Getting Reacquainted with Constitutional Torts

Author : Benjamin C. Zipursky

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Richard Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 **Cal. L. Rev.** 933 (2019)).

Richard H. Fallon, Jr.'s *Bidding Farewell to Constitutional Torts* is an important article at many levels. The provision by a leading constitutional scholar of a thoughtful and rigorous overview of the field, recent Supreme Court decisions within it, and new trains of scholarship criticizing those decisions is itself of great value. But there is much more here, and some of it is surprising. One might have expected a robust defender of the rule of law such as Fallon[1] to excoriate the Supreme Court's repeated expressions of skepticism about the principle that "where there's a right, there is a remedy." Instead, Fallon shares much of the Court's skepticism and, in principle, shares its view that, in a range of scenarios, it is sensible to permit anticipated social costs to defeat the ability of victims of constitutional rights violations to hold those who have victimized them accountable. While the article ultimately defends the landmark *Bivens* decision itself, and a certain notion of state accountability to victims before courts of law, this too is something of a surprise in a piece purporting to "bid farewell" to the entire field.

In a manner consistent with his sensitivity to a range of constraints on legal interpretation, Fallon subdivides his article into three parts: (1) a doctrinal descriptive section; (2) the articulation of normative considerations relevant to the establishment of an attractive framework of liability rules for government actors and a proposal for such a framework; and (3) an analysis of which institutions are well-suited to adopt and implement that framework. Each of these inquiries is thoughtful, defensible, and important.

On the doctrinal descriptive section, Fallon makes several points. First, he emphasizes the Court's increasingly adamant yet not quite complete rejection of the possibility of new *Bivens* claims in *Ziglar v. Abbasi* (following on the heels of *Ashcroft v. Iqbal*). Second, he describes the remarkable breadth of qualified immunity under *Harlow v. Fitzgerald* and its progeny, and the still-greater breadth of official immunity for judicial and legislative acts. Third, he recognizes the Court's efforts to restrict plaintiffs' remedies further by procedural requirements such as those laid down in *Iqbal*. Similarly, he notes the weakening of *Ex Parte Young* and rights to injunctive relief as laid out in Armstrong v. Exceptional Child Care Center.

While the descriptive section of the article ends by condemning the Rehnquist and Roberts Courts for its "methodologically untethered activism in service of the apparent cause of limiting suits to enforce the Constitution," Fallon is also highly critical of recent scholars advocating a reinvigoration of constitutional torts by a common law tort mindset. Instead, he puts forth a framework that treats individual rights as interests and candidly recognizes both the value of private rights of action to vindicate rights and the value of pragmatic judicial crafting that balances those interests against the needs of the state, the costs of liability, and the practicalities of litigation. *Bivens* and 1983 doctrine, he argues, should be adjusted in light of all of these considerations. Neither qualified immunity nor absolute immunity should be regarded as "regrettable" necessities but as "valuable, adaptive device[s] for achieving the best overall regime of substantive rights, rights to sue for tort remedies, and immunity defenses." Recognizing the incompatibility of his view with the common-law mindset advocated by other scholars, he writes:

> However serviceable a tort-law-based mode of controlling official misconduct may have been in the Founding era, a framework built on common law concepts and categories is outdated, misleading, and potentially dangerous as a guide to thinking about constitutional and rule-of-law issues in the current day. Since the collapse of the *Lochner* era, it has been widely recognized that modern legislatures should have broad authority to displace common law assignments of private rights and duties. And just as the common law fails to provide a

> reliable baseline for identifying constitutionally protected rights, a tort-law-based conceptual scheme fails to mark the categories of legal norms that most urgently require judicial enforcement against public officials for the rule of law to thrive in the modern era.
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> When we view rights and remedies as part of a package, moreover, it may sometimes be better to have more broadly defined rights with a set of partially incomplete remedies than to have individually effective remedies for every constitutional violation. To give a pair of concrete examples, if the costs of the Supreme Court rulings in cases such as *Brown v. Board of Education* and *Miranda v. Arizona* had included damages remedies against school officials who had maintained racially segregated classrooms or against judges who had allowed the admission of confessions obtained without *Miranda* warnings, the Court might have felt unable to decide *Brown* and *Miranda* as it did.

Once engaged in crafting a theoretical framework from an instrumentalist point of view,[2] Fallon identifies three important functions of constitutional remedies: compensation to the victims of official misconduct, empowerment of victims to hold accountable those who have injured them, and deterrence (and enforcement of the law as against the government itself) in recognition of the importance of rule-of-law values. A crucial point of the article is that the existence of rights of action for injunctions or damages – which would putatively (and sometimes, actually) help to achieve the aforementioned goals – must be weighed against the offsetting social costs not only to the state, but also to the individuals whose substantive rights might not be recognized by courts were their recognition necessarily connected to an expansion of liability.

The last part of Fallon's article offers reasons for thinking that a place remains for judicially created remedies for official wrongdoing, and that the Supreme Court's restriction of *Bivens* is unjustifiable not only from an instrumentalist point of view, but from the point of view of constitutional theory and in light of the institutional competence concerns that have been offered in defense of the Court's current position. When he finally does weigh in on various substantive issues in this field, he argues (among other things) that: (a) the FTCA and the Westfall Act actually provide reasons for the Court to be more open to *Bivens* claims than it has been, not less open; (b) some forms of official immunity and qualified immunity are indeed justifiable, but the sharply pro-defendant form that has developed since *Harlow v. Fitzgerald* is unjustifiably restrictive; (c) the conception of municipal liability in Monell v. Department of Social Services is too narrow; there should be substantial constitutional tort liability for state and municipal entities.

There are at least three paradoxical features of Fallon's article. The first is at one level semantic, but at another substantive. The article is titled "Bidding Farewell to Constitutional Torts," but it is in fact a reacquaintance with the field and an argument for a more robust return (hence, the title of this jot). A second is that what Fallon recommends as a *replacement* for a common law tort approach to official liability is in fact what the Supreme Court and a range of legal scholars have long regarded as the very core of common law tort thinking, namely, an approach that favors crafting liability rules based on a pluralistic instrumentalism that calls for the weighing of various social consequences that seem likely to follow from the presence of more or less liability. Third, it is a central tenet of rule-of-law scholars like Fallon that no one is above the law and that government actors must know that they will be held accountable for their misuses of office, yet Fallon seems to be advocating for free-form judicial policymaking as to when there is and when there is not accountability for the government's infringement of individual rights.

I will take these points in order. Fallon must mean by "constitutional torts" a particular conceptualization of *Bivens* and 1983 actions that has attracted significant scholarly attention in recent years – roughly speaking, an overlap of the views defended by James Pfander and William Baude (respectively) in recent articles.[3] Pfander points to a broad period in American legal history when it was widely understood that government actors are straightforwardly liable in their individual capacity for torts they commit against private citizens, unless what they did was in fact proper under the Constitution. On this view, constitutional torts are just common law torts (like trespass or battery or negligence), committed by governmental actors. Pfander and others have sharply criticized the Supreme Court of the past quarter century not only for eviscerating liability in *Bivens* and 1983 more generally, but also for undercutting this common law

conception of what a constitutional tort claim really is. Fallon is with them on the first point, but not on the second. He thinks the Court is closer to having the right conception of constitutional torts than Pfander or others. For any number of reasons he elaborates in the paper, he believes that the common law conception cannot really work. That is why he wants to bid it farewell. It would have been less catchy but more perspicuous if he had named the article "Bidding Farewell to the common law conception of constitutional torts," or, more precisely, "Bidding Farewell to the Nineteenth Century common law conception of constitutional torts."

For scholars like myself and my collaborator John Goldberg (Fallon's colleague), it is ironic that Fallon contrasts common law tort thinking with pluralistic and instrumentalist reasoning that takes seriously compensation, deterrence, and social costs. That is what a great deal of common law thinking has been since roughly 1960s when William Prosser was the country's preeminent tort scholar and the California Supreme Court became the nation's leading expositor of tort law. Fallon seems to be under the impression – perhaps from recent constitutional tort commentators like Pfander, Baude, and Wells – that common law torts is widely understood as a rights-based, non-instrumentalist domain of legal reasoning. For better or worse, neither courts nor the majority of law professors look at common law torts this way today. Indeed, the pragmatic instrumentalist mindset Fallon ultimately prescribes to courts for thinking about *Bivens* and 1983 is quite close to the way most law professors think about common law torts today.

The most striking feature of Fallon's article is his willingness to say that the social costs of providing redress to individuals whose constitutional rights were violated will sometimes count as a decisive reason to decline to hold those state actors accountable. This is one of the reasons he believes official immunity of various forms must be maintained. And it is the principal reason he rejects the outright attack on the results reached by the Roberts' Court in constitutional tort cases. On the face of it, this recognition of costs defeating rights – put forward not simply as a law professor telling a hard truth but as an approval of judicial cautiousness in recognizing rights of action – is at odds with a strong commitment to the rule of law in its classic, Diceyan form, and, relatedly, to a Dworkinian conception of rights as trumps.

Ironies have two sides, of course, and my own principal takeaway is that Fallon, in the end, is a great advocate for further elaboration of constitutional rights *and* rights of action. Indeed, I commend this article because, in its deliberately down-to-earth quality, it both educates torts professors as to where we are in this complex field and indicates the availability of many middle paths in these times of extremism. Coming from a leading figure in constitutional law and theory, this is a lot to ask for, and we get it.

My problem, of course is more in marketing than in substance. Why did Fallon have to pitch the discussion as a critique of rights, when he is indeed a rights-based thinker? It appears to me that Fallon has fallen into the trap that also caught Prosser and mid-Twentieth Century common law scholars. They believed there were two choices in the judicial crafting of doctrine – 'traditional' common law, which (in their minds) carried with it an inherent bent toward laissez faire, or a flexible form of instrumentalism that would allow for progressive law reform. In response to the worry that, even today, contemporary advocates of a common-law approach are intentionally or unintentionally arguing for the restoration of a narrow, classical liberal conception of government, Fallon advocates for instrumentalism. As John Goldberg and I have argued, however, it is fallacious to align common law with laissez-faire and instrumentalism with progressivism – these were merely contingent associations characteristic of a certain phase of our history.[4] Fallon is on solid ground when he rejects rights-based formalism for constitutional torts,[5] but a rights-sensitive form of pragmatism will be needed if we are serious about preserving government accountability and the rule of law.

1. Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 **Texas L. Rev.** 487 (2018).
2. Fallon expressly refers to the importance "instrumental reasoning" on page 163. It is possible that his view would be more accurately described as "functionalist" than "instrumentalist," but his own endorsement of interest-based and "instrumental" reasoning provides reasons to think that "instrumentalism" is fairly applied to his view.

3. James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 **Calif. L. Rev.** 737 (2019); William Baude, *Is Qualified Immunity Unlawful?*, 106 **Calif. L. Rev.** 45 (2018). *See also* Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 **Ga. L. Rev.** 1003 (2012).
4. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 **U. Pa. L. Rev.** 1733 (1998).
5. Notably, however, even if Pfander and Baude display great reliance on history in the interpretation of the law, it is far from clear that either ought to be counted as a formalist.

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