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NOTES

EXPANDING THE *BIVENS* DOCTRINE: WHY COURTS ARE CAPABLE OF FINDING ADDITIONAL CAUSES OF ACTION IN PRISONER LITIGATION

Erin Rafferty

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NOTES

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Erin Rafferty*

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INTRODUCTION

Should prisoners be able to sue over placements with violent cellmates?[1] United States federal circuit courts are split over whether new causes of action may be brought in lawsuits on behalf of prisoners' rights.[2] In the November 2023 case *Sargeant v. Barfield*, the Seventh Circuit held that the claim of the plaintiff, a federal prisoner, presented a new context and cause of action to which Supreme Court precedent could not apply.[3]

Sargeant assessed "whether a federal prisoner can bring a *Bivens* action alleging that a prison official failed to protect him from violent attacks by his cellmates" and ultimately concluded that, based on previous Supreme Court decisions, "the answer is no."[4] The *Bivens* doctrine was established by the 1971 Supreme Court opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which held that unreasonable searches and seizures under the Fourth Amendment "by a federal agent acting under color of his authority gives rise to a [federal] cause of action for damages consequent upon his unconstitutional conduct."[5] Through this holding, the Supreme Court created a canon for *Bivens* causes of action—claims which allow plaintiffs to seek damages when federal officers acting under the appearance of their federal authority violate the U.S. Constitution.[6] In other words, plaintiffs who have had their constitutional rights violated by federal officers may, under a *Bivens* claim, receive compensation in federal court when their right to do so is not otherwise statutorily recognized.[7]

Sargeant sought to extend the *Bivens* doctrine past its three limited circumstances for application.[8] These three circumstances are: unreasonable

[1] *See generally* Sargeant v. Barfield, 87 F.4th 358 (7th Cir. 2023).

[2] Bernie Pazanowski, *Case Manager Avoids Suit Over Giving Prisoner Violent Cellmates*, BLOOMBERG L. NEWS (Nov. 28, 2023, 3:21 PM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X55GD4DG000000#jcite [https://perma.cc/4NVZ-2V6E].

[3] 87 F.4th at 368.

[4] *Id.* at 360.

[5] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

[6] *Bivens Action*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/bivens_action [https://perma.cc/G5QM-35EY] (last visited Jan. 7, 2025).

[7] *See id.*

[8] Pazanowski, *supra* note 2.

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searches violating the Fourth Amendment;[9] discrimination by a congressman against a staffer because of their sex, violating the Fifth Amendment;[10] and failing to provide adequate medical treatment to an asthmatic inmate, violating the Eighth Amendment.[11] The Seventh Circuit refused to apply *Bivens* to the claims brought in the *Sargeant* case, joining the Fourth Circuit in its denial to extend the *Bivens* doctrine.[12] However, the Third Circuit previously recognized a new application for the *Bivens* cause of action,[13] and the Seventh Circuit noted the existence of a circuit split.[14]

In addition to the circuit split, the Prison Litigation Reform Act of 1995 ("PLRA") provides legislation that guides how causes of action for prisoners might develop.[15] The Seventh Circuit, in *Sargeant*, noted that Congress might be better equipped to assess needs for remedies.[16] The existence of the PLRA could indicate that Congress does "not desire a new remedy."[17] On the other hand, it seems as though refusing to extend the *Bivens* doctrine opposes what *Bivens* sought to do—give prisoners a chance at justice. The *Bivens* opinion recognizes both a "greater capacity for harm" in an agent acting under the authority of the United States and a "right of every individual to claim the protection of the laws."[18] Therefore, the Supreme Court could eventually extend the *Bivens* doctrine to encompass *Sargeant*'s cause of action if there is a desire to expand prisoners' civil liberties.

This Note seeks to explore whether other circuits, or the Supreme Court itself, should expand the contexts to which *Bivens* can apply in the future. Part I discusses Supreme Court precedent, the history of prison litigation legislation, and protections under the Eighth Amendment. Part II analyzes how United States circuits came to differing conclusions about the application of *Bivens*. Part III assesses whether the

[9] *See Bivens*, 403 U.S. at 389.

[10] *See* Davis v. Passman, 442 U.S. 228, 228 (1979).

[11] *See* Carlson v. Green, 446 U.S. 14, 16 (1980).

[12] Pazanowski, *supra* note 2.

[13] *See* Bistrian v. Levi, 912 F.3d 79, 88 (3d Cir. 2018) (holding that plaintiff had a cognizable claim after defendants failed to protect him from "a substantial risk of serious injury at the hands of other inmates.").

[14] Sargeant v. Barfield, 87 F.4th 358, 364 (7th Cir. 2023).

[15] 42 U.S.C. § 1997e.

[16] *Sargeant*, 87 F.4th at 364.

[17] *Id.* at 368.

[18] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392, 397 (1971).

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Seventh Circuit was correct in determining that the *Bivens* framework could not be applied to the case of *Sargeant v. Barfield* and what the Supreme Court should consider if it were to hear this case, or a similar one, in the future. This Note concludes with a discussion on public policy surrounding prisoners' rights.

I. BACKGROUND AND HISTORY

A. The Development of the Bivens *Doctrine*

The story of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* began on November 26, 1965, when agents of the Federal Bureau of Narcotics entered *Bivens*'s apartment and arrested him without warrants to do so.[19] In this process, the agents restrained *Bivens* in front of his wife and children and threatened to arrest his family as well.[20] The agents searched the entire home before taking *Bivens* to a federal courthouse to be interrogated and subjected to a strip search.[21] In 1967, *Bivens* alleged in a complaint that the United States District Court for the Eastern District of New York had jurisdiction over the case, and that "[w]hile acting under the colors and authority of the United States of America, six (6) Agents of the U.S. Narcotic Bureau, did violate [his] constitutional rights."[22] *Bivens* claimed that the search and arrest were carried out in the absence of a warrant and that the agents used unreasonable force in his arrest.[23] The trial court dismissed the complaint, holding that it was "abundantly clear that no federal question [was] presented by the complaint."[24] On appeal, the United States Court of Appeals for the Second Circuit affirmed the order of the district court dismissing the complaint.[25] *Bivens* failed to convince the court to depart from the "sound principle of judicial restraint" and recognize an action under the Fourth Amendment in this case.[26]

[19] *Id.* at 389.

[20] *Id.*

[21] *Id.*

[22] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 276 F. Supp. 12, 13 (E.D.N.Y. 1967). The statutes *Bivens* referenced giving jurisdiction to the district court were the Civil Rights Act of 1871, 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a) and 1343(3)–(4).

[23] *Bivens*, 403 U.S. at 389.

[24] *Bivens*, 276 F. Supp. at 16.

[25] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 726 (2d Cir. 1969).

[26] *Id.*

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When *Bivens* reached the United States Supreme Court, however, the Court held that a plaintiff is entitled to redress injury through remedial mechanisms that are ordinarily available in federal courts "if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights."[27] Ultimately, *Bivens* noted that federal courts have the power to award damages for violations of constitutionally protected interests and thus, remedy abuses of power.[28] The Court reversed the prior Second Circuit decision and remanded the case to that court for proceedings consistent with the Supreme Court opinion.[29]

The Supreme Court has only allowed for *Bivens* causes of action in three scenarios—the first, of course, being the *Bivens* case itself.[30] In 1979, eight years after the original *Bivens* Supreme Court decision, the Court recognized a second *Bivens* cause of action in *Davis v. Passman*.[31] A woman named Shirley Davis was hired as an administrative assistant to United States Congressman Otto E. Passman of the Fifth Congressional District of Louisiana in February of 1974.[32] Just a few months later, Passman fired Davis, who he admitted was a hard worker, because it was essential to him that Davis's position instead be held by a man.[33] Similar procedural issues to those in *Bivens* ensued in the *Davis* case, with the litigation ultimately facing the same question as that in *Bivens*: was there a federal cause of action for these damages?[34] In this instance, however, the Court had to consider a violation of the Fifth Amendment rather than the Fourth.[35]

The Court of Appeals for the Fifth Circuit, in deciding *Davis*, held that "no civil action for damages" could be implied when there occurs a violation of the Due Process Clause of the Fifth Amendment.[36] The Supreme Court disagreed, holding that "in [*Davis*], as in *Bivens*, if petitioner is able to prevail on the merits, she should

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[27] *Bivens*, 403 U.S. at 397.

[28] *See id.*

[29] *Id.* at 398.

[30] *See Bivens*, 403 U.S. 388; Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).

[31] 442 U.S. 228 (1979).

[32] *Id.* at 230.

[33] *Id.*

[34] *See id.*; *see also Bivens*, 403 U.S. at 389.

[35] *Davis*, 442 U.S. at 228.

[36] Davis v. Passman, 571 F.2d 793, 801 (5th Cir. 1978).

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be able to redress her injury in damages, a 'remedial mechanism normally available in the federal courts.'"[37]

The third circumstance to which *Bivens* has been applied occurred only a year after *Davis* in the 1980 case *Carlson v. Green*.[38] On behalf of the estate of her deceased son, the mother of Joseph Jones, Jr. alleged that he suffered injuries due to violations of his due process, equal protection, and Eighth Amendment rights by federal prison officials.[39] Just as in *Bivens* and *Davis* before it, this case questioned whether there was a remedy available directly under the Constitution—this time, for violations of the Eighth Amendment.[40] In *Carlson*, the trial court held that Jones could have maintained a *Bivens* cause of action had he survived, but the damages available to his estate did not meet the jurisdictional-amount requirement due to Indiana's survivorship laws.[41] The Court of Appeals for the Seventh Circuit disagreed and held that whenever a state survival statute would interfere with a *Bivens* cause of action against defendants whose conduct results in death, federal common law will allow the action.[42] The court reasoned that the Indiana law applied by the trial court would "'subvert' 'the policy of allowing complete vindication of constitutional rights' by making it 'more advantageous for a tortfeasor to kill rather than to injure.'"[43] The Supreme Court affirmed, holding that post-death claims such as those in *Carlson* must survive so as not to thwart the goals of *Bivens* actions.[44] Uniformity is necessary for civil rights claims against federal officials, and "uniformity cannot be achieved if courts are limited to applicable state law."[45] Thus, the Supreme Court expanded the *Bivens* doctrine to include this decedent's mother's claims under the Eighth Amendment.[46]

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[37] *Davis*, 442 U.S. at 248 (quoting *Bivens*, 403 U.S. at 397).

[38] 446 U.S. 14 (1980).

[39] *Id.* at 16.

[40] *Id.*

[41] *Id.* at 17.

[42] *Id.* at 17–18.

[43] *Id.* (quoting Green v. Carlson, 581 F.2d 669, 674 (7th Cir. 1978)).

[44] *Id.* at 25.

[45] *Id.* at 24.

[46] *See id.*

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The *Bivens* doctrine has not been expanded in over forty years, and this Note seeks to analyze the fairness, or lack thereof, inherent in the Supreme Court's failure to modify the applicability of the doctrine. The reason new *Bivens* causes of action are so rarely recognized stems from an important point in then-Chief Justice Burger's dissent in *Bivens*: They are damage remedies which are not provided for by the Constitution and are not enacted by Congress.[47] There is an argument to be made for preserving the separation of powers by avoiding any expansion of *Bivens* causes of action—court-created remedies have the potential to veer toward unconstitutionality if Congress would be better suited to establish remedies. However, fifteen years after *Carlson*, Congress restricted opportunities for prison litigation.[48]

B. The Prison Litigation Reform Act of 1995

When Congress passed the PLRA, it changed facets of the United States Code on civil rights legislation and made it more difficult for prisoners to bring lawsuits in federal courts.[49] Specifically, the PLRA amended the Civil Rights of Institutionalized Persons Act to require that prisoners exhaust all administrative remedies before bringing a civil action for a violation of their rights.[50] This means that prisoners must go through prison grievance procedures and all administrative appeal opportunities before they can actually sue over prison conditions.[51]

An alleged drastic increase in prison litigation led to attempts across all governmental branches to restrict these types of lawsuits.[52] Congress wanted to reduce meritless claims in prison litigation and limit the remedies available for lawsuits concerning prison conditions.[53] A supporter of the PLRA, Kansas Senator Robert Dole, suggested that the amendment would "work to restrain liberal federal

[47] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 427–30 (1971).

[48] *See* Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e.

[49] *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, AM. C.L. UNION, https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf [https://perma.cc/FTL3-7RH7] (last visited Jan. 7, 2025); John Boston, *The Prison Litigation Reform Act*, *in* JAILHOUSE LAW.'S MANUAL 348, 348 (12th ed. 2020).

[50] *See* Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a).

[51] *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *supra* note 49.

[52] Katherine Bennett & Rolando V. Del Carmen, *A Review and Analysis of Prison Litigation Reform Act Court Decisions: Solution or Aggravation?*, 77 PRISON J. 405, 405 (1997).

[53] *Id.*

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judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage state and local prison systems."[54]

However, there was opposition to the PLRA. Congressional Records from March 19, 1996, show that several government figures found issues with the constitutionality of the Act.[55] Massachusetts Senator Edward M. Kennedy expressed "deep concern," stating that the PLRA was not simply "an attempt to reduce frivolous prisoner litigation over trivial matters" but rather "a far-reaching effort to strip Federal courts of the authority to remedy unconstitutional prison conditions."[56] Senator Kennedy believed the PLRA was unconstitutional because the legislative branch was seriously impeding the judicial branch.[57] In a Judiciary Committee hearing, Kennedy explained, Associate Attorney General John Schmidt noted consequences of the PLRA would include "unwisely curtail[ing] the power of the Federal courts to remedy constitutional and statutory violations in prisons, jails, and juvenile detention facilities."[58] Perhaps the PLRA was not what it seemed. It did more than simply refine the large quantities of prisoner claims coming into United States federal courts; it took away much of the ability of those courts to manage who could bring claims before them.

Of course, after its enactment, courts were then tasked with interpreting and applying the PLRA. By 1997, the PLRA had seen heavy litigation.[59] Courts additionally addressed several alleged constitutionality issues with the PLRA.[60] There were concerns over "separation of powers, due process, equal protection, access to the courts and First Amendment rights, and the protection against double jeopardy" in the early years of the PLRA's existence.[61] Moreover, not only were there constitutional issues raised by the PLRA, courts also faced legal issues in implementing the Act.[62] New requirements and conflicts with other federal rules

[54] *Id.* at 406 (quoting 141 CONG. REC. S14626 (1995)).

[55] *See* 142 CONG. REC. S2296 (1996).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Bennett & Del Carmen, *supra* note 52, at 407.

[60] *Id.* at 409.

[61] *Id.* at 409–10.

[62] *Id.* at 420.

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presented challenges for courts in applying the PLRA's standards.[63] Clearly, the PLRA created even more "litigation and confusion" for courts within the prison litigation sphere.[64]

The 2000 Supreme Court case *Miller v. French* is an example of an issue of separation of powers raised in litigation over the PLRA.[65] Prisoners argued that the PLRA's automatic stay provision,[66] codified under 18 U.S.C. § 3623(b)(2), violated separation of powers principles because the time constraint interfered with judicial functions.[67] The Court disagreed, holding that separation of powers principles do not prevent Congress from changing applicable law.[68] The Court in *Miller* stated that "[t]he PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly."[69]

In 2007, the Supreme Court decided *Jones v. Bock* and addressed Congress's attempts to avoid prison litigation through the exhaustion requirement of the PLRA.[70] The Sixth Circuit, before the case was appealed to the Supreme Court, affirmed the district court's opinion that a plaintiff must show there was "total exhaustion" of administrative remedies for each claim.[71] The Supreme Court then unanimously held that the PLRA does not require this "total exhaustion."[72] At the end of the opinion, the Court noted that it is "not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate,

[63] *Id.*

[64] *Id.* at 438.

[65] 530 U.S. 327 (2000).

[66] *Id.* at 331 (quoting 18 U.S.C. § 3626(e)(2)–(3)) ("[U]nder the PLRA's 'automatic stay' provision, a motion to terminate prospective relief 'shall operate as a stay' of that relief during the period beginning 30 days after the filing of the motion (extendable to up to 90 days for 'good cause') and ending when the court rules on the motion.").

[67] *Id.* at 349–50.

[68] *Id.* at 349.

[69] *Id.* at 350.

[70] 549 U.S. 199 (2007).

[71] Jones v. Bock, 135 F. App'x 837, 838 (6th Cir. 2005).

[72] *Jones*, 549 U.S. at 223.

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when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks."[73]

Although *Jones* sets a lower-than-total standard for the PLRA's exhaustion requirement and thus lessens the burden on potential prisoner plaintiffs, the idea that courts may try to "manage their dockets" in such a way as to avoid prison litigation suggests there could still be an inequitable burden on prisoners.[74] Because courts must still determine whether prisoners have achieved "exhaustion" before attempting to file suit, this requirement continues to present an unfair obstacle for many prisoners seeking justice.[75] The PLRA prevents many prisoners from receiving compensation in federal courts for having their constitutional rights violated by federal officials.[76] Therefore, there is a need for change—new remedies should be created through mechanisms such as expanding the *Bivens* doctrine.

The adoption of the PLRA changed prison litigation fifteen years after *Carlson*.[77] The court in *Sargeant*, as is discussed later in this Note, suggests that the PLRA indicates Congress may not want to create new remedies in prison litigation.[78] However, it has been nearly thirty years since the enactment of the PLRA, and since its inception, justice groups have wanted it repealed.[79] Recognizing a new *Bivens* cause of action is likely necessary to improve prison litigation over time and to give power back to federal courts to remedy constitutional violations.

Sargeant sought protection under the Eighth Amendment through the *Bivens* doctrine.[80] Since the cases referenced in this Note show that prisoner litigation often involves violence, which is protected against under the Eighth Amendment, *Sargeant*'s claim is likely one that deserves recognizable remedies. Allowing the

[73] *Id.* at 224.

[74] *Id.*

[75] Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/H55H-4Z8S].

[76] *See, e.g.*, 42 U.S.C. § 1997e(e) (limiting recovery without a "prior showing of physical injury or the commission of a sexual act").

[77] Pazanowski, *supra* note 2.

[78] *Id.*

[79] Fenster & Schlanger, *supra* note 75.

[80] Sargeant v. Barfield, 87 F.4th 358, 361 (7th Cir. 2023).

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Bivens doctrine to cover more causes of action under the Eighth Amendment could do exactly that.

II. WHY DID THE CIRCUIT SPLIT OCCUR?

A. Farmer v. Brennan

United States circuit courts are split over whether the 1994 Supreme Court case *Farmer v. Brennan* recognized a new *Bivens* cause of action for a violation of the Eighth Amendment.[81] In *Farmer*, prisoner Dee Farmer alleged that federal prison officials violated the Eighth Amendment due to "deliberate indifference" to Farmer's safety.[82] Farmer subsequently filed a *Bivens* complaint.[83] Under the Eighth Amendment, the *Farmer* Court said that prison officials are required to provide humane conditions of confinement, ensure inmates have their needs adequately met, and "take reasonable measures to guarantee the safety of the inmates."[84] Additionally, it is recognized that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners."[85] The Court rejected Farmer's argument that there should be an objective test for deliberate indifference, holding instead that liability will not be imposed on prison officials solely for denying an inmate humane conditions of confinement or for the presence of objectively inhumane conditions.[86] Rather, an official must "know[] of and disregard[] an excessive risk to inmate health or safety."[87] A claimant does not need to show that an official believed harm would actually occur nor that an official knew that a specific prisoner was likely to commit the assault.[88] Ultimately, the Court held that the prison officials lacked the knowledge required for the "deliberate indifference" standard and remanded the case.[89]

[81] 511 U.S. 825 (1994); *see* Pazanowski, *supra* note 2.

[82] *Farmer*, 511 U.S. at 829.

[83] *Id.* at 830.

[84] *Id.* at 832 (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).

[85] *Id.* at 833 (quoting Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1988)).

[86] *Id.* at 837–38.

[87] *Id.* at 837.

[88] *Id.* at 842–43.

[89] *Id.* at 848–50.

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B. The Third Circuit

The United States Court of Appeals for the Third Circuit decided in a 2018 case, *Bistrian v. Levi*, that *Farmer* implicitly presented a new context to which the *Bivens* doctrine could be applied.[90] Peter Bistrian, a detainee at the Federal Detention Center ("FDC") in Philadelphia, brought suit against prison officials based on allegations that the officials "failed to protect him from other prisoners and punitively detained him in the FDC's Special Housing Unit."[91] In its *Bivens* analysis, the *Bistrian* court relied heavily on *Ziglar v. Abbasi*, which noted that expanding the *Bivens* doctrine is disfavored.[92] The *Abbasi* inquiry to determine whether the *Bivens* doctrine can be extended to a new context consists of two steps: (1) courts must determine whether "the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court" so as to present "a new *Bivens* context," and (2) if the case does present a new context to which *Bivens* may apply, courts must assess whether there are "special factors counselling hesitation" which have not been previously considered in other *Bivens* cases.[93] So, extending the *Bivens* doctrine requires both an implication of a new constitutional right and consideration of new special factors.[94] Important special factors, the *Bistrian* court held, may include the existence of alternative remedial systems and separation-of-powers concerns.[95]

Bistrian placed great importance on the *Farmer* decision. The Third Circuit stated that:

> Although the *Farmer* Court did not explicitly state that it was recognizing a *Bivens* claim, it not only vacated the grant of summary judgment in favor of the prison officials but also discussed at length 'deliberate indifference' as the legal standard

[90] 912 F.3d 79 (3d Cir. 2018).

[91] *Id.* at 83.

[92] *Id.* at 89 ("The Supreme Court's recent opinion in *Ziglar v. Abbasi* said bluntly 'that expanding the *Bivens* remedy is now a "disfavored" judicial activity,' but noted that *Bivens* actions have been recognized in three contexts.") (quoting Ziglar v. Abbasi, 582 U.S. 120, 121 (2017)).

[93] Ziglar v. Abbasi, 582 U.S. 120, 136, 139 (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)).

[94] *Id.*

[95] *Bistrian*, 912 F.3d at 90.

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> to assess a *Bivens* claim, the standard by which all subsequent prisoner safety claims have been assessed.[96]

Thus, according to the Third Circuit, the Supreme Court recognized a failure-to-protect claim under the Eighth Amendment through a new *Bivens* cause of action in *Farmer*.[97]

Defendants in *Bistrian* argued that other remedial routes were available to the plaintiff through prison grievance processes.[98] However, the circuit court held that these did not prevent the availability of a *Bivens* cause of action because they would not redress the harm by awarding proper damages.[99] Most important to this Note, defendants also argued that the congressional silence in the PLRA concerning *Bivens* remedies conveys congressional "intent that there be none."[100] The Third Circuit, in response, noted that the implications of the PLRA were unpersuasive to their court based on the Supreme Court precedent of *Farmer*.[101]

C. The Fourth Circuit

The United States Court of Appeals for the Fourth Circuit had a different opinion about *Farmer*. In early 2023, the Fourth Circuit held in *Bulger v. Hurwitz* that *Farmer* did not create a new context for *Bivens* actions.[102] In *Bulger*, a federal prisoner was allegedly beaten to death by other inmates.[103] His estate sued the United States and Federal Bureau of Prisons officials based on the argument that its Eighth Amendment claims could be recognized as a *Bivens* cause of action.[104] Appellant relied on *Farmer* and the Third Circuit's decision in *Bistrian*, suggesting that these cases extended the *Bivens* doctrine in such a way that appellant could recover under a *Bivens* cause of action.[105] Appellant argued that the present case was "sufficiently

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[96] *Id.* at 90–91.

[97] *Id.* at 91.

[98] *Id.* at 92.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 92–93.

[102] 62 F.4th 127, 139 (4th Cir. 2023).

[103] *Id.* at 133.

[104] *Id.*

[105] *Id.* at 139.

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akin to the Supreme Court's decisions in *Carlson* and *Farmer*" for Eighth Amendment claims.[106]

The Fourth Circuit disagreed that appellant's Eighth Amendment claims presented a new context for *Bivens*.[107] First, the court believed *Bulger*'s facts to be materially distinct from those of *Carlson*.[108] While *Carlson* dealt with prison officials' failure to provide medical care to an inmate, appellant's claims in *Bulger* were based on a failure to stop a transfer of an inmate to prevent violence imposed upon them by other prisoners.[109] Inmate transfers implicate different policies and concerns from the issues in *Carlson*.[110]

Second, the Fourth Circuit stated that the appellant could not rely on *Farmer* either.[111] The court included a statement from its previous case, *Tate v. Harmon*,[112] in which it wrote that the Supreme Court did not actually address whether the claim in *Farmer* was properly a *Bivens* claim.[113] Rather, the Supreme Court let the action proceed in order to resolve a circuit split over the legal test for "deliberate indifference."[114] Thus, the Fourth Circuit refused to apply the *Bivens* doctrine to *Bulger* because it believed *Farmer* did not expand the potential *Bivens* causes of action.[115] A circuit split over whether *Farmer* should be recognized as a new *Bivens* claim was born.

D. The Seventh Circuit

How, then, did the United States Court of Appeals for the Seventh Circuit decide *Sargeant v. Barfield*?[116] In this case, Sargeant, a federal prisoner, filed a

[106] *Id.* at 138.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] 54 F.4th 839, 847 (4th Cir. 2022).

[113] *Bulger*, 62 F.4th at 138–39.

[114] *Id.* (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994)).

[115] *Id.*

[116] 87 F.4th 358 (7th Cir. 2023).

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grievance against Cruze, a prison official.[117] When Sargeant discovered that Cruze had been shown the grievance, in violation of the prison's rules, he complained to a second official, Barfield.[118] Barfield began to tell others about the grievance, so Sargeant filed another grievance against Barfield.[119] Barfield then, in retaliation, placed Sargeant with cellmates Barfield knew were violent.[120] Sargeant alleged that Barfield failed to protect him from other prisoners.[121] Therefore, he argued, he had an Eighth Amendment claim that could proceed under a *Bivens* cause of action.[122]

Sargeant argued that the Supreme Court created a *Bivens* cause of action for failure to protect through *Farmer*.[123] The court noted that "[a] circuit split exists on this point, with the Third and Fourth Circuits disagreeing over whether *Farmer* created a new context."[124] The Seventh Circuit asserted that the Court never held that a *Bivens* remedy existed for *Farmer*, it merely assumed so.[125] While the Supreme Court did firmly recognize a *Bivens* action under the Eighth Amendment in *Carlson*, which created a basis for *Farmer*, the Seventh Circuit deemed Sargeant's claim to be a new context as it differed too strongly from the facts and policy implications of *Carlson*.[126] The nature of Sargeant's claim could not have been contemplated by *Carlson*.[127] The Seventh Circuit thus agreed with the Fourth Circuit on this divisive issue.

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[117] *Id.* at 360.

[118] *Id.* at 360–61.

[119] *Id.* at 361.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 364.

[124] *Id.* at 364. *Compare* Bistrian v. Levi, 912 F.3d 79 (3d Cir. 2018), *with* Bulger v. Hurwitz, 62 F.4th 127 (4th Cir. 2023).

[125] *Sargeant*, 87 F.4th at 365.

[126] *Id.* at 366–67 (noting "that Sargeant's suit might implicate policy determinations that the Supreme Court did not consider in *Carlson*," such as "the risk that the claim would interfere with the functioning of another branch," namely the Bureau of Prisons).

[127] *Id.* at 367 (holding "that Sargeant's claim would interfere with a vastly different part of prison operations—housing assignments instead of medical case—meaning that his claim threatens to intrude in ways *Carlson* did not contemplate").

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III. SHOULD THE *BIVENS* FRAMEWORK BE APPLIED TO *SARGEANT*?

This Note argues that the *Bivens* doctrine should have been applied to *Sargeant*, and that courts should not be so reluctant to expand *Bivens* causes of action. In this Part, this Note discusses how the Supreme Court should decide *Sargeant*, or an otherwise similar issue should it hear such a case.

The dissent in *Sargeant* argues that the Seventh Circuit should have followed the Third Circuit in recognizing *Farmer* as a *Bivens* case.[128] These arguments more strongly align with the original purpose of the *Bivens* doctrine in protecting individual rights. The dissent suggests that the majority opinion is overly anticipatory of a potential Supreme Court move.[129] The Supreme Court has not overruled *Farmer*. The dissent does, however, point out that the Supreme Court has instructed lower courts to recognize a *Bivens* claim only after applying the two-step analysis laid out in *Abbasi*.[130] Additionally, courts apply this test in a way that limits *Bivens*, *Carlson*, and *Davis* "strictly to their facts, thereby implicitly overruling *Farmer v. Brennan*."[131] While this might seem to indicate that courts should avoid extending *Bivens*, a lack of an explicit opinion by the Supreme Court on the matter signifies that courts instead can, and should, extend the doctrine. Supreme Court precedent that has not been overruled must be followed; *Farmer* is still a part of the *Bivens* doctrine.

A. Why Have Courts Refused to Expand the Bivens *Doctrine?*

The first reason why courts are hesitant to expand the *Bivens* doctrine is because the Supreme Court has expressed that recognizing *Bivens* causes of action is a disfavored judicial activity.[132] To this end, the 2022 case *Egbart v. Boule* includes several circumstances in which a *Bivens* cause of action may not be found: (1) if there is any reason to think judicial intrusion would be harmful or inappropriate;[133] (2) if there is any reason that Congress might be better equipped to create a

[128] *Id.* at 369 (Hamilton, J., dissenting).

[129] *Id.*

[130] *Id.* at 371 (Hamilton, J., dissenting).

[131] *Id.*

[132] Ziglar v. Abbasi, 582 U.S. 120, 135 (2017).

[133] 596 U.S. 482, 496 (2022).

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remedy;[134] and (3) "[i]f there is even a single 'reason to pause before applying [the doctrine] in a new context.'"[135] If these considerations occur to a court, it cannot recognize a *Bivens* remedy.[136]

Second, courts likely want to minimize prisoner litigation so they do not face as many frivolous claims, especially in federal courts. In *Jones*, the Supreme Court expressed sympathy for federal courts attempting to manage their dockets.[137] The purpose of the PLRA was to cut down on prisoner litigation, and again, the defendants in *Bistrian* argued that "congressional silence in the PLRA about the availability of *Bivens* remedies is evidence of an intent that there be none."[138] Since some courts want to give deference to congressional language—or lack thereof—when considering expansion of prisoner claims, they argue that the PLRA changed the circumstances of prisoner litigation after the creation of the *Bivens* doctrine.[139] Congress, they allege, wants to limit *Bivens* claims.[140]

Finally, there is an argument to be made that *Farmer* is simply not widely regarded as being a part of the *Bivens* doctrine group of cases. The Fourth Circuit pointed out in *Bulger* that the Supreme Court has never included *Farmer* in compilations of its *Bivens* cases in opinions such as *Egbert*, *Hernandez*, and *Ziglar*.[141] The doctrine, according to the Fourth Circuit, does not go beyond the three original *Bivens* claims.[142]

B. Conversely, Why Should Courts Expand the Bivens *Doctrine?*

Courts should create extensions for and recognize new causes of action under *Bivens* because prisoners should have access to remedies in federal courts for actions by federal officials that violate a prisoner's rights. When federal officials fail to

[134] *Id.* at 492.

[135] *Id.* (quoting Hernandez v. Mesa, 589 U.S. 93, 102 (2020)).

[136] *Id.*

[137] Jones v. Bock, 549 U.S. 199, 202 (2007).

[138] Bistrian v. Levi, 912 F.3d 79, 92 (3d Cir. 2018); *see also* Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e (1996).

[139] *Bistrian*, 912 F.3d at 93.

[140] *Id.*

[141] Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023).

[142] *Id.*

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protect prisoners, those prisoners should have an implied constitutional right to take action.

The existence of the PLRA leads many to believe that Congress does not desire any other remedies under *Bivens* and, therefore, that courts creating new causes of action offend legislative intent.[143] However, *Bistrian* reveals that in *Bivens* contexts, courts can find the PLRA unpersuasive.[144] Considering the age of the legislation and the existence of present-day movements for change in prison litigation, more courts should find the PLRA unpersuasive. If Congress truly wanted to speak on the issue of expanding *Bivens*, it would issue further legislation. Since it has not done so, courts should be free to apply the *Bivens* framework as desired without restraining legislative intent and thus disturbing separation of powers principles. Courts should not wait for Congress to do something before working to expand prisoner litigation.

The *Egbart* criteria for expanding the *Bivens* doctrine seem overly harsh in that they may dissuade courts from even attempting a *Bivens* analysis.[145] Since *Bivens* and *Farmer* have not been overturned by the Supreme Court or changed through legislation, their holdings and analyses should still be applicable.

Bistrian highlighted that "[a]ssuming the existence of a *Bivens* cause of action—without deciding the issue—can risk needless expenditure of the parties' and the courts' time and resources."[146] Therefore, the Third Circuit said it may consider the issue "in the interest of justice," even when it is not raised by a defendant.[147] The purpose of creating causes of action in the original *Bivens* case was to further justice for prisoners;[148] the Third Circuit aligns with what *Bivens* set out to do.

Essential to the *Bivens* holding is a principle the United States has held closely since its early days—civil liberty. In quoting *Marbury v. Madison*, the Supreme Court implies that *Bivens* causes of action are essential for justice when one's rights

[143] *See Bistrian*, 912 F.3d at 93.

[144] *Id.* at 92.

[145] *See* Egbart v. Boule, 596 U.S. 482, 496 (2022).

[146] *Bistrian*, 912 F.3d at 89.

[147] *Id.*

[148] *Id.* at 93.

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are violated.[149] A federal cause of action is fair when there exists an abuse of power by a federal official.[150]

Despite the limitations set by the courts on the *Bivens* doctrine, it is well-settled law by the Supreme Court.[151] Therefore, if the Supreme Court were to hear *Sargeant v. Barfield* or a similar case, it should find that (1) the *Farmer* case did, in fact, extend the *Bivens* doctrine, and (2) *Bivens* should be applied in the context of *Sargeant* as well.

CONCLUSION

The United States is a country with extremely high incarceration rates and should work to improve conditions for prisoners.[152] This should include improving the ways in which prisoners can achieve justice. The PLRA and the subsequent failures to expand the *Bivens* doctrine create barriers for incarcerated people to bring lawsuits when they have been wronged. If more circuits, or the Supreme Court itself, continue to see the PLRA as a reason why the *Bivens* doctrine should not be expanded, justice will continue to be significantly limited. The PLRA makes it harder for prisoners to bring cases because of its exhaustion rule and lack of affirmation for *Bivens* claims.[153] Even worse, the PLRA makes those cases harder to win due to restrictions on remedies and discouragement of attorneys to take civil rights cases.[154] Civil rights lawsuits filed by incarcerated people thus drastically decreased after the passage of the PLRA.[155] As it turns out, the frequency of civil rights lawsuits was not actually on the rise when the PLRA was passed.[156] While the PLRA may have

[149] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (quoting Marbury v. Madison, 1 Cranch 137, 163 (1803)) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he received an injury.").

[150] *See id.* at 397.

[151] *Regulating Federal Law Enforcement: Considerations for Congress*, CONG. RSCH. SERV. (Feb. 15, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10487 [https://perma.cc/6UHZ-PRG8].

[152] "With nearly two million people behind bars at any given time, the United States has the highest incarceration rate of any country in the world." *United States Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/US.html [https://perma.cc/Z7C2-MLT6] (last visited Jan. 7, 2025).

[153] Fenster & Schlanger, *supra* note 75.

[154] *Id.*

[155] *Id.*

[156] *Id.*

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accomplished Congress's goal of decreasing prisoner lawsuits, it seems as though there may not have been a real threat of prisoner litigation overwhelming courts in the first place. The PLRA may have been merely an attempt to minimize prisoners' abilities to litigate in general.

Recognizing and expanding the *Bivens* doctrine could be one step toward making civil rights actions more accessible to prisoners. One argument is that courts should establish a presumption for judicial review of constitutional claims and standardize the viability of *Bivens* claims.[157] This Note, however, suggests that courts should abandon the idea that creating new remedies is a job left for Congress; courts should stop waiting for Congress to expand or diminish these remedies. The Supreme Court is fully capable of finding new *Bivens* causes of action regardless of the existence of the PLRA or the case law which complicates the *Bivens* analysis. It is essential to expand these causes of action so that prisoners may receive damages when their constitutional rights are violated. Prisoners involved in litigation deserve better.

[157] James F. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 151 (2009).

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