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Qualified Sovereignty

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Cover Page Footnote

Assistant Professor of Law, University of North Carolina School of Law. Professor of Law, University of California, Berkeley. The authors are grateful for help developing this article from Beth Colgan, John F. Preis, David Marcus, Jon D. Michaels, Andy Hessick, Leigh Osofsky, Carissa Byrne Hessick, and Alexander Reinert, as well as to participants in faculty workshops at the University of North Carolina School of Law, the University of California, Los Angeles School of Law, and the University of California, Berkeley School of Law. We benefited enormously from superb research assistance from Mallory Morris, Jared Church, and Monica Roth. We are grateful to the student editors at Washington Law Review, whose work greatly improved our own work.

QUALIFIED SOVEREIGNTY

Kate Sablosky Elengold* and Jonathan D. Glater**

Abstract: Sometimes acts of the federal government cause harm; sometimes acts of contractors hired by the federal government cause harm. In cases involving the latter, federal contractors often invoke the sovereign’s constitutionally granted and doctrinally expanded supremacy to restrict avenues for the injured to recover even from private actors. In prior work, we analyzed how federal contractors exploit three “sovereign shield” defenses—preemption, derivative sovereign immunity, and derivative intergovernmental immunity—to evade liability, accountability, and oversight.

This Article considers whether, when, and how private federal contractors should be held accountable in a court of law. We argue that a contractor should be required to qualify before it can derive the immunity enjoyed by its sovereign partner. This Article proposes that a private contractor be entitled to such “qualified sovereignty” contingent on satisfying three conditions: (1) it was acting as the government’s agent, (2) it complied with any guidelines established by the government, and (3) it was reasonable for the contractor to believe that its conduct would not violate rights protected by law. Adopting scaffolding from two embattled doctrinal constructs—derivative sovereign immunity and qualified immunity—qualified sovereignty balances the rights of victims to recover for harms with protection for private entities from unforeseen liability incurred at the government’s explicit and lawful direction.

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INTRODUCTION

Private businesses supply, support, and act on behalf of the United States federal government across numerous and diverse domains and correspondingly can lay claim to the sovereign’s exceptional defenses to liability for harm they cause. These defenses block claims in widely divergent contexts because contractors provide myriad services, from fighting wars,¹ to operating prisons² and detention centers,³ to managing a \$1.6 trillion portfolio of student loans.⁴ This Article proposes limits on the availability of these defenses. This outsourcing is not particularly new, but its modern scope and consequences⁵ raise important questions about the application of the longstanding legal doctrines that determine when those harmed by government action, or action taken on behalf of the government, may recover damages for the injury.⁶

Federal contractors’ conduct can and does cause harm.⁷ Contractors

1. CONG. BUDGET OFF., PUB. NO. 3053, CONTRACTOR’S SUPPORT OF U.S. OPERATIONS IN IRAQ I (2008), <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/08-12-iraq-contractors.pdf> [<https://perma.cc/LS7X-6EPK>] (“CBO estimates that as of early 2008 at least 190,000 contractor personnel, including subcontractors, were working on U.S.-funded contracts in the Iraq theater.”). These contractors have not been limited to ancillary roles. Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT’L L. 395, 401–02 (2009) (noting that “[a]lthough military regulations prohibit contractors from performing inherently governmental functions, including combat operations, reality has not conformed to this rule”).

2. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

3. *GEO Grp., Inc. v. Newsom*, 15 F.4th 919 (9th Cir. 2021).

4. *Pennsylvania v. Navient Corp.*, 967 F.3d 273 (3d Cir. 2020); Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. 969, 1010–11 (2021) [hereinafter *Sovereign Shield*].

5. JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 15 (2017) (observing that “[w]hile it is true that private and commercialized actors carrying out State responsibilities have been around since before the Founding, any comparison between those folks and the ones we encounter today is entirely inapt”).

6. See *Sovereign Shield*, *supra* note 4, at 980–94 (describing the interplay of three powerful doctrines that together may protect federal actors from civil liability and other forms of accountability and oversight).

7. See, e.g., *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1143 (S.D. Cal. 2018)

operating federal prisons have been charged with failing to protect the health of prisoners in the midst of a raging pandemic;⁸ contractors operating detention centers have been charged with failing to keep track of children and parents separated at the border;⁹ contractors providing military equipment have been charged with knowingly manufacturing and selling defective battlefield flares to the United States Army and Air Force;¹⁰ contractors for the Department of Energy were charged with the improper handling and disposal of radioactive waste at a plant in Kentucky;¹¹ and government officials issued a report documenting “repeated cases of procurement fraud, kickbacks, and misuse of taxpayer funds” in Pentagon contracts.¹²

When the federal government performs such tasks—and causes such harms—itsself, it enjoys extensive and powerful immunity to a wide variety of claims brought by victims of its negligent or intentional activities.¹³ Unless expressly waived by Congress, the federal government, as supreme sovereign, enjoys the protection of three distinct but related doctrines—sovereign immunity, intergovernmental immunity, and preemption—which we have previously termed the “sovereign shield.”¹⁴

(order granting preliminary injunction) (finding that federal policy of separating parents and children at the United States border may violate the federal constitution).

8. *See, e.g.*, *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 3041326 (S.D. Fla. June 6, 2020) (discussing immigration detainees at three detention centers, two of which were run by contractors, alleging that their confinement violated government COVID protocols).

9. *Family Separation*, S. POVERTY L. CTR., <https://www.splcenter.org/our-issues/immigrant-justice/family-separation> [<https://perma.cc/LU7B-A8WP>] (describing the complaints that the organization has filed on behalf of separated migrant families, including those who were “scatter[ed] . . . among a network of facilities run by private contractors under the federal Office of Refugee Resettlement (ORR), while their parents [were] locked up in rural, isolated ICE facilities”).

10. Complaint, *United States ex rel. Dye v. ATK Launch Sys., Inc.*, No. 06-cv-00039 (D. Utah Nov. 2, 2007).

11. First Amended Complaint, *United States ex rel. Boegh v. Bechtel Jacobs Co.*, No. 02-cv-00300 (W.D. Ky. Apr. 8, 2008).

12. Press Release, Off. of Congressman Peter DeFazio, Harkin and Defazio Release List of Fraud Cases Among Top 100 Pentagon Contractors (June 7, 2000), <http://s3.amazonaws.com/fcmd/documents/documents/000/000/474/original/harkindefazio.pdf?1423019028> [<https://perma.cc/JM54-5WHG>].

13. To be sure, federal legislation explicitly permits recovery in specified circumstances. A prime example is the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346, 2671–2680. The FTCA, discussed *infra* at section I.A, permits a person to sue the federal government for the following:

[I]njury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

14. *See Sovereign Shield*, *supra* note 4.

Federal contractors, as agents of the federal government, may also lay claim to derivative protection of the sovereign shield.¹⁵ When successful in invoking this perquisite of the sovereign, contractors leave citizens without recourse for harms suffered. This has occurred when, for example, individuals have claimed harm due to a contractor's eviction of a resident of public housing,¹⁶ a contractor's provision of health care services in a prison,¹⁷ and a contractor's investigation of a firefighter's suspicious absenteeism.¹⁸

In previous work, we have examined the contours of each of the three sovereign shield doctrines and the ways contractors purposely confuse and conflate them to create a powerful barrier against liability and oversight.¹⁹ We called attention to how an expansive sovereign shield creates an "alliance of Goliaths" between private sector contractors and the federal executive branch.²⁰ We revealed how that alliance undermines constitutional principles of federalism and separation of powers.²¹ And, most importantly, we showed how application of the sovereign shield leaves injured plaintiffs without a remedy.²²

This Article offers a novel solution to the sovereign shield problem. We argue that a federal contractor's access to these powerful doctrines to avoid liability should be contingent—that a federal contractor must *qualify* for such protection.²³ When a contractor should have known that its conduct on behalf of the federal government would violate rights of the plaintiff that are protected by law, it should not qualify for sovereign shield protection. In other words, the contractor would bear the burden of

15. *Id.* at 980–84 (arguing that federal contractors take advantage of the incoherent doctrinal understanding of the sovereign shield doctrines to extend their protection to cover conduct undertaken by private actors).

16. *Meadows v. Rockford Hous. Auth.*, 861 F.3d 672, 677–78 (7th Cir. 2017) (finding that private security contractor was entitled to qualified immunity defense because its employees acted "under the direct supervision of [Housing Authority] officials when they carried out the actions that [the plaintiff] challenges").

17. *Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 789 (7th Cir. 2014) (explaining that the private contractor would be entitled to qualified immunity "unless the constitutional violation was caused by an unconstitutional policy or custom of the corporation itself" and that "[r]espondeat superior liability does not apply to private corporations" (emphasis in original)).

18. *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (finding that a private lawyer investigating on behalf of a public entity was entitled to qualified immunity because "immunity . . . should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis").

19. *See Sovereign Shield*, *supra* note 4.

20. *Id.* at 1030–32.

21. *Id.* at 1041–46.

22. *Id.* at 1038–41.

23. *See infra* Part II.

establishing that the failure to anticipate a legal violation was reasonable on the facts available and given the terms of the contract.²⁴ If the contractor could not bear that burden, the contractor would be susceptible to monetary damages. Our proposal borrows from two embattled doctrines: derivative sovereign immunity and qualified immunity. Taking them together, we propose that a federal contractor qualify to derive the protections of its sovereign contracting partner *only* when (1) the contractor was acting as the government’s agent, (2) the contractor complied with any guidelines established by the government, and (3) it was reasonable for the contractor to believe that its conduct would not violate legal rights.

We previously argued that these sovereign shield defenses—federal preemption of state law, sovereign immunity, and intergovernmental immunity—should be available only when the contested action is *noncommercial*, opening both the government and its private contractors up to legal liability for harms caused by *commercial* conduct.²⁵ The normative case for recognizing forms of federal sovereign immunity is weaker when (1) the government—directly or indirectly through contractors—provides a service that is not uniquely public, meaning that other, nongovernmental entities offer a similar service and (2) the government’s activity is more akin to commercial conduct.²⁶ On the other

24. See *infra* section II.B for a discussion of reasonableness.

25. See generally Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign in Commerce*, 73 STAN. L. REV. 1101 (2021) [hereinafter *Sovereign in Commerce*]. This is an application of the doctrine of respondeat superior, or what we have previously labeled “upstream liability,” where both the contractor agent and the federal principal are liable for the acts of the contractor. *Id.* at 1147–48. We recognize that the Justices have not endorsed drawing a distinction between commercial and noncommercial conduct in the context of immunity, yet we see opportunity still in the Court’s doctrine. In fact, a majority of the Supreme Court declined to recognize a distinction between states’ commercial and noncommercial activities in the course of rejecting an argument that participation in a federal program that explicitly allowed for suit against the state necessarily entailed abrogation of state sovereign immunity. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). The majority found that the state of Florida had not consented to suit in federal court by participation in the federal program, *id.* at 676, and that the fact that the federal program involved commercial activity did not matter, *id.* at 684 (“[T]he constitutionally grounded principle of state sovereign immunity is [not] any less robust where, as here, the asserted basis for constructive waiver is conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of ‘market participants.’”). However, the dominant concern of the *College Savings* majority was that immunity could not be waived *implicitly*, by participating in the government program; the Justices’ discussion of the weight to be accorded to a commercial/noncommercial distinction was limited to that context. That is, participation in commercial conduct could not sustain the argument that by doing so, a state implicitly surrendered its sovereign immunity. *Id.* Further, in support of our argument that the Court should recognize the commercial/noncommercial distinction in the sovereign shield context, we identify several doctrinal contexts in which it has already made that distinction. *Sovereign in Commerce*, *supra*, at 1129–42.

26. See generally *Sovereign in Commerce*, *supra* note 25.

hand, when the federal government—directly or indirectly through contractors—provides a beneficial public service that otherwise would be (1) unavailable, (2) available on unacceptable terms, or (3) available with unacceptable consequences, then the normative case for some form of federal sovereign immunity is more compelling.²⁷ Were our full proposal to be implemented, then the qualified sovereignty proposal in this Article would only apply to *noncommercial* conduct. It is not necessary, however, to adopt our full project proposal, including the commercial/noncommercial distinction, to agree with the qualified sovereignty construct proposed herein. Rather, qualified sovereignty could be adopted and applied to *all* actions undertaken by a private actor on behalf of the federal government. By holding private contractors liable for violating an individual's legal rights, qualified sovereignty strikes a careful balance. Unlike our earlier calls to abolish both sovereign immunity and its derivations when the alleged bad action is commercial,²⁸ here we do not advocate for a complete ban on sovereign immunity, even for private companies acting pursuant to a contract with the federal government.

One reason for that choice is an interest in consistency. Our proposal closes the accountability gap between government actors and their private contractors, when engaged in the same activity. In that way, it gives credence to an intuition about fairness—an agent following orders that are neither illegal nor unfair themselves should not be held liable when the principal is not. *And* it closes the accountability gap between private actors and private contractors, treating private contractors more like any other actor in the private sector. Another reason for that choice is efficiency in government action. Our proposal balances the rights of victims to recover for harms with protection for private entities from unforeseen liability

27. In such instances, weighing the potential public benefits against the potential costs of the harmful conduct to the individual presents a political question. The federal legislature may determine that the aggregate value of the service to the public means it should be undertaken despite the risk of harm. Examples include providing for the national defense, which is both costly and inherently risky, *see, e.g.*, *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986) (“It should be axiomatic that ‘considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and are exempt from review by civilian courts.’” (quoting *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982))); Hazel Glenn Beh, *The Government Contractor Defense: When Do Governmental Interests Justify Excusing a Manufacturer’s Liability for Defective Products?*, 28 SETON HALL L. REV. 430, 443 (1997) (“Judicial deference to military and national-defense decisions is well-rooted in judicial opinions.”); engaging in criminal law enforcement, which only the government has the authority to do; or operating carceral facilities, which would itself constitute a crime if performed by individuals at their own discretion, 18 U.S.C. § 1201(a)–(d) (making kidnapping illegal).

28. *Sovereign in Commerce*, *supra* note 25.

incurred at the government's explicit and lawful direction. If government contractors never derived the sovereign protections of their contracting partner, government contracts would be less efficient and more expensive. Rather, by holding government contractors accountable only for a reasonably foreseeable violation of legal rights, both the contractor and the government agency are incentivized to enter contracts and implement them in thoughtful and lawful ways.

The discussion that follows has three Parts. Part I explains how current law governs when and under what circumstances an injured person can seek relief from the government or its contractors. This Part explores three paths to remedy harmful conduct by the federal government and its agents—a Federal Tort Claims Act (“FTCA”) claim,²⁹ a *Bivens* claim,³⁰ and a state law tort claim. Adopting the perspective of the plaintiff, this Part shows how victims seeking monetary damages against the federal government or government agents must run a similar gauntlet, whichever of the three legal mechanisms is used. It further illuminates how the doctrines allow private contractor agents to escape without accountability.

Part II develops the “qualified sovereignty” construct, borrowing from derivative sovereign immunity and qualified immunity. It argues that, if a contractor cannot qualify for sovereign shield protection, it should not receive such protection. In that case, any action against the contractor would avoid the hurdles of the FTCA, *Bivens*, and sovereign shields as applied to state law.

To make the theoretical concrete, Part III then turns to the case of *Ammend v. Bioport, Inc.*,³¹ wherein a group of several dozen former military personnel, along with their families, sued for damages related to their receipt of an anthrax vaccine (“AVA”), directed by the United States Department of Defense and produced and implemented by private companies under contract with the federal government. The first section of Part III applies the qualified sovereignty construct to the facts and procedure of this case.

The final section of Part III is for readers of our trilogy of Articles,³² which comprehensively identify, dissect, and propose related solutions to the understudied phenomenon of contractors evading accountability by using the sovereign shield. The final section explores the process a court would follow to determine how the defendants in the *Ammend* case would have to approach their sovereign shield defenses if a court adopted both

29. 28 U.S.C. § 1346(a)(2).

30. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). For a more detailed analysis, see *infra* section I.B.

31. 322 F. Supp. 2d 848 (W.D. Mich. 2004).

32. See *Sovereign Shield*, *supra* note 4; *Sovereign in Commerce*, *supra* note 25.

our commercial/noncommercial protocol and our qualified sovereignty construct. A brief conclusion follows.

I. CURRENT LAW—FEDERAL CONTRACTORS AND AVOIDANCE OF LIABILITY

When a plaintiff is injured by a government contractor, acting under the guidance and direction of the federal government, the plaintiff has three primary avenues to seek money damages.³³ One avenue is to try to hold the United States liable for the contractor agent's actions in federal court pursuant to the process and law of the Federal Tort Claims Act.³⁴ Under another avenue, the plaintiff can seek to hold the contractor agent directly responsible in federal court pursuant to the implied remedy of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (“*Bivens*”).³⁵ Finally, the plaintiff can seek to hold the contractor agent responsible by bringing an action alleging violations of state tort law in state court.³⁶ All three of those avenues require the plaintiff to run a procedural gauntlet in which the government contractor can (often successfully) seek to avoid legal accountability. Under current law, federal contractors may avoid liability by invoking the sovereign shield or exploiting gaps in federal actor accountability.

To understand how the current law operates, it is necessary to set out how these three avenues apply to both government officials and government contractors. This Part both sets the stage for the remainder of the Article and contributes to the literature by explaining the procedural

33. See Danielle C. Jefferis, *Delegating Care, Evading Review: The Federal Tort Claims Act and Access to Medical Care in Federal Private Prisons*, 80 LA. L. REV. 37, 40–41 (2019) (noting that a federal prisoner can bring a constitutional claim against the government only through the FTCA or *Bivens*, explaining that “the availability of those claims is exceedingly narrow”). An injured plaintiff may also have other statutory remedies, wherein Congress has waived sovereign immunity. See Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 480 (2011) (“There are three basic sources of liability under federal law for government officials or entities alleged to have violated substantive legal principles: 42 U.S.C. § 1983, which provides a cause of action against state actors for violations of the Constitution; liability pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which implies a cause of action for damages against federal officials for certain violations of the Constitution; and statutory causes of action, which specifically provide causes of action against government officials or their entities, such as the Americans with Disabilities Act.”); Sarah L. Brinton, *Three-Dimensional Sovereign Immunity*, 54 SANTA CLARA L. REV. 237, 249 (2014) (citing three of “Congress’s most important statutory waiver creations: (1) the U.S. Court of Claims and the Tucker Act; (2) the Federal Tort Claims Act (FTCA); and (3) the Administrative Procedure Act (APA)”).

34. 28 U.S.C. §§ 1346(b), 2671.

35. 403 U.S. 388 (1971).

36. For example, the plaintiff in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), alleged violations of Virginia tort law.

hurdles that plaintiffs confront in bringing any of these claims. This Part shows how the FTCA and *Bivens* claims create parallel procedural processes, from the plaintiff’s perspective, that make it exceedingly difficult to get monetary damages. It then explains how the remaining avenue to recovery—state law—is the most vulnerable to sovereign shield defenses, which stop plaintiffs in their tracks. In the end, plaintiffs are left with limited ability to recover from federal actors and even more limited ability to recover from private actors acting under the guidance and direction of the federal government.

A. *Federal Tort Claims Act and Its Procedural Hurdles*

The Federal Tort Claims Act waives sovereign immunity of the United States for certain torts committed by federal employees acting within the scope of their employment.³⁷ The law illustrates that, notwithstanding the power of federal sovereign immunity,³⁸ Congress retains the power to waive, or abrogate, that immunity.³⁹ In cases involving allegations of constitutional and non-constitutional torts caused by federal action, Congress has waived federal immunity through the FTCA⁴⁰ and, over decades, courts have extensively refined the scope of liability.⁴¹ In an FTCA action, plaintiffs confront two sets of procedural hurdles that they must clear to avoid getting kicked out of court on immunity grounds. The plaintiff must first overcome sovereign immunity, satisfying the requirements of the FTCA, and then must avoid the Act’s exceptions that restore immunity. Although the defendant bears the burden of proving that an FTCA exception applies, both the Supreme Court and lower courts have been generous to the government in their interpretations of the law

37. *Brownback v. King*, 592 U.S. ___, 141 S. Ct. 740, 745 (2021).

38. U.S. CONST. art. VI, § 1, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”); Mark C. Niles, “*Nothing but Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1287–91 (2002) (explaining the adoption of federal sovereign immunity in the United States).

39. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (explaining that Congress can waive federal sovereign immunity to monetary damages, but the waiver must be “unequivocally expressed in statutory text” and “strictly construed . . . in favor of the sovereign”); *United States v. King*, 395 U.S. 1, 4 (1969) (explaining that the United States may waive its sovereign immunity to suit, but such a waiver must be “unequivocally expressed”). *But see* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 522 (2008) (arguing that, in recent decades, the Supreme Court has been less rigid in “considering the nature and extent of liability by the government”).

40. 28 U.S.C. §§ 1346(b), 2671.

41. *See, e.g., infra* section I.B.2 (discussing *Richardson v. McKnight*, 521 U.S. 399 (1997)).

for some time.⁴²

1. *FTCA Accountability—Government Employees*

The FTCA, passed in 1946, permits civil claims against the federal government for federal statutory or constitutional violations.⁴³ In other words, the FTCA provides a process through which a tort victim can seek relief against a federal employee who would otherwise be immune.⁴⁴ More specifically, the FTCA gives federal district courts exclusive jurisdiction to hear “claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,” where, under similar circumstances, the United States, if a private person, would be liable under the law applicable in the place where the injury occurred.⁴⁵

This sovereign immunity waiver applies only in certain circumstances and in accord with a particular protocol. Under the FTCA scheme, if a plaintiff sues a federal employee, either the Attorney General or a federal district court must “certify” that the employee was acting within the scope of their employment.⁴⁶ When government employees do not act within the scope of their employment, the FTCA does not apply, and a plaintiff may sue the employees directly.⁴⁷

Once the Attorney General or federal judge has certified that a federal employee defendant had been acting “within the scope of his office or employment at the time of the incident out of which the claim arose,” the

42. See Niles, *supra* note 38, at 1300–01 (explaining the exceptions to the FTCA and noting that “the discretionary function restriction is stated in broad terms, has resulted in a substantial limitation on the liability of the United States in a wide range of circumstances, and has fostered a substantial jurisprudence”).

43. 28 U.S.C. § 1346(b)(1) (conferring on federal district courts “exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred”).

44. *Id.*

45. *Id.*

46. 28 U.S.C. § 2679(d)(3).

47. A corporate defendant might well prefer that the FTCA apply; the structure of the Act creates an incentive for the contractor and its employing agency together to argue that the FTCA dictates the availability of any remedy. This is an example of the same kind of incentive we explored in *Sovereign Shield*, in that the government principal has no disincentive to help its contractor agent take advantage of federal supremacy to avoid potential liability, and the contractor has every reason to do exactly that. *Sovereign Shield*, *supra* note 4, at 1038–46.

United States is substituted as a party in the employee's place.⁴⁸ At that point, the FTCA is triggered, the suit is "deemed an action against the United States,"⁴⁹ the court dismisses the individual employee and substitutes the United States as a defendant,⁵⁰ and the case proceeds against the United States in federal court.⁵¹ The structure of the FTCA thus protects individual government employees from liability,⁵² regardless of the outcome of the action against the United States.⁵³ The plaintiff must exhaust their administrative remedies before an FTCA case can be heard in federal district court.⁵⁴ FTCA claims are not subject to the Seventh Amendment's jury requirement.⁵⁵

Once a complaint is filed in federal court, the FTCA's requirements, exceptions, and defenses apply. The FTCA's immunity waiver is subject to statutory limits, in the form of exceptions, which attach as soon as the government's employee is certified.⁵⁶ One of the frequently used and powerful exceptions is the "discretionary function exception," which excepts "any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty."⁵⁷ This means that if a government employee is entrusted with a degree of discretion, victims of harms caused by the employee's exercise of that discretion may have no remedy; the underlying idea is that the government should not be subject to judicial "'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."⁵⁸ Courts and advocates have argued that this

48. 28 U.S.C. § 2679(d).

49. *Id.* § 2679(d)(1).

50. *Id.*

51. *Id.* § 2679(d)(2).

52. *Id.* § 2679(b)(1) (making the suit against the United States "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee").

53. And, if the plaintiff originally brings a state law claim against the employee, the Westfall Act allows the Attorney General to certify the employee and the claim converts into an FTCA claim. *Harbury v. Hayden*, 522 F.3d 413, 416 (D.C. Cir. 2008) (citing 28 U.S.C. § 2679(d)(1)).

54. 28 U.S.C. § 1346(b)(1); *id.* § 2675(a) (requiring exhaustion of administrative remedies).

55. 28 U.S.C. § 2402.

56. The exceptions to the immunity waiver were designed to protect the government from extensive financial risk while at the same time encouraging the government to maximize public benefit rather than to try to minimize risk. KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 2 (2019).

57. 28 U.S.C. § 2680(a).

58. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

exception is so expansive that it essentially swallows the original immunity waiver.⁵⁹

The discretionary function exception is not the only statutory limitation on the FTCA's immunity waiver. The FTCA bars suits against the government in more than a dozen categories of cases, including certain claims "arising from the actions of law enforcement officers administering customs and excise laws,"⁶⁰ "certain claims predicated upon intentional torts committed by federal employees,"⁶¹ and "[a]ny claim arising in a foreign country."⁶² Of particular salience at the time of writing, in the midst of the raging COVID-19 global pandemic, is the FTCA exemption for "[a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States."⁶³ Although there are compelling rationales for some or all of these exceptions, their net effect is to limit a waiver of sovereign immunity that would otherwise provide a remedy to plaintiffs injured (and sometimes gravely injured) by government conduct.⁶⁴

This complex statutory structure can leave an injured plaintiff without any remedy. If, for example, the government employee who caused injury was acting within the scope of their employment when they harmed the plaintiff but the United States is protected by an FTCA exception, the injured plaintiff is left without any recourse against either the government or its employee.⁶⁵ This liability escape hatch protects both employee and employer and creates an incentive to certify when the government is likely to find safety in one of the many broad exceptions to the FTCA's immunity waiver.

59. See, e.g., *Matthews v. United States*, No. C07-00030, 2011 WL 3471140, at *2 (D. Guam Aug. 5, 2011) (describing "the discretionary function exception" as "the most frequently litigated" statutory exception to the FTCA), *aff'd*, 586 F. App'x 366 (9th Cir. 2014); James R. Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) (similar).

60. LEWIS, *supra* note 56, at 16 (citing 28 U.S.C. § 2680(c)).

61. *Id.* at 17 (citing 28 U.S.C. § 2680(h)).

62. 28 U.S.C. § 2680(k).

63. *Id.* § 2680(f).

64. See, e.g., *Foster Logging, Inc. v. United States*, 973 F.3d 1152 (11th Cir. 2020) (holding that the FTCA exception barred action by logging company for damages caused by the Army forestry division's alleged failure to observe, monitor, and maintain a controlled burn); see also *Willett v. United States*, 24 F. Supp. 3d 1167 (M.D. Ala. 2014) (holding that the plaintiff's FTCA action against the United States for injuries she sustained when she was alleged sexually assaulted by a VA hospital employee were dismissed pursuant to the discretionary function exception).

65. See *B & A Marine Co. v. Am. Foreign Shipping Co.*, 23 F.3d 709, 715 (2d Cir. 1994); see also *Bannum, Inc. v. Samuels*, 221 F. Supp. 3d 74 (D.D.C. 2016). The plaintiff is also left without remedy if they do not meet the stringent procedural requirements of the FTCA, including exhausting administrative remedies. See *Harris v. Wilson*, 282 F. Supp. 3d 80 (2017) (holding that the FTCA applied, but the plaintiff's failure to exhaust her administrative remedies barred her from proceeding).

2. FTCA Accountability—Government Contractors

Although the FTCA waives federal sovereign immunity only for acts committed by United States employees⁶⁶ and explicitly exempts independent contractors from the definition of employee,⁶⁷ the determination of who can be held liable under what circumstances is considerably more complex than that clear-sounding description implies. The statute defines “[e]mployee of the government” to include “persons acting on behalf of a federal agency in an official capacity.”⁶⁸ And courts in some circumstances have determined that non-employee, private individuals *are* federal employees for purposes of the FTCA. Consistent with agency principles regularly invoked in sovereign immunity cases,⁶⁹ in distinguishing employees from independent contractors, the reviewing court’s inquiry focuses on the degree of control exercised by the United States.⁷⁰ For the contractor to be considered an employee, the federal government must have supervised the contractor’s day-to-day operations or had control over the contractor’s physical performance.⁷¹ More specifically, courts assess whether the contractor, rather than the government, exercised day-to-day supervision and control of its own activities.⁷² This leaves plaintiffs injured by federal contractors uncertain

66. 28 U.S.C. § 1346(b)(1).

67. *Id.* § 2671; *U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Va., LLC*, 899 F.3d 236, 248 (4th Cir. 2018) (“An ‘employee’ does not include an ‘independent contractor’ working for the government.” (citing 28 U.S.C. § 2671; *United States v. Orleans*, 425 U.S. 807, 814 (1976))); *see* Jefferis, *supra* note 33, at 42 (“Increasingly, however, the federal government attempts to evade its own duty of care owed to people in its custody by invoking the FTCA’s independent-contractor exception.”).

68. 28 U.S.C. § 2671.

69. *See* *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940); *Sovereign Shield*, *supra* note 4, at 986–92; Jefferis, *supra* note 33, at 53 (“Courts’ application of the FTCA’s independent-contractor exception generally tracks common law principles of principal-agent relationships.”).

70. *Del Valle v. Sanchez*, 170 F. Supp. 2d 1254, 1264–65 (S.D. Fla. 2001) (identifying that “the determining factor” as to whether a party is an employee or an independent contractor is “the level of control exercised by the federal government over the individual or agency” (citing *Orleans*, 425 U.S. at 814)).

71. *Id.*; Ann K. Wooster, Annotation, *When Is Federal Agency Employee Independent Contractor, Creating Exception to United States Waiver of Immunity Under Federal Tort Claims Act* (28 U.S.C. § 2671), 166 A.L.R. Fed. 187 (2021) (originally published in 2000).

72. *Orleans*, 425 U.S. at 814 (“A critical element in distinguishing an agency from a contractor is the power of the Federal Government ‘to control the detailed physical performance of the contractor.’” (quoting *Logue v. United States*, 412 U.S. 521, 528 (1973))); *id.* at 815 (holding that independent contractor status under the FTCA turns on “whether [the contractor’s] day-to-day operations are supervised by the Federal Government”); *see also* *Williams v. United States*, 50 F.3d 299, 307 (4th Cir. 1995) (finding independent contractor status based on “a comprehensive instrument providing that [the contractor] was responsible for the maintenance of the Premises” and “the daily operations

whether they can seek relief through the FTCA.

Consider two contrasting examples. In *Bird v. United States*,⁷³ the Tenth Circuit found that a nurse anesthetist qualified as an employee under the FTCA because he did not have broad discretion to exercise his independent judgment.⁷⁴ Rather, the court found that the nurse anesthetist worked under the supervision and control of an operating surgeon who was an employee of the federal government.⁷⁵ The FTCA procedure then kicked in—the United States was substituted for the nurse anesthetist as defendant, leaving him free from individual liability.⁷⁶ The United States then could seek the protection of the FTCA’s immunity waiver exceptions.

On the other hand, in *Robb v. United States*,⁷⁷ the court found that physicians who provided medical services at facilities operated by the federal government worked relatively independently of the federal government’s control and therefore qualified as independent contractors for FTCA purposes.⁷⁸ The court noted that the doctors who failed to diagnose a cancerous lesion on the plaintiff’s lung were employed by a private entity hired by the U.S. Air Force.⁷⁹ The reviewing court also concluded that: (1) nothing in the contract between that entity and the Air Force showed an intention to make the doctors employees of the federal

of the Premises”); *Larsen v. Empresas El Yunque, Inc.*, 812 F.2d 14, 16 (1st Cir. 1986) (holding that the independent contractor defense applied where responsible party ran the “day-to-day operation of [a] restaurant” that was located on premises “owned and controlled by the United States”).

73. 949 F.2d 1079 (10th Cir. 1991).

74. *Id.*; see also *Bannum, Inc. v. Samuels*, 221 F. Supp. 3d 74 (D.D.C. 2016) (finding that claims against a Bureau of Prisons contractor were covered by the FTCA, the United States was the only proper defendant, and that the FTCA failed because the plaintiffs did not exhaust remedies and an FTCA exception applied); *Omnipol v. Worrell*, 421 F. Supp. 3d 1321 (M.D. Fla. 2019) (contracting officers were considered employees under the FTCA, but the action was dismissed pursuant to federal sovereign immunity).

75. See *Bird*, 949 F.2d at 1086 (“Nurse Bullon was not a physician bound to exercise his judgment independently of a government supervisor. He was not only subject to the rules and regulations and, indeed, a statute placing him under the control and supervision of physician employees of the hospital, but he was under their actual control to the extent they chose to exercise it. He was required to work with patients designated by others. He maintained no separate office. He used hospital equipment exclusively. He could see patients in no other place nor under any other circumstance than as directed by government employees. He was under the control and supervision of the government surgeon at the hospital to the same extent that nurse Forsythe, a regular employee of the government, was.”).

76. *Id.* at 1088 (finding that the nurse anesthetist “was an employee of the government and not an independent contractor within the contemplation of the FTCA” and remanding to the lower court to apply the FTCA).

77. 80 F.3d 884 (4th Cir. 1996).

78. *Id.* at 890; see also *Creel v. United States*, 598 F.3d 210, 212 (5th Cir. 2010).

79. *Robb*, 80 F.3d at 893.

government,⁸⁰ and (2) the government did not control the daily activities of the doctors to an extent that they could be deemed employees.⁸¹ Because the contractor doctors were not considered employees, the FTCA was not triggered, and the injured plaintiff could sue the contractor directly in state or federal court.⁸² Nevertheless, the defendant contractor would not be, at that point, prohibited from invoking sovereign shield defenses (preemption, derivative sovereign immunity, or intergovernmental immunity) in that state or federal litigation.⁸³

To review and consolidate a confusing process, we set out three possible scenarios where a plaintiff seeks to recover monetary damages related to harm caused by a government contractor via the FTCA. Each has a different outcome.

In the first scenario, the contractor is certified as a federal employee, thus subjecting the claim to the FTCA. Imagine that, in this scenario, none of the FTCA waiver exceptions apply and the federal government may be liable directly for the underlying tort. Neither the contractor nor the contractor's employee—under the doctrine of respondeat superior—is subject to direct liability, and the injured plaintiff can recover monetary damages only from the United States. This possibility creates an incentive for a contractor to argue that it is an employee, operating under extensive federal control and with minimal discretion or autonomy.

In the second scenario, the contractor's employee is certified as a federal employee, thus triggering the FTCA. In this second scenario, however, imagine that one of the FTCA's exceptions to the immunity waiver applies or that the federal government is otherwise relieved of liability under the FTCA. Because the FTCA is triggered, the individual who committed the challenged action cannot be held liable, nor can their contractor employer under the doctrine of respondeat superior.⁸⁴ And because an exception to the immunity waiver applies, the United States may assert sovereign immunity, protecting the federal government itself from liability.⁸⁵ Consequently, the injured plaintiff is left with no avenue for redress. The outcome of this second scenario incentivizes, reinforces,

80. *Id.* at 891.

81. *Id.* at 892.

82. *Id.* at 890.

83. *See Sovereign Shield*, *supra* note 4; *see also infra* section I.C.

84. Note, however, that the dismissal is often without prejudice, in case the United States "subsequently withdraws the certification." *See Roemen v. United States*, 463 F. Supp. 3d 990, 1007 (D.S.D. 2020).

85. *See, e.g., Bannum, Inc. v. Samuels*, 221 F. Supp. 3d 74 (D.D.C. 2016) (finding that claims against a Bureau of Prisons contractor were covered by the FTCA, the United States was the only proper defendant, and that the FTCA failed both because the plaintiffs did not exhaust remedies and an FTCA exception applied).

and strengthens the alliance between the government agency and its contractor because, by working together, both entities escape accountability. We have previously defined and critiqued this relationship.⁸⁶

In the third scenario, the contractor's employee is *not* certified as a federal employee. Therefore, the FTCA does not apply at all. In this scenario, the plaintiff would not be able to sue the federal government but would be able to assert claims against the contractor employee responsible for the injury and against the contractor itself via respondeat superior. In that action, however, the contractor could still seek the protection of the sovereign shield.⁸⁷ Even if a derivative sovereign immunity defense is unavailable because the contractor is not an employee, the contractor can nevertheless assert preemption of applicable state law and/or intergovernmental immunity to try to avoid liability. For example, in *Boyle v. United Technologies Corp.*,⁸⁸ sometimes considered a derivative sovereign immunity case itself,⁸⁹ the United States Supreme Court found that because the contractor enjoyed significant discretion in its operations, it was not an employee but an independent contractor, and consequently the FTCA did not apply. The contractor was still able to escape liability for the death of a United States Marine, however, by relying on conflict preemption.⁹⁰ *Boyle* offers an example of successful invocation of the

86. See *Sovereign Shield*, *supra* note 4, at 977. In fact, understanding the practical implications, many plaintiffs challenge the certification of an employee as within the scope of the employment. See LEWIS, *supra* note 56, at 14. With respect to these first two scenarios, we have also previously argued that, if the original harmful activity was commercial, neither the federal government nor its contractor agent should be able to escape liability by resorting to a sovereign shield defense, including sovereign immunity. If courts were to adopt our suggestion, then, for commercial activities, neither the government nor its contractor would be able to assert sovereign immunity, rendering the FTCA—and its exceptions—irrelevant. See *Sovereign in Commerce*, *supra* note 25, at 1142–52. Therefore, depending on the challenged action and traditional agency principles, the plaintiff could seek relief from the contractor employee, the contractor company, and the federal government principal. However, even if the courts or Congress were to adopt our proposal for commercial conduct, the FTCA applies in many situations involving conduct that would be deemed noncommercial, *see id.*, leaving the outcomes in the above scenarios intact and allowing the employee and their contractor employer to escape from liability.

87. See *Cabalce v. VSE Corp.*, 914 F. Supp. 2d 1145, 1159 (D. Haw. 2012) (granting United States' motion to dismiss claims arising under the FTCA for lack of subject matter jurisdiction because the plaintiff was injured by federal contractors' actions); *Cabalce v. VSE Corp.*, 922 F. Supp. 2d 1113, 1123–27 (D. Haw. 2013) (affirming the rejection of defendant's assertions that it was not subject to state law tort action because of sovereign shield defenses, including preemption and derivative sovereign immunity).

88. 487 U.S. 500 (1988).

89. See *Sovereign Shield*, *supra* note 4, at 980.

90. *Boyle*, 487 U.S. 500; *see also* *Koochi v. United States*, 976 F.2d 1328, 1336–37 (9th Cir. 1992) (“The imposition of such liability on the manufacturers of the Aegis would create a duty of care where

sovereign shield by a contractor—using one, two, three, or an undefined mix of doctrines—to avoid accountability. This outcome not only forecloses recovery for injured plaintiffs, but also may produce the bizarre result that a federal contractor has broader immunity from liability than the federal government does itself.⁹¹ Regardless, this analysis shows that when the FTCA does apply, the exceptions to the general waiver extend generously to private actors under contract with the federal government.⁹² As alternate arguments that both protect contractors, the FTCA’s procedure and sovereign shield protections can leave plaintiffs injured by a private government contractor without means of redress.

B. *Bivens*, 42 U.S.C. § 1983, and Procedural Hurdles

In 1871, Congress provided for abrogation of states’ immunity, in language now codified in 42 U.S.C. § 1983,⁹³ which subjects any person acting “under color of any statute, ordinance, regulation, custom, or usage[] of any State or Territory” to liability⁹⁴ for “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” inflicted on “any . . . person” within the jurisdiction of the United States.⁹⁵ The Court has extensively assessed the scope and implications of remedies under § 1983 for defendants who are natural persons.⁹⁶ States retain their Eleventh Amendment immunity, notwithstanding § 1983.⁹⁷

The Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁹⁸ took a step toward providing a similar path to recovery to that provided by § 1983 for plaintiffs alleging that federal

the combatant activities exception is intended to ensure that none exists. Accordingly, preemption is appropriate.”).

91. That is, if the federal government had been the defendant in *Boyle*, the FTCA would have provided a path to (limited, to be sure) liability; the federal government, itself the sovereign, would be statutorily precluded from asserting the immunity that United Technologies, the contractor, asserted in *Boyle*. *But see Koohi*, 976 F.2d at 1328 (also dismissing claims against the United States pursuant to the FTCA’s exceptions).

92. *See infra* notes 215–226 and accompanying text (chronicling the lack of accountability for private contractors of the federal government who assert sovereign shield defenses in civil litigation).

93. 42 U.S.C. § 1983.

94. In law (i.e., for damages) or equity (injunctive or other relief). *Id.*

95. *Id.*

96. *See, e.g., Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (concluding that “[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers”).

97. *Quern v. Jordan*, 440 U.S. 332, 343–44 (1979).

98. 403 U.S. 388 (1971).

agents violated a right protected by the U.S. Constitution.⁹⁹ Thereafter, the Court's extensive § 1983 jurisprudence has been applied to *Bivens* actions as well.¹⁰⁰ Relatedly, the Court's creation and application of "qualified immunity" to protect state government officials from liability under § 1983 applies to a *Bivens* defendant if he did not know and should not have known that his actions violated the plaintiff's federally-protected right.¹⁰¹

While § 1983 and *Bivens* have different origins, they follow a similar procedural and substantive path, which is not unlike the one we described with respect to the FTCA. The plaintiff must first overcome sovereign immunity, satisfy the requirements of *Bivens*, and then must overcome a qualified immunity defense. Like the exceptions to the FTCA, the judge-created construct of qualified immunity has been thoroughly excoriated by critics, who argue that *Bivens*' power to hold government actors liable for injuries has been wholly stymied by qualified immunity,¹⁰² leaving the plaintiff without access to relief. In addition, the procedure for holding a contractor liable under *Bivens* suffers from the same loopholes as the FTCA. If, for example, a federal contractor was acting within the scope of its contract and under the direction of the federal agency, it can escape liability in the loophole between a *Bivens* claim, which cannot lie against a private actor,¹⁰³ and a state tort action, in which the defendant can assert derivative sovereign immunity, or some other doctrinal component of the sovereign shield.¹⁰⁴ The liability loophole protects both the contractor and the federal government.¹⁰⁵

99. *Id.*

100. See *Ashcroft v. Iqbal*, 556 U.S. 662, 675–76 (2009) ("In the limited settings where *Bivens* does apply, the implied cause of action is the 'federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U.S.C. § 1983.'" (quoting *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006))).

101. See *Butz v. Economou*, 438 U.S. 478, 506–07 (1978); *id.* at 504 ("Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

102. Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 936–37 (2019) (explaining the history of government liability in three historical phases that have become progressively more hostile to permitting monetary relief against the government and its officials).

103. See *infra* notes 158–166 and accompanying text (discussing *Minnecci v. Pollard*, 565 U.S. 118 (2012) and its holding).

104. See *infra* notes 181–189 and accompanying text (describing the ways that contractors can use the sovereign shield doctrines to avoid liability under state law).

105. See *Sovereign Shield*, *supra* note 4, at 1034–38.

1. *Potential Liability—Government Actors*

42 U.S.C. § 1983 affords a monetary damages remedy when a state actor’s conduct violates a federally protected right.¹⁰⁶ Regularly, civil rights plaintiffs use § 1983 to seek relief against state actors for violations of their constitutional and other federal rights, such as the Eighth Amendment prohibition against imposition of “cruel and unusual punishment[.]”¹⁰⁷ or the Fourth Amendment protection against unreasonable searches and seizures.¹⁰⁸ The Supreme Court has explained that § 1983 protects “federally guaranteed rights” and is enforceable against “[a]nyone whose conduct is ‘fairly attributable to the State.’”¹⁰⁹ Prisoners in state facilities turn to § 1983 when harmed by abusive guards,¹¹⁰ for example, and victims of racial profiling at the hands of state law enforcement officers use § 1983 to seek to vindicate their rights.¹¹¹

While a plaintiff may seek relief from the individual state actor, such as a municipality, that caused the harm, and in some cases may seek relief from the defendant state actor’s supervisor,¹¹² the same plaintiff cannot necessarily seek relief against the entity that employs the bad actor. Rather, whether a plaintiff can sue the responsible entity depends on the kind of analysis the Court undertook in a 1978 case, *Monell v. Department of Social Services*.¹¹³ In *Monell*, women sought back pay after being required to take unpaid leaves of absence while pregnant, before such

106. 42 U.S.C. § 1983.

107. U.S. CONST. amend. VIII.

108. U.S. CONST. amend. IV.

109. *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

110. *See, e.g., Green v. Padilla*, 484 F. Supp. 3d 1098 (D.N.M. 2020) (addressing section 1983 action by prisoners in state correctional facility alleging abusive conduct by guards).

111. *See, e.g., Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020) (addressing section 1983 action by Black motorist stopped and detained by police officer).

112. *See, e.g., Green*, 484 F. Supp. 3d at 1165 (Plaintiff “plausibly alleges that [supervisor] subjectively was aware that [prison guard] was prone to abuse inmates; she expressly alleges that [prison guard] was placed on leave for improper relationships with female inmates, and that [supervisor] was aware of this pattern of impropriety”).

113. 436 U.S. 658 (1978). The Court concluded that a “local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents [and that] [i]nstead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible.” *Id.* at 694; *see also Edelman v. Jordan*, 415 U.S. 651, 676–77 (1974) (distinguishing between claims against the state and its officers and stating that “[t]hrough a § 1983 action may be instituted by public aid recipients such as [plaintiff], a federal court’s remedial power, consistent with the *Eleventh Amendment*, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury” (emphasis added)). The Court reaffirmed this distinction in *Quern v. Jordan*, 440 U.S. 332, 341 (1979).

leaves were considered medically necessary.¹¹⁴ Whether anyone—and who—actually pays any damages awarded is also complicated. Government entities like municipalities may indemnify the state officials responsible for the harm when they are successfully sued under § 1983,¹¹⁵ but a successful plaintiff may nonetheless be blocked by Eleventh Amendment immunity in any effort to recover from a state¹¹⁶ or from “local government units . . . considered part of the State for Eleventh Amendment purposes.”¹¹⁷

When an individual, natural person causes harm while acting in an official capacity on behalf of the federal government, rather than on behalf of a state, *Bivens* comes into play: the Supreme Court has recognized a non-statutorily-created path for a victim to recover from individual federal agents¹¹⁸ that operates similarly to § 1983’s state sovereign immunity waiver.¹¹⁹ In *Bivens*, which involved an allegedly unconstitutional search and seizure, the Court declared that a victim who “can demonstrate an injury consequent upon the violation by federal agents of [the victim’s] Fourth Amendment rights . . . is entitled to redress [the] injury through a particular remedial mechanism normally available in the federal courts.”¹²⁰ The Court grounded its newly-created theory of liability on the

114. *Monell*, 436 U.S. at 661.

115. *Id.* at 713 n.9 (Powell, J., concurring); *see also* *Austin v. Niblick*, 626 Fed. App’x 167, 170–71 (7th Cir. 2015) (analyzing municipal and state law indemnification provisions in case involving successful § 1983 claim).

116. *See, e.g.*, *Laufman v. Elliston*, 116 Fed. App’x 88, 89 (9th Cir. 2004) (holding that if the successful plaintiff in a § 1983 action “has any viable claim against the State of Arizona under the indemnification statute (a matter on which we express no opinion), he must pursue that claim in the state court system”); *see also* *Edelman*, 415 U.S. at 675–77 (rejecting argument that “§ 1983 was intended to create a waiver of a State’s Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself”).

117. *Monell*, 436 U.S. at 690 n.54.

118. I.e., recovery is available from the individual people acting on behalf of the federal government, not from the government itself. *See, e.g.*, *Reinbold v. Evers*, 187 F.3d 348, 355 n.7 (4th Cir. 1999) (“*Bivens* does not allow for recovery of money damages, or suits in general, against the government itself.”).

119. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (declining to recognize a cause of action under *Bivens* against a federal agency, rather than just a federal agent, because the rationale for *Bivens* recovery is “to deter the [federal] officer” (emphasis in original)). Nor is a *Bivens* action possible when the defendant is a corporate entity acting on behalf of the federal government. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71–72 (2001) (reasoning that it would be asymmetrical to permit a plaintiff to recover against a private corporation because a “federal prisoner in a [federal Bureau of Prisons (“BOP”)] facility alleg[ing] a constitutional deprivation . . . may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity[,] [but] [t]he prisoner may not bring a *Bivens* claim against the officer’s employer, the United States, or the BOP”).

120. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). The plaintiff sought, and the Supreme Court allowed for, money damages from each of the agents of the federal government who carried out the search. *Id.* at 388–89.

understanding that a violation of the Fourth Amendment, which “guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority,”¹²¹ must be remediable. Having found a violation of a federally protected right, the Court declared, “it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”¹²²

Since the creation of the remedy in 1971, however, the Supreme Court has grown more and more reluctant to expand the universe of potential *Bivens* actions.¹²³ As Justice Breyer observed, in rejecting a *Bivens* claim resting on the Eighth Amendment, the Court “has had to decide in several different instances whether to imply a *Bivens* action” and “in each instance it has decided against the existence of such an action.”¹²⁴ The Court refused to recognize a *Bivens* claim brought by undocumented immigrants detained by the federal government in the wake of the September 11, 2001, terror attacks, who challenged the detention as violative of their Fourth and Fifth Amendment rights.¹²⁵ The Court declined to allow a *Bivens* cause of action in the wake of a fatal, cross-border shooting by a United States Border Patrol officer of a youth in Mexico.¹²⁶ And the Court rejected a *Bivens* claim where a landowner alleged that Bureau of Land Management (“BLM”) employees extorted the landowner to force him to grant an easement over his property.¹²⁷ In each case, the Justices expressed considerable concern about expanding the availability of a *Bivens*-type remedy to a new context. Lower court opinions abound, citing to such Supreme Court cases, prohibiting *Bivens* claims from proceeding.¹²⁸

121. *Id.* at 392.

122. *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

123. *Minnecci v. Pollard*, 565 U.S. 118, 124 (2012).

124. *Id.*

125. *Ziglar v. Abbasi*, 582 U.S. ___, 137 S. Ct. 1843, 1857, 1860 (2017) (listing various additional cases in which the Court has declined to create an implied damages remedy).

126. *Hernandez v. Mesa*, 589 U.S. ___, 140 S. Ct. 735, 749–50 (2020).

127. *Wilkie v. Robbins*, 551 U.S. 537, 560–62 (2007); see also Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 812 (“Precisely because *Bivens* was a matter of judicial implication, . . . the Court retains and has exercised the power to limit the extent of any *Bivens* remedy, consistently restricting the reach of *Bivens* from 1980 on.”).

128. See, e.g., *White v. True*, No. 19-CV-0418, 2019 WL 3074528, at *2–3 (S.D. Ill. July 15, 2019) (finding that an inmate’s allegations that the correctional officers’ refusal to allow him to write his daughter letters violated his First Amendment rights did not create a valid *Bivens* action); *Williams v. O’Donnell*, No. 19-CV-00418, 2020 WL 6686416, at *3 (D. Or. Nov. 12, 2020) (noting that the “Supreme Court has declined to extend the right of action implied in *Bivens* to permit individuals to bring claims against federal agencies for damages arising from violation of the individual’s

Even if a court permits a *Bivens* action to proceed, the plaintiff is not entitled to get to the merits of the action without clearing a second procedural hurdle—overcoming a claim of qualified immunity. In the same way that the FTCA exceptions swallow the initial immunity waiver,¹²⁹ critics compellingly argue that qualified immunity makes the remedy provided by § 1983 and *Bivens* available in theory but not in practice.¹³⁰

The qualified immunity doctrine, critics contend, is imprecisely and misleadingly named. Although the Supreme Court has characterized the immunity for individual defendants in a § 1983 or *Bivens* action as “qualified” rather than total, the effect is absolute: if qualified immunity applies, it fully shields a defendant from suit. There are no gradations of immunity once a court invokes qualified immunity. One of the goals of the doctrine—for no statute establishes the parameters or criteria for this particular executive armor—is to enable government defendants to avoid the “burdens of broad-reaching discovery”;¹³¹ thus, qualified immunity inhibits a claimant’s ability to even gather evidence or move on to the merits of a claim.¹³²

In *Butz v. Economou*,¹³³ the Court explained that federal executive branch officials enjoy qualified immunity in suits alleging violations of constitutional rights, like state officials confronting § 1983 claims.¹³⁴ The Court rejected the federal government’s assertion that unconditional, or absolute, immunity should protect federal actors.¹³⁵ A few years later, the Court described the two-step test that had to be satisfied by an official asserting qualified immunity, explaining 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

constitutional rights” in plaintiff’s claims against the FBI and others); *Harris v. Dunbar*, No. 17-cv-00536, 2018 WL 3574736, at *4 (S.D. Ind. July 25, 2018) (dismissing plaintiff’s First and Fifth Amendment challenges under *Bivens*).

129. *See supra* note 59.

130. *See generally* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633 (2013) (noting the ways in which qualified immunity has become a quasi-absolute bar on recovery for plaintiffs injured by federal contractors).

131. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

132. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (explaining that a “defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery”).

133. 438 U.S. 478 (1978).

134. *Id.* at 500.

135. *Id.* at 498.

would have known.”¹³⁶ In articulating this formulation, the Court sought to obviate the need for burdensome fact investigation of subjective intent.¹³⁷ Instead, upon motion by a defendant, a court would consider two seemingly objective questions: whether the defendant official’s alleged conduct¹³⁸ violated a right (a) that was clearly established and (b) of which a reasonable person would have known. The Court subsequently held that trial courts have discretion to choose the order in which to address these questions.¹³⁹

As the Court’s qualified immunity doctrine developed over roughly fifty years, the “clearly established” prong of the test has become its defining factor. Because instances of official conduct giving rise to either a § 1983 or *Bivens* claim inevitably differ in their particulars, a defendant can successfully contend that the plaintiff’s right to be free of harms caused by such conduct had not been clearly established by a prior judicial decision.¹⁴⁰ The Court’s decisions have ensured that the bar a defendant official must clear in order to obtain immunity is low: an official need persuade a reviewing court only that the conduct undertaken did not violate rules that were clearly established at the time, and the Supreme Court has further explained that this means that officials are entitled to this protection unless the officials are “plainly incompetent” or knowingly committing acts in violation of law.¹⁴¹ Numerous commentators have criticized this immunity doctrine, arguing that the Supreme Court has made it far too easy for state actors to qualify.¹⁴²

136. *Harlow*, 457 U.S. at 818.

137. *Id.* at 816–18.

138. Of course, if the defendant disputes the allegations, resolving the seemingly objective questions becomes considerably more challenging in the absence of discovery. *See Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009) (observing, in weighing whether lower court’s denial of qualified immunity constituted immediately appealable decision, that “whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded”).

139. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). This represented a shift; the Court previously had instructed lower courts to assess whether a right was violated first, then determine whether the right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The move in *Pearson* gave trial court judges more leeway to choose whatever order would resolve litigation sooner, an outcome consistent with the goal of minimizing the burden of litigation on government official defendants. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L.J.* 2, 17 (2017).

140. *See Blum et al.*, *supra* note 130, at 652 (arguing that to satisfy the “clearly established” prong, the Court demanded a “pertinent Supreme Court or controlling circuit court decision or a consensus of persuasive authority from other circuits”).

141. *Ziglar v. Abbasi*, 582 U.S. ___, 137 S. Ct. 1843, 1866–67 (2017).

142. Schwartz, *supra* note 139, at 6–7 nn.5–7 (listing scholarly works critical of qualified immunity doctrine). Recently, even the Supreme Court has taken a step toward reining in the doctrine, emphasizing that a plaintiff need not identify a case with identical facts in order to establish that a right allegedly violated was “clearly established.” *Taylor v. Riojas*, 592 U.S. ___, 141 S. Ct. 52, 53–

Empirical research on the effects of the doctrine, however, offers a quantitative rebuttal to the notion that qualified immunity has undermined the availability of remedies under § 1983 and *Bivens*.¹⁴³ Professor Joanna C. Schwartz, in a large-scale empirical study of § 1983 civil rights cases, found that “contrary to judicial and scholarly assumptions, qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end.”¹⁴⁴ In fact, Schwartz concludes that across the five districts included in her study of almost 2,000 lawsuits, “just 3.9% of the cases in which qualified immunity could be raised were dismissed on qualified immunity grounds.”¹⁴⁵ Professor Alexander A. Reinert, who undertook an earlier and similar study of the effect of qualified immunity in *Bivens* actions, came to a similar conclusion.¹⁴⁶ Professor Reinert recognizes the almost universally held belief that *Bivens* plaintiffs find relatively little success in large part because of the federal actors’ access to qualified immunity,¹⁴⁷ but empirically shows that “the availability of qualified immunity plays a limited role in *Bivens* failures.”¹⁴⁸

That is not to say, however, that the empirical studies are supportive of qualified immunity as it has been implemented by the courts. Even those scholars remain unconvinced that qualified immunity achieves its stated goals.¹⁴⁹ Because qualified immunity may still operate to discourage potential claimants or their lawyers from bringing meritorious suits,¹⁵⁰ or

54 (2020) (per curiam) (stating that “no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, [the challenged conduct] was constitutionally permissible” even if it had not been precisely identified in prior case and quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997) for the principle that “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question”).

143. Schwartz, *supra* note 139; Reinert, *supra* note 127, at 813 (concluding that “*Bivens* cases are much more successful than has been assumed by the legal community, and that in some respects they are nearly as successful as other kinds of challenges to governmental misconduct”).

144. Schwartz, *supra* note 139, at 9.

145. *Id.* at 10.

146. Reinert, *supra* note 127, at 851.

147. *Id.* at 812.

148. *Id.* at 813. In fact, Reinert finds that “success rates for *Bivens* suits range from 16% to more than 40%, which is at least an order of magnitude greater than has previously been estimated.” *Id.* In a review of hundreds of filed cases making *Bivens* claims, Reinert found that “[d]ismissal on the merits, for frivolity, and for failure to exhaust administrative remedies were the most common grounds for terminating a case.” *Id.* at 843.

149. *Id.* at 843–44; *see also* Schwartz, *supra* note 139, at 48 (finding, for example, that in a sample of 1,183 cases, official defendants raised a qualified immunity defense in only 13.9% of cases in which the defense was available); Reinert, *supra* note 127, at 847 (“It seems beyond dispute, for instance, that a system of formal governmental liability would vindicate interests in full compensation.”).

150. Reinert, *supra* note 33, at 477 (arguing that, although qualified immunity plays less of a role

may encourage quick settlements,¹⁵¹ Professor Schwartz concludes that the “available evidence suggests that qualified immunity may make it more difficult for plaintiffs to secure representation and may encourage plaintiffs to settle, [although] it is infrequently the formal reason that cases end.”¹⁵² Put slightly differently, while Professor Schwartz voices criticism of the effects of qualified immunity on substantive outcomes, she does not believe those effects are the result of the doctrine’s formal application to filed cases.

2. *Potential Liability—Federal Contractors*

Injured people may prosecute § 1983 claims against nongovernmental entities, such as contractors, acting on behalf of state or local government. For example, a prisoner at a state correctional facility in Tennessee could bring a § 1983 lawsuit for injuries allegedly inflicted by guards who were employees of the private corporation operating the prison on behalf of the state.¹⁵³ Similarly, a firefighter alleging violations of the Fourth and Fourteenth Amendments by a private attorney hired by the city to investigate the firefighter’s absenteeism, could rely on § 1983.¹⁵⁴ It did not matter in that case, *Filarsky v. Delia*,¹⁵⁵ that the lawyer was not an employee.

However, when someone is injured by a nongovernmental entity, such as a contractor, acting on behalf of the federal government, *Bivens* may not provide a path to relief.¹⁵⁶ In other words, unlike the Tennessee state prisoner,¹⁵⁷ a federal prisoner injured by a guard who was employed by a private company under contract with the federal government has no

in the success of a filed case than imagined, “lawyers often take qualified immunity into account at the case-screening stage and indeed may in some cases avoid litigation in which qualified immunity is even a potential issue”); Schwartz, *supra* note 139, at 51 (noting that evidence suggests that the qualified immunity doctrine “may make it more difficult for plaintiffs to secure representation”).

151. Schwartz, *supra* note 139, at 51.

152. *Id.*

153. *Richardson v. McKnight*, 521 U.S. 399, 401–02 (1997).

154. *Filarsky v. Delia*, 566 U.S. 377, 382 (2012).

155. 566 U.S. 377 (2012).

156. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (holding that *Bivens* did not confer a right of action on a federal inmate claiming that a private prison operating a halfway house under contract with the federal Bureau of Prisons violated his Eighth Amendment rights); *Minneci v. Pollard*, 565 U.S. 118, 125–26 (2012). Under such facts, the Court held, the plaintiff could (and had to) avail himself of a state tort law remedy against the employee. *Minneci*, 565 U.S. at 125–26. And even if a plaintiff may file a *Bivens* action against an individual, government official, that official still may assert a qualified immunity defense. Thus, the *Bivens* action is not a tool “for altering an entity’s policy” but is a deterrent to the individual only. *Corr. Servs. Corp.*, 534 U.S. at 74.

157. *Richardson*, 521 U.S. at 401–02.

Bivens claim against the individual guard, his contractor employer, or the federal government. The Court reached this flat conclusion in *Minneci v. Pollard*,¹⁵⁸ a 2012 case brought by a prisoner in a federal facility operated by a private company.¹⁵⁹ In *Minneci*, the plaintiff charged that prison officers had violated the Eighth Amendment's ban on cruel and unusual punishment.¹⁶⁰ The majority reasoned that the "Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law" and consequently there was no need to apply the "freestanding" damages action enabled by *Bivens*.¹⁶¹ Justice Breyer deemed it "critical" that the defendant officers sued in *Minneci* were employees of a *private* company, not the federal government: "[T]he potential existence of an adequate 'alternative, existing process' differs dramatically in the two sets of cases," Breyer wrote, because "[p]risoners ordinarily cannot bring state-law tort actions against employees of the Federal Government."¹⁶² The majority's reasoning is instructive; it recognizes that the purpose of *Bivens* was to provide a path to potential recovery in the absence of explicit, federal legislation.¹⁶³ Rather than extend *Bivens* to private companies under contract with the federal government, the Court deemed that state tort law provided a sufficient remedy.¹⁶⁴ But the potential for contractors to rely on the sovereign shield to avoid state liability creates a Catch-22. This is similar to the Catch-22 faced by plaintiffs seeking to hold contractors liable under the FTCA. Private actors—even those under contract with the federal government—cannot be held liable under *Bivens* because state tort law ostensibly provides sufficient incentives to protect victims' rights against private actors.¹⁶⁵ Such an analysis ignores that the federal contractor—in the state court action—could raise sovereign shield defenses, thus avoiding

158. 565 U.S. 118 (2012).

159. *Id.* at 120.

160. *Id.* at 122.

161. *Id.* at 125–26.

162. *Id.* at 126 (emphasis omitted).

163. *Id.* at 123.

164. *Id.* at 130. In *Minneci*, the Court recognized that there could be no such similar state court action against a federal employee. Under the Westfall Act, 28 U.S.C. §§ 2671, 2679(b)(1), were a federal employee the defendant in an action under state tort law, the federal government itself would be substituted for that employee. *See Minneci*, 565 U.S. at 126.

165. *See Minneci*, 565 U.S. at 130 ("[I]n principle, the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations. The features of the two kinds of actions just mentioned suggest that, in practice, the answer to this question is 'yes.'").

liability and foreclosing any remedy for the plaintiff.¹⁶⁶

How does the notion of qualified immunity apply to contractors in this structure? One version of the question arose in *Richardson v. McKnight*,¹⁶⁷ the Tennessee prison case referenced above. In *Richardson*, the Supreme Court weighed a § 1983 claim by a prisoner in a state correctional facility operated by a contractor. The plaintiff alleged that prison guards violated his Eighth Amendment right to be free from cruel and unusual punishment by “subjecting him to tight restraints during his transport to another prison.”¹⁶⁸ The guards asserted a qualified immunity defense, but the trial court judge disagreed,¹⁶⁹ as did an appellate panel that considered the question on an interlocutory appeal.¹⁷⁰ In affirming its rejection of the qualified immunity defense, the majority of the Court emphasized the incentive that marketplace competition creates for private actors to act aggressively—an incentive that public actors lack.¹⁷¹ A significant justification of qualified immunity is countering potential governmental “timidity”¹⁷² that the threat of liability might create, so in the absence of such timidity, there was no need for protection from liability.¹⁷³ The majority went on to note that a private sector employer need not dangle the prospect of immunity to lure talented employees because it can provide insurance and higher wages to offset any liability risk,¹⁷⁴ and in any event, the “risk of ‘distraction’ [by litigation] alone cannot be sufficient grounds for immunity.”¹⁷⁵

Although both the Supreme Court and lower courts have applied qualified immunity to private contractors in § 1983 litigation,¹⁷⁶ the

166. See *infra* section I.C. However, Professor Alexander A. Reinert and Professor Lumen N. Mulligan argue persuasively that *Minneeci* should be understood in narrower terms as precluding a *Bivens* claim only to the extent that state tort law provided an equivalent and adequate remedy. Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneeci*, 90 WASH. U. L. REV. 1473, 1500 (2013) (criticizing the Court for “assert[ing] that the existence of alternative state-law remedies illustrated that *Bivens* was inapt”).

167. 521 U.S. 399 (1997).

168. *McKnight v. Rees*, 88 F.3d 417, 418 (6th Cir. 1996), *aff’d sub nom. Richardson v. McKnight*, 521 U.S. 399 (1997).

169. *Id.* at 419.

170. *Id.* at 425.

171. *Richardson*, 521 U.S. at 408–09.

172. *Id.* at 409.

173. *Id.* at 410.

174. *Id.* at 411.

175. *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

176. See *Filarsky v. Delia*, 566 U.S. 377, 394 (2012) (overturning a Ninth Circuit decision holding that a private attorney contracted by the city was not entitled to seek the protection of qualified immunity); *Perniciaro v. Lea*, 901 F.3d 241, 251 (5th Cir. 2018) (allowing privately employed

approach in *Richardson* seems palatable. It allows the plaintiff to proceed in a § 1983 litigation against the private contractor without facing a qualified immunity challenge. However, the same problem that we have been facing throughout the course of our overall project still arises—private companies under contract with the *federal* government are able to skirt, avoid, and escape liability under current doctrine. That is because § 1983 does not apply to federal contractors. Rather, a plaintiff would have to turn to a *Bivens* claim. But the Court, having concluded that a *Bivens* action is not available,¹⁷⁷ stops the claim in its tracks before even reaching the question of whether a private contractor employee is entitled to qualified immunity.

C. *State Tort Action and Its Procedural Hurdles*

If a plaintiff is prohibited from bringing a claim for violation of a federal or constitutional right, pursuant to the FTCA, *Bivens*, or another statutory immunity waiver, then that plaintiff can only turn to state tort law for a remedy. Of course, the plaintiff will be barred from suing the federal government itself on the grounds of sovereign immunity. The question, then, is whether the plaintiff can sue a federal government contractor—a private company acting pursuant to a contract with the federal government—under state law. This is, after all, what the Court envisioned when it closed off *Bivens* actions against private entities in *Minneeci*.¹⁷⁸ Based on our prior in-depth analysis of the ways in which private entities under contract with the federal government use and abuse sovereign shield defenses,¹⁷⁹ especially with respect to state law claims, to avoid liability,¹⁸⁰ we contend that this is not a sufficient option.

That is because there is nothing stopping a defendant federal contractor, sued under state law, from asserting that it is not subject to liability because it is entitled to the benefits of derivative sovereign immunity, intergovernmental immunity, and/or preemption.¹⁸¹ Derivative sovereign

psychiatrist defendants who were not directly employed by the state to raise the defense of qualified immunity); *Meadows v. Rockford Hous. Auth.*, 861 F.3d 672, 677–78 (7th Cir. 2017) (allowing privately employed security defendants, under contract with the state Housing Authority, to assert a qualified immunity defense).

177. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *accord Minneeci v. Pollard*, 565 U.S. 118 (2012).

178. *Minneeci*, 565 U.S. at 125.

179. *See Sovereign Shield*, *supra* note 4.

180. *Id.*

181. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–13 (1988) (finding that “civil liabilities arising out of the performance of federal procurement contracts” are among certain areas of law involving “uniquely federal interests” that require preemption of state law).

immunity is a mechanism by which a federal agent or instrumentality can derive the benefits of the sovereign's immunity under either traditional agency principles or under traditional preemption analysis. The former traces its roots to *Yearsley v. W.A. Ross Construction Co.*,¹⁸² and the latter is articulated in *Boyle v. United Technologies Corp.*¹⁸³ Intergovernmental immunity traces its origin to *McCulloch v. Maryland*,¹⁸⁴ and prohibits states from discriminating against or regulating the federal government.¹⁸⁵ In its derivative form, private contractors can seek to claim the benefits of intergovernmental immunity by arguing that, by regulating the private entity, the state is, in effect, regulating or discriminating against the federal government.¹⁸⁶ Federal preemption of state law rests on the protections of the Supremacy Clause of the Federal Constitution,¹⁸⁷ has been developed into multiple forms through the Court's jurisprudence, and preference for federal law where there is a conflict between state and federal law.¹⁸⁸ In addition to traditional preemption claims, contractors regularly assert that the federal contracts themselves provide the necessary preemptive power to avoid liability under state law.¹⁸⁹

That a contractor could avoid liability in this way is not simply a theoretical possibility. In *Smith v. International SOS Assistance, Inc.*,¹⁹⁰ for example, the court specifically noted that, while the FTCA did not "provide . . . a blanket extension of sovereign tort immunity to persons acting at the government's behest,"¹⁹¹ courts have recognized "two defenses that contractors may raise in order to argue that the government's sovereign immunity shields them from tort suit."¹⁹² Those two defenses were *Boyle's* "government contractor defense" and *Yearsley's* "derivative

182. 309 U.S. 18 (1940).

183. 487 U.S. 500 (1988). For an extensive analysis of derivative sovereign immunity, including *Yearsley* and *Boyle*, see *Sovereign Shield*, *supra* note 4, at 986–92.

184. 17 U.S. (4 Wheat.) 316 (1819).

185. *Id.* at 425, 436 (holding that Congress has the power to incorporate a national bank and that a state cannot constitutionally tax its branches).

186. *See, e.g.*, *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 72–75 (D.D.C. 2018) (plaintiff student loan servicing organization alleged that the District of Columbia's effort to regulate student loan servicers—private entities under contract with the federal government—in the District violated intergovernmental immunity principles). For an extensive analysis of intergovernmental immunity, see *Sovereign Shield*, *supra* note 4, at 992–94.

187. U.S. CONST. art. VI, cl. 2.

188. For an extensive analysis of preemption, see *Sovereign Shield*, *supra* note 4, at 981–85.

189. *See* David S. Rubenstein, *Supremacy, Inc.*, 67 UCLA L. REV. 1130, 1165–68 (2020) (tracing how federal contracts can operate to displace state law through "preemption by contract").

190. No. C11-3125LFR, 2013 WL 6474150 (E.D. Pa. Dec. 6, 2013).

191. *Id.* at *2.

192. *Id.*

sovereign immunity” defense.¹⁹³ Our previous work traced how federal contractors have been turning to sovereign shield defenses to avoid state law claims for decades.¹⁹⁴ We showed that when a private entity under contract with the federal government engages in illegal behavior that causes harm, it may seek to exploit the benefits of the sovereign’s supremacy. A court reviewing the contractor’s defense and applying the “inverted agency” analysis described above¹⁹⁵ assesses whether the contractor complied with the terms of its contract with the government and whether the government specifically directed the contractor to operate in a way that created the risk of the harm that occurred. If the court concludes that the contractor, as the federal government’s faithful servant, essentially did what the government told it to do, then the government is to blame and the contractor will likely enjoy access to the same defenses that the government, had it directly caused the harm itself, would be able to claim.¹⁹⁶

In *Evans v. Mayer Tree Service*,¹⁹⁷ the plaintiff sued state and federal entities, along with their private contractors, for impermissible removal of plaintiff’s trees in connection with the cooperative effort to control an infestation of the Asian longhorned beetle.¹⁹⁸ After a federal court dismissed the FTCA claim under the discretionary function exception theory,¹⁹⁹ the state court held that the contractor and subcontractor would not be liable for state torts, relying on derivative sovereign immunity.²⁰⁰ In *Carley v. Wheeled Coach*,²⁰¹ an emergency medical technician who was injured when the ambulance she was riding in flipped over sued the manufacturer, who had provided the vehicle pursuant to a federal contract with the United States General Services Administration.²⁰² Citing extensively to both *Boyle* and *Yearsley*, the Third Circuit held that the government contractor defense applied to both military and nonmilitary contractors.²⁰³ In *Carley*, the court explained how the FTCA could

193. *Id.* (first citing *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); then citing *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940)); *see also infra* section II.A.

194. *See Sovereign Shield*, *supra* note 4, at 978–94.

195. *See supra* note 15 and accompanying text; *see also Sovereign Shield*, *supra* note 4, at 1007.

196. *See, e.g., Yearsley*, 309 U.S. at 20–21 (“[I]t is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will.”).

197. 162 N.E.3d 70 (Mass. App. Ct. 2020).

198. *Id.* at 71–72.

199. *Evans v. United States*, 876 F.3d 375, 384 (1st Cir. 2017).

200. *Mayer Tree Service*, 162 N.E.3d at 76.

201. 991 F.2d 1117 (3d Cir. 1993).

202. *Id.* at 1118.

203. *Id.* at 1120.

simultaneously offer the federal government immunity in the federal court action and shelter the private contractor from liability in the state court action through the government contractor defense. The court relied on the FTCA's discretionary function exception for each conclusion, which worked together to eliminate all of plaintiff's claims.²⁰⁴ Although the *Carley* court left open the final decision due to limited facts, one need only look to *Boyle* for an example of the FTCA and the sovereign shield working together to foreclose all of a plaintiff's remedies.²⁰⁵

Even where defendant contractors' sovereign shield defenses are not ultimately successful, the current confusion and extent of their reach harms the jurisprudence generally and litigants specifically. In *Torres v. United States Department of Homeland Security*,²⁰⁶ for example, immigrant detainees and legal organizations brought suit challenging conditions of confinement at two facilities.²⁰⁷ One of the facilities was an immigration detention facility in San Bernardino County run by The GEO Group, Inc. ("GEO") pursuant to its contract with U.S. Immigration and Customs Enforcement ("ICE").²⁰⁸ In a motion to dismiss, GEO argued that the court did not have jurisdiction to hear the case because of defenses sounding in preemption (arguing that the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252, stripped the court of jurisdiction) and intergovernmental immunity (arguing that the requested relief could "enjoin or restrain operation" of the relevant provisions of the INA).²⁰⁹ In the same motion, however, GEO argued that it was not a state actor and thus, could not be held liable for constitutional violations.²¹⁰ In other words, in the same breath, GEO relied on its relationship with the federal government to save it from liability, then turned on a dime to renounce that relationship to save itself from liability.

Even when a contractor is unsuccessful, as GEO was in *Torres*,²¹¹

204. *Id.* at 1120–23.

205. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 513–14 (1988) (finding that no reasonable jury could find for the plaintiff where government contractor established government contractor defense); *see also In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 351 (4th Cir. 2014) (finding plaintiffs could be denied relief for injuries resulting from exposure to emissions from open burn pits where private federal contractors could rely on the "combatant activities" exception to the FTCA to derive the benefits of the sovereign's immunity).

206. 411 F. Supp. 3d 1036 (C.D. Cal. 2019).

207. Complaint at 3–4, *Torres*, 411 F. Supp. 3d 1036 (No. 5:18-cv-02604), https://www.aclusocal.org/sites/default/files/aclu_socal_torres_20181214_complaint.pdf [<https://perma.cc/KS6N-STSK>].

208. *Id.* at 2.

209. *See Torres*, 411 F. Supp. 3d at 1047, 1050 (order denying motion to dismiss).

210. *Id.* at 1057.

211. *Id.*

simply by claiming a sovereign shield defense, the contractor benefits by delaying the proceedings, increasing the costs to the plaintiff, and continuing to benefit from the ongoing government contract.²¹² Further, even when a contractor unsuccessfully deploys one or more sovereign shield defenses in a particular litigation, it is not precluded from seeking the protection of such doctrines in future cases.²¹³

By creating and building up the multiple doctrinal walls that protect the federal government and its contractors from liability, the Supreme Court has left plaintiffs with rights but few remedies.²¹⁴ In many instances, plaintiffs injured by federal government contractors have no remedy. This happens when a defendant contractor is certified as a government employee, but the substituted government defendant then takes advantage of one of the FTCA's wide-ranging immunity waiver exceptions.²¹⁵ It also happens when an FTCA claim is thrown out under the "independent contractor" exception, but a state court later determines that the same "discretionary function" exemption provides preemptive protection for the contractor in the state court action.²¹⁶ It occurs when a *Bivens* claim is thrown out on the grounds that a private contractor was the bad actor, and then the defendant contractor seeks the protection of sovereign shield

212. See *Sovereign Shield*, *supra* note 4, at 1039 (exploring how "[e]ven when contractors lose their individual battles, confusion and conflation of the sovereign shield doctrines benefit the government contractors and their agency partners to the detriment of consumers and their state advocates"); see also Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974) (cataloging advantages that recurrent, organizational litigants have over infrequent, individual litigants); Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1387 (2006) (same); Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287, 293 (2018) ("Even parties able to retain counsel may be stymied as the costs of litigation mount. Wealthy parties regularly use discovery devices and motion practice to make it impossible for less powerful actors to pursue meritorious claims to conclusion.").

213. *Sovereign Shield*, *supra* note 4, at 1039–40 (explaining how issue preclusion does not prevent a contractor from recycling the same arguments in future litigation). And although we are primarily concerned with cases where the procedural hurdles make it impossible for a plaintiff to achieve redress from any entity, we note the analytic tension that arises even when the plaintiff can successfully get damages from a contractor under state law. In a tort action under state law, the individual contractor employee defendant might well not have to pay damages, as a result of indemnification. RESTATEMENT (THIRD) OF AGENCY § 8.14 (AM. L. INST. 2006). This is at odds with the Court's earlier pronouncement that an entity, as opposed to a natural person, was not a proper defendant under *Bivens*. See *supra* note 115 and accompanying text; see also *FDIC v. Meyer*, 510 U.S. 471, 484–86 (1994).

214. This is not a new problem. See Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1480 (2018) (recognizing scholars that "have identified how raising the various remedial standards has resulted in a kind of remedial collapse, where all of the remedies are collectively unavailable for the violation . . . of a constitutional right").

215. See *supra* notes 84–86 and accompanying text (explaining FTCA scenario two).

216. See *supra* notes 85–87 and accompanying text (explaining how the FTCA can eliminate multiple remedial avenues for plaintiffs).

defenses in a resulting state tort lawsuit.²¹⁷

In certain circumstances, government actors may even be held accountable for the same conduct for which their private contractor partners escape liability. This occurs where the contractor bad actor is replaced by the United States in an FTCA action. In that circumstance, any liability lies with the federal government. The contractor employee and—importantly—the contractor entity escape with no liability or accountability. The same thing also happens when a federal contractor would be dismissed under *Bivens*, but a federal officer would not be. In that scenario, only the individual government actor may be liable for constitutional violations. While a separate state court action against the individual contractor employee could result in tort damages, such a victory is not guaranteed.

This pattern of pleadings and defenses has also occurred in the military context where contractors walk away largely unscathed. Consider the cases arising from the Abu Ghraib torture and prisoner abuse scandal. Suffering a shortage of military personnel overseas in 2003, the U.S. government contracted with private U.S. corporations to provide civilian interrogators and interpreters to work in conjunction with U.S. military intelligence personnel.²¹⁸ In mid-2004, shocking evidence surfaced publicly that Iraqi detainees at Abu Ghraib had been severely abused.²¹⁹ Although U.S. military members were criminally prosecuted, leading to courts-martial and convictions,²²⁰ and despite there being public evidence that the private corporations were involved in the abuse,²²¹ the Department

217. See *supra* notes 198–203. It is also worth noting that there are practical barriers when a case originates with federal claims in federal court and is required to refile with state claims in state court. Procedural barriers like statute of limitations may preclude the second suit.

218. See Major General Antonio M. Taguba, Army Regulation 15-6 Investigation of the 800th Military Police Brigade 15–16 (2004).

219. Rebecca Leung, *Abuse at Abu Ghraib*, CBS NEWS (May 5, 2004), <https://www.cbsnews.com/news/abuse-at-abu-ghraib/> [<https://perma.cc/3BVR-UXTR>]; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (Apr. 30, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib> [<https://perma.cc/DVL7-ZTW9>].

220. See, e.g., *England Sentenced to 3 Years for Prison Abuse*, NBC NEWS (Sept. 26, 2005, 10:06 AM), <https://www.nbcnews.com/id/wbna9492624> [<https://perma.cc/3K28-2LZY>] (noting that there were “nine courts-martial [and various convictions] of low-level soldiers charged in the [Abu Ghraib] scandal”); *Soldier Is Found Guilty in Abu Ghraib Abuse*, N.Y. TIMES (May 17, 2005), <https://www.nytimes.com/2005/05/17/us/soldier-is-found-guilty-in-abu-ghraib-abuse.html> [<https://perma.cc/UA5B-WTWY>] (detailing the convictions of soldiers in relation to the abuse of inmates at Abu Ghraib).

221. See, e.g., Daniel Seiden, *CACI Fights ‘Unprecedented’ Abu Ghraib Torture Liability Ruling*, BLOOMBERG L. (Apr. 25, 2019, 1:51 AM), <https://news.bloomberglaw.com/federal-contracting/unprecedented-ruling-returns-abu-ghraib-case-to-fourth-circuit> [<https://perma.cc/4XPQ-V3AD>] (detailing the involvement of a private military contractor—CACI Premier Technology Inc.—

of Justice declined to file criminal charges against the contractor employees or the contractor entities themselves. Subsequently, hundreds of Iraqi plaintiffs filed a series of civil lawsuits against these corporations. Of the three major suits,²²² one was settled out of court²²³ and one was dismissed on grounds of conflict and field preemption.²²⁴ The third remains precariously pending after many of its claims were dismissed under various sovereignty defenses as the case moved from district to appellate courts.²²⁵ Because the military exceptions to waivers of sovereign immunity and the corresponding defenses are uniquely complex, we leave further analysis in this realm to scholars specializing in military matters. We note only that the accountability gap between government actors and their contractors strikes us as improperly balanced.

What, therefore, do we learn from the current state of doctrinal affairs to account for in crafting our proposed remedy? We take the following lessons, sketched here and implemented in Part II to follow:

Qualified immunity, as a construct and in the abstract, provides a useful framework to develop a theory of qualified sovereignty for government contractors.²²⁶

Liability for injuries caused by contractor employees should not stop with the natural person. Any remedial scheme must provide for liability of the individual's employer, the federal contractor, under a theory of respondeat superior.²²⁷

State law, in addition to federal legislation and constitutional law, should provide a basis for claims against a federal government contractor.

in the operations of suspect activity at Abu Ghraib); Pratap Chatterjee & A.C. Thompson, *Private Contractors and Torture at Abu Ghraib, Iraq*, CORPWATCH (May 7, 2004), <https://corpwatch.org/article/private-contractors-and-torture-abu-ghraib-iraq> [<https://perma.cc/ECH3-FMKK>] (outlining the support staff provided by CACI International, Inc. to aid in operations at Abu Ghraib).

222. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir. 2011).

223. *Al-Quraishi, et al. v. Nakhla and L-3 Services*, CTR. FOR CONST. RTS. (Sep. 8, 2021), <https://ccrjustice.org/home/what-we-do/our-cases/al-quraishi-et-al-v-nakhla-and-l-3-services> [<https://perma.cc/3ULV-Y45X>].

224. *See Saleh*, 580 F.3d at 16–17.

225. *See Al Shimari*, 679 F.3d at 210–12 (describing procedural history).

226. The authors of this Article synthesized this lesson from the work of previous scholars. *See, e.g.*, Schwartz, *supra* note 139 (identifying the merits of qualified immunity as a framework to analyze the propriety of imposing liability on the government for harms officials cause); Reinert, *supra* note 127 (same).

227. For years, scholars have argued that *Bivens* remedies must apply to entities, rather than just individuals. *See, e.g.*, Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1558–59 (1972) (arguing that the Court should enable such actions for damages); Reinert, *supra* note 127, at 814 n.18 (collecting scholarly works calling for entity accountability).

II. QUALIFIED SOVEREIGNTY

What if immunity were truly contingent? We argue that this constitutes the proper resolution to the conundrum of liability for private entities that operate pursuant to a federal contract. Recall that the function of immunity is to act as a barrier to protect the sovereign from unwarranted liability that would detract from the ability to achieve lofty goals in service of the public. A government defendant that acted in good faith and did not violate a clearly established right has a persuasive claim to some form of immunity.²²⁸

But what of a private actor under contract with the sovereign? Extension of the sovereign shield to a federal contractor turns on the contractual relationship: the nature and extent of the contractor's liability depend on the association between contractor and sovereign. Thus, if the sovereign would have enjoyed some form of immunity or benefitted from federal preemption of state law, then the contractor may lay claim to the same protection and to the same extent, provided that the contractor complied with the terms of a lawful contract to engage in lawful conduct.²²⁹ But such strong protection should not be extended when the action taken would clearly violate a person's or persons' rights. We decline to accept that private entities should derive the benefits of sovereignty regardless of harms caused or rights violated.

Instead, for a government contractor, we propose "qualified sovereignty," an immunity available to that contractor only after meeting certain conditions. Specifically, we propose that once a plaintiff has established that a contractor has caused harm in violation of the plaintiff's rights,²³⁰ the contractor is qualified to seek derivative protection of the sovereign shield *only* if (1) the contractor was acting as the government's agent, (2) the contractor complied with any guidelines or instructions given by the government, and (3) it was reasonable for the contractor to believe that its conduct would not violate legal rights. A private entity acting pursuant to a federal contract may be entitled to sovereign shield protections, but not automatically. A contractor should be susceptible to monetary damages for harms caused by its conduct on behalf of the federal government if the contractor should have known that its conduct violated the plaintiff's legal rights.

228. Consistent with our previous work, we would also limit the application of sovereign shield defenses to noncommercial conduct. *Sovereign in Commerce*, *supra* note 25, at 1128–29.

229. See *Sovereign Shield*, *supra* note 4, at 1004–07.

230. In the context of our prior work, this showing, sufficient to survive a motion to dismiss were the defendant a private entity unaffiliated with the federal government, would rebut the presumption of applicability of the sovereign shield. *Sovereign in Commerce*, *supra* note 25, at 1142.

The first two prongs are borrowed from the *Yearsley* doctrine of derivative sovereign immunity and are, at their most basic, an agency analysis.²³¹ The third prong is salvaged from the doctrine of qualified immunity.²³² These are two unlikely sources for components of a “fix” intended to promote availability of a remedy. As discussed above²³³ and in our previous work,²³⁴ we have misgivings about the dangerous consequences of the Court’s repeated moves to expand the scope of government actor protection and correspondingly to limit the possibilities of plaintiff recovery. Although the jurisprudence surrounding derivative sovereign immunity and qualified immunity is replete with problems, our proposed qualified sovereignty construct differs in four critical ways: (1) it applies to private actors, rather than government actors; (2) it applies to entities and is not limited to individuals; (3) it looks to a broad range of underlying rights violations; and (4) it reimagines qualified immunity’s “clearly established”²³⁵ prong for the private defendant. By specifying the conditions that must be met before a court may deny a remedy to a victim wronged by a federal contractor and by expanding the pool of both plaintiffs and underlying causes of action, our proposal aims to counter the interpretive moves that the Court has made when applying derivative sovereign immunity and, to a greater extent, qualified immunity. The Court’s doctrinal steps have operated in the real world to deny relief to plaintiffs.

Such a doctrinal modification would open possibilities of recovery for plaintiffs who, having alleged contractors’ harmful conduct, currently are blocked by sovereign shield defenses and the application of sovereign immunity waivers, explained in Part I. Under our proposal, plaintiffs suing federal contractors would confront sovereign shield defenses only if the contractor successfully were to lay claim to qualified sovereignty. If the contractor should reasonably have known that its conduct would violate a legal right, then the contractor could not hide behind its relationship with the sovereign to avoid liability. The plaintiff could sue the private contractor in federal or state court just as it would sue any other

231. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20–22 (1940); see also *Sovereign Shield*, *supra* note 4, at 987–89 (explaining the *Yearsley* doctrine).

232. See generally Schwartz, *supra* note 139 (criticizing the doctrine of qualified immunity). See also Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1888–889 (2018) (describing criticism of Supreme Court’s expansive treatment of qualified immunity); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230–31 (2006) (describing the difficulty of applying qualified immunity doctrine).

233. See *supra* notes 19–22 and accompanying text.

234. See *Sovereign Shield*, *supra* note 4, at 973–74 (summarizing “challenges posed by the expansion of the sovereign shield”).

235. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

private entity. Here we seek to expand an injured plaintiff's access to monetary remedies for currently uncompensated injuries.

This objective could be achieved in other ways, too. For example, if the federal legislature were to act toward the same goal by redefining the extent of sovereign shield defenses available to contractors, we would embrace that result as well.

A. *Borrowing from Yearsley*

This theory of qualified sovereignty is informed by derivative sovereign immunity, which allows a nonfederal actor to exploit perquisites of sovereignty, provided certain conditions are met.²³⁶ To determine whether a contractor is entitled to such immunity, reviewing courts consider the existence of the relationship between contractor and sovereign, the degree of specificity of instructions given the contractor by the sovereign,²³⁷ and the degree of the contractor's compliance with those instructions.²³⁸ The idea is clear: the greater the sovereign's responsibility for the conduct that caused harm, the stronger the contractor's claim to any derivative sovereign liability protections. The Supreme Court explained this in *Yearsley*, in which the Court held that a private company, under contract with the federal government, was not liable under an eminent domain theory because its actions were undertaken pursuant to the contract.²³⁹ Where the government authorized the contractor's action and the authority was validly conferred by Congress, the Court held that "there is no liability on the part of the contractor for executing [the government's] will."²⁴⁰ Courts have looked to the 1940 *Yearsley* decision as the seminal case on derivative sovereign immunity.²⁴¹

As a threshold matter, therefore, our proposal for qualified sovereignty requires that a contractor establish that the necessary relationship with the federal government existed, that the contractor complied with the contract's terms, and that the conduct that caused harm was specified or

236. *Sovereign Shield*, *supra* note 4, at 986.

237. *Id.* at 989.

238. *Id.* at 1006.

239. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20–22 (1940).

240. *Id.*

241. Courts have used different terms for application of the *Yearsley* doctrine, including "derivative sovereign immunity," *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 343 (4th Cir. 2014), and "shared immunity," *Portis v. Folk Constr. Co.*, 694 F.2d 520, 524 (8th Cir. 1982). The Supreme Court has seemingly embraced the notion of "immunity" as applied to the *Yearsley* doctrine. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 159–60 (2016).

required by the contract.²⁴² This would be a prerequisite step in the analysis but would not be dispositive in the determination of the availability of sovereign shield defenses.

This turn to *Yearsley* as step one of asserting qualified sovereignty is critical to our proposal. As the above discussion explains, with respect to qualified immunity, a defendant officer arguing that they exercised discretion in committing the harmful act may evade liability in order to provide officials “breathing room to make reasonable but mistaken judgments about open legal questions.”²⁴³ Further, FTCA exceptions, including the “discretionary function” exception, can provide the requisite path to preemption under *Boyle*.²⁴⁴ Intuitively, these doctrinal conclusions make little sense: in a discretionary zone, doctrine should incentivize an official to act with more, rather than less, concern for the rights and safety of the potentially vulnerable party. Further, it starkly contrasts to traditional agency analysis invoked in *Yearsley* and in other contexts to determine whether an agent is liable alone or alongside a principal.²⁴⁵ Under the qualified sovereignty construct, a federal contractor could not claim the benefits of the sovereign shield if it exercised discretion in committing the alleged bad act.

Although the Court suggested in *Richardson v. McKnight* that private companies working for the government are subject to market incentives to do a good job (and the possible availability of the sovereign shield undermines any such incentive),²⁴⁶ in reality, there may be few rivals to any one contractor seeking federal business. Relatively few companies have competed to operate federal prison facilities, for example.²⁴⁷ Thus market pressure may be insufficient to provide an incentive to respect the rights of others, to ensure that the contractor and its employees look out for those who are vulnerable to its misconduct or negligence. For that reason, qualified sovereignty focuses on entities, not just natural persons.

242. In our prior work, we argue that recovery should be possible for the plaintiff if the conduct that caused harm was commercial in nature, *Sovereign in Commerce*, *supra* note 25, at 1145–46. Therefore, if our vision were implemented in full, a contractor defendant could not invoke qualified sovereignty at all if the alleged bad action was commercial. For further explanation, see *infra* section III.C.

243. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

244. *See supra* notes 56, 184–187.

245. *See Sovereign Shield*, *supra* note 4, at 1007 (explaining the “inverted agency” analysis used by courts to determine whether a contractor defendant enjoys the protection of the doctrines available to prevent suits against the sovereign).

246. 521 U.S. 399, 410–12 (1997).

247. *See* MEGAN MUMFORD, DIANE WHITMORE SCHANZENBACH & RYAN NUNN, HAMILTON PROJECT, *THE ECONOMICS OF PRIVATE PRISONS* 3 (2016) (finding that the three largest private prison companies account for 96% of all private prison beds).

The idea is that the prospect of liability should (1) lead contractors to control their employees' behavior; (2) lead contractors to push back on federal guidelines that threaten clear violations of individual rights; and (3) ensure true access to remedies for individuals harmed by contractor conduct by holding contractors liable for their agents' and employees' conduct under principles of respondeat superior.

B. Salvaging from Qualified Immunity

The first part of qualified sovereignty is the agency prong; the second part is the reasonableness prong. The defendant contractor bears the burden of proof for both prongs. Once a defendant contractor establishes the necessary relationship with the federal government, it would then need to establish that it was reasonable for the contractor to believe that its conduct would not violate the plaintiff's legal rights.

If a plaintiff shows that a federal contractor violated a constitutionally protected right by detaining a civilian,²⁴⁸ for example, that contractor would then have to establish that it was reasonable for the contractor to believe that its course of conduct in implementing the contract would not violate a legal right. This standard would require the contractor to bear the burden of establishing that the failure to anticipate a legal violation was reasonable on the facts available and given the terms of the contract.

The argument here is not for blanket adoption of the qualified immunity test as developed by the Court. Critics have severely undermined that jurisprudence, as noted above,²⁴⁹ and we recognize that too often in practice it may function as a real or perceived bar to suit.²⁵⁰ Instead, we propose that once a plaintiff shows that the harm suffered is the result of a violation of a right protected by law, the burden is on the contractor defendant to show not merely that its conduct was not incompetent but that it was reasonable for the contractor to believe its conduct would not violate the plaintiff's rights.

The reasonableness prong of the analysis borrows from the torts

248. *See, e.g., Zuneska v. Cnty. of Suffolk*, 338 F. Supp. 3d 102, 111 (2018) (registered sex offender filed § 1983 action against County and contractor hired by county to "verify" his address, alleging violations of First Amendment right to privacy and Fourth Amendment right to be "free from unreasonable seizures").

249. *See, e.g., Schwartz, supra* note 139, at 6 (arguing that the "United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal").

250. *Jamison v. McClendon*, 476 F. Supp. 3d 386, 391 (S.D. Miss. 2020) (order granting qualified immunity) (observing that the "doctrine is called 'qualified immunity' . . . [but] [i]n real life it operates like absolute immunity").

context.²⁵¹ In that context, “reasonable person” is “a person exercising those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others.”²⁵² This standard gives some flexibility and looks to a community standard, rather than an individual, subjective standard.²⁵³ Our proposal, invoking this definition of reasonableness, differs from the “clearly established” analysis invoked in modern qualified immunity doctrine in two ways.

First, the current qualified immunity doctrine requires not simply that the *right* be clearly established (e.g., the Eighth Amendment right to be free of “cruel and unusual punishments”²⁵⁴) but also that the fact that the official’s *particular conduct* clearly violated that right (e.g., binding a non-violent pregnant woman’s hands and feet with zip ties, then tripping her, causing a miscarriage is a violation of the Eighth Amendment).²⁵⁵ This is why some scholars have noted that the “clearly established” prong of qualified immunity leaves creative, innovative, or just novel rights violations unremedied.²⁵⁶

Our approach to “reasonableness” requires only that the right be reasonably known to the contractor and avoids the particularized fact inquiry. This approach aligns with early analysis of the qualified immunity doctrine, where the courts assessed “clearly established” law at a higher level of abstraction.²⁵⁷ For example, if a reasonable contractor, accounting for the circumstances of the contract and work, believes that it would be negligent to operate a vaccination site in violation of Food and Drug Administration (“FDA”) and manufacturing standards with a

251. See, e.g., RESTATEMENT (FIRST) OF TORTS § 11 (AM. L. INST. 1934) (explaining that the words “‘reasonably believes’ are used throughout the Restatement of this Subject to denote the fact that the actor believes that a given fact or combination of facts exist and that the circumstances which he knows, or should know, are such as to cause a reasonable man so to believe”).

252. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 cmt. b (AM. L. INST. 1965) (defining the standard by which negligence is determined in tort law).

253. *Id.* cmt. c.

254. U.S. CONST. amend. VIII.

255. See *Nelson v. Corr. Med. Serv.*, 583 F.3d 522, 524–25 (8th Cir. 2009); F. Andrew Hessick & Katherine C. Richardson, *Qualified Immunity Laid Bare*, 56 WAKE FOREST L. REV. 501, 537–38 (2021) (defining the historical and modern approaches to qualified immunity and arguing that the doctrine has evolved in a way that no longer balances the competing principles for which it was established).

256. Schwartz, *supra* note 139, at 61–62 (describing the risk that plaintiffs with valid claims might not pursue them in light of the difficulty of showing that the “conduct at issue has . . . been clearly established by prior cases”).

257. See *Procunier v. Navarette*, 434 U.S. 555, 562–65 (1978); *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

misbranded drug,²⁵⁸ it would not be necessary to show as well that a prior court had found a vaccination site operator negligent in the exact same particularized circumstances. That a reasonable contractor would believe the action would violate state tort law would be sufficient on its own to prohibit the contractor from invoking the protections of the sovereign shield.

Second, in application of qualified immunity in the last thirty or forty years, the Court has increasingly prioritized the rights of government officials over the rights of the injured citizen. It has done this by eliminating the original requirement that the government official act in good faith²⁵⁹ and has turned “a reasonable person” standard into a “no reasonable officer” standard.²⁶⁰ In *Harlow v. Fitzgerald*,²⁶¹ in 1982, the Court held 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.”²⁶² As the doctrine developed, however, “a reasonable person” for purposes of qualified immunity analysis became a *single* reasonable person. This is clear where, twenty years later, the Court turned the qualified immunity analysis around, holding that a government official’s conduct clearly violated the law only when “every ‘reasonable official would [have understood] that what he is doing violates that right.”²⁶³ Such a shift in orientation leads to the Court’s conclusion that qualified immunity “protects ‘all but the plainly incompetent or those who knowingly violate the law.’”²⁶⁴ Our proposal rejects that approach. Instead, it proposes that the sovereign shield be unavailable if *a* reasonable contractor, in contradistinction to *every* reasonable contractor, should have known the

258. See *infra* section III.A.

259. See Hessick & Richardson, *supra* note 255, at 517–18 (explaining that *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), abandoned the good faith requirement for qualified immunity in favor of a doctrine that was concerned about pecuniary and non-pecuniary costs to the officers of facing legal actions).

260. *Id.* at 511.

261. 457 U.S. 800 (1982).

262. *Id.* at 818.

263. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

264. *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The Justices clarified the implications of this rule in *Ziglar v. Abbasi*. 528 U.S. ___, 137 S. Ct. 1843, 1867 (2017) (“[I]f a reasonable officer might not have known for certain that the conduct was unlawful[,] then the officer is immune.”).

contours of the right—a subtle, though powerful, difference.²⁶⁵

Nor are the relevant rights for purposes of qualified sovereignty limited to constitutional rights. Contractors who violate state or federal statutory rights, state or federal constitutionally protected rights,²⁶⁶ or rights in the shadows of those constitutionally protected rights, may lose the protections of the sovereign shield. The breadth of coverage, meaning the range of rights assured possibility of a remedy, should lead the contractors to think through the implications and possible effects of their manner of performance, a point to which we return below. Thus, one benefit of recognizing a broad range of rights that might give rise to liability is deterrence: the specter of liability should encourage the contractor or potential contractor to decline to take on certain tasks if the necessary activities might create risk of significant financial liabilities to the business.

It is possible, even probable in some lines of business, that the prospect of expanded liability may lead private entities to shy away from performing services that they were previously willing to provide for the government because of the increased liability risk. We regard this correction as a benefit rather than a flaw. The contractor's changed assessment implies that performance was previously profitable because of the availability of the sovereign shield, meaning that protection from liability constituted an unbargained-for benefit to the business at the expense of the taxpayer. Such changes in business strategy may also offer a market-based response to the question of the optimal degree of reliance on the private sector to perform ostensibly public work, with the choices of business leaders highlighting the judgment call to be made when our proposed, modified liability regime compels internalization of costs of harms.

We limit our qualified sovereignty proposal to private entities working under contract with the federal government. Extending it to the government itself would sharply weaken the notion of sovereign immunity. Although there have been compelling calls to do just that,²⁶⁷

265. *But cf.* Hessick & Richardson, *supra* note 255, at 522 (recognizing that the change in phrasing “suggests a substantial strengthening of qualified immunity,” but also noting that the “true significance of this change is unclear”).

266. We recognize that applying a federal standard to assess the clarity of state law could introduce possible federalism concerns. We do not take those up in this project.

267. Federal sovereign immunity does not find explicit origin in the Constitution. *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 522 (2003) (arguing that “the constitutional provenance of federal ‘sovereign immunity’ is obscure, and was a matter of genuine uncertainty in early years”); Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, “Accident,” and Policy in the Development*

we continue to recognize the rationale behind sovereign immunity—protecting common resources and public tax dollars, sustaining separation of powers, and protecting the government from undue interference.²⁶⁸ Perversely, under current sovereign immunity waivers, including the Federal Tort Claims Act and the *Bivens* doctrine, which we have discussed above,²⁶⁹ the federal government and its employees may face greater direct accountability than private contractors engaged in the same bad behavior. One benefit of our solution is that it corrects this imbalance.

Our approach to the availability of the sovereign shield defenses further ensures both that the pool of potentially liable defendants is larger and the likelihood of such a defendant having to pay damages or otherwise respond for injuries inflicted is greater. In suggesting that this is normatively desirable, we do not intend to argue that there is an optimal probability of defendant liability; we do, however, contend any selection of a normative baseline demands an adequate justification. Thus, advocates of expanding *limits* on liability of federal contractors bear the

of Sovereign Immunity Doctrine, 43 WAKE FOREST L. REV. 765, 776–77 (2008) (describing sovereign immunity as a “mystery” and noting that “[f]ederal sovereign immunity is not mentioned in the Constitution and was not explicitly recognized by the Supreme Court until 1821”). Although it remains a well-established doctrine, see *Pornomo v. United States*, 814 F.3d 681, 687 (4th Cir. 2016) (“[T]he default position is that the federal government is immune to suit.”); *Lipsey v. United States*, 879 F.3d 249, 253 (7th Cir. 2018) (“[T]he United States as sovereign is immune from suit unless it has consented to be sued.”); *Evans v. United States*, 876 F.3d 375, 380 (1st Cir. 2017), *cert. denied*, ___ U.S. ___, 139 S. Ct. 81 (2018) (“[T]he United States is immune from suit without its consent.”), scholars have argued for its limitation or elimination. See, e.g., Jackson, *supra*, at 607–08; Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 6 (1924) (arguing that because “many states have not yet granted such consent and since those that have, have so qualified it as to exclude practically all cases of liability for tort, it is proper to show that the reasons which once may have been deemed to justify the public policy of immunity from suit and responsibility do not in fact today prevail”); Edwin M. Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1, 37 (1926) (asserting that “none of the grounds advanced for the sovereign immunity, historical or theoretical, can today command serious respect or be regarded as convincing”); Clark Byse, *Proposed Reforms in Federal “Nonstatutory” Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484 (1962) (arguing that the doctrine of sovereign immunity, among others, has “operated to deny or unreasonably hinder judicial review of federal administrative action”); Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 391 (1970) (calling for the “elimination of the doctrine of sovereign immunity as a barrier to judicial review of federal administrative action”).

268. Randall S. Abate & Carolyn H. Cogswell, *Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis*, 15 VA. ENV’T L.J. 1, 4–5 (1995); David A. Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725, 727 (1988). *But see* Fallon, *supra* note 102, at 940 (arguing that “the historical accident of sovereign immunity—extended to governments on a categorical basis, without regard to the interests or exigencies at stake in particular cases—lacks a defensible normative rationale”). Consistent with our prior work, we would limit application of sovereign immunity to *noncommercial* conduct. See *Sovereign in Commerce*, *supra* note 25, at 1142.

269. See *supra* Part I.

burden of justifying that shift, as well as the Court's past decisions that expanded the scope of the immunity and preemption doctrines. The doctrinal movement in this as in other contexts²⁷⁰ has reduced the possibility of obtaining a remedy, at the expense of victims, and it is far from clear that any of the rationales offered by the Court in support of their ever-more-robust interpretations of the doctrine actually provide adequate justification.²⁷¹ Moreover, the values we seek to vindicate are not radical, though they may be out-of-step with a majority of the Justices: we begin with the simple premise that those whose rights are violated by private parties deserve a remedy.²⁷² Explicitly extending sovereign immunity only to federal contractors that can satisfy the conditions of qualified sovereignty, as set forth above, would expand the set of circumstances under which plaintiffs injured by contractor conduct may recover. This is the goal: to make more parties currently benefiting from a form of derivative immunity unable to turn to its protections when citizens' rights have been violated. While this reform would not ensure recovery in all circumstances, it improves upon current doctrine. And as noted above, should critics of sovereign immunity,²⁷³ qualified immunity,²⁷⁴ or FTCA exceptions²⁷⁵ prevail on Congress or the Court to modify statutes or doctrines and thus broaden access to redress, our qualified sovereignty construct could be modified to follow suit. We fear, however, that neither such legislative nor judicial moves are likely. In the next Part, we illustrate how qualified sovereignty would work.

III. ILLUSTRATION: QUALIFYING SOVEREIGNTY

The case for adoption of our qualified sovereignty construct to this point has necessarily been abstract. In this Part, we illustrate how a court

270. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) (describing the Supreme Court's "continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth").

271. See, e.g., Schwartz, *supra* note 139, at 18 (decrying the lack of empirical evidence supporting the Court's reasoning that in the absence of a robust qualified immunity defense, government actors would be subject to the "burdens of discovery and trial").

272. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (stating that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

273. See generally Jackson, *supra* note 267 (cataloging the failures of sovereign immunity to remedy harms for injured plaintiffs).

274. See generally Schwartz, *supra* note 139 (identifying deficiencies in qualified immunity in providing a remedy to injured parties).

275. See generally Niles, *supra* note 38 (critiquing the FTCA and its exceptions as overly broad).

could implement our proposal in the context of the facts of an actual case. The first section below describes the litigation we offer as a case study, while the second section outlines how a court would weigh arguments if qualified sovereignty were available. The third section puts qualified sovereignty in the context of our prior work on the proper scope of sovereign immunity.

A. *Anthrax Vaccine—The Case*

In *Ammend v. BioPort, Inc.*,²⁷⁶ a group of several dozen former military personnel, along with their families, sued for damages related to their receipt of an anthrax vaccine (“AVA”).²⁷⁷ The vaccinations were directed as part of the United States Department of Defense (“DoD”) mass vaccination directive issued on November 26, 1993, and the 1997 Anthrax Vaccination Immunization Program.²⁷⁸ The vaccine was not voluntary, and soldiers who refused were disciplined.²⁷⁹ Subsequent studies linked the AVA to Gulf War Syndrome, birth defects, hypersensitivity pneumonia, gastroparesis, optic neuritis, life threatening allergic reactions, fatigue, sleep disturbance, Crohn’s disease, multiple sclerosis, and asthma.²⁸⁰

Plaintiffs sued BioPort, Inc. (“BioPort”), which allegedly manufactured, designed, distributed, produced, and sold AVA pursuant to an exclusive contract with DoD,²⁸¹ two state government entities that were BioPort’s predecessors,²⁸² and Dr. Robert C. Myers, a doctor of veterinary medicine and the Chief Operating Officer and principal owner of BioPort.²⁸³ The plaintiffs asserted that defendants misrepresented the side effects of the vaccine,²⁸⁴ ran the AVA facility without complying with necessary Food and Drug Administration (“FDA”) and manufacturing standards,²⁸⁵ misbranded the drug,²⁸⁶ and changed the production process without FDA approval.²⁸⁷ Plaintiffs further alleged that they were

276. 322 F. Supp. 2d 848 (W.D. Mich. 2004).

277. *Id.* at 852–53.

278. Complaint at ¶¶ 99, 105, *Ammend*, 322 F. Supp. 2d 848 (No. 5:03-CV-031).

279. *Id.* ¶ 119.

280. *Id.* ¶¶ 150–53.

281. *Id.* ¶ 78.

282. *Id.* ¶¶ 79–80.

283. *Id.* ¶ 81.

284. *Id.* ¶¶ 100, 115, 121.

285. *Id.* ¶¶ 102, 132, 142.

286. *Id.* ¶¶ 123, 141.

287. *Id.* ¶ 126.

inoculated by one of the negligently manufactured lots of AVA²⁸⁸ and suffered injury.²⁸⁹ For example, plaintiff Mark Ammend, a fifty-three year-old Air Force fire chief, alleged that, prior to his AVA inoculation, he was in very good health.²⁹⁰ After his four AVA inoculations, Mark “suffered from chronic fatigue and memory loss, as well as serious muscle loss and cognitive problems.”²⁹¹ Within a month of his final vaccination, “Mark was in a wheelchair.”²⁹² Another plaintiff, Sarah Berdugo, a twenty-eight-year-old Air Force Captain, was in “excellent health” prior to receiving her inoculations.²⁹³ After her AVA vaccinations, Sarah “suffered from uterine bleeding, fever, migraines, skin sensitivities, nausea, joint pain, weight loss, skin rash, smell sensitivities, decreased libido, and gastrointestinal problems.”²⁹⁴ Seventy-five others alleged similar injuries, up to and including death.²⁹⁵ In light of such injuries, Plaintiffs alleged violations of state and federal law, including negligence, breach of warranties, breach of the right to be treated with essential human dignity, strict products liability, fraud, 42 U.S.C. § 1983 civil rights violations, and loss of consortium.²⁹⁶

Each of the defendants sought summary judgment to dismiss plaintiffs’ claims.²⁹⁷ In a lengthy opinion, the district court granted the two state defendants summary judgment under a theory of sovereign immunity²⁹⁸ but denied summary judgment to BioPort and Dr. Myers because the facts were insufficient to justify a finding of immunity for those parties.²⁹⁹ The court did analyze BioPort’s assertion that it was entitled to the protection of the sovereign shield. BioPort asserted that “[t]he government contractor defense provides an affirmative defense to state tort liability by extending

288. *Id.* ¶ 149.

289. *Id.* ¶¶ 161–63, 172–73, 180–81, 189, 198–99, 208–09, 218–19, 228–29, 238–39, 248–49, 257–58, 265–66, 274–75, 284–85, 294, 303–04, 313, 319, 324–26, 333–34, 342–43, 352–53, 360, 369–70, 379–80, 386–87, 395–96, 406–07, 417–18, 428–29, 436–37, 445–46, 455–56, 462–64, 473–74, 483–84, 492–93, 502–03, 511–12, 521–22, 531–32, 541, 549–50, 558–59, 568–69, 578–79, 587–88, 597, 606–07, 614–15, 621, 630–31, 639–41, 649–50, 657, 666, 674–75, 684–85, 693–94, 699–701, 706–07, 715–16, 722, 729–31, 738–40, 746–47, 755–59, 765–66, 772–75, 783–84, 793, 799–803, 808–11, 815–17, 825, 832–36, 843.

290. *Id.* ¶¶ 155–56, 160.

291. *Id.* ¶ 161.

292. *Id.* ¶¶ 158, 162.

293. *Id.* ¶¶ 202–03, 207.

294. *Id.* ¶ 208.

295. *See supra* note 289.

296. *Id.* ¶¶ 845–922.

297. *Ammend*, 322 F. Supp. 2d at 854.

298. *Id.* at 855–56.

299. *Id.* at 864, 877–79.

the sovereign immunity of the United States to contractors who manufacture products for the federal government.”³⁰⁰ The court initially punted on the issue, noting that there was insufficient evidence to show that BioPort met the requirements of *Boyle* immunity.³⁰¹

BioPort subsequently asserted that it was entitled to complete immunity under the government contractor defense.³⁰² It spent more than twelve pages of its brief explaining why it was entitled to this *Boyle* immunity.³⁰³ Dr. Myers also asserted the government contractor defense, relying on BioPort’s briefing to make his case.³⁰⁴ The court found that Dr. Myers was entitled to immunity based on his role in the corporate entity and that BioPort was entitled to assert the government contractor defense.³⁰⁵ The court also found that BioPort manufactured AVA according to DoD’s precise specifications, that AVA was manufactured in conformance with DoD standards, and that DoD was aware of the risks and dangers associated with AVA and BioPort’s facilities.³⁰⁶ This, according to the court, met the standard for a government contractor defense under *Boyle*, precluding a state law claim against BioPort and enabling the company to avoid liability.³⁰⁷

B. *Anthrax Vaccine—Qualified Sovereignty*

If the reviewing court were to implement our proposal of qualified sovereignty, would anything in the Anthrax case change? Upon plaintiffs’ showing that BioPort’s actions violated their legal rights, BioPort could assert a qualified sovereignty defense. To qualify for this sovereign shield protection, BioPort would need to establish: (1) it was acting as the government’s agent; (2) it complied with any guidelines established by the government; and (3) it was reasonable for the contractor to believe that its conduct would not violate legal rights.

Based on the information in the pleadings and opinions, it seems likely that BioPort could establish that it was acting as DoD’s agent. For example, the court found that a “DoD official characterized BioPort as a

300. *Id.* at 877.

301. *Id.* at 877–79.

302. *Id.* at 877; see *Sovereign Shield*, *supra* note 4, at 987–92, for a thorough explanation of *Boyle* and its relationship to *Yearsley*.

303. BioPort’s Motion for Summary Judgment at 42–54, *Ammend*, 322 F. Supp. 2d 848 (No. 5:03-CV-031).

304. Motion of Dr. Robert C. Myers for Summary Judgment at 15, *Ammend*, 322 F. Supp. 2d 848 (No. 5:03-CV-031).

305. *Ammend*, No. 1:03-CV-254, 2006 WL 1050509, at *2, *5 (W.D. Mich. Apr. 19, 2006).

306. *Id.* at *4.

307. *Id.*

‘GOCO,’ meaning a ‘government owned, contractor operated’ organization.”³⁰⁸ It is also likely that BioPort could establish that it complied with the guidelines established by the government. The court determined as much, holding that “BioPort manufactured AVA according to the DoD’s very precise specifications” and that BioPort and its predecessors “manufactured AVA in conformity with the DoD’s standards.”³⁰⁹ Because these first two prongs mirror the prongs of derivative sovereign immunity, the *Ammend* court addressed them specifically.

Qualified sovereignty would add an additional, and final, step. It would require BioPort to show that it was reasonable for it to believe that its conduct would not violate legal rights. The parties did not brief this, of course, and the court did not take this up, but we can at least set forth the process. The court would have to consider whether BioPort’s actions, as alleged in the complaint, violated federal law (here, the Federal Food, Drug, and Cosmetic Act³¹⁰) and/or state law (here, state tort law). Taking into account the legal rights inscribed in those statutes and common law, the court would need to determine whether BioPort reasonably should have anticipated that its conduct would violate any of those rights. For example, the court would appropriately ask whether the company was aware of the risk of harm and the risk that causing such harm would violate rights recognized by law. Should a court determine that BioPort’s actions were not reasonable, then BioPort would not qualify for sovereign shield defenses, and the action would not be thrown out on *Boyle* immunity grounds. The plaintiffs could proceed against BioPort without getting derailed by sovereign shield defenses.

In addition to increasing potential avenues to remedy for those harmed, this additional step creates an incentive that did not previously exist. Knowing that it might be liable for injuries caused by its violations of law should make BioPort approach both contract negotiations with DoD and implementation of the contract differently. The parties in this case already had significant bargaining power in the contract negotiation; BioPort and its predecessors successfully negotiated an indemnity agreement with DoD.³¹¹ Had BioPort been less sure of its access to sovereign shield defenses, it might have: (1) negotiated differently with the DoD; (2) taken more care in its implementation of the contract; and/or (3) resisted contractual terms that called for conduct that created a significant risk of

308. *Id.* (quoting BioPort’s Motion for Summary Judgment, *supra* note 303, at 25).

309. *Id.*

310. 21 U.S.C. §§ 301–399i.

311. Complaint at ¶ 109, *Ammend*, 322 F. Supp. 2d 848 (No. 5:03-CV-031).

harm.

C. *Anthrax Vaccine—A Complete Picture of the Project*

For readers of our previous writing who are interested in what would happen if a court were to adopt the series of proposals and protocols outlined over the course of three Articles,³¹² this section applies our ideas to the *Ammend* case.

In our first Article, we set out our serious normative concerns about the current state of the law, with respect to the sovereign shield and its application to private federal contractors.³¹³ Because we are committed to opening avenues for injured parties to recover, we then argued in our second article that courts should assess sovereign shield availability based on the challenged *action*, rather than on the identity of the *actor* and that actor's relationship with the sovereign.³¹⁴ We argued that, based on longstanding doctrinal analysis, courts should first determine if the challenged conduct was commercial.³¹⁵ If the court finds that the challenged action was commercial, then neither the government actor nor its contractor should be entitled to assert sovereign shield defenses to avoid monetary judgment.³¹⁶ If the court finds that the action was not commercial, then the government should be entitled to relevant sovereign shield protections.³¹⁷ Further, we proposed that a federal contractor should enjoy a presumption that sovereign shield defenses are available unless the contractor was acting either outside the scope of or in violation of its duties under contract.³¹⁸ We offered a protocol for courts to assess sovereign shield availability based on the commercial/noncommercial distinction.³¹⁹ Finally, in this Article, we addressed the scope of liability for noncommercial action undertaken by private entities under contract with the federal government.

What would have happened in the *Ammend v. BioPort* litigation had the court adopted the scheme that we set forth across all three Articles? Remember that the several dozen former military personnel and their families charged that the company violated state and federal laws in the

312. *Sovereign Shield*, *supra* note 4; *Sovereign in Commerce*, *supra* note 25. The final Article is this one.

313. *Sovereign Shield*, *supra* note 4.

314. *Sovereign in Commerce*, *supra* note 25, at 1108.

315. *Id.* at 1152–55.

316. *Id.* at 1146.

317. *Id.*

318. *Id.*

319. *Id.* at 1142–52.

development, implementation, and sale of the anthrax vaccine.³²⁰ Recall too that BioPort undertook these actions pursuant to its contract with the United States Department of Defense.³²¹

First, the court would have asked whether Congress unambiguously preempted state law or provided immunity for the challenged conduct. If so, the plaintiffs' claims would have been dismissed.³²² In this case, BioPort made no mention of preemption in its lengthy explanation of why it was entitled to *Boyle* immunity,³²³ even though *Boyle* is often considered a case involving preemption rather than derivative sovereign immunity.³²⁴ Therefore, it is a safe assumption that Congress did not unambiguously preempt state law claims legislatively.³²⁵ In this case, a preemption inquiry would not alter the outcome; if it could have, the defendants would have tried it.

Second, the court would consider whether the alleged bad act was commercial.³²⁶ To determine the answer to the commercial question, the court would have posed the following set of questions: (1) do private sector actors offer vaccination services or products in competition with the federal government or its contractor; (2) do individual consumers engage in direct transactions with BioPort; (3) does a state or federal consumer protection regulatory regime apply to similar vaccination products and services not involving the government; and (4) would the vaccination development and implementation be provided but for federal intervention?³²⁷ If the conduct was commercial, then plaintiffs asserting a violation of their rights could proceed to the merits of the action against BioPort and/or the Department of Defense itself. In other words, in the commercial context, sovereign immunity would not block the plaintiffs' path. That is because, absent sovereign immunity, the plaintiffs would not be forced to establish a waiver of that immunity.

These four questions may be difficult to answer in the anthrax vaccination case. We would expect to see a hard-fought battle, with the plaintiffs arguing that the conduct was commercial and the defendant arguing that the conduct was not commercial. That is because, under our

320. See *supra* notes 276–278, 284–288.

321. See *supra* note 281.

322. See *Sovereign in Commerce*, *supra* note 25, at 1143–45.

323. See *supra* notes 302–305.

324. See *Sovereign Shield*, *supra* note 4, at 980.

325. It is worth pausing here to note that our proposal leaves in place Congress's right to preempt unambiguously or to assign immunity explicitly to protect specific conduct, but we reject the notion of obstacle preemption as a barrier to liability. *Sovereign in Commerce*, *supra* note 25, at 1143–44.

326. *Id.* at 1145–46.

327. *Id.* at 1145.

proposed protocol, if the reviewing court concluded that the harmful conduct was commercial, both DoD and BioPort could be liable. But if the conduct was not commercial, DoD could lay claim to the perquisites of sovereignty directly and BioPort could do so derivatively, as the government's contractor and agent.

If the court were to determine that BioPort's challenged conduct was commercial, then it would look to basic agency principles to determine whether both the defendant contractor and its principal, DoD, could be held liable under respondeat superior. The general rule is that "[u]nless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment."³²⁸ Based on assertions made by BioPort about how the AVA operation ran, it is likely the court would find the company an agent of the federal government.³²⁹ Under our proposed protocol, then, the plaintiff could proceed against both the government principal (DoD) and the contractor agent (BioPort) without confronting sovereign shield defenses. In other words, absent other jurisdictional concerns, the case could proceed to the merits against both government and contractor. In Figure 1, below, the case would fall into the top left quadrant.

Figure 1

	Joint liability under agency law	No joint liability under agency law
Commercial conduct	Contractor agent may be liable Government principal may be liable	Contractor may be liable
Noncommercial conduct	Sovereign shield applies	Contractor may be liable

If, however, the court were to find that Bioport's actions were not commercial, BioPort would qualify to seek the protections of the

328. RESTATEMENT (THIRD) OF AGENCY § 7.01 (AM. L. INST. 2006).

329. If the court determined that there would be joint liability for the government and BioPort under agency law, perhaps because BioPort did not comply with the terms of its agreement with the DoD, then the plaintiffs could proceed to the merits of the action against BioPort. This would be true regardless of whether the underlying conduct was commercial or noncommercial.

sovereign shield. First, BioPort would have to show an agency relationship with the federal government. More specifically, the court would question whether the alleged bad action was taken within the scope of that agency relationship and pursuant to direction from the federal principal. In this case, BioPort made a compelling argument to the court that both were true.³³⁰ At that point, a court would move on to the final question: was it reasonable for the contractor to believe that its conduct would not violate legal rights? This is a fact-specific inquiry, where the court would ask: should the reasonable contractor have anticipated that the course of conduct to be embarked upon in fulfillment of the contract could cause harm in violation of rights protected by law? If the answer to that question is no, then BioPort should be able to assert sovereign shield defenses, including *Boyle* immunity, pursuant to inverted agency.³³¹ If, however, the court finds that BioPort should have anticipated that its actions would violate state or federal law, then it would not be entitled to derive the benefits of the sovereign shield. Importantly, this means that BioPort could not assert a claim based on derived sovereign immunity, derived intergovernmental immunity, or obstacle preemption. Absent other jurisdictional concerns, plaintiffs' case would proceed to the merits against BioPort.

CONCLUSION

Private entities perform an incredible quantity and variety of tasks for the federal government. In doing that work, these contractors sometimes cause harm. In this Article, we propose a new doctrinal approach to considering whether and how contractors' relationship with their federal government partner can protect them from liability for those harms. We propose that private entities operating under contract with the federal government should be permitted to derive supremacy protections based on their relationship with the sovereign *only* if they qualify for such protections. This proposal thus preserves the possibility of a remedy for victims of harms inflicted by contractors that otherwise and under current doctrine enjoy unjustified and unjustifiable impunity.

330. *Ammend v. BioPort, Inc.*, No. 1:03-CV-254, 2006 WL 1050509, at *3–4 (W.D. Mich. Apr. 19, 2006).

331. *See Sovereign in Commerce*, *supra* note 25, at 1147–52. This is more fully explored in section III.B, *supra*.