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## IQBAL SIGNALS BIVENS' PERIL: A CALL FOR CONGRESSIONAL ACTION

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## **Cover Page Footnote**

I would like to thank Professor Ian Weinstein for inspiring and advising this Note and Professors Michael M. Martin and John Pfaff for their valuable input and review. I would also like to thank those close to me for their support and encouragement throughout the Note-writing process.

# ***IQBAL SIGNALS BIVENS' PERIL: A CALL FOR CONGRESSIONAL ACTION***

*Megan Gephart\**

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## **INTRODUCTION**

In May 2009, the Supreme Court handed down its decision in a case that could have severely limited the availability of causes of action against federal agents who, in their capacity as government actors, violate the constitutional rights of individuals.

The case, known as *Ashcroft v. Iqbal*,<sup>1</sup> arose in the aftermath of the September 11, 2001 terrorist attacks.<sup>2</sup> The suit was brought by a man named

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1. 129 S. Ct. 1937 (2009).

Javaid Iqbal, a citizen of Pakistan, who was arrested on charges of fraud related “to identification documents and conspiracy to defraud the United States.”<sup>3</sup> Iqbal was designated as a person “of high interest” and was placed in the Administrative Maximum Special Housing Unit of the Metropolitan Detention Center (MDC).<sup>4</sup>

Iqbal pled guilty to the criminal charges and was deported to Pakistan where he filed charges against thirty-four current and former federal officials.<sup>5</sup> Focusing on his treatment at the MDC, Iqbal alleged violations of his constitutional rights.<sup>6</sup> Specifically, Iqbal alleged that he was designated as a person of high interest because of his race, religion, or national origin, in violation of his First and Fifth Amendment rights.<sup>7</sup> Among the federal officials named as defendants by Iqbal were Federal Bureau of Investigation (FBI) Director Robert Mueller and United States Attorney General John Ashcroft.<sup>8</sup> Iqbal alleged that “each [defendant] knew of, condoned, and willfully and maliciously agreed to subject’ [him] to harsh conditions of confinement ‘. . . solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”<sup>9</sup> Ashcroft and Mueller moved to dismiss for failure to state sufficient allegations to show their involvement in clearly established unconstitutional conduct.<sup>10</sup> The district court denied this motion.<sup>11</sup>

The Supreme Court, however, determined that Iqbal failed to state a cause of action under the standard set forth in the recently decided case *Bell Atlantic Corp. v. Twombly*.<sup>12</sup> The Court remanded the case, which afforded Iqbal the opportunity to amend his complaint.<sup>13</sup>

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2. *Id.*

3. *Id.* at 1943.

4. *Id.*

5. *Id.*

6. *Id.* at 1943-44.

7. *Id.* at 1944.

8. *Id.*

9. *Id.* (quoting First Amended Complaint at 172a-173a, *Elmaghraby v. Ashcroft*, No. 04-CV-1809(JG)(SMG), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part sub nom.* *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)) (third alteration in original).

10. *Id.*

11. *Id.*

12. 550 U.S. 544 (2007) (holding that in order to meet the pleading requirements of Federal Rule of Civil Procedure 8(a)(2), the “no set of facts” standard established in *Conley v. Gibson*, 355 U.S. 41 (1957), is an insufficient protection against disruptive discovery and that a plaintiff must plead enough facts to show that he is entitled to relief).

13. *Iqbal*, 129 S. Ct. at 1954.

It was significant to the outcome of this case that Iqbal was forced to rely solely on an implied cause of action, known as a *Bivens* cause of action, rather than a claim sanctioned by Congress through statute.<sup>14</sup>

This Note examines the propriety of a statutory replacement for the *Bivens* action. Part I of this Note outlines the history of implied causes of action generally, including the shifting attitude of the Court toward its power to fill gaps through the use of implied causes of action, as well as the Court's attitude toward the *Bivens* action specifically. Part II examines the arguments for and against the adoption of a statutory replacement for *Bivens* in the context of the United States post-9/11. Part III contemplates a statutory replacement for *Bivens*, which would strike a balance between deterring rogue government individuals and protecting government officials who violate constitutional rights in the good faith execution of their jobs.

## I. THE SHIFTING ATTITUDE OF THE COURT TOWARD *BIVENS*

### A. The History of *Bivens*

Implied causes of action are judicially-created causes of action that fill gaps where the legislature has not acted, but the court infers that a remedy exists to redress the particular harm at issue.<sup>15</sup> Although “[t]here is no federal general common law,”<sup>16</sup> federal courts still have common law-making powers in specific areas, including the gap-filling function provided by implied causes of action.<sup>17</sup> Implied causes of action were used frequently by the Warren Court and continued to be favored during the years immediately following Chief Justice Warren's retirement,<sup>18</sup> when the Court decided *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>19</sup>

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14. See *infra* notes 41-45 and accompanying text. In the opening portion of its opinion, the *Iqbal* majority explicitly stated that implied causes of action are disfavored. *Iqbal*, 129 S. Ct. at 1948. This signified the disadvantage Iqbal faced by having to bring an implied cause of action rather than a statutory cause of action.

15. See 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, 683 (1985).

16. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

17. See Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1643 (2008) (“Justice Jackson famously defended this sort of interstitial law-making by contending that ‘[w]ere we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes . . . .’” (quoting *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring))).

18. See Michael C. Dorf, *The Supreme Court Puts Ideology Aside in Deciding a Small But Important Ohio Election Case that Could Affect the 2008 Presidential Election*, FINDLAW (Oct. 21, 2008), <http://writ.news.findlaw.com/dorf/20081021.html> (noting that the Warren Court freely implied causes of action and viewed this gap-filling function as a duty

The Supreme Court in *Bivens* implied a cause of action that made monetary damages an available remedy for a federal official's violation of an individual's Fourth Amendment rights, even though the Constitution itself does not specifically provide for such a remedy.<sup>20</sup> The Court had considered a similar situation twenty-five years earlier in *Bell v. Hood*,<sup>21</sup> where a claim was made that federal investigators violated the Fourth and Fifth Amendment rights of an individual.<sup>22</sup> The Court held that general jurisdiction gave federal courts the power to use "any available remedy" to correct the violation of a constitutional right.<sup>23</sup> The Court did not, however, answer the question of whether a federal court could find an implied right to damages as a remedy under the Constitution.<sup>24</sup> In 1971, the *Bivens* Court picked up where *Hood* left off.

The majority in *Bivens* noted that, although "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages," it is "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."<sup>25</sup> The majority went on to conclude that because there were "no special factors counseling hesitation in the absence of affirmative action by Congress," the remedy could be granted by the Court.<sup>26</sup>

In citing potential special factors that would counsel hesitation, the Court implied that it did not fully embrace the *Bivens* decision as one resting purely on a right arising out of the Constitution.<sup>27</sup> The Court's failure to identify the specific legal grounds on which *Bivens* stands has created the issue of how to reconcile the overlapping powers of the judiciary and

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of the Court); see also *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (stating that "[i]t is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded" (quoting *Bell v. Hood*, 327 U.S. 687, 684 (1946))).

19. 403 U.S. 388 (1971).

20. *Id.* at 395-96.

21. 327 U.S. 678 (1946).

22. *Id.* at 679.

23. *Id.* at 684.

24. *Id.* at 684-85.

25. *Bivens*, 403 U.S. at 396 (internal quotation marks and citation omitted).

26. *Id.* The "special factors counseling hesitation" language was important in later cases when the Court determined that where Congress has acted by providing any remedy, even a remedy not as effective as *Bivens*, *Bivens* may not be extended. See *infra* notes 56-58 and accompanying text.

27. See generally George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263 (1989) (arguing that the Court could have resolved the issue using a more straightforward analysis).

the legislature with regard to remedies for constitutional violations.<sup>28</sup> As this Note later discusses, the failure of the Court to take a firm stance on its power to create federal common law in this area has given the current Court ammunition with which to limit *Bivens* remedies.<sup>29</sup>

In his dissent from the *Bivens* majority, Chief Justice Burger took the unusual step of expressly calling upon Congress to create a statute akin to 42 U.S.C. § 1983,<sup>30</sup> which would grant a statutory cause of action for damages against federal officials who violate an individual's constitutional rights.<sup>31</sup> Justice Burger's recommendation of a statute to replace *Bivens* made clear that he agreed with the majority that the cause of action should exist. Nevertheless, he disagreed over whether the Court had the power to judicially create the *Bivens* cause of action, believing that the Court's action was a violation of the separation of powers.<sup>32</sup>

In addition to the majority and dissenting opinions, Justice Harlan filed a separate concurring opinion in which he agreed with the majority that granting a cause of action for damages was the appropriate response because "[f]or people in *Bivens*' shoes, it is damages or nothing."<sup>33</sup> Read literally, this statement implies that a plaintiff can only succeed on a *Bivens* claim if damages are the only possible remedy for the specific situation at issue before the court.<sup>34</sup> This type of analysis, combined with the "special factors" language found in the majority's opinion, has also fueled the current Court's narrow interpretation of *Bivens*.<sup>35</sup>

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28. *Id.* Professor Brown argues that the *Bivens* Court could have reasoned, in a straightforward way, "that the plaintiff asserted a right under the Constitution, that the federal courts have jurisdiction over cases arising under the Constitution, and thus, that they have the power and the duty to award damages if a compensable violation of constitutional rights is shown." *Id.* at 269. This analysis would not have required the "special factors" language which has recently been used by the current Court to strike down *Bivens* claims. See *infra* Part I.B.

29. See *infra* Part I.B.

30. Section 1983 grants a statutory cause of action for damages against state or local actors by providing in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ." 42 U.S.C. § 1983 (1996).

31. *Bivens*, 403 U.S. at 412, 422-23 (Burger, J., dissenting).

32. *Id.*; see also Brown, *supra* note 27, at 267 (explaining that the dissent viewed the creation of the *Bivens* remedy as truly a legislative task and only Congress could create this type of cause of action).

33. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

34. See Nutter, *supra* note 15, at 691.

35. See *id.* at 694-95 (stating that the Court has adopted the "Damages or Nothing Approach" in analyzing *Bivens* claims, which requires damages to be the only potential remedy, and thus significantly restricts the availability of *Bivens* awards).

Despite Chief Justice Burger's dissenting opinion, Congress did not act to replace *Bivens*. The cause of action was embraced by the Court and enjoyed a decade of expansion, exemplified by the Court's decisions in *Davis v. Passman*,<sup>36</sup> where the Court extended the *Bivens* cause of action to Fifth Amendment claims, and *Carlson v. Green*,<sup>37</sup> where the Court extended *Bivens* to the Eighth Amendment. Lower courts also adopted the rationale of the majority and extended *Bivens* causes of action to First<sup>38</sup> and Sixth<sup>39</sup> Amendment claims.

Since the Court's decision in *Bivens*, the views of the *Bivens* majority and dissent about the power of the Court to infer causes of action have been a central issue of contention with the current Court recently favoring the views of the *Bivens* dissent.<sup>40</sup> It is unclear, however, whether the current Court strictly rejects its role as gap-filler because of separation of powers concerns, or if it only rejects its gap-filler function when it disagrees with the policy choice of the law in question. *Bivens* provides an example of a controversial policy choice in the eyes of the Court. Causes of action for damages against federal agents, and the government more generally, tend to be disfavored by certain political constituencies.<sup>41</sup> If the current Court sympathizes with those sentiments, there might be an alternative reason for its resistance to extensions of *Bivens*.<sup>42</sup>

Although it is unlikely that the Court will ever spell out its motivations entirely, there are some commentators who blatantly state that whether or not causes of action like *Bivens* are favored depends on the political leanings of the Court.<sup>43</sup> A popular legal blogger articulates the issue plainly:

Conservatives hate Bivens. Liberals love it. There are fantastic arguments for love and hate. Some conservatives say that Article III courts lack the power to create common-law causes of action. Plus, conservatives, as a matter of realpolitik, don't like lawsuits against the police. On the former point, liberals say that's silly: There is indeed a substantial

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36. 442 U.S. 228 (1979).

37. 446 U.S. 14 (1980).

38. See, e.g., *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.8 (D.C. Cir. 1993) (en banc); *Milhouse v. Carlson*, 652 F.2d 371 (3d Cir. 1981).

39. *Wounded Knee Legal Def./Offense Comm. v. FBI*, 507 F.2d 1281 (8th Cir. 1974).

40. See *infra* Part I.B.

41. See *Ashcroft v. Iqbal: Supervisory Liability Under Bivens and Section 1983*, CRIME & FEDERALISM (July 26, 2009), [http://federalism.typepad.com/crime\\_federalism/2009/07/ashcroft-v-iqbal-supervisory-liability-under-bivens.html](http://federalism.typepad.com/crime_federalism/2009/07/ashcroft-v-iqbal-supervisory-liability-under-bivens.html) [hereinafter CRIME & FEDERALISM] (stating that causes of action against the government are disfavored by conservatives).

42. See *infra* notes 58-59 and accompanying text.

43. See, e.g., CRIME & FEDERALISM, *supra* note 41.

body of federal common law. On the latter point, liberals say nothing. Pointing out conservative's pro-government bias is bad manners.<sup>44</sup>

Regardless of the reason, whether it is the Court's perception of the limitations of its power, or its distaste for causes of action against the government, it is clear that the current Court disfavors *Bivens*.<sup>45</sup>

The next portion of this Note discusses the current Court's view of *Bivens* more thoroughly, including how sections of the majority and concurring opinions of *Bivens* have recently been used by the Court to limit the *Bivens* cause of action.

### B. The Current Court's Attitude Toward *Bivens*

Implied causes of action are now explicitly disfavored by the Supreme Court.<sup>46</sup> Some believe that *Bivens* is treated as a matter of discretionary relief that can be cut back at the Court's will, rather than a decision that binds the Court through stare decisis.<sup>47</sup> Ironically, the primary reasons that the Court has given for declining to extend *Bivens* stem from the *Bivens* majority and concurring opinions.<sup>48</sup>

The *Bivens* majority indicated that there were two potential exceptions to the extension of the cause of action.<sup>49</sup> The first exception provides that a remedy may be available where the case involves "no special factors counseling hesitation in the absence of affirmative action by Congress."<sup>50</sup> The

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44. *Id.*

45. *See infra* Part I.B.

46. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (stating that implied causes of action are disfavored and the Court is reluctant to extend liability to new categories of defendants). Although the subject, in its entirety, is beyond the scope of this Note, it is far from clear that the Court is correct in analyzing implied causes of action as disfavored when compared to statutory causes of action absent congressional action rejecting the judicially created cause of action. In fact, gap-filling has been recognized as an important role for the Court, in that it assists the legislature by acknowledging that it is sometimes impossible to create all-inclusive statutory codes. *See supra* note 17 and accompanying text. For more on this subject, see Nutter, *supra* note 15, at 688 n.19, and CRIME & FEDERALISM, *supra* note 41 ("[C]onservative justices, when they can, limit *Bivens* . . . [by writing] opinions which state: '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.'" (quoting *Iqbal*, 129 S. Ct. at 1948)).

47. *See* Michael C. Dorf, *Iqbal: The Bivens Dicta*, DORF ON LAW (May 18, 2009, 3:48 PM), <http://www.dorfonlaw.org/2009/05/iqbal-bivens-dicta.html> [hereinafter *The Bivens Dicta*].

48. *See* Brown, *supra* note 27, at 273-74 (noting that congressional action providing some sort of relief for the complained of conduct is viewed by the current Court as a bar to *Bivens* recovery).

49. *See id.* at 270.

50. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

second exception, again deferring to Congress, states that “we have here no explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents.”<sup>51</sup> These exceptions suggest that the Court’s power to grant the damages remedy is subject to congressional revocation. Thus, Congress, as explained by the Court in *Carlson v. Green*,<sup>52</sup> may preclude damage relief in *Bivens* actions by granting alternative remedies.<sup>53</sup>

In *Bush v. Lucas*,<sup>54</sup> the Court declined to extend *Bivens* liability to a First Amendment violation claim where Congress had already developed a comprehensive remedy scheme.<sup>55</sup> The *Bush* Court treated the congressional remedy as a “special factor[] counseling hesitation,” thus blurring the two exceptions into one exception, namely, congressional creation of a remedy.<sup>56</sup> The Court in *Bush* noted that Congress’ consideration of the issue meant that this was a case where the wrong would be redressed even without the extension of an implied damages remedy.<sup>57</sup> The Court rejected the claim that the *Bivens* remedy must be granted because Congress’ solution was not as effective as *Bivens*.<sup>58</sup> Instead, the Court held that the congressional remedy need only be constitutionally adequate,<sup>59</sup> and noted that Congress was better suited to weigh the costs and benefits of the competing policy considerations of remedies.<sup>60</sup>

Thus, the Court has taken the position that the relief made available by Congress need not be as effective as damages relief provided by *Bivens*. This belief reflects the viewpoint of the “Damages or Nothing Approach” of Justice Harlan’s concurring opinion, if that language is read literally as a requirement to granting *Bivens* relief.<sup>61</sup> *Bush* also echoes *Bivens* dissent by making the claim that Congress is in a better position than the Court to determine the appropriate remedies for violations of constitutional rights.<sup>62</sup>

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51. *Id.* at 397.

52. 446 U.S. 14 (1980).

53. *Id.* at 18-19; *see also* Brown, *supra* note 27, at 271.

54. 462 U.S. 367 (1983).

55. *Id.* at 390.

56. Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251, 1251-52 (1988) [hereinafter *Bivens Doctrine in Flux*].

57. *See Bush*, 462 U.S. at 388-90.

58. *Bivens Doctrine in Flux*, *supra* note 56, at 1252.

59. *Id.* (noting that the constitutional adequacy standard leaves open a broad question as to whether Congress can replace *Bivens* remedies by granting remedies that do not provide meaningful protection of a plaintiff’s rights).

60. *See Bush*, 462 U.S. at 388-89.

61. *See* Nutter, *supra* note 15, at 692.

62. *Compare* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting) (recommending that Congress, not the Court,

Thus, *Bush* marks the shift of the Court toward both a narrow reading of *Bivens* and an analysis that more closely aligns with the *Bivens* dissent.

This shift may be traced to Justice Rehnquist's dissent in *Carlson v. Green*,<sup>63</sup> where he encouraged the Court to overrule *Bivens*, making many of the same arguments as the *Bivens* dissent.<sup>64</sup> Rehnquist's dissent stated that Congress' action to provide a remedy in the area at hand should be dispositive because Congress has taken account of competing considerations in striking "what it considers to be an appropriate balance."<sup>65</sup>

There is also evidence that other Justices have shifted their views on implied causes of action generally. Justice Kennedy, author of *Iqbal*, which expressly stated that implied causes of action are disfavored by the Court,<sup>66</sup> expressed the opposite view in an earlier opinion.<sup>67</sup> In *Virginia Bankshares*, Justice Kennedy stated that by improperly attempting to limit implied causes of action, the Court was using "guerrilla warfare to restrict a well-established implied right of action."<sup>68</sup> This language acknowledges that implied causes of action are not treated with strict stare decisis application, and that even well-established implied rights of action are subject to improper attack and limitation by the Court. Ironically, by the time *Iqbal* reached the Court, Justice Kennedy was apparently prepared to use "guerrilla warfare" of his own to limit the extension of *Bivens*.<sup>69</sup>

*Iqbal* presents a new approach by the Court for limiting implied causes of action. As opposed to using one of the *Bivens* exceptions to reject the *Bivens* claim made by *Iqbal*, the Court used a procedural rule to limit the cause of action at the pleading stage before discovery could occur.<sup>70</sup> Specifically, in *Iqbal*, the Court extended the pleading standard announced in *Bell Atlantic v. Twombly*,<sup>71</sup> requiring plaintiffs to file a complaint with enough factual content, accepted as true, for the court to draw a reasonable

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"should develop . . . [a] remedy"), with *Bush*, 462 U.S. at 388-89 (stating that "Congress is in a far better position than a court" to create a remedy).

63. 446 U.S. 14 (1980).

64. *Id.* at 32, 40-45 (Rehnquist, J., dissenting).

65. *Id.* at 51, 53.

66. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

67. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991).

68. *Id.* at 1115 (Kennedy, J., concurring in part and dissenting in part). Although the implied cause of action at issue in *Virginia Bankshares* was not a *Bivens* action, the language illustrates the shifting views of members of the Court as to whether or not implied causes of action deserve a strict application of stare decisis, or whether, in the alternative, the Court is free to use its discretion to grant these actions on a case by case basis.

69. See *Iqbal*, 129 S. Ct. at 1947-48.

70. See *id.* at 1953-54.

71. 550 U.S. 544 (2007).

inference that the defendant is liable for the misconduct.<sup>72</sup> This is an arguably stricter standard than the facial requirement of the Federal Rules of Civil Procedure, as Rule 8(a)(2) does not mention anything about alleging facts to support a claim, but rather requires the pleader to state a claim for which relief can be granted.<sup>73</sup> Further, Form 11 of the Federal Rules of Civil Procedure provides a sample complaint for negligence that simply states the date and place where the incident occurred, the negligent action of the defendant, and the allegation that the negligence resulted in the plaintiff's injury.<sup>74</sup> The sample complaint does not include any further factual matter which would indicate, as the Court suggests in *Twombly* that it should, regardless of whether the defendant is liable for the misconduct.<sup>75</sup>

Interpreting Rule 8(a)(2) more strictly is unlikely to have a significant effect in most cases because plaintiffs' lawyers tend to allege specific facts in their complaints, regardless of the fact that Rule 8(a)(2) contains no such facial requirement.<sup>76</sup> Furthermore, in most cases where a pleading is found to be insufficient, the court will grant leave to amend the complaint.<sup>77</sup> Rule 8(a)(2) assumes that the party has access to the information needed to satisfy the Court's pleading standard set forth in *Twombly* without the benefit of discovery. However, in a case like *Iqbal*, where there is a significant informational asymmetry between the parties, this heightened requirement could prove fatal to a plaintiff's claim as much of the specific factual information related to defendants like Ashcroft will be inaccessible until the discovery stage because it is not a matter of public record.<sup>78</sup>

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72. See *Twombly*, 550 U.S. at 570.

73. According to Rule 8(a)(2), a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Significantly, prior to the *Iqbal* decision, some scholars argued that *Twombly* was limited to antitrust cases and the decision did not reinterpret Rule 8(a)(2) generally. See Leading Case, *Pleading Standards*, 121 HARV. L. REV. 305, 310 n.51 (2007).

74. See FED. R. CIV. P. Form 11.

75. See *id.*

76. See Maxwell S. Kennerly, *Ashcroft v. Iqbal: Not Nearly As Important As You Think*, LITIGATION & TRIAL (June 29, 2009), <http://www.litigationandtrial.com/2009/06/articles/the-law-for-lawyers/ashcroft-v-iqbal-not-nearly-as-important-as-you-think/>.

77. See FED. R. CIV. P. 15(a)(2) (stating that the court may grant leave for the party to amend a complaint and that the court should freely grant this leave when justice requires).

78. See Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 928 (2010) (arguing that, because of the impossibility of a plaintiff possessing all of the necessary information, cases will be dismissed).

**C. Given that *Bivens* is Disfavored, What Options Does the Court or Congress Have?**

The fact that the Court has been hostile toward *Bivens* and other implied causes of action begs the question: What is the future of *Bivens* liability? The answer depends heavily on which government branch takes action.

One possibility is that the Court will continue chipping away at *Bivens* liability, effectively eviscerating it as a cause of action. By refusing to extend or expand *Bivens* liability, individual government employees will be effectively immune to suits for violations of constitutional rights. This indemnification would save government resources that otherwise would be spent on discovery and defense for government actors.<sup>79</sup> The downside, however, is that victims would be forced to bear all costs of constitutional violations, which some might consider an intolerable outcome.

Alternatively, the Court could explicitly overturn *Bivens*. This would make clear that no cause of action allowing recovery of damages exists for violations of constitutional rights and all parties would adjust their behavior accordingly. By overturning *Bivens*, the Court would take a more straightforward approach that would send a clearer signal to victims about their realistic recovery options. Further, the explicit lack of a judicial *Bivens* remedy might put pressure on lawmakers to take action, which the *Bivens* dissent and the current Court would likely prefer.<sup>80</sup>

Finally, even without the Court overturning *Bivens*, Congress could enact a statute creating a cause of action for damages for violations of constitutional rights by government officials. This would eliminate the uncertainty created by the Court's broad discretion to grant or deny the cause of action and would legitimize the cause of action for those on the Court who disfavor either implied causes of action generally or *Bivens* causes of action specifically.<sup>81</sup>

This Note recommends that *Bivens* be codified and replaced by statute. The second portion of this Note examines the arguments for and against the

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79. See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 67 (1999) (noting that, almost without exception, the government represents or pays for representation of federal officials accused of violating constitutional rights). Further, the government pays the settlements and damages of these actions in most cases. *Id.* If *Bivens* liability were never extended, these costs would be avoided.

80. See *supra* note 32 and accompanying text.

81. See generally Michael B. Hedrick, Note, *New Life for a Good Idea: Revitalizing Efforts to Replace the Bivens Action with a Statutory Waiver of the Sovereign Immunity of the United States for Constitutional Tort Suits*, 71 GEO. WASH. L. REV. 1055 (2003) (arguing that Congress should amend the Federal Tort Claims Act to create a statutory cause of action to replace *Bivens*).

adoption of a statute granting a *Bivens* remedy of monetary damages to individuals whose constitutional rights are violated by federal officials.

## II. ARGUMENTS FOR AND AGAINST A CODIFICATION OF *BIVENS*

This section of the Note gives an overview of the arguments that have been advanced both in favor of, and against, the adoption of a statute to replace *Bivens* as an implied cause of action in the current, post-9/11 context.

### A. Arguments for Replacing *Bivens* by Statute

Proponents of the adoption of a statute to replace *Bivens* first argue that the post-9/11 environment requires that there be certainty as to the availability of damages against the government and its agents for violations of constitutional rights.<sup>82</sup> In the wake of 9/11, Congress expanded the federal government's internal security powers, as illustrated by the adoption of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001.<sup>83</sup> The USA PATRIOT Act amended the Foreign Intelligence Surveillance Act<sup>84</sup> to allow the issuance of warrants without a showing of probable cause provided the warrant is for a significant intelligence-gathering purpose.<sup>85</sup> The USA PATRIOT Act also allows the government to track email and internet usage.<sup>86</sup> Through these and other provisions of the Act, the federal government has gained the power, once reserved to the states, to monitor individuals in a way that potentially implicates constitutional rights.<sup>87</sup> By allowing the federal government greater access to individuals' information, the USA PATRIOT Act creates a greater likelihood of constitutional violations. These violations must be addressed by *Bivens*

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82. See, e.g., *id.* at 1060 (arguing that the 9/11 terrorist attacks redefined the federal government's role in internal security).

83. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

84. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of the U.S.C.).

85. See Hedrick, *supra* note 81, at 1060 n.49 (stating that before the USA PATRIOT Act, the government was required to make a showing of "probable cause that the primary purpose of the request was gathering intelligence on a foreign target").

86. See USA PATRIOT Act § 216.

87. See Hedrick, *supra* note 81, at 1061. These provisions have potential Fourth Amendment implications, as some argue that the USA PATRIOT Act itself sanctions official disregard of Fourth Amendment rights. *Id.* Further, because of the significant correlation between national origin, race, religion, and those being monitored after the 9/11 attacks, Fourteenth Amendment issues could arise.

rather than 42 U.S.C. § 1983, which applies only to state officials.<sup>88</sup> However, because the Court currently disfavors implied causes of action, as evidenced by the *Iqbal* decision,<sup>89</sup> *Bivens* may be an inadequate device for protecting constitutional rights in the post-*Iqbal* era.<sup>90</sup> For this reason, some argue for the adoption of a statute to replace *Bivens* so that the cause of action would no longer be a matter of the Court's discretion and there would be certainty about the availability of relief.<sup>91</sup>

A second argument for the adoption of a statute to replace *Bivens* responds to the concern that allowing recovery of damages from federal agents who violate constitutional rights would create chilling effects that would hamper agents' abilities to perform and be decisive on the job.<sup>92</sup> Proponents of the replacement of *Bivens* by statute argue that any chilling effects created by the statute would be limited to rogue officials and, therefore, would not deter federal agents from taking needed action for fear of personal liability.<sup>93</sup> This argument is based on the assumption that the government would continue to allow indemnification unless a violation of clearly established law had occurred.<sup>94</sup> The chilling effects are thus limited to rogue officials, because only rogue agents would be personally responsible for damages from a violation—all others would be indemnified by the government.<sup>95</sup> Because this is the exact type of conduct the law intends to deter, the chilling effect is an argument for adoption of a statute. Further, because government indemnity is already available under *Bivens*, new costs would not necessarily arise from the creation of a statutory replacement. In fact, if done correctly, the costs to the government and ultimately the taxpayers could potentially be reduced.<sup>96</sup>

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88. See *infra* notes 102-07 and accompanying text.

89. See *supra* note 46 and accompanying text.

90. An example of the inadequacy of the *Bivens* remedy is that plaintiffs' cases will be dismissed where the plaintiff lacks the necessary information to meet the new, heightened pleading standard. See Kilaru, *supra* note 78.

91. See Hedrick, *supra* note 81, at 1063 (noting that a major benefit of a statutory replacement for *Bivens* is the "alleviation of uncertainty regarding the interaction of *Bivens* actions and other congressional schemes").

92. See David L. Noll, Note, *Qualified Immunity in Limbo: Rights, Procedure, and the Social Costs of Damages Litigation Against Public Officials*, 83 N.Y.U. L. REV. 911, 918-19 (2008).

93. See Pillard, *supra* note 79, at 77-78.

94. *Id.* at 77.

95. Any current chilling effect is limited to uncertainty in the indemnification law, which could be limited by statute. See *id.*

96. See discussion *infra* Part III.

Of great concern to the Court in *Twombly* and *Iqbal* was the potential for non-meritorious claims to cause disruptive discovery for defendants.<sup>97</sup> Another argument for a statute replacing *Bivens* is that Congress could provide for limited discovery, as was contemplated by the Second Circuit in *Iqbal v. Hasty*.<sup>98</sup> The Second Circuit suggested that limited discovery could strike a balance between the qualified immunity defense allowed to government officials and the liberal pleading standard of Rule 8(a)(2), while also limiting discovery costs for defendants and protecting privileged information.<sup>99</sup> The majority in *Ashcroft v. Iqbal* explicitly rejected the suggestion of limited discovery through its discretion in allowing *Bivens* cases to proceed.<sup>100</sup> However, if a statute replaced *Bivens*, Congress could authorize courts to allow limited discovery before deciding whether cases should be dismissed.<sup>101</sup>

Finally, proponents of the adoption of a statute to replace the *Bivens* decision argue that a statute would create needed symmetry between causes of action against state and federal officials.<sup>102</sup> In contrast with 42 U.S.C. § 1983,<sup>103</sup> which provides a cause of action against *state* agents who violate federal constitutional rights under the color of law,<sup>104</sup> *Bivens* is the only cause of action available that provides monetary damages to individuals whose constitutional rights are violated by *federal* agents. Although initially there may have been symmetry between *Bivens* and § 1983 causes of action, the disfavored treatment of *Bivens* by the Court has eliminated that symmetry so that individuals whose rights are violated by federal agents have fewer remedies than those whose rights are violated by state actors.<sup>105</sup>

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97. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (noting that in light of an increasing caseload in federal courts, parties should not advance into the discovery stage when there is “no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint” (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984))).

98. 490 F.3d 143, 158-59 (2d Cir. 2007).

99. See *id.*

100. See 129 S. Ct. at 1953 (refusing to allow *Iqbal*’s complaint to go forward even with discovery controls such as in camera review in place, because “the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process”).

101. This approach was also suggested by Justice Stevens in the *Twombly* dissent. See *Twombly*, 550 U.S. at 596-97 (Stevens, J., dissenting) (“[E]ven if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental- and unjustified-change in the character of pretrial practice.”).

102. See *Brown*, *supra* note 27, at 265-66.

103. 42 U.S.C. § 1983 (1996).

104. See *supra* note 30 and accompanying text.

105. *Brown*, *supra* note 27, at 265-66.

The Court, in *Butz v. Economou*,<sup>106</sup> compared the two causes of action in the context of immunity defenses and determined that it would be impossible to distinguish “between suits brought against state officials under 42 U.S.C. § 1983 and suits brought directly under the Constitution against federal officials.”<sup>107</sup> If it is impossible to distinguish between the officials in terms of immunity defenses, why should there be a nearly outcome-determinative distinction in terms of one’s ability to bring the actions? Without the broad judicial discretion enjoyed by the Court under *Bivens*, this outcome-determinative asymmetry could be eliminated.

### B. Arguments Against Replacing *Bivens* by Statute

This section describes the arguments advanced against extending liability for monetary damages to government officials who violate an individual’s constitutional rights.

One common argument against extending liability is that the fear of liability will create a chilling effect that will deter federal agents from taking required action in their line of work.<sup>108</sup> This argument assumes that government agents fear that if a suit is brought against them they will personally have to pay damages or legal fees, rather than have the government indemnify them for these costs.<sup>109</sup> Such fears would disincentivize necessary official action where the law is novel or unclear.

Fear of a “flood of litigation” is another common argument.<sup>110</sup> The fear is that the creation of a cause of action against government actors who violate constitutional rights will produce a flood of non-meritorious litigation that will clog the court system and impose deadweight losses on the government.<sup>111</sup> “Deadweight loss” is an economic term, which describes a situation in which the outcome is not Pareto optimal.<sup>112</sup> The argument is that non-meritorious claims produce deadweight loss, which in turn imposes costs on society that make society and defendants worse off without making anyone better off.<sup>113</sup>

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106. 438 U.S. 478 (1978).

107. *Id.* at 504.

108. See Noll, *supra* note 92.

109. See Pillard, *supra* note 79, at 78.

110. Noll, *supra* note 92, at 919-20.

111. *Id.*

112. *Id.* at 919 n.47 (defining Pareto optimal outcomes as outcomes where a party cannot be made better off without making another party worse off). Under this definition, the chilling effect argument discussed above, *supra* notes 108-09 and accompanying text, can also be understood as a deadweight loss avoidance argument.

113. Noll, *supra* note 92 at 919 n.47.

A third argument against extending *Bivens* liability, advanced by the *Iqbal* majority itself, is that claims against the government can impose costly and disruptive discovery.<sup>114</sup> Among these costs is the fear that privileged or confidential government information could be leaked through the discovery process.<sup>115</sup> This leads to a second chilling effect argument, namely, that the political decision-making process will be disrupted if government agents fear liability for participation in frank discussions that could later be discoverable and to which liability could attach.<sup>116</sup>

A final argument against adopting a statutory replacement for *Bivens* flows from the recognition that in most cases, the government, and thus the taxpayers, bear the ultimate cost of *Bivens* litigation.<sup>117</sup> By denying a cause of action against federal officials accused of violating an individual's constitutional rights, the government is able to save resources that likely would have been spent defending against the action and paying damages.

The next part of this Note advances the arguments in favor of replacing *Bivens* and advocates for the adoption of a statute by Congress. Part III includes a discussion of the form that the statute could take in order to achieve both efficiency and access to justice.<sup>118</sup>

### III. CONGRESS SHOULD ADOPT A STATUTE TO REPLACE *BIVENS*

In order to reach the conclusion that Congress should adopt a statute to replace *Bivens*, it is necessary to reexamine some of the arguments against statutory replacement.

The first of these arguments is that granting a cause of action in damages against federal agents would have a chilling effect on agents' actions, which sometimes would cause agents to fail to take needed action for fear of personal liability.<sup>119</sup> Given the current use of government indemnification in *Bivens* cases, the chilling effect argument is unsatisfactory. Because the federal government assumes the costs of defending virtually all *Bivens*

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114. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

115. See Noll, *supra* note 92, at 920.

116. See *id.* at 920-21.

117. See Pillard, *supra* note 79, at 76 (acknowledging that when indemnification occurs, it is the taxpayers who foot the bill); see also Noll, *supra* note 92, at 918 (listing a lawyer's availment of government resources in a *Bivens* case as a direct cost of the cause of action).

118. In advocating for a statutory replacement of *Bivens*, this Note is not implying that *Bivens*, as a matter of federal common law, stands on inferior ground as compared to congressionally created law. Rather, this Note acknowledges the current Court's position on *Bivens*, and argues for statutory replacement to eliminate the current Court's discretionary power to make the cause of action available.

119. See Noll, *supra* note 92.

actions,<sup>120</sup> the chilling effect on agents would be limited to those few cases where indemnification is unavailable. Indemnification is most commonly unavailable when the violation occurs outside of the scope of employment or when indemnification is not in the interest of the United States.<sup>121</sup> Because of the very limited scope of personal liability in *Bivens* cases, the chilling effect argument begins to unravel when indemnification is considered.

The second argument that must be reexamined posits that the deadweight losses flowing from non-meritorious claims create Pareto inefficiencies, which justify disallowing the cause of action in its entirety.<sup>122</sup>

While the filing of non-meritorious claims is clearly inefficient, this argument views the effects of these non-meritorious claims in a bubble. It would be more useful to analyze the situation using a Kaldor-Hicks, rather than Pareto, efficiency measurement.<sup>123</sup> Kaldor-Hicks efficiency analysis compares the total costs and benefits of having a cause of action against government officials generally available.<sup>124</sup> The cost-benefit analysis would then compare the aggregate costs imposed (including litigation costs, deadweight loss from non-meritorious claims, and any chilling effect on government officials)<sup>125</sup> with the aggregate benefits realized (including deterring constitutional violations, granting a remedy for loss incurred due to constitutional violations, and increasing public confidence in a system with safeguards against rogue government officials). This examination and weighing of the total costs and benefits is more appropriate than a Pareto optimal analysis because of the complexity (or impossibility) of taking any widespread government action that makes some better off without making *anyone* worse off.

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120. See Pillard, *supra* note 79, at 67.

121. See *id.* at 77 & n.56 (“A typical example of a *Bivens* case in which a public employee would not be represented and indemnified by the government is one in which the employee is under criminal investigation or prosecution by the government for the conduct that gave rise to the constitutional tort suit.”).

122. See *supra* notes 110-13 and accompanying text.

123. Compare *Economic Definition of Kaldor-Hicks Efficiency*, ECONOMIC GLOSSARY, <http://glossary.econguru.com/economic-term/Kaldor-Hicks+efficiency> (last visited Sept. 12, 2010) (“A type of efficiency that results if the monetary value of society’s resources are maximized.”), with *Economic Definition of Pareto Efficiency*, ECONOMIC GLOSSARY, <http://glossary.econguru.com/economic-term/Pareto+efficiency> (last visited Sept. 12, 2010) (“A type of efficiency that results if one person can not be made better off without making someone else worse off.”).

124. See *Economic Definition of Kaldor-Hicks Improvement*, ECONOMIC GLOSSARY, <http://glossary.econguru.com/economic-term/Kaldor-Hicks+improvement> (last visited Sept. 12, 2010) (“[I]f those gains exceed those losses, or the benefits exceed the costs, then social welfare is improved and undertaking the action provides a net benefit to society.”).

125. See Noll, *supra* note 92, at 918-22.

The third argument that must be reexamined is the “disruptive discovery” argument, which alleges that the creation of a statutory cause of action against federal officials could lead to costly or harmful discovery for defendants.<sup>126</sup> As previously discussed, this issue was of particular concern to the Court in *Twombly* and *Iqbal*.<sup>127</sup> Although the Court took the position that absent a pleading of specific facts alleging a violation the case must be dismissed, it could have adopted a more moderate approach and allowed limited discovery. In fact, the Second Circuit suggested such an approach in *Iqbal v. Hasty*.<sup>128</sup> This approach would have balanced the needs of plaintiffs alleging violations by high level officials as well as of defendants and the court system in limiting costs and protecting privileged and confidential information. Because much of the specific factual information related to high level government officials is arguably inaccessible until the discovery stage of the proceeding, allowing for limited discovery in the absence of specific factual pleading ensures that government officials are not shielded from liability, and thus provides the more balanced approach.

Given the inadequacy of the arguments against codifying *Bivens*, this Note argues that *Bivens* should be replaced by a statute. This statute should provide a cause of action allowing for general damages against federal officials who violate clearly established laws or invidiously attempt to take advantage of new or ambiguous laws. Alternatively, when federal agents, in the good faith execution of their duties, violate new or ambiguous laws, the government should indemnify the agents and limit damages to pecuniary costs for the reasons set forth below.

#### **A. Where Clearly Established Law has Been Violated, a Cause of Action Should be Available Against the Offending Agent**

In determining the form that a statute replacing *Bivens* should take, it is necessary to distinguish between situations where a government agent violates new or uncertain laws on the one hand, and on the other hand, situations where a government agent violates clearly established laws, and in so doing, causes damage to the victim. In the latter situation, no indemnification of the government should be available to the agent, and the agent should pay the full amount of proven damages.<sup>129</sup>

Such a rule limits the moral hazard problem that may exist when there is an expectation that the government will pay any damages that arise while

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126. See *supra* notes 114-16 and accompanying text.

127. See *supra* note 97 and accompanying text.

128. See 490 F.3d 143, 158 (2d Cir. 2007).

129. See *infra* Part III.B.

on the job.<sup>130</sup> Although some of this moral hazard problem is likely curbed by the prospect of negative employment consequences, for example, the possibility of losing one's job for blatant legal violations, the possibility of being held personally liable would further curb this problem to the extent that internal mechanisms fail. Granting such a cause of action could also strengthen the impact of internal controls because the enforcement of disciplinary proceedings depends upon the reporting of violations to the appropriate authorities. A statutory cause of action would give victims greater incentive to report abuses, which would in turn increase enforcement of internal controls and give them more bite.

Additionally, where the agent acts upon personal motives and ultimately violates the Constitution, it is difficult to argue that the government and the taxpayers should be responsible for the cost of this intentional, invidious, official misconduct.<sup>131</sup> In fact, allowing indemnity in these circumstances would mean that taxpayers would actually be subsidizing intentional unconstitutional conduct, which is clearly contrary to the purpose of indemnification.

The standard for imposing personal liability on a government official must be a violation of clearly established law. Whether or not a law is clearly established is a question of law.<sup>132</sup> The clearly established law standard is currently used by the Court to determine if qualified immunity applies to the offending government official.<sup>133</sup> Under the current system, if qualified immunity applies, the suit does not move forward and the victim is left to bear all of the costs attributable to the violation.<sup>134</sup> This Note

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130. Moral hazard is a term used by economists to explain why individuals covered by insurance engage in greater risk-taking than they would without insurance. *See Economics A-Z*, ECONOMIST, <http://www.economist.com/RESEARCH/ECONOMICS/alphabetical.cfm?letter=M#moralhazard> (last visited Sept. 12, 2010). In the case of indemnification, the ability to indemnify the government and escape payment of damages for violations of clearly established law functions as insurance for the government agent. The moral hazard theory suggests that because of indemnification, government agents engage in riskier behavior than they would if they were expected to pay damages out of their own pockets. Some argue that personal liability is needed to create effective deterrence of unconstitutional behavior. *See* Pillard, *supra* note 79, at 75 ("If constitutional tort damages are simply a cost of business passed on to government, officials might lack sufficient incentive to comply with constitutional commands.").

131. *See* Pillard, *supra* note 79, at 76.

132. *Elmaghraby v. Ashcroft*, No. 04-CV-1809(JG)(SMG), 2005 WL 2375202, at \*10 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part sub nom.* *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

133. Qualified immunity will bar suit for constitutional violations unless the defendant violated "clearly established" law, whereas immunity will not be granted if the violation occurred based on uncertain or novel law. *See* Pillard, *supra* note 79, at 80.

134. *Id.* ("Qualified immunity is undoubtedly the most significant bar to constitutional tort actions.").

argues that the statute adopted to replace *Bivens* should not include a qualified immunity provision, but rather, upon a showing by the defendant that no violation of clearly established law has occurred, the government should replace the agent as the defendant as the suit proceeds.<sup>135</sup>

Absent a showing by the agent that the violation was of a novel or ambiguous law, as opposed to a clearly established law, the case should move forward against the government agent and the plaintiff should be able to recover general damages—including pecuniary,<sup>136</sup> non-pecuniary,<sup>137</sup> and even punitive damages where appropriate. This allows the total cost of the injury to be internalized by the wrongdoer, which creates optimal deterrence and, therefore, decreases the number of violations that occur.

Furthermore, the intentional wrongdoer is the cheapest cost-avoider of the violation.<sup>138</sup> In most cases, choosing not to intentionally violate clearly established constitutional rights is cost-free.<sup>139</sup> Thus, efficiency will be promoted by placing the costs of violations on the wrongdoer, rather than on the victim who would have to purchase loss insurance to protect himself, or on the taxpayer who would have to use the democratic system to put potentially costly safeguards into place in order to eliminate violations.<sup>140</sup>

Thus, where clearly established law has been violated, efficiency and the principles of justice will place the full cost of the violation on the rogue government official.<sup>141</sup>

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135. See *infra* Part III.B.

136. Pecuniary damages include hospital bills, destroyed property, and other calculable expenses related to the violation. For a definition of monetary damages generally, see BLACK'S LAW DICTIONARY 447 (9th ed. 2010).

137. Non-monetary damages include pain and suffering and loss of consortium resulting from a violation. See *id.*

138. The cheapest cost-avoider is the party that could avoid the harm at the lowest cost. See Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1292 (1992); see also Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 n.19 (1972) (defining the cheapest cost avoider as the party who the arbitrary initial cost bearer would find worthwhile to bribe in order to obtain a change in behavior that would most lessen the cost of the accident).

139. This ignores the cost of lost utility to the would-be rogue government official, which comes from denying him the opportunity to violate clearly established law on a subsidized basis. This cost is viewed as insignificant for purposes of this Note.

140. See MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 7 (Robert C. Clark et al. eds., 8th ed. 2006) (explaining that in order to preserve scarce resources, damages are assessed against defendants as a way of measuring the cost of the violation, and the main function of liability is thus to bring about the efficient level of safety).

141. Whether or not general damages should ever be available in terms of efficiency is beyond the scope of this Note. However, because the current system embraces non-pecuniary damages for tortfeasors in most cases, see Joseph H. King, Jr., *Pain and Suffer-*

The next part of this Note discusses situations in which no clearly established law has been violated, but a violation nevertheless occurred and the victim suffered monetary losses.

**B. Absent a Violation of Clearly Established Law, a Cause of Action Against the Government Should Exist for Violations of an Individual's Constitutional Rights**

As opposed to the current system, where the costs of violations of new or uncertain laws are imposed on the victims, the statute adopted by Congress should provide a cause of action against the government for pecuniary losses suffered as a result of the violation of new or uncertain laws.<sup>142</sup> In fact, if plaintiffs are able to show that their constitutional rights were violated, and that the violation caused monetary losses or damages, the government should be strictly liable to the plaintiff for those damages. This would shift the cost of violations from the victim to the taxpayer, at least to the extent that those losses are quantifiable. Shifting the cost of violations of uncertain law to taxpayers effectively ensures that the cost is shared by society rather than concentrated on individual victims.<sup>143</sup>

This is also an appropriate response because the government exists for the benefit of society as a whole. The costs related to accidental violations of constitutional rights are a cost of having government enforcement of laws. These costs should be paid by all members of society, rather than by the relatively small number of unfortunate victims, because all members of society are beneficiaries of having an established government.<sup>144</sup> Under the current system, society is free-riding at the expense of victims by placing the entire cost of accidental violations upon them.

Placing the costs of accidental violations on the government has the added benefit of limiting the chilling effect on government agents caused by violations of clearly established law. This provides a safe haven for discre-

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*ing, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 164, 167 (2004), government actors who violate constitutional rights should not be immune from liability for any monetary recovery available to plaintiffs. This view is contrary to the arguments made in terms of the government in Part III.B of this Note. *See infra* Part III.B.

142. *See* Hedrick, *supra* note 81, at 1066 (arguing that an official's good faith may be relevant as to the cause of action against the official personally, but not relevant as to a cause of action against the government).

143. One of the primary goals of strict liability is to spread the costs of accidental violations among a broad class of people in order to provide insurance against what would otherwise be a devastating loss for an individual. *See* Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 350 (1996). Spreading accident costs is thus efficient because the costs cause less social and economic harm when spread among many people. *See id.*

144. *See* Pillard, *supra* note 79, at 82.

tionary actions taken by government agents on the basis of new or uncertain law and will not deter them from taking necessary action through fear of monetary liability. Actions that violate clearly established law, however, are effectively deterred because of the certainty that liability for the costs of that violation will attach to the wrongdoer.<sup>145</sup>

In contrast with the availability of general damages to a plaintiff who is the victim of a violation of clearly established law, the damages attributable to a violation of novel or uncertain law should be limited to the calculable pecuniary loss incurred.

There are several reasons for limiting the damages paid by the government to pecuniary damages. The first reason is that it is not as important, for deterrence purposes, that the government pay the full cost of the loss. This is because the government does not respond to economic incentives in the same manner as individuals and corporations.<sup>146</sup> The government responds to many noneconomic considerations, including public satisfaction and approval, special interest group requests, safety and security needs, and environmental concerns.<sup>147</sup> The government may simply pay judgments from the tax pool without changing its behavior because it does not feel monetary loss in the same way an individual does.<sup>148</sup> Because causing the government to internalize the non-pecuniary losses suffered by the victim likely would not discourage future violations, there is no deterrence justification for covering non-pecuniary losses. If deterrence of government agents were the only consideration, the same analysis would apply to pecuniary losses. Thus, further justification is needed to support limiting the damages available to plaintiffs to monetary losses when the government is defending this type of action.

The second factor that must be considered is the nature of plaintiff compensation for non-pecuniary losses. Professor Richard Abel argues that

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145. Under the current system, uncertainty about the ability of a government agent to indemnify the government can have a chilling effect on agents making discretionary decisions based on new or uncertain law. *See id.* at 78. However, the risk that an individual agent “would be left paying [his own] damages is negligible under the current system.” *Id.*

146. *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 846 (2001) (discussing the unique problems associated with determining how government incentives function, including the fact that some sort of political capital might be exchanged or valued rather than money).

147. *See id.* at 849 (acknowledging that the government responds to political rather than economic incentives).

148. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 353 (2000). For a different approach to the issue, *see* Gilles, *supra* note 146, at 859-67 (describing the “other important reasons why we should reasonably expect government to respond to the imposition of constitutional tort damage remedies”).

non-pecuniary losses are incoherent, incalculable, and incommensurable,<sup>149</sup> and thus are not losses which should be covered by the government.<sup>150</sup> While Professor Abel's characterization of non-pecuniary losses as incoherent, incalculable, and incommensurate<sup>151</sup> may be somewhat extreme, his characterization of the fundamental problem as one of calculation is accurate. That is, even if non-pecuniary damages could be calculated, the cost of doing so accurately would be prohibitively expensive in an already inefficient tort system,<sup>152</sup> and the question would remain—how much money effectively compensates victims for abstract losses like pain and suffering?<sup>153</sup>

The goal of awarding damages in tort law is to “return the plaintiff as closely as possible to his or her condition before the accident.”<sup>154</sup> In terms of non-monetary damages, however, plaintiffs cannot be returned to their pre-accident status. Plaintiffs cannot “unfeel” their pain and suffering; they cannot replace the relationships lost by the wrongful deaths of loved ones. Money cannot necessarily approximate the value of being free from these losses in a meaningful way.<sup>155</sup> Because of the impossibility of equating monetary damages with non-monetary losses, damages for these losses would not be available to plaintiffs who bring causes of action against the government for violations of constitutional rights. Although this system would force the victims to internalize the losses related to non-pecuniary damages, these losses could not be compensated with money.<sup>156</sup>

The third reason for limiting government liability to pecuniary damages is to protect taxpayers from paying for non-pecuniary losses that are not effectively compensated by money. Because juries are sympathetic to the victims of these types of violations, it is possible that juries would award large sums of money for pain and suffering even though the dollar amount

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149. See generally Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253 (2006).

150. Professor Abel argues that the tort system should not be in the business of covering general non-pecuniary losses at all, and does not limit his argument to the government as this Note does. See *id.*

151. *Id.*

152. See *id.* at 294-95 (discussing all of the potential complexities of calculating non-pecuniary damages).

153. See *id.* at 291.

154. *Id.* at 258.

155. *Id.* at 259 (“‘No one likes pain and suffering and most people would pay a good deal of money to be free of them.’ But giving victims money does not free them from pain.” (quoting *Kwasny v. United States*, 823 F.2d 194, 197 (7th Cir. 1987))).

156. See *id.* at 268 (noting that “money cannot buy nonexistence”).

is arbitrary in relation to the loss.<sup>157</sup> There is also the risk that money coming from the government tax pool would be viewed by the jury as “Monopoly Money,” causing them to award significant damages without considering the opportunity costs of such awards.<sup>158</sup> In order to protect the tax pool and government resources, the statute should not attempt to provide financial redress for non-pecuniary losses, which by definition cannot be compensated with money.

Although this system forces the victim to internalize the entire loss attributable to pain and suffering, society has the ability to effectively mitigate this loss by paying pecuniary damages. Any monetary payment for pain and suffering would simply shift wealth from society’s tax pool to the victim without granting meaningful relief. Because the goal is to find a system that effectively compensates victims while still maximizing efficiency in the allocation of scarce resources in the tax pool, a statute replacing *Bivens* should exempt the government from covering non-pecuniary losses caused by violations of new or uncertain constitutional rights.

Finally, under the suggested statute, if a violation of a new or unclear law were to occur without causing monetary harm, the victim would be left without a cause of action. Although at first glance this might seem undesirable, the arguments for excluding non-monetary damages also apply to a scenario without identifiable monetary losses. The fact that there would be no available cause of action does not mean that the victim of the violation was not harmed; it simply means that society is willing to accept the small probability of being the uncompensated victim because the costs that would be imposed by an alternative system are greater than the benefits.

### C. Flat Non-Pecuniary Damage Award Option

For political or other noneconomic reasons, a statute that does not provide monetary damages for non-pecuniary losses might be viewed by some as unacceptable and unadoptable. The next best alternative would be to cap non-pecuniary damages at a relatively small dollar amount.<sup>159</sup> This system has the benefit of acknowledging the victims’ losses without giving juries the discretion to award large damage amounts for noneconomic losses from the tax pool. The goal of awarding these damages would be to give symbolic compensation to victims who suffer emotional or other noneconomic

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157. *Id.* at 291-93.

158. The opportunity cost here would be all of the other uses that this tax money could go toward if it did not go toward compensation for non-pecuniary losses.

159. If extinguishing non-pecuniary awards for these types of cases is politically impossible or socially undesirable, awards for emotional losses should be capped at a relatively low figure in order to preserve scarce government resources.

losses, as well as to extend causes of action to victims of violations who do not suffer quantifiable monetary harms.

Further, the opportunity to recover damages up to the capped amount would be an incentive for victims who suffer no economic damage but do suffer emotional harm to bring suit. Giving victims a small award would acknowledge that they were harmed by government action and may also help them cope with the violation. While it is not customary to receive apologies in our legal system, providing a small damages award may be the only way a victim's strictly noneconomic harm could be recognized.

### CONCLUSION

Recent decisions suggest that, absent a congressional statute creating a cause of action for violations of constitutional rights by federal officials, the Court will continue to limit the *Bivens* doctrine.<sup>160</sup> *Iqbal* illustrates that the Court views the application of *Bivens* as discretionary, rather than deserving strict stare decisis deference.<sup>161</sup> Further, the application of the *Twombly* pleading standard to *Bivens* cases, as dictated by *Iqbal*, further chips away at the *Bivens* cause of action, limiting plaintiffs' ability to move forward with discovery, and ultimately their ability to succeed on a claim.<sup>162</sup>

In order to ensure that plaintiffs are afforded a meaningful opportunity to obtain relief, Congress should adopt an efficient statute to replace *Bivens*. An efficient version of that statute would deter rogue individual government officials by holding them liable for violations of clearly established law. On the other hand, where there was uncertainty about the law, and the government official executed his duties in good faith, the costs of any damages and litigation expenses would shift to the government. The adoption of a statute to replace *Bivens* would ensure that a cause of action allowing victims to recover damages for violations of their constitutional rights will no longer depend on the Supreme Court's view of its power to create such actions.

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160. See *supra* Part I.B.

161. See *The Bivens Dicta*, *supra* note 47.

162. See *supra* note 79 and accompanying text.