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Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under *Bivens*

CORNELIA T.L. PILLARD*

As Lon Fuller observed, judges engaged in legal reform sometimes use legal fictions to mask the fact that they are innovating. The legal fiction “brings the reform within the linguistic cover of existing law” in order to “avoid discommoding current notions” and to minimize the need for “troublesome adjustments” to established norms.¹ The Supreme Court’s pathbreaking decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*² rests on such a legal fiction. The *Bivens* majority sought to ensure relief from those constitutional violations that can only be remedied by money damages. Assuming that the federal government would have sovereign immunity against damage actions, the Court in *Bivens* held that constitutional tort actions could be brought against government officials only in their individual capacities. Individual liability under *Bivens* is fictional, however, because the federal government in practice functions as the real party in interest, paying for representation and reimbursing the sued individuals when they settle or pay judgments.

The opinion was written by the liberal, rights-oriented Justice William J. Brennan, and civil rights activists have long hailed the decision as a breakthrough for the protection of constitutional rights. Even now, constitutional scholars such as Professors Richard H. Fallon, Jr. and Daniel J. Meltzer praise the “genius” of the Court’s decision to hold individual officials liable for damages as a method of enforcing constitutional rights.³

Bivens has, however, proved to be a surreptitiously progovernment decision.

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1. LON FULLER, LEGAL FICTIONS 62–63 (1967).

2. 403 U.S. 388 (1971).

3. Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 173, 1822 (1991).

Although it appears to provide a mechanism for remedying constitutional violations, its application has rarely led to damages recoveries.⁴ Government figures reflect that, out of approximately 12,000 *Bivens* claims filed between 1971 and 1985, *Bivens* plaintiffs actually obtained a judgment that was not reversed on appeal in only four cases.⁵ While similar figures have not been systematically kept since 1985, recoveries from both settlements and litigated judgments continue to be extraordinarily rare. According to one estimate, plaintiffs obtain a judgment awarding them damages in a fraction of one percent of *Bivens* cases and obtain a monetary settlement in less than one percent of such cases.⁶ The low rate of successful claims indicates that, notwithstanding *Bivens*, federal constitutional violations are almost never remedied by damages. The low success rate of these claims also reflects that the courts are processing a tremendous amount of *Bivens* litigation. When analyzed by traditional measures of a claim's "success"—whether damages were obtained through settlement or court order—*Bivens* litigation is fruitless and wasteful, because it does not provide the remedies contemplated by the decision, and it burdens litigants and the judicial system.

This article argues that the Supreme Court's decision to place liability on federal officials in their personal capacity—what Professors Fallon and Meltzer call *Bivens*'s "genius"—is in fact its Achilles' heel. Individual liability under *Bivens* has become fictional because it is the government, and not the individual personally, that is in fact liable in *Bivens* cases. The individual liability fiction has ended up helping the federal government more than the *Bivens* plaintiff in various ways, and has contributed to the low rate of recovery under *Bivens*.

It may seem odd to attribute the low rate of *Bivens* recoveries to the

4. By "progovernment" I mean here that the decision has benefited the institutional interests of the Executive Branch as a defendant in constitutional tort litigation; this is not to say that governmental interests, broadly construed, necessarily oppose recovery for plaintiffs who have suffered constitutional harm. See *infra* note 130 and accompanying text. Except as noted, this article generally refers to the interests of the government in the narrower, more parochial sense.

5. See *Crawford-El v. Britton*, 93 F.3d 813, 838 (D.C. Cir. 1996) (en banc) (Silberman, J., concurring), *rev'd*, 523 U.S. 574 (1998); *Federal Tort Claims: Hearings on H.R. 595 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong. 15–17 (1983) [hereinafter *Hearings on H.R. 595*] (statement of J. Paul McGrath, Assistant Attorney General, Civil Division, U.S. Department of Justice) (listing 16 judgments of 10,000 to that date); Written Statement of John J. Farley, III, Director, Torts Branch, Civil Division, U.S. Department of Justice, to the Litigation Section of the Bar of the District of Columbia (May 1985) (on file with author) (stating that only 30 judgments were obtained by plaintiffs and that only four were not reversed on appeal and were actually paid); Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 343–44 (1989) (citing Farley and McGrath Statements).

6. Telephone Interview with Helene Goldberg, Director, Torts Branch, U.S. Department of Justice (Aug. 30, 1999) [hereinafter Goldberg Interview] (Where the *Bivens* claim is accompanied by an FTCA or other type of claim that appears meritorious, those figures would be correspondingly higher.). Prisoner litigation is the largest category under *Bivens*, and it provides one example of continued low success rates for plaintiffs. In the three years from 1992 through 1994, 1,513 *Bivens* cases were filed against officials of the Bureau of Prisons alone, resulting in two monetary judgments and approximately 16 monetary settlements. See Brief of the United States as Amicus Curiae at 3 n.2, *Kimberlin v. Quinlan*, 515 U.S. 321 (1995) (No. 93–2068).

individual liability fiction, given that fictional reliance on suits against government officials as a method of enforcing constitutional rights has an established and successful pedigree in *Ex Parte Young*.⁷ The *Bivens* fiction, however, differs significantly from the fiction on which *Young* relies, and it is that important distinction that has created the opportunity for *Bivens* to benefit the government at the expense of constitutional tort victims and, ultimately, the credibility of the legal system.

The Court in *Young* used an individual-liability rule to grant injunctive relief against state officials notwithstanding state sovereign immunity.⁸ The decision depends on the notion that, while sovereign immunity bars a suit directly against the government, officials who act unconstitutionally have exceeded their valid authority and are therefore answerable, not as representatives of government, but as private citizens. That notion is fictional not only because the miscreant official acts under color of governmental authority, but also because injunctive relief ordering prospective compliance with the Constitution constrains an official's on-the-job actions, not what he does on his own time. An injunction under *Young* therefore works just like an injunction against the government.

Because *Bivens* suits seek damages rather than injunctions, individual-capacity liability in those cases is not necessarily fictional in the *Young* sense; when an official is directed to pay damages, the official's own personal pocket-book is, at least potentially, at stake. It would seem that, from the defendant official's perspective, personal damages liability under *Bivens* is all too real. The fiction of *Bivens* instead lies in the predictable and actual consequence of the individual liability rule: virtually without exception, the government represents or pays for representation of federal officials accused of constitutional violations and pays the costs of judgments or settlements.⁹ The federal government has become the real defendant party in interest in *Bivens* litigation. This article focuses on the implications—doctrinal, economic, symbolic, institutional, and political—of the maintenance of the individual liability fiction in the face of that reality.

The relative merits of individual and governmental liability have been debated in academia and in Congress, but the Court has remained committed to *Bivens*'s individual liability fiction to the point of ignoring its real-world impact. The fiction has had various anomalous effects that generally undercut *Bivens*'s remedial efficacy and redound to the government's benefit. The notion that individuals are personally liable—however inaccurate in practice—has supported qualified immunity and related doctrines that would be unavailable if the

7. 209 U.S. 123 (1907); see 13 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 3524 (2d ed. 1984) (referring to *Ex Parte Young* individual liability rule as fictional).

8. *Young*, 209 U.S. at 161–62. The same principle has been assimilated to allow injunctive relief against federal officials. See, e.g., *Schneider v. Smith*, 390 U.S. 17 (1968); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912).

9. See *infra* notes 51–56 and accompanying text.

government itself were the acknowledged defendant. As an economic matter, qualified immunity has meant that exposure to *Bivens* liability fails to provide adequate incentives to prevent unconstitutional conduct, even while the nominal availability of such suits burnishes the government's public image. Moreover, with an individual rather than the government as client, government lawyers who defend *Bivens* actions behave more like "hired guns" with a singular mission of avoiding liability and less like public servants who would also take into account the broader public interest in remediation of constitutional violations. The illusion of an opportunity to obtain damages under *Bivens* also may well have relieved pressure on Congress to waive sovereign immunity and enact a more comprehensive and effective remedial scheme for constitutional torts.

The Court's adherence to the *Bivens* individual liability fiction brings with it substantial costs. The fiction has meant that the federal courts have not candidly or coherently analyzed basic normative questions at the heart of constitutional tort litigation. Those questions include: whether sovereign immunity should completely bar constitutional tort damages against the government; if not, what is the appropriate allocation of damages liability between the government and its agents; and in what circumstances, if any, partial immunities should be available to the government itself or to its employees. So far, the individual liability fiction has contributed to keeping those questions off the table.

In an example of the phenomenon that Lon Fuller identified, the fiction of individual liability helped change the law to permit recovery of damages for constitutional violations while permitting the Court to sidestep the difficult question of whether, when a constitutional violation occurs, sovereign immunity should bar recovery of monetary damages directly from the government. As Fuller also noted, however, legal fictions can obscure what is really going on. The Court's evasion of the sovereign immunity question has buried an underlying tension between constitutional enforcement through damages awards and principles of sovereign immunity that bar such awards. The evasion of a more candid resolution paved the way for a changing Supreme Court to undermine *Bivens*'s utility as a method of constitutional enforcement and has postponed the development of a more frank and coherent legal approach to constitutional torts and immunities.

I. THE *BIVENS* DECISION

A. THE CONSTITUTIONAL ENFORCEMENT DILEMMA AND THE INDIVIDUAL LIABILITY SOLUTION

The familiar facts of *Bivens* are a reminder that sometimes damages are the only effective remedy available for constitutional violations. Federal agents searched and ransacked Webster Bivens's house, manacled him in front of his family, threatened to arrest them, and later at the Brooklyn courthouse, strip-

searched *Bivens*—all without probable cause.¹⁰ *Bivens* suffered a constitutional violation for which he had no remedy. *Bivens* was never prosecuted, so exclusion of evidence was not available to vindicate his Fourth Amendment rights.¹¹ Because he did not face a realistic threat of future harm from the agents' conduct, injunctive relief would have been neither meaningful nor available to him.¹² Given the circumstances of the *Bivens* case, Justice Harlan observed that "for people in *Bivens*' shoes, it is damages or nothing."¹³

The Court in *Bivens* confronted a tension between two established principles: first, that for every right there must be a remedy; and, second, that sovereign immunity shields the federal government from damages liability in the absence of a congressional waiver.¹⁴ The *Bivens* Court saw the promise of a remedy for every right in *Marbury v. Madison*.¹⁵ The Court quoted Chief Justice Marshall's statement in *Marbury* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."¹⁶ In words that resonate strongly within American legal culture, *Marbury* underscores the centrality of remedies as a basis of governmental legitimacy:

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right.¹⁷

According to *Marbury*'s ideal, legal rights are not mere precatory or aspirational statements, but remediable claims, redressable in courts, for violations of law.¹⁸ That is especially true of federal constitutional rights, given that federal law is supreme and the Constitution trumps all other domestic sources of law.¹⁹ If

10. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

11. In any event, even evidentiary exclusion does not provide a remedy for an invasion of privacy in violation of the Fourth Amendment. Evidentiary exclusion is a deterrent mechanism, designed to prevent law-enforcement officers from intruding unreasonably on personal privacy in their quest to secure evidence. See *United States v. Leon*, 468 U.S. 897, 906 (1984). It does not provide a remedy in the sense of making whole the victim of an unconstitutional search. See generally, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (discussing distinctions between Fourth Amendment exclusion and remediation).

12. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

13. 403 U.S. at 410 (Harlan, J., concurring).

14. 42 U.S.C. § 1983 authorizes constitutional tort claims against local government entities, but such suits are unavailable for actions taken under color of federal, as opposed to state, law. See *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

15. 5 U.S. (1 Cranch) 137 (1803).

16. 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

17. 5 U.S. (1 Cranch) at 163.

18. See also *Watson v. City of Memphis*, 373 U.S. 526, 532–33 (1963) (stating that the constitutional rights asserted "are not merely hopes to some future enjoyment of some formalistic constitutional promise. . . . The basic guarantees of our Constitution are warrants for the here and now, and unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.") (emphasis omitted).

19. See U.S. CONST. art. VI, § 2.

courts fail to redress constitutional violations and government officials are free to ignore the Constitution without consequence, rights seem hollow to rights-holders and the limitations the Constitution imposes on governmental action appear false. The legitimacy and prestige of the Constitution and the government suffer. *Bivens* therefore adopted the normative position that constitutional violations should be remedied.²⁰

The Court also, however, faced the longstanding bar of sovereign immunity. The principle of sovereign immunity is diametrically opposed to the remediation principle associated with *Marbury*. Whereas *Marbury* speaks of remedies for legal wrongs as an important component of a "government of laws, and not of men,"²¹ sovereign immunity is traditionally explained in shorthand terms by the Blackstonian maxim "the King can do no wrong."²² Sovereign immunity bars relief against the United States unless the sovereign, speaking through the Congress, consents to be sued.²³ Congress has not waived sovereign immunity and invited claims against the government for damages to remedy constitutional violations.

Faced with a right that could be remedied only by a damage award and an established backdrop of sovereign immunity, the Court in *Bivens* found a right to damages implicit in the Fourth Amendment itself, but held that the proper defendants were the federal agents in their personal capacities, not the government.²⁴ Thus, *Bivens* gave effect to *Marbury*'s ideal in a constitutional area where there had previously been a remedial gap.

The *Bivens* decision marked an important step in the evolution of the judicial interpretation of the Constitution as a sword rather than a shield.²⁵ The Court affirmatively rejected the traditional view that Webster Bivens's exclusive remedy was state tort law. Under that traditional analysis, the Constitution properly

20. Whether constitutional rights require a federal damages remedy is a subject of ongoing debate. Although some scholars have observed that *Marbury*'s stated remedial imperative is less than absolute, see, e.g., Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), quoted in HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 330-60 (2d ed. 1973), the *Bivens* Court chose not to resolve the apparent dilemma by denying it, but embraced the remedial imperative as requiring that damages be available directly under the Constitution.

21. 5 U.S. (1 Cranch) at 163.

22. 1 WILLIAM BLACKSTONE, COMMENTARIES *107-39.

23. The doctrine was first discussed by the Supreme Court, in dictum, in *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264 (1821). Without questioning it, the Court applied "the general proposition that a sovereign independent State is not suable except by its own consent." *Id.* at 380.

24. The Court emphasized that damages are a "remedial mechanism normally available in the federal courts," and that they "have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971).

25. See Walter Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); see also Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969) (arguing, before the Supreme Court decided *Bivens*, that remedies such as damages that are ordinarily within the courts' competence should be available directly under the Constitution where necessary to implement constitutional guarantees).

entered the picture only as a limitation on the government agent's affirmative defense that he or she acted under a valid exercise of government law-enforcement power.²⁶ For example, in the absence of a claim directly under the Constitution, *Bivens* could have brought a common-law tort action in state court claiming trespass; if the agents raised as a defense that they had a governmental prerogative to enter his private home for law-enforcement purposes, *Bivens* could have sought to rebut that justification on the ground that the agents lacked probable cause and that the search was therefore unreasonable, in violation of the Fourth Amendment.²⁷

The Court in *Bivens* found that traditional approach inadequate. Justice Brennan's opinion recognized that governmental power carries with it an enhanced capacity to harm and concluded that "to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens" would "ignore the fact that power, once granted, does not disappear like magic when it is wrongfully used."²⁸ In other words, governmental power is different from private power, and the Constitution plays a special role in constraining and redressing abuses of governmental power.

The Court, however, omitted any discussion of whether damages for a constitutional violation might most appropriately be assessed against the government itself, nor did it make mention of sovereign immunity. The Court might have declared, for example, that in any apparent conflict between the Constitution and the common-law doctrine of sovereign immunity, the latter must yield. Or it might have held that sovereign immunity trumps the remediation principle.²⁹ But instead, the Court neatly sidestepped the tension between sovereign immunity and the remediation principle it had elaborated by holding the federal

26. See *Bivens*, 403 U.S. at 390-91. The Second Circuit in *Bivens*, subsequently reversed by the Supreme Court, had reasoned that the Framers did not intend to create "a wholly new federal cause of action founded directly on the Fourth Amendment[.]" but that "the medium [of enforcement] contemplated was . . . the common law action of trespass, administered in our judicial system by the state courts." 409 F.2d 718, 721 (2d Cir. 1969). The Fourth Amendment, in the Second Circuit's view, "serves to increase the efficacy of the trespass remedy by preventing federal law-enforcement officers from justifying a trespass as authorized by the national government." *Id.*

27. See Brief for the Respondents at 10-13, *Bivens*, 403 U.S. 388 (No. 70-301) (arguing that common-law trespass actions, not constitutional damages claims, are the appropriate recourse for Fourth Amendment violations).

28. *Bivens*, 403 U.S. at 391-92. The Supreme Court, in contrast to the court of appeals, found an affirmative right to recover in the Fourth Amendment itself, "regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize [under the law of trespass] the identical act if engaged in by a private citizen." *Id.* at 392. It expressly rejected respondents' argument that the Fourth Amendment serves only as a limitation on federal defenses to a state law claim and not as an independent limitation upon the exercise of federal power. See *id.* at 394.

29. The Supreme Court has relied principally on common-law tradition as the basis for sovereign immunity; the sovereign immunity principle "has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." *United States v. Lee*, 106 U.S. 196, 207 (1882). See generally ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 545-48 (2d ed. 1994) (noting that courts applying sovereign immunity "often have admitted that its justification in this country is unclear" and reviewing justifications for and criticisms of the doctrine).

agents liable in their individual capacities.³⁰

B. FILLING A REMEDIAL GAP: THE CONTEXT AND SCOPE OF *BIVENS*

In its recognition of the importance of damages as a constitutional remedy, the *Bivens* decision is not limited to Fourth Amendment jurisprudence. In the absence of *Bivens*, a remedy would also be lacking for violations of many other constitutional rights. The *Bivens* principle supplies a damages remedy for violations of the First,³¹ Fifth,³² and Eighth³³ Amendments. *Bivens* claims include not only challenges to unreasonable searches, arrests, or uses of force by federal agents, but also, for example, challenges to the failure to provide necessary medical care to federal prisoners, or to the denial of federal contracts or other governmental opportunities or benefits based on race, sex, religion, or speech.

Before *Bivens*, there was no remedy for federal constitutional torts as such. Congress had not specifically authorized damages for constitutional violations by federal officials. Two federal statutes expressly authorized suits against the government for broad classes of claims, which the courts had read to include contract claims and common-law tort claims. The Tucker Act,³⁴ enacted in 1887, authorizes judgment "upon any claim against the United States founded either upon the constitution, or any Act of Congress, or any regulation of an executive department or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."³⁵ The Tucker Act's exception for tort cases, however, excludes common-law and constitutional torts.³⁶ The Federal Tort Claims Act (FTCA),³⁷ enacted in 1946, waives federal sovereign immunity and allows the government to be sued for certain common-law tort claims. The FTCA makes the United States liable for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under

30. Even as the *Bivens* Court rejected the state common-law tort model as inapposite to abuses of governmental power, the Court retained a crucial feature of the common-law model by holding the defendant officials liable only in their personal capacities. The legal regime for recovery of damages for harms caused by agents of the federal government is therefore anomalous: The Constitution addresses abuses of uniquely governmental power, but constitutional tort claims may be brought only against individual governmental officials in their personal—that is, nongovernmental—capacities. Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (referring to the "well-recognized irony" that *Ex Parte Young* suits are simultaneously viewed as addressing acts of private individuals for Eleventh Amendment immunity purposes and as dealing with governmental actions that thereby implicate constitutional prohibitions).

31. See *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.8 (D.C.Cir. 1993) (en banc), *vacated on other grounds*, 515 U.S. 321 (1995).

32. See *Davis v. Passman*, 442 U.S. 228 (1979).

33. See *Carlson v. Green*, 446 U.S. 14, 17–18 (1980).

34. 28 U.S.C. §§ 1346(a)(2), 1491 (1994).

35. *Id.*

36. See *New Am. Shipbuilders v. United States*, 871 F.2d 1077, 1079 (Fed. Cir. 1989) ("If the government misconduct alleged was tortious, jurisdiction is not granted . . . under the Tucker Act.").

37. 28 U.S.C. §§ 1346(b), 2761–2680.

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.”³⁸ The FTCA’s references to governmental liability only in circumstances in which a private person would be liable, and to the governing “law of the place,” have been interpreted to exclude coverage for constitutional torts by federal personnel.³⁹

Shortly after *Bivens*, in 1976, Congress authorized challenges—including constitutional challenges—to any final federal agency action. Such suits may now be brought directly against the federal government under the Administrative Procedure Act (APA).⁴⁰ However, damages are not available under the APA; the 1976 amendment to APA sections 702 and 703 authorized only actions seeking “relief other than money damages.”⁴¹ Constitutional tort claims for damages therefore cannot be brought directly against the government under the APA, but must be brought against the individual official under *Bivens*.

In a sense, *Bivens* also fills a “gap” created by the absence of a civil rights statute, parallel to 42 U.S.C. § 1983, applicable to federal personnel. Section 1983 authorizes a private cause of action for relief, including damages, under

38. 28 U.S.C. § 1346(b).

39. *FDIC v. Meyer*, 510 U.S. 471, 477–78 (1994). Rights of recovery for common-law torts under the FTCA are, in addition, quite limited. The FTCA generally authorizes claims based on “negligent” or “wrongful” conduct, 28 U.S.C. § 1346(b), but limits claims for intentional torts to certain specified torts (assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution) and only when those intentional torts are committed by law-enforcement officers. *See* 28 U.S.C. § 2680(h). More significantly, there is no FTCA liability for harms caused in the course of performing discretionary functions, *see* 28 U.S.C. § 2680(a), and that exception has been very broadly construed. *See generally* LESTER S. JAYSON, *PERSONAL INJURY, HANDLING FEDERAL TORT CLAIMS* (1999) (describing FTCA coverage).

Although constitutional claims as such cannot be brought under the FTCA, common-law tort claims may in some cases serve, and historically have served, as functional proxies for constitutional claims. For example, use of excessive force by a law-enforcement officer in violation of the Fourth Amendment could also be pleaded as a state-law assault and battery claim under the FTCA, and an Eighth Amendment claim of denial of necessary medical treatment might be pleaded as a medical malpractice claim. At both a theoretical and a functional level, however, reliance on common-law proxies is a compromise. Such reliance does not give effect to constitutional standards, but depends on their coincidental and incomplete overlap with common-law standards. It anomalously makes the Constitution, the supreme law of the land, depend on the contours of the tort law of the fifty states. The Supreme Court in *Bivens* rejected the notion that, where damages are sought, the Constitution can only be enforced through state common law. *See supra* notes 27–28 and accompanying text; *see also* *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (“It is no answer [to a constitutional claim] that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”); *id.* at 196 n.5 (Harlan, J., concurring) (“It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.”); *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (noting distinction between constitutional violation and state tort). In *Carlson v. Green*, the Court rejected the contention that state tort remedies under the FTCA are exclusive of remedies under *Bivens*, in part on the ground that FTCA remedies are not in practice an adequate substitute for constitutional remedies. *See* 446 U.S. 14, 23 (1980).

40. 5 U.S.C. § 702.

41. 5 U.S.C. §§ 702, 703, amended by Pub. L. No. 94–574, § 1, 90 Stat. 2721 (1976).

the Constitution and federal statutes against state and local, but not federal, officials.⁴² As it has been interpreted by the Supreme Court, section 1983 is a scheme of notorious complexity.⁴³ For current purposes, it suffices to note that, unlike *Bivens*, section 1983 authorizes some, albeit limited, governmental liability.⁴⁴

In sum, damages under *Bivens* are, in many circumstances, the only remedy for constitutional violations. Various statutes authorize damages for factually related nonconstitutional claims, and nondamages relief for constitutional claims, against the federal government. Section 1983 authorizes constitutional damages claims against state and local officials and local government entities. For relief from constitutional malfeasance by federal officials, however, the judicially created *Bivens* remedy against public officials in their individual capacities remains the only mechanism for seeking damages for constitutional claims.

C. THE INDIVIDUAL LIABILITY RULE AS FICTION: THE REALITY OF GOVERNMENTAL LIABILITY

The critical turn in *Bivens* was the Court's decision to impose liability on individual officers, thereby bypassing the thorny issue of whether sovereign immunity should apply to constitutional claims or only to statutory and state common-law claims. Sovereign immunity aside, it is debatable whether individual or governmental liability (or both, in the form of joint and several liability, for example) would be the best rule. Some commentators have criticized *Bivens*'s individual liability rule, arguing that constitutional damage claims should, at least in some circumstances, run directly against the federal government rather than against the individual.⁴⁵

A range of rationales can be cited for governmental liability. Most constitutional violations by federal officials are committed by employees who seek, at

42. See *Blessing v. Freestone*, 520 U.S. 329 (1997); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

43. See generally SHELDON H. NAHMOD ET AL., *CONSTITUTIONAL TORTS* (1995) (treatise devoted to doctrinal issues arising in § 1983 litigation).

44. Where a constitutional violation was the result of the policy or custom of a local governmental entity, the entity itself can be held liable for damages. Local governmental officials can also be sued for damages in their individual capacities, as can state officials. The states' Eleventh Amendment sovereign immunity, however, bars damages claims against the state governments. As with common-law sovereign immunity at the federal level, states' Eleventh Amendment immunity has caused constitutional tort plaintiffs to sue individual state employees, who, in turn, have been indemnified by their governments, creating de facto governmental liability. See 5 FOWLER V. HARPER ET AL., *LAW OF TORTS* § 29.9 n.20 (2d ed. 1986); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49-50, 60 (1998); Carlos M. Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1795-96 (1997). The individual liability scheme at the state level is thus quite parallel to *Bivens* and some of the conclusions of this article regarding the anomalous consequences of individual liability are applicable to the constitutional tort scheme at the state level as well.

45. See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT* 82-121 (1983); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1484-92 (1987); Jeremy Travis, Note, *Rethinking Sovereign Immunity*, 57 N.Y.U. L. REV. 597, 634-37 (1982); Dellinger, *supra* note 25, at 1554, 1557; Rosen, *supra* note 5, at 371-77.

least in part, however misguided, to promote the government's interests; if they are acting on the government's behalf and the government (or, more broadly, society) is the beneficiary of their wrongful conduct, it seems only fair that the government should foot the bill when its employees' actions overstep the constitutional line.⁴⁶ Moreover, constitutional violations require state action, and thus the government that made an abuse of its official power possible should arguably be held accountable for that abuse. From the perspective of creating workable deterrence, individual government employees may lack the power or resources to bring their conduct into constitutional compliance, particularly where lack of training, ineffective systems, or inadequate resources are the problems; by the same token, only if government as an institution is held legally responsible for constitutional violations will it feel pressure to institute prophylactic measures, whether by enhancing staffing, improving training, or restructuring procedures.⁴⁷ Finally, if individual officials are judgment-proof, only governmental liability can provide full compensation.

Others have defended the *Bivens* approach on the ground that personal liability is necessary to provide sufficiently focused and effective deterrence to unconstitutional behavior.⁴⁸ And there is support for that view, too. If constitutional tort damages are simply a cost of business passed on to government, officials might lack sufficient incentive to comply with constitutional commands. An official who risks paying damages out of his or her own pocket will likely take more care to comply with the Constitution. Moreover, if an official

46. For example, when government violates the Fourth Amendment, it may be achieving law-enforcement or penal gains; when it violates First Amendment free speech rights, government may be benefiting in terms of controlling public debate or shaping its own image to its liking.

47. Professor Peter Schuck has persuasively argued that the deterrence potential of individual liability on the part of government employees is limited "because so much wrongdoing is rooted in organizational conditions and can only be organizationally deterred." SCHUCK, *supra* note 45, at 98. As he described it, violations of law by government officials arise from a number of factors—including failures of communication, capacity, motivation, and care—most of which are not within the control of the "street-level" governmental employee who is most commonly sued under *Bivens*. *Id.* at 5–12. Rather, the government must act at the agency level to communicate legal norms and induce employees to follow them, allocate resources sufficient to support constitutionally conforming conduct, and reform routines to minimize unlawfulness. To be sure, government is at bottom itself only a collection of individuals, and only individuals can be deterred. *See* Vázquez, *supra* note 44, at 1804. But governmental liability for damages is meaningfully distinct from the (unshifted) individual liability of street-level tortfeasors because the former regime, by drawing on the public fisc, places liability at the feet of policy makers, including legislators and supervisory officials, whereas the latter regime purports not to. Governmental liability also differs from the (unshifted) individual liability of supervisory or other high-level personnel, because the particular individuals a plaintiff elects to sue may not be those ultimately responsible, and because even high-level personnel may lack the requisite scope of control over the circumstances that gave rise to the violation (for example, the size of the agency's budget) to have prevented it. *See generally* Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 226 (1986) (discussing how constitutional violations can be "created by structures and contexts rather than by individuals").

48. *See, e.g.*, Janell Byrd, *Rejecting Absolute Immunity for Federal Officials*, 71 CAL. L. REV. 1707, 1718–21 (1983).

acts unconstitutionally out of personal motives, it seems unjust that the government, and ultimately the taxpayers, should have to bear the costs of that individual's misconduct.

There is, however, a third body of commentary on the issue that suggests that, at least from an economic perspective, the choice of individual versus governmental liability may not matter much.⁴⁹ These commentators have not directly analyzed the *Bivens* individual liability rule, but their insights are relevant to the operation and effectiveness of a regime that places liability exclusively on public employees and not on their employer. They argue that where the costs of liability may be shifted voluntarily between employer and employee, placing liability on an employee may be economically equivalent to placing liability on the employer. If individuals are held personally liable for harms caused by their employment, they will pressure their employers to cover those costs—whether in the form of additional compensation, insurance, or indemnification. In order to attract employees and to ensure that they fulfill their duties, an employer, whether public or private, may feel compelled to shoulder the costs of employee liability. Under this analysis, *Bivens*'s choice to impose liability on government employees is in fact a decision to place liability on the government itself, because the government, as employer, will have no realistic choice but to compensate its employees for their risk.⁵⁰

The federal government's response to *Bivens* shows that the economic analysis equating employee and employer liability has much force. The government indemnifies its employees against constitutional tort judgments or settlements (in the rare instances in which a *Bivens* claim results in a monetary liability) and takes responsibility for litigating such suits by providing Justice Department lawyers to defend its officials or by hiring private counsel with government funds.⁵¹ Department of Justice regulations currently provide for representation of constitutional tortfeasors for action within the scope of their federal employment, unless representation would be contrary to the interests of the United

49. See Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249 (1987); Christopher D. Stone, *The Place of Enterprise Liability in the Control of Legal Conduct*, 90 YALE L.J. 1 (1980); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988). See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

50. The equivalence is said to depend on two assumptions: that employees have sufficient assets to pay judgments against them in full and that the transaction costs of employment contracts that allocate liability between the employer and employee are small. See Kramer & Sykes, *supra* note 49, at 272. As discussed below, it also assumes that there are no defenses (like qualified immunity) or other liability-affecting factors (like juror sympathy) available to one (employer or employee) and not the other.

51. The federal government provides representation in about 98% of the cases for which representation is requested. See Memorandum for Heads of Department Components from Stephen R. Colgate, Assistant Attorney General for Administration (June 15, 1998) [hereinafter Colgate Memo] (regarding liability insurance reimbursement) (on file with author).

States.⁵² Where there is a conflict of interest, such as between officials who have been jointly sued, private counsel may be hired at governmental expense to represent individuals or groups of officials with common interests.⁵³ Regulations also authorize indemnification of Department of Justice employees; employees of other agencies are covered by their own agencies' indemnification policies.⁵⁴ Indemnification is not fully guaranteed up front: payment will be made only if the challenged conduct was within the scope of employment and indemnification is in the interest of the United States.⁵⁵ As a practical matter, however, indemnification is a virtual certainty.⁵⁶

The pressure that the *Bivens* rule of individual liability imposes on government to indemnify was foreseeable, and perhaps intended, by the Court in deciding *Bivens*. Professors Fallon and Meltzer observe:

[T]he genius of the [*Bivens*] system's general outlines lay in the pressure that it exerted on government . . . to indemnify its officials and thereby convert

52. See 28 C.F.R. § 50.15(a), (b) (1999). As a corollary principle, the Justice Department will not assert any legal position or defense on behalf of an employee sued in his individual capacity that is deemed not to be in the interests of the United States. See *id.* at § 50.15(a)(8)(ii).

53. See 28 C.F.R. § 50.15(a)(10).

54. See 28 C.F.R. § 50.15(c) (indemnification regulations applicable to Department of Justice employees); see also, e.g., 13 C.F.R. § 114.110 (Small Business Administration); 14 C.F.R. § 1261.316 (National Aeronautics and Space Administration); 17 C.F.R. §§ 142.1–142.2 (Commodity Futures Trading Commission); 22 C.F.R. § 21.1 (Department of State); 22 C.F.R. § 207.01 (Agency for International Development); 31 C.F.R. § 3.30 (Treasury); 32 C.F.R. § 516.32 (1996) (Army, Department of Defense); 34 C.F.R. §§ 60.1–60.2 (Education); 38 C.F.R. § 14.514(c) (Veteran's Affairs); 43 C.F.R. § 22.6 (Interior); 45 C.F.R. § 36.1 (Health and Human Services).

If sovereign immunity is a bar to governmental damages liability and only Congress is empowered to waive that immunity, see *supra* notes 23 and accompanying text, executive branch agencies arguably cannot reimburse federal employees consistently with sovereign immunity. To avoid such problems, indemnification policies have been promulgated agency by agency, providing for payment of judgments out of each agency's appropriation. The government has determined that, as long as indemnification "bears a logical relationship to the objectives of the general appropriation" for the agency, an agency may agree to indemnify its employees out of its appropriated funds consistently with principles of sovereign immunity. Indemnification of Department of Justice Employees, 10 Op. Off. Legal Counsel 6, 8 (1986); see also Indemnification of Environmental Protection Employees, 13 Op. Off. Legal Counsel 54, 57 (1989); Proposed Indemnification of Department of the Treasury Officers and Employees, 15 Op. Off. Legal Counsel 70 (1991). The congressional spending authorization embodied in each agency's appropriations act is thus deemed to provide the necessary congressional authorization. Other potential objections arise under the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A) (1994), and the Adequacy of Appropriations Act, 41 U.S.C. § 11(a) (1994). The Anti-Deficiency Act forbids the obligation of funds not already appropriated. 31 U.S.C. § 1341(a)(1)(A). The Adequacy of Appropriations Act forbids the government to obligate itself by contract "unless the same is authorized by law or is under an appropriation adequate to its fulfillment." 41 U.S.C. § 11(a). These potential obstacles to agency indemnification of employees are avoided, too, by drawing indemnification funds from existing appropriations, and by providing that indemnification shall be contingent upon the availability of appropriated funds. See 28 C.F.R. § 15(c)(5).

55. See 28 C.F.R. § 50.15(c); see also *id.* at § 50.15(a)(8)(iii).

56. A typical example of a *Bivens* case in which a public employee would not be represented and indemnified by the government is one in which the employee is under criminal investigation or prosecution by the government for the conduct that gave rise to the constitutional tort suit. These cases are, however, extremely rare.

what appeared to be a system of officers' liability into, for some if not all practical purposes, a regime of governmental liability.⁵⁷

As a result of this foreseeable indemnification, individuals are not in practice liable under *Bivens*. Although, as a formal matter, *Bivens* suits are brought against individual officials, government lawyers (or private lawyers paid by the government) carry out the defense in virtually every case, and settlements or judgments are paid from government coffers. Thus, it is the government, not the individual employee, that has become the real party in interest under *Bivens*, bearing the burdens of suit and liability for constitutional tort claims.

The Court brushed aside the contention that it should treat *Bivens* as effectively establishing governmental rather than individual liability more than a decade ago on the ground that federal regulations did not make reimbursement "sufficiently certain and generally available."⁵⁸ The fiction is, to be sure, not airtight. From the perspective of an individual federal official sued under *Bivens*, the residual uncertainty in indemnification and representation policies can be cause for concern.⁵⁹ However, reimbursement policies are now more uniformly the norm among federal agencies and departments than they were ten years ago.⁶⁰ Looking at the run of cases, the risk that an official who acted within the scope of his employment would be left paying damages is negligible.⁶¹ Moreover, in order to help assuage employees' concern that they might nonetheless bear personal liability for constitutional torts, the government may subsidize premiums on professional liability insurance for law-enforcement officers and supervisory or management officials.⁶² In sum, it is now fair to

57. Fallon & Meltzer, *supra* note 3, at 1822.

58. *Anderson v. Creighton*, 483 U.S. 635, 641 n.3 (citing 28 C.F.R. § 50.15(c)).

59. See Jeffries, *supra* note 44, at 51 n.17.

60. Interestingly, the Solicitor General pointed out in *Bivens* that, at the time, there was no legal authority for nor any practice of reimbursing federal employees for judgments against them. See Brief for the Respondents, *supra* note 27, at 28–30 & n.33.

61. In cases in which the United States has provided representation to the individual defendant, it has not once failed to reimburse a federal employee for the costs of a *Bivens* settlement or judgment. See Goldberg Interview, *supra* note 6; Colgate Memo, *supra* note 51, at 1. The Court's concern in *Anderson* is also unfounded because the claims least likely to be covered by indemnification are also unlikely to warrant qualified immunity, eliminating any argument that the individual liability/qualified immunity regime provides more complete protection.

62. See 5 U.S.C. § 5941 (Supp. II 1996); S. 1298, 106th Cong. (1999) (proposing to amend 5 U.S.C. § 5941 to require rather than permit subsidization of professional liability insurance premiums). The newly available professional liability insurance provides constitutional tort litigation and liability coverage for claims arising out of federal employees' performance of official duties. See, e.g., Acceptance Insurance Company, Federal Professional Liability Insurance Policy (on file with author). The coverage provides for counsel in the event that the Department of Justice declines a representation request and provides for payment of up to \$1 million damages per plaintiff in suits defended by either the Justice Department or the insurance company. See *id.* at 2, 8. The insurance company also provides a legal information hotline to federal employees. Between 17,000 and 18,000 federal employees have purchased such insurance. See Telephone Interview with John Hopping, Supervisor of Excess and Surplus Lines, Wright & Co. (Aug. 24, 1999). Wright & Co. is the exclusive insurance broker for federal employees' professional liability insurance. See *id.*

conclude that, as a practical matter, *Bivens* liability runs against the federal government, even though as a formal matter the named defendants must be individual officials in their personal capacities.

II. THE STRANGE RESULTS OF THE INDIVIDUAL LIABILITY FICTION

A. DOCTRINAL EFFECTS

Although federal officials do not in practice pay the costs of defending themselves or compensating the victims of constitutional violations, the federal courts have not accounted for that reality. The courts instead have taken the fiction of individual liability seriously, acting as if individual officials continue to bear the costs of litigation and liability personally. Notwithstanding the arguments in favor of governmental liability,⁶³ the Supreme Court has adhered steadfastly to the individual liability fiction. From Justice Brennan's opinion for the Court in *Carlson v. Green*⁶⁴ to Justice Thomas's opinion for a unanimous Court in *FDIC v. Meyer*,⁶⁵ the Court has defended individual liability as the best deterrent rule.⁶⁶

Taking the individual liability fiction seriously, the courts have used it to support qualified immunity and related procedural barriers to *Bivens* claims that bear substantial responsibility for the remarkably low success rates of *Bivens* suits. Reasoning that individuals are differently situated from government, the Court has provided individual defendants protections not available to the government itself. The most significant of those protective doctrines is qualified immunity, but from that doctrine stem related developments that have further limited recoveries under *Bivens*. None of those doctrines is directly available to government-entity defendants; indeed the Court's justifications of the doctrines expressly depend on the notion that individual government employees alone are responsible for defending themselves and paying damages under *Bivens*. Yet because individual liability under *Bivens* is fictional, the defendant-protective

63. See *supra* note 46–47 and accompanying text.

64. 446 U.S. 14 (1980).

65. 510 U.S. 471 (1994).

66. The Court in *Carlson* rejected the contention that, when allegations support both common-law and constitutional tort claims, FTCA remedies should be exclusive of remedies under *Bivens*. The Court reasoned, in part, that “because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability.” 446 U.S. at 21 (citation omitted). Justice Rehnquist, in dissent, however, critiqued the majority's assertion as an “unsupported assumption” and noted that the Court did not maintain that damages “actually come out of the federal employee's pocket.” *Id.* at 47 n.13.

In *Meyer*, the Court rejected the claim that Congress's express, general waiver of the FDIC's sovereign immunity made the agency subject to suit under *Bivens*. See 510 U.S. at 479. In the Court's view, application of *Bivens* to a government agency “would mean the evisceration of the *Bivens* remedy, rather than its expansion. It must be remembered that the purpose of *Bivens* is to deter the officer, and if plaintiffs could sue the government, the deterrent effects of the *Bivens* remedy would be lost.” 510 U.S. at 485.

doctrines in fact redound to the government's benefit, virtually immunizing it from liability for constitutional torts. Doctrines ostensibly designed for and justified as protections of individuals, therefore, actually operate to shield the government fisc.

1. Qualified Immunity under *Harlow v. Fitzgerald*⁶⁷

Qualified immunity is undoubtedly the most significant bar to constitutional tort actions. Qualified immunity bars recovery for constitutional torts unless the defendant official is alleged to have violated "clearly established" law.⁶⁸ If a claim is based on new or uncertain law, immunity applies; if a claim is based on clearly established law, it can go forward. Because of the common-law, case-by-case method through which constitutional standards develop, however, and the high level of specificity at which the clearly-established-law inquiry is conducted, most fact-intensive constitutional claims can reasonably be characterized as new. A nonfrivolous defense based on the merits of a constitutional issue will generally suffice to support immunity. As a result, qualified immunity has proved to be a virtually insurmountable hurdle to *Bivens* actions.

The Supreme Court articulated the modern qualified immunity standard in *Harlow v. Fitzgerald*.⁶⁹ While declining to extend absolute immunity to executive branch officials generally, *Harlow* reformulated the qualified immunity test in an effort to make it a more effective shield. Under the prior test, as articulated in *Wood v. Strickland*,⁷⁰ a government official asserting qualified immunity had to show that he had acted in subjective good faith. *Harlow* substituted a purely objective inquiry, asking only whether the government official was alleged to have violated "clearly established statutory or constitutional rights."⁷¹ In determining whether qualified immunity applies, the *Harlow* standard focuses exclusively on the clarity of the law, rather than on the defendant official's state of mind.

The availability of the qualified immunity defense depends on the status of

67. 457 U.S. 800 (1981).

68. *Id.* at 819.

69. *Id.*

70. 420 U.S. 308, 322 (1975).

71. 457 U.S. at 818. The Court observed that the subjective good-faith element of qualified immunity under *Strickland* had frustrated the purpose of the defense. *See id.* *Strickland* required the official to show that he neither "knew [n]or reasonably should have known" that his actions violated the Constitution, and that he acted "without malicious intention to cause a deprivation of constitutional rights." 420 U.S. at 322. Because the official's subjective intent was a factual issue, the official asserting immunity would virtually always be subjected to discovery, and often a trial, if the evidence genuinely conflicted regarding his state of mind. The official's difficulties under *Strickland* were rooted in the fact that the burden of proof on qualified immunity rested with him, requiring him, in effect, to prove a negative—his own lack of evil motive.

The Court in *Harlow* asserted that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-ranging discovery." 457 U.S. at 817-18. *Harlow*'s new objective test turned only on whether the alleged right was "clearly established"; it therefore avoided the "substantial costs [that] attend the litigation of the subjective good faith of government officials." *Id.* at 816.

the defendant as an individual official; when government entities can be sued, they are not entitled to assert qualified immunity.⁷² The principal justification for qualified immunity is that it gives public employees the protection they need to do their jobs with confidence. It stems from the concern that a government employee faced with a risk of personal liability will be forced to choose between bold execution of duties that might embroil him in litigation or shirking his duties in order to minimize his personal risk. As the Court explained in *Scheuer v. Rhodes*,⁷³ qualified immunity aims to alleviate "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."⁷⁴ In addition, qualified immunity is intended to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit,"⁷⁵ that is, the costs, burdens, and distractions of the litigation itself.⁷⁶ Thus, the objective of the qualified immunity doctrine is to protect public officials from both ultimate liability and the burdens of litigation.

Only because liability under *Bivens* formally runs against the individual does qualified immunity apply; where government entities are the defendants, qualified immunity is unavailable.⁷⁷ In *Owen v. City of Independence*,⁷⁸ the City itself (as opposed to its employees) sought qualified immunity against a due process claim under 42 U.S.C. § 1983 for failure to give notice and a hearing before firing the chief of police.⁷⁹ The court of appeals dismissed the case on qualified immunity grounds because the termination occurred before two Supreme Court decisions that clearly established the due process principles that

72. See *Owen v. City of Independence*, 445 U.S. 622 (1980).

73. 416 U.S. 232 (1974).

74. *Id.* at 240; see also *Wyatt v. Cole*, 504 U.S. 158, 167 (1992); *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1950) (Hand, J.)), *Butz v. Economou*, 438 U.S. 478, 506 (1978). Qualified immunity as a defense to *Bivens* suits is identical to qualified immunity as a defense to individual-capacity officer suits under section 1983. See *Butz*, 438 U.S. at 498–501. Qualified immunity cases decided in both contexts are therefore cited here interchangeably.

75. *Seigert v. Gilley*, 500 U.S. 226, 232 (1991).

76. See *Wyatt*, 504 U.S. at 167; *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

77. There is no governmental liability under *Bivens* by respondeat superior or otherwise. See *FDIC v. Meyer*, 510 U.S. 471, 484–85 (1994). Thus, there is no Supreme Court case law on the inapplicability of qualified immunity to the federal government, but the law of municipal liability under 42 U.S.C. § 1983 underscores the point that qualified immunity has been justified exclusively as a defense against individual and not governmental liability. See, e.g., *Owen v. City of Independence*, 445 U.S. 662, 638 (1980).

78. 445 U.S. 622 (1980).

79. The issue of whether government is entitled to the protections of qualified immunity arises under 42 U.S.C. § 1983 because that statute, unlike *Bivens*, authorizes local governmental liability for actions taken pursuant to an official policy or custom. See *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 707–08 (1978); *City of Canton v. Harris*, 489 U.S. 378 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

supported the police chief's claim. The Supreme Court reversed, holding that only individuals are entitled to qualified immunity. *Owen* held that the liability of governmental entities, unlimited by qualified immunity defenses, is necessary to ensure government accountability, to encourage deterrence, and to allow full compensation to victims of unconstitutional conduct.⁸⁰ *Owen* views loss-spreading via government liability as justified even when the constitutional violation is based on unclear law, because the public at large enjoys the benefit of governmental activities that sometimes give rise to constitutional liability. When individual officials are sued, however, the Court has struck a different balance, deeming it to be in the public interest to protect officials who violate the Constitution, even though doing so leaves victims of constitutional violations remediless.

The protection afforded by qualified immunity is a formidable barrier to recovery. The Court observed in *Anderson v. Creighton*⁸¹ that the question whether a legal claim is based on established law under *Harlow* "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified,"⁸² and for purposes of applying qualified immunity, the courts have chosen to identify constitutional rights at a high level of specificity. *Anderson* rejected the notion that a mere allegation of, for example, a right to "due process of law" is adequate to defeat a qualified immunity defense against a due process claim, and instead held that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."⁸³ Under *Anderson*, the clearly-established-law standard of *Harlow* is fact-specific and qualified immunity is correspondingly broad. As long as there is a reasonable basis for distinguishing the material facts that an official confronted when committing the constitutional tort from the facts of prior cases in the area, the official will be immune.⁸⁴ As the Court itself stated in *Malley v. Briggs*,⁸⁵ qualified immunity broadly protects "all but the plainly incompetent or those who knowingly violate the law."⁸⁶

2. The *Anderson v. Creighton* Requirement of Specific Precedent

Although the *Anderson* approach may appear sensible in the abstract, in practice it has barred constitutional challenges even to egregious conduct that would otherwise seem quite clearly unconstitutional. The Court in *Anderson*

80. 445 U.S. at 651-52.

81. 483 U.S. 635 (1987).

82. *Id.* at 639.

83. *Id.* at 640.

84. See *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985) (requiring only that, in a case of a warrantless wiretap, there be "a legitimate question" whether an exception to the warrant requirement applies to the facts at issue).

85. 475 U.S. 335 (1986).

86. *Id.* at 343.

insisted that “the very action in question” need not have “previously been held unlawful,”⁸⁷ but in cases involving fact-intensive constitutional standards, *Anderson* has in practice required as much.

Decided cases illustrate how high the *Anderson* bar has proved to be. In *Jenkins by Hall v. Talladega City Board of Education*,⁸⁸ for example, parents of two eight-year-old girls claimed that a teacher and a guidance counselor violated their Fourth Amendment rights when school personnel strip-searched the girls twice based only on a classmate’s report of missing a small amount of pocket money and another classmate’s contention that the plaintiffs were responsible. The divided en banc court dismissed the case on the ground that the school personnel were entitled to qualified immunity. The rule of *New Jersey v. T.L.O.*⁸⁹ applied: school officials, unlike government personnel in nonschool settings, are not required to obtain a warrant before searching students under their authority, but their searches nonetheless must be reasonable under the circumstances, and, in particular, must be “reasonably related in scope to the circumstances which justified the interference in the first place.”⁹⁰ Strip searches are plainly among the most intrusive searches, and a nonviolent theft of seven dollars—unlike weapons or drug possession, for example—is far from the most serious type of infraction that school officials confront. Under the *T.L.O.* balancing test, the repeated strip searches in *Jenkins* clearly were unnecessarily intrusive.⁹¹ However, the court of appeals held to the contrary, reading *Anderson* to require that, in order to defeat qualified immunity, the asserted right must have been developed in a concrete, factually similar circumstance, such that “pre-existing law dictate[s], that is, truly compel[s]” the conclusion that the particular challenged conduct is unconstitutional.⁹² *Jenkins* provides one illustration of how hard it is under *Anderson* to find that a constitutional right is clearly established.

Similarly, in *Rish v. Johnson*⁹³ the Fourth Circuit granted qualified immunity based on a lack of sufficiently analogous precedent. In *Rish*, federal prison

87. 483 U.S. at 640.

88. 115 F.3d 821 (11th Cir.), cert. denied, 118 S. Ct. 412 (1997).

89. 469 U.S. 325 (1985).

90. *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

91. Indeed, at the time of the conduct challenged in *Jenkins*, the leading Fourth Amendment treatise commented that *T.L.O.* “at a minimum means that strip searches of students for nondangerous items are unconstitutional.” WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 17 (3d ed. 1996). Every case that had upheld even a partial strip search in school dealt with a search for weapons or other dangerous contraband and was based on specific information that those items would likely be found on the student’s person, and every case that had involved a school strip search for items not posing any imminent risk of serious harm had held the search to be unconstitutional. The *Jenkins* court, however, held that those cases were immaterial because they were from other jurisdictions and therefore were not binding on the defendants. 115 F.3d at 826 & n.4.

92. *Jenkins*, 115 F.3d at 823 (quoting *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149, 1150 (11th Cir. 1994) (en banc)). The Eleventh Circuit has gone so far as to state that “[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.” *Lassiter*, 28 F.3d at 1150. There are, of course, very few bright-line tests in constitutional law.

93. 131 F.3d 1092 (4th Cir. 1997).

inmates claimed that the prison's failure to provide them with appropriate protective clothing and equipment to safeguard them against infectious diseases while they cleaned blood, feces, and urine from prison housing and medical areas violated their clearly established Eighth Amendment rights. The Supreme Court had established by 1992, when the challenged conduct occurred, that prisoners' Eighth Amendment rights are violated by prison officials' deliberate indifference to known, substantial risks of serious bodily harm.⁹⁴ The plaintiffs alleged that other prisoners were infected with HIV and hepatitis B, both of which can prove fatal, and that their work involved risk of contact between those inmates' bodily fluids and the plaintiffs' unprotected skin and mucous membranes. Plaintiffs cleaned areas housing patients in mental seclusion who sometimes threw hazardous bodily fluids, yet they were provided with gloves only infrequently and were never given other protective gear, such as eyewear.⁹⁵ Remarkably, the court held that the alleged conduct failed to defeat qualified immunity: "[c]ertainly, no body of case law existed in 1992 addressing the necessity of prison officials supplying protective gear necessary to ensure that orderlies may employ universal precautions There was not a single legal decision establishing that the conduct in which appellants purportedly engaged was unconstitutional."⁹⁶ The court so declared notwithstanding a prior federal appellate decision that overcame immunity on what the *Rish* court itself described as "a similar issue."⁹⁷

Another recent example of a violation of a constitutional right left unremedied by the qualified immunity doctrine occurred in *Wilson v. Layne*.⁹⁸ *Wilson*

94. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 682 (1978) (noting that crowding inmates together in isolation cells with others who had infectious diseases such as hepatitis and venereal disease was among the prison conditions offending the Eighth Amendment); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that deliberate indifference to serious medical needs of prisoners constitutes cruel and unusual punishment).

95. See *Rish*, 131 F.3d at 1095, 1103 (Murnaghan, J., dissenting) (noting a defense witness who was Associate Warden for Health Service at the prison acknowledged that "sound medical and safety practices require that 'Universal Precautions' be taken"—including the wearing of gloves, goggles, and medical face masks—by all persons potentially exposed to another person's bodily fluids).

96. *Id.* at 1097.

97. *Id.*; see also *id.* at 1101. The court of appeals distinguished the clearly established Eighth Amendment right in *Fruit v. Norris*, 905 F.2d 1147, 1150–51 (8th Cir. 1990), on the ground that *Fruit* involved unprotected inmates having raw sewage poured over them from above as they cleaned a well, whereas the plaintiffs in *Rish* had feces and urine thrown at them by unruly mental patients. See 131 F.3d at 1097.

The court further concluded that there was insufficient evidence to raise a genuine issue of material fact as to whether the defendants were actually aware of the risks to which the plaintiffs allege they were deliberately indifferent. See *id.* at 1097–1100. But defendants' own witnesses acknowledged the risks, and the defense instead turned on controverting plaintiffs' factual assertions that appropriate protective gear was not in fact supplied—a genuine factual dispute that the district court could not, of course, have resolved on summary judgment. See FED. R. CIV. P. 56. Moreover, the district court had found that there were material factual disputes and denied qualified immunity, and the court of appeals lacked jurisdiction on an interlocutory appeal to review the sufficiency of the evidence to raise a genuine issue of fact. See *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

98. 119 S. Ct. 1692 (1999).

raised the question of whether federal officers executing an arrest warrant violated clearly established Fourth Amendment rights when they brought members of the press unauthorized by the warrant into a private home without the occupants' consent. The press followed the officers into the home of the suspect's parents, whose son was not present, and photographed the father in underpants and the mother in a nightgown.⁹⁹ Settled Supreme Court cases had held that, absent exigent circumstances or some other established exception to the warrant requirement, a search pursuant to a warrant cannot exceed the scope permitted by the warrant.¹⁰⁰ Remarkably, although the Supreme Court in *Wilson* unanimously held that the press intrusion into the house did run afoul of the Court's own Fourth Amendment precedent, the Court nonetheless held that the officers were immunized in light of *Anderson*. The Court concluded that it was "not obvious from the general principles of the Fourth Amendment that the conduct of the officers in this case violated the Amendment."¹⁰¹

The defendants never argued in these cases that their conduct actually was constitutional, but only that any rights they violated were not clearly established. Indeed, as the unanimity of the Supreme Court's decision on the merits of the Fourth Amendment issue in *Wilson* vividly illustrates, very strong legal claims may fail solely because of qualified immunity. It is similarly difficult to imagine that the courts in *Rish* or *Jenkins* would have found no liability in the absence of qualified immunity. It is the individual liability fiction, and the qualified immunity defense that the fiction invokes, that accounts for the lack of recovery in cases like these.

3. Interlocutory Appeals Pursuant to *Mitchell v. Forsyth*¹⁰² and *Behrens v. Pelletier*¹⁰³

An outgrowth of the qualified immunity doctrine that is also predicated on the individual liability fiction is the judicial decision to allow defendant *individuals* to assert qualified immunity repeatedly at different procedural stages of a case and to take an interlocutory appeal from any order denying such immunity. Government *entities*, in contrast, are bound by the final-judgment rule, which generally bars interlocutory appeals. This doctrine, by allowing repeated opportunities to seek qualified immunity from different judges, and by creating the potential for lengthy delays, poses another substantial obstacle to relief in *Bivens* actions.

In *Mitchell v. Forsyth*, the Supreme Court held that qualified immunity is not only a defense against ultimate liability, but confers a right not to stand trial that

99. See *Wilson v. Layne*, 141 F.3d 111, 113 (4th Cir. 1998).

100. See *Wilson*, 119 S. Ct. at 1697-98 (citing *Horton v. California*, 496 U.S. 128, 140 (1990); *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Maryland v. Garrison*, 480 U.S. 79, 87 (1987)).

101. *Id.* at 1700. Justice Stevens alone dissented from the qualified immunity holding. See *id.* at 1701-04.

102. 472 U.S. 511 (1985).

103. 516 U.S. 299 (1996).

justifies an exception to the final-judgment rule for orders denying qualified immunity.¹⁰⁴ Thus, in the few cases in which district courts determine that *Harlow* does not bar recovery, the defendant officials are entitled to seek immediate review in the courts of appeals. Only if a court of appeals also determines that the plaintiff's claim is not based on new law may the litigation proceed in the trial court.

Interlocutory appeals are available to individual constitutional tort defendants based on the same rationale that underlies *Harlow's* qualified immunity standard: government officials may be torn between official duty and personal interest, not only by the risk of liability, but also by the burdens of litigation. The interlocutory-appeal right is extended to individuals because they are sued in their individual capacities. That protection would not apply to the federal government were it the defendant in *Bivens* actions.¹⁰⁵

The availability under *Behrens v. Pelletier* of repeat opportunities for defendant officials to appeal denials of immunity before a case even reaches a final judgment in the trial court enhances the likelihood that immunity will be found.¹⁰⁶ Perhaps more importantly, multiple appeals are a potent defense tool even where immunity is not ultimately recognized, because trial court proceedings are stayed while immunity appeals are pending, and many years of delay from appeals can effectively defeat even meritorious claims.¹⁰⁷

4. Heightened Pleading Requirements

Another doctrine deriving from qualified immunity and depending on the individual liability fiction, heightened pleading, bars relief for constitutional claims that have a state-of-mind element. Courts of appeals have embraced heightened pleading standards in response to *Harlow's* perceived deficiency in resolving allegations premised on unconstitutional intent. For example, it is clearly established, generally without much regard to factual context, that official actions taken with a racially discriminatory intent, or actions taken in retaliation for political speech, are unconstitutional. Disputes in such cases tend to turn not on whether the complaint states a violation of established constitutional rights but on whether the alleged state of mind can be proved. In such circumstances, claims cannot be dismissed at the outset of the litigation under *Harlow's* objective, clearly-established-law standard. Constitutional claims with state-of-mind requirements present "the danger that plaintiffs might allege facts

104. 472 U.S. at 524–30.

105. The final judgment rule generally bars interlocutory appeals, see 28 U.S.C. § 1291, and the exception for appeals from orders denying qualified immunity established by *Mitchell* does not extend to governmental entities, which are not entitled to qualified immunity. See *Swint v. Chambers City Comm'n*, 514 U.S. 35, 41–43 (1995) (appellate courts have interlocutory jurisdiction only over claims of individual, and not governmental entity, defendants).

106. 516 U.S. at 299.

107. For example, by the time the Supreme Court decided the appealability issue in *Berhens* itself, the parties had spent more than four years litigating interlocutory appeals. *Id.* at 321 (Breyer, J., dissenting).

consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery and possibly trial that *Harlow* intended to spare them."¹⁰⁸

The courts of appeals have addressed this issue by adopting heightened pleading standards for intent-based constitutional tort claims against government officials in an attempt to protect the officials from the burden of litigating what might ultimately be baseless or insubstantial claims. For example, in a typical articulation of the heightened pleading requirement, the Ninth Circuit has held that "a plaintiff must put forward nonconclusory allegations of subjective motivation, supported either by direct or circumstantial evidence, before discovery may be had."¹⁰⁹

Like *Harlow's* new-law standard, the heightened pleading requirement is inapplicable to claims against government itself; its application in *Bivens* suits thus depends on the individual liability fiction. Heightened pleading is a protection only available to individual defendants, as it follows from their entitlement

108. *Siebert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), *aff'd*, 500 U.S. 226 (1991). *Harlow* and heightened pleading actually deal with two very different problems. *Harlow* is concerned with providing clear notice to government employees of the types of conduct for which they may be held liable in damages and with relieving them of liability where governing legal standards are murky. *Harlow* therefore assumes that the challenged conduct occurred and provides immunity against claims that are *legally* marginal. The heightened pleading cases, in contrast, address claims that may be viewed, at least before discovery, as *factually* marginal. Heightened pleading, therefore, assumes the clarity of the law, but tries to discern at an early stage in the litigation whether, as a factual matter, there is a strong chance that an unconstitutional motive was present. The implications of making a preliminary factual determination before discovery are quite different from—and more problematic than—the implications of making an early determination of a purely legal issue.

109. *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991); *see also Siebert*, 500 U.S. at 236 (Kennedy, J., concurring) (plaintiffs must make "specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal"); *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc) (complaint must "do more than allege conclusions," and "the district court need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts"); *Elliott v. Thomas*, 937 F.2d 338, 344–45 (7th Cir. 1991) ("unless the plaintiff has the kernel of a case in hand"—that is, "specific, nonconclusory allegations which establish the necessary mental state"—"the defendant wins on immunity grounds in advance of discovery"); *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763–64 (4th Cir. 1990) ("We agree . . . that a 'heightened pleading standard' is highly appropriate in actions against government officials."). *But see Crawford-El v. Britton*, 93 F.3d 813, 823 (D.C. Cir. 1996) (questioning the need for heightened pleading, because "we do not see why the limit on discovery and the [clear and convincing] standard of proof" that the circuit imposed on individual-capacity suits subject to qualified immunity "would not adequately fulfill the implications of *Harlow*"), *rev'd*, 523 U.S. 574 (1998) (rejecting clear and convincing evidence requirement). For a discussion of the D.C. Circuit's unique approach, *see infra* note 116.

The Fifth Circuit has pointed out that heightened pleading in the qualified immunity context is a misnomer. *See Schultea*, 47 F.3d at 1434; *see also Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.8 (D.C. Cir. 1993) (en banc), *vacated*, 515 U.S. 321 (1995); *Elliott*, 937 F.2d at 345. Qualified immunity is an affirmative defense, and a requirement that allegations be made with heightened specificity in order to defeat that defense cannot be imposed at the initial pleading stage, before the qualified immunity defense has been asserted. The Fifth Circuit has therefore held that district courts in individual-capacity suits in which a qualified immunity defense has been raised should require plaintiffs who have not pleaded with heightened specificity to do so in a reply to the defendant's answer under Federal Rule of Civil Procedure 7(a). *See Schultea*, 47 F.3d at 1433.

to assert qualified immunity. Several circuits originally had adopted heightened pleading standards applicable to constitutional tort claims, including, significantly, section 1983 claims against government entities. However, in 1993, the Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*¹¹⁰ unanimously rejected requirements of heightened pleading for civil rights claims against government entities on the ground that such special rules conflict with Federal Rules of Civil Procedure 8 and 9(b).¹¹¹ The *Leatherman* court expressly reserved, however, the question of whether the same logic applies to individual-capacity suits, in which qualified immunity may be a defense.¹¹² The Court suggested that its qualified immunity jurisprudence might “require a heightened pleading in cases involving government officials.”¹¹³ Notwithstanding the persuasive force of *Leatherman*’s rationale even in individual-capacity suits, every circuit that has considered the question since *Leatherman* has continued to apply heightened pleading requirements to the state-of-mind elements of claims against individual officials.¹¹⁴

The continued vitality of judicially fashioned heightened pleading requirements was called into doubt most recently by the Supreme Court’s decision in *Crawford-El v. Britton*,¹¹⁵ but the courts of appeals nonetheless continue to employ them. The District of Columbia Circuit in *Crawford-El* developed a unique approach to motive-based constitutional tort claims, going a step further than the heightened-pleading approach of other circuits to require that plaintiffs raising motive-based constitutional claims establish defendants’ motives by clear and convincing evidence.¹¹⁶ The Supreme Court rejected the D.C. Cir-

110. 507 U.S. 163 (1993).

111. The Court reasoned that, because Rule 9(b) imposes a requirement of heightened particularity only in two specified contexts—claims of fraud or mistake—and does not similarly impose such a requirement on claims of municipal liability under section 1983, civil rights claims are governed by the Rule 8(a)(2) regime of “notice pleading.” 507 U.S. at 167.

112. *See id.* at 166–67.

113. *Id.*

114. *See, e.g.,* *Babb v. Dornan*, 33 F.3d 472, 477 (5th Cir. 1994); *Schultea v. Wood*, 27 F.3d 1112, 1115 n.2 (5th Cir. 1994), *aff’d en banc*, 47 F.3d 1427 (5th Cir. 1995); *Branch v. Tunnell*, 14 F.3d 449, 455–57 (9th Cir. 1994); *Jordan v. Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994).

115. 523 U.S. 574 (1998). Because the Court addressed the issue only directly in dicta, lower courts have continued to adhere to their own heightened pleading standards. *See, e.g.,* *Smith v. Board of County Comm’rs of Fairfield County*, No. 97–3107, 1998 WL 321045, at *2 n.5 (6th Cir. 1998); *Ross v. State*, 15 F. Supp. 2d 1173, 1191 n.10 (M.D. Ala. 1998); *Helton v. Hawkins*, 12 F. Supp. 2d 1276, 1280 (M.D. Ala. 1998).

116. Before its en banc decision in *Crawford-El*, the D.C. Circuit required that, where an individual-capacity constitutional tort claim turned on an allegation of improper motive, the facts be supported by “specific direct evidence” of such motive. *Kimberlin v. Quinlan*, 6 F.3d 789, 793 (D.C. Cir. 1993) (en banc), *vacated*, 515 U.S. 321 (1995). The direct evidence rule prevented discovery and trial on all motive-based constitutional tort claims in the D.C. Circuit over a period of 10 years. *See Crawford-El*, 93 F.3d at 833 (Silberman, J., concurring). The direct evidence rule came under broad attack and appeared indefensible in view of the Supreme Court’s holding in *Holland v. United States* that “circumstantial evidence . . . is intrinsically no different from testimonial evidence.” 348 U.S. 121, 140 (1954); *see also* *Siegert v. Gilley*, 500 U.S. 226, 235–36 (1995) (Kennedy, J., concurring). The D.C. Circuit, sitting en banc in *Crawford-El*, thus abandoned the direct evidence rule in favor of a

cuit's higher burden of proof on the ground that it was not authorized by the holding or logic of *Harlow*, and that, to the extent that the circuit sought to limit discovery in actions that require proof of motive, such issues "are most frequently and most effectively resolved either by the rulemaking process or the legislative process."¹¹⁷ The Court's reasoning suggests that judicially fashioned heightened pleading standards are equally invalid.¹¹⁸ However, the *Crawford-El* Court approved the "firm application" of the existing Federal Rules of Civil Procedure in individual-capacity constitutional tort actions, inviting district courts to "insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal."¹¹⁹ Lower courts continued to require heightened pleading even after *Leatherman* seemed to cut the logical ground out from under such requirements; it would not be surprising if courts now relied on *Crawford-El*'s reference to specific allegations to justify continuing to do so.

Heightened pleading has imposed a significant barrier to recovery under *Bivens*, requiring dismissal of constitutional tort claims where the victim cannot plead unconstitutional state of mind with particularity. To be sure, judging by its recent inhospitable response to heightened proof standards, the Supreme Court may eventually reduce if not entirely eliminate the disparity between pleading requirements in *Bivens* suits and in other areas. In the meantime, however, heightened pleading requirements have been an especially troublesome hurdle for *Bivens* plaintiffs. Evidence of state of mind is usually in the hands of the defendant, and specifics are difficult to plead before discovery is had. Thus, by its very character a heightened pleading requirement raises the bar on recovery in a way that screens out some meritorious cases. In practice, it appears that heightened pleading requirements have been met in only one *Bivens* case in

clear-and-convincing standard of proof, instead of the usual preponderance standard, for state-of-mind elements of constitutional tort claims against individual government officials. See 93 F.3d at 815. The circuit also limited discovery in individual-capacity constitutional tort suits, holding that summary judgment may be granted against the plaintiff without affording any opportunity for discovery "unless the plaintiff can establish, based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest, a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive." *Id.* at 841 (Ginsburg, J., concurring). The circuit apparently also abandoned its heightened pleading standard, see, e.g., *Kartseva v. Department of State*, 37 F.3d 1524, 1530-31 (D.C. Cir. 1994), as unnecessary in view of the restrictions applicable under *Crawford-El*. Given the difficulty of proving intent even under a preponderance standard, the clear-and-convincing evidence standard would likely have defeated most *Bivens* claims. As noted in the text, however, the Supreme Court reversed the D.C. Circuit in *Crawford-El* and invalidated the clear-and-convincing evidence standard for individual-capacity constitutional tort cases. See 523 U.S. at 574.

117. *Crawford-El*, 523 U.S. at 595.

118. See Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1925 & n.187 (1998) (suggesting that *Crawford-El* puts an end to judicially fashioned heightened pleading requirements in qualified immunity cases as well as heightened standards of proof).

119. 523 U.S. at 597-98 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819-20 n.35 (1981); *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring)).

which the issue was raised.¹²⁰

In sum, it is only because *Bivens* liability runs in name against individual defendants that qualified immunity and its related doctrines apply. The Court justifies this special treatment on the theory that it is necessary to alleviate fears of liability that would otherwise chill government officials from effectively performing their jobs. The reality, however, is that the government is the entity that, both predictably and actually, takes responsibility for paying the costs of defending and resolving *Bivens* claims. If the government itself were recognized to be the real defendant party in interest, the logic of *Owen*, *Mitchell*, and *Leatherman* would render qualified immunity, interlocutory appeal rights, and heightened pleading requirements inapplicable. The continued vitality of those doctrines—at least as currently justified—therefore depends on the courts' refusal to acknowledge that individual liability under *Bivens* has become fictional.

B. NONDOCTRINAL EFFECTS OF *BIVENS* INDIVIDUAL LIABILITY FICTION

Bivens's individual liability fiction and the qualified immunity doctrines that it supports have had significant consequences for litigants, the government, and society at large. In particular, the fiction has had anomalous effects on the economic incentives of litigants and the government, created false symbolism, harmed the institutional integrity of the government, and effectively halted legislative reform of the law governing constitutional torts.

1. Economic Incentive Effects

The doctrinal outgrowths of the individual liability fiction dramatically affect the economic incentive effects of individual, as compared with governmental, liability. Two types of incentives are typically at stake in constructing a scheme that responds to constitutional torts: (1) incentives for government employees to do their jobs and pursue the public interest without being "overdeterred" by fear of personal liability; and (2) incentives for victims of unconstitutional conduct to seek a remedy and accordingly place deterrent pressures on government and its employees to avoid and prevent constitutional harms. An efficient constitutional tort system would prevent overdeterrence while maintaining sufficient pressure on both governmental employers and their employees to take cost-effective measures to prevent and avoid constitutional wrongdoing.

Economic theorists observe that, all else being equal, individual liability becomes the functional equivalent of governmental liability in terms of net outcomes.¹²¹ As the economic analysis predicts, in the wake of *Bivens* the

120. See *Mendocino Envtl. Ctr. v. Mendocino County*, 14 F.3d 457, 462–65 (9th Cir. 1994). Some cases in the D.C. Circuit have been held to have met heightened pleading, but they nonetheless foundered on the alternative, higher standards the D.C. Circuit imposed. See, e.g., *Kimberlin*, 6 F.3d at 793–94; *Crawford-El v. Britton*, 951 F.2d 1314, 1321 (D.C. Cir. 1991).

121. See *supra* note 49 and accompanying text.

government has responded to the individual liability rule by ensuring that its officials are covered by indemnification, government representation, government-subsidized insurance, and the like, thereby creating a regime of de facto government liability.

But all else is not equal, and the economic equation of individual and governmental liability under *Bivens* has broken down. The Supreme Court in elaborating the doctrines described above has refused to take the reality of indemnification into account. Two regimes—indemnification and qualified immunity—are therefore each operating simultaneously, putatively to serve the same end of shielding public employees. As an economic matter, however, they each function quite differently. Indemnification policies allow plaintiffs to recover, but shift responsibility for constitutional tort damages from the official to the government. In contrast, qualified immunity bars plaintiffs' recovery altogether, shifting the risk of loss back onto the victim and leaving constitutional harms uncompensated.

These two parallel but distinct regimes—indemnification and qualified immunity—create different sets of incentives. Either of the two regimes, taken alone, would protect against chilling public employees' vigorous performance of their duties, as qualified immunity would allow for dismissal of most suits and indemnification would ensure that employees need not pay monetary judgments or settlements out of their own pockets.¹²² In terms of plaintiffs' incentives to sue, in contrast, the two regimes differ significantly.¹²³

A regime of indemnification (unaccompanied by qualified immunity) would preserve such incentives by ensuring that, even while public employees' pockets

122. One might argue that qualified immunity, by eliminating not just employees' obligations to pay but also forestalling liability findings flowing from their conduct, more effectively prevents overdeterrence. An employee who is fully reimbursed for monetary losses may still seek to avoid the risk to reputation that comes from being a defendant in a civil rights lawsuit. One response to that concern, however, is that if it were generally understood that under *Bivens* (as under *Ex parte Young*) individual defendants function as stand-ins for the government, reputational harm to the individual would be minimized. When a bureaucrat is personally sued for a failure to provide due process, for example, the observing public fairly assumes that such lawsuits come with the job, and that the individual is not a bad person for being formally held responsible. Another response to the concern about overdeterrence flowing from risks to reputation is that, to the extent reputational harm persists even when the government is known to be the real party in interest, a concern to shield defendants from such harm would seem to require qualified immunity even in cases of governmental liability—such as municipal liability under section 1983—because those cases are typically premised on the missteps of identified government employees. The Court in *Owen v. City of Independence*, 445 U.S. 622, 655–56 (1980), however, held that qualified immunity is unwarranted in those cases, and the Court does not seem poised to reconsider *Owen*. See, e.g., *Board of County Comm'rs v. Brown*, 520 U.S. 397, 405–06 (1997) (relying on *Owen*). Putting aside the reputational concerns, therefore, the two regimes both appear adequately to serve an interest in avoiding public employee overdeterrence.

123. In other words, both systems seek to control "Type I error," or false positives, in which a government employee is overdeterred by an inflated risk (or perception of risk) of a finding of unconstitutionality. The indemnification approach does a better job than the qualified immunity approach, however, of also controlling "Type II error," or false negatives, in which government actors are not required to pay notwithstanding their violation of constitutional norms. For a discussion of this economic terminology, see Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711, 711–15 (1996).

are protected, victims of unconstitutional conduct may still recover. Also, when the government has to pay the costs of its employees' constitutional violations, it will have an economic incentive to conform its employees' conduct to constitutional norms. In contrast, a regime of qualified immunity from suit eliminates, not only the public employee's liability, but the victim's compensation, and so critically blunts plaintiffs' incentives to sue. When litigation is suppressed, government is likely to take less care to avoid unconstitutional conduct. Qualified immunity and related doctrines thus substantially diminish the level of deterrence against constitutional wrongdoing that application of substantive constitutional standards, undiluted by qualified immunity, would produce.

Some would argue that ordinary tort models of deterrence are inapplicable to the government for a variety of reasons, and therefore that one should not be concerned that qualified immunity reduces deterrence of unconstitutional conduct. Granted, government agencies and departments may have substantial noneconomic incentives, such as public oversight and political pressure, to maintain economically efficient levels of compliance with the Constitution that private corporations typically lack. For-profit entities, as opposed to governmental ones, may respond more reliably to monetary liabilities cutting into their bottom lines.¹²⁴ Nevertheless, governmental liability (not to mention the liability of private, not-for-profit entities) is typically analyzed in deterrence terms.¹²⁵ Moreover, whereas the net deterrent effects that litigation imposes on governments as compared to private entities might differ,¹²⁶ in practice such effects are often significant in both arenas.

The underlying economic challenge is to strike a balance that results in public employees and their employers taking the optimal level of care. Perhaps such a balance can never be perfectly struck, but the point here is simply that the individual liability fiction substantially alters the economic incentive effects of the current regime. And because that fiction is taken seriously, neither the Court nor commentators have sought fully to address those effects.

2. Symbolic Effects

The individual liability fiction also confers symbolic benefits on the government by hiding the presence of the government as the real party in interest. The fiction affects both the courtroom narrative in constitutional tort cases and the broader social perception of government as constrained by the Constitution.

By presenting an individual as the wrongdoer, the fiction has benefited the

124. Cf. *Richardson v. McKnight*, 521 U.S. 399, 410–11 (1997) (distinguishing private from public prison administration on grounds that “government employees typically act within a *different system*” from private employees—a system “often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives of the ability of individual department or supervisors flexibly to reward, or to punish, individual employees”) (emphasis added).

125. See, e.g., *Owen*, 445 U.S. at 651.

126. Liability-driven deterrence of unconstitutional conduct by government actors would probably be most effective if the liability were calibrated to run against the budget of the entity that is in the best position to prevent similar constitutional violations. See SCHUCK, *supra* note 45, at 104–09.

government by keeping government itself, with its disproportionate power and resources, out of the dramatic picture that *Bivens* cases present to the courts and the public. The fiction of individual liability means that the government itself is not a party to constitutional tort suits. The governmental power that is, under the state action doctrine, a necessary ingredient of constitutional misconduct is pushed offstage. Instead, the litigation appears to be between private persons: an individual government official, a public servant likely to be popular with judge and jury, and the constitutional tort victim, often a federal prisoner, welfare recipient, or other unsympathetic individual.

Public officials will often be viewed with favor for having devoted their careers to public good rather than private gain, and jurors are unlikely to think that "street level" public officials, who are the most frequent *Bivens* defendants, have deep pockets. Jurors may therefore hesitate to find liability for fear of putting at risk an official's car or mortgage payments, affecting his or her ability to pay for children's college education and perhaps even causing personal bankruptcy. Although officials are protected by indemnification, the government has successfully argued that jurors should not be informed of the existence of indemnification policies or, if they are, that they should be instructed that defendant officials are not automatically entitled to indemnification.

The government benefits from the way the individual liability fiction hides both its own role in wrongdoing and its deep pocket. For example, the Department of Justice will not entertain an individual official's request for government indemnification of a judgment or settlement amount "before entry of an adverse verdict, judgment or award."¹²⁷ Thus, the government sends its employees into litigation or settlement negotiations without any authority to pay out of government funds, even though the government, rather than the individual, almost inevitably ends up paying the costs associated with the litigation. Naturally, to the extent that the decisionmakers believe that there is at least some real possibility that a defendants' personal resources—rather than those of the federal government—are at stake, the judgment or settlement is likely to be smaller. Thus, due to the fiction's symbolic effect, liability is less likely to be found and damage awards are likely to be smaller.

At the same time, *Bivens* enhances the image of the federal government as one that operates within the bounds of the law, meaningfully constrained by the Constitution. The nominal availability of *Bivens* claims makes the government appear more constitutionally constrained than it really is and obscures the remedial shortfall that might otherwise prompt calls for reform.¹²⁸ This illusion alleviates the tension that the *Bivens* Court faced between a system of constitutional rights and the doctrine of sovereign immunity.

127. 28 C.F.R. § 50.15(c)(3) (1999).

128. To be sure, qualified immunity has come under a great deal of scholarly and even judicial criticism. But the critiques have focused on the boundaries of the doctrine and its unfairness to constitutional tort victims; they have not identified the confusion and anomalies created by the individual liability fiction as the root of the problem.

The illusion that damages are meaningfully available under *Bivens* depends on misperceptions about qualified immunity. At least superficially, qualified immunity appears more modest than it is. Although it has operated as a virtually complete bar to recovery, it seems to create a much more limited obstacle to constitutional relief than does sovereign immunity. The message of *Harlow* appears to be that only a narrow category of the most cutting-edge constitutional claims will be barred as too new. In practice, however, *Anderson* has ensured that “clearly established” rights are the rare exception, not the rule. Reliance on qualified immunity, rather than sovereign immunity, allows the government to look less authoritarian than it may be when no effective relief is available for constitutional torts.¹²⁹ Moreover, when the government seeks broad qualified immunity protection on behalf of its officials in court, it highlights not its own unremediable abuses of power, but rather its role as a solicitous employer seeking the protections its anxious employees need to do their jobs.

In sum, the individual liability fiction has provided the government with both the pragmatic benefits of sovereign immunity and the ideological benefits of perceived government accountability. Under *Bivens*, the government enjoys virtually complete immunity from liability for damages without having to justify application of sovereign immunity to constitutional violations. Thus, although *Bivens* has consistently been hailed as a development beneficial to plaintiffs and to the full remediation of constitutional violations, it has proved to be a progovernment decision, enhancing the prestige of both the executive branch and the courts at the expense of constitutional tort victims.

3. Institutional Effects

Bivens's individual liability fiction also creates institutional confusion and malfunction. When government lawyers defend federal employees who are sued in their personal capacities, the government's traditional case-assessment calculus is thrown off, and to some extent the government lawyers who defend federal officials must shed their “governmental voice.” In non-*Bivens* cases in which the government itself is formally the litigating party, the Justice Depart-

129. *Harlow* also appeared to create a merely temporary bar against any given type of claim, pending clarification of constitutional standards, but has actually helped to forestall such clarification. Because courts have generally decided the qualified immunity issue first, the doctrine has allowed courts to reject constitutional claims without even reaching their merits. The Court's recent decision in *Wilson v. Layne* promises to change that, however, by mandating that “[a] court evaluating a claim of qualified immunity ‘must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all.’ ” 119 S. Ct. 1692, 1697 (1999) (quoting *Conn v. Gabbert*, 119 S. Ct. 1292, 1295 (1999)). *Wilson*'s directive is itself problematic, appearing to authorize (and even require) advisory opinions and contradicting the principle of avoidance of unnecessary decisions of constitutional issues. *But see* *United States v. Leon*, 468 U.S. 897, 924–25 (1984) (approving determination of Fourth Amendment issue before decision whether officers' good faith precludes application of exclusionary rule). *Wilson* may, however, prompt clarification of legal standards and thereby limit the number of times a given type of unlawful conduct will go unredressed.

ment assesses its potential litigation positions not only in terms of how well they serve the government's immediate interests—such as an agency's programmatic interests or the government's interest in saving costs—but also in terms of whether they serve the broader interests of society. Ideally, Justice Department lawyers are not simply “hired guns” for a client, but civil servants acting for the people as a whole in upholding the nation's laws, and its legal positions are designed to take the public interest into account.¹³⁰ In contrast, when Justice Department lawyers represent individual defendant officials in *Bivens* cases, they approach cases differently; they must behave more like private lawyers, as they are ethically bound to serve their individual clients' *personal* interests.¹³¹

Federal regulations require that government representation of *Bivens* defendants cease if such representation should conflict with the government's interests,¹³² but a subtle, structural conflict between a government lawyer's fidelity to the government versus her fidelity to an individual employee is always present. Whereas the Justice Department might advocate a more individual-rights-protective interpretation of a constitutional provision if the government itself were the defendant, the *Bivens* individual liability fiction creates pressure (or cover) to seek narrower interpretations of constitutional provisions and broader defenses.¹³³ Justice Department lawyers know that officials are protected by governmental representation and indemnification, but they also see how officials' role as even nominal defendants under *Bivens* personally affects those who are sued in their individual capacities. In a unique way—one that is borne of identification with defendant officials—the Justice Department lawyers, too, take the fiction seriously.

Moreover, the standard employed by the government to determine whether it will represent and indemnify officials sued under *Bivens* discourages public employees from pointing the finger at government and instead urges them to

130. See, e.g., Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 81 (1995). The Solicitor General may deny approval of, and therefore bar, an appeal by any federal government person or entity if the Solicitor General concludes that the government's overall interests are thus better served, even if the particular governmental actor (for example, an agency, commission, or prosecutor) wants to appeal. The Solicitor General may for similar reasons confess error and decline to defend a lower court victory.

131. See 28 C.F.R. § 50.15(a)(3) (1999). Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege.

132. Conflicts among the interests of federal officials who are jointly sued, or between the interests of the United States and a defendant official, can in theory be mediated by the appointment of private counsel at governmental expense. See 28 C.F.R. § 50.15(a)(10) (conflict with interests of other defendant officials); § 50.15(a)(11) (conflict with interests of United States); § 50.16 (standards for appointment of private counsel). Payment for private counsel can be denied, however, where providing private representation is not in the interests of the United States. See 28 C.F.R. § 50.16(c)(2)(iv). In any event, reimbursement of private counsel fees “is not available for legal work that advances only the individual interests of the employee.” 28 C.F.R. § 50.16(d)(1).

133. Although the government in its Supreme Court briefs routinely recites that its interests in *Bivens* cases are both to ensure adequate remediation and deterrence of unconstitutional conduct and to ensure adequate protection of public officials seeking to do their jobs, the government's bottom line has almost without exception sought narrower interpretations of constitutional rights and of the *Bivens* remedy and broader interpretations of qualified immunity and other defensive measures.

close ranks with their superiors. This effect derives from the strong interest a government official sued in his individual capacity has in ensuring that the government will exercise its discretion to provide him with representation and to indemnify him in the event of a judgment or settlement. Because the government will represent employees only when the employees' interests are not in conflict with those of the United States, *Bivens* defendants face inevitable pressures to align themselves with the government's institutional interests and thereby maximize their chance of attaining the valuable benefits of government representation and indemnification.

Another institutional by-product of the individual liability fiction is the tremendous volume of *Bivens* claims processed by the government and the courts. The Civil Division of the Justice Department has a branch devoted specifically to defending constitutional tort litigation, and it is currently processing over 5,000 pending claims.¹³⁴ Given the extremely low rate of recovery under *Bivens*, this huge volume of lawsuits is, by traditional measures of litigation success, a fruitless and wasteful exercise.¹³⁵ Insofar as *Bivens* creates an illusion that recovery is available where it is not, it also encourages the filing of claims that are destined to fail. There are many factors that contribute to the persistence of *Bivens* filings despite their low financial yield for plaintiffs. It is fair to say that among those factors is the obfuscatory quality of the current *Bivens* regime.¹³⁶ If the Court in *Bivens* had simply held that sovereign immunity bars recovery for constitutional torts, and had not implied a remedy against officials in their individual capacities, constitutional tort victims presumably would have learned quite quickly and directly that damages relief is unavailable and would have stopped filing such claims.

It is, at least in part, the relative ambiguity and incompleteness of the qualified immunity bar, in contrast to a categorical and complete defense like sovereign immunity, that tempts litigants to brave the odds. While the lack of clarity about which specific claims will merit qualified immunity obscures the

134. U.S. Department of Justice, *Civil Division Brochure* (visited Sept. 7, 1999) <<http://www.usdoj.gov/civil/brochure/index.html>>.

135. In order to conclude otherwise, one would have to find that an efficient level of deterrence is created by individual officials being very often subject to suit but seldom subject to monetary judgment or settlement. It is possible that the mere fact of having one's conduct challenged in litigation, and of facing the admittedly remote possibility of an adverse judgment, will deter officials to some extent, but it hardly seems the most efficient or calibrated way to go about it.

136. Other factors helping to explain why people continue to file *Bivens* cases, even though they are destined to fail, include that many *Bivens* plaintiffs are uncounseled federal prisoners and public interest organizations representing plaintiffs who may be less cost-sensitive and more willing to take a case to make a point, such as to air publicly allegations of unconstitutional conduct. Uncounseled prisoners may lack the requisite knowledge for accurate case assessment and, in any event, lack other rewarding activities competing for their attention. They may also reap psychic benefits from invoking the federal legal system against their captors; they can at least make them squirm if they cannot ultimately make them pay. This is not to suggest that prisoner claims necessarily lack merit; many undoubtedly do, but it is also the case that because prisoners live in institutions under governmental coercion and away from public scrutiny, they are particularly vulnerable to abuses of governmental power.

extent to which it bars recovery of damages, it also fails to provide government officials with the assurances they need to act with confidence when carrying out their official duties. Federal government officials are protected from constitutional tort liability by defendant-protective legal doctrines, representation and indemnification policies, and the availability of insurance to cover residual risks. Ironically, however, uncertainty remains about the extent to which individuals can be personally liable under *Bivens*. If officials take the fiction seriously, they will have substantial concerns about exposure that they would lack under an exclusive regime of official-capacity liability. As noted above, the current regime may have legitimating benefits for the government that a regime of absolute sovereign immunity would lack. The government purchases those benefits, however, at the expense of its own employees' peace of mind.¹³⁷

4. Political Effects

Chief Justice Burger's dissenting opinion in *Bivens* argued that Congress, not the Court, should have taken the initiative to create a damage remedy for constitutional violations.¹³⁸ Burger believed that if the Court denied a damage remedy, popular opinion would have pressured Congress to enact one.¹³⁹ He even took the extraordinary step of sketching out a recommended federal statute waiving sovereign immunity and authorizing constitutional claims for damages directly against the government.¹⁴⁰ Given the majority's decision, we cannot know what Congress would have done if the *Bivens* Court had decided as Burger wished. However, we do know that the *Bivens* decision has subsequently contributed to the failure of legislative efforts to make the government directly accountable for constitutional torts. Because *Bivens* created at least the illusion of a remedy, it relieved pressure that otherwise might have prompted Congress to authorize damages for constitutional violations. More pertinent here, the individual liability fiction appears to have been responsible for the final deadlock in the most serious legislative effort to date.

137. It is impossible to know how much anxiety *Bivens* continues to elicit among federal officials. Some of the advocacy over a decade ago in favor of the bills to amend the FTCA focused on perceived overdeterrent effects of *Bivens* on federal officials. The point here is simply that, to the extent that individuals are used as a proxy for government under *Bivens* but the fiction is nonetheless taken seriously, the individuals inevitably bear some psychic burdens that they otherwise would not.

138. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 411–12, 422–23 (1971) (Burger, C.J., dissenting); see also *id.* at 427 (Black, J., dissenting) (“[T]he fatal weakness in the Court’s judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.”); *id.* at 430 (Blackmun, J., dissenting) (“[I]t is the Congress and not this Court that should act.”).

139. See 403 U.S. at 412 (Burger, C.J., dissenting). Quoting Thayer, the Chief Justice asserted that the Court, if it refrained from “undertaking a function not its own,” could “help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation.” *Id.* (quoting JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, & FELIX FRANKFURTER ON JOHN MARSHALL 88 (Phoenix ed., 1967) (internal quotation marks omitted)).

140. See *id.* at 422–23 (Burger, C.J., dissenting). Burger’s recommended statute notably included no special rules like those established in *Harlow* and *Mitchell*.

Between 1973 and 1985, twenty-one bills were introduced in Congress seeking to replace individual liability under *Bivens* with direct governmental liability; only three were reported to committee, and none was successful.¹⁴¹ The bills were refined successively as various controversies were worked out and compromises reached. No bill seeking to improve *Bivens*'s approach to constitutional tort liability and immunity has been introduced since 1985.

It is difficult to know precisely why the legislative efforts ultimately failed, but two points stand out. First, there has been unanimous support for governmental liability for constitutional torts among all interested parties testifying on this kind of legislation. The executive branch,¹⁴² organizations representing public officials,¹⁴³ civil liberties organizations,¹⁴⁴ and other commentators¹⁴⁵ have all favored legislation providing for substitution of the United States in place of individual defendant officials. Second, when the issue came to a head, the executive branch would not support any bill that did not also permit the government to raise qualified immunity in its own defense.¹⁴⁶ Civil liberties

141. See Thomas J. Madden & Nicholas W. Allard, *Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 470, 476 n.23 (1983) (16 bills by 1982, with only three forwarded to committee and none reported out of committee). After Madden and Allard completed their study, five more unsuccessful bills were introduced: S. 492, 99th Cong. (1985); H.R. 440, 99th Cong. (1985); S. 829, 98th Cong. (1983); S.775, 98th Cong. (1983); H.R. 595, 98th Cong. (1983).

142. See, e.g., *Title XIII of S. 829: To Amend the Federal Tort Claims Act: Hearings on S. 829 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong. 6 (1983) [hereinafter *Hearings on S. 829*] (testimony of William Webster, Director of the FBI); *id.* at 10–11 (testimony of Roscoe L. Egger, Commissioner of Internal Revenue); *id.* at 28 (testimony of Paul McGrath, Assistant Attorney General, Civil Division); *id.* at 27–38 (testimony of A. James Barnes, General Counsel, United States Department of Agriculture); see also *id.* at 17 (testimony of Loren A. Smith, Chairman, Administrative Conference of the United States); *Hearings on H.R. 595, supra* note 5, at 116 (statement of Thomas J. Madden, Partner, Kaye, Scholer, Fierman, Hayes & Handler, and author of report on *Bivens* for Administrative Conference).

143. See, e.g., *Hearings on S. 829, supra* note 142, at 96 (statement of Bun Bray, Executive Director of the Federal Managers' Association); *id.* at 97 (statement of Jerry Shaw, General Counsel, Senior Executive Association and Chairman, Federal Employees' Coordinating Committee); *id.* at 114 (statement of Jack Solerwitz, General Counsel, Federal Law Enforcement Officers Association); *id.* at 113 (Statement of Lawrence A. Cresce, President, Association of Federal Investigators).

144. See, e.g., *id.* at 121 (statement of Jerry J. Berman, American Civil Liberties Union); *Hearings on H.R. 595, supra* note 5, at 57, 65 (statement of Alan B. Morrison, Director of Litigation, Public Citizen Litigation Group).

145. See, e.g., *Hearings on S. 829, supra* note 142, at 140–41 (statement of Kenneth Culp Davis).

146. The Assistant Attorney General in charge of the Civil Division under President Reagan argued in favor of qualified immunity for the United States on grounds similar to those in Justice Powell's dissent in *Owen*, including that government could face massive liability for actions not understood at the time to be unconstitutional. See *Hearings on H.R. 595, supra* note 5, at 28. Oddly, the Administrative Conference of the United States and then-FBI director William Webster argued in favor of qualified immunity on the ground that, without it, the government would face "strict liability." *Hearings on S. 829, supra* note 142, at 17 (testimony of Loren Smith) (reporting that the Administrative Conference was divided over the issue, but favored the government retaining qualified immunity on the ground that deterrence depends on employee consciousness of misconduct, and, in the absence of qualified immunity, there would be strict liability for constitutional torts); *id.* at 7–8 (testimony of William Webster) (suggesting that, in the absence of qualified immunity, there would be a system "akin to a no-fault compensation system"). Liability under the Constitution would not, of course, be strict, but

groups and other commentators reasoned that, if liability were governmental rather than individual, qualified immunity would be inappropriate.¹⁴⁷ In addition, most of the groups representing public employees, such as their unions, were willing to forego qualified immunity in order to ensure the legislation's passage.¹⁴⁸ The executive branch, however, did not accept that approach. The ACLU characterized the government's insistence on retaining qualified immunity as the principal obstacle to enacting legislation authorizing constitutional tort claims directly against the United States.¹⁴⁹ The political story therefore suggests that the majoritarian branches have been unwilling to act in the broader interests of both constitutional tort victims and government officials if doing so means foregoing the benefits that the individual liability fiction confers on government.

We cannot know for sure what Congress would have done had the Court affirmed the appellate decision in *Bivens*. Given that the government appears to prefer individual rather than governmental liability, Congress might well have responded simply by enacting an individual liability regime, that is, a legislated *Bivens*.¹⁵⁰ It is also plausible, however, that the coalition in favor of governmental liability would have succeeded in urging Congress to provide for governmental liability, and, given the individual-focused rationales for qualified immunity, Congress would have afforded no such immunity for the government. In other words, it may be that the existence of the judicially fashioned *Bivens* remedy decisively diminished momentum behind a political response, but that Congress would have acted in the absence of that judicial remedy and would have waived sovereign immunity to provide for a damages cause of action directly against the government fisc.¹⁵¹ If *Bivens* reduced political pressure for such an outcome, the decision in that way, too, has proved to be progovernment.

would require proof meeting the relevant constitutional standard (for example, intent to discriminate in violation of the Fifth Amendment, lack of probable cause or reasonable suspicion in violation of the Fourth Amendment, intent to burden protected speech in violation of the First Amendment, or reckless disregard under the Eighth Amendment). The Carter Administration, in contrast, supported legislation that did not include qualified immunity for the government. See *Amendment of the Federal Tort Claims Act: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 96th Cong. 123 (1979), 3–4 (statement of Deputy Attorney General Benjamin Civiletti); *Federal Tort Claims Act: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong. 4 (1978) (statement of Attorney General Griffin Bell).

147. See *Hearings on S. 829, supra* note 142, at 138 (statement of Kenneth Culp Davis) (arguing that “the justification for deciding against the plaintiff [on qualified immunity grounds] disappears when the government is the defendant; the government should be liable for wrongful action, despite both reasonableness and good faith”).

148. See, e.g., *id.* at 95, 98 (Shaw and Bray); *id.* at 104 (Solerwitz); *id.* at 191 (Hughes); but see *id.* at 99–100 (testimony of Ordway Burden, Chairman, National Law Enforcement Council).

149. See *id.* at 123.

150. See *supra* text accompanying notes 42–44 and accompanying text. Or perhaps it might have adopted a scheme for federal actors that mirrors section 1983 as it applies to municipal actors, relying principally on individual liability, with governmental liability available under only limited circumstances.

151. For example, the APA, enacted in the wake of *Bivens*, might have encompassed a damages remedy if the Court had not already created one. See *supra* notes 40–41 and accompanying text.

5. Effects on the Courts' Normative Analysis

Finally, and most importantly, in addition to the practical effects discussed above, the Court's preservation of the individual liability fiction has allowed it to avoid candid discussion of the normative questions underlying constitutional tort litigation. This article has argued that in the quarter century since *Bivens*, the Court has at least purported to take the individual liability fiction seriously and has relied on it to develop practically impermeable doctrinal protections for *Bivens* defendants. That doctrinal approach has obscured the fundamental normative questions posed by constitutional tort litigation.

There are three central normative dilemmas raised by constitutional tort litigation that the *Bivens* Court at least partially sidestepped: (1) whether damages should be available for constitutional torts, or whether they should, in the absence of clear congressional action, be wholly precluded by sovereign immunity; (2) if damages are available, who should pay them—the individual government official, or the government itself; and (3) if the government pays, whether any limited or qualified immunity should be available to it. The Court has implicitly provided bottom-line answers to these questions, but has done so in an indirect way and thereby avoided the need to justify its results normatively.¹⁵²

The individual liability fiction of *Bivens* has allowed the Court to leave the sovereign immunity principle undisturbed. Especially as applied to remedies for constitutional violations, however, the validity of sovereign immunity is subject to serious question.¹⁵³ The Court could have acknowledged that the federal agents in *Bivens* were acting in their official capacities and therefore might have either permitted relief notwithstanding sovereign immunity, or barred it based

152. To be sure, the Court adheres to *Bivens* and its sovereign and official immunity doctrines for reasons that are not purely normative, including common-law and constitutional history, structure, principle, and, by now, *stare decisis*. Normative concerns have also, however, consistently played a significant role in these areas of constitutional liability and immunity. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (observing that *Harlow* “completely reformulated qualified immunity along principles not at all embodied in the common law”); *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980) (taking into account, *inter alia*, normative concerns for deterrence, remediation, and loss-spreading, etc.). The argument here is addressed to those normative aspects of the Court's analysis.

153. The anomaly of importing such a doctrine into the American constitutional system is compounded by what Professor Louis Jaffe refers to as “a magnificent irony” that the American version of sovereign immunity is even broader than the original common law version. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 197 (1965); *see also* *Muskopf v. Coming Hosp. Dist.*, 359 P.2d 457, 458–59 (Cal. 1961) (quoting Borchard, *Governmental Liability in Tort*, 34 *YALE L.J.* 1, 4 (1924) (“At the earliest common law” sovereign immunity “only rarely had the effect of completely denying compensation. How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called ‘one of the mysteries of legal evolution.’ ”). Justice Stevens has argued that sovereign immunity is inappropriate to the American constitutional system because it depends on a theory of divine right of kings, under which the sovereign is not subject to legal constraint but only to the “higher court” of God. John Paul Stevens, *Is Justice Irrelevant?*, 87 *Nw. U. L. REV.* 1121 (1991); *see also* Amar *supra* note 45, at 1427 (“no government entity can enjoy plenary ‘sovereign’ immunity from a suit alleging a violation of a constitutional right”). *Cf.* *Alden v. Maine*, 119 S. Ct. 2240, 2269 (1999) (Souter, J., dissenting) (rejecting the view that state sovereign immunity is an inherent and indefeasible right of statehood implicit in the Constitution).

on that principle. As it was, the Court neither justified the inapplicability of sovereign immunity to constitutional tort claims, nor offered any rationale for allowing sovereign immunity to stand as a bar to recovery for constitutional torts. The individual liability fiction so effectively circumvented the issue whether sovereign immunity should apply that the majority opinion saw no need even to mention it. Apparently the Court tacitly accepted Justice Harlan's conclusion in his concurring opinion that "[h]owever desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit."¹⁵⁴ It was not until a quarter century later that the Court actually stated that sovereign immunity applies to bar not only state common-law and statutory claims, but federal constitutional claims as well.¹⁵⁵ By that time, however, the Court treated the issue as a foregone conclusion not worthy of reasoned discussion.

A second normative question that *Bivens*'s individual liability fiction helped the Court to avoid was whether and to what extent liability for constitutional torts should be imposed on the government or on the individual tortfeasors. Because the Court has not acknowledged the degree to which the current regime is in practice one of governmental liability, it has never justified that regime. The Court has instead defended *Bivens* as if it stands for the proposition that exclusive officer liability provides the best deterrent in all cases.¹⁵⁶ That analysis is not accurately descriptive, because individual liability can be and has been shifted to the government by means of indemnification. The Court's stated preference for individual liability as the best deterrent is also not effectively proscriptive, because the Court has not prohibited the shifting of liability. An ideal regime might be one in which governmental liability is the norm,¹⁵⁷ with a narrow category of intentional misconduct subject to a rule of nonshiftable individual liability. Or perhaps the best rule would mirror rules in private tort law, under which an employer and its employees are jointly and severally liable for wrongdoing. Because it has relied on the individual liability fiction, however, and chosen not to grapple with the realities of governmental liability, the Court has never openly sorted out the appropriate roles for governmental and individual liability.

Finally, the Court has refused to acknowledge that qualified immunity operates in practice to protect the government fisc, and it therefore has never justified the de facto extension of qualified immunity to government. As ex-

154. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971).

155. See *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

156. See *id.* at 485-86; *Carlson v. Green*, 446 U.S. 14, 21 (1980) ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the [Federal Tort Claims Act] remedy against the U.S.").

157. See, e.g., *Kramer & Sykes*, *supra* note 49, at 251, 284-87, 293-94, 301 (proposing, in the distinct but analogous context of 42 U.S.C. § 1983, vicarious governmental liability based on negligence, that is, a rule imposing liability on the government only to the extent that it failed to institute available and efficient means to prevent the violation).

plained above, the Court's development of qualified immunity has consistently relied on the notion that government officials need protection from the burdens of litigation and unforeseeable liability in order to free them from fear of personal damages liability and its inhibiting effects. That justification does not apply, however, once it is understood that the government can and does serve the same purposes through its representation and indemnification policies. Given that government addresses the prospect of its employees incurring personal liability by consistently shouldering the costs of constitutional tort claims against them, that purpose no longer supports also applying qualified immunity to those same officials. In the context of indemnification, the practical function of qualified immunity is, in effect, to provide the *government* with a defense. But the Court has not only failed to justify application of qualified immunity directly to protect the government, it has affirmatively disavowed the appropriateness of any such application. Ultimately, by creating the individual liability fiction and maintaining qualified immunity, the Court has bolstered the system of sovereign immunity it purported to circumvent. Moreover, by perpetuating the fiction of individual liability, it has precluded itself, as well as society at large, from ever having to make the choice of whether the government should truly be held responsible for the constitutional violations of its agents.

This article does not purport to resolve the normative problems identified here. Its goal is the more modest one of describing anomalies that the individual liability fiction has generated, including the degree to which the fiction has undermined the effectiveness of the *Bivens* remedy from plaintiffs' perspective and boosted the federal government's institutional interests in appearing accountable while avoiding liability. Perhaps this article will help to set the stage for a more coherent and accurate normative analysis than the courts have thus far undertaken.

A more candid approach in the first instance might have led the Court to grapple expressly with whether sovereign immunity is applicable to constitutional claims. By appearing to provide a workable remedy, individual liability under *Bivens* may have helped to forestall judicial abandonment of sovereign immunity and may also have taken pressure off of Congress to waive it. If the courts candidly took account of the reality of liability shifting onto the government, they might fashion narrower qualified immunity doctrines¹⁵⁸ or abandon them altogether,¹⁵⁹ afford fewer special procedural protections to *Bivens* defendants, and permit juries to learn of indemnification and representation arrangements.

Even if we believe that history and precedent now constrain the Court from adopting a normatively ideal regime,¹⁶⁰ or if we are satisfied with the patterns

158. Some commentators suggest that qualified immunity should be more narrowly framed. See, e.g., Vázquez, *supra* note 44, at 1801; Fallon & Meltzer, *supra* note 3, at 1797.

159. The Court's decision in *Owen v. City of Independence* provides some possible rationales for nonapplication of qualified immunity to government entities.

160. For example, strong as arguments may be against application of the common-law doctrine of

of liability produced under the current constitutional tort system,¹⁶¹ we should be concerned with the lack of judicial candor along the way.¹⁶² The mismatch between the courts' persistent rhetoric of individual liability and the reality of governmental liability under *Bivens* impairs the courts' credibility.

Judicial candor is essential to the process of justification, or reasoned elaboration, that is at the heart of judicial legitimacy.¹⁶³ The expectation that courts give genuine and persuasive reasons for their decisions helps to constrain judicial power. There are important legitimacy issues at the heart of the current *Bivens* regime, including questions regarding the source of courts' authority to cut back on constitutional causes of action with judge-made exceptions and limitations such as qualified immunity, heightened pleading, and interlocutory appeals. Those questions are exacerbated when the stated rationale for those doctrines—the availability of immunity at common law for defendant officials—is inapposite to the de facto defendant: the government. If courts believe that the existence of sovereign immunity makes it unproblematic to use qualified immunity in a way that approximates sovereign immunity and actually protects the government, they have not yet frankly said so.

Judicial candor also fosters public trust in outcomes. That virtue is particularly important in constitutional litigation, where the lawfulness of the use of public power against marginal and often disaffected persons is at issue. Rationalizing the expansive use of qualified immunity as a protection of officials' pocketbooks and engaging in the litigation pretense that defendants appear in their personal capacities breeds cynicism when individual liability is a fiction.

CONCLUSION

The Court in *Bivens* purported to take constitutional rights seriously and therefore prescribed a damages remedy. But in designing that remedy, the Court sidestepped the most difficult issues in constitutional tort law by imposing liability on individual government employees rather than on government itself. Some have argued that this was *Bivens*'s genius; the Court foresaw that indemnification would follow and therefore created governmental liability without

sovereign immunity to constitutional (as opposed to common law) claims, it seems a long shot at this stage to argue that the Court should curtail sovereign immunity and authorize constitutional tort suits directly against the government by overruling *FDIC v. Meyer*.

161. Some scholarship generally supports the existing regime by supplying rationales the Court has not itself elaborated. See generally, e.g., Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998); John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989); Charles T. Putnam & Charles T. Ferris, *Defending a Maligned Defense: The Policy Bases of the Qualified Immunity Defense in Actions Under 42 U.S.C. § 1983*, 12 BRIDGEPORT L. REV. 665 (1992).

162. See generally David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

163. See HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 161, 165–68, 487 (tentative ed. 1958); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978) (discussing importance of reasoned argument as an element of adjudication).

entering the difficult thicket of sovereign immunity and confronting the question of whether liability should be imposed on the government itself. But since that decision, the Court has taken the individual liability fiction seriously and as a result has provided ever broader defendants' protections, all of which foreseeably redound to the benefit of government itself.

Bivens's individual liability fiction has had anomalous and inadequately justified effects on the constitutional tort system. The fiction has sustained a regime in which we have, without fully knowing it, come full circle to the situation of constitutional rights without remedies. *Bivens* may have overstated its promise of full remediation. But in holding out that promise and then scaling it back in a manner that has been less than candid, the Court has impaired our ability to debate, criticize, and remedy the Court's implicit choices.