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Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims

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"But a right implies a remedy . . . ."

—James Madison[1]

I. INTRODUCTION

In January 2000, three New York state prison officials refused to provide Wayne Ford, a Muslim prisoner, one religious meal: the Eid ul Fitr feast that marks the completion of Ramadan.[2] Mr. Ford sued the prison officials for damages, claiming this refusal placed a substantial burden on his religious practice without legitimate penological justification in violation of the First Amendment's Free Exercise Clause.[3] After the district court granted summary judgment in favor of the prison officials, Mr. Ford appealed, and the Second Circuit vacated the decision of the district court.[4] On remand, Mr. Ford settled his claims against the individual state prison officers for an undisclosed amount.[5]

If Mr. Ford had been in a federal prison instead of a state prison, the federal courts would have afforded him no relief for this violation of his religious rights.[6] This is because federal courts have steadfastly

1. THE FEDERALIST NO. 43, at 237 (James Madison) (J.R. Role ed., 2005).
2. Ford v. McGinnis, 352 F.3d 582, 584 (2d Cir. 2003).
3. *Id.*
4. *Id*. at 598.
5. Stipulation of Settlement and Order of Dismissal, Ford v. McGinnis, 230 F. Supp. 2d 338 (S.D.N.Y. 2002) (No. 00 Civ. 03437).
6. *See*, *e.g.*, Turkmen v. Hasty, 789 F.3d 218, 236 (2d Cir. 2015) (holding that no damages remedy was available for violations of the First Amendment's Free Exercise Clause where federal detainees were denied access to Koran and religious meals); Ajaj v. United States, No. 15-cv-00992-RBJ-KLM, 2016 WL 6212518, at *3 (D. Colo. Oct. 25, 2016); Brown v. Prisons, No. 3:14-cv-681 (RNC), 2016 WL

refused to extend the holding of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[7] to Free Exercise claims brought against federal agents, thereby leaving federal prisoners without a remedy at law for violations of their religious rights. This result—whereby state prisoners are afforded remedial protections for their religious rights that are denied to federal prisoners—allows federal prison officials to act with impunity while their state counterparts are held liable for the same unconstitutional conduct. Such an outcome is arbitrary and contrary to constitutional design.[8]

This Article argues the federal courts should extend *Bivens* to recognize the availability of a damages remedy against federal prison officials who violate a prisoner's Free Exercise rights. After examining the development of the damages remedy for constitutional violations, including the Supreme Court's retraction of *Bivens* over the last two decades and the Court's most recent *Bivens* decisions from last term, the Article first argues lower courts have wrongly applied the current *Bivens* framework to determine a damages remedy remains unavailable to federal prisoners with Free Exercise claims. Using the Court's most recent *Bivens* decision as a guidepost, the Article systematically describes the challenges of recognizing a damages remedy in this context, providing a blueprint that may be transferrable to other constitutional contexts. Then the Article argues that allowing for damages—particularly punitive damages—for violations of a federal prisoner's religious rights serves a dual purpose. First, allowing federal prisoners to assert damages claims protects the inherent dignity and redemptive value of prisoners' spiritual lives—a protection that serves the rehabilitative purposes of imprisonment. Second, the availability of monetary relief to federal prisoners furthers the earliest purposes of

1305102, at *1 (D. Conn. Mar. 31, 2016) (holding that no damages remedy was available where federal prisoner was subject to a cross-gender pat down in violation of her sincerely held religious beliefs); Rezaq v. Fed. Bureau of Prisons, No. 13-cv-00990-MJR-SCW, 2016 WL 97763, at *9 (S.D. Ill. Jan. 8, 2016) (holding that no damages remedy was available under the First Amendment Free Exercise clause where a federal prison official refused to accommodate a Muslim prisoner's observance of Ramadan); Saleh v. United States, No. 09-cv-02563-PAB-KLM, 2011 WL 2682803, at *16 (D. Colo. Mar. 8, 2011), *overruled in part on other grounds*, 2011 WL 2682728, at *5 (July 8, 2011).

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

8. *See*, *e.g.*, Carlson v. Green, 446 U.S. 14, 22 (1980) ("[T]he 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." (quoting Butz v. Economou, 438 U.S. 478, 504 (1978))); *Butz*, 438 U.S. at 506 ("In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees."); United States v. Lee, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.").

punitive or exemplary damages: to compensate individuals for dignitary harms suffered as a result of government misconduct. Finally, the Article argues that by allowing federal prison officials to remain free from liability for violations of the Free Exercise Clause, the federal courts are abdicating their responsibility "to review the constitutionality of executive actions affecting individual rights"[9] and effectively overruling *Bivens*.

Part II provides a brief overview of the parallel development and recognition of a damages remedy for constitutional violations by local,[10] state,[11] and federal actors.[12] Part II then discusses the implications of the Supreme Court's most recent *Bivens* cases: *Ziglar v. Abbasi*[13] and *Hernandez v. Mesa*.[14] Part II concludes by providing a historical overview of *Bivens* scholarship, tracing each wave of scholarship following each set of new *Bivens* decisions and commenting on the future of *Bivens* in light of *Abbasi*.

Part III argues that the lower court decisions declining to extend a damages remedy to federal prisoners' Free Exercise claims were wrongly decided under the existing *Bivens* framework, even with the new guidance offered by *Abbasi*. Part III first examines whether the context presented here—federal prisoners' Free Exercise claims—is truly a new context under existing *Bivens* precedent. The Article goes on to examine the two-part analysis in every *Bivens* case: (1) whether special factors counsel hesitation in expanding the *Bivens* remedy to the new context and (2) whether adequate alternative remedies exist to protect the constitutional right at issue.

In this analysis, the court must first consider whether special factors counsel hesitation from expansion of the *Bivens* remedy.[15] In prior cases, special factors included cases involving military affairs;[16] cases against private corporations acting under color of law;[17] cases against federal agencies, rather than individuals;[18] and cases where it is too difficult to ascertain a workable cause of action.[19] The rationale provided in each of these cases is that the purpose of *Bivens* liability is to deter individual government actors from unconstitutional conduct,

9. George Bach, *Answering the "Serious Constitutional Question": Ensuring Meaningful Review of All Constitutional Claims*, 117 W. VA. L. REV. 177, 181 (2014).
10. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986).
11. Smith v. Wade, 461 U.S. 30 (1983); Carey v. Piphus, 435 U.S. 247 (1978).
12. *Bivens*, 403 U.S. 388.
13. 137 S. Ct. 1843 (2017).
14. 137 S. Ct. 2003 (2017).
15. Carlson v. Green, 446 U.S. 14, 18 (1980); Davis v. Passman, 442 U.S. 228, 245 (1979).
16. United States v. Stanley, 483 U.S. 669, 683 (1987); Chappell v. Wallace, 462 U.S. 296, 300 (1983).
17. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71 (2001).
18. FDIC v. Meyer, 510 U.S. 471, 484–86 (1994).
19. Wilkie v. Robbins, 551 U.S. 537, 560–61 (2007).

and that purpose would not be fulfilled in these instances.[20] None of these special factors are present where a federal prisoner challenges the unconstitutional conduct of a federal prison official. Moreover, the special factor most often identified by the lower courts declining to extend *Bivens* in the First Amendment context is the so-called deference to be afforded prison officials in constitutional litigation.[21] But this concern conflates the limited way in which the First Amendment already applies in a prison setting with a "special factor" counseling hesitation in the *Bivens* context. To the extent there are concerns about judicial intervention in the management of prisons, those concerns are fully addressed by the substantive limitations placed on the reach of the First Amendment in the prison context.[22]

Part III then examines the second prong of the *Bivens* standard, whether "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."[23] The Supreme Court has found congressionally created civil service and Social Security remedies[24] and state tort claims[25] to be adequate alternative remedies. Here, the Article examines the one close call to whether an alternative remedy exists, the Religious Freedom Restoration Act (RFRA),[26] concluding there is no congressionally provided alternative remedy that would substitute for *Bivens* recovery. The other adequate alternative remedies often identified by the lower courts addressing a Free Exercise claim seeking relief under *Bivens* are the federal prison system's

20. *See, e.g.*, *Malesko*, 534 U.S. at 70–71.

21. *See* Ajaj v. United States, No. 15-cv-00992-RBJ-KLM, 2016 WL 6212518, at *3 (D. Colo. Oct. 25, 2016); Shepard v. Rangel, No. 12-cv-01108-RM-KLM, 2014 WL 7366662, at *11 (D. Colo. Dec. 24, 2014).

22. *See* Turner v. Safley, 482 U.S. 78, 89–91 (1987).

23. Carlson v. Green, 446 U.S. 14, 18–19 (1980) (citing Davis v. Passman, 442 U.S. 228, 245–47 (1979)).

24. Schweiker v. Chilicky, 487 U.S. 412, 421–22 (1988) (Social Security benefits); Bush v. Lucas, 462 U.S. 367, 381–89 (1983) (civil service system).

25. *Malesko*, 534 U.S. at 72–73.

26. A potential avenue of alternative relief could be the availability of monetary relief under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (2012). Passed by Congress in 1993, the Supreme Court held RFRA unconstitutional as applied to the states, but the statute remains in effect as applied to the federal government. *See* City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997); O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003). Courts are split on whether RFRA created a cause of action for damages against individuals for substantial burdens on religious rights. *Compare* Patel v. Bureau of Prisons, 125 F. Supp. 3d 44, 53 (D.D.C. 2015) (damages claims recognized), *with* Tanvir v. Lynch, 128 F. Supp. 3d 756, 780–81 (S.D.N.Y. 2015). Whether and how the availability of monetary relief under RFRA might impact the analysis provided in this Article is briefly discussed *infra* section III.C. A more robust discussion would be worthwhile, but it is beyond the scope of this piece.

grievance program and the availability of injunctive relief.[27] Neither of these options, however, provides the type of meaningful and alternative relief contemplated by the Supreme Court in *Bivens*.

Part IV provides a three-fold argument on the importance of a damages remedy for substantial burdens on prisoners' Free Exercise rights. First, the Article discusses the particular vulnerability of the prison population and argues this vulnerability makes the protection of religious rights all the more important. Prisoners are a particularly vulnerable population because they are subject to the arbitrary whims of their captors at all times. When these arbitrary whims rise to the level of constitutional violations, particularly when those affected are members of unpopular or particularly targeted religious group, the resultant harms are dignitary in nature and target a prisoner's very notion of self. The second piece of the argument in Part IV asserts that such harms deserve the utmost constitutional protection. With these ideas in mind, Part IV argues that affording prisoners the opportunity to recover damages for violation of their religious rights perfectly aligns with the historical purpose of punitive damages.[28] The earliest English common law cases allowing for exemplary damages "did so only in instances where some sort of dignitary harm to the plaintiff had been established, but remained otherwise uncompensated."[29] Allowing prisoners to seek punitive damages for the dignitary harms associated with Free Exercise violations affords the socially powerless—those unable to protect themselves—the opportunity to vindicate their constitutionally protected rights when they are violated by the much more powerful individual prison guards, a purpose consistent with the historical role of punitive damages in our legal system.[30]

Finally, Part V concludes by discussing how creating a system whereby state prisoners are allowed to seek damages for the dignitary harms associated with Free Exercise violations but in which federal prisoners are not afforded the same remedy for the same violation of rights, the federal courts are sanctioning "a system that arbitrarily

27. *See, e.g.*, Ajaj v. Fed. Bureau of Prisons, No. 15-cv-00992-RBJ-KLM, 2017 WL 219343, at *2–5 (D. Colo. Jan. 17, 2017).

28. Because the Prisoner Litigation Reform Act (PLRA) would most likely bar recovery of compensatory damages, my focus here is on punitive damages. *See* 42 U.S.C. § 1997e(e) (2012). *But see* Wilcox v. Brown, 877 F.3d 161, 169–70 (4th Cir. 2017) (recognizing the availability of recovery for some compensable harms under the First Amendment).

29. Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 14 (2004).

30. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 71 (1999); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285 (1993) ("The history of the rise of the doctrine of punitive damages is a part of the struggle of individuals to preserve their rights against the mighty.").

punish[es] some people's illegal conduct while systematically—or haphazardly—leaving others' misconduct untouched."[31] Such a system, whereby the rights of state prisoners are protected but the rights of federal prisoners are not, is inconsistent with even the most recent *Bivens* decisions from the Supreme Court.[32]

II. DEVELOPMENT OF DAMAGES REMEDY AGAINST GOVERNMENT OFFICIALS FOR CONSTITUTIONAL VIOLATIONS

While the founders likely envisioned the availability of a damages remedy for the violation of constitutional rights,[33] the federal courts remained largely unreceptive to claims for damages for constitutional violations until the second half of the twentieth century.[34] Since then, the availability of a damages remedy for constitutional violations committed by *state* officials is clear and nearly universal, absent successful assertion of an immunity defense.[35] In stark contrast, the

31. Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 271 (2009).

32. *Cf.* Minneci v. Pollard, 565 U.S. 118 (2012).

33. *See*, *e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1488 (1987) ("Even in the absence of today's more expansive vision of affirmative rights, the framers recognized that affirmative relief would often be essential to protect negative rights—especially where the government violation could not be prevented *ex ante*, and where the government would enjoy the fruits of its past violations."); Anthony DiSarro, *When a Jury Can't Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS L. REV. 333, 337 (2012) ("[D]amages were intended to play a central, if not preeminent, role in remedying infringements of constitutional rights.").

34. *See, e.g.*, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986) (recognizing that compensatory damages are only available for constitutional violations resulting in actual injury and that absent actual injury, only nominal damages are available); Carey v. Piphus, 435 U.S. 247 (1978) (same); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing a damages remedy for Fourth Amendment violations against federal officials); Monroe v. Pape, 365 U.S. 167 (1961) (first recognizing the availability of a damages remedy for actions brought against state and local officials under 42 U.S.C. § 1983).

35. Government actors sued in their individual (or personal) capacities are often entitled to assert a defense of absolute immunity. *See*, *e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998) (recognizing absolute immunity for state and local legislators engaging in legislative acts); Mireles v. Waco, 502 U.S. 9, 11–12 (1991) (recognizing absolute judicial immunity); Briscoe v. LaHue, 460 U.S. 325 (1983) (recognizing absolute immunity for police officer witnesses who testify in judicial proceedings); Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976) (recognizing absolute prosecutorial immunity). Even when no absolute immunity protections apply, government officials can avail themselves of the protections of qualified immunity so long as the law was not yet clearly established at the time the official committed the unconstitutional act. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 836

availability of damages to persons whose rights are violated by *federal* officials is increasingly uncertain.[36] The divergence in the availability of a damages remedy is discussed in detail in the following sections.

A. Damages Against State and Local Officials Under 42 U.S.C. § 1983

Congress passed 42 U.S.C. § 1983 as part of the Civil Rights Act of 1871, at the height of the tumultuous Reconstruction era that followed the Civil War.[37] Through this statute, Congress sought "to provide a federal forum for civil rights claims"[38] in large part "because, by reason of prejudice, passion, neglect, intolerance or otherwise," state courts were failing to enforce the rights, privileges, and immunities guaranteed by the newly enacted Fourteenth Amendment.[39] While § 1983 lay largely dormant for just under a century, the legislative history makes clear Congress intended the law provide monetary relief to victims of constitutional rights violations by state and local authorities.[40]

> It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal Courts . . . .[41]

Relying heavily on this legislative history, the U.S. Supreme Court first expressly recognized a cause of action under § 1983 in *Monroe v.*

(2016) (stating that defendants not already given absolute immunity have qualified immunity and "can be held liable for money damages only if their conduct violated clearly established constitutional law").

36. The contracting availability of a damages remedy against agents of the federal government is discussed in detail *infra* section II.B.
37. The Civil Rights Act of 1871 was also known as the "Ku Klux Klan Act" and was undoubtedly meant to redress "the failure of certain states to enforce their laws with an even hand." Mitchell J. Edlund, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander Is Injured*, 30 VAL. U. L. REV. 161, 169, 170 n.41 (1995).
38. Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989).
39. *Monroe*, 365 U.S. at 180; *see also* Eaton & Wells, *supra* note 35, at 835 (stating that the statute was enacted in order to enforce the Fourteenth Amendment).
40. While the Supreme Court initially declined to recognize a cause of action against local officials under 42 U.S.C. § 1983, *see Monroe*, 365 U.S. at 190–92, it has since held municipal entities can be held liable under § 1983 when an official's unconstitutional action carried out a municipal policy or practice. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).
41. *Monroe*, 365 U.S. at 179–80 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 216 (1871)).

Pape,[42] decided in 1961. Notably, the *Monroe* Court unambiguously found the federal remedy under § 1983 is "supplementary to the state remedy."[43] In other words, the existence of concurrent state remedies is not a bar to a cause of action under § 1983.[44]

Since *Monroe*, § 1983 litigation steadily expanded.[45] The Supreme Court has recognized that nominal, punitive, and compensatory damages are available under the statute, and even where compensatory damages cannot be established due to lack of an actual injury, nominal and punitive damages remain available to redress a constitutional violation.[46] While the remedies available to victims of constitutional violations by state and local actors continued to grow, the same could not be said for the redressability of the very same violations by federal actors.

B. Damages Against Federal Officials Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[47]

As the Supreme Court gradually acknowledged the full scope of remedies available under § 1983, it also began recognizing the availability of monetary relief for constitutional violations perpetrated by agents of the federal government.[48] The first case to recognize a cause of action for damages against *individual* federal officials for violations of constitutional rights was *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[49] Prior to *Bivens*, victims of constitutional violations by federal officers could seek relief only in state courts through common law suits for trespass against the federal agents.[50] Yet, by the time *Bivens* reached the Court, "several flaws in

42. *Id.* at 167.
43. *Id.* at 183.
44. Zinermon v. Burch, 494 U.S. 113, 124 (1990).
45. *See* Hudson v. Michigan, 457 U.S. 586 (2006).
46. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986) (recognizing that compensatory damages are only available for constitutional violations resulting in actual injury and that absent actual injury only nominal damages are available); Smith v. Wade, 461 U.S. 30 (1983) (establishing punitive damages are available for § 1983 claims where a government official acted with evil motive or intent or in callous disregard to federally protected rights); Carey v. Piphus, 435 U.S. 247 (1978) (recognizing that compensatory damages are only available for constitutional violations resulting in actual injury and that absent actual injury only nominal damages are available).
47. 403 U.S. 388 (1971).
48. *See*, *e.g.*, Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979); *Bivens*, 403 U.S. 388.
49. 403 U.S. 388.
50. James E. Pfander, *The Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *in* FEDERAL COURTS STORIES 275, 280 (Vicki C. Jackson & Judith Resnik eds., 2010); *see also* STEPHEN I. VLADECK, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, THE *BIVENS* TERM: WHY THE SUPREME COURT SHOULD

the original model had crystallized."[51] First, not all constitutional rights have close analogues in state tort law.[52]

> Second, the same period saw federal courts more routinely asserting the power to *enjoin* unconstitutional conduct by the federal government—even though, as with damages, no statute expressly authorized them to provide such relief—creating both a strange jurisdictional asymmetry between prospective and retrospective relief against federal officers and a precedent for a more aggressive federal judicial role.[53]

Finally, the development of the federal common law provided an analytic framework through which the federal judiciary could assess whether a judicially created, rather than statutory, remedy might be available in a certain context.[54] "These developments came to a head in *Bivens*."[55]

The *Bivens* case began the day after Thanksgiving 1965 when a group of federal agents from the Drug Enforcement Agency, then known as the Federal Bureau of Narcotics, without a warrant "knocked on the door of the apartment of Webster Bivens, arrested him on narcotics charges, and searched the premises."[56] The agents not only arrested Mr. Bivens without a warrant, but they used unreasonable force when doing so, shackling him in front of his wife and children and subjecting him to a humiliating strip search.[57] The officers never charged the innocent Mr. Bivens with a crime, and Mr. Bivens challenged the violation of his Fourth Amendment rights by filing suit in federal court, requesting fifteen thousand dollars in damages from each of the federal officers.[58]

REINVIGORATE DAMAGES SUITS AGAINST FEDERAL OFFICERS 2 (2017), https://www.acslaw.org/sites/default/files/The_Bivens_Term.pdf [https://perma.unl.edu/L2B3-Q4LQ] ("When it comes to suits for damages for abuse of power, federal officials are usually governed by local law.").

51. VLADECK, *supra* note 50.
52. *Id.*
53. *Id.*
54. *Id.* (quoting Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389–91 (1964)).
55. *Id.*
56. Pfander, *supra* note 50, at 280.
57. *Id.*
58. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390 (1971). Mr. Bivens filed his lawsuit in the Eastern District of New York, invoking jurisdiction under 42 U.S.C. § 1983; 28 U.S.C. § 1343(3)–(4); and 28 U.S.C. § 1331, the federal question statute, which, at the time, required that the amount in controversy exceed ten thousand dollars. Pfander, *supra* note 50, at 281. The government moved to dismiss Mr. Bivens's pro se action, arguing that Mr. Bivens could not bring suit under § 1983 against federal agents and that the agents enjoyed absolute immunity under § 1331. *Id.* at 282. The district court granted the government's motion, finding that the federal officers enjoyed absolute immunity. *Id.* Mr. Bivens sought leave to appeal in forma pauperis, and in response, the district court issued a new opinion holding that Mr. Bivens' complaint presented no federal question because no implied right of action for damages against federal officers existed. *Id.* at 282–83. In the Second Circuit, after

Unsuccessful in both the district court and the U.S. Circuit Court for the Second Circuit, Mr. Bivens filed a petition for certiorari to the Supreme Court in May 1969.[59] The Court ultimately granted certiorari and issued its opinion on June 21, 1971, reversing the holding of the Second Circuit.[60] In a 5–3 opinion, the Court held the Constitution itself provides a cause of action for damages for violations of the Fourth Amendment by individual federal agents.[61] Specifically, the Court determined that so long as Congress had not provided an adequate alternative remedy for violation of the right at issue and so long as there were no special factors counseling the Court to hesitate acting in an area where Congress had not, "private individuals whose constitutional rights had been violated by federal officers were entitled to pursue damages remedies in the federal courts."[62]

In the period immediately following *Bivens*, both the Supreme Court and the lower federal courts extended the *Bivens* remedy to other constitutional violations.[63] Notably, the federal courts extended *Bivens* to First Amendment Free Speech claims,[64] First Amendment Freedom of Association claims,[65] Fifth Amendment Equal Protection claims,[66] Fifth Amendment Due Process claims,[67] Sixth Amendment right-to-an-attorney claims,[68] and Eighth Amendment prison-conditions claims.[69] Of these, the Supreme Court itself expressly expanded

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appointment of counsel, Mr. Bivens lost again. The panel upheld the district court's determination that no implied right of action existed. *Id.* The Second Circuit further found that Congress had not created a cause of action in this area and that it would be inappropriate for the federal courts "to fill the hiatus left in this area by Congress . . . since . . . the absence of a federal damage action has not rendered illusory the right to remain free from unreasonable search and seizure in view of the other remedies available for its enforcement." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 725 (2d Cir. 1969).

59. Pfander, *supra* note 50, at 283.
60. *Bivens*, 403 U.S. at 395–97.
61. *Id.*
62. VLADECK, *supra* note 50, at 3. Importantly, valid defenses remain available to federal agents sued under *Bivens*. *Id*.
63. Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 811 (2010).
64. Howard v. Warden, 348 F. Supp. 1204, 1205 (E.D. Va. 1972) (recognizing *Bivens* remedy for First Amendment claim, but ultimately finding plaintiff failed to state a claim under the First Amendment).
65. Paton v. La Prade, 524 F.2d 862, 870 (3d Cir. 1975).
66. Davis v. Passman, 442 U.S. 228, 234–35 (1979); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931–32 (10th Cir. 1975).
67. Apton v. Wilson, 506 F.2d 83, 93–94 (D.C. Cir. 1974); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1157–58 (4th Cir. 1974); U.S. *ex rel.* Moore v. Koelzer, 457 F.2d 892, 894 (3d Cir. 1972).
68. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 161–62 (D.D.C. 1976).
69. Carlson v. Green, 446 U.S. 14, 19–20 (1980); Patmore v. Carlson, 392 F. Supp. 737, 739–40 (E.D. Ill. 1975); Walker v. McCune, 363 F. Supp. 254, 256 (E.D. Va. 1973).

Bivens to include employment-discrimination claims brought under an Equal Protection theory encompassed by the Fifth Amendment's Due Process Clause[70] and cruel-and-unusual-conditions claims brought under the Eighth Amendment.[71] Indeed, after *Bivens*, courts and commentators understood that the Supreme Court would continue to treat *Bivens* actions in the same manner as actions brought under § 1983.[72] *Carlson v. Green* provides a clear picture of how and why this understanding developed.

In *Carlson*, the estate of Joseph Jones, Jr., through the administrator and decedent's mother, Marie Green, sued federal prison officials for personal injuries her son endured while in the custody of said officials at the U.S. Penitentiary-Terre Haute, in Terre Haute, Indiana.[73] Mr. Jones, who suffered from asthma, had an asthma attack on August 15, 1975, and went to the prison infirmary where he suffered for eight hours without seeing a doctor or receiving treatment.[74] Eventually, a federal prison official administered two injections of Thorazine to Mr. Jones, ignoring that the injections were contraindicated for treatment of an asthma attack.[75] After the second injection, Mr. Jones suffered a heart attack and died.[76] Ms. Green sued prison officials for damages for the violation of her son's Eighth Amendment rights.[77] While the district court determined Indiana's survival statutes precluded a cause of action by Mr. Jones's estate,[78] the Seventh Circuit reversed, holding the estate could seek vindication of Mr. Jones's rights through *Bivens*.[79]

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70. *Davis*, 442 U.S. at 234–35. *Davis* found that a Congressman could be held liable for employment discrimination under *Bivens*. *Id.* at 230–31. In its most recent term, the Supreme Court cast doubt on the continued viability of much of the analysis in *Davis*. It indicated that because *Davis* was decided "before the Court's cautionary instructions with respect to *Bivens* suits" were announced, it could not provide guidance on later employment discrimination claims brought in new contexts. Ziglar v. Abbasi, 137 S. Ct. 1843, 1859 (2017). *Abbasi* is discussed in detail *infra* section III.C.
71. *Carlson*, 446 U.S. 14.
72. Reinert, *supra* note 63, at 822; *see also* George D. Brown, *"Counter-Counter-Terrorism via Lawsuit"—The* Bivens *Impasse*, 82 S. CAL. L. REV. 841, 858 (2009) (noting that during the *Davis* and *Carlson* era, courts presumed that constitutional damages actions should go forward); Gary S. Gildin, *The Standard of Culpability in Section 1983 and* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 614 (1983) (noting that *Bivens* relief is not restricted to particular constitutional amendments).
73. Green v. Carlson, 581 F.2d 669, 670–71 (7th Cir. 1978).
74. *Id.* at 671.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 672.
79. *Id.* at 674 (stating that holding that the Indiana survival statutes precluded Mr. Jones's estate from recovering for the violation of his rights "would not only fail to

The Supreme Court agreed, holding that the violation of Mr. Jones's rights could be vindicated under a *Bivens* theory and that the estate could pursue vindication of those rights after Mr. Jones's passing.[80] In recognizing the availability of a *Bivens* remedy, the Supreme Court found no special factors counseled hesitation and expressly held that Congress failed to create any adequate alternative remedies.[81] First, the Court expressly found federal prison officials "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate," and the defense of qualified immunity could appropriately address any interference in the performance of their official duties.[82]

Second, the Court extensively examined whether Congress provided the estate, acting on behalf of the federal prisoner, an adequate alternative remedy through the Federal Tort Claims Act (FTCA).[83] The Court provided five reasons why Congress did not intend to supplant *Bivens* through the FTCA.[84] As an initial matter, the Court determined the legislative history of the 1974 amendment to the FTCA "made it crystal clear that Congress view[ed] FTCA and *Bivens* as parallel, complementary causes of action."[85] Second, the Court found *Bivens* is a more effective remedy because it not only compensates victims of constitutional violations by the federal government but also provides a deterrent effect to correct individual federal officers' behavior.[86] In recognizing the importance of this deterrent effect, the Court

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effectuate the policy of allowing complete vindication of constitutional rights; it would subvert that policy").

80. Carlson v. Green, 446 U.S. 14, 18–23, 25 (1980).

81. *Id.* at 19.

82. *Id.* Indeed, as I discuss in extensive detail *infra* section III.B, any special deference to prison officials the federal courts may deem necessary is already extensively built into the substantive test for First Amendment claims brought by prisoners, and such deference need not keep prisoners' constitutional claims out of court.

83. *Id.* at 19–23. The Federal Tort Claims Act (FTCA) allows for suit against the federal government for torts committed by its employees. *See* 28 U.S.C. §§ 1346(b), 2671–80 (2012). The "only proper defendant" to an FTCA claim is the United States; a citizen cannot sue an individual federal officer on an FTCA theory of liability. Jackson v. Kotter, 541 F.3d 688, 693 (7th Cir. 2008).

84. *Carlson*, 446 U.S. at 19–23.

85. *Id.* at 19–20; *id.* at 20 ("[A]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents *and* the Federal Government. Furthermore, this provision should be viewed as a *counterpart* to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved)." (quoting S. REP. NO. 93-588, at 3 (1973))).

86. *Id.* at 21 ("It is almost axiomatic that the threat of damages has a deterrent effect . . . .").

specifically pointed to the similar constraining purpose of § 1983.[87] Third, the Court viewed the deterrent effect created by the availability of punitive damages under *Bivens* as far superior to that of the FTCA, where punitive damages are statutorily prohibited.[88] Fourth, the Court found it significant that a plaintiff can present his *Bivens* claim to a jury, while an FTCA claim must be tried to the bench.[89] Finally, because FTCA claims must be plead under state tort theories, an action under the FTCA might not exist in every state, "[y]et it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules."[90] Each of these reasons, supplied by the Supreme Court in *Carlson*, becomes important when considering whether federal prisoners ought to have a *Bivens* remedy available to them for violations of their First Amendment Free Exercise rights, discussed in more detail below.

Despite the Court's unequivocal articulation of the need for a *Bivens* remedy in *Carlson*, the three-plus decades since *Carlson* reveal a Court reluctant to extend *Bivens* to new contexts.[91] In some instances, the Court determined special factors exist which preclude an extension of *Bivens*. Such special factors include congressional deference to the unique requirements of the military[92] and the lack of a workable cause of action.[93] In other instances, the Court conflated the special-factors exception and the adequate-alternative-remedy exception to conclude the existence of a congressional statute in a particular area

87. *Id.* at 21 n.6.

88. *Id.* at 22. At this point, the Court also expressly noted "that the 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Id.* (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

89. *Id.*

90. *Id.* at 23 ("The question whether respondent's action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.").

91. Reinert, *supra* note 63, at 822–23.

92. Following an identical limitation to FTCA claims, the Court in *United States v. Stanley* declined to extend *Bivens* to claims brought by military service members when the injury arose of activity "incident to service." 483 U.S. 669, 681, 683 (1987); *see also* Chappell v. Wallace, 462 U.S. 296, 304 (1983) (declining to extend *Bivens* to injuries suffered by members of the military while in service).

93. Wilkie v. Robbins, 551 U.S. 537, 555 (2007). In *Wilkie*, the Court declined to extend *Bivens* to a claim that officials from the Bureau of Land Management had engaged in a pattern of harassment and intimidation to acquire an easement across private property because a case like this, involving the "hard bargaining" of federal officials, would "present a delicate line-drawing problem as courts and juries struggled to say when the government had gone too far in pursuit of its interest." Pfander, *supra* note 50, at 297. At least one commentator has indicated that *Wilkie* may signal that the *Bivens* doctrine is "on life support." *See* Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 CATO SUP. CT. REV. 23, 26.

is itself a factor "counseling judicial hesitation."[94] For example, in *Bush v. Lucas*, the Court declined to extend a *Bivens* remedy to civil service employees alleging First Amendment Free Speech violations because the existence of an "elaborate remedial system" in the form of the Civil Service Commission's Federal Employee Appeals Authority counseled hesitation.[95] Similarly, in *Schweiker v. Chilicky*, the Court declined to extend a *Bivens* remedy to actions brought under the Due Process Clause of the Fifth Amendment for the denial of Social Security benefits, deferring to the existence of a congressional scheme created to address constitutional violations that occur during the course of the program's administration.[96] Finally, in three instances the Court declined to extend a *Bivens* remedy where the constitutional violations are committed by actors who are not individual federal government officials.[97] In short, in the thirty-seven years since *Carlson*, the Court has not found reason to extend *Bivens* relief.

The Supreme Court's last term, which began in October 2016, brought two cases implicating the availability of a *Bivens* remedy for unconstitutional conduct by federal government actors: *Ziglar v. Abbasi*[98] and *Hernandez v. Mesa*.[99] Neither case resulted in an extension of the *Bivens* remedy, but both left open the possibility of a *Bivens* remedy in two new contexts. The next section will examine these two cases and their impact on the future of the *Bivens* doctrine.

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94. Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 297 (1995). The existence of a congressional statute governing federal prisoners' Free Exercise claims is a potential roadblock to the argument I am asserting here because the Religious Freedom Restoration Act (RFRA) clearly offers more protections to Free Exercise than current First Amendment jurisprudence. I address this issue more fully *infra* section III.C.

95. 462 U.S. 367, 387–90 (1983) Ultimately, the Court concluded the existence of the congressional remedy signaled that Congress was in a better position to fashion the scope of the type of remedy sought by the plaintiff.

96. Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (declining to extend *Bivens* "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations").

97. First, in *FDIC v. Meyer*, the Court declined to extend a *Bivens* remedy to claims against a federal agency, finding that naming the agency rather than a specific individual as a defendant counselled hesitation. 510 U.S. 471, 486 (1994). Second, in *Correctional Services Corp. v. Malesko*, the Court declined to extend a *Bivens* remedy to claims against a private prison corporation since the deterrent rationale applied to individuals, not private entities. 534 U.S. 61, 70–71 (2001). Finally, in *Minneci v. Pollard*, the Court declined to extend a *Bivens* remedy to claims against the employees of private prison contractors, concluding that claims against these contractors could be asserted "within the scope of traditional state tort law." 565 U.S. 118, 125 (2012).

98. 137 S. Ct. 1843 (2017).

99. 137 S. Ct. 2003 (2017).

C. The Future of *Bivens*

The first of the two *Bivens* cases the Supreme Court heard last term, *Ziglar v. Abbasi*,[100] involved claims brought by several Muslim men who were detained in inhumane conditions after the events of September 11, 2001.[101] Focusing its decision on the special-factors analysis, the Supreme Court declined to extend *Bivens* to what it termed the "detention policy claims," which stated that federal officials, including prison wardens, violated the plaintiffs' Fourth and Fifth Amendment rights to due process and equal protection by holding them in restrictive conditions of confinement[102] and subjecting them to frequent strip searches.[103] Ultimately, the Court concluded that because the detention-policy claims implicated "immigration and national security, areas particularly within the expertise of Congress and the executive," special factors existed to preclude a *Bivens* remedy on those claims.[104]

In reaching this conclusion, the Court attempted to clarify the "proper test for determining whether a case presents a new *Bivens* context"[105] and to identify what exactly constitutes "special factors counselling hesitation."[106] As to the first, the Court stated:

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100. 137 S. Ct. 1843.

101. Erwin Chemerinsky, *Chemerinsky: Two End-of-Term Decisions Close the Courthouse Doors to Those Who Have Been Injured*, ABA J., (July 6, 2017), http://www.abajournal.com/news/article/chemerinsky_again_closing_the_courthouse_doors [https://perma.unl.edu/ZFN7-RCAM].

102. While the Supreme Court rather innocuously referred to the plaintiffs' claims as simply "detention policy claims" throughout its analysis, the actual conditions of confinement were rather harsh and torturous:

> Conditions . . . were harsh. Pursuant to official Bureau of Prisons policy, detainees were held in "tiny cells for over 23 hours a day." Lights in the cells were left on 24 hours. Detainees had little opportunity for exercise or recreation. They were forbidden to keep anything in their cells, even basic hygiene products, such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. And they were strip searched often—any time they were moved, as well as at random in their cells. Some of the harsh conditions . . . were not imposed pursuant to official policy. According to the complaint, prison guards engaged in a pattern of "physical and verbal abuse." Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.

Abbasi, 137 S. Ct. at 1853 (citations omitted); *see also* Vance v. Rumsfeld, 701 F.3d 193, 206 (7th Cir. 2012) (Wood, J., concurring) (cataloguing similar treatment to that described in *Abbasi* and finding it to be torture).

103. *Abbasi*, 137 S. Ct. at 1853.

104. Chemerinsky, *supra* note 101.

105. *Abbasi*, 137 S. Ct. at 1859.

106. *Id.* at 1857.

> If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.[107]

As to the second, the Court did not expressly define special factors and instead stated:

> The necessary inference . . . is 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. Thus, to be a "special factor counselling hesitation," a factor must cause a court to hesitate before answering the question in the affirmative.[108]

Using these guideposts, the Court concluded the *Abbasi* claimants sought to extend *Bivens* to a new context by challenging not just standard law enforcement operations but rather "elements of the Government's whole response to the September 11 attacks."[109] Because this would inevitably lead to judicial inquiry into national security issues, the Court ultimately determined it was for Congress, not the Courts, to determine if a damages remedy should be available in this context by striking the balance "between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril."[110] What is noteworthy about this statement is that by declining to exercise its power to hear constitutional questions when only a damages remedy is at issue, the Court allowed federal officials the freedom to make not only lawful decisions but also unlawful ones that are never subject to review. By refusing to extend the remedy, the Court permitted federal officials,

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107. *Id.* at 1859–60. A cursory glance at this list, particularly the last two "differences" listed, makes clear that the Court is conflating the questions of whether a case presents a new context for a *Bivens* remedy and whether that case presents special factors counseling hesitation to extend the *Bivens* remedy. It seems the first question should be whether or not recognizing a damages remedy in a particular case would be a true extension of *Bivens*. Then, if it is a new context, the analysis would turn to whether special factors cautioned against providing the remedy in a particular case and whether Congress had expressly provided other available remedies for the constitutional violation.

108. *Id.* at 1857–58. Discussed in more detail below, in the prison context, this makes the federal courts doubly deferential to the other branches of government when it comes to the administration of the federal prison system and ultimately may result in the federal courts abdicating their responsibility to check the abuse of executive power. *See infra* section III.B.

109. *Abbasi*, 137 S. Ct. at 1861.

110. *Id.* at 1863.

like the petitioners in *Abbasi*, to act with impunity and complete disregard of fundamental constitutional values.

Nevertheless, while the Supreme Court expressly declined to extend *Bivens* to the "new context"[111] presumably created by the detention-policy claims, the Court took a different approach when considering whether the "prisoner abuse claim" could proceed.[112] While the Court noted the prisoner abuse claim carried significant parallels to *Carlson*, it ultimately determined allowing the claim to move forward would require a "modest extension of *Bivens*."[113] Concluding the issue had not been adequately briefed, the Court remanded the case to allow the lower courts to grapple with the question of whether *Bivens* relief should be extended to this new context.[114] In so doing, the Court provided some guidance to the lower courts faced with determining whether *Bivens* relief should extend to the prisoner abuse claim. Because that guidance is directly relevant to consideration of whether the *Bivens* remedy should be available for Free Exercise claims brought by federal prisoners, discussion of this aspect of *Abbasi* is reserved for section IV.B.

As it did with the prisoner abuse claim in *Abbasi*, the Court declined to engage in the special-factors analysis in *Hernandez*—the second case to raise the *Bivens* question from last term—and instead remanded the case to the Fifth Circuit for analysis under the framework announced in *Abbasi*.[115] Like those in *Abbasi*, the facts underlying the petitioners' claims in *Hernandez* are horrific. In 2010, fifteen-year-old Sergio Hernández was playing with three friends in a concrete culvert that separates El Paso, Texas, from Juarez, Mexico.[116] Playing a common children's game of running up the culvert to touch the eighteen-foot fence built by the United States, the unarmed boys frolicked in plain view of the nearest border crossing at Paso del Norte Port of Entry.[117] While the boys were playing, a U.S. Border Patrol agent grabbed one of the boys during his bicycle patrol of the culvert, causing the other boys, including Sergio, to flee back towards Mexico.[118] As he ran, the border patrol agent shot Sergio in the head, killing him.[119] Sergio's parents sued the border patrol agent under a *Bivens* remedial theory alleging the agent violated the Fourth and

111. *See supra* note 70.
112. *Abbasi*, 137 S. Ct. at 1863.
113. *Id.* at 1864.
114. *Id.* at 1865.
115. Hernandez v. Mesa, 137 S. Ct. 2003, 2006–07 (2017).
116. Brief for Petitioner, *Hernandez*, 137 S. Ct. 2003 (No. 15-118), 2016 WL 7156393, at *2.
117. *Id.* at *2–3.
118. *Id.* at *3.
119. *Id.*

Fifth Amendments of the U.S. Constitution.[120] The Fifth Circuit determined Sergio lacked any Fourth Amendment rights in these circumstances and granted the border agent qualified immunity on the Fifth Amendment claim.[121] The Supreme Court reversed and remanded, instructing the lower courts to first decide the question of whether *Bivens* provides an available remedy in these circumstances before turning to the constitutional questions.[122] Thus, the Court declined to recognize a *Bivens* remedy in yet another case.

After *Abbasi* and *Hernandez*, practitioners and scholars alike are left to ponder what, if anything, is left of *Bivens*. Indeed, after each significant *Bivens* decision from the Supreme Court, scholars and commentators provide thorough discussion on the future of *Bivens*. After the Court's first significant retraction of the *Bivens* doctrine in *Bush v. Lucas* and *Chappell v. Wallace* in 1983, scholars questioned the impact of these decisions on the vindication of First Amendment-rights violations by the federal government across the board and on the vindication of the violation of the constitutional rights of federal employees by their employer.[123] Other commentators noted the special-

120. *Id.* at *8–10.

121. *Hernandez*, 137 S. Ct. at 2007.

122. *Id.* at 2006–08.

123. *See* Patrick W. Kelley, *The Right of Federal Employees to Sue Their Supervisors for Injuries Consequent upon Constitutional Violations*, 108 MIL. L. REV. 211, 273 (1985) (questioning whether *Bush* left open any possibility of suit by federal employees against their employers for constitutional rights violations); Joan Steinman, *Backing Off* Bivens *and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 297 (1984). Steinman critiqued not only the narrowing of remedies available for First Amendment rights violations but also specifically faulted the *Bush* and *Chappell* Court as failing to ensure the purported alternative remedies were in fact adequate to "meet constitutional minima." Steinman, *supra*, at 339. Steinman suggested the following considerations be made when the federal courts consider whether a congressional scheme should preclude the *Bivens* remedy:

> The courts should decide whether a statutory scheme was intended by Congress to substitute for a *Bivens* action. If it was not so intended, then a *Bivens* remedy may be afforded, absent special factors counselling hesitation. If it was so intended, the courts must resolve additional questions. Does the legislated remedy speak to the violation suffered: does it afford retrospective relief for past violations and prospective relief if future violations are sufficiently threatened? Is the legislated remedy adequate for this plaintiff, however useful it may be for persons differently situated? Has the plaintiff meaningful access to the legislated remedies? Are the available remedies truly compensatory, not merely symbolic? Is the *Bivens* remedy indispensable in the sense that no other remedial scheme can prevent the substantive constitutional requirements from becoming a "mere form of words"? [sic] The Supreme Court needs to articulate further standards for determining whether congressional remedies are constitutionally adequate.

Id. Thus far, the Court has provided little additional guidance along the lines suggested by Steinman for how courts should determine whether alternative

factors prong of the *Bivens* analysis appeared to be gradually converged into the alternative-remedial-scheme analysis.[124]

Similarly, after a second pair of cases further limited the *Bivens* doctrine in the late 1980s, commentators were quick to criticize the Court's curtailment of constitutional remedies in suits against federal actors. For example, immediately following the Supreme Court's 1988 decision in *Schweiker v. Chilicky*,[125] the *Harvard Law Review* published a compelling critique of the *Chilicky* Court's conclusion that congressional silence on the availability of a damages remedy in a particular area is a special factor counseling hesitation in establishing a *Bivens* remedy.[126] Other scholars compellingly criticized the Court's increasing deference to Congress on issues of remedying constitutional violations and, in particular, how the deference created a constitutional scheme wherein issues of separation of powers trump issues of federalism.[127] Ultimately, by the end of the 1980s, commentators concluded the Supreme Court greatly limited the availability of "constitutional tort actions against federal officials."[128]

While the 1990s only saw one Supreme Court case refusing to extend *Bivens*—*F.D.I.C. v. Meyer*[129]—constitutional scholars continued to grapple with the failure of *Bivens* to protect the constitutional

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remedies are sufficiently adequate for vindication of the constitutional rights at issue.

124. *See* Joe D. Dillsaver, *The Supreme Court and Suits Against Governmental and Military Superiors*, 25 A.F. L. REV. 87, 92–93 (1985); David C. Nutter, Note, *Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution Is Necessary: The Changing Scope of the* Bivens *Action*, 19 GA. L. REV. 683, 714 (1985).

125. 487 U.S. 412 (1988).

126. *The Supreme Court, 1987 Term: Leading Cases*, 102 HARV. L. REV. 279, 287–88 (1988) ("It is simple, no doubt, to decide a case by holding that the combination of congressional action, regardless of its focus, and congressional silence, regardless of its cause, renders the judiciary powerless to act.").

127. George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 IND. L.J. 263, 265–66, 298–99 (1989) (arguing that the analysis of remedial questions when the source of the right is a statute should be different than when the source of the right is the Constitution and concluding the federal courts can respect congressional competence without abdicating their responsibility to adjudicate constitutional claims); Gene R. Nichol, Bivens, Chilicky*, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1121, 1150 (1989) (criticizing the Court's expansion of the special-factors exception beyond its initial grounding in the doctrine of separation of powers into amorphous areas lacking any textual support in the Constitution); Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 357–61 (1989) (highlighting the additional obstacles to recovery faced by a plaintiff suing a federal government official versus a plaintiff suing a state or local government official).

128. John Paul Woodley, Jr., *Constitutional Tort Actions Against Federal Officials After* Schweiker v. Chilicky, 1989 ARMY LAW. 10, 15.

129. 510 U.S. 471 (1994).

rights of individuals harmed by federal officials in the same manner and scope that § 1983 protects the constitutional rights of individuals harmed by state and local officials.[130] Other scholars posited that *Bivens* failure rests largely on its decision to impose liability on individual government employees, and not the federal government itself, because that decision led to the tidal wave of additional broad protections afforded to governmental defendants in federal civil rights cases.[131]

After the turn of the century, as the Supreme Court continued to constrict the *Bivens* remedy, scholars and commentators continued to criticize the Court's *Bivens* jurisprudence.[132] Indeed, much commentary began to adopt a highly pessimistic view that *Bivens* would extend no further than the three situations recognized by the Supreme Court in *Bivens*, *Davis*, and *Carlson*.[133] One commentator encouraged

130. William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1149–52 (1996) (commenting on the overall failure of *Bivens* to bring redress to victims of federal officials' constitutional rights violations). In part, Kratzke relies on the conclusion that even those *Bivens* actions allowed to proceed are unsuccessful on the merits. *Id*. at 1149–50. However, a more recent survey of *Bivens* cases brought in five federal judicial districts showed that *Bivens* claims succeed at a much higher rate than previously thought. *See generally* Reinert, *supra* note 63; *see also* Bandes, *supra* note 94, at 336–38 (arguing that "the Constitution is enforceable without the need for congressional authorization, and that the Constitution is enforceable regardless of its congruence with state or common law" and positing a new analytical framework to address constitutional claims for damages against federal actors). *But see* Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape*,* 78 UMKC L. REV. 889, 907 (2010) ("[T]he foreclosure of *Bivens* claims under this special factors analysis should only arise where the remedies are comparable.").

131. James E. Pfander, Iqbal*,* Bivens*, and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN ST. L. REV. 1387, 1415 (2010) ("The decision to recognize a *Bivens* action seems to have compelled the federal courts to develop a matching set of immunity principles."); Pillard, *supra* note 30, at 79–90 (1999) (arguing that the federal courts have used the idea that government officers will be held liable individually to support greater procedural and immunity protections).

132. Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 356–62 (arguing that *Malesko* portends a shift toward an earlier era when courts declined to imply rights of action under certain statutes or the Constitution); Elizabeth Martin, Note, Correctional Services Corp. v. Malesko: *The Supreme Court's Continued Refusal to Stand Behind* Bivens, 32 PUB. CONT. L.J. 197, 211 (2002) (criticizing the Supreme Court's refusal to provide a *Bivens* remedy for federal prisoners suing a private prison corporation as contrary to "the goals, promises, and protections of *Bivens*").

133. Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 326 (2012) ("[T]he courthouse doors have been shut on those who want to sue the government or government officials."); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 948 (2010) ("[T]here may be many reasons that the Court seems to have adopted a preference for injunctive over damages relief in civil rights cases . . . . [But] the illusory promise of equity does damage to public rights litigation."); Michael P.

the Supreme Court to embrace the *Bivens* decisions as part of the federal common law and to reformulate the entire *Bivens* doctrine (or non-doctrine) to allow for flexibility in the type of remedy afforded.[134] Other commentators called for Congress to explicitly address whether and when the federal courts should hold the federal government liable in damages for violations of constitutionally protected rights.[135] Still others argued Congress already provided statutory recognition of the "right to pursue constitutional tort claims against federal actors" through the Westfall Act and the Supreme Court need simply recognize this congressional action.[136] Finally, scholars encouraged the federal courts and practitioners alike to return their focus to the first question of the *Bivens* doctrine: whether a particular case presents a true extension of the *Bivens* remedy.[137]

Robotti, *Separation of Powers and the Exercise of Concurrent Constitutional Authority in the* Bivens *Context*, 8 CONN. PUB. INT. L.J. 171, 205 (2009) (concluding that the *Bivens* remedy has been rendered meaningless and encouraging the Court to "reconsider the *Bivens* line of cases in this light and embrace *Bivens* as a constitutional common law decision"); Tribe, *supra* note 93, at 70 (noting that "*Robbins* appear[ed] to represent the first time the Court ha[d] found a *Bivens* remedy unavailable to redress a run-of-the-mill constitutional claim against a federal official in the absence of an alternative remedial scheme that is even arguably designed to be comprehensive" and finding the decision the first to deviate from *Bivens*'s "core holding"); Heather J. Hanna & Alan G. Harding, Comment, *Ubi Jus Ibi Remedium—For the Violation of Every Right, There Must Be a Remedy: The Supreme Court's Refusal to Use the* Bivens *Remedy in* Wilkie v. Robbins, 8 WYO. L. REV. 193, 226–28 (2008) (concluding that the makeup of the current Court will not provide a majority willing to recognize a *Bivens* remedy in a new context). *But see* Alexander Volokh, *Keynote Article: The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 AKRON L. REV. 287, 328–29 (2013) (arguing that while *Minneci* may have been wrongly decided, it does not close the courthouse doors on all prisoner litigation).

134. Robotti, *supra* note 133, at 202–04 (arguing that the *Bivens* doctrine should be reformulated to "bring coherence to [it] by grounding it in the functionalist theory of separation of powers and the theory of constitutional common law").

135. Brown, *supra* note 72, at 904–10 (2009) (encouraging Congress to break the *Bivens* impasse to allow victims of federal government overreach in the War on Terror some form of relief, either in the form of an equivalent § 1983 statute applied to the federal government, adding provisions to the FTCA to redress these wrongs, creating a new national security court, or establishing a compensation system outside the judicial process).

136. James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 141 (2009); *see also* James E. Pfander & David P. Baltmanis, *W(h)ither* Bivens*?*, 161 U. PA. L. REV. 231, 243 (2013) ("[T]he removal and transformation provisions of the Westfall Act leave litigants . . . entirely free to mount federal constitutional tort claims . . . ."); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 580 (2013) (arguing that interpreting the Westfall Act as making remedies available at the federal level would avoid constitutional concerns and better implement congressional intent).

137. Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473, 1495 (2013).

As outlined above, the Supreme Court followed this suggestion in *Abbasi*, articulating a number of factors federal courts should consider in determining whether a particular context represents a new area under *Bivens*. But the *Abbasi* court made clear that absent the precise circumstances presented in *Bivens*, *Davis*, and *Carlson*, litigants seeking to assert a *Bivens* remedy will find themselves in a "new" context. For this reason, the remainder of this Article will deviate from prior scholarship on the availability of a *Bivens* remedy by focusing on one narrow type of claim—a Free Exercise claim brought by a federal prisoner—to argue a *Bivens* remedy should be available in this context under existing *Bivens* jurisprudence for significant practical and policy reasons. Rather than add to the chorus of criticisms and suggested solutions focusing on the broad-based *Bivens* doctrine as a whole, this Article focuses instead on one constitutional claim brought by one type of plaintiff against one type of federal official with the hope that the analysis and discussion are transferrable to other situations and claims.

The reasons for this approach are threefold. First, *Abbasi* makes clear, at least for now, that the availability of a *Bivens* remedy will largely be a case-by-case determination. Second, prisoners are a uniquely vulnerable population, completely subject to the whims of their prison-official captors. This vulnerability is not unique to state prisoners; there is nothing inherently special about federal prison employees vis-à-vis their state counterparts that justifies exempting federal prison officials from liability for constitutional violations while holding state prison officials accountable for the very same violations. Thus, the fact that state prisoners have remedies available to them that federal prisoners do not turns constitutional design on its head when conditions of prison life remain largely identical between the state and federal systems. Finally, religion has been a central part of this country's approach to incarceration since the opening of the first penitentiary to today,[138] and religious rights in prison are important not only to rehabilitation but to help prisoners cope with the inherent dignitary harms of prison life.[139]

This approach necessarily assumes the natural result of *Abbasi* will not be the elimination of *Bivens* entirely. To do away with *Bivens* entirely would be to abandon a remedial system designed to hold government actors accountable by imposing damages meant to deter bad behavior.[140] Such a result would be untenable when applied to Free Exercise claims brought by federal prisoners because it would lead to a clear disparity in the availability of constitutional remedies to fed-

138. *See infra* section IV.B.
139. Jim Thomas & Barbara H. Zaitzow, *Conning or Conversion? The Role of Religion in Prison Coping*, 86 PRISON J. 242, 250 (2006).
140. Pfander, *supra* note 50, at 291.

eral prisoners and their state counterparts, an idea developed further in section III.C.

III. EXTENDING *BIVENS* TO FREE EXERCISE CLAIMS BROUGHT BY FEDERAL PRISONERS

Few federal courts have engaged in the kind of thorough analysis called for in *Abbasi* to determine whether a *Bivens* remedy is available to federal prisoners asserting Free Exercise claims. The vast majority of courts assume without expressly deciding or engaging in any of the analysis outlined by the Supreme Court in its *Bivens* cases that a plaintiff can proceed on a *Bivens* theory and proceed to the merits of the plaintiff's claim.[141] Of the courts that analyzed whether the remedy is available, all determined a *Bivens* remedy is unavailable, but for scattershot reasons and often without the full analysis outlined in *Abbasi*.[142] This Part will walk through the analysis provided by the

141. Because of the incredibly high burden placed on prisoner-plaintiffs in First Amendment claims, the vast majority of whom are proceeding pro se*,* many of these cases result in summary dismissal in any event. *See, e.g.*, Potts v. Holt, 617 F. App'x 148, 153 (3d Cir. 2015) (reversing district court's grant of qualified immunity on Free Exercise *Bivens* claim without addressing *Bivens* availability in this context); Ford v. Bureau of Prisons, 570 F. App'x 246, 250 (3d Cir. 2014) (proceeding to merits of First Amendment claim without addressing *Bivens* question); Watkins v. Donnelly, 551 F. App'x 953, 960 (10th Cir. 2014) (same); Watkins v. Rogers, 525 F. App'x 756, 757 (10th Cir. 2013) (same); Jean-Pierre v. Bureau of Prisons, 497 F. App'x 164, 168 (3d Cir. 2012) (same); Garraway v. Lappin, 490 F. App'x 440, 445 (3d Cir. 2012) (same); Coley v. Smith, 441 F. App'x 627, 628 (11th Cir. 2011) (same); Daly v. Davis, No. 08-2046, 2009 WL 773880, at *2 (7th Cir. Mar. 25, 2009) (same); Weinberger v. Grimes, No. 07-6461, 2009 WL 331632, at *4 (6th Cir. Feb. 10, 2009) (same); Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 814–15 (8th Cir. 2008) (upholding grant of summary judgment on merits of Free Exercise claim without addressing *Bivens* question); Resnick v. Adams, 348 F.3d 763, 771 (9th Cir. 2003) (turning to merits of Free Exercise claim without reference to *Bivens* question); Kalka v. Hawk, 215 F.3d 90, 95 (D.C. Cir. 2000) (same); Chesser v. Walton, No. 12-cv-1198-JPG-RJD, 2016 WL 6471435, at *2 (S.D. Ill. Nov. 2, 2016) (same); Williams v. Valazair, No. CIV-14-456-M, 2015 WL 9315537, at *4–5 (W.D. Okla. Nov. 9, 2015) (same); Ramadan v. FBOP, No. 1:14-25757, 2015 WL 5684126, at *2–6 (S.D.W. Va. Sept. 28, 2015) (same); Bouman v. Broome, No. 3:13cv847 KS-MTP, 2015 WL 5604275, at *2 (S.D. Miss. 2015) (same).

142. Mack v. Warden, 839 F.3d 286, 305 (3d Cir. 2016) (determining RFRA provides a comprehensive alternative remedial scheme for Free Exercise violations and that it provides Free Exercise claimants all appropriate relief); Turkmen v. Hasty, 789 F.3d 218, 236 (2d. Cir. 2015) (holding a *Bivens* Free Exercise claim presents a new context that has not been recognized by the Supreme Court, so dismissal was proper without further analysis), *rev'd in part on other grounds and vacated in part by* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Ajaj v. Fed. Bureau of Prisons, No. 15-cv-00992-RBJ-KLM, 2017 WL 219343, at *2–5 (D. Colo. Jan. 17, 2017) (finding no *Bivens* remedy because alternative remedies existed in the forms of injunctive relief and the prison system's grievance policies and the potential "onslaught of litigation" counseled against expanding *Bivens* to this context) (I am

Supreme Court in *Abbasi* to demonstrate that even under the high standard required to recognize the availability of a *Bivens* remedy in a new context, a *Bivens* remedy should be available to federal prisoners asserting a Free Exercise claim. This analysis will provide a careful critique of the few federal court decisions that found either an adequate alternative remedy or determined special factors prevented the recognition of a *Bivens* remedy in this context. The hope of offering this thorough analysis is to provide a blueprint scholars and advocates can build on to (likely slowly) rebuild the constitutional protections recognized by *Bivens* in this and other contexts.

A. Is a *Bivens* Remedy for Free Exercise Claims Truly an Extension of *Bivens*?

After *Abbasi*, the answer to the question of whether a *Bivens* remedy for Free Exercise claims is truly an extension of *Bivens* is almost certainly *yes*. Before *Abbasi*, when faced with the question of whether a claim truly extended the *Bivens* doctrine, the Court focused on whether the claim involved a new category of defendants or a new context.[143] In the context of Free Exercise claims brought by federal prisoners, the category of defendants is certainly not new; *Carlson* expressly contemplated a *Bivens* claim against federal prison officials.[144] Whether the context is new is certainly a closer question. It depends heavily on how narrowly or broadly the Court views the context of any given claim. In the broadest sense, a Free Exercise claim brought by a federal prisoner is simply brought in the prison context, like the claim in *Carlson*.[145] Moreover, the Supreme Court allowed a *Bivens* claim to move forward in a First Amendment context without engaging in any analysis as to the appropriateness of *Bivens* relief. In *Hartman v. Moore*,[146] which considered whether "a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges," the Supreme Court accepted without analysis that a vengeful federal officer "is subject to an action for damages on the authority of *Bivens*."[147] Thus, the Supreme Court has expressly provided for the availability of a damages remedy in both the prison context and the First Amendment con-

counsel of record for Mr. Ajaj in this case); Hedin v. Castillo, 3:14-cv-01504-CL, 2016 WL 6915322, at *4 (D. Or. Sept. 27, 2016) (finding that RFRA is an alternative remedy precluding Bivens claim); Rezaq v. Fed. Bureau of Prisons, No. 13-cv-00990-MJR-SCW, 2016 WL 97763, at *9 (S.D. Ill. Jan. 8, 2016) (finding no *Bivens* remedy without analysis).

143. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001).

144. Carlson v. Green, 446 U.S. 14, 19 (1980).

145. *Id.*

146. 547 U.S. 250 (2006).

147. *Id.* at 256–57.

text.[148] Thus, prior to *Abbasi*, a federal prisoner-plaintiff might plausibly argue that allowing a damages remedy to a First Amendment Free Exercise claim required no extension of *Bivens*.

After *Abbasi*, a prisoner will almost certainly fail if he[149] asserts this type of argument. As articulated above in section II.C., the *Abbasi* Court provided a nonexhaustive list of differences to consider when determining whether a particular context is new, including:

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.[150]

Of these, a Free Exercise claim brought by a federal prisoner will generally not raise meaningful differences from *Carlson* in the following areas: the rank of the officers involved, the statutory or other legal mandate under which the officer was operating, and the risk of disruptive intrusion by the judiciary into the functioning of other branches. The estate in *Carlson* sued the director of the Federal Bureau of Prisons as well as various prison officials at the United States Penitentiary-Terre Haute.[151] The Supreme Court clearly determined those types of prison officials "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate."[152] Similarly, all federal prison

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148. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court assumed without deciding that a *Bivens* remedy was available under the Free Exercise Clause but expressed some doubt as to whether it would have extended the *Bivens* remedy to the Free Exercise context had it been squarely presented with the question:

> Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants. That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment.

Id. at 675 (citations and quotations omitted).

149. I use the male pronoun here because the overwhelming majority of federal prisoners are male. *See Inmate Gender*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp [https://perma.unl.edu/4MXN-H6F7] (last updated Aug. 26, 2017) (showing a federal-prison population that is 93.2% male and 6.8% female).

150. Ziglar v. Abbasi, 137 S. Ct. 1843, 1859–60 (2017). As mentioned above, it appears that the last items on this list conflate the special factors discussion with the new context discussion. Therefore, I reserve discussion of the special factors for *infra* section III.B.

151. Green v. Carlson, 581 F.2d 669, 671 (7th Cir. 1978).

152. Carlson v. Green, 446 U.S. 14, 19 (1980).

officers employed by the Federal Bureau of Prisons are tasked with fulfilling the Bureau's duties as outlined in 18 U.S.C. § 4042. Finally, a federal prisoner's Free Exercise claim would not lead to a greater "disruptive intrusion" into the running of the Federal Bureau of Prisons than a federal prisoner's Eighth Amendment medical-care claim brought pursuant to *Carlson.* Therefore, these three potential differences do not support the conclusion that a federal prisoner's Free Exercise claim presents a new context for a *Bivens* remedy.

In contrast, consideration of the constitutional right at issue, the generality or specificity of the official action, and the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted will likely lead to the opposite conclusion: a federal prisoner's Free Exercise claim presents a new context under existing *Bivens* jurisprudence. First, as discussed above, the Supreme Court has never expressly recognized the availability of a *Bivens* remedy in any First Amendment context.[153] While the Court accepted, without analysis, the availability of a *Bivens* remedy in the First Amendment retaliation context,[154] it has not extended this recognition to Free Exercise claims.

While it is not entirely clear what the *Abbasi* Court meant by "the generality or specificity of the official action," the Court's extensive analysis of the "general policy"[155] at issue in the detention policy claims indicates this particular difference relates to whether a cause of action is challenging broad-based executive policy or specific actions by federal officials. Free Exercise claims may fall into both categories. For example, certain cases may challenge prison policies that place particular burdens on prisoners' Free Exercise,[156] while other cases may challenge the specific conduct of an individual officer or officers.[157] At this point, because both types of claims present a new context under existing *Bivens* jurisprudence, the type of claim asserted makes little difference for the purpose of determining whether a federal prisoner's Free Exercise claim presents a new context. However, should the Court recognize one type of claim in the future, the existence of this difference as pronounced by the Supreme Court may

153. *Iqbal*, 556 U.S. at 676.

154. Hartman v. Moore, 547 U.S. 250, 256–57 (2006).

155. *Abbasi,* 137 S. Ct. at 1860.

156. *See, e.g., Chesser v. Walton*, No. 12-cv-1198-JPG-RJD, 2016 WL 6471435, at *2 (S.D. Ill. Nov. 2, 2016) (asserting claims against individuals for creating and enforcing policy that limited congregate prayer of Muslim prisoners).

157. *See, e.g.*, Mack v. Warden, 839 F.3d 286, 291–92 (3d Cir. 2016) (challenging harassing anti-Muslim conduct of certain correctional officers as violative of the Free Exercise Clause).

lead to separate special-factors analyses related to whether or not a challenge to prison policy is a special factor counseling hesitation.[158]

Finally, turning to the final difference listed by the Supreme Court in *Abbasi*, the extent of judicial guidance as to how an officer should respond to the problem or emergency is again unclear. To a certain degree, it appears to conflate the question of whether a particular claim is presenting a new context under *Bivens* with whether a special factor counsels hesitation and whether the officer being sued should be afforded qualified immunity. Qualified immunity allows a government official sued in his or her individual capacity to escape liability for a constitutional violation if (1) he or she did not commit a constitutional violation or (2) the constitutional violation alleged was not clearly established by prior judicial decisions.[159] Thus, even if the Court were to allow a *Bivens* remedy in a particular context, insufficient judicial guidance as to how an officer should respond to a particular problem will be a basis for dismissal of a suit.[160] Nevertheless, because no *Bivens* cases provide guidance on Free Exercise claims, this factor supports the conclusion the claim presented here—a federal prisoner's Free Exercise claim—is a new context. However, if the Court recognizes a *Bivens* remedy in a Free Exercise case, there are ample cases brought by state prisoners alleging Free Exercise violations that provide clear guidance to prison officials as to the type and extent of acceptable burdens on religious exercise in the prison setting.[161]

Because *Abbasi* makes clear almost every case will present a new context for *Bivens* purposes except those brought under circumstances nearly identical to those presented in *Bivens*, *Davis*, and *Carlson*, a Free Exercise claim brought by a federal prisoner against federal prison officials presents a new context subject to the special factors and alternative remedy analysis.

158. I discuss *infra* section III.B whether cases challenging the Bureau of Prisons's policies implicate the same kind of special concerns discussed in *Abbasi*. I conclude they do not.

159. Pearson v. Callahan, 555 U.S. 223, 231–32 (2009).

160. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

161. *See*, *e.g.*, Cruz v. Beto, 405 U.S. 319 (1972); Washington v. Klem, 497 F.3d 272 (3d Cir. 2007); Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006); Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004).

B. Do Special Factors Exist that Would Counsel Hesitation in Expanding the Availability of a *Bivens* Remedy for Free Exercise Claims Brought by Federal Prisoners?

After noting it never expressly defined the phrase "special factors counselling hesitation," the *Abbasi* Court stated 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."[162] The Court further made clear that if "Congress has designed its regulatory authority in a guarded way" in a particular context, it is "less likely that Congress would want the Judiciary to interfere."[163] With this, the *Abbasi* Court specifically highlighted those areas where, in prior *Bivens* cases, it found Congress specifically created a regulatory scheme wherein the courts had no role—in military matters,[164] the public purse by making a federal agency pay damages,[165] and federal lands.[166]

Generally speaking, the special factors the Court recognizes as requiring hesitation involve the military, concerns of national security, and foreign-policy considerations.[167] None of these concerns are implicated by a Free Exercise claim brought by a federal prisoner against a federal prison official. Indeed, because federal courts readily hear cases for injunctive relief against the federal prison system, there are no inherent separation of powers concerns related to judicial enforcement of constitutional norms in the prison context. Nonetheless, some of the *Abbasi* Court's analysis of the special factors implicates issues federal-prison-official defendants will undoubtedly raise in future cases. Each of these issues is addressed below in turn.

Initially, the *Abbasi* Court was incredibly concerned with the litigation's potential to question and challenge the process and deliberations related to the government's formulation of the detention policy itself.[168] Indeed, the *Abbasi* Court expressed deep skepticism at the idea that the federal courts should be intruding upon the Executive's policymaking function in this manner.[169] Undoubtedly, future challenges to the actions of federal prison officials will implicate, either directly or indirectly, prison policies, and defendants to these cases will, to the extent possible, reframe particular claims as challenges to

162. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857–58 (2017).
163. *Id.* at 1858.
164. *Id.* (citing United States v. Stanley, 483 U.S. 669, 679 (1987); Chappell v. Wallace, 462 U.S. 296, 302 (1983)).
165. *Id.* (citing FDIC v. Meyer, 510 U.S. 471, 486 (1994)).
166. *Id* (citing Wilkie v. Robbins, 551 U.S. 537, 561–62 (2007)).
167. *Id.* at 1860–62. Indeed, national security appears to be the foremost concern of the *Abbasi* Court.
168. *Id.* at 1860–61.
169. *Id.*

policy rather than challenges to the actions of a particular individual.[170]

A prisoner-plaintiff has several avenues available to him to attempt to distinguish the *Abbasi* policy and prison policies relating to Free Exercise claims. Initially, the *Abbasi* policy was formulated by persons outside the Federal Bureau of Prisons—namely, Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar.[171] Cases challenging Free Exercise violations by federal prison officials will rarely, if ever, implicate policies that are formulated by such high-level executive officials. Rather, federal prison policy is often developed by officials in the Federal Bureau of Prisons' Central Office in Washington, D.C. and implemented at the local institutional level. Any Free Exercise challenges would result from either (1) discriminatory implementation of certain policies or (2) a prison official's failure to properly follow policy. Therefore, only the rare federal prisoner Free Exercise case will implicate the type of policy at issue in the detention-policy claims in *Abbasi*. Moreover, the defendants to a federal prisoner Free Exercise case will rarely be the type of high-level executive officials described in *Abbasi*, and the *Abbasi* Court noted this special factor—interference in policy deliberations—only applied to high-level-executive-official defendants.[172] Thus, this factor should not prohibit federal prisoners' Free Exercise claims from moving forward.

The *Abbasi* Court noted three other factors that counseled hesitation in affording a remedy under *Bivens* for the detention policy claims. First, the "claims challenge more than standard 'law enforcement operations'" and instead implicate "sensitive issues of national security."[173] Second, Congress requested the Department of Justice to investigate the conditions created by the detention policy, the Justice Department did so in a detailed report, and Congress never chose to extend a damages remedy related to the conditions described in that report.[174] Finally, the *Abbasi* Court concluded alternative remedies

170. *See* Memorandum in Support of Defendants' Motion for Judgment on the Pleadings, Holder v. Saunders, Civ. Act. No. 13-cv-038-KCC-EBA (E.D. Ky. filed Aug. 17, 2017) (on file with author). After *Abbasi*, the Federal Bureau of Prisons, the defendant in *Saunders* moved for judgment on the pleadings just as the case was headed to trial, arguing that because the plaintiff's complaint rested on a challenge to prison officials' actions that were taken in accordance with policy, *Abbasi* precluded suit on the plaintiff's Eighth Amendment claims despite those claims' similarities to *Carlson*. *Id.* at 16–19.

171. *Abbasi*, 137 S. Ct. at 1853, 1858 (identifying Attorney General Ashcroft and INS Commissionar Ziglar as "Executive Officals" and noting the "formal policy" at issue in the "detention policy claims" was adopted by the Executive Officials).

172. *Id.* at 1861.

173. *Id.* (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 283 (1990)).

174. *Id.* at 1862.

existed for the *Abbasi* plaintiffs.[175] Because this final factor appears to conflate the second question to the *Bivens* analysis—whether Congress has created alternative remedies—it will be addressed below. The other two factors, however, should not preclude the availability of a *Bivens* remedy for a federal prisoner's Free Exercise claim.

First, a federal prisoner's Free Exercise claim will necessarily challenge the operation of the federal prisons, but such operation does not inherently implicate sensitive national-security issues and, on its face, appears more akin to a challenge to standard law enforcement operations. While some federal prisoners may present issues tangential to national security,[176] the vast majority of prisoner Free Exercise claims will have no relation to national-security issues.

Further, federal prisoners' Free Exercise claims are not an area where congressional silence demonstrates congressional intent to provide a damages remedy to federal prisoners. As the *Abbasi* Court briefly mentioned in its discussion of the prisoner-abuse claims, Congress passed the Prison Litigation Reform Act (PLRA) in 1996.[177] The *Abbasi* Court highlighted the idea that the PLRA "does not provide for a standalone damages remedy against federal jailers."[178] However, the *Abbasi* Court ignored the provisions of the PLRA that *expressly contemplate the availability of a damages remedy for federal prisoners*.[179] For example, the PLRA includes a specific provision requiring any damages award made "to a prisoner in connection with a civil action brought against any *Federal*, State, or local jail, prison, or correctional facility or *against any official or agent of such* jail, prison, or correctional facility" be first applied to restitution before being awarded to the prisoner.[180] Additionally, the PLRA also requires that the victims of any crime committed by a prisoner be informed of a compensatory damages award before such award is provided to a prisoner.[181] Thus, the plain language of the PLRA indicates that Congress understood that federal prisoners might obtain monetary relief for the violations of their rights, and this is not a situation where congressional silence on the exact question of whether federal prisoners

175. *Id.* at 1863.

176. An example is if a prisoner is placed on Special Administrative Measures (SAMs) by the Attorney General and challenges the burdens placed on his religious exercise by the SAMs. *See, e.g.*, Ghailani v. Holder, No. 14-cv-00041-CMA-BNB, 2015 WL 430375, at *3 (D. Colo. Jan. 30, 2015), *rev'd on other grounds*, Ghailani v. Sessions, 859 F.3d 1295 (10th Cir. 2017).

177. *Abbasi*, 137 S. Ct. at 1865 (citing 42 U.S.C. § 1997e (2012)).

178. *Id.*

179. *See, e.g.,* § 1997e(e) (precluding a prisoner from suing for compensatory damages "for mental or emotional injury suffered while in custody without a prior showing of physical injury").

180. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 807, 110 Stat. 1321-66, 1321-76 (1996) (emphasis added).

181. *Id.*

should be afforded a damages remedy for Free Exercise violations should be read to indicate disapproval of a *Bivens* claim.

Moreover, the congressional history of the PLRA indicates Congress intended for the statute to apply to *Bivens* claims brought by federal prisoners.[182] Indeed, Congressman Frank LoBiondo, a Republican congressman from New Jersey and one of the principal sponsors of the PLRA, stated the following during debate over the bill: "An exhaustion requirement [as part of the PLRA] would aid in deterring frivolous claims: by raising the cost, in time/money terms, of pursuing a *Bivens* action, only those claims with a greater probability/magnitude of success would, presumably, proceed."[183] Clearly, Congress sought to impose significant barriers to prisoners'-rights litigation but did not expressly eliminate *Bivens* actions entirely. This provides strong evidence that Congress had no intention of eliminating the *Bivens* remedy altogether for federal prisoners.

In addition to the special factors mentioned in *Abbasi*, the lower federal courts identified a couple of additional special factors that led to the foreclosure of *Bivens* relief in Free Exercise cases. First, some courts determined the deference afforded to prison officials in constitutional litigation is a special factor counseling hesitation to expand the *Bivens* remedy in the First Amendment context.[184] This concern confuses the limited way in which the First Amendment already applies in the prison context with a special factor. To the extent there are concerns about judicial intervention in prison management, those concerns are fully addressed by the *substantive* limitations placed on the reach of the First Amendment in the prison context.[185] Permitting *Bivens* actions by federal prisoners in the Free Exercise context is not the equivalent of permitting judicial enforcement of the full panoply of First Amendment rights within the prison walls. Rather, allowing prisoners to sue for damages for violations of their religious rights simply puts those prisoners in the same position as their state counterparts—they simply have the limited right to Free Exercise that state prisoners already have by virtue of prisoner First Amendment-rights jurisprudence.

The final factor at least one lower federal court mentioned in declining to extend the *Bivens* remedy to Free Exercise claims brought by federal prisoners is that doing so would "add to the Court's already

182. *See* Whitley v. Hunt, 158 F.3d 882, 886 (5th Cir. 1998) (finding that the PLRA "plainly" indicates Congress intended for the statute to apply to *Bivens* claims).

183. 141 CONG. REC. H14078-02, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo).

184. Shepard v. Rangel, No. 12-cv-01108-RM-KLM, 2014 WL 7366662, at *17 (D. Colo. Dec. 24, 2015) (recommendation of the magistrate judge).

185. *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that because of the deference due to prison officials, infringements on First Amendment rights in prison are always judged under a reasonableness standard).

heavy burden of prisoner litigation."[186] However, there is simply no evidence that the federal courts' refusal to recognize a *Bivens* remedy in federal prisoners' Free Exercise cases results in a smaller prison-conditions docket.[187] Additionally, foreclosing an avenue of relief to federal prisoners that is available to their state counterparts abdicates the role of the court as an arbiter of constitutional claims against the federal government. This is particularly true in the First Amendment context, where the *express terms* of the Amendment apply directly to the federal government and where the states did not become subject to its provisions until after the passage of the Fourteenth Amendment.[188]

Given the above analysis, while there are certainly some cases that might present close calls and require further detailed analysis on one or more potential special factors, there are no special factors that so fully counsel hesitation as to disallow federal-prisoner Free Exercise *Bivens* claims *in toto*. Indeed, in the vast majority of cases there should be no impediments to allowing a federal prisoner to proceed in his case for monetary relief for the violation of his federal rights. The Article now turns to the question of whether adequate alternative remedies exist that justify disallowing a *Bivens* remedy in this context.

C. Has Congress Created an Adequate Alternative Remedy to Address the Violation of Federal Prisoners' Free Exercise Rights?

The *Abbasi* Court and lower federal courts that have analyzed whether to recognize a *Bivens* remedy mention several possible alternative remedies that might provide an adequate means to redress the denial of a federal prisoner's Free Exercise rights. Those alternatives include: the possibility of injunctive, mandamus, or habeas relief; the availability of the administrative-remedy program or the federal prisoners' internal grievance system; the availability of relief through the FTCA; and the availability of relief through RFRA. When carefully examined, however, it is clear that none of these remedies are true alternative avenues of relief.

First, injunctive, mandamus, and habeas relief are neither consistently available to federal prisoners nor adequate. Initially, injunc-

186. Ajaj v. United States, No. 15-cv-00992-RBJ-KLM, 2016 WL 6212518, at *3 (D. Colo. Oct. 25, 2016); Shepard v. Rangel, No. 15-cv-00992-RBJ-KLM, 2014 WL 7366662, at *18 (D. Colo. Dec. 24, 2015).

187. *See supra* notes 141–42 (outlining the number of cases filed for Free Exercise violations despite the federal courts' refusal to expressly recognize the availability of a *Bivens* remedy).

188. Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247, 247 (1995).

tions, mandamus, and habeas relief are necessarily forward looking, while the relief being sought in a *Bivens* case is necessarily backward looking. Despite dicta in *Abbasi* indicating the Supreme Court may determine injunctive and habeas relief are adequate alternatives in some instances, the Supreme Court has never found an alternative remedy where a potential remedy is only forward looking. Indeed, the Supreme Court continually recognizes "[i]njunctive or declaratory relief is useless to a person who has already been injured."[189] For this reason, the Court looks to whether alternative remedies "provide roughly similar incentives for potential defendants to comply with the [Constitution] while *also* providing roughly similar *compensation* to victims of violations."[190]

The question of whether an injunction, action in mandamus, or habeas corpus petition provide roughly similar incentives for defendants to comply with the Constitution provides no clear answer. The *Abbasi* Court strongly implies the injunctive and habeas relief[191] that may have been available to the *Abbasi* plaintiffs provides some modicum of deterrent effect to the defendants.[192] However, this ignores the different procedural realities of a suit for prospective relief and a suit for damages. A suit for prospective relief will be asserted against the federal prison agency or an official in his "official capacity," which is a legal fiction that allows for a suit against the government itself.[193] Thus, unless a defendant is sued in his individual capacity for damages, there is no reason to believe the suit for prospective relief will, in and of itself, provide any deterrent effect to individual bad actors. Regardless of whether a suit for prospective relief can provide a deterrent effect, it provides no compensation for plaintiffs that could be

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

190. Minneci v. Pollard, 565 U.S. 118, 130 (2012) (emphasis added).

191. The *Abbasi* Court distinguished the situation in *Abbasi* from the situation in *Bivens* and *Davis*:

> It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which "it is damages or nothing." Unlike the plaintiffs in those cases, repondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concering the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able to challenge their confinement conditions via a petition for writ of habeas corpus.

Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 (2017) (citations omitted). Thus, according to the *Abbasi* Court, injunctive relief halting enforcement of the detention policy or some form of undefined habeas relief might have provided the detainees adequate relief.

192. *Id.* at 1863.

193. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) (citing *Ex parte* Young, 209 U.S. 123, 159–60 (1908)).

equivalent to the compensation possible under *Bivens*. Moreover, the idea that an equitable remedy should be obtained when legal remedies might be possible contradicts the historical notion that an equitable remedy should be sought only when legal relief is insufficient.[194] For these reasons, the possibility of injunctive relief, mandamus relief, or habeas relief provides no adequate alternative remedy to a *Bivens* suit for prisoners seeking vindication of their Free Exercise rights.

Before addressing the adequacy and availability of the federal prison system's administrative-remedy program, it is important to understand an additional topic in regard to cases for injunctive relief against the Federal Bureau of Prisons (BOP).[195] "[D]amages may be the only effective remedy for constitutional violations that occur during a discrete and relatively brief period, and therefore may not be susceptible to injunctive relief because of the rules of justiciability."[196] Even for those cases where the constitutional violation lasts for longer periods, the BOP is in a unique position to prolong litigation by inserting complicated procedural questions into cases for injunctive relief. This is because the BOP has prisons across the country in numerous judicial districts and the unbridled authority to move a particular prisoner for "any reason whatsoever or for no reason at all."[197] Indeed, in cases for injunctive relief that present important constitutional questions, the BOP's modus operandi is to move the prisoner-plaintiff from the jurisdiction in which the case was filed to another judicial district in an attempt to moot or otherwise throw unique procedural wrenches into the prisoner's claim.[198]

In other words, the BOP can and does manipulate litigation in order to avoid judicial decisions on the merits of any constitutional

194. *Equible Remedy*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining *equitable remedy* as "[a] remedy, usu[ally] a nonmonetary one such as an injunction or specific performance, obtained when available legal remedies, usua[lly] monetary damages, cannot adequately redress the injury").

195. What follows is largely drawn from my personal experience representing prisoners in cases against the Federal Bureau of Prisons.

196. Chen, *supra* note 130, at 923.

197. Collins v. Webster, No. 2:10-CV-172-JMS-WGH, 2013 WL 364574, at *9 (S.D. Ind. Jan. 30, 2013) (quoting Brown-Bey v. United States, 720 F.2d 467, 470 (7th Cir. 1983)).

198. The BOP attempted to first moot a prisoner-plaintiff's injunctive claim by transferring him from Colorado to Indiana and then transferring the claim to another judicial district. Chapman v. Fed. Bureau of Prisons, 235 F. Supp. 3d 1066, 1066–68 (S.D. Ind. 2017). Without his concomitant *Bivens* claims grounding the case in Colorado, the prisoner-plaintiff's claim may have been placed on an endless venue merry-go-round. In the spirit of full disclosure, I am counsel of record for Mr. Chapman. See *Rezaq v. Nalley*, 677 F.3d 1001, 1009 (10th Cir. 2012); *Jordan v. Sosa*, 654 F.3d 1012, 1020–21 (10th Cir. 2011); and *Shakur v. Federal Bureau of Prisons*, 950 F.Supp. 3 (D.D.C. 1997) for examples of the BOP attempting to moot or introduce other procedural questions into a prisoner's claim for injunctive relief.

claim. Without access to *Bivens* claims, prisoner-plaintiffs may find themselves with no judicial relief for violations of their constitutional rights.[199] For example, if a prisoner files suit for violation of his religious rights and the BOP immediately takes steps to moot the injunctive claim while the court determines that the prisoner's damages claims are not allowed under *Bivens*, the prisoner-plaintiff is left with no judicial relief whatsoever for the harms he suffered. Indeed, such a result incentivizes, rather than deters, the unconstitutional conduct of federal prison officials who are able act unconstitutionally and are perpetually insulated from liability by manufacturing mootness, either by instituting policy changes or transferring prisoners. Thus, injunctive claims are particularly inadequate alternatives to *Bivens* relief.

Satisfied that the availability of prospective relief does not provide an adequate alternative remedy, the Article turns now to whether the BOP's administrative-remedy program provides an adequate alternative. For several reasons, it does not, despite the Supreme Court's apparently favorable view of the program as articulated in *Malesko*.[200] First, the administrative-remedy program is not a congressionally created scheme.[201] Second, the purpose of the administrative-remedy program is to provide a procedural mechanism that allows prisoners to raise any issues about their confinement.[202] It is not meant to address or protect the constitutional rights of the federal prison population. Indeed, "[g]rievance system rules and procedures are supposed to provide informal and summary resolution of complaints, not full-

199. *See* Ajaj v. United States, No. 15-cv-00992-RBJ-KLM, 2016 WL 6212518, at *3 (D. Colo. Oct. 25, 2016) (finding that prisoner-plaintiff's request for accommodation to fast during Ramadan is moot while simultaneously finding he cannot assert *Bivens* claims for the years during which prison officials refused to accommodate his fast during Ramadan, even though the accommodation did not start until after he initiated suit); *see also* Michele C. Nielsen, *Mute and Moot: How Class Action Mootness Procedures Silences Inmates*, 63 UCLA L. REV. 760, 775 (2016) ("The prison context . . . renders inmates vulnerable to such unilateral, involuntary mootness. Inmate locations, treatment, and classifications exist at the whims of prisons. Thus, if prisons can simply reshuffle inmates through transfers and reclassify prisoners through implementing measures . . . in order to avoid or strategically manipulate litigation, inmates are distinct kinds of plaintiffs who require additional protections from defendants who attempt to render their claims moot."). Such protections should include the availability of damages remedies for violations of their fundamental constitutional rights.

200. Corr. Servs. Corp. v. Malesko, 543 U.S. 61, 74 (2001).

201. *See* Carlson v. Green, 446 U.S. 14, 18–19 (1980) (stating that a *Bivens* remedy is not required "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" (emphasis added)).

202. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, OGC/LIT NO. 1330.18, ADMINISTRATIVE REMEDY PROGRAM 1-2 (2014) [hereinafter BOP AR PROGRAM], https://www.bop.gov/policy/progstat/1330_018.pdf [https://perma.unl.edu/3AL].

fledged litigation of federal claims."[203] For the BOP's program, a BOP official is required to respond to grievances filed by federal prisoners, but the program does not require any particular relief should the BOP official find merit to the underlying complaint.[204] There is no requirement that BOP officials cease wrongful conduct, and there is no provision to provide prisoners compensation for past harms.[205] Most in-depth investigations into prison grievance systems conclude that "submitting a grievance is more akin to lodging a complaint with the police than with filing a complaint in court; while filing a grievance initiates an investigative process, it is not intended to instigate adjudication of legal claims."[206] Thus, the administrative-remedy program provides no deterrent effect and is a "remedy" in name only—it is certainly not adequate for purposes of the *Bivens* analysis.[207]

The third alternative remedy not mentioned by the *Abbasi* Court but raised by at least one lower court is the FTCA.[208] However, because the Court is yet to overturn *Carlson*, lower courts that find the FTCA is an adequate alternative remedy are ignoring clear Supreme Court precedent. In *Carlson*, the Court flatly, yet thoughtfully, rejected the argument that the FTCA is an alternate and adequate remedy to *Bivens* relief.[209] It reasoned that Congress intended the FTCA to be a counterpart to *Bivens*, not its replacement.[210] It concluded that *Bivens* serves as a deterrent to individual actors in a way the FTCA

203. Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 316 (2007).

204. *See generally* BOP AR PROGRAM, *supra* note 202.

205. *Id.*; *see also* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 546–47 (2001) (concluding prison grievance systems do not provide for "proactive problem-solving mechanisms in[ ] the grievance process").

206. Shay & Kalb, *supra* note 203, at 318. See Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837 (2016), for a thorough criticism of the ineffectiveness of filing a complaint with the police.

207. Indeed, much criticism has been levied against prison grievance proceedings in general. *See*, *e.g.*, Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1806–07 (concluding that grievance proceedings are "insufficiently judicial in nature to warrant preclusive effect" in part because "the administrative proceeding may produce no reviewable findings, or no relevant ones" and "there is no guarantee that whatever findings do result will be the product of a procedure that comports with federal due process standards").

208. *See, e.g.*, Saleh v. United States, No. 09–cv–02563–PAB–KLM, 2011 WL 2682803, at *11 (D. Colo. Mar. 8, 2011) (finding the FTCA an adequate alternative remedy for prisoner-plaintiff's First Amendment *Bivens* claim), *overruled in part by* Saleh v. United States, No. 09–cv–02563–PAB–KLM, 2011 WL 2682728 (July 8, 2011) .

209. Carlson v. Green, 446 U.S. 14, 20–25 (1980).

210. *Id.* at 22.

cannot in the same way prospective relief cannot.[211] The Court also favorably commented on the availability of punitive damages and jury trials[212] in *Bivens* suits but not FTCA suits.[213] Finally, the Court expressed disapproval of the idea because FTCA claims are premised on state tort law; thus, FTCA liability is dependent upon the law of the state in which the federal prisoner resides.[214] This raises concerns about the need for the Constitution to be equally applicable throughout the country.[215]

The final alternative remedy that will necessarily be implicated by a federal prisoner's attempt to find a *Bivens* remedy for Free Exercise violations is any remedy available under RFRA.[216] Passed in 1993, Congress unequivocally intended RFRA to "repair the damage to religious liberty caused by the Supreme Court's decision in *Employment Division v. Smith*,"[217] a 1990 Supreme Court case wherein "the Supreme Court held that neutral and generally applicable laws can be applied to suppress religious practices, and that states need have no reason for refusing exemptions for the free exercise of religion."[218] RFRA thereby creates a statutory right to religious freedom that is more protective than the First Amendment. Under RFRA, the government cannot substantially burden a person's religious exercise without demonstrating the burden is both in furtherance of a compelling

211. *Id*. at 20.

212. The historical importance and current efficacy of civil jury trials has been thoroughly researched and commented on by other scholars. For our purposes, because a federal prisoner will only gain access to a civil jury trial if he is able to assert a *Bivens* claim (injunctive and FTCA claims are always tried to the bench), it is important to note:

> The Framers believed a civil jury trial was necessary for several reasons. Perhaps most importantly, they viewed it as a check on the corrupting power of judges. A jury composed of twelve men assembled for just one case would be less susceptible to corruption or the influence of the sovereign, than a single, unelected Article III judge. With a jury trial, private litigants would also know that their interests could be vindicated in litigation with the government.

Joseph M. Clark, *A Different Tack: The Case for a Least Restrictive Means Requirement for Summary Judgment*, 40 U. DAYTON L. REV. 333, 338 (2016) (citing THE FEDERALIST NO. 83, at 484 (Alexander Hamilton) (Kathleen M. Sullivan ed., 2009)); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 656 (1973)); *see also* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Teaches Us About the Second*, 122 YALE L.J. 852, 873 n.99 (2013); George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 186–90.

213. *Carlson*, 446 U.S. at 22.

214. Hoery v. United States, 324 F.3d 1220, 1222 (10th Cir. 2003).

215. *Id.* at 23.

216. 42 U.S.C. § 2000bb-1(a)–(c) (2012).

217. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 209–10 (1994) (citing Emp't Div. v. Smith, 494 U.S. 872 (1990)).

218. *Id.* at 209.

government interest and the least restrictive means of accomplishing that interest.[219] While RFRA was later found unconstitutional as applied to the states because it exceeded Congress's power under Section 5 of the Fourteenth Amendment,[220] the statute remains in effect as applied to the federal government, including the federal prisons.[221]

At the time Congress debated the bill, a number of attorneys general attempted to persuade Congress to exempt prisons from the statute's religious-liberty protections, to no avail.[222] Senators Alan Simpson and Harry Reid sponsored a proposed amendment to the bill that would have expressly provided that nothing in RFRA "shall affect, interpret, or in any way address that portion of the First Amendment regarding laws prohibiting the free exercise of religion."[223] Importantly, RFRA is not a constitutional amendment but a statute "designed to perform a constitutional function" by codifying the standard of review to be applied in cases involving Free Exercise violations.[224] Indeed, RFRA could not override the Supreme Court's interpretation of the First Amendment—it simply took a constitutional right, converted it to a statutory right, and codified the protections afforded to that *statutory right*.[225] This is why federal prisoners can and do sue the federal government and its agents for violations of *both* their constitutional right to freely exercise their religion and their statutory right to do the same.[226]

Nevertheless, at least one lower federal court determined that Congress's passage of RFRA signifies that it intended the statute to be an alternative remedial scheme for Free Exercise *constitutional violations*, thereby precluding an extension of *Bivens* to remedy violations of the First Amendment's Free Exercise clause.[227] Notably, in *Mack v. Warden Loretto FCI*, the Third Circuit supported this conclusion by expressly finding RFRA provides claimants with all "appropriate re-

219. § 2000bb-1(a)–(b).

220. *See* City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997). In response to *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which applies to states and their prisons. 42 U.S.C. § 2000cc-1 (2012). RLUIPA, passed using Congress's power under the Spending Clause, has survived constitutional challenges. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005).

221. O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003) (noting that RFRA's application to internal federal government operations rests on Article I, Section 8, Clause 18 of the Constitution); Kikumura v. Hurley, 242 F.3d 950, 959–60 (10th Cir. 2001); Jama v. U.S. Immigration & Naturalization Serv., 343 F. Supp. 2d 338, 369–70 (D.N.J. 2004) (applying RFRA to federal immigration detainees).

222. Laycock & Thomas, *supra* note 217, at 239–40.

223. 139 CONG. REC. S14,468 (daily ed. Oct. 27, 1993).

224. Laycock & Thomas, *supra* note 217, at 218–19.

225. *Id.* at 243.

226. *See supra* notes 141–42.

227. Mack v. Warden Loretto FCI, 839 F.3d 286, 305 (3d Cir. 2016).

lief" for Free Exercise violations, including damages relief against individual federal officers who violate the religious rights of federal prisoners.[228] Thus, RFRA appears to present the biggest roadblock for a *Bivens* remedy for Free Exercise violations. But, I submit, it is not quite that simple.

First, the lower federal courts are decidedly split on whether RFRA authorizes damages against individual defendants for claims brought under the statute.[229] For the courts who decided RFRA does not authorize damages, part of the rationale used to support their decision is that RFRA only authorizes a cause of action against the government itself, not individuals, and damages have never been available against the government, as opposed to individuals.[230] In interpreting the legislative history of RFRA, these courts concluded that "Congress' intent in enacting RFRA could not be clearer: It was to restore Congress' understanding of the compelling interest test as it existed before *Smith*—no more, no less."[231] To the extent this is the appropriate conclusion to draw from RFRA's legislative history, then Congress did not intend for RFRA to provide the sort of *comprehensive remedial scheme* that should preclude the extension of the *Bivens* remedy.

Moreover, even if the *Mack* court's interpretation of RFRA is correct[232] and individual damages liability should be available under the statute, a *Bivens* remedy should also be available. While this proposition is far afield the Supreme Court's current *Bivens* jurisprudence, "a damages remedy against the offending party is a *vital component of any scheme for vindicating cherished constitutional rights*."[233] As another constitutional scholar clearly lays out, providing a damages remedy for violations of constitutional rights plays a crucial role in the American constitutional scheme:

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228. *Id*. at 301, 304–05.

229. *See, e.g.*, Mack v. O'Leary, 80 F.3d 1175, 1177 (7th Cir. 1996) (allowing RFRA suit against individual for damages); Fernandez-Torres v. Watts, No. 2:16–cv–24, 2017 WL 1173923, at *2 (S.D. Ga. Mar. 29, 2017) (no damages available under RFRA); Barrera-Avila v. Watts, No. 2:16–cv–141, 2017 WL 933123, at *4 (S.D. Ga. Mar. 8, 2017) (same); Ajaj v. United States, No. 15–cv–00992–RBJ–KLM, 2016 WL 6212518, at *3 (D. Colo. Oct. 25, 2016); Rezaq v. Fed. Bureau of Prisons, No. 13–cv–00990–MJR–SCW, 2016 WL 97763, at *9 (S.D. Ill. Jan. 8, 2016) (money damages available under RFRA against individuals), Tanvir v. Lynch, 128 F. Supp. 3d 756, 780 (S.D.N.Y. 2015) (finding that RFRA does not authorize a damages case).

230. *Tanvir*, 128 F. Supp. 3d at 779–80.

231. *Id.* at 780.

232. While outside the scope of this Article, I find the *Mack* court's conclusion that the text and legislative history of RFRA support a conclusion that RFRA allows for monetary relief from individuals to be entirely credible and accurate. Nonetheless, for the reasons articulated below, I believe a *Bivens* remedy should also be available.

233. Owen v. City of Independence, 445 U.S. 662, 651 (1980).

> Individual damages actions play a significant role in the constitutional enforcement scheme by permitting injured parties to be compensated for harms caused by renegade public officials' unconstitutional conduct and providing some deterrence of official misconduct. They also play a valuable signaling role, both to society and to public officials, about the importance of constitutional values and the rule of law.[234]

This signaling role—the idea that "the imposition of damages against public officials can serve a valuable symbolic function to convey a broad societal message that public officials, like ordinary citizens, must adhere to the rule of law and that constitutional rights are valued by our system of justice"[235]—is perhaps the most important value provided by a system that ensures damages remedies are available to all, regardless of their status.

The necessity to provide equal remedial protections for violations of constitutional rights holds particularly true in the context of remedies available for the violation of religious freedoms protected by the First Amendment. As further explored below, in section IV.B, with particular focus on the importance of religion in prison, the free exercise of religion has been a central tenet of American constitutional protection since the earliest days of the republic, with protections found in both the Bill of Rights and nearly all state constitutions.[236] Moreover, the need for prison systems to bear a semblance of fairness in order to remain legitimate, discussed in more detail in section IV.A, likewise contributes to the importance of protecting the religious rights of all prisoners in the same manner and through the same processes. This combination—the fundamental importance of religious freedoms to the American constitutional system and the need for fairness in the administration of prisons—creates a compelling rationale for ensuring federal prisoners have the same remedial mechanisms available to them as their state counterparts. This rationale moves beyond the traditional *Bivens* test and negates the idea that a mere statute like RFRA should or could be an adequate alternative solution to address *constitutional* violations.[237]

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234. Chen, *supra* note 130, at 890.

235. *Id*. at 901.

236. John Witte Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, *in* THE FIRST AMENDMENT: THE FREE EXERCISE OF RELIGION CLAUSE—ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 33, 43 (Thomas C. Berg ed., 2008).

237. On this same note, because existing jurisprudence requires that a plaintiff seeking to vindicate the violation of his constitutional rights under the First Amendment is required to meet a higher burden than a plaintiff suing for vindication of his statutory rights under RFRA, the mere fact that a plaintiff might meet this higher burden deserves remedial protection that properly acknowledges the importance of the rights enshrined in the Constitution.

IV. IMPORTANCE OF A DAMAGES REMEDY FOR SUBSTANTIAL BURDENS ON THE FREE EXERCISE OF RELIGION IN PRISONS

There is no doubt that serving time in an American prison is not an easy experience. The incarceration boom of the past four-plus decades has been accompanied by a move toward harsher and more punitive policies.[238] Moreover, social psychologists have long recognized that authoritarian institutions like prisons are ripe for allowing and even encouraging abuses by those in power.[239] Yet, the reality of modern-day prison life is largely unknown to the American public,[240] and the

238. *See generally* MONA LYNCH, SUNBELT JUSTICE ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2010) (tracing Arizona's transition from a rehabilitative to punitive model of punishment). Lynch explicitly sets out to illustrate how Arizona "became a national trend-setting leader in delivering harsh punishment" using Arizona as but one illustration of "a sociological and cultural theoretical framework that explicates how punishment functions during a moment of paradigm transformation." *Id.* at 3; *see also* ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT 182 (2014) (describing America's "muscular desire to punish").

239. The most famous, and controversial, experiment examining the behavior of both the powerful and the powerless in prisons is the Stanford Prison Experiment, in which social psychologist Philip Zimbardo and his team created a mock prison in the basement of the psychology building at Stanford University. Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 73 (1973). However, other famous experiments and studies in psychology and sociology reveal that ordinary citizens often respond to authoritarian figures and institutions with blind obedience, regardless of the evils being perpetrated or sanctioned by such obedience. *See*, *e.g.*, Solomon E. Ashe, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS 1, 3 (1965) (discussing the results of a series of experiments testing behavior in a group setting, finding that individuals are quick to conform to the behavior of others, and concluding that social situations profoundly impact human behavior); Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57, 74–75 (1965) ("With numbing regularity good people were seen to knuckle under the demands of authority and perform actions that were callous and severe. . . . A substantial proportion of people do what they are told to do, irrespective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from legitimate authority.").

240. MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 18 (2006). The invisibility of the modern carceral state lies in stark contrast to the public's historical interest in prisons:

> The problem of the prison was central to major political theorists of the eighteenth and nineteenth centuries. The role that punishment and imprisonment served in maintaining social order, legitimizing the state, and reforming the soul were key concerns of thinkers like Mill, Bentham, Kant, Montesquieu, Tocqueville, and Francis Lieber, the first named professor of political science in the United States. Years ago prisons also transfixed the public. American penitentiaries were a prime sightseeing destination for foreign and domestic tourists. Prison officials charged entrance fees and put prisoners on view as if they were in a zoo, sometimes hosting thousands of tourists in a single day. Charles Dickens

political process provides little oversight or protection to prisoners.[241] For these reasons, the role of the judiciary in protecting the rights of prisoners is vital, and judicial remedies meant to deter future wrongful conduct are of the utmost importance.

There are three interwoven practical and policy areas relied on to reach the ultimate conclusion that allowing for and preserving a damages remedy for violations of a prisoner's Free Exercise rights is of paramount importance. First, prisons, by their nature, invite unchecked abuse by the powerful over the powerless. Second, religion in prison is both important for the incarcerated, as a way to maintain a sense of self and preserve a sense of dignity, and for the incarcerators, who often view allowing for religious observance and activities in prison as serving a greater rehabilitative goal.[242] Finally, the very purpose of punitive damages in constitutional cases is to deter the powerful from exerting unfair control over the powerless. By refusing federal prisoner-plaintiffs the option to pursue these damages in court, the federal courts abdicate their responsibility to check the unrestrained power of the Executive over a uniquely vulnerable population—the 185,254 prisoners locked within the confines of the federal prison system.[243]

A. The Stanford Prison Experiment and the "Lucifer Effect"[244]: How Prisons Create an Environment Ripe for Abuse

In August 1971, a group of psychologists at Stanford University, led by Philip Zimbardo, conducted an experiment where they created a prison in the basement of Stanford University's Jordan Hall.[245] The pyschologists recruited university students to play the parts of prison-

> reportedly told the warden of Cherry Hill prison after a visit: "The Falls of Niagara and your Penitentiary are two objects I might almost say I most wish to see in America."
>
> *Id*. (first citing MICHAEL HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1978, at 101 (1980); and then quoting NEGLEY K. TEETERS & JOHN D. SHEARER, THE PRISON AT PHILADELPHIA, CHERRY HILL: THE SEPARATE SYSTEM OF PENAL DISCIPLINE: 1829–1913, at 114 (1957)).

241. Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 458 (1999); *see also* N.Y. CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS 7 (2012) ("What occurs behind prison walls is murky.").

242. Thomas & Zaitzow, *supra* note 139, at 250.

243. *About Our Agency*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency [https://perma.unl.edu/6CJH-NAH3].

244. PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007).

245. *Id.* at 20.

ers and guards in the experiment.[246] Zimbardo and the other psychologists screened each of the participants for personality disorders before starting the experiment.[247] Utilizing the assistance of the local police, the students assigned to be prisoners were "arrested" and taken into custody on Sunday, August 14, 1971.[248] Within hours of taking the so-called prisoners into custody, the students assigned as guards began a series of abuses against the prisoners.[249] The experimenters, "surprised both by the intensity of the guards' domination and the speed with which it appeared,"[250] ended the experiment, meant to last two weeks, after a mere six days.[251]

Many conclusions regarding the situational influence of power on human behavior and how that situational power plays out in prisons can be drawn from Zimbardo's study. A few are of signfiance here. First, "[p]ower is a concern when people either have a lot of it and need to maintain it or when they have not much power and want to get more."[252] Both of these dynamics are likely present in a prison at any given time. Prison guards have an enormous amount of power but are incredibly outnumbered by the powerless prisoners surrounding them.[253] Yet, despite this lopsided distribution of power of the few over the many within the prison system, prison guards often view themselves as the "dentists of the law enforcement world."[254] In other words, even though prison guards have a lot of power within the prison system, they see themselves as having little power or prestige vis-à-vis their law enforcement cohorts. This psychological tug-of-war for prison guards inevitably leads to stress that guards may choose to relieve through perpetrating abuses on prisoners.[255]

This result can be intensified by another important conclusion from the Stanford Prison Experiment: the idea that pressures to conform arising from the need for social approval can overwhelm a per-

246. *See id.* at 19–20.

247. *Id.* at 30.

248. *Id.* at 23, 34–39.

249. *Id.* at 40–56.

250. *Id.* at 196.

251. *Id.* at 171–72, 178.

252. *Id.* at 208.

253. Shane Bauer, *My Four Months as a Private Prison Guard,* MOTHER JONES, July–Aug. 2016, http://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer [https://perma.unl.edu/PGR6-T4UQ] ("There are almost never more than two floor officers per general population unit. That's one per 176 inmates.").

254. TED CONOVER, NEWJACK: GUARDING SING SING 20 (2000).

255. Dasha Lisitsina, *"Prison Guards Can Never Be Weak": The Hidden PTSD Crisis in America's Jails*, GUARDIAN (May 20, 2015), https://www.theguardian.com/us-news/2015/may/20/corrections-officers-ptsd-american-prisons [https://perma.unl.edu/35S9-U87Z].

son's sense of right and wrong.[256] Zimbardo and his team found that "[g]roup pressure from other guards placed significant importance on being a 'team player,' conforming to an emergent norm that demanded dehumanizing the prisoners in various ways."[257] The third and final conclusion from the Stanford Prison Experiment relevant to this discussion is the idea that prisons do more than just create an environment ripe for physical abuse or violence directed at the powerless by the powerful. In authoritarian instututions like prisons,

> [w]hat is more typical is[ ] *mediated violence*, where authorities pass along orders to underlings who carry them out or the violence involves verbal abuse that undercuts the self-esteem and dignity of the powerless. Authorities often take actions that are punitive and whose consequences are not directly observable. For example, giving hostile feedback to someone that knowingly will disrupt their performance and adversely affect their chances of getting a job qualifies as a form of such socially mediated violence.[258]

It is this sort of psychological and dignitary assault by a prison guard on a prisoner that creates great concern. Physical assaults on prisoners can violate the Eighth Amendment, and prisoners should certainly have a damages remedy available to them for the physical and psychological harms that result from excessive uses of force. Such a remedy is available for state prisoners through § 1983, and *Carlson* established that federal prisoners have a concomitant remedy under *Bivens*.[259] The focus here is on protecting the Free Exercise rights of prisoners and on deterring prison guards from unjustifiably burdening those rights. That focus stems from a belief that burdens on the religious rights of a prisoner are often meant to be an attack on the prisoner's core belief system, the system he uses to define who he is and how, even as a prisoner, he might choose to live his life with dignity. Prisoners' religious-rights cases highlight a myriad of mediated abuses prison guards perpetrate on the prisoners they confine, including:

1. On multiple occasions, forcibly removing a prisoner from his cell, in full SWAT gear, with physical force, placing the prisoner in another room, and forcibly shaving his head;[260]
2. Forcing a Muslim prisoner working in the kitchen to prepare pork and punishing the prisoner for refusing;[261]
3. Pushing a Muslim prisoner during his daily prayers;[262]

256. ZIMBARDO, *supra* note 244, at 221.

257. *Id.*

258. *Id.* at 278.

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

260. Smith v. Ozmint, 578 F.3d 246, 259 (4th Cir. 2009).

261. Williams v. Bitner, 359 F. Supp. 2d 370, 373 (M.D. Pa. 2005).

262. Arroyo Lopez v. Nuttall, 25 F. Supp. 2d 407, 409 (S.D.N.Y. 1998) (awarding state prisoner seven thousand dollars in damages for violation of Free Exercise rights).

4. Refusing to tell a Muslim prisoner the time of day in order to allow him to pray and refusing to tell him the date so he could observe Ramadan;[263]
5. Throwing a Muslim prisoner's Qur'an in the garbage or on the floor;[264]
6. Refusing to allow a prisoner to preach;[265] and
7. Excluding a prisoner from his faith services for a period of three months.[266]

These indignities may appear minor in the context of other cruelties prisoners may face in prison, but often these indignities are motivated or accompanied by a discriminatory or malicious animus. Indeed, prison officials often equate religious practice to other trouble-making acts in the prison.[267] Moreover, as discussed in further depth below, these humiliations attack the very core of how a person defines himself, a harm felt even more acutely in prison, where prisoners are required to hide much of their identity in order to survive the harshness of daily prison life.

B. The Importance of Religious Rights in Prison

> Religion is a special phenomenon, in part, because it plays such a wide variety of roles in human life: it is an institution, but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and locus of community, akin to family ties, but it is more than that; it is an aspect of identity, but it is more than that; it provides answers to questions of ultimate reality, and offers a connection to the transcendent; but it is more than that. Religion cannot be reduced to a subset of any larger category.[268]

All schoolchildren in the United States learn early that issues of religious liberty were important and influential to the drafters of the Constitution and the Bill of Rights.[269] Indeed, "the founders understood freedom in matters of religious belief and practice as something fundamental to the American experiment."[270] And while the meaning of the twin religion clauses in the First Amendment continues to be debated today, it is clear that the "sixteen words capture numerous

263. Omar v. Casterline, 288 F. Supp. 2d 775, 781–82 (W.D. La. 2003).
264. Jama v. Esmor Corr. Servs., Inc., No. 97-3093, 2008 WL 724337, at *2 (D.N.J. Mar. 17, 2008).
265. Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 38 (1st Cir. 2007).
266. Meyer v. Teslik, 411 F. Supp. 2d 983, 989–90 (W.D. Wis. 2006).
267. CONOVER, *supra* note 254, at 21 (recounting that prison officials told him "the rules they followed to prevent trouble: breaking up gatherings of more than six people; forbidding martial arts practice, group worship (Muslims wanted to pray together and kneel toward Mecca), and contact sports").
268. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 42 (2000).
269. James A. Sonne, *Religious Liberty, Clinical Education, and the Art of Building Bridges*, 22 CLINICAL L. REV. 251, 257 (2015).
270. *Id.* at 257–58.

abiding principles, including liberty of conscience, free exercise, pluralism, equality, separationism, and disestablishment."[271] The principle relating to liberty of conscience becomes the most important in prison, both in terms of prisoners' coping mechanisms and chances at rehabilitation.

The prison system as we know it stems from early Quaker ideals about penance and reform.[272] "Religion has, in one way or another, been a cornerstone" of the American prison system, and "[b]y the mid-20th century, religion was recognized as an accepted program in virtually all U.S. prisons . . . [but], with limited exceptions, religious rights extended primarily to the two Christian doctrines of Catholics and Protestants."[273] This discriminatory provision of religious rights in prison continued until the Supreme Court allowed a Muslim prisoner to challenge prison policies restricting his access to religious leaders of his faith in *Cooper v. Pate*.[274] While the availability of religious programming remains largely focused on Christian values, faith-based programming is considered by many to "contribute substantially to prison life for staff and prisoners."[275] Indeed, "there is considerable evidence that religion contributes to feelings of well-being, reduces stress, and increases general health."[276] Religion is also seen as a way for prisoners to form healthy connections with others, and "[a]ffiliation with a religious group may be the only place where these inmates can interact with other inmates in a positive manner and have a sense of psychological well-being."[277] Moreover, the vast majority of prison chaplains view "religious counseling and other religion-based programming an important aspect of rehabilitating prisoners."[278]

Thus, religion serves an important function in prison for both the prisoners and the prison officials. For prisoners, the right to religious freedom "is intrinsic to the human person."[279] Indeed, the right to religious freedom is grounded in inherent human dignity: "When people

271. *Id.* at 259.
272. GOTTSCHALK, *supra* note 240, at 47; Jim Thomas & Barbara H. Zaitzow, *Conning or Conversion? The Role of Religion in Prison Coping*, 86 PRISON J. 242, 247 (2006).
273. Thomas & Zaitzow, *supra* note 272, at 257.
274. 378 U.S. 546 (1964).
275. Thomas & Zaitzow, *supra* note 272, at 250.
276. *Id.* at 254.
277. *Id.*
278. FORUM ON RELIGION & PUB. LIFE, PEW RESEARCH CTR., RELIGION IN PRISONS: A 50-STATE SURVEY OF PRISON CHAPLAINS 11 (Sandra Stencel et al. eds., 2012), http://assets.pewresearch.org/wp-content/uploads/sites/11/2012/03/Religion-in-Prisons.pdf [https://perma.unl.edu/8ZR5-K69X].
279. TIMOTHY SAMUEL SHAH, WITHERSPOON INST. TASK FORCE ON INT'L RELIGIOUS FREEDOM, RELIGIOUS FREEDOM: WHY NOW? DEFENDING AN EMBATTLED HUMAN RIGHT 3 (2012).

lose their religious freedom, in other words, they lose more than their freedom to be religious. They lose their freedom to be human."[280] Therefore, curtailments of religious freedom in prison do not simply infringe upon certain religious practices; they can effectively attack a person's core identity. For this reason, and because of the historical importance of religious rights to the American tradition, religious rights in prison deserve the utmost constitutional protection.

C. The Historical Purpose of Punitive Damages

From the earliest English common law allowing for exemplary, or punitive damages, it is clear punitive damages were meant to redress "some sort of dignitary harm to the plaintiff [that would] remain[ ] otherwise uncompensated."[281] As discussed above, prisoners are a particularly vulnerable population, subject to the whim of their captors at all times, and violations of prisoners' religious rights are inherently dignitary harms. Thus, allowing prisoners to seek punitive damages affords the socially powerless—those unable to protect themselves—the opportunity to vindicate their constitutionally protected rights when those rights are violated by the more powerful prison guards. Such a purpose is consistent with the historical role of punitive damages in our legal system.[282]

Consequently, punitive damages, likely the only damages available to prisoner-plaintiffs asserting Free Exercise claims because of the physical-injury requirement of the PLRA,[283] are exactly the type of damages meant to compensate the dignitary harms associated with Free Exercise violations.[284] Yet only *state* officials currently face punitive-damage liability for violation of one of the nation's foremost constitutional protections and *federal* officials do not. Because of this structure, the system is set up to elevate the interests of some at the

280. *Id.* at 28.

281. Redish & Mathews, *supra* note 29, at 14 (2004).

282. Pillard, *supra* note 30, at 71; Rustad & Koenig, *supra* note 30, at 1285 ("[T]he history of the rise of the doctrine of punitive damages is a part of the struggle of individuals to preserve their rights against the mighty.").

283. The PLRA provides that a prisoner may not receive compensatory damages "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e) (2012). The PLRA places no such limitation on the availability of punitive damages.

284. *See* Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 434 (2008); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1008 (2007) ("Punitive damages vindicate the 'dignity' of the private citizen and, therefore, the private right whose violation grounds their award is the private right not to have one's dignity violated. This right can be expressed in a number of ways—the right to respect, the right to dignity, and the right to moral equality.").

expense of others.[285] In a system where all federal officers must take an oath to support and defend the Constitution,[286] such a result is nonsensical, untenable,[287] and contrary to the historic roots of punitive damages awarded in cases involving "the abuse of official authority [and] acts in which the defendant used his social power to abuse the plaintiff."[288] By refusing to uniformly allow an award of punitive damages against both state and federal prison officials for the dignitary harms associated with religious rights violations, federal courts are abdicating their responsibility to ensure the Constitution is respected by both the states and the executive branch of the federal government.

V. CONCLUSION

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[289]

Since Chief Justice John Marshall penned the Supreme Court's landmark decision in *Marbury v. Madison*, the proposition that the rule of law requires judicial remedies for wrongs perpetrated by the government has been generally accepted as universal truth.[290] From the earliest days of the American republic, the idea that federal

285. Markel, *supra* note 31, at 271 (2009) ("[A] system that arbitrarily punished some people's illegal conduct while systematically—or—haphazardly leaving others' misconduct untouched would be one that participated (perhaps unwittingly) in the making of false assessments of whose interests count how much in a liberal democracy. Consequently, when people defy their equal obligation to obey the rules the state has imposed to protect the rights of others, the state may seek to punish them . . . .").

286. *See* 5 U.S.C. § 3331 (2012).

287. Markel, *supra* note 31, at 263–64 ("It's interesting that the principle of democratic self-defense is embodied in the oath taken by federal officers, the substance of which obligates them to protect the decision-making structure of the nation. The oath illuminates the idea that the Constitution must be defended against attack by those who shift the rules unlawfully, thus revealing offenses as, to some degree, forms of rebellion." (citations omitted)).

288. Sebok, *supra* note 284, at 1008 (citing Charles T. McCormick, *Some Phases of the Doctrines of Exemplary Damages*, 8 N.C. L. REV. 129, 137 (1930)).

289. Marbury v. Madison, 5 U.S. 137, 163 (1803).

290. William Michael Treanor, *The Story of* Marbury v. Madison*: Judicial Authority and Political Struggle*, *in* FEDERAL COURTS STORIES 29, 30 (Vicki C. Jackson & Judith Resnik eds., 2010) ("*Marbury* played a critical part in the development of the larger propositions that, in the new republic, there was a distinction between politics and law, and that remedies for governmental wrongs were necessary to the rule of law.").

"judges ought to be guardians of the Constitution"[291] by enforcing constitutional rights through judicial review has been recognized as vitally important.[292] However, judicial review becomes meaningless to individuals if the federal courts refuse to provide a remedy for violations of constitutional rights.[293]

Scholars have extensively criticized the Supreme Court's retraction of the *Bivens* doctrine as a failure to uphold *Marbury*'s promise of a remedy for all violations of individual rights.[294] While agreeing with this critique, this Article focuses on a discrete type of claim to argue that by refusing to hold federal officials accountable in the same manner and form as state officials who are performing the *same* job for violations of the *same* constitutional rights, the Supreme Court is inevitably creating a constitutional scheme wherein federal actors can violate the Constitution with impunity while their state counterparts are held accountable. Moreover, by focusing on remedy before rights, the Supreme Court is stripping itself and the lower federal courts of jurisdiction over claims arising from the Constitution itself. This result is antithetical to constitutional history and design, and creates a perverse federalist system wherein the federal government holds the states to higher constitutional standards than it holds itself. Such a system is inherently arbitrary, unfair, and unequal. This is clearly demonstrated when examining the incongruous remedies available in Free Exercise challenges brought by state and federal prisoners.[295]

When first adopted, the Constitution applied primarily to the federal government. After the Civil War, Congress drafted and approved, and the states ratified, the Fourteenth Amendment.[296] Decades later,

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291. *Id.* at 42 (citing 11 ANNALS OF CONG. 179 (1802) (statement by Republican Senator Wright of Maryland during congressional debates as to whether to repeal the Judiciary Act of 1801)).

292. *Id.*; *see also* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 245 (2012) (calling for a theory of deference for the prison-law context).

293. *Marbury*, 5 U.S. at 166 ("But where a specific duty is assigned by law, and individual rights depend upon the enforcement of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.").

294. *See supra* section II.C.

295. *See supra* Parts II–III.

296. Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069, 1074 (2017). A full examination of the history behind the ratification of the Fourteenth Amendment is beyond the scope of this piece. However, the 39th Congress faced "formidable roadblocks" in securing ratification.

> Article V required the approval of three-fourths of the states, and white southern legislatures were fully prepared to reject the Fourteenth and Fifteenth Amendments, thereby depriving them of legal validity. When faced with this prospect, congressional Republicans used military force and other desperate constitutional expedients to ram their amendments through the southern legislatures. These heavy-handed methods contributed to the alienation of the white South for generations.

the Supreme Court acknowledged that certain provisions of the Bill of Rights were applicable to the states through the Due Process Clause of the Fourteenth Amendment,[297] a practice known as the incorporation doctrine.[298] The Supreme Court did not incorporate the Free Exercise clause until 1940,[299] thereby expressly holding the states to the same standards as the federal government with regard to Free Exercise rights.[300] Prior to incorporation, the Constitution placed no limits on state regulation of religion; indeed, the text of the First Amendment itself is focused on limitations placed on the federal government through Congress.[301] Despite this textual anomaly, the federal courts continue to analyze the substance of Free Exercise claims against the state in the same manner as those asserted against the federal government.

To be clear, this Article is not arguing that the Supreme Court got it wrong in the incorporation cases. To the contrary, the Fourteenth Amendment rightly requires the states to protect and secure the individual rights and liberties enshrined in the Bill of Rights in the same way it requires the federal government to do so. What is asserted, however, is that by imposing inconsistent remedial consequences for violations of those rights on state actors vis-á-vis federal actors, the federal courts ignore constitutional history and design meant to protect individuals from rights infringement by the *federal* government. In the prison setting, this results in federal prison officials escaping with no repercussions for violations of federally protected constitutional rights while state prison officials are held liable for the very same acts. Such a result stands constitutional design on its head[302] and creates an inherently arbitrary and unfair constitutional scheme that "values other concerns of far less importance over the constitutional rights of individuals—rights that lie at the heart of our judicial system."[303]

BRUCE ACKERMAN, THE CIVIL RIGHTS REVOLUTION 58 (3d ed. 2014).

297. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (incorporating the takings provision of the Fifth Amendment).

298. Poppel, *supra* note 188.

299. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

300. Other commentators have examined the problems inherent to applying the same Free Exercise standards to the state and federal government. *See*, *e.g.*, Poppel, *supra* note 188, at 248–49.

301. U.S. CONST. amend. I ("*Congress* shall make no law . . . " (emphasis added)).

302. Carlson v. Green, 446 U.S. 14, 22 (1980) ("'Constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." (citations omitted)).

303. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 133 MICH. L. REV. 1219, 1254 (2015).

A judicial system that undervalues individual rights and results in such obviously arbitrary and unfair outcomes leads to unpredictability and allows for abuse and injustice. The prison context creates an environment ripe for abuse on its own such that allowing federal prison officials to act with impunity only heightens the risk of abuse. Moreover, the perception of fair treatment plays an important role in both the prison context and in the broader justice system. "Much psychological research has addressed the importance of the perception of fair process in the evaluation of the quality of justice dispensed in any legal setting."[304] Chief Justice Earl Warren recognized the important role of the federal courts in promoting a fair society and "believed that the Court had a responsibility to enforce constitutional guarantees, and anything less amounted to 'judicial abnegation.'"[305] With this in mind, the Warren Court used its power "to achieve fairness and equal protection for all," embodying, as Michael Anthony Lawrence posits, "the 'justice-as-fairness' approach" of John Rawls.[306] But in the four-plus decades since Justice Warren retired, the Court has moved away from fairness as a guiding principle, focusing instead on other non-individual rights matters to divest itself of jurisdiction in both *Bivens* cases and prisoners'-rights cases more generally.[307]

The Court's latest line of *Bivens* cases declined to extend *Bivens* to new contexts based on purported separation of powers concerns. Mainly, if Congress has not expressly authorized a suit for damages in a particular context, the Court should exercise restraint to entertain a cause of action wherein damages are the sought-after remedy.[308] However, Congress granted the federal courts jurisdiction on all matters of federal law—28 U.S.C. § 1331 provides "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Congress enacted this statute, thereby granting the federal courts federal question jurisdiction, in 1875, presumably to promote "uniformity in the interpretation and application of federal law."[309] In other words, "because the

304. Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, Wilkinson v. Austin, 545 U.S. 209 (2005) (No. 04-495) (citing Jon Darley et al., *Psychological Jurisprudence: Taking Psychology and Law into the Twenty-First Century*, *in* TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY 35–39 (James Ogloff ed., 2002)).

305. Michael Anthony Lawrence, *Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court*, 81 BROOK. L. REV. 673, 690 (2016) (quoting BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 265 (1983)).

306. *Id.* at 694 (citing JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999)).

307. *See* Shay & Kalb, *supra* note 203, at 324.

308. Zigalr v. Abbasi, 137 S. Ct. 1843, 1863 (2017).

309. Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 84. Chemerinsky argues that individual federal-rights cases are the most important cases decided by the federal courts. *Id*. at 91.

Constitution, treaties, and statutes of the United States apply to the entire country, they should have essentially the same meaning in all parts of the country."[310] Yet, by divesting themselves of jurisdiction to hear Free Exercise claims brought by federal prisoners, the federal courts are simply abdicating jurisdiction, often in order to get rid of irritating cases.[311] The result of this abdication is an inconsistent application of the Constitution depending on the identity of the defendant.

"The ability to control, even if not unfettered, confers moral responsibility."[312] Federal courts have the power to hear and remedy constitutional claims. Because prisoners' Free Exercise claims are of utmost constitutional importance, the federal courts should allow federal prisoners to seek damages in the same manner and form as their state counterparts. This would ensure equal applicability of the Constitution to all parties. When litigants choose to seek relief, "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy."[313] Federal prisoners deserve that remedy.

310. *Id.*

311. Shay & Kalb, *supra* note 203, at 324 ("The problem with th[is] type of jurisdiction-abdication . . . is that in embracing rigid, bright-line rules in order to get rid of irritating cases, courts may find that they have tied their own hands when they subsequently want to reassert authority.").

312. Michael Hatfield, *Legitimacy, Identity, Violence, and the Law*, *in* ON TORTURE 145, 156 (Thomas C. Hilde ed., 2008) (focusing on the moral responsibility of lawyers, who have exclusive control over legal interpretations). This moral responsibility extends to the judiciary, which has ultimate control of how the law is applied and is ultimately responsible for providing the necessary checks on executive action.

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