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Personal Liability as Administrative Law

David Zaring*

Abstract

Administrative law has almost exclusively concerned itself with lawsuits against agencies as collective entities, under the auspices of the Administrative Procedure Act. In light of the growing number and prominence of suits by war on terror plaintiffs against senior government officials, this Article considers the use of personal liability to discipline government officials and assesses it as an alternative to traditional administrative law. It compares the civil suits to criminal prosecutions of these officials and compares both of them to less-obviously law related scandal campaigns. Personal sanctions—of which Bivens complaints are a principal example—are worth more attention. These mechanisms, and the constitutional tort in particular, are case studies of the popular inclination to decentralize government, of the value of symbolic laws, and, increasingly, of the personalization of law and politics. Solving some of the problems of personal liability, as it works today, might best be done not by enhancing the bite of the always-challenged lawsuits and prosecutions, but by making sure that the law makes it more possible for political cases to be made against government officials, rather than legal ones.

Table of Contents

I. Introduction	314
II. Three Kinds of <i>Bivens</i> Actions	319
A. The Doctrinal Problems for Plaintiffs	323
B. The Constitutional Tort Against Policy	331
C. The Slightly Successful Law Enforcement Suit.....	339

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D. The Suit of Last Resort	342
III. Criminal Prosecution	347
IV. Conclusion.....	356
A. Can the Symbol of Personal Liability Justify Its Practice?	357
B. An Alternative to Litigation?	359
C. Decentralized Governance as It Really Works.....	365

I. Introduction

Scooter Libby, the former Deputy Chief of Staff to the President, has been prosecuted criminally,¹ sued in federal court by Valerie Plame—the covert CIA employee whose identity he allegedly revealed²—and driven from his office as chief of staff to the Vice President.³ The litigation to which he was subjected was both the subject of an active prediction market,⁴ and covered in novelistic detail by the press.⁵ Is Libby's experience unique?

This Article suggests that it is not, and that Libby's trials, rather than being exceptional, exemplify an overlooked, troubled, but rapidly evolving legal regime that limits government power, and has little to do with the Administrative Procedure Act (APA), which is ordinarily thought of as the principal mechanism of government constraint.⁶

That regime is rooted in the personal liability suit, an increasingly popular alternative to litigation under traditional administrative law. Since the advent of the war on terror, the Secretary of Defense, Secretary of Homeland Security,

1. See, e.g., Neil A. Lewis, *Libby Given 30 Months for Lying in C.I.A. Leak Case*, N.Y. TIMES, June 6, 2007, at A1 (reporting Libby's sentence resulting from his criminal prosecution).

2. See Neil A. Lewis, *Ex-C.I.A. Officer and Husband Sue Cheney, Libby and Revealed Leak*, N.Y. TIMES, July 14, 2006, at A16 (describing the civil suit brought by Valerie Plame and her husband, Joseph Wilson).

3. See Editorial, *The Case Against Scooter Libby*, N.Y. TIMES, Oct. 29, 2005, at A18 (stating that "Mr. Libby was forced to resign [on October 28, 2005]").

4. That prediction market closed once Libby was convicted. For a discussion of its operation, see *Prediction Market on Scooter Libby Pardon*, Posting of Tim Finin to Ebiquity Blog, <http://ebiquity.umbc.edu/blogger/2007/03/10/prediction-market-on-scooter-libby-pardon> (Mar. 10, 2007, 13:00 EST) (on file with the Washington and Lee Law Review).

5. See Frazier Moore, *Washington and Media Face Off*, HOUS. CHRON., Feb. 13, 2007, at TV Feature Section 6 (discussing the "Washington free-for-all that has ensnared the news media: the perjury trial of former vice presidential aide I. Lewis 'Scooter' Libby").

6. Administrative Procedure Act, Pub. L. No. 79-404, §§ 1-11, 60 Stat. 237, 237-44 (1946) (codified as amended in scattered sections of 5 U.S.C.).

Attorney General, and FBI Director have all defended suits brought on the same theory as Libby's.⁷ Thousands of other government supervisors have purchased insurance against the possibility that they might be sued like Libby, ranging from run-of-the-mill federal supervisors to the CIA officials who oversee that agency's approach to the war on terror.⁸

In the way that legal scholars usually think about litigation, that insurance is perplexing. When plaintiffs sue individual government officials in their personal capacity, they almost always lose before the trial court and do even worse on appeal.⁹ For all his legal peril, Libby will not serve a day in prison—he was pardoned—and has won the civil suit by Plame.¹⁰ In 2007, the Supreme Court made already difficult cases for personal liability even more difficult for would-be plaintiffs to establish.¹¹ Other high-ranking government officials, despite many unhappy headlines, have proven to be all but impossible to win money from in civil suits.¹²

Criminal law has a similar record of success. Independent counsel prosecutions rarely resulted in the conviction of executive branch employees, and the Department of Justice's Public Integrity Section has rarely gone after federal supervisors (much less, for example, than the department has prosecuted corporate executives) and has not done any better than in other cases involving federal employees in those cases where it has so acted.¹³ Prosecutors who have begun to investigate excesses in the war on terror have not yet reached Libby's colleagues over the Plame affair, and it appears that they will not do so.

7. See *infra* notes 97–110 and accompanying text (describing the specific claims brought against these parties).

8. See *infra* note 195 (indicating that concerned CIA officials are purchasing liability insurance policies).

9. See, e.g., *infra* note 10 and accompanying text (stating that despite Scooter Libby's legal troubles, he is unlikely to spend any time in jail).

10. See *Wilson v. Libby*, 498 F. Supp. 2d 74, 77–78 (D.D.C. 2007) (dismissing Plame's suit), *aff'd*, 535 F.3d 697 (D.C. Cir. 2008); Press Release, White House Office of the Press Sec'y, Statement by the President on Executive Clemency for Lewis Libby (July 2, 2007), available at <http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html> (announcing the President's commutation of Libby's sentence).

11. See *Wilkie v. Robbins*, 127 S. Ct. 2588, 2604 (2007) (refusing to recognize a *Bivens* claim when most of the allegations against government officials were "within the Government's enforcement power").

12. See *infra* notes 114–25 and accompanying text (discussing the failure of plaintiffs to ultimately prevail in civil suits despite years of discovery).

13. See *infra* notes 198–216 and accompanying text (giving statistics on various Department of Justice sections).

Nonetheless, the rapt attention paid to these cases against high government officials, when contrasted with their litigated outcomes, is striking. Moreover, I argue, the attention is part of the point. The personal liability suit is an attention and claim-based regime that probably occupies more of the attention of government leaders than do suits to undo rules promulgated by the Environmental Protection Agency or the Securities and Exchange Commission. Personal liability suits underpin the news cycle and drive the just-so narratives of which Washington is fond.¹⁴

And yet, scholars have failed to think about personal liability in a systematic way. The neglect is not entirely surprising—legal academics tend to focus on agencies, appeals, and verdicts, while the system of liability of government officers, at least as actually practiced, turns on individuals, district courts, and complaints. Personal liability claims work in a disaggregated and decentralized way, and those sorts of regimes are difficult to study.¹⁵ Studying suits against the government that the government usually wins also might not, at first glance, look promising.

But the claim against individual government officials, seeking jail terms or damages from their personal fortunes, especially needs analysis now. Despite their high failure rate, these claims are the resort of thousands of plaintiffs every year, an important part of the Department of Justice's criminal docket, the source of increasing numbers of headlines, and the legal exemplification of the personalization of Washington politics.¹⁶

Personal liability has become an important alternative to administrative procedure not just because it is an alternative. It offers its own features, features that some have found to be particularly compelling today. The plaintiffs and political operatives who drive the litigation are often in it for the process, and the prospect of distracting, confronting, and wearing down officials that have aggrieved them, all in the most public of arenas.¹⁷ To Mark

14. See, e.g., Tim Cornwell, *Key Question: How Did Chandra Levy Die?*, SCOTSMAN, May 24, 2002, at 9 (reviewing prominent scandals in the city); Danielle Reed, *Scandal Tourism*, WALL ST. J., Feb. 6, 1998, at B7 (describing a company offering "Scandal Tours" of the capital).

15. Though, as discussed in Part IV of this Article, a number of scholars and government reformers have embraced decentralized regimes like the personal liability regime on both descriptive and normative grounds.

16. See *infra* notes 85–131 and accompanying text (giving examples of, and commentary on, these types of lawsuits).

17. The Supreme Court has recognized this concern. See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 382 (2004) (evaluating a privilege claim after the Vice President sued for failing to meet statutory obligation, and discussing the need to "give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties").

Tushnet, the turn to the personal characterizes our current political era. "[C]ontemporary politics is highly personalized," he observes, creating a "politics of personal destruction" wreaked by political operatives and opposition researchers, searching for grounds for litigation, and seeking to foment it.¹⁸

Consider the personal liability suit. Rather than thinking of the tort against individual government officials, or a *Bivens* action,—so called because of the 1971 Supreme Court case, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,¹⁹ that announced the availability of the remedy—as one type of lawsuit, it is more helpful to divide it into three kinds of complaints. The newest kind—the tort case against a senior official as a policy challenge—is particularly interesting, especially when compared with the other two sorts of *Bivens* actions: the pro se and quasi-pro se cases that always lose, and the excessive use of force cases that usually lose.²⁰ These cases, and the policy challenge in particular, get brought not because the plaintiff thinks she will collect damages, at least not usually, but because the plaintiff thinks she can obtain other benefits from the litigation.²¹

Strike suits and political attacks, litigation strategies that are not designed around winning the case—it all sounds quite alarming. But ignoble motives do not necessarily damn the system of individual liability. Expressive and symbolic, rather than tangible, benefits are perfectly acceptable offerings for any legal system.²² The personal liability of high officials, after all, is a paean to the supremacy of the law over its implementers.²³ The ability of individuals

18. Mark V. Tushnet, *The Constitutional Politics of the Clinton Impeachment*, in *AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* 162, 170 (Leonard V. Kaplan & Beverly I. Moran eds., 2001).

19. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that *Bivens* was entitled to recover damages against federal agents for injuries suffered as a result of the violation of his Fourth Amendment rights).

20. See *infra* Part II (reviewing the three types of *Bivens* claims and some statistics regarding their success).

21. See, e.g., *infra* notes 170–73 and accompanying text (describing cases brought to challenge federal drug policy).

22. For some of the classic formulations of the way that expressive laws work, see generally Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998) and Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

23. Expressive laws, after all, are frequently underenforced. See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603 (2000) ("[A] legal ban on smoking in public places or a 'pooper-scooper' law can motivate citizens not to smoke in certain areas or to clean up after their dogs even where the state has no resources invested in direct (or first order) enforcement."). However, expressive and symbolic laws are usually about something—and the usual *Bivens* claim is not, at least not about something legally viable.

or disinterested investigators to file suits against the government leadership provides a sort of democratic access to those leaders. Personal liability in this way offers claims of accessibility to all levels of the government to whoever wants to avail themselves of them.

Nonetheless, even conceding these advantages, we might worry about the system. Symbolism and the pursuit of fora to harangue important people—such advantages have a political ring. Perhaps these personal sanctions really just provide opportunities to essentially pursue political ends. And if that is the case, the usefulness of turning to the legal system to resolve these sorts of complaints is much less clear.

It turns out that lawsuits are not particularly effective mechanisms through which to pursue political values. Instead, it could be that pursuing less overtly legal mechanisms, such as the so-called "Washington scandal" might be a better—although certainly not perfect—way of expressing disagreement with the political views of a senior government official. If so, a few simple reforms might be in order.

In Part II of this Article, I delve into the *Bivens* suit in detail.²⁴ I compare the high-profile claims against high-profile defendants being made today with the law enforcement and other claims made in the modern *Bivens* complaint. Because comparison is useful, I compare these tort suits to two alternatives. In Part III of the Article, I consider criminal prosecutions against government officials. What role does that alternative form of individual liability play in supervisor management? How does it work? I answer these questions by looking to the history of the prosecutions of federal officials under the Independent Counsel statute and consider a decade's worth of reports by the Department of Justice's Public Integrity Section. In Part IV, the Conclusion, I evaluate the regime of individual liability and suggest that of all the personal sanctions imposed on government officials, an extra-legal one, the so-called Washington scandal, might be the best of an imperfect set of vehicles for realizing policy debates. I accordingly discuss how we might create an environment that incentivizes less litigious forms of personal liability. Finally, I evaluate what the legal environment of personal liability can tell us about a popular project among government reformers: the decentralization of authority. I think that the difficult, often fruitless, and transaction-cost-laden personal liability regime serves as a corrective against decentralization triumphalists, though it exemplifies the increasing importance of decentralized governance in American life.

24. I do so in even more detail in David Zaring, *New Constitutional Torts*, 2 J. TORT L., <http://www.bepress.com/jtl/vol2/iss1/art3> (2008).

A note about methodology: Comparing tort complaints, criminal prosecutions, and scandals makes for a comprehensive enough story about the personal risks policymakers face, but it does not lend itself to apples-to-apples analysis. Nonetheless, the qualitative approach taken here is supplemented with analyses of collections of cases and complaints, as well as the occasional table designed to illustrate aspects of the curious role of personal sanctions today.²⁵ This data is used for illustrative and descriptive purposes, and the approach is a qualitative one.

II. Three Kinds of Bivens Actions

In what follows, I begin with a brief review of constitutional tort doctrine, which, as handed down by the Supreme Court, has been almost uniformly hostile to would-be plaintiffs since 1982. I then look in detail at three kinds of claimants who nonetheless choose to be plaintiffs. I consider the new series of high-profile policy suits, which tend to be directed at policies, and particularly policies related to the ongoing war on terror, law enforcement suits, and pro se/everybody else suits.²⁶ I conclude with a brief evaluation of the constitutional tort as a mechanism of decentralized governance.

Bivens suits have been around for thirty-six years, have been the subject of a rich scholarly literature, at least for their first two decades, and, as the Supreme Court has, since 1982, regularly curtailed the remedy, have been afflicted with regular intimations of desuetude.²⁷ Is there more than the headline-making current suits to prompt a re-examination of these suits now?

25. For the best-known primer on how to conduct this sort of research, see generally GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994).

26. To provide another mild word about the methods adopted in this section, any sort of effort to trifurcate a cause of action by type of plaintiff risks oversimplification. In particular, the new high-profile plaintiffs have often concerned themselves with suing law enforcement officials, partly because many of them have been detained by those officials pursuant to the so-called war on terror. These cases blur the edges between the "new" sort of complaint and the very traditional ones involving use-of-force claims. Likewise, some high-profile plaintiffs can file suits just as meritless as those of the pro se variety; Valerie Plame's case against Karl Rove, for example, did not appear to have much of a link to any constitutional violation that any court has found before. Here too, the new type of suit merges a bit with the desperate case.

27. See, e.g., Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results Of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 66 (1999) ("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.").

Two strains of recent scholarship provide points of departure for this part of this Article.

First, recent administrative law historical research suggests that the tort suit was an important part—indeed, in some ways the only part—of early administrative law. As Jerry Mashaw has recently reminded us, "[j]udged by the statutes of the Federalist period, administrators were often expected to be supervised by lawsuits."²⁸ In fact, individual liability was a primary form of administrative law, though Mashaw shows that other more "modern" forms of extrajudicial command and control were also evident during the early republic.²⁹ Still, in this period, tort suits had pride of place.³⁰ Congress provided for individual liability in a number of statutes authorizing the nascent federal bureaucracy, required government officials to post bonds that could satisfy potential judgments against them, and created *qui tam* actions in many circumstances that permitted individuals to sue the officials for dereliction of duties.³¹

Nor was the United States unique in using the tort suit to constrain policymakers. In other legal systems, tort suits against government officials, particularly before the late nineteenth century professionalization and bureaucratization of the civil service, were often the only means available to regulate government conduct.³² Mashaw's work is scrupulously historical, but

28. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1316 (2006). Apparently, the past has relied upon different notions of the public and private spheres of government work. Because common law actions against government officials turned on the personal culpability of the defendant, they avoided the public-private distinctions that have been enshrined in prominent modern doctrines such as sovereign immunity and state action.

29. *See id.* at 1260 ("From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive power, created systems of administrative adjudication, and provided for judicial review of administrative action.").

30. *See id.* at 1258 ("Until well into the twentieth century federal judicial remedies respecting administrative action took two dominant forms: either a common law action against the officer or a suit challenging the constitutionality of the administrator's authorizing statute. From this perspective administrative law disappears into common law subjects like torts . . .").

31. *See id.* at 1317–18 ("Once again *qui tam* actions were often provided by statute as a means of recovering from wayward officials." (citing An Act for Establishing Trading Houses with the Indian Tribes, ch. 13, § 3, 1 Stat. 452, 452–53 (1796) (concerning violations of Indian trading laws by Indian agents); An Act To Incorporate the Subscribers to the Bank of the United States, ch. 10, § 8, 1 Stat. 191, 195–96 (1791) (concerning illegal activities by officials of the Bank of the United States); An Act Providing for the Enumeration of the Inhabitants of the United States, ch. 2, § 3, 1 Stat. 101, 102 (1790) (concerning a marshal's failure to file census returns))). For example, postal and tax officials who abused their posts were subject to tort suits. As Mashaw has explained, "Official immunity was nonexistent. The officers' only defense was that they were carrying out their statutory responsibilities." *Id.* at 1321.

32. Aristotle described how during the Periclean period Ephialtes reformed the Council of

his effort to reclaim the "lost century" of administrative law in the United States, and in doing so to remind us of the importance of the tort suit as the principal vehicle of constraint on government action, invites consideration of how personal liability works now.³³ Tort mattered then and was used to rein in government excesses. Does it still matter?

Second, the liability of leadership is on the table elsewhere. Consider the recent research of Bernard Black, Stephen Cheffins, and Michael Klausner on the personal liability of outside directors of corporations.³⁴ In corporate law, as in suits against the government, these sorts of high level suits have a high profile—they resulted in judgments in the litigation that followed the failures of Enron and WorldCom, and that, in turn, led to generous press coverage.³⁵ However, suits against outside directors very rarely result in actual judgments against the defendants who run the corporations at issue.³⁶ Black, Cheffins, and Klausner concluded that this sort of liability exists only in cases of a "perfect storm" or when a director "can't afford to win" because of the expenses of litigation and underinsurance.³⁷ But they also noted that:

the Areopagus: "First, he put to death many of its members by impeaching them of offenses committed in their administration." ARISTOTLE, CONSTITUTION OF ATHENS 25 (Edward Poste trans., Rothman & Co. 2d ed. 1993) (1892); see also Adriaan Lanni, *Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie?*, 43 AM. J. LEGAL HIST. 27, 32 (1999) ("Hagnon's proposal to try Pericles indicates how casual the Athenians could be about the legal basis of a lawsuit: according to Plutarch, he proposed that Pericles be tried before fifteen hundred jurors, 'no matter whether it is called a prosecution for embezzlement (klope), bribery (doron), or a misdemeanor (adikion).'" (quoting PLUTARCH, PERICLES 32)); Robin Osborne, *Law in Action in Classical Athens*, 105 J. HELLENIC STUD. 40, 52 (1985) (describing the role of courts in Athenian society). And indeed, there is a conventional view that the English common law crowded out the field of administrative years until long after it had become a viable American field. See *Ridge v. Baldwin*, [1964] A.C. 40, 72 (H.L.) ("We do not have a developed system of administrative law—perhaps because until fairly recently we did not need it."); A. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 326 (7th ed. 1908) ("The words 'administrative law,' . . . are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation. . . . [T]he want of a name arises at bottom from our non-recognition of the thing itself.")

33. See Mashaw, *supra* note 28, at 1260 ("[A]dministrative law has a century of history at the national level that has yet to be carefully explored."). See generally Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007).

34. See generally Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055 (2006).

35. See *id.* at 1057 ("Outside director liability is again causing much concern, with the current trigger being the 2005 securities class action settlements involving WorldCom and Enron.")

36. See *id.* at 1060–61 (describing the rarity of success in suits against directors).

37. *Id.*

The conventional wisdom was that being an outside director of a public company was risky. Fear of liability has for some time been a leading reason why potential candidates turn down board positions. . . . Outside directors are concerned instead that . . . they will be sued for oversight failures when, unbeknownst to them, management has behaved badly.³⁸

Is the liability concern—perhaps over-concern—of corporate board members shared by senior government officials?

An answer to these questions will also have something to say about a substantial chunk of the docket of the federal courts. The Torts Branch of the Department of Justice has estimated that it faces "about five thousand *Bivens* claims per year against, typically, four to five defendants" each.³⁹

Moreover, *Bivens* claims are more important potential constraints than are other tort vehicles for suits and particular government officials: the Federal Tort Claims Act (FTCA)⁴⁰ and § 1983⁴¹—a cause of action that, at least in theory, only differs from the *Bivens* case on the basis of the level of government that employs the individual defendant.⁴² But FTCA claims are not allowed to be made against officials exercising their discretion—that is, making policy—and so are a bit less interesting to an administrative lawyer.⁴³ As for § 1983,

38. *Id.* at 1058.

39. William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1151 (1996) (citing interviews with Torts Branch officials). A very large percentage of these cases are brought by prisoners. *See id.* ("Many prisoners bring *Bivens* claims because they have time on their hands and are unhappy with their lot.").

40. *See* Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (2000) (authorizing suits against the United States for the torts committed by federal officials).

41. *See* 42 U.S.C. § 1983 (2000) (granting the right to sue state officials who, acting "under color of" state law, deprive a person of constitutionally protected rights).

42. *See, e.g.,* Scheuer v. Rhodes, 416 U.S. 232, 235 (1974) (holding the dismissal of § 1983 actions against a governor, under the common-law doctrine of executive immunity, to be inappropriate), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982). For an overview and defense of the liability of high-ranking state and local officials, see generally Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147. *See also* Michael S. Greve, *Business, the States, and Federalism's Political Economy*, 25 HARV. J.L. & PUB. POL'Y 895, 913 (2002) ("When the average mayor or governor thinks of 'commandeering,' what comes to his mind is not the rare direct federal intervention of the sort at issue in *New York v. United States* and *Printz v. United States* but rather a private lawsuit under § 1983.").

43. *Compare* Harlow v. Fitzgerald, 457 U.S. 800, 806–07 (1982) (discussing immunity from lawsuits for executive branch officials), *with* Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended in scattered sections of 28 U.S.C.) (providing, *inter alia*, immunization for federal employees acting within the scope of their employment). This combination makes the policy motivated non-*Bivens* tort suit difficult to maintain. The relevant provision of the Westfall Act is codified at 28 U.S.C. § 2679 (2000).

the level of government clearly matters with regard to holding senior employees liable, and we are most interested in high-level federal policymakers (though it is worth seeing how *Bivens* works against every other federal policymaker).⁴⁴ In outcome, moreover, *Bivens* cases look very different than § 1983 cases and conflating the two remedies is accordingly unproductive.

A. The Doctrinal Problems for Plaintiffs

Despite the prominence of tort in early American administrative law, things changed as the courts began to develop a law of administrative procedure, codified in 1946 by the Administrative Procedure Act. By 1959, a plurality of the Justices on the Supreme Court declared that they approved of Learned Hand's conclusion that it would be "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation" through the courts.⁴⁵

Things are doctrinally different today. All government officials who are not adjudicators, legislators, or prosecutors, including high-level officials, now receive only qualified immunity from suit for claims against them for damages personally;⁴⁶ their absolute immunity from such suit has been gone since *Bivens* was decided in 1971, which announced that petitioners were "entitled to recover money damages for any injuries . . . suffered as a result of" violations of the Fourth Amendment.⁴⁷

44. Or so scholars have noted, though few have come up with a good functional reason for it, other than perhaps the assumed competence of federal officials. See 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 27:26 (2d ed. 1984) (noting the "failure of the *Bivens* doctrine to compete more successfully with § 1983"); Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 366 (1989) ("[G]overnmental liability and the right to attorneys' fees, which are not made available to a *Bivens* plaintiff, combined with the extra restrictions applicable only in *Bivens* actions, make the task of the *Bivens* plaintiff that much more difficult than that of an individual suing under section 1983.")

45. Rosen, *supra* note 44, at 349 n.69 (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

46. See *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) ("It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities."); *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 734–35 (1980) ("[J]udges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities."); *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) ("[A] prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties.")

47. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (creating such a remedy for Fourth Amendment claims). For a brief overview of *Bivens* claims from a practitioner's perspective, see generally John E. Nordin, II, *The*

The Supreme Court followed its *Bivens* decision with *Davis v. Passman*,⁴⁸ in which it held that *Bivens* claims based on the due process clause were justiciable.⁴⁹ Because the government's due process obligations are the constitutional basis for administrative process, the prospect of suing individual officials for due process violations raised the possibility of a very real APA alternative that could be invoked to constrain agency action through individual liability.⁵⁰

Moreover, the Court in *Butz v. Economou*⁵¹ noted that federal officers "are accountable when they stray beyond the plain limits of their statutory authority."⁵² It reiterated its rejection of the notion that federal officials might be "absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes" if they knowingly and deliberately infringed constitutional rights in doing so.⁵³ As Justice Rehnquist concluded at the time, *Economou*, especially when considered with *Passman*, raised the possibility of the tortification of almost all government action through the *Bivens* form.⁵⁴

Constitutional Liability of Federal Employees: Bivens Claims, 41 FED. B. NEWS & J. 342 (1994); for a more scholarly brief, but similarly brief, overview, see generally Note, *Government Tort Liability*, 111 HARV. L. REV. 2009 (1998).

48. See *Davis v. Passman*, 442 U.S. 228, 234 (1979) (holding that Plaintiff asserted a constitutionally protected right and that damages were an appropriate remedy).

49. *Id.*

50. Non-*Bivens* suits generally will not work for policy-related attacks because the Federal Tort Claims Act bars suits based on the "exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. § 2680(a) (2000). Because this includes any actions that involve "an element of judgment or choice," and are "based on considerations of public policy," the ability to bring non-constitutionally based claims against policymakers has become very narrow—and indeed, explicitly exempts many of the sort of decisions made in administrative law. James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) (quoting *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991)).

51. See *Butz v. Economou*, 438 U.S. 478, 507 (1978) (holding that "federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business").

52. *Id.* at 495.

53. *Id.* at 485.

54. See *id.* at 522 (Rehnquist, J., dissenting) ("The ease with which a constitutional claim may be pleaded . . . where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that."); see also *Federal Tort Claims Act: Hearings on S. 1775 Before the Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. 143–44 (1982) (written statement of Donald J. Devine, Director, Office of Personnel Management) (explaining that an attorney with only rudimentary legal skills can convert any grievance into a constitutional tort and that such complaints are rarely dismissed, thereby

Since the 1980s, however, the Supreme Court has made it very difficult for plaintiffs to win a *Bivens* case. Most recently in 2007, in *Wilkie v. Robbins*,⁵⁵ the Court closed the door on yet another possible form of individual civil liability: The *Bivens* retaliation claim.⁵⁶ Over the past twenty-five years, the Supreme Court cut back on *Bivens* by adopting a vigorous sovereign immunity standard for individual government officials, by permitting Congress to contract around the liability standard, and finally, as in *Wilkie*, by occasionally declining to extend the *Bivens* remedy to new contexts where there are "special factors counseling hesitation."⁵⁷

First, in *Harlow v. Fitzgerald*,⁵⁸ the Court outlined the scope of the qualified immunity from suit that most government officials would hold.⁵⁹ In *Harlow*, the Court held that objective good faith on the part of the defendant was sufficient for a trial court to dismiss a *Bivens* suit⁶⁰—and it did so in a case that could have had real implications for administrative policy. Harlow sued a number of senior advisors to the President alleging that they had conspired to

prolonging anxiety and even impeding defendants' ability to obtain a home mortgage or car loan). For a broader discussion, see Kratzke, *supra* note 39, at 1180–81 (setting forth recommendations of a report prepared for the Administrative Conference of the United States).

55. See *Wilkie v. Robbins*, 127 S. Ct. 2588, 2604–05 (2007) (determining that "any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation").

56. The Court's policy-oriented analysis noted that there are a lot of ways to grieve government officials without making a federal case about it, and underlying its opinion must be some fear about what creating a constitutional retaliation claim might do. See *id.* at 2604 ("[A] *Bivens* action to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations."). For criticism of *Wilkie* by the law professor who argued the case, see generally Lawrence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23.

57. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); see *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68–74 (2001) (outlining some limits on the availability of causes of action claiming unconstitutional actions by federal officials); *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (discussing the ability of Congress to preclude *Bivens* remedies with remedial legislation, and the possibility of special factors counseling hesitation before any further extensions of the remedy). For a doctrinal analysis of these ways out of the *Bivens* remedy, see generally Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251 (1988).

58. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

59. *Id.* at 818–19.

60. See *id.* at 813 ("[P]ublic policy . . . mandates an application of the [good faith] immunity standard that would permit the defeat of insubstantial claims without resort to trial.").

deprive a whistleblower of his job after he testified before Congress on military cost overruns.⁶¹

Second, after *Economou*, the Court permitted Congress to circumvent the *Bivens* standard through legislation:

When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the court's power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling [sic] hesitation before authorizing a new kind of federal litigation.⁶²

Congress eventually responded to the *Economou* invitation with federal legislation making the United States the exclusive defendant in any tort action arising from the conduct of a government employee—with the exception of constitutional torts or in cases specifically authorized by statute.⁶³ The result radically reduced the ability of injureds to hold individual employees accountable. Congress so acted because it concluded, as Learned Hand predicted might happen earlier, that the "erosion of immunity of [f]ederal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire [f]ederal workforce."⁶⁴

61. Indeed, Richard Nixon was an original defendant in the suit. *See id.* at 805 ("Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment . . .").

62. *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *see Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (stating that a *Bivens* action may be defeated "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective").

63. *See Federal Employees Liability Reform and Tort Compensation Act of 1988*, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (codified as amended at 28 U.S.C. § 2679(b)) (enacting such legislation).

64. *Id.* § 2(a)(5), 102 Stat. at 4563. Of course, many observers disagree with Congress. *See GREGORY SISK, LITIGATION WITH THE FEDERAL GOVERNMENT* 395 (4th ed. 2006) ("A number of commentators have argued that there would be substantial advantages in shifting liability for both ordinary and constitutional torts from public employees to the government itself."); Pillard, *supra* note 27, at 66 ("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."); Michael B. Hedrick, Note, *New Life for a Good Idea: Revitalizing Efforts to Replace the Bivens Action with a Statutory Waiver of the Sovereign Immunity of the United States for Constitutional Tort Suits*, 71 GEO. WASH. L. REV. 1055, 1055–56 (2003) (arguing that *Bivens* is inadequate and that Congress should amend the Federal Torts Claims Act and give some teeth to the sort of remedy *Bivens* tries to create); *cf.* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L.

Third, last term's *Wilkie* decision was another example of why courts may decline to find *Bivens* actions appropriate—if they find "special factors counseling hesitation," they may decline to permit *Bivens* plaintiffs who pass the qualified immunity and alternative remedy hurdles to maintain their causes of action. In *Wilkie*, the special factors included the unappealing prospect of thousands of retaliation lawsuits maintained against government officials, but in other cases has included matters of "national security."⁶⁵ The Court found the prospect of policy-related retaliation claims such as these to be unappetizing additions to the federal docket.⁶⁶ In its view:

[A] *Bivens* action to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations. Exercising any governmental authority affecting the value or enjoyment of property interests would fall within the *Bivens* regime⁶⁷

Wilkie underscored the serious doctrinal hurdles to any *Bivens* claim. The Supreme Court almost never rules for a *Bivens* plaintiff, and that has been the case, as a matter of practice, for some twenty-five years. *Bivens* complainants now have a series of difficult hurdles to pass to survive a preemptive motion to dismiss. They must establish a lack of good faith on the part of the defendant, establish that there is no alternative regulatory scheme that might provide them with redress for their injuries, and prove that there are no other "special factors" that, even if bad faith and the lack of an alternative are adequately pled, might cause a court to dismiss a *Bivens* claim anyway. It is unsurprising, in light of

REV. 1575, 1748 (2001) (arguing that *Bivens* gives "Congress the power to reduce, to a limited degree (but *only* a limited degree), constitutionally inspired judicial protections"). This Article will not engage the merits of substitution of the government as the defendant for the individual employee, other than to note that the doctrine of individual responsibility is certainly one with a long history. The Supreme Court suggested that the individual responsibility fiction is jurisprudentially important in *FDIC v. Meyer*, 510 U.S. 471 (1994). In *Meyer*, it held that the "logic" of *Bivens* was rooted in the responsibility of the individual employee, rather than the government as a whole, for the employee's unconstitutional action. *Id.* at 484–85.

65. See Tribe, *supra* note 56, at 65 ("Although the *Bush* Court purported to find . . . a 'special factor[] counseling hesitation,' the real thrust of *Bush* was to expand the class of cases in which congressionally created remedies would be held to preclude *Bivens* recovery" (quoting *Lucas*, 462 U.S. at 380)). Tribe is not an entirely unbiased source. He represented the plaintiff before the Supreme Court. *Id.* at 23–24.

66. As the Court explained, "[H]igh officials require greater protection than those with less complex discretionary responsibilities." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

67. *Wilkie v. Robbins*, 127 S. Ct. 2588, 2604 (2007).

these doctrinal difficulties, that doctrinal and Supreme Court-focused academics see little of interest in the *Bivens* remedy.⁶⁸

And, if aggregate outcomes are any indication, the modern *Bivens* plaintiff does indeed face substantial difficulties. In addition to the difficult immunity barriers presented by these cases, plaintiffs often have a hard time establishing that the official they think is behind the policy proximately caused the harm they claim to have suffered, creating the opportunity to file a quick motion to dismiss on both qualified immunity and standing grounds.⁶⁹

Moreover, the courts have interpreted the qualified immunity that government officials ordinarily enjoy to mean the right to be dismissed prior to the onset of discovery.⁷⁰ And many government officials are entitled to absolute immunity, which leads, of course, to the same result. In some cases, the rendering of an opinion on the legality of a government policy or program might be interpreted as an essentially adjudicative act—and government adjudicators, legislators, and prosecutors are entitled to absolute immunity.⁷¹ Other high-ranking *Bivens* defendants, such as Donald Rumsfeld, have been able to successfully attack the causal link between their supervisory position and the particular harm done to the plaintiff.⁷²

In addition, courts and juries may be leery of imposing personal liability on government officials for carrying out their duties, even if they do so badly.⁷³

68. See *supra* notes 27–44 and accompanying text (describing how although tort suits against administrators were once an important part of administrative law, the constitutional tort doctrine is harsh towards plaintiffs and rarely results in court remedies).

69. The importance of establishing that the defendant caused plaintiff's injury was established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In *Lujan*, the Court stated that "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 560–61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

70. *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982) (noting that one advantage of qualified immunity would be to prevent plaintiffs from "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery").

71. Or so it has been held for decades. See, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871) (stating that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly").

72. See *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 106 (D.D.C. 2007) ("[T]he need for unhesitating and decisive action by military officers, in conjunction with recognition of Congress' constitutionally-vested authority over military affairs, required the judiciary to abstain from inferring *Bivens* remedies against military officials for injuries arising out of, or in the course of, activities incident to military service.").

73. See, e.g., *Kratzke, supra* note 39, at 1150 ("[C]ourts and juries are hostile to imposing personal liability upon a government employee for merely doing his or her job.").

Accordingly, although the United States faces billions of dollars in tort claims every year,⁷⁴ individual government officials have paid damages out of their own pockets much less often. A review of appellate decisions citing *Bivens* issued between January 1, 2004, and August 7, 2006, shows no cases affirming a judgment against federal employees—that is, there were no cases in which a monetary judgment against the defendants was upheld.⁷⁵

To be sure, plaintiffs sometimes won procedural victories, allowing their claims to survive the initial motion to dismiss. However, even these outcomes were rare. Of the 363 cases decided during that year-and-a-half, there were thirteen favorable procedural rulings for the plaintiffs (and no favorable substantive rulings),⁷⁶ three of which I discuss in detail below.

74. As one supervisor in the Department of Justice told Congress: "In fiscal year 2000, Torts Branch attorneys were defending the United States in almost 2900 cases in which over \$23 billion was at stake." *Concerning Reauthorization of the Dep't of Justice, Civil Div.: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Stuart E. Schiffer, Acting Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice), available at 2001 WL 506067.

75. The search was for "'403 U.S. 388' & da(after 1/1/2004) & da(before 8/7/2006)" in Westlaw's "U.S. Court of Appeals Cases" (CTA) database. A search of the courts of appeals database for the term *Bivens* alone brings up 465 cases. The search was "bivens & da(after 1/1/2004) & da(before 8/7/2006)" in Westlaw's CTA database. I also added cases related to West's headnote for "Liabilities of [United States] officers or agents for negligence or misconduct" during the same period, to pick up cases that might have been missed by the citation. This headnote is numbered 393k50, and has been organized under the categories of United States, headnote 393 and Government in General, headnote 393I. The search included all reported cases, including those cases in West Publishing's Federal Appendix. That reporter includes "unpublished" appellate decisions after 2001 from all circuits except the Third, Fifth, and Eleventh. Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 259, 260 (2002). As Brooks observes, "As of late 2001, with the introduction of the Federal Appendix, the concept of the 'unpublished opinion' is no longer a legal fiction—it is fiction, pure and simple. Unpublished opinions are now published in every relevant sense. They are printed in bound volumes, are available on law library shelves, come complete with West Key Numbers, and even have their own citation format: __ F. App'x __." *Id.* at 259–60.

76. See *Pacheco v. Lappin*, 167 F. App'x 562, 565 (7th Cir. 2006) (vacating and remanding a dismissed equal protection claim based on an allegation that the Bureau of Prisons (BOP) refused to admit plaintiff to a prison-run program to treat substance abuse on the ground that he lacked sufficient documentation, while it accepted white prisoners who had even less documentation); *Robbins v. Wilkie*, 433 F.3d 755, 772 (10th Cir. 2006) (affirming denial of Defendants' motion for summary judgment in a claim against federal employees who allegedly extorted a ranch owner in attempt to force owner to grant easement to the Bureau of Land Management), *rev'd*, 127 S. Ct. 2588 (2007); *Crocker v. Wright*, 143 F. App'x 523, 524 (4th Cir. 2005) (finding that a First Amendment claim by a prisoner "amounts to a cognizable injury sufficient to survive the court's review for frivolousness"); *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005) ("The refusal to allow King to obtain a book on computer programming presents a substantial First Amendment issue."); *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103–04 (9th Cir. 2004) (suggesting that a *Bivens* claim against private prison

A number of other authorities have concluded that *Bivens* claims make for a moribund form of law. The Supreme Court did not find for a *Bivens* plaintiff between 1980 and 2004.⁷⁷ In 1996, the D.C. Circuit located evidence that the government had only paid four *Bivens* claimants.⁷⁸ By the early 1990s, DOJ supervisors estimated that plaintiffs obtained judgments awarding damages in a fraction of one percent of *Bivens* cases and received cash in a settlement in less than one percent of all claims.⁷⁹ Scholars have found very few examples of successful judgments before 1995.⁸⁰ And one government official testified that between 1972 and 1985, of the over "12,000 *Bivens* suits filed, only thirty have resulted in judgments on behalf of plaintiffs."⁸¹

Moreover, the actual case of individual, unindemnified liability is exceedingly rare, even rarer than what we have discussed before. If plaintiffs get past the doctrinal hurdles, persuade a jury to find for them, and withstand appeal, most

employees might survive); *Moore v. Hartman*, 388 F.3d 871, 872–73 (D.C. Cir. 2004) (permitting a malicious prosecution case to go forward), *rev'd*, 547 U.S. 250 (2006); *Dale v. Lappin*, 376 F.3d 652, 655–56 (7th Cir. 2004) (concluding that the district court improperly dismissed a *Bivens* case for failure to exhaust administrative remedies, because those remedies might, in fact, have been exhausted); *Magluta v. Samples*, 375 F.3d 1269, 1284 (11th Cir. 2004) (permitting a case to move past the motion to dismiss stage); *Kwai Fun Wong v. United States*, 373 F.3d 952, 978 (9th Cir. 2004) (permitting an immigration-related *Bivens* claim to proceed past the motion to dismiss stage); *Goldstein v. Moatz*, 364 F.3d 205, 220 (4th Cir. 2004) (permitting a malicious prosecution case to proceed past the motion to dismiss stage).

77. See *Kratzke*, *supra* note 39, at 1150 n.295 (reviewing the four *Bivens* cases the Court has decided since then). In 2004, however, the Court held that officers were not entitled to immunity for searches carried out using insufficiently particularized warrants. *Groh v. Ramirez*, 540 U.S. 551, 563–64 (2004).

78. See *Crawford-El v. Britton*, 93 F.3d 813, 838 (D.C. Cir. 1996) (en banc) (Silberman, J., concurring) ("[B]y 1985 only 30 *Bivens* suits out of more than 12,000 resulted in a monetary judgment for the plaintiff at the trial level with only four judgments actually having been paid."), *rev'd*, 523 U.S. 574 (1998). "Obviously, the vast majority of these suits are meritless." *Id.* at 838; see RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1122 (4th ed. 1996) ("The view that constitutional tort actions are less likely to prove meritorious than civil litigation has been confirmed as to both prisoner and nonprisoner actions . . .").

79. *Pillard*, *supra* note 27, at 66 n.6 (citing an interview with the director of the Department of Justice's Constitutional Torts section); see also *SISK*, *supra* note 64, at 354 ("[S]uccessful *Bivens* suits are few in number.").

80. See *Pillard*, *supra* note 27, at 66 n.5 (stating that there were 16 judgments of 10,000 to that date) (citing *Federal Tort Claims: Hearings on H.R. 595 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 15–17 (1983) (statement of J. Paul McGrath, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice) [hereinafter *Hearings on H.R. 595*]).

81. *Rosen*, *supra* note 44, at 343 (citing 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 1 (May 1985)).

federal officials do not have to worry about paying a cent in damages. The government's policy of indemnifying its employees⁸² is most of the reason why, but the widespread purchase of private insurance covers any shortfall in indemnity.

To result in out-of-pocket damages, the action would have to be so lawless that the Department of Justice declined to represent the official in the ensuing civil litigation, and the insurance would have to fail.⁸³ And the federal government provides representation in about 98% of the cases for which representation is requested.⁸⁴ If representation is provided, moreover, the indemnification decision is almost automatic.⁸⁵

Nonetheless, there are thousands of *Bivens* complaints made every year. Why all these lawsuits, given that they are so hard to win?

B. The Constitutional Tort Against Policy

The newest and most innovative breed of tort suits seeks to change government policy. These cases feature newsworthy plaintiffs, sophisticated lawyers, and high-ranking defendants. For example, Jose Padilla, the alleged Al Qaeda detainee, recently sued John Yoo, a well-known law professor, for drafting a legal opinion on the legality of certain interrogation techniques while employed at the Department of Justice.⁸⁶ Padilla is represented by Yale's International Human Rights Clinic.⁸⁷ Former CIA employee Valerie Plame unsuccessfully sued the Vice President, his former Chief of Staff, and a political adviser to the President for outing her as a covert agent.⁸⁸ Plame was represented by pre-eminent Washington privacy lawyer Anne Weissman, and advised by legal luminaries such as

82. See 28 C.F.R. § 50.15(c)(1) (2007) (providing for indemnification when "the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and . . . indemnification is in the interest of the United States").

83. See *id.* § 50.15 (providing for indemnification of federal employees and explaining factors leading to denial of indemnification).

84. Or so Pillard reports. Pillard, *supra* note 27, at 76 n.51.

85. See *id.* at 77 ("As a practical matter, however, indemnification is a virtual certainty."); *id.* at 78 n.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 judgement [sic].").

86. See Complaint ¶ 107, *Padilla v. Yoo*, No. 08-CV-0035 (N.D. Cal. Jan. 4, 2008), available at <http://jurist.law.pitt.edu/pdf/YooComplaint.pdf> (enumerating Padilla's allegations that his constitutional and statutory rights were violated).

87. *Id.*

88. See *Wilson v. Libby*, 498 F. Supp. 2d 74, 100 (D.D.C. 2007) (concluding that Wilson "failed to state a claim upon which relief can be granted with respect to [the] four causes of action asserted directly under the Constitution").

constitutional scholar Erwin Chemerinsky.⁸⁹ The American Civil Liberties Union (ACLU) has filed suits over the extraordinary renditions policy under *Bivens* and the Alien Tort Statute on behalf of a variety of detainees;⁹⁰ others have received pro bono assistance from a litany of large law firms.

It is too early to report on precisely how these high-profile suits will fare in every particular, but it is not too early to predict their ultimate outcome. Although they may survive a preliminary motion or two or get a reported decision on appeal, their eventual outcome is in little doubt. These suits almost never succeed.

Accordingly, the new, high-profile *Bivens* suit offers the puzzle of represented, often smart plaintiffs filing unlikely claims. Why is this the pattern we see?

It isn't easy to generalize, but it appears that in the near term the limited legal alternatives to individuals wrapped up in the war on terror make the long-shot *Bivens* suit comparatively attractive. More generally, in these high-profile cases, winning the lawsuit is less precisely the point than is practicing increasingly personal politics while calling attention to a policy and a plight.

Many of these suits look quite implausible. With the *Yoo* suit, in which the plaintiff singled out a particular government lawyer instead of the interrogators and guards who were detaining him, the *Wall Street Journal* editorial page suspected that the point was publicity, rather than liability.⁹¹ Law professors such as Orin Kerr,⁹² Roger Alford,⁹³ and Jonathan

89. See *id.* at 77 (listing Anne Weismann as counsel); see also Citizens for Responsibility and Ethics in Washington, <http://citizensforethics.org/about/staff> (last visited Oct. 10, 2008) (providing biographical information about Weismann) (on file with the Washington and Lee Law Review); Matt Apuzzo, *CIA Leak Case Moves on to Civil Court*, http://www.usatoday.com/news/washington/2007-03-08-3650830860_x.htm, Mar. 8, 2007 (describing Chemerinsky as "Plame's lawyer") (on file with the Washington and Lee Law Review).

90. See Complaint at 25, *El Masri v. Tenet*, No. 1:05-CV-1417 (E.D. Va. Dec. 6, 2005), available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf (requesting compensatory and punitive damages for the alleged abduction of Khaled El-Masri).

91. Editorial, *Yale and the Terrorist*, WALL ST. J., Jan. 10, 2008, at A14, available at http://online.wsj.com/article/SB119992441375879407.html?mod=opinion_main_commentaries ("What we really have here is less a tort claim than a political stunt intended to intimidate government officials. Nothing in the claim will change Padilla's future, and the suit asks for only \$1 in damages, plus legal fees.")

92. See *Yale Law Clinic Sues Yale Law Graduate for Bad Lawyering*, Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1199480362.shtml> (Jan. 4, 2008, 16:59 EST) ("Based on the complaint, I don't think Yale Law School ends up looking very good on either side of this one.") (on file with the Washington and Lee Law Review).

93. See *Padilla v. Yoo and the Bivens National Security Exception*, Posting of Roger Alford to Opinio Juris, <http://opiniojuris.org/2008/01/14/padilla-v-yoo-and-the-bivens-national-security-exception> (Jan. 14, 2008, 18:14 EDT) ("[A]n extensive post . . . makes it sound like

Adler⁹⁴ adjudged the merits of the suit to be, on their face, unpromising. The *Plame* suit was directed more directly at those who had done her ill, but she did not, at least initially, sue the federal government official who admitted being the one to leak her identity to the columnist who first reported it.⁹⁵

But if these suits are long shots on liability and of limited nuisance value, it is nonetheless unlikely that they serve no purpose. They are brought by relatively sophisticated and often well-advised plaintiffs. We have, therefore, something of a puzzle in the new prominence of the *Bivens* policy-related claims. They do not work, but they are increasingly prominent. Why is this so?

In my view, the prominence itself explains much of the phenomenon. These lawsuits are often accompanied by publicity campaigns and press releases. Sometimes they are brought by plaintiffs, as is the case with war on terror detainees, who do not have many alternatives. It is the prospect of at least a little, and perhaps a lot of, fanfare, along with the possibility of a lottery-win-like placement with a judge willing to contemplate discovery, that best explains them.

These briefly viable cases can attract press attention and make a public point. Yoo has angrily gone on record after being sued as saying that these cases are used "to harass the men and women in our government, force the revelation of valuable intelligence and press novel theories that have failed at the ballot box and before the [P]resident and Congress," which is the sort of reaction that would please any impact litigator.⁹⁶ *Plame's* case was also the stuff of headlines.⁹⁷

And they are increasingly common, especially in light of the difficulties war on terror claimants have had in other fora. In *Celikogus v. Rumsfeld*,⁹⁸

Padilla's case against John Yoo is much easier than it is. It's not an easy case.") (on file with the Washington and Lee Law Review).

94. See *Padilla v. Yoo*, Posting of Jonathan Adler to The Volokh Conspiracy, <http://volokh.com/posts/1199480622.shtml> (Jan. 4, 2008, 16:03 EST) ("I would be surprised were this suit to get all that far.") (on file with the Washington and Lee Law Review).

95. See Complaint, *Plame v. Libby*, No. 1:06-CV-01258 (D.D.C. July 13, 2006), available at <http://www2.nationalreview.com/pdf/WilsonvLibby.pdf> (not naming Armitage as a defendant); Robert D. Novak, *Armitage's Leak*, WASH. POST, Sept. 14, 2006, at A21, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/13/AR2006091301572.html> (acknowledging that Richard Armitage, then the Deputy Secretary of State, was the source of the leak of *Plame's* covert identity).

96. John Yoo, *Terror Suspects are Waging 'Lawfare' on U.S.*, PHILA. INQUIRER, Jan. 16, 2008, at A16.

97. See *supra* note 2 and accompanying text (providing a *New York Times* story on the topic).

98. See Amended Complaint at 68–69, *Celikogus v. Rumsfeld*, No. 06-CV-1996 (D.D.C.

five former Guantánamo detainees sought damages and declaratory relief against Secretary of Defense Donald Rumsfeld and the former chairman of the Joint Chiefs of Staff.⁹⁹ Nine other detainees sued Rumsfeld, among others.¹⁰⁰ In *Arar v. Ashcroft*,¹⁰¹ the plaintiff sued most of the high-ranking officials in the current administration.¹⁰² In *Islamic American Relief Agency (IARA) v. Unidentified FBI Agents*,¹⁰³ the plaintiffs sued the Secretary of the Treasury and Attorney General based on the plaintiffs' designation as terrorists.¹⁰⁴ Other, non-war on terror plaintiffs have recently filed their own high-profile suits. In *Hatfill v. Ashcroft*,¹⁰⁵ the government labeled Hatfill, a former NIH scientist and bio-weapons expert, a "person of interest" in the wake of anthrax attacks during 2001, and allegedly revealed this to the media.¹⁰⁶ Hatfill responded by suing two Attorneys General.¹⁰⁷

Mar. 21, 2007), available at http://ccrjustice.org/files/CELIKOGUS_AmendComplaint.pdf (requesting relief).

99. *Id.*; see *Celikogus v. Rumsfeld*, <http://ccrjustice.org/ourcases/current-cases/celikogus-us-v.-rumsfeld> (last visited Oct. 10, 2008) (summarizing the basic facts of this action) (on file with the Washington and Lee Law Review).

100. *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 104 (D.D.C. 2007) (precluding a *Bivens* suit based on "special factors counseling hesitation" in the absence of affirmative action by Congress—military affairs, foreign relations, and national security are constitutionally committed to the political branches of government).

101. See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 279 (E.D.N.Y. 2006) (finding Arar's claims foreclosed under the "special factors counseling hesitation" exception to *Bivens*).

102. See *id.* at 250 (identifying various defendants including John Ashcroft, former Attorney General of the United States; Larry D. Thompson, former Acting Deputy Attorney General; Tom Ridge, former Secretary for Homeland Security; and James W. Ziglar, former Commissioner for Immigration and Naturalization Services).

103. See *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 55, 60 (D.D.C. 2005) (granting defendants' motions to dismiss).

104. See *id.* at 40 (stating that the "Office of Foreign Assets Control . . . designated the [Plaintiffs' organization] as a Specially Designated Global Terrorist . . . and blocked [their] assets").

105. See *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 121 (D.D.C. 2005) (holding that Hatfill stated a "viable claim for violation of his Fifth Amendment rights" but that he fails on the *Bivens* action "because the allegations regarding this claim must be pursued solely pursuant to the Privacy Act").

106. See Complaint ¶ 5, *Hatfill v. Ashcroft*, No. 03-CV-1793 (D.D.C. Nov. 18, 2005), available at 2005 WL 3439122 ("Indeed, after the defendants' leaks put Dr. Hatfill at the center of the media's coverage of the investigation, defendant Ashcroft poured gasoline on the fire by going on national television and naming Dr. Hatfill a 'person of interest' in the investigation.").

107. See *id.* ¶ 9 (explaining that "Defendants Ashcroft and Gonzales were, in their respective turns, the highest-ranking law enforcement officers in the United States" during the time period relevant to Hatfill's allegations).

Impact litigation groups like the ACLU, by filing suit against extraordinary rendition policies,¹⁰⁸ have given the media a new news hook to cover these oft-covered stories again. The ACLU attached to one of its complaints against, among others, the Attorney General, Deputy Attorney General, FBI Director, and Secretary of the Department of Homeland Security "a number of articles in the mainstream press recounting both the incidents of this particular case and the extraordinary rendition program more broadly," as the court noted in its opinion dismissing the claims.¹⁰⁹

These litigants may not expect the courts to award them damages as much as they hope to remind the public that senior government officials have blessed an extraordinary rendition program, written opinions on tough interrogation techniques, or outed a covert agent. Other disputants have sued senior officials for failing to react quickly during a crisis.¹¹⁰ After a judge suggested that *Bivens* claims against high-ranking officials might be the appropriate response to the actions of high-ranking government officials after Hurricane Katrina,¹¹¹ a group of New Orleans plaintiffs filed suit against former FEMA Director Michael Brown.¹¹²

Perhaps these sorts of responses, and the public debate about the underlying issues that they might generate, are part of the point of the lawsuits. The *New York Times* has speculated that the detention facilities at Guantánamo Bay, for example, the home of many of these suits, has become a cultural "shorthand for hopeless imprisonment and sweltering isolation"¹¹³—a conclusion that the attention caused by the lawsuits has, at least in part, prompted.

These suits are more symbolic than likely to succeed, in that they rely not on the verdict, but on the ability to make a claim against a policy-maker.¹¹⁴

108. See *supra* note 90 (providing an example of one such lawsuit).

109. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 257 (E.D.N.Y. 2006).

110. See *Freeman v. U.S. Dep't of Homeland Sec.*, Nos. 06-CV-4846, 06-CV-5689, 06-CV-5696, 2007 WL 1296206, at *5 n.4 (E.D. La. Apr. 30, 2007) (filing suit for the aftermath of Hurricane Katrina).

111. See *id.* ("The instant motion does not challenge the *Bivens* claims brought against the individual defendants in their personal or non-official capacities However, the United States does not become vicariously liable for the constitutional torts of its officials because the United States has not waived sovereign immunity for such actions." (citing *Brown v. United States*, 653 F.2d 196, 199 (5th Cir. 1981))).

112. See Complaint ¶ 3, *Freeman v. U.S. Dep't of Homeland Sec.*, No. 06-CV-4846 (E.D. La. Oct. 3, 2007), available at 2007 WL 4544573 (adding Michael Brown as a defendant).

113. William Glaberson, *Guantanamo, Evil and Zany in Pop Culture*, N.Y. TIMES, Feb. 18 2008, at A1, available at <http://www.nytimes.com/2008/02/18/us/18gitmo.html?ex=1204002000&en=1f353a9baf56fe37&ei=5070&emc=eta1>.

114. For some of the classic formulations of the way that expressive laws work, see

Indeed, the symbolic claims made by these plaintiffs probably count for most of the reason for the suit. The personal liability of high officials in this view is a paean to the supremacy of the law over its implementers even though those implementers will not pay for the injuries they have inflicted.¹¹⁵

Moreover, these suits offer the highly unlikely, but undoubtedly tempting, prospect of discovery—possibly even endless discovery. A model for today's policy-tort plaintiffs might be the Indian Trust¹¹⁶ or "Filegate" litigation.¹¹⁷ In the Filegate litigation, a conservative impact litigation group filed suit against the Clinton Administration over the appearance of FBI background check files on Republican political appointees in the White House.¹¹⁸ Establishing liability in the dispute never seemed to be the point of the litigation, which lasted for seven years without a resolution, and included 1,434 entries on the docket sheet, including entries long after the Clinton administration had left office.¹¹⁹ During that period the plaintiffs were able to get a judge to authorize extensive discovery, including depositions of high-profile government officials.¹²⁰ The news media responded. As the *Washington Post* reported:

generally Cooter, *supra* note 22, Lessig, *supra* note 22, and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

115. Expressive laws are frequently under-enforced. See Scott, *supra* note 23, at 1603 ("[A] legal ban on smoking in public places or a 'pooper-scooper' law can motivate citizens not to smoke in certain areas or to clean up after their dogs even where the state has no resources invested in direct (or first order) enforcement.").

116. See generally Indian Trust Home Page, <http://www.indiantrust.com> (last visited Oct. 13, 2008) (on file with the Washington and Lee Law Review).

117. See *Alexander v. FBI*, 194 F.R.D. 305, 308 (D.D.C. 2000) (addressing "what has become popularly known as 'Filegate'"). Other examples, of course, exist; note the prominence of the claims made by Mark Hatfill against the government officials who thought that he, a government scientist, was behind the anthrax exposures of 2001. For a recent summary of the case, see Eric Lichtblau, *Reporter Held in Contempt in Anthrax Case*, N.Y. TIMES, Feb. 20, 2008, at A15, available at <http://www.nytimes.com/2008/02/20/us/20anthrax.html?ei=5070&en=b0faf7da79a81eef&ex=1204174800&emc=eta1&pagewanted=print> (reporting, among other things, "'There's not a scintilla of evidence to suggest Dr. Hatfill had anything to do with it,' the judge said, yet the public notoriety has 'destroyed his life'").

118. See *Alexander*, 194 F.R.D. at 308 ("Plaintiffs allege that their privacy interests were violated when the FBI improperly handed over to the White House hundreds of FBI files of former political appointees and government employees from the Reagan and Bush Administrations.").

119. See *Clinton-Gore White House E-Mail Ordered Searched by Federal Judge*, JUDICIAL WATCH, <https://www.judicialwatch.org/clinton-gore-white-house-e-mail-ordered-searched-federal-judge> (last visited Oct. 24, 2008) (stating in 2002 that "a federal judge ordered . . . that Clinton White House email be searched for email related to the FBI files (Filegate) scandal") (on file with the Washington and Lee Law Review).

120. See David Segal, *Pursuing Clinton Suits Him Just Fine*, WASH. POST, May 30, 1998, at A01, available at <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/klayman053098.htm> (stating that Larry Klayman of Judicial Watch has taken "sworn

[O]pposing lawyers in the FBI file case have complained that their clients have been dragooned into appearing before [plaintiff's] whirring video camera for the flimsiest of reasons. [White House advisor Paul] Begala, for instance, was subpoenaed after joking in a speech before a business group that "[t]here are good Republicans out there, which is not something I would have known just from reading their FBI files. You know, I mean, 'I was joking, your honor.'"¹²¹

Similarly, in the Indian Trust litigation plaintiffs were able to obtain a series of increasingly vitriolic contempt orders and truly extensive discovery from, to the extent of some supervision over, the Department of the Interior.¹²² At one point they obtained an "order requiring disconnection of virtually all Interior computers from the internet."¹²³ These sorts of orders were being issued over a decade-long stretch of litigation.¹²⁴ As the D.C. Circuit finally concluded, after twelve appeals from interlocutory orders in the case, "in case after case the district court granted extensive relief against Interior, and in case after case we reversed, even under highly deferential standards of review."¹²⁵ There are over 3,500 entries on the case's docket, ten circuit judges have gotten involved in appeals, and one recent opinion compared the case to Charles Dickens' *Bleak House* in that "[t]he 'suit has, in the course of time, become so complicated' that 'no two lawyers can talk about it for five minutes without coming to a total disagreement as to all premises.'"¹²⁶ Here, too, counsel for the plaintiffs were presumably trying to establish liability and calculate damages at some point, but yet they seemed to be in no hurry to do so.¹²⁷

One generalizes from these two admittedly unique examples to the new sorts of *Bivens* litigation cautiously but, I think, fruitfully in that they represent a different sort of victory for would-be plaintiffs—the victory of lengthy discovery, further press coverage, and an opportunity to directly confront high-ranking defendants.

depositions of several Pentagon officials," and that Klayman has "become a kind of permanent, privately funded independent counsel, pioneering—Democrats would say abusing—the use of civil lawsuits as a political weapon against the administration").

121. *Id.*

122. For an overview, see generally *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006).

123. *Id.* at 331.

124. See *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 103 (D.D.C. 2008) ("This case has been in this courthouse for over eleven years.").

125. *Cobell*, 455 F.3d at 335.

126. *Kempthorne*, 532 F. Supp. 2d at 103 (quoting CHARLES DICKENS, *BLEAK HOUSE* 8 (George Ford & Sylvère Monod eds., Norton & Company 1977) (1853)).

127. See *id.* (concluding that "adequate accounting of the IIM trust" still needs to take place).

In this way these cases are a form of impact litigation.¹²⁸ As institutional reform litigation—cases that feature court takeovers of government institutions like schools or prisons—fades into the background and becomes doctrinally more difficult to pursue,¹²⁹ the clean complaint against a high-profile government defendant on a high-profile issue starts to seem more attractive.

Indeed, these suits are in some ways inheriting the mantel of institutional reform litigation, which led to a reconceptualization of the nature of judging and lawyering. Institutional reform litigation, posited by Abram Chayes and others, empowered the judge, focused on the remedy, not liability, and created a forward-looking relationship involving both the court and the litigants, rather than a backward-looking resolution of a dispute between litigants by a court.¹³⁰ In Chayes's view, the long-running institutional reform suit also changed the hierarchical relationship between courts themselves, privileging the trial judge who oversaw the long running cases over the appellate judges who rarely got a chance to weigh in.¹³¹ Others noted the importance of lawyers in these cases.¹³² Moreover, the legal networks created—from case to case, by repeat players in

128. See Antoinette S. Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice Skills Training*, 7 CLINICAL L. REV. 307, 319 (2001) (defining impact litigation as that which has a "broader impact than the individual served").

129. For an overview of the perceived decline of institutional reform suits, and a case for their perceived relevance, see generally David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2004).

130. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) [hereinafter Chayes, *The Role of the Judge*] (describing these basic characteristics of the new public law theory of civil adjudication); see also Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982) [hereinafter Chayes, *Foreword*] ("[T]he temporal orientation of the lawsuit is prospective rather than historical. . . . [Also,] because the relief sought looks to the future and is corrective rather than compensatory [Additionally,] prospective relief implies continuing judicial involvement.").

131. See Chayes, *The Role of the Judge*, *supra* note 130, at 1284 ("Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.").

132. See, e.g., ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 116–19 (2003) (exploring the irony of a democracy delegating policy decisions to judges); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2031 (1999) (book review) ("[L]aw reform by litigation 'depends on resources, and resources for rights litigation depend on a support structure of rights-advocacy lawyers, rights-advocacy organizations, and sources of financing.'" (quoting CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 11, 18 (1998))).

the system—verged on something of a shadow method of administration of government institutions.¹³³

The high-profile policy-directed tort suit is much less likely to make this sort of impact. Nonetheless, some of the purposes of this sort of litigation are similar to the purposes espoused by the institutional reform lawyers of an earlier era.

And so, perhaps, we can think of these suits as an alternative form of administration as well. The suits certainly seek to constrain government officials, and if they do not often succeed in that, they do garner attention, which may, ultimately, generate political coalitions to provide the relief that doctrine does not.

C. *The Slightly Successful Law Enforcement Suit*

Although policy-related tort suits against high government officials are particularly interesting and current, those suits are not the only kind. The most likely *Bivens* winners parallel the most likely forms of liability under § 1983: excessive use of force and claims of unconstitutional prison conditions.¹³⁴ *Bivens* itself featured claims of an unconstitutional search of the plaintiff's home.¹³⁵

Sometimes these law enforcement suits are simply about bad behavior by federal law enforcement officials; consider *Limone v. Condon*,¹³⁶ one of the few cases where an appellate court awarded the plaintiffs a procedural victory.¹³⁷ The plaintiffs in that case alleged that an FBI agent and a Boston detective framed three people, assisted Massachusetts in wrongly convicting them on a charge of first-degree murder, participated in a cover-up, and "allowed the three

133. See Zaring, *supra* note 129, at 1015 ("The repeat-playing litigators, parties, and experts who participate in this network facilitate the adoption of common standards by preferring familiar remedies, by valuing interoperability between cases, and by succumbing to the inertial momentum that this can create.").

134. Indeed, the Supreme Court has drawn explicit analogies between *Bivens* and § 1983. See, e.g., *Carlson v. Green*, 446 U.S. 14, 22 (1980) (noting that punitive damages can be had in both *Bivens* and § 1983 actions).

135. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (finding that a federal remedy exists when federal law enforcement agents conduct unlawful searches and arrests in violation of the Fourth Amendment).

136. See *Limone v. Condon*, 372 F.3d 39, 51–52 (1st Cir. 2004) (holding that "when a party who has the right to bring an interlocutory appeal on one issue attempts simultaneously to raise a second issue that ordinarily would be barred . . . [the court] will not exercise appellate jurisdiction over the pendent issue unless one of [certain] criteria is satisfied").

137. See *id.* at 52 (declining defendants' request to exercise pendant jurisdiction).

innocent men to languish in prison for years."¹³⁸ The First Circuit held that "deliberately fabricating evidence and framing individuals for crimes they did not commit" would, if proved, warrant liability.¹³⁹ In the subsequent trial the court found the defendants liable for \$102 million, the largest award ever for such a case and one that is being appealed.¹⁴⁰

In other cases particularly egregious searches or arrests might be challenged through the *Bivens* format.¹⁴¹ For example, in *Iqbal v. Hasty*¹⁴² a Muslim Pakistani pretrial detainee launched a prison conditions suit challenging his separation from the general prison population.¹⁴³ Iqbal alleged that he and other "high interest" prisoners were confined in their cells for twenty-three hours each day; restricted to non-contact visits; required to have handcuffs, leg irons, and four-officer escorts whenever they were outside of their cells; monitored in their cells with video cameras; and subjected to a communications blackout for several weeks.¹⁴⁴ Iqbal also alleged that the government treated all Muslim or Middle Eastern prisoners this way.¹⁴⁵ He sued his jailors and higher-ups in the Justice Department, including the

138. *Id.* at 43.

139. *Id.* at 45; *see also id.* at 44 (finding that such circumstances would be "easy pickings" for liability).

140. The court did not, however, find the defendants liable on *Bivens* grounds. *See* *Limone v. United States*, 497 F. Supp. 2d 143, 233–34 (D. Mass. 2007) (finding the FBI liable on a theory of "negligent supervision"); Pam Belluck, *U.S. Must Pay \$101.8 Million for Role in False Convictions*, N.Y. TIMES, July 27, 2007, at A19, available at [http://www.nytimes.com/2007/07/27/us/27mob.html&OQ=rQ3D1Q26refQ3Dus&OP=1c060eacQ2FQ27Q22Q3FtQ27TFQ20o!FFQ5EGQ27GQ3DQ3D3Q27Q3D3Q27G3Q27 soQ27G3IFtQ2ASQ5EIQ3C](http://www.nytimes.com/login?URI=http://www.nytimes.com/2007/07/27/us/27mob.html&OQ=rQ3D1Q26refQ3Dus&OP=1c060eacQ2FQ27Q22Q3FtQ27TFQ20o!FFQ5EGQ27GQ3DQ3D3Q27Q3D3Q27G3Q27 soQ27G3IFtQ2ASQ5EIQ3C) (reporting on the figure awarded).

141. The ACLU often files such suits. The ACLU of Florida filed such a suit in 2003, for example. *See* Complaint ¶ 1, *Lopez v. United States*, No. 03-CIV-21793 (S.D. Fla. Nov. 6, 2003), available at <http://www.aclufl.org/pdfs/Legal%20PDFs/Lopez%20amended%20complaint.pdf> (bringing a claim arising "from an illegal detention and intrusive body search conducted on the Plaintiff . . . by United States Customs Officials at Miami International Airport"). Additionally, the ACLU National Capital Area challenged the arrest of a videotaper of a demonstration through *Bivens*. *See* Complaint ¶ 1, *Okpaku v. Perry*, No. 1:03-CV-01388-HHK (D.D.C. June 26, 2003), available at <http://www.aclu-nca.org/pdf/JohnDoeVideotapingComplaintforWeb.pdf> (bringing a *Bivens* claim against a park police officer after he arrested the plaintiff "for videotaping the officer's interactions with a group of young people").

142. *See Iqbal v. Hasty*, 490 F.3d 143, 177 (2d Cir. 2007) (affirming "the denial of the Defendants' motions to dismiss all of the Plaintiff's claims, except for the claim of a violation of the right to procedural due process," on which denial was reversed).

143. *See id.* at 148 (considering, on appeal: "[C]laims concerning the Plaintiff's separation from the general prison population and confinement thereafter").

144. *Id.*

145. *See id.* at 148–50 (listing the various harms allegedly inflicted upon "thousands of Arab Muslim men as part of its investigation into the events of 9/11").

Attorney General.¹⁴⁶ The Second Circuit, though it did "fully recognize the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attack," could not overcome his "right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination."¹⁴⁷ The Supreme Court granted certiorari, and, as of this writing, has not decided the case.

These kinds of suits may be the suits most likely to result in successful litigation. Of appellate decisions citing *Bivens* issued between January 1, 2004 and August 7, 2006,¹⁴⁸ the only procedural victories that were followed by favorable substantive outcomes were law enforcement tort cases. In *Groh v. Ramirez*,¹⁴⁹ for example, the Supreme Court held that qualified immunity was not available to federal officers who relied upon facially invalid warrants to conduct searches.¹⁵⁰ The subsequent trial on the liability of the defendants is, as of this writing, still pending.¹⁵¹ In *Manning v. Miller*,¹⁵² the Seventh Circuit held that FBI agents who framed a former FBI informant for kidnapping and murder would also be unentitled to qualified immunity.¹⁵³ A jury subsequently awarded the plaintiffs \$6.5 million in damages; that judgment, however, was reversed in its entirety by the trial court.¹⁵⁴ And finally, *Limone v. Condon*, the

146. See *id.* at 143 (listing all of the named defendants).

147. *Id.* at 159.

148. See *supra* note 75 and accompanying text (describing my review of *Bivens* cases in this date range).

149. See *Groh v. Ramirez*, 540 U.S. 551, 565 (2004) (determining that a warrant was so deficient that officers could not have reasonably presumed it to be valid).

150. See *id.* at 563 (concluding that in such circumstances "a constitutional violation occurred" and defendants could not avail themselves of qualified immunity).

151. See Pretrial Brief at 17, *Ramirez v. Groh*, No. 99-CV-0017 (D. Mont. Apr. 24, 2006), available at 2006 WL 1497719 (certifying service of Ramirez's pretrial brief); Trial Brief at 25, *Ramirez v. Groh*, No. 99-CV-0017 (D. Mont. Apr. 21, 2006), available at 2006 WL 1497815 (certifying service of Groh's trial brief).

152. See *Manning v. Miller*, 355 F.3d 1028, 1034 (7th Cir. 2004) (holding that "investigators who withhold exculpatory evidence from defendants violate the defendant's constitutional due process right," regardless of the nature of the evidence withheld).

153. See *id.* at 1035 ("Because Manning is able to show that he is asserting a violation of a constitutional right and that the right was clearly established at that time, Agents Buchan and Miller cannot prevail on their qualified immunity claim.").

154. See *Manning v. Miller*, No. 02-CV-372, 2006 WL 3825043, at *9 (N.D. Ill. Dec. 26, 2006) (vacating the judgment against the defendants).

Boston FBI case, has already been discussed.¹⁵⁵ However, of these thirteen appellate victories, none affirmed money judgments against defendants.¹⁵⁶

In sum, thousands of *Bivens* plaintiffs file law enforcement suits every year.¹⁵⁷ The law enforcement tort is a traditional kind of *Bivens* suit, but it is not much more successful than the other kinds.

D. The Suit of Last Resort

The final way that the *Bivens* tort suit is used is as a cause of action of last—or often incorrect—resort. Because the Constitution is a broadly worded document, guaranteeing "equal protection,"¹⁵⁸ "due process,"¹⁵⁹ and other lofty but not carefully-defined terms, *Bivens* is a last resort for angry pro se litigants and is often pled by mistake in employment discrimination cases. Those sorts of claims comprise the majority of *Bivens* claims filed today.

But interspersed among the wrongheaded, and probably comprising less than ten percent of all *Bivens* claims, are challenges to government policies that the plaintiffs, even if represented by counsel, have not quite figured out how to fashion as some other form of administrative relief. These cases also suggest that individual liability is a final option for those aggrieved by government action but unsure how to proceed against it.

Of recent note in the District of Columbia are represented suits by a Vietnam veterans group alleging a cover-up of exposure to toxic materials by a variety of senior government officials¹⁶⁰ and a claim by an anti-regulation group that the Congressional creation of an accounting standards oversight board in the wake of the bankruptcy of Enron and WorldCom was unconstitutional.¹⁶¹ In this sense, the tort suit against the individual government official is a fail-

155. For this discussion, see *supra* notes 136–40 and accompanying text.

156. See *supra* note 75 and accompanying text (elaborating on the research methodology that netted the thirteen appellate victories described).

157. See *supra* note 39 and accompanying text (providing annual *Bivens* claim statistics).

158. U.S. CONST. amend. XIV, § 1.

159. *Id.*; U.S. CONST. amend. V.

160. See Complaint ¶ 2, *Vietnam Veterans of Am. v. McNamara*, No. 02-CV-2123 (D.D.C. Oct. 29, 2002), available at 2002 WL 32153429 ("Since at least 1962, Defendants and their predecessors have acted, individually and in concert, to conceal the true nature of, and potential for, adverse health effects caused by military testing of biological and chemical warfare agents from Plaintiffs and the public.").

161. See Complaint ¶ 95, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 06-CV-00217 (D.D.C. Feb. 7, 2006), available at 2006 WL 316852 ("By virtue of the grant of wide-ranging authority to the Board, the Act improperly and unconstitutionally delegates legislative power to an entity outside the Legislative Branch.").

safe—to be sure, a fail-safe with a very high noise level, but a cause of action of last resort that can be adapted to fit a large number of factual situations, as it has been left broadly undefined, if doctrinally limited, by the courts.

For a sense of what is going on in the most common form of constitutional tort litigation, only a review of complaints will do. Because comprehensive data is not easy to come by,¹⁶² an examination of 200 complaints raising *Bivens* claims, filed between October 27, 2004 and August 7, 2006,¹⁶³ provides a picture of the sort of allegations that plaintiffs were making in them.¹⁶⁴ One hundred and one of the *Bivens* complainants during this period were pro se, with eighty-seven having representation, and the remainder being non-*Bivens* complainants. Most of the complaints made straightforward constitutional tort allegations regarding illegal searches, unconstitutional prison conditions, malicious prosecutions, immigration violations, and employment discrimination. And given the number of poorly drafted, implausible complaints, it is not hard to feel some sympathy for the Seventh Circuit's unhappy view that "[t]he civil damages suit is worthless, especially if the victim of oppression is a social misfit or an unsavory character."¹⁶⁵

However, plaintiffs have not stopped trying to sue individual federal officials for implementing allegedly illegal policies, even in these low-profile and more random kinds of cases. In thirteen of the 200 complaints I examined, policy-related allegations were made, and I review them here to give a sense of the remaining kinds of claims that are made in constitutional tort cases that might pique interest.¹⁶⁶ In showing this, I want to suggest that even within the great

162. Eisenberg and Schwab concluded that complaint-based analyses were challenging in their earlier study of civil rights claims against individual government defendants because of the way these records were kept; their caution certainly applies in this case. See Theodore Eisenberg & Stewart J. Schwab, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 726 (1988) ("Limited to courthouse records . . . we employ more pedestrian measures of success.").

163. See *supra* note 75 and accompanying text (describing my review of *Bivens* cases in this date range).

164. I discarded duplicate complaints from my survey and did not include complaints with the term *Bivens* in them that did not represent individual liability awards.

165. *Littleton v. Berbling*, 468 F.2d 390, 413 (7th Cir. 1971) (quoting Charles D. Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 434 (1960)), *vacated*, 414 U.S. 514 (1974).

166. Though in two of these cases, the policy attacked was one promulgated by state or local officials. See Complaint ¶ 8, *Pope v. Curry*, No. 05-CV-01264 (N.D. Ala. June 9, 2005), available at 2005 WL 1555011 (challenging prison strip search policy); Complaint ¶ 54, *Zahler v. Bd. of Trs. of the Yakima County Library*, No. 05-CV-3035 (E.D. Wash. Apr. 1, 2005), available at 2005 WL 975853 (challenging local law library access policy).

ocean of random *Bivens* complaints there is a kind of administrative law—or, at least, a petition process styled as a court case.

Of the represented plaintiffs, a number of claimants brought war on terror-related claims. Three cases presented challenges to the government's detention policies for non-citizens after 9/11.¹⁶⁷ Another case challenged the policies of federal and local police officers regarding demonstrations in the capitol.¹⁶⁸ Another case challenged the government's power to freeze the assets of targets that it suspected might be providing financial support to terrorists.¹⁶⁹ A class action was filed against "the Bush Administration's secret spying program."¹⁷⁰

Other plaintiffs challenged federal drug policy. The Northern Lights Church challenged the application of federal drug laws to religious institutions,¹⁷¹ in light of the Religious Freedom Restoration Act,¹⁷² and *Sterner v. DEA*¹⁷³ presented a

167. See Complaint for Declaratory Relief and Damages ¶ 181, *Sabber v. Karpinski*, No. 05-CV-654-23 (D.S.C. Mar. 1, 2005), available at 2005 WL 918561 (alleging that the commander of the military unit in charge of Abu Ghraib prison in Iraq violated the Due Process Clause of the Fifth Amendment to the Constitution); Complaint for Declaratory Relief and Damages ¶ 182, *Ali v. Rumsfeld*, No. 05-CV-1201 (N.D. Ill. Mar. 1, 2005), available at 2005 WL 922428 (alleging that Defense Secretary Donald Rumsfeld "had effective control over all personnel within those detention facilities who carried out, authorized or allowed the widespread and systematic torture or other cruel, inhuman or degrading treatment of detainees"); Complaint ¶ 186, *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006) (No. 04-CV-01864), available at 2004 WL 2878175 ("Over the course of an arbitrary and baseless incarceration for more than two years, Defendants inflicted cruel and unusual punishment on Plaintiffs.").

168. Third Amended Complaint for Damages and Injunctive Relief ¶ 2, *Chang v. United States*, 246 F.R.D. 372 (D.D.C. 2007) (No. 02-CV-0210), 2005 WL 3499999 (seeking "injunctive and declaratory relief to protect the Plaintiffs and the public from a policy, custom and/or practice of arresting journalists, bystanders, and observers who are caught within trap-and-arrest zones during demonstrations").

169. See Complaint ¶ 53, *IARA-USA v. Unidentified FBI Agents*, 477 F.3d 728 (D.C. Cir. 2007) (No. 04-CV-02264), 2004 WL 3633839 (alleging that the FBI "seized IARA-USA's assets without a warrant and without the required level of individualized suspicion, in violation of the Fourth Amendment to the United States Constitution").

170. Class Action Complaint/Demand for Jury Trial ¶ 1, *Shubert v. Bush*, No. 06-CV-2282 (E.D.N.Y. May 17, 2006), 2006 WL 1783595.

171. See Complaint for Violation of Civil Rights and for Injunctive Relief ¶ 14, *N. Lights Church v. United States*, No. 06-CV-00514 (E.D. Cal. Apr. 28, 2006), available at 2006 WL 1469127 ("The Defendant, by prosecuting one of the church's members, has put the congregation on notice that its practice of using marijuana in church sponsored rituals will subject other members of the church to investigation, arrest, prosecution and imprisonment.").

172. See Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C.A. § 2000bb (West 2000)) (providing, inter alia, "a claim or defense to persons whose religious exercise is substantially burdened by government").

173. See *Sterner v. DEA*, 467 F. Supp. 2d 1017, 1040 (S.D. Cal. 2006) (granting Defendant's motion for summary judgment regarding "Plaintiff's allegations of First and Fourth Amendment violations based upon qualified immunity").

challenge to federal marijuana policy.¹⁷⁴ In another case, a set of government employees challenged an agency's random drug testing policy.¹⁷⁵

The remaining policy claims in the sample touched upon a grab-bag of issues. *Daniels v. Union Pacific Railroad Co.*¹⁷⁶ was filed by a union and challenged the procedures used by a rail company and the agencies that regulate it to delicense engineers.¹⁷⁷ The Rainbow Family, a group of people who meet in the woods, sued a number of Forest Service officers for the quasi-judicial process given after tickets were issued to the attendees of a particular meeting.¹⁷⁸ A group of Maryland individuals challenged FEMA's reimbursement policy after Hurricane Isabel.¹⁷⁹ The governor of Illinois challenged a base-closing decision made pursuant to the Base Realignment and Closing (BRAC) process,¹⁸⁰ and a water access group challenged the Department of the Interior's water policies.¹⁸¹

174. See Verified Complaint for *Bivens* and 42 U.S.C. § 1983 Damages, and Injunctive Relief and Return of Property ¶ 61, *Sterner v. DEA*, 467 F. Supp. 2d 1017 (S.D. Cal. 2006) (No. 05-CV-0196), available at 2005 WL 444862 ("Plaintiff Sterner seeks . . . damages . . . against Defendants . . . for . . . retaliation against Plaintiff Sterner for the exercise of his clearly established First Amendment right to discuss with and recommend to patients the medical use of marijuana . . .").

175. See Amended Complaint ¶ 49, *Freeman v. Fallin*, 422 F. Supp. 2d 53 (D.D.C. 2006) (No. 02-CV-386), available at 2005 WL 3174248 ("Defendants, acting individually and/or in concert with each other, violated Plaintiff Freeman's Fourth Amendment rights by using a warrantless drug test to gather evidence for a criminal investigation against Ms. Fairchild and Mr. Freeman.").

176. See *Daniels v. Union Pac. R.R. Co.*, 480 F. Supp. 2d 191, 196 (D.D.C. 2007) (finding that a "*Bivens* action cannot proceed against the government entities because such a claim can only be brought against individuals, and all claims against Union Pacific fail because it is not a state actor").

177. See Complaint ¶ 66, *Daniels v. Union Pac. R.R. Co.*, 480 F. Supp. 2d 191 (D.D.C. 2007) (No. 06-CV-00939), available at 2006 WL 1781191 ("Daniels and every other certified locomotive engineer represented by plaintiff . . . has a liberty interest in his right to pursue the profession of engineer, and the arbitrary revocation of such a license interferes with or extinguishes such a right to pursue the occupation of his choice.").

178. See Complaint ¶ 6, *Mayo v. U.S. Forest Officer FNU Krogstel*, No. 06-CV-01236 (D. Colo. June 27, 2006), available at 2006 WL 2033092 (bringing an action "for the constitutional injuries [the plaintiffs] are sustaining, or imminently will sustain, upon the defendants' refusal to conduct public trials for the charged defendants").

179. See Complaint ¶ 71, *Moffett v. Computer Scis. Corp.*, 457 F. Supp. 2d 571 (D. Md. 2006) (No. 05-CV-1547), available at 2005 WL 3569473 ("As a result of the violation of the 5th Amendment by these Defendants, the Plaintiffs were damaged . . .").

180. See Amended Complaint ¶ 1, *Blagojevich v. Rumsfeld*, 558 F. Supp. 2d 885 (C.D. Ill. 2008) (No. 05-CV-3190), available at 2005 WL 4113520 (stating that Plaintiff "alleges a violation of federal law pursuant to 28 U.S.C. § 1331 and *Bivens*").

181. See Complaint for Declaratory and Injunctive Relief ¶ 51, *Consejo de Desarrollo Económico de Mexicali, A.C. v. United States*, 482 F.3d 1157 (9th Cir. 2007) (No. 05-CV-

Pro se plaintiffs also occasionally challenged government policy. Two criminal defense lawyers challenged Criminal Justice Act fee caps.¹⁸² In another complaint, a group of plaintiffs challenged the funding of voter education initiatives across the United States.¹⁸³ In a third case, a prisoner tried to plead a class action of mentally ill prisoners challenging the policies related to the confinement of the mentally ill in federal prisons.¹⁸⁴

In short, while liability almost never attaches to any *Bivens* defendant, let alone one implementing some government policy (slightly less than one in ten cases) *Bivens* claimants hoped that it might—suggesting that even the *Bivens* claims of last resort can serve as an alternative to traditional administrative law.¹⁸⁵

0870), available at 2005 WL 3767346 (alleging that "[t]he attempt . . . to implement the San Luis Rey Act in a way which diverts the seepage water from the Mexicali Valley to other users potentially renders unusable the entire Mexicali Aquifer," and thus that this Act violated due process of law).

182. See Amended Complaint ¶ 26, *Rosenfeld v. Wilkins*, 280 F. App'x 275 (4th Cir. 2008) (No. 05-CV-00072), available at 2006 WL 1178028 (alleging that "Counsel were denied due process of law in violation of the Fifth Amendment to the Constitution of the United States").

183. See Complaint at 22, *Forjone v. California*, No. 06-CV-0080A (N.D.N.Y. Feb. 6, 2006), available at 2006 WL 657088 (requesting, among other things, a "preliminary injunction suspending [2002 Help America to Vote Act] filing deadlines, [and a] permanent injunction for equal treatment of suffrage and autonomy for all New York State Citizens").

184. See A Diversity Civil Rights Complaint at 12, *Arnette v. Gonzales*, No. 06-CV-40081 (D. Mass. Apr. 28, 2006), available at 2006 WL 1726185 (praying for "One Million dollars for each plaintiff of this class action for each year held in custody by the Federal Bureau of Prisons").

185. These reviews of opinions and pleadings should by no means be considered comprehensive; they are subject to the limitations of electronic searches generally, and in particular electronic searches that gathered only a small sample of the universe of claims—and one that, moreover, gathered that sample unrandomly. However, obtaining data on cases where federal officials faced individual liability in tort is rather difficult. The Civil Division denied my FOIA request for a copy of the Torts Branch's monograph entitled "Defending the Individual Capacity Claim," which might have described the department's policies. See Letter from James Kovakas, Attorney in Charge, FOI/PA Office, Civil Div. to David Zaring, Assistant Professor, Wharton School of Business (June 20, 2006) (on file with the Washington and Lee Law Review). This data collection problem is not a new one. George Bermann urged that agencies collect and publicize tort claim data—which he noted that no agency did—as long ago as 1984. George A. Bermann, *Administrative Handling of Monetary Claims: Tort Claims at the Agency Level*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 639, 725 (1984) See generally George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. L. REV. 509 (1985) (presenting a law-review length version of Bermann's report).

III. Criminal Prosecution

Although few legal cases were more prominent than the criminal investigation of President Clinton's real estate dealings in Arkansas in the 1990s, the investigation resulted in few convictions, and no convictions of executive branch officials, who were the putative targets of the probe.¹⁸⁶ Libby's prosecution was somewhat similar in both focus and effort; Libby was convicted of failing to recount accurately the timeline of statements he made regarding a covert operative to the press—but not, of actually unmasking that operative.¹⁸⁷ Libby, of course, was pardoned.¹⁸⁸

These cases, with their low yields and focus on ethical and during-the-investigation conduct, rather than substantive delicts, exemplify the criminal prosecution of senior government officials, which now serves to focus public attention and, at least arguably, to create controversy more than it punishes conduct.¹⁸⁹

In this sense—and in the sense that it targets individuals, rather than institutions—criminal prosecutions of senior officials would not seem to constrain government conduct much at all. The independent counsel statute had a

186. Over the course of the six-year investigation, sixteen individuals were convicted on a total of sixty-two felony and eight misdemeanor charges. See 1 FINAL REPORT OF THE INDEPENDENT COUNSEL *IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION* app. 5 at cii–cvi (2001), available at <http://icreport.access.gpo.gov/final> (charting the prosecutions and convictions resulting from the criminal investigation).

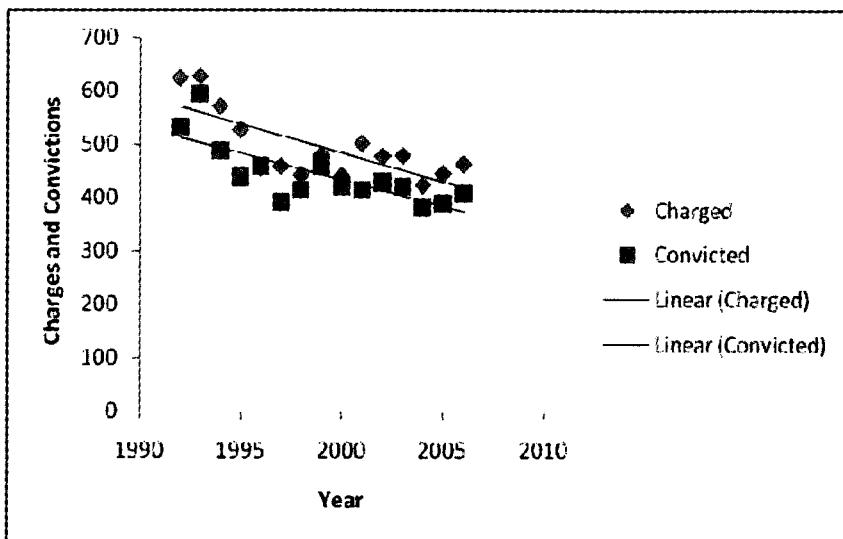
187. See Neil A. Lewis, *Libby, Ex-Cheney Aide, Guilty of Lying in C.I.A. Leak Case*, N.Y. TIMES, Mar. 7, 2007, at A1 ("Lewis Libby Jr. . . . was convicted . . . of lying to a grand jury and to FBI agents investigating the leak of the identity of a CIA operative in the summer of 2003 amid a fierce public dispute over the war in Iraq."). For an overview of the case, see Alan Dershowitz, *Legal Ethics and the Constitution*, 34 HOFSTRA L. REV. 747, 768 (2006) ("Then [Libby] is asked to testify and many of the counts of the indictment are just like the Clinton counts: it depends what 'is' is, whether it's present tense or past tense."). Libby was convicted for false statements made during an investigation into whether he or people he worked with had divulged the identity of an undercover CIA agent during the course of his duties—which neither he, nor, apparently, his co-workers had done, at least in a way that would rise to be a criminal offense. See Peter Baker, *Iranians Aid Iraq Militants, Bush Alleges*, WASH. POST, Feb. 15, 2007, at A01 ("[W]eeks of testimony . . . confirmed that three administration officials other than Libby—Bush adviser Karl Rove, then-Deputy Secretary of State Richard L. Armitage and then-White House press secretary Ari Fleischer—leaked the identity of undercover CIA officer Valerie Plame.").

188. See Amy Goldstein, *Bush Commutes Libby's Prison Sentence*, WASH. POST, July 3, 2007, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070200825.html> ("President Bush commuted the sentence of I. Lewis 'Scooter' Libby yesterday, sparing Vice President Cheney's former chief of staff 2 1/2 years in prison . . .").

189. See *supra* note 187 and accompanying text (describing Libby's prosecution for statements made during the investigation rather than the events from which the investigation arose).

miserable record of success and the Department of Justice's Corporate Fraud Task Force counts far more convictions of supervisory defendants than its Public Integrity Section.¹⁹⁰ In fact, the number of indictments and convictions by that section has declined from 1992–2006, as Figure 1 shows.

Figure 1: Charges and Convictions of Federal Employees 1992–2006¹⁹¹



And the senior government officers that are convicted tend to be punished no differently than other federal employees—their sentences are shorter and their fines are lower.¹⁹² Moreover, senior officials not acquitted may be, and often are, pardoned.¹⁹³

190. The 1,236 convictions claimed by the Department of Justice's Corporate Fraud task force between 2002 and 2007, Press Release, Dep't of Justice, Fact Sheet: President's Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity (July 17, 2007), http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html (last visited Aug. 15, 2008) (on file with the Washington and Lee Law Review), compares favorably with the 220 government convictions between 1994 and 2004. That number is approximately the same as the number of CEOs convicted by the task force. See *id.* (claiming convictions of "214 chief executive officers and presidents").

191. See *infra* note 212 for the source of this data.

192. Compare Pub. Integrity Section, U.S. Dep't of Justice, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2004 12 (2004), available at <http://www.usdoj.gov/criminal/pin/docs/arpt-2004.pdf> (indicating that a former member of the Senior Executive Service in the Treasury "was sentenced to one year of probation, a \$2,500 fine, and 25 hours of community service" for making a false writing in conjunction with questioning over approving a sole-source contract after receiving gifts), with *id.* at 16 (indicating that a former Department of Defense official was "sentenced to 26 months in prison, three years of supervised release, and ordered to pay \$55,124 in restitution" for sole-sourcing several DOD contracts in exchange for money).

193. The Constitutional basis for the executive authority is found in Article II, Section 2, of the U.S. Constitution, which states that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." U.S. CONST. art. II, § 2, cl. 1.

But these suits are nonetheless important. Many senior defendants, and even some former prosecutors, have described the prosecution of high-ranking government officials as affairs politicized by the attention they draw and targets at which they aim.¹⁹⁴ The problem for defendants lies not in the peril but in the process. Senior officials complain regularly about the time they spend defending themselves from suit.¹⁹⁵ It has been estimated that defending the President during the Clinton administration took up 75% of the time and resources of the White House counsel's office;¹⁹⁶ it is not clear that this was a valuable use of that office's time. CIA personnel knowledgeable about the agency's detention and interrogation practices apparently worry that they may be exposed to domestic criminal prosecution, even though the prospects of jail time are remote.¹⁹⁷

It is this concrete effect—along with the more difficult-to-specify values of protecting ideals of no one being above the law and ensuring against very severe, and possibly unprecedented, abuses of power—that best explains what is going on with the relationship between criminal liability and policymaking authority.

A tour through the recent record of criminal prosecution of senior federal officials is informative.

First, it is worth remembering how few favorable court outcomes the independent counsels got. A review of the final reports (if any) of each of the twenty independent counsel investigations reveals that very few of

For an early, but fundamental analysis of the power, see *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) ("A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; . . . it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never [offended].").

194. As one independent counsel said during his investigation, "While the 'politicalization' of an independent counsel probably reached a new plateau during the Iran-Contra investigation, that strategy has been ratcheted up several notches with the 'demonization' of the independent counsel now witnessed by the American public." Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2359 (1998); see also Tushnet, *supra* note 18, at 163 (arguing that "[o]ne might have taken the issue in a presidential impeachment process to be a political one").

195. Former House Majority Leader Tom DeLay, for example, has decried the "criminalization of politics." Delay claims, "[T]hey can't beat you at the ballot box, so they try to beat you at the jury box." Interview by Fox News with Tom Delay, Former Majority Leader, H.R. (Aug. 14, 2007), available at 2007 WLNR 15710891.

196. See BRADLEY H. PATTERSON JR., *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 107 (2000) ("The business of defending Clinton did more than gobble up 75 percent of the White House counsel's time and human resources . . .").

197. See Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, at 46, 49 (indicating that there are CIA personnel concerned about facing criminal prosecution and noting that some have even taken out personal liability insurance).

these counsels, with two exceptions, obtained the convictions of any senior federal official (or junior official, for that matter).¹⁹⁸ This series of prosecutions ran from 1979 to 2003 and featured a wide array of substantive issues, though they tended to prosecute more narrowly, particularly on false statements of one sort or another.¹⁹⁹

In all of the independent counsel investigations, successful prosecutions of federal officials were extraordinarily rare. Only Arlin Adams and Larry Thompson's investigation of Department of Housing and Urban Development Secretary Samuel Pierce over bribes-for-grants allegations in the department's mod-rehab program²⁰⁰ and Lawrence Walsh's investigation of the Iran-Contra affair²⁰¹ were at all successful—if convictions are a measure of independent counsel success. Adams and Thompson accounted for six, and Walsh for four of the fourteen total convictions of federal employees procured during the period during which independent counsel law was in effect.²⁰² Compared to the success rates boasted by ordinary criminal prosecutors, the success rates of the independent counsels have been extraordinarily low, based on indictments,

198. See Stephen Seplow, *Even Former Independent Counsels Say Statute is Too Broad*, PHILA. INQUIRER, Oct. 18, 1998, at E04 ("There have been 20 independent-counsel investigations since Arthur Christy, the first, was appointed in 1979 to look into alleged cocaine use by Hamilton Jordan, President Jimmy Carter's chief of staff. As with 11 of 14 counsels who have finished their work, Christy filed no charges.").

199. For brief overviews, see JACK MASKELL, INDEPENDENT COUNSELS APPOINTED UNDER THE ETHICS IN GOVERNMENT ACT OF 1978, COSTS AND RESULTS OF INVESTIGATIONS, CRS REPORT FOR CONGRESS app. (2003) [hereinafter MASKELL, COSTS AND RESULTS] (charting the costs and convictions, if any, of each of the independent counsel investigations concluded by that time) (on file with the Washington and Lee Law Review); Jack Maskell, *The Independent Counsel Law*, 45 FED. LAW. 28, 31 (1998) (charting the same since the Iran-Contra investigation); Hon. J. Harvie Wilkinson III & Hon. T.S. Ellis III, Panel Discussion, *The Independent Counsel Process: Is it Broken and How Should it Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1523–24 (1997) (charting the independent counsels and their records).

200. See MASKELL, COSTS AND RESULTS, *supra* note 199, at 7–8 (discussing the Pierce investigation). As one former Walsh prosecutor noted approvingly of the Pierce investigation, "As the investigations went forward, the Independent Counsel found criminality in a lot of other places and prosecuted quite a few of those cases. . . . The investigation did spread widely. It may deserve criticism for not snipping off some of its farthest branches and tossing those tendrils back to the Department of Justice for its handling." John Q. Barrett, *Independent Counsel Law Improvements for the Next Five Years*, 51 ADMIN. L. REV. 631, 638 (1999).

201. See MASKELL, COSTS AND RESULTS, *supra* note 199, at 5–6 (discussing the Iran-Contra investigation). For a discussion and defense of Walsh's investigation by a Watergate Era prosecutor, see Samuel Dash, *Independent Counsel: No More, No Less a Federal Prosecutor*, 86 GEO. L.J. 2077, 2085–94 (1998).

202. See *supra* note 199 (providing sources for statistics regarding the number of convictions resulting from the independent counsel investigations).

convictions, or cost.²⁰³ At the same time, the publicity surrounding these scandals was high.²⁰⁴

Moreover, even if senior officials did face conviction pursuant to the independent counsel process, they could be pardoned, as was Henry Cisneros by President Clinton after one independent counsel investigation²⁰⁵ and Casper W. Weinberger, Elliott Abrams, Duane R. Clarridge, and Alan D. Fiers, Jr. by President Bush after another such investigation.²⁰⁶

Nor did other federal prosecutors report larger success rates when prosecuting senior officials. Indeed, the number of prosecutions and convictions of federal employees has declined over the decade.

To get a sense of just what sort of peril senior officials faced, I examined all cases where senior federal officials²⁰⁷ were convicted of crimes between 1994 and 2004.²⁰⁸ The section reported fifty-four such convictions, the highest ranking of

203. Not every independent counsel investigation was criticized for its expense, but many were. For a rather telling defense of the cost of one of the most expensive independent counsel investigations, see Smaltz, *supra* note 194, at 2358–59. As for the success rates of the prosecutions, the Bureau of Justice Statistics reported that "[c]ases were terminated against 83,391 defendants during 2004." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2004 59, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0404.pdf>. Most (90%) defendants were convicted. *Id.* Of the 74,782 defendants convicted, 72,152 (or 96%) pleaded guilty or no-contest. *Id.* at 62. Additionally, for a comparison to the Department of Justice's task force prosecution of the wrongdoing of senior corporate officials, see *supra* note 190 and accompanying text.

204. Cass Sunstein studied front-page mentions of independent counsels in a selection of daily news articles. He found that mentions of the counsels increased steadily from zero in 1978 to 120 during the first three quarters of 1997. Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2278 (1998).

205. See David Johnston & Neil A. Lewis, *Inquiry on Clinton Official Ends with Accusations of Cover-Up*, N.Y. TIMES, Jan. 19, 2006, at A1 ("After being indicted on 18 felony counts, Cisneros pleaded guilty in 1999 to a misdemeanor charge of lying to investigators. He was later pardoned by President Clinton.").

206. See Joel Brinkley & Tim Weiner, *The Iran-Contra Report: Chronology; After 13 Years of Hide-and-Seek, a Bitter Chapter of U.S. History Ends*, N.Y. TIMES, Jan. 19, 1994, at A8 (stating that on December 24, 1992, "President George Bush pardon[ed] Messrs. Weinberger, . . . Abrams, . . . Clarridge and Fiers"). For an examination of the Department of Justice's pardons statistics, see *Presidential Clemency Actions by Administration: 1945 to 2001*, http://www.usdoj.gov/pardon/actions_administration.htm (last visited Aug. 16, 2008) (on file with the Washington and Lee Law Review).

207. Which I defined as supervisors, Schedule C political appointees, or Senate-confirmed or elected officials in the executive branch.

208. The Public Integrity Section is not the only prosecutor of federal officials; the individual U.S. Attorneys' Offices and special prosecutors, including, during this period, the independent counsels, also prosecuted federal officials. I am not alone in turning to the reports of the Department of Justice. Edward Glaeser and Raven Saks used the reports of the Public Integrity Section to assemble their data on corruption in America. See Edward L. Glaeser & Raven Saks, *Corruption in America* 8 (Harvard Inst. of Econ. Research, Discussion Paper No.

which were two National Security Advisers (both of whom pleaded out conflict of interest charges), and the lowest of which was a group supervisor in the Drug Enforcement Agency.²⁰⁹ Most senior officials convicted fell between these poles.²¹⁰

To be sure, supervisors were prosecuted for different things by the Public Integrity Section than were average federal employees. Supervisors represented approximately 25% of the total number of successful convictions carried out during the ten-year period, but they accounted for two-thirds of the conflict of interest prosecutions.²¹¹

Table 1: Prosecutions of Federal Employees 1992–2006²¹²

Claim ²¹³	Non-Supervisory		Supervisory		Total
	Prosecutions	Percentage	Prosecutions	Percentage	
Loss	118	81%	28	19%	146
Truth	41	80%	10	20%	51
Bias	13	33%	26	67%	39
Bribery	32	65%	17	35%	49
Other	19	95%	1	5%	20
Total	223	73%	82	27%	305

2043, 2004), available at <http://www.economics.harvard.edu/pub/hier/2004/HIER2043.pdf> (indicating that the authors' "corruption data is derived from the Justice Department's 'Report to Congress on the Activities and Operations of the Public Integrity Section'").

209. See *infra* note 212 for the source of this data.

210. All of this data is available from the author on request (in the form of an Excel spreadsheet).

211. As Beth Nolan has explained, "[F]ederal conflict-of-interest laws and regulations take one of two general approaches: They either forbid government employees from undertaking certain activities that raise the potential for actual or apparent conflicts of interest; or they forbid federal employees from participating in matters in which they have such an interest." Beth Nolan, *Removing Conflicts From the Administration of Justice: Conflicts of Interest and Independent Counsels under the Ethics in Government Act*, 79 GEO. L.J. 1, 47 (1990) (citation omitted).

212. The data for this table was taken from the 1992 through 2006 versions of PUB. INTEGRITY SECTION, U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION. These reports are available at <http://www.usdoj.gov/criminal/pin/>.

213. I coded the claims as follows: fraud, theft, and tax evasion formed my principal loss category; false statements, obstruction of justice, perjury, and the failure to disclose information formed my principal truth category; conflicts of interest and post-employment restriction violations were the basis for a category of "bias" crimes; bribery, the acceptance of unlawful gratuities, and offenses like them, though also surely indicative of bias, comprised a second money-related category; and finally, I grouped the other prosecutions, e.g., witness tampering, access without authorization, unlawful disclosure or concealment, into a small catch-all category.

Supervisors were substantially more likely to be prosecuted for a conflict of interest than were other federal employees. They were unlikely to be charged for taking money from the government itself, by defrauding it or stealing from it, where they accounted for only 19% of the prosecutions. And they were no more likely to be accused of taking money from applicants, in the form of bribes, than were low-level employees, despite the relatively prominent and powerful nature of their offices.²¹⁴

Supervisors were also punished and fined no differently than other federal employees convicted of the same types of crimes, despite their higher positions, and, presumably, capacity to engage in greater mischief.²¹⁵

I analyzed these punishments in two ways: first, through a punishment index²¹⁶ based on the months of supervision by the prison system that these employees faced, and second through a calculation of the fines that convicted employees paid.

Table 2: Median and Average "Punishment" for Convicted Federal Employees (in months) 1992–2006²¹⁷

Claim	Median Non-Supervisory	Median Supervisory	Average Non-Supervisory	Average Supervisory
Loss	36.00	54.00	61.46	71.10
Truth	34.50	36.00	43.02	35.33
Bias	41.63	12.00	30.00	25.67
Bribery	45.00	78.00	53.64	65.78
Other	36.00	24.00	56.00	24.00

The median and average internments faced by convicted supervisors were not statistically different from those faced by other federal employees, though descriptively, the conflict of interest internments faced by supervisors were somewhat higher.²¹⁸ In short, the higher up on the pay scale one goes, it is not necessarily the case that the punishments got worse.

214. A simple chi-square test establishes that the differences in convictions for fraud and theft (more by employees) and for conflict of interest (more by supervisors) were statistically significant.

215. See *supra* note 192 and accompanying text (comparing sentences of senior officials to other federal employees).

216. I calculated the punishment index by multiplying the number of months of incarceration by three and adding to that the months of parole multiplied by one that each defendant faced, in light of the seriousness of incarceration as compared to non-incarcerated supervision. The index thus offers insights into the seriousness with which delicts committed by supervisors were punished compared to those committed by non-supervisory personnel.

217. See *supra* note 212 for the source of this data.

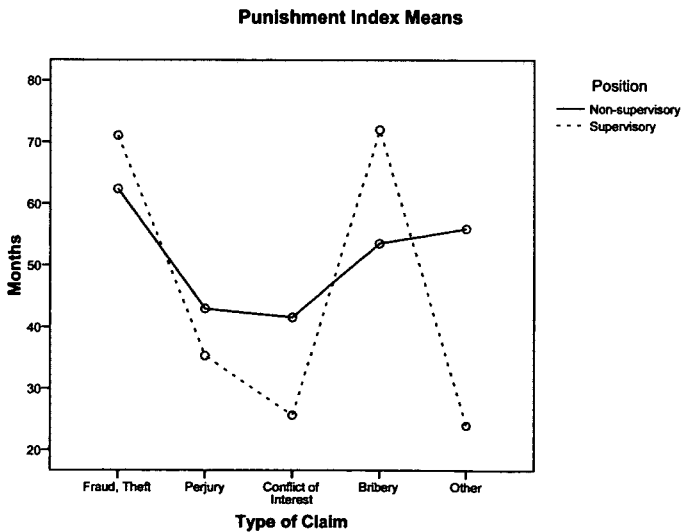
218. A variety of statistical tests (e.g., independent t-tests, Mann-Whiney U tests, factorial

Table 3: Median and Average Fines or Restitution Paid by Convicted Federal Employees (in dollars) 1992–2006²¹⁹

Claim	Median Non-Supervisory	Median Supervisory	Average Non-Supervisory	Average Supervisory
Loss	9,999.85	10,069.00	73,443.47	68,085.06
Truth	5,000.00	2,500.00	45,871.60	2,833.33
Bias	5,000.00	5,000.00	10,334.82	18,590.00
Bribery	13,293.64	23,000.00	59,337.15	29,932.40
Other	5,000.00	50,000.00	10,200.20	50,000.00

Table 3 indicates that supervisors and nonsupervisors faced relatively similar financial penalties for similar prosecutions. The differences between the fines, at any rate, were not statistically significant, and so once again, the empirical story supporting the criminalization of leadership meme is a shaky one. Leadership instead does not appear to have been treated differently than other sorts of federal employees.²²⁰

ANOVAs) were used to compare means across position, claim, and the interaction of the two. None of these tests showed any significant differences, most likely due to large standard deviations within groups. The graph in this footnote illustrates the means for the different positions by claim type, and is suggestive of some trends that might turn out to be significant with larger sample sizes—the lines, of course, are purely illustrative, rather than indicative of a trend.



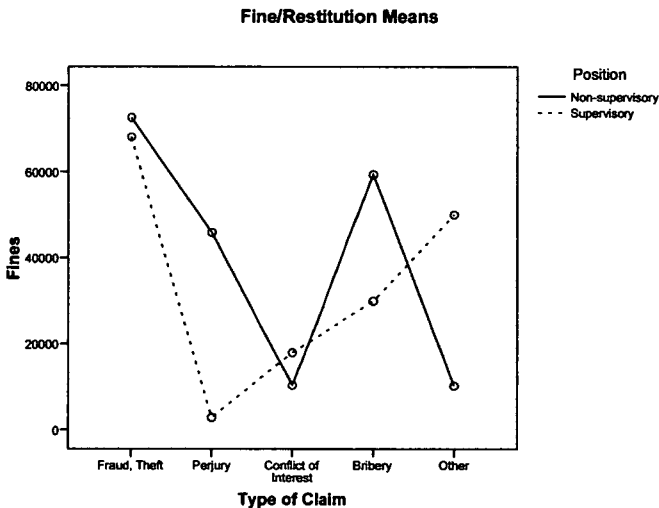
219. *Id.*

220. A variety of statistical tests (e.g., independent t-tests Mann-Whiney U tests, factorial

Although it is hard to establish just how much deterrence is being affected by a regime based solely on how the regime fares in court, the prosecution record does offer evaluators of the regime something tangible to analyze.²²¹ To the extent that it does police those policymakers, it focuses more on the revolving door and, to a lesser degree, on the importance of truthfulness, at least when investigations of policymakers are launched.

What they do achieve, then, is better thought of as a mechanism of governance that pursues symbolic values. Criminal law scholars have argued

ANOVAs) were used to compare means across position, claim, and the interaction of the two. None of these tests showed any significant differences, most likely due to large standard deviations within groups. The graph in this footnote illustrates the means for the different positions by claim type, and is suggestive of some trends that might turn out to be significant with larger sample sizes—the lines, of course, are purely illustrative, rather than indicative of a trend.



221. Of course, as Steven Shavell has reminded us, low success rates do not necessarily mean that a legal regime is without teeth. See Steven Shavell, *Any Frequency of Plaintiff Victory at Trial is Possible*, 25 J. LEGAL STUD. 493, 494 (1996) ("[T]he theory describing settlement versus trial does not support a tendency toward 50 percent plaintiff victories. Indeed, the notion that a selection effect should engender a 50 percent tendency seems outwardly implausible."). It could be that all the easy cases settle. But because the criminal case data includes all formal settlements (plea bargains) Shavell's concerns are mostly limited to those cases that never make it into the legal system. Whether there are many such informal actions is something I doubt, but cannot prove. As for the tort system, in addition to the appellate judgment data, we have the testimony by DOJ officials suggesting that any settlements after retention of a lawyer, at any rate, are rare. See *supra* note 79 and accompanying text (describing the rarity of settlements in these circumstances).

that the criminal law regime expresses support for certain values.²²² Here, the values served, other than the usual ones of deterrence, are more airy ones designed to establish that no federal employee is above the law.

Of course, this is not why politicians often call for special prosecutors and criminal investigations.²²³ Criminal prosecutions of government officials are high-profile endeavors, and arguably, much of the sanction inflicted is administered by the process of criminal investigation, resulting as it does in media attention, uncomfortable rounds of questioning, and the engagement of expensive lawyers.²²⁴ The image is bad, and so may be the effect of the investigation on the senior official's efforts to enact his policy preferences.²²⁵

IV. Conclusion

I conclude in three ways. First, I explore some of the implications of the symbolic, and somewhat political, purposes that civil and criminal suits against senior government officials serve.

Second, because I conclude that it is not clear that this justification entirely clears the legal process of personal liability, I compare the current regime to another sort of personal sanction that might do a better job—the Washington scandal. In this part of the conclusion, I also suggest some reforms that might encourage people to operate an individual liability system outside of litigation.

Finally, I consider what this system means for the case for decentralized government, a subject dear to the heart of many academics, especially those who gravitate towards the domestic system from the international one, as I do. I conclude that the vibrancy of the individual liability regime vindicates the descriptive claims of these scholars but its strange content and mechanics do not establish its normative desirability.

222. See, e.g., Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 415 (1999) ("[T]he real value of deterrence—its secret ambition—is to quiet illiberal conflict between contending cultural styles and moral outlooks.").

223. See Sunstein, *supra* note 204, at 2276 (finding that "political opponents of any administration . . . are likely to find it very much in their political interest to call for an independent counsel to investigate some real, possible, or even wholly imagined wrongdoing").

224. See ROBERT WILLIAMS, *POLITICAL SCANDALS IN THE USA* 126 (1999) (asserting that "even when prosecutions do not follow, the reputations and careers of those investigated are often badly damaged").

225. See Sunstein, *supra* note 204, at 2276 (arguing that a political call for a criminal investigation "is far more likely than . . . a reasoned objection to a policy initiative to produce attention").

A. *Can the Symbol of Personal Liability Justify Its Practice?*

When, as is the case with tort suits and criminal prosecutions of government supervisors, the level of direct enforcement of a legal regime is low, the regime's persistence has often been thought to lie in what Robert Scott has called second and third order enforcement: the use of informal sanctions by others, such as shaming, or the self-internalization of the rule by the would-be enforcer.²²⁶ In this way the law is designed to serve a rather symbolic purpose—and this sort of design helps to make sense of smoking bans or "pooper-scooper" laws that are rarely enforced by the police but that still enjoy wide obedience.²²⁷ Does the essentially symbolic subjection of the personal property and liberty of government policymakers to individual claimants appear to incentivize better government?

Symbolism has a rich pedigree among those legal scholars who think that, as a descriptive matter at least, it explains the creation of a number of legal regimes. Max Lerner long ago claimed that "the whole of a culture is shot through with symbolism" and that law was perhaps the most powerful symbol of them all.²²⁸ Mark Tushnet has been willing to countenance even the most fig-leafy of symbolic laws as a category of governance that neither does much good, nor much harm.²²⁹ As Tushnet and Yackle have clarified, symbolic laws "define—or express—who we are as a society," although in doing so as gauzily

226. See Scott, *supra* note 23, at 1603–04 ("[L]aws can influence behavior by imposing informal (or second-order) sanctions, such as shaming . . . [and] can have self-sanctioning (or third order) effects to the extent that citizens internalize the legal rule and are deterred by the prospect of guilt.").

227. See *id.* at 1603 ("[A] legal ban on smoking in public places or a 'pooper-scooper' law can motivate citizens not to smoke in certain areas or to clean up after their dogs even where the state has no resources invested in direct (or first order) enforcement.").

228. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1293 (1937). Lerner characterized the Supreme Court and the Constitution as the law's primary—and quite conservative—symbols that served as a sort of opiate of the masses. *Id.* The more radical and psychological aspects of the critique still has acolytes today. See Marie A. Failinger, *Against Idols: The Court as a Symbol-Making or Rhetorical Institution*, 8 U. PA. J. CONST. L. 367, 369 (2006) ("[T]he Supreme Court necessarily makes symbolic responses to the often frightening realities of human existence. In its calling to signify a constitutional culture from the nightmare of interpersonal and inter-institutional—indeed, international—conflicts, the Supreme Court is forced in each decision to choose which message it will speak."); Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1110 (2005) ("American law itself takes on a rainbow of symbolic forms.").

229. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1269–84 (1999) (reviewing a few different forms of expressivism).

as they do, "symbolic [laws] have nothing to accomplish, they can hardly fail."²³⁰

But other observers think that symbolic regimes, rather than tangible benefits, are perfectly acceptable offerings for any legal system.²³¹ The personal liability of high officials might make us feel like we have a government of laws and not men.²³² No matter how important—and remember, the highest-ranking of officials are being sued and investigated as the regime now stands—they are subject to suit by anyone, even if those suits do not last long.²³³ The lawsuit, in this view, is a form of democratic access, available to anyone with a filing fee. Although some former administration officials have claimed that legalization is inhibiting fast and effective government action—claimed by some to be particularly necessary in the war on terror—others may prefer a regime that combines a general lack of onerousness with the opportunity to make specific claims against your perceived slights.²³⁴

All of this symbolism without much substance is a bit disconcerting. Additionally, although courts are not letting purely political claims proceed, the plaintiffs who sue are often quite political—and, as we have discussed, the criminal cases against high government officials have also been rather politicized themselves.²³⁵ Is such a political process worth it?

Symbolic laws have a bread-and-circuses feel. These cases target individuals, but government policy is implemented by organizations.²³⁶ They

230. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 84 (1997).

231. See *supra* notes 228–30 and accompanying text (discussing various scholars' accepting views of symbolism); see also Sunstein, *supra* note 114, at 2051 ("[T]he expressive function of law has a great deal to do with the effects of law on prevailing social norms. Often law's 'statement' is designed to move norms in fresh directions.")

232. Expressive laws, after all, are frequently underenforced. See Scott, *supra* note 23, at 1603–04 ("[A] legal ban on smoking in public places or a 'pooper-scooper' law can motivate citizens not to smoke in certain areas or to clean up after their dogs even where the state has no resources invested in direct (or first order) enforcement."). However, expressive and symbolic laws are usually about something and the usual *Bivens* claim is not—at least not about something legally viable.

233. See, e.g., Carol D. Leonnig, *Plame's Suit Against Top Officials Dismissed*, WASH. POST, July 20, 2007, at A5 (detailing the dismissal of ex-CIA agent Valerie Plame's lawsuit against high-ranking officials in the Bush Administration, including Vice President Dick Cheney, then-chief of staff I. Lewis "Scooter" Libby, and then-senior White House adviser Karl Rove).

234. See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007) (arguing against over-legalization of the process of the war on terror).

235. *Supra* note 194 and accompanying text.

236. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY*

result in adverse verdicts so rarely that I have not been able to identify much constraint at all, other than hard-to-quantify deterrence of, say, foreign adventurism against the explicit direction of Congress (the Iran-Contra investigation)²³⁷ and the basest abuses of domestic law enforcement officials (such as the *Limone* litigation).²³⁸

Moreover, why do we want to make individual liability a symbol? The effort to move liability away from the individual, after all, is what animates Mashaw's history of administrative law.²³⁹ It also probably explains some of the impetus for the Westfall Act, which substitutes the United States as the defendant for a wide variety of individual tort claims.²⁴⁰

B. An Alternative to Litigation?

An alternative to lawsuits may do a better job of reaching policy, while avoiding the prospect of financial ruin or jail time and permitting the aggrieved the satisfaction of personal blame. Political scandals are often critiqued as random distractions from the business of government.²⁴¹ But the lightly-made point in this section is that, in comparison to the costs and benefits of individually-targeted civil and criminal lawsuits, the individually-targeted scandal is both descriptively more common and important, and arguably normatively desirable (even though no form of personal liability is perfect). If so, a legal regime that improved the quality of our individual sanctions might try to fix problems here first, rather than in the civil and criminal schemes.

After all, neither the tort nor the criminal regime have driven as many high-ranking officials from office as have more norms-based and purely political efforts.²⁴² Consider the so-called Washington scandal, a "style of

DISABILITY CLAIMS 26 (1983) (asserting that "decisionmaking goes on not in one head, but initially, in the heads of thousands").

237. See *supra* note 201 and accompanying text (referencing Lawrence Walsh's investigation of the Iran-Contra affair and providing a source for discussion of the investigation).

238. See *supra* notes 136–40 and accompanying text (discussing *Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004)).

239. *Supra* notes 28–33 and accompanying text.

240. See 28 U.S.C. § 2679(d)(1) (2000) (providing that "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his . . . employment . . . the United States shall be substituted as the party defendant").

241. See, e.g., Sunstein, *supra* note 204, at 2268 ("It would be good to devote far more attention to measures to alleviate poverty and far less attention to questions about where, exactly, the Vice President was when he engaged in fund-raising.").

242. See Steven G. Calabresi, *Some Structural Consequences of the Increased Use of*

American politics—always has been, always will be," according to Larry Sabato.²⁴³ If scandals include publicly aired contretemps (that is, an event reported in the print media) associated with a loss of position, then scandals sans litigation remove more senior officials from office than do lawsuits.²⁴⁴

During the past administration, the list of scandaled-out-of-office senior officials includes Carl Truscott,²⁴⁵ Michael D. Brown,²⁴⁶ Susan Ralston,²⁴⁷ and Janet Rehnquist.²⁴⁸ And there were many others, too numerous to detail here.

A detailed examination of the Department of Justice's supervisors—none of whom were prosecuted criminally or subject to civil damages awards—is instructive. If one looks only to heads of offices in the Bush Department of Justice who served for four years or less,²⁴⁹ out of sixty-five resignations between 2001 and July 31, 2007, one can find sixteen resignations tied to a series of media stories about, and congressional investigations of, a politicized appointment

Ethics Probes as Political Weapons, 11 J.L. & POL. 521, 522 (1995) (arguing that the prevalent use of political ethics probes has resulted in a "McCarthyite regime of unfair scandal-mongering and guilt by accusation").

243. Jim VandeHei & Peter Baker, *Scandals Take a Toll on Bush's Second Term*, WASH. POST, Oct. 14, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/13/AR2005101301955.html> (quoting Sabato and describing his work on scandals).

244. See Sunstein, *supra* note 204, at 2281 (arguing that the rise of "attack journalism" has rendered independent prosecutors far less necessary).

245. See Dan Eggen, *ATF Director Resigns Amid Spending Probe*, WASH. POST, Aug. 5, 2006, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/04/AR2006080401496.html> (reporting Carl Truscott's resignation as director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, after the launch of an internal investigation into questionable spending on a new headquarters while the agency was considering sharp cuts in the number of new cars and bulletproof vests it provides agents).

246. See Richard W. Stevenson, *Storm And Crisis: The Emergency Agency; After Days of Criticism, Emergency Director Resigns*, N.Y. TIMES, Sept. 13, 2005, at A26 (stating that Michael Brown resigned as director of the Federal Emergency Management Agency, three days after being stripped of his duties overseeing the post-hurricane relief effort).

247. See Anne E. Kornblut, *Aide Who Linked Abramoff and Rove Resigns at White House*, N.Y. TIMES, Oct. 7, 2006, at A10 (describing how Susan B. Ralston, a former aide to the disgraced lobbyist Jack Abramoff who went on to work for the presidential adviser Karl Rove, resigned from the White House after a report suggested she was the conduit between Abramoff and the White House).

248. See Christopher Marquis, *A Top Health Official Resigns Under Pressure*, N.Y. TIMES, Mar. 5, 2003, at A19 (reporting that Janet Rehnquist, Inspector General of the Health and Human Services Department, resigned in the face of Congressional opposition and a wide-ranging inquiry into her conduct including her request to delay a federal audit of the Florida state employees' pension fund, in possible deference to Governor Jeb Bush).

249. This was a matter of reviewing the department's press releases and searching the usual databases for mentions of the named employees, and, if we could find a departure, then we looked to see if there was a publicly reported story about why the official left.

process within the department.²⁵⁰ As many as thirty DOJ officials threatened to resign, and eight appear to have resigned, over scandals related to the way the Department and the administration were prosecuting the war on terror, including policies related to the wiretapping of certain domestic calls and the treatment of detainees and other terrorism suspects.²⁵¹ Others resigned because of ties to a corrupt lobbyist, as well as for predictable reasons of misfeasance.²⁵² That is, around the time of their departure there were stories in the press that could be interpreted as critical of their performance. For example, the director of the Bureau of Alcohol, Tobacco, and Firearms resigned after press stories broke about the possible misuse of expenditures.²⁵³ A U.S. Attorney resigned in the wake of claims of office mismanagement.²⁵⁴ Two others were fired for other sorts

250. See, e.g., Adam Cohen, *Why Have So Many U.S. Attorneys Been Fired? It Looks a Lot Like Politics*, N.Y. TIMES, Feb. 26, 2007, at A20, available at <http://www.nytimes.com/2007/02/26/opinion/26mon4.html?ex=1330232400&en=981c8a2bbf230de7&ei=5124> ("It is hard to call [President George W. Bush's firing of at least 7 U.S. Attorneys] anything other than a political purge."); Dan Eggen & Amy Goldstein, *Ex-Aide to Gonzales Accused of Bias*, WASH. POST, May 3, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/02/AR2007050201569.html> ("The Justice Department has launched an internal investigation into whether Attorney General Alberto R. Gonzales's former White House liaison illegally took party affiliation into account in hiring career federal prosecutors."); R. Jeffrey Smith, *Ex-Prosecutor Says He Faced Partisan Questions Before Firing*, WASH. POST, Mar. 26, 2007, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/24/AR2007032401122.html> ("One of the eight former U.S. attorneys fired by the Bush administration said yesterday that White House officials questioned his performance in highly partisan political terms at a meeting in Washington in September, three months before his dismissal."); Editorial, *The Gonzales Eight*, N.Y. TIMES, Mar. 8, 2007, at A22 ("Congressional hearings called to look into the firing of eight United States attorneys . . . left little doubt that the Bush administration had all eight—an unprecedented number—ousted for political reasons.").

251. See Michael Isikoff & Evan Thomas, *Bush's Monica Problem*, NEWSWEEK, June 4, 2007, at 24 ("[V]irtually the entire top leadership of the Justice Department is threatening to resign.").

252. See, e.g., Kornblut, *supra* note 247, at A10 (describing how Susan B. Ralston, a former aide to the disgraced lobbyist Jack Abramoff who went on to work for the presidential adviser Karl Rove, resigned from the White House after a report suggested she was the conduit between Abramoff and the White House); Susan Schmidt, *Ex-Justice Dept. Lawyer under Scrutiny in Probe*, WASH. POST, Apr. 28, 2007, at A6, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/04/27/AR2007042702228_pf.html ("A federal task force investigating the activities of disgraced lobbyist Jack Abramoff has in recent weeks been looking into whether one of Abramoff's colleagues improperly traded favors with a Justice Department lawyer The lawyer . . . resigned on April 6 as deputy chief of staff in the Criminal Division.").

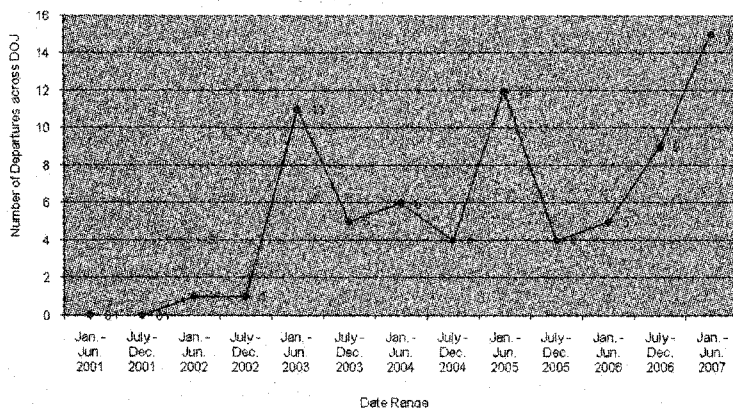
253. See *supra* note 245 (discussing the resignation of Carl Truscott).

254. See Dan Browning, *Embattled Paulose Steps Down: Minnesota's U.S. Attorney was Under Fire from Her Staff and Will Take a Post in D.C.*, STAR TRIB., Nov. 20, 2007, at 1A ("On Monday, former Minnesota U.S. Attorney Tom Heffelfinger said: 'I do believe that [U.S. Attorney Rachel Paulose's] departure is good news for the U.S. attorney's office. Her tenure has been marked with significant internal problems, which were undermining morale.'").

of malfeasance in office that did not arise to criminal conduct or unleash a flood of *Bivens*-related claims.²⁵⁵

Figure 2, which tracks the timing of the departures of senior officials from the DOJ, scandal or not, mitigates this story somewhat by suggesting that departures might peak after elections, and generally increase over the duration of an administration:

Figure 2: Timeline of DOJ Departures During the Bush Administration²⁵⁶



Not every departure from the Department of Justice—even after short terms of office—represented scandals, of course. Of the sixty-five departures, fifteen were related to promotions within the government, and twenty occurred for—at least as publicly stated—personal reasons (to return to private practice for financial reasons, for example), and that were not matched by media coverage suggesting any different reasons for the departure.

Scandals proceed the way that many criminal prosecutions, such as the independent counsel prosecutions, proceed. They develop horizontally from official to official and sometimes, as was the case for independent counsel investigations, result in the resignation of officials even in the absence of

255. See Amy Goldstein, *Justice Dept. Recognized Prosecutor's Work on Election Fraud Before his Firing*, WASH. POST, Mar. 19, 2007, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/18/AR2007031801077.html> (stating that David Iglesias and John McKay were fired after "Republican complaints that [they] neglected to prosecute voter fraud").

256. The figure was generated by searching Department of Justice press releases for changes among the heads of the various offices listed on the Department's organizational chart. A Westlaw Allnews search was then run to see if there was a reported reason for the departure. The method, which relied on handcoding and other data collection vagaries, is meant to be more suggestive than doubtlessly comprehensive.

evidence linking them directly to the initial scandal itself.²⁵⁷ The result is more of a network model of the uncovering of malfeasance than one based on the application of equal amounts of pressure to every government supervisor within an executive agency.²⁵⁸

The network model suggests some underenforcement of whatever norms scandals are meant to protect.²⁵⁹ Also, in other ways they are imperfect. Observers like Cass Sunstein have complained that scandals "damage processes of democratic deliberation by deflecting attention from serious issues involving the effects of policy on human lives, and instead focusing people—representatives, media, and citizens alike—on scandals that are often imaginary and that, even if real, usually do not deserve [such] prominence."²⁶⁰

But is litigation really any better? Although his critique applies to all sorts of scandals, Sunstein was referring to the scandals created by independent counsel investigations, which he found to be particularly unproductive.²⁶¹ If criminal and tort litigation have policy implications, but a personal process, so do other, non-legal attacks on high-ranking officials. Also, although no one would claim that the Washington scandal is a perfect governance institution, it may be better at achieving symbolic goals, somewhat more effective in imposing actual sanctions, and less harsh about the sanctions it does impose. After all, many of the Department of Justice scandal-related resignations were due to policy disputes related to the war on terror and presidential control of the criminal process.

How might we incentivize this form of government oversight over litigation? The costs of turning to litigation could be increased—more doctrinal hurdles could be imposed to make personal liability even more unlikely than it is today. But, at least for tort, many of these limits already exist or are being implemented every time the Supreme Court hears a *Bivens* case. More

257. See, e.g., WILLIAMS, *supra* note 224, at 71–72 (observing that Bernard Nussbaum and Roger Altman, two high-ranking officials in the Clinton Administration, were forced to resign based on allegations of misconduct stemming from an investigation that grew out of the initial Whitewater scandal).

258. See *id.* at 10 (describing the Whitewater scandal as a "classic example of how scandals multiply and diversify, how scandals grow out of each other and spin off in different directions").

259. See Sunstein, *supra* note 204, at 2283–86 (listing the scandals investigated by independent counsel from 1978 to 1996, most of which resulted in no charges being filed).

260. *Id.* at 2268. Robert Williams has added that "there is no obvious correspondence between the degree of controversy generated by scandals and the gravity of the misdeeds." WILLIAMS, *supra* note 224, at 2.

261. See Sunstein, *supra* note 204, at 2268 (arguing that the Independent Counsel Act encourages scandal-mongering and should be repealed or permitted to expire).

interesting prescriptions would focus on ensuring that the institutional framework for public contretemps is a functional one.

First, a vibrant set of watchdogs would be needed—this would mean an unfettered press, whistleblower protections, and a regime where congressional subpoenas are easy to come by and enforced.

Second, we also would need academics and other observers to see if patterns setting forth the substantive constraints of the regime cannot be found—a set of scandal doctrinalists, if you will, who can, based on past practice, identify the values to which future government officials must adhere.

This Article is not the place to go into the voluminous literature on the case for, and incentives of, such private enforcers,²⁶² but it is fair to say that if we do want to make a decentralized regime of disaggregated enforcement necessary, legal reform does not necessarily require much in the way of new abilities to sue, with the possible exception of making it possible for whistleblowers to sue if they feel that they are retaliated against.²⁶³

Instead, the legal regime need only make it possible for the purveyors of scandal to do their jobs; that means, in turn, plenty of access to government information and a vibrant press. Congress might start considering immunity for journalists who break stories.²⁶⁴ It might consider the sort of broad open government regime that states like Florida have adopted.²⁶⁵ More

262. For some traditional economic accounts, see generally William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975) and A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

263. Such protections have always been difficult to create effectively, at least if whistleblower win rates are any indication. Consider the case of whistleblowers in securities law. "[T]wo decades of attempts to make protection effective for government employee whistleblowers have proven unsuccessful—especially given the existence of an official agency that is designed to act as advocate and protector for whistleblowers." Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1767 (2007).

264. Though here too, skeptics have noted that defining "journalist" is not easy in an era of blogs and Washington interest groups. See Eugene Volokh, *Deterring Speech: When is it "McCarthyism"? When is it Proper?*, 93 CAL. L. REV. 1413, 1446 (2005) (noting "a tension in the First Amendment law related to potentially speech-detering government inquiries"); *Media Privileges for Bloggers—Two Victories over the Last Several Months*, Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1149631107.shtml> (June 6, 2006, 17:58 EST) (noting the difficulties of the case for media source privileges) (on file with the Washington and Lee Law Review).

265. Article I, section 24, of the Florida Constitution provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of . . . the legislative, executive, and judicial branches of government." FLA. CONST. art. I, § 24(a). Transparency, without specificity, of course, is no panacea. "'Transparency,' used in its strongest and most abstract form in the context of open government, acts as a term of opacity that promises more than it can deliver and ultimately fails to further its stated end of a better, more responsive, and truly democratic government." Mark Fenster, *The Opacity of*

controversially, it could get in the business of regulating the press itself, by, for example, requiring diversity of ownership, or possibly by subsidizing those parts of the industry in decline, like newspapers and political magazines.

There are some advantages to proceeding with extra-legal supervision of policymaking choices. These are the usual advantages named by those who believe that the political process can solve political questions, who worry about the counter-majoritarian difficulties, and so on. As Cass Sunstein has said, "[t]he vigilance of opposing parties and the press is [more] likely to be an obstacle to official wrongdoing and corruption," perhaps even more than judicial process.²⁶⁶ Perhaps taking some steps to assure open government, in addition to traditional administrative procedure, instead of enhancing the individual liability alternatives, is what is required to turn the personal sanctions regime into something more worth having.

C. Decentralized Governance as It Really Works

One final reason why personal liability is important is because of the work it does as an alternative to traditional forms of administrative law. In many ways, it is a model of New Governance, a topic in vogue amongst legal academics.²⁶⁷ Jody Freeman has sought to identify ways that the increasingly important role of decentralized private institutions in governance might be managed.²⁶⁸ Charles Sabel and Michael Dorf have characterized decentralized arrangements as, at best, a "new form of government" that enables "citizens . . . to utilize their local knowledge to fit solutions to their individual circumstances."²⁶⁹ Others, such as Pamela Karlan and Daniel Meltzer, have

Transparency, 91 IOWA L. REV. 885, 893 (2006).

266. Sunstein, *supra* note 204, at 2280.

267. The concept of disaggregated governance developed through Anne-Marie Slaughter's liberal approach to international law. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 363 (1997) (describing the incentives involved in supranational participation of "disaggregated domestic government institutions seeking to resist either the centralization or the radical fragmentation of power"); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2024 (2003) ("Networks of disaggregated governmental entities develop shared values and identities distinct from those of other components of their home states.").

268. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 7 (1997) (promoting negotiated regulation as a collaborative process producing better outcomes than rulemaking); Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1291-92 (2003) (noting the trend toward privatization in recent decades).

269. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998).

found the prospect of a set of so-called "private attorneys general"—which as the former defines the term, permits the legislature to "vindicate important public policy goals by empowering private individuals to bring suit"²⁷⁰—to be an attractive one.²⁷¹

The individual liability regime in some ways offers an opportunity to evaluate the turn to decentralized and privatized administration in a specific context. Individually directed lawsuits, after all, disaggregate the government defendants to the individual level; their tort scheme relies on private attorneys general.

Decentralized governance has many benefits; it shortens the distance between the governed and the governors; it tracks issues into specific, small-scale, problem-solving institutions, like particular cases overseen by particular courts.²⁷² In some developing arenas of governance, such as international law, horizontal governance models (if not precisely decentralized ones), like networks, may be necessary, comparatively effective, and desirable.²⁷³

However, personal liability litigation, at least in this context, comes with some obvious problems; inexpertise is one, as the plaintiffs attacking government policymakers (or the government prosecutors) may be parties with limited interest in the policies being implemented by the official—even, at times, in the particular policy being applied to them, if there is such a policy.²⁷⁴ Moreover, the attractions of the Weberian model of rationalized and ordered bureaucratic action are not duplicated by a regime where anyone can make a case against anyone. Additionally, it is by no means clear that this regime leads to a high, or even adequate, level of enforcement, given the few favorable verdicts achieved by the personal liability plaintiffs and prosecutors. As we

270. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003).

271. *See id.* at 209 ("The Congress and Supreme Court of an earlier era constructed the institution of the private attorney general because they recognized that, without private attorneys general, it would be impossible to realize some of our most fundamental constitutional and political values."); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 295 (1988) ("If criminal defendants can be private attorneys general, cannot civil plaintiffs serve the same function?").

272. *See* DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 252–53 (1992) (explaining the advantages of governmental decentralization).

273. *See* ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 1–21 (2004) (making the case for network governance in international law).

274. *Cf.* Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 289 (1985) ("Decentralization, however, means less expertise, and a risk of less professional objectivity.").

have seen, personal liability is a transaction cost enterprise and a method of policing, at best, the worst excesses of government exercise.

To be sure, the appeal of these kinds of suits—compensation in cases of government violence, the ability to make a high-profile statement about government policy in the case of the marquis plaintiffs, and the right to raise one's voice in court in the case of everyone else—is clear enough. However, the ad hoc and decentralized natures of the would-be constrainees make them much less clearly adequate representatives of the public interest. Decentralized and new governance is attractive, but on the evidence of the personal liability suit, it is hardly a panacea of administrative organization.

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