27. Immunities

"That's the good thing about being president, I can do whatever I want."

– Barack Obama, in an offhand remark while visiting Monticello, 2014

Introduction

The basic idea of tort law is that if you are responsible for someone else's injuries, then you are responsible for making them whole. Plaintiffs bring claims, and defendants are judged by the care they took, the knowledge they had, and the intent or indifference they manifested. If they are blameworthy, then they've got to pay up.

But sometimes the law allows blameworthy defendants to escape all legal responsibility. They are not let go because of anything they did or didn't do. Instead, they are let go because of *who they are*. This is how immunity works. It makes certain defendants legally untouchable. Whatever destruction they wreak, they can dust off their hands and walk away.

Immunities can be asserted by family members, charities, sovereign governments, and government officials. Some immunities depend on the circumstances. Others are absolute in character. In terms of historical trends, immunity doctrines are in a state of flux. Some are on the wane; others are waxing larger.

When they apply, immunities can bring an absolute halt to litigation, regardless of whether the defendant's conduct was egregious and even if it leaves the plaintiff with no remedy at all.

Family Immunities

Historically, American law recognized two forms of immunity within the family – spousal immunity and parent-child immunity. The national trend is toward the abrogation of both.

Spousal immunity prohibited one spouse from suing the other. The historical rationale was that, once married, a husband and wife were one person. More accurately, a man and his wife became just the man, with the wife losing her legal personhood upon marriage. Spousal immunity follows from the idea that it doesn't make sense to allow a man to sue himself.

In keeping with the general arc of American history, the lessening of discrimination against women has been a slow historical process for the common law. In the late 1800s, legal reforms began allowing married women to have distinct legal personality and to own property in their own name. On account of these changes, the theoretical basis for spousal immunity eroded: A wife suing the husband was no longer equivalent to a man suing himself.

Confronted with this logic, some courts offered up a separate rationale for spousal immunity – that preventing spouses from suing one another assisted in the cause marital harmony. The counterargument, of course, is that once things have gotten to the point that spouses want to sue each other, there isn't a lot of marital harmony left to preserve.

There is a more subtle counter-argument: There may be non-hostile reasons for one spouse to sue another – for instance, to establish negligence in an automobile accident so as to trigger the obligation of an insurance company to pay for personal injuries. These days, a majority of jurisdictions have abolished spousal immunity entirely. Others have weakened and limited it.

Parent-child immunity precludes minor children from suing their parents. This immunity, never recognized in England, was an invention of American law. Like spousal immunity, parent-child immunity seems to have rested largely on outdated ideas of the family being a single legal unit represented by the man of the house. A large number of jurisdictions have eliminated the immunity, and where it is still recognized, it is often limited or weakened.

In case you are wondering, there is no immunity for any other family relationship – such as between siblings or between grandparents and their grandchildren.

Charitable Immunity

American law also long recognized immunity for charitable organizations, including hospitals, educational institutions, and religious entities. Charitable immunity was justified largely on two theories. First, the *trust fund theory* held that donors who funded these entities gave their money in trust to fund the provision of services – not to pay judgments. Second, the *implied waiver theory* held that beneficiaries of a charity's munificence had impliedly waived their right to sue for injury.

Charitable immunity may have felt justified in a bygone era, when hospitals, perhaps staffed by nuns, gave free care to the indigent. Today, however, non-profit hospitals are run like giant corporations. They expect full payment for their services, and patients who lack the resources to pay are turned away. Increasingly, universities and even museums are operating as corporate entities, jockeying for "market share," looking to "monetize assets," and extend the reach of their "brand." Such entities frequently assert intellectual property entitlements so as to extract maximum licensing revenues from inventions, artistic works, and recognizable elements of their corporate identity.

Given our present-day reality, it's no wonder that charitable immunity is on the decline. More than 30 states have abolished it all together. Others have repealed it for non-profit hospitals.

Government Immunities

The doctrine of **sovereign immunity** precludes suit against a sovereign entity. In the United States, that means the federal government and each of the states.

While immunities for charities, spouses, and parents are on the ebb, the doctrine of sovereign immunity remains very strong. Individuals are generally powerless to sue the state or federal government unless the government decides, of its own volition, to allow itself to be sued.

Notably, over the course of the 20th Century, sovereign governments increasingly decided to allow themselves to be sued, at least under certain circumstances.

The Federal Tort Claims Act (discussed more below), and similar statutes in the states, permit citizens to sue their government to get tort recovery in many of the same circumstances where tort recovery would be possible against a private entity. Yet since sovereign immunity remains solid as judicial doctrine, legislatures have complete discretion to pick and choose what they will and will not be liable for. And they can give themselves a variety of procedural advantages in the process.

The doctrine of sovereign immunity in American law was inherited from the English courts. In England, sovereign immunity rested on the theory of the divine right of kings and the idea that, in the eyes of the law, the king could do no wrong. Commentators have pointed out that, since the American Revolution was premised on the idea of rejecting the divine right of kings, it seems odd to retain the doctrine of sovereign immunity. Yet whether or not the doctrine of sovereign immunity is theoretically well-grounded, its continuing vitality has not come under serious attack.

It is important to keep in mind what sovereign immunity is and is not. It offers immunity only for the sovereign itself – that means the federal government, the state governments, and the various departments and agencies of the federal and state governments. State universities, the military, and state and federal administrative agencies are generally embraced by the doctrine. But local governments, since they have historically not been considered arms of the states, are not protected by sovereign immunity. In the absence of a statute to the contrary, cities and towns can generally be sued like anyone else – but jurisdictions vary.

Sovereign immunity also does not apply to government employees – at least not as a general matter. It is the government itself that is immune from suit. This conception is not universal, however. In Virginia, a middle school football coach, as a school board employee, was able to invoke what the court called "sovereign immunity" to shield himself from personal liability for acts of simple negligence. Yet the court said he remained liable for any damages arising out of gross negligence. See *Koffman v. Garnett,* 265 Va. 12, 15 (Va. 2003).

Despite the general unavailability of sovereign immunity for public employees, there are other, related immunity doctrines that public employees can assert.

Immunities for Individuals in the Government Context

Immunity for public officials is distinct from sovereign immunity. Where sovereign immunity has monolithic simplicity and unchecked vigor, immunities for public employees exist in a patchwork of statutes and common-law rules.

To understand immunity for public employees, it helps to start with the traditional default rule, which is that unless an exception applies, a public official has *no immunity*. That being said, exceptions have accumulated to the point that it is often impossible to sue a public employee for on-the-job conduct – even in egregious cases. Moreover, the trend is toward erecting more barriers to holding public employees liable in their personal capacity.

Probably the most longstanding form of immunity provided to individuals involved in the business of the government is immunity for individuals who are involved in judicial and legislative functions. Such immunities, often labeled "absolute," are quite powerful: Judges cannot be sued for any judicial function; prosecutors cannot be sued for any prosecutorial function; legislators cannot be sued for any legislative function. The absolute nature of these immunities means that if, for instance, a judge renders a decision from the bench that is in bad faith, contrary to law, and motivated more by greed or personal animus than anything else, the judge is still completely and totally immune. This immunity extends as well to individuals who are not public employees, but who are carrying out the business of the courts. In this way, immunity protects lawyers, witnesses, and jurors for civil liability for anything they say or do within the confines of judicial business. So a lawyer cannot be sued for defamation after telling the most heinous lies about a witness – so long as she or he does so in the course of a hearing, trial, or other official court matter. (Note that lawyer would, however, could face court sanctions and bar disciplinary action.) Similarly, legislators cannot be sued in tort for

proposing and voting on a new law, even if the law will result in, say, false imprisonment of private citizens, or even if the law is motivated by personal or racial animus.

Consonant with the immunities of judges and legislators, the President of the United States is immune from suit over any official acts.

Rank-and-file employees of government agencies present a more complicated set of issues. Traditionally, employees within the executive branch of government had no immunity at all. The trend, however, has been toward greater and greater recognition of immunity for public employees. A widely recognized doctrine gives public employees "qualified immunity" for acts done within the course and scope of employment so long as the acts were of a *discretionary* rather than a *ministerial* character. (This distinction is discussed below in context of the Federal Tort Claims Act and *Kohl v. United States*.)

Governments also protect their employees through statutes that provide indemnities or immunities. Some statutes require or allow the state to defend public employees who are sued for actions undertaken while on the job – whether or not those actions were discretionary or ministerial in nature. And such statutes may require the government to indemnify the employee for any judgment. This an be beneficial for both the defendant employee and the plaintiff: The plaintiff has a guaranteed source of payment, and the government employee will not be on the hook.

Other statutory schemes provide immunity to government employees for actions within the scope of their employment. "Scope of employment" is often interpreted very broadly. If you are a state trooper, is it really part of your job to taser a nonthreatening suspect? Most would say it's not. But for purposes of immunity and indemnity, it can be considered within the scope of employment.

Since 1988, federal employees have received the benefit of a sweeping form of immunity provided by the Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. §§ 2671, 2679(b)(1), better known as the **Westfall Act**. The statute immunizes

federal employees from personal liability for torts committed while on the job – whether classifiable as ministerial or not. The Westfall Act substitutes the United States into the action as a defendant, then permits liability only to the extent it is consistent with the Federal Tort Claims Act (discussed below). This means that in cases where the Federal Tort Claims Act disallows recovery, there may be no way for a tort victim to recover. In the case of *United States v. Smith,* 499 U.S. 160 (1991), the spouse of military service member stationed in Italy sought to sue armed forces physicians for negligence in the delivery of her baby, who suffered massive brain damage. The court held that the Westfall Act shielded the physicians from personal liability, and since the Federal Tort Claims Act did not allow tort liability for actions arising in a foreign country, Smith was left without any remedy.

States have various statutes that protect police officers from suit to different extents. But even these statutes do nothing to protect police from lawsuits brought under 42 U.S.C. § 1983 (discussed later in the Constitutional Torts chapter). The federal claim under § 1983 trumps all contrary state laws.

The Federal Tort Claims Act and Limited Waivers of Sovereign Immunity

Over the course of American history, the role of government has expanded radically. Instead of merely *governing*, governments have moved to providing more and more services of the kind that were previously provided by private entities. The earliest example was probably the Post Office in the late 18th Century. A movement to establish state universities took hold in the 19th Century. In the 20th Century, the federal government began providing recreation facilities under the auspices of the National Park Service, and it got into the business of generating electric power through the Tennessee Valley Authority.

In recognition of the changing role of government , Congress passed the Federal Tort Claims Act of 1946 ("FTCA"). The FTCA waives sovereign immunity in a carefully controlled and limited way to allow persons to sue the federal government for damages resulting from

the government's negligence during the course of non-governing activities. Its provisions are both substantive and procedural, creating a comprehensive system for tort suits against the federal government.

When it comes to suing the federal government in tort, the FTCA is the only game in town. If a plaintiff does not comply with the FTCA, the plaintiff will not be able to recover anything.

Procedurally, the FTCA requires that a plaintiff must first file an administrative claim with whatever governmental unit is alleged to be at fault – anything from the U.S. Air Force to the Smithsonian – and the plaintiff must specify a particular amount of compensatory damages. The agency then has six months to decide whether to pay the claim or deny it. If the claim is denied, the plaintiff can sue in federal district court. Suits in state court are not permitted.

Substantively, the tort liability of the federal government is determined with reference to the tort law of the state whose law would apply if the suit were against a private actor: That means that if, under the circumstances, a private actor would have been liable, then the federal government will be liable too. This is true even if the activity the government was engaging in is of a kind that would be incredibly unusual for a private person to undertake – such as hostage negotiations or munitions testing.

There are a number of important exclusions from liability.

First, there is an important exclusion based on remedies. Only compensatory damages are recoverable from the federal government. No punitive damages are allowed.

Another set of exclusions has to do with the cause of action: The federal government does not allow itself to be sued for battery, assault, false imprisonment, false arrest, fraud, interference with contract rights, defamation, malicious prosecution, or abuse of process. Also, no theory of strict liability can be used. That means the would-be strict liability plaintiff has to prove negligence – no matter how ultrahazardous the activity might have been. (From nuclear weapons testing to experiments with smallpox, the federal government engages in an impressive array of ultrahazardous

activities.) For the most part, that leaves negligence as the lone cause of action that can be used to sue the United States.

The FTCA also has very important exemptions based on the nature of the conduct: No claim can be brought for any combatant actions of the military in wartime. 28 U.S.C. § 2680(j). No claim can be brought for any action taking place in a foreign country. 28 U.S.C. § 2680(k). Most importantly, no claim can be brought for any "discretionary function." 28 U.S.C. § 2680(a).

The **discretionary function exception** requires elaboration. Government actions are divided into two categories: ministerial functions and discretionary functions. Ministerial actions can incur negligence liability for the government, discretionary functions cannot. The term **ministerial function** denotes government action that implements some policy-making decision. The term **discretionary function** denotes the policy-making decision itself. In essence, to exercise a discretionary function is to engage in an act of *governing*. And the idea is that you can't sue the government for governing. It is as if the doctrine is saying that democracy and elections are the intended mode of redress for bad government – not lawsuits.

Thus, if a postal truck runs a red light and hits your car, you can sue. But if a new health insurance mandate has caused you to lose money, you can write a letter to member of Congress. As a matter of theory, the distinction is clear. In practice, however, the dividing line between discretionary functions and ministerial functions is not always easy to discern.

Case: *Kohl v. United States*

The case tackles the question of how to differentiate a discretionary function from a ministerial function.

Kohl v. United States

United States Court of Appeals for the Sixth Circuit
November 16, 2012

699 F.3d 935. Debra R. KOHL, Plaintiff–Appellant, v. the UNITED STATES OF AMERICA, Defendant–Appellee. No.

11–6213. MOORE, J., delivered the opinion of the court in which McKEAGUE, J., joined. MERRITT, J., delivered a separate dissenting opinion.

KAREN NELSON MOORE, CIRCUIT JUDGE.

This case arises out of the execution of a field experiment aimed at improving the government's technical capacity to respond to Improvised Explosive Devices (IEDs). Plaintiff–Appellant Debra R. Kohl ("Kohl") seeks recovery for injuries allegedly sustained due to negligence of a federal employee operating a winch while collecting debris generated by the planned detonation of explosives during this government-funded research experiment. Kohl appeals the district court's determination that her claims were barred by the discretionary-function exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.,* and that the court thus lacked subject-matter jurisdiction. Because we conclude that the government's decisions about how to extract evidence from the site of the explosions, and what types of equipment to use to do so, are shielded from liability by the discretionary-function exception, we AFFIRM the judgment of the district court.

I. BACKGROUND

On December 4, 2007, Kohl, a certified bomb technician with the Hazardous Devices Unit of the Metropolitan Nashville Police Department ("MNPD"), participated in a research experiment funded by the U.S. Department of Defense at the Tennessee State Fire Academy in Bell Buckle, Bedford County, Tennessee. The experiment involved constructing and detonating explosive devices in vehicles and then collecting post-blast debris for laboratory analysis as forensic evidence. This experiment was part of a larger research project conducted by scientists working at Oak Ridge National Laboratory, managed by the University of Tennessee–Battelle for the Department of Energy. Explosives Enforcement Officers of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), Jason Harrell and Alex Guerrero, assisted and participated in the experiment.

Following the detonation of the explosives, and after an "all-clear" was given, participants in the project, including Kohl, entered the explosives range to inspect the vehicles. Kohl and Officer Todd Mask, another MNPD bomb technician participating in the project, proceeded to investigate one of the vehicles, a minivan. Kohl searched the passenger's side of the minivan for evidence, while Mask attempted to search the driver's side of the vehicle. However, the driver's side door of the minivan had "buckled," and as a result, it would not open. The investigation team decided to try to access the inside of the van by using a winch on the driver's side door. After a first failed attempt to winch the door, a second attempt was made. While other team members were preparing to winch the door a second time, Kohl testified that she returned to the passenger's side door of the van and continued searching for evidence. During this time, Kohl was "leaning into the passenger side of the vehicle."

Then, although the record is not clear about exactly how Kohl came into contact with the vehicle, Kohl testified that she remembers feeling "pain in the top of [her] head" and that she "saw stars." The complaint alleges that "[d]ue to the winching, the door came loose and the door frame of the vehicle crashed into Ms. Kohl's head." After seeking medical care the following day, Kohl was referred to a neurologist, who diagnosed her with "post-concussive syndrome with persistent headaches and cognitive changes." Since the incident, Kohl has not been employed.

Kohl filed this action on December 16, 2009 in the U.S. District Court for the Middle District of Tennessee under the FTCA, seeking damages. The complaint alleges that federal employees were negligent in "operat[ing] the winch in an unsafe manner," "fail[ing] to warn Plaintiff of dangers regarding the winch," "conduct[ing] the operation, including winching of the vehicle, without proper safety protocols," and by "fail[ing] to use reasonable and due care to prevent injury to Plaintiff." Defendant United States filed a motion to dismiss or, alternatively, for summary judgment on January 7, 2011, in part on the basis that the district court lacked subject-matter

jurisdiction. Finding that the conduct at issue in this case falls within the discretionary-function exception to the FTCA, the district court dismissed Kohl's claims for lack of subject-matter jurisdiction.

II. ANALYSIS

A. Discretionary–Function Exception: Legal Framework

At issue is whether the district court erred in finding that it lacked subject-matter jurisdiction over Kohl's claims. We review de novo a district court's dismissal based on the application of the discretionary-function exception to the FTCA.

Sovereign immunity generally bars claims against the United States without its consent. Congress, through the FTCA, waived this governmental immunity for claims brought for injury or loss of property, or personal injury or death 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. The FTCA's waiver of immunity is limited, and contains a series of exceptions. One of these exceptions—known as the discretionary-function exception—states that the FTCA's waiver does not apply to "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If a claim falls within this exception, then federal courts lack subject-matter jurisdiction, and the claim must be dismissed. This appeal concerns whether the conduct at issue in Kohl's claims falls within the discretionary-function exception.

Determining whether a claim falls within the discretionary-function exception involves a two-step test. The first step "requires a determination of whether the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice." *Rosebush v. United States,* 119 F.3d 438,

441 (6th Cir.1997). If there was such a violation of a mandatory regulation or policy, then the discretionary-function exception will not apply, because "there was no element of judgment or choice," *id.,* and thus "the employee has no rightful option but to adhere to the directive."*Berkovitz v. United States,* 486 U.S. 531, 536 (1988).

If, on the other hand, there was room for judgment or choice in the decision made, then the challenged conduct was discretionary. In such a case, the second step of the test requires a court to evaluate "whether the conduct is 'of the kind that the discretionary function exception was designed to shield'" from liability. *Rosebush,* 119 F.3d at 441. The discretionary-function exception is meant "to prevent judicial 'second-guessing' of ... administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814 (1984).

The discretionary-function exception's scope extends beyond high-level policymakers, and includes government employees at any rank exercising discretion. *Id.* at 813 ("[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."). "A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions." *Gaubert,* 499 U.S. at 325. Even where government action is taken on the day-to-day operational level, and implements broader governmental objectives, if that action involves choice or judgment that is "susceptible to policy analysis," then it falls within the discretionary-function exception. *Id.* "We also consider the fact that '[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.' " *Sharp ex rel. Estate of Sharp v. United States,* 401 F.3d 440, 443 (6th Cir.2005).

B. Application to Kohl's Case

In determining whether Kohl's claims fall within the discretionary-function exception, "the crucial first step is to determine exactly what conduct is at issue." *Rosebush,* 119 F.3d at 441. Theparties disagree about how to characterize appropriately the conduct. Kohl argues that the relevant conduct is "use of a winch on a large minivan while people are working in and around the minivan, and whether the Government employee sufficiently alerted those people before doing so." Kohl's theory is that the context of the use of the winch is irrelevant to the analysis of the discretionary-function exception. Using this narrow characterization of the conduct at issue, Kohl goes on to argue that the ministerial act of using a winch does not involve policy-related judgments, and thus is not shielded from liability by the discretionary-function exception. The Government, on the other hand, emphasizes the context in which the alleged injury occurred: a field experiment which recreated a bomb scene and required trained bomb technicians to recover evidence from the scene. Using this broad characterization, the Government argues that the decisions related to how best to conduct the experiment did involve policy-related judgments and thus are shielded from liability. The Government's theory appears to be tantamount to a contention that every decision, "[a]t every level," in the context of the post-blast investigation would be shielded from liability. Each of these views is too extreme.

Kohl's narrow characterization must be rejected, because it "collapses the discretionary function inquiry into a question of whether the [government] was negligent." *Rosebush,* 119 F.3d at 442. "Negligence, however, is irrelevant to our inquiry at this point." *Id.* We rejected a similarly narrow approach in *Rosebush,* which involved a child who was severely burned when she fell into a fire pit on a campground site maintained by the United States Forest Service. Plaintiff argued that the Forest Service was negligent in "fail[ing] to make the fire pit safe for unsupervised toddlers, and to warn of the dangers of the fire pit." *Id.* at 441. The *Rosebush* court held that this characterization was too narrow, and that instead, the conduct at issue was the maintenance of the Forest Service's campsites and fire

pits. Similarly, in *Bell v. United States,* 238 F.3d 419 (6th Cir. Nov. 6, 2000) a panel of this court in an unpublished opinion rejected a narrow characterization of the conduct at issue for purposes of analysis under the discretionary-function exception. *Bell* involved a slip and fall due to a wet floor of a lobby of a post office building, which was open to the public even during hours when the Post Office itself was closed and unstaffed. Suing the United States under the FTCA to recover for her injuries, the plaintiff argued that the relevant conduct was the "Post Office's lack of efforts to maintain the premises in a reasonably safe manner." Again, we concluded that this formulation was too narrow, instead holding that "the conduct at issue here is the~ postmaster's conduct in deciding under what circumstances to allow the lobby area to remain open to the public at times when the service windows were closed." *Id.*; *see also Merando v. United States,* 517 F.3d 160, 168 (3d Cir.2008) (rejecting a narrow framing of the conduct at issue as whether the government had discretion "not to find and remove the hazardous tree," instead concluding that the "relevant issue" was whether the government "had discretion in formulating and executing [the hazardous tree management] plan"); *Autery v. United States,* 992 F.2d 1523, 1527–28 (11th Cir.1993) (rejecting plaintiff's contention that the relevant conduct was the allegedly negligent manner in which the park's employees carried out a plan to remove hazardous trees, instead concluding that the relevant issue was "[w]hether park personnel had discretion in executing that plan").

Kohl's formulation of the conduct at issue is inappropriate for the same reason: by framing the question as whether the ATF employee operated the winch in a safe manner, Kohl "begs the question." To characterize the issue as whether the ATF employees had discretion to operate the winch in an unsafe manner is to ask whether the employees had discretion to be negligent. As we stated in *Rosebush,* negligence is irrelevant at this stage of the inquiry. The issues of whether the ATF employee who operated the winch was negligent, and whether the safety precautions taken were reasonable, are separate inquiries from the analysis of the discretionary-function exception. "It is the

governing administrative policy," rather than the negligence of a particular employee, "that determines whether certain conduct is mandatory for purposes of the discretionary function exception." *Autery,* 992 F.2d at 1528. Thus, the conduct at issue must be framed in terms of the scope of administrative authority to use discretion in executing the research experiment. More properly formulated, the conduct at issue is "the recovery of forensic evidence and the necessary actions taken to facilitate that recovery, including actions taken to dislodge the door of the minivan so that evidence could be recovered." *Kohl,* 2011 WL 4537969, at *7. Our analysis thus focuses on whether ATF's actions in collecting the forensic evidence from the field test, including decisions about what equipment to use, are protected by the discretionary-function exception.

Regarding the first step of the discretionary-function-exception test, neither party in this case argues that there was a mandatory policy or regulation at issue. Because there was no specific regulation or policy governing the post-blast investigation, the challenged government conduct involved discretion. ⌙Kohl appears to argue in her brief that *because* there was no formal or written policy addressing the conduct at issue, the discretionary-function exception cannot apply. This argument makes little sense. The governing precedents do not imply that government conduct can be discretionary only if it is taken pursuant to a written directive of some sort. Rather, the existence of such a formal statute, regulation, or policy prescribing a course of action means that the discretionary-function exception will not apply. Indeed, it is more likely that government agents are exercising discretion if they are conducting an experiment that is not governed by a written manual or regulation, because such decisions will involve "an element of judgment or choice." *Berkovitz,* 486 U.S. at 536.⌝

Thus, the district court properly concluded that the "relevant inquiry" is at the second step of the two-part discretionary-function-exception test.

The second step of the test requires a determination of whether the conduct is " 'of the kind that the discretionary function

exception was designed to shield' " from governmental liability. *Gaubert,* 499 U.S. at 322–23. It is important to note that framing the conduct more broadly, as we have done, does not imply that every action taken in connection with a government program will be brought under the umbrella of the broader policy-related judgments involved in the program. Although difficult to draw, there is a line between conduct "of the kind that the discretionary function exception was designed to shield," *Berkovitz,* 486 U.S. at 536, and the sorts of run-of-the-mill torts, which, while tangentially related to some government program, are not sufficiently "grounded in regulatory policy" so as to be shielded from liability. *Gaubert,* 499 U.S. at 325 n. 7; *see also Totten v. United States,* 806 F.2d 698, 700 (6th Cir.1986) (explaining that Congress, in the discretionary-function exception, "was drawing a distinction between torts committed in the course of such routine activities as the operation of a motor vehicle and those associated with activities of a more obviously governmental nature"). Where an act "cannot be said to be based on the purposes that the regulatory regime seeks to accomplish," the discretionary-function exception will not apply. *Gaubert,* 499 U.S. at 325 n. 7. The *Gaubert* Court used negligent driving by a government actor on government business as an example of conduct that would not be shielded by the discretionary-function exception. Driving a car, while it "requires the constant exercise of discretion," is not sufficiently connected to regulatory policy to fall within the discretionary-function exception.

The key question in this appeal is whether the conduct at issue here was sufficiently based on the purposes that the regulatory regime – here the research experiment – sought to accomplish. Although this is a close case, we conclude that the answer to this question is yes. The decision to use a winch was part of the decisionmaking involved in deciding how best to conduct the post-blast investigation. *Cf. Konizeski v. Livermore Labs (In re Consol. U.S. Atmospheric Testing Litig.),* 820 F.2d 982, 993–95 (9th Cir. 1987) (finding that claims of negligence for failure to maintain sufficient safety precautions during "inherently dangerous" field testing of nuclear weapons were

barred by the discretionary-function exception); *Creek Nation Indian Hous. v. United States,* 677 F.Supp. 1120, 1124–26 (E.D.Okla.1988) (finding, in a case involving an explosion of bombs being transported by a commercial carrier, that the discretionary-function exception barred negligence claims against the United States for alleged failure to take adequate safety precautions regarding transportation of explosives).

The planning and execution of the research experiment is susceptible to policy analysis, including judgments about how to respond to hazards, what level of safety precautions to take, and how best to execute the experiment in a way that balanced the safety needs of the personnel and the need to gather evidence from the vehicles. *See Rosebush,* 119 F.3d at 444(explaining that even if there is no indication "that policy concerns were the basis of a challenged decision, the discretionary function exception applies if the decision is susceptible to policy analysis") (citing *Myslakowski v. United States,* 806 F.2d 94, 97 (6th Cir.1986)). Decisions about how to execute the experiment include judgments as to what kinds of equipment to use to extract the evidence for forensic laboratory analysis. These equipment-related decisions were "intimately related" to the execution of the field experiment—in other words, judgments as to how to extract the evidence from the vehicles after the bombs were detonated, including what equipment to use, were necessary to the execution of the project. Thus, a challenge to the use of a particular piece of equipment, i.e., the winch, would amount to a challenge as to the overall execution of the research project. The conduct at issue is thus unlike the *Gaubert* Court's example of driving a car in connection with a government mission; the ATF employee's use of the winch was sufficiently related to the purposes that the post-blast investigation sought to accomplish to fall within the discretionary-function exception.~

Further, Kohl's contention that the conduct falls outside the exception because it involved "machine operator error" is of no avail. The Supreme Court's discretionary-function-exception cases have made clear that the fact that the

decisionmaking involved occurred on an operational level does not affect the analysis. The discretionary-function exception protects both high-level policymakers and the employees who implement broader governmental objectives. In *Varig Airlines*, the Court held that the discretionary-function exception shielded not only the federal government's broad decision to implement a "spot-check" system for ensuring compliance of airplanes with FAA regulations, but also "the acts of FAA employees in executing" the program.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court dismissing Kohl's claims for lack of subject-matter jurisdiction.

GILBERT S. MERRITT, CIRCUIT JUDGE, DISSENTING.

It seems to me that a private person acting as agent of a company, who is trying to open the door of a car with a regular winch with a strong spring, would normally be subject to standard tort principles in case of injury. Instead, my colleagues simply say there can be no such liability, despite the statutory language, if the conduct "involves choice or judgment" because—for some unstated reason—liability for such a choice "amount[s] to a challenge as to the overall execution of the research project." Why? The problem with formulating a standard or principle this way is that almost every act by government or private agent in the scope of employment would "challenge a policy" if it is for the purpose of carrying out some government or private interest, policy or plan.~

The court's theory is incoherent and directly contrary to the early case of *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), decided not long after the Federal Tort Claims Act was enacted. In the *Indian Towing* case the Court concluded that once the government makes a protected policy, every implementing step like conducting an experiment or repairing damaged equipment must proceed with "due care" in carrying out its decision. In *Indian Towing* the

government set up a lighthouse service. The government agent did not "repair" the light properly:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, *it was obligated to use due care* to make certain that the light was kept in working order ... and to repair the light or give warning that it was not functioning.

350 U.S. at 69 (Emphasis added). Likewise, once the government decided to carry out the hazardous IED experiment "it was obligated to use due care." The firearms agent using the winch did not have to ponder the nature of a policy. No considerations of social policy would come to mind in getting the door opened. The question should be the regular tort question for "private" persons in the economy: did the agent use due care?

Otherwise, there are severe distributional consequences for the entire society. The costs of torts by government agents are distributed only to private individuals. Here the plaintiff is permanently disabled by alleged government error. The government distributes income to the private companies that manufacture the IED's, the car and the winch. But the plaintiff's injuries somehow become a "challenge to government policy" and cannot be compensated.~

The nature of the conduct here is perfectly clear: a federal agent attempted to remove a door from a minivan with a winch in order to obtain evidence from within.~ Having defined the conduct, its context becomes relevant to the legal standard we must apply: Whether the government agent's decision was "grounded in social, economic, [or] political policy." *United States v. Gaubert,* 499 U.S. 315, 323 (1991). To make this determination, we typically must discern the legal authority for an agent's action. Even where there is no explicit constraint on an agent's action – and here there is not – discretion is guided by some sort of governmental pronouncement. An agent acquires

immunity for the government not simply by making a choice – she acquires it by making a choice that substantively constitutes the policy behind a statute, regulation, or agency guidance. *See id.* at 325 (holding that the discretionary function exception only protects actions "grounded in the policy of the regulatory regime").

In this case, the Government has been quite sketchy about the authority or purpose of the IED experiment at issue. Without an adequate explanation of the authority for the experiment—which appears not to have been disclosed before the district court granted the motion to dismiss—it is clear that the agent's decision was not grounded in any policy that the government or my colleagues can articulate. Even if we assume some sort of agency guidance and interpret the exercise in the way most favorable to the Government – as a training mission to recover evidence – I fail to see how the decision to winch the door off the van required any sort of policy judgment.

At root, policy judgment requires a balancing of interests. *See Myers v. United States,* 17 F.3d 890, 898 (6th Cir.1994) ("Th[e] *balancing* of interests ... characterizes the type of discretion that the discretionary function exception was intended to protect."). Of course, balancing is a necessary element of discretion. The majority believes that the agent's decision to use a winch was susceptible to policy analysis because it required him to "execute the experiment in a way that balanced the safety needs of the personnel and the need to gather evidence from the vehicles." This sort of balancing is a meaningless way to identify policy analysis. Had the agent crashed his car while speeding to the scene of the exploded van, he would have tacitly been balancing the safety of his passengers against the need to reach the subject of the experiment. Yet crashing a car is not behavior from which the government can claim immunity. The relevant question is not whether the government actor engaged in some sort of balancing, but whether judicial interference with the actor's balancing would "seriously handicap efficient government operations." *United States v. Varig Airlines,* 467 U.S. 797, 814 (1984).~

> Complex balancing pursuant to stated regulatory authority has characterized the situations in which courts apply the discretionary function exception.~ By contrast, no complex balancing was required in this case. The challenge facing the agent was how to get the door off the van to recover evidence. The Government points to no statute, regulation, or agency guidance granting the agent discretion to choose among a number of methods to achieve this task. Assuming that the agent had authority to remove the door, the ultimate decision to use the winch required no calculus as to the best use of government resources or the cost of proceeding otherwise. Indeed, there is no evidence that the agent had any tool but the winch available, or that he did anything other than grab the instrument nearest at hand. The decisional process the agent employed is not the sort of judgment characteristic of social, economic, or political policy.~
>
> Because the agent's decision to use a winch required no policy judgment, and because the plaintiff's suit would in no way interfere with government operations, I respectfully dissent.

Questions to Ponder About *Kohl v. United States*

A. Under the *Kohl* court's conception of the discretionary function test, is there *anything* that a government employee could do, other than crash a car, which would fall outside of the discretionary function exception?

B. What do we make of the policy question at the heart of the discretionary function exemption? Would the government's ability to govern be hamstrung if liability were permitted in a case such as this?

C. The majority writes, "The discretionary-function exception protects both high-level policymakers and the employees who implement broader governmental objectives." What do you think the court means when it says the exception "protects … employees"? Literally, the exception shields the federal government from liability – not the employees. (The employees are already fully immune because of the Westfall Act, discussed above.) So why does the court phrase it this way? Is there any sense to it, or is it just a relaxed style of writing?

Different Views of Discretionary Function

In *Downs v. United States,* 522 F.2d 990 (6th Cir. 1975), hijackers seized a small plane in Nashville, Tennessee and then forced it to fly to Jacksonville, Florida for a fuel stop. The FBI was alleged to have botched the rescue attempt by refusing to refuel the plane in Florida and instead attempting to shoot out the aircraft's engines and tires. In response to being fired on, one of the hijackers shot and killed two hostages.

Emphasizing the "sweeping language" of the FTCA's waiver of sovereign immunity, the *Downs* court held that decisions of the FBI agent in charge of the hijacking response were not protected as being within a discretionary function:

> We recognize that the agent was called upon to use judgment in dealing with the hijacking. Judgment is exercised in almost every human endeavor. It is not the mere exercise of judgment, however, which immunizes the United States from liability for the torts of its employees.~ We believe that the basic question concerning the exception is whether the judgments of a Government employee are of "the nature and quality" which Congress intended to put beyond judicial review. Congress intended "discretionary functions" to encompass those activities which entail the formulation of governmental policy, whatever the rank of those so engaged. We agree with a commentator's analysis of the provision: It would seem that the justifications for the exception do not necessitate a broader application than to those decisions which are arrived at through an administrator's exercise of a quasi-legislative or quasi-judicial function. In this case, the FBI agents were not involved in formulating governmental policy. Rather, the chief agent was engaged in directing the actions of other Government agents in the handling of a particular situation. FBI hijacking policy was not being set as an ad hoc or exemplary matter

> since it had been formulated before this hijacking.~
>
> The prospect of governmental liability for the actions of law enforcement officers should not cause those officers less vigorously to enforce the law. The need for compensation to citizens injured by the torts of government employees outweighs whatever slight effect vicarious government liability might have on law enforcement efforts.

Downs, 522 F.2d at 995-98. Judge Merritt's dissenting opinion in *Kohl* – in a portion not reproduced above – cited *Downs* as a laudable example of discretionary-function jurisprudence. That was in contrast to the majority's work in *Kohl*, which he called "muddled."

It seems difficult to reconcile *Downs* with *Kohl*. While *Downs* is still good law, it may reflect the predilections of a different era, when there was more skepticism of government action. Implying a trend, Judge Merritt wrote, "We now seem inclined to redistribute the costs of accidents created by government to private individuals who are much less capable of shouldering the burden."

Indeed, the cover of discretionary function seems to have grown to be very expansive.

In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), the Supreme Court held that the discretionary-function exception reaches far enough to shield the acts of FAA employees carrying out "spot check" inspections of maintenance records:

> The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. In administering the "spot-check" program, these FAA engineers and inspectors necessarily took

> certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA's alleged negligence in failing to check certain specific items in the course of certificating a particular aircraft falls squarely within the discretionary function exception of § 2680(a).

Varig Airlines, 467 U.S. at 820.

The discretionary function has also been upheld in numerous cases alleging negligent maintenance of facilities. In *Rosebush v. United States*, 119 F.3d 438 (6th Cir. 1997), the plaintiff's 16-month old daughter fell into a fire pit at a campsite and was badly burned by smoldering coals. The parents argued that the U.S. Forest Service was negligent in not placing a grating over the pit or a protective railing around it. The court held that the discretionary-function exception applied, since fire-pit maintenance involved "balancing the needs of the campground users, the effectiveness of various types of warnings, aesthetic concerns, financial considerations, and the impact on the environment, as well as other considerations."

Diplomatic Immunity and Immunities for International Organizations

As an extension of the principles of sovereign immunity, and also for practical concerns of keeping the machinery of international relations running smoothly, diplomats from foreign countries are immune from court process in the country where they are stationed. Technically, diplomats are subject to *the laws* of the United States while they are here, it is just that they are immune from *the courts*. For most practical purposes, this ends up being a distinction without a difference.

A historical outgrowth of diplomatic immunity is immunity for many international organizations. Immunity for these organizations is provided – if at all – by a treaty to which the United States is a signatory. Since international organizations increasingly engage in

highly complex, large-scale operations that are not merely diplomatic in character, this form of immunity is arguably of increasing importance. The United Nations, for instance, was recently sued for negligence over its disaster relief operations in Haiti. Following the 2010 earthquake in the country, the U.N. allegedly caused sewage to be dumped into a river, precipitating an outbreak of cholera that raged through 2013, killing roughly 9,000 people and sickening about 700,000. Sued in New York, the U.N. asserted its immunity to avoid liability.

The Firefighter's Rule

A final topic for us to consider along with various forms of immunities is a doctrine called the **firefighter's rule**. This doctrine prohibits firefighters from suing for injuries sustained because of a negligently set fire.

Suppose a homeowner carelessly starts a fire. A small child is trapped inside. A firefighter, in the course of rescuing the child, suffers smoke inhalation injuries. Anyone else in this situation – coming to the rescue of someone in danger – could sue the careless homeowner in negligence. But the firefighter cannot, because of the firefighter rule.

The firefighter rule can be characterized as a "reverse immunity," because instead of precluding suit against a particular class of defendants, the firefighter rule precludes a particular class of plaintiffs from suing.

The firefighter rule does not apply only to firefighters. It also may also apply to police officers and to other professional emergency responders. It has even been extended to the case of a veterinarian who sued after being bit by a dog brought for in for care.

One justification for the firefighter rule is assumption of the risk. By voluntarily taking on their job, professional emergency responders, or others in analogous situations, have assumed the risk of injury – or so goes the theory. The problem with assumption of the risk as the theoretical underpinning for the firefighter rule is that when bystanders come to the rescue – that is, nonprofessional emergency responders – they are considered foreseeable plaintiffs under

negligence doctrine, and assumption of risk does not bar their recovery.

The firefighter rule does have some flexibility to prevent certain instances of rank unfairness. Courts have held, for instance, that arsonists – those who intentionally start fires – are not protected by the firefighter rule.

Problem: Museum Gala

The Museum of Municipal Accomplishment, jointly owned and operated by the City of Metropolis and the non-profit Metropolis Museum Trust, has opened a new exhibition: *70 Years of Safety*. During the opening gala, a large steel structure – holding up various examples of "safe" scaffolding – collapses. Gala invitee Carl Cinitez is injured and trapped by the wreckage. It turns out that museum staff negligently failed to install several bolts, causing the collapse. The Metropolis Fire Department responds, and firefighter Fiona Freeman attempts to lift part of the structure up to free Carl, but when she does, she slips on an patch of cooking oil negligently left there by the Freeman's husband, Harold Heltenmayer, who happened to be serving as the caterer for the event. As a result, the structure collapses further, which further injures Cinitez and causes Freeman to suffer a compound leg fracture.

After Cinitez is finally freed, he and Freeman are whisked away by ambulance to the hospital via the closest route, which goes through the Metropolis Battlefield National Historic Park. Unfortunately for Cinitez and Freeman, the National Park Service has been undertaking a maintenance project that has involved removing key structural supports from a small bridge. The NPS neglected to place a sign warning of the bridge's compromised condition, and the structure collapses under the weight of the ambulance, causing Cinitez and Freeman to suffer additional injuries.

Who among the following defendants can assert immunity to block a lawsuit brought by Carl for personal injuries? And, separately, who among the following can assert immunity to block a personal injury suit brought by Fiona Freeman?

A. The City of Metropolis

B. The Metropolis Museum Trust

C. Fiona Freeman

D. Harold Heltenmayer

E. The National Park Service