# *Bivens* and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials

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## Introduction

In 1971, the United States Supreme Court handed down a decision in the case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.*[1] The Court held that a violation of the Fourth Amendment's guarantee against unreasonable searches and seizures gives rise to a cause of action for damages even in the absence of specific congressional authorization.[2] The purpose of this article is threefold: first, to determine what the Supreme Court held in *Bivens*, second, to analyze how lower federal courts

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1. 403 U.S. 388 (1971).

2. *Id.* at 395-97. For prior discussions of this case, *see generally* L. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE, 68-75 (1974); Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1534-38, 1553-55 (1972); Comment, *Constitutional Law—Fourth Amendment—Violation of the Fourth Amendment by Federal Agents Gives Rise to Cause of Action for Damages,* 24 ALA. L. REV. 131-45 (1971); Note, *Constitutional Law—Damages: Unreasonable Search by Federal Agents Under Color of Authority Provides a Federal Cause of Action for Damages Under the Fourth Amendment,* 38 BROOKLYN L. REV. 522-31 (1971); Note, *Constitutional Law—Damages for Fourth Amendment Violations by Federal Agents,* 21 DE PAUL L. REV. 1135-42 (1972); Note, *Constitutional Law—Search and Seizure—Federal Cause of Action for an Illegal Search and Seizure,* 10 DUQUESNE L. REV. 710-16 (1972); Note, *Bivens v. Federal Bureau of Narcotics: A New Dimension for the Fourth Amendment,* 5 J. MAR. J. PRAC. & PROC. 325-41 (1972); Note, *The Constitution as Positive Law: Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 5 LOY. L.A. L. REV. 126-61 (1972); Note, *Constitutional Law—Fourth Amendment—Unreasonable Search and Seizure Gives A Right of Action for Damages Against Federal Narcotics Agents: Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), 33 OHIO ST. L.J. 205-09 (1972); Note, *Constitutional Law—Federal Agents Conducting Unreasonable Searches and Seizures Are Liable for Damages Under the Fourth Amendment,* 50 TEX. L. REV. 798-806 (1972); Note, *Constitutional Law—Federal Civil Remedies—Implied Cause of Action for Fourth Amendment Violations,* 46 TUL. L. REV. 816-22 (1972); Note, *Damage Remedy for Federal Violation of Fourth Amendment Rights: Bell v. Hood, Chapter Two,* 25 U. MIAMI L. REV. 785-90 (1971); Note, *The Truly Constitutional Tort,* 33 U. PITT. L. REV. 271-85 (1971); Note, *Judicial Creation of a Federal Cause of Action for Damages for Fourth Amendment Violation by Federal Officers. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), 1971 WASH. U.L.Q. 686-90; Note, *Constitutional Law: Money Damages for Violations of the Fourth Amendment,* 11 WASHBURN L.J. 495-98 (1972).

have applied and, on occasion, extended the holding of *Bivens*, and third, to consider which extensions have a legitimate basis in the language of the Court's opinion and to determine what special advantages arise from basing a lawsuit on *Bivens*.

Part I of this article will provide a brief overview of the major decisions in this area of the law between 1946 and 1971, a detailed chronology of the *Bivens* case itself, and, finally, an examination of subsequent Supreme Court decisions bearing upon this subject. Part II reviews lower federal court cases that have interpreted *Bivens*, focusing initially on four procedural topics: the timing of the lawsuit, the jurisdictional amount in controversy issue, the standards used for judging the sufficiency of the pleadings and, finally, the availability of injunctive relief in such an action. Part II continues with an examination of four substantive matters: the applicability of *Bivens* to cases other than those involving the Fourth Amendment, the doctrine of respondent superior in a *Bivens*-based action, the applicability of *Bivens* to cases in which private parties and state officials and institutions are defendants and, finally, the issues of immunity and good faith in the context of a *Bivens* suit. Part III will present the author's conception of possible future directions for a *Bivens*-based cause of action, with particular emphasis upon its use as a potential substitute for suits brought under selected provisions of the Civil Rights Act.

## I. The *Bivens* Case: A Chronology

### A. Prior Decisional Law

The doctrine of sovereign immunity is based on the proposition that because the king can do no wrong, he necessarily cannot be sued in his own courts.[3] Because of this common law doctrine, it has long been a rule of American law that no suit may be prosecuted against the government without its consent.[4] Such consent was established with respect to general liability for negligent tortious conduct on the part of governmental agents by the enactment of the Federal Tort Claims Act.[5] But a specific provision of this legislation stipulates that the federal government is not vicariously responsible for the intentional torts of its personnel.[6] As a matter of common law, certain classes of governmental agents have traditionally been immune

3. *See* 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW, 458-59 (5th ed. 1942); Borchard, *Governmental Responsibility in Tort,* 36 YALE L.J. 1, 35 (1926).

4. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907); United States v. Lee, 106 U.S. 196, 207 (1882); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

5. 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1970).

6. 28 U.S.C.A. § 2680(h) (Supp. V 1975). Under these 1974 amendments, a suit may be brought against the United States for acts of assault, battery, false arrest, malicious prosecution, and similar wrongs by federal investigative agents. A federal investigative agent is "any officer of the United States who is empowererd by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

from prosecution for acts within the scope of their duties;[7] in addition, the Supreme Court has firmly established the principle that a subordinate administrative officer is similarly privileged for those torts committed in the course of discretionary acts (*i.e.*, those requiring the exercise of personal, independent judgment), but not for those committed in the course of ministerial acts (*i.e.*, those entailing mere obedience to mandatory orders issued by another.)[8] Thus, prior to 1971, a federal official who abused his power could be sued for damages primarily under state law, but federal law would supply any immunity he could claim.[9] In the period between 1946 and 1970, the Supreme Court handed down two significant decisions regarding the availability of a constitutional cause of action against governmental officials who commit intentional torts. It is useful to consider these decisions because they accentuate the significance of the Court's holding in *Bivens.*

The first of these decisions was *Bell v. Hood.*[10] In that case a member of the "Universal Mankind" organization alleged that FBI agents had violated his rights under the Fourth and Fifth Amendments. He lodged a suit for damages in federal district court, contending that the requisite jurisdiction existed because his claim arose under the Constitution and because the necessary amount in controversy had been alleged.[11] The district court dismissed the complaint and the United States Court of Appeals for the Ninth Circuit affirmed, finding lack of jurisdiction.[12] In the United States Supreme Court, the respondents argued that the petitioner's claim should be dismissed, both because it was cognizable only under state law[13] and because the Fourth and Fifth Amendments did not provide for monetary relief.[14]

In his majority opinion, Justice Black simply held that a federal court must entertain a claim such as the petitioner's unless that claim is either made solely for the purpose of obtaining federal jurisdiction or is manifestly frivolous.[15] Thus the issue decided was a very narrow one; the court merely indicated that the federal courts had jurisdiction to ascertain whether or not a complaint such as the petitioner's stated a proper cause of action.[16] On the

7. *See, e.g.,* Spalding v. Vilas, 161 U.S. 483, 498-99 (1895) (cabinet officers); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871) (federal judge); Yaselli v. Goff, 12 F.2d 396, 404 (2d Cir. 1926) (assistant U.S. attorney).

8. Barr v. Matteo, 360 U.S. 564, 575 (1959). *Cf.* Spalding v. Vilas, 161 U.S. 483, 498-99 (1895); United States v. Lee, 106 U.S. 196, 219-20 (1882); Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804). *See generally* W. PROSSER, LAW OF TORTS § 132, at 987-92 (4th ed. 1971).

9. Slocum v. Mayberry 15 U.S. (1 Wheat.) 1, 10, 12 (1817), *cited in* Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

10. 327 U.S. 678 (1946).

11. *Id.* at 680. Jurisdiction was claimed under 28 U.S.C. § 41(1) (1940).

12. Bell v. Hood, 150 F.2d 96, 99 (9th Cir. 1945).

13. 327 U.S. at 680-81.

14. *Id.* at 681.

15. *Id.* at 682-83.

16. This rationale was followed by a number of lower federal courts in varying contexts

issue of damages, Justice Black stated:

> Moreover, when 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. And it is also 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.[17]

This language could be interpreted as an indication by the majority that lower federal courts should not be too quick to find no federal remedy in cases where a constitutional cause of action was alleged. But, on remand, the district court in *Bell* proved to be inflexible. The district court noted that the FBI agents were immune from prosecution because they had acted within the scope of their authority.[18] That observation should have precluded any further discussion of the petitioner's claim. But the court went on to hold that neither the Fourth and Fifth Amendments nor existing federal statutes create any cause of action for damages against federal officers, and that the mere assertion of such a remedy does not mean that it exists in fact.[19] The complaint was therefore dismissed. The district court's approach was copied approvingly by other lower federal courts during the succeeding two decades.[20]

The other major case decided by the Supreme Court in this area prior to 1971 was *Wheeldin v. Wheeler*.[21] In that case, petitioner Dawson had been subpoenaed to appear and testify before the House Un-American Activities Committee. He alleged that Wheeler, an investigator for the committee, had affixed Dawson's name to the subpoena without authorization and with intent to expose the latter to "public shame, disgrace, ridicule, stigma, scorn and obloquy, and falsely place upon him the stain of disloyalty

during succeeding years. *See, e.g.,* Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 7 (3rd Cir. 1964) (alleged breach of third-party beneficiary contract); Mainelli v. Providence Journal Co., 312 F.2d 3, 5 (1st Cir. 1962) (alleged libel); Hicks v. City of Los Angeles, 240 F.2d 495, 497 (9th Cir. 1957) (alleged wrongful discharge from employment); Lowe v. Manhattan Beach School Dist., 222 F.2d 258, 259 (9th Cir. 1955) (alleged trespass and conversion); Fielding v. Allen, 181 F.2d 163, 166 (2d Cir.), *cert. denied*, 340 U.S. 817 (1950) (alleged fraud and breach of fiduciary duty); Overstock Book Co. v. Barry, 305 F. Supp. 842, 846 (E.D.N.Y. 1969), *aff'd*, 436 F.2d 1289 (2d Cir. 1970) (alleged harassment by state authorities seeking to deter the continued operation of purportedly pornographic bookstores); Brown v. Bullock, 194 F. Supp. 207, 236 (S.D.N.Y.), *aff'd*, 294 F.2d 415 (2d Cir. 1961) (alleged mismanagement of a mutual fund).

17. 327 U.S. at 684 (footnotes omitted).

18. Bell v. Hood, 71 F. Supp. 813, 817 (C.D. Cal. 1947) (citing Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845)).

19. 71 F. Supp. at 817, 820.

20. *See* United States v. Faneca, 332 F.2d 872, 875 (5th Cir. 1964), *cert. denied,* 380 U.S. 971 (1965); Johnston v. Earle, 245 F.2d 793, 796-97 (9th Cir. 1957); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. 12, 15 (E.D.N.Y. 1967); Martin v. Wyzanski, 262 F. Supp. 925, 928 (D. Mass. 1967); Koch v. Zuieback, 194 F. Supp. 651, 656 (S.D. Cal. 1961), *aff'd*, 316 F.2d 1 (9th Cir. 1963); Garfield v. Palmieri, 193 F. Supp. 582, 586 (E.D.N.Y.), *aff'd per curiam*, 290 F.2d 821 (2d Cir.), *cert. denied,* 368 U.S. 827 (1961).

21. 373 U.S. 647 (1963).

without any opportunity of fair defense, to petitioner's irreparable injury.''[22] Dawson sued in district court, claiming federal question jurisdiction.[23] Both injunctive and monetary relief were sought, but the district court denied the former because there was no imminent danger that Dawson would be forced to testify, and it declined to grant the latter because no federal cause of action for damages was deemed to exist in a case of this sort.[24] The United States Court of Appeals for the Ninth Circuit reversed, citing *Bell v. Hood*.[25] The district court then dismissed the complaint without opinion and the court of appeals affirmed, finding Wheeler had acted within the scope of his authority.[26]

In the Supreme Court, Justice Douglas' majority opinion held that, although federal courts had jurisdiction to entertain Dawson's complaint, that complaint evinced no cause of action.[27] The opinion noted that ''[a]part from any rights which may arise under the Fourth Amendment, Congress has not created a cause of action for abuse of the subpoena power by a federal official, at least where the subpoena power was never given coercive effect.''[28] Dawson was thus left with his remedies at state law.[29] Despite Justice Douglas' caveats about ''rights under the Fourth Amendment'' and ''coercive effect,'' the opinion in *Wheeldin* and the approach taken by the district court in *Bell* offered bleak prospects to any plaintiff seeking to sue federal officials in federal courts. This fact made the Supreme Court's opinion in *Bivens* all the more unexpected.

### B. The *Bivens* Case

#### 1. *Lower Court Proceedings*

On the morning of November 26, 1965, six federal agents entered the apartment of Webster Bivens. After conducting a thorough search of the premises, they arrested and manacled him in front of his wife and children. The agents accused Bivens of violating narcotics laws and threatened to, but in fact did not, arrest his entire family. He was then taken to the federal court building in Brooklyn and later transferred to the Federal Narcotics

22. *Id.* at 648.

23. *Id.* Jurisdiction was claimed under 28 U.S.C. § 1331(a) (1958). See note 32 *infra.*

24. 373 U.S. at 648-49.

25. Wheeldin v. Wheeler, 280 F.2d 293, 294 (9th Cir. 1960).

26. Wheeldin v. Wheeler, 302 F.2d 36, 38 (9th Cir. 1962).

27. 373 U.S. at 649.

28. *Id.* at 650.

29. *Id.* at 652. But Justice Brennan, in a forceful dissent, adopted a contrary stance. He said: "But I . . . would recognize the existence of federal common-law rights of action 'wherever necessary or appropriate' for dealing with 'essentially federal matters.' Plainly, this test supports recognition of a federal cause of action on the facts of the instant complaint. . . . [W]here, as here, it is alleged that a federal officer acting under color of federal law has so abused his federal powers as to cause unjustifiable injury to a private person, I see no warrant for concluding that state law must be looked to as the sole basis for liability." *Id.* at 664 (Brennan, J., joined by Warren, C.J., and Black, J., dissenting).

Bureau. At the latter facility, Bivens was interrogated, photographed, strip-searched, and booked. The complaint against him was subsequently dropped by the United States Commissioner.[30] On July 7, 1967, Bivens brought suit in federal district court, alleging a cause of action under section 1983 of the Civil Rights Act[31] and jurisdiction under sections 1331(a),[32] 1343(3),[33] and 1343(4)[34] of title twenty-eight of the United States Code.[35] He alleged that both the search of his apartment and his arrest were made without a warrant and in return sought $15,000 in damages from each agent.[36] The district court dismissed the complaint for want of jurisdiction on October 9th and issued a memorandum and order stating its reasons for dismissal on November 24th.[37] The court found no cause of action under section 1983 because the agents had not acted under color of state law.[38] As for section 1331(a) jurisdiction, the court responded with a lengthy excerpt from the opinion of the district court in *Bell v. Hood*[39] and concluded that "[it] is abundantly clear that no federal question is presented by the complaint."[40]

Bivens appealed to the United States Court of Appeals for the Second Circuit. On April 10, 1969, that court affirmed the district court's decision.

30. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 719 (2d Cir. 1969). Presumably the agents had been mistaken as to Bivens' identity.

31. 42 U.S.C. § 1983 (1970): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any citizen of the United States . . . 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."

32. 28 U.S.C. § 1331(a) (1958): "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

33. 28 U.S.C. § 1343(3) (1957) gives the district courts original jurisdiction of any civil suit commenced "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

34. 28 U.S.C. § 1343(4) (1957) gives original jurisdiction of an action commenced "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

35. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. 12, 13 (E.D.N.Y. 1967).

36. *Id.*

37. *Id.*

38. *Id.* at 13-14. Section 1343 jurisdiction was found to be dependent on the existence of civil rights authorized by law and the court therefore found it necessary to look elsewhere for the existence of a basis for redress. *Id.* at 13 (citing Hatfield v. Bailleaux, 290 F.2d 632, 636 (9th Cir.), *cert. denied,* 368 U.S. 862 (1961)).

39. 71 F. Supp. 813, 816-20 (C.D. Cal. 1947), *quoted in* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. at 15. See notes 18-19 and accompanying text *supra*.

40. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. at 16.

In his majority opinion, Chief Judge Lumbard declared "that the Fourth Amendment does not provide a basis for a federal cause of action for damages arising out of an unreasonable search and seizure."[41] Although he did not find the opinion of the district court in *Bell* to be a conclusive basis on which to deny Bivens' claim,[42] Chief Judge Lumbard found that all germane precedents indicated that the petitioner's sole remedy was a cause of action for trespass in the state court.[43] Bivens' counsel had argued that a federal common law action could be implied from the condemnation of conduct contained in the Fourth Amendment in the same way that the federal courts had previously derived such causes of action from statutory proscriptions. The majority opinion agreed and cited some examples, including injunctive relief against continuing constitutional violations and the exclusionary rule.[44] But Chief Judge Lumbard declared:

> We do not believe that the remedy of a civil damage action against law enforcement officials also can be said to be implicit in the Fourth Amendment on the ground that it is essential to the effective vindication of the right to be free from unreasonable search and seizures. In general, damage actions against individual officials for past constitutional violations would appear to be much less essential to the maintenance of the rule of law than are remedies to prevent threatened or continuing constitutional transgressions by the government itself, or to prevent the government from benefiting from a constitutional violation.[45]

Thus the appellate court left Bivens with two options: to sue in the state court for a "deliberate, and not a merely technical," violation of the Fourth

41. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 719 (2d Cir. 1969). In his concurrence, Judge Waterman indicated that he agreed with this holding as an accurate statement of the law at that point in time; moreover, he believed that the crucial factor was that a suit would lie *somewhere. Id.* at 726 (Waterman, J., concurring). Since the majority found that Bivens' complaint failed to state a cause of action, it expressed no opinion as to whether or not the respondents were immune from prosecution. *Id.* at 720.

42. The district court in *Bell v. Hood* had suggested that the Fourth Amendment proscribed only those unreasonable searches and seizures committed by the federal government, not those committed by "individual action"; thus an agent exceeding his authority was no longer serving as an adjunct of the government but rather became a private actor not amenable to suit under the Constitution. Bell v. Hood, 71 F. Supp. 813, 817 (C.D. Cal. 1947). Chief Judge Lumbard found this distinction to be untenable because even though an agent exceeded his actual authority, he still utilized the "apparent authority" derived from his official position. 409 F.2d at 721. In defense of the district court's rationale in *Bell*, it should be noted that it relied on specific language of a prior opinion of the United States Supreme Court: "For more than one hundred years . . . one of the settled principles of our Constitution has been that [the Fourth and Fifth] Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit." Feldman v. United States, 322 U.S. 487, 490 (1944), *quoted in* Bell v. Hood, 71 F. Supp. at 816.

43. 409 F.2d at 721 (citing Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963); Boyd v. United States, 116 U.S. 616, 627 (1886)).

44. 409 F.2d at 723-24.

45. *Id.* at 724.

Amendment[46] or to lobby in Congress for the enactment of a new federal remedy.[47]

Neither the opinion of the district court nor that of the appellate court was surprising. Both were entirely consistent with the precedents set by the United States Supreme Court in *Wheeldin v. Wheeler*[48] and the district court in *Bell v. Hood.*[49] The Supreme Court granted Bivens' writ of certiorari.[50] A disinterested observer could not have expected that it would effect any significant departure from prior decisional law.

### 2. *The Supreme Court's Decision*

That expectation proved to be incorrect. The Supreme Court reversed the decision of the court of appeals by a six to three majority in an opinion handed down on June 21, 1971.[51] Justice Brennan's opinion for the majority found that the lower court's conclusion that Bevins' remedy should be

46. *Id.* at 725.

47. *Id.* at 724-25.

48. 373 U.S. 647 (1963). See notes 21-29 and accompanying text *supra*.

49. See notes 18-20 and accompanying text *supra*.

50. 399 U.S. 905 (1970).

51. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 390 (1971). The majority opinion was authored by Justice Brennan, joined by Justices Douglas, Stewart, White, and Marshall. Justice Harlan concurred specially. *Id.* at 398-411. Chief Justice Burger and Justices Black and Blackmun each wrote separate dissents. *Id.* at 411-27, 427-30, 430, respectively. Justice Harlan's concurrence raised some valuable points. He conceded that the interest Bivens claimed was federally protected. *Id.* at 400. Thus, the primary issue he confronted was whether or not the creation of a federal common law remedy was a task relegated exclusively to Congress. He noted that in other contexts, the "Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." *Id.* at 402. Since the federal courts had broad equitable powers to enjoin threatened invasions of constitutional interests, it seemed anomalous to him that congressional authorization would be a prerequisite to the granting of monetary relief. *Id.* at 404-05. As for the criteria governing the implementation of such relief, Justice Harlan said that "[d]amages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result." *Id.* at 408. Moreover, he indicated that courts of law are capable of taking into account the relative magnitude of claimed deprivations of Fourth Amendment rights so as to accord "meaningful compensation." *Id.* at 409. In a footnote, Justice Harlan said that the same might not be true with respect to other constitutionally protected interests, so the appropriateness of monetary relief in other contexts might vary. *Id.* at 409 n.9. Chief Justice Burger's dissent may be summarized by saying that he believed the creation of a federal damage remedy should be left to Congress. *Id.* at 411-12. The remainder of his opinion was a lengthy criticism of the continued existence of the exclusionary rule of evidence in criminal cases. *Id.* at 412-27. Justice Black's dissent pointed out that while Congress had created a cause of action against state officials who violate a person's Fourth Amendment rights, it had chosen not to enact a remedy against federal officials. *Id.* at 427-28. Therefore, for the court to do so was an usurpation of legislative power. *Id.* at 428. Moreover, Justice Black argued, the policy considerations involved—overcrowded court dockets, the potential for frivolous lawsuits, and the possible deterrent effects upon proper official action—militated against the development of a remedy by judicial fiat. *Id.* at 428-29. Justice Blackmun's dissent essentially repeated Justice Black's rationale. *Id.* at 430.

limited to a cause of action under state law was based upon an "unduly restrictive" view of the Fourth Amendment.[52] The majority adopted a more expansive view of the amendment, saying it "operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen."[53]

The Court found it important that alternative remedies at state law were inadequate. Thus it noted that (1) local trespass laws usually require forcible entry, whereas in cases involving federal agents, mere invocation of authority may, in and of itself, secure an entry through either consent or acquiescence in light of the perils of physical resistance,[54] and (2) state ordinances could not be expected to limit effectively the exercise of authority by federal officers.[55] As to the type of federal remedy available, Justice Brennan noted that damages were traditionally regarded as "the ordinary remedy for an invasion of personal interests in liberty."[56] Although the Fourth Amendment does not provide for damage awards, the Court cited *Bell* for the proposition that federal courts may utilize any available remedy to rectify an invasion of a federally protected interest, provided a federal statute creates a general right to sue.[57] Moreover, Justice Brennan said, "no special factors counselling hesitation" in the absence of an affirmative congressional authorization, such as federal fiscal policy, existed in this case.[58] *Wheeldin* was distinguished because the petitioner in that case had sought to "impose liability upon a congressional employee for actions contrary to no constitutional prohibition, but merely said to be in excess of the authority delegated to him by the Congress."[59] In sum, the Court announced that a damage remedy can lie against federal officials who violate a plaintiff's Fourth Amendment rights. It then remanded the case for consideration of the issue of immunity.[60]

At this point, two interrelated interpretative points can be made about Justice Brennan's opinion. First, the case developed a policy of access. The underlying thrust of the decision was to afford a plaintiff like Bivens an opportunity to litigate in federal courts. This was perceived to be necessary in order both to establish the guarantees of the Fourth Amendment as a check upon individual abuses of federal authority and to insulate causes of action based on violations of the Fourth Amendment from the vagaries of state tort law. In developing this policy of access, the majority opinion

52. *Id.* at 391.
53. *Id.* at 392.
54. *Id.* at 394-95.
55. *Id.* at 395.
56. *Id.*
57. *Id.* at 396 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)). See note 17 and accompanying text *supra*.
58. 403 U.S. at 396 (citing United States v. Standard Oil Co., 332 U.S. 301, 311 (1947)).
59. *Id.* at 396-97. See notes 21-22, 28 and accompanying text *supra*.
60. *Id.* at 397-98.

implicitly adopted a rather expansive view of the role of the federal judiciary vis-à-vis that of Congress. As Justice Black contended in his dissent, creation of a federal remedy was a task best suited for Congress, because only the legislative branch has both the time and the means to investigate and fully evaluate the advantages and disadvantages of any particular method of judicial redress for an official's infringement of a constitutional right.[61] The majority, in the course of its nine-page opinion, did not (and, realistically, could not) conduct such an evaluation. Second, for a decision creating an action at federal common law, *Bivens* is remarkably open-ended; the Court neither defines the substantive parameters of, nor elucidates the procedural constraints upon, the remedy invented. The lower federal courts were, in effect, licensed to develop their own rules and a predictable consequence of this license would be lack of uniformity.

### 3. *The Second Appellate Court Decision*

In dealing with the issue of immunity upon remand, the United States Court of Appeals for the Second Circuit[62] took three factors into consideration: the doctrine of immunity for federal officials,[63] the precedents developed in section 1983 litigation, and common law rules of liability for police officers.[64] The court held that the federal officers in this case enjoyed no immunity from prosecution, but were entitled to raise the defense that they acted "in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted."[65]

With regard to the threshold question of whether the doctrine of sovereign immunity[66] protected the defendants in this suit, Circuit Judge Medina, in his opinion for the majority, noted that the Supreme Court had extended such immunity to all officials carrying out "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretion."[67] For such an official, immunity from prosecution results from any act "within the outer perimeter of his line of duty."[68] After reviewing prior definitions of "line of duty" or "scope of authority,"[69] the court concluded that the defendants were acting in their

61. See note 51 *supra*.

62. For an especially detailed analysis of this decision, *see* Note, *Bivens v. Six Unknown Named Agents: A New Direction in Federal Police Immunity,* 24 HASTINGS L.J. 987 (1973).

63. See notes 3-8 and accompanying text *supra*.

64. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972).

65. *Id.*

66. See notes 7-9 and accompanying text *supra*.

67. Barr v. Mateo, 360 U.S. 564, 575 (1959), *quoted in* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d at 1342-43.

68. Barr v. Mateo, 360 U.S. at 575, *quoted in* Bivens v.Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d at 1343.

69. 456 F.2d at 1343-45 (citing, *inter alia*, Spalding v. Vilas, 161 U.S. 483, 498 (1896) ("action having more or less connection with the general matters committed by law to [an

roles as government officers charged with making arrests and hence that their conduct fell within the bounds of their allotted power.[70] Although the court granted that the agents were empowered to act as they had, it found that because their duties were not discretionary in nature, they were not shielded from prosecution. Judge Medina concluded that immunity was not warranted either under the common law or under established precedent in section 1983 actions.[71] Since the court believed that the cause of action created by the Supreme Court was "roughly analogous" to a section 1983 action against a state official, it was deemed absurd to allow immunity for one set of police officials and deny it to others, merely because they served different employers.[72]

Having ruled out immunity for the narcotics agents, Judge Medina noted that even the Second Restatement of Torts allowed a defense of good faith and reasonable belief in the validity of an arrest and search.[73] In applying this doctrine to the case at bar, he held:

> Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. We think, as a matter of common sense, a law enforcement officer is entitled to this protection.[74]

official's] control or supervision."); Norton v. McShane, 332 F.2d 855, 861-62 (5th Cir. 1964) (same formulation as *Spalding* but noted that if an act is within an official's line of duty, the presence of underlying malice is immaterial); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) ("the occasion must be such as would have justified the [official's] act, if he had been using his power for any of the purposes on whose account it was vested in him.")).

70. In reaching such a conclusion the court expressly declined to hold that the mere allegation of lack of probable cause for the search and arrest was sufficient to charge the defendants with the commissions of unauthorized acts. *See* 456 F.2d at 1344.

71. In Pierson v. Ray, 386 U.S. 547, 555 (1967), the Supreme Court held that the common law denial of immunity to police officers was applicable in section 1983 suits. *See* Note, *Immunity of Prosecuting Officials From Suit for Alleged Deprivation of Civil Rights,* 40 TEMP. L.Q. 244, 250 (1967).

72. 456 F.2d at 1346-47 (citing Carter v. Carlson, 447 F.2d 358, 371 (D.C. Cir. 1971) (Nichols, J., concurring), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973); Bethea v. Reid, 445 F.2d 1163, 1166 (3d Cir. 1971) (Gibbons, J., for the court), *cert. denied,* 404 U.S. 1061 (1972); Anderson v. Nosser, 438 F.2d 183, 205 (5th Cir. 1971) (Bell, J., concurring)).

73. 456 F.2d at 1347 (citing RESTATEMENT (SECOND) OF TORTS § 121(b) (1965)).

74. 456 F.2d at 1348-49. Chief Judge Lumbard, in his concurrence, suggested that the standard of probable cause should not be governed by constitutional criteria in *Bivens* actions, but rather by the "less stringent reasonable man standard of the tort action against government agents." *Id.*

Clearly, this is a process that balances individual civil rights against the need for the efficient operation of government; the fact that the defendants were law enforcement officers weighed heavily in that balance.[75] The case was then remanded for further proceedings consistent with the balancing principle announced by the majority.[76] On reflection, the Second Circuit's ruling can be said to have raised serious obstacles to successful litigation of a cause of action in federal court. But, as the court noted, these obstacles were also present for similar types of actions brought either under federal or state law prior to the Supreme Court's decision in *Bivens*.

This second decision by the appellate court was handed down on March 8, 1972. Thus, six years and four months after the incident in question and four years and nine months after first instituting his action in federal court, Webster Bivens had earned the right to proceed to trial. In light of the many obstacles that Bivens had been compelled to overcome in order to acquire the right to have his claim litigated, one might legitimately wonder why anyone would wish to follow in his footsteps. That is a question that the remainder of this article will explore.

### C. Subsequent Substantive Supreme Court Discussions

In the years since 1971, the Supreme Court has adopted what could be characterized as a laissez-faire stance toward its ruling in *Bivens*. Given the fact that the Court's opinion in that case was so open-ended, one might expect that fuller explication would soon be forthcoming. It was not. In later decisions, it has been suggested that the doctrine of *Bivens* should apply to cases involving impairment of the right to have one's votes for party convention delegates counted,[77] and to alleged Fourth Amendment violations by IRS officials.[78] But in each instance, these views were expressed by one or two justices in the course of a sharply-worded dissent. The majority opinions in each case simply failed to address the subject.

Only two majority opinions construing (or deemed to be construing) the doctrine of *Bivens* have been handed down by the Court since 1971. In the first, *District of Columbia v. Carter*,[79] the Court held that the conduct of a police officer employed by the District of Columbia is not actionable under section 1983 of the Civil Rights Act because the district is not a state or

75. The majority stressed factors peculiar to the situation of law enforcement officers: (a) the fact that their lives are constantly in danger (*id.* at 1347); (b) the fact that they perform "functions indispensable to the preservation of our American way of life" (*id.*); (c) the fact that statutory language regulated the conduct of the agents in this case (*id.*); and (d) the fact that the constitutional probable cause standard that such officials must base their reasonable belief upon is something even "learned and experienced jurists" can't reach any lasting consensus about (*id.* at 1348).

76. *Id.* at 1348.

77. O'Brien v. Brown, 409 U.S. 1, 14 n.7 (1972) (Marshall & Douglas, J.J., dissenting).

78. Laing v. United States, 423 U.S. 161, 209-10 n.14 (1976) (Blackmun, J., dissenting).

79. 409 U.S. 418 (1973).

territory.[80] But the majority opinion, authored by Justice Brennan, noted that such allegedly unconstitutional acts might be reached by a *Bivens*-based action.[81]

The second case was *City of Kenosha v. Bruno*.[82] The appellees therein were owners of liquor-serving establishments and holders of one-year liquor licenses issued by the cities of Racine and Kenosha, Wisconsin. Renewals of the licenses were denied by the cities pursuant to state statutory procedure.[83] A suit was lodged in a three judge district court by the appellees, who alleged that section 1983 of the Civil Rights Act entitled them to injunctive relief against the municipalities in question. It was further alleged that the licenses were denied without a trial-type adversary hearing because the establishments in question offered nude dancing as entertainment for their customers.[84] The district court held that the failure to provide an adversary hearing deprived the licenseholders of a property interest without due process of law required by the Fourteenth Amendment of the Constitution,[85] and granted them summary judgment.[86] On appeal, the Supreme Court held that a municipality is not a person for the purposes either of a damage suit or an action seeking an injunction under section 1983.[87] It went on to note that during the proceedings in the three judge district court, each of the appellees had alleged an investment of at least $20,000 in their respective businesses.[88] The Court suggested that if this were true there might be a sufficient amount in controversy to warrant the district court's assumption of jurisdiction under section 1331(a) of title twenty-eight of the United States Code.[89] As the case had been decided below on cross-motions for summary judgment and the appellate record was therefore correspondingly incomplete, the majority declined to address the issue and simply remanded the case for further proceedings.[90] The Court never cited *Bivens*, but merely referred to section 1331. Two concurring justices specifically stated, however, that the remedy created in *Bivens* was available to the appellees in this case.[91]

What can properly be adduced from *Bruno*? To infer a conclusion one way or the other from a clear-cut refusal to decide is unwise. As one district

80. *Id.* at 432. See note 31 *supra*.
81. *Id.* at 433.
82. 412 U.S. 507 (1973).
83. *See* WIS. STAT. ANN. §§ 176.05(1), (8) (Supp. 1973).
84. Misurelli v. City of Racine, 346 F. Supp. 43, 45 (E.D. Wis. 1972).
85. *Id.* at 47.
86. *Id.* at 51.
87. 412 U.S. at 513. See note 31 *supra*. *Accord,* Monroe v. Pape, 365 U.S. 167, 187 (1961).
88. 412 U.S. at 514.
89. 28 U.S.C. § 1331(a) (1958). See note 32 *supra*.
90. 412 U.S. at 514.
91. *Id.* at 516 (Brennan & Marshall, J.J., concurring).

court has said, the Supreme Court, after noting possible section 1331(a) jurisdiction, simply remanded the case "without in any way intimating what the appropriate disposition should be."[92] Yet some other federal courts have concluded that *Bruno* permits the lodging of a *Bivens*-based action against a municipality.[93] Even if one assumes that the Supreme Court authorized section 1331(a) as the jurisdictional basis for such a claim, there is no indication that the majority had a cause of action based on *Bivens* in mind when it referred to section 1331; it might well have been referring to the possibility of injunctive relief against a municipality or state subdivision that deprives a plaintiff of constitutional rights that existed long before *Bivens* was decided.[94] If the Supreme Court intended to permit the appellees in *Bruno* to sue under the doctrine of *Bivens*, the consequences which flow from this proposition are significant. It would mean that *Bivens* itself applies to actions for injunctive as well as monetary relief, that it remedies violations of the Fourteenth as well as the Fourth Amendment, that it lies against state as well as federal officers, and that it may be utilized to redress deprivations of property interests as well as liberty interests. Justices Brennan and Marshall would appear to be willing to accept these consequences, but there is no conclusive indication that at least three of their fellow justices are willing to join them. Thus, with respect to discussions about and analysis of *Bivens* by the Supreme Court, the scope of the remedy remains as nebulous today as it was in 1971. The onus of interpretation and expansion has shifted by default to the lower federal courts.

## IV. Subsequent Interpretations by the Lower Federal Courts

### A. Selected Procedural Problems

This section of the article focuses on the development of *Bivens* by lower federal courts. Emphasis will first be placed on four procedural topics

92. Pitrone v. Mercadante, 420 F. Supp. 1384, 1388 (E.D. Pa. 1976) (footnote omitted).

93. *See, e.g.*, Shifrin v. Wilson, 412 F. Supp. 1282, 1303 (D.D.C. 1976); Williams v. Brown, 398 F. Supp. 155, 156 (N.D. Ill. 1975); Perry v. Linke, 394 F. Supp. 323, 325 (N.D. Ohio 1975); Jamison v. McCurrie, 388 F. Supp. 990, 991 (N.D. Ill. 1975); Dahl v. City of Palo Alto, 372 F. Supp. 647, 651 (N.D. Cal. 1974).

94. *See, e.g.*, Hays v. Port of Seattle, 251 U.S. 233, 237 (1920); City of Mitchell v. Dakota Cent. Tel. Co., 246 U.S. 396, 407 (1918); Herndon v. Chicago, R. I. & P. Ry. Co., 218 U.S. 135, 155 (1910); Ludwig v. Western Union Tel. Co., 216 U.S. 146, 164 (1910); Smyth v. Ames, 169 U.S. 466, 518-19 (1898); Tindal v. Wesley, 167 U.S. 204, 220 (1897); City Ry. Co. v. Citizens R.R. Co., 166 U.S. 557, 570 (1896); Scott v. Donald, 165 U.S. 107, 112 (1896); *In re* Tyler, 149 U.S. 164, 190 (1893); Pennoyer v. McConnaughy, 140 U.S. 1, 10 (1891); Davis v. Gray, 83 U.S. (16 Wall.) 203, 220-21 (1872). *See also* City of Charlotte v. Fire Fighters Local 660, 426 U.S. 283, 284 n.1 (1976). There the Court stated that it did not need to decide (in the context of the case that it was dealing with) whether a suit against a municipality could be jurisdictionally grounded on section 1331(a). This statement was followed by citations to *Bivens* and *Bell v. Hood*, 327 U.S. 678 (1946). At least one possible interpretation of this enigmatic comment is that *Bruno* did *not* decide whether a *Bivens*-based cause of action may be brought against a municipality which infringes a plaintiff's constitutional rights.

(statute of limitations, amount in controversy, standards for judging the sufficiency of the pleadings, and injunctive relief), and then on four substantive subjects (applications of *Bivens* to other amendments, the problem of respondeat superior, applications of *Bivens* to non-federal defendants, and the problems of immunity and good faith). Two preliminary considerations should be mentioned. First, the selection of topics is arbitrary. There are other issues that merit analysis, but those subjects selected are perhaps the most controversial and problematic. Second, during the course of the remainder of this article, it will be necessary to discuss how the topics above have been dealt with in section 1983 cases, when and where courts rendering decisions in *Bivens*-based suits have deemed such cases to have precedential value.[95]

### *1. The Timing of the Lawsuit*

In the course of its opinion in *Bivens*, the Court failed to indicate what statute of limitations would govern the remedy being created. Therefore, on this subject, the lower federal courts had a tabula rasa with which to work. They were constrained solely by the limits of their own discretion, but those limits proved to be very constricting. If the lower federal courts desired an object lesson in how not to develop a statute of limitations policy, they needed to look no further than their own record in section 1983 litigation. Though created by Congress, section 1983 of the Civil Rights Act contains no statute of limitations.[96] It is an established precept of statutory interpretation that where an act of Congress lacks a statute of limitations governing the remedy it creates, federal courts should apply the statute of limitations controlling analogous types of suits in the forum state.[97] Early in this century that doctrine was extended to Civil Rights Act litigation by the case of *O'Sullivan v. Felix*,[98] which indicated that although the action is brought in a federal court, that does "not preclude" application of time limits imposed by the states.[99]

95. At this juncture, it is worth noting that many federal courts have found *Bivens* to be a federal analogue of section 1983 and thus have generally applied procedural rules developed in the latter context to the former type of case. See note 285 and accompanying text *infra*.

96. See note 31 *supra*.

97. Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 705-06 (1966); Cope v. Anderson, 331 U.S. 461, 463 (1947); McClaine v. Rankin, 197 U.S. 154, 158 (1905); Campbell v. Haverhill, 155 U.S. 610, 614-15 (1895); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir. 1961).

98. 233 U.S. 318 (1914).

99. *Id.* at 322. *Accord*, Ammlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974); Almond v. Kent, 459 F.2d 200, 203 (4th Cir. 1972); Rinehart v. Locke, 454 F.2d 313, 315 (7th Cir. 1971); Romer v. Leary, 425 F.2d 186, 187 (2d Cir. 1970); Crosswhite v. Brown, 424 F.2d 495, 496 (10th Cir. 1970); Beard v. Stephens, 372 F.2d 685, 688 (5th Cir. 1967); Horn v. Bailie, 309 F.2d 167, 168 (9th Cir. 1962); Mohler v. Miller, 235 F.2d 153, 155 (6th Cir. 1956). When a

This simple doctrine has led to highly disparate results among the various courts of appeals. Thus in the Third Circuit, the rule is that the court will apply the statute of limitations governing the tort underlying the section 1983 complaint.[100] In the Second,[101] Ninth,[102] and Tenth[103] Circuits a two-step procedure has been developed. The courts initially must apply the time limitation for state actions created by statute; if no such statute of limitations exists within the forum state, then the general civil limitations period will control. The Fourth Circuit purports to apply state statutes of limitations governing injury to the person,[104] but it is as yet unclear whether that is a general rule within the circuit or a rule arising only out of the Virginia legal system with which the two leading court of appeals opinions dealt. The Fifth,[105] Sixth,[106] and Seventh[107] Circuits have adopted divergent ap-

particular claim accrues (and thus when the statute of limitation begins to run) is still deemed to be a matter of federal law. Cope v. Anderson, 331 U.S. 461, 464 (1947); Fisher v. Whiton, 317 U.S. 217, 220-21 (1942); Rawlings v. Ray, 312 U.S. 96, 98 (1941). But when a statute is tolled is still apparently a matter of state law. Duncan v. Nelson, 466 F.2d 939, 941-42 (7th Cir.), *cert. denied,* 409 U.S. 894 (1972); Hughes v. Smith, 264 F. Supp. 767, 770 (D.N.J.), *aff'd,* 389 F.2d 42 (3d Cir. 1967); Gordon v. Garrison, 77 F. Supp. 477, 480 (E.D. Ill. 1948).

100. Howell v. Cataldi, 464 F.2d 272, 277 (3d Cir. 1972); Orlando v. Baltimore & Ohio Ry., 455 F.2d 972, 973 (3d Cir.), *cert. denied,* 409 U.S. 858 (1972); Thomas v. Howard, 455 F.2d 227, 229 (3d Cir. 1972); Hileman v. Knable, 391 F.2d 596, 597 (3d Cir. 1968); Henig v. Odorioso, 385 F.2d 491, 493 (3d Cir.), *cert. denied,* 390 U.S. 1016 (1967).

101. Kaiser v. Cahn, 510 F.2d 282, 284 (2d Cir. 1974); Rosenberg v. Martin, 478 F.2d 520, 526-27 (2d Cir.), *cert. denied,* 414 U.S. 872 (1973); Ortiz v. LaVallee, 442 F.2d 912, 914 (2d Cir. 1971); Romer v. Leary, 425 F.2d 186, 187 (2d Cir. 1970); Swan v. Board of Higher Educ., 319 F.2d 56, 60 (2d Cir. 1963).

102. Willis v. Reddin, 418 F.2d 702, 704 (9th Cir. 1969); Horn v. Bailie, 309 F.2d 167, 168 (9th Cir. 1962); Smith v. Cremins, 308 F.2d 187, 189 (9th Cir. 1962).

103. Crosswhite v. Brown, 424 F.2d 495, 496 (10th Cir. 1970); Wilson v. Hinman, 172 F.2d 914, 915 (10th Cir.), *cert. denied,* 336 U.S. 970 (1949).

104. Allen v. Gifford, 462 F.2d 615, 615 (4th Cir.), *cert. denied,* 409 U.S. 876 (1972); Almond v. Kent, 459 F.2d 200, 203-04 (4th Cir. 1972). In the latter case, the court indicated that every cause of action under section 1983 results from personal injuries, so perhaps its approach has ramifications for district courts situated in other states within the Fourth Circuit.

105. *See* White v. Padgett, 475 F.2d 79, 82-3 (5th Cir.), *cert. denied,* 414 U.S. 861 (1973) (applied three-year Florida statute of limitations for statutorily-created liability); Nevels v. Wilson, 423 F.2d 691, 691-92 (5th Cir. 1970) (same conclusion as in *White*); Shank v. Spruill, 406 F.2d 756, 756-57 (5th Cir. 1969) (applied two-year Georgia general statute of limitations in the absence of one applicable to the underlying tort); Beard v. Stephens, 372 F.2d 685, 689 (5th Cir. 1967) (applied one-year Alabama statute of limitations for the underlying tort).

106. *See* Garner v. Stephens, 460 F.2d 1144, 1147-48 (6th Cir. 1972) (applied five-year Kentucky limitation period for liability created by statute); Madison v. Wood, 410 F.2d 564, 567-68 (6th Cir. 1969) (applied three-year Michigan limitation period for liability due to injuries to the person or to property); Mulligan v. Schlachter, 389 F.2d 231, 233 (6th Cir. 1968) (applied two-year Michigan statute of limitations on the cause of action for the underlying tort).

107. *See* Weber v. Consumers Digest, Inc., 440 F.2d 729, 731 (7th Cir. 1971) (applied five-year Illinois statute of limitations for underlying tort); Jones v. Jones, 410 F.2d 365, 366-67 (7th Cir. 1969), *cert. denied,* 396 U.S. 1013 (1970) (applied two-year Illinois statute of limitations for underlying tort); Wakat v. Harlib, 253 F.2d 59, 63-64 (7th Cir. 1958) (applied Illinois catch-all

proaches in various cases, sometimes applying the state statute of limitations governing the underlying tort, and at other times applying the time period controlling causes created by statute. Again, there appears to be no one fixed rule in these circuits and it is virtually impossible to guess whether they tend to favor one approach or another. The Eighth Circuit has adopted two different rules,[108] which it admits are completely inconsistent with one another.[109]

The chaotic statute of limitations policy developed in section 1983 litigation exemplified one unfeasible way of dealing with the problem. The approach taken in *Bivens* actions has proved to be even more confusing. This was graphically illustrated by the results obtained in three cases decided by different New York federal judges in 1975 and 1976. The first of these decisions was *Felder v. Daley.*[110] A suit was brought against state and federal law enforcement officers alleging a violation of the Fourth Amendment arising from an illegal entry into the plaintiffs' apartment.[111] The incident in question occurred on September 26, 1972; the complaint was filed on November 27, 1973. The federal officer in the case was not served until October 2, 1975.[112] In analyzing its options, the district court indicated that it was bound to borrow the analogous statute of the forum state.[113] The police officers employed by the state (and sued under section 1983) were held to be entitled to claim the bar imposed by the three-year limitation period for liability based on a statute.[114] But the federal officer being sued under *Bivens* was not liable under any statute.[115] Therefore, the court held that the cause of action against him was restricted by the New York one-year

statute of limitations). *See also* Duncan v. Nelson, 466 F.2d 939, 941-42 (7th Cir.), *cert. denied,* 409 U.S. 894 (1972) (suggested but declined to say whether it might depart from *Wakat*).

108. *See* Savage v. United States, 450 F.2d 449, 451-52 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972) (applied two-year Minnesota statute of limitations for underlying tort); Glasscoe v. Howell, 431 F.2d 863, 865 (8th Cir. 1970) (said either five-year Arkansas general statute or three-year statute limiting liability derived from statute was applicable).

109. Warren v. Norman Realty Co., 513 F.2d 730, 734 (8th Cir. 1975) (applied 180-day limit contained in Nebraska fair housing statute); Reed v. Hutto, 486 F.2d 534, 536 (8th Cir. 1973) (applied three-year Arkansas general statute). *See also* Barrett v. Wichael, 387 F. Supp. 1263, 1264 (S.D. Iowa 1974) (elected to follow *Glasscoe*); Zaun v. Halpern, 382 F. Supp. 2, 3 (D. Minn. 1974) (elected to follow *Savage*).

110. 403 F. Supp. 1324 (S.D.N.Y. 1975).

111. *Id.* at 1325. It was alleged that the defendants smashed in the door of the apartment with a sledgehammer, entered with drawn revolvers, ransacked the premises and harassed one occupant, forcing her to sit naked during the search. *Id.* at 1326.

112. *Id.* at 1325.

113. *Id.*

114. *Id.* at 1326. *See* N.Y. CIV. PRAC. LAW § 214(2) (McKinney 1972).

115. *Id. But cf.* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). There the Court construed the term "statute" broadly enough so as to encompass a provision of the Constitution.

statute of limitations for intentional torts.[116] Thus the claims of the adult plaintiffs against him were dismissed as time-barred.[117]

The second case was *Ervin v. Lanier.*[118] The plaintiff hijacked a jet airliner to Cuba in 1969. He thereafter sought political asylum in Czechoslovakia. Desiring to renounce his American citizenship, he visited the United States embassy in Prague for that purpose. The complaint alleged that he was detained by embassy officials and compelled to sign "voluntary repatriation" papers. However, he managed to escape from the embassy and fled to East Germany. He was captured by United States government agents, allegedly beaten, and once more coerced into signing papers of repatriation. The plaintiff alleged that defendant Lanier (International Relations Officer for the Office of Public Safety of the Department of State) conspired with agents of Pan American Airlines to have the plaintiff taken back to the United States.[119] A multimillion-dollar lawsuit was lodged against the various government agents and against Pan American Airlines.[120] The acts in question occurred in September, 1969; a complaint was not filed until November 27, 1974.[121] Regarding the *Bivens* claim, the district court found a "judicial preference" for treating federal defendants in *Bivens* actions and state defendants in section 1983 actions alike.[122] It therefore held that New York's three-year limitations period for legislatively-created liability was "more appropriate even though a *Bivens* action is not technically based upon a liability created by statute."[123] In any case, plaintiff's claim was time-barred.[124]

The last decision in this series was *Regan v. Sullivan.*[125] There, as in *Felder,* it was alleged that state and federal law enforcement officers had combined to infringe the plaintiffs' Fourth Amendment rights. But in *Regan* the plaintiffs urged the court to adopt a "purely federal statute of limitations on grounds of uniformity."[126] They argued that since the 1974 amendments

116. 403 F. Supp. at 1326. *See* N.Y. CIV. PRAC. LAW § 215(3) (McKinney 1972).

117. *Id.* The complaints of the infant plaintiffs, though tolled by state law, were summarily dismissed for failure to prosecute, without any supporting authority.

118. 404 F. Supp. 15 (E.D.N.Y. 1975).

119. *See id.* at 17-18.

120. *Id.* at 17.

121. *Id.* Jurisdiction was alleged primarily under 28 U.S.C. §§ 1331, 1343. A cause of action against the airlines was purportedly based on three provisions of the Civil Rights Act, two other federal statutes, and *Bivens*. The court never decided whether *Bivens* applies to a private actor. *See id.* at 20. For cases which do address this topic, see notes 290-310 and accompanying text *infra*.

122. *Id.* at 20.

123. *Id. Accord*, Feilder v. Moore, 423 F. Supp. 62, 63 (W.D.N.C. 1976); Shifrin v. Wilson, 412 F. Supp. 1282, 1301-02 (D.D.C. 1976).

124. 404 F. Supp. at 20.

125. 417 F. Supp. 399 (E.D.N.Y. 1976).

126. *Id.* at 402.

to the Federal Tort Claims Act,[127] the United States was answerable for the intentional acts of its investigative agents; thus in a *Bivens* suit arising out of those same acts, the statute of limitations should be that imposed by section 2401(b) of the Federal Tort Claims Act on a suit against the government.[128] The court dismissed this argument, saying that that provision referred to the time for the filing of an administrative claim, not the institution of a lawsuit.[129] It went on to consider other alternatives. One was the application of the same statute of limitations utilized in section 1983 suits; the district court indicated that such a solution would foster only state-by-state uniformity.[130] The court concluded that it "must reject the argument that a . . . federal period [of limitations, (referring to section 1983 precedents)] should be created, and therefore [turned] to New York law as the most appropriate source to determine the applicable limitations period for a *Bivens* action."[131] The result achieved in *Ervin v. Lanier* was rejected because a cause of action founded on the Fourth Amendment could not be said to be derived from statutory law.[132] The result in *Felder v. Daley* was objectionable because the "conceptual character and the rights" underlying a *Bivens* cause of action were said to differ distinctively from that of an action for an intentional tort.[133] Noting that the Fourth Amendment limits official action, the district court in *Regan* applied the state statute of limitations arising from liability incurred by an official while performing an act in his official capacity, which required commencement of a suit within one year.[134] The reason given was:

> Law enforcement officers would be placed at a distinct disadvantage and effective action in making arrests would inevitably be inhibited if such officers had to wait for two, three or more years to find out whether or not they would be subject to some large civil liability at a time when memories were dim and witnesses and records perhaps not available.[135]

Under this approach, the plaintiff's claim was time-barred.[136]

127. See note 6 *supra*.

128. *Id.* at 402. 28 U.S.C. § 2401(b) (1970): "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

129. 417 F. Supp. at 402.

130. *Id.*

131. *Id.*

132. *Id.* at 403.

133. *Id.*

134. *Id. See* N.Y. CIV. PRAC. LAW § 215(1) (McKinney 1972).

135. *Id.* at 404.

136. *Id.* In this case, plaintiffs sued fourteen months after the incident in question occured.

Thus three federal courts situated in the same state purporting to apply the same general legal principle arrived at three different conclusions. The net result of this approach to a statute of limitations policy is that the plaintiff bears the risk of being assigned to a district court unwilling to adopt an approach favoring his claim. Consequently, the principle of access to the federal judiciary voiced by the Supreme Court in *Bivens* is undermined. If copying the approach utilized in section 1983 cases is undesirable, and if reliance on analogous state law provisions produces a deleterious inconsistency, what other alternatives exist? One option, of course, is that the Supreme Court could adopt an arbitrary period of limitation on its own. As *Bivens* itself is a judge-made remedy, this is a logical technique that would result in nationwide uniformity.

A second technique might be application of the concept of laches. As the Supreme Court has said, "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."[137] Thus laches substitutes pragmatic concepts of convenience and fairness to the parties for mechanistic invocations of time limits. Arguably, this flexible, prudential approach is well suited for furthering the policy of access espoused in *Bivens* and at the same time affording maximum protection for governmental officials confronted with possible liability arising from stale claims. Two objections, however, may be raised to the alternative of laches. First, the flexibility of the device is in itself a source of uncertainty. A statute of limitations provides a clear-cut time span, a specified duration. But the defense of laches may bar one suit brought within six months and not prohibit another suit brought only after ten or fifteen years have elapsed.[138] It is an ad hoc technique, and ad hoc techniques, by definition, produce no clear-cut standards. A second and more telling objection is the fact that federal courts will not permit the intrusion of equitable principles into actions at law.[139] If one characterizes a *Bivens* action as a suit in equity (and some courts would permit equitable redress as part of what they denominate a *Bivens* cause of

137. Galliher v. Cadwell, 145 U.S. 368, 373 (1892). *See* Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946); Powell v. Zuckert, 366 F.2d 634, 636 (D.C. Cir. 1966); Blankenship v. Boyle, 329 F. Supp. 1089, 1112 (D.D.C. 1971).

138. *See* Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946); Alsop v. Riker, 155 U.S. 448, 461 (1894); McKnight v. Taylor, 42 U.S. (1 How.) 161, 168 (1843). *See also* Powell v. Zuckert, 366 F.2d 634, 637 n.2 (D.C. Cir. 1966).

139. Cope v. Anderson, 331 U.S. 461, 463-64 (1947); Russell v. Todd, 309 U.S. 280, 289 (1940); Morgan v. Koch, 419 F.2d 993, 996 (2d Cir. 1969), *cert. denied,* 397 U.S. 1011 (1970). Even where a complaint prays in the alternative for legal and equitable relief, it has been held that laches is unavailable. *See* Morgan v. Koch, *supra;* Myzel v. Fields, 386 F.2d 718, 742 (8th Cir. 1967) *cert. denied,* 390 U.S. 951 (1968).

action),[140] this objection presents no problem. But since the monetary remedy created by the Supreme Court in *Bivens* is a distinctly legal remedy, the objection seems persuasive.

Yet a third option was suggested by one of the plaintiff's arguments in *Regan.* As that decision pointed out,[141] since 1974 the United States has consented to being sued for intentional torts committed by its investigative agents. Since a Fourth Amendment infringement can now produce both a suit against the government and a suit against the individual federal officials involved, it makes sense to impose similar timing constraints. As the district court in *Regan* indicated,[142] section 2401(b) of the Federal Tort Claims Act is inapposite. But the same cannot be said for its companion provision, section 2401(a):

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.[143]

It may be argued that six years is too long. But if the government is willing to make itself amenable to suit for so lengthy a period despite all the policy considerations that would seem to militate against such an extended limitation period, is there any reason why the time limit should be less for an agent of the government?[144] A statute of limitations of six years merely ensures a full opportunity to lodge a suit in federal court; it does not ensure that the plaintiff will succeed on the merits of his claim.

### 2. *Amount in Controversy Requirement*

It is now firmly established[145] that jurisdiction for a *Bivens* suit must be based on section 1331(a) of title twenty-eight of the United States Code, and

140. See notes 201-03 and accompanying text *infra*.

141. See notes 127-28 and accompanying text *supra*.

142. See note 129 and accompanying text *supra*.

143. 28 U.S.C. § 2401(a) (1966). One crucial problem with this proposal is that its underlying rationale applies only in classical *Bivens* cases involving federal agents. Where the doctrine of *Bivens* has been extended to impose liability upon state agents or private parties, the optimum solution may simply be a single time limit imposed by the Supreme Court.

144. It might be argued that whereas the government can afford a large damage award in favor of a plaintiff, an individual official cannot. But this objection is one that is really directed against the creation of any monetary remedy, rather than against a possible period of limitations governing that remedy. The Supreme Court in *Bivens* ignored the potential crushing financial blow an adverse verdict might have upon an official found guilty of tortious conduct; one might simply suggest that it was not the function of the court to concern itself with the ability of the named defendants to pay any damage award in case the plaintiff eventually prevailed on the merits. Moreover, as the Court noted by analogy, a potential plaintiff's chances of eventual success may be decidedly slim. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 391 n.4 (1971).

145. *See, e.g.,* Lynch v. Household Fin. Corp., 405 U.S. 538, 546-47 (1972); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1200 (9th Cir. 1975); Johnson v. County of Chester, 413 F.

therefore there must be a showing of over $10,000 in controversy.[146] The rule laid down by the Supreme Court in 1938 is that if a court is convinced "to a legal certainty" that the necessary amount is not in controversy, it must reject the plaintiff's claim.[147] The problem is exacerbated when the plaintiff seeks to redress a deprivation of his constitutional rights. For example, consider a situation similar to that presented in the *Bivens* case itself: federal agents break into the plaintiff's dwelling, damage the premises and subject the plaintiff to humiliation and abuse. The actual damages suffered may be minimal, but the infringement of the plaintiff's Fourth Amendment interest in being free from unreasonable searches and seizures is considerable. What is the cost in dollars and cents of that infringement, and what type of valuation is to be placed on the plaintiff's right?

Supp. 1299, 1312-13 (E.D. Pa. 1976); Sheets v. Stanley Community School Dist. No. 2, 413 F. Supp. 350, 351 (D.N.D. 1975), *aff'd,* 532 F.2d 111 (8th Cir. 1976); Nixon v. Hampton, 400 F. Supp. 881, 887 (E.D. Pa. 1975), *aff'd*, 535 F.2d 1247 (3d Cir. 1976); Barszcz v. Board of Trustees, 400 F. Supp. 675, 676 (N.D. Ill. 1975), *aff'd,* 539 F.2d 715 (7th Cir. 1976); Smith v. City of E. Cleveland, 363 F. Supp. 1131, 1135 (N.D. Ohio 1973).

146. See note 32 *supra*. The obviousness of this proposition was not immediately apparent. The majority opinion by Justice Brennan in *Bivens* was silent on the jurisdictional basis of the remedy created. It was Justice Harlan, in his concurrence, who suggested that the Court was considering Bivens' claim of jurisdiction under section 1331(a) and not his alternative claims under 28 U.S.C. §§ 1343(3), (4). *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 398 n.1 (1971) (Harlan, J., concurring). Could jurisdiction have been maintained legitimately under either section 1343(3) or 1343(4)? The Second Circuit in its first decision in *Bivens* said no, both because Bivens could neither allege the "color of state law" which is a prerequisite of section 1343(3) jurisdiction nor the "Act of Congress" which is necessary for section 1343(4) jurisdiction, and also because section 1343, taken *in toto*, was deemed to apply only to state and not to federal officials. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 720 n.1 (2d Cir. 1969). Other courts generally concur with the view of the Second Circuit. *See, e.g.,* King v. Morton, 520 F.2d 1140, 1151 (D.C. Cir. 1975); Spock v. David, 469 F.2d 1047, 1050 (3d Cir. 1972), *rev'd on other grounds,* 424 U.S. 828 (1976); Melanson v. Rantoul, 421 F. Supp. 492, 500 (D.R.I. 1976); Blassingame v. United States Attorney Gen., 387 F. Supp. 418, 419 (S.D.N.Y. 1975); Brown v. Schlesinger, 365 F. Supp. 1204, 1207 n.1 (E.D. Va. 1973); Ramirez v. Weinberger, 363 F. Supp. 105, 108 (N.D. Ill. 1973), *aff'd without opinion,* 415 U.S. 970 (1974); Shimabuku v. Britton, 357 F. Supp. 825, 826 (D. Kan. 1973), *aff'd on other grounds,* 503 F.2d 38 (10th Cir. 1974). The one major exception is the United States Court of Appeals for the Third Circuit. In Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972), it was said in dictum that an invocation of section 1343(3) alone plus an averment of a deprivation of Eighth Amendment rights would suffice to state a cause of action against *federal* officers. *Id.* at 274-75. *See also* Finch v. Weinberger, 407 F. Supp. 34, 40 (N.D. Ga. 1975) (suggested in dictum that section 1343(3) might be a source of jurisdiction in a suit against the Secretary of Health, Education and Welfare). These contentions are both unique and dubious.

147. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938). *Accord,* Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238, 243 (1943). This standard is sufficiently elastic so that it is capable of being manipulated by a judge. Thus in Comprehensive Group Health Serv. Bd. of Directors v. Temple Univ., 363 F. Supp. 1069 (E.D. Pa. 1973), the "legal certainty" standard was said to require no more than a "present probability" that an amount exceeding the minimum jurisdictional requirement was at stake. *Id.* at 1095 n.49.

The prudential reasons underlying an amount in controversy requirement were best stated by the United States Court of Appeals for the Second Circuit in the case of *Arnold v. Troccoli:*[148]

> With mounting caseloads in our metropolitan centers, and increasing numbers of cases awaiting trial, it has become doubly important that the district courts take measures to discover those suits which ought never to have been brought in the federal court and to dismiss them when the court is convinced to a legal certainty that the plaintiff cannot recover an amount in excess of $10,000.[149]

In the past, the Supreme Court has not been indifferent to this rationale. In other contexts, it has indicated that it may not take cognizance of cases to which no test of money value can be applied.[150] Should this principle apply in cases where constitutional violations are alleged? The majority of the Supreme Court in *Bivens* never discussed the problem but it would seem that rigorous application of such a principle would frustrate the very policy of access to the federal courts which *Bivens* sought to establish. Justice Harlan, in his concurrence, indicated that

> [T]he experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights.
>
> . . . .
>
> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.[151]

148. 344 F.2d 842 (2d Cir. 1965).

149. *Id.* at 845. *Accord,* Givens v. W. T. Grant Co., 457 F.2d 612, 614 (2d Cir.), *vacated on other grounds,* 409 U.S. 56 (1972); Opelika Nursing Home v. Richardson, 448 F.2d 658, 666-67 (5th Cir. 1971); City of Boulder v. Snyder, 396 F.2d 853, 856 (10th Cir. 1968), *cert. denied,* 393 U.S. 1051 (1969); Elfland v. Widman, 284 F. Supp. 498, 499 (S.D.N.Y. 1968). *Arnold* dealt with the amount in controversy issue in the context of diversity, not federal question, jurisdiction. But arguably the underlying policy considerations asserted by the Second Circuit apply with equal force to suits based on section 1331(a). During the analysis of the amount in controversy requirement, there will be numerous references to decisions involving similar claims to those presented in *Bivens*-based suits, but decided prior to 1971. The reason for doing so is that the threshold jurisdictional problems will be the same in all cases involving an issue as to whether or not there is the mandatory amount in dispute required by section 1331(a).

150. *See, e.g.,* Kurtz v. Moffitt, 115 U.S. 487, 498 (1885); Youngstown Bank v. Hughes, 106 U.S. 523, 524 (1882); Potts v. Chumasero, 92 U.S. 358, 361 (1875); Barry v. Mercein, 46 U.S. (5 How.) 103, 120 (1847). *Accord,* Carroll v. Somervell, 116 F.2d 918, 920 (2d Cir. 1941).

151. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 409, 411 (1971) (Harlan, J., concurring).

The manner in which the lower federal courts have dealt with the minimum jurisdictional amount requirement in the context of cases involving alleged deprivations of constitutional rights has led to diverse results. Some courts have adopted a restrictive approach and have flatly declined to entertain suits involving purported infringements of rights incapable of valuation; this is distinctly a minority view.[152] Other courts have rendered decisions (most of which antedate the Supreme Court's ruling in *Bivens*) that require a plaintiff to go beyond merely alleging that the constitutional right offended was in some sense inestimable; under these rulings, he or she must allege and show monetary consequences definitely exceeding the required jurisdictional amount.[153] A third approach has been that of according the complaint a "liberal construction" which often results in an ipse dixit by the court that the jurisdictional obstacle has in fact been overcome.[154] Yet other courts purport to apply the "legal certainty" test, and thus conclude that where constitutional rights have been allegedly violated, it is legally uncertain that the requisite jurisdictional amount is *not* at stake.[155] Perhaps the largest number of courts have simply held that the deprivation of a constitutional right will, if alleged, be enough in and of itself to surmount the $10,000 barrier;[156] one court has even gone so far as to

152. *E.g.,* Kheel v. Port of New York Auth., 457 F.2d 46, 49 (2d Cir.), *cert. denied,* 409 U.S. 83 (1972); Goldsmith v. Sutherland, 426 F.2d 1395, 1398 (6th Cir.) *cert. denied,* 400 U.S. 960 (1970); Kelley v. Metropolitan County Bd. of Educ., 372 F. Supp. 528, 538 (M.D. Tenn. 1973); Calvin v. Conlisk, 367 F. Supp. 476, 483 (N.D. Ill. 1973), *rev'd,* 520 F.2d 1, 9-10 (7th Cir. 1975), *vacated on other grounds,* 424 U.S. 902 (1976); Boyd v. Clark, 287 F. Supp. 561, 564 (S.D.N.Y. 1968), *aff'd without considering the point,* 393 U.S. 316 (1969).

153. *E.g.,* Yoder v. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation, 339 F.2d 360, 364 (9th Cir. 1964); Giancana v. Johnson, 335 F.2d 366, 369 (7th Cir. 1964), *cert. denied,* 379 U.S. 1001 (1965); Yahr v. Resor, 339 F. Supp. 964, 968-69 (E.D.N.C. 1972); West End Neighborhood Corp. v. Stans, 312 F. Supp. 1066, 1068 (D.D.C. 1970). The majority of these cases antedate *Bivens* and, in the instance of *Giancana*, a later decision of the Seventh Circuit was quick to distinguish it and hence undercut its value as precedent. *See* Calvin v. Conlisk, 520 F.2d 1, 9 (7th Cir. 1975) *vacated on other grounds,* 424 U.S. 902 (1976).

154. *E.g.,* Jenness v. Forbes, 351 F. Supp. 88, 90 (D.R.I. 1972); Fifth Ave. Peace Parade Comm'n v. Hoover, 327 F. Supp. 238, 241 (S.D.N.Y. 1971), *aff'd on other grounds,* 480 F.2d 326 (2d Cir. 1973) *cert. denied,* 415 U.S. 948 (1974). *See also* Fein v. Selective Service Sys. Local Bd. No. 7, 430 F.2d 576, 384-85 (2d Cir. 1970) (Lumbard, C.J., dissenting).

155. *E.g.,* Spock v. David, 469 F.2d 1047, 1052 (3d Cir. 1972), *rev'd on other grounds,* 424 U.S. 828 (1976); Raffety v. Prince George's County, 423 F. Supp. 1045, 1063 (D. Md. 1976); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 148 (D.D.C. 1976); Revis v. Laird, 391 F. Supp. 1133, 1139 (E.D. Cal. 1975), *rev'd without opinion,* 541 F.2d 286 (9th Cir. 1976); Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974); Butler v. United States, 365 F. Supp. 1035, 1041 (D. Hawaii 1973)

156. *E.g.,* Calvin v. Conlisk, 520 F.2d 1, 9 (7th Cir. 1975), *vacated on other grounds,* 424 U.S. 902 (1976); CCCO-Western Region v. Fellows, 359 F. Supp. 644, 648 (N.D. Cal. 1972); Schroth v. Warner, 353 F. Supp. 1032, 1036 (D. Hawaii 1973); Cortright v. Resor, 325 F. Supp. 797, 810 (E.D.N.Y.), *rev'd on other grounds,* 447 F.2d 245 (26 Cir. 1971), *cert. denied,* 405 U.S. 965 (1972); Murray v. Vaughn, 300 F. Supp. 688, 695-96 (D.R.I. 1969).

say that unspecific allegations to this effect will suffice.[157] Other courts have elected to practice what can only be referred to as creative jurisprudence; they will, of their own accord, perform the task of searching the facts alleged in the pleadings in order to infer the existence of the requisite jurisdictional amount.[158] Finally, some courts choose to lump together the compensatory and punitive damages sought by the plaintiff in a *Bivens* action in order to find an amount in excess of $10,000 at stake.[159]

The more conservative approaches listed in the foregoing paragraph sacrifice a plaintiff's ease of access to the courts for the presumed benefit of having a less crowded docket and concomitantly fewer demands on the time and resources of the judiciary. The more liberal approaches tend to take *Bivens* at its word; the courts following such approaches decline to dismiss complaints solely because of the uncertainty of the extent of damages incurred. One might well ask whether the minimum amount in controversy

157. Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931-32 (10th Cir. 1975).

158. *See, e.g.,* Berk v. Laird, 429 F.2d 302, 306 (2d Cir. 1970), *cert. denied,* 404 U.S. 869 (1971) (in case involving a soldier who sought to prevent his transfer to Vietnam, the court inferred the requisite amount in controversy by considering the loss of earning capacity which might be occasioned by a potential battlefield injury); Williams v. Phillips, 360 F. Supp. 1363, 1365 n.2 (D.D.C. 1973) (in suit attempting to oust the acting director of the Office of Economic Opportunity, jurisdictional amount inferred, *inter alia,* from the facts that said director administered the disbursement of $790 million dollars annually and earned over $10,000 a year); Klinkhammer v. Richardson, 359 F. Supp. 67, 70 (D. Minn. 1973), *aff'd,* 488 F.2d 920 (8th Cir. 1973) (in suit alleging reservist who failed to have his hair cut short was threatened with involuntary reactivation, jurisdictional amount inferred from the potential costs of such reactivation).

159. *E.g.,* Hanna v. Drobnick, 514 F.2d 393, 398 (6th Cir. 1975); Hartigh v. Latin, 485 F.2d 1068, 1071-72 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 948 (1974); Pirtone v. Mercadante, 420 F. Supp. 1384, 1387 n.6 (E.D. Pa. 1976); Shifrin v. Wilson, 412 F. Supp. 1282, 1287 n.1 (D.D.C. 1976); Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974). In contexts other than a *Bivens* type of action, this technique has been deemed permissible. *See, e.g.,* Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238, 240 (1943); Barry v. Edmunds, 116 U.S. 550, 562 (1886); Wood v. Stark Tri-County Bldg. Trades Council, 473 F.2d 272, 274 (6th Cir. 1972); Davis v. Peerless Ins. Co. 255 F.2d 534, 538 (D.C. Cir. 1958). *But see* Zweibon v. Mitchell, 516 F.2d 594, 659 (D.C. Cir. 1975) (dictum); Holodnak v. Avco Corp., 514 F.2d 285, 292 (2d Cir.), *cert. denied,* 423 U.S. 892 (1975). The Second Circuit disapproved such an aggregation of compensatory and punitive damages because it found that *Bivens* purportedly did not allow for punitive damages. This interpretation was based on the language in Justice Brennan's opinion holding that *Bivens* "is entitled to recover money damages *for any injuries he had suffered* as a result of the agents' violation of the [Fourth] Amendment." Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (emphasis added). The issue is not entirely free of doubt; resolution depends on one's view of the purpose underlying an award of punitive damages. If that purpose is deterrence of similar conduct by others, then punitive damages should have no place in a *Bivens* action because deterrence has no place in such an action for the purposes of determining liability. *See id.* at 408 (Harlan, J., concurring). But there is significant authority to the effect that punitive damages have a second purpose in that they compensate the plaintiff for ordinarily non-compensible injuries. *See* W. PROSSER, LAW OF TORTS § 2 at 9 (4th ed. 1971). Nevertheless, it is the author's opinion that the Second Circuit's view has merit.

requirement should apply at all in *Bivens* actions. A state officer invading a plaintiff's constitutional rights can be sued for damages in a section 1983 action,[160] yet there is no amount in controversy requirement for such a suit.[161] There is no persuasive reason for having suits against federal officers for similar unconstitutional conduct governed by different prerequisites. If one assumes that there is no valid reason for making such a distinction, it then becomes necessary to reconcile that assumption with the ineluctable conclusion that the only legitimate jurisdictional basis of a *Bivens* suit is section 1331(a), with its amount in controversy requirement. Perhaps the optimum solution is for the federal courts to adopt a uniform policy requiring that (a) the plaintiff in a *Bivens* suit make only a pro forma allegation that over $10,000 is at stake, and that (b) such an allegation be deemed conclusive for jurisdictional purposes, so that the defendant will be precluded from contesting the issue. If it is truly vital to ensure that a plaintiff is afforded access to federal court so that he may have an opportunity to vindicate an invasion of his constitutional rights, then such a concededly liberal policy would seem to be appropriate. The only major objections to such an approach are those suggested by *Arnold v. Troccoli:*[162] the screening-out of frivolous lawsuits and the overcrowding of court dockets. Frivolous lawsuits may be dealt with by other devices, however.[163] As for the problem of overcrowding if the jurisdictional policy underlying a *Bivens*

160. *See* Donovan v. Reinhold, 433 F.2d 738, 743 (9th Cir. 1970); Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir.), *cert. denied,* 393 U.S. 940 (1968); Basista v. Weir, 340 F.2d 74, 87 (3d Cir. 1965); Nesmith v. Alford, 318 F.2d 110, 124 (5th Cir. 1963) *cert. denied,* 375 U.S. 975 (1964); Hague v. C.I.O., 101 F.2d 774, 789 (3d Cir.), *mod. on other grounds,* 307 U.S. 496 (1939); Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919); United States *ex rel.* Motley v. Rundle, 340 F. Supp. 807, 811 (E.D. Pa. 1972); Urbano v. McCorkle, 334 F. Supp. 161, 170 (D.N.J. 1971), *aff'd without opinion,* 481 F.2d 1400 (3d Cir. 1973); Sexton v. Gibbs, 327 F. Supp. 134, 142-43 (N.D. Tex. 1970), *aff'd* 446 F.2d 904 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062 (1972); Davis v. Board of Trustees, 270 F. Supp. 528, 531 (E.D. Ark. 1967), *aff'd* 396 F.2d 730 (8th Cir.), *cert. denied,* 393 U.S. 962 (1968); Antelope v. George, 211 F. Supp. 657, 660 (D. Idaho 1962); Soloman v. Pennsylvania R.R. Co., 96 F. Supp. 709, 712 (S.D.N.Y. 1951). Some commentators have suggested that the damage remedy in a section 1983 suit is of recent origin. *See* REMEDIES: CASES AND MATERIALS at 680 (2d ed. K. York & J. Bauman eds. 1973). The cases cited above indicate that this is simply not so.

161. *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 543-44 n.7 (1972); Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943). The reason for this is that the jurisdictional basis for a cause of action under section 1983 is 28 U.S.C. § 1343 (3), and that statute contains no minimum amount in controversy requirement. See note 33 *supra*.

162. See notes 148-49 and accompanying text *supra*. In fact, it has been suggested that because a plaintiff in a federal question case relies on question case relies on rights created by the Constitution, laws or treaties of the United States, the federal courts have a duty to provide a forum for his or her claim, regardless of how petty (in a pecuniary sense) that claim might be. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1311, at 174 (1969).

163. *See* FED. R. CIV. P. 12(c) (1966) (judgment on the pleadings) *and* FED. R. CIV. P. 56(b) (1963) (summary judgment motion brought by a defendant).

action was harmonized with those of a section 1983 action, Justice Brennan's majority opinion in *Bivens* acknowledged and dismissed that contention.[164] Surely, a liberal approach to the amount in controversy requirement is probably preferable to the various inconsistent techniques currently utilized by lower federal courts.

### 3. *Standards for Judging the Sufficiency of the Pleadings*

Under Federal Rule of Civil Procedure 8(a), a claim for relief must contain a "short and plain" statement of a basis for jurisdiction, a similar statement showing that the plaintiff is entitled to relief, and a demand for appropriate relief.[165] The Supreme Court, in discussing the standards for judging the sufficiency of a complaint, has said that it "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[166] A claim may be dismissed under Federal Rule of Civil Procedure 12(b) if it is obviously without merit or wholly frivolous.[167] These are the standards generally governing a *Bivens* type of action; it is interesting to examine how they operate in practice.

In *Rende v. Rizzo*,[168] a *Bivens* suit was brought against the mayor and police commissioner of Philadelphia along with various named and unnamed lower-ranking police officers, alleging various acts of official brutality resulting in deprivations of constitutional rights. The claim was upheld as to the unnamed police officers because the alleged violations of civil rights that they had committed had been specifically pled.[169] But the complaints against the mayor and the commissioner were dismissed. The court held that allegations that a superior has knowledge of violent propensities on the part of those under his control *and* that he was capable of restraining those

164. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 391 n.4 (1971). Justice Brennan cited a study which indicated that of all the reported section 1983 cases instituted in federal courts between 1951 and 1967, only fifty-three survived a motion to dismiss. *See* Ginger & Bell, *Police Misconduct Litgation—Plaintiff's Remedies,* 15 AM. JUR. TRIALS 555, 580-90 (1968).

165. FED. R. CIV. P. 8(a) (1966).

166. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

167. Hagans v. Lavine, 415 U.S. 528, 537-38 (1974). Previous Supreme Court decisions have described criteria for dismissal in similar ways. *See* Bailey v. Patterson, 369 U.S. 31, 33 (1962) ("wholly unsubstantial"); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933) ("plainly unsubstantial"); Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910) ("obviously frivolous"); McGilvra v. Ross, 215 U.S. 70, 80 (1909) ("no longer open to discussion"); Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904) ("so attenuated and unsubstantial as to be absolutely devoid of merit"). These formulations were developed in the context of 12(b)(1) dismissals.

168. 418 F. Supp. 96 (E.D. Pa. 1976).

169. *Id.* at 97-98.

propensities would suffice to impose liability on such an upper echelon officer; but in the case at bar it was alleged only that the officials in question "encouraged" police brutality by publicizing their "get tough" stance on crime control.[170]

In *Nickerson v. Gilbert*,[171] IRS agents were alleged to have wrongfully levied upon and sold the plaintiff's property to pay for back taxes. The defendants claimed they were immune from suit since they were acting within the outer perimeter of their line of duty.[172] The district court agreed and noted that the determination of whether to execute a levy was a discretionary act.[173] But the acts complained of were those performed in connection with the *execution* of a levy, and hence were ministerial;[174] therefore "[t]o the extent that the plaintiff may be able to establish that the defendants' conduct in executing said levy was unjustifiably tortious and/or violative of the plaintiff's Fourth Amendment rights, the defendants are not entitled to an absolute immunity from suit."[175] If unjustifiability was established, then the defendants' "good faith or reasonable belief" would be at issue.[176] The court explained its liberal construction of the complaint by saying that "the fact that the defendants may have properly seized said jointly held realty [does not mean] that the entirety of plaintiff's claim must fail under any and all circumstances . . . ; it is possible that specific facts established during the trial of this action may sustain the plaintiff's allegation."[177]

In *White v. Boyle*,[178] plaintiff, president of the Virginia Taxpayers' Association, alleged that because of his criticisms of the present federal revenue-collecting system, he was made a target of a deliberate policy of harassment by the IRS, which purportedly took the form of trespasses and illegal investigations into his bank accounts.[179] The defendants contended that the investigations were the routine consequence of plaintiff's filing of a deficient 1040 form for the taxable year of 1972.[180] Summary judgment for

170. *Id.* at 98.

171. 66 F.R.D. 593 (D.R.I. 1975).

172. *Id.* at 595.

173. *Id.* at 596.

174. For definitions of the terms "discretionary" and "ministerial," see note 8 and accompanying text *supra*.

175. 66 F.R.D. at 596. The court here purports to follow the ruling laid down in Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972), but its approach differs radically from that utilized by the Second Circuit. See notes 67-71 and accompanying text *supra*.

176. 66 F.R.D. at 596-97.

177. *Id.* at 597 (citations omitted).

178. 538 F.2d 1077 (4th Cir. 1976), *aff'g* 390 F. Supp. 514 (W.D. Va. 1975).

179. 538 F.2d at 1078.

180. *Id.* at 1078-79.

the defendants was upheld on the grounds that the plaintiff had failed to allege any facts which would put into dispute the motivation underlying the IRS action[181] and that he had failed to demonstrate any violations of constitutional rights, because the alleged Fourth Amendment violations were said to be based entirely on conjecture and hence could not withstand a specific denial of wrongdoing by the agents in question.[182]

In *Walker v. McCune*,[183] the plaintiff, an inmate at the Federal Reformatory in Petersburg, Virginia, sued the warden and several guards alleging he was: attacked by fellow inmates on September 12, 1972, after which he was placed in solitary confinement for six days; nearly burned to death in a fire started outside his cell by other inmates on September 18, 1972, and sexually assaulted by three fellow prisoners on October 29, 1972, whereupon he was placed in a holding cell for his own protection.[184] Summary judgment for the defendants was granted because the court said the plaintiff made no allegations tending to establish either a "pattern of undisputed and unchecked violence within the institution in general"[185] or "egregious failure" by officials to protect him.[186]

These cases reveal certain judicial tendencies in dealing with a *Bivens*-based cause of action. First, the flexible nature of such an action will not displace the rules of civil procedure governing a defendant's motion for a summary judgment. If a plaintiff attempts to resist such a motion solely on the basis of his allegations, a court is likely to accept as conclusive the affidavits of the defendant officials, as it did in *White*. Second, though there is authority to the contrary,[187] allegations must specify which constitutional rights were impaired by which acts of the defendants. Failure to do so defeated such claims in *Rende* and *White*. Finally, even within these procedural constraints, there is a great deal of discretion left to courts, as is shown by the different fates of the complaints in *Nickerson* and *Walker*. Yet if one characterizes *Bivens* as defining a rule of expedited access to the federal courts, the result in *Nickerson* rather than the result in *Walker* would seem to be more faithful to the spirit of the Supreme Court's decision.

The problem underlying the issue of standards for judging the sufficiency of a complaint is accentuated when it is considered in the context of some specialized federal procedure. A useful example of such a procedure is

181. *Id.* at 1079-80.

182. *Id.* at 1080. *Accord*, Smallwood v. United States, 358 F. Supp. 398, 408 (E.D. Mo. 1973).

183. 363 F. Supp. 254 (E.D. Va. 1973).

184. *Id.* at 255-56.

185. *Id.* at 256.

186. *Id.* The authority cited for this two-part test was Penn v. Oliver, 351 F. Supp. 1292, 1294 (E.D. Va. 1972).

187. See note 157 *supra*.

section 1915 of title twenty-eight of the United States Code.[188] Subsection (a) of that provision authorizes the commencement of a suit in forma pauperis without either the prepayment of costs or the imposition of a bond provided the plaintiff submits an affidavit stating that he is unable to pay, sets forth his alleged cause of action, and indicates his belief that he is entitled to redress.[189] Subsection (d) permits the court to dismiss such a proceeding if the allegation of poverty proves to be false or if it is satisfied that the action is frivolous or malicious.[190] In *Jones v. Bales*,[191] for example, the plaintiff alleged a conspiracy among a private citizen, state law enforcement officers, and federal officials to entrap him. In his complaint, Jones contended that upon being released from prison for a prior offense, he was arrested on an illegal detainer warrant, incarcerated, and abused. The defendants then allegedly caused Jones to be released on bail into their custody; they purportedly imprisoned him in an apartment in Atlanta, Georgia. He was supplied with false identification papers and claimed he was coerced into cashing stolen money orders for the defendants. Police apprehended him with some of these money orders on his person; he was ultimately convicted for this offense. Jones alleged that the defendants informed the police that he would have the money orders in question in his possession on the day of his arrest.[192] The district court said that even a conclusory complaint would be liberally construed in order to be filed in forma pauperis, but, once filed, the court is entitled to use its discretionary powers under section 1915(d) to dismiss it.[193] Subsection (d) was deemed to be a very broad "grant of power to dismiss in situations where dismissal under Federal Rule of Civil Procedure 12 might be improper."[194] A dismissal in this case was said to be warranted for three reasons. The court did not

188. 28 U.S.C. § 1915 (1959).

189. 28 U.S.C. § 1915(a) (1970).

190. 28 U.S.C. § 1915(d) (1970).

191. 58 F.R.D. 453 (N.D. Ga. 1972), *aff'd per curiam,* 480 F.2d 805 (5th Cir. 1973).

192. 58 F.R.D. at 456-57.

193. *Id.* at 464.

194. *Id.* at 463. The court listed various cases which purportedly support its assertion. Only two of the cited authorities are directly on point. *See* Cruz v. Beto, 405 U.S. 319, 328 (1971) (Rehnquist, J., dissenting); Fletcher v. Young, 222 F.2d 222, 224 (4th Cir. 1955). Other courts have found judicial discretion under section 1915(d) to depend upon the frivolousness of a claim and they offer differing views of what is or is not frivolous. *See* Flowers v. Turbine Support Div., 507 F.2d 1242, 1244 (5th Cir. 1975) (wide discretion to dismiss frivolous suits does not permit highly arbitrary action); Clark v. Zimmerman, 394 F. Supp. 1166, 1178 (E.D. Pa. 1975) (power to dismiss a claim where the realistic chances of the plaintiff's success are slight); Louisiana *ex rel.* Purkey v. Ciolino, 393 F. Supp. 102, 106 (E.D. La. 1975) (same formulation as in *Clark*); Watson v. Devlin, 167 F. Supp. 638, 641 (M.D. Mich. 1958), *aff'd*, 268 F.2d 211 (6th Cir. 1959) (dismissal permissible when it would be a "miscarriage of justice" to put the proposed defendants to the burden of retaining counsel and mounting a defense). Thus the ambit of judicial discretion under section 1915(d) is not settled law by any means.

believe the plaintiff could prove that a conspiracy existed.[195] Even if he could, it doubted that he could prove that a conspiracy to deny him his civil rights existed;[196] in addition, the court said that the plaintiff was prone to sue at the slightest provocation.[197]

How much special discretion to dismiss should be permitted in an in forma pauperis proceeding? Again, the problem reduces itself to one of ease of access. Both the in forma pauperis proceeding and the *Bivens* cause of action are intended to ensure an opportunity to litigate in federal court. But in *Jones*, the discretion inherent in the subsection (d) power to dismiss was used to cut off the substantive cause of action. Although it is impossible to say how many *Bivens* suits are lodged in forma pauperis,[198] it does seem anomalous to permit differing standards for judging the sufficiency of such a complaint under rule 12(b) as compared to the similar process under section 1915(d) and to justify such differing standards on the basis of the plaintiff's financial status. This would seem to be especially true in suits seeking redress of deprivations of constitutional rights; as *Bell v. Hood*[199] pointed out, the discretion to dismiss a complaint in such cases for improper pleading should be very limited.[200] This is one area where the Supreme Court needs to delineate adequate guidelines.

### *4. Injunctive Relief*

The Supreme Court in *Bivens* specifically created a monetary and hence a *legal* remedy.[201] It did not need to create a form of injunctive, and therefore *equitable*, redress because such a means of vindicating one's constitutional rights was already well established before *Bivens* was de-

195. 58 F.R.D. at 465.

196. *Id.*

197. *Id.* at 465 n.4.

198. It should be noted that Webster Bivens sought to appeal from the district court decision against him *in forma pauperis,* but the court denied that request, deeming it frivolous and in bad faith. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. 12, 16 (E.D.N.Y. 1967), *rev'd on this point,* 409 F.2d 718, 720 (2d Cir. 1969). The procedure would seem to be most attractive to plaintiffs in the situation of the inmate-petitioners in *Jones* and *Walker*. It should be noted that in *Walker*, for example, the plaintiff made an appearance pro se. The advantage in this latter procedure is that a *pro se* complaint may be found to state a cause of action under *Bivens*, provided it meets minimum specifications as to the necessary pleadings. *See, e.g.,* McNally v. Pulitzer Pub. Co., 532 F.2d 69, 76 (8th Cir. 1976); Jones v. Perrigan, 459 F.2d 81, 83 (6th Cir. 1972); Bethea v. Reid, 445 F.2d 1163, 1165 (3rd Cir. 1971); Jihaad v. Carlson 410 F. Supp. 1132, 1134 (E.D. Mich. 1976). However, the disposition of the complaint in *Walker* suggests that treatment of pro se petitions is also somewhat varied.

199. 327 U.S. 678 (1946).

200. See note 15 and accompanying text *supra*.

201. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

cided.[202] Nevertheless, a few courts have erroneously concluded that *Bivens* provides for equitable remedies against officials acting unconstitutionally.[203]

It may be important to determine where the source of the equitable relief lies for several reasons. First, if the damage remedy of *Bivens* is separate from any available injunctive relief, then that damage remedy may undermine the availability of injunctive relief because it provides adequate redress at law.[204] If, however, equitable as well as legal remedies can be derived from *Bivens*, then it would seem logical to conclude that the Supreme Court meant them to complement, not cancel, one another. Second, the cases granting injunctions against federal officers which were decided prior to *Bivens* all hold that such equitable redress is available to a plaintiff only upon a showing that the officer in question acted either in excess of the lawful authority granted to him or pursuant to authority unlawfully conferred upon him.[205] *Bivens* (as construed by the Second Circuit) provided for a damage remedy against federal officials performing nondiscretionary acts without good faith but within the scope of their authority.[206] If the source of the equitable relief available to a plaintiff is *Bivens* itself, that fact may provide a broader scope for such relief than was established by the Supreme Court's pre-*Bivens* rulings. Finally, there is authority to the effect that immunity is not a bar and good faith is not a defense to suits seeking injunctions.[207] Implicit in this conclusion is the unstated premise that such protective devices are available only when the

202. *See id.* at 400, 404 (Harlan, J., concurring); Bell v. Hood, 327 U.S. 678, 684 (1946); Lewis v. S.S. Baune, 534 F.2d 1115, 1122 (5th Cir. 1976); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 723 (2d Cir. 1969), *rev'd on other grounds,* 403 U.S. 388 (1971).

203. *See* Washington Free Comm., Inc. v. Wilson, 484 F.2d 1078, 1081 n.5 (D.C. Cir. 1973) (misconstruing Brown v. Donielson, 334 F. Supp. 294, 298 (S.D. Iowa 1971)); Clark v. Illinois, 415 F. Supp. 149, 151 (N.D. Ill. 1976) (misconstruing Williams v. Brown, 398 F. Supp. 155, 157-58 (N.D. Ill. 1975)); Coomes v. Adkinson, 414 F. Supp. 975, 983 (D.S.D. 1976); Commonwealth of Pennsylvania v. Int'l U. of Op. Eng'rs Local No. 542, 347 F. Supp. 268, 286 (E.D. Pa. 1972). Other courts permit injunctive requests in a *Bivens* type of action without analysis. *See, e.g.,* Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 928, 930 (10th Cir. 1975). Others look to *Bivens* for guidelines on when to grant separate injunctive relief. *See, e.g.,* Wounded Knee Legal Defense/Offense Comm. v. FBI, 507 F.2d 1281, 1284 (8th Cir. 1974).

204. *Cf.* Rizzo v. Goode, 423 U.S. 362, 378 (1976) (citing Giles v. Harris, 189 U.S. 475, 486 (1903), Irwin v. Dixion, 50 U.S. (9 How.) 10, 33 (1850)).

205. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 701-02 (1949); Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21 (1940); Philadelphia Co. v. Stimson, 223 U.S. 605, 619-20 (1912); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 109-10 (1902); Noble v. Union River Logging R.R. Co., 147 U.S. 165, 171-72 (1893); Poindexter v. Greenhow, 114 U.S. 270, 288 (1884).

206. See notes 64-74 and accompanying text *supra*.

207. National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974); Stanford Daily v. Zurcher, 366 F. Supp. 18, 20 (N.D. Cal. 1973).

person being sued faces potential monetary loss as a result of the suit. But the Supreme Court has been willing to award attorney's fees and court costs to a successful plaintiff in an action in equity,[208] and at least one court has extended this approach to an equitable proceeding against federal officers to redress alleged deprivations of constitutional rights.[209] If such equitable relief has its source in *Bivens*, then one may argue that it should be subject to the immunity bar and good faith defense established by the second appellate court opinion in that case, at least to the extent that the plaintiff seeks fees and costs in addition to an injunction. If, however, such equitable relief exists separately from *Bivens*, then limiting concepts developed by the Second Circuit's 1972 decision in that case should have no application in a *Bivens* suit. In this author's opinion, no doctrines developed by the *Bivens* series of cases should be construed to limit the scope of equitable remedies which federal courts may fashion.[210]

The problem of injunctive relief in a section 1331(a) case is probably most likely to arise in connection with a request for a preliminary injunction sought to restrain continuing misconduct.[211] Various decisions have estab-

208. *See* Hall v. Cole, 412 U.S. 1, 9 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-94 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939); Trustees v. Greenough, 105 U.S. 527, 531-37 (1881). *But see* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). There the Supreme Court held that a plaintiff is not entitled to attorney's fees in any type of federal litigation unless (1) there is a contract or statute granting such fees, (2) the successful party conferred a common benefit by the recovery of a fund or property, (3) there was willful disobedience of a court order by the losing party, or (4) the losing party acted wantonly, vexatiously, in bad faith, or for oppressive reasons. *Id.* at 257-59. Arguably, exception (4) is available in a case seeking equitable redress for deliberate deprivations of constitutional rights; but in order to fit in under the exception the plaintiff must show that the defendant vexatiously maintained an unfounded defense. Pre-litigation oppression apparently will not suffice. *See* Skehan v. Board of Trustees, 538 F.2d 53, 57 (3d Cir. 1976).

209. Stanford Daily v. Zurcher, 366 F. Supp. 18, 25 (N.D. Cal. 1973).

210. This conclusion is buttressed by the fact that a legal remedy can be granted only if a claimant can prove he is vested with a legal right. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395-97 (1971); J. I. Case Co. v. Borak, 377 U.S. 426, 431-33 (1964). But enforcement of an equitable claim requires no such proof. *See* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14-15 (1942) (with reference to public interests only); Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 551-52 (1937); Davis v. Romney, 490 F.2d 1360, 1368-69 (3d Cir. 1974).

211. *See* FED. R. CIV. P. 65(a) (1966) (defining notice required for and consolidation of a preliminary injunction proceeding). Rule 65(c) requires posting of security in the event that trial on the merits should show that the injunction ought not to have been issued. If the plaintiff succeeds, the injunction will normally be modified so as to become permanent. A refusal by the trial court to issue a preliminary injunction is an appealable interlocutory order under 28 U.S.C. § 1292(a)(1) (1970). But taking such an appeal has its risks. The refusal by the trial court will not normally be overturned unless there is an abuse of discretion or an obvious error of law. Jones v. Snead, 431 F.2d 1115, 1116 (8th Cir. 1970); Societé Comptoir de L'industrie Cotonniere Établissements Boussac v. Alexander's Dep't Stores, Inc., 299 F.2d 33, 35-36 (2d Cir. 1962). But on appeal, the reviewing court may consider the case in toto and even dismiss it on the merits. Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940); Smith v. Vulcan Iron

lished that four prerequisites must be met before a federal court will issue a preliminary injunction: first, a reasonable probability that the request will succeed on the merits; second, irreparable injury to the movant for which no legal remedy is adequate; third, proof that others will not suffer serious adverse consequences because of the injunction; and fourth, the movant's interest in having the injunction granted outweighs the public interest in denying its issuance.[212] In practice this is a difficult burden to meet.

An example of how to meet this burden may be found in *Illinois Migrant Council v. Pilliod.*[213] The Illinois Migrant Council and several individual plaintiffs sued various officials of the Immigration and Naturalization Service (INS), seeking to enjoin an alleged pattern of official searches, seizures, detentions, and arrests directed against resident aliens of Mexican descent. At the trial court, the issue was whether a preliminary injunction could be obtained. Affidavits contended that INS agents would stop Chicanos walking down public streets or driving their cars down public highways, ask them for identification papers, and threaten them with incarceration if such papers were not promptly produced.[214] It was also alleged that INS agents would compile lists of addresses at which illegal aliens might be found and conduct mass raids of those premises. During these raids, agents would knock on the doors of dwellings, identify themselves to the occupants, enter the dwellings, search the premises without warrants, and interrogate the occupants, occasionally subjecting those whom they felt to be uncooperative to verbal and physical abuse.[215] Official conduct was governed by INS pamphlets which informed agents that they did not need warrants to search dwellings and that they could make a stop or an arrest without probable cause.[216]

The trial judge issued a preliminary injunction.[217] He was convinced

Works, 165 U.S. 518, 525 (1897); McNally v. Pulitzer Pub. Co., 532 F.2d 69, 73-74 (8th Cir. 1976); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972); Allstate Ins. Co. v. McNeill, 382 F.2d 84, 87-88 (4th Cir. 1967), *cert. denied sub nom.* Murray v. McNeill, 392 U.S. 931 (1968).

212. *See, e.g.,* North Avondale Neighborhood Ass'n v. Cincinnati Metropolitan Hous. Auth., 464 F.2d 486, 488 (6th Cir. 1972); Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); Doeskin Products v. United Paper Co., 195 F.2d 356, 359 (7th Cir. 1952); Northwest Indus., Inc. v. B.F. Goodrich Co., 301 F. Supp. 706, 710 (N.D. Ill. 1969). Some courts have added the requirement that the purpose of the preliminary injunction must be one of preserving the *status quo ante. See, e.g.*, Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953); Warner Bros. Pictures v. Gittone, 110 F.2d 292, 293 (3d Cir. 1940).

213. 398 F. Supp. 882 (N.D. Ill. 1975), *aff'd*, 540 F.2d 1062, 1072 (7th Cir. 1976).

214. 398 F. Supp. at 887-88.

215. *Id.* at 889-91. Some of the dwellings were owned by the employer of the occupants, Del Monte Canning Co.

216. *See id.* at 902-03.

217. *Id.* at 901.

that the plaintiffs could succeed on the merits because the searches were made without consent and the stop-and-frisks were made solely because a person appeared to be of Mexican ancestry. But the court held that probability of success on the merits also requires proof of a "reasonable probability that the conduct was part of an official policy to the end that there is a substantial likelihood that future violations will occur."[218] This prerequisite was satisfied by the agency pamphlets which lent official sanction to improper conduct and by the fact that even the minimal guidelines in those pamphlets were not being consistently followed by those in the field.[219] Substantial likelihood that the plaintiffs would suffer irreparable injury was also found. The court concluded that the Fourth Amendment violations by the agents were serious injuries and that the monetary remedy of *Bivens* was inadequate because a continuing pattern of unconstitutional deprivation of rights existed.[220] No adverse consequences to others were found, because compelling the agents to obey the Constitution could only benefit the public as a whole.[221] As for balancing the competing interests at stake, the district court said vigorous enforcement and immigration laws would not justify unlawful conduct by government officials.[222] *Pilliod* graphically illustrates the obstacles that must be overcome by a plaintiff seeking to vindicate his constitutional rights by means of an equitable remedy. But the reluctance of federal courts to grant such relief is entirely reasonable in light of the fact that a plaintiff denied such redress will have recourse to the remedy of damages created by *Bivens*. This serves to emphasize the point that it is unreasonable to interpret *Bivens* as the source of both a legal and an equitable cause of action.

218. *Id.* at 901-02 (citing Washington Free Comm. Inc. v. Wilson, 484 F.2d 1078, 1081 (D.C. Cir. 1973); Long v. District of Columbia, 469 F.2d 927, 932 (D.C. Cir. 1972)). *Cf.* Golden v. Zwickler, 394 U.S. 103, 108 (1969) (declaratory judgments).

219. 398 F. Supp. at 903.

220. *Id.* at 904 (citing Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969); Lankford v. Gelston, 364 F.2d 197, 200 (4th Cir. 1966)).

221. 398 F. Supp. at 904.

222. *Id.* The decisive factor in the district court's rationale may have been its conclusion that the "stop-and-frisks" were clearly contrary, and the warrantless searches were probably contrary to prior Supreme Court rulings. *See* United States v. Ortiz, 422 U.S. 891, 896-97 (1975) (INS searches of vehicles at traffic checkpoints are illegal unless made with consent of the driver or with probable cause); United States v. Brignoni-Ponce, 422 U.S. 873, 884-86 (1975) (INS agents may stop and frisk persons only on a reasonable suspicion that they are aliens and not merely because they appear to be of Mexican ancestry); Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (a warrantless search made on the basis of coerced consent violates the Fourth Amendment); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (warrantless INS search of a vehicle at a site which is not the functional equivalent of a border violates the Fourth Amendment unless justified by probable cause).

## B. Selected Substantive Problems

### *1. Applicability to Other Amendments*

The Supreme Court in *Bivens* dealt only with the Fourth Amendment. The majority opinion, written by Justice Brennan, discussed prior Supreme Court rulings on that amendment to show why it was necessary to provide a federal cause of action to vindicate the right of privacy it guarantees.[223] Moreover, the damage remedy announced by the Court was found to be one arising primarily from the Fourth Amendment's proscription against unreasonable searches and seizures.[224] In his concurrence, Justice Harlan specifically said that the monetary relief created by the majority was a permissible form of redress in a claim arising under the Fourth Amendment, but he noted that "[t]he same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted."[225]

In light of these considerations, a number of federal courts have been unwilling to extend the *Bivens* remedy to cases not involving the Fourth Amendment.[226] Others have simply declined to address the issue.[227] The

223. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392-94 (1971).

224. *Id.* at 397.

225. *Id.* at 409 n.9 (citing Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring)). In *Monroe,* Justice Harlan talks about the unavailability of damage remedies for such things as loss of voting rights, the harm caused by being psychologically coerced to confess, and the harm caused by being compelled to attend segregated schools.

226. La Bar v. Royer, 528 F.2d 548, 549 (5th Cir. 1976) (limited *Bivens* to its factual analogues); Livingood v. Townsend, 422 F. Supp. 24, 27-28 (D. Minn. 1976); Schofield v. County of Volusia, 413 F. Supp. 908, 909 (M.D. Fla. 1976); Bankhead v. Cowin, 405 F. Supp. 326, 327 (E.D.N.Y. 1975) (dictum) (indicated that *Bivens* might be very difficult to apply in contexts other than those arising under the Fourth Amendment); Jones v. United States, 401 F. Supp. 168, 174 (E.D. Ark. 1975); Moro v. Telemundo Incorporado, 387 F. Supp. 920, 924 n.1 (D.P.R. 1974) (dictum); Archuleta v. Callaway, 385 F. Supp. 384, 388 (D. Colo. 1974); Moore v. Schlesinger, 384 F. Supp. 163, 165 (D. Colo. 1974); McLaughlin v. Callaway, 382 F. Supp. 885, 893 n.4 (S.D. Ala. 1974) (dictum) (in the context of a Fifth Amendment claim *Bivens* applies only where no remedy already exists); Polakoff v. Henderson, 370 F. Supp. 690, 692-93 (N.D. Ga. 1973) (dictum); *In re* Grand Jury Investigation, 362 F. Supp. 870, 877 (M.D. Pa. 1973); Smothers v. Columbia Broadcasting Sys., Inc., 351 F. Supp. 622, 626 n.4 (C.D. Cal. 1972) (dictum); Davidson v. Kane, 337 F. Supp. 922, 924 (E.D. Va. 1972).

227. The Second Circuit has failed to do so on several occasions. New York Pathological & X-Ray Laboratories, Inc. v. Immigration & Naturalization Serv., 523 F.2d 79, 82 n.5 (2d Cir. 1975); Weise v. Syracuse Univ., 522 F.2d 397, 404 (2d Cir. 1975); Holodnak v. Avco Corp., 514 F.2d 285, 292 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975); Wahba v. New York Univ., 492 F.2d 96, 103-04 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974). The same is true of the District of Columbia Circuit. Greenya v. George Washington Univ., 512 F.2d 556, 562-63 n.13 (D.C. Cir. 1975); Cardinale v. Washington Technical Inst., 500 F.2d 791, 796 n.5 (D.C. Cir. 1974). *But see* Sullivan v. Murphy, 478 F.2d 938, 965 & n.7 (D.C. Cir. 1973) (dictum). This silence by the Court

view of the former group of courts has been aptly summarized by District Judge John A. Reed: "The *Bivens* holding, in the opinion of this court, should not be given an overly generous interpretation thereby expanding the district courts' jurisdiction to situations not clearly within the ambit of the *Bivens* case."[228] The underlying policy here is one of judicial self-restraint, an unwillingness to go beyond the boundaries set by the Supreme Court. This is an entirely legitimate decision-making technique. But it is a technique which has rarely been followed in *Bivens* cases. An overwhelming number of lower federal courts have extended or have indicated their willingness to extend the *Bivens* doctrine to cases other than those involving Fourth Amendment claims.[229] Often these extensions have been ipse dixits,

of Appeals for the District of Columbia has prompted at least some judges therein to extend unilaterally the *Bivens* doctrine to other contexts. *See* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 161-62 (D.D.C. 1976); Saffron v. Wilson, 70 F.R.D. 51, 53 n.1 (D.D.C. 1975). On the other hand, the district court opinions in the Second Circuit have divided equally on this issue. *Compare* DeMaria v. Jones, 416 F. Supp. 291, 299 (S.D.N.Y. 1976); Bankhead v. Cowin, 405 F. Supp. 326, 327 (E.D.N.Y. 1975) (both refusing to extend *Bivens* unilaterally) *with* Turano v. Board of Educ., 411 F. Supp. 205, 209 (E.D.N.Y. 1976); Blassingame v. United States Attorney Gen., 387 F. Supp. 418, 419 (S.D.N.Y. 1975) (both extending *Bivens* to situations other than those involving only the Fourth Amendment.)

228. Schofield v. County of Volusia, 413 F. Supp. 908, 909 (M.D. Fla. 1976). Judge Reed indicated that to permit a suit against a county under *Bivens* would enable a plaintiff to do something he would not be permitted to do under section 1983. *Id.* See text accompanying notes 302-42 *infra*.

229. Davis v. Passman, 544 F.2d 865, 873 (5th Cir. 1977) (Fifth Amendment); Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975) (Thirteenth and Fourteenth Amendments); Weir v. Muller, 527 F.2d 872, 873 (5th Cir. 1976) (Fifth Amendment); Brault v. Town of Milton, 527 F.2d 730, 732 (2d Cir. 1975) (Fourteenth Amendment), *rev'd*, 527 F.2d 736 (2d Cir. 1975) (en banc); Paton v. La Prade, 524 F.2d 862, 869-70 (3rd Cir. 1975) (First Amendment); Yiamouyiannis v. Chemical Abstracts Serv., Inc., 521 F.2d 1392, 1393 (6th Cir. 1975) (First Amendment); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 932 & n.5 (10th Cir. 1975) (Fifth Amendment); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (Fifth Amendment); Sullivan v. Murphy, 478 F.2d 938, 965 & n.47 (D.C. Cir. 1973) (Fifth Amendment) (dictum), *cert. denied,* 414 U.S. 880 (1974); Braden v. University of Pittsburgh, 477 F.2d 1, 7 n.10 (3rd Cir. 1973) (Fourteenth Amendment) (dictum); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892, 894 (3d Cir. 1972) (Fifth Amendment); Bethea v. Reid, 445 F.2d 1163, 1164-65 (3d Cir. 1971) (Fifth Amendment), *cert. denied,* 404 U.S. 1061 (1972); Writers Guild of America, West, Inc., v. FCC, 423 F. Supp. 1064, 1088-89 (C.D. Cal. 1976) (First Amendment) (dictum); Owen v. City of Independence, 421 F. Supp. 1110, 1119 (W.D. Mo. 1976) (Fourteenth Amendment); Eisenberg v. Mathews, 420 F. Supp. 1274, 1277-78 (E.D. Pa. 1976) (Fifth Amendment); Coomes v. Adkinson, 414 F. Supp. 975, 983 (D.S.D. 1976) (Fifth Amendment); Jihaad v. Carlson, 410 F. Supp. 1132, 1134 (E.D. Mich. 1976) (First and Eighth Amendments) (dictum); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 161-62 (D.D.C. 1976) (First and Sixth Amendments); Williams v. Brown, 398 F. Supp. 155, 156 (N.D. Ill. 1975) (Fourteenth Amendment); Patmore v. Carlson, 392 F. Supp. 737, 740 (E.D. Ill. 1975) (First, Fifth, Sixth, Eighth, and Ninth Amendments); Revis v. Laird, 391 F. Supp. 1133, 1139 (E.D. Cal. 1975) (First and Fifth Amendments); Patterson v. City of Chester, 389 F. Supp. 1093, 1096 (E.D. Pa. 1975) (First and Fourteenth Amendments); Blassingame v. United States Attorney Gen., 387 F. Supp. 418, 419 (S.D.N.Y. 1975) (First and Eighth Amendments) (dictum); Brown v. Board of Educ., 386 F. Supp. 110, 121-22 & n.5 (N.D. Ill. 1974) (Fourteenth Amendment); Shaffer v.

but on occasion a court has tried to explain the rationale underlying its decision.

In *Berlin Democratic Club v. Rumsfeld*,[230] First and Sixth Amendment claims were presented.[231] The plaintiffs were members of a political club in West Germany composed mostly of American citizens. It supported the election of George McGovern for president in 1972 and the impeachment proceedings against Richard Nixon in 1973; it also operated a legal aid service for American soldiers stationed in West Germany. It was alleged that United States Army Intelligence placed the club and its activities under electronic surveillance, covertly infiltrated its membership with army agents for the purpose of disrupting its servicemen's counseling activities, drew up blacklists which caused several of the plaintiffs to be fired from their jobs at the United States exhibit at the German Industrial Fair and from their jobs at private firms, debarred other plaintiffs from military installations in Berlin, and caused West German authorities to institute deportation proceedings against one plaintiff.[232] The district court said of the First Amendment claim:

> Courts that have extended *Bivens* to other constitutionally protected interests have seen no compelling distinction between the fourth and first or fifth amendments. Clearly the interests to be protected are equally if not more fundamental. And once a citizen's first amendment rights have been violated, he is without redress in the absence of a monetary award. When a person has, however temporarily, lost the freedom of expression guaranteed him by the Constitution, because a federal official has attempted to restrain that person's expression, the injury is simply too great to permit it to go unredressed.[233]

Wilson, 383 F. Supp. 554, 562 (D. Colo. 1974) (Fifth Amendment) (dictum); United States *ex rel.* Harrison v. Pace, 380 F. Supp. 107, 110 (E.D. Pa. 1974) (Fifth Amendment); Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974) (First Amendment); Dahl v. City of Palo Alto, 372 F. Supp. 647, 651 (N.D. Cal. 1974) (Fifth Amendment); Perzanowski v. Salvio, 369 F. Supp. 223, 229 (D. Conn. 1974) (Fourteenth Amendment); Butler v. United States, 365 F. Supp. 1035, 1039-40 (D. Hawaii 1973) (First and Fifth Amendments); Dupree v. City of Chattanooga, 362 F. Supp. 1136, 1139 (E.D. Tenn. 1973) (Fourteenth Amendment); James v. United States, 358 F. Supp. 1381, 1386 (D.R.I. 1973) (Fifth and Eighth Amendments) (dictum), *vacated*, 502 F.2d 1159 (1st Cir. 1974); Washington v. Brantley, 352 F. Supp. 559, 564 (M.D. Fla. 1972) (Fourteenth Amendment) (dictum); Johnson v. Alldredge, 349 F. Supp. 1230, 1231 (M.D. Pa. 1972) (Fifth Amendment), *aff'd in part and rev'd in part on other grounds*, 488 F.2d 820 (3d Cir. 1973); Howard v. Warden, Petersburg Reformatory, 348 F. Supp. 1204, 1205 (E.D. Va. 1972) (First and Ninth Amendments); Commonwealth of Pennsylvania v. International U. of Op. Eng'rs Local No. 542, 347 F. Supp. 268, 286 (E.D. Pa. 1972) (Thirteenth and Fourteenth Amendments) (dictum); Saffron v. Wilson, 70 F.R.D. 51, 53 n.1 (D.D.C. 1975) (all constitutional interests).

230. 410 F. Supp. 144 (D.D.C. 1976).

231. Fourth, Fifth, and Ninth Amendment violations were also alleged. *Id.* at 148. The court did not discuss these claims in detail, however.

232. *Id.* at 147-48.

233. *Id.* at 161.

As to the Sixth Amendment claim arising from electronic eavesdropping of an attorney-client conference, the district court found damages rather than reversal of the conviction to be both necessary and appropriate. Appropriateness was found because courts were said to be well-equipped to take into account causation and damages.[234] Necessity was found because:

> A criminal who has been convicted . . . has suffered obvious harm through loss of his reputation, his financial resources, and perhaps his freedom pending appeal. Reversal on appeal may ameliorate the extent of these damages; it cannot eradicate them. If a conviction has been caused at least in part by violation of the criminal's Sixth Amendment rights, there is no adequate remedy other than damages to redress fully the resultant harm.[235]

In *States Marine Lines, Inc. v. Shultz*,[236] customs agents boarded plaintiff's vessel docked in the port of Charleston, South Carolina and seized cargo valued at $39,619.45. The agents did not have permission to board the ship and did not have a warrant. The District Director of Customs informed States Marine Lines that the seized items were being held subject to forfeiture for alleged statutory violations; the plaintiff could not recover the cargo unless it was willing to pay penalties. States Marine Lines sued for $50,000 in damages.[237] The plaintiff alleged that there was a violation of the Fifth Amendment actionable under *Bivens*.[238] The court noted that the plaintiff in this case sought to vindicate property and not liberty interests and that in *Bivens* the Supreme Court had found that "[h]istorically damages have been regarded as the ordinary remedy for an invasion of personal interests *in liberty*."[239] But the court went on to conclude that in section 1983 cases the Supreme Court has permitted suits for deprivation of property without due process of law[240] and that it would therefore be anomalous to deny the same right to sue under the Fifth Amendment.[241] Again, a damage remedy was found to be necessary and appropriate:

> The necessity and appropriateness of judicial relief is no less compelling in this case than it was in *Bivens*. As in *Bivens*: A common law or state tort remedy may or may not afford a means of redressing this wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to federal authority; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of mandamus are no longer viable alternatives.[242]

234. *Id.* at 162. For similar views expressed by Justice Harlan, see note 151 and accompanying text *supra*.

235. 410 F. Supp. at 162.

236. 498 F.2d 1146 (4th Cir. 1974).

237. *Id.* at 1147-48.

238. *Id.* at 1156.

239. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971) (emphasis added).

240. 498 F.2d at 1154 (citing Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972)).

241. 498 F.2d at 1157.

242. *Id.*

*Butler v. United States*[243] arose out of alleged violations of First, Fourth, and Fifth Amendment rights by named and unnamed military personnel stationed at Hickam Air Force Base.[244] The court found it to be anomalous that damages for First Amendment violations could be exacted from state officials but not from federal officials.[245] Moreover, it noted that damages were the only practicable form of redress once the occasion for exercising one's right of free speech has passed.[246] Additionally, the district court said:

> First Amendment rights are no less important than Fourth Amendment or Fifth Amendment rights. They are, in fact, historically interrelated. The progression of cases which have read the First Amendment into the Fourteenth Amendment did so by finding the First Amendment freedoms to be personal liberties protected by the due process clause of the Fourteenth Amendment. The same incorporation took place in the federal area. Thus protection of First Amendment rights through the Fifth Amendment against federal action rests on the same Constitutional imperatives as through the Fourteenth Amendment against state action.[247]

Considering the decision of the Supreme Court in *Bivens*, one may ask whether these decisions are justified. One can offer several reasons to support the conclusion that they are. First, the rule of *expressio unius est exclusio alterius* should not be applied to decisions of the Supreme Court. The Court in *Bivens* discussed the Fourth Amendment because that was all that was before it. Its silence regarding damage remedies for infringements of other constitutional rights cannot properly be construed as a rejection of any extension of those remedies to violations of other provisions of the Bill of Rights. Second, the very open-ended character of the *Bivens* decision indicates that the lower federal courts were to have a good deal of discretion in administering the legal remedy which the Court created. Extension of the *Bivens* remedy to other constitutional provisions is arguably part and parcel of the discretion with which the district courts and courts of appeals were in

243. 365 F. Supp. 1035 (D. Hawaii 1973).

244. *Id.* at 1039. The plaintiffs sought to enter Hickam Air Force Base to protest the Vietnam war during a *public* campaign speech to be delivered there by President Nixon. Military personnel detained, fingerprinted, and photographed plaintiffs, and eventually denied them access. In all, seven different causes of action were pleaded against the military authorities. *See id.* at 1037-38.

245. *Id.* at 1040.

246. *Id.*

247. *Id.* at 1039-40 (footnotes omitted). In regard to the incorporation that takes place in the federal area, *see* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). For the interrelationship of the First, Fourth, and Fifth Amendments, *see* Stanford v. Texas, 379 U.S. 476, 484-85 (1965) (quoting Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting): "The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of *Entick v. Carrington*, . . . [19 How. St. Tr. 1029 (1765)]. These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.' ")

fact given. Third, the key to *Bivens* was the unavailability of other adequate legal remedies.[248] As *Schultz* and *Rumsfeld* suggest, that problem is equally pressing in cases involving First, Fifth, or Sixth Amendment claims. There would appear to be no sound reason to grant access to the courts only for Fourth Amendment violations; certainly Fourth Amendment guarantees are not manifestly more important than those of the First, Fifth, or Sixth Amendments.[249] The court in *Bivens* quoted language from *Bell v. Hood*[250] to the effect that "where 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."[251] Should this rule be any less valid in First or Fifth Amendment cases than it is in Fourth Amendment cases? Plainly not, especially in view of the "historic interrelationship"[252] of these constitutional provisions.

Two caveats are necessary. As *Schultz* noted,[253] *Bivens* addresses itself to infringements of liberty, not property.[254] It could be argued that remedies for violations of the Fifth Amendment which deprive a person of property should be left to state law, notwithstanding section 1983 decisions to the contrary. But the argument that a deprivation of a property interest without due process of law somehow merits less protection than a similar impairment of a liberty interest is a specious one. As the Supreme Court has pointed out in another context,

> the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[255]

In light of this rationale, it seems sensible to conclude, as the court in *Schultz* did, that *Bivens* provides a remedy for *all* types of infringements of the Fifth Amendment. A second caveat is that Justice Brennan in *Bivens* spoke of the absence of "special factors counselling hesitation" in that

248. See note 55 and accompanying text *supra*.

249. *But see* note 61 and accompanying text *supra*.

250. 327 U.S. 678 (1946).

251. *Id.* at 684 (footnote omitted), *quoted in* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

252. See note 247 *supra*.

253. See note 239 and accompanying text *supra*.

254. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. at 395. See note 239 *supra*.

255. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). Justice Brennan's majority opinion was referring to a suit brought under section 1983 and section 1343(3) (see note 33 *supra*), but his argument has equally forceful implications for suits brought under *Bivens* and section 1331(a). However, later rulings of the Supreme Court suggest that interests in liberty and interests in property may not be coextensive. See notes 479, 483, and accompanying text *infra*.

case.[256] Such factors do not seem to exist in cases involving requested extensions of the *Bivens* doctrine to the rest of the first nine amendments for the reasons previously stated. They may exist, however, in cases involving requested extensions of *Bivens* to the Fourteenth Amendment.[257]

### 2. *Application of the Doctrine of Respondeat Superior*

It is a well-established rule that the doctrine of respondeat superior, or vicarious liability,[258] does not exist in a case brought under section 1983 of the Civil Rights Act.[259] The Supreme Court in *Bivens* never considered the problem. As might be expected, some lower courts have applied the doctrine in a *Bivens* suit,[260] while others have not.[261]

Several decisions emanating from the district courts in Illinois illustrate the problems surrounding this area of the law. The initial ruling came in *Jamison v. McCurrie.*[262] That case arose from a suit against the city of Chicago and several of its police officers. It was alleged that the police wrongfully refused to incarcerate the murderer of the plaintiff's decedent; it was further alleged that the city was liable both because it was responsible for the improper training of its law enforcement officers and because it was responsible under the theory of respondeat superior.[263] Considering the

256. *Id.* at 396. See notes 58-59 and accompanying text *supra*.

257. See notes 345-65 and accompanying text *infra*. The discussion at that juncture of the article will focus upon the applicability of the Eleventh Amendment to certain types of *Bivens*-based suits.

258. For the background of and the policy considerations underlying this concept, *see* W. PROSSER, LAW OF TORTS § 69, at 458-59 (4th ed. 1971).

259. The issue was left unanswered by the Supreme Court in Monroe v. Pape, 365 U.S. 167, 191 (1961). Lower courts have consistently held, however, that vicarious liability has no place in a section 1983 suit. Hampton v. Holmsburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976); Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974); Kish v. County of Milwaukee, 441 F.2d 901, 905 (7th Cir. 1971); Dunham v. Crosby, 435 F.2d 1177, 1180 (1st Cir. 1970); Candelaria v. Valdez, 353 F. Supp. 1096, 1097 (D. Colo. 1973); Boyden v. Troken, 352 F. Supp. 722, 723 (N.D. Ill. 1973); Jennings v. Davis, 339 F. Supp. 919, 921 (W.D. Mo. 1972); Barrows v. Faulkner, 327 F. Supp. 1190, 1191 (N.D. Okla. 1971); Nugent v. Sheppard, 318 F. Supp. 314, 315 (N.D. Ind. 1970); Roberts v. Williams, 302 F. Supp. 972, 987 (N.D. Miss. 1969); Salazar v. Dowd, 256 F. Supp. 220, 223 (D. Colo. 1966); Jordan v. Kelly, 223 F. Supp. 731, 737 (W.D. Mo. 1963).

260. *See, e.g.,* Sanabria v. Village of Monticello, 424 F. Supp. 402, 410-11 (S.D.N.Y. 1976); Rende v. Rizzo, 418 F. Supp. 96, 98 (E.D. Pa. 1976); Shifrin v. Wilson, 412 F. Supp. 1282, 1307 (D.D.C. 1976) (supplemental opinion); Collum v. Yurkovich, 409 F. Supp. 557, 559 (N.D. Ill. 1975); Williams v. Brown, 398 F. Supp. 155, 156 (N.D. Ill. 1975); Maybanks v. Ingraham, 378 F. Supp. 913, 916 (E.D. Pa. 1974). *See also* Schoonfield v. Mayor of Baltimore, 399 F. Supp. 1068, 1079 n.16 (D. Md. 1975).

261. *See, e.g.,* Kite v. Kelley, 546 F.2d 334, 337 (10th Cir. 1976); Weiss v. J.C. Penney Co., 414 F. Supp. 52, 54 (N.D. Ill. 1976); Gresham v. City of Chicago, 405 F. Supp. 410, 412 (N.D. Ill. 1975); Jamison v. McCurrie, 388 F. Supp. 990, 994 (N.D. Ill. 1975); Jackson v. Wise, 385 F. Supp. 1159, 1162-63 (D. Utah 1974); Smetanka v. Borough of Ambridge, 378 F. Supp. 1366, 1377 (W.D. Pa. 1974); Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Cal. 1972).

262. 388 F. Supp. 990 (N.D. Ill. 1975).

263. *Id.* at 992.

Supreme Court's decision in *City of Kenosha v. Bruno,*[264] the district court found authority to entertain the suit under *Bivens* and section 1331(a).[265] The court in *Jamison* refused, however, to find any liability for purportedly negligent training because of the perceived impropriety of federal courts assuming the roles of "super-administrators."[266] As to any theory of respondeat superior, the court held, "[t]o create vicarious liability under the constitution with the present facts (non-systematic failure to arrest) in the absence of any stated congressional policy is, in the mind of this Court, unjustified."[267]

The next decision came in *Williams v. Brown,*[268] in which suit was brought against various police officers and the city of Chicago for an alleged unlawful arrest and false imprisonment. Again, jurisdiction was sustained under *Bivens* and section 1331(a),[269] As to the damage liability of the municipality, the district court said that the city's responsibility "for the unconstitutional acts of its employees is particularly appropriate in the area of police misconduct. Judges and commentators have asserted that, as a matter of public policy, municipalities should be liable for the torts of their police."[270] The court found no bar to the suit against the city because of the Eleventh Amendment,[271] and it noted that under Illinois law a municipality is normally liable for the intentional torts of its agents.[272]

264. 412 U.S. 507 (1973). See notes 82-93 and accompanying text *supra*.

265. See note 32 *supra*.

266. 388 F. Supp. at 992. *Cf.* Rizzo v. Goode, 423 U.S. 362, 378-80 (1976).

267. 388 F. Supp. at 994.

268. 398 F. Supp. 155 (N.D. Ill. 1975).

269. *Id.* at 156.

270. *Id.* at 159.

271. *Id.* at 160. See notes 345-65 and accompanying text *infra*.

272. *Id.* (citing Arnolt v. City of Highland Park, 52 Ill. 2d 27, 31, 282 N.E.2d 144, 148 (1971)). There has been some question as to whether state common law immunities should protect a municipality sued under section 1331(a). A few courts have said such local law as there is should be applicable. *See* Skehan v. Board of Trustees, 501 F.2d 31, 44 (3d Cir. 1974), *vacated on other grounds,* 421 U.S. 983 (1975); Maybanks v. Ingraham, 378 F. Supp. 913, 916 (E.D. Pa. 1974). *But cf.* Shifrin v. Wilson, 412 F. Supp. 1282, 1307 (D.D.C. 1976) (supplemental opinion). The court in *Shifrin* characterized the purpose of such common law immunity as that of preventing threats to the efficient functioning of government. But, the court reasoned, since the officials of that government are not immune under local law in a constitutional tort case, that efficient functioning is impaired at the moment a suit is lodged. Therefore, there would seem to be no reason to continue to allow local law to shield the municipality from vicarious liability. Of course, this entire problem becomes moot if the federal court deciding the case happens to be situated in one of the increasing number of states which have dispensed with the doctrine of local sovereign immunity. *See, e.g.,* Smith v. State, 93 Idaho 795, 802, 473 P.2d 937, 944 (1970); Willis v. Department of Conservation & Economic Dev., 55 N.J. 534, 540, 264 A.2d 34, 37 (1970); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 39-41, 115 N.W.2d 618, 624-25 (1962); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 25, 163 N.E.2d 89, 96 (1959). *See generally* W. PROSSER, LAW OF TORTS § 131, at 975-87 (4th ed. 1971).

In *Gresham v. City of Chicago,*[273] the plaintiff alleged false imprisonment and unlawful arrest; he sued individual police officers and the city of Chicago. The district court noted that no allegation of wrongdoing was tendered against the city.[274] It said that "[h]olding a municipality liable on a vicarious liability or respondeat superior theory, however, raises serious constitutional problems as to the power of the federal government to create such liability."[275] Absent a clear-cut congressional authorization to bring such a cause of action, the district court believed it was bound to dismiss the suit against the city.[276] *Gresham* was followed by *Collum v. Yurkovich*.[277] The plaintiff therein alleged that he was beaten by policemen while in custody. He sued the individual officers and the city of Chicago under the theory of respondeat superior. The district court determined that it had jurisdiction.[278] It held, as in *Williams*, that since state law would render the city liable, federal courts in a *Bivens* type of action could apply the doctrine of vicarious liability; any claim to the contrary was deemed "ill-founded."[279]

The last and most recent decision in this series came in *Weiss v. J.C. Penney Co.*[280] In this case, the plaintiff alleged that agents of J.C. Penney Co. (who accused him of theft) combined with the police officers of Niles, Illinois, to threaten, forcibly imprison, and coerce a confession from him.[281] The district court found sufficient state action to create a cause of action under *Bivens,* section 1331(a), and the Fourteenth Amendment.[282] After noting the disparate results in *Gresham* and *Williams*, the court simply said that "the better reasoned view would result in this court's not fashioning a monetary remedy under the theory of *respondeat superior* in the instant case. The situation here is not so extraordinary as to necessitate providing an unusual remedy."[283]

Thus within one district, two opinions took one approach while three took another. Deciding which result is better poses certain difficulties. Section 1983 actions do not encompass the theory of respondeat superior.[284] A number of courts have deemed *Bivens* to be the federal counterpart of a section 1983 suit and hence governed by similar criteria.[285] If so, the

273. 405 F. Supp. 410 (N.D. Ill. 1975).
274. *Id.* at 412.
275. *Id.*
276. *Id.*
277. 409 F. Supp. 557 (N.D. Ill. 1975).
278. *Id.* at 558.
279. *Id.* at 559.
280. 414 F. Supp. 52 (N.D. Ill. 1976).
281. *Id.* at 53.
282. *Id.*
283. *Id.* at 54.
284. See note 259 *supra*.
285. *See, e.g.,* Rodriguez v. Ritchey, 539 F.2d 394, 399 (5th Cir. 1976); Brawer v. Horowitz, 535 F.2d 830, 834 (3d Cir. 1976); Paton v. La Prade, 524 F.2d 862, 871 (3d Cir. 1975); Brubaker v. King, 505 F.2d 534, 536 (7th Cir. 1974); Bivens v. Six Unknown Named Agents of the Fed.

conclusion of this syllogism should be that respondeat superior should not apply in a *Bivens* action.[286] The response to this syllogism is that *Bivens* created a cause of action governed implicitly by the principles of the federal common law of torts. Respondeat superior is an established principle of tort law. Why then should the federal common law of torts be restricted by a limitation judicially engrafted onto a statutory cause of action? This author doubts that any compelling reason for such a restrictive approach exists; certainly there is no language in *Bivens* supporting such a limiting interpretation. Here, too, conclusive authority in the form of a Supreme Court ruling would be very helpful.

### 3. *Defendants Other Than Federal Officials*

#### a. Persons and Non-Governmental Entities

The Supreme Court in *Bivens* dealt only with redress against federal agents. A number of lower federal courts have said that in light of alternative remedies such as section 1983, the *Bivens* doctrine should be restricted to suits against federal officials.[287] Other courts, as the cases cited in the preceding section make clear,[288] disagree and have applied *Bivens* in suits alleging unconstitutional conduct by state officials. The theory put forward by one court is that:

> Although *Bivens* dealt with the availability of a federal remedy against federal officers for violation of rights secured by the fourth amendment, its analysis is arguably capable of being extended to create a remedy at law against state officers who have allegedly violated rights secured by other federal constitutional provisions.[289]

Yet other courts have taken the ultimate step and found the conduct of private individuals or entities to be actionable under *Bivens.*

In *McNally v. Pulitzer Publishing Co.*,[290] the plaintiff was indicted for aircraft piracy. Prior to trial, he was incarcerated in the Federal Medical Center in Springfield, Missouri, for psychiatric observation. A report made

Bureau of Narcotics, 456 F.2d 1339, 1346 (2d Cir. 1972); Bethea v. Reid, 445 F.2d 1163, 1166 (3d Cir. 1971); Lowery v. Hauk, 422 F. Supp. 490, 493 (C.D. Cal. 1976); Rende v. Rizzo, 418 F. Supp. 96, 98 (E.D. Pa. 1976); Gissen v. Tackman, 401 F. Supp. 305, 309 (D.N.J. 1975). *Contra,* Kochie v. Norton, 343 F. Supp. 956, 960 (D. Conn. 1972).

286. But is it permissible to say section 1983 practices and procedures are carried over into *Bivens* causes of action? Certainly some are, but others are not. For further discussion and comparison, see text accompanying notes 417-28 *infra.*

287. *See, e.g.,* United States v. Schiavo, 504 F.2d 1, 27 (3d Cir. 1974); Williams v. Rogers, 449 F.2d 513, 517 (8th Cir. 1971); Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976); Gambling v. Cornish, 412 F. Supp. 243, 244 (N.D. Ill. 1975); Coleman v. Tennessee Valley Trades & Lab. Coun., 396 F. Supp. 671, 676 (E.D. Tenn. 1975); Perry v. Linke, 394 F. Supp. 323, 326 (N.D. Ohio 1975); Moro v. Telemundo Incorporado, 387 F. Supp. 920, 924 n.1 (D.P.R. 1974); Kelly v. Metropolitan County Bd. of Educ., 372 F. Supp. 528, 537 (M.D. Tenn. 1973); Rodriguez v. Barcelo, 358 F. Supp. 43, 48 (D.P.R. 1973).

288. See cases cited in note 260 *supra.*

289. Perzanowski v. Salvio, 369 F. Supp. 223, 229 (D. Conn. 1974).

290. 532 F.2d 69 (8th Cir. 1976).

as the result of such observation was partially read into the public record during a pretrial hearing. An assistant federal district attorney prosecuting the case transferred a copy of this report to a correspondent for the *St. Louis Post-Dispatch*; portions of the document were quoted in a subsequent article on the trial.[291] McNally sued, *inter alia,* the federal attorney, the reporter, and the newspaper under section 1985(3) of the Civil Rights Act[292] and under *Bivens*. The United States Court of Appeals for the Eighth Circuit found no cause of action stated under section 1985(3) because no conspiracy involving racial or class-based discrimination had been alleged or proven.[293] The appellate court did find a cause of action stated under *Bivens*, however, both against the federal attorney and the private defendants who were alleged to have "acted in concert with a federal official acting under color of federal law."[294]

In *Yiamouyiannis v. Chemical Abstracts Service, Inc.,*[295] the plaintiff was a biochemist employed by the defendant private firm. He took a vigorous public position against the flouridation of drinking water, a position that conflicted with the official policy of the Department of Health, Education, and Welfare. CAS warned the plaintiff to desist in airing his views publicly on this subject. When he refused, he was placed on probation and eventually resigned.[296] The plaintiff sued, alleging a cause of action under *Bivens*.[297] He contended that because CAS had received partial federal funding and because the firm had been pressured by HEW to discipline the plaintiff, the requisite governmental action was present. The United States Court of Appeals for the Sixth Circuit found a cause of action under *Bivens* and remanded the case for further proceedings so that the plaintiff could be given the opportunity to prove the alleged concerted activity of CAS and HEW.[298]

In *Commonwealth of Pennsylvania v. Local Union No. 542, International Union of Operating Engineers,*[299] the state attorney general and twelve black constituents of Local 542 sued the defendant union in a class action, alleging discrimination against black members.[300] Approximately seven months after the initial suit was lodged, the plaintiffs sought an

291. *Id.* at 72.

292. 42 U.S.C. § 1985(3) (1970): "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal protection and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." See note 318 *infra*.

293. 532 F.2d at 75.

294. *Id.*

295. 521 F.2d 1392 (6th Cir. 1975).

296. *Id.* at 1392-93.

297. *Id.* at 1393.

298. *Id.*

299. 347 F. Supp. 268 (E.D. Pa. 1972).

300. *Id.* at 272.

injunction *pendente lite*, alleging that union members and officials had at various times harassed and intimidated the individual parties to the original class action.[301] The district court relied on *Bivens* for the "proposition that there is an implied right for damages and for injunctive relief arising from the mere enactment of the 13th and 14th amendments to the Constitution."[302]

Last, in *Gardels v. Murphy*[303] a lawsuit arose from the activities of advancement for President Nixon during a visit to the town of Pekin, Illinois, in June of 1973. A group protesting the war in Vietnam and the bombing of Cambodia joined the crowds queueing to hear President Nixon speak; they carried placards which stated "Stop the War" and "You Can't Hide from Watergate in Pekin." Pro-administration groups were carrying their own signs and banners were also present. It was alleged that one Murphy and others belonging to the Presidential Advance Office harassed and assaulted the plaintiffs, who were members of the anti-war contingent.[304] A suit was brought under *Bivens* alleging First, Fourth, and Fifth Amendment violations and seeking damages and injunctive relief; the named defendants were Murphy and the Director of the White House Advance Office, one Henkel.[305] The latter was granted a summary judgment; the district court found he had acted within the scope of his authority and, because his duties were discretionary in nature, he was immune from suit under the doctrine of *Barr v. Matteo.*[306] Murphy pointed out that he was a private businessman who acted as a spare-time advanceman; his expenses were not paid by the government, but by the Republican Party and the Committee to Re-Elect the President.[307] The district court responded that the visit to Pekin was not a partisan campaign trip; it noted that the Advance Office was an executive department that had apparently delegated part of its duties to a political party.[308] Thus it concluded that "a political party could establish a common law agency with the government whenever the government delegates authority to it."[309] As a result of this and the fact that the Presidential Advance Office monitored Murphy's duties, the court deemed the "mantle of federal authority to be draped around him" and denied a summary judgment in his favor.[310]

301. *Id.* at 273-78.

302. *Id.* at 286. Injunctive relief was in fact granted on the basis of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-3(a), -5(f) (1964). *See* 347 F. Supp. at 287.

303. 377 F. Supp. 1389 (N.D. Ill. 1974).

304. *Id.* at 1392.

305. *Id.* at 1393.

306. 360 U.S. 564 (1959). See notes 67-68 and accompanying text *supra*.

307. 377 F. Supp. at 1398-99.

308. *Id.* at 1399.

309. *Id.* (citing Smith v. Allwright, 321 U.S. 649, 663 (1944), for an analogous principle).

310. 377 F. Supp. at 1399.

These decisions are arguably not legitimate extensions of *Bivens*. A key point in that case was the unavailability of adequate alternative remedies.[311] The Court in *Bivens* noted that a suit against federal agents in state courts might be stymied both by the fact that the state judiciary has only limited power to restrict federal authority[312] and the fact that the guarantees of the Fourth Amendment reach conduct other than that deemed impermissible by the State.[313] These considerations are not really present in cases involving state officials and private parties. First, the conduct of a state's citizens is a proper subject for state and not for federal regulation; the concept of federalism would suggest that state tort law should govern disputes between private citizens of a state. But what of the claim that the state official or the private party is acting in an unconstitutional fashion? Again, adequate alternative remedies exist. A state officer acting under color of state law is liable under section 1983 of the Civil Rights Act.[314] Private parties may be liable under sections 1981,[315] 1982,[316] 1983,[317] and

311. See note 55 and accompanying text *supra*.

312. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

313. *Id.* at 392.

314. See note 31 *supra*.

315. 42 U.S.C. § 1981 (1970): "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The Supreme Court has clearly indicated that this statute applies to private action. Runyon v. McCrary, 95 S. Ct. 2586, 2593-95 (1976); Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-40 (1973); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 n.78 (1968).

316. 42 U.S.C. § 1982 (1970): "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This statute has also been construed to reach purely private conduct. Runyon v. McCrary, 95 S. Ct. 2586, 2595 (1976); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 437 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236-38 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421-22 (1968).

317. 42 U.S.C. § 1983 (1970). Section 1983 has been construed to reach private persons acting in concert with state officials to deprive a person of his constitutional rights. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-52 (1970); United States v. Price, 383 U.S. 787, 794 n.7 (1966); Smith v. Brookshire Bros., Inc., 519 F.2d 93, 94-95 (5th Cir. 1975); Barnes v. Dorsey, 480 F.2d 1057, 1061 (8th Cir. 1973). *McNally* and *Yiamouyiannis* might be explained by saying that the courts therein adopted by analogy this "in concert" theory for *Bivens* types of cases. But given the policy considerations underlying the Supreme Court's decision in *Bivens*, this technique of implication by analogy would seem to be impermissible. The Court expressly found a plaintiff's remedies at state law to be inadequate because of the inherent authority exercised by federal officers and the concomitant inability of local tribunals to effectively curb abuses of that authority. See notes 54-55 and accompanying text *supra*. The same difficulties would not appear to exist in suits brought in state courts against private parties.

1985(3)[318] of the same enactment. No additional remedies would seem to be mandated by the Constitution. Even the cases extending *Bivens* have not cited any evidence that demonstrated that existing means of redress are inadequate. Moreover, extending *Bivens* to private parties or state officers may entitle them to immunity or to a good faith defense, which they would not have at state law.[319] The policy reasons for creating a damage remedy against federal officers are not present in suits against state officers and private parties. It is arguably undesirable to derive from *Bivens* a general federal cause of action against *all manner* of tortfeasors simply because their conduct is also constitutionally impermissible.

**b. Governmental Entities**

Decisions handed down by the Supreme Court have established that municipalities[320] and counties[321] are not amenable to suit under section 1983 of the Civil Rights Act.[322] Nonetheless a number of lower federal courts

318. See note 292 *supra*. Section 1985(3) does apply to purely private conspiracies. Griffin v. Breckenridge, 403 U.S. 88, 104 (1971); Ward v. St. Anthony Hosp., 476 F.2d 671, 676 (10th Cir. 1973); Fallis v. Dunbar, 386 F. Supp. 1117, 1121 (N.D. Ohio 1974); Barrio v. McDonough Dist. Hosp., 377 F. Supp. 317, 320 (S.D. Ill. 1974). The usual evidentiary prerequisites for a cause of action under section 1985(3) are proof of: (1) the existence of a conspiracy, (2) for the purpose of depriving a person or class of persons of equal protection or privileges and immunities under the law and (3) an act in furtherance of the conspiracy resulting in (4) an injury to or deprivation of the plaintiff's rights. Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973). The courts usually deem the presence of invidiously discriminatory motivation to be decisive. Griffin v. Breckenridge, *supra* at 101-02; Means v. Wilson, 522 F.2d 833, 840 n.5 (8th Cir. 1975); Thomas v. Economic Action Comm., 504 F.2d 563, 564-65 (5th Cir. 1974); Arnold v. Tiffany, 487 F.2d 216, 218 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); Bricker v. Crane, 468 F.2d 1228, 1232-33 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). But at least one court was willing to extend section 1985(3) to cases where no such invidious discrimination would arguably seem to exist. *See* Westberry v. Gilman Paper Co., 507 F.2d 206, 208 (5th Cir.), *vacated as moot*, 507 F.2d 216 (5th Cir. 1975) (en banc). *See also* Action v. Gannon, 450 F.2d 1227, 1232, 1237-38 (8th Cir. 1971); Richardson v. Miller, 446 F.2d 1247, 1249 (3d Cir. 1971).

319. No case actually grapples with the problem with respect to private parties. Arguably such parties should not be entitled to any type of official immunity, but they may be entitled to a claim of good faith regarding their conduct. State officers are subject to the constructions placed upon their potential defenses in section 1983 litigation. In regard to whether *Bivens*-based cases interpret section 1983 precedents differently, see notes 407-44 and accompanying text *infra*.

320. City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973); Monroe v. Pape, 365 U.S. 167, 187 (1961).

321. Moor v. County of Alameda, 411 U.S. 693, 710 (1973). *Cf.* Aldinger v. Howard, 96 S. Ct. 2413, 2421 (1976) (held Federal courts may not exercise pendent jurisdiction over a county on a State law claim factually related to a section 1983 claim against county officials).

322. See note 31 *supra*. It is well established that a state is not suable under section 1983. Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 324 (6th Cir.), *cert. denied*, 389 U.S. 975 (1967); Loux v. Rhay, 375 F.2d 55, 58 (9th Cir. 1967); Willford v. California, 352 F.2d 474, 476 (9th Cir. 1965); United States *ex rel.* Lee v. Illinois, 343 F.2d 120, 120 (7th Cir. 1965); Christman v. Commonwealth of Pennsylvania, 272 F. Supp. 805, 806 (W.D. Pa. 1967).

have found (or indicated a willingness to find) that municipalities, counties, and other local governmental entities are subject to suit under a combination of *Bivens* and section 1331(a).[323] Thus in *Dahl v. City of Palo Alto*[324] a property owner sued the city for appropriating his land by means of a rezoning ordinance passed after the city annexed the Foothills area. The plaintiff alleged deprivation of property without due process of law required by the Fifth and Fourteenth Amendments.[325] The district court found a valid claim jurisdictionally based upon section 1331(a)[326] and carefully distinguished that statute from section 1983:

*But see* Fitzpatrick v. Bitzer, 96 S. Ct. 2666, 2671-72 (1976). In that decision, the Supreme Court said that the Eleventh Amendment does not bar a backpay suit (based on Title VII of the Civil Rights Act) against a state. In dictum, the Court offered the generalization that the enforcement provisions of section five of the Fourteenth Amendment limit the scope of the Eleventh Amendment. Whether or not this dictum presages a shift in judicial policy is as yet unclear.

323. Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975); Brault v. Town of Milton, 527 F.2d 730, 732 (2d Cir. 1975), *rev'd on other grounds,* 527 F.2d 736 (2d Cir. 1975) (en banc); Singleton v. Vance County Bd. of Educ., 501 F.2d 429, 433 (4th Cir. 1974); Cardinale v. Washington Technical Inst., 500 F.2d 791, 795 (D.C. Cir. 1974) (citing only Bell v. Hood, 327 U.S. 678 (1946)); Braden v. University of Pittsburgh, 477 F.2d 1, 7 n.10 (3rd Cir. 1973) (dictum); Sanabria v. Village of Monticello, 424 F. Supp. 402, 409 (S.D.N.Y. 1976); Owen v. City of Independence, 421 F. Supp. 1110, 1119 (W.D. Mo. 1976); Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709, 715-17 (D.N.J. 1976); Sheets v. Stanley Community School Dist. No. 2, 413 F. Supp. 350, 351 (D.N.D. 1975) (dictum), *aff'd*, 532 F.2d 111 (8th Cir. 1976); Shifrin v. Wilson, 412 F. Supp. 1282, 1307-08 (D.D.C. 1976); Demkowicz v. Enary, 411 F. Supp. 1184, 1193 (S.D. Ohio 1975); Collum v. Yurkovich, 409 F. Supp. 557, 559 (N.D. Ill. 1975); Lombard v. Board of Educ., 407 F. Supp. 1166, 1170 (E.D.N.Y. 1976); Barszcz v. Board of Trustees 400 F. Supp. 675, 676 (N.D. Ill. 1975) (dictum), *aff'd*, 539 F.2d 715 (7th Cir. 1976); Schoonfield v. Mayor of Baltimore, 399 F. Supp. 1068, 1079 n.16 (D. Md. 1975) (dictum); Williams v. Brown, 398 F. Supp. 155, 157 (N.D. Ill. 1975); Patterson v. City of Chester, 389 F. Supp. 1093, 1096 (D.D. Pa. 1975) (dictum); Brown v. Board of Educ., 386 F. Supp. 110, 121-22 (N.D. Ill. 1975); Maybanks v. Ingraham, 378 F. Supp. 913, 914-16 (E.D. Pa. 1974); Dahl v. City of Palo Alto, 372 F. Supp. 647, 651 (N.D. Cal. 1974); Smith v. City of E. Cleveland, 363 F. Supp. 1131, 1135 (N.D. Ohio 1973) (dictum); Dupree v. City of Chattanooga, 362 F. Supp. 1136, 1139 (E.D. Tenn. 1973). The Third Circuit joined this series of cases in its decision in Skehan v. Board of Trustees, 501 F.2d 31, 44 (5th Cir. 1975), *vacated on other grounds,* 421 U.S. 983 (1975). On remand, it held that an intervening state court decision required it to extend sovereign state immunity to the defendant college. Skehan v. Board of Trustees, 538 F.2d 53, 62 (5th Cir. 1976) (citing Brungard v. Hartman, 12 Pa. Cmwlth. 477, 479, 315 A.2d 913, 914 (1974)). Presumably the conclusion reached in the first *Skehan* decision would apply to similar governmental entities in states within the Third Circuit which do not extend sovereign immunity so widely. To understand why the appellate panel's opinion in the *Brault* case is included in this list of decisions, see note 337 *infra*. *See also* Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 HARV. L. REV. 922, 929 (1976).

324. 372 F. Supp. 647 (N.D. Cal. 1974).

325. *Id.* at 648.

326. The plaintiff's cause of action was based on alleged violations of the Constitution (and hence *Bivens*). Section 1331(a) alone provides no substantive relief. *See* Pitrone v. Mercadante, 420 F. Supp. 1384, 1388 (E.D. Pa. 1976); Gresham v. City of Chicago, 405 F. Supp. 410, 412 (N.D. Ill. 1975); Jamison v. McCurrie, 388 F. Supp. 990, 991-92 (N.D. Ill. 1975); Perry v. Linke, 394 F. Supp. 323, 325 (N.D. Ohio 1974).

> The passage of § 1331 was also motivated by very different considerations than those to which § 1983 was a response. § 1983 was an effort by Congress to provide a forum and a remedy for those whose rights were being violated but who could get no relief in the courts or agencies of their states. . . . Amendments were offered extending liability specifically to include cities and counties, but many members of Congress were unwilling to extend liability to municipalities . . . . As finally passed, the act provided redress only against the persons who were depriving others of their rights. The Act of March 3, 1875, the predecessor of § 1331, on the other hand, was the culmination of efforts dating back to the first Congress to give general federal question jurisdiction to the federal judiciary. . . . The record is silent as to whether Congress meant to make municipalities liable for acts of their agents which violate federal law. While it may be argued that Congress assumed that suits in federal court against municipalities would be unconstitutional, as had recently been vigorously argued in the debates over the passage of § 1983 . . . it is not the role of this court to read in such a limitation in the absence of legislative history.[327]

Perhaps the most interesting of these decisions expanding the liability of governmental entities is that rendered by the United States Court of Appeals for the Second Circuit in *Brault v. Town of Milton.*[328] There also the plaintiffs, owners of a trailer park, alleged deprivation of property without the due process of law required by the Fourteenth Amendment. The town of Milton had passed an ordinance prohibiting the use of mobile homes within the township limits and sought to enforce this ordinance against the Braults by means of an injunction.[329] The Vermont Supreme Court eventually held the ordinance invalid because the town had given insufficient notice to those eligible to vote on the statute.[330] In a later decision, however, the state supreme court found the town to be immune from a suit for damages under state law.[331] The Braults sued in federal court under *Bivens* and

327. 372 F. Supp. at 651. The court also cited City of Kenosha v. Bruno, 412 U.S. 507 (1973), for support. See text accompanying notes 89-93 *supra*. *But see* Raffety v. Prince George's County, 423 F. Supp. 1045, 1058 (D. Md. 1976); Bunting v. City of Columbia, 423 F. Supp. 446, 448 (D.S.C. 1976); Farnsworth v. Orem City, 421 F. Supp. 830, 831 (D. Utah 1976); Pitrone v. Mercadante, 420 F. Supp. 1384, 1389-90 (E.D. Pa. 1976). The court in *Pitrone* specifically sought to rebut the rationale expressed in *Dahl.* It cited three reasons for its conclusion: the availability of an alternative remedy under section 1983; the assertion that because Congress expressed its wish to exempt municipalities from damage liability when it enacted section 1983, that wish should control subsequent judicial construction regarding the scope of section 1331(a); and the argument that because plaintiffs sue municipalities in order to be assured of having at least one defendant capable of paying a judgment, to allow such suits would thus frustrate the very legislative policy announced in the congressional debates preceding the enactment of section 1983.

328. 527 F.2d 730 (2d Cir. 1975).

329. *Id.* at 732.

330. Town of Milton v. Brault, 129 Vt. 431, 282 A.2d 681 (1971). For the rationale underlying the state court's opinion, see Town of Milton v. LeClaire, 129 Vt. 495, 499, 282 A.2d 834, 836 (1971).

331. Town of Milton v. Brault, 132 Vt. 377, 383, 320 A.2d 630, 634 (1974).

section 1331(a).[332] The reviewing panel of the court of appeals found that the claim for relief came "within *Bivens*' sweeping approbation of constitutionally-based causes of action."[333] The purported conflict with section 1983 was dismissed with the statement that:

> If a construction of § 1331 as authorizing such suits would render meaningless the immunity enjoyed by municipalities under § 1983, we might find this argument more persuasive. This is not in fact the case, however, for § 1331, with its amount in controversy requirement, would preserve the municipality's § 1983 immunity as to actions not involving the minimum sum . . . . *Bell v. Hood* and *Bivens* itself, moreover, caution against assuming that Congress' exemption for municipalities under § 1983 informed its efforts four years later in establishing federal question jurisdiction.[334]

The full court of appeals sitting en banc reversed, saying no cause of action was stated because the Fourteenth Amendment had not been violated.[335] The Braults, said the full court, had been granted notice, statement of the charges against them, and an opportunity to defend in the town's suit against them to enforce the ordinance.[336] Therefore, the full court of appeals declined to discuss the Fourteenth Amendment issue.[337]

It is legitimate for courts to rely on *Bivens* as a source of a cause of action against local government entities. There is one key factor present in these cases that was absent in the cases involving suits against state officials and private persons: the lack of an alternative remedy. In most of these cases section 1983 of the Civil Rights Act would not provide a cause of action,[338] and a suit in state courts might be prevented by local doctrines of sovereign immunity.[339] Consequently there is a definite need to have a forum available. Invoking legislative history provides no persuasive evidence to the

332. 527 F.2d at 733.

333. *Id.* at 734.

334. *Id.* at 735.

335. Brault v. Town of Milton, 527 F.2d 736, 741 (2d Cir. 1975) (en banc). *Accord,* on similar facts, Gordon v. City of Warren, 415 F. Supp. 556, 564-65 (E.D. Mich. 1976).

336. 527 F.2d at 738-39.

337. *Id.* at 736. What the en banc decision means is disputable. One court has said it is a "recession" from the holding that *Bivens* encompasses a Fourteenth Amendment claim. Mitchell v. Libby, 409 F. Supp. 1098, 1099 (D. Vt. 1976). But other courts seem to find the appellate panel's reasoning to be controlling. *See* Cox v. Stanton, 429 F.2d 47, 50 (4th Cir. 1975); Turano v. Board of Educ., 411 F. Supp. 205, 211 (E.D.N.Y. 1976). And yet other courts say that in light of the Second Circuit's indecision on this subject, they will decline to discuss it. *See* Haber v. County of Nassau, 411 F. Supp. 93, 94 (E.D.N.Y.), *modified,* 418 F. Supp. 1120 (E.D.N.Y. 1976); Bankhead v. Cowin, 405 F. Supp. 326, 327 (E.D.N.Y. 1975). The Second Circuit has since reiterated its wish to avoid providing any definitive answer to the problem. *See* Fine v. City of New York, 529 F.2d 70, 76 (2d Cir. 1975).

338. See notes 320-21 and accompanying text *supra.*

339. However, it should be noted that most courts in *Bivens* suits *will* apply local doctrines of sovereign immunity. See note 272 *supra.*

contrary. As *Dahl* pointed out,[340] the congressional debates preceding enactment of section 1331(a) are unilluminating. The courts criticizing the conclusions expressed in *Dahl*[341] have done so by resorting to the technique of implication by analogy; noting that Congress, in passing section 1983, expressed an intent to exempt municipalities from damage liability, these courts have imputed a similar limiting intent with respect to the enactment of section 1331(a). Unfortunately, this analogy requires a comparable construction of two very different statutes; section 1983 creates a *cause of action* while section 1331(a) is merely a conferral of *jurisdiction.*[342] A proper use of the technique of implication by analogy would require comparison of section 1983 and *Bivens*. Making such a comparison discloses the fallacy inherent in the reasoning of the courts which do not permit *Bivens*-based suits against municipalities, because the Court in *Bivens never* addressed this subject. Later Supreme Court decisions upholding municipal immunity in section 1983 suits[343] do not necessarily have implications for *Bivens* actions, because the Court, in handing down these subsequent decisions, confronted (as indicated above) specific statements by members of Congress that evince an intent to limit the scope of the remedy enacted. Because *Bivens* is a *judicially*-created cause of action, legislative intent is not as relevant a concern.[344] At least one other special factor "counselling hesitation" exists in these cases, however: the Eleventh Amendment.[345]

340. See note 327 and accompanying text *supra*.

341. See note 327 *supra*.

342. See note 326 *supra*. For a general discussion of section 1983 vis-à-vis the various jurisdictional sections of title twenty-eight of the United States Code, *see* Gonzalez v. Young, 46 U.S.L.W. 2064, 2065 (3d Cir., July 15, 1977). Of course, the court in *Dahl* is equally blameworthy in this respect, because it was the first to make the confusing juxtaposition of sections 1983 and 1331(a). See note 327 and accompanying text *supra*. The entire issue becomes moot if one assumes, as many courts do, that the Supreme Court's decision in City of Kenosha v. Bruno, 412 U.S. 507 (1973), held that section 1331(a) confers jurisdiction in suits against a municipality. As pointed out earlier, that assumption is incorrect. See notes 92-94 and accompanying text *supra*.

343. See notes 320-21 and accompanying text *supra*.

344. The Court in *Bivens* did indicate that a damage remedy against federal officials might not have been implied had there been an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Bivens v. Six Unknown Named Agents of Fed.Bureau of Narcotics, 403 U.S. 388, 397 (1971). But with respect to suits against municipalities and state subdivisions, (a) there has been no "explicit congressional declaration" in the form of a statute or resolution, (b) section 1983 is a patently ineffective alternative and (c) even if it were otherwise, it cannot be said to be "effective in the view of Congress," absent some further legislative declaration.

345. U.S. CONST. amend. XI: "The Judicial power of the United States shall not be 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."

The Eleventh Amendment is not a defense to a *Bivens* type of action, it is a bar to federal jurisdiction.[346] Courts have applied the amendment to *Bivens* suits in three different ways. One approach is suggested by *Demkowicz v. Endry*,[347] a suit against a school board wherein a pregnant teacher sought reinstatement because she was compelled to stop teaching even though she was not physically incapable of doing so. The court noted the Eleventh Amendment immunity claimed by the governmental unit, but found that a school board cannot be equated with a sovereign state for the purposes of the amendment.[348]

A second approach is typified by the cases of *Washington v. Brantley*[349] and *Perzanowski v. Salvio.*[350] In *Washington*, the plaintiff alleged that Brantley, a policeman employed by the city of Dunnellon, Florida, used unnecessary force to apprehend him.[351] Suit was lodged against Brantley and the city. The district court found a Fourteenth Amendment claim to be cognizable under *Bivens*, but went on to say that the Fourteenth Amendment did not repeal the Eleventh.[352] Since a city was deemed to be a subdivision of the state under Florida law,[353] the court concluded that the municipality of Dunnellon was immune from prosecution.[354] In *Perzanowski,* a lawsuit was instituted against a building inspector, a building commission, and the city of New Britain, Connecticut. It was alleged that these defendants were responsible for wrongfully condemning and demolishing a building owned by the plaintiff.[355] The court simply held one could not seek damages from a political subdivision of a state (such as a municipality) when the state itself could not be sued in federal court.[356]

A third technique for dealing with the Eleventh Amendment issue was adopted in *Turano v. Board of Education of Island Trees Union Free School District No. 26.*[357] There a schoolteacher denied tenure sought only rein-

346. Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 305 (1952); Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 464 (1945); United States v. United States Fidelity & Guarantee Co., 309 U.S. 506, 512 (1940); Missouri v. Fiske, 290 U.S. 18, 25 (1933); *Ex parte* New York, 256 U.S. 490, 497 (1921); Hans v. Louisiana, 134 U.S. 1, 10, 15 (1890).

347. 411 F. Supp. 1184 (S.D. Ohio 1975).

348. *Id.* at 1193.

349. 352 F. Supp. 559 (M.D. Fla. 1972).

350. 369 F. Supp. 223 (D. Conn. 1974).

351. 352 F. Supp. at 560.

352. *Id.* at 563-64.

353. *See* Loeb v. City of Jacksonville, 101 Fla. 429, 432, 134 So. 205, 207 (1931); City of Miami v. Lewis, 104 So. 2d 70, 72 (Fla. Dist. Ct. App. 1958).

354. 352 F. Supp. at 565. *Cf.* Burton v. Waller, 502 F.2d 1261, 1273 (5th Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

355. 369 F. Supp. at 225.

356. *Id.* at 230-31.

357. 411 F. Supp. 205 (E.D.N.Y. 1976).

statement *nunc pro tunc* under section 1983 of the Civil Rights Act.[358] The court found no Eleventh Amendment bar because only equitable relief was being sought.[359] It noted that the plaintiff could amend his complaint to state a cause of action under *Bivens* and section 1331(a) as well.[360] Summary judgment for the defendant school district was therefore denied.[361] Several months after this decision, the United States Court of Appeals for the Second Circuit decided *Monell v. Department of Social Services of New York City*,[362] wherein it ruled both that a board of education is not a "person" under section 1983 and that municipal employees may not be sued for damages under section 1983 for acts violating a plaintiff's constitutional rights unless they are sued as individuals and not in their official capacity.[363] *Monell* held that a suit for damages, as distinct from one for injunctive relief, cannot be brought against a state official *qua* official because the real party in interest (and the one who would have to pay any damages recovered by the plaintiff) is the state.[364] As a result of the *Monell* decision, the district court in *Turano* issued a supplemental opinion saying that the rationale of *Monell* would create an Eleventh Amendment bar in suits under section 1983 *and* under section 1331(a).[365]

Which of these techniques is proper? The Supreme Court has consistently said that the Eleventh Amendment's bar to jurisdiction applies only in suits against a state and not in suits against the subdivisions of a state, such as a county or a municipality.[366] The one exception to this rule is where the nominal defendant is a subdivision of the state but the actual defendant is the state itself.[367] Thus the general analysis advanced in *Monell* is a proper interpretation of the Eleventh Amendment and it would bar damage suits brought under *Bivens* whenever the state would have to pay if the nominal defendant loses. But if one takes this approach literally, no *Bivens* suit seeking substantial damages could ever be brought against a school board or a municipality or a county. Although such subdivisions of a state do

358. *Id.* at 209.
359. *Id.*
360. *Id.*
361. *Id.* at 210.
362. 532 F.2d 259 (2d Cir. 1976).
363. *Id.* at 264.
364. *Id.* at 265.
365. 411 F. Supp. at 211.
366. Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 645 (1911); Graham v. Folsom, 200 U.S. 248, 254-55 (1906); Workman v. City of New York, 179 U.S. 552, 565-66 (1900); Lincoln County v. Luning, 133 U.S. 529, 530 (1890).
367. Edelman v. Jordan, 415 U.S. 651, 663 (1974); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 577 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 462-64 (1945); Lincoln County v. Luning, 133 U.S. 529, 530 (1890); *In re* Ayers, 123 U.S. 443, 506-07 (1887); Poindexter v. Greenhow, 114 U.S. 270, 287 (1884).

generate their own revenue, they are not financially autonomous. The state, either directly or indirectly, subsidizes their continued functioning. The problem thus becomes one of where to draw the line.[368] The approach in *Monell* arguably extends the protection of the Eleventh Amendment too far. A better approach might be found by considering the classic statement of the "real party in interest" doctrine expressed by the Supreme Court in the case of *In re Ayers*:[369]

> To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the *only real party* against which *alone in fact* the relief is asked and against which the judgment or decree effectively operates.[370]

The broad rule of *Ayers* is really very narrow. Careful drafting of a complaint can ensure that "the only real party against which alone in fact" redress is sought is not just the state, but also the individual official or the governmental subdivision. And certainly the rule of *Monell* (as well as the

368. One should not minimize the difficulties in drawing this line. In some cases the courts have no difficulties. Thus, for example, a suit against a state court has generally been held to be barred by the Eleventh Amendment. Zuckerman v. Appellate Div., 421 F.2d 625, 626 (2d Cir. 1970); Mackay v. Nesbett, 285 F. Supp. 498, 503 (D. Alas. 1968), *cert. denied,* 396 U.S. 960 (1970); Lenske v. Sercombe, 266 F. Supp. 609, 612-13 (D. Ore. 1967); Campbell v. Washington State Bar Ass'n, 263 F. Supp. 991, 992 (W.D. Wash. 1967). Less obvious examples cause more problems. Thus, for example, with regard to state highway commissions, the courts are evenly divided as to whether the Eleventh Amendment bars an action in federal court. *Compare* Harrison Constr. Co. v. Ohio Turnpike Comm'n, 272 F.2d 337, 341 (6th Cir. 1959); Department of Highways v. Morse Bros., 211 F.2d 140, 144 (5th Cir. 1954); Sherman v. Ulmer, 201 F. Supp. 660, 662 (E.D. Pa. 1961) (all denying immunity) *with* Harris v. Pennsylvania Turnpike Comm'n, 410 F.2d 1332, 1334-35 (3d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970); Simmons v. South Carolina State Highway Dep't No. 1, 195 F. Supp. 516, 517 (E.D.S.C. 1961); Dunnuck v. Kansas State Highway Comm'n, 21 F. Supp. 882, 883 (D. Kan 1938) (all upholding immunity). Similar problems exist with respect to boards of education. *Compare* St. Helena Parish School Bd. v. Hall, 287 F.2d 376, 377 (5th Cir. 1961); Fabrizio & Martin, Inc. v. Board of Educ., 290 F. Supp. 945, 948 (S.D.N.Y. 1968) (upholding the right to sue) *with* Wihtol v. Crow, 309 F.2d 777, 782 (8th Cir. 1962); Delevay v. Richmond County School Bd., 284 F.2d 340, 340 (4th Cir. 1960); Meyerhoffer v. East Hanover Township School Dist., 280 F. Supp. 81, 84 (M.D. Pa. 1968) (upholding immunity from suit). These disparate decisions may be reconciled by saying that the federal courts balance three different factors: (a) who the real party in interest is, (b) the scope of the sovereign immunity doctrine under the law of the forum state, and (c) whether or not the federal court is bound to apply the law of the forum state. At any rate, it is crucial to distinguish between, for example, a school board as a discrete governmental entity and the individual serving on that board. The individual's unconstitutional conduct is definitely actionable. Griffin v. Prince Edward County School Bd., 377 U.S. 218, 228 (1964). *Accord, Ex parte* Young, 209 U.S. 123, 159-60 (1908).

369. 123 U.S. 443 (1887).

370. *Id.* at 506-07 (emphasis added). See text accompanying note 383 *infra*.

doctrine in *Ayers*) should not be applied to section 1331(a) claims seeking injunctive relief against the unconstitutional acts of state officers.[371]

### *4. Immunity and Good Faith*

#### a. Section 1983 Precedents

It is well established that certain common law immunities survive in section 1983 litigation.[372] Thus state legislators,[373] judges,[374] and prosecuting attorneys[375] are all immune from suit for acts done within the scope of their duties. Following the decision by the Second Circuit in *Bivens* in 1972,[376] the Supreme Court handed down two rulings on good faith and immunity in section 1983 cases that proved to be influential in *Bivens* actions.

The first of these was *Scheuer v. Rhodes.*[377] The case arose out of the killing of three students by national guardsmen at Kent State University in 1970. The personal representatives of the estates of the decedents brought suit against the governor of Ohio, the adjutant general and his assistants, the president of the university, and various members of the Ohio National Guard under section 1983.[378] After the trial court found the proceeding barred by the Eleventh Amendment, the case was appealed to the appellate court for the Sixth Circuit. That court concluded that the governor and the president of Kent State both enjoyed executive immunity,[379] that the national guardsmen, acting as agents of the state, were also immune,[380] that the adjutant general's office was immune because it was an instrumentality of

371. See cases cited in note 94 *supra*.

372. *See* Wood v. Strickland, 420 U.S. 308, 316-17 (1975); Scheuer v. Rhodes, 416 U.S. 232, 243-44 (1974); Pierson v. Ray, 386 U.S. 547, 554 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

373. Tenney v. Brandhove, 341 U.S. 367, 376-77 (1951).

374. Pierson v. Ray, 386 U.S. 547, 555-56 (1967). *Accord,* Jacobson v. Schaefer, 441 F.2d 127, 129 (7th Cir. 1971); Haldane v. Chagnon, 345 F.2d 601, 604 (9th Cir. 1965); Rhodes v. Meyer, 334 F.2d 709, 718 (8th Cir. 1964); Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963). The immunity also extends to court clerks and assistants. Davis v. McAteer, 431 F.2d 81, 82 (8th Cir. 1970); Stewart v. Minnick, 409 F.2d 826, 826 (9th Cir. 1969); Peckham v. Scanlon, 241 F.2d 761, 763 (7th Cir. 1957); Niklaus v. Simmons, 196 F. Supp. 691, 712 (D. Neb. 1961); Ginsberg v. Stern, 125 F. Supp. 596, 602-03 (W.D. Pa. 1954), *aff'd*, 225 F.2d 245 (3d Cir. 1955).

375. Imbler v. Patchman, 424 U.S. 409, 431 (1976). *Accord,* Wilhelm v. Turner, 431 F.2d 177, 180 (8th Cir. 1970); Fanale v. Sheehy, 385 F.2d 866, 868 (2d Cir. 1967); Bauers v. Heisel, 361 F.2d 581, 589 (3d Cir. 1966); Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963); Cawley v. Warren, 216 F.2d 74, 76 (7th Cir. 1954); Rhodes v. Houston, 202 F. Supp. 624, 633 (D. Neb.), *aff'd*, 309 F.2d 959 (8th Cir. 1962).

376. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

377. 416 U.S. 232 (1974).

378. *Id.* at 234.

379. Krause v. Rhodes, 471 F.2d 430, 438, 440 (6th Cir. 1972).

380. *Id.* at 442.

the state[381] and that, at any rate, the case presented a non-justiciable controversy.[382]

The Supreme Court reversed these rulings. It found no Eleventh Amendment bar because the complaint sought to impose individual and personal liability only on the named defendants, and not on the state of Ohio.[383] Chief Justice Burger's majority opinion found no absolute "executive immunity" but only a qualified exemption from liability. This qualified immunity from prosecution for acts done within the scope of one's duties would vary with the discretion and responsibilities of the office held by a defendant.[384] Chief Justice Burger stated that "[i]t is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[385] The Court found no occasion for a "definitive exploration" of the subject because of the scantiness of the record due to the fact that the case was decided on the pleadings in the courts below; it was remanded for further proceedings.[386]

The second of these landmark decisions was *Wood v. Strickland.*[387] Students enrolled at the Mena Public High School in Arkansas were expelled for "spiking" punch served at a meeting attended by students and parents and sponsored by an extra-curricular school organization on school grounds.[388] The girls involved were initially suspended for two weeks by the president of the school subject to the decision of the full school board. That board, at a meeting attended by neither the disciplined students nor their parents, first recommended leniency. It changed its mind and voted for expulsion after the wife of a member of the board relayed a telephoned message from the local superintendent of schools who had reported that one of the disciplined students had started a fight at a basketball game that very evening. This decision to expel was reiterated at a second session of the board, held a week later at which the girls, their parents and counsel were present.[389] A lawsuit was instituted under section 1983 requesting both reinstatement and damages.[390] The district court handed down a directed verdict for the defendants, concluding that there was no liability absent

381. *Id.* at 439.
382. *Id.* at 440.
383. 416 U.S. at 238.
384. *Id.* at 243.
385. *Id.* at 247-48.
386. *Id.* at 249-50.
387. 420 U.S. 308 (1975).
388. *Id.* at 311.
389. *Id.* at 312-13.
390. *Id.* at 309-10.

proof of malice on the part of the board members.[391] The United States Court of Appeals for the Eighth Circuit reversed. It said that although the school district was immune from suit,[392] the same immunity did not extend to individual board members. The court found a denial of substantive due process as guaranteed by the Fourteenth Amendment[393] and noted that the board members would be liable if it was shown that they acted without good faith, not without malice.[394]

The Supreme Court sustained the opinion of the court of appeals. Justice White's majority opinion said that failure to recognize a good faith defense would unfairly impose upon a school administrator liability for his immediate responses in crisis situations.[395] The Court rejected the option of absolute immunity.[396] It instead chose to apply a "qualified good-faith immunity" which it defined as follows:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[397]

It is useful to compare the standards set forth in *Scheuer* and *Wood* with that laid down by the Second Circuit in its 1972 *Bivens* decision.[398] The Second Circuit in *Bivens* developed a simple, manageable tripartite test. First, it would consider whether the defendant official falls either within that class of officials traditionally granted immunity at common law for acts done within the scope of their duties or within that class of officials granted a similar immunity because their function involves the performance

391. Strickland v. Inlow, 348 F. Supp. 244, 250 (W.D. Ark. 1972).

392. Strickland v. Inlow, 485 F.2d 186, 191 (8th Cir. 1973).

393. *Id.* at 190.

394. *Id.* at 191. The court noted that good faith as a defense to a suit seeking injunctive relief is usually judged by the standard of whether the administrator's decision was "reasonble." Jones v. Snead, 431 F.2d 1115, 1117 (8th Cir. 1970); Esteban v. Central Missouri State College, 415 F.2d 1077, 1090 (8th Cir. 1969), *cert. denied,* 398 U.S. 965 (1970); Powe v. Miles, 407 F.2d 73, 84-85 (2d Cir. 1968); Wasson v. Trowbridge, 382 F.2d 807, 811-12 (2d Cir. 1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir. 1961). *See also* Wood v. Strickland, 420 U.S. at 315-16 n.7.

395. 420 U.S. at 319.

396. *Id.* at 320.

397. *Id.* at 322.

398. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

of discretionary acts.[399] Second, if the defendant official falls within either of these two classes, a court must ascertain whether or not his acts were in fact within the scope of his duties.[400] If they were, the suit must be dismissed. If they were not, however, the court proceed to step three, wherein the defendant official must prove both that he believed in good faith that his conduct was lawful and that this belief was reasonable.[401]

In contrast, the *Scheuer-Wood* test is confusing. It transmutes the concept of "good faith" into one of "qualified immunity"; but this transposition is inadvisable. An immunity is a *bar* to a lawsuit while good faith is only a *defense*. As *Bivens* suggests, a mere claim of good faith does not require an appellate court to uphold a trial court's dismissal of a complaint. If that claim of good faith is disputed by the plaintiff, there is a material issue of fact which is triable.[402] On the other hand, if there is a claim of immunity, the appellate court can look to the law governing liability of officials and if it finds that the claim is valid, the plaintiff is denied access to the federal court.[403] By obfuscating these distinctions, the Supreme Court has created semantic problems with which the lower federal courts will have great difficulty. But one can say that the language in *Scheuer* retains the essential concepts underlying a good faith defense as those concepts were developed by the Second Circuit in *Bivens*. The same cannot be said for Justice White's language in *Wood. Bivens* established that an official defendant must prove a reasonable, good faith belief in the validity of his conduct. *Wood* says that the official defendant is liable if he knew, or if he reasonably should have known, or he maliciously intended, that his conduct would deprive the plaintiff of his constitutional rights. Thus Justice White substitutes the criterion of *knowledge* for one of *belief*. This would appear to give the defendant far more protection than the standard provided in *Bivens*.[404] Additionally, Justice White adds the concepts of motivation and

399. *Id.* at 1342-43. See notes 67-70 and accompanying text *supra*.

400. *Id.* at 1343-47. See notes 71-72 and accompanying text *supra*.

401. *Id.* at 1347-48. See notes 73-74 and accompanying text *supra*.

402. *Id.* at 1348.

403. *Id.* at 1342.

404. *Cf.* Skehan v. Board of Trustees, 538 F.2d 53, 62 (3d Cir. 1976): "While we can give guidance to the district court as to where various burdens lie on the [*Wood*] qualifications, we are less confident of our ability to suggest by what criteria the reasonableness of the . . . defendants' lack of knowledge of due process requirements should be measured. The district court will be required to inquire into the status and responsibility of each individual defendant and to determine whether, for example, a trustee should be held responsible for the same level of knowledge of constitutional rights as a college president or a commissioner of education. The determination may turn on the relative availability to each defendant of counsel, as well as the relative certainty of the legal issue, a criterion to which the [*Wood*] court expressly adverted. 420 U.S. at 322. The federal courts will be entering largely unchartered [*sic*] waters here, for the pre-existing role of unqualified official immunity meant that very little if any case law was developed with respect to standards of liability for negligent mistakes of law by persons making nonjudicial adjudications." See notes 392-94 and accompanying text *supra*.

malice, the very concepts the Eighth Circuit's opinion in *Wood* (which Justice White purports to sustain) rebuked the district court for considering. This element of malice would seem to accord the defendant official less protection, because statements by the defendant that he did not know (and should not have known) of the illegality of his conduct might be rebutted by a showing of acts from which the nebulous notion of malice might be inferred. But Justice White's analysis does not end there. He goes on to say that suits for damages are appropriate only upon a showing of "impermissible motivation" or such disregard for "clearly established" constitutional rights that bad faith may be inferred. This dual standard for suits seeking monetary redress is, however, inherently confusing. "Impermissible motivation" encompasses a variety of intents not necessarily limited to malice, but "disregard of clearly established rights" seems to require the existence of a constitutional right which is unquestionably present. This language would permit the defendant official to claim that the right plaintiff alleges that he was deprived of was not clearly established at the time of the conduct complained of and therefore no remedy for the past conduct is allowable.[405] Thus in a damage suit *Wood* seems to accord the defendant far more protection than was provided by the Second Circuit in *Bivens*. One might respond that *Wood* is limited to the "specific context of school discipline" and, furthermore, should be restricted solely to section 1983 cases. The Supreme Court has indicated that the first assertion is probably false[406] and the lower federal courts in *Bivens* actions have been quick to follow the guidelines set forth by *Scheuer*, and later, *Wood*.[407]

405. *See also* Morales v. Hamilton, 391 F. Supp. 85 (D. Ariz. 1975). There a plaintiff in a *Bivens* action sought a retroactive application of the doctrine of Almeida-Sanchez v. United States, 413 U.S. 266 (1973). (See note 208, *supra*). At the time, the Ninth Circuit permitted such retroactivity. *See* United States v. Peltier, 500 F.2d 985, 989 (9th Cir. 1974). The district court declined to follow the retroactivity rule on the theory that it would have the effect of creating an ex post facto offense in violation of the dictates of the Constitution. 391 F. Supp. at 88. Subsequently, the Supreme Court in the *Peltier* case also concluded that retroactive application of *Almeida-Sanchez* would be unwarranted. United States v. Peltier, 422 U.S. 531, 535 (1975). *See generally* Note, *The Extent of the Border*, 1 HASTINGS CONST. L.Q. 235 (1974).

406. *See* O'Connor v. Donaldson, 422 U.S. 563, 577 (1975). That case involved the conduct of officials at the Florida State Hospital in Chattahoochee. The Court remanded the case for reconsideration in light of Wood v. Strickland, 420 U.S. 308 (1975), characterizing the latter decision as one dealing with the immunity of state officials in general.

407. *See, e.g.*, Rodriguez v. Ritchey, 539 F.2d 394, 399, 401 (3d Cir. 1976); White v. Boyle, 538 F.2d 1077, 1080 (4th Cir. 1976); Jones v. United States, 536 F.2d 269, 271 (8th Cir. 1976); Paton v. La Prade, 524 F.2d 862, 872 (5th Cir. 1975); Apton v. Wilson, 506 F.2d 83, 92-93 (D.C. Cir. 1974); Brubaker v. King, 505 F.2d 534, 536 (7th Cir. 1974); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1158-59 (4th Cir. 1974); Shifrin v. Wilson, 412 F. Supp. 1282, 1298-99 (D.D.C. 1976); Birdwell v. Schlesinger, 403 F. Supp. 710, 718 (D. Colo. 1975); Morales v. Hamilton, 391 F. Supp. 85, 89 (D. Ariz. 1975); La Verne v. Corning, 376 F. Supp. 836, 839-40 (S.D.N.Y. 1974), *aff'd*, 522 F.2d 1144 (2d Cir. 1975). Presumably, those courts which have claimed that section 1983 precedents apply in *Bivens* types of actions would also deem themselves bound by *Scheuer* and *Wood*. See note 285 *supra*.

**b. Selected Applications of Section 1983 Doctrines**

It is interesting to consider how the doctrines of immunity and good faith operate in a *Bivens*-based action. The following four cases typify the kinds of problems encountered in wrestling with these issues. Though they are not entirely representative of the usual *Bivens* suit (in that three of the decisions deemed a cause of action to exist), they do illustrate the difficulties attendant to a *Bivens*-based cause of action.

In *Brawer v. Horowitz*,[408] the plaintiffs were prison inmates serving a sentence for transporting and conspiring to transport stolen United States Treasury Bills. They sued, *inter alia*, under *Bivens*, alleging that the prosecuting attorney and his chief witness at their trial combined to deprive them of their Fifth Amendment rights.[409] They sought monetary relief from the witness in addition to requesting that their conviction be set aside.[410] At the trial court level, a summary judgment was granted in favor of the prosecuting attorney but a default judgment was obtained against the witness.[411] The United States Court of Appeals for the Third Circuit found that the immunity extended to prosecuting attorneys by the Supreme Court in section 1983 litigation should also control in *Bivens* suits.[412] It went on to deal with the problem of whether or not the state's witness should be entitled to immunity. It noted that in order effectively to enforce the criminal laws, the government often had to rely on "inside" informants; in this case, the witness had been relocated and given a new identity by federal officials.[413] As a result, the court applied the common law rule that a witness is not civilly liable for "words spoken in office."[414] It noted that the interest of the plaintiffs against having inflammatory or perjured testimony uttered by a witness in their trial is best protected by a subsequent indictment for perjury, by asking the trial judge to exclude the most egregious utterances and by undermining the witness' credibility on cross-examination.[415] Thus a cause of action against the prosecution's witness on the basis of *Bivens* failed.

408. 535 F.2d 830 (3d Cir. 1976).

409. *Id.* at 832.

410. *Id.* at 832-33.

411. *Id.* at 833.

412. *Id.* at 834 (citing Imbler v. Patchman, 424 U.S. 409, 431 (1976)).

413. 535 F.2d at 836.

414. *Id.* at 837. *See* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 474 (1909). *Cf.* Sacks v. Stecker, 60 F.2d 73, 75 (2d Cir. 1932).

415. 535 F.2d at 837. Assuming arguendo that a prosecuting attorney and a witness conspire to present perjured testimony, it would seem unlikely that the most formidable of these sanctions (indictment for perjury) would emanate from the same prosecutor's office accused of wrongdoing (provided, of course, that this was not an arbitrary, unilateral action by one particular prosecutor).

In *VonderAhe v. Howland*,[416] the IRS audited the plaintiff, a doctor, for the taxable years of 1966 and 1967. The doctor produced a set of patient cards showing charges and collections for each patient. The audit went without incident. Subsequently, a disgruntled former employee of the doctor called the IRS and said that the doctor kept a second set of patient cards for emergency cases; a second employee indicated where this second set of cards might be found in the doctor's office. Apparently, checks received from emergency patients were deposited in a Swiss bank account which had not been disclosed either on the tax returns in question or during the audit. IRS agents secured a "general warrant;" on June 16, 1970, they raided the doctor's office and home, seizing thousands of documents in addition to the emergency patient cards. As a result of the wholesale seizure of his patient files, Doctor VonderAhe was forced to discontinue his practice for two weeks until the IRS returned extraneous records.[417] The plaintiff sued under *Bivens*, seeking injunctive and monetary relief.[418] At the trial court level, the government's motion to dismiss was granted. The United States Court of Appeals for the Ninth Circuit reversed. It found a patently unreasonable search and seizure. It was true that there was enough probable cause to justify the issuance of a warrant, but not a *general* warrant. The court said that in seeking a general warrant, the agents became "responsible for its breadth."[419] The court found it "difficult to belief that the draftsmen did not insert 'unreasonable' to avoid just such an *in terrorem* state as the agents created and wreaked here."[420] Moreover, the court criticized the manner of the search. Since the agents knew what they wanted, they could have issued a subpoena *duces tecum*; instead they engaged in a "sudden assault," impairing the practice of the plaintiff and the convenience and health of his patients.[421] The appellate court concluded that a valid cause of action was stated under *Bivens*.[422]

In *Rodriguez v. Ritchey*,[423] a truly bizarre case arose. During 1971 and 1972 the FBI conducted an investigation into organized gambling activities in central Florida. The agent in charge was one Santoiana. Under his command were, *inter alia*, agents Arwine, Batley and Kinne. As part of the investigation, a pen register monitoring device was connected to the telephone line of one Frank Vega, a suspect. This wiretap was monitored by Batley. On October 5, 1971, Vega phoned one Margaret Waltz, whom he

416. 508 F.2d 364 (9th Cir. 1974).
417. *See id.* at 365-68.
418. *Id.* at 372.
419. *Id.* at 369.
420. *Id.* at 370.
421. *Id.*
422. *Id.* at 372.
423. 539 F.2d 394 (5th Cir. 1976).

addressed as "Margo." Her telephone number was 935-0024; the pen register recorded this number as 935-9024. None of the agents knew who "Margo" was, so Santoiana assigned Arwine to the task of locating her whereabouts. The number 935-9024 was that of a pay phone and therefore unlisted. When Arwine was unable to locate it in the Criss Cross Telephone Directory, he called up the General Telephone Company of Tampa. An agent for the telephone company mistakenly identified the number as one belonging to the plaintiff, Margaret Rodriguez. In fact, her number was 876-5646 and was listed in the directory. Arwine checked with the local sheriff's office and learned Rodriguez had no prior arrests; a call to the Greater Tampa Credit Bureau yielded Rodriguez's address. Arwine then asked John Fairbanks, a local detective sergeant, if he had encountered Rodriguez's name in a prior county gambling investigation. Fairbanks replied that he did remember a Rodriguez who was a beautician. Since Margaret Rodriguez operated a beauty parlor, Arwine believed he had clear-cut corroboration that she was involved in organized gambling. In fact, the Rodriguez Fairbanks referred to was an entirely different person. On March 3, 1972, Arwine phoned Margaret Rodriguez to compare her voice with that on the wiretap tape of Vega's telephone line. As a response to a question in a subsequent deposition clearly revealed, Arwine did not dial 935-9024 (the number recorded on the pen register) because he had mislaid the slip of paper bearing that number. Instead, he looked up Margaret Rodriguez's number in the phone directory. When she answered the call, Arwine believed hers was the voice of the "Margo" Vega had spoken with. On the same day, March 3, mass arrests were made by the FBI in the Tampa area. Margaret Rodriguez was arrested by special agents Ritchey and Sosbee. A magistrate released her on a surety bond. On March 13, 1973, over a year later, Agent Kinne allowed Rodriguez and her attorney to listen to the tape of the Vega-"Margo" conversation; the attorney said that the voice on the tape was not that of his client. Kinne checked this allegation and discovered that Margaret Rodriguez had indeed been misidentified. On May 31, 1973, the charge against her was dismissed. She promptly sued agents Santoiana, Kinne, Ritchey, Sosbee, Batley, and Arwine under *Bivens*, alleging deprivation of her Fourth Amendment rights.[424] The trial court granted summary judgment for all the defendants. On appeal, the appellate court for the Third Circuit reversed in part. Starting with the premise that the *Bivens* claim was governed by rules developed in section 1983 proceedings,[425] the court proceeded to consider the liability of each defendant individually. Batley was found to be free from liability because he had neither instigated nor

424. For the facts of this case, see *id.* at 395-98, 402-03.

425. *Id.* at 399.

participated in Rodriguez's arrest.[426] Agent Kinne had presented the evidence to the grand jury which resulted in the indictment against Rodriguez; but the court said there were no facts creating a "material dispute" as to his good faith.[427] Santoiana's summary judgment was upheld because no errors in his supervision were responsible for Rodriguez's arrest.[428] Agents Ritchey and Sosbee were deemed immune from suit for false arrest because they acted on a valid warrant.[429] As to Arwine, however, the court said "the conglomeration of errors committed by him was the vital link in the chain which caused [Rodriguez] to be indicted and to suffer the treatment already described."[430] On that basis alone, summary judgment in favor of Arwine was denied.[431]

In *Shifrin v. Wilson,*[432] equally difficult problems were presented. On May 1, 1972, Deputy General Counsel Kenneth Crosson of the District of Columbia Metropolitan Police Department requested an opinion from the district's Corporation Counsel, Gilbert Gimble, as to the constitutionality of article two, section three of the district's police regulations (requiring a permit from the chief of police before a speech could be delivered in a public place). The request was rerouted in September of 1972 to Assistant Corporation Counsel David Eisenberg. He did not prepare a memorandum until early March of 1973. Upon receipt of said memorandum, a circular was drawn up by Police Chief Jerry Wilson indicating that the speech regulation should no longer be enforced. This circular was issued to police officers on March 21, 1973. Earlier, on February 9, 1973, plaintiff Shifrin stood in front of the Soviet embassy in Washington, D.C., intending to deliver an address against prison camps in the U.S.S.R. Because he lacked a permit to speak, he was arrested. On March 20, 1973, the charges were dropped.[433] The plaintiff sued, *inter alia*, the police officers making the arrest, Police Chief Wilson, and the corporation counsel and his assistant.[434] It was alleged that Wilson should not have enforced the regulation pending the memorandum from the counsel; it was also alleged that the failure of the corporation counsel's office to issue a prompt opinion on the regulation was responsible for the deprivation of Shifrin's rights.[435] As for John Connor,

426. *Id.* at 401-02.
427. *Id.* at 402.
428. *Id.*
429. *Id.* at 401 (citing Perry v. Jones, 506 F.2d 778, 780 (5th Cir. 1975); Fleming v. McEnany, 491 F.2d 1353, 1357 (2d Cir. 1974)).
430. 539 F.2d at 403.
431. *Id.* at 404.
432. 412 F. Supp. 1282 (D.D.C. 1976).
433. *Id.* at 1287-88.
434. *Id.* at 1287.
435. *Id.* at 1288-89.

the captain of the arresting officers, the district court applied the test of good faith set down in the second *Bivens* opinion by the United States Court of Appeals for the Second Circuit. It noted that since this was a defense and not a bar to suit, any summary judgment for Connor was premature until he tendered evidence of his good faith and reasonable belief.[436] As he had not, further proceedings on this issue were necessary.[437] Similarly, summary judgment for Police Chief Wilson was denied. The court found no common law immunity shielding Wilson, but said "good faith-reasonableness qualified immunity" as developed by *Scheuer* was applicable.[438] The court again said the issue was a triable one and could not be dealt with on a motion for summary judgment.[439] As for the corporation counsel and his assistants, the district court concluded that their liability was governed by whether or not the delay in issuing an opinion on the constitutionality of the police regulation was the "proximate cause" of the deprivation of Shifrin's First Amendment rights, and proximate cause is an issue for the trier of fact.[440] Prosecutorial immunity was denied to the corporation counsel and his staff because they did not engage in any quasi-judicial or trial functions,[441] but, applying *Scheuer*, the district court found that these defendants were also entitled to prove a defense of good faith and reasonableness at trial.[442]

These decisions are surprising. In *Brawer,* a court of appeals unilaterally developed a new immunity for *Bivens* actions. In *VonderAhe*, federal agents making a search and seizure under an admittedly valid warrant were held to be subject to suit under *Bivens* because they could have acquired the information they sought through less disruptive alternatives. The net effect of *Rodriguez* and *Shifrin* is to create a cause of action under *Bivens*, not for an intentional tort, but for *negligence.* One might respond that under the tests announced in *Scheuer v. Rhodes* and *Wood v. Strickland* mere negligence would not suffice to create a cause of action;[443] similarly, under

436. *Id.* at 1295. No immunity was found for Connor because the court looked to the decision of the Supreme Court in Pierson v. Ray, 386 U.S. 547, 555 (1967), which held that police officers are not immune from suit under section 1983 of the Civil Rights Act.

437. 412 F. Supp. at 1297.

438. *Id.* at 1298-99.

439. *Id.* at 1299-1300.

440. *Id.* at 1302 (citing Monroe v. Pape, 365 U.S. 167, 187 (1961), for the proposition that it is permissible to take into account general principles of tort law). See text accompanying notes 441-52 *infra*. The district court noted the limitations imposed by the case of Rizzo v. Goode, 423 U.S. 362 (1976), on actions under section 1983, but indicated that *Rizzo* had little bearing on suits brought under section 1331(a). *See* 412 F. Supp. at 1301-02 n.22. See notes 458-69 and accompanying text *infra*.

441. 412 F. Supp. at 1303-04. *See* Imbler v. Patchman, 424 U.S. 409, 430 (1976); Apton v. Wilson, 506 F.2d 83, 93-94 (D.C. Cir. 1974); Donovan v. Reinbold, 433 F.2d 738, 743-44 (9th Cir. 1970).

442. 412 F. Supp. at 1304-05.

443. *See* Wood v. Strickland, 420 U.S. 308, 319 (1975).

the doctrines of these decisions, the agents in *VonderAhe* would be entitled to a "good faith-reasonableness qualified immunity" because they (rightfully) believed that their general warrant validated their actions. Of course, *VonderAhe* preceded *Scheuer* and *Wood*, so it may be differentiated on that basis. But *Rodriguez* and *Shifrin* were decided in 1976, so how does one explain the results achieved in those cases? One answer might be that these two latter decisions were section 1331(a), not section 1983, actions, so the Third Circuit and the district court of the District of Columbia were not obliged to abide by precedents developed in different legal contexts. But that answer is too simplistic; both courts stated they were obliged to abide by the rulings in section 1983 cases.[444] In sum, what these decisions seem to suggest is that lower federal courts are at liberty to *select* which section 1983 rulings they desire to be bound by.

*VonderAhe, Rodriguez*, and *Shifrin* also indicate that lower federal courts are, on occasion, willing to accord less protection to an official defendant than the Second Circuit granted in its 1972 *Bivens* decision. Certainly the good faith-reasonable belief defense developed in the latter case would seem to require a different result than the one reached in *VonderAhe.*[445] But the proper response to that contention is that the Ninth Circuit was utterly free to invent its own criteria for a valid defense and it did so. Of course the same is true of the courts in *Rodriguez* and *Shifrin*. Until the Supreme Court conclusively addresses the issue, such judicial inventiveness and independence are entirely permissible decision-making techniques.

## III. The Future of a *Bivens* Type of Action

The question this article sought to explore is: what advantage is there in suing on the basis of *Bivens*? As has been shown, in comparing a *Bivens* claim and a section 1983 cause of action, the former has some distinct attractions. In contrast to a section 1983 suit, one can, under *Bivens,* sue counties[446] and municipalities,[447] sue under the theory of respondeat superior in some jurisdictions,[448] and possibly confront less stringent defenses to suit.[449] As interpreted by the lower federal court, moreover, the differences between a section 1983 action and a *Bivens* claim that made the former remedial source seem attractive have been dissipated. Thus, in many

444. *See* Rodriguez v. Ritchey, 539 F.2d 394, 399, 401 (3d Cir. 1976); Shifrin v. Wilson, 412 F. Supp. 1282, 1298, 1304 (D.D.C. 1976).

445. It might also be argued that the Second Circuit's 1972 *Bivens* decision was limited *solely* to suits against police officials, because of the particular factors justifying a policy that ensures that such officers are entitled to certain wide-ranging defenses to a lawsuit. See note 75 and accompanying text *supra*.

446. See notes 321, 323 and accompanying text *supra*.

447. See notes 87, 93, 323 and accompanying text *supra*.

448. See notes 258, 261 and accompanying text *supra*.

449. See notes 423-42 and accompanying text *supra*.

jurisdictions, a *Bivens* suit not only can be brought against state officials and entities,[450] but also can be utilized to vindicate a variety of constitutional rights other than those guaranteed by the Fourth Amendment.[451] In some jurisdictions, *Bivens* is deemed to be an independent source of equitable relief;[452] in all jurisdictions, equitable relief can be sought concurrently (against either state[453] or federal[454] officials) with a *Bivens*-based claim for damages. In some jurisdictions, too, punitive damages may be recoverable in a *Bivens* cause of action.[455] The one major difference between section 1983 lawsuits and *Bivens* claims that *is* still significant is the $10,000 amount in controversy requirement, but that requirement has, more often than not, been liberally construed by lower federal courts.[456] But interpreting *Bivens* as an overly generous source of a federal remedy for any claim falling under the rubric of "constitutional tort" has led and, no doubt, will continue to lead to occasionally questionable results and even more questionable complaints.[457]

Nevertheless, one can say *why* the remedy created in *Bivens* is being utilized. First, at least as against federal officials, it is still the only monetary remedy available in federal courts. Second, as against state officials and entities, it has become perhaps a more productive remedial source than section 1983. This argument can be illustrated by considering two opinions handed down by the Supreme Court in 1976 which will have far-reaching impact on the potential for success on any section 1983 claim.

The first of these decisions was *Rizzo v. Goode.*[458] In 1970, two suits were lodged against, *inter alia*, the mayor, the city managing director, and the police commissioner of Philadelphia. The plaintiffs sought equitable

450. See note 323 and accompanying text *supra*.

451. See note 229 and accompanying text *supra*.

452. See note 203 and accompanying text *supra*.

453. See note 94 and accompanying text *supra*.

454. See note 202 and accompanying text *supra*.

455. See note 159 and accompanying text *supra*.

456. See notes 154-58 and accompanying text *supra*.

457. The cases allowing a *Bivens* cause of action to be stated against private parties are good examples of what this author deems to be questionable complaints. These complaints are best typified by those assuming that the decision in *Bivens* somehow abrogated the sovereign immunity of the federal government. The courts have consistently disabused plaintiffs of this notion. Duarte v. United States, 532 F.2d 850, 852 (2d Cir. 1976); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 930 (10th Cir. 1975); James v. United States, 358 F. Supp. 1381, 1387 (D.R.I. 1973), *vacated on other grounds,* 502 F.2d 1159 (1st Cir. 1973); Smallwood v. United States, 358 F. Supp. 398, 405 (E.D. Mo. 1973); Monarch Ins. Co. v. District of Columbia, 353 F. Supp. 1249, 1254 (D.D.C. 1973), *aff'd*, 497 F.2d 683 (2d Cir. 1974), *cert. denied*, 419 U.S. 1021 (1975). *But see* Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1554-59 (1972). Sometimes, however, courts fail to dismiss frivolous concepts; at least one district court has indicated in a dictum that *Bivens* may serve as a means of vindicating not only rights arising under the Constitution, but also arising under a law of the United States. Rodriguez v. Barcelo, 358 F. Supp. 43, 48 (D.P.R. 1973).

458. 423 U.S. 362 (1976).

relief in the form of intervention in and supervision over the city's police force; it was alleged that the police systematically mistreated minority citizens.[459] After a good deal of procedural skirmishing,[460] a federal district court handed down a lengthy opinion concluding that there was an organized pattern of oppression against non-whites by members of Philadelphia's police force.[461] Rather than intervening directly into the internal operations of a municipal police department,[462] the district judge ordered the defendants before it to revise police manuals so that they would clearly state the boundaries of permissible police conduct in dealing with civilians. In addition, they were to revise procedures for processing complaints against police officers by making available complaint forms to civilians, to develop a procedure to screen out frivolous complaints, ensure a full and prompt investigation of all legitimate complaints, and provide for a fair adjudication of whether or not a given charge was frivolous by creating an impartial, independent board which would hold sessions at which the complainant and the police officer could state their respective cases. Last, defendants were instructed to promptly notify complainants of the eventual disposition of their charges.[463] The United States Court of Appeals for the Third Circuit affirmed this decree, deeming it adequate to prevent further police misconduct.[464]

The Supreme Court reversed. Justice Rehnquist's opinion for the Court noted that the police officers who had allegedly deprived the respondents of their constitutional rights were not named as parties to the original suit; the only causal connection between the petitioners and the incidents of police misconduct was the fact that they were nominally in charge of the operation of the city's police department.[465] There was no showing that the petitioners approved or knew of the misconduct of the individual police officers; nor was there any showing that failure to grant equitable relief would have resulted in continuing harm to the respondents themselves as distinct from the classes of persons they sought to represent.[466] Thus Justice Rehnquist indicated that the respondents (plaintiffs in the district court)

459. *Id.* at 366-67.

460. *See* COPPAR v. Rizzo, 357 F. Supp. 1289, 1290-92 (E.D. Pa. 1973), for a procedural history of this litigation.

461. *Id.* at 1319.

462. The district court did, however, indicate that it had the inherent equitable power to intervene and enforce standards of its own devising if it wished. *Id.* at 1320. Other courts have done exactly that with respect to different types of state institutions. *See, e.g.,* Suzuki v. Quisenberry, 411 F. Supp. 1113, 1127-34 (D. Hawaii 1976); Morales v. Turman, 383 F. Supp. 53, 78 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976); Martarella v. Kelly, 359 F. Supp. 478, 483-86 (S.D.N.Y. 1973); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 768-70 (E.D.N.Y. 1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1372-74 (D.R.I. 1972); Wyatt v. Stickney, 344 F. Supp. 387, 395-407 (M.D. Ala. 1972), *modified and enf'd sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

463. 357 F. Supp. at 1321.

464. Goode v. Rizzo, 506 F.2d 542, 548 (3d Cir. 1974).

465. 423 U.S. at 371.

466. *Id.*

lacked standing to sue.[467] He went on to discuss the scope of injunctive relief available under section 1983 of the Civil Rights Act. One limit on the equitable powers of federal courts under section 1983 was the "principle of federalism." Thus Justice Rehnquist said:

> When the frame of reference moves from a unitary court system . . . to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.[468]

For these reasons it was said that equitable relief under section 1983 could be invoked only in "the most extraordinary circumstances."[469]

The second far-reaching decision by the Supreme Court interpreting section 1983 of the Civil Rights Act was *Paul v. Davis*.[470] Fifteen years earlier, in the case of *Monroe v. Pape*,[471] the Court had indicated that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[472] The decision in *Paul* urged a far different reading of the statute. In this case Davis was arrested on June 14, 1971, on a charge of shoplifting. He was arraigned in September of 1971 and pled not guilty. The charge was filed away with leave to reinstate. In late 1972, petitioner Paul, the chief of police in Louisville, Kentucky, issued a flyer to local merchants displaying the names and photographs of "active shoplifters." Davis' name and photo were among those shown. Shortly after the circulation of the flyer, a judge in a Louisville Police Court dismissed the shoplifting case against Davis.[473] The latter sued under section 1983, seeking damages and injunctive relief.[474] The trial court dismissed the complaint. The United States Court of Appeals for the Sixth Circuit reversed, finding that the alleged facts constituted a denial of due process of law.[475] The court of appeals concluded that the stigma created by having one's name and likeness included in a pamphlet purporting to list active criminals without any notice or hearing whatsoever violated the guarantees of the Fourteenth Amendment.[476]

467. *Id.* at 372-73.

468. *Id.* at 379 (citing Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1975)).

469. 423 U.S. at 379.

470. 424 U.S. 693 (1976).

471. 365 U.S. 167 (1961).

472. *Id.* at 187.

473. 424 U.S. at 694-96.

474. *Id.* at 696.

475. Davis v. Paul, 505 F.2d 1180, 1182 (6th Cir. 1974).

476. *Id.* at 1184. As support for the contention that honor and reputation were liberties subject to the protection of the Fourteenth Amendment, the court of appeals cited, *inter alia*, Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Wieman v. Updegraff, 344 U.S. 183, 191 (1952); United States v. Lovett, 328 U.S. 303, 316-17 (1946). *See* 505 F.2d at 1182-83.

The Supreme Court reversed. Justice Rehnquist's majority opinion found in this case an instance of defamation per se, but said that such an offense does not give rise to a constitutional cause of action. Any other view, he averred, "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment."[477] Justice Rehnquist indicated that the Fourteenth Amendment should not be construed as the source of some far-reaching federal law of torts:

> Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, *Griffin v. Breckenridge,* 403 U.S. 88,101-102 (1971); *a fortiori* the procedural guarantees of the Due Process Clause cannot be the source for such law.[478]

Thus the Court found that reputation alone, considered separately from some tangible property interest like employment, is insufficient to invoke the protection of the Fourteenth Amendment's due process clause.[479] In a dictum, Justice Rehnquist noted that any right of privacy enjoyed by respondent Davis which would prohibit the public disclosure of his arrest on a shoplifting charge was also a similarly non-protected interest.[480]

The impact of *Rizzo* and *Paul* on section 1983 litigation is as yet unclear. *Rizzo* does seem to require that injunctive relief in section 1983 cases be limited to only the most egregious situations. Given the fact that the district court in *Rizzo* did not even intervene directly, but only asked local officials to draw up their own procedures (conforming to certain minimum guidelines),[481] the Supreme Court's position would seem to be that *any* judicial intrusion into the internal operations of state and local institutions must meet stringent criteria of justifiability. Additionally, *Rizzo* seems to say that section 1983 will not reach acts of official negligence which result in the actual deprivation of constitutional rights.[482] *Paul v. Davis* apparently

477. 424 U.S. at 699.

478. *Id.* at 700-01.

479. *Id.* at 701. The cases cited by the court of appeals (see note 476 *supra*) were distinguished on this basis. *See id* at 701-10.

480. *Id.* at 712-13. *See* Note, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege,* 3 HASTINGS CONST. L.Q. 543, 554-55 (1976).

481. See note 463 and accompanying text *supra*.

482. *See* Rizzo v. Goode, 423 U.S. 362, 384-85 (1976) (Blackmun, J., dissenting).

holds that the impugning of one's reputation without a concomitant deprivation of some property right is not actionable under section 1983.[483] Interpretation of *Rizzo*[484] and *Paul*[485] has yielded varying and sometimes inconsis-

483. *See* Bishop v. Wood, 96 S. Ct. 2074, 2080-81 (1976) (Brennan, J., dissenting); Paul v. Davis, 424 U.S. 693, 714 (1976) (Brennan, J., dissenting).

484. *See* Illinois Migrant Council v. Pilliod, 540 F.2d 1062, 1069 (7th Cir. 1976) (held in suit seeking to enjoin random harassment of Chicanos by Immigration & Naturalization Service agents that *Rizzo* does not preclude enforcement of a prohibitory, as distinct from a mandatory, injunction); Diaz Gonzalez v. Colon Gonzalez, 536 F.2d 453, 458 (1st Cir. 1976) (held in suit seeking reinstatement in the Puerto Rican Department of Social Services that the principles of federalism enunciated in *Rizzo* precluded such tampering with the internal affairs of local government); Calvin v. Conlisk, 534 F.2d 1251, 1252 (7th Cir. 1976) (held in suit seeking to enjoin alleged misconduct of Chicago police that the doctrine of *Rizzo* barred any relief because named plaintiffs could not show any likelihood of immediate harm to them); Frederick L. v. Thomas, 419 F. Supp. 960, 976 n.25 (E.D. Pa. 1976) (suggested *Rizzo* might not bar judicial enforcement of individualized educational services for children with learning disabilities upon proof of invidious discrimination in the furnishing of such services by a municipality); Mayberry v. Maroney, 418 F. Supp. 669, 672 (W.D. Pa. 1976) (said *Rizzo* barred injunctive interference with the internal operations and conditions of a state penitentiary); McKee v. Breier, 417 F. Supp. 189, 190-91 (E.D. Wis. 1976) (said in suit against police officials for alleged misconduct, *Rizzo* did not apply where plaintiffs sought money damages and when chief of police "failed to act at a time when he knew that individual civil rights were being violated"); DeMaria v. Jones, 416 F. Supp. 291, 300 (S.D.N.Y. 1976) (held suit alleging federal drug agents "coerced" plaintiffs into committing criminal and immoral acts did not state a cause of action under *Rizzo*); Delaney v. Dias, 415 F. Supp. 1351, 1354 (D. Mass. 1976) (held *Rizzo* inapplicable where suit against police sought only $2,000,000 in damages and where no pattern of misconduct was alleged); Arthur v. Nyquist, 415 F. Supp. 904, 973 (W.D.N.Y. 1976) (held in school desegregation suit that *Rizzo* is inapplicable where it is alleged state and city defendants created and maintained segregated schools); Roach v. Kligman, 412 F. Supp. 521, 528 (E.D. Pa. 1976) (held in suit seeking to enjoin continuation of allegedly unconstitutional prison conditions that mere fact that superintendent of prisons exercised "close supervision and control" is not enough to state a cause of action under *Rizzo*); League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873, 886 n.3 (C.D. Cal. 1976) (said in suit alleging discriminatory hiring practices that *Rizzo* does not apply where claim rests on an immediate injury, not future speculation); Tucker v. City of Montgomery Bd. of Comm'rs, 410 F. Supp. 494, 508 (M.D. Ala. 1976) (held where discriminatory practices sought to be enjoined were sanctioned by state law, and mayor and officials participated in decisions enforcing such law, *Rizzo* did not bar injunctive remedy).

485. *See* Bonner v. Coughlin, 545 F.2d 565, 566-67 (7th Cir. 1976) (held prison guard's negligent loss of plaintiff-inmate's trial transcript not actionable under *Paul*); Sullivan v. Brown, 544 F.2d 279, 283 (6th Cir. 1976) (held mere reprimand and transferral of a tenured teacher not actionable under *Paul*); Colaizzi v. Walker, 542 F.2d 969, 973 (7th Cir. 1976) (said *Paul* permits a suit where stigma to reputation is coupled with failure to rehire); Walker v. Callahan, 542 F.2d 681, 683 (6th Cir. 1976) (held that letter from county prosecutor allegedly defaming plaintiff was not actionable under the theory of *Paul*); Edelberg v. Illinois Racing Bd., 540 F.2d 279, 285-86 (7th Cir. 1976) (held in suit challenging constitutionality of Racing Board rule denying winnings to owner of any horse which has allegedly been drugged that no action for injury to reputation was possible because of *Paul*); Ryan v. Aurora City Bd. of Educ., 540 F.2d 222, 226 n.2 (6th Cir. 1976) (teachers denied contract renewals without any reasons being given had no cause of action because, as in *Paul*, no right was guaranteed to them under state law); Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 365 (9th Cir. 1976) (held *Paul* didn't bar a suit where a doctor suffered stigma to reputation *and* dismissal from defendant hospital's residency program); Harris v. Harvey, 419 F. Supp. 30, 32 (E.D. Wis. 1976) (held defamation of

tent results on the part of the lower federal courts, so it is premature to attempt to assess the overall consequences of these decisions. But these decisions *are* restrictive and they *do* limit both the availability and the desirability of a section 1983 action. By contrast, one can argue that these decisions do not affect section 1331(a) litigation brought under the principles announced in *Bivens*. The Court in *Rizzo* and *Paul* never mentioned a *Bivens* cause of action. Moreover, the limits on injunctive relief created by *Rizzo* would not seem to affect a *Bivens* suit, which is properly only a suit for damages. Similarly, much of the discussion in *Paul* is inapposite in the context of a *Bivens* claim because the Supreme Court's decision in *Bivens* was consciously *intended* to create a species of federal tort law. One may argue that *Rizzo*'s refusal to permit injunctive relief in cases of official negligence should apply in suits seeking equitable relief under section 1331(a), but at least one court has openly questioned this thesis.[486] Thus, it would seem that the plaintiff seeking to redress constitutional violations by state officials might have a better opportunity in at least being able to litigate his claim by suing under a combination of *Bivens* and section 1331(a), rather than proceeding under section 1983 of the Civil Rights Act.

## Conclusion

The lower federal courts have made the Supreme Court's decision in *Bivens* a prolific source of substantive constitutional law involving tortious deprivations of rights guaranteed by the first nine and the Fourteenth Amendments. Should the Supreme Court take the opportunity to review its *Bivens* decision, what can be expected? It should be noted that two of the six justices who voted for a damage remedy in *Bivens* (Justices Harlan and Douglas) are no longer serving on the Court. Of the four remaining justices, only Justices Marshall and Brennan have indicated a willingness to expand

plaintiff by district attorney not actionable under *Paul*); Colorado Seminary (Univ. of Denver) v. National Collegiate Athletic Ass'n, 417 F. Supp. 885, 896 (D. Colo. 1976) (held alleged defamation caused by imposition of NCAA sanctions not actionable under *Paul*); Howlett v. Walker, 417 F. Supp. 84, 87 (N.D. Ill. 1976) (held defamation of political candidate didn't deprive same of any "right or status," as *Paul* requires); Tomko v. Lees, 416 F. Supp. 1137, 1139 (W.D. Pa. 1976) (held in suit alleging police coerced plaintiff to act as an informant that *Paul* does not bar section 1983 suit alleging deprivation of "freedom of choice"); De Maria v. Jones, 416 F. Supp. 291, 303 (S.D.N.Y. 1976) (cited *Paul* as one reason for denying monetary relief in suit alleging entrapment); Shore v. Howard, 414 F. Supp. 379, 393 (N.D. Tex. 1976) (dismissed discrimination suit saying that *Paul* permits defamation action under section 1983 only if plaintiff can prove actual defamation, governmental action depriving the individual of a right previously held under state law, and occurrence of the defamation in the course of government action); Roach v. Kligman, 412 F. Supp. 521, 528 (E.D. Pa. 1976) (held allegation of gross negligence will not give rise to a section 1983 suit because of *Paul*); Connealy v. Walsh, 412 F. Supp. 146, 159 (W.D. Mo. 1976) (held in suit alleging termination of plaintiff's employment because she refused to remove a "McGovern for President" bumper sticker from her car that *Paul* permits suit whenever charges creating a stigma "involve imputation of illegal, dishonest or immoral conduct which call into question the former employee's good name, honor or integrity.")

486. See note 440 *supra*.

*Bivens* beyond its original scope.[487] This author suspects that a majority of the other justices sitting on the Court will be unlikely to allow a plaintiff to do under *Bivens* and section 1331(a) what cannot presently be done under section 1983. Nevertheless, until the Court hands down a conclusive ruling, the lower federal courts are free to continue to extend the scope of *Bivens*.

The consequences flowing from these observations are interesting. If one believes that, on balance, the extension of the remedy of *Bivens* is a desirable goal, then the inaction of the Supreme Court is a salutary phenomenon. By adopting a laissez-faire stance toward *Bivens*, the Court has, in effect, tacitly encouraged the jurisprudential creativity being displayed by tribunals in the lower echelons of the federal judiciary. The costs of such independent inventiveness are lack of uniformity and inconsistency, but from the perspective of the plaintiff seeking to vindicate his constitutional rights, these may be a small price to pay for the privilege of having a relatively efficacious means of redress in federal court.

487. See notes 77, 91 and accompanying text *supra*.