

Damages or Nothing-the Efficacy of the Bivens-Type Remedy

W. Mark Smith

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

W. Mark Smith, *Damages or Nothing-the Efficacy of the Bivens-Type Remedy*, 64 Cornell L. Rev. 667 (1979)
Available at: <http://scholarship.law.cornell.edu/clr/vol64/iss4/4>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

NOTES

"DAMAGES OR NOTHING"—THE EFFICACY OF THE BIVENS-TYPE REMEDY

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹ plaintiff sued federal law enforcement agents for damages resulting from an allegedly unconstitutional search and arrest.² In a dramatic departure from received law, the Supreme Court inferred a cause of action from the fourth amendment itself.³ As the Second Circuit has noted, "[f]ew opinions have stirred as much debate as *Bivens*."⁴ Commentators have extensively analyzed the case and its ramifications.⁵ Courts have wrestled with new issues it spawned, such as the possibility of inferring damage remedies from amendments other than the fourth⁶ or of obtaining relief from nonfederal defendants.⁷

¹ 403 U.S. 388 (1971).

² Specifically, plaintiff charged that "the arrest and search were effected without a warrant, . . . unreasonable force was employed in making the arrest . . . , [and] the arrest was made without probable cause." *Id.* at 389.

³ *Id.* at 395-97.

⁴ *Turpin v. Maillet*, 579 F.2d 152, 157 (2d Cir.) (en banc) (dictum), *vacated sub nom.* *City of West Haven v. Turpin*, 99 S. Ct. 554, *cert. denied*, 99 S. Ct. 586 (1978).

⁵ See, e.g., Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. L. REV. 526 (1977); Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977); Comment, *Sovereign Immunity—An Anathema to the "Constitutional Tort,"* 12 SANTA CLARA LAW. 543 (1972); Note, *Measuring Damages for Violations of Individuals' Constitutional Rights*, 8 VAL. U. L. REV. 356 (1974).

⁶ See, e.g., *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978) (fifth amendment); *Davis v. Passman*, 571 F.2d 793 (5th Cir.) (en banc), *rev'd*, 47 U.S.L.W. 4643 (1979) (fifth amendment); *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977) (fourteenth amendment); *White v. Boyle*, 538 F.2d 1077 (4th Cir. 1976) (first amendment); *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975) (thirteenth and fourteenth amendments); *Patmore v. Carlson*, 392 F. Supp. 737 (E.D. Ill. 1975) (fifth and eighth amendments).

⁷ See, e.g., *Turpin v. Maillet*, 579 F.2d 152 (2d Cir.) (en banc) (municipality), *vacated sub nom.* *City of West Haven v. Turpin*, 99 S. Ct. 554, *cert. denied*, 99 S. Ct. 586 (1978); *Molina v. Richardson*, 578 F.2d 846 (9th Cir.) (municipality), *cert. denied*, 99 S. Ct. 724 (1978); *Monks v. Hetherington*, 573 F.2d 1164 (10th Cir. 1978) (private persons); *Jamison v. McCurrie*, 565 F.2d 483 (7th Cir. 1977) (municipality); *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977) (town police chief); *Wiley v. Memphis Police Dep't*, 548 F.2d 1247 (6th Cir. 1977) (municipality); *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976) (municipality and employees); *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975) (municipality); *Skehan v. Board of Trustees*, 501 F.2d 31 (3d Cir. 1974) (state college), *vacated on other grounds*, 421 U.S. 983 (1975).

Despite appearances, the Court did not decide *Bivens* to complicate the law, but to compensate victims of unconstitutional official acts. As Justice Harlan, concurring, explained:

[S]ome form of damages is the only possible remedy for someone in *Bivens*' alleged position. It will be a rare case indeed in which an individual in *Bivens*' position will be able to obviate the harm by securing injunctive relief from any court. . . . [A]ssuming *Bivens*' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. *For people in Bivens' shoes, it is damages or nothing.*⁸

A *Bivens*-type⁹ action, therefore, accomplishes its purpose only when a deserving plaintiff¹⁰ recovers damages.

⁸ 403 U.S. at 409-10 (emphasis added). See *Butz v. Economou*, 438 U.S. 478, 485-86 (1978) (dictum); *Carey v. Phipus*, 435 U.S. 247, 254-55 (1978) (dictum).

Lehmann, *supra* note 5, argues that *Bivens* reflects a policy of access to the federal courts. *Id.* at 539-40. He confuses the means with the end. Absent a corresponding right to relief, a plaintiff needs no day in court; Lehmann's theory cannot justify expending judicial resources.

Deterrence of unconstitutional official conduct is another possible rationale for *Bivens*. See, e.g., Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROB. 8, 9 (1978). Cf. *Green v. Carlson*, 581 F.2d 669, 673 (7th Cir. 1978) (dictum) (joint policies of compensation and deterrence). Some deterrent effect inheres in a compensatory award and recovery. See *Carey v. Phipus*, 435 U.S. 247, 256-57 (1978). The Court's description of the *Bivens* cause of action, however, precludes deterrence from being a primary goal. As one commentator has noted:

To effectively deter unconstitutional searches, a constitutional cause of action for damages must focus on the conduct of the defendant, not on measurable harm to the plaintiff. Unconstitutional searches must result in recoveries sufficient to prevent similar future misconduct regardless of a plaintiff's inability to demonstrate either actual damage or malicious intent. But unfortunately the Court characterizes the cause of action recognized in *Bivens* as compensatory, a remedy affording recoveries when a plaintiff can "demonstrate an injury."

1972 UTAH L. REV. 276, 281 (footnotes omitted). To the extent that the deterrence rationale does underlie *Bivens*, it, like the compensation rationale, is vindicated only if deserving plaintiffs recover on the cause of action.

⁹ A *Bivens* action derives specifically from the fourth amendment. A *Bivens*-type action is one alleging a violation of any constitutional amendment, including the fourth.

¹⁰ A plaintiff is deserving if (1) federal officials have violated his constitutional rights and (2) a court recognizes a *Bivens*-type action for loss of those rights. Many plaintiffs fail to meet these criteria. See Table B *infra*. Courts, increasingly sensitive to attempted constitutionalization of all injuries, may refuse to accord constitutional significance to some harms caused by federal officials. See, e.g., *Davis v. Passman*, 571 F.2d 793, 799-800 (5th Cir. 1978) (en banc), *rev'd*, 47 U.S.L.W. 4643 (1979). Cf. *Paul v. Davis*, 424 U.S. 693, 699-710 (1976) (state official's defamatory publication does not violate procedural due process or right to privacy).

1

OBSTACLES TO RECOVERY

A plaintiff whose constitutional rights have been violated by a federal official may name a variety of parties as defendants: the official himself, his superiors, the employing department or agency, or the United States. Regardless of their choices, however, deserving plaintiffs almost always go uncompensated because they cannot surmount an unusual array of hurdles to judgment and recovery.

A. Suits Against the United States

Without an explicit waiver, the doctrine of sovereign immunity bars actions for money damages against the United States or a federal agency.¹¹ No statute comprehensively waives sovereign immunity for constitutional tort suits arising out of federal officials' conduct. The federal question jurisdiction statute¹² and the Tucker Act¹³ are jurisdictional¹⁴ only; they do not constitute

¹¹ See *United States v. Muniz*, 374 U.S. 150, 152-58 (1963) (dictum); *Blackmar v. Guerre*, 342 U.S. 512, 515 (1952).

¹² 28 U.S.C. § 1331(a) (1976).

¹³ *Id.* §§ 1346(a), 1491.

¹⁴ Typically, § 1331(a) is the basis for district court subject-matter jurisdiction over *Bivens*-type actions. See, e.g., *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 547 (1972) (dictum). The Tucker Act provides in part:

The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

....
 (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1346(a) (1976). Section 1491 vests exclusive federal subject-matter jurisdiction in the Court of Claims for the same class of cases where the amount in controversy exceeds \$10,000.

The Second Circuit has indicated that a district court may exercise Tucker Act jurisdiction over a *Bivens*-type action against the United States. See *Duarte v. United States*, 532 F.2d 850, 851-52 (2d Cir. 1976) (dictum). In the same year, the Ninth Circuit held both that a district court may and that it may not exercise such jurisdiction. Compare *Wiren v. Eide*, 542 F.2d 757, 760 (9th Cir. 1976) with *Midwest Growers Coop. Corp. v. Kirkemo*, 533 F.2d 455, 465 (9th Cir. 1976). *Kirkemo* ruled the Tucker Act inapplicable to *Bivens*-type actions because they fall within the "sounding in tort" exception to the jurisdictional grant. *Id.* By treating the tort exception as a limit on each of the bases for jurisdiction, however, this interpretation reads the internal punctuation out of the statute. The Court of Claims has held that the Tucker Act provides jurisdiction over suits arguably sounding in tort if

waivers of immunity.¹⁵ The District of Columbia Court of Appeals has suggested that the Federal Tort Claims Act (FTCA),¹⁶ following its amendment in 1974,¹⁷ waives sovereign immunity for all constitutional tort claims.¹⁸ But Congress limited the reach of the 1974 amendment to intentional fourth amendment violations.¹⁹ Congress has, albeit unsystematically, waived

they also arise under the Constitution, federal statutes or regulations, or a contract. *See, e.g.,* Bird & Sons, Inc. v. United States, 420 F.2d 1051, 1053-54 (Ct. Cl. 1970); Fort Sill Gardens, Inc. v. United States, 355 F.2d 636, 637-38 (Ct. Cl. 1966).

For a discussion of early *Bivens*-type cases exploring possible bases for subject-matter jurisdiction, see Lehmann, *supra* note 5, at 552 n.146.

¹⁵ Section 1331(a): *Cale v. City of Covington*, 586 F.2d 311, 313-14 (4th Cir. 1978); *Smith v. Grimm*, 534 F.2d 1346, 1351 n.6 (9th Cir.), *cert. denied*, 429 U.S. 980 (1976); *Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972). Tucker Act: *United States v. Testan*, 424 U.S. 392, 397-98 (1976); *Duarte v. United States*, 532 F.2d 850, 851-52 (2d Cir. 1976).

¹⁶ 28 U.S.C. §§ 1346(b), 2671-2680 (1976).

¹⁷ In April 1973, federal narcotics agents allegedly invaded an apartment in Collinsville, Illinois, held the occupants at gunpoint, threatened to shoot them, and caused extensive property damage before realizing that they had entered the wrong dwelling. A short time later, using similar tactics, the same agents raided a nearby house with the same result. No warrants were issued prior to either raid. *See* Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497, 500-05 (1976).

In response to the Collinsville raids, Congress amended the FTCA to include intentional fourth amendment violations. *See* S. REP. NO. 93-588, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789. Prior to 1974, § 2680(h) excepted specified intentional torts from the FTCA's waiver of immunity. 28 U.S.C. § 2680(h) (1970). The 1974 amendment qualified this exception by making the FTCA applicable to "any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by "investigative or law enforcement officers of the United States Government." Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50.

¹⁸ *Black v. Sheraton Corp. of America*, 564 F.2d 531, 539-40 (D.C. Cir. 1977) (dictum). *Accord*, *Mahoney v. Waddle*, 564 F.2d 1018, 1060 (3d Cir. 1977) (dictum) (dissenting opinion, Garth, J.), *cert. denied*, 438 U.S. 904 (1978). Other courts have concluded that constitutional torts are not excepted from, and are therefore actionable under the FTCA. *See* *Founding Church of Scientology v. Director, FBI*, 459 F. Supp. 748 (D.D.C. 1978); *Avery v. United States*, 434 F. Supp. 937, 945-46 (D. Conn. 1977). *But see* *Birnbaum v. United States*, 588 F.2d 319, 327 (2d Cir. 1978) (constitutional torts outside FTCA), *rev'g* 436 F. Supp. 967 (E.D.N.Y. 1977).

¹⁹ "[T]he Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued without probable cause." S. REP. NO. 93-588, 93d Cong., 1st Sess. 4 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791. The text of the statute itself should have foreclosed the District of Columbia Court of Appeals' position. *See* note 17 *infra*.

Looking beyond the language of the 1974 amendment, however, the D.C. Circuit's result may be defensible. State law determines governmental liability under the FTCA (28 U.S.C. §§ 1346(b), 2672 (1976)) and if states must provide a *Bivens*-type remedy, *Bivens* it might constitute state law for FTCA purposes. If the Supreme Court had decided *Bivens* on constitutional grounds it clearly would have bound the states. *See* *Mapp v. Ohio*, 367

sovereign immunity for a few other constitutional torts.²⁰ Outside

U.S. 643, 655 (1961) (remedies compelled by fourth amendment are binding on states). But the Court repudiated this view:

[W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

403 U.S. at 397. See *Davis v. Passman*, 571 F.2d 793, 796-97 (5th Cir.), *rev'd on other grounds*, 47 U.S.L.W. 4643 (1979); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 798-800 (2d ed. 1973); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 26.00, at 574 & 26.00-1 (1976).

Nevertheless, *Bivens* may bind the states as constitutional common law. See Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23-24, 24 n.125 (1975). But see *Birnbaum v. United States*, 588 F.2d 319, 327-28 (2d Cir. 1978).

Even if the District of Columbia Circuit's interpretation was correct, the FTCA does not guarantee a judgment for deserving plaintiffs; it merely authorizes governmental liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1976). Even though the United States is the defendant, FTCA plaintiffs face some of the obstacles that prevent recovery from individual defendants (see notes 22-142 and accompanying text *infra*). See, e.g., *Norton v. United States*, 581 F.2d 390 (4th Cir.), *cert. denied*, 99 S. Ct. 613 (1978) (in FTCA action for fourth amendment violations by federal law enforcement agents, United States can invoke qualified immunity defense available to individual officers), *rev'g* 427 F. Supp. 138, 146-52 (E.D. Va. 1977). But see *Crain v. Krehbiel*, 443 F. Supp. 202, 215-16 (N.D. Cal. 1977).

Moreover, the FTCA imposes unusual procedural requirements including a two-year limitations period for presenting a claim to the appropriate federal agency (28 U.S.C. § 2401(b) (1976)) with final agency disposition a prerequisite to suit (§ 2675). It allows no punitive damages (§ 2674), and limits attorneys' fees (§ 2678). By excepting "discretionary" acts from the FTCA's purview, section 2680(a) probably excludes most constitutional tort suits. See, e.g., *Butz v. Economou*, 98 S. Ct. 2894, 2910 (1978) (dictum); *Midwest Growers Coop. Corp. v. Kirkemo*, 533 F.2d 455, 465 (9th Cir. 1976); *Ostrer v. Aronwald*, 434 F. Supp. 379, 382-83 (S.D.N.Y.) (dictum) (prosecutor's decision to use coercive means to induce witness to testify falls within discretionary act exception), *aff'd on other grounds*, 567 F.2d 551 (2d Cir. 1977); Freed, *supra* note 5, at 544-45 n.98; Comment, *supra* note 5, 12 SANTA CLARA LAW. at 551. But see *Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978) (distinguishing unconstitutional activities which fall outside agency's properly delegated functions, to which the discretionary act exception does not apply, from those within authority, as to which court reached no decision). If plaintiff succeeds in obtaining a judgment against the government, however, payment of damages is guaranteed. 31 U.S.C.A. § 724a (West Supp. 1978).

²⁰ In addition to claims alleging intentional fourth amendment violations (see note 19 and accompanying text *supra*), Congress has, for example, authorized suits against the United States for discrimination in federal employment. 42 U.S.C. § 2000e (1976) (Title VII). A plaintiff cannot use such a waiver in conjunction with a *Bivens*-type theory; the statute

these limited instances, however, sovereign immunity continues to bar *Bivens*-type actions against the United States.²¹

B. Suits Against Federal Officials

The sovereign immunity bar relegates plaintiffs with *Bivens*-type claims to suing individual federal officials. In such suits, prerequisites to judgment and recovery that are unrelated to demonstrating a compensable constitutional injury frequently prevent satisfaction of meritorious claims.

I. Proper Defendants

The doctrine of respondeat superior does not apply in *Bivens*-type actions against federal officials. Courts will base liability only on an official's direct responsibility for acts violating plaintiff's rights.²² Plaintiff may not sue top-level personnel that he

waives immunity only for the statutory right of action. *See Norton v. United States*, 581 F.2d 390, 393-95 (4th Cir.), *cert. denied*, 99 S. Ct. 613 (1978). Title VII, the exclusive remedy for suits alleging federal employment discrimination (Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976)), precludes *Bivens*-type suits. *See Berio v. EEOC*, 446 F. Supp. 171, 173-74 (D.D.C. 1978); *Pace v. Mathews*, 15 Fair Empl. Prac. Cas. 703, 703-04 (D.D.C. 1978); *Beeman v. Middendorf*, 425 F. Supp. 713, 715-16 (D.D.C. 1977). *But see Brosnahan v. Eckerd*, 435 F. Supp. 26 (D.D.C. 1977). Moreover, courts may refuse to infer a cause of action from a constitutional amendment if an adequate statutory remedy exists. *See, e.g., Torres v. Taylor*, 456 F. Supp. 951, 954-55 (S.D.N.Y. 1978) (no damage remedy inferred from fifth and eighth amendments because FTCA adequate); *Neely v. Blumenthal*, 458 F. Supp. 945, 960 (D.D.C. 1978) (no cause of action inferred from Constitution for employment discrimination because Title VII adequate). In any event, plaintiffs are compelled to rely on the statutory remedy, if one exists, and are subject to the corresponding statutory procedures, which may hinder recovery. *See note 19 supra*.

²¹ *See Butz v. Economou*, 438 U.S. 478, 504-05 (1978) (dictum); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 410 (1971) (concurring opinion, Harlan, J.); *Jaffee v. United States*, No. 78-2041, slip op. at 9-10 (3d Cir. Feb. 9, 1979); *Norton v. United States*, 581 F.2d 390, 393 (4th Cir.), *cert. denied*, 99 S. Ct. 613 (1978); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1362-63 (9th Cir.), *cert. granted*, 99 S. Ct. 613 (1978); *Duarte v. United States*, 532 F.2d 850, 852 (2d Cir. 1976); *Terrapin Leasing, Ltd. v. United States*, 449 F. Supp. 7, 8 (W.D. Okla. 1978); *Smith v. Commissioner*, 78-1 U.S. Tax. Cas. ¶ 9,326 (N.D. Ga. 1978); *Donohue v. United States*, 437 F. Supp. 836, 842-43 (E.D. Mich. 1977); *Smallwood v. United States*, 358 F. Supp. 398, 405, 407 (E.D. Mo.), *aff'd mem.*, 486 F.2d 1407 (8th Cir. 1973); *Monarch Ins. Co. of Ohio v. District of Columbia*, 353 F. Supp. 1249, 1253-54 (D.D.C. 1973), *aff'd mem.*, 497 F.2d 683-86 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974).

²² *See, e.g., Kite v. Kelley*, 546 F.2d 334, 337-38 (10th Cir. 1976); *Black v. United States*, 534 F.2d 524, 527-28 (2d Cir. 1976); *Fayerweather v. Bell*, 447 F. Supp. 913, 916 (M.D. Pa. 1978); *Marquez v. Kiley*, 436 F. Supp. 100, 105 n.6 (S.D.N.Y. 1977); *Jackson v. Wise*, 385 F. Supp. 1159, 1162-63 (D. Utah 1974); *Green v. Laird*, 357 F. Supp. 227, 230 (N.D. Ill. 1973). Respondeat superior is also unavailable in suits under 42 U.S.C. § 1983 (1976), *Bivens'* statutory counterpart for suits against state and local governments and offi-

can readily identify once he determines which federal agency deprived him of his rights. Supervisory officers are properly defendants only if they participated or acquiesced in the purported misconduct of their subordinates.²³ Plaintiff must ferret out the directly responsible officials themselves.²⁴

Identifying the officials who violated plaintiff's rights may pose an insurmountable hurdle. An obviously problematic area, not limited to constitutional tort cases, is the mass tort. Unless a supervisory official has personal responsibility for *en masse* constitutional offenses,²⁵ a deserving plaintiff may be precluded from recovery because he cannot identify the official who injured him with sufficient particularity.²⁶ Involvement of the federal bureaucracy in the deprivation of plaintiff's rights compounds identification difficulties. Bureaucratic decisionmaking is often anonymous at all but the uppermost levels.

Many plaintiffs must file complaints naming "unknown" officials as defendants.²⁷ Some courts readily dismiss unnamed de-

officials (*see note 65 infra*). *See Monell v. Department of Social Serv.*, 436 U.S. 658, 691-95 (1978) (municipalities); *Johnson v. Glick*, 481 F.2d 1028, 1033-34 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973) (officials).

Vicarious liability would increase the deterrent effect generated by a damage recovery by providing the superior with incentive to prevent his underlings from engaging in unlawful behavior. *See W. PROSSER, HANDBOOK ON THE LAW OF TORTS* 459 (4th ed. 1971); James, *Vicarious Liability*, 28 TUL. L. REV. 161, 168 (1954). Judicial imposition of liability for fault resulting in injury only harmonizes with a compensatory purpose.

²³ *See cases cited in note 22 supra*.

²⁴ If the offending official dies, plaintiff may proceed against his estate. *See Dobbs v. Huff*, 446 F. Supp. 35, 36-37 (N.D. Ga. 1977). Federal Rule of Civil Procedure 25(d)(1), which authorizes automatic substitution of a deceased official's successor as defendant in a lawsuit, is inapplicable because it is explicitly limited to officials sued in their official capacity. *Bivens*-type suits reach officials in their individual capacity. *See note 91 infra*.

The Seventh Circuit has held that a *Bivens*-type action survives the death of the injured party. *See Green v. Carlson*, 581 F.2d 669, 672-75 (7th Cir. 1978) (applying federal common law); *Beard v. Robinson*, 563 F.2d 331, 332-34 (7th Cir. 1977) (borrowing state law), *cert. denied*, 438 U.S. 907 (1978).

²⁵ *E.g.*, *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) (Capitol Police chief who supervised mass arrests of demonstrators liable for violations of first amendment rights).

²⁶ *Cf. Verkuil, Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C. L. REV. 548, 556-57 (1972) (state officials). Even in face-to-face encounters with the public, officials may retain their anonymity. Federal agents arrested Webster Bivens, yet he initially sued "unknown" defendants. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 390 n.2.

²⁷ *See, e.g.*, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 390 n.2; *Lowe v. Armistead*, 582 F.2d 1291, 1293 (4th Cir. 1978); *Beard v. Robinson*, 563 F.2d 331, 332 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978); *J.D. Pflaumer, Inc. v. United States Dep't of Justice*, 450 F. Supp. 1125, 1128 (E.D. Pa. 1978); *Lofland v. Meyers*, 442 F. Supp. 955, 957 (S.D.N.Y. 1977); *Vorhauer v. United States*, 426 F. Supp.

fendants.²⁸ Others, more sensitive to the identification problem, have refused to dismiss claims against John Doe defendants until plaintiff has had an adequate opportunity to identify allegedly responsible officials through discovery.²⁹ Discovery, however, may fail to uncover proper defendants. In addition, even if plaintiff identifies proper defendants during discovery, his motion to amend the complaint to name them may not relate back to the original pleading, thereby re-exposing his suit to the time bar.³⁰ Identification problems, therefore, may prove dispositive. Moreover, the frequency of their occurrence and the uncertainty they produce may discourage the prosecution of legitimate *Bivens*-type claims.

2. Personal Jurisdiction

Once he identifies the proper officials, plaintiff faces the hurdle of personal jurisdiction.³¹ If any defendants reside out-

839, 840 (E.D. Pa. 1976); *Kipperman v. McCone*, 422 F. Supp. 860, 879 (N.D. Cal. 1976); *Saffron v. Wilson*, 70 F.R.D. 51, 56 (D.D.C. 1975); *Dupree v. Village of Hempstead*, 401 F. Supp. 1398, 1400 (E.D.N.Y. 1975); *Lowenstein v. Rooney*, 401 F. Supp. 952, 954 (E.D.N.Y. 1975); *Burkhart v. Saxbe*, 397 F. Supp. 499, 501 (E.D. Pa. 1975); *Ghandi v. Police Dep't of Detroit*, 66 F.R.D. 385, 386 (E.D. Mich. 1975); *Jackson v. Wise*, 385 F. Supp. 1159, 1161 (D. Utah 1974); *Gardels v. Murphy*, 377 F. Supp. 1389, 1392 (N.D. Ill. 1974); *Butler v. United States*, 365 F. Supp. 1035, 1038 & n.6 (D. Hawaii 1973); *Reese v. Nixon*, 347 F. Supp. 314, 315 (C.D. Cal. 1972).

²⁸ See, e.g., *Black v. United States*, 534 F.2d 524, 528 (2d Cir. 1976); *Lofland v. Meyers*, 442 F. Supp. 955, 959, 960 (S.D.N.Y. 1977); *Kipperman v. McCone*, 422 F. Supp. 860, 879 (N.D. Cal. 1976); *Dupree v. Village of Hempstead*, 401 F. Supp. 1398, 1400 (E.D.N.Y. 1975). Local court rules may require this result. See *Reese v. Nixon*, 347 F. Supp. 314, 315 (C.D. Cal. 1972); C.D. CAL. R. 4(i).

²⁹ See, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 390 n.2 (noting use of discovery to determine defendants' identities); *J.D. Pflaumer, Inc. v. United States Dep't of Justice*, 450 F. Supp. 1125, 1136 (E.D. Pa. 1978); *Lowenstein v. Rooney*, 401 F. Supp. 952, 960 (E.D.N.Y. 1975); *Saffron v. Wilson*, 70 F.R.D. 51, 56 (D.D.C. 1975).

³⁰ See *Bennett v. Campbell*, 564 F.2d 329, 332 (9th Cir. 1977).

³¹ Of course, plaintiff must also effect service of process on defendants. See 2 MOORE'S FEDERAL PRACTICE ¶ 4.02[3], at 4-44 (2d ed. 1978). If the officials reside in the forum state, plaintiff must comply with FED. R. CIV. P. 4(d) (1) or (7). Rule 4(d)(5), governing service on "an officer or agency of the United States," is inapplicable because it is limited to suits against officials in their official capacity (see *Griffith v. Nixon*, 518 F.2d 1195, 1196 (2d Cir.), cert. denied, 423 U.S. 995 (1975)), whereas *Bivens*-type defendants are sued in their personal capacity. See *Relf v. Gasch*, 511 F.2d 804, 808 n.18 (D.C. Cir. 1975); *Green v. Laird*, 357 F. Supp. 227, 229 (N.D. Ill. 1973). See also note 91 *infra*.

Service requirements for nonresident defendants vary with the basis of personal jurisdiction. See note 33 and accompanying text *infra*. Locating the defendant, necessary where personal service is required, may be unusually difficult in the *Bivens* context because federal employment frequently involves transfer. See J. HAWKINS, THE UNCLE SAM CONNEC-

side the forum state,³² either state law or a pertinent federal statute may overcome that hurdle.³³ But although state long-arm statutes generally will grant personal jurisdiction in *Bivens*-type cases, nonresident defendants sometimes elude their grasp.³⁴

Courts disagree about whether any federal statute fills this gap. The most likely candidate is 28 U.S.C. § 1391(e):³⁵

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or any agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. . . .

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure ex-

TION 111-14 (1976). Statistical data on geographic transfers of federal employees are not conveniently available. See Letter of Dr. Philip A.D. Schneider, Assistant Director of Workforce Information, United States Civil Service Commission (Oct. 6, 1978) (on file at the *Cornell Law Review*). Courts may be unsympathetic to plaintiffs' inability to locate defendants. See *Felder v. Daley*, 403 F. Supp. 1324, 1326-27 (S.D.N.Y. 1975) (dismissing *Bivens* claim against federal agent where plaintiff was unable to locate defendant even though U.S. Attorney could have located him).

³² District courts also recognize limits on their exercise of personal jurisdiction over in-state defendants (see R. FIELD, B. KAPLAN & K. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 768-69 (4th ed. 1978)), but no reported *Bivens*-type case considers this issue.

³³ FED. R. CIV. P. 4(e) provides:

Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

³⁴ See *Marsh v. Kitchen*, 480 F.2d 1270, 1272-74 (2d Cir. 1973); *Kenyatta v. Kelley*, 430 F. Supp. 1328, 1330-31 (E.D. Pa. 1977); *Kipperman v. McCone*, 422 F. Supp. 860, 870-75 (N.D. Cal. 1976); *Socialist Workers Party v. Attorney Gen. of the United States*, 375 F. Supp. 318, 320-25 (S.D.N.Y.), *modified*, 510 F.2d 253 (2d Cir. 1974); *Rimar v. McCowan*, 374 F. Supp. 1179, 1182-83 (E.D. Mich. 1974).

³⁵ 28 U.S.C. § 1391(e) (1976).

cept that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.³⁶

Several courts have held that this section does not affect personal jurisdiction, but merely provides venue "if, [and] only if, jurisdiction—personal and subject matter—otherwise exists."³⁷

Most courts, however, have concluded that section 1391(e) authorizes nationwide personal jurisdiction over federal officials sued on a constitutional tort theory.³⁸ But several have also imposed limitations on the statute's scope. Although one court held section 1391(e) applicable to any defendant who was a federal official at the time he allegedly committed unconstitutional acts,³⁹

³⁶ This provision indisputably liberalizes venue requirements for suits against the government or its subdivisions. See S. REP. NO. 1992, 87th Cong., 2d Sess. (1962), reprinted in [1962] U.S. CODE CONG. & AD. NEWS 2784; H.R. REP. NO. 536, 87th Cong., 1st Sess. (1961).

³⁷ *United States ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir.), cert. denied, 396 U.S. 918 (1969). Accord, *Kipperman v. McCone*, 422 F. Supp. 860, 870-71 (N.D. Cal. 1976); *Montilla v. Laird*, 336 F. Supp. 1063, 1065-66 (D.P.R. 1971).

³⁸ See *Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978), cert. granted sub nom. *Colby v. Driver*, 99 S. Ct. 1015 (1979); *Briggs v. Goodwin*, 569 F.2d 1, 9-10 (D.C. Cir. 1977), cert. granted sub nom. *Stafford v. Briggs*, 99 S. Ct. 1015 (1979); *Blum v. Morgan Guar. Trust Co.*, 539 F.2d 1388, 1391 (5th Cir. 1976); *Liberation News Serv. v. Eastland*, 426 F.2d 1379, 1382 (2d Cir. 1970) (dictum); *Rabiolo v. Weinstein*, 357 F.2d 167, 168 (7th Cir. 1966) (dictum), cert. denied, 391 U.S. 923 (1968); *Crowley v. United States*, 388 F. Supp. 981, 987 (E.D. Wis. 1975); *Tenants and Owners in Opp. to Redev. v. United States Dep't of HUD*, 406 F. Supp. 1024, 1030 (N.D. Cal. 1973); *Environmental Defense Fund, Inc. v. Froehlke*, 348 F. Supp. 338, 364 (W.D. Mo. 1972), aff'd on other grounds, 477 F.2d 1033 (8th Cir. 1973); *United States ex rel. Armstrong v. Wheeler*, 321 F. Supp. 471, 476-77 (E.D. Pa. 1970); *United States ex rel. Lohmeyer v. Laird*, 318 F. Supp. 94, 98-100 (D. Md. 1970); *Metz v. United States*, 304 F. Supp. 207, 209 (W.D. Pa. 1969).

Congress could provide for nationwide service of process (see *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 442 (1946) (dictum)), subject only to a reasonable notice requirement (see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The constitutionality of nationwide personal jurisdiction is less settled. Courts justify nationwide jurisdiction under § 1391(e) on various grounds. See *Driver v. Helms*, 577 F.2d at 154 (personal jurisdiction constrained only by constitutional limits on service of process); *Briggs v. Goodwin*, 569 F.2d at 8-10 (no constitutional limitation on congressional power to grant personal jurisdiction to district courts); *United States ex rel. Garcia v. McAninch*, 435 F. Supp. 240, 244 (E.D.N.Y. 1977) (federal employees have sufficient minimum contacts with United States to justify nationwide personal jurisdiction in federal court). Cf. *Mariash v. Morrill*, 496 F.2d 1138, 1142-43 (2d Cir. 1974) (applying minimum contacts test to uphold personal jurisdiction acquired by nationwide service pursuant to 15 U.S.C. § 78aa (1970)). See also R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 32, at 768-69.

³⁹ See *United States ex rel. Garcia v. McAninch*, 435 F. Supp. 240, 244 (E.D.N.Y. 1977); cf. *Lowenstein v. Rooney*, 401 F. Supp. 952, 962 (E.D.N.Y. 1975) (analyzing § 1391(e) as venue statute).

the First Circuit disagreed in *Driver v. Helms*.⁴⁰ That court held that the statute could not reach "those defendants who, at the time [the] action was brought, were not serving the government in the capacity in which they performed the acts on which their alleged liability is based."⁴¹ The First Circuit anchored its decision on a literal reading of the present tense verb in the statute,⁴² refusing to depart from the statute's "plain meaning" because it was not "absurd or plainly at variance with the policies of § 1391(e)."⁴³ The court deemed insignificant the chance that federal officials would resign their posts to escape section 1391(e).⁴⁴ But it failed to consider the frequency of terminations or transfers in federal employment for reasons unrelated to potential liability in lawsuits.⁴⁵ Unless a party files suit immediately upon violation of his rights, he faces an appreciable possibility, steadily increasing with time, that nonterritorial federal defendants will resign or transfer and fall outside section 1391(e) under the *Driver* interpretation.

Courts would best serve the policies behind section 1391(e), maximizing judicial economy and the relative convenience of the

⁴⁰ 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979).

⁴¹ 577 F.2d at 151. *Cf.* Lamont v. Haig, 590 F.2d 1124 (D.C. Cir. 1978) (analyzing § 1391(e) as venue statute); Kipperman v. McCone, 422 F. Supp. 860, 876-77 (N.D. Cal. 1976) (analyzing § 1391(e) as venue statute); Wu v. Keeney, 384 F. Supp. 1161, 1168 (D.D.C. 1974), *aff'd mem.*, 527 F.2d 854 (D.C. Cir. 1975) (analyzing § 1391(e) as service of process provision). This exclusion encompasses officials who are no longer employed by the United States or who no longer work within the same department or agency. The court reached no decision concerning officials who were promoted within the same department subsequent to committing the purportedly unconstitutional acts. 577 F.2d at 149-50, 151 n.11.

⁴² 577 F.2d at 149-50. In addition, the court argued that "there is a clear indication in the legislative history that Congress did not mean to reach at least those former officials who have moved away from Washington," and, in a footnote, quoted from the House Report:

"This bill is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia." . . . Prior to 1962 (when the bill was passed) former officials who had moved away from Washington would not have been subject to suit in Washington.

Id. at 150 & n.10. Absent even a hint in the legislative history that Congress considered the problem of former employees, this argument is mere sophistry.

⁴³ *Id.* at 150.

⁴⁴ *Id.*

⁴⁵ From October 1976 through September 1977, an estimated 650,707 federal employees, or approximately 23% of the federal civilian workforce, either left government service or transferred between agencies. *See* Letter, *supra* note 31. Since only 200-300 suits are pending against federal officials at any given time (*see* note 145 *infra*), it seems unlikely that a significant number of these employees were fleeing § 1391(e).

parties,⁴⁶ by applying the statute to former officials. Unless a single district court has personal jurisdiction under state law over all former federal employees, *Driver* would require a plaintiff to litigate the same claim several times. But multiple litigation inconveniences plaintiffs and burdens courts.⁴⁷ In contrast, the United States provides counsel and bears the cost of defending *Bivens*-type suits,⁴⁸ and it can conveniently defend suits anywhere in the country.⁴⁹ Justice Department representation reduces individual defendants' involvement to a minimum. In short, applying section 1391(e) to former officials seriously encumbers no one and avoids inconvenience for both plaintiffs and the judiciary.

In a second holding, the *Driver* court interpreted section 1391(e) expansively by applying it to officials sued in their personal capacities.⁵⁰ Although some courts had limited the statute to official capacity suits,⁵¹ *Driver's* result better comports with the statute's legislative history. Congress intended section 1391(e) to apply "in an action against a Government official seeking damages . . . for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty."⁵²

Section 1391(e) has also been subjected to a number of singular interpretations. Courts have held that this provision expanded personal jurisdiction only over officials who would have been sub-

⁴⁶ S. REP. NO. 1992, 87th Cong., 2d Sess. 3 (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 2784, 2786.

⁴⁷ Multiple litigation also opens the door to possible defensive use of collateral estoppel against the plaintiff. *See generally* *Blonder-Tongue Labs. v. University of Ill. Found.*, 402 U.S. 313 (1970).

⁴⁸ *See* note 171 *infra*. The regulations authorizing Justice Department representation of federal employees expressly apply to former officials. 28 C.F.R. § 50.15(a) (1978).

⁴⁹ *See* S. REP. NO. 1992, 87th Cong., 2d Sess. 3 (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 2784, 2786.

⁵⁰ 577 F.2d at 151-54. *Accord*, *Misko v. United States*, 77 F.R.D. 425, 428, *constitutional claim dismissed on grounds of intramilitary immunity*, 453 F. Supp. 513 (D.D.C. 1978); *United States ex rel. Garcia v. McAninch*, 435 F. Supp. 240, 244 (E.D.N.Y. 1977); *cf. Briggs v. Goodwin*, 569 F.2d 1, 7 (D.C. Cir. 1977) (analyzing § 1391(e) as venue statute), *cert. granted sub nom. Stafford v. Briggs*, 99 S. Ct. 1015 (1979).

⁵¹ *See* *Kenyatta v. Kelley*, 430 F. Supp. 1328, 1330 (E.D. Pa. 1977); *Writers Guild of America West, Inc. v. FCC*, 423 F. Supp. 1064, 1159 (C.D. Cal. 1976) (dictum); *cf. Paley v. Wolk*, 262 F. Supp. 640, 643 (N.D. Ill. 1965) (analyzing § 1391(e) as venue provision), *cert. denied*, 386 U.S. 963 (1967).

⁵² S. REP. NO. 1991, 87th Cong., 2d Sess. 3 (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 2784, 2786; H.R. REP. NO. 536, 87th Cong., 1st Sess. 3 (1961).

The text of section 1391(e) also supports *Driver*; it applies to officials who allegedly acted "under color of legal authority." This phrase ordinarily signifies constitutional tort actions. 577 F.2d at 151-54. *See also* note 19 *supra*.

ject to suit in the District of Columbia⁵³ or who were nominal defendants in suits essentially against the United States.⁵⁴ One court restricted section 1391(e) to mandamus actions;⁵⁵ another to executive-branch employees.⁵⁶

The difficulty of establishing personal jurisdiction over out-of-state federal officials may rob deserving plaintiffs of a judicial remedy. State statutes may not reach far enough. Most courts agree that section 1391(e) expands the amenability of federal officers to suit, but they limit the scope of the statute in diverse ways.⁵⁷ If neither state law nor section 1391(e) provides a single district with in personam jurisdiction over all defendants, plaintiff must eliminate some of his adversaries or file several suits. Either option debilitates *Bivens* by deterring the litigation of meritorious claims or decreasing the compensatory effectiveness of recoveries.⁵⁸

3. Statute of Limitations

The Supreme Court has never indicated what statute of limitations controls *Bivens*-type cases. Only six lower federal courts have faced the issue; all applied a limitations period governing

⁵³ See *Rimar v. McCowan*, 374 F. Supp. 1179, 1181-82 (E.D. Mich. 1974).

⁵⁴ See *Macias v. Finch*, 324 F. Supp. 1252, 1255 (N.D. Cal. 1970).

⁵⁵ See *Davis v. FDIC*, 369 F. Supp. 277, 279 (D. Colo. 1974).

⁵⁶ See *Liberation News Serv. v. Eastland*, 426 F.2d 1379, 1382-84 (2d Cir. 1970).

⁵⁷ The Supreme Court recently granted certiorari in two cases posing § 1391(e) issues and may bring uniformity to the interpretation of the statute. See *Colby v. Driver*, 99 S. Ct. 1015 (1979), *granting cert. to Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978); *Stafford v. Briggs*, 99 S. Ct. 1015 (1979), *granting cert. to Briggs v. Goodwin*, 569 F.2d 1 (D.C. Cir. 1977).

⁵⁸ If plaintiff decides to sue only those officials amenable to suit in a single jurisdiction, he risks his claim on that suit. But he buys a pig in a poke; prior to trial he has no formal technique to aid him in selecting the defendants most likely liable. If plaintiff loses, the statute of limitations may prevent him from pursuing other defendants. Moreover, if he continues to seek compensation, that loss routes him into multiple litigation.

If plaintiff gambles on multiple litigation, however, defendants in each suit might whipsaw him by blaming their absent fellows for the loss of plaintiff's rights. Plaintiff also risks defensive use of collateral estoppel. See note 47 *supra*. Moreover, because attorneys' fees are rarely awarded (see note 135 *infra*), the added expense of duplicative litigation decreases the net recovery available.

Consolidating pretrial proceedings under the multidistrict litigation statute (28 U.S.C. § 1407 (1976)) might mitigate these added costs. But plaintiffs rarely succeed in obtaining substantial settlements; only a full trial offers any real chance for full compensation. See notes 150-170 and accompanying text *infra*. Pretrial consolidation, therefore, remains far from balsamic.

analogous causes of action in the forum state.⁵⁹ In three of the six cases, however, courts sitting in New York disagreed over what state action most resembled a constitutional tort claim.

In *Ervin v. Lanier*,⁶⁰ a district court found that two state limitations periods potentially applied to a *Bivens*-type complaint charging an unconstitutional arrest: the one-year period for intentional torts⁶¹ or the three-year period for liabilities created by statute.⁶² The court had concluded that the three-year provision governed plaintiff's Civil Rights Act claims against nonfederal defendants.⁶³ It applied the same limitations period to the *Bivens*-type claim against federal officials⁶⁴ to preserve similar treatment for common-law and statutory constitutional tort actions.⁶⁵

⁵⁹ See *Beard v. Robinson*, 563 F.2d 331, 334 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978); *Regan v. Sullivan*, 557 F.2d 300, 303 (2d Cir. 1977); *Cole v. Kelley*, 438 F. Supp. 129, 137 (C.D. Cal. 1977); *Shifrin v. Wilson*, 412 F. Supp. 1282, 1301 (D.D.C. 1976); *Felder v. Daley*, 403 F. Supp. 1324, 1325 (S.D.N.Y. 1975); *Ervin v. Lanier*, 404 F. Supp. 15, 20 (E.D.N.Y. 1975).

Similarly, outside the *Bivens* context courts commonly turn to state law if a federal cause of action lacks a corresponding statute of limitations. See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (42 U.S.C. § 1981); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966) (Labor Management Relations Act); *Cope v. Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act); *Campbell v. City of Haverhill*, 155 U.S. 610, 613-21 (1895) (Patent Act); *Swan v. Board of Higher Educ.*, 319 F.2d 56, 59 (2d Cir. 1963) (42 U.S.C. § 1983). But see cases cited in *Lehmann*, supra note 5, at 545-47.

A federal common-law limitations period may be fashioned if the need for national uniformity or the nature of the protected federal right demands it. See, e.g., *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958). *Bivens*-type cases apparently do not satisfy these criteria. See *Regan v. Sullivan*, 557 F.2d at 303, 307. Certainly no court has fashioned such a federal period for a *Bivens*-type claim.

⁶⁰ 404 F. Supp. 15 (E.D.N.Y. 1975).

⁶¹ N.Y. Civ. PRAC. LAW § 215(3) (McKinney 1972).

⁶² *Id.* § 214(2).

⁶³ 404 F. Supp. at 19-20. The court applied the three-year provision to plaintiff's claims under 42 U.S.C. §§ 1983, 1985 (1970). Plaintiff's § 1986 claim was barred by its internal limitations period.

⁶⁴ 404 F. Supp. at 20. The court noted that, despite the similarity to § 1983 actions, a *Bivens*-type cause of action does not give rise to liability under a statute and applying the three-year period to *Bivens*-type suits strained the language of the limitations statute. Even the three-year period, however, barred the *Bivens*-type claim. *Id.*

⁶⁵ 42 U.S.C. § 1983 (1976), under which plaintiff brought one Civil Rights Act claim, creates a cause of action for violations of constitutional rights by state and local officials. Courts view § 1983 as a statutory counterpart of *Bivens* and look to § 1983 caselaw when deciding unresolved issues in federal constitutional tort cases. See, e.g., *Butz v. Economou*, 98 S. Ct. 2894, 2907-10 (1978); *Green v. Carlson*, 581 F.2d 669, 673 (7th Cir. 1978); *Rodriguez v. Ritchey*, 539 F.2d 394, 399 (5th Cir. 1976), modified en banc, 556 F.2d 1185 (1977), cert. denied, 434 U.S. 1047 (1978); *Paton v. LaPrade*, 524 F.2d 862, 871 (3d Cir. 1975); *Mark v. Groff*, 521 F.2d 1376, 1380 (9th Cir. 1975); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1346 (2d Cir. 1972).

*Felder v. Daley*⁶⁶ was decided four days later. Occupants of an apartment filed a *Bivens* action against federal and local law enforcement officers for damages resulting from an entry and search allegedly violative of the fourth amendment.⁶⁷ The court held that the claim against the federal officer sounded in intentional tort and applied the one-year statute of limitations rejected in *Ervin*.⁶⁸

In *Regan v. Sullivan*,⁶⁹ plaintiff alleged federal officials had unconstitutionally arrested and detained him.⁷⁰ The district court rejected *Felder's* intentional tort limitations period on the ground that constitutional torts were not really analogous to common-law intentional torts.⁷¹ The *Regan* court also rejected *Ervin*, arguing that the three-year period applied only to genuinely statutory claims.⁷² The court found instead that plaintiff's claim resembled suits against sheriffs, and applied another subsection of the one-year statute.⁷³

On appeal, the Second Circuit agreed that the intentional tort limitations period was not germane,⁷⁴ but rejected the one-year statute because the policy justifying such a short period, protection of indemnifying municipalities, did not extend to federal officials.⁷⁵ Nor did the court relish the prospect of a case-by-case determination of the analogy between particular federal defendants and various types of state officials; suits against different classes of officials implicated different New York statutes.⁷⁶ The court concluded that *Bivens*-type actions were controlled by either *Ervin's* three-year period or the six-year catch-all provision,⁷⁷ neither of which had run.⁷⁸

⁶⁶ 403 F. Supp. 1324 (S.D.N.Y. 1975).

⁶⁷ *Id.* at 1326.

⁶⁸ *Id.* The one-year statute barred the claim as to the adult plaintiffs. The statute was tolled as to the infant plaintiffs, but the court dismissed their complaint against the federal agent for failure to prosecute. *Id.* at 1326-27.

⁶⁹ 417 F. Supp. 399 (E.D.N.Y. 1976), *modified*, 557 F.2d 300 (2d Cir. 1977).

⁷⁰ 417 F. Supp. at 401.

⁷¹ *Id.* at 403.

⁷² *Id.* at 402-03. *Ervin*, like *Regan*, was decided in the Eastern District of New York. The *Regan* court justified its departure from precedent by characterizing the *Ervin* rule as dictum. *Id.* at 403.

⁷³ 417 F. Supp. at 403-04. N.Y. CIV. PRAC. LAW § 215(1) (McKinney 1972) barred the claim.

⁷⁴ 557 F.2d at 304.

⁷⁵ *Id.* at 307.

⁷⁶ *Id.*

⁷⁷ N.Y. CIV. PRAC. LAW § 213(1) (McKinney 1972).

⁷⁸ 557 F.2d at 307.

Although superficially a question of law, selecting the most accurate state analogy for limitations purposes turns on a question of fact. For example, if state statutes distinguish among defendants according to their official duties, a court must inquire into the federal official's functions. If the defendant's intent affects the state limitations period, a court must investigate his state of mind. Ad hoc decisions may result, and plaintiffs cannot anticipate which statute a court will apply.⁷⁹ Unless a court has ruled that as a matter of law only one state statute applies to *Bivens*-type actions,⁸⁰ each suit faces the time bar without certainty.

4. Amount in Controversy

Section 1331(a) provides subject-matter jurisdiction for *Bivens*-type cases.⁸¹ Prior to 1976, its \$10,000 amount in controversy requirement⁸² hindered many deserving plaintiffs.⁸³

⁷⁹ See Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97, 99.

⁸⁰ See *Beard v. Robinson*, 563 F.2d 331, 335-38 (7th Cir. 1977) (applying Illinois catch-all limitations statute to *Bivens*-type action because all specific statutes inapplicable and catch-all provisions govern Civil Rights Act suits), *cert. denied*, 438 U.S. 907 (1978). *Regan* probably represents a similar approach, although there the court found it unnecessary to choose between two limitations statutes. See notes 74-78 and accompanying text *supra*.

Bivens' compensatory purpose should inform a court's selection of an applicable state statute or its computation of a federal common-law period. *Cf.* *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977) (borrowed state limitations period must comport with policies underlying federal statutory cause of action). Because constitutional misconduct often impairs intangible rights without causing any physical harm (see note 84 and accompanying text *infra*), a plaintiff may recognize his injury only tardily. Difficulties in identifying and locating proper defendants (see notes 22-29 and accompanying text *supra*; note 31 *supra*) may further impede the filing of a suit. Moreover, many *Bivens*-type cases arise out of officials' conduct during criminal investigations. If plaintiffs have to file suit quickly, their right to obtain information through discovery may well conflict with the government's need to maintain secrecy until criminal proceedings terminate. See *Regan v. Sullivan*, 557 F.2d 300, 303 (2d Cir. 1977). Therefore, courts should hesitate to apply a limitations period so short as to regularly bar compensable *Bivens*-type claims.

⁸¹ See note 14 *supra*.

⁸² 28 U.S.C. § 1331(a) (1970) (amended in 1976).

⁸³ State courts may also adjudicate *Bivens*-type actions. *Sixth Camden Corp. v. Township of Evesham*, 420 F. Supp. 709, 728 (D.N.J. 1976) (dictum). *But cf.* *Gabalton v. United Farm Workers Organizing Comm.*, 35 Cal. App. 3d 757, 762 n.4, 111 Cal. Rptr. 203, 206 n.4 (1973) (dictum) (*Bivens* "probably cannot be invoked here because . . . the remedy is a federal court remedy"), *cert. denied*, 416 U.S. 957 (1974). Whether state courts provide a viable alternative to a federal forum is unknown. A review of the reported decisions of California, Georgia, Illinois, Massachusetts, New York, and Texas yielded no constitutional tort suits against federal officials. Federal courts are more appropriate for *Bivens*-type suits (see notes 95-98 and accompanying text *infra*). They may also offer plaintiffs procedural

Deprivations of constitutional rights often cause minimal tangible harm. Frequently plaintiffs could meet the jurisdictional amount only by appraising the worth of the violated right itself.⁸⁴ Courts developed no less than seven standards for evaluating the amount in controversy in cases alleging constitutional injury.⁸⁵ For example, some decided that plaintiffs could not value constitutional rights in monetary terms and therefore could not satisfy the \$10,000 requirement.⁸⁶ Other courts applied the legal certainty test.⁸⁷ Still others held that alleging the loss of constitutional rights was sufficient in itself to meet the jurisdictional amount.⁸⁸

In 1976, Congress amended section 1331(a) to dispense with the amount in controversy requirement "in any such action brought against the United States, any agency thereof, or any officer or employee thereof *in his official capacity*."⁸⁹ But it omitted an "under color of legal authority" clause, the phrase commonly used to denote personal damage actions.⁹⁰ Because *Bivens*-type cases are directed against officials in their personal capacities,⁹¹

advantages, for example, the availability of both state long-arm statutes and, in most jurisdictions, § 1391(e) to acquire personal jurisdiction over defendants (*see* notes 31-38 and accompanying text *supra*).

⁸⁴ *See* Lehmann, *supra* note 5, at 551-57; Note, *supra* note 5, 8 VAL. U.L. REV. at 363.

⁸⁵ For a complete discussion of the pre-1976 judicial approaches to the § 1331(a) jurisdictional amount in suits to vindicate constitutional rights, *see* Lehmann, *supra* note 5, at 551-57. *See also* Comment, *The Jurisdictional Amount in Controversy in Suits to Enforce Federal Rights*, 54 TEX. L. REV. 545, 559-69 (1976).

⁸⁶ *See, e.g.,* Kheel v. Port of New York Auth., 457 F.2d 46, 49 (2d Cir.) (action for declaratory judgment), *cert. denied*, 409 U.S. 983 (1972); Goldsmith v. Sutherland, 426 F.2d 1395, 1397 (6th Cir.) (action for injunction), *cert. denied*, 400 U.S. 960 (1970).

⁸⁷ *See, e.g.,* Shifrin v. Wilson, 412 F. Supp. 1282, 1287 n.1 (D.D.C. 1976); Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974).

The Supreme Court enunciated the legal certainty rule in *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938):

The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

Id. at 288-89. (footnotes omitted).

⁸⁸ *See, e.g.,* Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931-32 (10th Cir. 1975).

⁸⁹ 28 U.S.C. § 1331(a) (1976) (emphasis added). The Supreme Court has noted that "[t]he obvious effect of this modification . . . is to confer jurisdiction on federal courts to review agency action . . ." *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

⁹⁰ *See* note 52 *supra*.

⁹¹ Depending on the remedy plaintiff contemplates, he may sue a federal official in either his official or his individual capacity. If plaintiff seeks to hold an official liable for acts committed under color of legal authority and to recover damages from the official's personal fortune, he sues the defendant in his personal capacity. However, "if the decree

the amendment probably does not exempt them from the jurisdictional amount requirement.⁹²

Unfortunately, the amount in controversy requirement, designed to keep "petty controversies" out of federal court,⁹³ inaccurately screens *Bivens*-type suits. Because constitutional tort cases center on nonpecuniary rights, the amount in controversy should be irrelevant to judging the propriety of federal court jurisdiction.⁹⁴ Several factors suggest that federal courts should freely

would operate against" the sovereign, . . . or if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration", . . . or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act," he seeks relief from the defendant in his official capacity. *Gnota v. United States*, 415 F.2d 1271, 1277 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970). *See also* H.R. REP. No. 1936, 86th Cong., 2d Sess. 6 (1960) (letter of Deputy Attorney General Lawrence Walsh); 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3655, at 175-80 (1976). The "relief aspect" of sovereign immunity creates this distinction; courts may not award damages in an action against an official in his official capacity absent waiver of the government's immunity. *Huntington Towers, Ltd. v. Franklin Nat'l Bank*, 559 F.2d 863, 869-70 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978); *McNutt v. Hills*, 426 F. Supp. 990, 999-1000 (D.D.C. 1977).

An exception to the doctrine of sovereign immunity allows plaintiff to sue an official in his official capacity for allegedly unconstitutional acts. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949). One court has applied this exception in a *Bivens*-type action for money damages (*J.D. Pflaumer, Inc. v. United States Dep't of Justice*, 450 F. Supp. 1125, 1132 (E.D. Pa. 1978)), but the Supreme Court takes the better view, limiting it to actions for specific relief. *See Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. at 701-02; *McNutt v. Hills*, 426 F. Supp. at 1001; D SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT §§ 16.105 (1970).

The court's treatment of Clarence Kelley in *Burkhart v. Saxbe*, 397 F. Supp. 499 (E.D. Pa. 1975) (opinion on motion to dismiss), 448 F. Supp. 588 (E.D. Pa. 1978) (opinion on cross motions for summary judgment), illustrates the distinction between personal and official capacity. Plaintiff, alleging she was the subject of illegal and unconstitutional electronic surveillance, sued several defendants; Kelley, in both his personal capacity and his official capacity as director of the F.B.I., was among them. 397 F. Supp. at 501. The purported misconduct occurred more than two years before Kelley took office. Since Kelley did not participate in the operation of the wiretaps, the court could not hold him liable for money damages in his personal capacity. 448 F. Supp. at 607. In his official capacity, however, Kelley was a proper defendant. Injunctive relief was available; Kelley could exercise the powers of his office to provide that relief. 397 F. Supp. at 602.

⁹² *But cf.* *Fayerweather v. Bell*, 447 F. Supp. 913, 915 (M.D. Pa. 1978) (applying 1976 amendment without specifying the capacity in which officials were sued).

⁹³ *See* S. REP. No. 1830, 85th Cong., 2d Sess. 4 (1958), *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3101.

⁹⁴ *See* Lehmann, *supra* note 5, at 555-57; Comment, *supra* note 5, 12 SANTA CLARA LAW. at 555-57; Comment, *supra* note 85, at 545-46. *See generally* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1311(a) & commentary, at 172-76 (Official Draft 1969); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 122-26 (3d ed. 1976).

admit *Bivens*-type cases.⁹⁵ They are more practiced at constitutional adjudication than state courts.⁹⁶ Federal law governs most issues in *Bivens*-type cases⁹⁷ and state remedies may inadequately redress federal constitutional torts.⁹⁸

The jurisdictional amount requirement does not plague section 1983 suits,⁹⁹ the state-official counterparts of *Bivens*-type claims.¹⁰⁰ Indeed, it rarely applies to any federal question case.¹⁰¹ Nevertheless, the requirement keeps *Bivens*-type actions out of federal court.¹⁰² The anomaly is evident.

5. Individual Immunity

Various immunity doctrines protect federal officials from liability in *Bivens*-type suits. A judge enjoys absolute immunity from actions for money damages unless he acted nonjudicially and "in the clear absence of all jurisdiction."¹⁰³ The doctrine has im-

⁹⁵ See generally Weschler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 225-26 (1948).

⁹⁶ The federal judiciary has implicitly acknowledged the propriety of adjudicating *Bivens*-type claims without reference to jurisdictional amount requirements. Most judicial standards for testing the claimed amount in controversy effectively repealed the \$10,000 requirement. See Lehmann, *supra* note 5, at 554-55.

⁹⁷ See notes 182-183 and accompanying text *infra*.

⁹⁸ The *Bivens* majority, for example, considered state law both insufficient to fully vindicate fourth amendment rights and potentially inconsistent with fourth amendment policies. 403 U.S. at 390-95.

⁹⁹ See 28 U.S.C. § 1343(3) (1976).

¹⁰⁰ See note 65 *supra*.

¹⁰¹ Nearly all federal question cases fall within special jurisdictional statutes that require no minimum amount. See C. WRIGHT, note 94 *supra*, at 122-26. Suits against federal officials to enforce federal rights comprise the only major class of cases that clearly remain subject to the jurisdictional amount requirement. See *id.* at 125-26.

¹⁰² See Table B *infra*.

¹⁰³ *Stump v. Sparkman*, 435 U.S. 349, 355-57, 360 (1978). Although *Stump* involved a state judge, the Court probably envisioned an identical standard for federal judges. The majority held that "the governing principle of law" had been established a century earlier in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), an action against a federal judge. *Bradley's* jurisdictional test, to which the *Stump* Court added the judicial act requirement, has been applied indiscriminately to both state and federal judges. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 553-54 & n.9 (1967) (dictum) (*Bradley's* absolute immunity available to state judges in § 1983 actions). The policies underlying judicial immunity, preservation of the integrity and independence of judicial decisionmaking (see 435 U.S. at 355 (quoting *Bradley*)), clearly cut across political divisions. Cf. *Butz v. Economou*, 438 U.S. 478, 500 (1978) ("there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement . . . than is accorded state officials when sued for the identical violation").

Protected judicial acts are identified by considering "the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and . . . the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." 435 U.S. at 362.

munized a judge who ordered a demonstrator expelled from a courthouse corridor¹⁰⁴ and judges who allegedly violated plaintiff's constitutional rights during a securities fraud conviction and a bankruptcy proceeding.¹⁰⁵

Similarly, prosecutorial immunity frustrates many *Bivens*-type actions.¹⁰⁶ Courts historically have granted absolute immunity to prosecutors sued for acts performed within the scope of their duties.¹⁰⁷ Some have refined this doctrine and allowed absolute immunity only where a prosecutor acted as an advocate, rather than an investigator or administrator.¹⁰⁸ But even when courts deny absolute immunity, they generally permit prosecutors to raise an official immunity argument.¹⁰⁹

In the *Bivens* context, official immunity is the most significant immunity doctrine because every defendant may claim its protection. The doctrine has undergone considerable evolution.¹¹⁰ Initially, in *Barr v. Matteo*,¹¹¹ the Court accorded officials absolute immunity from liability predicated on "discretionary acts at those levels of government where the concept of duty encompasses the

¹⁰⁴ *Lowery v. Hauk*, 422 F. Supp. 490, 491-93 (C.D. Cal. 1976).

¹⁰⁵ *Smallwood v. United States*, 358 F. Supp. 398, 402-04 (E.D. Mo.), *aff'd mem.*, 486 F.2d 1407 (8th Cir. 1973).

¹⁰⁶ *See, e.g., United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972) (prosecutor allegedly falsified evidence and solicited perjury); *Human Eng. Inst. v. Abbott*, 77-2 U.S. Tax Cas. ¶ 9,671, at 88255-56 (N.D. Ohio 1977) (I.R.S. attorneys instituted tax evasion prosecution); *Lofland v. Myers*, 442 F. Supp. 955 (S.D.N.Y. 1977) (prosecutor allegedly suborned perjury, withheld evidence, introduced false evidence, acquiesced in illegal search and seizure); *Carlsberg v. Gatzek*, 442 F. Supp. 813 (C.D. Cal. 1977) (S.E.C. attorneys allegedly sought injunction without notice, filed affidavit containing false statements, publicly made false statements, advised plaintiff's debtors to stop making payments); *Blassingame v. United States Atty. Gen.*, 387 F. Supp. 418 (S.D.N.Y. 1975) (prosecutor allegedly breached agreement to exchange payment and parole for false testimony).

¹⁰⁷ *See Butz v. Economou*, 438 U.S. 478, 509-10 (1978) (dictum); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

¹⁰⁸ *See Daniels v. Kieser*, 586 F.2d 64, 68-69 (7th Cir. 1978); *Apton v. Wilson*, 506 F.2d 83, 91-94 (D.C. Cir. 1974). Immunity may exist even where the rationale for the doctrine does not. In *Daniels*, the trial court refused absolute immunity to a prosecutor sued by a prosecution witness, reasoning that fear of liability, although it might affect the prosecutor's decision to indict, would not have restrained his choice of witnesses. *Daniels v. Kieser*, 446 F. Supp. 1160 (N.D. Ill. 1978). Ignoring this policy-oriented approach, the Seventh Circuit reversed. *Daniels v. Kieser*, 586 F.2d 64, 68-69 (7th Cir. 1978).

¹⁰⁹ *See, e.g., Briggs v. Goodwin*, 569 F.2d 10, 16 (D.C. Cir. 1977), *cert. granted sub nom. Stafford v. Briggs*, 99 S. Ct. 1015 (1979); *Helstoski v. Goldstein*, 552 F.2d 564, 566 (3d Cir. 1977); *Daniels v. Kieser*, 446 F. Supp. 1160, 1163 n.3 (N.D. Ill.), *rev'd on other grounds*, 586 F.2d 64 (7th Cir. 1978); *Williams v. Wright*, 432 F. Supp. 732, 741 (D. Ore. 1976).

¹¹⁰ For a discussion of the development of the immunity doctrines, see *Freed, supra* note 5.

¹¹¹ 360 U.S. 564 (1959).

sound exercise of discretionary authority.”¹¹² In *Scheuer v. Rhodes*,¹¹³ the Court reduced the protection afforded state officials in section 1983 suits:

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.¹¹⁴

After *Scheuer*, lower courts quarrelled over the appropriate immunity standard for federal officials charged with violating the Constitution.¹¹⁵ The Supreme Court resolved this conflict in *Butz v. Economou*:¹¹⁶

[I]n a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only

¹¹² *Id.* at 575 (footnote omitted).

¹¹³ 416 U.S. 232 (1974).

¹¹⁴ *Id.* at 247-48.

The Court subsequently rearticulated this standard:

[A state official] is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights

Wood v. Strickland, 420 U.S. 308, 322 (1975). *See also* *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978); *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975).

¹¹⁵ A handful of courts retained absolute official immunity. *See, e.g.*, *Jackson v. Plate*, 76-1 U.S. Tax Cas. ¶ 9395, at 84,206 (E.D. Mich. 1975); *Green v. Cauthen*, 379 F. Supp. 361, 374-77 (D.S.C. 1974). *But see* *Butz v. Economou*, 438 U.S. 478, 495 (1978) (“*Barr* did not purport to protect an official who . . . also violated those fundamental principles of fairness embodied in the Constitution.”).

Others held that federal officials enjoyed only qualified immunity unless their responsibilities were so discretionary that they warranted absolute protection from liability. *See, e.g.*, *G.M. Leasing Corp. v. United States*, 560 F.2d 1011, 1013-15 (10th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *State Marine Lines, Inc. v. Shultz*, 498 F.2d 1146, 1158-59 (4th Cir. 1974); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1347 (2d Cir. 1972).

Many other courts offered federal officials only qualified immunity. *See* *Ervin v. Ciccone*, 557 F.2d 1260, 1262 (8th Cir. 1977) (*per curiam*); *Weir v. Muller*, 527 F.2d 862, 872 (5th Cir. 1976); *Paton v. LaPrade*, 524 F.2d 862, 872 (3d Cir. 1975); *Mark v. Groff*, 521 F.2d 1376, 1379-80 (9th Cir. 1975); *Apton v. Wilson*, 506 F.2d 83, 90-94 (D.C. Cir. 1974); *Tritsis v. Backer*, 501 F.2d 1021, 1023 (7th Cir. 1974).

¹¹⁶ 438 U.S. 478 (1978).

to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.¹¹⁷

The *Butz* Court acknowledged the tension between the immunity doctrines and *Bivens*: plaintiffs deserve compensation for violations of their constitutional rights by federal officials, but the public interest demands shielding governmental decisionmakers from civil liability.¹¹⁸ Qualified immunity attempts to accommodate these competing interests. Most courts condition immunity upon defendant's affirmative showing that he acted with a reasonable, good-faith belief in the lawfulness of his conduct.¹¹⁹

¹¹⁷ *Id.* at 507 (footnote omitted). In dicta, the Court endorsed absolute judicial immunity and prosecutorial immunity for advocacy activities. *Id.* at 508-12. Because *Butz* presented only common-law immunity issues, the decision does not affect constitutional protection of legislators. See U.S. CONST. art. I, § 6. Legislative immunity has thwarted plaintiffs in at least two *Bivens*-type cases. See *Doe v. McMillan*, 566 F.2d 713 (D.C. Cir. 1977) (per curiam), cert. denied, 435 U.S. 969 (1978); *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc) (per curiam).

¹¹⁸ 438 U.S. at 506. Official immunity is usually justified on three grounds. It avoids the unfair punishment of an official for performing a duty delegated to him, and perhaps required of him, by law. It diminishes any deterrent effect the threat of liability might have on the entry into and vigorous performance of public service. Finally, defending lawsuits requires expending time and energy; immunity minimizes this distraction from attending to public affairs. See *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974); *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950); *Freed*, *supra* note 5, at 529-30.

The latter two justifications relate directly to the public interest. The unfairness rationale seems to focus on the official's interest. But under general tort principles, liability for damages rests on a failure to perform legally imposed duties properly. See *W. PROSSER*, *supra* note 22, at 324-26. To argue that liability in *Bivens*-type cases is unfair to defendants is to argue by analogy against the settled law of torts. The unfairness rationale is more easily defended as a component of the deterrence justification; the unfairness may contribute to the chilling effect on accepting and fearlessly performing public duties.

¹¹⁹ See, e.g., *Butz v. Economou*, 438 U.S. 478, 498 (1978) (dictum); *Dellums v. Powell*, 566 F.2d 167, 176 (D.C. Cir. 1977), cert. denied, 98 S. Ct. 3146 (1978); *Skehan v. Board of Trustees*, 538 F.2d 53, 61-62 (3d Cir. 1976), cert. denied, 429 U.S. 979 (1976); *McCray v. Burrell*, 516 F.2d 357, 370 (4th Cir. 1975), cert. dismissed, 426 U.S. 471 (1976); *Smith v. Losee*, 485 F.2d 334, 342 (10th Cir. 1973), cert. denied, 417 U.S. 908 (1974); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1347-48 (2d Cir. 1972).

The First and Seventh Circuits apparently place the burden of proof on plaintiffs. See *Hanneman v. Breier*, 528 F.2d 750, 756 (7th Cir. 1976) ("damages are appropriate only if plaintiffs prove defendant's bad faith"); *Palmigiano v. Mullen*, 491 F.2d 978, 980 (1st Cir. 1974) ("plaintiff must also show that he is prepared to prove the defendants' bad faith or at least such a degree of neglect or malice . . . as to deprive defendants of official immunity.").

The Fifth and Eighth Circuits vacillate. Compare *Landrum v. Moats*, 576 F.2d 1320, 1329 (8th Cir. 1978) ("like other affirmative defenses . . . , the burden is on the defen-

Because such qualified immunity issues involve questions of fact, courts should almost never summarily dispose of constitutional tort suits.¹²⁰ Every plaintiff should have an opportunity to establish a compensable claim.

Nevertheless, in practice *Bivens*-type actions rage hopelessly against qualified immunity. Most jurisdictions have emasculated *Scheuer*'s discretion component, once a limit on immunity, and have made the reasonableness and good faith of defendant's belief in the propriety of his conduct the controlling issue.¹²¹ On

dant"), *cert. denied*, 99 S. Ct. 282 (1978); and *Donaldson v. O'Connor*, 493 F.2d 507, 527 (5th Cir. 1974) (approving jury instruction that plaintiff need only show state action depriving him of his rights in § 1983 action), *vacated on other grounds*, 422 U.S. 563 (1975), with *Goodman v. Parwatikar*, 570 F.2d 801, 805 (8th Cir. 1978) ("to recover damages [plaintiff] must also establish the requisite knowledge or malice of the defendants") and *Hander v. San Jacinto Junior College*, 519 F.2d 273, 277 n.1 (5th Cir. 1975) (dictum) (defendant "is not personally liable for damages under § 1983 unless the plaintiff can establish a 'malicious intention to cause a deprivation of constitutional rights'").

¹²⁰ See *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). The *Imbler* court observed: "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." *Id.*

¹²¹ At common law, governmental employees were immune from suit for discretionary, but not for ministerial acts. See W. PROSSER, *supra* note 22, at 988-91. Courts treated acts as discretionary for *Barr* purposes (see text accompanying note 112 *supra*) if they resulted from "a judgment or decision which it is necessary that the . . . official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability . . ." *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963). The circularity of this definition made discretion the sole operative criterion for determining absolute official immunity. Discretion was the litmus for courts choosing between absolute and qualified immunity during the *Scheuer-Butz* interregnum. See note 115 *supra*.

Scheuer explicitly conditioned qualified immunity upon the scope of the defendant's discretion. See text accompanying note 114 *supra*. The Fifth Circuit considers the defendant's range of discretion in setting the standard for judging the reasonableness of his belief that he had not violated plaintiff's rights. See *Slavin v. Curry*, 574 F.2d 1256, 1266 (5th Cir. 1978); *Bryan v. Jones*, 530 F.2d 1210, 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 865 (1976).

Other circuits may infrequently allude to the discretion component of the *Scheuer* standard (see, e.g., *Paton v. La Prade*, 524 F.2d 862, 872 (3d Cir. 1976) (dictum)), but they usually analyze only the good-faith and reasonableness of defendant's belief. See *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 711 (3d Cir. 1978) (dictum), *cert. denied*, 99 S.Ct. 454 (1978); *Briggs v. Goodwin*, 569 F.2d 10, 16 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); *G.M. Leasing Corp. v. United States*, 560 F.2d 1011, 1015 (10th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *Askew v. Bloemker*, 548 F.2d 673, 678-79 (7th Cir. 1976); *White v. Boyle*, 538 F.2d 1077, 1080 (4th Cir. 1976); *Jones v. United States*, 536 F.2d 269, 271 (8th Cir.), *cert. denied*, 429 U.S. 1039 (1977); *Economou v. United States Dep't of Agriculture*, 535 F.2d 688, 696 (2d Cir. 1976), *vacated sub nom. Butz v. Economou*, 438 U.S. 478 (1978); *Glasson v. City of Louisville*, 518 F.2d 899, 908-09 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

motions for summary judgment, plaintiff is rarely in a good position to counter defendant's affidavit that he acted reasonably and in good faith. Courts regularly decide or assume that defendants violated plaintiff's rights, but grant summary judgment for the officials or dismiss the complaint on qualified immunity grounds.¹²² This result guts *Bivens*.

6. Damages

Courts disagree about what damages *Bivens*-type plaintiffs may recover. Some circuits allow both punitive and compensatory damages,¹²³ but one has prohibited the former.¹²⁴ The Supreme Court recently settled this question for actions under section 1983, *Bivens*' statutory counterpart for state employees.¹²⁵

In *Carey v. Phipus*,¹²⁶ plaintiff sued public school officials for actual and punitive damages resulting from an alleged violation of their procedural due process rights.¹²⁷ A unanimous¹²⁸ Court held that, absent proof of actual injury, only nominal damages of one dollar or less are appropriate where important procedural

Although the Ninth Circuit expressly contends that the degree of discretion exercised by the defendant is irrelevant under *Scheuer* (*Omnibus Fin. Corp. v. United States*, 566 F.2d 1097, 1101 (9th Cir. 1977)), most courts have merely redefined "discretion" as "within [an official's] sphere of . . . responsibility." *Wood v. Strickland*, 420 U.S. at 322. See also *Cordeco Dev. Corp. v. Vasquez*, 539 F.2d 256, 260 (1st Cir. 1976), cert. denied, 429 U.S. 978 (1976); *Jones v. United States*, 536 F.2d at 271. The concept of discretion still has content. But since a defendant must act under color of legal authority to be liable on a *Bivens*-type theory, this redefinition robs the discretion requirement of any limiting effect on the enjoyment of immunity in the constitutional tort context.

¹²² See, e.g., *G.M. Leasing Corp. v. United States*, 560 F.2d 1011, 1015 (10th Cir. 1977), cert. denied, 435 U.S. 923 (1978); *White v. Boyle*, 538 F.2d 1077, 1080 (4th Cir. 1976) (dictum); *Jones v. United States*, 536 F.2d 269, 271-72 (8th Cir. 1976), cert. denied, 429 U.S. 1039 (1977); *Midwest Growers Coop. Corp. v. Kirkemo*, 533 F.2d 455, 464 (9th Cir. 1976); *Brubaker v. King*, 505 F.2d 534, 538-39 (7th Cir. 1974); *Fairchild, Arabatzis & Smith, Inc. v. Sackheim*, 451 F. Supp. 1189, 1193-95 (S.D.N.Y. 1978). For principled analyses leading to denial of summary judgment motions on qualified immunity grounds, see, e.g., *Askew v. Bloemker*, 548 F.2d 673, 679-80 (7th Cir. 1976); *Shifrin v. Wilson*, 412 F. Supp. 1282, 1294-97, 1299-1300 (D.D.C. 1976).

¹²³ See, e.g., *Paton v. La Prade*, 524 F.2d 862, 871-72 (3d Cir. 1975) (dictum); *Alvarez v. Wilson*, 431 F. Supp. 136, 143-44 (N.D. Ill. 1977); *Stokes v. United States Immigration & Naturalization Serv.*, 393 F. Supp. 24, 28 (S.D.N.Y. 1975) (dictum).

¹²⁴ See *Dellums v. Powell*, 566 F.2d 167, 195-96 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978); *Tatum v. Morton*, 562 F.2d 1279, 1285 (D.C. Cir. 1977). But cf. *Hartigh v. Latin*, 485 F.2d 1068, 1072 (D.C. Cir. 1973) ("punitive damages . . . are to be included in the amount in controversy for jurisdictional purposes"), cert. denied, 415 U.S. 948 (1974).

¹²⁵ See note 65 *supra*.

¹²⁶ 435 U.S. 247 (1978).

¹²⁷ *Id.* at 250. Plaintiffs claimed they were suspended from school without procedural due process.

¹²⁸ Justice Blackmun did not participate.

rights are violated.¹²⁹ Although it specified no precise “quantum of proof required to support a particular damages award where actual injury is proved,”¹³⁰ the Court refused to presume that damages result from procedural due process violations,¹³¹ reasoning that “neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”¹³² The Court noted that section 1983, like *Bivens*, is designed to compensate constitutional injuries.¹³³ Nevertheless, the Court continued, “[t]his is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights,” for example if the defendant officials had “act[ed] with a malicious intention to deprive [plaintiffs] of their rights or to do them other injury. . . .”¹³⁴

If courts apply *Carey*'s analysis to *Bivens*-type cases, plaintiffs will have available a wider range of damages.¹³⁵ Compensatory damages are uncontroversial. Few judges will deem a lost constitutional right so trivial that it would not support an award of nominal damages. Punitive damages are appropriate if defendants acted with malice or intent, or if the unconstitutional conduct was otherwise egregious.¹³⁶

¹²⁹ *Id.* at 266-67.

¹³⁰ *Id.* at 267 n.25.

¹³¹ *Id.* at 259-65. The Court left open the question whether damages for violations of substantive rights, such as the right to vote, might properly be presumed. *See id.* at 264 n.22.

¹³² *Id.* at 264.

¹³³ 435 U.S. at 254-55.

¹³⁴ *Id.* at 257 n.11. In *Carey*, however, the district court “specifically found” no such malicious intention. *Id.*

¹³⁵ Attorneys' fees are a form of recovery still typically unavailable in *Bivens*-type cases. A court may award attorneys' fees only if a statute authorizes reimbursement of plaintiff's expenses, if plaintiff's suit confers a common benefit on a definable class, or if a defendant willfully disobeys a court order or acts in bad faith. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 257-59 (1975). No federal statute sanctions attorneys' fees in *Bivens*-type actions. *Tatum v. Morton*, 386 F. Supp. 1308, 1316 (D.D.C. 1974), *rev'd on other grounds*, 562 F.2d 1279 (D.C. Cir. 1977). A *Bivens*-type suit contemplates remedying a specific instance of constitutional misconduct, and will rarely provide a general benefit to a class. *See Tatum v. Morton*, 386 F. Supp. at 1316 (summarily concluding that constitutional tort suit failed to qualify as “benefit to the class” case). Unless the defendant defies the court or acts in bad faith, therefore, plaintiffs may not recover attorneys' fees.

¹³⁶ *Cf. Mawson v. Winans*, No. 77-365 (M.D. Pa. Apr. 26, 1978) (awarding punitive damages in § 1983 action against state prison official for striking inmate and offering reward for inmate's murder). Punitive damages may not be inconsistent with *Bivens*' compensatory purpose. Since plaintiffs face difficulties in proving actual losses (*see* note 84 and accompanying text *supra*), punitive damages may ameliorate deficiencies in compensatory

7. Jury Verdict

In *Bivens*-type suits, critical questions of liability, immunity, and damages lie within the province of the jury.¹³⁷ For a *Bivens*-type plaintiff, however, the jury itself may be an undeserved obstacle. Plaintiffs in constitutional torts suits frequently compare unfavorably with defendants in the eyes of jurors.¹³⁸ A law enforcement agent or prison official probably will evoke more sympathy from a jury than will the victim of his allegedly unconstitutional acts, typically an inmate or accused lawbreaker. Moreover, defendants can magnify this disparity by informing the jury that any damages it awards will come out of the pocket of an overworked, underpaid official.¹³⁹ Only with difficulty will a plaintiff wrest a substantial award from a hostile jury.

8. Recovery

Most federal civil servants are judgment-proof;¹⁴⁰ they earn too little to pay substantial judgments.¹⁴¹ Moreover, plaintiffs or

awards. To the extent that a deterrence rationale underlies *Bivens*, a punitive award is appropriate. In any event, courts should be more comfortable with assessing punitive damages than they are with the less familiar task of valuating constitutional rights.

¹³⁷ See *In re Zweibon*, 565 F.2d 742, 746 n.12 (D.C. Cir. 1977) (per curiam); *Meiners v. Moriarity*, 563 F.2d 343, 348-50 (7th Cir. 1977); Boger, Gitenstein & Verkuil, *supra* note 17, at 535.

¹³⁸ See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 421-22 (1971) (dictum) (dissenting opinion, Burger, C.J.); *Dellinger*, *supra* note 5, at 1553; Satlin, *Constitutional Law: Search and Seizure: An Alternative to the Exclusionary Rule*, 26 J.A.G. J. 255, 259-60 (1972); 10 DUQ. U.L. REV. 710, 714 (1972); 62 GEO. L.J. 1771, 1778 (1974); 46 TULANE L. REV. 816, 820-21 (1972); 1971 WASH. U.L.Q. 686, 689. Cf. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 499, 500-01 (1955) (local officials).

A recent study of § 1983 suits against local police officers indicated that jurors were biased against constitutional tort plaintiffs. See Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979). The Project documented juror bias against nonwhite plaintiffs, those with unusual lifestyles, and those with prior criminal records. *Id.* at 794-99. On the other hand, jurors were favorably disposed toward the defendant police officers. *Id.* at 800-02. The jury selection process aggravated these biases. *Id.* at 806-09.

¹³⁹ See *Meiners v. Moriarity*, 563 F.2d 343, 349-50 (7th Cir. 1977); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 456 (1978).

¹⁴⁰ See S. REP. NO. 588, 93d Cong., 1st Sess. 3 (1973), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2789, 2790; S. REP. NO. 469, 93d Cong., 1st Sess. 36 (1973) (individual views of Senator Percy); *Dellinger*, *supra* note 5, at 1553; Comment, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 TEMPLE L.Q. 938, 972 (1976); 39 BROOKLYN L. REV. 943, 954-55 (1973); 10 DUQ. U.L. REV. 710, 714-15 (1972); 24 HASTINGS L.J. 987, 1003 (1973); 46 TULANE L. REV. 816, 820 (1972); 1971 WASH. U.L.Q. 686-689; 20 WAYNE L. REV. 1353, 1357 (1974).

¹⁴¹ The Civil Service Commission estimates that as of October 1978, the mean annual salary of full-time federal civilian employees was \$18,131. The mean income of nonsuper-

dinarily may not garnish federal employees' wages.¹⁴² Unless the defendant owns substantial attachable property, therefore, judgment debts in constitutional tort cases will usually remain unsatisfied.

II

A QUANTITATIVE OVERVIEW

The *Bivens* defendants argued that, in view of some of the impediments discussed above, a constitutional tort cause of action against federal officials would be futile.¹⁴³ Justice Harlan disagreed, responding that "damages to some degree will be available when the option of litigation is chosen."¹⁴⁴ Experience has proven him wrong. The author surveyed 172 *Bivens*-type cases seeking damages from federal officials.¹⁴⁵ Defendants won nearly every case that went to judgment.

visory personnel, the class of officials most likely to be proper defendants in *Bivens*-type actions (see notes 22-23 and accompanying text *supra*), was \$17,187 for General Schedule employees and \$15,199 for Federal Wage System workers. See Letter, *supra* note 31.

¹⁴² See *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846); *May Dep't Stores Co. v. Smith*, 572 F.2d 1275 (8th Cir. 1978). A creditor may garnish federal wages only if the employing agency is a governmental corporation engaged in commercial activity with the public (see *Federal Housing Admin. v. Burr*, 309 U.S. 242, 245 (1940)) or if Congress has waived the general prohibition against garnishment for that bureau (see *May Dep't Stores Co. v. Williamson*, 549 F.2d 1147, 1147-48 (8th Cir. 1977)). Typically, neither exception obtains in *Bivens*-type actions. The only instance where these exceptions are likely to apply are cases against postal officials for aiding law enforcement officials in monitoring and opening plaintiff's mail. See generally *Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom. Colby v. Driver*, 47 U.S.L.W. 3482 (1979); *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975). The current trend permits garnishment of Post Office employees' wages. See *Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462 (3d Cir. 1977); *May Dep't Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Standard Oil Div. v. Starks*, 528 F.2d 201 (7th Cir. 1975).

¹⁴³ Brief for Respondents at 25-32.

¹⁴⁴ 403 U.S. at 410 (concurring opinion).

¹⁴⁵ This study selected cases from reported decisions by means of traditional and computer-assisted research methods. Unfortunately, the total population of *Bivens*-type cases can only be identified by examining the files of every district court clerk. See Letter of John J. Farley, III, Assistant Director, Torts Branch, Civil Division, United States Department of Justice (Nov. 1, 1978) (on file at the *Cornell Law Review*); Letter of James A. McCafferty, Chief of Statistical Analysis and Research Division, Administrative Office of the United States Courts (Oct. 2, 1978) (on file at the *Cornell Law Review*); Letter of Sue Walsb, Information Service, Federal Judicial Center (Oct. 23, 1978) (on file at the *Cornell Law Review*). Random sampling is impossible without the total population. Rigorous statistical theory demands that analysis of a nonrandom sample be merely descriptive, eschewing inferences regarding the total population. See generally D. HUFF, *HOW TO LIE WITH STATISTICS* 13, 21 (1954).

TABLE A
*Final Disposition of Bivens-type Cases
 Cases Against Federal Officials*¹⁴⁶

	<i>Number</i>	<i>Percent of all cases studied</i>
Judgment for plaintiff	5	3
Judgment for defendant	131	76
Settlement	5	3
Final disposition pending	18	10
Status unknown	24	14
Total cases	172	100

Plaintiffs lost a sizeable number of cases on the merits, but over twice as many on grounds unrelated to the merits. The immunity doctrines and the proper defendant requirements constituted the most significant bars to judgment for plaintiffs.

We believe, however, that this study accurately portrays the pro-defendant trend in *Bivens*-type actions. The Justice Department reports that, as of November 1, 1978, "[s]uits which have actually resulted in a judgment [for plaintiff] are extremely few in number, perhaps six." See Letter of John J. Farley, *supra*. Excluding no relevant reported case, the survey identified four (two-thirds) of these cases. See notes 150-67 and accompanying text *infra*. We suspect that the survey did not find two-thirds of *all Bivens*-type cases, and so picked up a smaller proportion of the total population than of judgments for defendants.

Because we drew cases from reported decisions, the study probably underincludes settlements and pending cases. Typically, 200-300 *Bivens*-type cases are pending. See STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE, SEN. COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., JUSTICE DEPARTMENT RETENTION OF PRIVATE LEGAL COUNSEL TO REPRESENT FEDERAL EMPLOYEES IN CIVIL LAWSUITS 1 (Comm. Print 1978) [hereinafter cited as STAFF REPORT]; *U.S. Backs Shift in Federal Tort Liability*, Nat'l L.J., Dec. 4, 1978, at 4, col. 2.

After identifying the cases, we requested information regarding final disposition from the clerks of the forum courts. We frequently obtained docket sheets and unpublished opinions. A sample cover letter and questionnaire is on file at the *Cornell Law Review*. We collected all information between October 1 and December 31, 1978, and have made no attempt to update this data.

¹⁴⁶ Cases that had reached final disposition, either in part or as a whole, are included in Table A. The sum of the columns exceeds the total because some cases fit two categories. If clerks failed to respond to our request for information, we included the affected cases in the "Status unknown" category. See generally note 145 *supra*. A research memorandum listing the cases included in each category is on file at the *Cornell Law Review*.

TABLE B
*Grounds for Dismissal or Judgment
 in Defendant's Favor*¹⁴⁷

	<i>Number</i>
No meritorious claim	40
No <i>Bivens</i> -type cause of action	8
No constitutional violation	32
Grounds unrelated to merits	89
Proper defendant problems	18
Improper personal jurisdiction or service of process	12
Insufficient jurisdictional amount	5
Statute of limitations bar	3
Sovereign immunity bar	26
Individual immunity bar	51
Other ¹⁴⁸	4
Relationship to merits	
unknown	21
General verdict by jury	3
Insufficient pleadings	9
Other ¹⁴⁹	9
Total judgments for defendants	131

¹⁴⁷ A research memorandum listing cases included in each category in Table B is on file at the *Cornell Law Review*. The sum of each column exceeds the total because some cases fit two or more categories. See generally note 145 *supra*.

¹⁴⁸ The following cases below were dismissed on the following grounds:

1. improper venue—*Smith v. Commissioner*, 78-1 U.S. Tax Cas. ¶ 9,326 (N.D. Ga. 1978); *Kipperman v. McCone*, 422 F. Supp. 860, 879 (N.D. Cal. 1976).
2. failure to exhaust administrative remedies—*National Indian Youth Council v. Morton*, 363 F. Supp. 475, 479-80 (W.D. Okla. 1973).
3. improper removal from state court—*Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1362 (9th Cir. 1977).

¹⁴⁹ The cases below were dismissed on the following grounds:

1. voluntary dismissal—*Lowenstein v. Rooney*, 401 F. Supp. 952 (E.D.N.Y. 1975), *dismissed*, No. 74C-593 (July 3, 1978); *Black Panther Party v. Alexander*, 75-1 U.S. Tax. Cas. ¶ 9,376 (N.D. Cal. 1975), *dismissed*, No. 74-1247 (Feb. 27, 1976); *Green v. Laird*, 357 F. Supp. 227 (N.D. Ill. 1973), *dismissed*, No. 72C-2461 (Oct. 18, 1973).

The relief awarded plaintiffs in their handful of victories has varied considerably. In *Saal v. Middendorf*,¹⁵⁰ a homosexual servicewoman whom the Navy had designated ineligible for reenlistment sought monetary and equitable relief for violation of her due process rights.¹⁵¹ Although the court initially indicated that damages might be available,¹⁵² it ultimately granted only an injunction.¹⁵³ *Halperin v. Kissinger*¹⁵⁴ held that the electronic surveillance of government employees by Nixon Administration officials violated plaintiff's constitutional rights.¹⁵⁵ The court awarded only nominal damages of one dollar against each of the three responsible defendants.¹⁵⁶ In *Tatum v. Morton*,¹⁵⁷ the court denied punitive damages and limited compensatory damages to one hundred dollars for each plaintiff who had been arrested during a peaceful prayer vigil. The court limited the award because the plaintiffs were participating in a demonstration and most refused to post collateral in order to obtain release after being arrested.¹⁵⁸ On plaintiffs' appeal, the District of Columbia Circuit affirmed the denial of punitive damages¹⁵⁹ but reversed and remanded because the trial court erred in limiting the compensatory recovery.¹⁶⁰ In *Dellums v. Powell*,¹⁶¹ the jury awarded each of many arrested anti-war demonstrators \$7,500 for violation of first amendment rights and \$500 for cruel and unusual punish-

2. directed verdict for unspecified reasons—*Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975), *dismissed*, No. 73-871 (D.C. Cal. Oct. 12, 1977); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975), *dismissed*, No. 74-74 (D. Wyo. July 20, 1977).

3. failure to prosecute—*Wounded Knee Legal Defense/Offense Comm. v. F.B.I.*, 507 F.2d 1281 (8th Cir. 1974), *dismissed*, No. 73-5082 (D.S.D. May 14, 1976); *Felder v. Daley*, 403 F. Supp. 1324, 1326-27 (S.D.N.Y. 1975).

4. by agreement—*Gardels v. Murphy*, 377 F. Supp. 1389 (N.D. Ill. 1974), *dismissed*, No. 73-2336 (date unknown).

5. grounds for dismissal unknown—*James v. United States*, 358 F. Supp. 1381 (D.R.I. 1973), *dismissed*, No. 4670 (Aug. 14, 1974).

¹⁵⁰ 427 F. Supp. 192 (N.D. Cal. 1977).

¹⁵¹ *Id.* at 194.

¹⁵² *Id.* at 203.

¹⁵³ No. 73-1299 (N.D. Cal. May 6, 1977).

¹⁵⁴ 424 F. Supp. 838 (D.D.C. 1976) (opinion on liability), 434 F. Supp. 1193 (D.D.C. 1977) (opinion on damages).

¹⁵⁵ 424 F. Supp. at 843-45.

¹⁵⁶ 434 F. Supp. at 1195.

¹⁵⁷ 386 F. Supp. 1308 (D.D.C. 1974).

¹⁵⁸ *Id.* at 1313-14.

¹⁵⁹ 562 F.2d 1279, 1285 (D.C. Cir. 1977).

¹⁶⁰ *Id.*

¹⁶¹ 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

ment.¹⁶² The total judgment for both common-law and constitutional torts in this class action suit against the District of Columbia and individual officers was estimated at twelve million dollars.¹⁶³ The District of Columbia Circuit set aside the first amendment damages as excessive and remanded the case to the jury to determine actual damages.¹⁶⁴ The jury in *Askew v. Bloemker*,¹⁶⁵ one of the Collinsville raids cases,¹⁶⁶ awarded \$45,000, including \$29,000 in punitive damages. Because of defendants' appeals, plaintiffs have not recovered damages in any of these cases.¹⁶⁷ Plaintiffs' success with settlements has been equally weak.¹⁶⁸

Justice Harlan's remark, that for *Bivens*-type plaintiffs it is "damages or nothing,"¹⁶⁹ was ironically prophetic. In the cases surveyed, a tiny proportion of plaintiffs obtained judgments or settlements. Even in these cases, the magnitude of the injury and the time and expense presumably necessary to secure compensation often seem to dwarf the sum awarded.¹⁷⁰ Most plaintiffs recovered nothing regardless of the merit of their claims. *Bivens* has failed as a compensatory remedy.

III

A REFORM PROPOSAL

The Supreme Court's recognition of a right to damages for federal officials' constitutional torts has proven chimerical. Expos-

¹⁶² 566 F.2d at 174 n.6.

¹⁶³ *Id.* at 208 (concurring opinion, Leventhal, J.). One source reported that the United States intended to pay all damages awarded against Powell, although it did not indicate what empowered the government to do so. See 25 LAW ENFORCEMENT LEGAL LIABILITY REP. 4 [AELE] (1975).

¹⁶⁴ 566 F.2d at 196.

¹⁶⁵ 548 F.2d 673 (7th Cir. 1976), *jury verdict for pltf.*, No. 73-79 (S.D. Ill. Aug. 29, 1978).

¹⁶⁶ See note 17 *supra*.

¹⁶⁷ See Letter of John J. Farley, *supra* note 145.

¹⁶⁸ See *Kudley v. Hollo*, 431 F. Supp. 470 (N.D. Ohio 1976), *dismissed*, No. 76-838 (N.D. Ohio Aug. 16, 1977) (stipulating that honorable discharge fully satisfied claim that activation of Army reservist without following regulations violated fourth and fifth amendments); *VonderAhe v. Howland*, 508 F.2d 364 (9th Cir. 1974), *dismissed*, No. 70-1438 (N.D. Cal. June 3, 1976) (stipulated dismissal with parties bearing own costs); *State Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974), *dismissed*, No. 73-8 (D.S.C. Nov. 19, 1975) (settling *Bivens*-type claim that Treasury and Custom officials' seizure of cargo violated fifth amendment for \$12,000); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), *dismissed*, No. 67-C-655 (E.D.N.Y. Mar. 8, 1974) (settled for \$500); *Scheunemann v. United States*, 358 F. Supp. 875 (N.D. Ill. 1973), *dismissed*, No. 72-1934 (N.D. Ill. May 7, 1973) (dismissed pursuant to stipulation without any compensation for plaintiff).

¹⁶⁹ 403 U.S. at 410 (concurring opinion).

¹⁷⁰ Attorneys' fees are rarely available in *Bivens*-type cases. See note 135 *supra*.

ing the United States to liability in *Bivens*-type cases¹⁷¹ would dissolve most extraneous obstructions to recovery in meritorious suits. Unusual problems with subject-matter jurisdiction,¹⁷² personal jurisdiction and service of process,¹⁷³ and statutes of limitations¹⁷⁴ would evaporate. At least at the pleading stage, plaintiffs could satisfy the proper defendant requirements.¹⁷⁵ Extinguish-

¹⁷¹ For views favoring the abrogation of sovereign immunity, both generally and in the constitutional tort context, see, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 410 (concurring opinion, Harlan, J.), 422-23 (dissenting opinion, Burger, C.J.); Borchard, *Governmental Immunity in Tort* (pt. VI), 36 YALE L.J. 1 (1926); Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383 (1970); Dellinger, *supra* note 5, at 1553-59; Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. I (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Lloyd, *Le Roi Est Mort; Vive Le Roi*, 27 N.Y.U. L.Q. REV. 38 (1949); Comment, *Sovereign Immunity—An Anathema to the "Constitutional Tort"*, 12 SANTA CLARA LAW. 543 (1972).

The Justice Department has advanced a novel rationale for waiving sovereign immunity in the constitutional tort context. The Department provides counsel to any federal employee sued in his individual capacity if "[his] actions reasonably appear to have been performed within the scope of his employment, and . . . providing representation is in the interest of the United States." 28 C.F.R. § 50.15(a)(2) (1978). If more than one official is sued in a given action, the Department may retain private counsel to represent the additional defendants in order to avoid conflicts of interest. *Id.* § 50.16. The incidence of private counsel is relatively low. See STAFF REPORT, *supra* note 145, at 935-43. Nevertheless, the total annual cost of retaining private counsel has exceeded one million dollars. See *U.S. Backs Shift in Tort Liability*, Nat'l L.J., Dec. 4, 1978, at 5, col. 4. If the United States were solely liable for its employees' constitutional torts, of course, the Justice Department would face no conflicts of interest, and public funds now spent for private counsel could be saved. See *Amendments to the Federal Tort Claims Act: Joint Hearings on S. 2117 Before the Subcomm. on Citizens and Shareholders Rights and Remedies and the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 7 (1978) (statement of Attorney General Griffin Bell) [hereinafter cited as *Senate Hearings*].

¹⁷² Section 1331(a), providing subject-matter jurisdiction over *Bivens*-type cases, does not impose a jurisdictional amount requirement on suits against the United States. See note 89 and accompanying text *supra*.

¹⁷³ FED. R. CIV. P. 4(d)(4) provides for service

[u]pon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States . . . , and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

Plaintiffs can easily comply with this provision.

¹⁷⁴ 28 U.S.C. § 2401(a) (1976) mandates a six-year statute of limitations for civil suits against the United States.

¹⁷⁵ Plaintiff would initially meet the proper defendant requirement by suing the United States. Whether plaintiff could continue to do so would depend on the vicarious liability standard adopted for constitutional tort suits against the United States: common-law re-

ing the threat of individual officials' liability would render the individual immunity doctrines superfluous.¹⁷⁶ Jury bias might well diminish.¹⁷⁷ Moreover, sovereign liability would guarantee a solvent defendant.

The Federal Tort Claims Act (FTCA) governs the liability of the United States for a similar class of actions: torts arising under state law.¹⁷⁸ Thus, it appears to offer a handy mechanism for waiving sovereign immunity in *Bivens*-type suits.¹⁷⁹ Five bills in the Ninety-fifth Congress,¹⁸⁰ and two in the Ninety-sixth,¹⁸¹ proposed shifting liability for constitutional torts from officials to the United States. But Congress should proceed cautiously in amending the FTCA to embrace *Bivens*-type actions. Under the FTCA, "the law of the place where the act or omission occurred" determines the liability of the United States.¹⁸² Federal law governs

spondeat superior principles, as in FTCA cases (28 U.S.C. § 2674 (1976)); or the "government[al] policy or custom" standard applicable in § 1983 suits against municipalities (see *Monell v. Department of Social Serv.*, 436 U.S. 658, 694 (1978)). Respondeat superior would better effectuate *Bivens*' compensatory purpose, since it would require plaintiffs to prove nothing more than that a federal official violated plaintiff's constitutional rights while performing his duties. Moreover, respondeat superior would best deter unlawful conduct. See note 22 *supra*.

¹⁷⁶ See generally note 118 *supra*. Cf. Newman, *supra* note 139, at 457-58 (discussing state officials). The specter of defending a lawsuit may also chill an official's zeal in performing his duties. But waiving sovereign immunity for constitutional torts would demote the offending employee from defendant to witness. Both his visibility and his involvement in any suit would diminish, thereby reducing any adverse impact. Deterrence theorists, concerned that sovereign liability would eliminate the sole disincentive to unconstitutional conduct by officials, insist that administrative accountability procedures be fortified before absolving individual employees from liability. See STAFF REPORT, *supra* note 145, at 26-27.

¹⁷⁷ A statute waiving sovereign immunity for constitutional tort suits might well prohibit trial by jury. Cf. 28 U.S.C. § 2402 (1976) (no jury trial in FTCA and Tucker Act suits against the United States). Even if cases were tried to a jury, however, the government's deep pocket would generate less sympathy than the officials' shallow ones.

¹⁷⁸ The FTCA also governs intentional fourth amendment violations (see note 17 *supra*), but they, being *sui generis*, will be ignored in this analysis.

¹⁷⁹ See, e.g., 24 HASTINGS L.J. 987, 1004 (1973).

¹⁸⁰ H.R. 13793, 95th Cong., 2d Sess. (1978), 124 CONG. REC. H8126 (daily ed. Aug. 8, 1978); S. 3314, 95th Cong., 2d Sess. (1978), 124 CONG. REC. S11048 (daily ed. July 18, 1978); S. 2868, 95th Cong., 2d Sess. (1978), 124 CONG. REC. S5193 (daily ed. Apr. 10, 1978); S. 2117, 95th Cong., 1st Sess. (1977), reprinted in *Senate Hearings, supra* note 202, at 39-47; H.R. 9219, 95th Cong., 1st Sess. (1977). For an earlier proposal, see H.R. 10439, 93d Cong., 1st Sess. (1973), reprinted in *Federal Tort Claims Amendments: Hearings on H.R. 10439 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 2-6 (1974).

¹⁸¹ See S. 695, 96th Cong., 1st Sess. (1979); H.R. 193, 96th Cong., 1st Sess. (1979).

¹⁸² 28 U.S.C. §§ 1346(b), 2672 (1976). Federal causes of action fall outside the FTCA. See *Birnbaum v. United States*, 588 F.2d 319, 327 (2d Cir. 1978) (constitutional torts); *Baker v. F & F Inv. Co.*, 489 F.2d 829, 835 (7th Cir. 1973) (Civil Rights Act); *Devlin*

Bivens-type actions¹⁸³ and Congress should not attempt to harmonize constitutional torts with those currently cognizable under the FTCA by consigning them to state law.¹⁸⁴ The laws and courts of different states might treat similarly injured plaintiffs nonuniformly.¹⁸⁵ Although tolerable where plaintiffs sue on state-created rights, nonuniform treatment of federal constitutional rights is unacceptable.¹⁸⁶

Congress might stretch the FTCA to encompass a federal rule of decision for constitutional torts.¹⁸⁷ Different vicarious liability principles,¹⁸⁸ defenses,¹⁸⁹ immunity standards,¹⁹⁰ and damage rules¹⁹¹ would apply to an FTCA state tort theory and an FTCA

Lumber & Supply Corp. v. United States, 488 F.2d 88, 89 (4th Cir. 1973) (per curiam) (Miller Act); *Davis v. United States*, 395 F. Supp. 793, 795-97 (D. Neb. 1975), *aff'd per curiam*, 536 F.2d 758 (8th Cir. 1976) (OSHA). *But see* *Somerset Seafood Co. v. United States*, 95 F. Supp. 298, 305-06 (D. Md.), *aff'd*, 193 F.2d 631 (4th Cir. 1951) (ship's sinking, caused by government's breach of statutory duty to mark wrecked vessels, actionable under FTCA) and cases cited in note 18 *supra*.

¹⁸³ Federal law provides the rule of decision, although courts may occasionally borrow state law, for example, in the statute of limitations context (*see* text accompanying note 59 *supra*).

¹⁸⁴ One bill made precisely this attempt. *See* H.R. 13793, 95th Cong., 2d Sess. sec. 3, 124 CONG. REC. S11048 (daily ed. July 18, 1978).

¹⁸⁵ *Compare* *Birnbaum v. United States*, 436 F. Supp. 967, 987 (E.D.N.Y. 1977) (permitting, under New York law, recovery of damages for mental distress resulting from constitutional tort), *aff'd*, 588 F.2d 319 (2d Cir. 1978) *with* *Hetrick v. Willis*, 439 S.W.2d 942, 943 (Ky. 1969) (no damages for mental distress unless accompanied by physical contact or injury). Federal law compensates mental distress resulting from constitutional misconduct. *See* text accompanying note 132 *supra*.

¹⁸⁶ *See* *Boger, Gitenstein & Verkuil, supra* note 17, at 521-22.

¹⁸⁷ This proposal has been made. *See, e.g.*, H.R. 9219, 95th Cong., 1st Sess., secs. 1, 2 (1977).

¹⁸⁸ *Respondeat superior*, generally available in state tort cases (*see* W. PROSSER, *supra* note 22, at 458-67), is inapplicable in *Bivens*-type cases (*see* notes 22-23 and accompanying text *supra*).

¹⁸⁹ A variety of defenses available in state tort suits (*see* W. PROSSER, *supra* note 22, at 98-138, 416-57) may have no counterpart in constitutional law. The *Bivens* Court itself offered an example:

[A]lthough the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant, . . . a private individual lawfully in the home of another will not normally be liable for trespass beyond the bounds of his invitation absent clear notice to that effect.

403 U.S. at 394-95 n.7 (citations omitted).

¹⁹⁰ Federal officials enjoy absolute immunity from state torts, but only qualified immunity from constitutional torts. *See* *Butz v. Economou*, 438 U.S. 478, 483-90, 494-95, 507-08 (1978); *Granger v. Marek*, 583 F.2d 781, 784 (6th Cir. 1978); *Evans v. Wright*, 582 F.2d 20, 21 (5th Cir. 1978). The United States may assert its employee's immunity defense in an FTCA suit. *See* note 19 *supra*.

¹⁹¹ Courts should tailor damage awards to the interest protected by the cause of action. *See* *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The interests safeguarded by state and constitutional tort claims may differ. For example, the trespass cause of action protects the

constitutional tort theory arising out of the same set of facts.¹⁹² Characterizing both types of theories as "FTCA claims," however, might blind some judges and juries to the distinctions; confusion, fallacious analogies, and incorrect decisions could result.¹⁹³

Moreover, other FTCA provisions disserve *Bivens'* compensatory purpose. Unhappily, the Act prohibits punitive damages.¹⁹⁴ The FTCA's two-year time bar¹⁹⁵ might prematurely exclude meritorious *Bivens*-type cases.¹⁹⁶ The discretionary act exception clashes with a goal of remedying constitutional misconduct.¹⁹⁷ Finally, in the interest of efficient claim administration,¹⁹⁸ the FTCA requires that before filing suit, a plaintiff must obtain final

possessory interest in land. See W. PROSSER, *supra* note 22, at 68. The fourth amendment guarantees a personal privacy interest, the "absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 392; *Katz v. United States*, 389 U.S. 347, 351-53 (1967).

¹⁹² For example, S. 3314 provided that:

1. federal instead of state law would be the rule of decision for constitutional tort claims (secs. 1, 2(a));
2. plaintiffs could recover minimum liquidated damages in constitutional tort suits, but not in state tort claims (sec. 3(b));
3. with few exceptions, the United States could not assert its employee's individual immunity defenses in constitutional tort actions, although immunity for state tort claims would remain intact (sec. 3(b));
4. constitutional tort claims could be brought as class actions, without similar provision for state tort actions (sec. 4(b));
5. the state tort remedy against the United States would be exclusive of a remedy against the official, whereas the constitutional tort claim against the United States would be exclusive of a claim against the official (sec. 6);
6. different standards would govern substitution of the United States for individual employees in state and constitutional tort suits (sec. 7);
7. investigatory and disciplinary proceedings would lie against employees whose actions result in a constitutional tort, but not state tort, liability against the government (sec. 8); and
8. constitutional tort suits would be excluded from § 2680's exceptions to the FTCA's waiver of sovereign immunity (sec. 9(a)).

S. 3314 would create exceptions for constitutional tort actions in seven of the eleven basic FTCA provisions (28 U.S.C. §§ 1346(b), 2671-80).

¹⁹³ Even congressional draftsmen get confused. S. 3314, 95th Cong., 2d Sess. (1978), provides in sections 1 and 2(a) that the government's "liability [is] to be determined in accordance with applicable Federal law." In section 3(b), however, the bill states, "The United States shall be liable . . . to the same extent as entitlement to compensation is recognized under the tort law of the place where the violation complained of occurred."

¹⁹⁴ 28 U.S.C. § 2674 (1976).

¹⁹⁵ 28 U.S.C. § 2401(b) (1976).

¹⁹⁶ See note 80 and accompanying text *supra*.

¹⁹⁷ See note 19 *supra*.

¹⁹⁸ Efficient claim administration results from expeditious settlement procedures and avoidance of unnecessary litigation. See S. REP. NO. 1327, 89th Cong., 2d Sess. 2, 4 (1966), reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2515, 2516, 2518.

administrative disposition of his claim from the agency whose employee caused the injury.¹⁹⁹ Unfortunately, agencies lack special expertise in constitutional law.²⁰⁰ They may also be reluctant to admit liability. Thus, agency review might merely delay satisfaction of meritorious claims without significantly easing the judicial caseload.²⁰¹ These factors militate against incorporating a federal constitutional tort cause of action into the FTCA.

CONCLUSION

An uncommon array of obstacles thwarts deserving plaintiffs in *Bivens*-type suits. Sovereign immunity bars most claims against the United States. If the plaintiff sues individual officials, acquiring personal jurisdiction over defendants who reside outside the forum jurisdiction may be problematic. Plaintiffs usually cannot anticipate what statute of limitations applies to their claim. *Bivens*-type actions, unlike nearly every other federal question case, may be foiled by a jurisdictional amount requirement. Liability extends only to officials who directly participate in constitutional misconduct, but even offending officials may escape through individual immunity doctrines. Some jurisdictions have limited the types of damages available. Unsympathetic juries impede recovery. Finally, even if the plaintiff wins, most federal officials are judgment-proof.

In practice, *Bivens* offers no remedy at all. Plaintiffs have won only a handful of cases; most lose on grounds unrelated to the merits of their claims. Congress has considered waiving sovereign immunity for constitutional tort cases, a salutary reform. These proposals, however, would utilize the Federal Tort Claims Act, a vehicle ill-suited to the task. Instead, to ensure compensation of deserving plaintiffs, a discrete statutory scheme governing *Bivens*-type actions should be enacted. While this scheme should parallel the FTCA in many ways, Congress must tailor a constitutional tort claims act so that it avoids the FTCA's pitfalls and maximizes the

¹⁹⁹ 28 U.S.C. § 2675(a) (1976).

²⁰⁰ *Fairchild, Arabatzis & Smith, Inc. v. Sackheim*, 451 F. Supp. 1181, 1186 (S.D.N.Y. 1978) (refusing to require exhaustion of administrative remedies prior to adjudication of constitutional tort suit in absence of congressional directive).

²⁰¹ Statistical data on the current effectiveness of administrative review as a means of settling meritorious claims without litigation are unavailable.

incidence and adequacy of compensation of meritorious *Bivens*-type claims.²⁰²

W. Mark Smith

²⁰² Merely waiving sovereign immunity, without accompanying procedural and substantive provisions, probably would not significantly increase compensation of deserving plaintiffs. Section 1983, an appropriate barometer (*see note 65 supra*), has had indifferent success. *See* Ginger & Bell, *Police Misconduct Litigation—Plaintiff's Remedies*, 15 AM. JUR. TRIALS 555, 580-90 (1968) (in 17 years, only 54 reported § 1983 cases were settled, or proceeded past a motion to dismiss); 5 U.S. COMMISSION ON CIVIL RIGHTS, JUSTICE: 1961 COMMISSION ON CIVIL RIGHTS REPORT 116; Project, *supra* note 138, at 786-789 (out of 149 § 1983 cases against Connecticut police officers, plaintiffs won only 7 of 28 cases that were tried before a jury, with an average award of \$5,723). *Cf.* INTERNATIONAL CITY MANAGEMENT ASSOCIATION, PUBLIC OFFICIAL LIABILITY: 1976 (Urban Data Service Report, May 1977), analyzed in P. BROWN, PERSONAL LIABILITY OF PUBLIC OFFICIALS, SOVEREIGN IMMUNITY, AND COMPENSATION FOR LOSS, Feb. 1977, at 5-6 (Law & Ethic Series No. 1) (without discriminating between types of suits, survey shows 74% of suits against state and county officials decided in their favor).