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Bivens and Beyond: Creating a Meaningful Remedy for Federal Prisoners in a Post-*Boule* Landscape

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Abstract:

For nearly 50 years, the Bivens action served as a vehicle to compensate individuals when their constitutional rights had been infringed on by a federal officer. Bivens actions operated as the federal equivalent of Section 1983 claims in state courts against state officers. But in June 2022, with a conservative majority in the U.S. Supreme Court, the Bivens framework was gutted by Egbert v. Boule. Boule held that if a Bivens claim is filed in a context that differs from the three previously accepted contexts (the Fourth, Fifth, and Eighth Amendments), the claim must fail, as Congress is better equipped to address the issue. In the context of federal prisoners, this drastically alters the current landscape, and makes it harder for prisoners in federal custody to file claims for relief when their civil rights have been violated. Federal prisoners are a vulnerable population and this post-Boule landscape leaves them without a meaningful remedy when their constitutional rights have been violated. This Note examines how Boule altered the Bivens landscape and offers support for a strengthening of Bivens actions and further protection of federal prisoner rights based on precedent and social policy.

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I. *Introduction*

Imagine you are a prisoner, serving out your sentence in a state prison, doing as you are told, but there is one guard who consistently singles you out.[1] He has beaten you several times before and your injuries have been documented in the prison infirmary. You find a lawyer to represent you and decide that the best course of action is to file a specific kind of civil lawsuit against the officer for the infringement of your civil rights.

This action, your lawyer explains, is called a "1983 action." A § 1983 action comes from the U.S. Code Section 1983,[2] and it is a cause of action that "imposes liability on persons who, acting under color of state law, violated the federal rights of others."[3] Section 1983 was enacted in 1871, originally as a way to protect "Black Americans from white supremacist violence and murder"[4] in the South after the Civil War ended.[5] However, it was not until 1978, when the Supreme Court ruled on *Monell v. Department of Social Services*,[6] that § 1983 actions started to be filed more regularly against individuals acting under color of law, as well as against government entities.[7] Over the years, § 1983 has been used to challenge a variety of civil rights violations, including "unconstitutional arrests . . . and unreasonable searches of people and property."[8]

Now imagine, you are in the same situation, within the same state, but you are being held in a federal facility. The same facts as above exist, but since you are in federal prison, bringing a § 1983 action is not an option, even when there is proof that a

1. This introduction story is a hypothetical and any resemblance to real-life persons or events is coincidental.

2. 42 U.S.C. § 1983 (1996).

3. MARGO SCHLANGER ET AL., INCARCERATION AND THE LAW 834 (10th ed. 2020).

4. Scott Michelman, *Happy 150th Anniversary, Section 1983!*, AM. C.L. UNION (Apr. 20, 2021, 4:15 PM) [perma.cc/B8BG-Q8G6].

5. *See id.* (explaining the origin of § 1983).

6. 436 U.S. 658 (1978).

7. *See* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913 (2015) (describing the impact of *Monell*, the case "breathed new life into the long dormant statutory remedy and fostered an optimistic outlook for enforcement of civil rights").

8. Michelman, *supra* note 4.

guard beat you. This is because "[n]o similar statute extends analogous liability against federal officials for constitutional right violations."[9]

Logically, it does not make sense that you cannot sue the official when the only difference between the first and second fact pattern is that one individual is a state prisoner, and one is a federal prisoner. This means that state prisoners have greater civil rights protections than federal prisoners do.[10] Case law has developed to help bridge the gap between state and federal prisoner civil rights protections, but a concrete statutory scheme still eludes federal prisoners.

In 1971, the Supreme Court decided *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*,[11] and created an opportunity for federal prisoners to get redress when their civil rights were violated.[12] Over time, the Supreme Court formally recognized that a *Bivens* cause of action could proceed in situations where a person's Fourth,[13] Fifth,[14] or Eighth Amendment[15] rights had been violated. This decision in *Bivens* helped level the playing field so that federal prisoners could seek redress in similar ways to state prisoners.[16]

However, in June 2022, the Supreme Court halted the expansion of *Bivens*. The Court's decision in *Egbert v. Boule*[17] made

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9. SCHLANGER, *supra* note 3, at 834.

10. *See id.* at 834 (noting that there is no federal equivalent for § 1983, making it much harder for federal prisoners to sue federal officials than it is for state prisoners to sue state officials).

11. 403 U.S. 388 (1971).

12. *See id.* at 397 (creating a right to sue federal officers for infringements of the Fourth Amendment and holding that Webster Bivens was entitled to money damages, which opened the door for prisoners filing suit in future cases to recover damages, as well).

13. *See id.* (creating a cause of action for individuals to sue federal officials when their Fourth Amendment rights have been violated).

14. *See Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (holding that a cause of action exists under the Fifth Amendment).

15. *See Carlson v. Green*, 446 U.S. 14, 18 (1980) (allowing a *Bivens* action to proceed under the Eighth Amendment).

16. *See Bivens*, 403 U.S. at 397 (creating a cause of action to sue federal officials for a constitutional violation, similar to the type of sued filed against state officials in § 1983 actions).

17. 596 U.S. 482 (2022).

clear that any suit alleging a violation outside of the previously accepted Fourth, Fifth, or Eighth Amendment violations would fail.[18] Since this decision, the gap between protections for state and federal prisoners has only widened, and federal prisoners are still lacking a meaningful remedy when their civil rights are violated by government officials.[19]

This Note examines *Bivens* in a post-*Boule* landscape and argues that the Supreme Court's recent decision in *Egbert v. Boule* has dramatically scaled back the rights of federal prisoners when it comes to violations of their constitutional rights. This Note will begin with an examination of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, and the established cause of action known as a *Bivens* action in Part II.[20] Then, in Part III, this Note will discuss *Egbert v. Boule* and analyze the impact that decision has had on *Bivens* litigation since it was announced in June 2022.[21] Part IV will explore some of the current administrative remedies available to individuals in the Bureau of Prison's ("BOP") custody and will explain why such remedies are not adequate.[22] Part V will briefly examine policy considerations related to protecting prisoners' rights through *Bivens* actions, including the vulnerability of prisoners, qualified immunity as a limit on relief, the role of precedent, and what *Bivens* actions, when successful, give to injured parties.[23] Part VI will propose recommendations for moving forward.[24] By limiting the holding of *Boule* so that it does not extend to federal prisoners and by creating a federal equivalent to § 1983, these suggestions help to ensure that federal prisoners have meaningful pathways to redress when their constitutional rights have been violated. This Note will conclude in Part VII with a callback to arguments previously

18. *See id.* (noting that scenarios that did not align with previously recognized *Bivens* actions will no longer be heard by courts).

19. *See* SCHLANGER ET AL., *supra* note 3, at 834 (pointing out that there is not a federal version of § 1983, so in cases where state prisoners could sue state officials for violations of rights, federal prisoners do not have a statutory equivalent).

20. *See* discussion *infra* Part II.

21. *See* discussion *infra* Part III.

22. *See* discussion *infra* Part IV.

23. *See* discussion *infra* Part V.

24. *See* discussion *infra* Part VI.

discussed and a final reminder about the importance of having a meaningful way for federal prisoners to be compensated when their constitutional rights have been violated by a federal official.[25]

II. Background on Bivens

A. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics

In 1971, the Supreme Court heard *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, and the Court's decision created a new and important cause of action for individuals whose constitutional rights had been violated by federal officials.[26] Petitioner Webster Bivens alleged that Federal Bureau of Narcotics agents came into his apartment and arrested him in front of his family.[27] The federal agents then searched Bivens' apartment before taking him to a courthouse for processing.[28] Bivens sued the federal agents alleging that the agents lacked both an arrest and search warrant and used unreasonable force when they arrested him.[29] Bivens alleged that he had been handcuffed while his wife and children watched,[30] and that the federal agents had "threatened to arrest the entire family."[31]

In a 6-3 decision, the Supreme Court found that Bivens had a cause of action under the Fourth Amendment,[32] and allowed Bivens to recover damages for the injuries he suffered at the hands

25. *See* discussion *infra* Part VII.

26. *See* 403 U.S. 388, 389 (1971) (holding that a right of action exists when federal agents violate an individual's Fourth Amendment rights).

27. *See id.* (giving the facts of the case).

28. *See id.* ("They searched the apartment from stem to stern.").

29. *See id.* (detailing the action Bivens filed against the federal agents).

30. *See id.* ("The agents manacled petitioner in front of his wife and children . . . .").

31. *Id.*

32. *See* U.S. CONST. amend. IV ("The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .").

of the federal agents.[33] This cause of action has come to be known as a *Bivens* action.[34] The majority opinion, authored by Justice Brennan, highlighted the fact that the Fourth Amendment can serve as a limit on federal power,[35] especially because of the power dynamics at play between an individual and a federal official.[36] The Court sought to ensure that US citizens have "the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority[,]"[37] noting that the protection and preservation of these rights occurs in the courts.[38]

The majority opinion ended with a reminder that according to precedent, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good [on] the wrong done."[39] This sentiment was also echoed by Justice Harlan, in his concurrence, where he pointed out that there have been instances when federal law does not explicitly authorize a remedy, but where the Court has created a remedy when it is needed to effectively carry out the law as intended.[40]

The dissenting opinion of Chief Justice Burger scolded the majority, saying that creating a new cause of action violated the separation of powers because "[l]egislation is the business of

33. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) ("[P]etitioner's complaint states a cause of action under the Fourth Amendment . . . [and] we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.").

34. *See id.* (holding that the petitioner was able to file suit against federal agents in a new cause of action).

35. *See id.* at 392 ("[T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.").

36. *See id.* ("[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used.").

37. *Id.*

38. *See id.* at 394–95 ("[T]here is no safety for the citizen, except in the protection of the judicial tribunals . . . .").

39. *Id.* at 396.

40. *See id.* at 402 (Harlan, J., concurring) ("[T]his Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute.").

Congress."[41] He did not question the need for a remedy for populations whose rights had been infringed on by federal officials,[42] but he reasoned that Congress should take the lead, as it did when it enacted the Federal Tort Claims Act in 1946.[43]

Justice Black's dissent echoed several of the same concerns as Chief Justice Burger;[44] however, Justice Black had an additional worry—that the number of frivolous lawsuits would increase, clog the court systems, and create a strain on already-limited judicial resources.[45] Justice Blackmun, in a single-paragraph dissent, also worried about the increase in litigation.[46] But he added that the creation of *Bivens* actions would have a chilling effect on law enforcement and "make the day's labor for the honest and conscientious officers even more onerous and critical."[47] This argument is often seen today in the context of qualified immunity, which will be elaborated on in Part V, Subpart C.[48]

This new cause of action was a significant step in expanding the protections of § 1983 to a federal context.[49] Section 1983 created a cause of action that allowed individuals to sue state officials who violated their civil rights when the official was acting

41. *See id.* at 411–12 (Burger, C.J., dissenting) ("We would more surely preserve the important values of the doctrine of separation of powers — and perhaps get a better result — by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power.").

42. *See id.* at 415 ("I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials.").

43. *See id.* at 421 ("Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1964 in the Federal Tort Claims Act.").

44. *See id.* at 427–30 (Black, J., dissenting) (stating similar reasons to Chief Justice Burger's for dissenting).

45. *See id.* at 428 ("Unfortunately, there have also been a growing number of frivolous lawsuits . . . .").

46. *See id.* at 430 (Blackmun, J., dissenting) ("But I also feel that the judicial legislation, [of this opinion] . . . opens the door for another avalanche of new federal cases.").

47. *Id.* at 430.

48. *See* discussion *infra* subpart V.C.

49. *See* SCHLANGER, *supra* note 3, at 834 (stating that there is no federal equivalent to § 1983).

"under color of state law."[50] Before *Bivens*, there was no equivalent of § 1983 to impose liability on federal officers.[51] Even when *Bivens* actions could be filed only for Fourth Amendment violations, like the violations alleged in the original *Bivens* case, these actions still helped fill a gap where aggrieved citizens previously had no remedial avenues.[52] Over time, the Supreme Court has applied *Bivens* to violations of other constitutional rights, which will be explained in turn.

B. Bivens under the Fifth Amendment

Eight years after the Supreme Court decided that a Fourth Amendment cause of action existed in *Bivens*, the Court found a Fifth Amendment cause of action existed in *Davis v. Passman*.[53] Davis was an administrative assistant for Louisiana Congressman Otto Passman.[54] Davis was fired from her position just over six months after she started working for Passman.[55] The termination letter Passman wrote to Davis said that "she was 'able, energetic, and a very hard worker,' [but] he had concluded 'that it was essential that the understudy to my Administrative Assistant be a man.'"[56] In a 5-4 decision for Davis, Justice Brennan, writing for the majority, held that a cause of action under the Fifth Amendment existed when the Amendment's Due Process Clause was violated.[57] This decision allowed *Bivens* actions to proceed for

50. *Id.*

51. *See id.* (noting that § 1983 does not have a federal counterpart).

52. *See* Bivens v. Six Unknown Named Agents Fed. of Bureau of Narcotics, 403 U.S. 388, 390–91 (showing that before the decision the rights of harmed individuals were limited to state tort law in state courts).

53. *See generally* Davis v. Passman, 442 U.S. 228 (1979) (finding for a *Bivens* action in the Fifth Amendment context).

54. *Id.* at 230.

55. *Id.*

56. *Id.*

57. *See id.* at 248–49 (holding that the Court of Appeals decision should be reversed because there was a cause of action for the Fifth Amendment under which Davis could bring suit).

violations of due process and helped to safeguard individual rights from government intrusion.[58]

Much of the Court's analysis in *Davis* focused on what a cause of action is and whether Petitioner Davis could bring such an action.[59] The Court made clear that "constitutional rights are to be enforced through the courts."[60] For such constitutional rights to mean anything, those who have had their constitutional rights violated, and have no other remedy outside the court system, should be able to bring an action.[61] The Court referenced other cases in which petitioners filed suit for Fifth Amendment violations by state officials[62] emphasizing the analogous nature of § 1983 actions at the state level with *Bivens* actions at the federal level.[63] After establishing that *Bivens* actions could be brought in both Fourth[64] and Fifth[65] Amendment contexts, the Court soon established a *Bivens* cause of action under the Eighth Amendment.[66]

58. *See id.* at 230 (reversing the Court of Appeals for the Fifth Circuit and allowing a *Bivens* action to proceed for a violation of the Due Process Clause of the Fifth Amendment).

59. *See* Davis v. Passman*,* 442 U.S. 228, 240–42 (1979) (discussing factors at play when a new cause of action is created).

60. *Id.* at 242.

61. *See id.* (explaining that constitutional rights will have no meaning if there is no way for individuals whose rights have been violated to be compensated).

62. *See id.* at 242–43 (referring to successful actions against officers for Fifth Amendment violations).

63. *See id.* at 243 (explaining that, in this case, the petitioner's Fifth Amendment right was violated and the Court had already recognized suits for Fifth Amendment violations directly under the Equal Protection Clause).

64. *See* Bivens v. Six Unknown Named Agents Fed. Bureau Narcotics, 403 U.S. 388, 397 (1971) (holding that Bivens had a right to sue the federal agents for violating his Fourth Amendment rights).

65. *See* Davis v. Passman*,* 442 U.S. 228, 248–49 (1979) (creating a *Bivens* action for Fifth Amendment violations).

66. *See* Carlson v. Green, 446 U.S. 14, 18 (1980) (creating a *Bivens* action for Eighth Amendment violations).

C. Bivens under the Eighth Amendment

One year after *Davis* was ruled on, the Court heard *Carlson v. Green*.[67] In a 7-2 decision, the Supreme Court affirmed the Court of Appeals and found that the respondent was entitled to file a *Bivens* action for an Eighth Amendment violation.[68] Respondent, Marie Green, originally brought suit on behalf of her deceased son, alleging that his Eighth Amendment rights were violated while he was a federal prisoner, claiming that prison officials did not give her son proper medical attention.[69] In its opinion, the Court articulated the two situations in which a *Bivens* action cannot proceed,[70] and noted that, even though Green could have brought suit under the Federal Tort Claims Act ("FTCA"), her *Bivens* action could nevertheless proceed.[71]

The first situation occurs if the defendants can demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress."[72] While the Court has never explicitly defined such "special factors," factors that can be inferred from other Court opinions include a Congressional action that suggests a judicial remedy would be inappropriate,[73] and whether, historically, damages were an appropriate remedy.[74] In *Ziglar v. Abbasi*, a 2017 case, when discussing special factors, the Court said that "the inquiry must concentrate on 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.

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67. *Id.*

68. *See id.* (affirming the Court of Appeals, which held that the petitioner could file a *Bivens* action for an Eighth Amendment violation).

69. *Id.* at 14–16.

70. *See id.* at 18 (explaining the two cases where a *Bivens* action can be defeated).

71. *See id.* at 20 (reviewing Congressional actions related to the FTCA and *Bivens* actions and after recognizing both actions as Eighth Amendment violations, deciding that a complaint of this nature could be brought in an FTCA action or a *Bivens* action).

72. *Id.* at 18.

73. *See id.* at 19 (noting some factors the Court considers when deciding whether or not "special factors" exist).

74. *See Davis v. Passman,* 442 U.S. 228, 245 (1979) (explaining that damages have often been "regarded as the ordinary remedy for an invasion of personal interests in liberty").

Thus, to be a 'special factor counselling hesitation,' a factor must cause a court to hesitate before answering that question in the affirmative."[75]

The second situation occurs "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[76] This second situation is much easier for courts to identify than the "special factors," given the explicitness requirement.

In *Carlson*, the Court looked at both situations and determined that neither existed in the case at issue.[77] Looking at the first situation, the Court explained that the Bureau of Prisons did "not enjoy such independent status in [the] constitutional scheme as to suggest judicially created remedies against them might be inappropriate."[78]

When the Court examined the second situation, the opinion specifically stated that there is no indication that the FTCA,[79] explained further in Part IV, preempted *Bivens* actions, despite both the FTCA and *Bivens* actions offering similar remedies.[80] In fact, the Court viewed the FTCA and *Bivens* actions as "complementary causes of action."[81] There was not any Congressional action to suggest that the FTCA was an exclusive remedy and the Court found this especially noteworthy because "Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy."[82]

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75. 582 U.S. 120, 135–36 (2017).

76. *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (emphasis in original).

77. *See id.* at 19–20 (1980) (determining that neither of the two situations which defeat a *Bivens* action existed).

78. *Id.* at 19.

79. *See* SCHLANGER, *supra* note 3, at 855 (explaining that the Federal Tort Claims Act was enacted to allow victims to recover damages when federal employees committed torts while acting in the course of their employment); *see also Carlson*, 446 U.S. at 20 (clarifying that, since Congress did not explicitly state that the FTCA preempted *Bivens*, it was appropriate for either type of action to be brought in this situation).

80. *See Carlson*, 446 U.S. at 19 (noting that the FTCA does not prevent *Bivens* actions because the FTCA was passed years before *Bivens* came before the Court).

81. *Id.* at 20.

82. *Id.*

The Court also highlighted that "the *Bivens* remedy is more effective than the FTCA remedy."[83] Not only does *Bivens* compensate injured parties,[84] but the litigation framework "serves a deterrent purpose" in ensuring that federal officers are not violating the constitutional rights of others.[85] *Bivens* actions allow the victim to recover damages against the individual who violated their rights, while under the FTCA you would recover damages from the United States.[86] This recovery against the individual functions as a deterrent,[87] whereas that incentive is lost under the FTCA. *Bivens* actions also allows for punitive damages,[88] while "punitive damages in an FTCA suit are statutorily prohibited."[89] While not a primary consideration, the Court also acknowledged that there is no option for a jury in an FTCA action, while a jury *is* an option in a *Bivens* action.[90] Finally, the Court reasoned that *Bivens* actions are more advantageous because FTCA actions "exis[t] only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward."[91] The Court recognized principles of fairness and stated that "it is obvious that the liability of federal officers for violations of citizens' constitutional rights should be governed by uniform rules."[92] In short, the Court believed *Bivens* to be a more appropriate remedy than the FTCA for procedural, remedial, and fairness reasons.[93]

The holding in *Carlson* exemplified the Court's multi-faceted endorsement of a further expansion of *Bivens*—extending it to

83. *Id.*
84. *Id.* at 20–21.
85. *Id.* at 21.
86. *Id.*
87. *Id.*
88. *Id.* at 21–22.
89. *Id.* at 22.
90. *Id.*
91. *Id.* at 23.
92. *Id.* at 23.
93. *See id.* at 20–23 (noting that the FTCA's jury prohibition and lack of punitive damages, compared to the uniform application and greater potential for damages under a *Bivens* action, led the Court to believe that *Bivens* actions are the better option).

allow an Eighth Amendment cause of action.[94] This decision was crucial for federal prisoners, who, by their nature, experience limitations on their rights.[95] For fifty years since the initial *Bivens* decision, and over forty years since the *Carlson* decision, individuals across the United States were able to find redress through *Bivens* actions.[96] However, in 2022, a conservative majority in the Court announced its decision in *Egbert v. Boule*,[97] which drastically altered the field of *Bivens* litigation.

III. Egbert v. Boule

In June 2022, the Supreme Court upended the *Bivens* landscape through its decision in *Egbert v. Boule*.[98] Robert Boule, the respondent, ran a bed-and-breakfast called "Smuggler's Inn" in Washington state.[99] Some parts of Boule's property extended into Canada, and it was very easy for people to walk in and out of the United States from Boule's property.[100] More than once, U.S. Border Patrol agents had seen people cross the Canadian border and enter Boule's business and had also seized various narcotics from the business.[101] Boule had even served as a confidential informant to Border Patrol agents to assist in the apprehension of criminals engaged in cross-border crimes.[102]

Boule went so far as to host guests at his inn that he knew were unlawfully in the United States, call Border Patrol on them, and keep the money he had been paid by the guests after he assisted in their apprehension by Border Patrol.[103] Petitioner,

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94. *See id.* at 18 (affirming the Seventh Circuit's extension of Bivens actions to the Eighth Amendment violations).

95. *See Prisoners' Rights*, LEGAL INFO. INST. (last updated June 2017) ("[P]risoners do not have full constitutional rights . . . .") [perma.cc/RVL3-BPTB].

96. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971) (creating a cause of action so individuals whose constitutional rights had been violated had a legal remedy).

97. 596 U.S. 482 (2022).

98. *Id.*

99. *Id.* at 487.

100. *Id.* at 486.

101. *Id.* at 487–88.

102. *Id.* at 488.

103. *Id.*

Agent Erik Egbert, was one of the U.S. Border Patrol agents that had interacted with Boule before and was aware of Boule's quasi-criminal business practices.[104]

The events that led to the litigation which the Court reviewed occurred in March 2014.[105] Boule had informed Agent Egbert that a Turkish national was planning to stay at the Smuggler's Inn.[106] Agent Egbert was suspicious of an individual traveling so far just to stay at Boule's inn, and Agent Egbert later showed up outside the establishment.[107] Boule alleged that he told Agent Egbert to leave his property.[108] However, Agent Egbert refused to leave and Boule alleged that Agent Egbert then lifted him up and threw him against a car and to the ground.[109] Boule called 911 and Agent Egbert called into dispatch, both requesting that a supervisor come to the scene.[110] Once a supervisor and additional border patrol agent arrived, they reviewed the immigration paperwork of the Turkish national.[111] After they determined that the Turkish national had lawfully entered the U.S., the agents left Boule's property.[112] After the altercation with Agent Egbert, Boule "sought medical treatment for injuries to his back."[113]

A short time later, Boule filed a grievance with Agent Egbert's supervisors alleging that "Agent Egbert had used excessive force and caused him physical injury."[114] Boule also filed an administrative complaint with Border Patrol under the FTCA.[115] Boule claimed that while these complaints were being reviewed, Agent Egbert retaliated by reporting Boule to various agencies,

104. *Id.*
105. *Id.* at 488–89.
106. *Id.*
107. *Id.*
108. *Id.* at 489.
109. *Id.*
110. Boule v. Egbert, 998 F.3d 370, 386 (9th Cir. 2021).
111. Egbert v. Boule, 596 U.S. 482, 488 (2022).
112. *Boule*, 998 F.3d at 386.
113. *Id.*
114. *Egbert*, 596 U.S. at 489.
115. *Id.*

which led to investigations into Boule's conduct.[116] This prompted the Internal Revenue Service to audit Boule's tax returns,[117] as well as investigations by the other agencies into Boule's business.[118] Boule's FTCA claim was later denied and, after investigating the situation for a year, Border Patrol declined to take any action against Agent Egbert.[119] In January 2017, Boule filed a *Bivens* action against Agent Egbert, alleging that his constitutional rights had been violated by Agent Egbert in the scope of his employment.[120]

In his action against Agent Egbert, Boule alleged that his Fourth Amendment rights had been violated by Egbert's use of excessive force and that his First Amendment rights had been violated through Agent Egbert's unlawful retaliation.[121] The Federal District Court "declined to extend a *Bivens* remedy to Boule's claims"[122] and the Court of Appeals reversed, allowing Boule's action to proceed.[123] The Court of Appeals noted that "[a]lthough the Supreme Court has made clear that 'expanding the *Bivens* remedy is now a disfavored judicial activity,' a *Bivens* remedy is still available in appropriate cases and there are 'powerful reasons' to retain it in its 'common and recurrent sphere of law enforcement.'"[124]

The Court of Appeals conducted a two-part analysis in its decision to reverse the District Court's ruling.[125] First it asked "whether the request involves a claim that arises in a 'new context' or involves a 'new category of defendants'" and then it looked to see whether any "special factors" would suggest that the action should

116. *See id.* at 489–90 (listing the agencies that Agent Egbert reported Boule to, including the Washington State Department of Licensing, the IRS, the Social Security Administration, and the Whatcom County Assessor's Office).

117. *Id.* at 490.

118. Boule v. Egbert, 998 F.3d 370, 386 (9th Cir. 2021).

119. Egbert v. Boule, 596 U.S. 482, 489–90 (2022).

120. *Id.* at 490.

121. *See id.* ("Boule sued Agent Egbert in his individual capacity . . . alleging . . . a First Amendment violation for unlawful retaliation.").

122. *Id.*

123. *Id.*

124. Boule v. Egbert, 998 F.3d 370, 385 (9th Cir. 2021).

125. *Id.*

not proceed.[126] The Court of Appeals found that Boule's claim was a conventional Fourth Amendment excessive force *Bivens* action.[127] It differed only from claims "routinely brought against F.B.I. agents under *Bivens*" in that it was being filed against a Border Patrol agent, rather than an FBI agent.[128] Though Agent Egbert's status as a Border Patrol agent has potential national security implications, the Court of Appeals did not find it to be a strong enough concern to preclude the *Bivens* action.[129]

Looking to Boule's First Amendment claim,[130] the Court of Appeals acknowledged that while "the [Supreme] Court has never actually *held* that a First Amendment retaliation claim may be brought under *Bivens*,"[131] it has "explicitly stated . . . that such a claim may be brought."[132] It is longstanding law "that federal officials violate the First Amendment when they retaliate for protected speech,"[133] however the Court of Appeals recognized that Boule's First Amendment claim against Agent Egbert was arising in a new context.[134] After proceeding through the traditional two-part analysis, the Circuit Court determined that no special factors existed that made it think *Bivens* should not be extended to the First Amendment in this situation.[135] In fact, the Court of Appeals even said that "there is even less reason to hesitate in extending *Bivens* to Boule's First Amendment retaliation claim than there is in his Fourth Amendment excessive force claim."[136] The Court of Appeals opinion finished with an analysis of other potential

126. *Id.*

127. *Id.* at 388.

128. *Id.*

129. *See id.* at 388–89 (9th Cir. 2021) ("[I]n the 'run-of-the-mill' Fourth Amendment case now before us, we hold that any costs imposed by allowing a *Bivens* claim to proceed are outweighed by compelling interests in favor of protecting United States citizens on their own property in the United States from unconstitutional activity by federal agents.").

130. *See id.* at 389 (noting that Boule's First Amendment claim arose from Boule complaining about Agent Egbert and Agent Egbert retaliating against Boule).

131. *Id.* (emphasis in original).

132. *Id.* at 389–90.

133. *Id.* at 390.

134. *Id.*

135. *Id.*

136. *Id.* at 391.

remedies for Boule;[137] unsatisfied that there was another remedy that would adequately compensate Boule for the harms he suffered, the Court of Appeals ultimately reversed the District Court ruling and remanded the case for the District Court to allow the *Bivens* action to proceed.[138]

Eventually, the case reached the Supreme Court, and they agreed with the District Court and reversed the Court of Appeals' decision.[139] Justice Thomas, writing for the majority, began the Court's analysis by stating that "creating a cause of action is a legislative endeavor."[140] The Court has been hesitant over the last few terms to create and expand rights through its opinions.[141] The hesitation to do the same in *Boule* is, therefore, unsurprising.[142] The majority showcased this hesitancy to legislate[143] by stating that "if a claim arises in a new context, a *Bivens* remedy is unavailable . . . if there is even a single 'reason to pause before applying *Bivens* in a new context.'"[144] Additionally, courts cannot create *Bivens* remedies "if Congress has provided, or has

137. *See id.* at 391–92 (examining the other remedies available for Boule).

138. *See id.* at 391–92 (finishing the examination of existing remedies and reversing the District Court, allowing Boule's *Bivens* suit against Agent Egbert to proceed).

139. *See Egbert v. Boule*, 596 U.S. 482, 486 (2022) (reversing the Court of Appeals and agreeing with the Federal District Court).

140. *Id.* at 491.

141. *See* Ann Woolhandler & Michael G. Collins, *Was Bivens Necessary?*, 96 NOTRE DAME L. REV. 1893, 1893 (2021) (referring to statements made by Justice Alito where he said that *Bivens* came from a time when the Court was more willing to infer causes of action); *see also* Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135 (1977) (explaining that in recent years, there is conflict surrounding the idea that the "role of the federal government – through its Constitution, laws and courts – is to provide protection for civil rights against state abuse").

142. *See* Woolhandler & Collins, *supra* note 141**,** at 1894 ("[Justice Alito] also suggested that if *Bivens* were decided today, the Court would be unlikely to reach the same result.").

143. *See Separation of Powers*, LEGAL INFO. INST. [perma.cc/H8A2-N6AP].

> Separation of powers is a doctrine of constitutional law under which the three branches of government are kept separate . . . . [E]ach branch is given certain powers so as to check and balance the other branches. Each branch has separate powers, and generally each branch is not allowed to exercise the powers of other branches.

144. *Egbert*, 596 U.S. at 492.

authorized, the Executive to provide, 'an alternative remedial structure.'"[145] The Court clarified this point stating that whether these alternative remedies are adequate is a legislative determination, and therefore not a question for the Courts.[146] Just so long as an alternative exists, a *Bivens* action cannot proceed.[147] It is up to Congress to decide whether the existing remedies are adequate.[148]

Specific to the facts of *Boule*, the Court believed that there was a national security interest based on the near-border interactions between Border Patrol, Agent Egbert, and Boule.[149] The Supreme Court has long declined to intervene in situations related to or adjacent to national security,[150] but that sentiment does not bolster the Court's overall holding, which essentially made it impossible to create new causes of action under *Bivens*.[151] The Court continually referred to border-security and national security concerns in its opinion;[152] however the Court failed to recognize that not every case in which a federal official acts in a way that violates constitutional rights arises in a national security context.

In her partial concurrence and dissent, Justice Sonia Sotomayor, joined by Justices Breyer and Kagan said that the majority "stretche[d] national-security concerns beyond

145. *Id*. at 493.

146. *Id.* at 498.

147. *See id.* at 498 ("So long as Congress or the Executive has created [another] remedial process . . . the courts cannot second-guess that calibration by superimposing a *Bivens* remedy.").

148. *See id.* at 498 ("[W]hether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts.").

149. *See id.* at 494 ("Congress is better positioned to create remedies in the border-security context . . . .").

150. *See* Shirin Sinnar, *Courts Have Been Hiding Behind National Security for Too Long*, BRENNAN CTR. FOR JUST. (Aug. 11, 2021) (explaining that courts often decline to make decisions related to national security, believing that such questions should be answered by the Executive or legislative branch) [perma.cc/WJQ7-77G5].

151. *See Egbert v. Boule*, 596 U.S. 482, 501 (2022) ("[A] plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' with *Bivens*, *Passman*, or *Carlson* unless he also satisfies the 'analytic framework' prescribed by the last four decades of intervening case law.").

152. *See id.* at 493 ("Congress is better positioned to created remedies in the border-security context . . . .").

recognition" in its reversal of the Court of Appeals.[153] She looked at other cases linked to national security when the Court declined to extend *Bivens*,[154] and determined that Boule, a US citizen injured on US soil, did not implicate the national security and border-security concerns the majority was so concerned about.[155] Allowing Boule's Fourth Amendment claim to proceed against Agent Egbert would not "challenge or alter 'high-level executive policy'" as the majority claims it would.[156] Sotomayor agreed that, in regards to Boule's First Amendment claim, the "courts were ill equipped to tailor an appropriate remedy."[157] While all members of the Court agreed that extending *Bivens* to the First Amendment would be an inappropriate action by the Court in this situation,[158] there were disagreements between the Justices about the majority opinion's overall effect on *Bivens* litigation as a whole.[159]

A. Egbert v. Boule Dramatically Impacted the Existing Bivens Litigation Landscape

Looking at the Court's opinion in *Boule* in its entirety, the outcome did much more than prevent Boule from recovering against Agent Egbert. It halted any expansion of the *Bivens* case law without recognizing that sometimes a *Bivens* action is most likely the best way for an injured party to recover any type of damages.[160] The majority wrongly exaggerated the national

153. *Id.* at 505 (Sotomayor, J., concurring in part and dissenting in part).

154. *See id.* at 513–14 (referencing *Hernández v. Mesa*, 140 S.Ct. 735 (2020), in which "a CBP agent shot and killed a Mexican child across the U.S.-Mexico border").

155. *See id.* at 514 (noting that Boule was a U.S. citizen who was injured on his own property, inside the U.S.).

156. *Id.* at 515.

157. *Id.* at 517–18.

158. *See id.* at 498–99 ("[W]e hold that there is no *Bivens* action for First Amendment retaliation."); *see also id.* at 517–18 (Sotomayor, J., concurring in part and dissenting in part) (concurring in the judgement that there is no cognizable *Bivens* First Amendment claim here).

159. *See id.* at 524–26 (Sotomayor, J., concurring in part and dissenting in part) (criticizing the majority's analysis as "draining the concept of 'remedy' of all meaning").

160. *See Carlson v. Green*, 446 U.S. 14, 20–21 (1980) (explaining why *Bivens* was a better remedy than the FTCA).

security concerns in *Boule*,[161] as well as ignored existing precedent when coming to a conclusion.[162]

Justice Sotomayor was straightforward in her critique of the majority's shift away from precedent, calling out the Court's action as "pay[ing] lip service to the [two-part] test set out in our precedents, [and] effectively replac[ing] it with a new single-step inquiry designed to constrict *Bivens*."[163] She also accused the majority of "selectively quoting [the Court's] precedents and presenting its newly announced standard as if it were always the rule."[164] In *Ziglar v. Abbasi*, the Court clarified that a context is "'new' if it is 'different in a *meaningful* way from previous *Bivens* cases decided by [the] Court.'"[165] Justice Sotomayor noted that the majority's opinion about what a new context under *Bivens* is, was "in serious tension with the Court's longstanding rule that trivial differences alone do not create a new *Bivens* context."[166] The majority's decision in *Boule* was thus a serious departure from precedent in regards to when a court allows a *Bivens* action to proceed and when it declines based on the facts creating a new context.[167]

Additionally, the majority's statement that they must refrain from creating remedies if Congress might not agree that a remedy is needed drastically misconstrues previous statements from Congress in the *Bivens* action arena.[168] It was clearly established in *Carlson v. Green* that Congress did not intend to make the FTCA

161. *See Egbert v. Boule*, 596 U.S. 482, 494 (2022) ("Congress is better positioned to created remedies in the border-security context . . . ."); *see also id.* at 505– (Sotomayor, J., concurring in the judgement in part and dissenting in part) (accusing the Court of "stretch[ing] national security implications beyond recognition" in this case).

162. *See id.* at 517 (Sotomayor, J., concurring in the judgement in part and dissenting in part) ("The measures the Court takes to ensure Boule's claim is dismissed are inconsistent with governing precedent.").

163. *Id.* at 518.

164. *Id.*

165. *See Ziglar v. Abbasi*, 582 U.S. 120, 136 (2017) (emphasis added).

166. *Egbert*, 596 U.S. at 519 (Sotomayor, J., concurring in part and dissenting in part).

167. *See id.* (emphasizing the majority's departure from precedent).

168. *See id.* at 491 ("'[I]f there are sound reasons to think Congress must doubt the efficacy or necessity of a damages remedy[,] the courts must refrain from creating [it].'") (quoting Ziglar v. Abbasi, 582 U.S. 120, 138 (2017)).

the sole remedy for aggrieved prisoners and did not question the efficacy of *Bivens* actions.[169] Justice Sotomayor also pointed out that, specifically related to *Boule*'s fact pattern, "there is no indication that Congress acted to deny a *Bivens* remedy for a case like this . . . ."[170] While not directly related to federal prisoners, the majority's opinion did grant complete immunity to all Customs and Border Patrol Agents for *Bivens* actions;[171] Congress likely would not approve of a categorical exemption for federal officials of a certain agency simply because they had not yet passed a statute themselves.

In conclusion, the Court's departure from precedent will constrict future analyses of *Bivens* cases before courts. This drastic change to the *Bivens* landscape was only supported by surface-level reasoning that contravenes established precedent. Despite the previously mentioned critiques of *Bivens* actions, as well as general critiques of the Court's quasi-legislative exercise of power when it created the right to sue federal officials, *Bivens* actions have become especially crucial for federal prisoners. *Bivens* actions helped to fill a gap and created another avenue for relief[172] for a population with mostly limited rights.[173] The other existing avenues that federal prisoners have when their constitutional rights have been violated fall short of providing a substantial remedy,[174] which makes the preservation of *Bivens* for federal prisoners even more paramount.

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169. *See Carlson v. Green*, 446 U.S. 14, 20 (1980) ("[C]ongressional comments accompanying [the FTCA] amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action . . . .").

170. *Egbert v. Boule*, 596 U.S. 482, 521 (2022) (Sotomayor, J., concurring in part and dissenting in part).

171. *See id.* at 494 (explaining that the Court would not recognize a *Bivens* cause of action against Agent Egbert because of the "risk of undermining border security") (quoting Hernández v. Mesa, 140 S.Ct. 735, 747 (2020)).

172. *See* Bivens v. Six Unknown Named Agents Fed. Bureau Narcotics, 403 U.S. 388, 397 (1971) (holding that Bivens was entitled to recover damages against the federal agents); *see also Carlson v. Green*, 446 U.S. 14, 18 (1980) (allowing a *Bivens* action to proceed in an Eighth Amendment context).

173. *See Prisoners' Rights, supra* note 95 ("[P]risoners do not have full constitutional rights . . . .").

174. *See Carlson v. Green*, 446 U.S. 14, 20–21 (1980) (noting the inadequacies in the FTCA compared to a *Bivens* action).

IV. Existing Remedies within the Bureau of Prisons are not Adequate when Prisoners' Constitutional Rights have been Violated

While there are existing remedies for prisoners in federal custody, these fail to adequately compensate individuals when their constitutional rights have been infringed on. The existing remedies, including the Federal Tort Claims Act,[175] and the Bureau of Prisons' Administrative Remedy Program,[176] will be explained in turn, except for the Prison Rape Elimination Act (PREA).[177]

A. *The Federal Tort Claims Act (FTCA)*

One remedial option for prisoners is to file a lawsuit under the Federal Tort Claims Act.[178] The Federal Tort Claims Act allows recovery for torts committed by federal employees in the scope of their employment.[179] The Federal Tort Claims Act (FTCA) was first enacted in 1946,[180] and allows the victims of torts committed by federal employees during the course of their employment to recover damages.[181] The FTCA is a waiver of sovereign immunity by the government, thus opening the federal government up to liability in various situations.[182] While the FTCA was in place long before the Supreme Court heard *Bivens*, it is an accepted fact that

175. 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2411, 2412, 2671–80.

176. *See generally* CHARLES E. SAMUELS, JR., DIR. FED. BUREAU PRISONS, ADMINISTRATIVE REMEDY PROGRAM (Jan. 6, 2014) [hereinafter ADMINISTRATIVE REMEDY PROGRAM] (detailing the various administrative remedies available to inmates).

177. 34 U.S.C. § 30301 (2003). The PREA is a separate administrate remedy process prescribed by Congress to address sexual assault and abuse. While the PREA is an important piece of legislative, its relevance in the context of this Note is limited.

178. 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2411, 2412, 2671—80.

179. SCHLANGER, *supra* note 3, at 855.

180. *Federal Tort Claims Act (FTCA)*, U.S. ENV'T PROT. AGENCY (Jan. 26, 2023) [perma.cc/QL2Y-7KPZ].

181. SCHLANGER, *supra* note 3, at 855.

182. *See id*. (noting that the government waives sovereign immunity in the FTCA allowing themselves to be sued for violations of *any* federal employee).

certain harms against individuals may allow the victim to recover under both the FTCA, as well as through the filing of a *Bivens* action.[183] As mentioned above, the Supreme Court does not believe that the FTCA preempts the filing of a *Bivens* action and the FTCA is *not* an "exclusive remedy."[184]

The Federal Tort Claims Act provides that "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred," then a claim can be brought under the FTCA against the agent who committed the act or omission.[185] To file a claim under the FTCA, the injured party, also called the claimant, must first file a claim with the appropriate federal agency .[186] The federal agency has six months to review the claim and make a final decision as to whether they will award the damages the claimant requested.[187] After receiving a denial of the claim from the agency, or after six months has passed since the claim was filed, the claimant may file a federal law suit in the District Court where the events in the claim occurred.[188]

The FTCA allows for monetary compensation if the claimant is successful, however claimants cannot recover punitive damages.[189] This means that a claimant can only recover what is needed to compensate them for their injuries but cannot recover any further damages.[190] This is a drawback for the FTCA, because punitive damages function as a deterrent against the defendant, so barring their recovery as a whole limits how effective the FTCA

183. *See id*. at 856 ("Some kinds of harm can support both a *Bivens* action and an FTCA action."); *see also Carlson v. Green*, 446 U.S. 14, 19 (referring to FTCA claims and Bivens actions as being "complementary").

184. *See Carlson*, 446 U.S. at 20 (noting that Congress will explicitly state when it wishes to make something an exclusive remedy).

185. 28 U.S.C. § 2672 (1990).

186. 28 U.S.C. § 2675(a) (1966). The "appropriate federal agency" is the agency which employes the agent alleged to have caused the injury.

187. *Id*.

188. *Federal Tort Claims Act — Suing the Federal Government for Injuries*, JUSTIA [perma.cc/45AW-P6U4].

189. *Id.*

190. *See Damages*, LEGAL INFO. INST. (explaining the difference between compensatory damages, which are based on "actual loses," and punitive damages, which are "intended to punish the wrongdoer") [perma.cc/RF89-MH4R].

is at compensating claimants.[191] Another deterrent is lost in the FTCA because it is the US government paying out the claims, rather than in the individual government official;[192] if an individual need not worry about having to pay out a judgement against them, the incentive to behave in accordance with the law is diminished.

Another hurdle embedded in the FTCA is § 2680(a), the discretionary function exception.[193] If the government can show that a federal employee was exercising discretion when they committed the act that injured the claimant, then an FTCA suit cannot proceed.[194] This exception to FTCA liability has been called "'the broadest and most consequential'" exception under the FTCA.[195] There has been disagreement among courts "on whether the discretionary function exception shields tortious conduct that allegedly violates the U.S. Constitution[.]"[196] However, there has been documented reluctance by the Supreme Court to upset FTCA-related precedents,[197] just as the Court expressed reluctance in *Boule* regarding the expansion of *Bivens*,[198] so it is unlikely that the FTCA caselaw will shift in favor of offering claimants more room to recover damages against the federal government. While the FTCA is a concrete statute allowing recovery against the

191. *See id.* ("When a tort wrongdoer was willfully reckless or the harm was particularly bad, the court may award punitive damages in addition to compensatory damages.").

192. *See Carlson v. Green*, 446 U.S. 14, 21 (1980) ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States.").

193. *See* 28 U.S.C. § 2680(a) (2023) (forbidding suits against the federal government founded on claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation" or an agency or employee's choice of whether or not to perform a discretionary function).

194. *See* MICHAEL D. CONTINO & ANDREAS KUERSTEN, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 18 (2023) (explaining how the Discretionary Function Exception of the FTCA works).

195. *Id.*

196. *Id.* at 21.

197. *See id.* at 37 (noting the hesitancy of the Supreme Court to readjudicate settled doctrines surrounding the FTCA).

198. *See Egbert v. Boule*, 596 U.S. 482, 491 (2022) (explaining that the "Judiciary's authority" to create causes of action is "at best, uncertain.").

federal government, the lack of punitive damages[199] and lack of clarity related to the recovery of damages for constitutional violations[200] limits the FTCA's overall usefulness for federal prisoners.

B. The Bureau of Prisons' Administrative Remedy Program

Another option for federal prisoners is to engage directly with the Bureau of Prisons' Administrative Remedy Program.[201] Prisoners must first go through the procedures laid out in the BOP grievance process before filing a lawsuit.[202] If prisoners do not "first take [their] complaints through all levels of the prison's or jail's grievance system, complying with all deadlines and other procedural rules of that system . . . [their] right to sue may be lost forever."[203] Each claim a prisoner puts forth must individually exhaust all administrative remedies.[204] While some courts "diff[er] widely on when [a prisoner's] failure to exhaust might be excused . . . the safest course is always: with respect to *each claim* you want to raise, and *each defendant* you want to name [i.e. multiple prison guards], in your eventual lawsuit, you should *file a grievance* and *appeal* that grievance through *all available levels of appeal*."[205] This strict procedural requirement for exhaustion

199. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) (noting that *Bivens* offers punitive damages, but not the FTCA).

200. *See* CONTINO & KUERSTEN, *supra* note 194, at 5 (explaining that the FTCA only authorizes recovery if the government actor would be liable in the state where the violation occurred).

201. *See* ADMINISTRATIVE REMEDY PROGRAM, *supra* note 176, at 1 (laying out the purpose of the program as allowing "an inmate to seek formal review of an issue relating to any aspect of his/her own confinement").

202. *See* WASHINGTON LAWS.' COMM., BOP GRIEVANCE GUIDE: A GUIDE TO ADMINISTRATIVE REMEDY REQUESTS AT FEDERAL PRISONS 1 (2018) [hereinafter BOP GRIEVANCE GUIDE] ("You must finish all administrative steps before suing about prison conditions under federal law.").

203. *The Prison Litigation Reform Act in the United States*, NO EQUAL JUST. (June 16, 2009) [perma.cc/KYS2-7AT7].

204. AM. C.L. UNION, KNOW YOUR RIGHTS: THE PRISON LITIGATION REFORM ACT (PLRA) 1 (2002) [hereinafter PLRA].

205. *Id.* at 1 (emphasis in original).

stems from the Prison Litigation Reform Act (PLRA), which was passed by Congress in 1996.[206]

While the PLRA adds additional restrictions on an already vulnerable population,[207] there are several built-in safeguards to try to preserve prisoners' rights to sue when they fail to properly exhaust all administrative avenues.[208] If it is found that a prisoner did not properly exhaust their grievance and the suit is to be dismissed, it will be dismissed without prejudice, meaning that the prisoner can file the lawsuit at a later date once they have properly exhausted the administrative remedies.[209] The D.C. Circuit Court of Appeals has ruled that "courts may still issue injunctions to prevent irreparable injury pending exhaustion of administrative remedies."[210] Despite strict exhaustion requirements, the Administrative Remedy Program that prisoners must first engage in is straightforward and also has built in safeguards to help preserve prisoners' rights.[211] The Administrative Remedy Program is explained in detail below.

a. *How the Bureau of Prisons' Administrative Remedy Program Actually Works*

Before prisoners can file a lawsuit, they must first proceed through the Bureau of Prisons' Administrative Remedy Program.[212] The Administrative Remedy Program has rigid steps that must be followed, which only serves to add an additional layer

206. *See The Prison Litigation Reform Act in the United States*, *supra* note 203 (noting where the exhaustion requirements originated).

207. *See id.* ("The PLRA subjects lawsuits brought by prisoners in the federal courts to a host of burdens and restrictions that apply to no other persons.").

208. *See* PLRA, *supra* note 204, at 2 (discussing ways prisoners can still succeed even if they fail to exhaust before filing suit).

209. *Id.*

210. *Id.*; *see also* Jackson v. D.C., 254 F.3d 262, 268 (D.C. Cir. 2001) ("[T]he PLRA contains nothing expressly foreclosing courts from exercising their traditional equitable power to issue injunctions to prevent irreparable injury pending exhaustion of administrative remedies.").

211. *See* ADMINISTRATIVE REMEDY PROGRAM, *supra* note 176, at 2–12 (providing the Bureau of Prisons' Administrative Remedy Program steps).

212. *See* PLRA, *supra* note 204 at 1 (discussing the requirement to exhaust administrative remedies before filing suit).

of challenges that a prisoner must overcome. There are strict time limits and all the steps a prisoner must take help to ensure that there is a paper trail of the prisoner's grievances.[213] The first step is to engage in the informal resolution process.[214] The prisoner "shall first present [their] issue of concern informally to staff, and staff shall attempt to informally resolve the issue . . . ."[215] It is the Warden's responsibility to make sure the informal resolution process in place is effective and timely responds to prisoner concerns.[216]

The next step in the Administrative Remedy Program is for the prisoner to file an Administrative Remedy Request.[217] Both the informal resolution *and* Administrative Remedy Requests must be filed within 20 days of the incident the prisoner is complaining about.[218] This means that sometimes prisoners must file an Administrative Remedy Request before receiving a response to their informal resolution.[219] After filing the Administrative Remedy Request, a prisoner must wait for the Warden's response.[220] If the prisoner is unsatisfied with the Warden's response, or if the Warden does not respond within 20 days from the filing of the Remedy Request, the prisoner may submit an appeal to the Regional Director.[221]

If the prisoner is unsatisfied with the Regional Director's Response, or if the Regional Director does not respond within 30 days, the prisoner may submit a final appeal to the Bureau of Prisons' General Counsel.[222] It is at this point that the prisoner is

213. *See* ADMINISTRATIVE REMEDY PROGRAM, *supra* note 176 at 2–3 (detailing the essential steps a prisoner must follow when engaging in the Administrative Remedy Program); *see also* BOP GRIEVANCE GUIDE, *supra* note 202, at 2 ("It also creates a paper trail and show you tried to resolve the problem.").

214. *See* ADMINISTRATIVE REMEDY PROGRAM, *supra* note 176, at 4 ("[A]n inmate shall first present an issue of concern informally . . .").

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 5.

219. *See id.* at 4 (explaining that some of the time limits require concurrent filings of both Informal Resolutions and Remedy Requests).

220. *Id.*

221. *Id.* at 6–7.

222. BOP GRIEVANCE GUIDE, *supra* note 202, at 4–5.

considered to have exhausted the administrative remedies process and may proceed with filing a lawsuit, should they so choose.[223] For an incarcerated individual, the amount of waiting a prisoner has to endure at each step is tedious and all but ensures a prisoner will have to wait at least several months before they experience any type of relief.

Several safeguards are embedded within this administrative process which help to ensure that all prisoners are given an equitable process to lodge complaints.[224] One such safeguard is allowing extensions of the filing deadlines "[w]here the inmate demonstrates a valid reason for delay."[225] The Bureau of Prisons has articulated several reasons for delay they consider valid, including "an extended period in-transit during which the inmate was separated from documents needed to prepare the Request or Appeal; an extended period of time during which the inmate was physically incapable of preparing a Request or Appeal; [or] an unusually long period taken for informal resolution attempts."[226]

There is also a procedure to protect inmates when they "reasonably believe the issue [they are complaining about] is sensitive and [their] safety or well-being would be placed in danger if the Request became known at the institution [they were currently being housed at]."[227] In this situation, a prisoner "may submit their Request directly to the appropriate Regional Director" and mark the Request as "Sensitive."[228]

Prisoners are also permitted to "obtain assistance from another inmate or from institution staff in preparing a Request or an Appeal."[229] A prisoner can also be assisted by an outside source, like a member of their family or a lawyer.[230] For prisoners who are "illiterate, disabled, or who are not functionally literate in

223. *See id.* at 5 ("The grievance process is now complete. This means that you have finished all of the administrative steps required before suing about prison conditions under federal law.").

224. *See* ADMINISTRATIVE REMEDY PROGRAM, *supra* note 176, at 4 (detailing specific instances in which an attempt at informal resolution is not required).

225. *Id.* at 5.

226. *Id.*

227. *Id.* at 6.

228. *Id.*

229. *Id.* at 8.

230. *Id.*

English,"[231] it is the responsibility of the facility's Warden to make sure there is some type of assistance available should these prisoners want to engage in the Administrative Remedy Program.[232]

Should a prisoner submit a Request or Appeal and there is an error (i.e., the submission is "obscene or abusive, or does not meet any other requirement"),[233] as long as the error can be corrected, the submission will be returned to the prisoner for them to correct and they will be permitted to resubmit.[234] When deciding whether to reject a submission, the Coordinators who review the submissions "should be flexible, keeping in mind that major purposes of the [Administrative Remedy] Program are to solve problems and be responsive to issues inmates raise."[235] These safeguards play a critical role in the Administrative Remedy Program helping to ensure that every prisoner with a viable complaint will be able to pursue a remedy.[236]

In short, prisoners are expected to adhere to strict deadlines when submitting their claims.[237] While there are safeguards in place, like allowing late filings if the situation requires it, this is a tedious step prisoners *must* engage in before filing a lawsuit is even an option.[238] The purpose of the Administrative Remedy Program is to respond to prisoner requests and complaints related to their confinement.[239] The Process does not contemplate monetary compensation when parties have been injured and acts

231. *Id.* (quoting 28 CFR § 542.16(b) (2014)).

232. *Id.*

233. *Id.* (quoting 28 CFR § 542.17(a) (2014)).

234. *Id.*

235. *Id.*

236. *See id.* at 8–9 (discussing the responsibility of the prison to provide assistance for disadvantaged prisoners to obtain assistance and the opportunity for prisoners to correct mistakes in their filings).

237. *See generally* BOP GRIEVANCE GUIDE, *supra* note 202 (outlining the deadlines imposed at each step of the grievance process). *See generally id.* (noting the many time-bound requirements embedded in the Administrative Remedy Program).

238. *See* PLRA, *supra* note 204, at 1 (discussing the need to exhaust administrative remedies before filing suit).

239. *See* ADMINISTRATIVE REMEDY PROGRAM, *supra* note 176, at 2 (listing a stated purpose of the program as "inmates will be able to have any issue related to their incarceration formally reviewed by high-level Bureau officials").

a hurdle to prisoners who want to file lawsuits as soon as they have been injured.[240] The Administrative Remedy Program is not a suitable alternative to *Bivens* actions because it "cannot provide monetary relief"[241] and exists mainly to bring problems related to confinement to the attention of BOP personnel.[242]

V. Policy Considerations Regarding the Protection of Prisoners' Rights

Prisoners are considered a vulnerable population, therefore, it is essential that their rights be well-protected and that they have clear and effective remedies to compensate them when they have been harmed.[243] While the success of *Bivens* actions has been questioned, the potential remedies the lawsuits can provide outweigh any existing concerns.[244] The following paragraphs will briefly examine and address some of the concerns about *Bivens* litigation and ultimately conclude that *Bivens* should still be available for federal prisoners in the previously recognized contexts,[245] as well as have the potential to be expanded to other contexts, if appropriate.

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240. *See* Administrative Remedy Program: Excluded Matters, 67 Fed. Reg. 50804, 50804 (Aug. 6, 2002) (to be codified at 28 C.F.R. pt. 542) ("[T]he Administrative Remedy Program ordinarily cannot provide monetary relief.").

241. *Id.*

242. *See generally* ADMINISTRATIVE REMEDY PROGRAM, *supra* note 176 (outlining the process to bring complaints to the attention of prison officials).

243. *See Vulnerable Subjects – Prisoners*, UNIV. VA. HUMAN RSCH. PROT. PROGRAM ("Prisoners, therefore, constitute a vulnerable population for which additional protections are warranted.") [perma.cc/XB3H-UCSA].

244. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010).

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.

245. *See generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (creating a right to sue federal officers for infringements of the Fourth Amendment); *see also* Davis v. Passman, 442 U.S. 228, 248–49 (1979) (holding that a cause of action exists under the Fifth Amendment); *see also* Carlson v. Green, 446 U.S. 14, 18 (1980) (allowing a *Bivens* action to proceed under the Eighth Amendment).

A. *The Limited Rights of Prisoners Make Adequate Remedies Essential*

Prisoners must have clearly established avenues to lodge complaints against the officials in charge of their custody. Prisoners are a vulnerable population, therefore, protecting their rights is essential. [246] Whether or not prisoners are held in state or federal custody, they retain limited rights while incarcerated.[247] The limited rights prisoners possess exist to ensure that jails and prisons uphold "minimum standard[s] of living," and that the facilities protect prisoners from discrimination on the basis of race, religion, national origin, and sex.[248] Prisoners also retain their Eighth Amendment right to be free from cruel and unusual punishment.[249] While the Court ruled in *Carlson v. Green* that individuals can sue for Eighth Amendment violations,[250] the holding in *Egbert v. Boule*[251] is still alarming, to say the least. It was an explicit statement from the Court that any new context under *Bivens* cannot proceed, and this serves as a direct limitation on the rights of federal prisoners.

Despite the protections that currently exist, federal prisoners are still largely unable to vote,[252] are required to work, but can only earn wages ranging from twelve cents to forty cents an hour,[253] and their ability to communicate with the outside world is restricted

246. *See Vulnerable Subjects – Prisoners*, *supra* note 243 ("Prisoners . . . constitute a vulnerable population for which additional protections are warranted.").

247. *Prisoners' Rights*, *supra* note 95.

248. *See id.* (explaining the application of the Eighth and Fourteenth Amendments to inmates).

249. *Id.*

250. *See* 446 U.S. at 18 (creating a *Bivens* action under the Eighth Amendment).

251. *See* 596 U.S. 482, 486 (2022) (reversing the Court of Appeals under the reasoning that "prescribing a cause of action is a job for Congress, not the courts").

252. *See Voting Resources*, FED. BUREAU PRISONS ("Presently, only Maine, Vermont, and the District of Columbia (DC) allow incarcerated individuals to vote . . . .") [perma.cc/542L-7UTW].

253. *See Work Programs*, FED. BUREAU PRISONS ("Sentenced inmates are required to work. . . . Inmates earn 12¢ to 40¢ per hour for these work assignments.") [perma.cc/6EPE-2FWG].

and closely monitored.[254] The Supreme Court's opinion in *Egbert v. Boule* serves as another limitation on prisoner rights as it does not let prisoners file suit on claims outside the Fourth, Fifth, and Eighth Amendments.[255] While *Bivens* still exists in these three contexts, the Court has made clear that "recognizing a cause of action under *Bivens* is a 'disfavored judicial activity.'"[256] Therefore, when *Bivens* actions come before courts in the future, there is the potential for courts to attempt to distinguish them from the existing *Bivens* scenarios so they can dismiss the lawsuit.

Whether that possibility materializes is inconsequential, because ultimately *Boule* cut off the ability for prisoners to file suit in situations that differ even slightly from *Bivens*, *Davis*, or *Carlson*.[257] The Supreme Court made it very clear that if they had the chance to revisit *Bivens*, they would not have created a cause of action they did in 1971.[258] This sentiment, coupled with concerns surrounding judicially created remedies,[259] make it imperative that the *Bivens* cause of action be preserved, and strengthened, for federal prisoners. Along with protecting a vulnerable population, another reason to strengthen the area of *Bivens* actions in regard to prisoners' rights is because of existing case law which suggests that *Boule* deviated from precedent,[260] and that the expansion of *Bivens* should continue.

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254. *See Stay in Touch*, FED. BUREAU PRISONS (explaining that inmates' access to physical mail, phone calls, and email largely require approval from the prison and will usually be monitored) [perma.cc/ERQ7-RHA5].

255. *See generally Egbert*, 596 U.S. 482 (limiting *Bivens* actions to violations of the Fourth, Fifth, or Eighth Amendment).

256. *Id.* at 491.

257. *See id.* at 501 ("[A] plaintiff cannot justify a Bivens extension based on 'parallel circumstances' with *Bivens*, *Passman*, or *Carlson* unless he also satisfies the 'analytic framework' prescribed by the last four decades of intervening case law.").

258. *See id.* at 1809 ("[W]e have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution.").

259. *See* Boule v. Egbert, 998 F.3d 370, 385 (9th Cir. 2021) (referring to the Supreme Court's statement that "expanding the *Bivens* remedy is now a disfavored judicial activity") (quoting Ziglar v. Abbasi, 582 U.S. 120, 135 (2017)).

260. *See* Egbert v. Boule, 596 U.S. 482, 504–05 (Sotomayor, J., concurring in part and dissenting in part) ("[Today's decision] contravenes precedent and will strip many more individuals who suffer injuries at the hands of other federal

B. Existing Case Law Supports the Preservation and Strengthening of Bivens in the Context of Federal Prisoners' Rights

There is a strong body of case law that supports the preservation and strengthening of *Bivens* actions, not just in the context of federal prisoners. The Supreme Court has said that *Bivens* is an extremely effective remedy for plaintiffs.[261] Comparing *Bivens* actions to the FTCA, the Court found that *Bivens* was a better remedy because it is a stronger deterrent against individual government officials misbehaving, allows for punitive damages, and allows a jury trial, if the plaintiff so chooses.[262] Perhaps most important is that *Bivens* actions apply uniformly to *all* federal officials, while the FTCA only helps a claimant recover if the state where they were injured has a state-level cause of action for the violation.[263] For the Court to backtrack in *Boule* and ignore the strong remedies *Bivens* provides as a reason to strengthen the doctrine is an uncalled for departure from the Court's long held beliefs about the effectiveness of *Bivens* remedies.

In *Boule*, the majority expressed distaste towards judicially created remedies.[264] Despite the Court's suggestion that Congress is almost always better equipped than the courts to create remedies,[265] there has been documented support from the legal community regarding the creation of the *Bivens* action. Judge Friendly, who served on the Second Circuit, "suggested that federal courts could appropriately make federal common law in areas of federal concern where a uniform rule was desirable and

officers, and whose circumstances are materially indistinguishable from those in Bivens, of an important remedy.").

261. *See* Carlson v. Green, 446 U.S. 14, 20–23 (1980) (explaining why the Court believed that *Bivens* actions, as opposed to FTCA actions, are the better option).

262. *Id.*

263. *See id.* at 23 (explaining that the FTCA only applies if the state where the claimant was injured finds the action that caused the injury to be misconduct).

264. *See Egbert*, 596 U.S. at 491–92 (noting that Congress is better equipped to create causes of action compared to the courts).

265. *See id.* ("Unsurprisingly, Congress is 'far more competent than the Judiciary' to weigh such policy considerations.").

suggested that tort suits against federal officers was such an area."[266] Even those "who criticize implied statutory action have argued that federal courts should be able to imply rights of action to implement the Constitution."[267] Multiple times in the *Bivens* opinion, the Court made it clear that, without courts creating remedies for aggrieved citizens when the situation so demands, "there is no safety for the citizen."[268] It has always been the responsibility of the courts to "be alert to adjust their remedies so as to grant the necessary relief,"[269] which is why the Court's holding in *Boule* is completely nonsensical.

Finally, the Court's reason for disrupting the *Bivens* landscape does not align with recognized reasons for overturning precedent. Generally, Supreme Court precedent is overturned only when the Court finds "past precedent [to be] unworkable or no longer viable, perhaps [due to erosion] by its subsequent opinions or by changing social conditions."[270] The Court may also overturn precedent because it "simply thought it got it wrong in the past."[271] Even still, this historically only happened when the Court believed the decision was "badly reasoned" or "inconsistent with their own sense of the constitutional framers' intentions."[272]

None of these reasons for overturning precedent are cited in *Boule*. The majority continually announced concerns about the Court engaging in legislative actions when Congress is better equipped to create such remedies,[273] but failed to cite a concrete reason to depart from precedent. The majority did not find *Bivens* to be an unworkable doctrine because the Court recognized that *Bivens* actions could still be brought in previously-recognized

266. Woolhandler & Collins, *supra* note 141**,** at 1895.

267. *Id*.

268. Bivens v. Six Unknown Named Agents Fed. Bureau Narcotics, 403 U.S. 388, 394–95 (1971) (quoting United States v. Lee, 106 U.S. 196, 219 (1882)).

269. *Id*. at 392.

270. David Schultz, *The Supreme Court Has Overturned Precedent Dozens of Times, Including Striking Down Legal Segregation and Reversing Roe*, CONVERSATION (June 30, 2022, 8:22 AM) [perma.cc/MV3F-YDV7].

271. *Id.*

272. *Id.*

273. *See* Egbert v. Boule, 596 U.S. 482, 490–95 (2022) (citing to policy, national and border-security, and judicial remedies as reasons why Congress is better suited to created causes of action than courts).

contexts.[274] Social conditions have not changed to make it so *Bivens* is no longer viable.[275] There are still constitutional violations at the hands of government officials and Congress has not codified any statute to make *Bivens* obsolete.[276]

Even if the Court believed that it "got it wrong" with *Bivens*, the Court did not explicitly suggest that *Bivens* was badly reasoned or went against what the framers would have intended.[277] At most, the Court questioned whether the original *Bivens* decision violated the separation of powers as a judicial act of lawmaking.[278] However, if Congress felt that the decision were inappropriate it would have enacted a statute specifically aimed to address the issue, or declared the FTCA to be an exclusive remedy, at some point in the fifty-one years between *Bivens* and *Boule*. Another reason to question the holding in *Boule* is because it helps to bolster the controversial qualified immunity defense, which does not serve its intended purpose, and only functions as another barrier to recovery for injured persons.

C. Qualified Immunity is a Barrier to Recovery Against Federal Agents and Officers

Qualified immunity protects federal officers from being sued in certain situations,[279] and *Boule* reinforces this doctrine. Qualified immunity is a defense meant to protect government

274. *See id.* at 1809 ("But to decide the case before us, we need not reconsider *Bivens* itself.").

275. Movements for law enforcement accountability are still prevalent and have gained traction in the Black Lives Matter movement. *See* Rashawn Ray, *How Can We Enhance Police Accountability in the United States?*, BROOKINGS INST. (Aug. 25, 2020) (discussing the need for legal and operational change to policing in the wake of the deaths of George Floyd, Breonna Taylor, and Rayshard Brooks) [perma.cc/4X67-MKNC].

276. S. 3343, 117th Cong. (2021) (referencing the Bivens Act of 2021 introduced to the Senate to codify Bivens actions federally).

277. *See Egbert*, 596 U.S. 490–95 (focusing on policy considerations and border security in denying relief to the plaintiff).

278. *See id.* at 500 (explaining that the Court should "ask whether the Judiciary should alter the framework established by the political branches").

279. *See* SCHLANGER, *supra* note 3, at 846 (explaining that qualified immunity "holds that government officials are immune from suit unless they clearly violate established federal law").

officials from being sued for violating an individual's rights.[280] Officials can be sued only when they "violated a clearly established statutory or constitutional right."[281] According to the Supreme Court, qualified immunity is meant to protect "all but the plainly incompetent or those who knowingly violate the law."[282] This defense can be asserted both in § 1983 cases and in *Bivens* actions.[283]

Qualified immunity is said to "balance[] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[284] Courts have justified the use of the qualified immunity defense by stating that government officials "should not be dissuaded from zealous enforcement of the law,"[285] though this has sentiment has been the subject of much debate.[286] The Supreme Court has also justified qualified immunity from a policy standpoint saying that it provides protection to law enforcement officers who do their jobs; officers exposed to liability should only be those who are "plainly incompetent or those who knowingly violate the law."[287] It has been said that, qualified immunity, when raised as a defense, almost always prevents recovery,[288] but a 2010

280. *Qualified Immunity*, LEGAL INFO. INST. (last updated Aug. 2022) [perma.cc/VV97-BF3T].

281. *Id.* (internal quotations omitted).

282. Malley v. Briggs, 475 U.S. 335, 335 (1986).

283. *See Qualified Immunity*, NAT'L CONF. STATE LEGISLATORS (Jan. 12, 2021) ("In 1967, the Supreme Court recognized qualified immunity as a defense to § 1983 claims.") [perma.cc/N4BU-RS4Q]; *see also* Butz v. Economou, 438 U.S. 478, 486 (1978) (agreeing with the Court of Appeals that qualified immunity can be used as a defense in Bivens actions).

284. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

285. SCHLANGER, *supra* note 3, at 847.

286. *See id.* (noting that law enforcement officers rarely pay personally when found liable and that scholars disagree on whether contemporaneous common law "really afforded government officials a good faith defense against monetary lability").

287. *See Malley*, 475 U.S. at 341 (discussing the evolution of qualified immunity).

288. *See* Reinert, *supra* note 244, at 812 ("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 is an imposing barrier.").

study found that "qualified immunity plays a limited role in *Bivens* failures."[289]

Despite the findings of the study, there are still well-reasoned arguments against qualified immunity. One such argument, enunciated by Justice Sotomayor in a 2015 dissenting opinion "express[ed] concern that the Court's qualified immunity decisions contribute to a culture of [law enforcement] violence."[290] Justice Sotomayor voiced her concerns once more in *Boule*, calling back to the Court's opinion in *Ziglar* stating that "'individual instances of discrimination or law enforcement overreach' are, by their nature, 'difficult to address except by way of damages actions after the fact.'"[291] As previously explained, prisoners already have limited rights, and for many, the chance to file a *Bivens* suit was the best chance at recovery when their rights had been violated.[292] However, with the Supreme Court's clear distaste for *Bivens* actions,[293] combined with the qualified immunity defense in the background, it has become even harder, if not impossible for prisoners to find meaningful compensation. A final policy consideration focuses on the available remedies; Bivens actions provide the most meaningful remedies when compared to the FTCA[294] and Administrative Remedy Program.[295]

D. The Remedies Bivens Actions Can Provide are More Substantial than Other Remedies

Bivens, when compared to the FTCA and Administrative Remedy Program, is better suited to provide a meaningful remedy to aggrieved federal prisoners. As mentioned above, *Bivens* actions

289. *Id.* at 813.

290. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799 (2018) (referring to Mullenix v. Luna, 577 U.S. 7, 25–26 (2015).

291. Egbert v. Boule, 596 U.S. 482, 511 (2022) (Sotomayor, J., concurring in part and dissenting in part) (quoting Ziglar v. Abbasi, 582 U.S. 1843, 1862 (2017)).

292. *See* discussion *supra* subpart V.A.

293. *See Egbert*, 596 U.S. at 502 ("[W]e have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution.").

294. *See* discussion *supra* subpart IV.A.

295. *See* discussion *supra* Part IV.B.

allow the plaintiff to recover both compensatory and punitive damages.[296] This means that the injured party could recover more damages than they would in another type of action, as well as deters individual officers from violating the constitutional rights of others.[297] It is important to continue to preserve *Bivens* because it offers a superior remedy to the FTCA and BOP Administrative Remedy Program.[298]

In regard to the FTCA, the Supreme Court listed several reasons why *Bivens* was the preferred remedy. The advantages of *Bivens* compared to the FTCA are the potential for the cases to be heard by juries, the availability of punitive damages, and the deterrent effect *Bivens* has on federal agents.[299] Additionally, there is the fact that *Bivens* applies to *all* federal agents, while there must be a case-by-case determination if an FTCA action can be filed in a particular state.[300]

Looking to the Administrative Remedy Program, a considerable disadvantage is the Bureau of Prisons cannot award monetary damages through this process.[301] In *Davis,* the Supreme Court noted that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[302] To have a remedy that does not provide for monetary compensation, despite the commonplace nature of such damages, is to have an ineffective remedy, at best. While the Administrative

296. *See* Carlson v. Green, 446 U.S. 14, 20–21 (1980) (providing reasons why *Bivens* is a better option for injured parties to pursue relief).

297. *See Damages*, *supra* note 190 (explaining that punitive damages are "intended to punish the wrongdoer").

298. *See Carlson*, 446 U.S. at 20–21 (describing the benefits a *Bivens* action provides a plaintiff); *see also* Administrative Remedy Program: Excluded Matters, 67 Fed. Reg. 50804, 50804 (Aug. 6, 2002) (to be codified at 28 C.F.R. pt. 542) (noting that the Administrative Remedy Program cannot award monetary compensation).

299. *See Carlson*, 446 U.S. 20–21 (explaining why *Bivens* is a superior remedy to the FTCA).

300. *See id.* at 23 (explaining that a claimant can only sue under the FTCA in the state where the injury occurred and only if that state has an equivalent cause of action).

301. *See* Administrative Remedy Program: Excluded Matters, 67 Fed. Reg. at 50804 (stating that the Administrative Remedy Program does not offer monetary compensation).

302. Davis v. Passman, 442 U.S. 228, 245 (1979).

Remedy Program can grant injunctions to help address prisoner complaints,[303] it fails to offer the remedy that "make[s] the injured party whole."[304]

While the FTCA and Administrative Remedy Program provide some compensation to prisoners, they have severe limitations. *Bivens* adequately addresses these limitations and should thus be preserved. Aside from the preservation of *Bivens*, this Note explores several additional possible solutions to ensure there is robust protection for federal prisoners, which are discussed below.

VI. Recommendations in the Aftermath of Egbert v. Boule

This Note proposes several courses of action that can be taken in the aftermath of *Egbert v. Boule* and how to limit its negative effect on federal prisoners. While *Boule* potentially preserved the right to sue for violations of the Fourth, Fifth and Eighth amendments,[305] this case problematically prevents prisoners from filing *Bivens* actions based on allegations that other rights were violated and will potentially make it harder for prisoners to be successful in *Bivens* actions moving forward.

To address these concerns, this Note recommends limiting the holding of *Boule* so that it does not extend to federal prisoners. Much of the majority opinion of *Boule* focused on national security and border security concerns,[306] which do not implicate federal prisoners. As a result, the holding should not extend to federal prisoners. Finally, this Note recommends a federal equivalent to § 1983, allowing a statutory right for prisoners to sue federal officials when their constitutional rights have been violated.

While *Boule* did preserve the right to sue for violations of the Fourth, Fifth and Eighth amendments, this opinion definitively prevents prisoners from filing *Bivens* actions based on allegations that other rights were violated. *Boule* stops prisoners from using

303. *See* PLRA, *supra* note 204, at 2 ("[C]ourts may still issue injunction to prevent irreparable injury pending exhaustion of administrative remedies.").

304. *Damages*, *supra* note 190.

305. *See generally* Egbert v. Boule, 596 U.S. 482 (2022) (announcing that any *Bivens* action filed outside the context of the Fourth, Fifth, or Eighth Amendment would no longer be able to proceed in court).

306. *See id.* at 494–97 (noting Congress has the needed expertise for border security-related issues).

Bivens actions as potential remedies because it prevents them from filing these suits at all. There are currently solutions to this problem that would be easy to implement and help ensure that federal prisoners are afforded at least the same protections as state prisoners.

A. *Boule Should Not Be Extended to Federal Prisoners*

The majority opinion in *Egbert v. Boule* focused on the "border-security context" from which the facts of the case emerged.[307] It has been customary for many years for the Supreme Court to defer to Congress when issues of national security and foreign policy come before the Court.[308] The Court's hesitancy can be summarized as their belief that "foreign affairs or national security decisions are constitutionally allocated to the executive, . . . that politically accountable actors should decide high-stakes questions, [and] the idea that courts lack expertise in the security arena."[309] This is a valid argument, yet the same rationale does not make sense when it is extended to contexts beyond national security.

Egbert v. Boule took the Court's aversion to national security contexts and applied it to any future cases arising under *Bivens*.[310] Yet the rationale that Congress is better equipped to create causes of action and that the Court lacks expertise does not apply in the context of prisoners' rights. The Court *has* created a cause of action for prisoners,[311] and had Congress felt it was better suited than the Court in that situation, it would have passed legislation or explicitly stated that the cause of action was unavailable to prisoners.[312] In fact, Congress did the opposite when it said that

307. *See id.* (discussing the involvement of a border patrol agent and the incident's proximity to the Canadian border).

308. *See* Sinnar, *supra* note 150 (documenting a "pattern of deference" in the Supreme Court's approach to national security issues).

309. *Id.*

310. *See* 596 U.S. at 496 (noting that "a court cannot afford a plaintiff a *Bivens* remedy" if there is "any reason to think that judicial intrusion into a given field must be harmful or inappropriate." (internal quotations omitted).

311. *See* Carlson v. Green, 446 U.S. 14, 18 (1980) (creating a *Bivens* action for Eighth Amendment violations).

312. *See id.* at 19–21 (noting that the FTCA was passed years before *Bivens* came before the court and therefore the FTCA does not prevent *Bivens* actions).

the FTCA did not preclude the filing of a *Bivens* action.[313] The Congressional disapproval the Court claims it is seeking to avoid simply does not exist here.[314] The Court should use the facts of *Boule* to distinguish from cases involving the vulnerable population of prisoners and allow for continued development of *Bivens* related to prisoners because Congress does not disapprove.

While the precedent that supports *Bivens* and disfavors *Boule* was explained above in Part V, it must be mentioned again: *Boule* should not be extended to the context of prisoners suing federal officials because *Boule*'s application in such a context would go against nearly 50 years of existing precedent.[315] Besides limiting the application of *Boule*'s holding, a statute that is the federal equivalent of § 1983 would also help protect prisoners.

B. A Federal Equivalent to § 1983 Lawsuits

Congress can look to § 1983 as a model for a federal scheme and create a statute that mirrors the language of § 1983, but applied to federal officials, rather than state officials.[316] Section 1983 has long been used as a way for individuals to be compensated when state actors infringe on their constitutionally protected rights,[317] and the creation of a federal equivalent is long overdue.

Section 1983 allows injured parties to recover both compensatory and punitive damages,[318] which often serves as a deterrent effect.[319] Not only does the law motivate state officials to protects the constitutional rights of individuals, but it could also

313. *See id.* at 20 ("[C]ongress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy.").

314. *See id.* (same).

315. *See* discussion *supra* subpart V.A.

316. *See* SCHLANGER, *supra* note 3, at 834 (noting that § 1983 claims are only available against officials of a state government, not officials of the federal government).

317. *Id.*

318. *See* Thomas L. Horvath, *Punitive Damages Authorized in Section 1983 Action When "Reckless Disregard" Shown*, 67 MARQ. L. REV. 757, 764–66 (1984) (explaining that punitive damages may be awarded in a § 1983).

319. *See Punitive Damages*, LEGAL INFO. INST. (last updated Jan. 2024) ("[A]warding of punitive damages serves as a deterrence measure against specific misconduct.") [perma.cc/EN77-SK3Q].

compensate the victim while punishing the wrongdoer.[320] In the context of federal prisoners, ensuring they have both robust protections of their constitutional rights and a clear way to recover is necessary as federal prisoners are already a vulnerable population.[321]

It is illogical that two people can experience the same constitutional violation at the hands of a government official, but only one may have the chance to file a lawsuit because they were injured by a state official, rather than a federal official. Plainly speaking, there is a strong common-sense argument to create a federal equivalent to § 1983. Such an equivalent would also provide individuals injured by federal officials a right to sue for First Amendment violations, too.[322] Extending that statutory scheme to federal officials who violate *any* federal law, not just constitutional rights would create stronger protections not only for prisoners, but for all citizens. Creating a federal equivalent to § 1983 not only makes logical sense, but it will strengthen the protections for federal prisoners and their rights in a legislatively enshrined manner.

VII. Conclusion

When the Supreme Court created the *Bivens* cause of action, it recognized that individuals needed a way to be compensated when a federal official violated their constitutional rights.[323] For over fifty years, *Bivens* served as the most comparable federal equivalent to § 1983. The Supreme Court recognized it was a more beneficial remedy for federal prisoners than other avenues, like the

320. *See Damages, supra note* 190 (noting that tort cases allow for the injured party to receive both compensatory and punitive damages).

321. *See Vulnerable Subjects – Prisoners*, *supra* note 243 (referring to prisoners as a "vulnerable" population).

322. *See* Ariz. Students' Assn. v. Ariz. Bd. of Regents, 824 F.3d 858, 867 (2016) ("A plaintiff may bring a Section 1983 claim alleging that public officials, acting in their official capacity, took action with the intent to retaliate against, obstruct, or chill the plaintiff's First Amendment rights."); *see also* Egbert v. Boule, 596 U.S. 482, 498–99 ("[W]e hold that there is no *Bivens* action for First Amendment retaliation.").

323. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (creating a right for injured individuals to sue federal officials for infringements of the Fourth Amendment).

FTCA, and even Congress declined to limit prisoners' ability to file *Bivens* actions.[324] Despite years of precedent supporting the *Bivens* cause of action, the Supreme Court drastically limited the doctrine's impact with its decision in *Egbert v. Boule*.[325]

Although *Bivens* actions have drawbacks of their own, including being limited to certain categories of constitutional violations,[326] for the vulnerable federal prison population, a *Bivens* action is the only way for them to receive meaningful compensation when their rights have been violated. Logically, a state prisoner and federal prisoner who both experience a constitutional rights violation should be able to find similar redress in the courts. The Supreme Court's decision in *Boule* goes against logic and precedent, and unnecessarily extends the holding to federal prisoners. Because of the vulnerability of federal prisoners, it is even more imperative that there is a robust scheme to protect their constitutional rights. The protection of these constitutional rights happens in the courts.[327] However, more protection is now required outside the courts since *Egbert v. Boule*. Limiting the holding of *Boule* and creating a federal equivalency to § 1983 are effective in-court and out-of-court actions that can ensure federal prisoners have adequate remedies when their constitutional rights have been violated by a federal official.

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324. *See* Carlson v. Green, 446 U.S. 14, 20–21 (1980) (providing reasons why *Bivens* is a better option for injured parties to pursue relief and noting that Congress did not explicitly declare that the FTCA precludes *Bivens* actions).

325. *See generally Egbert*, 596 U.S. 482 (limiting *Bivens* actions to violations of the Fourth, Fifth, or Eighth Amendment).

326. *See Bivens*, 403 U.S. at 397 (holding that there was a right to sue for Fourth Amendment violations); *see also* Davis v. Passman, 442 U.S. 228, 248–49 (1979) (holding that a cause of action exists under the Fifth Amendment); Carlson, 446 U.S. at 18 (allowing a *Bivens* action to proceed in an Eighth Amendment context).

327. *See Bivens*, 403 U.S. at 394–95 ("In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights [which] have been invaded by the officers of the government, professing to act in its name.") (quoting United States v. Lee, 106 U.S. 196, 219 (1882)).