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ZERO TO HERO: THE UNAVAILABILITY OF *BIVENS* AND WHY CONGRESS SHOULD INTERVENE

Amanda Pulido[*]

ABSTRACT

In *Bivens*, the Supreme Court held that although 42 U.S.C. § 1983 is silent as to its application to federal agents, the plaintiff had an implied cause of action against federal agents for violation of his constitutional rights. Since this decision, the Court has heavily narrowed the implied *Bivens* cause of action and punted the decision to Congress to codify a cause of action against federal agents. As the law currently stands, plaintiffs must overcome a confusing framework that conflates constitutional merits with whether a cause of action exists, affords extreme deference to executive decisions, and is presumptively unavailable. In June of 2020, federal agents were deployed to cities throughout the United States to end recurring protests against police brutality and systemic racism. Federal agents used excessive force to remove protestors, resulting in several lawsuits. However, because of *Bivens*' narrow application, a remedy is unavailable. In contrast, the plaintiffs could sue if officers acting under color of state or local law had used excessive force, using § 1983 as a vehicle to remedy their injuries. Whether an agent acts under color of state or federal law should not be the determining factor in deciding whether a remedy is available. This comment will discuss the flaws in the current *Bivens* framework, recognizing why a codified *Bivens* is necessary. Further, this comment will address how a codified *Bivens* would look, analyzing: who could be sued, for what rights a codified *Bivens* would apply, and how a codified *Bivens* would interact with other areas of civil rights law.

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I. INTRODUCTION

In the Summer of 2020, the killings of Ahmaud Arbury,[1] George Floyd,[2] Breonna Taylor,[3] and more[4] by law enforcement caused a ripple effect throughout the nation, as Americans began to protest police brutality and the injustices minorities face.[5] Protests demanding more from law enforcement officials[6] occurred in every major city: some peaceful,[7] others not. On June 1, 2020, unidentified federal agents deployed riot tactics to end a peaceful protest in Lafayette Square.[8] Demonstrators were protesting several injustices that plagued the nation and were instead met with an illustration of the problem. Federal agents tear-gassed and violently removed

1 *Ahmaud Arbery: What You Need to Know About the Case*, BBC NEWS (Nov. 22, 2021), https://www.bbc.com/news/world-us-canada-52623151.

2 Bill McCarthy, *The Death of George Floyd: What You Need to Know*, POLITIFACT (May 29, 2020), https://www.politifact.com/article/2020/may/29/death-george-floyd-what-you-need-know/.

3 *What Happened to Breonna Taylor?*, WALL ST. J. ONLINE (Oct. 2, 2020), https://plus.lexis.com/api/permalink/be216ee8-8a45-4288-a499-19ace4f3ea47/?context=1530671.

4 George Floyd: *Timeline of Black Deaths and Protests*, BBC NEWS (Apr. 22, 2021), https://www.bbc.com/news/world-us-canada-52905408.

5 *See* Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME MAG. (June 4, 2020, 6:49 AM), https://time.com/5847967/george-floyd-protests-trump/.

6 *See* Martin Austermuhle, *Here's What Black Lives Matter D.C. Is Calling for*, *and Where the City Stands,* NPR (June 9, 2020), https://www.npr.org/local/305/2020/06/09/872859084/here-s-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands.

7 *See* Sanya Mansoor, *93% of Black Lives Matter Protests Have Been Peaceful*, *New Report Finds,* TIME MAG. (Sept. 5, 2020, 11:47 AM), https://time.com/5886348/report-peaceful-protests/.

8 Tom Gjelten, *Peaceful Protesters Tear-Gassed to Clear Way for Trump Church Photo-Op*, NPR (June 1, 2020, 11:50 PM), https://www.npr.org/2020/06/01/867532070/trumps-unannounced-church-visit-angers-church-officials.

demonstrators.[9] The Washington D.C. chapter of the American Civil Liberties Union ("ACLU")—on behalf of Black Lives Matter D.C. and the citizens injured—immediately filed suit against Attorney General Barr, the unidentified federal agents, and other federal officials.[10]

The District Court for the District of Columbia dismissed all of the plaintiffs' claims against federal officials, finding that no remedy was available to the plaintiffs.[11] If state or local officials had violated one of these citizens' constitutional rights, a claim could be established through 42 U.S.C. § 1983, which provides redress for constitutional violations committed by officials acting under color of state law.[12] However, no federal counterpart currently exists, and because federal agents violated these Americans' rights, it will be difficult for these citizens to receive any remedy.

In *Bivens*, the Supreme Court recognized an implied cause of action through § 1983 against federal officials for a violation of an individual's constitutional rights.[13] Since then, the Court has expressed its hesitation towards extending *Bivens* further, in fear of legislating from the bench.[14] Thus, the current state of the *Bivens* doctrine provides a very limited opportunity for redress and requires plaintiffs to follow a very confusing framework.[15] In the Court's most recent *Bivens* decisions, the Court emphasized that extending *Bivens* was a "'disfavored' judicial activity,"[16] and hinted that if the Court's past *Bivens* decisions had been decided by the current Court, the Court would reject those claims.[17] A codified *Bivens* is therefore necessary to hold federal officials accountable and provide a right to redress to individuals whose constitutional rights were violated by a federal agent or agency.

This comment will address the unavailability of redress from constitutional violations by federal officials, the need for Congress to codify *Bivens*, and what a codified *Bivens* would look like. Section II of this comment will provide a brief background of § 1983 and the development of

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9 *Id.*

10 Plaintiff's Complaint, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469 (D.D.C. June 4, 2020).

11 Memorandum Opinion at 9, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469 (D.D.C. June 21, 2021) ("[T]he *Bivens* claims must be dismissed because an extension of the *Bivens* remedy to this 'new context' is unwarranted.") (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1859 (2017)).

12 *See* 42 U.S.C.S. § 1983 (2020); *see also* Martin A. Schwartz, *Excessive Force Claims Against Federal Officers*, 264 N.Y. L. J., at 1 (2020) (discussing the disparities between § 1983 and the lack of a federal counterpart, and the history of the *Bivens* doctrine).

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

14 *See infra* Part II.

15 *See infra* Part II.

16 Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

17 Hernandez v. Mesa, 140 S. Ct. 735 (2020).

the current state of the *Bivens* doctrine. This section first introduces § 1983 as a check on state and local law enforcement. Next, the introduction of the *Bivens* case, its expansion, and the Court's quick hesitation and punt back to Congress. Lastly, the current state of the *Bivens* doctrine and the lack of redress for citizens whose constitutional rights have been violated by federal agents.

Section III of this comment will consider the clearing of Lafayette Square[18] and the resulting lawsuit.[19] This section will use the case as an illustration of how the current *Bivens* doctrine fails plaintiffs. Also, this section shows how no redress is available when federal agents violate an individual's rights and essentially proves why a codified *Bivens* is necessary to remedy violations of an individual's constitutional rights.

Finally, Section IV of this comment will dissect how a codified *Bivens* would look and interact with other areas of civil rights law. First, this section will address why Congress is best positioned to intervene and codify a cause of action against federal agents. Next, this section will dissect what a codified *Bivens* should look like, including who would be liable under the statute and the scope of rights covered. Further, this section will address the policy implications of a *Bivens* statute, the ramifications a codified *Bivens* could cause throughout the federal government, and how a codified *Bivens* would impact ongoing litigation.[20]

This comment is the beginning of necessary reform but is in no way the final solution. Both Congress and the Court must continue to learn from its mistakes and strive towards improvement. A codified *Bivens* provides direction from Congress, clarity in the courts, and an opportunity to afford redress for citizens. Fixing this gap would allow plaintiffs to bring a claim against federal agents to remedy constitutional violations.

II. HOW *BIVENS* FAILED TO GO THE DISTANCE

A. *42 U.S.C. § 1983 and* Bivens

The statute that codifies a right to redress for constitutional violations by state/local officials, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

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18 Gjelten, *supra* note 8.

19 Plaintiff's Complaint, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469 (D.D.C. June 4, 2020).

20 *See supra* note 11.

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[21]

Section 1983 provides a civil remedy for individuals whose constitutional rights were violated by state actors.[22] Enacted as a response to racial violence throughout the states, the federal government wanted to create an adequate remedy to protect formerly enslaved peoples.[23] No federal equivalent of § 1983 was enacted because law enforcement primarily operated under color of state and local law at the time of § 1983's creation in 1871.[24] The original language of § 1983 made every person liable who, under color of law of any "state," deprived another of her constitutional rights.[25]

In *Monroe*, the Court "breathed new life into the moribund statute, . . . broadly construe[ing] the statute's key phrase 'under color of any [state law]' to cover even acts by state officers committed without state authorization."[26] However, no statutory basis exists to provide a right to redress for individuals whose rights were violated by federal officials. Congress never created a federal counterpart to § 1983. The federal government cannot be sued because it enjoys sovereign immunity, which prevents individuals from suing the United States *eo nomine*, or "by its name."[27] The Federal Tort Claims Act allows limited opportunities for redress.[28] Essentially, if a state official violated an individual's constitutional rights, § 1983 provided a remedy. But

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21 42 U.S.C. § 1983.

22 *Id.*

23 Ku Klux Klan Act of 1871, 42 U.S.C. § 1983.

24 *Id.*

25 An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, H.R. 320, 42nd Cong. Ch. 22 (1871).

26 Eric H. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 500–01 (1985) (discussing a reconstructed § 1983 after the decision of *Monroe v. Pape*); *see* Monroe v. Pape, 365 U.S. 167, 186–87 (1961).

27 Cohens v. Virginia, 19 U.S. 264, 372 (1821) (concluding that sovereign immunity is a "universally recognized opinion").

28 James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 CALIF. REV. 737, 772 (2019).

if the same constitutional violation occurred by a federal official, no parallel codified right to redress exists.

Nonetheless, since the creation of § 1983, the federal government's powers have grown exponentially.[29] The increased capacity of the federal government's law enforcement powers also increased the number of complaints of abuse. In 1971, the Supreme Court recognized an implied cause of action under § 1983 against federal agents.[30] In *Bivens*, the petitioner argued six federal narcotics agents violated his Fourth Amendment rights after the agents entered his home without a warrant or probable cause, arrested the petitioner in front of his family, threatened to arrest his family, and then mistreated the petitioner at the police station.[31] The Fourth Amendment—which protects individuals from unreasonable searches and seizures—does not expressly provide for a remedy, and § 1983 did not apply to federal officials, thus providing no explicit remedy in this case.[32]

A five Justice majority concluded that the petitioner could pursue a damages claim, implying a cause of action through the Constitution itself.[33] Writing for the majority, Justice Brennan concluded that the Fourth Amendment operated as a check against federal power regardless of the rights accorded by state tort law.[34] Further, state laws regulating trespass and the invasion of privacy differed from the rights protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, which may be "inconsistent or even hostile."[35] While an individual can bar the door against unwelcome intruders, federal authorities were more difficult to resist and were more likely to unlock the door.[36]

Recognizing a right existed, the Court determined that the best remedy was money damages. Damages have historically been recognized as the typical remedy for personal injuries.[37] The Fourth Amendment guaranteed the right to be free from unreasonable searches and seizures carried out by federal agents, and "[w]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their

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29 *See generally An Overview of the Federal Police*, POLICE1 (Aug. 1, 2010), https://www.police1.com/archive/articles/an-overview-of-the-federal-police-force-3lUfL7uRZ5zjdWbT/.

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

31 *Id.* at 389.

32 *Id.*

33 *Id.* at 392.

34 *Id.*

35 *Id.* at 394.

36 *Id.*

37 *Id.* at 395.

remedies so as to grant the necessary relief."[38] Congressional silence was not dispositive,[39] for "the question [was] merely whether petitioner, if he [could] demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, [was] entitled to redress his injury through a particular remedial mechanism normally available in the federal courts."[40] The Court concluded that because the petitioner stated a Fourth Amendment violation, he was entitled to recover money damages.[41] When the Supreme Court decided *Bivens*, the Court created an implied cause of action under § 1983 against federal agents, even though § 1983 was silent as to its application to federal officials.[42]

Justice Harlan took a different approach in his concurring opinion, but ultimately reached the same conclusion as the majority. Justice Harlan began from 28 U.S.C. § 1331(a)'s jurisdictional grant to federal district courts over all civil actions "arising under" the Constitution and laws.[43] Once the Court has jurisdiction, the Court can grant any equitable remedy available, including injunctions. If the Court could award an injunction, the Court had the power to award damages.[44] Justice Harlan recognized this was a case of "damages or nothing," meaning that no other adequate remedy existed. The petitioner could not sue the United States because the federal government had not waived sovereign immunity; the exclusionary rule was not applicable because no charges had been filed against the petitioner, and thus no evidence could be excluded; and an injunction could not remedy past harm.[45] Justice Harlan concluded that because no other remedy was available, the petitioner should receive money damages.[46]

In his majority opinion, Justice Brennan outlined two limitations where a *Bivens* remedy would have been unavailable: (1) if "special factors counsel hesitation";[47] or (2) if Congress has provided a satisfactory statutory alternative.[48] Although the Court in *Bivens* did not invoke such limitations, these limitations have shaped subsequent cases, significantly limiting the remedies available when an individual's rights have been violated by a federal agent.

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38 *Id.* at 392.

39 *Id.* at 397.

40 *Id.*

41 *Id.*

42 *See id.* at 389.

43 *Id.* at 399–400.

44 *Id.* at 400–06.

45 *Id.* at 410.

46 *Id.* at 396.

47 *Id.*

48 *Id.* at 397.

B. *Case Law After* Bivens

For a decade following *Bivens*, lacking action from Congress, courts extended and applied the holding in *Bivens*.[49] For example, in *Davis*, the Supreme Court extended *Bivens* to provide a remedy in an employment-discrimination claim for an Equal Protection violation under the Fifth Amendment brought by a former congressional staffer against her former employer.[50] In *Carlson*, the Supreme Court extended *Bivens* to provide a remedy in a medical malpractice claim for a violation of the Eighth Amendment by a prison doctor, even though an alternative remedy was available through the Federal Tort Claims Act ("FTCA").[51] The Court has also assumed a *Bivens* remedy existed for violations of free speech[52] and freedom of religion.[53] However, the expansion of *Bivens* remedies was short-lived and soon met resistance.

In every other context considered, the Court has rejected *Bivens* claims for falling in one of the limitations outlined in Justice Brennan's majority opinion in *Bivens*.[54] In *Bush*, a NASA employee brought a First Amendment free speech claim against his employer.[55] The Court refused to "create a new substantive legal liability without legislative aid,"[56] because, "Congress is in a better position to decide whether or not the public interest would be served by creating it."[57] In both *Chappell*[58] and *Stanley*,[59] the Court rejected due process claims brought by military personnel. In *Chappell*, the Court reasoned that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers."[60] In *Stanley*, the Court

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49 Michael A. Rosenhouse, Annotation, *Bivens Actions—United States Supreme Court Cases*, 22 A.L.R. Fed. 2d 159, 1, 4.

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

51 Carlson v. Green, 446 U.S. 14 (1980). *But see* Minneci v. Pollard, 565 U.S. 118 (2012). In *Minneci*, the Supreme Court rejected a prisoner's Eighth Amendment medical malpractice claim after a federal prison guard allegedly denied the prisoner medical care. The Court held that an alternate remedy existed because a private company ran the federal prison, and thus the prisoner could sue the guard and the company under state tort law. *Minneci*, 565 U.S. at 130.

52 Wood v. Moss, 572 U.S. 744 (2014); Reichle v. Howards, 566 U.S. 658 (2012).

53 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

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

55 Bush v. Lucas, 462 U.S. 367, 389 (1983).

56 *Id.* at 390 (quoting United States v. Standard Oil, 332 U.S. 301, 302 (1947)).

57 *Id*.

58 Chappell v. Wallace, 462 U.S. 296 (1983).

59 United States v. Stanley, 483 U.S. 669 (1987).

60 *Chappell*, 462 U.S. at 304.

concluded that the disruption caused by "judicial intrusion upon military discipline" was a special factor to counsel hesitation in application of the remedy.[61] In *Schweiker*, the Court rejected a Fifth Amendment procedural due process claim by social security recipients because an adequate remedy already existed.[62] In each case, the Court attempted to tiptoe through Congress's waters—essentially legislating a remedy for constitutional violations by federal officials—expressing its hesitation to extend *Bivens* remedies in different contexts.

The Court's decision in *Wilkie* made its stance on *Bivens* claims clear when the majority of the Court concluded that the default or presumption is to not allow *Bivens* claims beyond the limited circumstances already recognized because, "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf."[63] The majority in *Wilkie* was concerned that if the Court extended a *Bivens* action into this context, it would open the floodgates to a host of unworthy suits.[64] In her dissent, Justice Ginsburg pointed to § 1983, or the "controlled experiment."[65] If unworthy § 1983 suits did not flood courts, there was no reason to believe that courts would be overwhelmed by *Bivens* suits.[66]

Justice Ginsburg also argued that the default of *Bivens* was that the case should go forward unless the case arose in one of the special circumstances.[67] Essentially, the Court has progressed from extending *Bivens* in the first decade following its decision to not extending *Bivens* any further. The Court has consistently expressed hesitation regarding overstepping its powers, yet throughout the years, Congress has yet to codify a *Bivens* remedy. Notably, most of these cases were not a "damages or nothing" scenario,[68] each of these cases had other administrative schemes or remedies available.

C. *The Westfall Act*

In 1988, Congress passed the Westfall Act. The Westfall Act amended the Federal Tort Claims Act ("FTCA"), waiving sovereign immunity for the

61 *Stanley*, 483 U.S. at 681–83.

62 Schweiker v. Chilicky, 487 U.S. 412, 425 (1988).

63 Wilkie v. Robbins, 551 U.S. 537, 562 (2007) (quoting Bush v. Lucas, 462 U.S. 367, 389 (1983)).

64 *Id.* at 560.

65 *Id.* at 581.

66 *Id.* at 581.

67 *Id.* at 577.

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

federal government for constitutional tort claims.[69] When enacted in 1946, the FTCA authorized civil actions against the United States for tort claims caused by the negligence or wrongful act of a federal employee acting within the scope of his employment.[70] The FTCA as enacted exempted intentional torts. Congress first amended the FTCA after (and arguably in light of) *Bivens* in 1974 to permit suits alleging intentional tort violations committed by federal law enforcement officers.[71] At the time, the Court viewed the FTCA and *Bivens* as parallels, as well as state law remedies against federal officers.[72] When Congress passed the Westfall Act in 1988, it made the FTCA the exclusive tort damages remedy against the United States, preempting all non-federal remedies against federal employees acting within the scope of their employment.[73]

The Westfall Act made the FTCA the exclusive remedy, but also codified some limitations on the FTCA, including: (1) the amendment does not encompass claims against non-law enforcement officers for intentional torts[74]; (2) claims arising out of a federal agent's discretionary duties;[75] and (3) claims arising out of military service.[76] Most importantly, the Westfall Act explicitly barred claims against the United States that alleged a constitutional violation.[77]

D. Bivens *as the Exception, not the Norm*

The *Bivens* decision reflected a trend of implying rights recognized by the Court at the time. The Court has made it clear since then that constitutionally based suits against federal agents are the exception; the norm is to deny these suits.[78] In a post-9/11 world, the Court rejected each *Bivens* claim[79] for foreign citizens alleging mistreatment or torture by federal U.S. officials while detained because the "special factors" of foreign policy,

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69 28 U.S.C. § 1346(b).

70 Federal Tort Claims Act § 410(a), 60 Stat. at 842–44 (current version at 28 U.S.C. § 1346(b)(1)).

71 *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50.

72 Carlson v. Green, 446 U.S. 14, 19–20 (1980).

73 28 U.S.C. § 2679(b).

74 28 U.S.C. § 2680(h).

75 28 U.S.C. § 2680(a).

76 28 U.S.C. § 2680(j).

77 28 U.S.C. § 2679(b)(2)(A).

78 *See* Alexander J. Lindvall, Essay, *New Contexts and Special Factors: The Courts New* Bivens *Framework*, 43 U. ARK. LITTLE ROCK L. REV. 63, 77 (2020) (quoting Hernandez v. Mesa, 140 S. Ct. 735, 741–42 (2020)).

79 *See* Katrina Carmichael, Note & Comment, *The Unconstitutional Torture of an American by the U.S. Military: Is There a Remedy Under* Bivens*?*, 29 GA. ST. U.L. REV. 1093, 1099 (2013) (critiquing the courts inconsistent response to claims brought by those who were tortured by military officials).

national security, and military autonomy counselled hesitation.[80] The Court also rejected torture claims brought under *Bivens* by American citizens.[81] In *Abbasi*, the Court concluded that extending *Bivens* to new claims was a "disfavored judicial activity,"[82] further emphasizing the Court's hesitation towards creating implicit legislation.

In *Abbasi*, the federal government detained several Muslim-American immigrants, holding the prisoners in a detention center in Brooklyn without bail.[83] The detainees alleged they were subject to torturous mistreatment.[84] The Court, in a 4-2 decision, rejected the *Bivens* claim, expressing its skepticism towards recognizing implied causes of actions.[85] Justice Kennedy, writing for the majority, explained this trend towards *Bivens* actions being the exception rather than the norm, stating that *Bivens* cases must be understood in the context of the prevailing law in which they were decided.[86] In the time when *Bivens* was decided, the Court followed a different approach in recognizing implied actions.[87] Justice Kennedy further stated the Court is now cautious towards advancing *Bivens* claims.[88] The Court then adopted a two-step inquiry for analyzing *Bivens* claims. First, the Court must ask whether the case is different in a "meaningful way."[89] The Court provided a non-exhaustive list to aide in this analysis:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.[90]

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80 *See, e.g.*, Ali v. Rumsfeld, 649 F.3d 762, 773 (D.C. Cir. 2011); Arar v. Ashcroft, 585 F.3d 559, 565 (2d Cir. 2009).

81 *See, e.g.*, Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390 (D.C. Cir. 2012); Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

82 Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

83 *Id.* at 1852–53.

84 *Id.* at 1853.

85 *Id.*

86 *Id.* at 1855–58.

87 *Id.* at 1855.

88 *Id.*

89 *Id.* at 1859–60.

90 *Id.* at 1860.

If the context is "not new," the case may proceed. But, the Court will move to step two if the case arises in a new context. In step two, the Court must decide whether there are any "special factors" that advise against extending *Bivens* in the presented case.[91] The Court did not create an exhaustive list, but mentioned that courts should look to (1) whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" and (2) "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."[92] The case should be dismissed if courts find any "special factors" weighing against the *Bivens* suit.[93]

The Court ultimately decided in *Abbasi* that the case arose in a new context and special factors counselled hesitation, therefore rejecting the claim.[94] First, the Court concluded that the context was "new" because the claim "challenge[d] the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil."[95] Next, the Court concluded that four special factors existed that counselled hesitation: (1) the claims challenged the processes of executive agencies, where discovery of the case would cause the Court to inappropriately interfere with the sensitive functions of the executive branch;[96] (2) the claims required inquiry into the government's response to 9/11, but the courts must give deference to the government's approach to national security;[97] (3) Congressional silence on the issue despite public attention to the government's response;[98] and (4) this was not a case of "damages or nothing," meaning the plaintiffs could receive relief elsewhere.[99] Hence, because these special factors were present, the Court denied the detainees' *Bivens* suit.

After *Abbasi*, it was unclear how limited this decision was. Specifically, how "different" a case could be from the three cases previously recognized before the difference was meaningful enough to arise in a new context.[100] *Hernandez v. Mesa* cleared that confusion. In *Hernandez*, the parents of a

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91 *Id.* at 1857.

92 *Id.* at 1858.

93 *Id.* at 1857.

94 *Id.* at 1862–63.

95 *Id.* at 1860.

96 *Id.* at 1860–61.

97 *Id.* at 1861–62.

98 *Id.* at 1862.

99 *Id.* at 1862–63.

100 Alex Langsman, *Breaking* Bivens*?: Falsification Claims After* Ziglar v. Abbasi *and Reframing the Modern* Bivens *Doctrine*, 88 FORDHAM L. REV. 1395, 1407–08 (2020).

deceased Mexican fifteen-year-old citizen brought a *Bivens* suit against the Border Patrol officer who shot their son.[101] The parents argued that the officer violated their son's Fourth and Fifth Amendment rights.[102] When the agent shot Hernandez, the agent was on the United States side of the border, but Hernandez was on the Mexican side of the border.[103] The Court first decided the case a week after *Abbasi*, and remanded the case for the lower court to conduct a special factors analysis in light of *Abbasi*.[104] Afterwards, in a 5-4 decision, the Court applied the framework adopted in *Abbasi* and held that *Bivens* did not extend to the present case.[105]

On its face, *Hernandez* closely resembled *Bivens* itself: both cases involved a Fourth Amendment violation for excessive force challenging the conduct of a federal agent.[106] However, *Hernandez* involved a cross-border shooting and a Mexican national.[107] These differences led the Court to conclude that the case was different in a meaningful way from prior *Bivens* suits.[108] Because the case arose in a new context, the Court considered whether any special factors counselled hesitation.[109] The Court found multiple special factors counselled hesitation, including: (1) the potential effect on foreign relations;[110] and (2) the national security implications which could arise.[111] Because special factors counselled hesitation, the Court concluded that no cause of action was available.[112]

The *Hernandez* Court made it clear that the days of inferring causes of action were long gone,[113] noting that if *Bivens*, *Davis*, and *Carlson* had been decided today, "it is doubtful that [the Court] would have reached the same result."[114] Although the Court did not overrule *Bivens*, if the Court has any "reason to pause" before applying *Bivens* in a new context, the Court will reject the *Bivens* suit.[115] Essentially, if the case is not virtually identical to

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101 Hernandez v. Mesa, 140 S. Ct. 735, 740 (2020).

102 *Id.*

103 *Id.*

104 Hernandez v. Mesa, 137 S. Ct. 2003, 2006–08 (2017).

105 *Hernandez*, 140 S. Ct. at 739.

106 *See id.* at 740; Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390 (1971).

107 *Hernandez*, 140 S. Ct. at 740.

108 *Id.* at 743.

109 *Id.* at 744–49.

110 *Id.* at 744.

111 *Id.* at 746.

112 *Id.* at 750.

113 *Id.* at 741–44.

114 *Id.* at 742–43.

115 *Id.* at 743.

Bivens, *Davis*, or *Carlson*, the Court will reject the claim.[116] This framework makes it extremely difficult for plaintiffs to receive redress and fails to hold federal officials accountable for their actions. While an official acting under color of state law can be held liable for violating an individual's rights,[117] the official would not be held liable if acting under color of federal law. However, an individual has a right to claim protection of the laws when her rights have been violated.[118]

III. THE REALITY OF NO *BIVENS* REMEDY

A. *The Clearing of Lafayette Square*

Despite the Court's ultimatum, Congress has not proposed legislation to codify a *Bivens* action.[119] Yet, a few months after the *Hernandez* decision, Black Lives Matter protests swept the nation,[120] many occurring right outside of Congress's door.[121] Beginning on May 29, 2020, demonstrators began to gather in Lafayette Square,[122] a public venue located directly across Pennsylvania Avenue from the White House that is frequently used as a protest location.[123] On June 1, 2020, demonstrators gathered in Lafayette Square once again to protest police brutality in America.[124] Donned in riot gear, local and federal law enforcement, as well as the military, surrounded the demonstrators.[125] Attorney General Barr entered Lafayette Square and pointed towards St. John's Church, where President Donald Trump would

116 Lindvall, *supra* note 78, at 79.

117 42 U.S.C. § 1983.

118 *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

119 *See* Cori Alonso-Yoder, *Police Reform Must Also Address Federal Law Enforcement*, LAW360 (June 14, 2020, 8:02 PM), https://www.law360.com/access-to-justice/articles/1282432 (discussing the proposed reform and how it must incorporate federal law enforcement accountability).

120 Leah Millis, *US Saw Summer of Black Lives Matter Protests Demanding Change*, REUTERS, https://widerimage.reuters.com/story/us-saw-summer-of-black-lives-matter-protests-demanding-change (last updated Dec. 10, 2020).

121 Patricia Sullivan et al., *Thousands Gathered Across City to Protest Death of George Floyd*, WASH. POST (June 7, 2020), https://www.washingtonpost.com/dc-md-va/2020/06/06/dc-protests-saturday-george-floyd/.

122 Clarence Williams et al., *Demonstrations for George Floyd Lead to Clashes Outside White House*, WASH. POST (May 30, 2020), https://www.washingtonpost.com/local/public-safety/demonstration-for-george-floyd-shuts-down-dc-intersection/2020/05/29/af7b5d40-a1f9-11ea-b5c9-570a91917d8d_story.html.

123 Plaintiff's Complaint at 8, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469-DLF (D.D.C. June 4, 2020).

124 *Id.* at 11.

125 *Id.* at 12.

soon make an appearance.[126] Thirty minutes later, law enforcement officers deployed riot tactics on the crowd, firing flash-bang shells, tear gas, smoke canisters, pepper balls, and rubber bullets into the crowd.[127] Officers "hit, punched, shoved, and otherwise assaulted the demonstrators with their fists, feet, batons, and shields."[128] The Department of Justice later acknowledged that Attorney General Barr ordered the subsequent attack on demonstrators.[129] However, this was just the beginning. The weeks that followed found anonymous federal forces deployed to major cities across America, taking drastic actions to "diffuse" the situation.

After the clearing of Lafayette Square, the Washington D.C. chapter of the ACLU filed a lawsuit (the Lafayette Square case) against Attorney General Barr, other federal officials, and the unidentified federal agents involved in the clearing.[130] In its complaint, the ACLU argues that the defendants are jointly and severally liable pursuant to *Bivens* for the violation of the plaintiffs' First Amendment rights to free speech, assembly, and petition, and Fourth Amendment right to freedom from unreasonable seizure.[131] In October 2020, the defendants filed a motion to dismiss, arguing a *Bivens* remedy was unavailable.[132] Specifically, Attorney General Barr

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126 *Id.*; Gjelten, *supra* note 8.

127 *See* Plaintiff's Complaint at 13, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469 (D.D.C. June 4, 2020) (citing Ashley Parker, Josh Dawsey & Rebecca Tan, *Inside the Push to Teargas Protesters Ahead of a Trump Photo Op*, WASH. POST (June 1, 2020), https://www.washingtonpost.com/politics/inside-the-push-to-tear-gas-protesters-ahead-of-a-trump-photo-op/2020/06/01/4b0f7b50-a46c-11ea-bb20-ebf0921f3bbd_story.html; Reuters, *Graphic Warning: Peaceful Protesters Fired at with Tear Gas, Rubber Bullets by U.S. Military Police*, YOUTUBE (June 1, 2020), https://www.youtube.com/watch?v=UrMoqSPZym0; Dan Zak et al., *'This Can't Be Happening': An Oral History of 48 Surreal, Violent, Biblical Minutes in Washington*, WASH. POST (June 2, 2020), https://www.washingtonpost.com/lifestyle/style/this-cant-be-happening-an-oral-history-of-48-surreal-violent-biblical-minutes-in-washington/2020/06/02/6683d36e-a4e3-11ea-b619-3f9133bbb482_story.html).

128 Plaintiff's Complaint at 14, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469-DLF (D.D.C. June 4, 2020).

129 *See id.* at 4; Alexander Mallin & Katherine Faulders, *AG Barr Ordered Protesters to Be Cleared from Park Before Trump Visit: Officials*, ABC NEWS (June 2, 2020, 3:02 PM), https://abcnews.go.com/Politics/ag-barr-ordered-protesters-cleared-park-trump-visit/story?id=71026258. *But see* Associated Press, *Barr Says He Didn't Give Tactical Order to Clear Lafayette Park Protesters*, POLITICO (June 5, 2020, 8:58 PM), https://www.politico.com/news/2020/06/05/barr-says-he-didnt-give-tactical-order-to-clear-protesters-304323.

130 *See generally* Plaintiff's Complaint, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469-DLF (D.D.C. June 4, 2020). The ACLU included as defendants other local police and local officials. However, this comment will address only the liability of the federal agents.

131 *Id.* at 24–25.

132 Defendant Barr's Motion to Dismiss at 5, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469-DLF (D.D.C. Oct. 1, 2020).

argued his rank foreclosed a *Bivens* claim, and "presidential security" counselled hesitation to extend *Bivens* to this case.[133]

B. *No Redress*

Unsurprisingly, the district court dismissed the *Bivens* claims, finding that the case arose in a new context and special factors counselled hesitation.[134] Under the Court's current *Bivens* framework, the vast majority of cases will be dismissed.[135] The current *Bivens* framework is insufficient to remedy violations by those acting under color of federal law. The *Abbasi* analysis—and the Court's application of it—makes it extremely difficult for plaintiffs to recover.[136] Further, the FTCA, as amended by the Westfall Act, leaves an entire class of plaintiffs without relief, because the Act explicitly excludes constitutional violations.[137]

First, the *Abbasi* framework renders it impossible for plaintiffs to recover.[138] *Hernandez* was clear that any slight deviation from the Court's previously recognized cases would arise in a new context.[139] In the Lafayette Square case, the court found that the First Amendment claims arose in a new context because the Court never extended *Bivens* to a claim brought under the First Amendment.[140] Although the complaint also alleged Fourth Amendment violations[141]—which have been previously recognized by the Supreme Court[142]—the court found that the claim likewise arose in a new context.[143] The cases differ factually: in *Bivens*, the Fourth Amendment violation happened at the petitioner's home,[144] and here the claims concerned

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133 *See* Defendant Barr's Motion to Dismiss at 16, 24–25, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469-DLF (D.D.C. Oct. 1, 2021).

134 Black Lives Matter D.C. v. Trump, No. 20-cv-1469 (DLF), 2021 U.S. Dist. LEXIS 114699, at *22 (D.D.C. June 21, 2021).

135 *See supra* Part II.

136 *See supra* Part II.

137 *See supra* Part II.

138 Lindvall, *supra* note 78, at 78–80.

139 *See* Hernandez v. Mesa, 140 S. Ct. 735, 743–49 (2020).

140 Black Lives Matter D.C. v. Trump, No. 20-cv-1469 (DLF), 2021 U.S. Dist. LEXIS 114699, at *24 (D.D.C. June 21, 2021).

141 Plaintiff's Complaint at 6, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469-DLF (D.D.C. June 4, 2020).

142 *See* Wood v. Moss, 572 U.S. 744, 754 (2014); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–91 (1971).

143 Black Lives Matter D.C. v. Trump, No. 20-cv-1469 (DLF), 2021 U.S. Dist. LEXIS 114699, at *25 (D.D.C. June 21, 2021).

144 *See Bivens*, 403 U.S. at 389.

government officers' response to a protest.[145] As suspected, the court focused on the factual circumstances rather than the constitutional provision, leaving redress possible only in extremely limited circumstances.

Further, the court found that special factors counseled hesitation. Attorney General Barr raised one special factor in his motion to dismiss—presidential security—which was upheld and recognized in court. Comparing the wave of *Bivens* litigation following 9/11 (which were denied)[146] to this case, both involved enforcement of executive decisions. Here, Attorney General Barr ordered the clearing of Lafayette Square to ensure President Trump could walk safely to St. John's Church.[147] Regardless of whether this reason is significant, the Supreme Court already decided it would not question the executive's decisions.[148] Thus, the "national security considerations implicated in this context counsel against extending a damages remedy without congressional approval."[149]

Next, the plaintiffs in the Lafayette Square case would likely find no redress under the FTCA. The Westfall Act amended the FTCA so that the Act did not cover constitutional violations,[150] and thus the plaintiffs in the Lafayette Square case could not recover for violations of their First and Fourth Amendment rights. Even if Congress repealed the Westfall Act and allowed the FTCA to cover constitutional violations, the FTCA allows recovery only from the United States,[151] not the individual federal officials. Therefore, here, the plaintiffs could not recover from the actual officers who caused their injuries.

The current system of redress does not sufficiently protect individuals whose constitutional rights are violated by an official acting under color of federal law. The protests exposed many flaws within the law and abuses of power by law enforcement. The public's eyes opened to a flawed criminal justice system and demanded systemic change to help aid a hurting nation. Congress proposed different legislation to address these demands: (1) the Justice in Policing Act, intended to resolve issues of police brutality; and (2) the Reforming Qualified Immunity Act, intended to roll back the qualified immunity defense.[152] None of Congress' proposed legislation addresses or

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145 *Black Lives Matter D.C.*, 2021 U.S. Dist. LEXIS 114699, at *1, *13.

146 *See supra* Part II.

147 *See* Defendant Barr's Motion to Dismiss at 1, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469-DLF (D.D.C. Oct. 1, 2020).

148 *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017).

149 *Black Lives Matter D.C.*, 2021 U.S. Dist. LEXIS 114699, at *29.

150 28 U.S.C. § 2679(b)(2).

151 28 U.S.C. § 1346(b).

152 Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020).

attempts to codify *Bivens*. The Court has made its stance extremely clear: it will not extend *Bivens* any further than it already has. Congress must be the branch to take action and codify *Bivens*. Otherwise, federal officials lack the accountability necessary to protect the safety of Americans.

IV. ANSWERING THE FIVE W'S OF CODIFYING *BIVENS*

A codified *Bivens* is necessary to provide a right to redress for those whose constitutional rights are violated by federal officials. Federal law enforcement's power continues to grow,[153] and the Supreme Court was clear in *Hernandez* that it would no longer recognize *Bivens* actions unless the case was virtually identical to the cases already decided.[154] As the law currently sits, no route to recovery exists if an individual's rights are violated by federal officials. Section 1983 applies only to violations by officials acting under color of state and local law,[155] providing no redress for those whose rights are violated by officials acting under color of federal law. This section will provide in greater detail what a *Bivens* statute would look like.

In short, under a codified *Bivens*, an individual may sue any federal agent who, while acting under the color of federal law, violated that individual's constitutional right. Further, this statute would cover all constitutional violations, not just those previously recognized by the Court.[156] This section will also analyze how a codified *Bivens* would resemble and differ from § 1983, using § 1983 as its marker for defining the scope of redress available under a *Bivens* statute.

A. *Why Congress?*

Congress must be the branch to create a *Bivens* remedy. Even though Congress has remained silent on codifying *Bivens*, James Pfander argued that Congress already codified *Bivens* through negative implication when Congress passed the Westfall Act.[157] The Westfall Act excluded claims based on a constitutional violation, which Pfander argued indicated Congress's intent for constitutional claims to be brought separately and independently

153 *Criminal Justice: Federal Law Enforcement Agencies*, TEXAS A&M KILLIAM LIB. (last updated Mar. 16, 2022, 2:52 PM), https://tamiu.libguides.com/c.php?g=533918&p=3653625. Some argue that the better route is to codify certain *Bivens* actions, to narrow the right to redress. *See also* Carmichael, *supra* note 79, at 1121. However, this approach not only narrows an individual's rights, but is impractical. The expansion of federal law enforcement has come to a point where more accountability is necessary.

154 Hernandez v. Mesa, 140 S. Ct. 735, 741–42 (2020).

155 42 U.S.C. § 1983.

156 *See supra* Part II.

157 JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR (1st ed. 2017).

from the FTCA.[158] This independent action would be a *Bivens* suit.[159] However, Congress holds the primary responsibility of legislation.[160] Separation of powers principles are subverted "where the whole power of one department is exercised by the same hands which possess the whole power of another department."[161] Although the judiciary's role is largely undefined,[162] the judiciary often defers when the powers implicated are typically dedicated to another branch.[163] The dissenters in *Bivens* and *Davis* critiqued the Court for partaking in judicial lawmaking,[164] and the majority in later cases have viewed recognizing an implied cause of action as a "disfavored judicial activity."[165] A legislative approach puts the burden back where it rightfully belongs: with the legislature.[166] This approach is the least problematic[167] and provides for uniformity in this area of the law. Although Congress has remained silent on the issue, its silence cannot require the Court to act independently.

Congress has two options: amend § 1983 to allow for claims against officials acting under color of state or federal law; or enact a separate cause of action.[168] Regardless, to codify *Bivens*, Congress should use § 1983 as its framework:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .[169]

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158 *Id.*

159 *See id.*; *see also* Ben Shattuck, Bivens *or Nothing Constitutional Torts and Cross-Border Shootings*, 52 ARIZ. ST. L.J. 1373, 1410 (2020).

160 *See* Paul M. Secunda, *Whither the* Pickering *Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1147 (2008) (citing Wilkie v. Robbins, 551 U.S. 537, 585 (2007) (Ginsburg, J., concurring in part and dissenting in part) ("If Congress wishes to codify and further define the Bivens remedy, it may do so at any time.")).

161 *See* THE FEDERALIST NO. 47 (James Madison).

162 Ryan D. Newman, Note, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 499–500 (2006).

163 *Id.*

164 *See supra* Part II.

165 Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

166 Secunda, *supra* note 160, at 1148.

167 *But see* Secunda, *supra* note 160 (arguing that Congress' silence on codifying *Bivens* is an indication of its desire to not extend § 1983 protections to violations by federal officials).

168 *See* Carmichael, *supra* note 79, at 1119–20.

169 42 U.S.C. § 1983.

Modeling a *Bivens* statute after § 1983 is the most effective solution because § 1983 has been well-received by the legal community[170] and is often praised for being a statute designed "for the public good."[171] Section 1983 (and a codified *Bivens*) allow more liberal recovery[172] and can be more effective than other potential remedies, such as state-law remedies.[173] Using § 1983 as its framework also allows Congress to rely on its precedent to set the standard and resolve any ambiguities between prior *Bivens* jurisprudence and § 1983. Under a codified *Bivens*, an individual whose constitutional rights were violated by a federal official may assert a cause of action if: (1) the federal agent acted under color of federal law and (2) deprived the individual of any rights, privileges, or immunities secured by the Constitution.[174]

B. *Who Is Liable*

A codified *Bivens* should mirror the standard of liability outlined in § 1983 and already applied in *Bivens* cases,[175] which subjects any official who acted "under color" of state or local law to liability.[176] Under a codified *Bivens*, an official acts under color when the official (1) misuses power possessed by virtue of federal law; and (2) that misconduct is possible only because the wrongdoer is clothed with the authority of federal law.[177] Under "color" of law includes both official acts following or enforcing an unconstitutional law and where an officer "oversteps" his authority to engage in unconstitutional conduct.[178] Courts have successfully applied this standard in the context of § 1983 and § 242, suggesting similar success is possible in the context of a codified *Bivens*. The analysis would turn on whether the defendant federal agent had the actual or apparent authority from the federal

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170 Carmichael, *supra* note 79, at 1120.

171 *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 73 (1989) (Brennan, J., dissenting) (praising the policy promoted by § 1983 after the Court denied a claim under the statute).

172 *See* Matthew W. Tikonoff, *A Final Frontier in Prisoner Litigation: Does* Bivens *Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 1001 n.159 (2007).

173 *Id.* at 1001 n.158.

174 Although § 1983 applies to both violations of "the Constitution *and laws*," extending a codified Bivens to violations of statutory rights would unnecessarily complicate the availability of remedies. *See infra* Section C.

175 *See* Wilkie v. Robbins, 551 U.S. 537, 569 (2007) (Ginsburg J., dissenting) (recognizing the same "clothed with authority" standard from *Screw* and *Monroe*).

176 *See* 42 U.S.C. § 1983.

177 United States v. Classic, 313 U.S. 299, 326 (1941).

178 Screws v. United States, 325 U.S. 91, 111 (1945).

government and whether that grant of power enabled the agent to engage in the challenged misconduct.

The Court expressed hesitation towards personal liability in the past when denying a *Bivens* remedy,[179] arguing that individual liability would deter government officials from acting in fear of suit. However, the Court's hesitation should not influence Congress's decision to codify *Bivens*. A recent study of the Federal Bureau of Prison's (BOP) *Bivens* claims found that in less than 5% of cases, BOP employees and their employers paid a share of the settlement amount, the share amounting to only 0.32% of the more than $18.9 million paid to plaintiffs to resolve these claims.[180] The study also found that government attorneys had the matters resolved with funds from the Judgment Fund, which is funded by the Treasury of the United States.[181] Thus, individual liability would not deter federal officials from doing their jobs because the employees rarely contribute to settlements and judgments in actions brought against them.[182]

The "under color" language can further extend liability to private actors whose position enables the actor to perform similar functions as actors employed by the federal government. The prior *Bivens* framework denied a cause of action where one might exist if the same actor had been clothed with state-granted power.[183] Under this prior framework, a plaintiff could not bring suit against private entities[184] or a private employee of a private entity managing a federal prison.[185] This discrepancy unfairly limits the universe of potential defendants by focusing the analysis on who employs the defendant rather than if the defendant wielded the requisite power. A codified *Bivens* would resolve this discrepancy and allow for a uniform application of the law. In § 1983 litigation, courts look for "joint participation" between the private actor and government,[186] which lower courts already apply with similar "joint participation" factors in *Bivens* actions. The "under color" requirement of the statute allows a plaintiff to vindicate a violation of her rights by a private actor if the private actor was clothed with the same federally-granted power that a federal actor would be.

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179 *See supra* Part II.

180 James E. Pfander et al., *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 579 (2020).

181 *Id.*

182 *Id.* at 594.

183 *See supra* Part II; *see also* Tikonoff, *supra* note 172, at 1001–03.

184 Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001).

185 Minneci v. Pollard, 565 U.S. 118, 131 (2012).

186 *See* Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 296 (2001).

Congress must also consider where to end liability. "Persons" does not include a state itself under § 1983,[187] and similar limitations should be maintained under a codified *Bivens*. The United States waives sovereign immunity under the FTCA,[188] which explicitly excludes constitutional violations.[189] Just as "persons" does not extend to the state itself, liability here should not extend to suits against the United States itself. Although this approach would create a discrepancy in the reach of liability between § 1983 and a codified *Bivens*,[190] the approach would maintain uniformity in federal liability. Using the "under color" standard from § 1983 resolves many of the discrepancies between § 1983 and *Bivens*, affording plaintiffs the opportunity to bring suit against actors clothed with either state or federal law. Extending liability maintains the balance between remedying violations and holding officials accountable without disadvantaging federal officials because these agents often do not personally contribute to payments from suit.[191]

C. *What Rights Are Covered*

i. Secured by the Constitution

A codified *Bivens* should cover all rights secured by the Constitution. The prior *Bivens* framework conflated whether a cause of action existed with whether an underlying substantive right was violated.[192] This retail approach to *Bivens* presumed a cause of action was unavailable, whereas a codified *Bivens* would allow courts to adopt a wholesale approach as done in the context of § 1983, focusing on the constitutional merits of the case. Under a codified *Bivens*, plaintiffs must prove that they were deprived of "rights, privileges, or immunities secured by the Constitution." Unlike the previous *Bivens* framework, which only recognized a cause of action for violations of an individual's Fourth, Fifth, or Eighth Amendment rights—and assumed in the context of the First Amendment—in fear of creating laws reserved for Congress,[193] a codified *Bivens* would cover all rights secured by the

187 Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that "neither a State nor its officials acting in their official capacities are persons under § 1983.").

188 28 U.S.C. § 1346(b).

189 28 U.S.C. § 2679(b).

190 *See* FDIC v. Meyer, 510 U.S. 471, 484–86 (1994); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). In *Monell*, the Court held that municipalities were "persons" under § 1983, "when execution of a government[] policy inflict[ed] the injury." *Monell*, 436 U.S. at 694. In *Meyer*, the Court rejected a *Bivens* claim against a federal agency to avoid a substantial extension of *Bivens* and because the "deterrent effects of the *Bivens* remedy would be lost." *Meyer*, 510 U.S. at 485–86.

191 *See* Pfander et al., *supra* note 180, at 622.

192 *See supra* Part II.

193 *See supra* Part II.

Constitution. This parallel resolves the discrepancy between the rights plaintiffs can challenge under § 1983 and *Bivens*.

ii. State of Mind Requirement

Because the *Bivens* statute would remedy deprivations of rights secured by the Constitution, the statute should require the same proof standards as § 1983. No state of mind is written into § 1983, but the statute instead incorporates the state of mind of the underlying constitutional right being enforced.[194] A codified *Bivens* would similarly not comport a state of mind requirement into the *Bivens* statute. Rather, the claim would instead depend on the state of mind derived from the underlying substantive right.[195] The appropriate state of mind would vary by the underlying right and potentially by the factual circumstances surrounding the allegation. For example, under a codified *Bivens*, the plaintiffs in the Lafayette Square case would need to prove that the force used by the federal agents was unreasonable to prove a violation of their Fourth Amendment rights.

iii. Differences from § 1983

Section 1983 and a codified *Bivens* should not be entirely identical. Specifically, a codified *Bivens* should not extend to statutory violations[196] and should not apply as broadly as § 1983 does where an alternative remedial scheme is available. First, limiting a codified *Bivens* to only constitutional violations would more closely resemble the current *Bivens* availability. Extending *Bivens* to incorporate statutory violations would unnecessarily over-broaden the availability of this remedy. Rather, limiting *Bivens* to constitutional violations alone would neatly provide an opportunity for redress that is currently unavailable for plaintiffs. Plaintiffs can already receive redress for statutory violations under the FTCA and Westfall Act.[197] Thus, Congress would only need to codify the gap left by the FTCA and Westfall Act: a right to redress for violations of the Constitution.

Further, § 1983 and a codified *Bivens* should differ in its approach of permitting a cause of action when an alternative remedial scheme exists.

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194 Parratt v. Taylor, 451 U.S. 527, 534–35 (1981) (concluding that § 1983 does not contain its own state of mind requirement independent of the state of mind of that necessary to prove a violation of the underlying right).

195 *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (implicitly recognizing that the underlying constitutional standard defines requisite state of mind in *Bivens* actions).

196 *See* 42 U.S.C. § 1983. Unlike § 1983 claims, which remedy violations of statutory rights, a codified Bivens should be limited to constitutional violations.

197 *See supra* Part II.

Section 1983 allows a plaintiff to bring parallel and concurrent constitutional and statutory claims. However, Congress has developed a separate statutory scheme around *Bivens*,[198] offering alternative mechanisms for redress.[199] Previously, the Court has denied *Bivens* cases where an alternative remedy is available, citing floodgate concerns[200] and Congressional intent.[201] Section 1983 provides a "controlled experiment"[202] and can guide Congress in evaluating the scope of rights available under *Bivens*.[203] In § 1983 claims, an alternative remedy does not automatically preclude a claim, especially where the scope of rights and redress available differ.[204] Absent explicit Congressional intent to displace a *Bivens* remedy, a codified *Bivens* could permit plaintiffs to bring a *Bivens* claim where alternative remedial schemes exist but differ in scope of rights and redress available.[205]

For example, the civil service scheme provides a remedy for the violation of a federal employee's constitutional rights.[206] However, the civil service scheme does not allow plaintiffs to bring suit against government officials, the rights differ from those available under *Bivens*,[207] and scholars have questioned the effectiveness of remedies through the civil service scheme.[208] Congress could allow plaintiffs to bring a *Bivens* claim where an alternative remedy exists in these instances to ensure plaintiffs can receive proper redress. Nonetheless, there are several differences between the structure of the federal government and the governments of the states, and the unique role of the federal government as an employer suggests a more limited scope of rights available is appropriate. Congress would likely not permit concurrent constitutional and statutory claims, in fear that it would interfere with the existing large statutory scheme it created.

198 *See* 28 U.S.C. § 1346(b).

199 *See generally* PFANDER, *supra* note 157.

200 Wilkie v. Robbins, 551 U.S. 537, 561 (2007).

201 Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017).

202 *Wilkie*, 551 U.S. at 581.

203 James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 139–40 (2009).

204 *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 252–53 (2009).

205 *See* Pfander & Bartmanis, *supra* note 203, at 143.

206 *See* Bush v. Lucas, 462 U.S. 367, 380–81, 388 (1983).

207 *Id.* at 389–90.

208 Pfander & Bartmanis, *supra* note 203, at 143 n.141.

V. CONCLUSION: HOW WOULD A CODIFIED *BIVENS* IMPACT CIVIL RIGHTS LAW?

A codified *Bivens* would provide the demonstrators from the Lafayette Square case a right to redress. Under the current *Bivens* framework, the Court would likely deny the claim because the case arises in a new context and special factors counsel hesitation. However, under a codified *Bivens*, a cause of action exists: the unidentified federal agents are "persons" who acted "under color" of federal law and allegedly deprived the demonstrators of rights secured by the Constitution.[209] The Court will decide whether a deprivation of constitutional rights occurred on its own. But the *Bivens* statute provides the right to suit and a chance to proceed in Court, which does not currently exist.

A codified *Bivens* would not impede on or interfere with the federal government's power because the federal government would be held to the same standard that currently exists by implication. Although *Bivens* has been implied through the Court and only few cases are recognized, federal agents have been held to the standard recognized by *Bivens* for decades. Further, a codified *Bivens* would hold federal officials accountable and deter these officials from violating an individual's constitutional rights. A codified *Bivens* would maintain the balance pursued in civil rights litigation between allowing federal officials to operate efficiently while providing opportunities for an individual to vindicate a violation of her rights.

Without a codified *Bivens*, courts will continue to rely on a convoluted framework that disadvantages plaintiffs and prevents them from vindicating violations of their constitutional rights. A codified *Bivens* would establish a cause of action that would give plaintiffs the opportunity to remedy injuries and provide a clear framework for courts to follow. Moving forward, the courts' role would be to interpret the *Bivens* statute, determining whether the statute is applicable to the presented case. Courts would then decide whether the federal agent in question violated the statute, meaning whether the federal agent violated the individual's constitutional rights, and if any defense is applicable, protecting the federal agent. Codifying *Bivens* ensures that whenever an individual receives an injury, he has a right to claim the protection of the laws.[210] Codifying *Bivens* ensures that the plaintiffs injured in the clearing of Lafayette Square have a right to claim the protection of the laws.

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209 Plaintiff's Complaint at 24, Black Lives Matter D.C. v. Trump, No. 1:20-cv-01469-DLF (D.D.C. June 4, 2020).

210 *See* Marbury v. Madison, 5 U.S. 137, 163 (1803).