IS THE BILL OF RIGHTS LAW? SANCTIONS & IMPLIED CAUSES OF ACTION

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ABSTRACT

If someone who breaks a rule can be confident they will suffer no consequences, is that rule a law? This Article asks that question about some of our most cherished rules—those contained in the Bill of Rights.

To some legal philosophers, positivists in particular, the threat of consequences is the defining feature of a law. Thus, a rule, even if clearly written down, lacks the power of law if, when it is broken, no formal punishment follows. Under the doctrines of Bivens *and qualified immunity, some violations of the Bill of Rights by federal officials do not lead to legal punishment, as victims are barred from suing officials who violate their rights. Under the sanctions-centered definition of law, those provisions of the Bill of Rights are not law at all regarding those officials. If that outcome is unacceptable, then the doctrine of* Bivens *must change, allowing people to sue the federal officials who violated their constitutional rights. Alternatively, if* Bivens *is a legitimate exercise of judicial review, then we simply must accept that some provisions of the Bill of Rights are not "law" under the sanctions-based definition regarding certain officials. Either way, defining laws as rules with the true threat of consequences leads to a new, clear, and intriguing view of* Bivens.

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INTRODUCTION

A New York City police officer stops a commuter on the subway and demands to search his belongings. Typically, commuters comply with this request and, regardless of whether they thought they had a choice, consent to a search. This particular commuter, however, is a smart and plucky law student. He tells the cop that, without probable cause or consent, searching him would violate the Fourth Amendment.

On the surface, it may seem that the police officer has the upper hand in terms of power; he is in uniform and clearly acting with the authority of the state. Both parties also know, however, that the law student is right, and if the search proceeded in violation of the Fourth Amendment, two things would happen. Its fruits would be suppressed in the prosecution of the law student, *and* the law student could sue the officer in federal court for monetary damages for violating his constitutional rights under 42 U.S.C. § 1983. Because the parties understand these eventualities and can make a reliable prediction that the student would prevail,[1] the student is actually the one with the power. The power tends to rest with the person holding the biggest stick, and the laws have handed that stick to the commuter here, either because the commuter has always had that natural right[2] or as a matter of national values.[3]

Change one fact: instead of a New York City police officer, the official is an agent for the Federal Bureau of Investigation (FBI). The interaction goes down exactly the same way; the only difference is that instead of being able to sue the officer under § 1983, the law student would be able to sue him under the *Bivens* doctrine (established in a 1971 Supreme Court case). Through *Bivens*, courts recognize private rights of action against federal officials for monetary damages for constitutional violations.[4]

Change one more fact: the official still works for the FBI, but instead of asking to search the law student, the official threatens to arrest him and have him jailed indefinitely. The law student informs the official that this would violate his Fifth Amendment right to due process. They both know he is right; the Bill of Rights still applies and is still a "precious part of our legal

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1. This requires assuming both parties actually know what would happen legally (that the law student would actually win the lawsuit) and factually (that the law student would indeed be plucky enough to file a § 1983 lawsuit).

2. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting) ("[T]he Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.").

3. *See* LEARNED HAND, THE BILL OF RIGHTS 3 (questioning whether the Bill of Rights is "the altogether human expression of the will of the state conventions that ratified them; that their authority depends upon the sanctions available to enforce them").

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

heritage."[5] Here, though, if the official follows through on his threat, the student could only sue for his release from custody, not monetary damages. If this official is just trying to harass the law student, he would not be deterred by that possibility.[6] There is a remote possibility that the official would be criminally prosecuted under 18 U.S.C. § 242, which "makes it a crime for a person acting under color of *any* law to willfully deprive a person of a right or privilege protected by the Constitution."[7] But a prosecution under § 242 would be outside of the law student's control, unlikely to happen in the first place,[8] and entail a high standard of proof.[9]

Because this is a federal official, the law student's only chance at damages in federal court would be if the court recognized a *Bivens* cause of action for Fifth Amendment due process violations.[10] But, as detailed below, because of the Court's reluctance to expand *Bivens* to any new contexts,[11] the best prediction here is that *Bivens* would not be available.[12] The bigger stick is now in the hands of the official. The eventuality that gave the law student power in the first situation is gone, not because his "rights" have changed, but because the available remedies have.

The outcome described above is based on a sanction-centered definition of law commonly attributed to positivism: a law is a command from the sovereign backed up by the threat of a sanction for non-compliance.[13] It

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5. EARL WARREN, THE LAW AND THE FUTURE (1955).

6. *Cf. Bivens*, 403 U.S. at 413–17 (1971) (Burger, C.J., dissenting) (criticizing exclusionary rule as a method to deter officials from illegal searches and seizures).

7. *Deprivation of Rights Under Color of Law*, U.S. DEP'T OF JUST. C.R. DIV. (May 31, 2021), https://www.justice.gov/crt/deprivation-rights-under-color- law#:~:text =Section%20242%20of%20Title%2018,laws%20of%20the%20United%20States (emphasis added).

8. TARYN A. MERKL, PROTECTING AGAINST POLICE BRUTALITY AND OFFICIAL MISCONDUCT: A NEW FEDERAL CRIMINAL CIVIL RIGHTS FRAMEWORK 4 n.10 (2021).

9. Screws v. United States, 325 U.S. 91, 103 (1945) (requiring specific intent).

10. Depending on state law, the law student might be able to sue the official in state court for violation of his privacy rights, but that cause of action would be based on state privacy law.

11. The Court has found *Bivens* causes of action for the Fourth Amendment's protection against unreasonable search and seizure, Fifth Amendment Due Process (in some situations), and the Eighth Amendment's prohibition of cruel and usual punishment. *See infra* notes 24–36 and accompanying text.

12. This example relies on the law student's not threatening to sue the official for violating his Fourth Amendment rights, painting the arrest as an unlawful seizure. I chose a Fifth Amendment violation because the Supreme Court in *Hernandez*, *infra* note 40, and *Ziglar*, *infra* note 23, did not find a *Bivens* remedy for Fifth Amendment due process violations, but this example would work as long as the federal official threatened to violate one of the law student's constitutional rights for which there is not a *Bivens* cause of action (the official could have threatened to quarter soldiers in the law student's house without consent, in violation of the Third Amendment, or to bribe jurors in his criminal trial in violation of the Sixth Amendment, for example).

13. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 5 (ALBERMARLE STREET, JOHN MURRAY 1861) ("Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command* . . . . If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase."); *see also* Scott J. Shapiro, *What is the Internal Point of View?*, 75 FORDHAM L. REV 1157, 1157 (2006) ("[Austin] held legal rules to be threats backed by sanctions and statements of legal obligations as predictions that the law threatened sanctions will be carried out.").

exemplifies Oliver Wendell Holmes' theory that the practice of law is a matter of predicting what will happen to the parties—that "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by the judgment of the court."[14] The parties' understanding of law and the distribution of power is based on their predictions of how a court will behave.

The sanction-centered definition of law is by no means the only, or even a popular, description of law.[15] In the area of constitutional remedies, however, it is important that the Constitution delineates what the government can and cannot do.[16] The three branches of government have an interest in ensuring that their commandments (statutes, judicial decisions, executive actions, or agency decisions) are enforced. That same interest does not apply automatically to a document that limits what those branches can do—the Constitution. Without remedies for violations, constitutional provisions are at a unique risk of being "reduced to 'a form of words.'"[17]

Under a sanction-centered definition of law, if a court allows a suit for damages against a state official for an unreasonable search but not against a federal official for a due process violation, then only the former action is *actually* illegal because it is the only one with legal consequences. If the law student sues the federal official in the due process circumstance, the case will be dismissed for lack of a cause of action. Even if the student's rights were clearly violated, the consequences for the official will only be semantic—he will know he was in the wrong, but he will not be punished. Because the federal official will not face sanctions, he does not violate the

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14. O.W. Holmes, Jr., *The Path of the Law*, *in* JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW 824, 825 (George C. Christie et al. eds., 2020).

15. *See generally* Fredrick Schauer, *Was Austin Right After All: On the Role of Sanctions in a Theory of Law*, 23 RATIO JURIS 1 (2010).

16. Bandes, *infra* note 54, at 292 ("The Constitution is meant to circumscribe the power of government where it threatens to encroach on individuals. Therefore, the Constitution must be enforceable by individuals even when the political branches do not choose it to be."). Austin and Bentham emphasized that in addition to being enforceable, law was the command of the sovereign. The sovereign is whoever is generally obeyed but does not obey anyone else. Austin, *supra* note 13, at 624; *see also* Schauer, *supra* note 15, at 4 (describing Austin's theory as "one in which the subjects had developed a habit of obedience to the commands of the sovereign, but in which the sovereign, essentially by definition, had developed a habit of obedience to no one at all."). For the purposes of this Article, that sovereign could be understood to be "the people" in a system of popular sovereignty, making the U.S. Constitution an expression of the sovereign's will. *Sovereignty*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining popular sovereignty as a "system of government in which policy choices reflect the preferences of the majority of citizens."). The government must obey the will of the people expressed in the Constitution.

17. Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)); *see also* Stephen I. Vladeck, *Our Increasingly Unenforceable Constitution*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/opinion/increasingly-unenforceable-constitution.html ("[C]onstitutional rights aren't worth all that much if there's no mechanism for enforcing them."); Warren, *supra* note 5, at 11 ("The pursuit of justice is not the vain pursuit of a remote abstraction; it is a continuing direction for our daily conduct.").

law in detaining the commuter. By contrast, if the law student sues the state official for the search and wins, a sanction—damages—will follow. Because of that sanction, it would be illegal for him to conduct that search.

Of course, there could be other types of consequences. Even if the federal official could not be sued for damages, he may anticipate that he will get in trouble with his boss or embarrass himself, which would also deter him from searching or detaining the law student. To some, these consequences are no different from formal legal consequences; they add to the law student's power to negatively affect the official's life if he does something illegal.[18] To others, these social consequences are different from formal legal ones; they are inconveniences that the official is obliged to avoid, and they reflect the violation of a social rule, but they are not violations of law because they do not lead to liability in court.[19]

I. CAUSES OF ACTION AND *BIVENS*

To explore how these theories apply to the example, it is necessary to understand the legal mechanisms at work: the requirement of a cause of action and, more specifically, *Bivens*. First, viable lawsuits in federal court must state a cause of action on which relief can be granted.[20] Causes of action can be express or implied. Express causes of action are contained in the law that the plaintiff claims was broken; the law describes a right and states that someone can sue for violation of that right. Under 42 U.S.C. § 1983, for example, someone who violates another's rights under the color of state law "shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress . . . ." Thus, the law student could sue the state police official under § 1983.

When causes of action are not express, courts must determine whether the law alleged to have been broken implies a cause of action. A cause of action is usually presumed when the plaintiff seeks injunctive relief to stop an ongoing violation of federal law.[21] For actions seeking damages, federal courts assess the source of law to determine whether an implied damages

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18. John Austin, *Lectures on Jurisprudence*, *in* JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW 624 (George C. Christie et al. eds., 2020).

19. H.L.A. Hart, *The Concept of Law*, *in* JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW 712 (George C. Christie et al. eds., 2020); Shapiro, *supra* note 13, at 1157.

20. FED. R. CIV. P. 8(a)(2); FED. R. CIV. P. 12(b)(6); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And their Connections to Substantive Rights*, 92 VA. L. REV. 633, 694 *n. 228 (2006).

21. Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 261 (2011) (allowing suit against state seeking injunctive relief for violations of federal law to proceed); *see also* John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 3 (2013) ("If [an ongoing violation of federal law] exists, and Congress has not affirmatively barred the action, then a suit for injunctive relief will be available.").

remedy is available. When that source is a statute, courts interpret it to determine whether Congress intended it to contain a private right of action.[22] When the law that was allegedly violated is found in the Constitution, however, congressional intent does not apply in the same way.[23] Judges disagree on what indicates an implied constitutional cause of action for damages and whether a constitutional provision can imply such a cause of action at all.

Enter *Bivens v. Six Unknown Named Agents*, in which the Supreme Court established a private right of action for monetary damages against federal officials for Fourth Amendment violations.[24] Bivens sued federal officials for illegally arresting and searching him in his New York home.[25] The Fourth Amendment does not include an express cause of action; it states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[26] The Court acknowledged that "the Fourth Amendment does not in so many words provide for its enforcement by an award of monetary damages for the consequences of its violation."[27] Nonetheless, the Court concluded that Bivens' lawsuit for monetary damages could proceed based on an implied cause of action.[28] Concurring in the judgment, Justice Harlan wrote that "some form of damages is the only possible remedy for someone in Bivens' alleged position," and in light of federal courts' authority to provide equitable relief in similar scenarios, hearing a suit for damages was an appropriate method to "assure the vindication of constitutional interests."[29]

Dissenting, Chief Justice Burger wrote that recognizing a cause of action "not provided for by the Constitution and not enacted by Congress" violated the separation of powers and that the Court was exercising legislative authority it did not have.[30] He spent the bulk of his opinion, however, criticizing the exclusionary rule as an ineffective remedy for Fourth Amendment violations and recommending to Congress how it should "take the lead" in filling the gaps.[31]

Justice Black agreed that recognizing a *Bivens* right of action was

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22. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 434 (8th ed. 2021) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 688 (1979); J.I. Case Co. v. Borak, 377 U.S. 433 (1964)).

23. Ziglar v. Abbasi, 582 U.S. 120, 133 (2017) (comparing the process of identifying an implied statutory cause of action with that of identifying a constitutional one).

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

25. *Id.*

26. U.S. CONST. amend. IV.

27. *Bivens*, 403 U.S. at 396.

28. *Id.* at 397.

29. *Id.* at 407, 409–10 (Harlan, J., concurring in judgment).

30. *Id.* at 411 (Burger, C.J., dissenting).

31. *Id.* at 421.

beyond the Court's constitutional authority.[32] He, too, weighed in with advice to Congress, cautioning against legislating a private right of action for the practical reason that it would clog already overburdened courts with frivolous lawsuits.[33] Justice Blackmun described the majority opinion as "judicial legislation" and echoed the concern that *Bivens* would inundate federal courts and "stultify proper law enforcement."[34]

One way to understand the Court's general disagreement is that the majority thought recognizing a damages remedy was a judicial activity, and the dissenters believed it was a legislative one. The majority and Justice Harlan saw that by virtue of the Constitution's *having* a Fourth Amendment, courts have the ability to grant appropriate remedies. The dissenters felt that granting a remedy was a strictly legislative activity that they had no power to undertake.

The Court has recognized *Bivens* actions for violations of two other constitutional provisions. In 1979, it recognized a private cause of action against a federal official for violating the Fifth Amendment's Due Process Clause.[35] A year later, it recognized a private cause of action against federal prison officials for violating the Eighth Amendment's prohibition of cruel and unusual punishment.[36] Both decisions were divided.[37] Several cases since have denied *Bivens* actions, primarily because of statutes creating alternative remedies[38] or precluding private causes of action.[39]

II. TODAY'S APPROACH TO *BIVENS*

Those denials reflect how the Court's approach to *Bivens* has changed significantly since 1971. It is now based on the understanding that allowing *Bivens* actions is "a 'disfavored' judicial activity."[40] From this starting point, the analysis consists of two questions.[41] The first is whether the claim "arises in a 'new context' or involves a 'new category of defendants.'"[42] If either is new, the next question is "whether there are any 'special factors

32. *Id.* at 428–29 (Black, J., dissenting).
33. *Id.*
34. *Id.* at 430 (Blackmun, J., dissenting).
35. Davis v. Passman, 442 U.S. 228, 242 (1979) ("[J]usticiable constitutional rights are to be enforced through the courts . . . unless such rights are to become merely precatory . . . .").
36. Carlson v. Green, 446 U.S. 14 (1980).
37. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented in *Davis*. 442 U.S. at 249–55. In *Carlson*, Justices Powell and Stewart concurred in the judgment, and Chief Justice Burger and Justice Rehnquist dissented. 446 U.S. at 25–54.
38. Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicky, 487 U.S. 412 (1988).
39. Hui v. Castaneda, 599 U.S. 799 (2010).
40. Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) (quoting Ziglar v. Abbasi, 582 U.S. 120, 135 (2017)).
41. *Id.* at 743.
42. *Id.* (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001)).

that counsel hesitation'" about extending *Bivens*.[43] Special factors include alternative remedial schemes and implications for national security[44] or foreign affairs.[45] When there are special factors in a new context, the plaintiff lacks a cause of action, and the case will not proceed.[46] Under this analysis, the Court has dismissed claims brought under the Eighth Amendment against a private corporation under contract with the Bureau of Prisons,[47] claims under the Fourth and Fifth Amendments against a federal border agent who shot and killed someone across the border,[48] and due process and equal protection challenges to confinement after 9/11.[49]

There are at least three views of the *Bivens* doctrine.[50] The first is that a federal court's ability to establish a damages remedy is just like its ability to grant injunctive relief—both are an exercise of the court's equitable powers, and neither poses a constitutional problem.[51] This view categorizes *Bivens* remedies as common law making—if Congress chose to abolish *Bivens* entirely by statute, it could.[52] The second is that the Constitution is self-executing such that the remedies are inherent to constitutional rights—that it is a "settled and invariable principle, that every right, when withheld, must have a remedy."[53] Under this view, instead of having the discretion to recognize *Bivens* actions, courts are obligated to recognize them: "[w]hen [legislated remedies] do not exist or are inadequate, the Court must create effective judicial remedies."[54] The third is that it is entirely outside of a

43. *Id.* (quoting *Ziglar*, 582 U.S. at 136).
44. *Ziglar*, 137 S. Ct. at 1843.
45. *Hernandez*, 140 S. Ct. at 743.
46. *Id.* at 743.
47. *Malesko*, 534 U.S. at 61.
48. *Hernandez*, 140 S. Ct. at 735.
49. *Ziglar*, 137 S. Ct. at 1843.
50. CHEMERINSKY, *supra* note 22 at § 9.1. There is at least one more, which is that causes of action have nothing to do with the Constitution and they were just invented because judges wanted barriers to lawsuits they found undesirable. For the purposes of this paper, I am focusing on the constitutional theories of *Bivens*.
51. *Id.*; *see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971) ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."); Molina v. Richardson, 578 F.2d 846, 850 (9th Cir. 1978) (citation omitted) ("The majority in Bivens strongly implied that specific congressional action might have precluded the judicial creation of a damages remedy in that case. Such preclusion would not be permissible, of course, were the Bivens result a constitutional necessity.").
52. John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L. J. 2513, 2514 (stating that Congress has "power to determine what kind of decrees the federal courts can issue in lawsuits that are within their jurisdiction but that do not involve causes of action themselves created by Congress," at least regarding courts it establishes); CHEMERINSKY, *supra* note 22, at 673.
53. Marbury v. Madison, 5 U.S. 137, 147 (1803).
54. Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 324 (1995); Donald L. Doernberg, *Betraying the Constitution*, 74 BAYLOR L. REV. 323, 338 (2022) ("Refusal to recognize actions under constitutional provisions ostensibly protecting individuals' rights erases them from the Constitution."); CHEMERINSKY, *supra* note 22 at § 9.1.

court's role to recognize a cause of action that has not been legislated.[55] In short, the Constitution either 1) permits, 2) requires, or 3) prohibits *Bivens* remedies.[56]

III. APPLYING THE SANCTION-CENTERED DEFINITION OF LAW

Someone adopting the sanction-centered definition of law could have a few reactions to these explanations. As previously acknowledged, the sanction-centered definition of law is important for constitutional remedies; without remedies, constitutional provisions are at a unique risk of becoming ineffectual.[57] Interestingly, the lower court, whose opinion was reversed by *Bivens,* noted this concern. The Second Circuit wrote that judicially created remedies are appropriate if necessary to prevent a "clearly declared right" from becoming a "mere 'form of words.'"[58] The court believed that its decision did not render the Fourth Amendment a form of words, however, because of the availability of injunctive relief and the exclusionary rule.[59] But neither would have applied to Bivens' case. He would not have had standing to seek injunctive relief because he could not have proved that the violation was likely to reoccur,[60] and "no charges were ever filed against him," so the exclusionary rule had no prosecution to affect.[61]

With the sanction-centered definition of law in mind, it is easy to formulate rationales for two of the three *Bivens* explanations. First, consider the requisite view under which *Bivens* remedies are inherent to the Constitution and therefore required. The sanction-centered definition of law is consistent with this explanation. The Constitution is law, so when it is violated, regardless of whether statutes provide express causes of action, sanctions follow. In the final subway example above, under this view, the law student could sue the federal official for monetary damages for violating

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55. *Bivens*, 403 U.S. at 428 (Black J., dissenting) ("For us to [create a remedy that neither Congress nor a state has enacted] is, in my judgment, an exercise of power that the Constitution does not give us."); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."); CHEMERINSKY, *supra* note 22 at § 9.1.

56. Hereinafter the "permissive," "requisite," and "prohibitive" views.

57. Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)); *see also* Vladeck, *supra* note 17 ("[C]onstitutional rights aren't worth all that much if there's no mechanism for enforcing them."); Warren, *supra* note 5, at 11 ("The pursuit of justice is not the vain pursuit of a remote abstraction; it is a continuing direction for our daily conduct.").

58. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 723 (2d Cir. 1969), *rev'd,* 403 U.S. 388 (1971).

59. *Id.*

60. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

61. Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1534 (1972).

either his Fourth or Fifth Amendment rights, regardless of anything Congress does.[62] If he could not, then federal officials could violate the Constitution without consequence, and it would not be properly understood as law.

The prohibitive view of *Bivens* is also consistent with a sanctions-based definition of law. Under this view, "[f]ederal courts lack the authority to engage in the distinctly legislative task of creating causes of action for damages to enforce federal positive law."[63] Absent legislation creating a cause of action, the law student would not have a cause of action against the federal official for violating either his Fourth or Fifth Amendment rights. Because the official suffers no sanction for his conduct, those Amendments are not actually law. They are still a command of the sovereign, but they lack the essential feature of being backed up by a threat of enforcement. This is the view taken up by the *Bivens* dissenters.[64]

Even if the plaintiff could sue the official under state law for some violation of privacy or property rights, the right would then come from state law, not from the Fourth Amendment. This scenario leaves the duty of creating causes of action (i.e., sanctions) to Congress. In a case like *Bivens*, in which injunctive relief is inapplicable, and no other remedies are available, the allegedly violated right would actually not be a right at all because it would be unenforceable.[65]

Thus, under the prohibitive view, instead of being properly understood as laws, constitutional provisions lacking causes of action would be guiding principles or statements of society's virtues as opposed to enforceable rules. Austin would identify such principles as imperfect laws: "that is to say, laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions."[66] Constitutional provisions without *Bivens* causes of action would not be positive law, but

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62. Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to* Bivens, 28 A.B.A. NAT'L SEC. L. REP. 1, 4 (2006) ("Congress cannot deprive individuals of a remedy for violations of their constitutional rights simply by refusing to create one; the Constitution is self-executing and privately enforceable, at least with respect to some of the individual rights it bestows.").

63. Hernandez v. Mesa, 140 S. Ct. 735, 752 (2020) (Thomas, J., concurring).

64. *See supra* notes 30–34 and accompanying text.

65. A major issue with this theory is § 242, under which the official could be criminally prosecuted for violating constitutional rights. Prosecution under this statute is unlikely, but it is undeniably a possible sanction for the official's behavior. Because of the emphasis in *Bivens* and its progeny that the possible remedy "is *Bivens* or nothing," *Hernandez*, 140 S. Ct. at 760 (Ginsburg, J., dissenting), I am focusing only on remedies that the person whose rights were violated could bring about. Criminal prosecution under § 242 certainly seems like a sanction, but it is an interesting question whether it is a remedy to the person whose rights were violated. This paper has mostly used remedy and cause of action interchangeably with sanction, but this issue highlights an important difference.

66. Austin, *supra* note 18, at 635. If Congress legislated causes of action against federal officials for constitutional violations, then there would be sanctions, but they may still be insufficient to turn the constitutional provision into a properly understood law, because the sanction was not created by the sovereign that created the Constitution (the people).

following them would be akin to a "dut[y] imposed by positive morality."[67]

Chief Justice Burger and Justice Black adopted this approach in their *Bivens* dissents. They recognized simultaneously the importance of the rule and their inability to enforce it without exceeding their authority. They even appealed to Congress to do what they believed the Court could not.[68]

IV. QUALIFIED IMMUNITY

The argument that law should be prospective may explain why courts would want to clearly establish *Bivens* remedies or why Congress should legislate causes of action. It also supports another judicially created barrier to suing federal officials: qualified immunity. Qualified immunity is a separate inquiry from a cause of action.[69] It serves as a complete defense for government officials who can show that their actions did not violate clearly established law.[70] Any government officials, not just federal ones, are protected by qualified immunity. For example, the law student could sue the state police official based on a § 1983 cause of action, but if the official shows his conduct was not a *clear* Fourth Amendment violation, then the official is immune from suit. Qualified immunity exemplifies the value that a command is a law only if it can be prospectively followed. If the law changed so frequently that it became impossible to follow, it may not be law, and it would be unfair to hold people to standards they did not know.[71]

Realistic litigants may view denials of *Bivens* claims and qualified immunity as basically the same thing; they are both tools used to protect

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67. *Id.*

68. This appeal is reminiscent of an iconic Jurisprudence article, Lon Fuller's *The Case of the Speluncean Explorers*. 62 HARV. L. REV. 616 (1949). Through a series of fictional judicial opinions, Fuller exemplifies various jurisprudential approaches. In one, Chief Justice Truepenny found no statutory exception that would allow him to rule as his "sympathies . . . incline[d]," but his opinion urged his fellow Justices to communicate the propriety of clemency to the Chief Executive. *Id.* at 619. Another shares elements with the *Bivens* dissents. Justice Keen insists that it is not the Court's role to consider clemency, and undermining the separation of powers disserves everyone in the long run. He would have the Court rule as he believes the law requires and force the executive to grant clemency in response to the pressure of popular opinion. *Id.* at 637. Chief Justice Burger expresses a similar sentiment in *Bivens*, urging the Court to "adher[e] rigidly to its own duty, . . . to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 428–29 (1971) (Burger, C.J., dissenting) (quoting JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES & FELIX FRANKFURTER, JOHN MARSHALL 88 (Phoenix ed., 1967)). For the dissenters, it would take something additional to turn a constitutional provision that does not contain an express cause of action into positive law. Under this view, it would be beyond a court's authority to enforce such a duty. Rather, a court's job would be merely to apply positive law that people can prospectively follow; that does not include imperfect laws.

69. *Bivens*, 403 U.S. at 397–98 (remanding on qualified immunity question).

70. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Pearson v. Callahan, 555 U.S. 223, 237 (2009) ("[Qualified immunity] is an immunity from suit rather than a mere defense to liability.").

71. Lon L. Fuller, *The Morality That Makes Law Possible*, *in* JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW 247, 249 (George C. Christie et al. eds., 2020). Why this heightened avoidance of retroactivity applies only for government officials is a topic for another day.

officials from liability.[72] To those who believed *Bivens* was wrong when decided (i.e., the prohibitive view),[73] qualified immunity might just be a correctional mechanism for that mistake.[74] However, courts still treat them as two separate issues.[75] It is worth asking whether the same positivist justification—that officials should not be held accountable for actions that they did not know violated the law—should be the foundation for both.

It is also worth noting that qualified immunity applies equally in cases brought under § 1983 and under *Bivens*. § 1983 clearly indicates to state officials that they can be sued for constitutional violations, so it makes sense that the qualified immunity question is limited to whether the official's conduct was clearly unconstitutional. In *Bivens* cases, however, defendants might argue that they, as federal officials, did not violate clearly established law because it is not clearly established that a federal official is liable for damages for a constitutional violation other than in situations factually identical to *Bivens*, *Davis*, or *Carlson*. Because positive law contains no threat of sanction for constitutional violations by federal officials outside of those three factual scenarios, constitutional provisions are not law at all as applied to federal officials, let alone "clearly established" law.

For example, imagine the law student on the subway sues the federal official who illegally detained him. Seeing no factually similar precedent, and despite the new context and absence of special factors counseling hesitation, the court recognizes a *Bivens* cause of action. The official's conduct is a clear violation of the student's due process rights. The official might still assert qualified immunity—the argument would be that it was not clearly established that he, a federal official, could be *sanctioned* for that conduct (because it was not clearly established that a *Bivens* cause of action would exist). Therefore, it was not clearly established that his conduct was illegal. In other words, sanctions are necessary to make conduct illegal, and

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72. Andrew Kent, *Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 NOTRE DAME L. REV. 1755, 1760 (2021) (citing Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006)) ("The current Court's Bivens restrictions are seen (accurately, I believe) as just one aspect of a package of Court-crafted doctrines designed to limit the ability of persons aggrieved by government misconduct to seek judicial redress in damages, while preserving some government accountability.").

73. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., dissenting) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition.").

74. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 63 (2018) (describing qualified immunity as a "compensating adjustment").

75. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397–98 (1971) (remanding on qualified immunity question); Hernandez v. Mesa, 137 S. Ct. 2003, 2005–06 (2017) (describing *Bivens* inquiry as "'antecedent' to the other questions presented," including qualified immunity).

it was not clearly established that sanctions would occur here, so the official did not violate clearly established law.

In reality, the qualified immunity question will merely be whether, on the merits, the official's conduct violated due process, which would not be influenced by the cause of action issue. The official's claim that it was not clear he would be punished would not excuse a due process violation because courts and litigants are not obligated to use a sanction-centered definition of law. But if one took that definition to its logical end, it would *functionally* excuse the due process violation by foreclosing any remedies. Formally, the existence or absence of a cause of action is not a decision on the merits of the constitutional violation. But that distinction collapses under the sanctions-centered theory of law. Restated simply, if there is no cause of action, then there is no sanction, so no law was violated. This qualified immunity wrinkle shows that the distinction is not meaningless and that *Bivens* is more than just window-dressing meant to facilitate the dismissal of cases. Constitutional provisions, even if they cannot be enforced through *Bivens* actions, *are* more than "mere words" if they affect what rules someone can be held accountable for knowing. But, this qualified immunity wrinkle would only arise in the unlikely circumstance in which it was unclear whether a cause of action existed, and the court decided that one did. If the court decided the other way, the qualified immunity question would not even be reached because there would be no cause of action. In any event, this demonstrates why uncertainty over whether a *Bivens* cause of action exists is undesirable.[76]

V. TODAY'S APPROACH TO *BIVENS* UNDER A SANCTIONS-BASED DEFINITION OF LAW

The view that sanctions are not constitutionally mandated may lead to unacceptable outcomes for some. It may seem counterintuitive to think of black letter constitutional law like the Bill of Rights as anything less than "law." I share this view. I think it is idealistic and naïve for lawyers or legislators to think that people will follow guiding social or moral values when they know that those rules do not fall into the category of binding law (or that no sanctions will follow). Most people probably follow such principles due to an innately felt duty to follow the rules,[77] to protect their

76. *See infra* notes 84–94 and accompanying text.

77. H.L.A. Hart, *The Concept of Law*, *in* JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW 712, 714–715 (George C. Christie et al. eds., 2020) ("[T]he statement that someone *had an obligation* to do something is of a very different type [from one that he *was obliged* to do something] and there are many signs of this difference.") (emphasis added). *But see* California v. Texas, 141 S. Ct. 2104, 2118 (2021) (discussing report that said repealing the individual health insurance mandate and reducing the penalty to zero dollars would have the same effect because "'only a small

reputations, or for some other reason.[78] But people are all different, and in an increasingly complicated world, not everyone can be expected to perceive, let alone follow, moral and social pressures. Eventually, guiding principles are violated.[79] When they are, it is much simpler and fairer to deal with when the standard has been laid out ahead of time.

Some violations, of course, cannot be proactively foreseen, making this impossible. It can take a violation of a right for us to realize that a law is necessary. Enforcing the Bill of Rights is not one of those cases. It clearly uses the word "right," and to many, it is intuitive that such rights would inherently contain remedies.[80] Even if they did not, countless violations have served as opportunities to create enforcement mechanisms. Again, the Bill of Rights is uniquely vulnerable to being nullified by a lack of remedies because it exists to protect people from the majority—it specifically limits the government's authority.[81] The government, like anyone, will probably follow guiding principles most of the time. But there will always be people, state actors or otherwise, on the margins. For such important, fundamental rights, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[82]

I hold this view, however, because I started from a firmly held belief that the Bill of Rights must be law. I applied the sanctions-based definition of law to that view to conclude that Bill of Rights provisions inherently include sanctions. It is coherent, though, that someone could read the Bill of Rights as guiding principles. Starting with the sanctions-based definition of law instead of from constitutional views, for example, would lead to a different conclusion. If someone learned the sanctions-based definition of law and *then* took a neutral look at how the Bill of Rights is currently enforced, it would make sense to conclude that the Bill of Rights is not actually law in some scenarios, as some of its violations can go without sanctions.

Whether *Bivens* remedies are constitutionally mandated or prohibited, there is a coherent application of the sanctions-centered definition of law. If *Bivens* remedies are mandated, then there are sanctions for constitutional

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number of people' would continue to enroll in health insurance solely out of a 'willingness to comply with the law'").

78. The federal official in the subway, for example, may want to avoid trouble with his boss.

79. Even in our most revered institutions understood to be occupied by those with the utmost dignity, if socially understood ethics rules are not clearly written down, perceived violations will inevitably come to light. *See* Joshua Kaplan, Justin Elliot, & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (April 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow.

80. *See supra* note 54.

81. *See* Warren, *supra* note 5, at 7 ("The American constitutional system is in the great tradition which places the fundamental law above the will of the government.").

82. Marbury v. Madison, 5 U.S. 137, 176–77 (1803).

violations, and constitutional provisions are, therefore, laws. If the Constitution prohibits *Bivens* remedies and constitutional violations are not sanctioned unless required by statute, then constitutional provisions are not properly understood as law with respect to federal officials violating some rights. Rather, they are merely guiding principles. Reasonable minds could differ over what powers are inherent in the Constitution, but either view in this paragraph is coherent.

The sanctions-centered definition of law is more difficult to apply to the permissive view of *Bivens*: that the Constitution permits courts to grant damages remedies as a matter of their equitable powers but does not require it. Under this explanation, whether the law student can sue the federal official for monetary damages is up to the court's discretion. This means that whether the Fifth Amendment applies as a law to a federal official is up to the court's discretion. Under this theory, it must be that no constitutional provision on its own contains sanctions—so no constitutional provision is a right on its own—but courts can grant remedies to turn specific provisions into rights, just like how Congress can create causes of action under the prohibitive view.[83]

It is more problematic for courts to discretionarily create remedies than it is for Congress to. This is because if the Constitution does not inherently contain enforceable laws, then it is a fundamentally legislative activity to determine which ones are enforceable (i.e., which ones become law). When courts recognize *Bivens* causes of action at their discretion, it leaves the Bill of Rights in a weird, inconsistent array. No amendments contain specific authorizations to sue, and no legislation creates a cause of action, but some amendments contain rights while others do not. For example, *Bivens* would enable the law student to sue the FBI agent for damages for the illegal search, but not the illegal detention. If Congress passed legislation providing private causes of action for violations of some provisions of the Bill of Rights and not others, it would be within its authority—Congress makes laws, and creating remedies is what turns those provisions into laws. But when a court recognizes a private cause of action, it does two things. First, it confirms that causes of action are not inherent to constitutional provisions. Otherwise, courts could not have declined to recognize causes of action for some provisions. Second, because those causes of action are not inherent to the Constitution, it proves that when a court recognizes them, it exceeds its power to interpret the Constitution—recognizing the cause of action is what

83. When courts do exercise their discretion to find a *Bivens* remedy, the sanction is not created by the same sovereign that created the initial rule (the people who created the Constitution), so even with a *Bivens* remedy judicially established, the constitutional provision may not be properly understood as a law (in the same way that legislated causes of action are not articulated by the sovereign that created the Constitution so may not render it a law).

takes the constitutional provision from merely being a guiding principle to being a law, which is a legislative activity.

Despite this inconsistency, this scenario is the closest of the three to what happens in federal courts today. "The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue."[84] When presented with a *Bivens* case, courts go through the prescribed motions of determining whether a context is new and whether special factors counsel hesitation, but the odds are that no *Bivens* remedies are being established anytime soon.[85] The stated reason for this (in majority opinions) is not because courts lack the authority to recognize *Bivens* remedies—it is because doing so is "a 'disfavored' judicial activity."[86] This approach is necessarily discretionary; it is hard to characterize "special factors counseling hesitation" and the guiding principle that *Bivens* remedies are judicially disfavored any other way. The declining prevalence of *Bivens* remedies today is a matter of prudential, discretionary judicial restraint.

If it were otherwise—if *Bivens* remedies were constitutionally required or forbidden—then judges' "favor" would be irrelevant. The Court has stated it "need not reach the question whether the Constitution itself *requires* a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right."[87] But if courts adopted the theory that private causes of action were constitutionally required, then there would be no *Bivens* analysis. If someone alleged a constitutional violation, the case could proceed. The Court has written, for example, that a new context "might differ in a meaningful way [from an old one] because of the rank of the officials involved[.]"[88] It is hard to imagine the Court believes that a fact like that could negate something otherwise constitutionally mandated.[89]

If the prevailing theory were the prohibitive view, then even if old *Bivens* cases stood as a matter of *stare decisis* and were limited to their facts, it would be a waste of ink, in new cases, for courts to go through the motions of determining whether a case presents a new context or special factors that counsel hesitation. Even if that analysis now seems like a charade, the fact that courts still perform it demonstrates that they believe they have the

84. Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

85. Doernberg, *supra* note 54, at 337 ("In the past four decades, however, the Court has refused to recognize that the reasoning of those cases applies equally to violations of other Bill of Rights provisions.").

86. Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) (quoting Ziglar v. Abbasi, 582 U.S. 120, 135 (2017)).

87. Bush v. Lucas, 462 U.S. 367, 378 n.14 (1983) (emphasis added).

88. Ziglar v. Abbasi, 582 U.S. 120, 139–40 (2017).

89. Put another way, a search would not become reasonable because it was executed by a high-ranking official. Whether that official can be sued for damages, though, can depend on his rank. The ability to sue for damages cannot carry the same constitutional weight as the requirement that searches be reasonable.

discretion to recognize *Bivens* remedies. If they believed *Bivens* remedies were constitutionally prohibited, they could arrive at the same outcome without needing to communicate that they weighed some factors and that there was a possibility, even a remote one, of recognizing a *Bivens* cause of action.[90]

CONCLUSION

This leads to an unsatisfying description of *Bivens* and the Bill of Rights today. Courts have all but explicitly stated that causes of action are not inherent to the Constitution. Congress has not legislated private causes of action against federal officials for constitutional violations, but courts have decided they exist in some circumstances and not in others. Because creating a cause of action is essential to making a constitutional provision a law, it is Congress, not the courts, that should be creating them. Nonetheless, courts would recognize damages actions against the FBI agent for searching the law student, but not for detaining him, even when either is a constitutional violation.[91] In short, whether a *Bivens* remedy exists determines whether a constitutional provision is a right, and whether a *Bivens* remedy exists is now based on "judicial favor." Whether a certain constitutional provision actually is a right, then, is a discretionary choice for the court to make as opposed to black letter law.

This conclusion relies on the Court's approach to *Bivens* so far. The fact that it has recognized *Bivens* remedies in some contexts but not in others is evidence that *Bivens* remedies are not inherent to the Constitution. That absence of inherent sanctions leads to the conclusion that constitutional provisions are not laws. There are other potential starting points, though. For example, the starting point could be a firmly held belief that the Bill of Rights must be law, that when a provision says something *shall* not be done, it prohibits that act.[92] From there, the only possible conclusion under the sanctions-based definition of law is that sanctions must be inherent to the Bill of Rights (the requisite view). This view is appealing because it resolves a feeling of fundamental unfairness about the opening example—if people do something the Constitution says they *shall* not do,[93] whether that

90. Cynically, maybe some courts do this (go through the charade) to preserve their discretion, knowing that if they declared *Bivens* remedies constitutionally forbidden, they would be giving up a little bit of power, even power they rarely exercise, to the legislature.

91. *Compare Bivens*, 403 U.S. 388, *with Ziglar*, 582 U.S. 120.

92. In contrast, others might find constitutional provisions not to be enforceable on their own. For example, the government in *Bivens* argued that the Fourth Amendment's was only meant to foreclose defenses of "official justification" when officials were sued under state trespass laws for unreasonable searches. Dellinger, *supra* note 61, at 1538.

93. *Compare* U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ."), *with* U.S. CONST. amend. V ("No person

language was contained in the Fourth or Fifth Amendment or whether the perpetrator was a state or federal official seem like arbitrary bases on which to decide their fate.[94]

The requisite view would eliminate that unfairness, but it would also mean that the Supreme Court has been incorrect every time it failed to recognize a cause of action. Even when the Court did find causes of action, this view would render the analysis surplusage—instead of inquiring after a new context and special factors, the Court could have just said, "Of course, there is a cause of action," and moved on.

The Supreme Court could have started with this view when confronted with *Bivens* in 1971. It could have relied on a sanction-centered theory of law, taken for granted that the Fourth Amendment is law, and held that the Court must recognize a cause of action to fulfill its constitutional duties. The fact that the Court did not take this path in 1971 or in later cases shows that it at least does not believe the requisite view of *Bivens* was correct. Especially because the Court has been faced with other opportunities to recognize *Bivens* actions and has not done so, the most accurate description of current law is that *Bivens* remedies are not constitutionally mandated. And if that is true, then the *Bivens* dissenters were correct in recognizing that a cause of action exceeded the Court's authority. Case law, however, has taken the middle road; the Court has decided that *Bivens* remedies are neither required nor prohibited, granting itself the discretion to declare them depending on the case. Under a sanctions-centered definition of law, the Court has caught itself in a trap of exceeding its authority every time it recognizes a cause of action.

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shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

94. *Cf.* Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *after* Minneci, 90 WASH. U. L. REV. 1473, 1503 (2013) ("The only factual deviation between *Minneci* [(which had no cause of action)] and *Carlson* [(a *Bivens* cause of action)] is the happenstance that the United States government incarcerated the *Minneci* plaintiff in a [private] facility . . . rather than a facility run directly by the federal government.").