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THE BIVENS CONSTITUTIONAL TORT: AN UNFULFILLED PROMISE

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In the landmark Bivens *decision the Supreme Court inferred from the Constitution the right to seek damages for the infringement of one's constitutional rights by a federal official. Unlike its corollary cause of action against state officials under 42 U.S.C. § 1983, this damages remedy has proved elusive if not almost wholly unavailable. In this Article Mr. Rosen examines the application of* Bivens *and the reasons why the doctrine has failed to provide a meaningful remedy to the victims of constitutional deprivations. He discusses the formidable obstacles a* Bivens *plaintiff faces and the tendancy of courts to give more weight to federal officials' need to perform their duties without the threat of liability than to the need to vindicate citizens' constitutional rights. The Article concludes that until the courts or Congress restores a proper balance between these interests, the promise of the* Bivens *decision will continue to be unfulfilled.*

INTRODUCTION

In 1961 the United States Supreme Court ruled that the Civil Rights Statutes,[1] specifically 42 U.S.C. § 1983,[2] could be used by an individual to recover damages from a state official for deprivation of one's constitutional rights.[3] The Court found a damages remedy appropriate since section 1983 was enacted "to aid in the preservation of human liberty and human rights."[4] With its decision in *Monroe v. Pape*,[5] the Supreme Court ushered in the era of the "constitutional tort"—the right to obtain monetary relief for the violation of one's constitutional rights. At the same time, those citizens whose constitutional rights were violated by an FBI or INS agent had no similar cause of action since the Civil Rights Statutes have no application to the actions of a federal official.[6]

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1. 42 U.S.C. §§ 1981-1988 (1982).

2. Congress originally enacted 42 U.S.C. § 1983 as part of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act.

3. Monroe v. Pape, 365 U.S. 167, 171-87 (1961).

4. Gomez v. Toledo, 446 U.S. 635, 638-39 (1980) (quoting Owen v. City of Independence, 445 U.S. 622, 636 (1980) (quoting CONG. GLOBE, 42d Cong., 1st Sess., App. 68 (1871) (statement of Rep. Schellabarger))).

5. 365 U.S. 167 (1961).

6. *See, e.g.*, Martinez v. Winner, 771 F.2d 424, 441 (10th Cir. 1985) (federal officials ordinarily not subject to suit under § 1983); Fullman v. Graddick, 739 F.2d 553, 560 (11th Cir. 1984) (§ 1983 actions do not lie against federal law enforcement officials). A federal official can be sued under 42 U.S.C. § 1985(3) if he conspires with a state official to violate the equal protection rights of a citizen. United Bhd. of Carpenters v. Scott, 463 U.S. 825, 830 (1983).

It was not until a decade later that the Supreme Court created a corollary cause of action for individuals whose constitutional rights are infringed by an employee of the federal government. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[7] the Supreme Court ruled that a federal official could be held personally liable for damages resulting from violations of the plaintiff's fourth amendment rights. The Court found that in the absence of any statutory provision providing for such right, such as section 1983, an aggrieved party could bring suit directly under the Constitution.[8]

The Supreme Court in *Bivens*[9] felt compelled to fill a void left by Congress in the Civil Rights Statutes. As the Court later explained, a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees."[10] The Court found it inherently unfair that an individual whose constitutional rights were violated could be deprived of redress simply by virtue of the fact that the wrongdoer was a federal rather than state official. The only way to remedy this inequity was to create a damages cause of action based upon the Constitution itself. In so doing, the Court put teeth into the Constitution by ruling that a violation of a constitutional right would portend at least the same result as a violation of a common-law right—damages. This grand scheme has not, however, come to fruition.

Cases decided subsequent to the *Bivens* decision lead one to the unmistakable conclusion that what the Supreme Court created was a right without a meaningful remedy. The emergence of the constitutional tort forced the Court to strike a balance between protecting the rights of individuals to seek redress for violations of their constitutional rights and ensuring that the proper functioning of government is not hindered by a plethora of insubstantial lawsuits. In overemphasizing the threat to the governing function, the Court has struck this balance in such a manner as effectively to eviscerate the right it created in *Bivens*.

This Article examines the implementation of *Bivens* and some of the reasons why the doctrine has failed to achieve its primary purpose of providing a meaningful remedy to the victims of constitutional deprivations. The Article provides a framework by which to approach such actions and attempts to clarify some of the confusion surrounding the *Bivens* action—confusion which one might have predicted under a case which includes in its title "unknown named" agents as defendants.[11]

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7. 403 U.S. 388 (1971).

8. *Id.* at 397.

9. Constitutional tort cases are generally described as either a § 1983 or a *Bivens* case.

10. Gomez v. Toledo, 446 U.S. 635, 639 (1980) (quoting Owen v. City of Independence, 445 U.S. 662, 651 (1980)).

11. In the words of Professor Davis, "[C]ourts of appeals have followed each other in misunderstandings of Bivens." 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27:26, at 153 (2d ed. 1984). A good deal of the confusion derives from the fact that *Bivens* was an entirely new cause of action with no precedents or legislative history to guide the courts. The *Bivens* doctrine was created in 1971 and its forerunner, the suit for damages for a constitutional tort committed by a state actor, came into being just 10 years earlier in Monroe v. Pape, 365 U.S. 167 (1961). Only in the last five years have enough *Bivens* cases reached the Supreme Court to begin to develop a substantial body of law. Many questions, however, remain for the lower courts to address in the application of the *Bivens* doctrine.

Part I of the Article discusses the history of the constitutional tort, the evolution of the *Bivens* action, and the rationale which supported the Supreme Court's creation of the *Bivens* cause of action. Part II examines whether the *Bivens* action is achieving the purposes for which it was created. Part III reviews the formidable obstacles a *Bivens* plaintiff faces in attempting to obtain a recovery under a system that has tilted considerably in favor of the federal defendant. Finally, Part IV examines what can be done to balance the government's need to function efficiently with the rights of citizens to seek redress for violations of their constitutional rights.[12]

I. HISTORY OF THE CONSTITUTIONAL TORT AND THE *BIVENS* CAUSE OF ACTION

For nearly a hundred years, the general view was that the Civil Rights Statutes, in particular 42 U.S.C. § 1983,[13] were limited to the redress of an unconstitutional action specifically authorized by a state.[14] Constitutional deprivations caused by the local police officer who conducted an illegal search or the sheriff who wrongfully placed a person in custody were considered beyond their official authority and therefore not actionable. The courts reasoned that because conduct beyond an official's authority is not "state action," such conduct was not redressable under section 1983. A remedy, if any existed, was to be found under some common-law tort.[15]

Justice Blackmun, reviewing the history of the Civil Rights Statutes, found them, from the time of their inception until the 1940s, to be essentially useless as a method to redress constitutional wrongs: "[A]s the 20th century dawned, the Nation's commitment to civil rights lay in remnants. It was our Dark Age of Civil Rights .... As one can see, from the 1890's to the 1940's, the Civil Rights

12. *Bivens* actions and actions under 42 U.S.C. § 1983 are quite similar. Both seek redress for constitutional deprivations by government officials, the former for actions of federal officials, and the latter for those of state officials. In many respects the case law decided with regard to one type of case can be applied to the other. For instance, with regard to immunity from constitutional torts, *Bivens* suits and § 1983 actions are considered essentially identical. Anderson v. Creighton, 107 S. Ct. 3034, 3044 n.2 (1987) (Stevens, J., dissenting) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 n.30 (1982) (quoting Butz v. Economou, 438 U.S. 478, 504 (1978))); *see* Malley v. Briggs, 475 U.S. 335, 340 n.2 (1986). However, as discussed in more detail *infra*, Part III (D), some considerable differences between a *Bivens* action and a § 1983 action exist which make it much more difficult to obtain a recovery if one's constitutional rights happen to have been violated by a federal rather than a state official. For this reason this Article, while referring throughout to § 1983 actions, will focus on the *Bivens* cause of action.

13. 42 U.S.C. § 1983 (1982) reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

14. *Pape*, 365 U.S. at 195, 208-09 (Frankfurter, J., dissenting).

15. *Id.*; *see Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1170-75 (1977).

Act lay virtually dormant."[16]

In the 1940s the Supreme Court began to alter its view of "state action." In two cases in particular,[17] the Court broadened the scope of "state action" to include any "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[18] As Justice Blackmun noted, "*Classic* and *Screws* signalled a general relaxation of the strict 'state action' requirement that had shackled the Fourteenth Amendment and its enforcing Civil Rights Acts since Reconstruction."[19] Although the notion of "state action" was expanded by these decisions, damages recoveries generally were still limited to actions based on the enforcement of official state policy.[20]

It was not until 1961 that the Supreme Court applied its broader "state action" definition to a suit for damages under section 1983. In *Monroe v. Pape* the Court found that the victim of an illegal search and detainment could obtain damages from the arresting officers for their violation of the plaintiff's fourth amendment rights.[21] In applying a definition of "state action" which would include the routine acts of government, the Court released the bonds which had remained on the Civil Rights Statutes for ninety years by permitting a meaningful affirmative remedy for most deprivations of one's constitutional rights caused by a state official.

While victims of the acts of state officials could now rely upon 42 U.S.C. § 1983, victims of virtually identical acts committed by federal officials had no similar statutory right to a damages action. Section 1983, by its express wording, may be applied only to actions of persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."[22] There was simply no law that authorized redress for deprivation by a federal official of a constitutional right.

The Supreme Court was not unaware that a double standard existed concerning the protection of one's constitutional rights. As the Court later noted:

> The 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct

16. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 11-12 (1985). Apparently, only 21 cases were decided under § 1983 through 1920. *See* Maine v. Thiboutot, 448 U.S. 1, 27 (1980) (Powell, J., dissenting).

17. Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

18. *Screws*, 325 U.S. at 109.

19. Blackmun, *supra* note 16, at 17.

20. *See, e.g.*, Lane v. Wilson, 307 U.S. 268, 275-77 (1939); Nixon v. Condon, 286 U.S. 73, 85-87 (1932).

21. *Pape*, 365 U.S. at 187.

22. 42 U.S.C. § 1983; *see supra* note 6.

> of state officials than it does that of federal officials is to stand the constitutional design on its head.[23]

In an effort to remedy this inequitable situation, the Supreme Court decided *Bivens*. In *Bivens* the Court stated, "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[24] In *Bivens* the plaintiff sued directly under the Constitution for money damages arising from his illegal search and seizure by federal narcotics officers. Lacking any statutory basis for such an award, the Court inferred from the Constitution a right to obtain relief for the deprivation of one's fourth amendment rights by a federal official: "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[25]

The relief or remedy the Court created to accompany this newly recognized right was damages:

> 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. "The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury." . . . [W]e hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.[26]

The damages remedy created in *Bivens* was not to be recovered from the federal government. Instead, the Court ruled, without discussion, that the damages to which the victim was entitled could be garnered only from the individual federal official who committed the violation. Although nowhere mentioned in the majority opinion, the Court apparently assumed that the United States had sovereign immunity from a claim for damages based upon the Constitution.[27] Courts and juries were therefore left to look to the Park Service policeman, the INS official, or the FBI agent to be financially responsible for the actions each took on behalf of the federal government.

While the *Bivens* decision has been decried by numerous critics as a prime example of judicial activism and overreaching, the *Bivens* cause of action continues to exist in the absence of any statute authorizing it.[28] The right to obtain

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23. Butz v. Economou, 438 U.S. 478, 504 (1978).

24. *Bivens*, 403 U.S. at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

25. *Id.* at 392 (quoting *Bell*, 327 U.S. at 684).

26. *Id.* at 397 (quoting Marbury v. Madison, 1 Cranch 137, 163 (1803)). "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395.

27. The only statement to this effect was in the concurrence of Justice Harlan, 403 U.S. at 410; *see* United States v. Testan, 424 U.S. 392, 399 (1976).

28. The criticism started with the dissenting opinions in the Supreme Court's *Bivens* decision. The dissenting Justices argued that the majority's holding infringed upon the legislative function of Congress. *Bivens*, 403 U.S. at 421-22 (Burger, J., dissenting); *id.* at 427-30 (Black, J., dissenting). Similar sentiments were expressed by other Justices in subsequent cases. In Bush v. Lucas, 462 U.S.

damages from a federal official for a constitutional violation has been extended from the fourth amendment violation present in *Bivens* to the right to seek damages for violation of the first,[29] fifth,[30] sixth,[31] and eighth[32] amendments. Indeed, courts have generally viewed *Bivens* actions to apply to the full panoply of rights contained in the Constitution.[33]

The *Bivens* decision seemingly put constitutional violations by a federal official on a par with those committed by state officials. It created a right for an individual like Webster Bivens to obtain meaningful redress for the deprivation of his constitutional rights through a suit for damages.[34] In practice, however, this newly recognized right has remained virtually untapped. In retrospect, the Supreme Court's *Bivens* opinion has had a much less sweeping impact than one would have anticipated in 1971 when the case was decided.

367, 372-74 (1983), Justice Stevens questioned whether a cause of action would have been inferred directly from the Constitution had *Bivens* been decided at that time. In Carlson v. Green, 446 U.S. 14, 32-44 (1980), Justice Rehnquist, dissenting, argued that it was incorrect to infer judicially a damages remedy in the absence of statutory authority. *Compare* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135-38 (1978) (*Bivens* is a constitutional decision because it prevents the fourth amendment from being rendered a "mere form of words") *with* Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23-24 (1975) (*Bivens* is a common-law decision in keeping with "the long federal common law practice of articulating the remedial implications of federal statutory rights"). *See also* Turpin v. Mailet, 579 F.2d 152, 157 (2d Cir. 1978) (en banc) ("Few opinions have stirred as much debate as Bivens."), *vacated sub nom.*, City of West Haven v. Turpin, 439 U.S. 974, *cert. denied*, 439 U.S. 988 (1978).

29. Chapman v. Pickett, 586 F.2d 22, 26 (7th Cir. 1978); Dellums v. Powell, 566 F.2d 167, 195 (D.C. Cir. 1977); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (government officials liable for damages when performance of discretionary duties clearly violate known statutory or constitutional rights); Nixon v. Fitzgerald, 457 U.S. 731, 748 n.27, 749 (1982) (although assuming that private claim may be inferred under first amendment, Court held President of United States absolutely immune from damages for his official actions); Butz v. Economou, 438 U.S. 478 (1978) (the Court, although not specifically recognizing a *Bivens* cause of action for first amendment violations, addressed the issue of immunity from such an alleged violation.); *cf.* Bush v. Lucas, 462 U.S. 367, 390 (1983) (Marshall, J., concurring) (the Court assumed a first amendment violation but found that a *Bivens* action would not lie because the termination of a federal employee covered by a comprehensive statutory scheme by which the employee can challenge his dismissal is a "factor counseling hesitation" against inferring a *Bivens* remedy). Also, see *infra* text accompanying notes 125-42 (discussion of the "factors counseling hesitation" doctrine).

30. Davis v. Passman, 442 U.S. 228, 249 (1979).

31. Wounded Knee Legal Defense/Offense Comm. v. FBI, 507 F.2d 1281, 1284 (8th Cir. 1974); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 162 (D.D.C. 1976).

32. *Carlson*, 446 U.S. at 17-18.

33. *See* Bennett v. Campbell, 564 F.2d 329, 331-32 (9th Cir. 1977). *Bivens* actions have been brought against federal officials for a myriad of allegedly illegal activities, including wiretapping of other federal employees, Halperin v. Kissinger, 807 F.2d 180, 182 (D.C. Cir. 1986), and members of the press, Smith v. Nixon, 807 F.2d 197, 199 (D.C. Cir. 1986); improper incarceration, Bryan v. Jones, 530 F.2d 1210, 1212 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976); unlawful search and seizure, *Bivens*, 403 U.S. at 389; personnel actions taken in response to the exercise of first amendment rights, *Harlow*, 457 U.S. at 802; and inadequate medical care rising to the level of cruel and unusual punishment, *Carlson*, 446 U.S. at 16.

34. After remand from the Supreme Court, the Court of Appeals for the Second Circuit ruled in *Bivens* that there was no immunity for the individual federal officials. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1347 (2d Cir. 1972). The case was later settled, with each defendant paying Mr. Bivens $100. *See* Hernandez v. Lattimore, 454 F. Supp. 763, 767 n.2 (S.D.N.Y. 1978).

II. *BIVENS* HAS NOT ACHIEVED ITS PRIMARY GOAL

Although the *Bivens* cause of action has had several important effects,[35] including the deterrence of federal officials from violating constitutional rights and the development and refinement of such rights,[36] its primary purpose has always been to redress constitutional deprivations committed by federal officials.[37] The Supreme Court created the *Bivens* doctrine for the express and sole purpose of providing a damages remedy to the victims of constitutional torts.[38] That purpose has simply not been achieved.

The number of civil rights actions filed under 42 U.S.C. § 1983, excluding suits by federal prisoners, rose from 296 in 1960 to 14,741 by 1981.[39] A similar increase occurred in *Bivens* actions. Over 12,000 actions have been filed since *Bivens* was decided in 1971.[40] By 1982 roughly one out of every 300 federal officials was named as a defendant in a pending *Bivens* action.[41] As of May 1985, over 2,600 *Bivens* suits involving over 10,000 present and former federal officials were pending.[42] Justice Blackmun's warning in his dissent in *Bivens* that the Court's decision "opens the door for another avalanche of new federal cases," has proven to be quite prophetic.[43]

While federal officials have been inundated by *Bivens* lawsuits, adverse judgments have not been a problem. Of the some 12,000 *Bivens* suits filed, only thirty have resulted in judgments on behalf of plaintiffs.[44] Of these, a number

35. Professor Schuck contends that constitutional tort cases serve five primary goals: "to deter wrongdoing, to encourage vigorous decisionmaking by officials, to compensate victims of official misconduct, to exemplify society's moral principles, and to achieve institutional competence and legitimacy." P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 16 (1983).

36. *See* Comment, Harlow v. Fitzgerald: *The Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 903 n.6 (1984).

37. *Bivens*, 403 U.S. at 392, 395-97; *see also* Carey v. Piphus, 435 U.S. 247, 254 (1978); Note, *"Damages or Nothing" — The Efficacy of the Bivens Type Remedy*, 64 CORNELL L. REV. 667, 668 (1979) ("A Bivens-type action, therefore, accomplishes its purpose only when a deserving plaintiff recovers damages.").

38. *See supra* text accompanying notes 24-27.

39. *See* Comment, *supra* note 36, at 200. The total number of nonprison civil rights cases in the federal courts of appeals rose from 44 in 1960 to 2,661 in 1980. *Id.*

40. 51 Fed. Reg. 27,021, 27,022 (July 29, 1986); *see also Hearings on Title XIII of S. 829 — To Amend the Federal Tort Claims Act Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 26 (1983) [hereinafter *Hearings — S. 829*] (statement of J. Paul McGrath, Assistant Attorney General, Civil Division, U.S. Department of Justice).

41. *Federal Tort Claims Act: Hearings on S. 1775 Before the Subcomm. on Agency Administration of the Senate Judiciary Comm.*, 97th Cong., 2d Sess. 143 (1982) [hereinafter *Hearings — S. 1775*] (statement of Donald J. Devine, Director, U.S. Office of Personnel Management).

42. Written Statement of John J. Farley, III, Director, Torts Branch, Civil Division, U.S. Department of Justice, to the Litigation Section of the Bar of the District of Columbia (May 1985), at 1 [hereinafter Farley Statement]. The number of pending cases was nearly 3,000 by July 1986. 51 Fed. Reg. 27,022 (1986).

43. *Bivens*, 403 U.S. at 430 (Blackmun, J., dissenting). The majority in *Bivens* specifically addressed this concern of Justice Blackmun and predicted that no such avalanche would occur. *Id.* at 391 n.4.

44. Farley Statement, *supra* note 42, at 1; *see also Federal Tort Claims: Hearings on H.R. 595 Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 98th Cong., 1st Sess. 15-17 (1983) [hereinafter *Hearings — H.R. 595*] (statement of J. Paul McGrath, Assistant Attorney General, Civil Division, U.S. Department of Justice, listing the ex-

have been reversed on appeal and only four judgments have actually been paid by the individual federal defendants.[45] Moreover, very few *Bivens* cases have settled with any money paid to the plaintiff.[46]

A number of the *Bivens* suits filed since 1971 have no doubt lacked merit. Criminal defendants often use *Bivens* suits as weapons in their defense. Following the maxim that the best defense is a good offense, a company which has been cited for violations by government inspectors or a criminal defendant who has been searched might file a *Bivens* action as leverage in their criminal cases, alleging that the searches in question were unconstitutional. Given the chance, many federal employees, no matter how loyal, would seriously contemplate dismissing criminal charges or withdrawing civil penalties if taking such action would eliminate their exposure to personal liability for actions taken while fulfilling their governmental duties. The paucity of victories for plaintiffs alleging deprivation of their constitutional rights demonstrates, however, more than a propensity by the general public to bring frivolous lawsuits against federal officials. It reflects, instead, problems endemic to the *Bivens* action which have created an almost insurmountable bias against the plaintiff.[47]

As will be discussed below, *Bivens* plaintiffs have been deprived of a meaningful remedy because the courts have created innumerable obstacles to obtaining a recovery against wrongdoing federal officials. The courts have tipped the balance so far in favor of the concern for the proper functioning of government that the primary purpose of the *Bivens* action—the right of an aggrieved

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isting 16 judgments out of the 10,000 *Bivens* cases filed as of that date); *Hearings — S. 829, supra* note 40, at 11 (testimony of IRS Commissioner, Roscoe L. Egger, Jr., that of the 547 *Bivens* suits against IRS agents, there have been no judgments); *Hearings — S. 1775, supra* note 41, at 3 (testimony of FBI Director William H. Webster that of the over 600 *Bivens* cases filed against FBI agents, there have been only three judgments, two of which are on appeal).

45. Farley Statement, *supra* note 42, at 1. Examples of *Bivens* judgments reversed on appeal include Nees v. Bishop, 730 F.2d 606, 613 (10th Cir. 1984); Doran v. Houle, 721 F.2d 1182, 1188-89 (9th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984); Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979).

46. *See* Note, *supra* note 37, at 668-69 (reporting that of the 172 *Bivens* cases surveyed by the author only three percent involved judgments for the plaintiffs and only three percent involved any type of settlement); *see also Hearings — S. 829, supra* note 40, at 6-7, (testimony of FBI Director William H. Webster, stating that settling a case is "something an individual Bivens defendant is unlikely to do"). A *Bivens* defendant is unlikely to settle with any type of money being paid out because the success rate for such defendants (99.75% before appeal) is so high. The defendant has no incentive to settle to avoid having to pay his attorneys' fees because any federal employee sued for actions taken within the scope of his employment receives free representation from the Department of Justice. 28 C.F.R. § 50.15 (1987). If there is any conflict of interest which would prevent the government from representing the federal official, the government will hire private counsel for the employee. *Id.* § 50.15(a)(6).

47. A number of commentators have observed that the *Bivens* action is not achieving its purpose. For example, Thomas J. Madden, former General Counsel of the Law Enforcement Assistance Administration of the U.S. Department of Justice, stated, "I think we all agree by this time that the *Bivens* remedy is not satisfactorily serving the purpose it was fashioned by the Supreme Court to promote; that is, assuring adequate compensation of the victim, measured deterrence of official wrongdoing, and fairness in the administration of justice." *Hearings* — S. 829, *supra* note 40, at 52. The Administrative Conference of the United States, an independent agency of the United States government, has likewise recognized this problem: "The existing system of civil sanctions for constitutional violations by Federal officials does not provide adequate assurance of compensation for victims of such violations and discourages proper conduct by Government officials." 1 C.F.R. § 305.82-6 (1987).

citizen to obtain damages for a constitutional deprivation—has become an empty and unfulfilled promise.[48]

III. THE OBSTACLES TO A *BIVENS* RECOVERY

A. *Procedural Advantages Accorded to* Bivens *Defendants*

From the moment the *Bivens* plaintiff files his lawsuit he faces the realization that he is not competing on a level playing field. First, the plaintiff must plead the alleged constitutional tort with greater specificity than other claims.[49] Although not a particularly oppressive requirement, specifically pleading exactly what actions occurred, when, and by whom, may be a difficult task for the victim of an unlawful search or the subject of an illegal arrest. People who are subjected to misconduct by law enforcement officials often lack pertinent information about the incident, including in some instances the names of the government officials involved.

Courts have also construed jurisdiction, venue, and other preliminary issues in *Bivens* suits so as to favor the individual government defendant. For example, for the purpose of filing an answer to a complaint a *Bivens* defendant is considered an "officer of the United States" and may therefore take sixty days to respond, rather than the normal twenty days afforded to nongovernmental defendants.[50] At the same time, a *Bivens* defendant may not be served as an "officer of the United States" under Federal Rule of Civil Procedure 4(d)(5),[51] nor may a plaintiff obtain venue in a *Bivens* action under 28 U.S.C § 1391(e), which allows a plaintiff to bring an action in the district in which the plaintiff resides in suits against "an officer or employee of the United States."[52]

While not insurmountable, these procedural advantages work to discourage plaintiffs from bringing *Bivens* actions. If the plaintiff can overcome these preliminary hurdles, he then encounters much more difficult problems, still at the

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48. This view has not been shared by all commentators throughout the evolution of *Bivens* law. For example, one observer warned in 1981 that recent decisions of the Supreme Court had greatly expanded the potential liability of federal officials while greatly restricting their ability to claim immunity to constitutional tort suits. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 284-85 (1981).

49. Smith v. Nixon, 807 F.2d 197, 200 (D.C. Cir. 1986); Hullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984); Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977).

50. FED. R. CIV. P. 12(a).

51. Federal Rule of Civil Procedure 4(d)(5) provides:

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

. . . .

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

52. Stafford v. Briggs, 444 U.S. 527, 543-44 (1980) (dicta); *see* 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 1107 (1987). Federal Rule of Civil Procedure 4(d)(5) and 28 U.S.C. § 1391(e) apply only when federal officials are sued in their official governmental capacity (for example, when sued for injunctive relief) rather than when sued in their personal capacity for damages.

initial stages of the litigation.[53]

B. *The Government's Sovereign Immunity*

Despite the Supreme Court's foray into the legislative function in creating the *Bivens* cause of action, the Court apparently assumed it could not go so far as to extend liability to the government in the absence of a waiver of sovereign immunity by Congress. As Justice Harlan wrote in his concurrence in *Bivens*, "[h]owever desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit."[54] Curiously, this statement by Justice Harlan in his concurring opinion is the only statement by the Supreme Court implying that the government's traditional sovereign immunity to common-law torts applies equally to suits brought for violations of the Constitution.

Although the Supreme Court has never directly addressed this issue, the lower courts have assumed that the United States is immune from constitutional torts absent a waiver by Congress: "While Bivens created a federal tort for certain violations of the Fourth Amendment, it did not (and indeed could not) impose liability on the officer's employer, the federal government. The federal fisc was protected by the traditional doctrine of sovereign immunity."[55]

Although Congress has waived the government's sovereign immunity for most common-law torts[56] and contract actions,[57] it has not done so for constitutional torts.[58] Therefore, under the assumption made by the courts that the federal government is immune from such actions, any damages that a plaintiff is to recover in a *Bivens* suit must come from the individual federal employee who committed the wrong.[59] Moreover, the employee will not be indemnified or reimbursed by the federal government.[60] While such a result undoubtedly has a

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53. For a further discussion of the special procedural rules applicable in a *Bivens* case, see Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543 (1985).

54. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). For a discussion of the roots of the doctrine of sovereign immunity as it relates to *Bivens* actions, see Note, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. REV. 597 (1982).

55. Norton v. United States, 581 F.2d 390, 393 (4th Cir. 1978), *cert. denied*, 439 U.S. 1003 (1978); *see* Williamson v. United States Dep't of Agric., 815 F.2d 368, 373 (5th Cir. 1987); Hohri v. United States, 782 F.2d 227, 245 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 454 (1986); Arnsberg v. United States, 757 F.2d 971, 980 (9th Cir. 1984), *cert. denied*, 475 U.S. 1010 (1986); Keene Corp. v. United States, 700 F.2d 836, 845 n.13 (2d Cir. 1983); *cf.* United States v. Testan, 424 U.S. 392, 399 (1976) (government not liable for backpay to employee classified incorrectly under the classification act). *But see infra* text accompanying notes 220-234.

56. Most common-law tort actions may be brought under the Federal Tort Claims Act [Hereinafter FTCA], 28 U.S.C. §§ 2671 to 2680 (1982).

57. Contract actions may be brought under the Tucker Act, 28 U.S.C. § 1491 (1982).

58. See *infra* text accompanying notes 215-20 for a discussion of the bills introduced in Congress over the last 15 years which have sought to amend the FTCA to include constitutional torts.

59. "A suit for money damages . . . must be paid out of the pocket of the private individual who happens to be—or formerly was—employed by the Federal Government . . . ." Stafford v. Briggs, 444 U.S. 527, 542 (1980) (dicta).

60. "If an employee suffers an adverse judgment, with very few exceptions, it is he or she who must pay it." *Hearings — S. 1775, supra* note 41, at 160 (statement of J. Paul McGrath, Assistant Attorney General, Justice Department).

deterrent effect on potentially wrongful actions of federal employees, it appears to have an even stronger deterrent effect on judges and juries finding liability against the defendant.[61]

The simple reality is that judges and juries are extremely reluctant to render judgments causing federal employees personally to pay thousands of dollars for actions taken pursuant to their government employment.[62] Indeed, the government predicted as much in its briefs to the Supreme Court in *Bivens*. The Court explained, "as the Government contends, damages will rarely be realized by plaintiffs in these cases because of jury hostility, the limited resources of the official concerned, etc."[63] *Bivens* cases most often involve a government employee just doing his job, such as a low- or midlevel employee who was carrying out some program enacted by Congress and administered by political appointees in his agency, or an FBI agent who was risking his life trying to apprehend a dangerous criminal but who knocked without announcing or allowed his search of a house to extend beyond the constraints of the warrant. In such cases the judge or jury has two choices: to rule that the employee, who was diligently and conscientiously performing his job, must pay from his own pocket, or to find no liability. Understandably, many judges and juries lean toward the latter alternative, especially because it is often more difficult to "see" the injury from a constitutional tort, such as the denial of a person's due process, then the injury from a common-law tort involving personal injury.[64]

A small number of government agencies have created either formal procedures or informal understandings whereby the agency will indemnify the individual employee if a judgment is rendered against her in a *Bivens* action. For example, the Department of Justice recently reversed its policy of not indemnifying its employees for *Bivens* judgments.[65] This indemnification, however, is within the discretion of the Department and does not become effective until a

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61. The deterrent effect on the overzealous actions of federal officials results only to the extent that the officials are aware that they will personally have to satisfy a judgment rendered against them for actions taken in the scope of their employment. Outside of law enforcement officials who are frequently sued and their lawyers, many federal employees probably are unaware of such fact.

62. By definition, a defendant can only be held liable in a *Bivens* action if his acts were undertaken "within the outer perimeter of his [federal] duties." Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

63. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

64. It would, of course, be quite unusual for a judge to state on the record his reluctance to find for the plaintiff simply because of the identity of the defendants. This sentiment has, however, been expressed by numerous observers of *Bivens* actions. Senator Charles E. Grassley summed up this view in hearings on proposals to amend the FTCA to include constitutional torts:

> Federal employees are being increasingly sued for decisions made during the course of a workday, just doing their job. From forest ranger to Director of the National Cancer Institute, from meat inspector to Cabinet officer, our entire Federal work force is potentially liable for decisions made in carrying out Federal missions.

Hearings — S. 829, *supra* note 40, at 2 (statement of Subcommittee Chairman Senator Grassley); *see also* 5 K. DAVIS, *supra* note 11, § 27:41 (2d ed. 1984) (suggesting that courts should always inquire whether a judgment against the employee will be payed by employee or governmental employer); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 60 (1980) (arguing that it is so distasteful to hold government officials personally liable for carrying out the actions of the government that they should not be held liable regardless of the fact that the United States has not waived its sovereign immunity—no remedy at all is better than one against the federal employee).

65. 51 Fed. Reg. 27,021-22 (1986).

judgment is actually rendered.[66] Notwithstanding these limited situations where the government will contribute to the verdict, in the eyes of the judge or the jury, the federal employee is still standing before them without the U.S. Treasury to back up her actions. Therefore, a major stumbling block for the *Bivens* plaintiff is the assumed sovereign immunity of the United States which results in a great reluctance on the part of the factfinder to hold the individual government official financially responsible for an act of government.

C. *The Defense of Qualified Immunity*

As difficult as it is for the *Bivens* plaintiff to overcome the bias resulting from the government's sovereign immunity, it is a different type of immunity which presents his most formidable obstacle to recovery. The defense of qualified immunity has developed into the linchpin of the defense to virtually every *Bivens* action.

1. The Rationale for Qualified Immunity

When a government official is sued for a constitutional tort he typically responds to the complaint by filing a motion to dismiss, contending that he has qualified immunity from such action. The doctrine of qualified immunity is an attempt to reconcile two competing interests. It is designed to permit aggrieved individuals to seek redress for violations of their constitutional rights while at the same time protecting federal officials from the inhibiting effect such suits can create:

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." . . . On the other hand, permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.[67]

By providing defendants with qualified immunity, the Supreme Court has in effect made the right to sue for a constitutional deprivation a conditional right. Under the doctrine of qualified immunity, the plaintiff's ability to seek

66. 28 C.F.R. § 50.15(c)(1) (1987). The Department will entertain a request to indemnify or settle a claim prior to a judgment only in exceptional circumstances. *Id.* § 50.15(c)(3).

67. Anderson v. Creighton, 107 S. Ct. 3034, 3038 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)). As the Court stated in Barr v. Matteo, 360 U.S. 564 (1959):

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Id. at 571.

redress disappears if the federal official who violated his rights was acting in "good faith." The immunity applies regardless of how meritorious the plaintiff's claim may be: "[T]his Court always has recognized, however, that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official."[68] The Supreme Court therefore has struck a balance which admittedly allows legitimate claims of constitutional violations to go unredressed for the "greater good."[69]

2. Absolute Immunity Distinguished

The defense of qualified immunity to a constitutional tort differs from the various forms of absolute immunity which, unlike qualified immunity, impose an unconditional bar to recovery.[70] Persons accorded absolute immunity include judges,[71] prosecutors,[72] legislators,[73] witnesses,[74] and the President.[75] In each of these cases the individual receives unconditional immunity for all acts taken as part of the function the immunity is designed to protect.[76] For instance, a prosecutor will not be protected for actions taken while observing a strip search

68. Westfall v. Erwin, 108 S. Ct. 580, 583 (1988).

69. Judge Learned Hand, in the oft-quoted case of Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), explained the application of the immunity doctrine and how it protects even those federal officials who act out of a wholly vindictive or personal motive:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith. There must indeed be means of punishing public officials who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Id. at 581.

70. For a discussion of the historical basis for official immunity, see Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987).

71. Dennis v. Sparks, 449 U.S. 24, 27 (1980); Pierson v. Ray, 386 U.S. 547, 553-54 (1967). This immunity applies only to "judicial" functions, which do not include a judge's hiring and firing of court personnel. Forrester v. White, 108 S. Ct. 538, 544-46 (1988).

72. Imbler v. Pachtman, 424 U.S. 409, 424-29 (1976).

73. Gravel v. United States, 408 U.S. 606, 616-22 (1972); Tenney v. Brandhove, 341 U.S. 367, 376-77 (1951). The Speech and Debate Clause of the Constitution which provides absolute immunity in this situation does not apply where the alleged wrongful actions are not connected with the legislator's speech and debate function. In Davis v. Passman, 442 U.S. 228, 245-48 (1979), Congressman Passman was held to have only qualified immunity from a sex discrimination claim brought by one of his employees.

74. Briscoe v. LaHue, 460 U.S. 325, 334 (1983).

75. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

76. Forrester v. White, 108 S. Ct. 538, 544 (1988); *Gravel*, 408 U.S. at 617.

since such activities are outside of his prosecutorial role.[77] Absolute immunity is accorded to the above-described classes of individuals regardless of whether the individual is being sued for a common-law or constitutional tort.

Most federal employees not within one of the classifications set out above and who perform discretionary acts within the outer perimeter of their employment are absolutely immune from most common-law tort claims, although not from constitutional torts.[78] Absolute immunity for common-law torts for federal officials has been the general rule since the Supreme Court's 1959 decision in *Barr v. Matteo*.[79] Therefore, unless one is a judge, prosecutor, legislator, witness, or the President, all of whom have absolute immunity to both common-law

77. The question of who, or what functions, should be afforded absolute immunity is said to be derived from history and the common law. Mitchell v. Forsyth, 472 U.S. 511, 521 (1985). The first known pronouncements of judicial immunity in the Supreme Court and a state court in the United States were Bradley v. Fisher, 80 U.S. (13 Wall) 335, 347 (1871), and Yates v. Lansing, 5 Johns. 282 (N.Y. 1810). *See also Nixon*, 457 U.S. at 747 (explaining that the Court's decisions on immunity for government officials have been "guided by" the Constitution, federal statutes, history, and in the absence of explicit constitutional or congressional guidance, from common law and public policy). The result has been an unusual mix of who is accorded absolute immunity. For instance, the chief executive of the United States has absolute immunity from constitutional torts, *id.* at 749, while the chief executive of a state, the governor, does not. Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (qualified immunity is available depending on the scope of discretion and responsibilities of the office). The aides of a Congressman are absolutely immune from constitutional claims, *Gravel*, 408 U.S. at 616-22, while Cabinet officials and the top advisors to the President are not. Mitchell v. Forsyth, 472 U.S. 511, 521 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982).

78. In its last term, the Supreme Court for the first time extended absolute immunity for common-law torts to certain nongovernmental employees. In Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988), the Court held that a government contractor would be immune from common-law tort claims resulting from negligently caused design defects in the products they produce "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 2518. The Court explained that it was in effect extending the discretionary function exception in the FTCA to government contractors. *Id.* at 2517-18.

Arguing that the majority's decision blatantly usurps Congress' role in this area, the dissent in *Boyle* points out that the Court's decision takes the principle of absolute immunity to heights it has not heretofore been:

> The Court—unelected and unaccountable to the people—has unabashedly stepped into the breach to legislate a rule denying Lt. Boyle's family the compensation that state law assures them. This time the injustice is of this Court's own making.
>
> Worse yet, the injustice will extend far beyond the facts of this case, for the Court's newly discovered Government contractor defense is breathtakingly sweeping. It applies not only to military equipment like the CH-53D helicopter, but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans—from NASA's Challenger space shuttle to the Postal Service's old mail cars. The contractor may invoke the defense in suits brought not only by military personnel like Lt. Boyle, or Government employees, but by anyone injured by a Government contractor's negligent design, including, for example, the children who might have died had respondent's helicopter crashed on the beach. It applies even if the Government has not intentionally sacrificed safety for other interests like speed or efficiency, and, indeed, even if the equipment is not of a type that is typically considered dangerous; thus, the contractor who designs a Government building can invoke the defense when the elevator cable snaps or the walls collapse. And the defense is invocable regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the Government, however unreasonably dangerous, were "reasonably precise."
>
> . . . In my view, this Court lacks both authority and expertise to fashion such a rule, whether to protect the Treasury of the United States or the coffers of industry.

Id. at 2518-20 (Brennan, J., dissenting).

79. 360 U.S. 564, 574 (1959); *see also Butz*, 438 U.S. 478, 522 (1978) (Rehnquist, J., concurring

and constitutional claims, most federal employees generally will be accorded absolute immunity when sued for common-law torts and qualified immunity for constitutional torts.[80] This separate treatment exists even when the common-law and constitutional claims arise out of the same set of facts or occurrences.[81]

There has long been some question whether general absolute immunity applies to all common-law torts. Courts have seriously questioned the notion that there should be two separate types of immunity depending on how the claim is pleaded.[82] One explanation may be that because the government has waived sovereign immunity for most common-law claims through the Federal Tort Claims Act, there is no need in most cases to sue individual federal officials for common-law torts. An individual may not, however, sue the government for a constitutional tort and, therefore, must sue the individual employee if he is to obtain any recovery. If that employee were granted absolute immunity, there would be no remedy whatsoever.

The dichotomy between the two types of immunity has been resisted by at least one circuit court of appeals. In *Martin* v. *Malhoyt*[83] the District of Columbia Court of Appeals denied absolute immunity to Federal Park Service police officers accused of assault, battery, false arrest, false imprisonment, and other claims related to defendants' apprehension of plaintiffs. The court concluded that the reasons supporting absolute immunity from common-law torts—to protect federal officials from having to address their time and attention to frivolous lawsuits and to promote aggressive decision making unrestricted by the fear of subjecting oneself to personal liability[84]— are now fully satisfied by the Supreme Court's present formulation of qualified immunity.[85] In the District of Columbia, therefore, qualified immunity applies to both constitutional and common-law torts. The majority view remains, however, that all federal employees are

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and dissenting) (noting that the majority recognizes that executives are absolutely immune from common-law actions as long as they are within scope of authority).

80. *Butz*, 438 U.S. at 507-11.

81. Carlson v. Green, 446 U.S. 14 (1980). One set of acts often gives rise to both common law and constitutional tort claims. For example, an unlawful search may be both a fourth amendment violation and a battery. A violent arrest involving excessive force will result in claims of battery and a fifth amendment due process violation. Extreme medical neglect of a prisoner would cause claims of negligence and an eighth amendment claim of cruel and unusual punishment. *See id.*

82. Absolute immunity to common-law torts was first raised in *Barr*, 360 U.S. at 574. The Supreme Court first applied qualified immunity to a constitutional tort in Pierson v. Ray, 386 U.S. 547, 553-58 (1967), a case against state officials brought under the Civil Rights Statutes, 42 U.S.C. §§ 1981-1988 (1958). Qualified immunity was first applied to constitutional tort claims in a *Bivens* action in *Butz*, 438 U.S. at 504-08. Since that time, commentators and at least one Justice have questioned the use of the two different standards. *See, e.g., Butz*, 438 U.S. at 520 (Rehnquist, J., concurring and dissenting) (noting "the illogic and impracticability of distinguishing between constitutional and common-law claims for purposes of immunity"); 5 K. DAVIS, *supra* note 11, §§ 27:22-27:24 (observing that the Supreme Court has never adequately explained why there should be two different standards for immunity).

83. 830 F.2d 237 (D.C. Cir. 1987).

84. *Barr*, 365 U.S. at 571.

85. *Martin*, 830 F.2d at 250 ("These two concerns, we stress, in the years since *Barr*, have been fully incorporated into the federal qualified immunity doctrine."). The court in *Martin* also noted that the Supreme Court had never accorded absolute immunity from common-law torts to the actions of federal law enforcement officials. *Id.* at 249.

entitled to absolute immunity for most common-law torts.[86]

3. The Application of Qualified Immunity

In order to be entitled to qualified immunity, the federal employee must first establish that he was "acting within the outer perimeter of his employment" and that the actions at issue were "discretionary."[87] The "outer perimeter" of one's federal employment is to be broadly construed.[88] Even malicious actions, if conducted generally while on duty as a government official, are within the "outer perimeter" of one's federal employment and thus are protected by immunity.[89]

Similarly, the requirement that the act at issue be discretionary has also been construed broadly or, more often, simply ignored.[90] While the Supreme Court has recently affirmed the requirement that a federal official's acts must be discretionary in order to be accorded immunity, the Court did little to clarify the standard by which the lower courts are to judge whether an allegedly unconstitutional act was discretionary in nature.[91] If the defendant can satisfy the broadly interpreted "scope" and "discretion" requirements, the court then moves on to apply the test for qualified immunity.

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86. *See, e.g.*, Owyhee Grazing Ass'n v. Field, 637 F.2d 694, 697 (9th Cir. 1981); Miller v. DeLaune, 602 F.2d 198, 200 (9th Cir. 1979).

87. *Butz*, 438 U.S. at 522 (Rehnquist, J., concurring and dissenting); *Barr*, 360 U.S. at 574.

88. *See, e.g.*, Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980). The court in *Simons* stated:

> The Supreme Court has declared that, with respect to immunity, 'jurisdiction' ought to be defined broadly to include acts 'having more or less connection with the general matters committed by law' to the official's supervision. In other words, an act is within the official's jurisdiction if it is not 'manifestly or palpably beyond his authority.'

Id. at 786 (quoting Spalding v. Vilas, 161 U.S. 482, 498 (1896)). This broad construction applies even when the employee's conduct was clearly misguided or wrongful. Evans v. Wright, 582 F.2d 20, 21 (5th Cir. 1978) (per curiam); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). A supervisor accused of battery on his employee has been held to be acting within the scope of his authority. Dretar v. Smith, 752 F.2d 1015, 1018 (5th Cir. 1985). *But see* Araujo v. Welch, 742 F.2d 802 (3d Cir. 1984) (battery of subordinate found to be beyond the outer perimeter of a federal employee's duty); McKinney v. Whitfield, 736 F.2d 766 (D.C. Cir. 1984) (federal employees exceed outer perimeters of responsibilities when they use physical force to compel obedience of subordinates).

89. The Supreme Court in *Butz* quoted from Spalding v. Vilas, 161 U.S. 483 (1896), to help explain the expansive interpretation of the "outer perimeter" requirement: "Because the Postmaster General in issuing the circular in question 'did not exceed his authority, nor pass the line of his duty,' it was irrelevant that he might have acted maliciously." *Butz*, 438 U.S. at 492 (quoting *Spalding*, 161 U.S. at 499).

90. *See, e.g.*, Williamson v. United States Dep't of Agric., 815 F.2d 368, 380 (5th Cir. 1987); Poolman v. Nelson, 802 F.2d 304, 308 (8th Cir. 1986).

91. In Westfall v. Erwin, 108 S. Ct. 580, 584 (1988), the Supreme Court again declared that only federal officials performing discretionary acts are entitled to absolute immunity. The Court found defendants' decision to store toxic soda ash at an Army depot to be a nondiscretionary act and denied defendants immunity for the injuries suffered by plaintiff. *Id.* at 585. The Court reasoned that such a decision would not generally be inhibited by the threat of a lawsuit and therefore was not discretionary. *Id.* Beyond this, however, the Court did little toward creating any type of uniform standard by which to judge what acts are discretionary for the purpose of applying official immunity. Instead, the Court reverted to the rather nebulous balancing test it first announced in Doe v. McMillan, 412 U.S. 306 (1973): "[A]bsolute immunity for federal officials is justified only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.' " *Westfall*, 108 S. Ct. at 583 (quoting *Doe*, 412 U.S. at 320).

As originally formulated, the qualified immunity or good faith defense was measured by a two-prong test. In *Wood v. Strickland*[92] the Supreme Court explained that the defendant was entitled to immunity from suit if he could establish both objective and subjective good faith.[93] A federal official would be presumed to be immune unless it could be shown that 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 or other injury."[94]

The two-prong test for immunity requiring the official to establish that he did not knowingly violate an individual's constitutional rights and that his actions were not those which a reasonable official would have known to be unconstitutional, could in most cases be easily satisfied. Moreover, the Supreme Court established a procedural framework which would make it as likely as possible that a federal official could obtain immunity under the *Wood v. Strickland* test. In addressing the issue of when the question of qualified immunity should be decided, the Court admonished that "damages suits concerning constitutional violations need not proceed to trial but can be terminated on a properly supported motion for summary judgment based on the defense of immunity."[95] The Supreme Court warned the lower courts to apply the Federal Rules of Civil Procedure firmly, so as to ensure that insubstantial *Bivens* suits were dismissed at the initial stages of the litigation.[96]

The Court's direction to the lower courts to decide the immunity issue on pretrial motions would not appear to be particularly onerous if the parties were on equal footing with regard to such motions. However, in deciding such motions the courts are generally prohibited from permitting plaintiffs to engage in any discovery. The Supreme Court has mandated that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed."[97] The premise behind prohibiting discovery is that qualified immunity protects the government employee not only from a monetary judgment but also from being subjected to

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92. 420 U.S. 308 (1975).

93. *Id.* at 321.

94. *Id.* at 322.

95. *Butz*, 438 U.S. at 508; *see also* Harlow v. Fitzgerald, 457 U.S. 800, 819 n.35 (1982) (the Court reiterated this "admonishment"); Zweibon v. Mitchell, 720 F.2d 162, 167 (D.C. Cir. 1983) (citing *Harlow*, 457 U.S. 800 (1982) for this principle), *cert. denied*, 469 U.S. 880 (1984).

96. Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

Butz, 438 U.S. at 507-08.

97. *Harlow*, 457 U.S. at 818; *see also* Mitchell v. Forsyth, 472 U.S. 511 (1985) (indicating that frivolous discovery should be avoided); Smith v. Nixon, 807 F.2d 197, 200 (D.C. Cir. 1986) (exalting the rule in *Harlow* preempting discovery); Ellsberg v. Mitchell, 807 F.2d 204, 207 (D.C. Cir. 1986), (discovery should not be allowed in light of inadequate complaint), *cert. denied*, 108 S. Ct. 197 (1987).

suit at all.[98] Thus, without any discovery, the *Bivens* plaintiff must establish that the government official violated his constitutional rights and that he was not acting in "good faith," all just in order to avoid summary judgment.[99]

In creating the "good faith" test for qualified immunity the Supreme Court realized it was weighted in favor of the defendant. Recognizing that it had provided maximum protection for the federal employee through the *Wood v. Strickland* two-prong text, the Court admitted that "[a]ny lesser standard would deny much of the promise of § 1983 [and *Bivens* actions]."[100] It did not take long, however, for the Court to alter the standard so as to tip the scales even further in favor of the government official.

In *Harlow v. Fitzgerald* the Supreme Court found the "subjective element of the good-faith defense frequently . . . incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial."[101] The Supreme Court recognized that the lower courts had found it virtually impossible to follow its directive that qualified immunity be decided on summary judgment, without discovery, when one-half of the good faith test involved the fact-specific question of the subjective intent of the defendant. In response to this dilemma, the Supreme Court simply eliminated the subjective element of the test.[102]

The new test for applying qualified immunity, termed the "objective reasonableness" or "clearly established" test, holds that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[103] Under the new test, a federal official who knew he was violating the clearly established constitutional rights of the plaintiff or who acted with malicious intent to violate those rights would still be immune so long as a reasonable official would not have been aware that the actions at issue violated clearly established law.[104] Thus, a qualified immunity test already tilting toward the defendant (to be decided on summary judgment, without discovery) was further tilted in that direction with the elimination of the subjective element of the "good faith" test.

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98. "The entitlement is an *immunity from suit* rather than a defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526; *see also Harlow*, 457 U.S. at 816 (describing the general and special costs of subjecting officials to risks of trial).

99. The defense of qualified immunity is an affirmative defense which must be pleaded in the defendant's initial response to the complaint. Gomez v. Toledo, 446 U.S. 635, 640 (1980). As an affirmative defense, the burden of proof technically lies with the government official claiming to be immune from suit. *Id.* In practice, however, it is often the plaintiff who must disprove immunity. When a defendant makes a colorable (but not necessarily convincing) argument for immunity, the judge is almost precluded from denying the defendant's motion to dismiss since to do so and to send the case to trial or even discovery destroys the purpose of the immunity. *See supra* note 98.

100. *Wood*, 420 U.S. at 322.

101. *Harlow*, 457 U.S. at 815-16.

102. *Id.* at 816-19; *see also Mitchell*, 472 U.S. at 517 (explaining that in *Harlow* the Court had "purged [the] qualified immunity doctrine of its subjective components").

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

104. "*Harlow* precludes monetary relief for a violation of constitutional rights by an officer who knows he is acting unlawfully, so long as the law enforcement community in general considers his conduct arguably proper." Halperin v. Kissinger, 807 F.2d 180, 186 (D.C. Cir. 1986).

With the subjective element gone, the task of applying the clearly established test on summary judgment and without discovery has proved easier but still difficult. First, the courts are somewhat unclear on how to determine whether the law was clearly established at the time of the incident. The Supreme Court has already ruled that a government official does not necessarily violate "clearly established" law even though he violated an agency regulation governing his conduct.[105]

Instead, the test apparently requires that some case law exist declaring conduct of the type at issue to be unconstitutional. The question is "what type of case law?" Must there be a Supreme Court case on point, or a circuit court case, or some district court cases, and how many? The Supreme Court has attempted to provide some guidance in this area. In *Anderson v. Creighton*[106] the Court explained:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.[107]

While the Court has arguably set up a standard by which to judge whether prior law was clearly established, judges will certainly have to wrestle with this difficult question on a case-by-case basis. Because immunity applies unless the official violated law that was "clearly established," any uncertainty will provide immunity for the defendant. Understandably, commentators have criticized the new test as unduly biased against the victim of the constitutional tort.[108]

Even when established law is clear, many courts have found it difficult to determine, without discovery, whether a reasonable person would have believed he was violating clearly established law when the circumstances surrounding the alleged unconstitutional actions are in dispute.[109] For instance, when an FBI agent swears in an affidavit that he conducted a warrantless search with probable cause and under exigent circumstances, and the plaintiff avers that there was no reason to believe he had committed a crime or that he would be leaving the scene or that evidence would be destroyed, how does a judge determine

105. Davis v. Scheuer, 468 U.S. 183, 192-93 (1984). The Supreme Court held that defendant superior officers did not violate clearly established law under the due process clause even though they failed to provide a hearing to plaintiff employee whom they fired. The Court so ruled despite defendants' violation of a government regulation directing them to conduct a thorough investigation and to provide the employee with the opportunity to submit a written statement in his defense prior to the firing. The Court stated that government regulations simply have no bearing on whether the constitutional right was clearly established, even where, as in this case, the government regulation was arguably an attempt to set down the established law in a personnel handbook so that it would be available to the myriad workers who do not closely follow Supreme Court decisions. *Id.* at 194-95.

106. 107 S. Ct. 3034 (1987).

107. *Id.* at 3039 (citing *Mitchell*, 472 U.S. at 535 n.12).

108. *See* 5 K. DAVIS, *supra* note 11, § 27:24; Comment, *supra* note 36, at 911-13 nn.57-61.

109. *See Harlow*, 457 U.S. at 821 (Brennan, J., concurring) (stating that under the clearly established standard discovery may sometimes be necessary); *see also* McSurely v. McClellan, 697 F.2d 309, 320-21 (D.C. Cir. 1982) (summary judgment for defendant held inappropriate), *cert. denied*, 474 U.S. 1005 (1985).

whether a reasonable law enforcement officer would have known he was violating clearly established law by conducting a warrantless search? Obviously, the answer would differ depending on which version of facts the judge believed. Yet, the judge is directed to decide the issue on summary judgment, without discovery.

Faced with the same dilemma all over again, the Supreme Court may be ready to concede that its mandate to decide the qualified immunity question without discovery is, under certain circumstances, unworkable. In *Anderson v. Creighton* the Court reiterated that discovery concerning the subjective intent of the FBI agent accused of an unconstitutional search is irrelevant.[110] The Court found that the defendant would be immune if his acts, as pleaded by plaintiff, did not violate clearly established law. In a footnote at the end of the opinion, the Court explained that if the defendant would be immune under his own version of the facts, but would be found to have violated clearly established law under the plaintiff's version, then limited discovery may become necessary.[111] Thus, a *Bivens* plaintiff with a well-pleaded complaint may now stand a slightly better chance of surviving the initial summary judgment motion and obtaining some limited discovery.[112] Qualified immunity, however, remains the most substantial obstacle to recovery by a constitutional tort plaintiff.

Even if the plaintiff survives the formidable hurdle of a motion for summary judgment or a motion to dismiss based on qualified immunity, she still may not proceed to proving the substance of her allegations. Because qualified immunity protects the government official from any involvement in a lawsuit, a denial of a motion to dismiss or for summary judgment based on immunity is immediately appealable under the collateral order doctrine.[113] In addition, to further protect defendants from having to submit to discovery and trial, many courts will grant a stay of all discovery and trial court proceedings pending the outcome of the

110. *Anderson*, 107 S. Ct. at 3038-39.

111. The footnote reads:

> Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.

Id. at 3042-43 n.6 (citation ommitted).

112. If the plaintiff reaches this stage he still encounters obstacles which are not present in a lawsuit against nonfederal officials. For example, in order to depose an employee of the Justice Department, including an agent of the Federal Bureau of Investigation, Immigration and Naturalization, or Drug Enforcement Agency who is the subject of the suit, the plaintiff must first submit a request to the Justice Department for the deposition, outlining the questions which will be asked. 28 C.F.R. § 16.21 (1987).

113. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). This may not be the case, however, where the action also involves injunctive claims. As the court reasoned in Prisco v. United States, 851 F.2d 93 (3d Cir. 1988), because qualified immunity does not apply to injunctive claims, and since the case would have to go forward on the injunctive claims regardless of how the court decides the immunity issue, the purpose for allowing an immediate appeal (to free the official of the rigors and harassment of a trial) is no longer applicable since the official must sit through the same trial and present the same evidence to defend against the injunctive claims. *Id.* at 95-96.

interlocutory appeal. Therefore, a *Bivens* plaintiff with a substantial and well-grounded constitutional tort claim very often has to wait several years before she can proceed past the complaint stage of her case.

D. *Additional Roadblocks Not Present In A Section 1983 Action*

As discussed earlier in this Article,[114] the ability to sue a federal employee for a constitutional tort is not a right accorded by statute, such as 42 U.S.C. § 1983. It is, instead, a right created by the courts. As such, the courts may burden this right with restrictions which do not apply to a statutorily created cause of action. A *Bivens* cause of action is so burdened.

Although the two actions should be similarly interpreted,[115] certain obstacles are present in a *Bivens* action which do not apply to a section 1983 suit. A *Bivens* plaintiff who has had his constitutional rights infringed by a federal official in violation of clearly established law such that immunity will not be afforded to the government official, will still be deprived of recovery under certain circumstances. As the Supreme Court explained:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.[116]

These restrictions, the "special factors" and "alternative remedy" restrictions, do not apply in a section 1983 case.

1. The "Alternative Remedy" Restriction

If Congress has created a comprehensive remedy which adequately recompenses an individual for the deprivation of her constitutional rights, the plaintiff will be denied any right to seek additional remedies under *Bivens*. Of course, if the alternative remedy is truly adequate, the plaintiff would have no need to seek additional remedies. Whether the individual obtains an award through an administrative action or from a constitutional *Bivens* action should not matter, as long as the recovery from each type of action is comparable.

In *Carlson v. Green*[117] plaintiff had potential actions for wrongful death

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114. *See supra* text accompanying notes 9-10.

115. *See supra* note 12.

116. Carlson v. Green, 446 U.S. 14, 18-19 (1980). Although this principle was announced in *Bivens, Davis v. Passman,* and *Carlson v. Green,* it did not, according to the Supreme Court, become a holding—as opposed to mere dictum—until the decisions of Chappell v. Wallace, 462 U.S. 296 (1983), and Bush v. Lucas, 462 U.S. 367 (1983). *See* United States v. Stanley, 107 S. Ct. 3054, 3062-63 (1987).

117. 446 U.S. 14 (1980).

under the FTCA[118] and under the eighth amendment for cruel and unusual punishment. Both causes of action were based on the alleged extreme neglect of the medical needs of plaintiff's son while in federal prison. The Supreme Court, examining the FTCA, found no evidence that Congress had intended the statute to be an exclusive remedy for such actions. The Court, therefore, ruled that the plaintiff could maintain her common-law and constitutional actions simultaneously if she so chose.[119]

In *Brown v. General Services Administration*[120] plaintiff was a federal employee who brought suit directly under the Constitution for alleged denial of promotions based on his race. The Supreme Court reviewed section 717 of the Civil Rights Act of 1964,[121] a statutory scheme which presumably provided damages for such unconstitutional activity. In this case the Court found that Congress *had* intended that the statute serve as the exclusive, preemptive administrative remedy for the redress of federal employment discrimination. Therefore, a federal employee suing for discrimination on the job has no *Bivens* cause of action and instead is limited to administrative remedies.[122]

In theory, the application of the "alternative remedy" restriction should not deprive *Bivens* plaintiffs of a remedy they would otherwise have available through an action based directly on the Constitution. This restriction does not apply, after all, unless Congress has provided for an alternative and comparable remedy. In practice, however, the administrative remedy provided by Congress in a given case may have a very different result than an alternative constitutional tort action. For instance, in an administrative action the plaintiff loses her right to a jury trial. A hearing before an administrative judge may have a result very different from a full trial before a jury, particularly when the central issue is overreaching or abuse by the government. Additionally, punitive damages are generally not available in an administrative action as they are in a *Bivens* action.[123]

Consequently, under the "alternative remedy" restriction the *Bivens* plaintiff loses at least some of the rights which are available to him in a suit directly under the Constitution. The loss of these rights is of special concern when one considers that the Supreme Court has failed to explain adequately how a right derived directly from the Constitution can be abrogated by an act of Congress.[124]

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118. 28 U.S.C. §§ 2671-2680 (1982).

119. *Carlson*, 446 U.S. at 20.

120. 425 U.S. 820 (1976).

121. 42 U.S.C. § 717 (1964). Section 717 was added to the Civil Rights Act of 1964 by § 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16.

122. *Id*; *see* Purtill v. Harris, 658 F.2d 134 (3d Cir. 1981), *cert. denied*, 462 U.S. 111 (1983); White v. General Servs. Admin., 652 F.2d 913 (9th Cir. 1981).

123. *See* Smith v. Wade, 461 U.S. 30, 35 (1983); *Carlson*, 446 U.S. at 22.

124. Government defendants have argued from time to time that a *Bivens* action should not lie whenever any alternative remedy exists, not only when Congress expressly creates an alternative and exclusive remedy. *See* Tarpley v. Greene, 684 F.2d 1, 10 (D.C. Cir. 1982); Hearth, Inc. v. Department of Pub. Welfare, 617 F.2d 381 (5th Cir. 1980) (per curiam). This argument is based in part on the *Bivens* case itself where, in creating the cause of action, the Supreme Court took special note of the fact that for "people in Bivens' shoes, it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan,

2. The "Special Factors Counseling Hesitation" Restriction

The second and more confusing method by which courts can restrict *Bivens* actions, but not a section 1983 action, is through a determination that certain factors counsel hesitation in implying a *Bivens* cause of action.[125] In other words, courts can deny the right to sue a federal employee for a constitutional tort when "special factors" are present, regardless of whether there is any alternative remedy.[126]

The problem is that courts have provided little guidance on what special factors would counsel hesitation in implying a *Bivens* action. The Supreme Court has not until very recently even discussed the criteria for determining when such factors would be present. As the Court recently stated, "there are varying levels of generality at which one may apply 'special factors' analysis."[127] What has become clear, however, is that the scope of the special factors defense is broadening, thereby further restricting the right of the victim of a constitutional deprivation to obtain relief.

In *Chappell v. Wallace*[128] the Court held that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."[129] This holding was subsequently extended beyond the serviceman-superior relationship to restrict all constitutional tort actions arising out of activity incident to military service.[130] The Supreme Court found that the unique need within the military to maintain discipline and order was sufficient to prohibit *Bivens* actions.[131] Therefore, a serviceman who is illegally searched or is used as the subject of an LSD experiment without his knowl-

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J., concurring); *see also* Davis v. Passman, 442 U.S. 228, 246-47 (1979) (emphasizing that the plaintiff had no alternative remedy since a Congressional employee was not subject to the statutory remedies available to other federal employees). This argument has thus far not been accepted by the courts. *See, e.g., Carlson*, 446 U.S. at 22 (allowing plaintiff to pursue constitutional claims against the federal employees and a Federal Tort Claims action against the United States Government based on the same occurrence). The Court in *Carlson* did, however, recognize that the common-law remedy in that case was not a truly "adequate" one. *Id.* at 27 (Powell, J., concurring). The Supreme Court has embraced the alternative common-law remedy argument in a different context. The Court has determined that a plaintiff may fail to plead a violation of the due process clause when there is an adequate alternative common-law remedy to the deprivation of life, liberty, or property. Parratt v. Taylor, 451 U.S. 527 (1981). This argument has, therefore, restricted *Bivens* actions brought for violations of the fifth amendment.

125. *Bivens*, 403 U.S. at 396.

126. [I]t is irrelevant to a "special factors" analysis whether the laws currently on the books afford Stanley, or any other particular serviceman, an "adequate" federal remedy for his injuries. The "special facto[r]" that "counsel[s] hesitation" is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.

United States v. Stanley, 107 S. Ct. 3054, 3063 (1987); *see also* Bush v. Lucas, 462 U.S. 367, 388-89 (1983) (although the congressionally created alternative remedy was one of the factors counseling hesitation, the Court assumed for the sake of its holding that such civil service remedies are not as effective as a damages remedy and do not fully compensate an individual for the harm).

127. *Stanley*, 107 S. Ct. at 3062.

128. 462 U.S. 296 (1983).

129. *Id.* at 305.

130. *Stanley*, 107 S. Ct. at 3062.

131. *Id.* The Court also found important to its "special factors" analysis the Constitution's grant to Congress of authority over the military. *Id.*

edge[132] has no right to sue for the violation of his constitutional rights, no matter how outrageous the conduct or how clearly established the constitutional right which was violated.[133]

In *Bush v. Lucas*,[134] decided the same day as *Chappell*, plaintiff, an engineer at NASA, brought suit under the first amendment, alleging that he had been demoted because of his critical statements about the agency. Unlike *Chappell*, the Court found that the need for discipline in nonmilitary federal employment was, although important, not by itself enough to prohibit a *Bivens* action. The Court, however, held that this factor, along with the expertise of Congress in matters of federal employment and the comprehensive alternative remedies Congress had provided for such action, was enough to counsel hesitation in permitting a *Bivens* action.[135]

After *Chappell* and *Bush* one would discern that a *Bivens* action would be unavailable only where the maintenance of such action would be extremely disruptive to the operation of government, such as in the military or federal employment areas, and where Congress had provided both a particular expertise and a comprehensive scheme of remedies. The special factors defense was, however, broadened in a recent decision of the Supreme Court.

In *Schweiker v. Chilicky*[136] the plaintiffs were handicapped individuals who were wrongfully deprived of benefits under Title II of the Social Security Act, allegedly without due process.[137] Although plaintiffs eventually recovered their entitled benefits under the statute, they brought a *Bivens* action seeking consequential damages and damages for emotional distress resulting from being deprived of their entitled benefits for so long, in some cases for over a year.

The Court assumed for the purposes of its opinion that plaintiffs' due process rights had been denied and acknowledged "that suffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedied by the 'belated restoration of back benefits.' "[138] Despite recognizing that the "trauma to respondents, and thousands . . . like them, must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens,"[139] the Court refused to recognize a *Bivens* cause of action. The Court reasoned that Congress is the body charged with administering social security programs and it has not seen fit to provide remedies for a constitutional deprivation.

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132. *Id.* at 3061-62.

133. This restriction is based on the *Feres* doctrine, which generally prohibits a serviceman from suing for injury connected to his military service. Feres v. United States, 340 U.S. 135 (1950); *see* United States v. Johnson, 107 S. Ct. 2063 (1987).

134. 462 U.S. 367 (1983).

135. *Id.* at 389. The Court described in great detail the various statutory remedies available to a civil servant for employment actions. *Id.* at 380-89. While these alternative remedies were part of the Court's "special factors" analysis, the Court held that the remedies provided under these statutes, although comprehensive, were not exclusive and therefore the "alternative remedy" prohibition did not apply. *Id.*

136. 108 S. Ct. 2460 (1988).

137. 42 U.S.C. §§ 401-433 (1982).

138. *Schweiker*, 108 S. Ct. at 2463.

139. *Id.*

The Court's decision in *Schweiker* stands for the proposition that "Congressional authority over a given subject is itself a 'special factor' that 'counsel[s] hesitation.' "[140] Unlike *Chappell* and *Bush*, the Court did not find it necessary for Congress to have exhibited some expertise in the area of the legislation at issue or for a *Bivens* action to be particularly disruptive, as in the areas of federal and military employment. *Schweiker* seems to hold that if the matter is in Congress' domain, a *Bivens* remedy will not be available, regardless of whether the relief provided by Congress contemplates damages for the violation of constitutional rights.[141]

The Supreme Court in *Schweiker* did not necessarily define the outer limits of the types of special factors which would prohibit a *Bivens* action. One can only speculate as to what factors in the future will be sufficient to prohibit an aggrieved individual from maintaining a constitutional action to vindicate his rights. The special factors defense remains, then, as another tool which courts may use in other factual settings to further restrict the viability of a *Bivens* action.[142]

E. *Avenues of Relief Available to Section 1983 Plaintiffs Which Are Denied to* Bivens *Plaintiffs*

A *Bivens* plaintiff is not only burdened with restrictions such as those outlined above, which do not apply to an individual suing under section 1983. There also exist certain avenues or opportunities available to a section 1983 plaintiff which are denied to the *Bivens* plaintiff.

1. Governmental Liability

A constitutional tort plaintiff bringing a section 1983 action for a constitutional transgression perpetrated by a state employee may not recover damages from the state itself. The Supreme Court has held that, absent a waiver, each of the fifty state governments has sovereign immunity from constitutional torts.[143] Unlike the immunity which has been applied to the federal government, immunity for state governments is derived directly from the United States Constitution under the eleventh amendment.[144]

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140. *Id.* at 2472 (Brennan, J., dissenting).

141. Congress need not necessarily address and reject a suggestion of damages for a violation of constitutional rights for the congressionally designed remedy to preclude a *Bivens* action. "[T]he concept of 'special factors counselling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional *inaction* has not been inadvertent." *Id.* at 2461 (emphasis added).

142. For additional discussion of the effect of the "alternative remedy" and "special factors" prohibitions on a *Bivens* action, see Smith, *Bivens Actions for Federal Employees in the Aftermath of* Bush v. Lucas*: Which Remedies for Whom?*, 14 BALT. L. REV. 413 (1985); Steinman, *Backing Off* Bivens *and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269 (1984); Note, *Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution Is Necessary: The Changing Scope of the* Bivens *Action*, 19 GA. L. REV. 683 (1985).

143. Quern v. Jordan, 440 U.S. 332 (1979); Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 n.54 (1978); Edelman v. Jordan, 415 U.S. 651 (1974).

144. The eleventh amendment provides: "The Judicial power of The United States shall not be

Sovereign immunity accorded states under the eleventh amendment is not impenetrable. It may be waived by the states or by an act of Congress, at least with regard to matters of federal concern.[145] A waiver of sovereign immunity, whether by the states or by Congress, must be express.[146] The Supreme Court has determined that, because the Civil Rights Statutes provide for damages against "persons," Congress did not intend to waive sovereign immunity for constitutional torts committed by states.[147] Therefore, state governments are not subject to damages suits for constitutional torts committed by state employees.

With the advent of the modern era of the constitutional tort, municipalities were granted the same sovereign immunity afforded to states. In *Monroe v. Pape*[148] the Supreme Court held that municipalities, like states, were not "persons" as that term is used under 42 U.S.C. §§ 1981-1988 and were therefore protected from suit.[149] In 1978 the Court reexamined the legislative history of the Civil Rights Act and found that Congress had in fact intended the Act to apply to local governments.[150] Since city and local governments are "persons" under 42 U.S.C. § 1983, they are subject to money judgments for violating the constitutional rights of individuals.[151]

A municipality is not liable for all constitutional torts committed by its employees. It is only liable for constitutional deprivations resulting from some "policy" or "custom" of the local government.[152] The municipality's policy or custom must have been involved in the constitutional deprivation or have been the moving force behind it.[153] This involvement would include a city council taking action to fire a government employee without a proper hearing[154] or can-

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construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI; *see infra* text accompanying notes 215-32, (discussing the sovereign immunity of states under the eleventh amendment).

145. Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

146. *Fitzpatrick*, 427 U.S. at 445.

147. Quern v. Jordan, 440 U.S. 332 (1979); *Monell*, 436 U.S. at 658. The Court in *Quern* stated:

> [Section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.

Quern, 440 U.S. at 345.

148. 365 U.S. 167 (1961).

149. *Id.* at 191-92.

150. *Monell*, 436 U.S. at 690; *accord* Owen v. City of Independence, 445 U.S. 622, 635 (1980); Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 277-79 (1977). The determination of whether a local government or municipality has sovereign immunity from a constitutional tort is separate from the question of whether such entity may assert a defense of qualified immunity from such a claim. In *Owen* the Supreme Court, addressing this latter question, ruled that there was no basis for according qualified immunity to a municipality. *Owen*, 445 U.S. at 650; *see Monell*, 436 U.S. at 690-91; *infra* text accompanying notes 232-37.

151. *Owen*, 445 U.S. at 635; *Monell*, 436 U.S. at 690.

152. *Owen*, 445 U.S. at 633; *Monell*, 436 U.S. at 694.

153. Kentucky v. Graham, 473 U.S. 159, 166 (1985) (citing Oklahoma City v. Tuttle, 471 U.S. 808, 817-18 (1985)); Polk County v. Dodson, 454 U.S. 312, 326 (1981); *Monell*, 436 U.S. at 694).

154. *Owen*, 445 U.S. at 622.

celling a license for a concert based on the content of the performance.[155]

In order for a municipality to incur liability the "policy" or "custom" does not have to be a long-practiced one, but can be a one-time decision. Moreover, it need not be that of the ultimate governing authority of the local government. In *Pembaur v. Cincinnati*[156] the Supreme Court found the city liable where the city prosecutor advised police officers to search the defendant's office in order to find and compel the appearance of two grand jury witnesses who had failed to answer subpoenas. The Court emphasized that municipal liability will attach for a policy decision relating to a single incident as long as the person making the decision had appropriate authority.[157]

Governmental (municipal) liability in a section 1983 action is significant for a number of reasons. First, it provides a deep pocket. This is important not only so that there will be funds to pay off a successful plaintiff but because it also likely creates more successful plaintiffs by alleviating the reluctance of judges and juries to hold an individual employee liable for carrying out his governmental duties.[158] With a clear constitutional violation, the trier of fact will be more willing to find liability if a governmental entity is going to pay the judgment.

More importantly, seeking redress from a municipality avoids the largest stumbling block to a constitutional tort recovery: qualified immunity. The Supreme Court has held that, unlike the government employee whose actions are at issue, a municipality may not assert the defense of qualified immunity.[159] In a section 1983 case, the plaintiff may recover from a local government when the government officials who performed the unconstitutional acts would be immune.

This was precisely the case in *Pembaur v. Cincinnati*.[160] Defendants' conduct in *Pembaur* was not definitively declared to be unconstitutional until several years after the incident but before the Supreme Court decided the case. Because the law was not clearly established at the time of the incident, the individual officers and the city attorney were held to be immune. The city, on the other hand, was held liable because the actions taken were in fact unconstitutional, even though the Supreme Court did not declare them to be so until sev-

155. Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

156. 475 U.S. 469, 473 (1986).

157. Whether the individual making the decision is a "policy-making official" who would subject the governmental entity to liability by virtue of his actions is an issue of state law. It "is not a question of federal law and it is not a question of fact in the usual sense." City of St. Louis v. Praprotnik, 56 U.S.L.W. 4201, 4204-05 (March 1, 1988).

Compare Praprotnik with Oklahoma City v. Tuttle, 471 U.S. 808 (1985), *distinguished in Pembaur*, 475 U.S. at 482 n.11. In *Tuttle* plaintiff alleged that the police officer's use of excessive force violated the decedent's due process rights. She further alleged that the city was liable by virtue of its "policy" of failing to provide adequate training to its officers in the use of force. The Court held that the action at issue was not taken pursuant to a "policy" of the city. At the same time, the Court found that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*." *Tuttle*, 471 U.S. at 823-24.

158. *See supra* text accompanying notes 54-66.

159. Kentucky v. Graham, 473 U.S. 159 (1985); *Owen*, 445 U.S. at 633; *see infra* text accompanying notes 237-38 for a discussion of the rationale for this ruling.

160. 475 U.S. 469 (1986).

eral years later. This result could not occur in a *Bivens* action; if the federal officials have qualified immunity there can be no recovery.

2. Attorneys' Fees

In 1975 the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*,[161] upholding the "American Rule" that a prevailing party is not, under ordinary circumstances, entitled to attorneys' fees.[162] The Court rejected the notion that fees should be provided on a more liberal basis in civil rights cases in order to promote the ability of citizens to seek redress for the violation of such rights—the so-called "private attorney general" argument.[163]

In response to *Alyeska*, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, codified as part of the Civil Rights Act at 42 U.S.C. § 1988.[164] The Act allows a court, in its discretion, to grant attorneys' fees to the prevailing party in an action brought under the Civil Rights Statutes.[165] It was Congress' intent by enacting the statute to promote the concept of the "private attorney general."[166] Although the statute is worded generally, the courts have consistently provided attorneys' fees to successful section 1983 plaintiffs as a matter of course, even when the fees far exceed the judgment.[167]

Although section 1988 provides for attorneys' fees in civil rights actions, it applies only in those actions brought directly under the Civil Rights Statutes. While a *Bivens* action is essentially equivalent to a section 1983 action, a *Bivens* plaintiff, because he does not bring his action under the Civil Rights Statutes, may not obtain attorneys' fees under section 1988.[168]

Left with only the common-law American Rule which generally provides

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161. 421 U.S. 240 (1975).

162. *Id.* at 247.

163. *Id.* at 271.

164. *See* Riverside v. Rivera, 477 U.S. 561, 567 (1986).

165. 42 U.S.C. § 1988 (1981) in part reads:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

166. As the Senate reported on the bill:

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. REP. NO. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. AND ADMIN. NEWS 5908, 5910.

167. *See, e.g., Riverside*, 477 U.S. 561 (Court upheld an award of $245,456.25 in attorneys' fees when judgment in favor of plaintiffs was $33,350).

168. Martin v. Heckler, 773 F.2d 1145, 1147 (11th Cir. 1985) (en banc); Unification Church v. I.N.S., 762 F.2d 1077, 1079 (D.C. Cir. 1985); Premachandra v. Mitts, 753 F.2d 635, 637 (8th Cir. 1985) (en banc); Lauritzen v. Lehman, 736 F.2d 550, 552 (9th Cir. 1984).

attorneys' fees only if the other side's position is frivolous or fraudulent, *Bivens* plaintiffs have sought attorneys' fees under the Equal Access to Justice Act (the "Act").[169] This Act provides for attorneys' fees against the United States in any civil action (a) against the United States if the Court finds the government's position not to have been substantially justified,[170] or (b) against the United States or any officer or agency thereof, to the same extent that any other party would be liable under the common law or under the terms of any statute which provides for fees.[171] Attempts by *Bivens* plaintiffs to obtain attorneys' fees under the Act have generally proven unsuccessful.[172]

The first problem with application of the Act to *Bivens* cases is that, unlike section 1988, which provides for fees from the actual defendant,[173] the Act provides for fees only from the United States, which of course is never a party to a *Bivens* action.[174] This difference, in essence, eliminates the Act's more liberal provision, 28 U.S.C. § 2412(d)(1)(A), because it requires that the United States be a party to the action before it pay attorneys' fees.[175]

Subsection (b) of the Act does provide for fees when the defendant is an official of the United States sued in his official capacity, but only "to the same extent that any other party would be liable under the common-law or under the

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169. 28 U.S.C. § 2412 (1986).

170. 28 U.S.C. § 2412(d)(1)(A) provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Id.

171. 28 U.S.C. § 2412(b) states:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Id; *see* Pierce v. Underwood, 101 L. Ed. 2d 490 (1988) (Supreme Court's most recent explanation of this provision).

172. *See* cases cited *supra* note 168; Hall v. United States, 773 F.2d 703 (6th Cir. 1985); Grace v. Burger, 763 F.2d 457 (D.C. Cir. 1985). *But see* Boudin v. Thomas, 732 F.2d 1107 (2d Cir. 1984) (suggesting that the Act would provide for such fees. The court, however, based this suggestion on several district court cases from other circuits which were later reversed on the attorneys' fees issue).

173. *See* Kentucky v. Graham, 473 U.S. 159 (1985) (holding that § 1988 did not permit plaintiffs to recover damages from the state when judgment was against individual state employees in their individual capacities); *cf.* Pulliam v. Allen, 466 U.S. 522 (1984) (holding that judicial immunity does not bar an award of attorneys' fees under § 1988 when the plaintiff is a prevailing party and obtains injunctive relief).

174. *See supra* notes 169-71 and accompanying text. The Act is a partial waiver of the government's sovereign immunity and, as such, must be strictly construed in favor of maintaining immunity not specifically and clearly waived. Ruckelshaus v. Sierra Club, 463 U.S. 680, 686 (1983).

175. 28 U.S.C. § 2412(d)(1)(A) is more liberal than § 2412(b). Subsection (d)(1)(A) states that a court shall award fees unless the court finds that the position of the United States was "substantially justified." Subsection (b) allows a court to award fees in its discretion and then only in accord with common law rules as to when fees should be awarded. *See supra* notes 170-71 for full text of statutes.

terms of any statute which specifically provides for such an award."[176] Since 42 U.S.C. § 1988 specifically provides for an award of fees only in actions brought under 42 U.S.C. §§ 1981-1986, there is no statute that provides for an award of attorneys' fees for a *Bivens* plaintiff. A *Bivens* plaintiff can therefore only pursue fees against the United States to the same extent that she can against any party—under the American Rule.[177] In light of all the defenses available to *Bivens* defendants, it would only be in very limited instances, if any, that a *Bivens* plaintiff could establish that the government's defense was frivolous, as is required to obtain fees under the American Rule.[178]

Although the wording of the Act and section 1988 clearly differ, there appears to be no logical reason to differentiate between them. If attorneys' fees are necessary to ensure that citizens have available avenues to seek redress for violation of their constitutional rights,[179] it should not matter whether it was a state or federal official who violated those rights. Yet, as the law presently stands, a section 1983 plaintiff is generally entitled to attorneys' fees while a *Bivens* plaintiff is not.

The situation is similar to that faced by the Supreme Court in the original *Bivens* action. There Congress had created a remedy for persons whose constitutional rights were transgressed by a state actor but not when a federal employee was involved. In that case the Supreme Court responded by inferring a remedy from the Constitution. Here, Congress has created a corollary to its section 1983 remedy by providing for attorneys' fees in civil rights actions against state officials so as to allow for and encourage victims to obtain redress for the deprivation of their constitutional rights. Despite the same type of inequities which were present in *Bivens*, the Court has thus far refused to take action similar to that which it took in *Bivens* and has refused to infer from the Constitution or common law a right to attorneys' fees for a *Bivens* plaintiff.

As outlined above, governmental liability and the right to attorneys' fees, which are not made available to a *Bivens* plaintiff, combined with the extra restrictions applicable only in *Bivens* actions, make the task of the *Bivens* plaintiff that much more difficult than that of an individual suing under section 1983.[180]

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176. 28 U.S.C. § 2412(b).

177. *See* Unification Church v. I.N.S., 762 F.2d 1077, 1079-81 (D.C. Cir. 1985); Lauritzen v. Lehman, 736 F.2d 550, 557-59 (9th Cir. 1984).

178. Even if the plaintiff could establish that the government's defense was frivolous, the United States would likely contend that 28 U.S.C. § 2412(b) is inapplicable to a *Bivens* action. Subsection (b) applies to an action brought against a government official in his official capacity. 28 U.S.C. § 2412(b). A *Bivens* action is brought against a government employee in his individual capacity. As explained by the Supreme Court in Kentucky v. Graham, 473 U.S. 159, 165-66 (1985): "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law." *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 n.55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.

179. *See supra* notes 165-66.

180. Professor Davis argues that a *Bivens* action, at least in the abstract, is superior to a § 1983 action because it is not constrained by the twentieth-century statutory interpretation of a nineteenth-century statute. "The law needs more Bivens and less 1983." 5 K. DAVIS, *supra* note 11, § 27:26.

These are not, however, all of the impediments a *Bivens* plaintiff encounters in her quest to seek redress for her injuries.

F. *Additional Obstacles Applicable to Both* Bivens *and Section 1983 Actions*

In addition to the obstacles outlined above that are unique to a *Bivens* action, there exist additional roadblocks which further discourage constitutional tort plaintiffs from bringing suit and make chances of recovery more difficult. These roadblocks apply, for the most part, equally to *Bivens* actions and cases brought under 42 U.S.C. § 1983.

1. No Respondeat Superior

Unlike most plaintiffs, a constitutional tort plaintiff is limited in who she can sue. The fundamental concept of respondeat superior does not apply in a constitutional tort action. The plaintiff can sue only those federal officials personally involved in the alleged unconstitutional conduct.[181] Since a *Bivens* plaintiff is generally denied discovery through the initial stages of her case, it is often difficult to determine who may have had direct involvement in the allegedly illegal conduct. By the time the plaintiff is permitted to begin discovery—after surviving a motion to dismiss based on immunity and an appeal of the decision on that motion—and finds that other federal employees were involved, the statute of limitations may have run on naming them as defendants.

2. Does the Claim Rise to the Level of a Constitutional Tort?

A plaintiff is free to plead common-law and constitutional tort claims arising from the same conduct.[182] The mere pleading, however, of a constitutional cause of action does not by itself create such a claim and thereby subject federal employees to liability for damages.[183] Although a plaintiff may have lost her liberty, property, or even life at the hands of the government, if she was not deprived of her due process she has no right to seek redress under the Constitution. The courts will scrutinize *Bivens* claims to ensure that they actually rise to the level of a constitutional tort.

The scrutiny of *Bivens* claims has intensified in recent years, particularly with regard to alleged violations of the due process clause. In *Paul v. Davis*[184] the Supreme Court first warned against allowing the due process clause of the Constitution to become a "font of tort law."[185] The Court held that the plain-

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At the same time, he points out that in application the courts' misunderstanding of *Bivens* accounts for the "failure of the Bivens doctrine to compete more successfully with § 1983." *Id.*

181. *See* Polk County v. Dodson, 454 U.S. 312, 325 (1981); Tarpley v. Greene, 684 F.2d 1 (D.C. Cir. 1982); Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976); Black v. United States, 534 F.2d 524, 528 (2d Cir. 1976).

182. *See supra* text accompanying notes 117-24.

183. Baker v. McCollan, 443 U.S. 137, 140 (1979).

184. 424 U.S. 693 (1976).

185. *Id.* at 701. "We have noted the 'constitutional shoals' that confront any attempt to derive

tiff, who was incorrectly listed on a police flyer as a shoplifter, had a cause of action for defamation but not for a denial of his liberty or property without due process.

In *Baker v. McCollan*[186] plaintiff was arrested and held in jail for several days before the police realized that it was a case of mistaken identity. Admitting that plaintiff's liberty had wrongfully been deprived, the Court held that his only cause of action was under common law for false arrest and false imprisonment.[187]

It is no doubt difficult to determine where to draw the line in implying a constitutional cause of action. As Professor Davis points out, the question is often unanswerable.[188] The mere fact that one's property, liberty, or even life has been deprived by the government does not necessarily implicate constitutional protections provided under the fifth amendment. On the other hand, the recent trend has certainly been to constrict rather than expand the right.[189]

3. Standard of Culpability

The question has often arisen whether a constitutional tort plaintiff must establish that the government employee acted with specific intent to deprive her of her constitutional rights. While the courts were originally split on this issue, the majority held that the negligent deprivation of a constitutional right was sufficient to state a cause of action.[190] Some courts went further, holding that the plaintiff needed only prove that her constitutional rights were violated, regardless of whether it occurred through some negligent act.[191]

When the Supreme Court addressed this issue in a section 1983 case, it found nothing in the legislative history of the statute requiring any showing other than that a constitutional right had been violated—strict liability.[192] The Court therefore held that a negligent deprivation of property amounted to a deprivation under the due process clause.[193] This conclusion seemed to be buoyed during the Court's next term when it altered the qualified immunity test

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from congressional civil rights statutes a body of general federal tort law . . .; *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law." *Id.*

186. 443 U.S. 137 (1979).

187. *Id.* at 146. The courts similarly have held that there is no constitutional right to be free from wrongful indictments or from preindictment investigations conducted in a negligent manner or from malicious and unfounded claims leveled by the government. *See* Martinez v. Winner, 548 F. Supp. 278, 336 (D. Colo. 1982); Gray v. Bell, 542 F. Supp. 927, 930-31 (D.D.C. 1982), *aff'd*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Gill v. Gill, 412 F. Supp. 1153, 1157 (E.D. Pa. 1976).

188. *Hearings* — S. 829, *supra* note 40, at 135-36 (statement of Professor Kenneth Culp Davis: "The problem of what torts are constitutional and what torts are nonconstitutional is likely to produce a legal quagmire.").

189. *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 327 (1986); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986); Daniels v. Williams, 474 U.S. 327, 335-36 (1986); Hudson v. Palmer, 468 U.S. 517, 536 (1984).

190. *See* Gildin, *The Standard of Culpability in Section 1983 and* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 567 & n.66 (1983).

191. *Id.* at 569-70 n.68.

192. *See* Parratt v. Taylor, 451 U.S. 527, 534-35 (1981).

193. *Id.* at 536-37.

to one of objective reasonableness.[194]

In two companion cases decided five years later, the Court reversed its view that negligence was enough to state a cause of action for a deprivation of due process.[195] While affirming its view that the Civil Rights Statutes as a whole contain no state of mind requirement, the Court held that a negligent deprivation of life, liberty, or property does not state a cause of action under the due process clause.[196] Thus, as with the issue of whether a claim is of constitutional magnitude, the recent trend has been to create a culpability standard which makes it more difficult for the constitutional tort plaintiff to prevail.[197]

4. Damages

If a *Bivens* plaintiff overcomes all of the obstacles to obtaining a judgment, if she has enough facts to plead his cause of action adequately despite having no opportunity to engage in discovery, if the individual defendants are not entitled to immunity, if her allegations are deemed to be of constitutional stature, if there is no alternative remedy or factor counseling hesitation in implying a *Bivens* remedy, and if she is able to prove a constitutional deprivation, she faces the often difficult task of proving his damages.[198]

In *Carey v. Piphus*[199] the Supreme Court dismissed the notion that the mere violation of a constitutional right should automatically result in damages. The Court rejected the doctrine of presumed damages and ruled that damages are to be awarded to a constitutional tort litigant according to our common-law principles of compensating plaintiffs for actual injuries incurred.[200] In adopting the rule that only true "compensatory" damages should be awarded, the Court noted the difficulty in applying common-law principles of compensatory damages to the constitutional spectrum.[201]

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194. Harlow v. Fitgerald, 457 U.S. 800, 817-18. For a discussion of how the "clearly established" qualified immunity test creates a negligence standard of culpability, see Gildin, *supra* note 190, at 598-604.

195. Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986).

196. "We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels*, 474 U.S. at 328.

197. *See* Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved From Extinction?*, 55 FORDHAM L. REV. 1, 3 (1986) (arguing that while § 1983 itself has no culpability requirement, the recent trend has been for the Supreme Court to find some degree of scienter is necessary before the Constitution can be violated).

198. Of the 16 *Bivens* judgments rendered as of April 1983, seven involved damages of $1,000 or less. The damages ranged from $1, Clymer, Jr. v. Grzeegorek, Civil Action No. 80-1009-12 (E.D. Va. 1982), to $2.5 million, Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) (involving multiple defendants and 1,200 plaintiffs). *See Hearings — H.R. 595, supra* note 44, at 16-17, (statement of J. Paul McGrath, Assistant Attorney General, Civil Division, U.S. Department of Justice).

199. 435 U.S. 247 (1978).

200. " 'The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.' " *Id.* at 254-55 (quoting 2 F. HARPER & F. JAMES, LAW OF TORTS § 25.1, at 1299 (1956)); *see* Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986).

201. *Carey*, 435 U.S. at 258:

> In those cases [which do not have a directly analogous common law claim], the task will be the more difficult one of adapting common-law rules of damages to provide fair compensa-

In order to prove injuries at common-law, *Bivens* plaintiffs often must establish what may be termed "psychological injury" or injury to "dignitary interests." These include impairment of reputation, humiliation, embarrassment, and mental and emotional distress. Although such injuries are not the typical common-law variety, they are compensable in a constitutional tort action.[202] Additionally, punitive damages may be obtained in such cases to the same extent they are available under common law: when the defendant's conduct is wanton, malicious, or reflects a reckless or callous disregard for the plaintiff's rights.[203] The problem arises when the plaintiff can establish a deprivation of her constitutional rights but cannot prove a resulting physical or emotional injury other than an affront to having one's supreme rights violated.

After the Supreme Court's decision in *Carey*,[204] a number of courts found that "compensatory" damages included damages based on the importance of the constitutional right or principle violated.[205] The Supreme Court rejected this line of reasoning in *Memphis Community School District v. Stachura*.[206] Acknowledging that the "elements and prerequisites for recovery of damages" might vary depending upon the particular constitutional rights deprived, the Court held that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages in such cases."[207]

The *Stachura* decision leaves the state of damages for the constitutional tort plaintiff uncertain and imbalanced. The victim of an unconstitutional arrest or search will likely be able to prove psychological injury similar to that suffered under the common-law torts of false arrest, false imprisonment, or battery. The law is unclear as to whether she could recover additional damages—whether a court could hold that she suffered additional injury—because the unconstitutional activity was carried out by a person who used his governmental authority to perpetrate the violation, such as a police officer or other governmental official.

For the victim of a deprivation of free speech, who does not lose her job or

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tion for injuries caused by the deprivation of a constitutional right. Although this task of adaptation will be one of some delicacy—as this case demonstrates—it must be undertaken.

202. *See Stachura*, 477 U.S. at 306-07; *Carey*, 435 U.S. at 264; Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979) (per curiam). The court in *Baskin* observed:

> Emotions are intangible but they are none the less perceptible. The hurt done to feelings and to reputation by an invasion of constitutional rights is no less real and no less compensable than the cost of repairing a broken window pane or a damaged lock. Wounded psyche and soul are to be salved by damages as much as the property that can be replaced at the local hardware store.

Id.

203. Smith v. Wade, 461 U.S. 30, 51 (1983). Punitive damages are not available from a municipality in an action under 42 U.S.C. § 1983. *See* Newport v. Fact Concerts, Inc., 453 U.S. 247, 259-66 (1981).

204. 435 U.S. 247 (1978).

205. *See, e.g.*, Bell v. Little Axe Indep. School Dist., 766 F.2d 1391, 1408 (10th Cir. 1985); Corriz v. Naranjo, 667 F.2d 892, 897 (10th Cir. 1981), *cert. dismissed*, 458 U.S. 1123 (1982); Herrera v. Valentine, 653 F.2d 1220, 1227-29 (8th Cir. 1981); Konczak v. Tyrrell, 603 F.2d 13, 17 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

206. 477 U.S. 299 (1986).

207. *Id.* at 309 (quoting *Carey*, 435 U.S. at 264-65).

position as a result of his speech, establishing any type of physical or emotional injury resulting from the restriction of her speech would seem difficult. Because she would not be entitled to compensatory damages for the mere deprivation of an important or supreme right, damages would appear inappropriate under *Stachura*.[208] Yet, damages have been awarded in such cases even when it was recognized that they were extremely difficult to measure.[209] Moreover, denial of the right to vote has resulted in substantial damages merely upon proof that the individual was wrongfully deprived of that right, and nothing more.[210]

For the victim of a fifth amendment due process violation, the prospect of obtaining damages is much less certain. It was a procedural due process claim arising from the suspension of a high school student which was at issue in *Carey v. Piphus*.[211] Noting that there was no evidence of actual physical or emotional injury, the Supreme Court in *Carey* found that plaintiff was entitled to only nominal damages.[212]

In brief, damages for the *Bivens* plaintiff is at best an uncertain proposition. The more a plaintiff can characterize her damages as "compensatory," the better chance she has. As the law now stands, an individual whose constitutional rights have been deprived by actions of an overzealous or malicious government official may receive substantial damages, nominal damages, or nothing at all.

IV. SUMMARY AND RECOMMENDATIONS

In its *Bivens* decision the Supreme Court declared that the victim of a constitutional deprivation at the hands of a federal official was entitled to a remedy of damages.[213] In application, the damages remedy that the Court created in *Bivens* has proved elusive if not almost wholly unavailable.

Notwithstanding all of the citations to constitutional doctrine and common-law practices, virtually all of the obstacles placed before a *Bivens* plaintiff have essentially one factor at their root. That is, courts and juries will understandably "interpret" both the facts and the law (particularly the doctrine of qualified immunity) to prevent issuing a money judgment against a federal official for doing nothing more than carrying out his official duties, albeit incorrectly, overzealously and unconstitutionally. It is therefore uncertain whether *Bivens* plaintiffs will ever have a meaningful remedy until the United States waives its sovereign immunity for constitutional torts, to the extent such immunity actually exists. The question is, can this be accomplished?

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208. *Id.* at 310.

209. *See* Hobson v. Wilson, 737 F.2d 1, 57-63 (D.C. Cir. 1984), *cert. denied sub. nom.* Breenan v. Hobson, 470 U.S. 1084 (1985); Kincaid v. Rusk, 670 F.2d 737, 745-46 (7th Cir. 1982); Dellums v. Powell, 566 F.2d 167, 194-96 (D.C. Cir. 1977).

210. *Stachura*, 477 U.S. at 314 (Marshall, J., concurring) (citing *Carey*, 435 U.S. at 264, 265 n.22).

211. 435 U.S. 247 (1978).

212. *Id.* at 266.

213. *See supra* text accompanying note 26.

A. *The Legislative Approach*

A statutory waiver of sovereign immunity for constitutional torts was first suggested in the *Bivens* decision itself.[214] Amendments to the FTCA that would allow individuals to sue the United States for constitutional as well as common-law torts have been repeatedly and unsuccessfully introduced in Congress over the past fifteen years, almost since the *Bivens* decision was handed down.[215] While all sides appear to favor an amendment (the civil liberties groups in order to provide a meaningful remedy, the government in order to relieve its employees from the fear of personal lawsuits), the proposed legislation has been impeded by disputes over certain provisions, the foremost of which has been qualified immunity.[216]

The bills introduced by the government have, for the most part, provided that the United States, which would be the only defendant in a constitutional tort action, could still raise qualified immunity as a defense. Opponents of this proposed provision point out that municipalities are not entitled to this defense in section 1983 actions.[217] They further suggest that an FTCA amendment that maintains the defense of qualified immunity will do little to actually increase the number of damages judgments in favor of plaintiffs. As the Supreme Court explained in holding that local governments should not be accorded the right to raise a qualified immunity defense, "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated."[218] Thus, while virtually everyone agrees that a legislative waiver of the government's sovereign immunity to constitutional torts is the proper response, that answer does not appear to be forthcoming.[219]

B. *The Judicial Approach*

If remedial legislation seems unlikely, perhaps the answer is for the Supreme Court to reexamine the application of sovereign immunity in the con-

214. *Bivens*, 403 U.S. at 421-24 (Burger, C.J., dissenting).

215. Bills in the 100th Congress to amend the FTCA to provide a remedy for constitutional torts include S. 554, 100th Cong., 1st Sess. (1987); S. 612, 100th Cong., 1st Sess. (1987); H.R. 3083, 100th Cong., 1st Sess. (1987). Other attempts to amend the FTCA to include constitutional torts date back to 1973. For a list and discussion of these bills, see Madden, Allard & Remes, *Bedtime for* Bivens: *Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 475 (1983).

216. *See* Madden, Allard & Remes, *supra* note 215, at 475.

217. *See generally* Owen v. City of Independence, 445 U.S. 622, 638 (1980) (holding that municipalities are not entitled to qualified immunity).

218. *Id.* at 651.

219. Other issues in dispute and thus delaying passage of an amendment involve the amount of exemplary damages. A number of the bills provide for the greater of compensatory damages or some measure of exemplary damages, for example, $2,000 or $200 per day for each violation. Another matter of concern involves the degree of intra-agency disciplinary procedures which would be set in motion by virtue of a claim. Civil liberties groups worry that federal employees freed from the threat of personal liability for their wrongful acts will violate the constitutional rights of citizens with impunity absent at least the threat of strong disciplinary action.

text of governmental violations of constitutional rights. While a number of lower courts have held that the United States has sovereign immunity from constitutional torts,[220] the Supreme Court has never directly addressed this issue.[221] It has instead apparently extrapolated the doctrine, as it applied to common-law torts, because it has a long history in our common law. With a refocused approach relating solely to the constitutional tort, the Court should now examine this issue as one of first impression.

The doctrine of sovereign immunity is court-created and court-defined. The Supreme Court has noted that the doctrine has neither a constitutional nor statutory basis.[222] In the absence of direction from either the Constitution or Congress, the Court generally, and specifically in the case of immunity, looks for guidance to the common-law and public policy.[223] The application of the doctrine of sovereign immunity to constitutional torts does not appear to be supported by either of these sources.

1. The Historical Basis for Governmental Immunity From Constitutional Torts

When the Supreme Court first examined the possible application of the doctrine of sovereign immunity in this country, it held that states were *not* immune from suits brought by its citizens.[224] In the 1793 case of *Chisholm v. Georgia*[225] the Supreme Court ruled that nothing in the Constitution provides for sovereign or governmental immunity which would prohibit a federal court from entertaining a damages suit against a state. In what is recognized as the first instance of overruling a Supreme Court decision by a constitutional amendment,[226] the eleventh amendment was enacted specifically to grant states protection from suit.[227]

Although the terms of the eleventh amendment only denied federal courts jurisdiction to hear damages suits against states, it has been interpreted as the

220. *See* cases cited *supra* note 55.

221. In *Bivens* the only mention of sovereign immunity was an assumption by Justice Harlan in his concurrence that the United States could not be held liable. Justice Harlan wrote that "[h]owever desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). The issue of sovereign immunity, as it related to constitutional deprivations rather than common-law claims, was never addressed.

222. *See* Nevada v. Hall, 440 U.S. 410, 428 (1979) (Blackmun, J., dissenting) ("the sovereign-immunity doctrine has no *constitutional* source"). The law of official immunity of government officials is similarly derived neither from the Constitution nor from statutory law. "It has been observed more than once that the law of privilege as a defense to damages actions against officers of Government has 'in large part been of judicial making.' " *Butz*, 438 U.S. at 501-02 (quoting Barr v. Matteo, 360 U.S. 564, 569 (1959)).

223. Nixon v. Fitzgerald, 457 U.S. 731, 747-48 (1982); Owen v. City of Independence, 445 U.S. 622, 637 (1980).

224. Chisholm v. Georgia, 2 U.S. (Dall.) 419, 423-25 (1793).

225. *Id.*

226. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3.35 (1978).

227. Courts have interpreted the eleventh amendment to prohibit a citizen from filing suit in federal court against his own state, although the amendment does not expressly refer to such actions. *See* Hans v. Louisiana, 134 U.S. 1, 15 (1890).

"constitutionalization" of sovereign immunity for state governments.[228] As the Supreme Court stated in *Edelman v. Jordan*,[229] "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the eleventh amendment."[230] Of course, neither the eleventh amendment nor any other provision of the Constitution affords sovereign immunity to the federal government. Therefore, under the Supreme Court's early rulings, the federal government, with no constitutional provision to protect it, would not be entitled to sovereign immunity for constitutional or common-law torts.

The Supreme Court eventually changed its position with regard to common-law tort claims and held that the federal government was entitled to immunity from such actions. The Court found support for this holding in English common law. It determined that the doctrine of sovereign immunity—"the king can do no wrong"—was so steeped in English common law that it should be applied in this country.[231]

The mere fact that a doctrine was applied in England should not be enough to support its use in our system. As Justice Holmes noted, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[232] More importantly, the sovereign immunity developed in England applied only to common-law wrongs. English judges could not possibly have applied this concept to a constitutional wrong because England had neither a constitutional tort cause of action nor a constitution.

The doctrine of sovereign immunity to common-law torts has been sharply criticized in recent years. The doctrine has been "[d]ecried as irrational and immoral by some ('an anachronism without rational basis that has existed only by virtue of inertia'), criticized on historical grounds by others, [and] recognized by all to have little doctrinal coherence."[233] As Justice Brennan has stated:

> In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, the Court has aggressively expanded its scope. If this doctrine were required to enhance liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it.[234]

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228. *See, e.g.*, Parden v. Terminal Ry., 377 U.S. 184, 196 (1964); Monaco v. Mississippi, 292 U.S. 313, 329 (1934). In both *Parden* and *Monaco* the Supreme Court acknowledged that under the eleventh amendment a state can waive its sovereign immunity and consent to be sued in federal court. *Parden*, 377 U.S. at 192; *Monaco*, 292 U.S. at 329; *see* J. COOK & J. SOBIESKI, 1 CIVIL RIGHTS ACTIONS § 2.01, at 2-5 (1987).

229. 415 U.S. 651 (1974).

230. *Id.* at 663.

231. *Id.* For a discussion of the history of the doctrine of sovereign immunity as it developed in England, see Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); *see also* W. BLACKSTONE, COMMENTARIES *239, *241-42 (classical history of the King's perogative).

232. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

233. Interfirst Bank Dallas, N.A. v. United States, 769 F.2d 299, 303 (5th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986) (quoting Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 469, 11 Cal. Rptr. 89, 92 (1961)) (citations omitted).

234. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 302 (1985) (Brennan, J., dissenting).

A debate over the merits of continuing sovereign immunity is beyond the scope of this Article. What is important to note, however, is that this much criticized doctrine is seemingly based on little more than the homage paid to long-standing common law. It has no constitutional basis and appears to have little or no historical basis in either English or our own common law, at least with regard to a citizen seeking redress for violations of his constitutional rights.

2. Public Policy Issues Concerning Sovereign Immunity for Constitutional Torts

The rights granted under the Constitution are of course the supreme rights of any citizen. In its first decision permitting individuals to sue for damages for a constitutional deprivation, the Supreme Court explained that a "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right."[235] The Court later explained that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees."[236] The doctrine of sovereign immunity in effect eviscerates that remedy.

In finding that municipalities have neither sovereign nor qualified immunity from constitutional torts, the Supreme Court found that "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated."[237] The Court described the public policy grounds supporting a denial of any type of immunity for the government entity:

> How "uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were permitted to disavow liability for the injury it has begotten. A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.[238]

There seems to be no public policy basis for allocating to municipalities and local governments the "inevitable costs of government" but finding the federal

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Other Justices have expressed similar views. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 164 n.48 (1984) (Stevens, J., dissenting) ("The concept that the sovereign can do no wrong and that citizens should be remediless in the faces of its abuses is more a relic of medieval thought than anything else."); Malone v. Bowdoin, 369 U.S. 643, 652 (1962) (Douglas, J., dissenting) (doctrine "more and more out of date"); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 703, (1949) (there "may be substance" in the viewpoint that sovereign immunity is an "archaic hangover not consonant with modern morality"); Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting) (the doctrine of sovereign immunity "runs counter to modern democratic notions of the moral responsibility of the State").

235. Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

236. Gomez v. Toledo, 446 U.S. 635, 638-39 (1980).

237. Owen v. City of Independence, 445 U.S. 622, 655 (1980).

238. *Id.* at 651.

government free to walk away from its responsibilities. Yet, with the application of sovereign immunity, the individual whose rights are violated by the federal "institution that has been established to protect the very rights it has transgressed,"[239] is in fact left remediless.

In light of the fact that there exists neither a common-law mandate nor an historical basis supporting sovereign immunity to constitutional torts, and because the Supreme Court's own view of public policy would argue for demanding that the federal government answer in damages for its constitutional transgressions, the Court should specifically address whether the doctrine of sovereign immunity has any application to a *Bivens* action.

C. *An Alternative Approach: Narrow the Qualified Immunity Defense*

If the courts are reluctant to sound the death knell of sovereign immunity in the context of constitutional deprivations, they should at least apply qualified immunity for the purpose for which it was created. The Supreme Court has stated on numerous occasions that a federal official is entitled to qualified immunity if his acts were within the outer perimeter of his employment and were discretionary.[240] As applied, the requisite level of discretion has been so low that virtually every government employee who does more than sit at a desk and stamp documents is considered to be acting in a discretionary fashion.[241]

Government actors should be protected from the ramifications of their discretionary decisions. A cabinet official should be free to determine that ten percent of his work force must be dismissed in order to meet budget constraints. A high level official should be allowed to set the parameters for entitlement programs even if that decision deprives those entitlements to some people who would otherwise receive them. These are the types of "governmental" decisions that should be protected from reprisal. On the other hand, a decision whether to get a warrant, how to conduct a search, whether to permit a group to protest, or what type of hearing to provide, are the types of decisions made by government officials every day. They are the routine acts of government which should not be subject to immunity if a government official improperly performs those acts and deprives a citizen of her constitutional rights in the process.

The Supreme Court recently had the opportunity to redefine the "discretion" requirement in the context of an absolute immunity case.[242] In *Westfall v. Erwin*[243] the Court reaffirmed that only discretionary acts would be subject to immunity. At the same time, the Court provided little guidance for determining what acts are discretionary. The Court relied on a previously described balancing test[244] which holds immunity to be appropriate when " 'the contributions of

239. *Id.*

240. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

241. *See* cases cited *supra* note 91.

242. Westfall v. Erwin, 108 S. Ct. 580, 584-85 (1988); *see supra* note 91.

243. *Westfall*, 108 S. Ct. at 584-85.

244. Doe v. McMillan, 412 U.S. 306, 320 (1973).

immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.' "[245]

Although the Court settled on a rather wide-ranging standard, it cautioned that the test should not be applied too broadly. The Court explained that it had always recognized that "official immunity comes at a great cost: An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official."[246] For this reason the Court rejected the government's argument that immunity should be accorded to any official who exercises a minimum of discretion.[247] The Court found that "[b]ecause virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless."[248]

Although the Court used *Westfall* to reaffirm the importance of the "discretion" requirement, which had essentially been ignored in the immunity analysis conducted by the lower courts, its nebulous standard does little to guide courts in the application of that requirement. Indeed, the Court recognized this deficiency when it concluded that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute [or qualified] immunity is warranted in a particular context."[249] As outlined above, waiting for a legislative solution does not seem to be the answer and will certainly not help the victims of governmental violations of constitutional rights which will occur in the interim.

CONCLUSION

The Supreme Court has always addressed constitutional torts cases with an eye toward the "balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."[250] Now is the appropriate time to restore the system to a proper balance. If, as the Court stated, a "damages remedy against an offending party is a vital component of any scheme for vindicating cherished constitutional rights,"[251] the Supreme Court must awaken to the fact that its recent decisions have essentially eliminated that remedy. The Court must act to give the *Bivens* plaintiff, whose "cherished constitutional rights"[252] were in fact violated, at least a fair opportunity to obtain redress for those violations.

245. *Westfall*, 108 S. Ct. at 583 (quoting *Doe*, 412 U.S. at 320).
246. *Id.*
247. *Id.* at 584.
248. *Id.*
249. *Id.* at 585.
250. Davis v. Scherer, 468 U.S. 183, 195 (1984).
251. *See supra* note 10 and accompanying text.
252. *See supra* note 10 and accompanying text.