuring the protection of individual employees. The Justice Department's proposal amended the FTCA to include claims based on intentional torts. This proposal made the FTCA the exclusive remedy for any torts committed by government employees acting within the scope of employment, thereby protecting individual employees from liability.[159] Alternative proposals for expanding government liability for law enforcement misconduct were prepared and considered by the two Senate Committees most concerned with broadening federal liability, the Government Operations Committee and the Subcommittee on Constitutional Rights. The Senate proposals did not incorporate the Justice Department's attempt to establish the FTCA as an exclusive remedy. Most likely this was because individual immunity was seen as unwarranted when agents' torts were intentional, because individual liability is needed as a deterrent to, and a punishment for, intentional misconduct.[160]

The proposal that ultimately became law was that of Senator Ervin, then Chair of the Senate Committee on Government Operations. Senator Ervin proposed his intentional torts amendment to the FTCA as a rider to House of Representatives Bill No. 8245, which was then pending

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[158] *See* S. REP. NO. 93-588 (1973), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2790 (Committee Report); S. REP. NO. 93-469, at 29 (1973) (individual views of Senator Percy). Commentators have written extensively about the relative virtues of government and individual liability for constitutional violations by government officials. *See supra* note 8.

[159] The FTCA had previously been an exclusive remedy only as to claims arising from certain activities, most notably the operation of automobiles by federal employees. *See* 28 U.S.C. § 2679(b)-(d) (1970).

[160] *See* Richardson v. McKnight, 521 U.S. 399, 421 (1997) (rejecting *Bivens* liability for private prison operator because only individual liability effective for deterrence purposes); Boger, *supra* note 72, at 512. *But see* Madden, *supra* note 8, at 473-75 (arguing that individual liability is not necessary for effective deterrence). The Westfall Act later made the FTCA exclusive remedy for all torts committed within scope of employment. *See* 28 U.S.C. § 2679 (1994).

before the Committee and which proposed changes to the administration of federal drug control agencies, including the creation of the Drug Enforcement Agency.[161] The rider was intended "to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers."[162] Senator Ervin's inclusion of his proposed amendment in H.R. 8245 insured its speedy passage, as the administration was pressing for fast enactment of that bill.[163] H.R. 8245, including Senator Ervin's intentional tort rider, was enacted in March 1974. As noted, the 1974 Amendment made claims arising from the intentional torts of law enforcement officers actionable through Section 1346(b).[164]

The Committee Report on H.R. 8245 provides the most direct and useful legislative history for the amendment that ultimately passed.[165] The Report explicitly states Congress' intent to provide a remedy for intentional torts committed by federal law enforcement officers acting either within the scope of employment or under "color of Federal law."[166] The Report states:

> The effect of this provision is to deprive the Federal Government of

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[161] *See* Boger, *supra* note 72, at 516.

[162] S. REP. NO. 93-588 (1973), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2789.

[163] *See* Boger, *supra* note 72, at 516.

[164] *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (codified at 28 U.S.C. § 2680(h) (1994)). The new law amended Section 2680(h), which previously excluded FTCA claims arising from most intentional torts. *See supra* notes 126-27 and accompanying text.

[165] *See* ESKRIDGE, *supra* note 130, at 302-03 (stating that committee reports are most useful legislative history sources, and most frequently relied on by the Supreme Court, because "they provide an overview of the policy need for the statute," are accessible, and are relatively representative of the larger legislative body).

[166] S. REP. NO. 93-588 (1973), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2791. The Report also clearly evidences an intent to create a "counterpart to the *Bivens* case" that imposes United States liability for constitutional torts. Some early courts to apply the Amendment recognized the tension between the clear congressional intent to impose *Bivens*-type liability for federal constitutional torts, and the Amendment's language and placement within the FTCA, which remedies state law torts. *See* Norton v. United States, 581 F.2d 390, 395 (4th Cir. 1978) (holding that congressional intent to create *Bivens* analogue required application of federal law to claims brought under Amendment). Ultimately, congressional intent was disregarded by the Supreme Court, which read the FTCA's law of the place clause to exclude constitutional claims from the FTCA because they are based on federal, not state law. *See* Carlson v. Green, 446 U.S. 14, 25 (1980) (holding implicitly that constitutional claims are not actionable under the FTCA because they lack state law analogues); *see also* Hassel, *supra* note 8, at 455 (arguing that the 1974 Amendment could and should have been used as vehicle for creating government liability for federal officers' constitutional torts). Repeated subsequent attempts to pass legislation creating federal liability for constitutional torts have failed. *See id.* at 477 n.176; Madden, *supra* note 8, at 476-78 (describing legislation then pending in Congress).

> the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, malicious prosecution or abuse of process.[167]

Congress' use of the phrase "under color of federal law" indicates a desire to create a broad, federally defined liability. Congress well understood that "color of law," a phrase derived from Section 1983 jurisprudence, was a broadly and federally defined term encompassing official actions that were not in pursuance of any official policy, including illegal actions.

Indeed, the broad and uniform understanding of color of law is at the very heart of Section 1983 jurisprudence. Section 1983 imposes liability on any person who violates the Constitution or federal law while acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[168] Until 1961, when the Supreme Court decided the landmark case of *Monroe v. Pape*, official actions were considered under color of law only if they were officially authorized, or so widely tolerated as to amount to a custom or usage.[169] In *Monroe*, the Supreme Court significantly expanded Section 1983's reach by holding that the "color of law" requirement is satisfied as long as the actions were taken in the official's official capacity: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[170] The incident that gave rise to the *Monroe* decision was

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[167] S. REP. NO. 93-588 (1973), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2791. The "color of Federal law" standard is referenced a second time in the Report: "the Committee's amendment . . . would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law." *Id.*

[168] 42 U.S.C. § 1983 (2000).

[169] 365 U.S. 167 (1961); *see* CHEMERINSKY, *supra* note 45, at 458.

[170] *Monroe*, 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). In the Section 1983 and *Bivens* context, color of law is not the basis for government liability but for individual liability for constitutional violations. Because the "color of law" standard is normally associated with constitutional torts, it might be argued that Congress' reference to color of law was limited to the constitutional tort context, and that Congress intended state scope of employment standards to apply to state tort claims brought under the Amendment. Under this view, the Supreme Court's eventual exclusion of constitutional torts from the FTCA would make the color of law language in the Committee Report irrelevant. But the Committee Report specifies that, apart from the failed attempt to create constitutional tort liability, the 1974 Amendment was also intended to create liability for non-constitutional torts "in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law." S. Rep.

remarkably similar to the Collinsville raids that provided the impetus for the 1974 Amendment. The plaintiff in *Monroe* filed an action under Section 1983 against Chicago police officers who had broken into his home, forced him and his family to stand naked in their living room, and ransacked the house.[171] The Court found that the officers' actions, although clearly not authorized, were undertaken in their official capacity and therefore deemed within the color of law.[172] The Court held that the broad definition of color of law to include unauthorized and illegal abuses made possible by state power was necessary to provide an effective remedy for law enforcement abuses.[173]

Congress' invocation of the "color of law" standard thus demonstrates an intent to create a uniform federal standard that imposes liability for official misconduct made possible by the cloak of official power, regardless of whether it is authorized or undertaken in pursuance of official policy.[174] The Senate Report contains other evidence that Congress purposely invoked the "color of law" standard to create a remedy for a wide range of official misconduct made possible by virtue of the tortfeasor's official status. The Report expresses the intent to "waive[] the defense of sovereign immunity so as to make the government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*."[175] The broad "color of law" standard developed in the Section 1983 context is applicable to claims brought against individual federal officers under *Bivens* and its progeny.[176] Thus, Congress' intent to create a "counterpart to *Bivens* and its progeny" necessarily entails an intent to provide a uniform federal remedy for the broad range of misconduct encompassed by the "color of law" standard and actionable under *Bivens* and its progeny.[177] The

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No. 93-588 (1973), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2791.

[171] *Monroe*, 365 U.S. at 169.

[172] *Id.* at 184-85.

[173] *Id.* at 191.

[174] Those few courts and commentators that have studied this issue have acknowledged Congress' intent to create a remedy for a broad range of government intentional torts, beyond those encompassed by state definitions of scope of employment. *See* Norton v. United States, 581 F.2d 390 (4th Cir. 1978) (holding that congressional intent to create *Bivens* analogue required application of federal law to claims brought under Amendment); Boger, *supra* note 72, at 522-23 & n.125 (suggesting "color of law" standard be imported to claims under 1974 Amendment). *But see* Bates v. United States, 517 F. Supp. 1350, 1357 (W.D. Mo. 1981), *aff'd*, 701 F.2d 737 (8th Cir. 1983) (finding that congressional intent in passing Amendment is satisfied by application of purpose test).

[175] S. Rep. No. 93-588 (1973), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2791.

[176] *See* CHEMERINSKY, *supra* note 45, at 588-89.

[177] One of the significant rationales behind *Bivens*'s creation of a federal cause of action

Report also includes specific evidence of Congress' intent to create a remedy for illegal or unauthorized conduct. The Report indicates that the Amendment sought to impose liability on the government "if a federal narcotics agent intentionally assaults [] a citizen in the course of an illegal [] raid."[178] It further states "that the 1974 Amendment is intended to provide a remedy against the government for "tortious acts of its law enforcement officers when they act in bad faith or without legal justification."[179] Finally, the rejection of the Justice Department's proposal to provide individual immunity for the conduct actionable under the 1974 Amendment reflects Congress' intent to create a remedy for a broader range of incidents, including misconduct so egregious that individual immunity from personal liability would be inappropriate.[180]

Congress' intent to provide a remedy for egregious misconduct cannot be effectuated by application of state *respondeat superior* law. Just as the purpose test excludes much intentionally tortious conduct encompassed within the broader foreseeability and job-related authority tests, the purpose test excludes much intentionally tortious conduct encompassed by the even broader "color of law" standard.[181] Specifically, the purpose test requirement excludes from the FTCA particularly egregious misconduct for which Congress intended to provide a remedy — misconduct that does not serve any employer purpose at all but that is nonetheless made possible only by virtue of official power.[182] In essence, the most egregious abuses of power, which Congress specifically intended to remedy, are by definition excluded by many states' *respondeat superior* rules from the remedy Congress created. Congress'

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was the need for uniform rules governing remedies for official misconduct. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring) (stating that constitutional violations must "be compensable according to uniform rules of federal law").

[178] S. REP. NO. 93-588 (1973), *reprinted in* 1974 U.S.S.C.A.N. 2789, 2791.

[179] *Id.*

[180] *See* Boger, *supra* note 72, at 512 (noting that Justice Department's proposal did not take into account that individual liability might be necessary to effectively deter intentional misconduct).

[181] *See supra* Part I.A.

[182] *See id.*; *see also* Hallett v. United States, 877 F. Supp. 1423, 1430 (D. Nev. 1995) (holding that Navy officers were not acting in scope of employment when they committed assault at infamous Tailhook convention, although they were on duty and being paid for the time spent at convention); Bates v. United States, 517 F. Supp. 1350, 1357 (W.D. Mo. 1981), *aff'd*, 701 F.2d 737 (8th Cir. 1983) (holding that military policeman was not acting within scope of employment under Missouri law when he committed assault, rape, and murder, despite the fact that he was in uniform and on duty at the time). *See generally* Douglas S. Miller, *Off Duty, Off The Wall, But Not Off the Hook: Section 1983 Liability for the Private Misconduct of Public Officials*, 30 AKRON L. REV. 325, 353 (1997).

intent to provide a remedy against the government itself for egregious misconduct made possible by the badge of federal authority cannot be implemented in states that have adopted the "purpose" test.

In states that have adopted the foreseeability test, application of state law permits recovery for a broader category of misconduct, including misconduct that is motivated by personal malice or purpose but that is nonetheless foreseeable.[183] Nevertheless, even in states that have adopted the more liberal foreseeability test, application of state scope of employment rules to claims under the 1974 Amendment results in the denial of recovery for some plaintiffs who would be able to recover under the "color of law" standard Congress envisioned. Misconduct by an off-duty federal officer, even when made possible by use of the indicia of federal authority, has been held outside the scope of employment, and therefore not actionable under the FTCA, based on application of the foreseeability test.[184] The "color of law" standard encompasses such misconduct, so long as it was made possible only because the employee is cloaked with the authority of law.[185] Only in the relatively few states that have adopted the broadest state scope of employment rule — that imposing vicarious liability for abuses made possible by job-related authority — can plaintiffs recover in circumstances similar to those encompassed by the "color of law" standard invoked by Congress.[186]

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[183] *See, e.g.*, Red Elk v. United States, 62 F.3d 1102, 1107 (8th Cir. 1995) (holding that it was foreseeable that a male officer with authority to pick up teenage girl out alone at night in violation of curfew might be tempted to violate his trust); *see also supra* notes 2-5 and accompanying text.

[184] *See, e.g.*, Primeaux v. United States, 181 F.3d 876, 882-91 (8th Cir. 1999) (holding that although federal officer was driving official vehicle and returning from a work-related training session when he offered a ride to, and then sexually assaulted, a stranded motorist, his conduct was not within the scope of employment under South Dakota law because it was not foreseeable). For a discussion of the *Primeaux* decision, see Joshua M. Snyder, Casenote, *The Requirement of Scope of Employment Under the Federal Tort Claims Act . . . Where is the Line? Scrutinizing* Primeaux v. United States, 33 CREIGHTON L. REV. 465 (2000).

[185] *See, e.g.*, Almand v. DeKalb County, 103 F.3d 1510, 1513 (11th Cir. 1997) (stating that dispositive issue in the "color of law" analysis is whether official was acting pursuant to power possessed by state duty, whether or not on duty); Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989) (stating that "outward indicia suggestive of state authority — such as being on duty" is not determinative of whether officer acted under color of state law).

[186] *See supra* note 44 and accompanying text.

D. Does the Presumption in Favor of Federal Law Apply Here?

The legislative history of the 1974 Amendment demonstrates that Congress recognized the need for a federal standard governing the United States' liability for the intentional torts of law enforcement officers. And, Section 1346(b), which applies to claims under the 1974 Amendment, can be read to support such a federal standard. These factors indicate that there was no clear congressional intent for state law to apply, and thus support the presumptive application of federal law.[187] Application of federal law to the scope of employment determination under the 1974 Amendment is also warranted based on the reasons underlying the presumption in favor of federal law. The longstanding presumption that federal statutory terms are governed by federal law is based on the premise that federal legislation should be applied uniformly nationwide, and on the possibility that "the federal program would be impaired if state law were to control."[188] Given the reasons behind this presumption, federal law should only be displaced where uniform nationwide application of the term at issue is not important, and where application of state law would not otherwise interfere with the federal purposes or interests behind the statute. Both of these concerns support application of the presumption here. As set forth in Part I, a uniform nationwide rule governing the scope of federal officials' employment is needed and application of state law impairs the federal "program" of creating a meaningful system of accountability for the misconduct of federal officials.[189]

Given the policy reasons favoring a federal rule and the possibility of interpreting Section 1346(b) and the 1974 Amendment to support presumptive application of such a rule, why have courts consistently applied state law to the scope of employment determination under the Amendment? Application of state law has been based almost exclusively on the Supreme Court's 1955 decision in *Williams v. United States*.[190] *Williams*, which interpreted Section 1346(b) to require application of state *respondeat superior* law to the scope of employment determination, effectively bars creation or application of a federal scope

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[187] *See supra* note 114 and accompanying text.

[188] Jerome v. United States, 318 U.S. 101, 104 (1943) (citing United States v. Pelzer, 312 U.S. 399, 402 (1941)); *see also* Dickerson v. New Banner Inst., 460 U.S. 103, 119-20 (1983); NLRB v. Natural Gas Util. Dist., 402 U.S. 600, 603 (1971).

[189] *See supra* Part I.

[190] 350 U.S. 857 (1955) (per curiam).

of employment standard for claims under the 1974 Amendment.[191] *Williams* was decided nearly twenty years before the 1974 Amendment was passed, and had been widely applied in FTCA cases by 1974.[192] Congress' reliance on Section 1346(b) as the vehicle for making intentional torts actionable apparently did not take *Williams* into account. As a result, Congress' intent in passing the 1974 Amendment cannot be implemented within the existing statutory scheme, given *Williams'* interpretation of Section 1346(b).[193]

As set forth below, the *Williams* decision provides no substantive or reasoned basis for application of state *respondeat superior* law to claims under the 1974 Amendment, or even to claims based on the negligence of civilian or military employees. Indeed, the two-sentence decision contains no reasoning whatsoever. Examination of the decision reveals that it disregards significant Supreme Court decisions, renders superfluous Congress' only definition of the scope of employment clause, and was likely influenced by a misguided, *Erie*-based fear of creating a federal rule. The Supreme Court's weak and outdated decision is an insufficient basis for continued application of state *respondeat superior* law to claims under the 1974 Amendment, and indeed to FTCA claims generally. Continued reliance on *Williams* is particularly inappropriate given the policy reasons for establishing a federal scope of employment rule and Congress' intent to do so. Such reliance is unnecessary given the ability to square such a federal rule with the language of Section 1346(b) and with Congress' original intent in passing the FTCA. The fundamental flaws in *Williams* demonstrate the need for reconsideration of the rule for which it stands, both as applied to claims arising from the negligence context, and as applied to intentional tort claims under the 1974 Amendment.

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[191] *See infra* note 268.

[192] *See supra* note 125.

[193] Given the poor fit between Congress' intent and the inconsistent and often narrow remedies provided under state *respondeat superior* law, Congress' decision to use Section 1346(b) as the vehicle for imposing liability under the Amendment is puzzling. The problem likely resulted from the haste with which the Amendment was drafted and inserted into legislation headed for quick passage. *See supra* note 163 and accompanying text. In the rush to respond to high profile incidents and create a remedy for victims of federal law enforcement abuse, the Amendment's sponsors relied on the existing structure of the FTCA without taking into account the *Williams* decision. *See* Boger, *supra* note 72, at 516, 520.

IV. *WILLIAMS V. UNITED STATES*: A FLAWED DECISION

A. The Decision

After the FTCA was passed in 1946, the earliest courts to apply the new law recognized that Section 1346(b) was unclear as to whether that section's "law of the place" clause governs only the underlying liability rule or applies to the scope of employment determination as well.[194] These early courts were divided over whether to apply federal or state law to the scope of employment determination. The question arose in cases arising from the negligence of civilian employees, for whom Congress had not defined the scope of employment, and in cases arising from the negligence of members of the military, for whom the "line of duty" definition applied.[195]

In *United States v. Sharpe*, a case arising from the negligence of a member of the military, the Fourth Circuit held that "law of the place" was not appropriate to determine the scope of the employment/line of duty determination, because that determination concerned the "relationship of the federal government to its employees."[196] The *Sharpe* court cited then-recent Supreme Court decisions, including *Standard Oil* and *Feres*, establishing federal courts' authority to reject local law and fashion federal common law in certain areas, including matters concerning the military, actions involving federal agencies, and matters brought under non-diversity jurisdiction.[197] Buttressed by these authorities, the court identified the question of whether the tortfeasor was "acting within the scope of his office or employment" within the meaning of the statute as "a question of statutory construction as to which the federal courts are not bound by local decisions but apply their own standards."[198] The court drew the following distinction:

> We look to the federal law and decisions to determine whether or not the person who inflicted the injury was an 'employee of the Government acting within the scope of his office or employment.'

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[194] For analysis of the relevant statutory language, see *supra* Part III.A.

[195] *See* 28 U.S.C. § 2671 (1994). While the FTCA excludes claims arising from "combat activities," it permits claims arising from military members' negligence outside the combat arena. *Id.* § 2680(j); *see infra* note 123 and accompanying text.

[196] 189 F.2d 239, 241 (4th Cir. 1951).

[197] *See id.* (citing Feres v. United States, 340 U.S. 135, 142-44 (1950)); United States v. Standard Oil Co., 332 U.S. 301, 305-06 (1947); D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447 (1942); Deitrick v. Greaney, 309 U.S. 190 (1940); *see also supra* Part II.B.

[198] *Sharpe*, 189 F.2d at 241.

> We look to the local law for the purpose of determining whether the act with which he is charged gives rise to liability. The Tort Claims Act adopts the local law for the purpose of defining tort liability, not for the purpose of determining the relationship of the government to its employees.[199]

In *Field v. United States*, an Illinois district court followed the reasoning of *Sharpe* and found that federal law governs the scope of employment determination in the civilian context.[200] The court held generally that "the meaning of the words 'within the scope of his office or employment' and the elements constituting it are federal questions to be determined by construction of the federal statute" notwithstanding otherwise relevant state law presumptions.[201] The court noted that although Section 1346 (b) of the FTCA makes state negligence rules applicable to claims brought under it, the FTCA is "purely federal in nature" because without it, there is no right to sue the United States.[202]

In *United States v. Campbell*, a military case like *Sharpe*, the Fifth Circuit reached the opposite conclusion.[203] The court held that state law governed the military scope of employment determination, notwithstanding Congress' line of duty definition.[204] The plaintiff claimed that she had been negligently knocked down by a sailor who was running to board a troop train that was slowly pulling out of the

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[199] *Id.* In holding that federal law determines whether the tortfeasor was an "employee of the Government acting within the scope of his office or employment," the court linked the question of whether the tortfeasor is an employee with the question whether the tortfeasor acted within the scope of employment. The court apparently recognized the close connection between these two inquiries, and the need to decide both in tandem, and according to federal law.

[200] 107 F. Supp. 401, 404 (N.D. Ill. 1952).

[201] *Id.* at 405. In *Field*, plaintiff sued for damages to his automobile resulting from a collision with a government vehicle driven by a War Assets Administration employee. *Id.* at 402. At trial, the government admitted ownership of the vehicle, and plaintiff argued for application of the Illinois permissive use statute, under which a rebuttable presumption arises that the driver of an employer owned vehicle acted within the scope of employment. *Id.* The court refused to allow the benefit of the statute. *Id.*

[202] *Id.* at 404 (citing *Standard Oil*, 332 U.S. at 305-06). The employee in *Field* is described as "an employee of the War Assets Administration," a civilian position. *Id.* at 402; *see also* Gottlieb, *State Law*, *supra* note 58, at 224 (describing *Field* as a civilian case). The *Field* court nonetheless relied on language in *Sharpe* and *Standard Oil* specific to the military context. *Field*, 107 F. Supp. at 404. This reliance was presumably based on the quasi-military function of the agency in question, or on the premise that *Standard Oil's* holding was broadly applicable to government employees.

[203] 172 F.2d 500, 503 (5th Cir. 1949).

[204] *Id.*

station.[205] Plaintiff argued that the sailor acted in the line of duty at the time of the tort, regardless of whether he acted within the scope of employment.[206] According to the plaintiff, Congress' "line of duty" definition was intended to adopt a broad standard of liability for the torts of military personnel and to remove such claims from the stricter *respondeat superior* analysis.[207]

The court rejected this broad definition of line of duty, which it noted had been developed in a different context — to allow generous workers' compensation and insurance benefits where "members of the armed forces themselves are claimants."[208] The court found this broad definition was inconsistent with the FTCA's goal of limiting government liability to those circumstances where a private defendant would be liable under traditional *respondeat superior* rules.[209] According to the Fifth Circuit, the "purpose of the Tort Claims Act . . . [was] to make the United States liable . . . for the acts of its employees under the same circumstances, and no other, as those under which private persons would be liable for the acts of their employees according to the law of the place where the injury occurred."[210] The court held that application of state *respondeat superior* rules was necessary to limit the United States' liability to circumstances where a private person would be liable.[211] Early

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[205] *Id.* at 501.

[206] *Id.* at 502.

[207] *Id.* Plaintiff relied on opinions of the Attorney General, rulings of the Judge Advocate General and two state court decisions in which the phrase "line of duty" was interpreted "most liberally" in order to allow various insurance and workers' compensation claims by military personnel against the Government. *Id.* at 502.

[208] *Id.* at 503.

[209] *Id.*

[210] *Id.* The Court further objected to giving the scope of employment requirement "two inconsistent meanings," one for "all government employees except members of the armed forces" and the other "applying to acts of military personnel" that "would subject the Government to fantastic claims of liability having no relation to the doctrine of respondeat superior." *Id.*

[211] *Id.* In *United States v. Eleazer*, 177 F.2d 914, 918 (4th Cir. 1949), the Fourth Circuit likewise held that state law governs the scope of employment/line of duty determination in claims arising from military negligence. The Fourth Circuit also rejected the "enlarged" concept of line of duty liability and limited liability under the FTCA to that created under state *respondeat superior* rules. *Id.* at 917 ("As the injury . . . occurred in the State of North Carolina, the law of that state furnishes the rule as to the liability of the master for the negligence of the servant."). The Court held that, although Congress defined the scope of employment for military employees as the line of duty, Congress' overall intent was to "render the United States liable for the torts of its employees with certain specified exceptions, just as though it were a private person; and there could have been no possible reason to extend the rule of *respondeat superior* in the case of torts committed by military or naval personnel." *Id.*

decisions in the Ninth Circuit held that state law governs the scope of employment requirement in the civilian context as well.[212]

In *Williams v. United States*, the Supreme Court resolved the split among the circuits as to what law governs the scope of employment/line of duty determination in FTCA claims.[213] The plaintiff in *Williams* sought to recover damages for injuries caused by an intoxicated soldier's negligent driving of an army truck.[214] The district court found that the "sole question" on which liability turned was "whether the soldier was acting within the course and scope of his employment within the purview of the Tort Claims Act."[215] The district court held that federal law governs this determination, based on the reasoning of *Sharpe*.[216] The district court concluded that, under federal law, the soldier's use of an army vehicle was insufficient to place his actions within the line of duty because the soldier's use of the vehicle was not authorized by army regulations when he crashed into plaintiff's car.[217]

Plaintiff appealed, contending that California law of *respondeat superior* applied to the determination whether the soldier's actions were within the line of duty.[218] The Ninth Circuit affirmed the district court's decision, but held that federal law governs the scope of employment determination only in claims arising in the military context, because Congress' "line of duty" definition was a "drastic modification" of general master-servant law.[219] The court also noted more broadly that "when a question of statutory construction of federal legislation is involved, federal courts are not bound by local decisions but apply their own standards — this with respect to determining the relationship of the Government to its employees."[220]

The Supreme Court reversed, but provided no explanation or rationale for its decision. The Court's per curiam opinion consisted of two

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[212] *See* United States v. Wibye, 191 F.2d 181, 182 (9th Cir. 1951) (applying state law).

[213] 350 U.S. 857 (1955) (per curiam).

[214] Williams v. United States, 105 F. Supp. 208, 208 (N.D. Cal. 1952), *aff'd*, 215 F.2d 800 (9th Cir. 1954), *rev'd*, 350 U.S. 857 (1955) (per curiam).

[215] *Id.*

[216] *Id.* at 209.

[217] *Id.* at 210.

[218] The incident at issue took place in Guam, which had adopted California law in its Civil Code. *See id.* at 208.

[219] Williams v. United States, 215 F.2d 800, 807-08, 810 (9th Cir. 1954), *rev'd*, 350 U.S. 857 (1955) (per curiam). The court indicated in dicta that "it may be assumed that as to . . . civilian employees, the familiar doctrine of respondeat superior, as it has been applied under California law . . . would apply." *Id.* at 807.

[220] *Id.* (citing United States v. Sharpe, 189 F.2d 239 (4th Cir. 1951)).

sentences: "This case is controlled by the California doctrine of *respondeat superior*. The judgment is vacated and the case is remanded for consideration in the light of that governing principle."[221] Although the decision addresses the scope of employment decision in the specific context of claims arising from military negligence, the Court effectively decided the issue in the general civilian context as well. This is because, within the realm of negligence claims, the arguments for a federal scope of employment rule are strongest in the military context.[222] Indeed, as noted, the Ninth Circuit decision overruled in *Williams* had held that federal law governs in the military context but state law governs the scope of employment determination for the torts of civilian government employees.[223] Once the Supreme Court reversed that ruling, there was no basis for asserting that federal law governs the civilian scope of employment determination under Section 1346(b). Thus, *Williams* has, understandably enough, been interpreted to require application of state *respondeat superior* law to the general Section 1346(b) scope of employment requirement governing claims arising from civilian employee negligence.[224]

B. *Critique of* Williams

Although *Williams* now stands for the general principle that state *respondeat superior* law governs the scope of employment determination for all claims under Section 1346(b), indeed for all FTCA claims, the fact that the case arose in the military context is noteworthy. Given that context, the Court's decision, and its lack of reasoning, is particularly difficult to justify. In the absence of a fuller opinion, we can only presume that the Court viewed Section 1346(b) as unambiguously requiring application of state law to the scope of employment question generally, and that it viewed the line of duty definition as requiring application of state law to that question in the military context.[225] Of course, this explanation makes little sense, given that Section 1346's

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[221] Williams v. United States, 350 U.S. 857 (1955) (per curiam).

[222] *See supra* Parts II.B., III.B.3.

[223] *Williams*, 215 F.2d at 807-08.

[224] *See supra* note 125 and accompanying text.

[225] This conclusion is based on another assumption: that, given the presumption that federal statutory terms are governed by federal law, the court would have explained its choice of state law if it viewed its task as interpretation of an ambiguous statutory provision. The only explanation for the total lack of reasoning is that the court viewed the statute as clearly requiring application of state law, and therefore considered the presumption inapplicable.

ambiguity is demonstrated by the very circuit split the Court sought to resolve. In any event, even if Section 1346(b) is interpreted to require application of state law to the scope of employment requirement, generally this requirement should not apply to claims arising from military negligence. The fact that Congress had specifically defined scope of employment for members of the military indicates a desire to apply a specialized federal rule — distinct from the generally applicable scope of employment requirement — to claims arising from alleged negligence by members of the military.[226]

The *Williams* decision is also puzzling in light of its total disregard of then-recent Supreme Court precedents. *Williams* — issued eight years after *Standard Oil* and five years after *Feres* — is difficult if not impossible to reconcile with the emphasis in these two cases on the need for federal law to determine the relationship between the government and its military personnel. The *Williams* Court was faced with an issue that directly implicates that relationship, and disregarded these significant recent decisions.[227] The fact that the Court did not even address these precedents, or Congress' line of duty definition, raises the question of what might have influenced the Court to decide *Williams* as it did.

1. Concerns About Line of Duty Definition

The *Williams* decision may have resulted from the Court's concern that adopting a federal rule governing the line of duty/scope of employment determination would create a regime in which the ordinary negligence of military members is treated differently under the FTCA from the way the statute treats the ordinary negligence of civilian employees.[228] The Court may have feared that adoption of a federally defined line of duty standard for military negligence would impose a liability standard that was either too broad or too narrow to fulfill the general purpose of the original FTCA, which was to create liability analogous to that imposed on private employers.[229] On the one hand, the Court likely sought to avoid adoption of the broad, compensation-based line of duty definition that then existed. Prior to the FTCA's passage, the phrase "line of duty" had been used primarily as a means of generously defining circumstances under which military personnel or their survivors were

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[226] *See supra* Part III.B.3.

[227] *See supra* Part II.B.

[228] *See supra* note 210 and accompanying text.

[229] *See supra* notes 140-49 and accompanying text.

entitled to compensation for death, disability, or injury.[230] In this context, the phrase was defined in regulations, and construed by courts and the Attorney General, quite broadly to include incidents occurring during active duty, furlough, or leave of absence, so long as the injury was not caused by the misconduct of the victim or by the pursuit of purely private business.[231] Application of this broad definition of line of duty would create government liability beyond that imposed under traditional *respondeat superior* principles, and would therefore be inconsistent with the overall purpose of the original FTCA to create government liability no broader than that imposed on private employers.[232]

On the other hand, the Court may have been concerned that adopting a narrower definition of line of duty would allow the government to readily escape liability for the negligence of its military employees. A narrow definition would allow the government to assert that the conduct that gave rise to the tort was not authorized by existing military regulations, and therefore the tortfeasor was not acting in the line of duty when the tort was committed. In *Williams*, the United States' argument that the soldier had not acted in the line of duty was based in part on the fact that his use of the army vehicle for recreational purposes was not explicitly authorized by army regulations.[233] The plaintiff argued that allowing the line of duty determination to turn on the existence of authorizing regulations would allow the government to avoid liability simply by ensuring that army regulations do not authorize conduct that may give rise to negligence.[234] Thus, the Court may have viewed the line of duty definition advanced by the government as potentially too narrow

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[230] *See* Faix, *supra* note 87, at 12 & n.5; United States v. Campbell, 172 F.2d 500, 502 (5th Cir. 1949).

[231] *See* Gottlieb, *FTCA*, *supra* note 115, at 12; Faix, *supra* note 87, at 12-13 nn.5 & 7.

[232] Some courts, recognizing the important federal interest in defining the scope of military employment, resolved this problem by fashioning a narrower but nonetheless federal definition of line of duty to govern FTCA claims. The federal line of duty definitions courts devised for application in the FTCA incorporated both military regulations and state *respondeat superior* principles. Other courts seemed to view application of law of the place — the *respondeat superior* law of the state where the incident occurred — as the only or best means of avoiding the broad sweep of "line of duty." *See Campbell*, 172 F.2d at 503; United States v. Eleazer, 177 F.2d 914, 918 (4th Cir. 1949). The latter courts, including the Supreme Court in *Williams*, disregarded the significant federal interest in defining military employment, and disregarded Congress' intent to implement that interest by providing a specific federal rule governing the scope of employment of military personnel.

[233] Brief for United States at 32, Williams v. United States, 350 U.S. 857 (1955) (No. 470).

[234] Brief for Petitioner at 28, Williams v. United States, 350 U.S. 857 (1955) (No. 470).

to fulfill the original FTCA's general purpose of making the government liable for its employees' torts in circumstances similar to those where private employers would be liable.

Whether the Court feared that adopting a federal line of duty standard would impose too broad or too narrow a range of liability on the government, the Court's total rejection of a federal definition was not necessary to achieve the FTCA's general purpose of imposing liability on the government similar to that imposed on private employers. The Court could have readily adopted a federal definition of line of duty that incorporates both traditional state *respondeat superior* principles and the federal sources that govern the unique relationship between the military and its members.[235] Such a definition would have met the general FTCA purpose of treating the government as private employers are treated, but also accounted for the powerful federal interest in defining the relationship between the military and its employees.

2. Misplaced Apprehension About *Erie*

Given the ease with which the Court could have resolved any concerns about an overly broad or overly narrow line of duty definition, a question remains as to why the Court rejected the possibility of interpreting Section 1346(b) to require federal courts to establish and apply a scope of employment rule, either generally, or at least for claims arising from military negligence. Viewing the *Williams* decision in its broader historical context provides further insight into why the Court read the law of the place clause broadly to require application of state *respondeat superior* law rather than fashioning a federal rule governing the line of duty/scope of employment determination. The *Williams* Court's reading of Section 1346(b) was likely influenced by the Supreme Court's decision in *Erie R.R. Co. v. Tompkins*.[236] *Erie*'s ground-shifting ruling cast doubt on the validity, and even the existence, of general federal common law.[237] During the period when the FTCA was passed and *Williams* was decided, the reach of *Erie*'s prohibition against federal common law was still uncertain.[238] Also uncertain was the extent to

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[235] *See supra* note 232 and accompanying text.

[236] 304 U.S. 64 (1938).

[237] *See id.* at 78 (stating that "[t]here is no federal general common law"); Mishkin, *supra* note 15, at 798 (noting that *Erie* ended "the regime of general federal common law"); *see also* Field, *supra* note 15, at 885 (stating that federal common law's "very legitimacy seemed questioned" by *Erie*).

[238] *See* Mishkin, *supra* note 15, at 800 (noting that "the *Erie* decision seemed to create some question" as to the federal judiciary's competence to declare the governing law in an

which *Erie* required state law to govern in non-diversity cases pending in federal courts.[239] *Erie*'s enormous influence, and the uncertainty as to limits, may have influenced the *Williams* Court to read Section 1346(b) to require application of state law to the scope of employment/line of duty determination.

Erie's influence on the early understanding of Section 1346(b)'s law of the place clause resulted from the relatively unusual status of state law in the FTCA. State law operates in the FTCA not of its own force, but by congressional incorporation. Several commentators have cited the FTCA as a relatively unusual example of state law that operates in the federal system by congressional choice.[240] Thus, state law in the FTCA is distinguishable both from state law that operates in federal courts of its own force, and from state law that operates in federal courts by judicial incorporation. State law operates "of its own force" when Congress and the federal judiciary are powerless to alter it — substantive state law in post-*Erie* federal diversity actions is said to operate of its own force.[241] By contrast, state law operates by incorporation when the judiciary determines that state law provides the appropriate source for defining a term governed by federal law.[242] The significance of this distinction is that when state law governs of its own force, it must be applied by federal courts in its pure or complete form, while state law operating by judicial incorporation can be used selectively by federal courts.[243]

Because Congress has the power to replace state law as the basis for substantive tort liability under the FTCA if it wishes, state law operates in the FTCA not "of its own force" but by congressional incorporation.[244] That is, the United States' substantive tort liability is ultimately a question of federal law because of the principle of sovereign immunity, but Congress chose to use state underlying tort rules (but not, as this article argues, vicarious liability rules) to provide the content of that federal law. Yet, as Martha Field has observed, from the judicial

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"established federal program").

[239] *Id.* at 798 (noting that although *Erie* dealt with diversity cases, "Its impact was immediately felt more widely, extending to litigation directly involving the United States.").

[240] *See* HART & WECHSLER, *supra* note 16, at 766; Field, *Sources of Law*, *supra* note 15, at 978 n.409; Mishkin, *supra* note 15, at 802 n.22; *see also* Gen. Am. Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1522 (9th Cir. 1993) (observing that state law operates in the FTCA not of its own force but by Congressional incorporation).

[241] *See* Field, *Sources of Law*, *supra* note 15, at 974.

[242] *See id.*

[243] *See id.* at 963; Mishkin, *supra* note 15, at 803-05.

[244] *See* Field, *Sources of Law*, *supra* note 15, at 978.

perspective, substantive state tort liability law in the FTCA is treated as if it operates of its own force because courts must defer to Congress' selection of state law as the governing rule. In other words, because Congress has clearly said that state law governs the underlying tort liability analysis under the FTCA, courts must treat state substantive tort liability rules as deferentially as they would state law operating of its own force, and must apply state law in its pure form.[245] Field has noted that such areas of congressionally incorporated state law "join any areas in which state law operates of its own force as mandated enclaves for the operation of state law."[246]

State tort liability rules in the FTCA thus occupy the relatively unusual hybrid status of law that operates in the federal system as if of its own force but in fact by incorporation. This hybrid status has caused confusion as to the extent to which state law governs various provisions of the FTCA. In particular, courts and commentators have assumed that an *Erie*-based prohibition against application of federal substantive law is relevant to whether state or federal law governs a particular FTCA provision.[247] It is now generally acknowledged that *Erie* and its progeny would not prohibit the interpretation of federal statutory terms according to federal common law principles.[248] *Erie* is thus inapplicable to the FTCA scope of employment clause and to the FTCA generally because federal court jurisdiction over FTCA claims derives from Article III's grant of jurisdiction over "Controversies to which the United States shall be a Party," and state law accordingly operates in the FTCA only by congressional choice.[249]

Nonetheless, in the early years after the FTCA's passage, it appeared to some courts and commentators that state underlying tort rules operate similarly in the FTCA and in diversity actions.[250] Based on this apparent similarity, an *Erie*-based substance-procedure analysis[251] was improperly brought to bear, both explicitly and implicitly, to determine how far state law reaches into the FTCA.[252] Indeed, Congress' selection of law of the

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[245] *See id.*

[246] *Id.*

[247] *See infra* notes 254-55 and accompanying text.

[248] *See* Field, *Sources of Law*, *supra* note 15, at 894 (noting that the scope of federal common law making power is not a problem in cases of statutory construction).

[249] *See* U.S. CONST. art. III, § 2, cl. 1.

[250] *See supra* notes 254-255 and accompanying text.

[251] *See Hanna*, 380 U.S. at 465 (stating that the "broad command of *Erie*" was that "federal courts are to apply state substantive law and federal procedural law").

[252] *See, e.g., Johnson*, 576 F.2d at 612 (applying federal res judicata rules based in part on their status as procedural rather than substantive and noting that "[w]hile we are mindful

place as the rule governing tort liability in the FTCA was certainly influenced by the prevailing sentiment, since abandoned, that *Erie* prohibited the creation of federal common law.[253] And, prior to the Supreme Court's decision in *Williams*, commentators and courts analyzing what law governs the scope of employment determination invoked *Erie* in one way or another, demonstrating the confusion over whether *Erie* governs or otherwise influences this choice. One pre-*Williams* commentator, addressing what law governs the FTCA line of duty definition, questioned whether "this federal statutory definition of scope of employment should be applied to a tort action against the United States involving the alleged negligence of a member of the military service, or whether, on the basis of *Erie* and its progeny, a state definition of scope of employment should be used."[254] A second, perhaps more careful, commentator noted that the "vexatious problems" raised by the distinction under *Erie* between substantive and procedural issues "aris[e] in diversity cases, [and] do not affect the United States as a statutory defendant."[255] It is indicative of *Erie*'s import and looming presence that it was even raised as a potential issue.

One district court addressing the scope of employment choice-of-law question prior to the *Williams* decision made explicit reference to *Erie*. In *Field v. United States*, an Illinois district court held that "the meaning of the words 'within the scope of his office or employment' and the elements constituting it are federal questions to be determined by construction of the federal statute."[256] The court, however, conducted a thorough analysis demonstrating that *Erie* did not require application of state law to this issue. The court found this analysis necessary because, although the *Erie* rule arose in a diversity case and "by its own terms is inapplicable to matters governed by the Constitution and federal

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that . . . diversity jurisdiction principles do not govern Tort Claims actions, we think that similar considerations may apply to the federal courts' handling of these two very similar kinds of actions"); *Warden*, 861 F. Supp. at 402 (holding that substantive liability under FTCA governed by state law while procedure governed by federal law).

[253] *See* Gottlieb, *FTCA*, *supra* note 115, at 25 n.73 (stating that application of state "substantive law" is "legislative recognition of the [*Erie*] doctrine" and its call for uniformity of decision in coordinate federal and state courts).

[254] Comment, *A Problem —Application of the Law of the Place under the Federal Tort Claims Act*, 58 IOWA L. REV. 713, 714 (1972-73); *see also* Roszel C. Thomsen, *The Law of the Place Provisions of the Act*, 33 A.B.A. J. 959, 959 (1947) (under the FTCA, "matters of substance shall be governed by the law of the place where the act or omission occurred and matters of procedure by the Federal Rules," but the determination of whether "a particular question is one of substance or of procedure" is governed by federal conflict of laws rules).

[255] Gottlieb, *State Law*, *supra* note 58, at 210.

[256] 107 F. Supp. 401, 405 (N.D. Ill. 1952); *see supra* notes 201-202 and accompanying text.

statutes..." "the rule has governed in nondiversity cases as to matters not governed by the federal constitution, acts of Congress or treaties."[257] To justify application of federal law in an era in which *Erie*'s reach was considered almost limitless, the court explicitly set forth the federal nature of the FTCA scope of employment inquiry, and the need for a federal rule governing that inquiry.[258]

This early tendency to reference or even rely on *Erie* in addressing FTCA choice of law issues was likely due to uncertainty as to the bounds of the relatively recent decision in *Erie*, and a resulting apprehension about federal courts' ability to create and apply federal law.[259] Thus, although the Supreme Court was certainly aware that *Erie* did not strictly apply to the question of what law governs the scope of employment under the FTCA, it is nonetheless likely that the Court in *Williams* was influenced in its reading of the statute's language by the long shadow cast by *Erie*.

The confusion over *Erie*'s reach in the context of the FTCA is demonstrated by early courts' incorrect and over-zealous application of state law to other FTCA provisions, and to FTCA claims generally. Early courts' application of state law in the FTCA gave way to later recognition that federal law governed the provisions at issue. The first instance, involving "employee" status under the FTCA is perhaps most telling, given how closely this issue is related to the scope of employment issue. As noted, it is now widely accepted that federal employee status is governed exclusively by federal law.[260] When the FTCA was first passed, however, some courts applied the law of the place language to the whole of Section 1346(b), including the requirement that the tortfeasor was an "employee" of the government.[261] Accordingly, several early courts

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[257] *Field*, 107 F. Supp, at 403-04. The Court apparently considered the scope of employment issue one not governed by the FTCA because the FTCA did not specify what law governs that issue. *See id.*

[258] *See id.* A second district court facing this issue also made reference to *Erie*, but only to note that it "relates only to the law to be applied in the exercise of diversity jurisdiction" and is therefore inapplicable in the FTCA context. *See* Jozwiak v. United States, 123 F. Supp. 65, 68 (S.D. Ohio 1954).

[259] *See* Gottlieb, *FTCA*, *supra* note 115, at 25 n.73 (noting that the application of law of the place to FTCA actions is "legislative recognition of the doctrine of *Erie R.R. v. Tompkins* and subsequent cases").

[260] *See supra* note 60.

[261] *See* Buchanan v. United States, 305 F.2d 738 (8th Cir. 1962); Fries v. United States, 170 F.2d 726, 730 (6th Cir. 1948); Maloof v. United States, 242 F. Supp. 175 (D. Md. 1965); Hopson v. United States, 136 F. Supp. 804 (D. Ark. 1956). *See generally* S. R. Shapiro, Annotation, *Who Is an "Employee of the Government" for Whose Conduct the United States May Be Held Liable under the Federal Tort Claims Act — Federal Cases*, 14 L. Ed. 2d 892 (1999).

concluded that the question of who is an "employee" of the government was determined by state law. One court reasoned that, in light of the *Williams* Court's holding that state law controls whether an employee acted within the scope of employment, state law likewise determines whether a person is an "employee" of the government within the meaning of the Act.[262] Another court simply interpreted the basic language of Section 1346(b) — that the United States can be held liable for the negligence of its employees if a private person would be liable to the claimant "in accordance with the law of the place where the act or omission occurred" — to mean that the determination of whether the person is an employee of the government should be based upon the law of the place.[263] Given the current consensus that this issue was determined by federal law, earlier courts' erroneous conclusion that state law determines federal employee status demonstrates courts' unnecessary reluctance to apply federal rules under the FTCA, the ambiguity of Section 1346(b) as to what law governs its various terms, and the arbitrary nature of the *Williams* rule.

The second instance demonstrates more broadly that state substantive liability law was at first thought to apply so strictly that government liability was limited to those torts which had an exact analogue in state law.[264] Based on the language in the FTCA providing that the United States is liable as a private person would be (the same language often invoked to justify application of state scope of employment law), the Supreme Court and other courts initially rejected claims based on government activity for which there was no "analogous liability" in state law, such as negligent firefighting.[265] As noted above, the Supreme Court later backed away from its strict application of state law when it held in *Indian Towing Co. v. United States* that the requirement imposed by the FTCA was simply one of "like circumstances."[266] The Court read the "private person" requirement relatively broadly and found that it was satisfied where the plaintiff alleged a recognized basis for tort liability — that imposing a duty on one who undertakes to warn the public of a danger and thereby induces reliance — in spite of the absence of specific state precedent recognizing this particular liability in the

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[262] *See Hopson*, 136 F. Supp. at 812.

[263] *See Fries*, 170 F.2d at 730; *see also* Smick v. United States, 181 F. Supp. 149 (D. Nev. 1960).

[264] *See supra* note 20.

[265] *See* Dalehite v. United States, 346 U.S. 15, 42 (1953).

[266] 350 U.S. 61, 64 (1955).

precise context of lighthouse operation.[267]

V. THE NEED FOR LEGISLATIVE AMENDMENT

Examination of *Williams* reveals that the decision provides no reasoned justification or policy basis for continued application of state law to claims against the United States based on the intentional torts of federal law enforcement officials. Nonetheless, *Williams'* status as long-standing and unambiguous Supreme Court precedent renders unlikely, and even unadvisable, the possibility of courts construing the 1974 Amendment to allow adoption of a federal scope of employment rule. Given that *Williams* interpreted Section 1346(b), and the 1974 Amendment makes intentional torts actionable through that same provision, it is difficult to argue convincingly that, as a matter of statutory interpretation, *Williams* does not apply to claims under the Amendment.[268] Certainly, such an argument would be unpersuasive to those with textualist leanings.

Yet, as Congress recognized in passing the 1974 Amendment, a uniform federal rule is needed to determine the United States' vicarious liability for the intentional torts of law enforcement officers. Given *Williams'* inevitable application to claims under the current 1974 Amendment, further legislative action is needed to implement a federal rule. Congress would clearly be authorized to implement such a rule, and could do so by drafting a new, separate provision establishing that claims arising from the intentional torts of law enforcement officers are governed by a federal scope of employment rule, rather than by the law of any particular state. Congress may either specify the content of the federal rule, or leave that determination to federal courts applying the new law.[269] The rulemaker, whether Congress or the courts, must take into account the complex federal interests implicated in the creation of a system of government accountability for the misconduct of law enforcement officers.

Alternatively, a broader change could be implemented by amending Section 1346(b) to clarify that the scope of employment determination for

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[267] *See id.* at 64-65; *supra* note 20.

[268] *See, e.g.*, ESKRIDGE, *supra* note 130, at 277-78 ("Once the Supreme Court has authoritatively construed a federal statute, that precedent is not only entitled to the usual presumption of correctness suggested by the common law of stare decisis, but it is supposed to be given a heightened stare decisis effect.").

[269] Title VII provides an example of federal legislation directing courts to fashion federal vicarious liability rules. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998); *infra* note 276.

all FTCA claims is governed by federal law.[270] This broader solution makes sense in light of the flaws inherent in *Williams*. *Williams* is not merely inappropriate as applied to intentional tort claims. Indeed, the decision is flawed even, and especially, as applied in its original context — that of military negligence. In this context, there is also a special need for a federal rule, as Congress recognized when it defined scope of employment as meaning in the line of duty.[271] Of course, broad amendment of Section 1346(b) would also create a federal scope of employment rule in the civilian negligence context, where it is least needed. Nonetheless, a uniform federal rule serves the federal interests in efficiency and fairness even in the civilian negligence context.[272] Moreover, the broad solution would be far simpler than a regime in which intentional tort and military negligence claims are governed by federal scope of employment rules, while civilian negligence claims are governed by state rules.

If a broad amendment of 1346(b) is drafted, it could either specify the content of the federal scope of employment rules, or leave that determination to the courts. In either case, rulemakers must consider the need for specialized rules governing the scope of employment determination in each of three contexts: liability for the intentional torts of law enforcement officers, liability for the negligence of members of the military, and liability for the negligence of ordinary civilians. These specialized rules must take into account the differences among these types of liability, and the different reasons why a federal rule is needed in each context.[273]

Rulemakers may turn to a wealth of sources in fashioning federal vicarious liability rules in each of these three contexts. In the law enforcement intentional tort context, if broad liability is deemed appropriate, rulemakers can draw on the large body of federal law interpreting and applying the "color of law" standard in the Section 1983 and *Bivens* contexts.[274] In addition, rulemakers may look for guidance to the scope of employment rules in those states, such as California and

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[270] Again, any amendment Congress drafts could either specify the content of the scope of employment rule, or leave that determination to courts. In either case, the determination must be made by a federal body according to uniform federal standards.

[271] See *supra* Parts II.B, III.B.3; *see supra* note 149 and accompanying text.

[272] See *supra* Part II.A.

[273] See *supra* Parts I, II.

[274] *See* Boger, *supra* note 72, at 523 n.125 (suggesting use of "color of law" standard, rather than state *respondeat superior* law, to determine government liability for claims under the Amendment).

Louisiana, that have developed *respondeat superior* rules that take into account the unique nature of the law enforcement function.[275] Finally, the Supreme Court's decision in *Burlington Industries, Inc. v. Ellerth* serves as a model for the crafting of federal vicarious liability rules governing intentionally tortious conduct in order to effectuate the interests implicated in federal legislation.[276]

For guidance in crafting a rule for use in the military or civilian negligence context, rulemakers may draw on a federal body of agency law that includes scope of employment rules, and that is itself drawn from state scope of employment rules. Because negligence claims under the FTCA do not arise from exclusively governmental activities, they are likely to have close private analogues. It is, therefore, appropriate for the federal scope of employment rule in this context to be modeled after state or federal rules applicable to private employers. Federal scope of employment rules have been developed in a variety of contexts, including corporate criminal liability under federal securities and antitrust statutes,[277] admissibility of evidence under the Federal Rules of Evidence,[278] and adjudication of civil forfeiture actions.[279] The Supreme Court has interpreted the Copyright Act to require application of federal agency rules to the terms "employee" and "scope of employment" as used in that statute.[280] There is no one fixed federal scope of employment rule; federal law has incorporated both the purpose test and the foreseeability test in different contexts.[281] Rulemakers must thus decide whether the narrower or the broader rule is more appropriate in the

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[275] *See supra* note 44 and accompanying text.

[276] 524 U.S. 742, 764 (1998). The Court determined that employer liability under Title VII for supervisors' sexual harassment of employees should not be governed by existing federal scope of employment rules, because those rules often exclude precisely the intentionally tortious conduct that Title VII sought to deter. The Court crafted a broader federal standard that effectuates Title VII's aims by increasing the range of intentional conduct for which employers are liable. *See id.* at 764-65.

[277] *See, e.g.*, Sharp v. Coopers & Lybrand, 649 F.2d 175, 180-85 (3d Cir. 1981) (stating that federal scope of employment rules govern vicarious liability for criminal securities violation); Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 884-86 (3d Cir. 1975) (same).

[278] *See, e.g.*, City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 558 (11th Cir. 1998) (stating that general agency principles govern determination under Federal Rule of Evidence 801(d)(2)(D) of whether statement of party's agent regarded matter within scope of employment, and is therefore admissible).

[279] *See* United States v. One Parcel of Land, 965 F.2d 311, 312 (7th Cir. 1992).

[280] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (stating that federal agency law governs meaning of "employee" and "scope of employment" in Copyright Act).

[281] *See, e.g.*, Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 170-73 (2d Cir. 1968) (fashioning foreseeability test in context of federal admiralty law).

FTCA context, given the reasons behind the FTCA and the federal interests at stake.

Finally, the same general scope of employment rule should apply to claims arising from civilian and military negligence, but the rule governing the scope of employment determination in the military context must explicitly incorporate military-specific regulations as well as general scope of employment principles. Only incorporation of both of these sources into a federal scope of employment rule satisfies the substantial federal interest in defining the scope of military employment and running the military on a federal level, and gives meaning to Congress' line of duty definition. Thus, the military scope of employment or line of duty determination should take into account general scope of employment principles, as well as applicable military regulations that require or prohibit the allegedly tortious conduct.

CONCLUSION

With the passage of the FTCA, Congress took a significant step toward establishing a coherent system of government accountability for injuries inflicted by the negligence of federal employees. In passing the 1974 Amendment, Congress took the additional step of creating a system of accountability for the misconduct of federal law enforcement officers. Courts' continued application of state law to the scope of employment determination in claims brought under the 1974 Amendment undermines the effectiveness of that system and advances no alternative aims. Unthinking adherence to widely varied and marginally relevant state scope of employment rules produces random results devoid of any policy justification. A federal law is needed to serve the substantial federal interest in determining the extent of government liability for official misconduct, and to provide the uniformity that will allow efficient management of federal law enforcement agencies and fairness to victims of law enforcement abuse. Given the increasing powers of federal law enforcement officers under the USA Patriot Act, meaningful accountability for the inevitable abuses of those powers is urgently needed.[282]

Much of the need for a federal scope of employment rule governing intentional tort claims under the 1974 Amendment arises from the Amendment's imposition of liability for torts committed in the exercise of the government's unique law enforcement powers. Nonetheless, even

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[282] *See supra* note 7.

in negligence claims brought under the original FTCA, a uniform federal scope of employment rule would serve managerial and fairness interests that are undermined by application of varied state laws. More importantly, in FTCA claims arising from military negligence, a federal rule is needed to take into account the distinctly federal, and uniquely governmental, nature of the military employment relationship and the regulations governing that relationship.

The basis for continued application of state law to the FTCA scope of employment is thin indeed. The original statute and its legislative history do not clearly require application of state law to this question. Absent clear congressional intent, federal law presumptively governs this federal statutory term. The Supreme Court's decision to the contrary in *Williams* is ripe for reconsideration. The decision offers no explanation for an interpretation of the FTCA that disregards substantial federal policy concerns as expressed in the Court's then-recent decisions in *Standard Oil* and *Feres*, and that renders superfluous Congress' own military-specific definition of the scope of employment requirement. Reconsideration of the ramifications of *Williams* is also appropriate given that the decision was likely influenced by an undue apprehension of *Erie*'s prohibition against federal common law, which has since proved groundless in this context. Given its flaws, *Williams* provides an inadequate foundation for the general rule that the FTCA requires application of state scope of employment rules, even in the negligence context. Certainly, the decision can no longer justify applying state *respondeat superior* law to intentional tort claims brought under the 1974 Amendment.