# THE DISCRETIONARY FUNCTION EXCEPTION IN THE SECOND CIRCUIT

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In a society governed by the rule of law, what is the responsibility of a government to rectify its own errors when those errors injure its citizens? In the Anglo-American legal tradition, this question has been debated at least since the Magna Carta, and it remains a vexed one. The answer to this question is especially elusive with respect to government-inflicted personal injuries remediable only with money damages, a form of liability rule that has always been subject to broad areas of immunity for government, for its officials, and for both.[1] In the United States, federal and state laws have waived many of these immunities.

The legal uncertainties surrounding governmental responsibility for torts committed by its agents reflect a number of political and doctrinal factors, including the multiplicity of conflicting values at stake. Among others, these values include society's interests in encouraging government to act vigorously without undue caution, deterring unreasonably risky conduct, avoiding judicial control of discretionary and policy decisions entrusted to the politically accountable branches, protecting the public fisc from excessive claiming attracted by government's uniquely deep pockets, and vindicating and exemplifying the rule of law. Striking a just balance among these goals has proven exceedingly difficult.

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1. *See generally* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS ch. 2 (1983).

## I. THE FEDERAL TORT CLAIMS ACT AND ITS DISCRETIONARY FUNCTION EXCEPTION

Congress enacted the Federal Tort Claims Act ("FTCA") in 1946, and today, more than half a century later and despite a dramatic transformation in the scope and scale of the federal government, the original FTCA remains essentially unchanged.[2] The FTCA waives the Federal Government's sovereign immunity and gives the federal district courts exclusive jurisdiction over damage suits against the United States involving "personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government . . . 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."[3]

This general waiver of governmental immunity, however, is highly qualified, being subject to a number of statutory exceptions. Perhaps the most important of these exceptions is a provision, known as the "discretionary function exception" ("DFE"), that bars FTCA liability for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[4] Because the DFE's reach has been interpreted broadly, it precludes tort claims by many of those injured by government negligence.[5]

### *A. The DFE: Basic Principles*

Although the DFE's justification is reasonably clear, its application in particular cases has aroused much uncertainty since its inception. Its general purpose is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political

2. *See generally* LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES (1999).

3. 28 U.S.C. § 1346(b)(1) (2000).

4. 28 U.S.C. § 2680(a) (2000).

5. *See* Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 U.C.L.A. L. REV. 871, 871 (1991) ("The discretionary function exception presents a substantial obstacle for tort claimants to surmount, limiting the federal government's exposure by perhaps billions of dollars a year and unquestionably preventing many of those injured from receiving compensation.").

policy . . . ."[6] Yet much, if not most, of what government does is not policy making in any meaningful sense, and even a policy decision must at some point be effectuated through a routine implementing act that a low-level official may perform negligently. And as the very first U.S. Supreme Court decision to interpret the FTCA made clear, the DFE does not "relieve the Government from liability for such common-law torts as an automobile collision caused by the negligence of an employee . . . of the administering agency."[7]

In order to determine whether an official's conduct is immunized by the DFE from tort liability under the FTCA, the U.S. Supreme Court has articulated a two-part test developed in the cases *Berkovitz v. United States*[8] and *United States v. Gaubert*,[9] which we shall call the *Berkovitz-Gaubert* test, although its elements were prefigured in earlier decisions. First, was the conduct discretionary in the sense that it involved an "element of judgment or choice"?[10] Second, was the conduct "grounded in the policy of the regulatory regime"?[11] The Court has also insisted that for purposes of DFE line-drawing, the level or status of the official who injured the plaintiff is not dispositive. Instead, the proper focus is on the "nature of the actions taken and on whether they are susceptible to policy analysis."[12] If so, then it qualifies for DFE immunity, and if not, it is actionable (unless, of course, it is protected by some other statutory exception or applicable defense). Applying the DFE is difficult because one must locate the point at which policy ends and routine implementation begins.

### *B. The DFE in the Second Circuit*

The U.S. Court of Appeals for the Second Circuit has not confronted a case that significantly tests the DFE's boundaries since 1991,[13] the year that the U.S. Supreme Court decided its last DFE case,

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6. United States v. Varig Airlines, 467 U.S. 797, 814 (1984).

7. Dalehite v. United States, 346 U.S. 15, 34 (1953) (citation omitted) (applying DFE to manufacturing specifications drafted by high-level government officials; no acts of negligence by low-level officials were alleged).

8. 486 U.S. 531 (1988).

9. 499 U.S. 315 (1991).

10. *Id.* at 322 (applying DFE to high-level regulatory strategy).

11. *Id.* at 325.

12. *Id.*

13. In order to gain a rough sense of the relative frequency with which the DFE arises in FTCA litigation, both in federal courts nationwide as well as in the Second Circuit, we conducted a Westlaw search performed on May 28, 2000. (*continued*)

*Gaubert*. Since 1991, the Second Circuit has analyzed the scope of the DFE in only two cases: *Fazi v. United States*[14] and *Andrulonis v. United States*.[15]

In *Fazi*, the Second Circuit held that the DFE immunized a decision not to provide a security escort to a private postal contractor. The private postal contractor was robbed while delivering valuables for the government that he alleged were valued at over $250,000. Under postal regulations, a private carrier is entitled to a security escort for cargo worth more than $250,000. Fazi claimed that the agency was negligent in deciding that under the relevant regulations, blank travelers' checks worth $225,000 did not count toward the valuation. The court held that the agency's valuation methodology involved the interpretation of a regulation requiring the balancing of a number of relevant policy factors, a balancing that a court should not second-guess. *Fazi* stands for the proposition that "day-to-day" decisions are DFE-immunized if they are "management decisions" that "require[] judgment as to which of a range of permissible courses is the wisest."[16]

In *Andrulonis*, the Second Circuit held that the DFE did not apply to a federal researcher's failure to warn of the dangers of bacteria used in a federally funded clinical study. As will be discussed more extensively later in this Article, the court rejected the Government's attempt to characterize the individual federal scientist's negligence as having been grounded in a broader and hence immunized policy authority.

Despite the dearth of post-*Gaubert* decisions by the Second Circuit interpreting the DFE, a number of district courts in the Second Circuit have recently decided cases involving the DFE, thereby helping to define which government acts are and are not immunized. This Article will discuss two such cases: *Lemke v. City of Port Jervis*[17] and *Martin v.*

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A search for cases containing the phrase "Federal Tort Claims Act" for the year 1999 produced 418 cases in all federal courts and 62 cases originating in the Second Circuit. A search with the same parameter for all years after 1990 produced 4887 cases in all federal courts and 614 cases originating in the Second Circuit.

A search for cases containing both "Federal Tort Claims Act" and "Discretionary Function Exception" for the year 1999 produced 46 cases in all federal courts and 3 cases originating in the Second Circuit. A search with the same parameters for all years after 1990 produced 641 cases in all federal courts and 65 cases originating in the Second Circuit.

14. 935 F.2d 535 (2d Cir. 1991).
15. 952 F.2d 652 (2d Cir. 1991).
16. *Gaubert*, 499 U.S. at 325 (alteration in original).
17. 991 F. Supp. 261 (S.D.N.Y. 1998).

*United States*.[18] *Lemke* held that the invocation of a broad policy of safety is not enough to shield a routine inspection from scrutiny under tort law principles. *Martin* refused to apply the DFE to prison employees' failure to maintain a walkway in a safe condition.

## II. A NEW DFE CASE FOR THE SECOND CIRCUIT: *COULTHURST V. UNITED STATES*[19]

The Second Circuit recently revisited its DFE jurisprudence when it decided the case of *Coulthurst v. United States*.[20] On October 9, 1992, Dorrell R. Coulthurst, then a prisoner at the Federal Correctional Institute in Danbury, Connecticut ("FCI Danbury"), was injured while exercising in the prison weight room. According to the complaint, whose legal sufficiency was all that was at issue,[21] Coulthurst was pulling 270 pounds of weights on a lateral pull-down machine ("machine") when the cable connecting the weights to the pull-down bars snapped, driving the bars down into his neck and shoulders and inflicting various injuries including a torn rotator cuff in his left shoulder and traumatic injury to his neck and back.

According to FCI Danbury officials, "[a]ll equipment in the Weight Room is inspected on a daily basis."[22] The U.S. Bureau of Prisons ("Bureau") does not prescribe the precise method of inspection or remedying unsafe equipment. This "determination . . . is left to the discretion of the [inspector]."[23] The FCI Danbury equipment was inspected only two days before Coulthurst's accident.[24] More generally, the Bureau periodically reviews its physical fitness programs in accordance with its Program Review Guidelines ("the Guidelines"),[25]

18. 971 F. Supp. 827 (S.D.N.Y. 1997).

19. 214 F.3d 106 (2d Cir. 2000).

20. *Id.* The senior author of this article served, through appointment by the Second Circuit, as counsel for the plaintiff-appellant Dorrell R. Coulthurst. The junior author assisted on the briefs. The remainder of the article is largely drawn from our briefs in the *Coulthurst* case.

21. Accordingly, we characterize the facts, as the court did, in a way that is most favorable to the plaintiff. *See id.* at 108.

22. Plaintiff's Memorandum of Law Responding to Defendant's Motion to Dismiss, Ex. A., Coulthurst v. United States, 214 F.3d 106 (2d Cir. 1998) (No. 98-2860).

23. Defendant's Memorandum of Law in Support of Motion to Dismiss, Ex. B, *Coulthurst* (No. 98-2860).

24. Defendant's Reply Memorandum of Law, Ex. A, *Coulthurst* (No. 98-2860).

25. Defendant's Memorandum of Law in Support of Motion to Dismiss, Ex. C., *Coulthurst* (No. 98-2860).

which require such programs to be reviewed at least once every two years.[26] The reviewer is required to "[v]isit the inmate fitness area (if there is one) and determine if the equipment is arranged in a safe manner and if the participants use the equipment properly."[27] According to the Bureau, the purposes of these Guidelines are to provide a safe program and to protect the Bureau from lawsuits.[28]

Coulthurst filed an action under the FTCA in the U.S. District Court for the District of Connecticut against the United States ("Government"). He alleged that his injuries were caused by the Bureau's negligent inspection and maintenance of the machine's cable.[29] He also alleged recklessness by the Bureau in that many inmates at FCI Danbury had been injured previously in similar accidents due to snapping cables and broken metal support pins. Despite the Bureau's knowledge of these repeated accidents and injuries at FCI Danbury, Coulthurst alleged that the Bureau failed to maintain the machine in safe condition or to warn him about the dangers.[30]

The Government moved to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules Civil Procedure. It argued that the "duty to inspect the weight equipment at FCI-Danbury is a discretionary function to be performed by FCI-Danbury employees . . . in furtherance of B.O.P. policy."[31] The Government maintained that a "presumption exists that the decisions made by the federal employees in actually conducting the physical inspection of the gym equipment in furtherance of those Guidelines, are grounded in the same policy goals sought by the Bureau of Prisons."[32] The district court granted the motion in a brief memorandum opinion. It held that the Government's (i.e., the Bureau's) conduct enjoyed DFE immunity because (1) the Bureau's "decisions with respect to the inspection of the weight lifting equipment" as well as its "decision to repair equipment" were both discretionary,[33] and (2) the Bureau's decisions "regarding the maintenance and repair of [its] weight lifting

26. *See id.* at 3.
27. *Id.* at 22.
28. *See id.* at Ex. B, ¶ 7.
29. Compl., ¶ 6, Coulthurst v. United States, 214 F.3d (2d. Cir. 2000) (No. 98-2860).
30. *See id.* at ¶¶ 11-12.
31. Defendant's Memorandum of Law in Support of Motion to Dismiss at 4., *Coulthurst* (No. 98-2860).
32. *Id.* at 9.
33. Coulthurst v. United States, No. 95-1316, slip op. at 6-8 (D. Conn. July 31, 1998).

equipment [are] a paradigmatic example of an administrative decision grounded in social and economic policy."[34] Coulthurst appealed.[35]

On appeal, the Second Circuit held that Coulthurst's complaint sufficiently alleged conduct that was not immunized by the DFE, vacated the district court's decision, and remanded the case for further proceedings.[36] We represented Coulthurst in the Second Circuit and, perhaps not surprisingly, agree with its decision. In this Article, we use the facts presented in *Coulthurst* to analyze the issues that arise when applying U.S. Supreme Court and Second Circuit law to determine if the DFE covers government conduct. Determining whether the DFE applied to *Coulthurst*, involved carefully pinpointing the precise reach of the Bureau's policy. While the Government invoked a broad policy to shield its actions, the issue was whether the alleged negligence or recklessness of a low-level inspector in conducting a routine inspection can be said to be grounded in that policy as a matter of law. Like the Second Circuit, we conclude that the inspector's acts are neither discretionary nor grounded in policy, that they in fact undermine the relevant Bureau policy, that imposing liability for the inspector's acts would in no way affect the Bureau's decision-making process or authority, and that accordingly the DFE does not bar Coulthurst's claim. In the course of our analysis of this case, we propose some additional criteria for applying the DFE jurisprudence of the U.S. Supreme Court and Second Circuit.

## III. ANALYSIS AND APPLICATION OF THE *BERKOVITZ-GAUBERT* TWO-PART TEST

The DFE certainly immunizes some of the Bureau's specific actions—for example, its decisions to establish a gym, to manage it in certain ways, and to inspect the gym equipment for safety every so often. The more difficult issue is whether the allegedly negligent or reckless inspection itself—the checking of the machine's condition and safety, including the frayed cable—is immunized. But if it is immunized, then so is every action in the chain of events—including, hypothetically, the forgetfulness of an inspector who, having noted a dangerous condition and intending to repair it, simply failed to do so out

34. *Id.* at 8-9.

35. By a July 22, 1999 order of the Second Circuit, the senior author of this article was appointed to represent Coulthurst pro bono.

36. Coulthurst v. United States, 214 F.3d 106, 111 (2d Cir. 2000).

of inadvertence. Significantly, the negligent inspection alleged in *Coulthurst* would be actionable if conducted by a private gym in Connecticut where Coulthurst's injury occurred.[37] Given the tortiousness of this conduct under state law, which is an essential requirement for FTCA liability, the question is whether it was nevertheless so bound up with policy considerations that it must be immunized by the DFE.

Although this issue lies at the core of the DFE analysis, the district court finessed it by characterizing the Bureau's actions in very general terms such as: "decisions with respect to the inspection of the weight lifting equipment," and a "decision to repair equipment."[38] These formulations, however, are so encompassing and elastic that they indiscriminately aggregate discrete actions that are significantly different in those aspects that are relevant for purposes of DFE analysis. In fact, the Second Circuit has relied upon a far more discriminating approach when called upon to decide whether the DFE immunizes such conduct. For example, in *Andrulonis*, the Second Circuit rejected the Government's attempts to "sweep all of Dr. Baer's acts and omissions under the rug of broad CDC policy" because doing so "would effectively insulate virtually all actions by a government agent from liability, excepting only those where the agent acted contrary to a clear regulation."[39] Indeed, district courts in the Second Circuit have followed the circuit court's lead and made a point of disaggregating the government's course of conduct into the discrete decisions, acts, and omissions that comprise it—some of which qualify for the DFE, others not.

In cases like *Coulthurst*, courts should disaggregate what the district court improperly aggregated—the agency's course of conduct—and then apply the two prongs of the *Berkovitz-Gaubert* test to each discrete element, immunizing only those elements that both (1) constitute policy-level, discretionary choices and (2) are directly grounded in the statutory or regulatory regime.

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37. *See, e.g.*, Helbling v. Quinnipiac Coll., No. CV 97-0396846S, 1999 WL 619580 (Conn. Super. Aug. 6, 1999); Hoffman v. Healthworks, Ltd., No. CV 95-0380260S, 1999 WL 235816 (Conn. Super. April 9, 1999); Peck v. Physical Fitness Consultants, No. CV 93-04570952S, 1994 WL 468435 (Conn. Super. Aug. 19, 1994).

38. Coulthurst v. United States, No. 95-1316, slip op. at 6-8 (D. Conn. July 31, 1998).

39. Andrulonis v. United States, 952 F.2d 652, 655 (2d Cir. 1991).

### *A. The First Prong of the* Berkovitz-Gaubert *Test: The Discretionary Nature of the Tortious Conduct*

Any course of conduct consists of a succession of acts (or omissions), that in turn reflect prior decisions to act (or fail to act). In determining whether the DFE immunizes an act, the Second Circuit has carefully disaggregated the course of conduct into its discrete elements. We proceed to do the same with the Bureau's course of conduct in *Coulthurst*.

#### *1. The decision to establish a prison weight room.*

The decision to establish a weight room is clearly a discretionary one.[40] The Bureau has no obligation to provide a prison weight-room and the decision to establish one involves balancing a number of genuine and conflicting policy goals and constraints—inmate health and well-being, risks of inmate injuries, need for supervisory staff, scarce prison resources, and many others. If Coulthurst were claiming that the decision to establish a weight room caused him injury, that claim would properly be dismissed. This decision is directly analogous to the immunized discretionary policy decisions of the U.S. Coast Guard to establish and operate a particular lighthouse,[41] of the Park Service to patrol a particular beach,[42] of the Federal Aviation Agency ("FAA") to establish an air traffic control system,[43] and of the Forest Service to place a lifeguard at a swimming site[44]—all of which were precisely the sort of decisions that Congress intended the DFE to protect.

#### *2. The decisions about how to manage the weight room and inspect the equipment.*

Also discretionary are the Bureau's decisions about how the weight room will be managed—for example, the frequency and timing of inspections, the number of officers assigned to supervise inmates, the procedures for inspecting and maintaining equipment, and the

40. Defendant's Memorandum of Law in Support of Motion to Dismiss, Ex. C., *Coulthurst* (No. 98-2860) ("Visit the inmate fitness area (if there is one). . . .").
41. *See* Indian Towing Co. v. United States, 350 U.S. 61 (1955).
42. *See* Caraballo v. United States, 830 F.2d 19 (2d Cir. 1987).
43. *See* Ingham v. E. Air Lines, Inc., 373 F.2d 227 (2d Cir. 1967).
44. *See* Wysinger v. United States, 784 F.2d 1252 (5th Cir. 1986).

scheduling of use of the gym. The DFE would immunize these choices even if they turned out to create an unreasonable risk of injury.

Under the Guidelines, prison administrators enjoy wide discretion in scheduling inspections. There is a mandatory element; the Bureau must conduct a basic program review once every two years.[45] So long as the Bureau does so, however, its choice regarding how frequently to inspect is discretionary. Having decided to establish a weight room, it must now balance a (smaller) number of considerations, chiefly the staffing costs and safety benefits of more or less frequent inspections. The DFE immunizes this policy choice as well, and for the same reason.[46] It does so even if the Bureau botched the cost-benefit analysis that led to its decision.

This point is illustrated by the U.S. Supreme Court's decision in *Varig Airlines v. United States*,[47] a case involving analogous choices concerning the management of inspections. There, the plaintiff alleged that an airplane fire was caused by the FAA's policy of only "spot-checking" aircraft for compliance with safety standards.[48] Under this policy, the FAA varied the extent of inspection depending upon the experience and reputation of the manufacturer, rather than inspecting all aircraft thoroughly. For example, inexperienced manufacturers were subjected to more thorough inspections than were more established manufacturers.[49] The plaintiff challenged both the "spot-check" policy and the FAA's application of it to the manufacturer of the plane that injured him.[50] The court held that the DFE applied both to the policy of "spot-checking" and to the decision not to subject the plane in question to a thorough inspection.[51] Notably, however, the court did not reach the issue presented here: whether, having decided to inspect that plane in a particular fashion, the agency's negligent or reckless inspection would be immunized by the DFE.

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45. Defendant's Memorandum of Law in Support of Motion to Dismiss, Ex. C., *Coulthurst* (No. 98-2860).

46. *See, e.g.*, Lemke v. City of Port Jarvis, 991 F. Supp. 261, 265 (1998) (finding DFE applies to Farmers Home Administration's (FHA) decision not to inspect for lead risks at all houses considered for loans).

47. 467 U.S. 797 (1984).

48. *See id.* at 819.

49. *See id.* at 816-18.

50. *Id.* at 819.

51. *See Varig Airlines*, 467 U.S. at 819-20.

*3. The inspection.*

Under the Second Circuit's disaggregative approach, the analysis would next focus on the negligent inspection of the machine. The district court's approach in *Coulthurst* was apparently to assume that the inspection was immunized because it was the final step in a regulatory process that was discretionary in its inception and in certain pre-inspection decisions.[52]

A possible justification for such a conclusion might be to argue that the Bureau's policies permit inspectors to conduct inspections as they please, allowing them to decide when and how to inspect, and that because such choices might reflect efficiency and cost factors which might be characterized as policy decisions, they must be immunized. This appears to have been the district court's reasoning. Although superficially plausible, however, it does not withstand close scrutiny. It undermines the FTCA's main rationale, which is that the government should be liable for conduct that would be tortious if committed by a private actor.[53] Interpreting the DFE too broadly would defeat this purpose of both prongs of the *Berkovitz-Gaubert* test. First, even the most routine ministerial action by the lowest-level employee can be said to involve some judgment or choice. After all, the actor could have chosen to act differently, and might even have chosen to breach his duty.[54] Were the DFE to encompass all actions as to which the actor had such choices, it would literally swallow the FTCA's general waiver of immunity. Second, even the most routine agency action can always be linked to some general policy concern. After all, an agency action is *ultra vires* unless it is at least consistent with an authorizing statute or

52. As the U.S. Supreme Court has noted in dicta: "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." United States v. Gaubert, 499 U.S. 315, 324 (1991).

53. *See* Indian Towing Co. v. United States, 350 U.S. 61, 68-69 (1955) ("The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws."); Feres v. United States, 340 U.S. 135, 139-40 (1950).

54. *See* Caban v. United States, 671 F.2d 1230, 1232 (2d Cir. 1982) ("[A]ll federal employees exercise a certain amount of discretion in the discharge of their responsibilities . . . no federal employee is a robot."); *see also* Gonzalez v. United States, 690 F. Supp. 251, 253 (S.D.N.Y. 1988).

regulation.[55] For the same reason, the general purpose of using limited resources efficiently is too universal to constitute a policy judgment that triggers the DFE.[56] To put the point in a more economistic way, virtually *any* action, public or private, that purports to be rational reflects some form of cost-benefit analysis.[57]

For any official course of action, there comes a point at which the agency's policy choices, all protected by the DFE, remain to be executed by low-level officials through routine, implementing actions. Prior to *Gaubert*, Second Circuit courts often held that the point at which low-level officials merely perform routine implementing actions, those actions cease to enjoy the DFE immunity designed to protect policy choices.[58] These implementing officials, like their private counterparts, must act with reasonable care in order to avoid tort liability. The logic of confining the DFE to higher-level policy-based, discretionary choices is revealed by the paradigmatic case of actionable negligence—the careless driver of a government vehicle. Drivers must constantly exercise discretion and choice, and driving on official business directly furthers some government policy and purpose such as delivering the mail. As the U.S. Supreme Court stated in *Gaubert*: "[a]lthough driving requires constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy."[59] In short, the government does not enjoy discretion to perform routine, low-level, implementing tasks

55. *See, e.g.*, Andrulonis v. United States, 952 F.2d 652, 655 (2d Cir. 1991). To interpret DFE to link all government acts to their authorizing statutes "would effectively insulate virtually all actions by a government agent from liability. . . ." *Id.*

56. *See* ARA Leisure Servs. v. United States, 831 F.2d 193, 196 (9th Cir. 1987). DFE does not apply to failure to maintain road in safe condition because "[b]udgetary constraints underlie virtually all governmental activity." *Id.*

57. *See* Duke v. Dep't of Agric., 131 F.3d 1407, 1410 (10th Cir. 1997) ("[E]very governmental action is, to some extent, subject . . . to some argument that it was influenced by economics or the like."); Cope v. Scott, 45 F.3d 445, 448 (D.C. Cir. 1995) ("[N]early every government action is, at least to some extent, subject to 'policy analysis.'").

58. *See, e.g.*, Caplan v. United States, 877 F.2d 1314, 1316 (6th Cir. 1989) ("[O]nce the government makes a policy decision protected by the discretionary function exception, it must proceed with due care in the implementation of that decision."); Caraballo v. United States, 830 F.2d 19, 22 (2d Cir. 1987) ("Having decided to patrol, the Park Service is not absolved of liability on a claim of discretionary function for the manner in which it executed that decision."); Martin v. United States, 971 F. Supp. 827, 829 (S.D.N.Y. 1997) (finding DFE did not apply because claim went "not to the adoption of the policy but to its implementation on the night in question . . . .").

59. United States v. Gaubert, 499 U.S. 315, 325 n.7 (1991).

negligently, much less recklessly. For purposes of determining the DFE's scope, such tasks are not grounded in the regulatory policy that warrants immunity.

The U.S. Supreme Court established this basic principle as early as its decision in *Indian Towing Co. v. United States*.[60] There, a boat ran aground because the U.S. Coast Guard negligently maintained the light in its lighthouse, permitting the light to burn out. The Court explained that while the Government's decision to operate a lighthouse was a policy choice immunized by the DFE, its specific acts of negligence were not protected. These acts included the Coast Guard's failure to (1) check the lighthouse battery; (2) examine deficient lighthouse power connections; (3) check for one month to see if the lighthouse was functioning; and (4) repair the light or warn that it was not operating. *Indian Towing* is still good law, as is evident from the U.S. Supreme Court's discussion of the case in *Gaubert,* its most recent DFE decision. In *Gaubert*, the Court, after explaining that the distinction between immunized policy and non-immunized operational acts was not always clear, reaffirmed *Indian Towing*'s holding that the Coast Guard's ordinary negligence in allowing the light to burn out was not an exercise of policy judgment and thus did not qualify for DFE immunity.[61]

The Second Circuit, following the U.S. Supreme Court's lead, has often held that once the government makes a discretionary decision to provide a service, it comes under a mandatory duty to act with due care in providing it.[62] These precedents (and others) are wholly consistent with the U.S. Supreme Court's reading of *Indian Towing* in *Gaubert*: the Government no more has discretion to perform routine implementing acts negligently (much less recklessly) than its mail carriers have discretion to drive carelessly.

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60. 350 U.S. 61 (1955).

61. *Gaubert*, 499 U.S. at 326.

62. *See, e.g.*, Denham v. United States, 834 F.2d 518, 520 (5th Cir. 1987) (applying DFE to protect decision to provide swimming area, but not to government's failure to prevent concrete blocks from drifting into swimming area); *Caraballo*, 830 F.2d at 22 (applying DFE to protect decision to patrol beach, but not to beach patrol's failure to prevent plaintiff from diving into shallow water); Wysinger v. United States, 784 F.2d 1252, 1254 (5th Cir. 1986) (applying DFE to protect decision whether or not to have a lifeguard, but not to a lifeguard who acted negligently); Drake Towing Co. v. Meisner Marine Constr. Co., 765 F.2d 1060, 1064 (11th Cir. 1985) (applying DFE to protect decision to place navigational buoys in water, but not to government's negligence in maintaining them); Ingham v. E. Air Lines, Inc., 373 F.2d 227, 238 (2d Cir. 1967) (applying DFE to protect decision to establish air traffic control system, but not to government's failure to operate system with reasonable care).

This principle was recently applied by a lower court in the Second Circuit in a case like the instant one, involving a prisoner-plaintiff's claim against the Bureau. In *Martin v. United States*,[63] a prisoner was injured when he slipped on ice while waiting in line for his medication. Although the weather was stormy and the prisoner asked if he could wait for the medication inside, the prison guards forced him to wait in line outside for it. While noting that the DFE immunized the Bureau's policy of requiring prisoners to go to an outside hospital for their medication, the court, nonetheless, held that the negligent conduct of prison staff in requiring prisoners to go outside during a winter storm and in failing to maintain a safe walkway were routine implementing acts that the Bureau had no discretion to perform negligently.[64]

In effect, the complaint in *Coulthurst* alleged that the Bureau, having chosen to establish a weight room and inspect its machines for safety, then inspected the injurious machine in a negligent and reckless manner. Even before any discovery had been conducted, this theory of the facts was supported by a striking coincidence of events. The inspector apparently inspected the machine that injured Coulthurst on October 7, 1992,[65] and the accident occurred only two days later. Given this temporal sequence, six alternative factual explanations for his injury can readily be imagined:

(1) Despite initialing the inspection form, the inspector did not in fact inspect the machine in question.
(2) He inspected the machine but failed to notice the frayed cable.
(3) He noticed the frayed cable but decided not to report it or recommend its replacement to his supervisor.
(4) He reported it or recommended replacement of the cable but did not take the machine out of service or post a warning pending the repair.
(5) He posted an adequate warning but Mr. Coulthurst used the machine with its frayed cable anyway.
(6) The machine was in a safe condition but Mr. Coulthurst used it in an unsafe, contributorily negligent manner.

At the motion to dismiss stage, alternatives (1)-(4) were altogether consistent with Mr. Coulthurst's allegation that the Bureau negligently: "failed to diligently and periodically inspect the weight equipment, and the cable, and maintain the same in good and proper working

63. 971 F. Supp. 827 (S.D.N.Y. 1997).
64. *Id.* at 829.
65. Defendant's Reply Memorandum of Law, Ex. A, *Coulthurst* (No. 98-2860).

condition"; "failed to diligently and periodically inspect the weight equipment, and the cable, and maintain the weight equipment in safe condition and free from dangerous defects" and "failed to replace the cable after undue wear and tear."[66] Alternatives (5) and (6), if true, might or might not have defeated his claim, depending on the extent of his knowledge of the risk and the relative magnitude of his and the Bureau's respective faults. At this stage of the litigation, Mr. Coulthurst need not, indeed cannot, establish precisely what happened and which among alternatives (1)-(4) was in fact correct; that, of course, is what discovery is for. Alternatives (5) and (6) depend on discovery, and as to them the Bureau, not Coulthurst, bore the burden of proof.[67] For Coulthurst to survive the Bureau's motion to dismiss, it was enough that four of these possibilities–*or indeed any one of them*[68]—allege negligent and reckless performance of a low-level, routine, non-discretionary action.

Alternatives (3) and (4) involve failures to warn of a known danger, which constitute a specific kind of negligence (or recklessness). In one of its two post-*Gaubert* DFE decisions, the Second Circuit held that such failures to warn are not immunized by the DFE. In *Andrulonis v. United States*,[69] a bacteriologist sued under the FTCA after contracting rabies while conducting a federal drug experiment for a vaccine. A federal scientist had supplied a virus to the bacteriologist for the experiment and then observed the experiment while failing to warn the bacteriologist of the dangers, known to him but not to the plaintiff, of experimenting with this virus. The Second Circuit held that the federal scientist's negligence was not immunized by the DFE. Although he enjoyed broad policy discretion to develop a vaccine, he had no discretion in failing to take basic safety measures and warn in the face of a known risk from the virus.[70] Ignoring a known, clear, and recurring

66. Compl., ¶ 6, Coulthurst v. United States, 214 F.3d (2d. Cir. 2000) (No. 98-2860).

67. *See* CONN. GEN. STAT. § 52-114 (1999) ("[T]he burden of proving such contributory negligence shall rest upon the defendant or defendants.")

68. *See* Berkovitz v. United States, 486 U.S. 531, 543-45 (1988) (evaluating various interpretations of plaintiff's complaint in reviewing district court's decision to grant defendant's motion to dismiss pursuant to the DFE); *see also* Still v. DeBuono, 101 F.3d 888, 891 (2d Cir. 1996).

69. 952 F.2d 652 (2d Cir. 1991).

70. *Id.* at 655. *See also* Cope v. Scott, 45 F.3d 445, 451-52 (D.C. Cir. 1995) (finding DFE does not apply to failure to post adequate warning signs about dangerous road surface); George v. United States, 735 F. Supp. 1524, 1535 (M.D. Ala. 1990)

danger is not part of a policy choice of the kind immunized by the DFE.[71]

The misconduct alleged in *Coulthurst* goes well beyond a mere failure to repair or warn of a single broken machine. Rather, the complaint alleges that "many inmates at FCI Danbury have been injured during normal use of the gymnasium weight equipment for reasons similar to that alleged herein, i.e., snapping cables and metal support pins," and that the Bureau's "failure to maintain the safety of the gym . . . despite knowledge of the repeated accidents and injuries caused thereby" was a reckless "disregard for the health, safety, and welfare of the inmates who use said equipment."[72] If an agency's failure to adequately inspect or warn of a discrete danger does not fall under the DFE, it follows *a fortiori* that inaction in the face of *multiple* accidents—that is, *recklessness*—also is not immunized by the DFE. We know of no previous case in which the DFE has been interpreted to immunize an agency's reckless misconduct.

### B. *The Second Prong of the* Berkovitz-Gaubert *Test: Are the Decisions Grounded in Regulatory Policy?*

The district court in *Coulthurst,* citing four policy considerations in which the Bureau's alleged misconduct was grounded, believed that these considerations qualified it for DFE immunity. The four considerations were: "(1) providing the inmates with the equipment for physical fitness; (2) ensuring a safe environment; (3) doing so in an economic and cost effective manner," and (4) "protecting the institution

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(finding DFE does not apply to failure to warn of known danger of alligators in national park swimming area).

71. The Government sought to distinguish *Andrulonis* on the ground that here "a regulatory regime [is] in place. . . ." Brief for the Government at 25, Coulthurst v. United States, 214 F.3d 106 (2d Cir. 2000) (No. 98-2860). In *Andrulonis*, however, this court stated that only "a clear regulatory scheme entrust[ing] government agents with discretionary powers to effectuate a clearly-defined policy" could constitute the kind of "regulatory policy" that could "serve as a basis for infusing all decisions of CDC employees with policy implications." *Andrulonis*, 952 F. 2d at 655. The vaguely worded BOP regulation here would not meet that standard where a negligent act by an implementing inspector is concerned. In fact, the Second Circuit doubted that any CDC policy could ever serve to immunize such negligence. *Andrulonis* stands for the proposition that a negligent omission in routine implementation of a policy does not itself, without more, implicate policy concerns.

72. Compl. at ¶¶ 11, 12, Coulthurst v. United States, 214 F.3d (2d. Cir. 2000) (No. 98-2860).

from lawsuits."[73] None of these policies, however, is substantially hindered by denying DFE immunity to the Bureau's negligence. Quite the contrary; imposing liability would actually *advance* the first three policies.[74]

The Bureau's negligent conduct is linked to its policy goals only in the general sense that inspection is one of the final steps necessary to implement its policy decisions to have a gym and to inspect the equipment periodically. The DFE does not immunize even a discretionary decision merely because the decision is linked to a policy decision in an attenuated way. The DFE applies only if the decision is *itself* "grounded" in that policy.[75] To be grounded in a policy, the decision must, at a minimum, be consistent with it. The Bureau's negligence in *Coulthurst*, far from being compelled by the policy of providing inmates with a safe exercise environment, directly violated that policy. If, as *Andrulonis* and other cases we have cited hold, the DFE does not apply when negligent conduct cannot be traced back to a policy rationale, the DFE cannot possibly apply when that conduct actually *violates* the relevant policy and is reckless to boot.

*Lemke v. City of Port Jervis*,[76] a very recent decision by a district court in the Second Circuit, confirms this common-sense point. The Lemkes purchased a home with a federal loan from the Federal Housing Authority ("FHA"), which inspects homes on which it makes loans in order to determine whether they meet its suitability standards. The FHA visually inspected the home and approved the loan despite the fact that the house contained clearly visible lead plumbing that caused dangerously high lead levels in the blood of the Lemkes' daughter. When the Lemkes sued under the FTCA, the agency invoked the DFE.

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73. Coulthurst v. United States, No. 95-1316, slip op. at 9 (D. Conn. July 31, 1998).

74. The Bureau's invocation of the fourth policy is unpersuasive because that policy could properly apply only to *unjustified* lawsuits, the very question at issue here.

75. *See* Shansky v. United States, 164 F.3d 688, 693 (1st Cir. 1999) ("Virtually any government action can be traced back to a policy decision of some kind, but an attenuated tie is not enough to show that conduct is grounded in policy."); Cope v. Scott, 45 F.3d 445, 452 (D.C. Cir. 1995) (finding DFE applies to the Park Service's decisions regarding the management of roads, but not to its decisions regarding posting of warning signs); *Andrulonis*, 952 F.2d at 655 (finding DFE does not apply to the federal scientist's actions because they were not grounded in policy of developing a vaccine); Gonzalez v. United States, 690 F. Supp. 251 (S.D.N.Y. 1988) (finding DFE does not apply to Postal Office's operational choice to use unstable posts as line markers because the choice does not involve policy judgment).

76. 991 F. Supp. 261 (S.D.N.Y. 1998).

The court concluded that although the FHA's general inspection procedures qualified for DFE immunity, its "failure to detect clearly apparent conditions that made the home unsafe" did not.[77] Even though the loan program "defined safety as one element of suitability . . . [t]he government's failure to identify harmful conditions present in the property cannot be understood as in furtherance of any governmental policy or as the exercise of discretion pursuant to any governmental policy."[78] *Coulthurst* is closely analogous. The Bureau, like the FHA in *Lemke*, adopted a broad policy of safety and, also like the FHA, its negligent and reckless inspection was not grounded in that policy and in fact violated it.

## IV. CONCLUSION

Underlying the Government's argument in *Coulthurst* was the claim that rejecting DFE immunity would have "profound implications" for the Bureau,[79] perhaps even causing it to eliminate weightlifting equipment altogether.[80] This is a *non sequitur*. As the Second Circuit ultimately recognized, a decision to reject DFE immunity for the faulty inspection would not resolve the merits of the case.[81] Coulthurst still has to establish the Bureau's liability by proving that the agency breached the legal duty it owed him through wrongful conduct causing his injury, and that he neither was at fault himself nor assumed the risk of his injury. Even if he did succeed in establishing the Bureau's liability, moreover, he would not have challenged the frequency, method, budget, or any other aspect of its maintenance and inspection program, all of which are immunized by the DFE. Instead, the challenge would only go to the manner in which the Bureau official conducted this particular inspection. It is true that courts have often extended DFE immunity to decisions directly implicating the security concerns posed by prison inmates,[82] but the routine maintenance of prison equipment and physical plant involve concerns that are no different from those in other public

77. *Id.* at 265.
78. *Id.*
79. Brief for the Appellee at 19-20, Coulthurst v. United States, 214 F.3d 106 (2d Cir. 2000) (No. 98-2860).
80. *Id.* at 17.
81. *Coulthurst*, 214 F.3d at 111.
82. *See, e.g.*, Dykstra v. United States Bureau of Prisons, 140 F.3d 791 (8th Cir. 1998).

and private facilities. Reflecting this fact, Congress has expressly waived immunity from federal prisoners' suits.[83]

Holding public employees to a reasonable care standard is not disruptive; it actually advances the government's professed safety goal. Requiring an individual inspector to inspect equipment in a non-negligent way consistent with the Bureau's policy cannot disrupt safety policy. The burdens of conforming government behavior to ordinary tort standards must not be confused with the burdens of defending against tort actions. Congress considered that lawsuits might inconvenience government officials when it enacted the FTCA waiving the government's sovereign immunity. Unlike policy decisions that do not fit comfortably into the traditional common law tort model and might unduly disrupt government and harm the public, ordinary inspection and maintenance implicate the kinds of decisions that courts have the experience and ability to adjudicate effectively.

*Coulthurst* illustrates two fundamental principles that should, and for the most part do, shape FTCA litigation in which the government invokes the DFE as a defense. First, the fact that routine implementing actions by low-level officials involve some degree of choice, as all decisions do, does not thereby convert them into the sort of policy decisions that the DFE was meant to protect. Second, the government may not immunize an otherwise tortious action simply by showing that the government took the action in order to implement some policy purpose. Instead, the courts must carefully disaggregate the government's course of conduct in order to focus on the specific action at issue and determine whether that action was truly grounded in policy. For purposes of applying the DFE, a government action is not grounded in policy merely by virtue of the fact that it was undertaken under the general authority of a policy decision. To be DFE-immunized, the challenged action must *itself* entail a policy choice, and it must also be implemented in a manner consistent with the purposes of the authorizing policy.

83. *See* United States v. Muniz, 374 U.S. 150, 153 (1963).