Volume 62, Issue 3 Page 809

Stanford Law Review

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In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, *403 U.S. 388 (1971), the Supreme Court held that the Federal Constitution provides a cause of action in damages for violations of the Fourth Amendment by individual federal officers. The so-called "*Bivens*" cause of action—initially extended to other constitutional provisions and then sharply curtailed over the past two decades—has been a subject of controversy among academics and judges since its creation. The most common criticism of* Bivens*—one that has been repeated in different venues for thirty years—is that the Court's individual liability model, in which the offending officer is personally liable in damages, should be abandoned in favor of a governmental liability model akin to* respondeat superior *liability.*

Commentators base their criticism of the individual liability model on two empirical assumptions: (1) Bivens *suits are almost never successful; and (2) the defense of qualified immunity, available only to individuals, is a nearly insuperable barrier to plaintiffs' prevailing in* Bivens *claims. On this account, a move to the governmental liability model will ensure adequate compensation and deterrence while removing a substantial barrier to plaintiffs' success. These empirical claims about the general failure of* Bivens *suits and the explanation for that failure have never been tested. This Article corrects that oversight by offering the results of the first detailed empirical study of the determinants and outcomes of* Bivens *litigation. Based on data collected from cases filed in five district courts from 2001-2003, this Article concludes that the truths that scholars and judges have taken as a given are unsupported.* Bivens *claims succeed at a much higher rate than previously thought, especially compared to other civil rights litigation, and the defense of qualified immunity rarely plays a role in the*

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outcome of Bivens *litigation. These data call into question the given wisdom about the characteristics of* Bivens *litigation, and undermine the policy proposals that have occupied the field of* Bivens *scholarship.*

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INTRODUCTION

Almost from the moment the decision was announced in 1971, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[1] has stirred controversy within judicial and academic circles. In *Bivens*, the Supreme Court held for the first time that federal employees may be sued in their personal capacity[2] for damages for violations of the Constitution.[3] Although the specific claim pursued in *Bivens* related to alleged violations of the Fourth Amendment, the Supreme Court and lower courts soon extended *Bivens* liability[4] to other kinds of constitutional violations.[5] Thus, the Supreme Court put plaintiffs injured by federal officials' unconstitutional conduct in nearly the same shoes as victims of state and municipal unconstitutional conduct (who have a statutory right to seek damages and other remedies under 42 U.S.C. § 1983[6]).

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

2. Personal capacity claims are brought against government officials individually, almost always for damages. In theory, defendants who are found liable in their personal capacity are responsible for paying damages out of their own pockets, although the federal government, like most states and municipalities, usually indemnifies employees for the damages awarded in constitutional tort actions. *See, e.g.*, Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 76-78 (1999). Official capacity claims, by contrast, are brought nominally against government officials, but typically seek injunctive relief against a government entity that would otherwise be immune from suit in federal court. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100-01 (1984) (summarizing Eleventh Amendment principle that unconsenting states and their agencies may not be sued in federal court, regardless of the relief sought). Such suits have long been assumed to be proper against federal and state officials under the fiction spawned by *Ex parte Young*, 209 U.S. 123 (1908). For a detailed discussion of the practical distinction between personal and official capacity claims, see generally *Hafer v. Melo*, 502 U.S. 21 (1991).

3. 403 U.S. at 395-97.

4. Throughout this Article, I will use the terms "*Bivens* liability" and "*Bivens* litigation" to refer to the broad remedial scheme permitting the awarding of damages against federal officials for violation of *any* provision of the Constitution, and not just for the Fourth Amendment remedy implied in the original *Bivens* case.

5. *See* cases cited *infra* notes 54-55, 58-60.

6. Section 1983 provides as follows:

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

42 U.S.C. § 1983 (2006).

The word "person" in section 1983 applies to natural persons and has been interpreted to apply to municipalities as well. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978). The word "person" does not encompass states or their agencies, although it plainly applies to individual state officials. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989). Notably, while section 1983 plaintiffs can recover costs and attorneys' fees if they are successful, *see* 42 U.S.C. § 1988 (2006), no similar provision is applicable to *Bivens* plaintiffs, *see, e.g.*, Kreines v. United States, 33 F.3d 1105 (9th Cir. 1994) (rejecting claim for attorneys' fees in *Bivens* action and citing similarly decided cases from other circuits).

Precisely because *Bivens* was a matter of judicial implication, however, the Court retains and has exercised the power to limit the extent of any *Bivens* remedy, consistently restricting the reach of *Bivens* from 1980 on.[7]

Bivens nonetheless remains a potent cause of action, although most commentators view it as being more powerful in theory than in practice. Indeed, the working assumption in both the academy and the judiciary has been that *Bivens* litigation is remarkably unsuccessful.[8] Commentators offer many explanations for the relative lack of success of *Bivens* litigation, but most agree that *Bivens* plaintiffs are disadvantaged because the personal defense of qualified immunity[9] is an imposing barrier to recovery from federal officers.[10]

These assumptions about the outcome of *Bivens* litigation—that it is highly unsuccessful and that the availability of qualified immunity is a substantial reason for that lack of success—have never been empirically tested. Many researchers have evaluated the success of civil rights litigation in general, but no detailed empirical study has focused on *Bivens* litigation exclusively.[11] The numbers that are bandied about—for instance, the ubiquitous assertion that 12,000 claims were filed between 1971 and 1985 with only four judgments sustained for plaintiffs[12]—border on the apocryphal. To the extent any hard numbers reflecting success are mentioned, they are supported by statements made at legislative hearings or even more informal reports, they define "success" in a much narrower way than most empirical studies,[13] and they are

7. *See* cases discussed *infra* notes 61-62, 64-65 and accompanying text; *see also* Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 CATO SUP. CT. REV. 23 (arguing that *Bivens* remedy has been gradually undermined, and is endangered by the Court's analysis in *Wilkie v. Robbins*, 551 U.S. 537 (2007)). In a recent article, James Pfander and David Baltmanis argue that the Supreme Court has been overly restrictive in *Bivens* jurisprudence and suggest a novel approach to analyzing *Bivens* liability that would result in greater equality between section 1983 and *Bivens* plaintiffs. James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009).

8. *See* sources cited *infra* notes 91-92, 94-95.

9. Qualified immunity shields government officials from personal liability for civil damages when they behave reasonably in light of unclear law. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). The import of the defense is discussed in more detail below. *See infra* notes 79-86 and accompanying text.

10. *See infra* note 24.

11. Two articles published more than twenty-five years ago attempted to provide some estimate of the measure of success of *Bivens* claims, *see* Charles R. Wise, *Suits Against Federal Employees for Constitutional Violations: A Search for Reasonableness*, 45 PUB. ADMIN. REV. 845 (1985); Note, *"Damages or Nothing"—The Efficacy of the* Bivens*-Type Remedy*, 64 CORNELL L. REV. 667 (1979) [hereinafter *Damages or Nothing*], but as discussed below neither article can be relied upon to provide an accurate measure of success of *Bivens* claims.

12. This figure is repeatedly cited in judicial opinions and scholarly commentary. *See infra* notes 94-95 and accompanying text.

13. For the purposes of this Article, I will define "success" in a way similar to the most extensive studies of civil rights litigation: a judgment entered in favor of the plaintiff, a

not transparent enough to indicate what is even considered a *Bivens* claim.[14] And while this Article builds on the work of scholars such as Margo Schlanger, Theodore Eisenberg, and Stewart Schwab, who have conducted extensive studies of the relative success of civil rights claims in general, those scholars have not considered the success (or lack thereof) of *Bivens* litigation in particular.[15]

This Article represents the first attempt to systematically study the success of *Bivens* litigation, and its results challenge longstanding assumptions about the outcomes of these claims. After conducting a detailed study of case dockets over three years in five district courts, I conclude here that *Bivens* cases are much more successful than has been assumed by the legal community, and that in some respects they are nearly as successful as other kinds of challenges to governmental misconduct. Depending on the procedural posture, presence of counsel, and type of case, success rates for *Bivens* suits range from 16% to more than 40%, which is at least an order of magnitude greater than has previously been estimated. In addition, by specifically reporting how *Bivens* claims are resolved when they do fail, the data reported here show that the availability of qualified immunity plays a limited role in *Bivens* failures. This sharply contrasts with estimates of the role of qualified immunity based solely on published case studies,[16] demonstrating the hazards of overlooking unpublished case reports and dockets. This Article thus adds a substantial contribution to our knowledge about the outcomes of *Bivens* litigation, while

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settlement of some kind, or a stipulated/voluntary dismissal by the plaintiff. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1592-93 (2003); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 726-27 (1988). Of these three possibilities, the voluntary dismissal is perhaps the most controversial, because it rests on the assumption that a plaintiff would enter a dismissal only in exchange for some benefit, and not for other legitimate reasons, such as the realization that a claim is without merit. *See* Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 115-18 (2009).

14. Many claims that can be characterized as implicating *Bivens*—because they involve suits against individual federal officials for damages and they allege some violation of the Constitution—are often dismissed sua sponte, before service is even effectuated, because they are patently frivolous or state no comprehensible claim. *See infra* notes 147-50 and accompanying text. As I suggest below, we should be wary of counting these cases as *Bivens* claims for the purpose of inclusion in the denominator. *See infra* note 150 and accompanying text.

15. *See* Schlanger, *supra* note 13, at 1594 tbl.IIA (reporting success rate for prisoner civil rights suits filed between 1990 and 1995); Schwab & Eisenberg, *supra* note 13, at 728 tbl.II (reporting data on success rates of prisoner and nonprisoner civil rights claims and civil claims in general from three district courts for cases filed between 1980 and 1981); *see also* Theodore Eisenberg & Stewart J. Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 674 tbl.VIII, 678 tbl.IX (1987) (reporting data on success rate for cases filed in Central District of California).

16. *See, e.g.*, Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 136 n.65, 145 n.106 (1999) (finding that qualified immunity defenses were denied in only 20% of federal cases over a two-year period, but citing only reported cases).

suggesting avenues for further research.

Measuring the success (or lack thereof) of *Bivens* litigation is not solely an academic exercise. These data are relevant to one of the most disputed aspects of *Bivens*: the Court's decision that, to enforce the Constitution against the federal government, it is necessary that citizens have a private right of action against the *individual officer* who allegedly violated the Constitution. The "individual liability" model has been criticized from several perspectives, with the most common critique being that it shoulders individual officers with a substantial litigation burden without meeting *Bivens*' twin goals: compensating victims of unconstitutional conduct and deterring violations of constitutional rights.[17] Thus, in every decade since *Bivens* was announced, commentators have repeatedly proposed that the individual liability model adopted in *Bivens* be replaced by an entity liability model.[18]

The argument goes along these lines: just as the Court has recognized in

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17. The *Bivens* Court itself focused on the need for compensating the victims of wrongdoing, and placed little significance on the role that individual liability might play in deterrence. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396-97 (1971); *id.* at 408 (Harlan, J., concurring). The Court has subsequently interpreted *Bivens* liability as vindicating deterrent goals as well, sometimes to the detriment of compensatory goals. *See* cases cited *infra* note 171.

18. *See, e.g.*, Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1558-59 (1972) (criticizing *Bivens*' insistence that the remedy be available against individual defendants only, as opposed to against the Government itself). Professor Dellinger was only the first in a line of observers who have argued in favor of a governmental liability model for the unconstitutional conduct of federal officials. *See generally* Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986); *Damages or Nothing*, *supra* note 11, at 697-702 (proposing shift to governmental liability model, but not through the FTCA); Michael B. Hedrick, Note, *New Life for a Good Idea: Revitalizing Efforts to Replace the* Bivens *Action with a Statutory Waiver of the Sovereign Immunity of the United States for Constitutional Tort Suits*, 71 GEO. WASH. L. REV. 1055 (2003) (revisiting proposal to have FTCA cover constitutional torts). Some have argued that moving towards a governmental liability model will act as a better incentive for constitutional behavior. *See, e.g.*, David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1221. Others contend that interests in both deterrence and compensation would be enhanced by moving away from individual liability. Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 340-42 (1995); Diana Hassel, *A Missed Opportunity: The Federal Tort Claims Act and Civil Rights Actions*, 49 OKLA. L. REV. 455, 474-75 (1996); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 1002-03 (1989); Note, *Government Tort Liability*, 111 HARV. L. REV. 2009 (1998). And yet another variant of the argument for governmental liability focuses on these interests as well as reducing the burden on individual officials. William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1152 (1996) (arguing that shifting liability to federal government would increase the value of genuine *Bivens* claims and decrease the deleterious effect of *Bivens* claims on federal officials); Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 346 (describing "fulcrum of systemic reform" as increased governmental liability coupled with protecting individual officials from being sued and being held personally liable).

the section 1983 context that government entities may be best positioned to prevent constitutional violations,[19] so should *Bivens* liability be extended to the federal government, either through Court decision or through statute.[20] Most of these commentators argue that the qualified immunity available to individuals should not be extended to the federal government. In essence, they suggest that constitutional torts should be subject to a *respondeat superior* theory of liability, which would result in damages paid by the federal government for the unconstitutional acts of its employees, even when those employees themselves are immune from individual liability because of qualified immunity.[21] As in Federal Tort Claims Act (FTCA) claims, individual defendants would be dismissed from lawsuits and the United States would stand in as a substitute.[22]

Thus, the proposal is one of formal governmental liability, in which individual officers would not even be personally named in the underlying

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19. This is not to say that the Supreme Court has adopted an entity liability model for section 1983 liability. To the contrary, the Court has found that the statute does not apply to states qua states, *see* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989), but that municipalities may be sued directly under section 1983, under specific circumstances, *see* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690-91 (1978). Nonetheless, the extension of liability to municipalities is not akin to the *respondeat superior* liability provided in statutes like the FTCA, and section 1983 plaintiffs often will sue *both* municipalities and individual officers responsible for the constitutional violations.

20. As these commentators acknowledge, the Court has never fully addressed the sovereign immunity issues presented by extending *Bivens* liability to the Federal Government itself. Most commentators have suggested that the best way to achieve this goal is to amend the FTCA to permit constitutional tort claims to be brought pursuant to the statute. *See* sources cited *supra* note 18.

21. Susan Bandes argues, for instance, that governmental liability should be available precisely because qualified immunity may bar relief against individuals. *See* Bandes, *supra* note 18, at 340; *see also* Oren, *supra* note 18, at 1000-02 (proposing that governmental liability be exclusive remedy for constitutional violations and that liability be based on *respondeat superior* theory).

22. In contrast to the individual liability model adopted in *Bivens*, the FTCA has long provided a remedy for plaintiffs injured by federal actors on an entity liability theory. Under the FTCA, when a federal employee has committed a common law tort, the United States is substituted as a defendant and is "liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (2006). The substitution procedure is mandated by section 2679(d) and requires certification by the Attorney General or a court that the employee was acting within the scope of federal employment at the time of the allegedly tortious conduct. The United States is entitled to assert any defense that the individual would have been able to assert had the action been brought directly against the employee, § 2674, and additional limitations on liability are specifically provided for by the FTCA, further circumscribing the potential for liability, *see id.* § 2401(b) (statute of limitations); *id.* § 2675(a) (requiring exhaustion of administrative remedies); *id.* §§ 2672, 2676, 2679(b)(1) (judgment bar provision); *id.* § 2679(b)(2) (prohibiting FTCA claims based on the Constitution or a federal statute); *id.* § 2680 (prohibiting claims based upon taxation, admiralty, combatant activities during time of war, acts conducted as part of a discretionary function, and claims arising in a foreign country). In contrast to *Bivens*, FTCA plaintiffs have no right to a jury trial. *Id.* § 2402.

lawsuit.[23] There are several related reasons that scholars have made this proposal throughout the past thirty years. First, as discussed above, the overriding view is that *Bivens* claims are remarkably unsuccessful: most commentators assert that *Bivens* has not worked as a means of compensation or deterrence. Second, the proponents of governmental liability assert that *Bivens* claims fail for two principal reasons: (1) the availability of qualified immunity for individual officers;[24] and (2) relatedly, the hesitancy of courts or jurors to award damages against federal officials.[25] Third, the scholars claim that the best way to improve the success of *Bivens* claims without unduly burdening individual federal officers is to permit governmental liability for violations of

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23. In striking respects, it echoes the proposal offered by Chief Justice Burger in dissent in *Bivens*, who advocated congressional passage of a statute that would waive sovereign immunity for the unconstitutional acts of federal law enforcement officials and creation of a "quasi-judicial" tribunal to adjudicate claims of individual plaintiffs. 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting).

24. *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT, at xx, 100 (1983) (arguing for expanded governmental liability in lieu of individual liability, because immunity doctrine is unpredictable, does not deter, and often leaves victims without compensation); *see also* Kratzke, *supra* note 18 at 1149-50; H. Allen Black, Note, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733 (1991) (arguing that, because of conceptual and practical difficulties with qualified immunity doctrine, *Bivens* actions should be encompassed within FTCA claims). Professor Kratzke maintains that governmental liability should be substituted for individual liability, using the *respondeat superior* model from private tort law. Kratzke, *supra* note 18, at 1152, 1164-65. One principal concern he articulates is the effect being a defendant has on individual officers. *Id*. at 1143 ("Since the 1980s, it has become very difficult for plaintiffs . . . to win a *Bivens* case. The lawsuit itself, on the other hand, can annoy, harass, or even terrorize defendants to the point that they are afraid of effectively performing their duties.").

25. *See, e.g.*, Hassel, *supra* note 18, at 475 (describing resistance of courts and jurors to awarding damages against individual federal employees); Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 347 (1989) (arguing that a jury is unlikely to hold a *Bivens* defendant liable where the employee appeared to be conscientiously performing his job and where it is difficult to "see" the injury from a constitutional violation). This resistance might be related to several factors. For courts, it may be that federal judges are more likely to share norms with federal law enforcement officials about what amounts to unconstitutional conduct, such that they are less likely to view the actions of federal officials as violating those norms, at least as compared to state actors. *See* Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975 (2004) (arguing that federal courts had not found unconstitutional federal race discrimination because of shared views about what race discrimination was unlawful). It might also be that federal officials take the federal Constitution more seriously than do their state counterparts, either because they are more professional in general, or because it is a federal constitution. As for juries, they may share some of the same assumptions that federal judges have about the presumptive constitutionality of federal behavior, but more importantly they may be both skeptical of the typical *Bivens* plaintiff and leery of ordering federal officers to pay money out of their own pockets. Kratzke, *supra* note 18, at 1150 (suggesting that judges and juries resist imposing personal liability on *Bivens* defendants); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 385 (identifying fear of reprisals, expense of litigation, effectiveness of good faith defenses, "unsympathetic nature of many plaintiffs," and juries' biases as reasons that civil enforcement of Fourth Amendment in general is unsuccessful).

constitutional rights by federal employees, without extending the qualified immunity defense to the government.[26] These critics have had support in the legislature at various times. From *Bivens*' inception until the mid-1980s, there was a concerted legislative effort to "fix" the perceived problem of having an individual liability approach to constitutional violations by federal officials.[27] Although that effort failed and has not been revisited in the legislature,[28] commentators continue to make similar proposals.[29] I contend that the blanket prescription of governmental liability is unnecessary and unwarranted, given the data reported here regarding the prevalence and outcome of *Bivens* lawsuits.

In Part I of this Article, I describe the history and current state of *Bivens* litigation, focusing on the disputed position it occupies within the Supreme Court's jurisprudence. Although *Bivens* liability has been limited in scope, it remains viable for specific categories of constitutional violations. In Part II, I first summarize what we can surmise about *Bivens* litigation from previous studies, and then attempt to round out that knowledge with a detailed study of recent *Bivens* litigation filed over three years in five district courts.[30] The data show that many of the asssumptions upon which *Bivens* critics rest their prescription of government liability are false: properly viewed, *Bivens* claims are more successful than has been reported, and when *Bivens* claims fail it very rarely is because of the qualified immunity defense.[31]

What to make of these facts on the ground is another matter. I turn to this question in Part III and in particular address the arguments made by advocates for formal governmental liability. After discussing the consequences for future research, I conclude that these data, although preliminary in nature, do not support a complete abandonment of the individual liability model. Thus, the call for a wholesale shift away from individual liability for unconstitutional conduct is an overreaction to an empirically questionable claim about the state of *Bivens* litigation. I close with some alternative policy prescriptions that are

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26. *See, e.g.*, Hedrick, *supra* note 18 (proposing that the forfeiture of qualified immunity be granted in exchange for eliminating punitive damages).

27. *See* Pillard, *supra* note 2, at 98 (reporting that twenty-one bills were introduced between 1973 and 1985 seeking to substitute direct governmental liability for individual officer liability, of which three were reported to committee); John Riley, *Congress May Eliminate* Bivens *Suits Next Year*, NAT'L L.J., Dec. 12, 1983, at 15 (describing availability of "good faith" defense as major stumbling block to legislation); Rosen, *supra* note 25, at 372.

28. Despite substantial support for this modification, the attempt ultimately failed because the Department of Justice insisted that individuals' entitlement to qualified immunity be available to the government as well. *See* Pillard, *supra* note 2, at 98-99.

29. *See* sources cited s*upra* note 18.

30. I reviewed cases filed between 2001 and 2003, inclusive, in the Eastern and Southern Districts of New York, the Eastern District of Pennsylvania, the Northern District of Illinois, and the Southern District of Texas. The methodology, including the reasons why these particular districts were studied, is described in further detail below. *See infra* Part II.B.

31. I define "success" consistently with the methodology used by other researchers: judgment, settlement, stipulated dismissal, and voluntary dismissal. Schlanger, *supra* note 13, at 1592-93; Schwab & Eisenberg, *supra* note 13, at 726-27.

informed by the data and by some theoretical literature. Hence my ultimate modest proposal for further discussion: generally, leave *Bivens* as is, but permit individual defendants to exercise an exclusive right of joining the federal government where they acted pursuant to an official policy, whether formal or informal. This hybrid model of liability, I argue, combined with fee- and cost-shifting measures, will ensure that individuals will continue to be held personally liable for unconstitutional conduct that is a product of personal choice or predilection, but will shift responsibility to the government as an entity when appropriate.

I. THE EMERGENCE AND LIMITATION OF *BIVENS* CLAIMS

In the early morning hours of November 26, 1965, Webster Bivens was arrested by several agents[32] of the now defunct Federal Bureau of Narcotics (FBN),[33] who entered his home with weapons drawn, arrested him on narcotics charges, searched his apartment, and subjected him to a strip search upon booking at the federal courthouse in Brooklyn.[34] After the criminal complaint against him was dismissed,[35] Bivens filed a pro se complaint in the Eastern District of New York, seeking $15,000 in damages against each officer for allegedly violating his Fourth Amendment right to be free of unreasonable search and seizure.[36]

Had New York City police officers arrested Bivens, his claim against them would have been unremarkable and statutorily grounded. In 1961, the Supreme Court interpreted 42 U.S.C. § 1983 to provide a cause of action for damages

32. Although the case name suggests that six agents were involved, in fact only five were identified and served with the complaint. Brief for the Respondents at *2 n.1, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301).

33. This Agency was created in 1930 as part of the Department of the Treasury by an Act of June 14, 1930, 46 Stat. 585. It was responsible for enforcing laws relating to marijuana and narcotics such as heroin. U.S. DRUG ENFORCEMENT ADMIN., THE DEA HISTORY BOOK, 1970-1975 (2003), *available at* http://www.usdoj.gov/dea/pubs/history/deahistory_01.htm. By 1971, when *Bivens* was announced, the FBN had merged with the Bureau of Drug Abuse Control (an agency in the Department of Health, Education, and Welfare, responsible for the enforcement of laws to control dangerous drugs, including depressants, stimulants, and hallucinogens, such as LSD) to form the Bureau of Narcotics and Dangerous Drugs (BNDD), within the Department of Justice. *Id.* Short-lived, the BNDD was folded into the Drug Enforcement Administration, created in 1973 by order of President Nixon to consolidate enforcement of the nation's drug laws in one agency. *Id.*

34. *Bivens*, 403 U.S. at 389; Brief for the Petitioner at 2-3, *Bivens*, 403 U.S. 388 (No. 301). Mr. Bivens also alleged that his arrest took place in front of his wife and children, who were threatened with arrest by the FBN agents. *Id*.

35. The reasons for the dismissal are not reported, but the Second Circuit Court of Appeals referred to the apparent dismissal of the criminal complaint by a "United States Commissioner." Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 719 (2d Cir. 1969), *rev'd* 403 U.S. 388 (1971).

36. U.S. CONST. amend. IV.

against individuals who violated the Constitution while acting under color of state law.[37] Because section 1983 by its terms applies only to state and local actors, however, it provides no basis for bringing an action against federal officials for violations of the Constitution. In the absence of any statutory or precedential authority for Bivens' cause of action, the district court confronting his complaint dismissed it on two related grounds: lack of subject matter jurisdiction and failure to state a claim.[38] Despite the district court's admonition that an appeal of its order would be frivolous and "not taken in good faith,"[39] Bivens appealed to the Second Circuit, which affirmed on the ground that there was no basis for implying from the Fourth Amendment a damages remedy against individual federal officers.[40]

The Second Circuit was not writing on a clean slate when it affirmed the dismissal of Bivens's claims. More than two decades prior, in *Bell v. Hood*,[41] the Supreme Court had reserved the question of the appropriateness of a damages remedy against federal officials for violations of the Fourth Amendment, essentially leaving it to lower federal courts to determine the scope of civil remedies for Fourth Amendment violations.[42] Between *Bell* and

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37. Monroe v. Pape, 365 U.S. 167 (1961). Section 1983 was enacted as part of the Civil Rights Act of 1871, also known as the "Ku Klux Klan Act." KAREN M. BLUM & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 2 (1998), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sect1983.pdf/$file/sect1983.pdf. For nearly one hundred years after its enactment, it was rarely used, in part because courts and litigants interpreted it to apply solely to strike down "Black Codes" and the like that were passed in Southern States after the Civil War. Thus, between 1871 and 1920, only twenty-one section 1983 actions were decided by federal courts, with nine cases decided by the Supreme Court. *See* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363-66 (1951) (describing cases in general); *see also* Myers v. Anderson, 238 U.S. 368 (1915); Moyer v. Peabody, 212 U.S. 78 (1909); Devine v. City of L.A., 202 U.S. 313 (1906); Giles v. Harris, 189 U.S. 475 (1903); Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900); Clarke v. McDade, 165 U.S. 168 (1897); McGahey v. Virginia, 135 U.S. 662 (1890); Carter v. Greenhow, 114 U.S. 317 (1885); Bowman v. Chicago & Nw. Ry. Co., 115 U.S. 611 (1885). After *Monroe*, however, section 1983 litigation against state and municipal officials increased exponentially. *See* Schuck, *supra* note 18, at 283 n.2.

38. Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 276 F. Supp. 12 (E.D.N.Y. 1967), *aff'd*, 409 F.2d 718 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971).

39. *Id*. at 16.

40. *Bivens*, 409 F.2d 718. The Second Circuit assumed that a state law remedy for trespass would be available to plaintiffs like Mr. Bivens, thus rendering implying a remedy from the Constitution unnecessary. *Id*. at 725-26.

41. 327 U.S. 678 (1946).

42. In *Bell*, the plaintiffs alleged that several Federal Bureau of Investigation agents had illegally arrested them and searched their homes, taking away valuable property and personal papers. The *Bell* plaintiffs were high-ranking members of Mankind United, a religious cult founded by Arthur Bell. Bell claimed that a wide-ranging conspiracy ran the world, but that once 200 million people accepted the Mankind United plan for worldwide utopia, the conspiracy would be defeated. Internet Sacred Text Archive, Mankind United, http://www.sacred-texts.com/eso/mu/index.htm (last visited Jan. 9, 2009). At the time the searches were effectuated in *Bell v. Hood*, Bell and others were on trial for mail fraud. *Mankind United*, TIME, Sept. 20, 1937, *available at*

Bivens, few cases addressed or answered the question left open by the Supreme Court, other than the district court in *Bell*, which on remand held that there was no cause of action for violations of the Fourth Amendment.[43] Lower courts for the most part found ways to avoid the question.[44] Nor did scholars devote much attention to the issue, perhaps on account of the perception that it was of limited practical consequence.[45]

Thus, at the time *Bivens* came to the Supreme Court's door, not a single reported decision had squarely held that a cause of action for damages against federal officials existed where such officials violated the Constitution.[46] And the Supreme Court had held that a damages action was appropriate against the United States, not individual federal officers, only for self-executing provisions like the Takings Clause.[47] One could thus have been forgiven for expecting the Second Circuit's decision in *Bivens* to go unnoticed by the Supreme Court.

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http://www.time.com/time/magazine/article/0,9171,758200,00.html.

43. 71 F. Supp. 813, 817 (S.D. Cal. 1947). The district court's decision in *Bell* was heavily relied upon by the district court in *Bivens*. 276 F. Supp. at 15.

44. *See* Gautreaux v. Romney, 448 F.2d 731, 734-35 (7th Cir. 1971) (confirming that federal officials could be sued at least for equitable relief under the Due Process Clause, without specifically addressing the availability of monetary damages); Kletschka v. Driver, 411 F.2d 436, 446 (2d Cir. 1969) (remanding for a fuller determination of the facts prior to deciding whether a plaintiff had established a damages claim against federal officials for violation of the Due Process Clause); Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964) (finding it unnecessary to determine the issue left open in *Bell* because plaintiff had failed to allege that the matter in controversy exceeded the jurisdictional limitation of 28 U.S.C. § 1331); Norton v. McShane, 332 F.2d 855, 857-62 (5th Cir. 1964) (declining to address whether Constitution provided direct cause of action against federal officials because good faith immunity barred common law claims and section 1983 did not provide remedy against federal officials for violations of the Constitution). The Supreme Court declined its first post-*Bell* opportunity to hold that the Fourth Amendment created an implied cause of action for damages against individual officers. *See* Wheeldin v. Wheeler, 373 U.S. 647, 649-50 (1963) (finding it unnecessary to decide question because complaint alleged neither a search nor a seizure). The Ninth Circuit was one of the few appellate courts that specifically addressed whether individual federal officials could be sued for damages for violations of the Constitution, holding that no cause of action existed for violations of the Fifth Amendment. *See* Johnston v. Earle, 245 F.2d 793, 796 (9th Cir. 1957).

45. *See* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1111 (1969) (discussing in detail the legal justification for creating an implied right of action for violations of the Constitution by federal officers, although describing it as "not of great practical importance"). Very few other scholarly commentaries addressed the question. *See* Recent Case, 83 HARV. L. REV. 684, 687 (1970) (criticizing Second Circuit's *Bivens* decision for its "undue faith in the efficacy of existing remedies"); *see also* Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1 (1968) (criticizing *Wheeldin* and the district court's decision on remand in *Bell*).

46. One district court had held that a concessionaire of the federal government could be held liable under the Fifth Amendment for a violation of equal protection, if it provided segregated but unequal dining facilities at Washington National Airport. Nash v. Air Terminal Servs., Inc., 85 F. Supp. 545 (E.D. Va. 1949).

47. *See* Jacobs v. United States, 290 U.S. 13, 16 (1933) (granting monetary compensation for land flooded by a dam constructed by the government).

Instead, the Court granted certiorari and in a 6-3 decision announced for the first time that federal officials could be sued individually for damages for violations of the Fourth Amendment.[48] The Court was particularly attuned to the potential for abuse that accompanied the cloak of federal authority, pointing out that individuals are unlikely to resist entry by federal agents, nor are they likely to be successful in the event of resistance.[49] The Court's specific holding that damages are available for violations of the Fourth Amendment was delivered in a one-paragraph explanation based on the historical role of damages as the "ordinary remedy for an invasion of personal interests in liberty,"[50] the lack of "special factors counselling hesitation in the absence of affirmative action by Congress,"[51] and the lack of any provision of "another remedy, equally effective in the view of Congress."[52] Moreover, as Justice Harlan observed in concurrence, for plaintiffs like Bivens, the exclusionary rule is of no moment, and an injunction serves no purpose; in the presence of sovereign immunity preventing direct suit against the government, "it is damages or nothing."[53]

Initial reception of the *Bivens* decision was marked by ambivalence in the lower courts. On its face, *Bivens* applied only to Fourth Amendment claims against law enforcement officers, but many district and appellate courts treated *Bivens* as an invitation to permit individual damages actions against various federal officials for violations of additional constitutional provisions, including the First, Fifth, Eighth, Ninth, and Fourteenth Amendments.[54] As one appellate

48. Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

49. *Id*. at 394.

50. *Id*. at 395.

51. *Id.*

52. *Id.* at 397.

53. *Id.* at 410 (Harlan, J., concurring). The Court in *Bivens* analogized the right they recognized to the statutory right under section 1983 to recover damages for violations of the Constitution by state actors. Indeed, the Court rejected the dissenters' contention that recognition of the right would lead to an "avalanche" of federal court litigation, pointing out that a study of section 1983 litigation against police officers found only 53 reported cases between 1951 and 1967 that "survived a motion to dismiss," leading the Court to predict that at most, a federal district judge "could expect to try one such case every 13 years." *Id.* at 391 n.4 (majority opinion) (citing Ann Fagan Ginger & Louis H. Bell, *Police Misconduct Litigation—Plaintiff's Remedies*, 15 AM. JUR. TRIALS 555, 580-90 (1968)). The Court apparently expected *Bivens* litigation to follow the same pattern, thus defusing any concerns that recognition of the cause of action would overly burden federal courts. As luck would have it, section 1983 litigation increased dramatically during the 1970s, well beyond the Court's expectations. *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 522-23 & nn.174-75 (1982).

54. *See* Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931-32 (10th Cir. 1975) (applying *Bivens* to Fifth Amendment equal protection claim against employees of the Department of Interior); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1157-58 (4th Cir. 1974) (extending *Bivens* to due process claims against customs agent); Howard v. Warden, 348 F. Supp. 1204, 1205 (E.D. Va. 1972) (applying *Bivens* to First and Ninth Amendment claims); *see also* Panzarella v. Boyle, 406 F. Supp. 787, 792 & n.7 (D.R.I.

court reasoned, *Bivens* "recognizes a cause of action for damages for violation of constitutionally protected interests, and is not limited to Fourth Amendment violations."[55] While this appears to have been the majority rule, some lower courts limited *Bivens* to the Fourth Amendment context,[56] sometimes on the basis that other rights could be better protected through alternative remedies for violations.[57]

For several years after *Bivens* was announced, it appeared that the Supreme Court, like many lower courts, was prepared to treat the cause of action as similar to section 1983: the Court recognized that there was a *Bivens* action under the Due Process Clause for employment discrimination[58] and that *Bivens* provided a remedy under the Eighth Amendment for prisoners alleging cruel and unusual punishment.[59] During this time, the Court described *Bivens* as standing for the proposition that "the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[60] Since 1980, however, the Supreme Court has refused to permit *Bivens*-style claims in numerous contexts, including First Amendment claims brought by federal employees,[61] injuries suffered by members of the military while in service,[62]

1975) (citing cases that show that "the construction given to 28 U.S.C. § 1331 in *Bivens* properly applies to any alleged violation of a constitutionally protected interest not specifically excluded by other Congressional enactments"). The *Panzarella* court reflected the lower courts' general approach to *Bivens* claims, reasoning that there was no reason to think "that *Bivens* has somehow singled out the constitutional rights protected by the Fourth Amendment as in greater peril or more deserving of legal redress than those rights embodied in the First, Fifth or Fourteenth Amendments, for example." 406 F. Supp at 793.

55. United States *ex rel*. Moore v. Koelzer, 457 F.2d 892, 894 (3d Cir. 1972).

56. *See* Jones v. United States, 401 F. Supp. 168, 174-75 (E.D. Ark. 1975) (refusing to extend *Bivens* remedy for violation of right to speedy trial); Moore v. Schlesinger, 384 F. Supp. 163, 165 (D. Colo. 1974) (refusing to extend *Bivens* to First Amendment context).

57. *See Jones*, 401 F. Supp. at 174.

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

59. Carlson v. Green, 446 U.S. 14 (1980).

60. *Id.* at 18; *see also* Butz v. Economou, 438 U.S. 478, 504 (1978) (treating *Bivens* as providing compensation for "a compensable injury to a constitutionally protected interest," not solely Fourth Amendment interests). Thus, in extending *Bivens* liability to the Due Process Clause and the Eighth Amendment, the Court treated a damages remedy for constitutional violations as nearly presumptive. In *Davis*, for example, the Court found that there were "special concerns" that were in tension with implying a remedy in damages and that Congress had exempted federal employees like Ms. Davis from coverage of the statutory employment discrimination laws. *Davis*, 442 U.S. at 246-47. Nonetheless, the Court held that Congress had not indicated its intention to foreclose a *Bivens* remedy for federal employees and that damages are the presumptive remedy for invasions of personal liberty. *Id.* at 245-47. Similarly, *Carlson*'s discussion of extending *Bivens* liability to Eighth Amendment violations began with a presumption in favor of finding a damages remedy. *Carlson*, 446 U.S. at 18-19.

61. Bush v. Lucas, 462 U.S. 367 (1983).

62. United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983).

actions under the Due Process Clause for denial of Social Security benefits,[63] claims brought against federal agencies,[64] and claims brought against private corporations.[65] The reasons offered by the Court for refusing to recognize these new *Bivens* claims have varied: in different contexts, the Court has found reasons to defer to Congress to proscribe the entire scope of relief available to injured plaintiffs[66] and has identified policy reasons to be protective of specific governmental functions such as military service,[67] even in the absence of any other federal remedy for a plaintiff's injuries.[68] Moreover, the Court's refusal to extend *Bivens* to causes of action against *new* defendants, like federal agencies or private corporations acting under color of federal law, has been justified on the ground that such extension is inconsistent with the individual liability model of *Bivens* itself.[69]

The Supreme Court's current approach to considering new *Bivens* claims is well-reflected in *Wilkie v. Robbins*,[70] where the Court sounded what to one well-placed observer was the death knell to *Bivens* litigation.[71] The plaintiff in *Wilkie*—Frank Robbins—sued officials of the Bureau of Land Management, claiming that they had engaged in a pattern of harassment and intimidation to acquire an easement across the plaintiff's private property.[72] The *Wilkie* Court

63. Schweiker v. Chilicky, 487 U.S. 412 (1988).

64. FDIC v. Meyer, 510 U.S. 471 (1994).

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

66. In *Bush*, for instance, the Court said that it was not a question of "the merits of the particular remedy that was sought," but "who should decide whether such a remedy should be provided." *Bush*, 462 U.S. at 380. Because Congress had created an "elaborate remedial system" for federal employees complaining that their employment was adversely affected by their political expression, the Court found reason in *Bush* to defer to Congress. *Id.* at 388; *see also Schweiker*, 412 U.S. at 424-26 (following *Bush* in finding that the remedial scheme for Social Security benefits created by Congress counseled against creating a *Bivens* cause of action). In *Chappell*, the Court found that the Constitution had vested authority over military justice and discipline in Congress, U.S. Const. Art. I, § 8, cl. 14, demonstrating that "the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment." *Chappell*, 462 U.S. at 301. Indeed, Congress had exercised that authority by creating a "comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." *Id.* at 302.

67. *See Stanley*, 483 U.S. at 681 (holding that *Bivens* claims are disallowed whenever an injury arises out of activity "incident to service," to parallel with a similar limitation on FTCA claims).

68. *See id.* at 683.

69. *See Malesko*, 534 U.S. at 70 (finding that the deterrent rationale of *Bivens* applied to actions against individuals, not to actions against private entities); *Meyer*, 510 U.S. at 485-86 (finding that *Bivens* is not an appropriate remedy against federal agencies because *Bivens* was based on the presumption that relief was unavailable against the government itself).

70. 551 U.S. 537 (2007).

71. Tribe, *supra* note 7, at 26 ("[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery.").

72. *Wilkie*, 551 U.S. at 541. The previous owner had granted the easement to the Bureau, but because the Bureau failed to record the easement, Robbins took title to the

summarized its position as to *Bivens* claims as follows: "[I]t is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified."[73] The Court restated the two-step inquiry necessary to determine whether to imply a *Bivens* remedy as follows: (1) Is there an existing remedy protecting the interest sought to be vindicated by the plaintiff that "amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages?" And, (2) are there any "special factors counselling hesitation" in implying a *Bivens* remedy from the Constitution?[74] In *Wilkie*, because the availability of alternative remedies counseled neither for nor against a *Bivens* remedy, the Court turned to step two of the *Bivens* analysis: whether "special factors" made the Court hesitate before implying a new cause of action. The Court found that such "special factors" existed because Robbins' case required too much fine line-drawing between permissible and impermissible government conduct.[75] Rather than give judicial imprimatur for such a cause of action, the Court recommended that litigants like Robbins turn to the legislature.[76]

The Supreme Court's refusal to extend *Bivens* liability to new constitutional claims or new defendants since 1980 is a fair indication that the cause of action occupies a disputed position in our jurisprudence. This becomes even more evident when one considers the depth of judicial skepticism about the merit of such actions in the areas in which the remedy is recognized. Thus, the decision to recognize additional *Bivens* remedies is viewed by some as reflecting a judgment about "the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money."[77] Courts have not only expressed skepticism about the underlying merits of *Bivens* litigation, they have adopted novel rules in the context of *Bivens* litigation because of the concern that cases filed under that theory are more likely to be insubstantial.[78]

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property free of the easement. *Id.*

73. *Id.* at 550.

74. *Id.*

75. *Id.* at 555-57 (identifying difficulty with Robbins's claim that "defendants simply demanded too much and went too far," not that their ultimate goal was illegitimate).

76. *Id.* at 562.

77. Kimberlin v. Quinlan, 17 F.3d 1525, 1525-26 (D.C. Cir. 1994) (Williams, J., concurring in denial of rehearing en banc).

78. *See, e.g.*, Simpkins v. D.C. Gov't, 108 F.3d 366, 370 (D.C. Cir. 1997) (departing from typical rule to decide motion to dismiss for failure to state a claim even though service of complaint had not been properly effectuated because of court's duty to "stop insubstantial *Bivens* actions in their tracks and get rid of them"); Cameron v. Thornburgh, 983 F.2d 253, 258 n.5 (D.C. Cir. 1993) (justifying consideration of motion to dismiss despite improper venue on the basis that the Supreme Court has favorably suggested that lower courts "weed out" meritless *Bivens* claims as early as possible in litigation); *see also* Bolin v. Story, 225

A prime example of this is the modern qualified immunity defense, which was crafted by the Supreme Court in the *Bivens* context to permit public officials to escape liability for unconstitutional conduct where the law governing their conduct was unclear at the time of the violation or where they behaved objectively reasonably, even if unconstitutionally, in light of the clearly established law.[79] This formulation is a product of the tension between ensuring that citizens have a means to remedy constitutional violations and the Court's judgment that "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole."[80] The Court was consciously making policy, based on its acceptance of the contention that "with increasing frequency . . . plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts" which resist dismissal at summary judgment because of the abilities of "ingenious plaintiff's counsel" to create material issues of fact based on little evidence.[81] Thus, moving to an "objective reasonableness" standard was viewed as necessary to "permit the resolution of many insubstantial claims on summary judgment."[82]

Several principles accompany the qualified immunity doctrine which also stem from the Court's concern about meritless *Bivens* litigation. Defendants who seek dismissal on qualified immunity grounds are protected from discovery until the threshold legal question of qualified immunity is resolved.[83] Relatedly, defendants are entitled to take interlocutory appeals of otherwise unappealable denials of motions to dismiss or summary judgment if the issue they seek to appeal relates to the legal question of qualified immunity.[84] This exception to the final judgment rule is justified as one more tool for public officials to terminate insubstantial suits promptly.[85] Thus, as one appellate court observed, the Court has "embraced the policy-making flexibility that *Bivens* claims afford in crafting the scope of qualified immunity for federal officials."[86] The Supreme Court has advised lower courts to be attentive to

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F.3d 1234, 1240-42 (11th Cir. 2000) (per curiam) (making exception in *Bivens* context to rule that judicial immunity does not apply to suits for declaratory and injunctive relief); Mullis v. U.S. Bankr. Court for the Dist. of Nev., 828 F.2d 1385, 1391-94 (9th Cir. 1987) (same); *cf.* FDIC v. Meyer, 510 U.S. 471, 486 (1994) (refusing to allow *Bivens* action against federal agencies in part because of the "potentially enormous financial *burden*" such claims would impose on the federal government).

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

80. *Id.* at 814.

81. *Id.* at 817 n.29 (internal quotation marks omitted).

82. *Id.* at 818.

83. *See* Siegert v. Gilley, 500 U.S. 226, 232 (1991).

84. *See* Behrens v. Pelletier, 516 U.S. 299, 307-09 (1996); Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).

85. *See Behrens*, 516 U.S. at 306.

86. Whitacre v. Davey, 890 F.2d 1168, 1170 (D.C. Cir. 1989); *see also* Santiago v. James, No. 95CIV.1136(JFK), 1998 WL 474089, at *4 (S.D.N.Y. Aug. 11, 1998)

"artful pleading" and to rely on "firm application" of the Federal Rules of Civil Procedure to protect federal officials from "frivolous lawsuits."[87] Similar concerns were expressed by the Court in this past term's decision in *Ashcroft v. Iqbal*,[88] an opinion which gave lower courts more discretion to dismiss cases prior to discovery if certain allegations were deemed not plausible.[89]

The judicial skepticism of *Bivens* claims is often expressed in stark terms. Courts cite to various articles for the proposition that only a few *Bivens* claims out of several thousand have ever been successful.[90] Thus, judges have concluded that "the vast majority of these suits are meritless."[91] As one district court summarized the given wisdom:

> We are aware of the perils plaintiffs must overcome to successfully bring a *Bivens* action. They must plead their case with greater specificity than other claims, contend with the government's sovereign immunity, and overcome the procedural advantages afforded to defendants. Moreover, even after a plaintiff has overcome these difficulties, an individual defendant can assert an immunity defense. As a result, bringing a *Bivens* action is a Herculean task with little prospect of success.[92]

We are left with a conundrum of sorts. *Bivens* litigation is still here, despite limitations on its reach. Thus, it remains a viable means of obtaining relief for unconstitutional conduct, at least in those areas where *Bivens*-type claims have been recognized by the Supreme Court. Indeed, this cause of action has been

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(describing immunity rules as meant to "alleviate the concern that frivolous *Bivens* suits would unduly interfere with public officials' duties").

87. Butz v. Economou, 438 U.S. 478, 507-08 (1978).

88. 129 S. Ct. 1937 (2009). In the interest of full disclosure, the author was counsel of record for the respondent in *Iqbal*.

89. Iqbal's "plausibility" pleading standard had been announced two terms prior, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a case involving antitrust conspiracy allegations. On one account, then, *Iqbal* is notable only for making clear that *Twombly* applies in all cases, not just antitrust. *Iqbal*, 129 S. Ct. at 1953. On the other hand, *Iqbal* is an extension of *Twombly* that many believe will work significant changes to civil procedure. *See* Posting of Scott Dodson to Civil Procedure Prof Blog, http://lawprofessors.typepad.com/civpro (May 18, 2009); Posting of Michael Dorf to FindLaw, http://writ.corporate.findlaw.com/dorf (May 20, 2009); Posting of Howard Wasserman to PrawfsBlawg, http://prawfsblawg.blogs.com (May 18, 2009); Posting of Howard Wasserman to PrawfsBlawg, http://prawfsblawg.blogs.com (May 18, 2009). *But see* Drug and Device Law, http://druganddevicelaw.blogspot.com (May 28, 2009). While the implications of *Iqbal* are beyond the scope of this paper, the Court made clear that one of the bases for its decision was the concern about government officials being prematurely exposed to the burdens of discovery. *Iqbal*, 129 S. Ct. at 1953-54.

90. *See* cases cited *infra* note 95.

91. Crawford-El v. Britton, 93 F.3d 813, 838 (D.C. Cir. 1996) (Silberman, J., concurring) (citing R. FALLON, JR., D. MELTZER & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1122 (4th ed. 1996)), *vacated*, 523 U.S. 574 (1998).

92. Vaughan & Potter 1983, Ltd. v. United States, Civ. No. 91-F-1767, 1992 WL 235868 at *3 (D. Colo. July 29, 1992) (citation omitted).

relied on extensively in litigation challenging the Executive Branch's actions taken in the aftermath of September 11, 2001.[93] At the same time, courts assume that *Bivens* litigation is usually a waste of time for all concerned: the plaintiffs, the defendants, and the judiciary. It is to these assumptions about the benefits of permitting *Bivens* claims in their current model to which I now turn.

II. THE CHARACTERISTICS OF *BIVENS* CLAIMS: OUTCOMES AND DETERMINANTS

This Part will examine the dual empirical assumptions that *Bivens* claims are markedly less successful than other civil rights litigation and that the reason for this general failure is the Supreme Court's adoption of an individual model of liability for constitutional violations. Surprisingly, no published empirical studies exist regarding the success, or lack thereof, of *Bivens* claims in particular, despite the widespread assumptions regarding their ineffectiveness. The data reported here provide ample reason to question the assumptions that both courts and commentators have relied upon for the past three decades.

A. *The Existing Empirical Literature Regarding the Success of* Bivens *Claims*

There are no systematic empirical studies of the prevalence and outcomes of *Bivens* litigation, but there are anecdotal data which have been repeatedly cited by courts and commentators. The most common reference in the literature is to a statistic that out of 12,000 claims filed between 1971 and 1985, only four resulted in judgments that were sustained on appeal.[94] Published opinions have

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93. *See, e.g.*, *Iqbal*, 128 S. Ct. 2931; Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008), *reh'g en banc granted* (Aug. 12, 2008); Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *cert. granted sub nom.* Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008); Turkmen v. Ashcroft, No. 02 CV 2307(JG), 2006 WL 1662663 (E.D.N.Y. June 14, 2006). In the interest of full disclosure, the author is counsel for the plaintiff in the *Iqbal* line of cases.

94. *See* Michael W. Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. RICH. L. REV. 281, 297 (1980) (citing Department of Justice figures that only seven of "several thousand" *Bivens* suits have resulted in judgments against federal defendants, with the likely culprit being the availability of qualified immunity); Gail Donoghue & Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 452 n.18 (1998) (citing 30 out of 12,000 figure and describing "enormous" cost to defendants and public in defending "meritless claims"); Pillard, *supra* note 2, at 66; Rosen, *supra* note 27, at 343-44; Nathan R. Horne, Casenote, *Removing the "Special" from the "Special Factors" Analysis in* Bivens *Actions:* Vennes v. An Unknown Number of Unidentified Agents of the United States, 28 CREIGHTON L. REV. 795, 821 n.222 (1995) (citing Rosen, *supra* note 25, figure of 30 plaintiffs' judgments out of 12,000, and recounting "obstacles to a successful *Bivens* action"); T. Hunter Jefferson, Note, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1530 n.20 (1997) (citing Rosen, *supra* note 25, and 30 out of 12,000 figure). The 12,000 figure has been recycled in recent commentary as well. Ryan Newman, Note, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L.

also repeatedly relied upon this figure in opining on the general insubstantiality of *Bivens* claims.[95] These data, while marginally useful, are insufficient from an empirical perspective for several reasons. First, the figure was based on estimates from individuals within the Department of Justice,[96] even though at the time the estimates were made, the Department of Justice had no methodical means of tracking the number of *Bivens* claims.[97] Second, and relatedly, these anecdotal reports provide no account of how the information was collected or filtered; there is no indication of what "counted" as a *Bivens* claim and how the count was carried out. Finally, the estimate did not account for the possibility of *Bivens* claims being settled prior to judgment[98] and thus, even were the numbers accurate, they would represent an overly narrow definition of success.[99] For many reasons, then, this general figure cited by early scholarship is of limited assistance in evaluating the success of *Bivens* claims.

There are data other than the 12,000 claims figure, but it is of similarly marginal value. After obtaining access to internal Department of Justice files, Charles Wise attempted to estimate the number of claims filed in which *Bivens* was the principal claim. Based on a random sampling of files maintained as of July 1982 by the United States Department of Justice, Civil Division's Torts Branch, he estimated that 1470 claims had been filed in which *Bivens* liability was the moving force.[100] At the time of the research, 28 of the cases resulted in initial plaintiff verdicts, with five ultimately resulting in payment to the

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REV. 471, 474-75 (2006) (citing Pillard, *supra* note 2, and Rosen, *supra* note 27).

95. *See Crawford-El*, 93 F.3d at 838 (Silberman, J., concurring) (reciting figures indicating that as of 1985 only 30 *Bivens* suits out of more than 12,000 had resulted in a plaintiff's judgment at the trial level, with only 4 of those actually resulting in payment); Laswell v. Brown, 683 F.2d 261, 269 n.13 (8th Cir. 1982) (citing Dolan, *supra* note 94, for the proposition that "only seven of the several thousand constitutional tort suits brought since *Bivens* have resulted in judgments against a federal employee"); United States v. McKoy, 402 F. Supp. 2d 311, 315 (D. Mass. 2004) (citing figures from Rosen, *supra* note 25, Eisenberg & Schwab, *supra* note 15, and Slobogin, *supra* note 25); *Vaughan & Potter*, 1992 WL 235868, at *3 (citing figures from Rosen, *supra* note 25).

96. *See* Pillard, *supra* note 2, at 66 n.5 (citing statements by J. Paul McGrath, Assistant Attorney General, Civil Division, U.S. Department of Justice, and John J. Farley, III, Director, Torts Branch, Civil Division, U.S. Department of Justice); *see also* Rosen, *supra* note 25, at 343-44 (citing McGrath and Farley statements, as well as 51 Fed. Reg. 27021 (July 29, 1986) (reporting that "over 12,000" *Bivens* suits had been filed since 1971)).

97. *See* Wise, *supra* note 11, at 849.

98. Nor does it account for the possibility that cases in which both *Bivens* claims and Federal Tort Claims Act claims are filed will result in the FTCA claim being settled and the *Bivens* claim dismissed. Pillard, *supra* note 2, at 66 n.6 (noting that rate of success was thought to be higher when *Bivens* claim was filed with corresponding FTCA claim).

99. As discussed above, those studies which have sought to quantify "success" in various modes of litigation have uniformly defined "success" broadly, as any result in which there is a plaintiff's judgment, a settlement, or a voluntary or stipulated dismissal. *See* sources cited *supra* note 13.

100. Wise, *supra* note 11, at 849-50.

plaintiff.[101] Like the data discussed above, however, Wise's definition of success—a judgment for the plaintiff—was overly narrow. Moreover, Wise did not provide any detailed explanation of how the claims had been selected and how many were randomly analyzed. Similarly, W. Mark Smith conducted a study of 172 reported *Bivens* cases available in 1979, concluding that they were rarely successful.[102] Smith acknowledged the limitation of his sample, noting that "[b]ecause we drew cases from reported decisions, the study probably underincludes settlements and pending cases."[103] Of these reported cases, 10 (or about 5.8%) resulted in a settlement or a plaintiff's judgment, and 51 of the 131 judgments (38.9%) for defendants were based on individual immunity.[104]

Finally, some prison-specific *Bivens* data have been alluded to in litigation. The United States, in an amicus curiae brief filed in *Kimberlin v. Quinlan*,[105] reported that between 1992 and 1994, 1513 *Bivens* claims were filed against Bureau of Prison officials by federal prisoners, with 18 resulting in judgment or settlement for the plaintiff.[106] The source of this data, however, is not described in any detail or set forth in any document other than the brief.

This sums up the available empirical data regarding *Bivens* claims in particular, but there are additional and more recent data regarding civil rights claims in general. Several rigorous empirical studies have been conducted of civil rights and prisoner litigation in particular. Margo Schlanger sampled lawsuits from 1990-1995 to estimate the success of prisoner lawsuits in federal court and concluded that prisoners appeared to obtain something of value in approximately 15% of cases.[107] This compares with data gathered from 1980-1981 by Stewart Schwab and Theodore Eisenberg which estimated a rate of success of about 80% for nonprisoner civil plaintiffs, 50% for nonprisoner constitutional tort plaintiffs, and 18% for prisoner plaintiffs.[108] Some aspects

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101. *Id.* at 851.

102. *Damages or Nothing*, *supra* note 11, at 693.

103. *Id.* at 694 n.146.

104. *Id*. at 694-95, tbls.A & B.

105. 515 U.S. 321 (1995).

106. *See* Brief for the United States as Amicus Curiae Supporting Reversal, *Kimberlin*, 515 U.S. 321 (No. 93-2068), *available at* http://www.usdoj.gov/osg/briefs/1993/w932068w.txt. Sixteen of the cases were settled and twelve cases went to trial. Of the cases that went to trial, two resulted in judgments for the plaintiff.

107. Schlanger, *supra* note 13, at 1557. Schlanger defines a successful lawsuit as one that results in judgment for the plaintiff, settlement, or voluntary dismissal. *Id*. at 1594-96. For prisoner lawsuits, 6% to 7% were settled before trial, 1% received a judgment after trial, and 6% to 8% voluntarily dismissed their claims, presumably in return for something of value. *Id*. at 1597.

108. Schwab & Eisenberg, *supra* note 13, at 732-33; *see also* Eisenberg & Schwab, *supra* note 15, at 682. The data in the study were gathered from three separate judicial districts for cases filed in 1980-1981: the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia. Schwab & Eisenberg, *supra* note 13, at 721. Success was defined as settlement, judgment, stipulated dismissal, or voluntary

of the prison civil rights data indicate that the picture is more complicated than is suggested by this apparently vast disparity in rates of success. When prisoners were represented by counsel, for example, their rates of success nearly equaled that of nonprisoner civil rights plaintiffs.[109] Prisoner cases may also be poor models from which to draw generalizations, because of the resistance to settling by correctional staff, given the assumption that other prisoners will be encouraged to file less meritorious lawsuits if they are aware that settlement is a possibility.[110]

There are more recent data for civil-rights-specific litigation which provide greater detail regarding settlement rates in particular.[111] Along with Charlotte Lanvers, Eisenberg has analyzed settlement rates in the Eastern District of Pennsylvania and the Northern District of Georgia in cases filed and terminated between 2001 and 2002.[112] In the Eastern District of Pennsylvania, settlement rates were 45% for constitutional tort claims, 65.3% for contract claims, 82.4% for employment discrimination claims, and 87.2% for tort claims.[113] In the Northern District of Georgia, the respective settlement rates were 27.3% for constitutional torts, 72.5% for contract actions, 55.5% for employment discrimination suits, and 63.8% for tort claims.[114] Laura Beth Nielsen, Robert L. Nelson, and Ryon Lancaster have reported on success rates for employment discrimination claims, based on a review of 1672 randomly selected cases filed in seven district courts between 1998 and 2003, which report a 60% success rate.[115]

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dismissal. *Id*. at 726-27. Other studies suggest more varied success rates when civil litigation is broken down by subject matter. Eisenberg & Lanvers, *supra* note 13, at 9 (reviewing studies of tort litigation and antitrust claims reporting success rates of about 70%-80% of filed cases); Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 273-75 (2006) (reporting settlement rates in patent cases ranging from 65% to 68% for the years 1995, 1997, and 2000).

109. Schwab & Eisenberg, *supra* note 13, at 770-71 ("Excluding the uncounseled prisoner actions eliminates significant differences between success rates, the rates at which pretrial conferences, depositions, and trials occur, and the rates at which plaintiffs obtain money judgments and money settlements."); Eisenberg & Schwab, *supra* note 15, at 692 ("Using our broad definition of success, prisoner constitutional tort claimants succeeded in 53% of the cases filed by counsel, whereas nonprisoner constitutional tort claimants succeeded 56% of the time.").

110. Schlanger, *supra* note 13, at 1617-18.

111. Because so few cases go to trial, a focus on settlement rates approximates the success rate reported in other studies.

112. Eisenberg and Lanvers, *supra* note 13, at 11.

113. *See id*. at 15 tbl.3. Eisenberg and Lanvers also reported 95% confidence intervals of 40.9% to 49.1% for constitutional torts, 58.1% to 72.5% for contracts, 78.7% to 86.1% for employment discrimination, and 83.3% to 91.2% for tort actions. *Id*.

114. *Id*. The 95% confidence intervals for the Northern District of Georgia figures were 22% to 32.6% for constitutional tort, 65.6% to 79.4% for contract claims, 51.3% to 59.7% for employment discrimination, and 56.6% to 71% for tort claims. *Id.*

115. Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Uncertain Justice:*

The anecdotal reports of *Bivens* litigation, taken together with the more detailed studies of civil litigation in general, suggest that *Bivens* claims are by far the least successful claims filed in federal court. Compared with the vast majority of constitutional tort litigation brought against state officials, *Bivens* claims appear to fail at a high rate. For instance, the anecdotal evidence would suggest that success of *Bivens* claims filed by prisoners appears to be approximately 1%, compared with a 15% success rate for section 1983 cases filed by prisoners against state actors.[116] And while there has been no wholesale study of the success of *Bivens* claims in general, the reported data indicate a judgment rate of between .03% and 2%,[117] compared with an 80% success rate for nonprisoner civil plaintiffs and a 50% success rate for nonprisoner constitutional tort plaintiffs.[118] Without knowing the rates of settlement or stipulated dismissals, however, these data are of limited assistance. For instance, if the judgment rate is about 2% for *Bivens* claims, it is not terribly different than the overall judgment rate for other constitutional tort plaintiffs.[119] But because the cases in which a plaintiff obtains a judgment are always expected to be a small fraction of the cases in which the parties agree to a settlement or in which the plaintiff agrees to stipulate to the dismissal of a claim, knowing the judgment rate alone is insufficient to get a full picture of the relative "success" of *Bivens* claims. Nonetheless, these sparse data are the only available indications of the success, or lack thereof, of *Bivens* claims.

The second assumption of *Bivens* observers is that the principal barrier to success in *Bivens* litigation is the doctrine of qualified immunity and the general hesitance of juries and courts to award damages against individual federal officers. However, there is no information reliable enough to draw any conclusions as to the reasons that *Bivens* claims fail. The only reported study addressing the role of qualified immunity suggests that when introduced as a defense it is highly successful,[120] but this study did not specifically address

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Litigating Claims of Employment Discrimination in the Contemporary United States (Am. Bar Found. Research Paper Series No. 08-04, 2008), *available at* http://ssrn.com/abstract=1093313

116. *See* Brief for the United States, *supra* note 106. Of those prisoner *Bivens* actions that went to trial between 1992 and 1994, 2 out of 12 resulted in judgments for the plaintiff, a success rate of about 17%. *Id.* at 1 n.2. This compares favorably with the success rate of other prisoner constitutional tort litigation, including section 1983 litigation, in which the success rate after trial has been reported to be between 8% and 15%. Schlanger, *supra* note 13, at 1596.

117. The wide range reflects the difference between the "four judgments out of 12,000" data and Charles Wise's more nuanced analysis. *See* Wise, *supra* note 11, at 850-51 (reporting that 28 out of 1470 *Bivens* cases resulted in judgments against the defendants).

118. *See* references cited *supra* note 108.

119. *See* Eisenberg & Schwab, *supra* note 15, at 674-75 tbl.VIII (reporting plaintiff's judgment rate of 2% in constitutional tort cases).

120. *See* Hassel, *supra* note 16, at 145 n.106 (reporting that over a two-year period, a qualified immunity defense resulted in dismissal approximately 80% of the time it was introduced). Importantly, this study did not compare the rate at which qualified immunity

Bivens claims and was focused solely on published case reports, not the detailed docket review conducted here. Scholars have suggested several reasons other than qualified immunity for the lack of success of *Bivens* claims: the possibility that criminal defendants file *Bivens* actions to seek leverage in their criminal cases;[121] speculation that federal officials demonstrate "increased official compliance with constitutional norms";[122] belief by putative plaintiffs that there is a "marginally effective system in which many valid claims go unremedied";[123] the idea that prisoners file *Bivens* claims because they have "time on their hands";[124] the argument that *Bivens* plaintiffs sue because of confusion with the FTCA or because they believe the federal government will indemnify the individual defendant; or political reasons.[125] No concrete empirical evidence has been presented, however, indicating why *Bivens* claims fail, and whether the individual liability model plays a role in their failure. In sum, much of what we think we know about *Bivens* litigation we do not know with any certainty at all.

B. *Methodology of Five-District Survey*

Accordingly, I report here the results of a study of the current state of *Bivens* litigation, based on the outcomes of cases filed during the years 2001, 2002, and 2003 in the Eastern and Southern Districts of New York, the Southern District of Texas, the Eastern District of Pennsylvania, and the Northern District of Illinois.[126] The goal of this review was twofold: (1) to

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served as a ground for dismissal with the rate at which other bases for dismissal were relied upon.

121. Rosen, *supra* note 27, at 344.

122. Schwab & Eisenberg, *supra* note 13, at 781. Although this explanation was offered for why constitutional tort litigation in general is less successful than other civil litigation, it could presumably be offered to explain the failure of *Bivens* claims in particular.

123. *Id*. As these authors noted, "[w]ithout some sense of the number and seriousness of constitutional disputes not being filed, no clear interpretation of the evidence can be made." *Id*.

124. Kratzke, *supra* note 18, at 1151.

125. *Id*. Kratzke's suggestions for why *Bivens* claims are filed might be subject to some debate because the only sources cited for them are interviews he conducted with individuals within the Department of Justice, who might have a biased view of the motivations of *Bivens* plaintiffs.

126. The time period was chosen because of the desire to determine the current state of *Bivens* litigation and because of the likelihood that cases filed during that time period would be resolved by now. In addition, during the relevant time period, the law relating to *Bivens* claims remained relatively stable, with no new types of *Bivens* actions being recognized by the Supreme Court. The districts were selected because, during the time period studied, they were among the busiest district courts, measured by number of filings. *See* ADMINISTRATIVE OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS FOR 2001-2003, http://www.uscourts.gov/caseloadstatistics.html. Moreover, the districts are in the Second, Third, Fifth, and Seventh Circuits, which represent "moderate," "conservative," and "liberal" circuit courts, as measured by some empiricists. *See* Lee Epstein et al., *The Judicial Common*

determine the prevalence and overall success rate of *Bivens* claims filed in the districts studied; and (2) to determine the reasons why *Bivens* claims fail, when they fail. Before discussing the data, it is important to clarify certain methodological issues. In any study of "success" in litigation, careful attention must be devoted to proper definition of the numerator (the criteria for determining success) and the denominator (the criteria for inclusion as a *Bivens* case). I use a definition of success adopted by Theodore Eisenberg and others: judgment, settlement, voluntary dismissal, and stipulated dismissal.[127] Of these four criteria, there is a cogent argument to be made that counting stipulated and voluntary dismissals overestimates success, especially where it is difficult to know whether the plaintiff simply dismissed with the intention of refiling later.[128] I attempted to discern those instances where possible through a thorough review of the docket, but there is certainly the risk that some of the "successes" counted here are illusory.[129] In addition, because many *Bivens* claims are brought as parallel claims under the FTCA, settlements in cases in which both claims are present are considered successes, unless the *Bivens* claims had been dismissed earlier through other proceedings.[130]

Defining the denominator also posed many difficulties. Potential *Bivens* cases were identified using the case coding system of the Administrative Office of U.S. Courts.[131] At the outset, I defined a *Bivens* case as any case in which

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Space, 23 J.L. ECON. & ORG. 303, 312 fig.4 (2007) (using measure showing that as of 2000, the Second Circuit was one of the most "liberal" circuits, the Fifth Circuit was one of most "conservative" circuits, and the Third and Seventh Circuits were "moderate" circuits, as compared with Supreme Court).

127. *See* Eisenberg & Lanvers, *supra* note 13, at 4-5; Schlanger, *supra* note 13, at 1594-96; Schwab & Eisenberg, *supra* note 13, at 726-27.

128. Eisenberg & Lanvers, *supra* note 13, at 4-5.

129. One must therefore be cautious in resting too much on analyzing case outcomes. As other researchers have observed, while recording a simple success rate can appear to be meaningful, interpreting the data poses many dangers. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 586-87 (1998). Methodologically, however, this study attempts to avoid many of the pitfalls of empirical study of case outcomes. First, it does not rely on the data summarized by the Administrative Office of the United States Courts, because especially with respect to *Bivens* claims the coding by the A.O.'s office is unreliable. Second, it is not limited solely to recording formal judgments, but looks at success more broadly, as most empiricists suggest. Third, because the research examined the docket for each case, any changes to a judgment made on appeal were recorded. *See id.* (describing possible pitfalls of studying plaintiff win rates).

130. In large part, this is supported by the judgment bar of the FTCA—if an FTCA claim is settled, no action can proceed against an individual based on the same conduct alleged in the FTCA claim. 28 U.S.C. §§ 2672, 2676, 2679(b)(1). Moreover, the United States' consistent litigating position in cases in which both *Bivens* and FTCA claims are present has been that settlement must be under the FTCA and not *Bivens*.

131. This is easier said than done. The Administrative Office does not code specifically for *Bivens*, although there is a highly underinclusive PACER filter that nominally tags *Bivens* lawsuits. In my experience conducting this study, it failed to identify the vast majority of *Bivens* claims. Therefore, I used two means to determine the presence of *Bivens*

the following three factors were present: (1) at least one defendant was an individual federal officer; (2) some mention of the Constitution, however opaque, was made in the pleadings; and (3) the relief requested included monetary damages. This is likely an overly inclusive definition that leads to an underestimate of success rates, for reasons elaborated on below. For each potential case identified, it was often necessary to cull the case file to determine the presence of a *Bivens* claim and to determine how to properly characterize the outcome of the case. As Eisenberg and Lanvers suggest, I also excluded from the denominator cases that were transferred to another district or remanded to another adjudicative body.[132]

There are at least two potential objections to how I have determined the denominator. First, it might be objected that the proxies I used to find *Bivens* cases (both particular Administrative Office codes and the U.S. Defendant jurisdictional basis) did not uncover the entire universe of potential *Bivens* claims that existed during the relevant time frame. I have tried to account for this valid criticism by testing my coding system through a reverse-engineering study: that is, I searched for all *Bivens* cases that were reported in the Westlaw database from the year 2000 to the present in each of the subject districts, and then examined the on-line docket of each case to determine the code given the case by the Administrative Office, and whether those cases were classified as having a federal defendant. The results of this reverse-engineering demonstrated that my method of identifying *Bivens* cases reliably located at least 94% of the existing *Bivens* cases, with minor variations among the districts—that is, among the entire universe of reported *Bivens* cases in the subject districts, more than 94% would have been discovered using the methods in my study.[133]

The second criticism of these results is both easier and harder to answer. When discussing why *Bivens* claims fail, it must be acknowledged that one group of cases that cannot be studied are the *Bivens* cases that are never brought—that is, the cases in which someone was harmed by a federal official,

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claims. First, I searched for all cases which were filed with the Administrative Office's code for "civil rights" claims, "prisoner civil rights" claims, and "prison conditions" claims (Codes 440, 550, and 555); the vast majority of these were clearly brought against state or municipal officials and were not *Bivens* claims. Second, I culled files that were jurisdictionally defined as ones having the United States as a defendant, Often these were cases in which both a *Bivens* claim and a parallel FTCA claim were brought.

132. *See* Eisenberg & Lanvers, *supra* note 13, at 5-6.

133. My thanks to Margo Schlanger for suggesting this method of testing my search criteria. The results of the reverse engineering are reflected *infra* App. tbl.11. I recognize that this does not completely resolve the problem of undercounting the total number of *Bivens* cases—it might be that certain kinds of *Bivens* cases, with particular kinds of Administrative Office codes, are less likely to result in published opinions. Absent any data indicating that this kind of selection bias is occurring, however, I think it is fair to conclude that the methodology used in this study is a reliable means of finding the vast majority of *Bivens* cases.

in which a potential constitutional claim could be identified, but which was never brought as a court case.[134] One might expect that, much as in other litigation, this group of potential cases could be very large, but ultimately unknowable. This criticism is harder to respond to because of the impossibility of estimating how often viable *Bivens* claims are not brought, and therefore why such claims are not brought.[135] But the criticism is easier to respond to because this Article does not purport to describe the entirety of all *Bivens* claims, both potential and actually brought. Rather, the data presented herein, just as in other empirical studies of "success" in civil litigation, reflect only the outcomes and determinants of filed *Bivens* cases. In any event, the results of any empirical study should be presented with modesty, and this paper is no exception.

C. *Results of Five District Survey*

As Table 1 shows, almost 250 *Bivens* cases with final dispositions were identified through my survey of the case files from the five districts.[136] As a percentage of total civil filings involving federal questions, *Bivens* suits filed between 2001 and 2003 ranged anywhere from 0.7% to 2.5% of the work of the district courts surveyed, and 1.2% of the total federal question filings in the five districts.[137] Additional research is necessary to determine why there is such a

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134. There is some indication, for instance, that individuals living in the United States are generally less likely to seek and obtain legal services to resolve legal problems than individuals living in a variety of other countries. *See* Gillian K. Hadfield, *Higher Demand, Lower Supply?: A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 36 FORDHAM L.J. (forthcoming 2010), (manuscript at 12, available at http://ssrn.com/abstract=1410890). To my knowledge, no specific study has been done of the likelihood that individuals injured by government officials will resort to legal means for redress.

135. It may be possible to survey lawyers about why they might refuse to take on particular *Bivens* cases, but it is much harder to survey litigants themselves.

136. Eight cases in which no final disposition has been achieved are omitted from analysis in this paper. These cases all have been ongoing for some time and have involved extensive discovery and motion practice, but they are not informative as to the "success" of *Bivens* litigation as defined in this study.

137. *See* U.S. Courts, U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending March 31, 2002 http://www.uscourts.gov/caseload2002/tables/c03mar02.pdf (last visited Jan. 28, 2010); U.S. Courts, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2002 and 2003 http://www.uscourts.gov/caseload2003/tables/C00Mar03.pdf (last visited Jan. 28, 2010); U.S. Courts, U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending March 31, 2004 http://www.uscourts.gov/caseload2004/tables/C03Mar04.pdf (last visited Jan. 28, 2010). There is some difficulty in comparing these numbers directly, because the Administrative Office reports the number of cases filed per district on a March-March basis. That is, figures are only available for the cases filed between April 2001 and March 2002, and so on. Therefore, Table 1 actually compares the number of cases filed in which there was federal

large range between districts in terms of the prevalence of *Bivens* litigation. As Table 2 shows, more than 50% of the *Bivens* claims filed in the Eastern and Southern Districts of New York were prison conditions claims, and these two districts had among the largest number of *Bivens* claims, both in absolute number and as a percentage of federal question filings.[138] Thus, one might expect there to be a difference in the number of federal detainees held in each of these districts; the available data offer some support for that hypothesis.[139]

question jurisdiction in each of the districts between April 2001 and March 2004 with the number of *Bivens* claims filed between January 2001 and December 2003.

138. The success rates for prisoner versus nonprisoner claims are reflected in the following table:

Case Type	***Bivens* Filings**	**Successful Claims (%)**
Prison Conditions	118	18 (15.3%)
Fourth Amendment	38	11 (28.9%)
Other	85	10 (11.8%)
Total	**241**	**39 (16.2%)**

The success rate for prisoners' *Bivens* claims is consistent with the rate that has been previously reported by studies of success rates for prisoner civil rights claims. Schlanger, *supra* note 13, at 1557; Schwab & Eisenberg, *supra* note 13, at 732-33.

139. The population data reported here was collected on Mar. 4, 2009 and should be considered accurate as of that date. The Metropolitan Detention Center, located in the Eastern District of New York, is the second largest federal prison facility in the United States with a population of about 2700 pretrial detainees and prisoners. *See* Fed. Bureau of Prisons, Weekly Population Report, http://www.bop.gov/locations/weekly_report.jsp (last visited March 4, 2009). The Southern District of New York contains three federal facilities with a total population of almost 2000. *Id*. These two districts have among the highest proportion of *Bivens* filings. The Eastern District of Pennsylvania has one facility with about 1100 pretrial detainees and prisoners, and the Northern District of Illinois has one facility with a little more than 700 detainees. *Id*. Both of these districts have among the lowest percentage of *Bivens* suits. And the Southern District of Texas, with an intermediate percentage of *Bivens* suits, has three facilities with a total population of about 2800, although about a third of these are female prisoners. *Id*.

Table 1. Prevalence of *Bivens* Suits, by District, 2001-2003

District	Total Civil Filings	Civil Filings — Federal Question Jurisdiction	*Bivens* Filings (% of Federal Question Cases)
SDNY	34,725	3372	51 (1.5%)
EDNY	21,822	4545	67 (1.5%)
SDTX	23,497	5522	64 (1.2%)
EDPA	31,897	3231	23 (0.7%)
NDIL	31,151	4017	38 (1.0%)
TOTAL	**143,092**	**20687**	**243 (1.2%)**

Table 2. Prevalence of *Bivens* Suits by District and Case Type, 2001-2003

District	*Bivens* Filings	Prison Conditions Claims (%)	Non-Prison Claims (%)
SDNY	51	34 (66.7%)	17 (33.3%)
EDNY	67	36 (53.4%)	31 (46.6%)
SDTX	64	26 (40.7%)	38 (59.3%)
EDPA	21	9 (42.9%)	12 (57.1%)
NDIL	38	13 (34.2%)	25 (65.8%)
TOTAL	**241**	**118 (49.0%)**	**123 (51.0%)**

Understanding the success of *Bivens* lawsuits, however, is complicated. The raw numbers, reflected in Figure 1 reflect a range of success rates within each district. The total success rate, however, is approximately 16%, which is comparable to the rate for prisoner constitutional tort claims reported in other studies, but substantially less than the success rate reported for nonprisoner constitutional tort lawsuits.[140] The Eastern District of New York is a significant outlier, with *Bivens* litigants achieving more than twice as much success as litigants in every other district.[141] Even if one excludes the Eastern District of New York from the analysis, the raw rate of success is about 11%, more than the rates that have been reported for *Bivens* lawsuits in the past.[142] On the other side of the coin, *Bivens* litigants in the Eastern District of Pennsylvania achieve a success rate of about half that of litigants in all of the other districts combined.[143] Possible explanations for these differences are

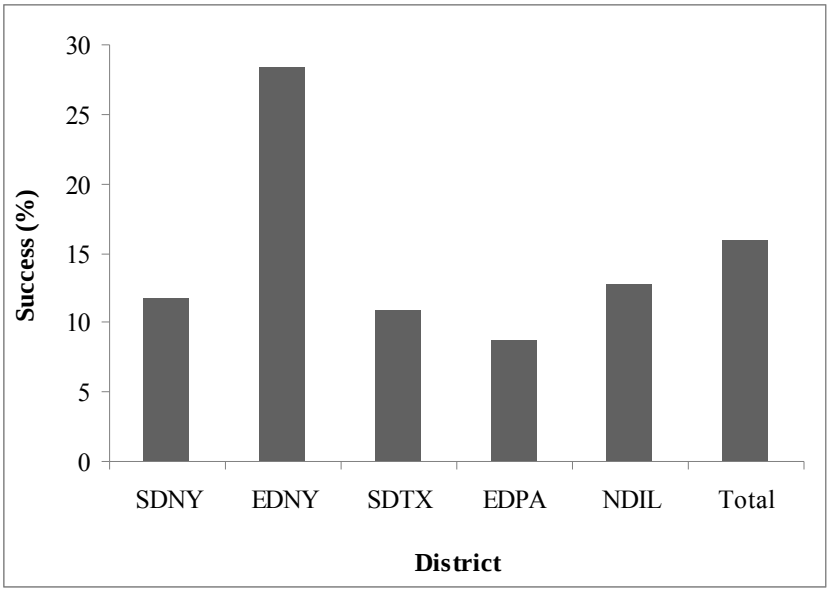
140. *See supra* notes 107-115 and accompanying text.

141. In the Appendix, I report the magnitude of difference in success rates and the results of Fisher's exact test for every possible combination of between-district comparisons, as well as for comparisons between each district and the sum of each other district. The difference between the Eastern District of New York's success rate and every district's is statistically significant at the $p < 0.10$ level, using a two-tailed Fisher's exact test. *See infra* App. tbl.3.

142. The increased rate of success is due almost entirely to the inclusion of settlements and voluntary dismissals in the numerator.

143. None of the differences between the Eastern District of Pennsylvania and other districts, except for the Eastern District of New York, are statistically significant. *See* App.

Figure 1. Raw Success Rates by District



explored in greater detail below.

Figure 2 and Table 3, which break down success according to whether the *Bivens* plaintiff was represented by counsel, together help to explain some of the variation in raw success rates between districts. As they demonstrate, in every district the presence of counsel is associated with a much higher rate of success in *Bivens* litigation, and the effect when one considers the numbers in the aggregate is convincing. The difference in success between pro se and represented plaintiffs is statistically significant in most districts and within the sample as a whole.[144] Moreover, when rates of success for pro se litigants are compared between districts, the Eastern District of New York once again reports a much greater rate of success that is statistically significant for every interdistrict comparison except for the Northern District of Illinois and the Southern District of New York.[145] When the success of counseled cases is compared between districts, however, there is much less variation in success rates and none of the differences is statistically significant.[146] Thus, one possible explanation for the significant difference between the districts' success rates reflected in Figure 1 may be explained in large part with the Eastern District of New York's more favorable resolution of pro se complaints.

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tbl.3.

144. The Southern District of New York and Northern District of Illinois are the exceptions. *See* Table 3.

145. Confidence intervals at the 95% level and results of Fisher's exact test are reported in the Appendix Table 4.

146. *See infra* App. tbl.5.

Figure 2. Success Rates by District, Pro Se, and Counseled Cases

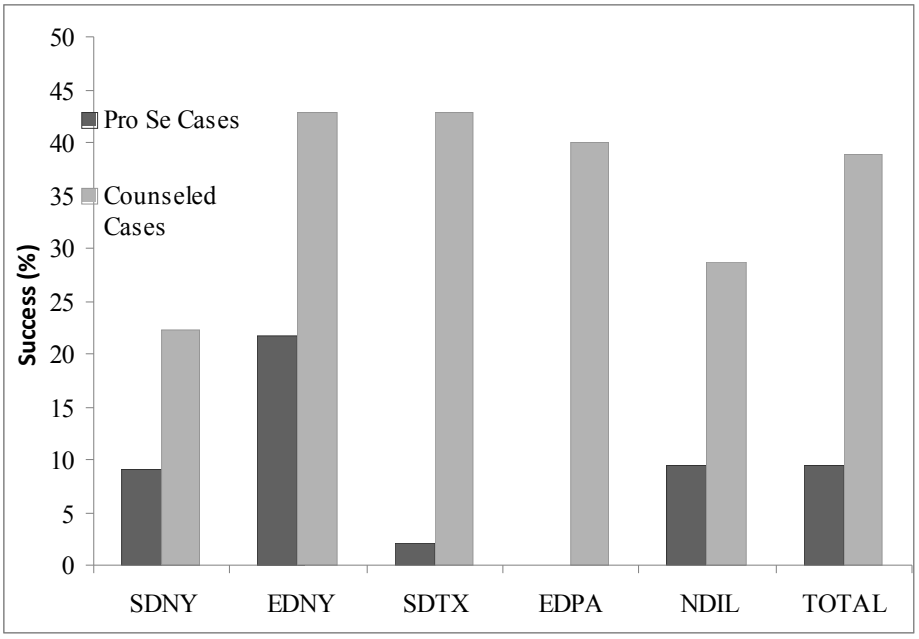


Table 3. Success Rates By District, Pro Se, and Counseled Cases, 2002

District	Pro Se *Bivens* Filings	Successful Pro Se Suits (%)	Counseled *Bivens* Filings	Successful Counseled Cases (%)	Fisher's Exact
SDNY	44	4 (9.1%)	7	2 (22.2%)	0.186
EDNY	46	10 (21.7%)	21	9 (42.9%)	0.088
SDTX	50	1 (2.0%)	14	6(42.9%)	<0.001
EDPA	18	0 (0%)	5	2 (40.0%)	0.040
NDIL	32	3 (9.4%)	7	2 (28.6%)	0.213
TOTAL	**190**	**18 (9.5%)**	**54**	**21 (38.9%)**	**<0.001**

To this point, I have presented data specific to *Bivens* litigation that is comparable to the data available in studies of other civil litigation. And while the data are new in that they focus on *Bivens* claims, they do not radically alter the common understanding of the success of this type of litigation: if we stopped here, we might think that *Bivens* claims are more successful than previously thought, but our impression would still be that *Bivens* litigation is much more likely to fail than succeed. This would be misleading. Recall that the definition of a *Bivens* case that I used to generate the raw numbers was an overly broad definition: I reviewed the complaints to determine whether there was any federal defendant, any mention of the Constitution, and a request for damages. If these were present, then the complaint was considered part of the

denominator for the raw numbers I report.

The difficulty with this definition is best illustrated by the kinds of complaints it encompasses. In the Northern District of Illinois, Henry Pocan filed a complaint requesting $98 million in damages from Chicago police officers and FBI agents; to the extent it is comprehensible, he appears to complain that he was wrongly imprisoned for a state crime, and it is unclear from the complaint what role the FBI agents allegedly played.[147] In the Eastern District of New York, Israel Valle filed a complaint against four federal judges seeking damages under a variety of constitutional provisions for the denial of a motion for a preliminary injunction.[148] Each of these cases, as well as many others, was dismissed without any answer or motion being filed, usually under the authority of 28 U.S.C. § 1915. All told, almost 20% of the *Bivens* claims identified in this survey were dismissed sua sponte because the district court screened them for frivolity and determined that they should be dismissed out of hand.[149] Such claims impose none of the burdens of *Bivens* litigation about which courts and commentators express concern—no defendant is subject to intrusive discovery or the potential of liability, and no attorney even has to review the complaint and prepare an answer or motion to dismiss. The individuals who file such complaints often do not even specifically advert to *Bivens*.[150] In the dataset that I reviewed, when courts gave leave to file an amended complaint, explaining what is necessary to include in a *Bivens* action, many of the plaintiffs did not even attempt to file an amendment. This indicates that perhaps the problem is primarily one of information failure. Whatever the explanation, there is nothing about the filing of these frivolous complaints that reflects on the necessity or appropriateness of the *Bivens* cause of action—presumably the plaintiffs who filed such complaints would have filed the same document whether or not *Bivens* liability was framed as a model of individual liability. The lawsuits tell us nothing about *Bivens* and everything about the filer. There is a strong argument for excluding these frivolously filed lawsuits in the denominator given the purposes of this study. Figure 3 reflects this judgment by recalculating success rates when such frivolous claims are excluded. With this change, the "success" numbers improve, but in the aggregate are still about half as successful as the constitutional tort claims studied by Eisenberg and others.[151] Once again, however, there is significant

147. *See* Complaint in Cv. No. 01-2399 (N.D. Ill.), on file with author.

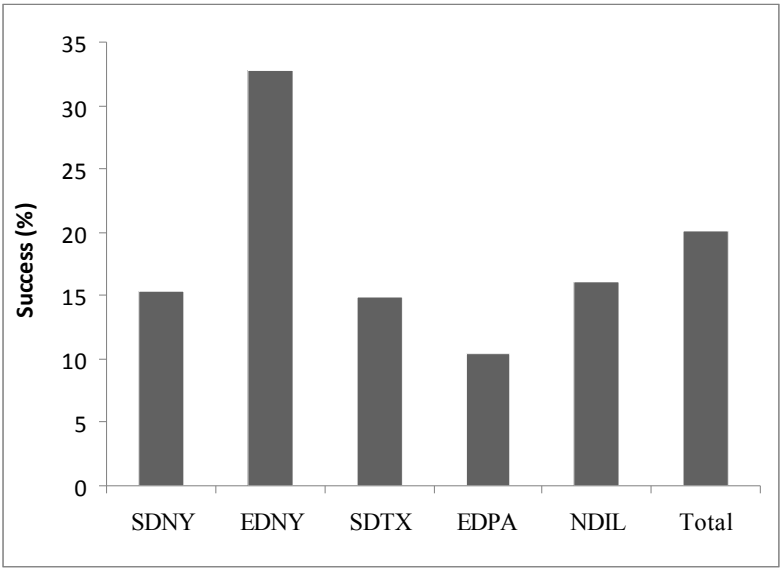
148. *See* Complaint in Cv. No. 03-4355 (E.D.N.Y.), on file with author.

149. Fifty of the complaints, or 20.5%, were dismissed as frivolous. *See infra* App. tbl.6. There was interdistrict variation: the Eastern District of New York dismissed the fewest complaints as frivolous, with 13.4%, while the Southern District of Texas dismissed 26.6% of the *Bivens* complaints as frivolous. *Id*. The other districts were closer to a 20% frivolous dismissal rate. *Id*.

150. Indeed, many of the pro se complaints purport to sue federal officials under section 1983.

151. *See* Eisenberg & Schwab, *supra* note 15, at 682 n.169 (reporting success rate of

Figure 3: Success Rates by District, Frivolous Claims Excluded



variation in the success rates of each district. The Eastern District of New York has a statistically significant higher rate of success than the Southern District of New York, the Southern District of Texas, the Eastern District of Pennsylvania, and the total of all other districts combined.[152] No other difference between the districts is statistically significant, however. Thus, by excluding frivolous claims, the variation between districts was reduced, even as the overall success rate increased.

Any significant differences between the districts completely evaporate when one considers solely those cases in which an answer or motion is filed, as Figure 4 demonstrates.[153] In those cases, the total success rate was about 30%, with variation between the districts of between 17% (Eastern District of Pennsylvania) and 37% (Eastern District of New York).[154] No interdistrict

38% for constitutional claims); *see also* Schwab & Eisenberg, *supra* note 13, at 729-30 (reporting success rate of 50% for nonprisoner tort plaintiffs).

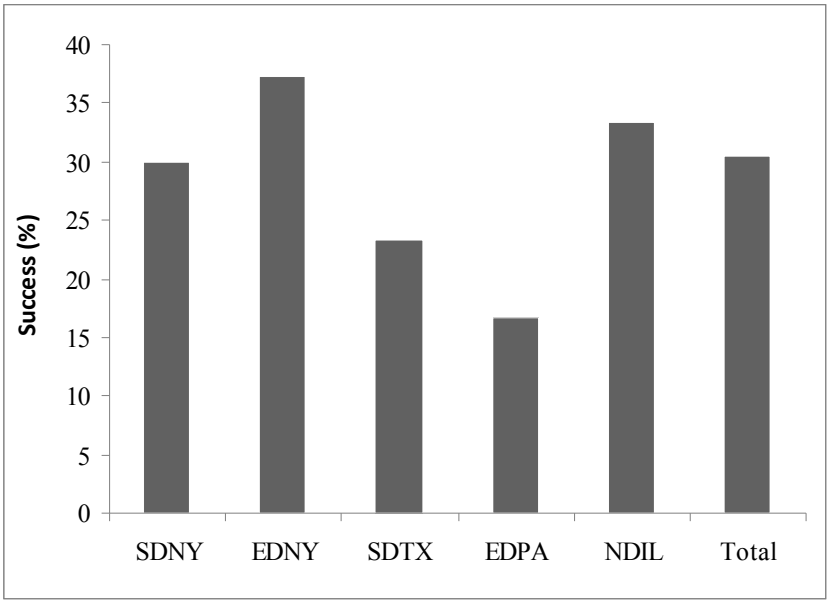
152. *See infra* App. tbl.8.

153. As a matter of terminology, I refer to these cases in Figure 4 as occurring after issue being joined, in contrast to the typical definition, which uses the filing of an answer, but not a motion to dismiss, as the dividing line.

154. When looking at success rates by case type, there is a similar effect, as the following table demonstrates:

Case Type	***Bivens* Filings, Issue Joined**	**Successful Claims (%)**
Prison Conditions	69	18 (26.1%)
Fourth Amendment	32	11 (34.4%)
Other	27	10 (37.0%)
Total	**128**	**39 (30.5%)**

Figure 4: Success Rates by District, Issue Joined



difference in success rate was statistically significant, however.[155] These success rates, other than the rate for the Eastern District of Pennsylvania, are within the range of success rates for constitutional tort cases reported by Eisenberg and others.[156]

Thus, when considering the success rate of *Bivens* litigation, one central factor is whether a complaint survives sua sponte judicial screening. The data suggest that if *Bivens* claims survive that screening, their rate of success is somewhere in between the previously reported success rates for prisoner civil rights litigation and nonprisoner civil rights litigation.[157] This comparison, however, is fraught with difficulty because previous studies did not analyze the success of litigation according to the procedural stage to which each case advanced. It is likely, for instance, that had Schlanger excluded claims dismissed as frivolous from her study of prisoner litigation, she would have

155. *See infra* App. tbl.10.

156. Between 2001 and 2002, Eisenberg and Lanvers reported 95% confidence intervals for success in constitutional tort cases from 22% to 33% for the Northern District of Georgia and 41% to 49% for the Eastern District of Pennsylvania. Eisenberg & Lanvers, *supra* note 13, at 15 tbl.3. The data reported in this study for the Eastern District of Pennsylvania need to be further explored given how different they are from Eisenberg and Lanvers' figures.

157. The figures that have been reported indicate a success rate of about 15% for prisoner plaintiffs, Schlanger, *supra* note 13, at 1557, and 50% for nonprisoner plaintiffs. Schwab & Eisenberg, *supra* note 13, at 733; *see also* Eisenberg & Schwab, *supra* note 15, at 682.

seen a significant increase in success rates.[158] Similarly, Eisenberg, Schwab, and Lanvers have provided different estimates of success rate for prisoner and nonprisoner civil rights litigation that does not differentiate based on the stage of litigation to which a complaint progresses.[159] Rather than undermine the approach taken here, however, this suggests further avenue for study.

Finally, apart from the general observations that can be made about the success of *Bivens* claims, the data provide important information about the role that the qualified immunity defense plays in the outcome of *Bivens* cases. As discussed at the outset, not only have commentators assumed that *Bivens* claims are remarkably unsuccessful, but they have also assumed that the reason for this lack of success is the availability of the qualified immunity defense for individual defendants. The data, summarized in Table 4 and Figure 5, provide little support for this longstanding assumption. Although defendants made arguments based on qualified immunity in some of the cases examined, the defense was the basis for a dismissal in only 5 out of the 244 complaints studied. Dismissal on the merits, for frivolity, and for failure to exhaust administrative remedies were the most common grounds for terminating a case.[160] Dismissals for lack of subject matter jurisdiction were more common than dismissals on qualified immunity grounds.

These data suggest that the qualified immunity defense is of minimal importance in regulating *Bivens*, at least in filed cases.[161] However one

158. *See* Schlanger, *supra* note 13, at 1594-95 (reporting that 80% of cases were resolved in defendant's favor pretrial, and suggesting that many of these were resolved sua sponte, but not providing data on frivolous or pre-answer dismissals).

159. Eisenberg and Lanvers report data suggesting that only about 6% of the cases they studied in the Northern District of Georgia and Eastern District of Pennsylvania were dismissed prior to the filing of an answer, but do not identify sua sponte dismissals. Eisenberg & Lanvers, *supra* note 13, at 13 tbl.2 (reporting that 4.72% of cases were dismissed for failure to serve or failure to prosecute and 1.14% were dismissed for failure to state a claim or other Rule 12 ruling). Schwab and Eisenberg report the percentage of cases in which significant events such as filing of answer or discovery occur, but do not differentiate success rates in these cases. Schwab & Eisenberg, *supra* note 13, at 733 tbl.IV; *see also* Eisenberg & Schwab, *supra* note 15, at 674 tbl.VIII.

160. A dismissal was considered on the merits whether it was a Rule 12(b)(6) dismissal or a summary judgment dismissal. Although the former is typically not a dismissal with prejudice, the distinction is not relevant for these purposes.

161. It is possible that the prospect of overcoming qualified immunity deters attorneys from taking on *Bivens* cases and that this creates a kind of selection bias in filed cases: attorneys may already have rejected those cases in which qualified immunity is likely to be a substantial barrier to relief. Even if this kind of screening were occurring, however, it may only displace the case from the counseled category to the pro se category, leaving the denominator of *Bivens* cases unchanged. Moreover, to the extent that this study compares the experience of *Bivens* cases with the experience of other civil rights cases, the same kind of screening may be taking place in both data sets (although the availability of attorneys' fees in other civil rights cases may operate to mitigate the screening out of cases particularly vulnerable to qualified immunity arguments). Finally, even when one looks to published district and appellate court decisions, it is not apparent that qualified immunity is the insuperable barrier that scholars have assumed. In a survey of all Westlaw-reported federal

interprets the data on overall success, then, these data call into substantial question what has been the given wisdom among *Bivens* critics and supporters alike. If the data are replicated elsewhere, it suggests that the doctrine of qualified immunity is of much greater symbolic than practical importance.[162] There are many different possible explanations, all of which bear further exploration. For instance, it is possible that the vast majority of *Bivens* cases involve disputes over well-established law, such that there are limited opportunities for defendants to raise qualified immunity as a defense. It also is possible that qualified immunity is operating in the background in those cases that are dismissed for being frivolous.[163] Relatedly, it may be that judges apply a modified doctrine of constitutional avoidance[164] where there is a way of resolving cases without relying on qualified immunity. Finally, and most troublingly, it may be that the prospect of qualified immunity deters lawyers from accepting the most difficult *Bivens* cases, thus operating as an unseen thumb on the scale in favor of maintaining the legal status quo.[165]

Bivens cases between the years 2000 and 2003, only forty-three district and appellate court cases addressed a qualified immunity defense; the defense was rejected in eighteen cases and accepted in fourteen cases. This contrasts with data collected by Diana Hassel for reported qualified immunity cases in the years 1997 and 1998, in which she observed that a qualified immunity defense was accepted in 80% of the cases in which it was raised. *See* Hassel, *supra* note 16, at 136 n.65, 145 n.106.

162. It is important to note that nothing indicates that qualified immunity needs to be strengthened because it is being relied on less often than has previously been thought. If anything, the data suggest that district courts have many different tools for resolving *Bivens* cases without recourse to qualified immunity.

163. Where a plaintiff seeks to proceed in forma pauperis, the district court is given the discretion to dismiss a complaint sua sponte if it, inter alia, "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(iii). This is the same statutory subsection that permits pre-answer dismissal for frivolousness. *Id.* § 1915(e)(2)(B)(i). Thus, it is possible that some district courts dismissing actions for being frivolous may be making an implicit judgment about the presence of a qualified immunity defense.

164. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

165. Changes in the law are often spurred by cases in which qualified immunity is at issue—such cases afford courts the opportunity to announce new legal principles while protecting individual defendants from damages liability. This aspect of qualified immunity is at the heart of the tension between the Supreme Court's opinions in *Saucier v. Katz*, 533 U.S. 194 (2001), and *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

Figure 5. Grounds for Termination, All Districts

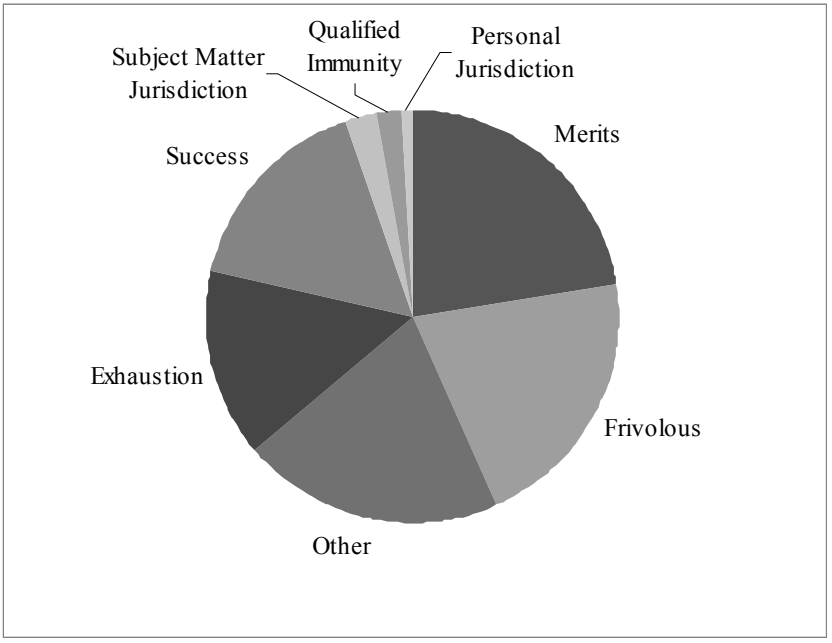


Table 4. Grounds for Termination, All Districts

Grounds	Frequency	Percent
Merits	55	22.5
Frivolous	50	20.5
Other[166]	50	20.5
Exhaustion	36	14.8
Success	39	16.0
Subject Matter Jurisdiction	6	2.5
Qualified Immunity	5	2.0
Personal Jurisdiction	2	0.8
Mootness	1	0.4
Total	**244**	**100.0**

166. Dismissals on this ground often involved the failure to amend in response to the Court's order, or the failure to prosecute the claim.

III. THE RAMIFICATIONS OF THESE DATA FOR FUTURE RESEARCH AND POLICY

These data flesh out our understanding of the state of *Bivens* litigation, and they also shed some light on the debate about using an individual liability model for *Bivens* claims. For our understanding of *Bivens* claims, the first point is that additional research should be done to expand our base of knowledge. Collecting data from additional districts and time periods, conducting surveys of practitioners who litigate *Bivens* cases, and looking more closely at the results obtained in *Bivens* cases will go a long way towards providing a more complete picture of the state of *Bivens* litigation.

Secondly, the widespread assumption that one of the failings of the individual liability model is that qualified immunity makes defending *Bivens* suits too easy appears to be highly questionable. On the other hand, there is no indication that successful *Bivens* claims result in individual officers paying out personal funds to satisfy judgments or settlements.[167] Thus, at least in filed *Bivens* cases, there is substantial evidence to question both sides of the qualified immunity debate. For the judiciary, which has embraced qualified immunity as a necessary means of protecting government officials from abusive litigation, there is reason to question this justification for the defense. For the critics of qualified immunity, who argue that it prevents valid claims from being adjudicated on the merits, these data also raise a red flag.

Finally, although the success rate of *Bivens* claims ranges in substantial degree, all the points on the continuum indicate greater success than has been assumed to date. Moreover, there is a suggestion that the presence of counsel and the forum district make a significant difference in the success of *Bivens* litigation.[168] These implications all bear further inquiry, but they again may undermine advocates on both sides of the *Bivens* debate. For those in the judiciary who see *Bivens* claims as almost universally frivolous, these data should offer cause for reconsideration. And for those scholars who have assumed that *Bivens* claims are ineffective at achieving the twin goals of deterrence and compensation, the data reported here may lead to rethinking.

These observations may have important policy ramifications. Ironically, the proposal that *Bivens* be mediated through entity liability rather than individual liability is supported by individuals on both sides of the *Bivens* debate. Those commentators who believe that qualified immunity is too high a

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167. The successful cases that I found all involved settlements or voluntary/stipulated dismissals, and all indications were that the United States ended up paying the settlement.

168. This is consistent with other studies of constitutional tort litigation. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1588-89 (1989) (finding greater regional differences in success of prisoner litigation than in civil rights litigation generally); Eisenberg & Schwab, *supra* note 15, at 692; Schwab & Eisenberg, *supra* note 13, at 770-71, 773-74.

hurdle to overcome support the move because they assume that the government will not be able to assert the defense.[169] Those who assume that individual officers are unfairly burdened by individual liability in the *Bivens* context argue that the government is better situated to bear the cost of defending and paying out *Bivens* claims.[170] In large part, the debate about replacing individual liability with governmental liability turns on assessments of whether governmental liability would better serve these twin interests in compensating victims and deterring potential violators.[171]

To the extent that this policy prescription is based on empirical judgments, these data offer reasons for hesitation. Recall that the advocates of replacing individual liability with governmental liability generally rest their recommendation on several assumptions: (1) *Bivens* claims are rarely successful; (2) the greatest barrier to success is the qualified immunity doctrine; and (3) therefore, the individual liability model fails to serve the twin goals of compensation and deterrence, while relieving burdens on individual officers.[172] However, *Bivens* claims do not fail as often as commentators have assumed, qualified immunity appears to play a marginal role in filed cases, and individual defendants are not, as a practical matter, financially burdened by *Bivens* litigation. There are good arguments for moving to governmental liability without regard for these data, which are, after all, far from dispositive. It seems beyond dispute, for instance, that a system of formal governmental liability would vindicate interests in full compensation.[173] There is more room

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169. *See* Bandes, *supra* note 18, at 340-41; Hassel, *supra* note 18, at 455-56, 476-77; Hedrick, *supra* note 18, at 1062-63, 1065-66; Oren, *supra* note 18, at 1000-02; Pillard, *supra* note 2, at 80-81.

170. *See, e.g.*, Kratzke, *supra* note 18, at 1152 (arguing that shifting liability to the federal government would increase the value of genuine *Bivens* claims and decrease the deleterious effect of *Bivens* claims on federal officials); Schuck, *supra* note 18, at 346 (expressing concern for protecting individual officials from being sued and from being held personally liable).

171. When *Bivens* was decided, the principal justification for providing the damages remedy was that, without it, Mr. Bivens himself would have no remedy at all: as Justice Harlan explained in concurring, "For people in Bivens' shoes, it is damages or nothing." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); *see also* Bandes, *supra* note 18, at 341 n.244 (noting that original purpose of *Bivens* was primarily compensation rather than deterrence). Subsequent to *Bivens*, however, the Court has identified an interest in deterrence as one basis for the cause of action. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); FDIC v. Meyer, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."); Carlson v. Green, 446 U.S. 14, 21 (1980) ("*Bivens* . . . in addition to compensating victims, serves a deterrent purpose."); Butz v. Economou, 438 U.S. 478, 505-06 (1978) (declining to provide absolute immunity to federal executive officials under *Bivens* because doing so would eviscerate deterrent effect).

172. *See supra* notes 9, 18-25 and accompanying text.

173. *Bivens*, of course, only provides a remedy in compensatory as opposed to prohibitory terms, a distinction that in other areas has been challenged as not providing

for debate regarding how a shift to formal governmental liability would advance deterrent interests.[174] If individual defendants were actually held personally financially accountable for constitutional violations, then one could imagine a relatively strong argument for how the prospect of *Bivens* liability would function as a deterrent.[175] But the reality of indemnification reduces the deterrent advantage of using an individual liability model.[176] Lawsuits can deter in nonmonetary ways, of course, by educating wrongdoers,[177] creating stigma and adverse publicity,[178] or causing personal offense.[179] There also are

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complete compensation and not providing sufficient deterrence. Jeffrey Standen, *The Fallacy of Full Compensation*, 73 WASH. U. L.Q. 145, 150-53 (discussing "pricing" remedies and their critics). As has been observed in the context of tort and contract actions, providing compensation may deter the breach of a legal duty only when the compensatory regime imposes higher costs than the value of engaging in the breach. *Id.* at 151 ("As a result, protection of the plaintiff's interests depends on the private, individualized decisions of a defendant weighing gains and harms prior to taking action.").

174. Questions about the relationship between individual damages actions in constitutional litigation and tort principles, and even whether tort doctrine should inform our approach to enforcing constitutional rights, have long been debated. *See, e.g.*, John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989) (arguing that principles of corrective justice should impose limits on government actors' liability for violations of constitutional rights); Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990) (disagreeing with Professor Jeffries' assumptions about the inherent wrongfulness of constitutional violations).

175. Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443 (arguing that damages are at least as effective a deterrent remedy as the exclusionary rule for Fourth Amendment violations).

176. If we believe that any fair remedial system balances interests in deterrence, compensation, and effective enforcement of legal norms, *see* Rudovsky, *supra* note 18, at 1211, then the relationship between indemnification and deterrence is critical.

177. *See* Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 917-18 (2001) (describing the "educative" and "deterrent" functions of criminal and tort law).

178. *See* Schlanger, *supra* note 13, at 1672-80 (arguing that litigation has a deterrent effect in jail and prison context, and disputing overdeterrence and antideterrence theories); *see also* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 283 (1988). These additional costs of litigation cause Professor Meltzer to question whether the additional prospect of liability for damages provides an additional level of marginal deterrence that is justified. *Id.*

179. *See* Meltzer, *supra* note 178, at 283. There is a symbolic harm in being named as a defendant in a lawsuit—defendants being deposed in litigation often express outrage and displeasure at being personally named in particular lawsuits. Indeed, my practice when taking depositions of nonparty officers was always to remind them at some point in the deposition that they were not defendants, with the hope, sometimes met, that they would respond by being more forthcoming. There are communicative consequences to other potential wrongdoers as well. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185 (arguing that the harm of abridging remedial options is to indicate to potential wrongdoers that violations may be caused without consequence); Schlanger, *supra* note 13, at 1681 (describing deterrent effect of media exposure from

financial burdens associated simply with being a defendant in litigation, regardless of whether liability ultimately is imposed.[180] And in certain circumstances, there may be employment-related ramifications for being found liable for a constitutional tort.[181] But these nonmonetary deterrents may be present in both an individual and governmental liability scheme. In any event, evaluating these arguments, aside from the role that empirical judgments might play in them, is beyond the scope of this Article.

However, to the extent that the debate about the relative benefits and disadvantages of the individual liability model continues, these data suggest that at least two concerns be kept in mind moving forward. First, it might be that a focus on incentives for litigation would achieve better results than a focus on the form of the entity—individual or governmental—to which liability attaches. That is, creating incentives for attorneys to litigate *Bivens* cases—e.g., provisions for fees and costs for prevailing parties—may result in more successful *Bivens* litigation, regardless of the formal defendant. As these data show, the presence of an attorney is associated with greater success. This does not necessarily mean there is a causal relationship—it may be that attorneys already take the better *Bivens* cases, and this is why counseled cases are more successful. Further research may help resolve this causal question.

Second, if an individual liability model is retained, it may be appropriate to consider a hybrid form of liability, one that ties governmental liability to the connection between policy choices, defined broadly to include formal and informal policy decisions, and the individual's unconstitutional conduct. Thus, instead of substituting the government for individual employees in every *Bivens* case, it might be sensible to permit employees to have a limited defense in *Bivens* cases. This defense would allow them to join the federal government as a necessary third party defendant where the individual defendant can show that the conduct in which she engaged was consistent with and in furtherance of government policy. This hybrid form of liability may better capture those cases in which individual liability is thought to create less of a deterrent, as where the harm caused by the constitutional violation is relatively small and widely dispersed.[182] Like any penalty, damages are less likely to adequately deter individuals when the probability of enforcement by plaintiffs is low, either

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lawsuits); *see also* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859-61 (2001) (describing informational advantages of municipal tort liability).

180. Schlanger, *supra* note 13, at 1675 n.389 (describing problems with would-be creditors as one of the chief complaints by officers subject to section 1983 suits).

181. Officers are sometimes shifted to different, less desirable, duties as a result. For instance, in the prison context, officers who are seen as particular risks may be transferred to positions that involve little to no inmate contact. Such positions offer little opportunity for career advancement.

182. *See* Meltzer, *supra* note 178, at 284; James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 400 (2003) (noting risk that individuals will not pursue a lawsuit).

because the difficulty of success is too low or because plaintiffs are unlikely to even bring suit.[183] The data presented here neither support nor refute this potential hybrid approach; if anything, further study is recommended to determine the extent to which the success of *Bivens* actions is mediated by whether the subject of a lawsuit is an isolated instance of misconduct by line officers or a conscious policy choice by supervisory officials.

This approach is consistent with the government's nominal approach to indemnification of its employees for *Bivens* claims. The government provides representation in the vast majority of cases in which it is requested,[184] and theoretically applies the same standard to decisions regarding representation as it does to decisions regarding indemnification: whether doing so would not be in the interests of the United States.[185] The assessment of what is contrary to the interests of the United States may be different once a fact finder has determined that an employee violated the Constitution. There would at least be some argument that indemnifying someone who violated the Constitution, especially in light of the qualified immunity defense, would not be in the interests of the United States, especially because all of the indemnification regulations require that an employee be acting within the scope of her duties. In this circumstance, however, the employee is not left defenseless; the Department authorizes the retention of private counsel, even if indemnification is ultimately found to be inappropriate.[186]

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183. Standen, *supra* note 173, at 219. Private litigants also face significant barriers when litigating against government defendants, including differences in resources and stakes and different assessments of the success of claims. Schwab & Eisenberg, *supra* note 13, at 750-55.

184. The exceptions appear to be cases in which the government itself has determined that the employee engaged in some kind of wrongdoing meriting discipline.

185. *See, e.g.*, 28 C.F.R. § 50.15(a), (b)(2) (2009) (providing right to representation for federal employees and officials sued for actions within the scope of employment when representation is in the interest of the United States); *see also* 13 C.F.R. § 114.110(a)(1) (2009) (authorizing indemnification and representation when doing so is in the Small Business Administration's interest); 14 C.F.R. § 1261.316(a) (2009) (authorizing indemnification when doing so is in the National Aeronautics and Space Administration's interest); 17 C.F.R. §§ 142.1, 142.2(a) (2009) (providing indemnification for Commodity Futures Trading Commission employees when doing so is in the interest of the United States); 22 C.F.R. § 21.1(a) (2009) (same for Department of State employees); 22 C.F.R. § 207.01(a) (2009) (same for Agency for International Development employees); 31 C.F.R. § 3.30(a) (2009) (authorizing indemnification when doing so is in the Department of Treasury's interest); 34 C.F.R. §§ 60.1(a)(1), 60.2(b)(1) (2009) (providing indemnification for Department of Education employees when doing so is in the interest of the United States); 38 C.F.R. § 14.514(c) (2009) (authorizing indemnification and representation when doing so is in the Department of Veterans Affairs' interest); 43 C.F.R. § 22.6(a) (2009) (same for Department of the Interior employees); 45 C.F.R. § 36.1(a) (2009) (authorizing indemnification when doing so is in the Department of Health and Human Services' interest). The Army has slightly more restrictive language, authorizing indemnification only when it is in the "best interests" of the United States and when there is a specific appropriation for such indemnification. 32 C.F.R. § 516.32(a) (2009).

186. *See* 28 C.F.R. § 50.15(a)(2), (a)(7), (a)(11) (2009) (distinguishing between right to

CONCLUSION

It remains an open question whether the individual liability model adopted by *Bivens* actually serves any legitimate purpose. On one hand, *Bivens* liability is fictional at least as it relates to individual liability because of the certainty of indemnification by the government in the event of an unlikely adverse judgment.[187] On this account, because the availability of a *Bivens* cause of action will never result in a federal official having to pay funds out of her own pocket, the fiction should be abolished and governmental liability should be embraced for the unconstitutional conduct of federal officials.

To make matters worse, not only does the *Bivens* cause of action act as a fig leaf in front of government payouts, but precisely because it adopts an individual model for liability, it makes available the defense of qualified immunity to defendants, an insurmountable barrier in the view of many scholars.[188] On the theory that, like municipalities in section 1983 actions, the federal government also would not have a qualified immunity defense available to it in a *Bivens* action, these scholars argue that the availability of qualified immunity is another reason to prefer a governmental liability model.

The data reported here offer little support for this proposed transition. On the other hand, the data also show, at best, moderate success of *Bivens* claims as compared with other constitutional tort litigation and civil litigation in general. This is a stark contrast to the generally dismal descriptions of the success of *Bivens* litigation prevalent in academic literature, but one still may question the effectiveness of this litigation. Perhaps *Bivens* claims are viewed with skepticism by federal courts that share certain institutional norms with federal officials that they do not share with state officials.[189] Perhaps federal officials actually take the Constitution more seriously and therefore violate it less often. Perhaps the availability of attorneys' fees and cost-shifting statutes in constitutional tort litigation against state actors creates incentives for better-quality litigation against such individuals. Whatever the causes of the modestly lower rates of success of *Bivens* litigation, these data do not support the view that a system of formal governmental liability would better serve the interests of deterrence or full compensation.[190] Any further proposals for reform should

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representation by Department attorneys or private counsel and indemnification decisions).

187. Pillard, *supra* note 2, at 67. Professor Pillard describes the federal government as the "real . . . party in interest" in *Bivens* suits, because it pays defense and indemnification costs. *Id.*

188. *Id.* at 66-68.

189. For instance, constitutional standards for prison administration are in conformity with good professional practice as well, and for no secret, but because there is cross-pollination between courts and professionals regarding good practices. Schlanger, *supra* note 13, at 1683; *see also* Primus, *supra* note 25, at 1023-24 (arguing that federal courts are likely to share common constitutional norms with federal policy makers).

190. It may be that *Bivens* claims will do effective deterrent work where they regulate the space between the kind of conduct prohibited by the FTCA and unconstitutional conduct.

be preceded by further empirical study, lest a hasty transition do harm to important interests currently vindicated by *Bivens* litigation.

To the extent that, for instance, excessive force claims under the Fourth Amendment also can be brought as battery claims under the FTCA, the benefit to be gained in a *Bivens* claim is the possibility of deterring individual officials through the prospect of having personally to dole out a judgment, or the remote possibility of being awarded punitive damages. But Due Process claims generally do not have a state law analog, and therefore cannot be brought with a parallel FTCA claim; *Bivens* liability may be a stronger sword in those types of cases, but that is an issue for future consideration.

APPENDIX

Contained within this Appendix are the raw data upon which all analyses are based (additional data are on file with the author) as well as the results of statistical testing of different relationships addressed in the Article. Each table is self-explanatory. I report confidence intervals and the results of Fisher's exact test for all comparisons. There are good grounds for relying more on magnitude of difference with confidence intervals when interpreting data such as this, rather than focusing solely on significance testing.[191] To the extent that significance testing is relevant, however, I use Fisher's exact test because in some interdistrict comparisons, the expected values for certain variables would be below five. All calculations were generated using Stata/SE Version 10.0, with supplementation by chi-square tables available at http://faculty.vassar.edu/lowry/VassarStats.html.

Appendix Table 1. Raw Data

File No.	District	Date Filed	Docket	Disposition	Frivolous	Issue Joined	Success	Pro Se	Exhaust. Dismissal
1	SDNY	1/29/2002	02-706	Mot Dismiss Granted	Y	Y	N	Y	N
3	SDNY	1/10/2002	02-209	Mot Dismiss Granted	N	N	N	Y	Y
4	SDNY	2/6/2002	02-915	Def Judgment	N	N	N	Y	N
5	SDNY	2/11/2002	02-1071	Def Judgment	Y	Y	N	Y	N
6	SDNY	3/4/2002	02-1630	Def Judgment	Y	Y	N	Y	N
8	SDNY	4/15/2002	02-2890	Def Judgment	Y	Y	N	Y	N
11	SDNY	7/19/2002	02-5585	Def Judgment	N	N	N	Y	N
12	SDNY	7/9/2002	02-5219	Mot Dismiss Granted	N	N	N	Y	N
17	SDNY	7/19/2002	02-5596	Def Judgment	N	Y	N	Y	N
18	SDNY	7/24/2002	02-5821	Mot Dismiss Granted	N	N	N	Y	Y
19	SDNY	7/18/2002	02-5569	Voluntary Dismissal	N	N	Y	Y	N
20	SDNY	8/15/2002	02-6523	Mot Dismiss Granted	N	N	N	N	Y
21	SDNY	8/14/2002	02-6486	Def Judgment	N	Y	N	Y	Y
23	SDNY	9/9/2002	02-7127	Def Judgment	N	Y	N	Y	N
25	SDNY	10/21/2002	02-8341	Def Judgment	Y	Y	N	Y	N
26	EDNY	11/25/2002	02-6631	Settled	N	N	Y	Y	N
27	SDNY	11/19/2002	02-9216	Mot Dismiss Granted	N	N	N	Y	Y
28	SDNY	11/25/2002	02-9423	Def Judgment	N	Y	N	Y	N
29	SDNY	11/25/2002	02-9499	Mot Dismiss Granted	N	N	N	N	Y
31	SDNY	12/27/2002	02-10297	Mot Dismiss Granted	N	N	N	Y	Y
33	EDNY	1/2/2002	02-187	Voluntary Dismissal	N	N	Y	Y	N
34	EDNY	1/10/2002	02-437	Summ J Granted	N	N	N	Y	Y
35	EDNY	1/10/2002	02-457	Def Judgment	N	N	N	Y	Y

191. *See* KENNETH J. ROTHMAN & SANDER GREENLAND, MODERN EPIDEMIOLOGY 183-201 (2d ed. 1998).

Appendix Table 1. Raw Data

File No.	District	Date Filed	Docket	Disposition	Frivolous	Issue Joined	Success	Pro Se	Exhaust. Dismissal
36	EDNY	3/1/2002	02-1330	Voluntary Dismissal	N	N	Y	N	N
37	EDNY	2/28/2002	02-1307	Summ J Granted	N	N	N	Y	Y
38	EDNY	2/27/2002	02-1346	Def Judgment	N	N	N	Y	N
39	EDNY	3/20/2002	02-1725	Mot Dismiss Granted	N	N	N	N	N
40	EDNY	3/13/2002	02-1581	Voluntary Dismissal	N	N	Y	N	N
41	EDNY	3/6/2002	02-1681	Def Judgment	N	N	N	Y	N
43	EDNY	4/18/2002	02-2285	Summ J Granted	N	N	N	Y	N
44	EDNY	4/30/2002	02-2561	Mot Dismiss Granted	N	N	N	N	N
46	EDNY	7/1/2002	02-4296	Def Judgment	N	N	N	Y	N
47	EDNY	7/29/2002	02-4284	Mot Dismiss Granted	N	N	N	Y	N
48	EDNY	7/5/2002	02-3993	Summ J Granted	N	N	N	Y	Y
49	EDNY	7/23/2002	02-4049	Mot Dismiss Granted	N	N	N	Y	N
50	EDNY	7/11/2002	02-3965	Settled	N	N	Y	N	N
51	EDNY	8/30/2002	02-4794	Settled	N	N	Y	N	N
52	EDNY	9/25/2002	02-5284	Mot Dismiss Granted	N	N	N	Y	Y
53	EDNY	9/12/2002	02-5063	Mot Dismiss Granted	N	N	N	N	N
54	EDNY	10/8/2002	02-5383	Mot Dismiss Granted	N	N	N	Y	Y
55	EDNY	11/20/2002	02-6185	Mot Dismiss Granted	N	N	N	Y	Y
56	EDNY	12/19/2002	02-6746	Voluntary Dismissal	N	N	Y	Y	N
57	EDNY	12/18/2002	02-6753	Def Judgment	N	N	N	Y	N
58	SDTX	1/4/2002	02-51	Mot Dismiss Granted	N	N	N	Y	Y
60	SDTX	2/7/2002	02-58	Def Judgment	N	N	N	Y	N
61	SDTX	4/26/2002	02-1588	Def Judgment	N	N	N	Y	N
62	SDTX	4/9/2002	02-1346	Def Judgment	N	N	N	Y	N
63	SDTX	5/14/2002	02-1799	Summ J Granted	N	N	N	Y	N
64	SDTX	6/27/2002	02-132	Summ J Granted	N	N	N	N	N
65	SDTX	7/26/2002	02-3276	Def Judgment	Y	Y	N	Y	N
66	SDTX	9/9/2002	02-3416	Def Judgment	N	Y	N	Y	N
67	SDTX	11/27/2002	02-4468	Mot Dismiss Granted	N	N	N	Y	N
68	SDTX	12/23/2002	02-560	Def Judgment	Y	Y	N	Y	N
69	SDTX	12/4/2002	02-4524	Def Judgment	N	Y	N	Y	N
71	EDPA	1/23/2002	02-373	Def Judgment	Y	Y	N	Y	N
72	EDPA	1/24/2002	02-395	Mot Dismiss Granted	N	N	N	Y	N
73	NDIL	1/14/2002	02-130	Def Judgment	N	Y	N	Y	N
74	NDIL	1/7/2002	02-141	Mot Dismiss Granted	N	N	N	Y	N
75	EDPA	6/20/2002	02-3993	Mot Dismiss Granted	N	N	N	N	N
76	NDIL	2/28/2002	02-740	Mot Dismiss Granted	N	N	N	Y	Y
77	EDPA	9/13/2002	02-7294	Mot Dismiss Granted	N	N	N	Y	N
78	NDIL	4/9/2002	02-2389	Def Judgment	N	Y	N	Y	N
79	EDPA	12/3/2002	02-8857	Plff Judgment	N	N	Y	N	N
80	EDPA	12/30/2002	02-9496	Summ J Granted	N	N	N	N	N
82	NDIL	6/28/2002	02-44398	Def Judgment	N	Y	N	Y	N
83	NDIL	6/28/2002	02-2626	Def Judgment	N	Y	N	Y	N
84	NDIL	7/23/2002	02-4849	Summ J Granted	N	N	N	Y	Y
85	NDIL	9/26/2002	02-5938	Def Judgment	N	Y	N	Y	N
86	NDIL	9/27/2002	02-6500	Def Judgment	N	Y	N	Y	N

Appendix Table 1. Raw Data

File No.	District	Date Filed	Docket	Disposition	Frivolous	Issue Joined	Success	Pro Se	Exhaust. Dismissal
87	NDIL	10/30/2002	02-5988	Def Judgment	N	Y	N	Y	Y
88	NDIL	10/29/2002	02-7779	Def Judgment	Y	Y	N	Y	N
89	NDIL	11/20/2002	02-5749	Def Judgment	Y	Y	N	Y	N
91	NDIL	12/2/2002	02-8714	Summ J Granted	N	N	N	Y	N
93	EDNY	5/23/2003	03-2655	Def Judgment	N	N	N	Y	N
94	EDNY	1/9/2001	01-127	Settled	N	N	Y	N	N
99	EDNY	5/4/2001	01-2897	Mot Dismiss Granted	Y	N	N	Y	N
100	EDNY	8/13/2001	01-5447	Summ J Granted	N	N	N	N	N
103	EDNY	12/14/2001	01-8359	Voluntary Dismissal	N	N	Y	N	N
104	EDNY	12/14/2001	02-8360	Summ J Granted	N	N	N	N	N
105	EDNY	1/29/2001	01-517	Mot Dismiss Granted	N	N	N	Y	N
106	EDNY	4/23/2001	01-2521	Summ J Granted	N	N	N	Y	N
107	EDNY	5/3/2001	01-2808	Settled	N	N	Y	Y	N
108	EDNY	5/24/2001	01-3420	Def Judgment	Y	Y	N	Y	N
110	EDNY	7/30/2001	01-5065	Voluntary Dismissal	N	N	Y	Y	N
111	EDNY	7/20/2001	01-5295	Voluntary Dismissal	N	N	Y	Y	N
112	EDNY	8/8/2001	01-5464	Summ J Granted	N	N	N	Y	Y
113	EDNY	8/8/2001	01-5465	Mot Dismiss Granted	N	N	N	Y	Y
115	EDNY	10/25/2001	01-7321	Mot Dismiss Granted	N	Y	N	Y	Y
116	EDNY	11/15/2001	01-7753	Mot Dismiss Granted	N	Y	N	N	Y
117	EDNY	11/1/2001	01-7853	Settled	N	N	Y	Y	N
118	EDNY	12/6/2001	01-8298	Summ J Granted	N	N	N	Y	Y
119	EDNY	12/12/2001	01-8379	Def Judgment	Y	Y	N	Y	N
120	EDNY	3/30/2001	01-2009	Def Judgment	N	Y	N	Y	Y
121	EDNY	3/28/2001	01-1989	Mot Dismiss Granted	N	Y	N	N	Y
126	SDNY	3/28/2001	01-2662	Def Judgment	N	Y	N	Y	N
127	SDNY	3/13/2001	01-2123	Settled	N	N	Y	Y	N
128	SDNY	3/13/2001	01-2121	Voluntary Dismissal	N	N	Y	Y	N
130	SDNY	4/16/2001	01-3155	Def Judgment	N	Y	N	Y	N
131	SDNY	4/24/2001	01-3408	Def Judgment	N	Y	N	Y	N
135	SDNY	7/2/2001	01-6010	Mot Dismiss Granted	N	N	N	N	Y
136	SDNY	8/17/2001	01-7740	Def Judgment	N	Y	N	Y	N
137	SDNY	8/23/2001	01-7961	Settled	N	N	Y	N	N
139	SDNY	9/7/2001	01-8451	Def Judgment	N	Y	N	Y	N
140	SDNY	7/12/1999	99-5004	Summ J Granted	N	Y	N	Y	N
141	SDNY	11/19/2001	01-10222	Def Judgment	Y	Y	N	N	N
142	SDNY	11/28/2001	01-10720	Voluntary Dismissal	N	N	Y	Y	N
147	SDNY	12/6/2001	01-10938	Mot Dismiss Granted	N	Y	N	Y	N
149	SDNY	2/8/2001	01-987	Settled	N	N	Y	N	N
150	SDTX	1/12/2001	01-142	Def Judgment	Y	Y	N	Y	N
151	SDTX	1/28/2000	00-41	Def Judgment	Y	N	N	Y	N
152	SDTX	3/20/2001	01-45	Voluntary Dismissal	N	N	Y	N	N
153	SDTX	3/23/2001	01-136	Mot Dismiss Granted	N	N	N	Y	Y
154	SDTX	3/2/2001	01-751	Def Judgment	Y	Y	N	Y	N
158	SDTX	4/3/2001	01-1214	Summ J Granted	N	N	N	N	N
159	SDTX	4/12/2001	01-1252	Mot Dismiss Granted	Y	Y	N	Y	N

Appendix Table 1. Raw Data

File No.	District	Date Filed	Docket	Disposition	Frivolous	Issue Joined	Success	Pro Se	Exhaust. Dismissal
160	SDTX	5/24/2001	01-235	Voluntary Dismissal	N	N	Y	N	N
161	SDTX	5/29/2001	01-628	Def Judgment	N	Y	N	Y	N
163	SDTX	6/4/2001	01-1853	Def Judgment	Y	Y	N	Y	N
166	SDTX	7/23/2001	01-2473	Def Judgment	Y	Y	N	Y	N
167	SDTX	7/19/2001	01-2450	Def Judgment	Y	Y	N	Y	N
168	SDTX	8/15/2001	01-374	Def Judgment	N	N	N	Y	N
170	SDTX	8/21/2001	01-381	Mot Dismiss Granted	Y	N	N	Y	Y
171	SDTX	6/7/2000	00-238	Mot Dismiss Granted	N	Y	N	Y	Y
172	SDTX	10/30/2001	01-3779	Def Judgment	Y	Y	N	Y	N
173	SDTX	12/13/2001	01-4324	Summ J Granted	N	N	N	N	N
174	SDTX	12/21/2001	02-1742	Def Judgment	N	Y	N	Y	N
175	SDTX	12/18/2001	01-208	Mot Dismiss Granted	N	N	N	N	N
176	SDTX	12/12/2001	01-580	Def Judgment	N	Y	N	Y	N
177	SDTX	12/6/2001	01-298	Voluntary Dismissal	N	N	Y	N	N
178	SDTX	5/5/1997	97-1568	Summ J Granted	N	N	N	Y	N
179	SDTX	6/14/2001	01-99	Settled	N	N	Y	N	N
180	SDTX	5/14/2001	01-1613	Summ J Granted	N	N	N	N	N
181	SDTX	3/23/2001	01-1014	Summ J Granted	N	N	N	N	N
182	EDPA	12/17/1999	99-6467	Settled	N	N	Y	N	N
194	NDIL	1/16/2001	01-172	Def Judgment	N	Y	N	Y	N
198	EDPA	11/21/2001	01-5873	Mot Dismiss Granted	N	Y	N	N	N
200	NDIL	2/13/2001	00-8029	Def Judgment	N	Y	N	Y	N
202	NDIL	2/28/2001	00-8227	Def Judgment	N	Y	N	Y	N
203	NDIL	4/18/2001	01-802	Summ J Granted	N	N	N	Y	N
204	NDIL	4/12/2001	01-826	Def Judgment	Y	Y	N	Y	N
205	NDIL	4/4/2001	01-2357	Mot Dismiss Granted	N	Y	N	Y	N
206	NDIL	4/17/2001	01-2399	Def Judgment	Y	Y	N	Y	N
207	NDIL	4/16/2001	01-2729	Def Judgment	N	Y	N	Y	N
208	NDIL	5/2/2001	01-3198	Def Judgment	N	N	N	N	N
209	NDIL	6/1/601	01-2519	Def Judgment	Y	Y	N	Y	N
210	NDIL	6/1/601	01-3053	Def Judgment	N	Y	N	Y	N
211	NDIL	8/14/2001	01-6233	Voluntary Dismissal	N	N	Y	Y	N
212	NDIL	9/26/2001	01-6808	Voluntary Dismissal	N	N	Y	Y	N
213	NDIL	11/14/2001	01-6218	Def Judgment	Y	Y	N	Y	N
214	NDIL	11/19/2001	01-8387	Def Judgment	Y	Y	N	N	N
215	NDIL	12/12/2001	01-9477	Voluntary Dismissal	N	N	Y	N	N
229	EDPA	4/19/2001	01-1929	Mot Dismiss Granted	N	N	N	Y	N
230	EDPA	4/23/2001	01-1992	Def Judgment	N	N	N	Y	N
237	EDPA	8/8/2001	01-4022	Other	N	Y	N	Y	N
250	NDIL	1/8/2001	01-146	Summ J Granted	N	N	N	N	N
251	NDIL	9/6/2001	01-6913	Mot Dismiss Granted	N	N	N	N	N
252	NDIL	11/16/2001	01-8077	Mot Dismiss Granted	N	N	N	Y	N
253	EDNY	2/18/2003	03-862	Mot Dismiss Granted	N	N	N	N	N
254	EDNY	2/4/2003	03-627	Summ J Granted	N	Y	N	Y	Y
255	EDNY	2/4/2003	03-854	Summ J Granted	N	N	N	Y	N
256	EDNY	3/3/2003	03-1097	Def Judgment	Y	Y	N	Y	N

Appendix Table 1. Raw Data

File No.	District	Date Filed	Docket	Disposition	Frivolous	Issue Joined	Success	Pro Se	Exhaust. Dismissal
257	EDNY	3/7/2003	03-1130	Settled	N	N	Y	N	N
258	EDNY	4/3/2003	03-198	Voluntary Dismissal	N	N	Y	Y	N
259	EDNY	5/27/2003	03-2759	Voluntary Dismissal	N	N	Y	Y	N
260	EDNY	5/27/2003	03-2778	Mot Dismiss Granted	Y	N	N	Y	N
261	EDNY	6/4/2003	03-2924	Def Judgment	N	N	N	Y	N
262	EDNY	7/8/2003	03-3349	Voluntary Dismissal	N	N	Y	Y	N
263	EDNY	7/7/2003	03-3351	Def Judgment	N	Y	N	Y	N
264	EDNY	7/21/2003	03-3542	Settled	N	N	Y	N	N
265	EDNY	8/1/2003	03-3761	Def Judgment	Y	Y	N	Y	N
266	EDNY	8/22/2003	03-4195	Summ J Granted	N	N	N	N	N
267	EDNY	8/29/2003	03-4355	Def Judgment	Y	Y	N	Y	N
268	EDNY	9/24/2003	03-4870	Voluntary Dismissal	N	N	Y	N	N
269	EDNY	9/25/2003	03-4913	Def Judgment	Y	Y	N	Y	N
270	EDNY	9/29/2003	03-4915	Def Judgment	N	Y	N	Y	N
271	EDNY	9/24/2003	03-4959	Def Judgment	Y	Y	N	Y	N
272	EDNY	11/17/2003	03-5773	Summ J Granted	N	N	N	N	N
273	EDNY	11/3/2003	03-5553	Summ J Granted	N	N	N	N	N
274	EDNY	12/5/2003	03-6146	Mot Dismiss Granted	N	N	N	N	N
275	SDNY	2/19/2003	03-1105	Def Judgment	N	Y	N	Y	N
276	SDNY	2/13/2003	03-979	Def Judgment	N	Y	N	Y	N
277	SDNY	3/10/2003	03-1608	Mot Dismiss Granted	N	Y	N	Y	Y
278	SDNY	3/14/2003	03-1800	Mot Dismiss Granted	N	N	N	N	N
279	SDNY	3/19/2003	03-1916	Def Judgment	Y	Y	N	Y	N
280	SDNY	4/16/2003	03-2660	Mot Dismiss Granted	N	N	N	Y	N
281	SDNY	4/8/2003	03-2409	Def Judgment	Y	Y	N	Y	N
283	SDNY	4/28/2003	03-2970	Def Judgment	Y	Y	N	Y	N
286	SDNY	5/9/2003	03-3268	Def Judgment	N	Y	N	Y	N
288	SDNY	5/16/2003	03-3562	Def Judgment	N	Y	N	Y	N
290	SDNY	6/25/2003	03-4568	Mot Dismiss Granted	N	N	N	Y	N
291	SDNY	6/25/2003	03-4718	Def Judgment	N	Y	N	Y	N
293	SDNY	6/25/2003	03-4681	Def Judgment	N	Y	N	Y	N
295	SDNY	8/28/2003	03-6533	Def Judgment	Y	Y	N	Y	N
296	SDNY	8/25/2003	03-6456	Summ J Granted	N	N	N	Y	N
300	SDNY	10/14/2003	03-8107	Def Judgment	N	Y	N	Y	N
302	SDNY	10/16/2003	03-8152	Def Judgment	Y	Y	N	Y	N
303	SDNY	10/16/2003	03-8156	Def Judgment	Y	Y	N	Y	N
308	EDPA	2/12/2003	03-850	Mot Dismiss Granted	N	Y	N	Y	N
311	EDPA	5/14/2003	03-3091	Summ J Granted	N	N	N	Y	Y
312	EDPA	6/16/2003	03-3675	Summ J Granted	N	N	N	Y	Y
313	EDPA	7/25/2003	03-4337	Def Judgment	N	Y	N	Y	N
314	EDPA	7/29/2003	03-4414	Def Judgment	Y	Y	N	Y	N
315	EDPA	7/21/2003	03-4252	Def Judgment	Y	Y	N	Y	N
316	EDPA	8/11/2003	03-2632	Summ J Granted	N	N	N	Y	N
317	EDPA	8/22/2003	03-4825	Other	N	Y	N	Y	N
318	EDPA	10/8/2003	03-5611	Mot Dismiss Granted	N	Y	N	Y	N
319	EDPA	10/7/2003	03-5581	Def Judgment	Y	Y	N	Y	N

Appendix Table 1. Raw Data

File No.	District	Date Filed	Docket	Disposition	Frivolous	Issue Joined	Success	Pro Se	Exhaust. Dismissal
320	EDPA	11/4/2003	03-6077	Other	N	Y	N	Y	N
321	EDPA	12/30/2003	03-6916	Summ J Granted	N	N	N	Y	N
324	SDTX	1/15/2003	03-173	Def Judgment	N	Y	N	Y	N
325	SDTX	1/14/2003	03-155	Mot Dismiss Granted	N	N	N	Y	N
326	SDTX	2/14/2003	03-539	Def Judgment	N	Y	N	Y	N
327	SDTX	2/18/2003	03-62	Mot Dismiss Granted	N	N	N	Y	N
330	SDTX	3/11/2003	03-893	Def Judgment	N	Y	N	Y	N
331	SDTX	3/7/2003	03-52	Voluntary Dismissal	N	N	Y	N	N
332	SDTX	4/9/2002	02-1346	Def Judgment	N	Y	N	Y	N
333	SDTX	5/6/2003	03-1523	Def Judgment	N	N	N	Y	N
334	SDTX	5/12/2003	03-1609	Mot Dismiss Granted	N	N	N	Y	N
335	SDTX	5/29/2003	03-1902	Def Judgment	Y	Y	N	Y	N
336	SDTX	5/16/2003	03-191	Def Judgment	Y	Y	N	Y	N
337	SDTX	5/6/2003	03-182	Other	N	Y	N	Y	N
338	SDTX	6/23/2003	03-2222	Other	N	Y	N	Y	Y
339	SDTX	6/17/2003	03-2121	Def Judgment	N	Y	N	Y	N
340	SDTX	7/15/2003	03-300	Def Judgment	N	N	N	Y	N
341	SDTX	7/28/2003	03-2904	Summ J Granted	N	N	N	N	N
342	SDTX	7/28/2003	03-2912	Def Judgment	N	N	N	Y	N
343	SDTX	8/8/2003	03-05	Def Judgment	Y	Y	N	Y	N
344	SDTX	8/4/2003	03-3067	Def Judgment	N	Y	N	Y	N
345	SDTX	8/8/2003	03-3170	Def Judgment	Y	Y	N	Y	N
346	SDTX	9/29/2003	03-3951	Def Judgment	N	Y	N	Y	Y
347	SDTX	10/14/2003	03-4439	Def Judgment	Y	Y	N	Y	N
348	SDTX	10/22/2003	03-4875	Def Judgment	N	Y	N	Y	N
349	SDTX	10/24/2003	03-335	Mot Dismiss Granted	N	N	N	N	N
350	SDTX	10/10/2003	03-mc-74	Def Judgment	Y	Y	N	Y	N
351	SDTX	11/28/2003	03-185	Def Judgment	N	Y	N	Y	N
352	SDTX	12/15/2003	03-5752	Voluntary Dismissal	N	N	Y	Y	N
353	SDTX	9/18/2003	03-371	Settled	N	N	Y	N	N
354	NDIL	1/24/2003	03-50034	Mot Dismiss Granted	N	N	N	N	N
355	NDIL	3/21/2003	03-2074	Voluntary Dismissal	N	N	Y	N	N
356	NDIL	4/15/2003	03-2564	Def Judgment	N	Y	N	Y	Y
357	NDIL	9/5/2003	03-4637	Mot Dismiss Granted	N	Y	N	Y	Y
359	NDIL	9/12/2003	03-6163	Def Judgment	Y	Y	N	Y	N
360	NDIL	11/12/2003	03-6888	Def Judgment	N	Y	N	Y	N
361	NDIL	12/3/2003	03-7206	Settled	N	N	Y	Y	N

Appendix Table 2. Raw Success Rate by District, 2001-2003

District	*Bivens* Filings	Successful Suits (%)	95% CI
SDNY	51	6 (11.8%)	2.9-20.6%
EDNY	67	19 (28.4%)	17.6-39.2%
SDTX	64	7 (10.9%)	3.3-18.6%
EDPA	23	2 (8.7%)	-2.8-20.2%
NDIL	39	5 (12.8%)	2.3-23.3%
TOTAL	**244**	**39 (16.0%)**	**11.4-20.6%**

Appendix Table 3. Statistical Testing of Inter-District Comparison of Raw Success Rates

Comparison	Magnitude of Difference (95% CI)	Fisher's Exact Test (two-tailed)
EDNY-SDNY	2.69 (1.15-6.29)	0.023
EDNY-SDTEX	2.59 (1.17-5.75)	0.016
EDNY-EDPA	3.26 (0.82-12.94)	0.084
EDNY-NDIL	2.21 (0.90-5.46)	0.092
EDNY-All others	2.51 (1.43-4.40)	0.001
EDPA-SDNY	0.74 (0.16-3.39)	1
EDPA-SDTX	0.80 (0.18-3.55)	1
EDPA-NDIL	0.68 (0.14-3.22)	0.704
EDPA-All others	0.52 (0.13-2.02)	0.390
SDNY-SDTX	1.08 (0.39-3.00)	1
SDNY-NDIL	0.92 (0.30-2.79)	1
SDNY-All others	0.69 (0.31-1.55)	0.400
SDTX-NDIL	0.85 (0.29-2.50)	1
SDTX-All Others	0.62 (0.29-1.32)	0.237
NDIL-All Others	0.77 (0.33-1.85)	0.64

Appendix Table 4. Statistical Testing of Inter-District Comparison of Success Rates for Pro Se Filings

Comparison	Magnitude of Difference (95% CI)	Fisher's Exact Test (two-tailed)
EDNY-SDNY	2.39 (0.81-7.07)	0.146
EDNY-SDTEX	10.87 (1.45-81.64)	0.003
EDNY-EDPA	∞	0.050
EDNY-NDIL	2.32 (0.69-7.77)	0.220
EDNY-All others	3.91 (1.64-9.33)	0.003
EDPA-SDNY	0 (0-∞)	0.313
EDPA-SDTX	0 (0-∞)	1
EDPA-NDIL	0 (0-∞)	0.295
EDPA-All others	0 (0-∞)	0.226
SDNY-SDTX	4.55 (0.53-39.16)	0.182
SDNY-NDIL	0.97 (0.23-4.04)	1
SDNY-All others	0.94 (0.33-2.73)	1
SDTX-NDIL	0.21 (0.03-1.96)	0.294
SDTX-All Others	0.16 (0.02-1.20)	0.046
NDIL-All Others	0.99 (0.30-3.21)	1

Appendix Table 5. Statistical Testing of Inter-District Comparison of Success Rates for Counseled Filings

Comparison	Magnitude of Difference (95% CI)	Fisher's Exact Test (two-tailed)
EDNY-SDNY	1.5 (0.42-5.35)	0.668
EDNY-SDTEX	1.00 (0.46-2.18)	1
EDNY-EDPA	1.07 (0.33-3.49)	1
EDNY-NDIL	1.5 (0.42-5.35)	0.668
EDNY-All others	1.18 (0.60-2.30)	0.776
EDPA-SDNY	1.40 (0.29-6.86)	1
EDPA-SDTX	0.93 (0.27-3.20)	1
EDPA-NDIL	1.40 (0.29-6.86)	1
EDPA-All others	1.03 (0.33-3.19)	1
SDNY-SDTX	0.67 (0.18-2.49)	0.656
SDNY-NDIL	1.00 (0.19-5.24)	1
SDNY-All others	0.71 (0.21-2.40)	0.693
SDTX-NDIL	1.50 (0.40-5.60)	0.656
SDTX-All Others	1.14 (0.55-2.36)	0.758
NDIL-All Others	0.71 (0.21-2.40)	0.693

Appendix Table 6. Percentage of Frivolous Filings by District

District	*Bivens* Filings	Frivolous filings (%)
SDNY	51	12 (23.5%)
EDNY	67	9 (13.4%)
SDTX	64	17 (26.6%)
EDPA	23	4 (17.4%)
NDIL	39	8 (20.5%)
Total	**244**	**50 (20.5%)**

Appendix Table 7. Success Rate By District, Frivolous Claims Excluded, 2001-2003

District	*Bivens* Filings	Successful Suits (%)	95% CI
SDNY	39	6 (15.4%)	4.1-26.7%
EDNY	58	19 (32.8%)	20.7-44.8%
SDTX	47	7 (14.9%)	4.7-25.1%
EDPA	19	2 (10.5%)	-3.3-24.3%
NDIL	31	5 (16.1%)	3.2-29.1%
TOTAL	194	39 (20.1%)	14.5-25.7%

Appendix Table 8. Statistical Testing of Inter-District Comparisons of Success Rates, Frivolous Claims Excluded

Comparison	Magnitude of Difference (95% CI)	Fisher's Exact Test (two-tailed)
EDNY-SDNY	2.13 (0.94-4.85)	0.062
EDNY-SDTEX	2.20 (1.01-4.78)	0.042
EDNY-EDPA	3.11 (0.80-12.15)	0.077
EDNY-NDIL	2.03 (0.84-4.91)	0.133
EDNY-All others	2.23 (1.29-3.85)	0.006
EDPA-SDNY	0.68 (0.15-3.08)	0.709
EDPA-SDTX	0.71 (0.16-3.10)	0.719
EDPA-NDIL	0.65 (0.14-3.04)	0.695
EDPA-All others	0.50 (0.13-1.90)	0.374
SDNY-SDTX	1.03 (0.38-2.8)	1
SDNY-NDIL	0.95 (0.32-2.84)	1
SDNY-All others	0.72 (0.33-1.60)	0.506
SDTX-NDIL	0.92 (0.32-2.65)	1
SDTX-All Others	0.68 (0.32-1.45)	0.40
NDIL-All Others	0.77 (0.33-1.82)	0.633

Appendix Table 9. Success Rate By District, Issue Joined, 2001-2003

District	*Bivens* Filings	Successful Suits (%)	95% CI
SDNY	20	6 (30.0%)	9.9-50.1%
EDNY	51	19 (37.3%)	23.4-50.5%
SDTX	30	7 (23.3%)	8.2-38.5%
EDPA	12	2 (16.7%)	-4.4-37.8%
NDIL	15	5 (33.3%)	9.5-57.2%
TOTAL	128	39 (30.5%)	22.5-38.4%

Appendix Table 10. Statistical Testing of Inter-District Comparisons of Success Rates, Issue Joined

Comparison	Magnitude of Difference (95% CI)	Fisher's Exact Test (two-tailed)
EDNY-SDNY	1.24 (0.58-2.65)	0.596
EDNY-SDTEX	1.60 (0.76-3.35)	0.226
EDNY-EDPA	2.24 (0.60-8.32)	0.307
EDNY-NDIL	1.12 (0.50-2.49)	1
EDNY-All others	1.43 (0.85-2.41)	0.239
EDPA-SDNY	0.56 (0.13-2.32)	0.676
EDPA-SDTX	0.71 (0.17-2.96)	0.707
EDPA-NDIL	0.50 (0.12-2.14)	0.408
EDPA-All others	0.52 (0.14-1.90)	0.343
SDNY-SDTX	1.29 (0.51-3.27)	0.744
SDNY-NDIL	0.90 (0.34-2.40)	1
SDNY-All others	0.98 (0.47-2.03)	1
SDTX-NDIL	0.70 (0.27-1.84)	0.722
SDTX-All Others	0.72 (0.35-1.45)	0.374
NDIL-All Others	1.11 (0.51-2.39)	1

Appendix Table 11. Results of Reverse Engineering Data Collection

District	Total Reported Bivens Cases	Cases coded AO 440, 550, or 555	Cases designated as US Govt Deft	Other Codes (Not US Govt Deft)
SDNY	97	70 (72%)	18 (19%)	9 (9%)
EDNY	70	48 (69%)	20 (29%)	2 (3%)
EDPA	42	35 (83%)	6 (14%)	1 (2%)
NDILL	38	25 (66%)	10 (26%)	3 (8%)
SDTEX	37	28 (76%)	7 (19%)	2 (5 %)
All Districts	284	206 (73%)	61 (21%)	17 (6%)