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# Bivens and Ward---Constitutional Remedies in the United States and Canada

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# *BIVENS* AND *WARD*—CONSTITUTIONAL REMEDIES IN THE UNITED STATES AND CANADA


## ABSTRACT

*Despite the killing of an unarmed fifteen-year-old boy by a federal border patrol agent, the U.S. Supreme Court in* Hernandez v. Mesa *refused to allow a* Bivens *cause of action to proceed and left an egregious violation of constitutional rights unremedied. The U.S. Supreme Court's rulings in* Ziglar v. Abbasi *and* Hernandez v. Mesa *further limited the* Bivens *cause of action in such a way that makes successfully suing federal officials for constitutional violations practically impossible. The Supreme Court frequently denies* Bivens *claims due to the purported availability of alternative remedies. However, the Court's recent jurisprudence makes clear that these alternative remedies do not need to be as effective as a remedy under* Bivens*, nor do they even need to be certain to exist. Thus, the supposed availability of alternative remedies in the United States often leaves individuals with no remedy at all. On the other hand, the Supreme Court of Canada's approach to constitutional remedies, outlined in* Vancouver (City) v. Ward, *functionally analyzes the availability and adequacy of alternative remedies, which increases a plaintiff's chance of obtaining effective relief. The U.S. Supreme Court should adopt portions of Canada's functional approach and consider the absence of alternative remedies an important factor in deciding to extend a* Bivens *claim to a new context. This will enhance the protection of constitutional rights in the United States and prevent individuals from being left without a remedy after their rights have been violated by a federal official.*

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## INTRODUCTION

Despite the tragic killing of an unarmed fifteen-year-old boy by a federal border patrol agent, the U.S. Supreme Court in *Hernandez v. Mesa* refused to allow a *Bivens* cause of action to proceed and left an egregious violation of constitutional rights unremedied.[1] The U.S. Supreme Court's rulings in *Ziglar v. Abbasi* and *Hernandez v. Mesa* further limited the *Bivens* cause of action in such a way that makes successfully suing federal officials for constitutional

[1] Hernandez v. Mesa, 140 S. Ct. 735 (2020).

violations practically impossible.[2] The Supreme Court frequently denies *Bivens* claims due to the purported availability of alternative remedies.[3] However, the Court's recent jurisprudence makes clear that these alternative remedies do not need to be as effective as a remedy under *Bivens*,[4] nor do they even need to be certain to exist.[5] Thus, the supposed availability of alternative remedies in the United States often leaves individuals with no remedy at all.

On the other hand, the Supreme Court of Canada's approach to constitutional remedies, outlined in *Vancouver (City) v. Ward*, functionally analyzes the availability and adequacy of alternative remedies,[6] thereby increasing a plaintiff's chance of obtaining effective relief. The rights–remedies gap in the United States is not inevitable. As the Supreme Court of Canada's approach demonstrates, it is possible to show attentiveness to the availability of alternative remedies without closing the door of federal courts to victims of lawlessness. The U.S. Supreme Court should follow Canada's lead and consider the *absence* of alternative remedies an important factor in deciding to extend a *Bivens* claim to a new context. Specifically, the Court should consider a more functional approach in line with the Supreme Court of Canada's approach in *Vancouver (City) v. Ward*.[7] This will enhance the protection of constitutional rights in the United States and prevent individuals from being left without a remedy after their rights have been violated by a federal official.

## I. *BIVENS* CLAIM JURISPRUDENCE

### *A. The Rise of* Bivens

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the U.S. Supreme Court implied a damages cause of action against federal officials for constitutional violations for the first time.[8] Bivens brought suit in federal court for damages against Federal Bureau of Narcotics agents who had arrested him and searched his home without probable cause or a warrant in violation of the Fourth Amendment.[9] In its analysis, the Court indicated that

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[2] *See* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); *Hernandez*, 140 S. Ct. 735.

[3] Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CAL. L. REV. 933, 951–52 (2019).

[4] Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. UNIV. L. REV. 1473, 1486 (2013) (citing Bush v. Lucas, 462 U.S. 367, 386 (1983)).

[5] *See* Leah Litman, *Remedial Convergence and Collapse*, 106 CAL. L. REV. 1477, 1509–10 (2018).

[6] Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28, para. 24 (Can.).

[7] *Id.*

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

[9] *Id.* at 389. The Fourth Amendment to the U.S. Constitution provides citizens with the right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV.

there were no "special factors counselling hesitation"[10] and "no explicit congressional declaration"[11] that prohibited a damages remedy or required an individual in these circumstances to seek redress through "another remedy, equally effective in the view of Congress."[12] In upholding his claim for damages, the Court stated that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[13] Justice Harlan, concurring in the judgment, emphasized that a damages remedy was important in this situation because "[f]or people in Bivens' shoes, it is damages or nothing."[14]

The Supreme Court then expanded the *Bivens* cause of action to two new contexts in *Davis v. Passman* and *Carlson v. Green*.[15] In these two cases, the Supreme Court extended *Bivens* to encompass damages claims against federal officials for violations of the Fifth Amendment's Due Process Clause[16] and Eighth Amendment's prohibition on cruel and unusual punishment.[17] In *Davis v. Passman*, the Court held that a damages action was appropriate against a U.S. congressman who had fired his female assistant because of her gender in violation of the Fifth Amendment.[18] Again, the Court indicated that there were no "special factors counselling hesitation"[19] and "no explicit congressional declaration"[20] that individuals in the plaintiff's position were prohibited from seeking a damages remedy against a responsible official.[21] Importantly, the Court emphasized the absence of alternative remedies and applied Justice Harlan's wisdom from *Bivens* that for this plaintiff it was also "damages or nothing."[22]

In *Carlson v. Green*, the Court considered whether the Constitution provided a damages remedy for a violation of the plaintiff's Eighth Amendment rights

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

11 *Id.* at 397.

12 *Id.*

13 *Id.* at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

14 *Id.* at 410 (Harlan, J., concurring).

15 Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).

16 *Davis*, 442 U.S. at 228.

17 *Carlson*, 446 U.S. at 14.

18 *Davis*, 442 U.S. at 228.

19 *Id.* at 245.

20 *Id.* at 246 (alteration in original).

21 *Id.* at 246–47.

22 *Id.* at 245 (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)). In *Correctional Services Corp. v. Malesko*, the Court expressly stated that the Court in *Davis v. Passman* "inferred a new right of action chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation." Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67 (2001).

despite the fact that a suit could be brought under the Federal Tort Claims Act (FTCA) against the United States.[23] The Court held that *Bivens* claims are not precluded by a remedy under the FTCA.[24] In fact, the Court emphasized that in an appropriate case, an individual could have a *Bivens* claim against the individual officials who violated their constitutional rights and also a FTCA claim against the United States.[25] The Court reasoned that Congress knows how to explicitly state when it desires that the FTCA be an exclusive remedy,[26] and that *Bivens* offered a more effective remedy than the FTCA in this case.[27] The Court highlighted three reasons why *Bivens* offered a more effective remedy than the FTCA. Specifically, *Bivens* claims offered an individual, deterrent effect;[28] the availability of punitive damages;[29] and the potential for a jury.[30] Finally, the Court noted that "an action under [the] FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action[.]"[31] Since the "FTCA [was] not a sufficient protector of the citizens' constitutional rights,"[32] the Court upheld the action for damages under the Eighth Amendment.[33]

### *B. The Tide Turns*[34]

Through 1980, the *Bivens* claim seemed to be on a steady path of expansion in part due to the Court's "narrow conception"[35] of those "special factors counselling hesitation[.]"[36] However, since *Carlson v. Green*, the Supreme Court has refused to recognize a *Bivens* cause of action in every relevant case that has come before it.[37] The Court has based its rejection of *Bivens* claims in

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23 Carlson v. Green, 446 U.S. 14, 16–17 (1980).

24 *Id.* at 23.

25 *See id.*

26 *See id.* The Court noted that Congress provided an explicit statement that the FTCA was an exclusive remedy in a number of statutes. *Id.* at 20.

27 *Id.*

28 *Id.* at 21.

29 *Id.* at 22.

30 *Id.*

31 *Id.* at 23.

32 *Id.*

33 *Id.* at 17–18.

34 SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 33 (5th ed. 2020).

35 Fallon, *supra* note 3, at 950.

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

37 Fallon, *supra* note 3, at 950.

most of these cases on either the presence of "special factors counselling hesitation"[38] or its identification of alternative remedies provided by Congress.[39]

In *Chappell v. Wallace*, the Court held that enlisted military personnel are not entitled to bring a *Bivens* claim against their superior officers for alleged constitutional violations.[40] In so holding, the Court emphasized the presence of "special factors counselling hesitation[.]"[41] Specifically, these factors included the unique relationship between military personnel and their superior officers,[42] the military's separate disciplinary system,[43] and the Constitution's express grant of military powers to Congress.[44] The Court's holding was broad and completely ruled out the possibility that enlisted military personnel would ever be able to maintain a *Bivens* claim against a superior officer.[45]

In *Bush v. Lucas*, an aerospace engineer brought a *Bivens* action against his supervisor alleging that he was demoted in retaliation for his First Amendment protected speech.[46] The Supreme Court rejected the *Bivens* claim because the aerospace engineer had an alternative remedy through the congressionally created Civil Service Commission.[47] The Court refused to supply a judicially-created remedy in this case because Congress protected federal employees from such retaliatory actions through "an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures . . . by which improper action may be redressed."[48] The Court determined that the Civil Service Commission's remedial scheme "provide[d] meaningful remedies for employees"[49] and that the aerospace engineer's First Amendment claim was "fully cognizable"[50] under this scheme. However, the Court also recognized that those "existing remedies [did] not provide *complete* relief[.]"[51] In *Bush*, the Court "showed greater deference to congressional action by requiring only that congressionally created remedies be 'meaningful,'

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38 *Id.* at 951–52; *Bivens*, 403 U.S. at 396.
39 Fallon, *supra* note 3, at 951–52; *Bivens*, 403 U.S. at 396.
40 Chappell v. Wallace, 462 U.S. 296 (1983).
41 *Bivens*, 403 U.S. at 396.
42 *Chappell*, 462 U.S. at 299.
43 *Id.* at 304.
44 *Id.* at 301.
45 *Id.* at 304.
46 *Bush v. Lucas*, 462 U.S. 367 (1983).
47 *Id.* at 390.
48 *Id.* at 385.
49 *Id.* at 381, 386.
50 *Id.*
51 *Id.* at 381, 388 (emphasis added).

moving away from the requirement that alternative remedies be 'viewed as equally effective' to a *Bivens* claim."[52]

Similarly, in *Schweiker v. Chilicky*, the Court considered whether individuals had a *Bivens* claim against the federal officials who wrongfully denied their Social Security benefits and violated their due process rights.[53] The Court rejected the *Bivens* claim because Congress had already provided individuals who had been wrongfully denied Social Security benefits with "meaningful"[54] redress through the Social Security's administrative system.[55] Furthermore, individuals who had exhausted these administrative remedies were then able to seek judicial review of the denial of their benefits,[56] including review of any constitutional claims the individuals had in regard to such denial.[57] In this "elaborate"[58] scheme, Congress did not provide for damages against individual officers who violated constitutional rights through the wrongful denial of benefits.[59] Since "congressional attention"[60] has been "frequent and intense"[61] in rectifying issues stemming from the wrongful denial of benefits, the Court determined that it had no room to provide an additional judicial remedy.[62]

In 2001, the Court put a twist on the alternative remedies analysis of *Bivens* by implying that the availability of state-law tort claims precluded a plaintiff's *Bivens* action.[63] In *Correctional Services Corporation v. Malesko*, a federal inmate sought damages for Eighth Amendment violations from a private corporation contracted by the Federal Bureau of Prisons to house inmates.[64] The Court held that a *Bivens* claim could not lie against a corporate entity contracted

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[52] Reinert & Mulligan, *supra* note 4, at 1486 (quoting *Bush*, 462 U.S. at 386; Carlson v. Green, 446 U.S. 14, 19 (1980)).

[53] Schweiker v. Chilicky, 487 U.S. 412 (1988).

[54] *Id.* at 423.

[55] *Id.* at 424–25.

[56] *Id.* at 424.

[57] *Id.*

[58] *Id.* at 425.

[59] *Id.* at 424.

[60] *Id.* at 435.

[61] *Id.* Congress specifically addressed the issue of the wrongful denial of benefits by enacting emergency legislation which caused individuals to continue to receive their benefits upon review of a state agency's finding of ineligibility. *Id.* Less than two years later, Congress again targeted this issue with legislation revising the program and its review process. *Id.* at 425–26.

[62] *Id.* at 429. The Court emphasized that "[w]hether or not [it] believe[s] that [Congress's] response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program." *Id.*

[63] Reinert & Mulligan, *supra* note 4, at 1487; Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001).

[64] *Malesko*, 534 U.S. at 63; Reinert & Mulligan, *supra* note 4, at 1486–87.

by the federal government,[65] just as a *Bivens* claim could not lie against a federal agency.[66] The Court reemphasized that "the purpose of *Bivens* is to deter *the officer*[.]"[67] Allowing suits against the entity itself would encourage aggrieved individuals to bring damages claims against the entity rather than the employee who committed the constitutional violation.[68] Although the case seemed to be decided when the Court held that corporate entities were not suable under *Bivens*, the Court did not stop here.[69] The Court further indicated that a *Bivens* claim was foreclosed in this situation because the plaintiff had alternative remedies under the Administrative Remedy Program of the Federal Bureau of Prisons and under state tort law.[70] Prior to *Malesko*, however, the Court indicated that state tort claims were not adequately protective of constitutional rights.[71] For this reason, the Court's analysis in *Malesko* "raise[d] the further question of whether the existence of alternative federal remedies, alternative state-law remedies, or both working in conjunction barred Mr. Malesko's *Bivens* [sic] claim."[72]

In *Wilkie v. Robbins*, the Court seemed to address the above issues raised in the *Malesko* decision.[73] The Court ultimately decided not to extend the *Bivens* cause of action in this case based on "judicial-manageability grounds,"[74] which fits within the analysis of whether the case presents any "special factors counselling hesitation[.]"[75] However, in the context of alternative state remedies, the Court indicated "that state-law remedies will bar a *Bivens* [sic] claim only if the Court concludes that Congress intended to rely upon state-law remedies as an alternative remedy."[76] Thus, it seems the Court's purpose in

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65 *Malesko*, 534 U.S. at 71.

66 FDIC v. Meyer, 510 U.S. 471, 484–86 (1994).

67 *Malesko*, 534 U.S. at 69 (quoting Carlson v. Green, 446 U.S. 14, 21 (1980)).

68 *Id.* at 71. Since a system that encourages suits against the entity rather than the individual would not deter the individual officers, the Court reasoned that "the deterrent effects of the *Bivens* remedy would be lost." *Id.* at 69 (quoting *Meyer*, 510 U.S. at 485).

69 Reinert & Mulligan, *supra* note 4, at 1486–87 (reasoning that, because the "no-entity-liability principle" decided the case, the Court's state-law tort remedy analysis was dicta).

70 *Id.*; *Malesko*, 534 U.S. at 72–74.

71 Reinert & Mulligan, *supra* note 4, at 1487–88 (referring to the Court's analysis in *Bivens* and *Carlson*).

72 *Id.* at 1489.

73 Wilkie v. Robbins, 551 U.S. 537 (2007).

74 Reinert & Mulligan, *supra* note 4, at 1489.

75 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971); Reinert & Mulligan, *supra* note 4, at 1489; *Wilkie*, 551 U.S. at 554.

76 Reinert & Mulligan, *supra* note 4, at 1489 (citing *Wilkie*, 551 U.S. at 554). Specifically, the Court stated, "[The] redress open to [the plaintiff] are . . . an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules. It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand . . . ." *Wilkie*, 551 U.S. at 554.

analyzing alternative state remedies is to ascertain whether Congress wanted the Court to utilize such remedies instead of implying a *Bivens* cause of action.[77]

### C. *Recent* Bivens *Jurisprudence*

#### 1. Ziglar v. Abbasi *(2017)*

The Court's approach reflects "an increasingly assertive hostility"[78] to *Bivens* claims, and the Court has only continued to restrict the doctrine.[79] Furthermore, Justices Scalia and Thomas have argued that *Bivens* and its progeny "should be limited 'to the precise circumstances that they involved.'"[80]

In *Ziglar v. Abbasi*, respondents sought damages against high-level Executive Branch officials after being arrested and detained for an extended period of time on immigration charges following the terrorist attacks of September 11, 2001.[81] Respondents, like hundreds of other Arab immigrants,[82] were being held on orders by the U.S. government "[p]ending a determination whether a particular detainee had connections to terrorism[.]"[83] Respondents alleged the deprivation of their substantive due process rights, violation of their equal protection rights under the Fifth Amendment, and other violations of their Fourth and Fifth Amendment rights.[84] Among other things, respondents were subject to detention in their "tiny cells for over 23 hours a day[,]"[85] frequent strip searches, and severe "physical and verbal abuse" by the prison guards.[86]

The Court noted that while the term "special factors counselling hesitation"[87] has yet to be defined,[88] "[t]he necessary inference . . . is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."[89] Furthermore, the Court reemphasized that it must

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77 Reinert & Mulligan, *supra* note 4, at 1491 (arguing that the Court's alternative-remedies analysis is based in separation of powers principles).

78 Fallon, *supra* note 3, at 951.

79 *Id.* at 951–52.

80 *Id.* (quoting *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring)).

81 Ziglar v. Abbasi, 137 S. Ct. 1843, 1851–52 (2017).

82 Fallon, *supra* note 3, at 952.

83 *Abbasi*, 137 S. Ct. at 1851.

84 Fallon, *supra* note 3, at 952; *Abbasi*, 137 S. Ct. at 1853–54.

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

86 *Id.*

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

88 *Abbasi*, 137 S. Ct. at 1857.

89 *Id.* at 1857–58.

employ "'caution' before 'extending *Bivens* remedies into any new context.'"[90] In a relatively circular definition, the Court stated the test for a new context is whether "the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court.]"[91] The Court gave examples of such meaningful differences,[92] but ultimately it seems that the Court will find any context new unless the case presents with exactly the same facts and issues as either *Bivens*, *Davis*, or *Carlson*.[93] In *Abbasi*, the Court narrowly framed the respondents' claims regarding the detention policy, which bolstered the Court's conclusion that the context was new.[94] While the Court's "new context" definition[95] offers little hope that *Bivens* will ever be extended,[96] Justice Kennedy emphasized that the Court was not overruling *Bivens* nor had Congress denounced *Bivens*.[97]

Partly relying on the deterrence rationale discussed in *Correctional Services Corp. v. Malesko*,[98] the Court in *Abbasi* maintained that *Bivens* claims are not suited for challenging an entity's policy.[99] The Court further reasoned that allowing a *Bivens* suit aimed at an entity's policy, such as the detention policy here,[100] "would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch"[101] by prying into the considerations and arguments that led to the formulation of such a policy.[102] Focusing on the separation of powers,[103] the Court also noted that the Constitution grants national

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[90] *Id.* at 1857 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001)).

[91] *Id.* at 1859.

[92] *Id.* at 1859–60 (including "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.")

[93] Daniel Blair, *One Step Away: How Hernandez II Signals the Elimination of Bivens*, 64 ST. LOUIS UNIV. L.J. 711, 717–19 (2020).

[94] *Abbasi*, 137 S. Ct. at 1860. Specifically, the Court framed the detention policy claims as ones which "challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil." *Id.*

[95] *Id.* at 1859.

[96] Blair, *supra* note 93, at 717–19.

[97] *Abbasi*, 137 S. Ct. at 1856. Justice Kennedy stated that "this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.*

[98] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001).

[99] *Abbasi*, 137 S. Ct. at 1860.

[100] *Id.*

[101] *Id.* at 1861.

[102] *Id.*

[103] *Id. But see* Fallon, *supra* note 3, at 953–54 (arguing the Court was less concerned with separation of powers implications when it upheld a qualified immunity defense in *Ziglar v. Abbasi* for a § 1985 claim even though that statute does not specifically make such a defense available).

security powers to the Legislative and Executive Branches.[104] For the Court, these special factors, namely separation of powers principles and national security concerns, ruled the day.[105] The Court also stated that these special factors "suggest that Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than 'inadvertent.'"[106]

Finally, the Court emphasized that it was of "central importance"[107] to its denial of a cause of action that the respondents potentially had alternative remedies available to them—namely, injunctive relief and a petition for a writ of habeas corpus.[108] Interestingly, the Court acknowledged that habeas has not yet been held to apply in cases challenging a detainee's condition of confinement.[109] Nevertheless, the Court emphasized that these remedies would have "provided a faster and more direct route to relief[.]"[110] After *Abbasi*, the alternative remedy need not be as effective as *Bivens*,[111] nor does it need to be certain to exist—"the mere *possibility* of another remedy may suffice[.]"[112]

*2.* Hernandez v. Mesa *(2020)*

In *Hernandez v. Mesa*, the Supreme Court considered whether to extend *Bivens* to provide a remedy against a federal border patrol agent who shot across the Texas border and killed a fifteen-year-old Mexican boy on Mexican soil.[113] The boy's parents sought damages against the border patrol agent for violations of the boy's Fourth and Fifth Amendment rights.[114] Finding that a cross-border shooting claim was a "markedly new"[115] context, the Court quickly moved on to the special-factors analysis.[116] Ultimately, the Court declined to provide a *Bivens* remedy because there were special "factors that counsel[ed] hesitation,"[117] especially potential foreign relations effects,[118] national security

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104 *Abbasi*, 137 S. Ct. at 1861 (citing U.S. CONST. art. I, § 8; art. II, §§ 1–2).
105 *Id.*
106 *Id.*
107 *Id.* at 1862.
108 *Id.*; *see* Litman, *supra* note 5, at 1509–10.
109 *Abbasi*, 137 S. Ct. at 1862.
110 *Id.* (quoting Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)).
111 Reinert & Mulligan, *supra* note 4, at 1486 (citing Bush v. Lucas, 462 U.S. 367, 386 (1983)).
112 Litman, *supra* note 5, at 1509–10.
113 Hernandez v. Mesa, 140 S. Ct. 735 (2020).
114 *Id.* at 741.
115 *Id.* at 739.
116 *Id.* at 744–49.
117 *Id.* at 744.
118 *Id.*; Blair, *supra* note 93, at 720–21.

concerns,[119] and various statutes in which Congress prohibited damages claims against federal officials when the injury occurred abroad.[120] The Court made clear that all of these special factors stemmed from one common concern—"respect for the separation of powers."[121]

As for the effect on foreign relations, the Court highlighted the adverse interests of the United States and Mexico in how a situation such as this one was handled and determined that it was "not [the Court's] task to arbitrate between them."[122] The Court also emphasized that the Executive Branch "has 'the lead role in foreign policy.'"[123] In the realm of national security, the Court articulated the importance of border security and compared judicial restraint in this realm to the restraint the Court showed regarding military discipline in *Chappell v. Wallace*.[124] The Court stated, "Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field."[125]

The Court determined that "it is 'telling,' . . . that Congress has repeatedly declined to authorize the award of damages for injury inflicted outside [U.S.] borders."[126] As Justice Ginsburg pointed out in the dissent, the Court's analysis overly focused on the fact that the boy happened to be on the Mexican side of the border when he was shot.[127] In the words of Justice Ginsburg, "[the boy's] location at the precise moment the bullet landed should not matter one whit"[128] because "[t]he purpose of *Bivens* is to deter the *officer*."[129] Similarly, the Court

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119 *Hernandez*, 140 S. Ct. at 746; Blair, *supra* note 93, at 720–21.

120 *Hernandez*, 140 S. Ct. at 747; Blair, *supra* note 93, at 720–21.

121 *Hernandez*, 140 S. Ct. at 749 (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1859 (2017)).

122 *Id.* at 745. The Court indicated that the U.S. Executive had determined that the agent had not acted unreasonably in the circumstances based on Border Patrol policy and thus should not "face charges in the United States nor be extradited to stand trial in Mexico." *Id.* at 744. On the other hand, Mexico argued that the agent should be extradited to stand trial in Mexico under Mexican law and that "the United States has an obligation under international law, specifically Article 6(1) of the International Covenant on Civil and Political Rights, . . . to provide a remedy for the shooting in this case." *Id.* at 745.

123 *Id.* at 744 (quoting Medellín v. Texas, 552 U.S. 491, 524 (2008)).

124 *Id.* at 746–47; Chappell v. Wallace, 462 U.S. 296 (1983).

125 *Hernandez*, 140 S. Ct. at 747.

126 *Id.* The Court gave examples of statutes that decline to offer damages awards for injuries inflicted outside the United States, including 28 U.S.C. § 1983, the Federal Tort Claims Act, and the Torture Victim Protection Act. *Id.* at 747–48.

127 *Id.* at 756 (Ginsburg, J., dissenting).

128 *Id.* Furthermore, Justice Ginsburg emphasized that "[i]t scarcely makes sense for a remedy trained on deterring rogue officer conduct to turn upon a happenstance subsequent to the conduct—a bullet landing in one half of a culvert, not the other." *Id.*

129 *Id.* (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017).

refused to give equal weight to the fact that the agent's conduct occurred on the United States side of the border.[130] Nevertheless, the Court deferred to Congress's refusal in related statutes to allow damages claims against federal officials when the injury occurred abroad.[131]

The Court also stated that "[i]t is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [the plaintiff] an 'adequate' federal remedy for his injuries[.]"[132] On the other hand, the dissent pointed out that the availability of alternative remedies was fundamentally important to the Court's holding in *Abbasi*.[133] Here, the plaintiffs had no alternative remedies under both American law and Mexican law.[134] Importantly, the dissent suggested that "[w]hile the absence of alternative remedies, standing alone, does not warrant a *Bivens* action, . . . it remains a significant consideration under *Abbasi*'s guidelines."[135] Regardless, the Court held that separation of powers principles defeated the plaintiff's *Bivens* claim.[136]

### *3. Current* Bivens *Test*

Currently, the test for determining whether a court should extend a *Bivens* claim to an individual consists of two steps. First, a court considers "[w]hether the claim arises in a new *Bivens* context, i.e., whether 'the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court].'"[137] Second, if the answer to the first question is yes, then a court will consider "whether there are any special factors that counsel hesitation about granting the extension."[138] If such factors exist, "that is, if [the Court] has reason to pause before applying *Bivens* in a new context or to a new class of defendants—[the Court] reject[s] the request."[139]

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130 *Id.* at 756.

131 *Id.* at 749.

132 *Id.* at 750 (quoting United States v. Stanley, 483 U.S. 669, 683 (1987)).

133 *Id.* at 757 (citing *Abbasi*, 137 S. Ct. at 1862).

134 *Id.* The dissent indicated that "[i]t is uncontested that plaintiffs find no alternative relief in Mexican law, state law, the Federal Tort Claims Act ('FTCA'), the Alien Tort Statute ('ATS'), or federal criminal law." *Id.*

135 *Id.*

136 *Id.* at 750. The Court noted that "[w]hen evaluating whether to extend *Bivens* [sic], the most important question 'is "who should decide" whether to provide for a damages remedy, Congress or the courts?'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1857). Further, the Court stated, "The correct 'answer most often will be Congress.'" *Id.*

137 *Abbasi*, 137 S. Ct. at 1864.

138 *Hernandez*, 140 S. Ct. at 743.

139 *Id.*

*4. Special Factors*

The special-factors analysis articulated by the Court is incredibly broad.[140] In fact, "[u]nder the current *Bivens* jurisprudence, there is possibly, even likely, no limit to special factors that counsel hesitation, short of [a rational basis]."[141] This section provides a non-exhaustive list of special factors the Court has found in previous *Bivens* cases.

In the military realm, the Court has found that the unique relationship between military personnel and their superior officers,[142] military's separate disciplinary system,[143] and Constitution's express grant of military powers to Congress[144] are all "special factors counselling hesitation[.]"[145] As for federal agency liability under *Bivens*, the Court has found the "potentially enormous financial burden"[146] on federal agencies stemming from such liability to be a special factor.[147]

The Court has also emphasized that the separation of powers is "central to [this] analysis."[148] Therefore, the Court must "concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."[149] The Court has recognized that Congress's establishment of any "alternative remedial structure"[150] can single-handedly preclude the Court from extending a *Bivens* cause of action,[151] whether or not that remedial structure offers the plaintiff adequate relief.[152] In *Abbasi*, the Court demoted the analysis of alternative remedies to a consideration of the special-factors analysis.[153] As James Pfander and Wade Formo point out, this "represented a departure from

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140 Blair, *supra* note 93, at 720.

141 *Id.* at 720.

142 Chappell v. Wallace, 462 U.S. 296, 299 (1983).

143 *Id.* at 304.

144 *Id.* at 301.

145 *Id.* at 298.

146 FDIC v. Meyer, 510 U.S. 471, 486 (1994).

147 *Id.*

148 Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

149 *Id.* at 1857–58.

150 *Id.* at 1858.

151 *Id*.

152 Hernandez v. Mesa, 140 S. Ct. 735, 750 (2020) (quoting United States v. Stanley, 483 U.S. 669, 683 (1987)).

153 James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 746 (2020) (citing *Abbasi*, 137 S. Ct. at 1858).

the approach in *Wilkie v. Robbins*, where the Court devoted the first step of its analysis to an assessment of alternatives."[154]

Further examples of special factors include potential foreign relations effects[155] and national security concerns.[156] Ultimately, it seems the Court will be able to find a special factor counselling hesitation if it wants to in any given situation.[157]

### *D. The Future of* Bivens

As highlighted in the *Abbasi* and *Hernandez* decisions, the Supreme Court's approach to *Bivens* claims has been increasingly restrictive.[158] With practically any difference being sufficient to render a case a "new context"[159] and the broad scope of the special-factors analysis,[160] it seems unlikely that the Court will extend *Bivens* past the three contexts to which it has already been extended.[161] Furthermore, two current justices of the Supreme Court—Justice Thomas and Justice Gorsuch—have argued for the Court to overrule *Bivens* altogether.[162]

The "conservative majority['s]"[163] resistance to *Bivens* stems from the separation of powers, and specifically, the lack of power the Judiciary has to legislate under the Constitution.[164] In *Hernandez*, Justice Thomas argued in his concurrence that allowing the *Bivens* doctrine to endure would "perpetuat[e] a usurpation of the legislative power"[165] because Congress, the body with the legislative power,[166] has not acted to create such a damages cause of action against federal officials.[167] According to the "conservative majority,"[168] creating a cause of action for constitutional violations is a "quintessentially legislative

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154 *Id.* at 745 (citing Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

155 *Hernandez*, 140 S. Ct. at 744; Blair, *supra* note 93, at 720–21.

156 *Hernandez*, 140 S. Ct. at 746; Blair, *supra* note 93, at 720–21.

157 Blair, *supra* note 93, at 720.

158 *Id.* at 714.

159 *Id.* at 718–19.

160 *Id.* at 722.

161 *Id.* at 711, 722.

162 *Id.* (citing Hernandez v. Mesa, 140 S. Ct. 735, 750–53 (2020) (Thomas, J., concurring)).

163 *Id.* at 722 (citing Taylor K. Brown, *Ruth Bader Ginsburg: Who Are the Justices on the US Supreme Court?*, BBC NEWS (Sept. 19, 2020), https://www.bbc.com/news/magazine-33103973). The conservative justices on the Court currently include Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Thomas. *See id.* at 722, 723 n.102.

164 *Id.* at 711, 716.

165 *Hernandez*, 140 S. Ct. at 752 (Thomas, J., concurring); Blair, *supra* note 93, at 715.

166 U.S. CONST. art. I, § 1.

167 *Hernandez*, 140 S. Ct. at 752 (Thomas, J., concurring); Blair, *supra* note 93, at 715–16.

168 Blair, *supra* note 93, at 722.

act."[169] Thus, the Court has deferred to Congress and refused to extend *Bivens* so as not to impinge on the legislative responsibilities of Congress.[170]

With Justice Ginsburg's passing in September 2020,[171] President Trump nominated to the Supreme Court now-Justice Amy Barrett of the Seventh Circuit, a "favourite of social conservatives[.]"[172] Justice Barrett was confirmed on October 26, 2020.[173] The Supreme Court now sits at six conservative justices and three liberal justices.[174] Given that the pushback against the *Bivens* doctrine stems from the conservative justices on the Court,[175] the confirmation of Justice Barrett is concerning for fans of the *Bivens* doctrine. With Justices Thomas and Gorsuch calling for the end of *Bivens*,[176] it remains to be seen how the changing ideological makeup of the Court will affect the future of the *Bivens* doctrine.

## II. CANADA

### *A. The Canadian Government and Constitution*

As a constitutional monarchy and federal parliamentary democracy,[177] Canada has a federal government in addition to provincial governments for its ten provinces and three territories.[178] The Constitution of Canada is made up of the Constitution Act, 1867 and the Constitution Act, 1982, which contains the Canadian Charter of Rights and Freedoms (Charter).[179] To protect human rights in Canada, the Parliament enacted the Canadian Bill of Rights in 1960 and the

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169 *Id.* at 716.

170 *Id.*

171 Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NAT'L PUB. RADIO (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87.

172 Anthony Zurcher, *Amy Coney Barrett: Trump Nominates Conservative Favourite for Supreme Court*, BBC NEWS (Sept. 27, 2020), https://www.bbc.com/news/world-us-canada-54312699.

173 Grace Segers, *Amy Coney Barrett Sworn In as Newest Supreme Court Justice*, CBS NEWS (Oct. 27, 2020, 11:18 AM), https://www.cbsnews.com/news/amy-coney-barrett-supreme-court-justice-sworn-in.

174 Zurcher, *supra* note 172; *The Political Leanings of the Supreme Court Justices*, AXIOS (June 1, 2019), https://www.axios.com/supreme-court-justices-ideology-52ed3cad-fcff-4467-a336-8bec2e6e36d4.html (stating that Justices Breyer, Kagan, and Sotomayor are the liberal justices on the Court).

175 Blair, *supra* note 93, at 715–16.

176 *Id.* at 711, 722 (citing Hernandez v. Mesa, 140 S. Ct. 735, 750–53 (2020) (Thomas, J., concurring)).

177 Ted Tjaden & Kim Nayyer, *Update: Researching Canadian Law*, GLOBALEX (Feb. 2019), https://www.nyulawglobal.org/globalex/Canada1.html#_The_Canadian_Legal.

178 *Id.*; *Introduction to the Canadian Legal System*, UNIV. MELBOURNE, https://unimelb.libguides.com/c.php?g=402997&p=5235595 (last visited Sept. 20, 2020).

179 *The Canadian Constitution*, UNIV. MELBOURNE, https://unimelb.libguides.com/c.php?g=402997&p=5235583 (last visited Sept. 20, 2020).

Canadian Human Rights Act in 1977.[180] However, because legislation is easily susceptible to change, the protection that these laws provide is relatively minimal.[181] As part of the written Constitution, the Charter protects human rights in Canada to a greater extent than the aforementioned laws.[182] Furthermore, the Charter "applies to all government action, meaning to the provincial legislatures and Parliament, and to everything done under their authority."[183]

Unlike in the United States, the power of Canadian courts to remedy a Charter violation is "constitutionally guaranteed."[184] The Constitution of Canada provides constitutional remedies in three separate provisions: Section 24(1) of the Charter, Section 24(2) of the Charter, and Section 52(1) of the Constitution Act, 1982.[185] Section 24(1) of the Charter provides:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.[186]

Notably, the Charter grants courts wide discretion in fashioning a remedy to redress constitutional violations under Section 24(1).[187] Marilyn Pilkington, a prominent scholar of Canadian Constitutional Law, described this wide discretion as follows:

> The Charter provides no explicit guidance as to the purposes for which remedies are to be given, the principles according to which courts should determine whether a remedy is appropriate and just in

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[180] *Rights and Freedoms in Canada*, DEP'T JUST., https://www.justice.gc.ca/eng/rp-pr/cp-pm/just/06.html (last visited Sept. 20, 2020).

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Marilyn L. Pilkington, *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms*, 62 CAN. BAR REV. 517, 530 (1984); *accord* Canadian Charter of Rights and Freedoms, § 24(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). In the United States, the power to remedy a constitutional violation either stems from a statute, as is the case with state officials under 28 U.S.C. § 1983, or stems from the Court's "ordinary jurisdiction and remedial authority" to imply a cause of action under the *Bivens* doctrine. Pilkington, *supra*, at 530, 533.

[185] Katharine June Fisher, Using Charter Damages to Provide Meaningful Redress and Promote State Accountability: A Re-Examination of the Omar Khadr Case 13–14 (Aug. 11, 2020) (unpublished L.L.M. thesis, Osgoode Hall Law School of York University) (on file with Osgoode Digital Commons).

[186] Canadian Charter of Rights and Freedoms, § 24(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

[187] Fisher, *supra* note 185, at 14.

> the circumstances, or the procedures through which applications for remedies should be made.[188]

Thus, the Charter expressly grants Canadian courts the power to determine how to best remedy a Charter violation under Section 24(1),[189] which could be through a declaration, supervisory jurisdiction, injunction, Charter damages, or other remedies.[190] Furthermore, it seems that the only textual limitation on this discretion is that the remedy must be "appropriate and just in the circumstances."[191] Charter damages under Section 24(1) of the Charter will be the focus of this Comment. However, it is helpful to understand the entire remedial framework provided in the Constitution of Canada.

While Section 24(1) is incredibly broad, Section 24(2) of the Charter is limited in application to criminal proceedings.[192] Section 24(2) provides courts with the power to exclude any unconstitutionally obtained evidence upon a showing that "the admission of [it in the proceedings] 'would bring the administration of justice into disrepute.'"[193] Finally, Section 52(1) of the Constitution Act, 1982 declares the Constitution as "the supreme law of Canada[.]"[194] Thus, Section 52(1) renders all legislation that conflicts with the Constitution null and void.[195]

Since the Charter explicitly states that it applies to the federal and provincial governments,[196] individuals seeking redress for Charter violations are able to directly sue the government, rather than be forced to sue individual officials, as

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188 Pilkington, *supra* note 184, at 518.

189 *Id.* at 530; Canadian Charter of Rights and Freedoms, § 24(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

190 Fisher, *supra* note 185, at 14.

191 Canadian Charter of Rights and Freedoms, § 24(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); *see* Pilkington, *supra* note 184, at 530; Raj Anand, *Damages for Unconstitutional Actions: A Rule in Search of a Rationale*, 27 Nat'l J. Const. L. 159, 160 (2010).

192 Fisher, *supra* note 185, at 14.

193 Canadian Charter of Rights and Freedoms, § 24(2), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); *accord* Fisher, *supra* note 185, at 14.

194 Constitution Act, 1982, § 52(1), *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

195 *Id.*; *see* Fisher, *supra* note 185, at 14. According to Fisher, "[r]emedial options used by courts under subsection 52(1) include striking down a law, severing offending language from the statute, reading down a provision that is overbroad, reading in language to remedy an under-inclusive provision, ordering a temporary suspension of invalidity, and providing an exemption for a particular claimant[.]" *Id.* at 14–15.

196 Pilkington, *supra* note 184, at 535; Canadian Charter of Rights and Freedoms, § 32(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). Specifically, Section 32(1) of the Charter applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament . . . [and] to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." *Id.*; Pilkington, *supra* note 184, at 552.

is the case in the United States due to sovereign immunity.[197] For this reason, Pilkington argues Canadian courts have "greater remedial scope" than U.S. courts.[198]

## *B. Charter Damages Jurisprudence*

### *1. Pre-*Ward *Cases*

Canadian courts have recognized the existence of damages for violations of the Charter for around thirty years.[199] However, the doctrine surrounding Charter damages has evolved sluggishly.[200] Prior to 2010, the Supreme Court of Canada (SCC) refrained from directly addressing the purpose of Charter damages and the framework that courts should follow in determining the applicability of Charter damages in a given situation.[201] Throughout this period, Charter damages were discussed as a potential remedy in the SCC's dicta and by dissenting judges, but "usually only in reference to how this area of the law was uncertain at best."[202] The following SCC cases evidence the need for guidance with respect to the Charter-damages remedy.[203]

In *RJR — MacDonald Inc. v. Canada*, the SCC considered the harm that would occur to two tobacco companies in the absence of a preliminary injunction restricting the application of a challenged advertising statute.[204] Although this case involves the issuance of an injunction under the Charter,[205] the Court incidentally discussed the availability of Charter damages.[206] While the Court

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[197] Pilkington, *supra* note 184, at 535. Pilkington also points out that these individuals will not "be denied the fruits of their victory against an official since it is open to a court to find government vicariously liable whenever it is appropriate and just to do so." *Id.*

[198] *Id.*

[199] Chuks Okpaluba, *The Development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court*, 23 STELLENBOSCH L. REV. 55, 55 (2012).

[200] *Id.*

[201] Fisher, *supra* note 185, at 21. Fisher argues that the "absence of a clear standard to assess whether *Charter* damages were appropriate . . . created inconsistency in the jurisprudence with respect to fault requirements, double recovery, the overall purpose of the remedy, and what objectives it ought to promote." *Id.*

[202] Peter Krikor Adourian, Charter Damages: Private Law in the Unique Public Law Remedy 16 (Sept. 7, 2018) (unpublished L.L.M. thesis, Osgoode Hall Law School of York University) (on file with Osgoode Digital Commons). Adourian further notes that the SCC's "decisions around *Charter* damages are something akin to setting up the furniture before the house is built, addressing details like specific immunities to *Charter* damages before defining its purpose and function." *Id.*

[203] *See* Fisher, *supra* note 185, at 22.

[204] RJR — MacDonald Inc. v. Canada (Attorney General), 1994 SCC 117, [1994] 1 S.C.R. 311, paras. 341–42 (Can.); *see* Adourian, *supra* note 202, at 17.

[205] *RJR — MacDonald Inc.*, 1 S.C.R. at 311; *see* Adourian, *supra* note 202, at 17.

[206] *RJR — MacDonald Inc.*, 1 S.C.R. at 311; *see* Adourian, *supra* note 202, at 17.

acknowledged the availability of Charter damages as a potential remedy under the Charter,[207] the Court noted that they are not "the primary remedy[.]"[208] The Court further observed that an analytical framework for Charter damages has yet to be created.[209] Nevertheless, the Court offered no guidance on the subject.[210]

Although *R. v. 974649 Ontario Inc.* does not directly involve Charter damages, it does involve a Charter remedy under Section 24(1).[211] Specifically, the SCC held that it was within the jurisdiction of a provincial court judge to award a claimant costs under Section 24(1) against the Crown for a violation of the Charter.[212] Importantly for the development of the Charter-damages remedy, the Court stated the following: "To the extent that it is difficult or impossible to obtain remedies for *Charter* breaches, the *Charter* ceases to be an effective instrument for maintaining the rights of Canadians."[213] This statement demonstrates the SCC's recognition of the importance of effective and available remedies with respect to Charter violations.

In *Mackin v. New Brunswick (Minister of Finance)*,[214] the SCC considered whether Charter damages were available in addition to a remedy striking down unconstitutional legislation under Section 52(1) of the Constitution Act, 1982.[215] In accordance with precedent, the Court applied the "general rule against awarding concurrent remedies"[216] and determined that Charter damages were not simultaneously available with a remedy under Section 52(1).[217] In what would later be coined as the *Mackin* principle, the Court announced an exception to this general rule against concurrent remedies.[218] Specifically, the Court held that Charter damages were not available for a state's enforcement of a valid, yet subsequently invalidated, statute "absent conduct that is clearly wrong, in bad

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[207] *RJR — MacDonald Inc.*, 1 S.C.R. at para. 341; *see* Fisher, *supra* note 185, at 22.

[208] *RJR — MacDonald Inc.*, 1 S.C.R. at para. 341; *see* Fisher, *supra* note 185, at 22.

[209] *RJR — MacDonald Inc.*, 1 S.C.R. at para. 342; *see* Fisher, *supra* note 185, at 22.

[210] *RJR — MacDonald Inc.*, 1 S.C.R. at para. 341; *see* Fisher, *supra* note 185, at 22. As Peter Adourian points out, "[i]n over a decade of Supreme Court decisions on the *Charter*, these three comments – which are entirely *dicta* in a case about injunctions, not damages – became the most informative precedential literature on *Charter* damages." Adourian, *supra* note 202, at 17.

[211] R. v. 974649 Ontario Inc., 2001 SCC 81, [2001] 3 S.C.R. 575 (Can.); *see* Fisher, *supra* note 185, at 23.

[212] *974649 Ontario Inc.*, 3 S.C.R. at para. 97; *see* Fisher, *supra* note 185, at 23.

[213] *974649 Ontario Inc.*, 3 S.C.R. at para. 1; *see* Fisher, *supra* note 185, at 23.

[214] Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, 2002 SCC 13, [2002] 1 S.C.R. 405 (Can.).

[215] *Id.*; *see* Fisher, *supra* note 185, at 23.

[216] Fisher, *supra* note 185, at 23; *see* Schachter v. Canada, 1992 SCC 74, [1992] 2 S.C.R. 679 (Can.); Guimond v. Quebec (Attorney General), 1996 SCC 175, [1996] 3 S.C.R. 347 (Can.).

[217] *Mackin*, 1 S.C.R. at para. 33; *see* Fisher, *supra* note 185, at 23.

[218] *Id.*

faith or an abuse of power[.]"[219] While the Court determined that the legislation was unconstitutional, it reasoned that holding the state liable in damages for enforcing a law that was valid at the time of enforcement would discourage officials from enforcing a law for fear of it being subsequently struck down.[220] The Court sought to "balance . . . the protection of constitutional rights and the need for effective government."[221] This concern for "good governance"[222] reappears in the current Charter-damages framework.[223] Instead of providing an answer to the fault requirement question, *Mackin* contributed to the jurisprudential "confusion about whether the state had to commit some type of fault before *Charter* damages could be awarded."[224]

In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, the SCC considered whether a trial judge's retention of supervisory jurisdiction over the government's compliance with a court order was an "appropriate and just" remedy under Section 24(1) of the Charter.[225] The trial court found that the claimants' Section 23 Charter rights were violated by the province "when it failed to provide adequate French-language schooling."[226] The trial judge ordered the province to "use their best efforts to construct schools and provide homogenous French programs by certain dates."[227] In fashioning his remedy, the trial judge also "retained supervisory jurisdiction" to ensure that the province was adhering to the order and its schedule.[228] On appeal, the SCC upheld the trial judge's remedy five to four.[229] However, the dissent asserted that the separation of powers doctrine prevented this type of supervisory jurisdiction.[230] More importantly for this Comment's purposes, the Court illuminated the meaning of an "appropriate and just" remedy under Section 24(1) by providing four factors for courts to utilize in making that determination.[231] According to the Court, an "appropriate and just" remedy will (1) "meaningfully vindicate[] the rights and freedoms of the claimants[;]"[232] (2) "employ means that are

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219 *Id.* at para. 78; *see* Adourian, *supra* note 202, at 24.

220 *Mackin*, 1 S.C.R. at para. 79; *see* Adourian, *supra* note 202, at 27.

221 *Mackin*, 1 S.C.R. at para. 79; *see* Adourian, *supra* note 202, at 26–27.

222 Adourian, *supra* note 202, at 27.

223 Fisher, *supra* note 185, at 24.

224 *Id.*

225 Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62, [2003] 3 S.C.R. 3, para. 55 (Can.); *see* Fisher, *supra* note 185, at 24.

226 Adourian, *supra* note 202, at 18; *see Doucet-Boudreau*, 3 S.C.R. at paras. 1–8.

227 Fisher, *supra* note 185, at 25; *see Doucet-Boudreau*, 3 S.C.R. at paras. 5–8.

228 Fisher, *supra* note 185, at 25; *see Doucet-Boudreau*, 3 S.C.R. at paras. 5–8.

229 *Doucet-Boudreau*, 3 S.C.R. at para. 55.

230 *Id.* at para. 92 (LeBel and Deschamps, JJ., dissenting); *see* Fisher, *supra* note 185, at 25.

231 *Doucet-Boudreau*, 3 S.C.R. at para. 55; *see* Adourian, *supra* note 202, at 18.

232 *Doucet-Boudreau*, 3 S.C.R. at paras. 55–58; *see* Adourian, *supra* note 202, at 18.

legitimate within the framework of [Canada's] constitutional democracy[;]"[233] (3) align with the proper "function and powers of a court[;]"[234] and (4) be "fair to the party against whom the order is made."[235] Thus, the Court defined Section 24(1) remedies in a way that would give effect to the purpose of the Charter provision.[236] The Court reasoned that such a purposive interpretation of Section 24(1) was necessary in order to promote the well-known principle that "where there is a right, there must be a remedy."[237]

As can be seen from the sparse jurisprudence on Charter damages since the Charter's enactment in 1982,[238] Canadian courts needed the SCC to provide them with "a coherent framework" for addressing Charter-damages claims.[239]

*2.* Vancouver (City) v. Ward

In *Vancouver (City) v. Ward*, the SCC finally announced a structured framework for analyzing a claim for Charter damages.[240] At a ceremony in Vancouver, police mistook Alan Ward, a civil rights lawyer, for someone who intended to fling a pie at the Prime Minister.[241] The police chased and handcuffed Ward and arrested him for breach of the peace.[242] The police then took him to a police station where he was subsequently strip-searched, and impounded his car.[243] Later, the police discovered they could not obtain a search warrant for the car and lacked the necessary evidence to charge Ward.[244] Around four and half hours after his arrest, Ward was released.[245] Ward sued the Province and the City of Vancouver for various torts and for breach of his Charter rights, seeking Charter damages.[246]

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233 *Doucet-Boudreau*, 3 S.C.R. at para. 56; *see* Adourian, *supra* note 202, at 18.

234 *Doucet-Boudreau*, 3 S.C.R. at para. 57; *see* Adourian, *supra* note 202, at 18.

235 *Doucet-Boudreau*, 3 S.C.R. at para. 58; *see* Adourian, *supra* note 202, at 18.

236 Adourian, *supra* note 202, at 18.

237 *Doucet-Boudreau*, 3 S.C.R. at para. 25; *see* Fisher, *supra* note 185, at 25.

238 *See* Fisher, *supra* note 185, at 17.

239 *Id.* at 22.

240 *See* Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28, para. 22 (Can.).

241 Okpaluba, *supra* note 199, at 63; *Ward*, 2 S.C.R. at para. 22. Apparently the Prime Minster was a popular target for being "pied." Brooke MacKenzie, *Backpedalling on Charter Damages: Henry v. British Columbia (Attorney General)*, 45 ADVOCS.' Q. 359, 361 (2016).

242 Okpaluba, *supra* note 199, at 63; *Ward*, 2 S.C.R. at paras. 7–8.

243 Okpaluba, *supra* note 199, at 63; *Ward*, 2 S.C.R. at para. 2.

244 Okpaluba, *supra* note 199, at 63; *Ward*, 2 S.C.R. at para. 9.

245 Okpaluba, *supra* note 199, at 63; *Ward*, 2 S.C.R. at para. 9.

246 Okpaluba, *supra* note 199, at 63; *Ward*, 2 S.C.R. at para. 10.

The SCC emphasized that Charter damages are a form of "public law damages[.]"[247] When an individual seeks Charter damages, he seeks damages directly against the government, as opposed to the individual officers responsible for the violation.[248] If someone wished to sue the individual officer responsible for violating his Charter rights, he would need to sue them through "existing causes of action[,]"[249] such as ordinary tort law.[250]

In a unanimous opinion, the SCC crafted a four-step process for courts to determine when damages are available under Section 24(1) of the Charter. At step one, the claimant must show that he has suffered a violation of his Charter rights.[251] At step two, the claimant must show that Charter damages fulfill at least one of the following functions: compensation, vindication, or deterrence.[252] At step three, the burden is on the defendant (i.e. the state) to show that Charter damages are "inappropriate and unjust" because of countervailing factors.[253] Finally, at step four the court determines the quantum of damages.[254]

In step one, the Court determined that Ward's Section 8 Charter rights had been violated by both the strip search and the seizure of his car.[255] At step two, the Court emphasized that it was adopting a "functional approach to damages[.]"[256] The goal of compensation is to place the claimant in the position he would have been in but-for the breach of his Charter rights.[257] The Court emphasized that compensation would generally be "the most prominent function"[258] and that a court should account for both pecuniary and non-pecuniary loss.[259] As for vindication, the focus is on "affirming constitutional

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247 *Ward*, 2 S.C.R. at para. 22.

248 *Id.*

249 *Id.*

250 *Id*. However, the Court noted that "the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state." *Id.*

251 *Id.* at para. 4.

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.* at paras. 62, 75. Section 8 of the Charter states, "Everyone has the right to be secure against unreasonable search or seizure." Canadian Charter of Rights and Freedoms, § 8, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

256 *Ward*, 2 S.C.R. at para. 24.

257 *Id.* at paras. 25, 27; Kent Roach, *A Promising Late Spring for Charter Damages: Ward v. Vancouver*, 29 NAT'L J. CONST. L. 145, 154–55 (2010).

258 *Ward*, 2 S.C.R. at para. 25.

259 *Id.* at paras. 49–50.

values"[260] and addressing the societal harm caused by the breach.[261] Finally, deterring future breaches of the Charter is an important goal of awarding Charter damages.[262] By deterrence, the Court emphasized that it was referring to "general deterrence,"[263] meaning that the goal is to dissuade other officials from violating the Charter and to foster an overall environment of governmental compliance.[264] Importantly, the Court stated that the absence of "personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award."[265]

As for the strip search, the Court determined that the Charter violation was "serious"[266] because strip searches are necessarily demeaning.[267] Thus, compensation was required for these intangible interests.[268] The objectives of deterrence and vindication would also be served by an award of damages for the strip search, due to the nature of the officer's conduct.[269] On the other hand, the seizure of the car did not call for an award of Charter damages because the police never searched the car and instead drove Ward to his car following his release.[270] Since Ward did not require compensation for the seizure of his car and the Charter violation was "not of a serious nature[,]"[271] the Court found that a declaration of unconstitutionality would "adequately" fulfill the goals of vindication and deterrence.[272]

At step three, the state must show that countervailing factors render damages an inappropriate remedy in order to negate an award of Charter damages.[273] The Court did not provide an exhaustive list of such countervailing factors,[274] but indicated that the availability of alternative remedies and good governance

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260 *Id.* at para. 28.

261 *Id.*

262 *Id.* at para. 29.

263 *Id.*

264 *Id.*

265 *Id.* at para. 30.

266 *Id.* at para. 64.

267 *Id.* at para 64–65 (indicating further that "it is not too much to expect that police would be familiar with the settled law that routine strip searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is concealing weapons that could be used to harm themselves or others[.]").

268 *Id.* at para. 64.

269 *Id.* at para. 66.

270 *Id.* at para. 77.

271 *Id*.

272 *Id.* at para. 78.

273 *Id.* at para. 33.

274 *Id.* at para. 34.

concerns were two considerations.[275] If an alternative remedy adequately fulfills the goals of compensation, vindication, and/or deterrence, then Charter damages "would serve no function" and therefore would not be available.[276] While a possible tort claim does not bar Charter damages, the court noted that "double compensation"[277] is not appropriate.[278] As for good governance concerns, the Court rejected the idea that Charter damages would always "chill[]" government conduct in a negative way because accepting that argument would mean that Charter damages would never be awarded.[279] Furthermore, deterring breaches of the Charter reinforces effective governance.[280] The Court noted that a valid good governance concern was present in *Mackin*, namely that holding a state liable in damages for enforcing a law that was valid at the time of enforcement would discourage officials from enforcing the law.[281]

As for the strip search, the Court noted that there were no available alternative remedies that would fulfill the function of compensation and redress his Section 8 Charter rights.[282] The Court also determined that no good governance concerns applied.[283] Thus, the Court found that Charter damages were functionally required.[284] Since the Court found the seizure of Ward's car was adequately remedied through a declaration, the Court did not address step three or four in relation to that claim.[285]

In step four, the Court addressed the amount of damages to be awarded for the strip search.[286] The phrase "appropriate and just" applies not only to whether damages should be awarded at all, but also to the proper amount of damages awarded.[287] Compensation requires "evidence of the loss suffered" for both pecuniary and non-pecuniary injuries.[288] As for vindication and deterrence, the

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275 *Id.* at paras. 33–34, 38.

276 *Id.* at para. 34.

277 *Id.* at para. 36.

278 *Id.* Therefore, "a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation[.]" *Id.*

279 *Id.* at para. 38.

280 *Id.*

281 *Id.* at para. 39; Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, 2002 SCC 13, [2002] 1 S.C.R. 405, para. 79 (Can.); *see* Adourian, *supra* note 202, at 27.

282 *Ward*, 2 S.C.R. at para. 68. The Court noted that Ward's tort claims of assault and negligence were dismissed, and that "[w]hile this defeated [his] claim in tort, it did not change the fact that his right under s. 8 of the *Charter* . . . was violated." *Id.*

283 *Id.*

284 *Id.* at para. 69.

285 *Id.* at para. 77.

286 *Id.* at paras. 70–73.

287 *Id.* at para. 46.

288 *Id.* at paras. 48–50.

Court indicated that a court should consider the "seriousness of the breach,"[289] the "impact of the breach on the claimant[,]"[290] and the "seriousness of the state misconduct[.]"[291] The amount of damages needs to be fair to the claimant and the state.[292] Importantly, the Court emphasized that a court should "focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right."[293] An award of $5000 was sufficient to fulfill the goals of Charter damages because the strip search was "relatively brief and not extremely disrespectful"[294] as Ward was not forced to remove his underwear.[295]

### *3. Post-*Ward *Cases*

Since *Ward*, three notable Charter-damages cases have come before the SCC: *Henry v. British Columbia (Attorney General)* in 2015, *Ernst v. Alberta Energy Regulator* in 2017, and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia* in 2020.[296] One would think the SCC would remain loyal to the *Ward* framework that it took so long to develop, but a close examination of these next three cases suggests the Court is not so faithful.[297]

#### *a.* Henry v. British Columbia (Attorney General)

In *Henry v. British Columbia (Attorney General)*, a man who was wrongfully convicted in 1983 and spent twenty-seven years in prison sought Charter damages for violations of his Section 7 and Section 11(d) rights.[298] The man's wrongful conviction and imprisonment stemmed from the Crown prosecutor's failure to disclose exculpatory evidence to the man before, during, and after his

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289 *Id.* at para. 52.

290 *Id.*

291 *Id.* The Court stated, "Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be." *Id.*

292 *Id.* at para. 53.

293 *Id.* at para. 55. The Court highlighted that while this is true, "damages under s. 24(1) should not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue." *Id.*

294 *Id.* at paras. 71, 73.

295 *Id.* at para. 71.

296 *See* Fisher, *supra* note 185, at 35.

297 *Id.*

298 Henry v. British Columbia (Attorney General), 2015 SCC 24, [2015] 2 S.C.R. 214 (Can.); *see* Adourian, *supra* note 202, at 49. Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Canadian Charter of Rights and Freedoms, § 7, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). The right provided in Section 11(d) of the Charter is the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal[.]" *Id.* § 11(d).

trial.[299] The man was acquitted upon the discovery of this information.[300] The SCC considered whether a claimant must plead the Crown prosecutor acted with malice in not disclosing the information in order to be eligible for Charter damages.[301] While the SCC determined that malice is not required, the majority announced that the claimant must plead the Crown "intentionally [withheld] information when it [knew], or would reasonably [have been] expected to know, that the information [was] material to the [accused's] defence" and that nondisclosure of the information would "likely impinge on the accused's ability to make full answer and defence."[302] The majority reasoned that requiring this "high threshold"[303] would promote good governance by ensuring that Crown prosecutors are able to perform their jobs without being "motivated by fear of civil liability[.]"[304]

The concurring opinion of Chief Justice McLachlin and Justice Karakatsanis disagreed with the way the majority approached the countervailing factors in this case.[305] Specifically, the concurrence highlighted that under the *Ward* framework countervailing factors are to be raised by the government during the third step of the analysis and thereby have no impact on the Court's assessment of a Charter damages claim until that step.[306] The majority, however, utilized theoretical policy concerns about protecting prosecutors to introduce a threshold liability requirement into the claimant's obligations at step one.[307] In this way, the majority failed to follow the *Ward* framework despite noting the framework was controlling.[308] While the SCC's holding technically only applies to cases involving wrongful non-disclosure,[309] it is possible this case will encourage lower courts and the SCC itself to supply threshold liability requirements in other types of cases as a result of considering policy concerns prior to the third

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299 *Henry*, 2 S.C.R. at paras. 9, 12, 122; *see* Adourian, *supra* note 202, at 49.

300 *Henry*, 2 S.C.R. at para. 19; *see* Adourian, *supra* note 202, at 49.

301 *Henry*, 2 S.C.R. at para. 30; *see* Adourian, *supra* note 202, at 50.

302 *Henry*, 2 S.C.R. at para. 31; *see* Adourian, *supra* note 202, at 50.

303 *Henry*, 2 S.C.R. at para. 31. Peter Adourian summarizes the Court's new test for Charter damages in wrongful nondisclosure cases "as requiring a *Charter* infringement plus intentional action, reasonable foreseeability, as well as causation and harm." Adourian, *supra* note 202, at 50.

304 *Henry*, 2 S.C.R. at para. 40.

305 *Id.* at para. 108 (McLachlin, C.J. and Karakatsanis, J., concurring); *see* MacKenzie, *supra* note 241, at 368.

306 *Henry*, 2 S.C.R. at para. 108 (McLachlin, C.J. and Karakatsanis, J., concurring); *see* MacKenzie, *supra* note 241, at 368.

307 *Henry*, 2 S.C.R. at para. 40. As Brooke MacKenzie aptly stated, "The majority veered off track . . . when it allowed policy concerns to steer it away from the *Ward* framework, rather than addressing those policy considerations within the framework." MacKenzie, *supra* note 241, at 371.

308 *Henry*, 2 S.C.R. at para. 34; *see* MacKenzie, *supra* note 241, at 365.

309 *Henry*, 2 S.C.R. at para. 33; *see* Adourian, *supra* note 202, at 54.

step of the *Ward* framework.[310] Thus, as Brooke MacKenzie points out, the majority in *Henry* "once again introduced uncertainty into an area that was only recently clarified."[311]

*b.* Ernst v. Alberta Energy Regulator

In *Ernst v. Alberta Energy Regulator*,[312] the SCC considered whether a statutory immunity clause was unconstitutional because it barred individuals from pursuing Charter-damages claims against a quasi-judicial regulatory board.[313] After publicly speaking out against the Alberta Energy Regulator (Board), Ernst claimed that the Board violated her Charter right to freedom of expression by barring her from communicating with the Board and from registering her various complaints regarding hydraulic fracturing for over one year.[314] The Board argued that Ernst was unable to bring a Charter-damages claim due to a statutory immunity clause that prevented individuals from bringing suit against the Board for any action taken pursuant to the Energy Resources Conservation Act.[315] Ernst argued that this immunity clause was unconstitutional because it barred her claim under the Charter for damages against the Board.[316]

The SCC broadly held that damages could never be an "appropriate and just remedy" for Charter violations committed by the Board.[317] Interestingly, the SCC emphasized that "[t]he jurisprudence does not require that every pleaded claim for *Charter* damages be assessed on an individualized, case-by-case basis[,]"[318] even though *Ward* made clear that "[w]hat is appropriate and just will depend on the facts and circumstances of the *particular case*."[319] Nevertheless, the SCC claimed to apply the *Ward* framework, specifically the countervailing factors portion, to determine that the Board could never be subject to Charter damages.[320] The SCC noted that judicial review is available as an "alternative, and more effective, remedy" in these types of cases and that

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310 *See* Adourian, *supra* note 202, at 54.

311 MacKenzie, *supra* note 241, at 360; *see* Adourian, *supra* note 202, at 51.

312 Ernst v. Alberta Energy Regulator, 2017 SCC 1, [2017] 1 S.C.R. 3 (Can.).

313 *Id.* at para. 13.

314 *Id.* at para. 6.

315 *Id.* at para. 9; Energy Resources Conservation Act, R.S.A. 2000, c E-10, § 43 (repealed 2013) (Can.).

316 *Ernst*, 1 S.C.R. at para. 2.

317 *Id.* at para. 31. Justice Cromwell stated, "If *Charter* damages could never be an appropriate and just remedy for *Charter* breaches by the Board, then [the immunity clause] does not limit the availability of such a remedy under the *Charter* and the provision cannot be unconstitutional." *Id.* at para. 24.

318 *Id.* at para. 29.

319 Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28, para. 19 (Can.) (emphasis added).

320 *Ernst*, 1 S.C.R. at para. 26.

the Board's ability to perform its functions would be frustrated if damages were allowed.[321] Furthermore, the SCC stated that a case-by-case analysis of whether Charter damages are appropriate against regulatory boards would render an immunity effectively useless.[322] As in *Henry*, the SCC restricted the scope of the Charter damages remedy, but this time by immunizing many regulatory boards from Charter-damages claims.[323]

*c.* Conseil scolaire francophone de la Colombie-Britannique v. British Columbia

In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*,[324] the claimants alleged the Province violated their minority-language rights under Section 23 of the Charter.[325] The claimants sought "various orders requiring the Province to alter its funding system for the provision of French language education, remedy issues with inadequate educational facilities . . . and provide compensation for past Section 23 breaches."[326] With regard to Charter damages, the SCC considered whether the *Mackin* principle immunizes the government from Charter damages stemming from "decisions made in accordance with government *policies*."[327] The SCC held the *Mackin* principle does not apply to actions taken pursuant to government policies because extending immunity to government policies would render the Charter damages remedy "illusory."[328] The SCC stressed that such an expansive interpretation of the *Mackin* principle would "permit a government to avoid liability for damages simply by showing that its unlawful actions are authorized by its policies."[329] Highlighting the differences between duly enacted

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[321] *Id.* at paras. 30, 41. Though acknowledging that Charter damages are not available as a remedy through judicial review, the SCC emphasized that judicial review could potentially provide a claimant with a corrective order and faster relief. *Id.* at paras. 35, 37. The SCC emphasized that "*Ward* directs [courts] to consider the existence of alternative remedies, not identical ones[.]" *Id.* at para. 37.

[322] *Id.* at para. 30.

[323] *See* Fisher, *supra* note 185, at 37.

[324] Conseil scolaire francophone de la Colombie-Britannique v. British Columbia, 2020 SCC 13 (Can.).

[325] *Id*. at 27–28. As Professor Emily Lewsen notes, Section 23 of the Charter provides Canadians "in regions of Canada where either English or French is a minority language in relation to the other" and "whose first language is or whose primary school instruction was in [English or French]" with "the right to have their children receive a public education in that language." Emily Lewsen, *En Termes Pédagogiques: The Supreme Court Issues a Long-Awaited Ruling that Clarifies and Invigorates Minority Language Educational Rights*, 29 EDUC. & L.J. 239, 240 (2020). Canadian Charter of Rights and Freedoms, § 23(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

[326] Lewsen, *supra* note 329, at 241.

[327] *Conseil scolaire francophone*, 2020 SCC at para. 164 (emphasis added).

[328] *Id.* at paras. 166, 173.

[329] *Id.* at para. 172.

legislation and government policies, the SCC emphasized that a law is "well-defined" and enacted through "a transparent public process[,]"[330] while a government policy is a broad category with "unclear limits[.]"[331] These differences persuaded the SCC not to extend the immunity to cover government policies.[332] The SCC ordered the Province to pay $6 million and $1.1 million in Charter damages respectively for failing to sufficiently fund school transportation and rural minority-language schools as required by Section 23.[333]

## III. DISCUSSION

In the United States, narrowing the *Bivens* cause of action has left individuals with no remedy for constitutional violations—both technical and those resulting in cognizable harm—committed by federal officials.[334] Under Canada's approach to Charter damages, individuals who suffer constitutional violations in Canada have more paths to *some* form of relief.[335] The following discussion offers explanations for how and why those who seek a remedy in Canada are more likely to obtain some relief, whether in the form of Charter damages or an alternative remedy.

### *A. A Rigorous Analysis of the Legal and Practical Availability of Alternative Remedies*

U.S. Supreme Court precedent has suggested that remedies other than *Bivens* are available to remedy a wrong, but in actuality those remedies may not be available at all.[336] As Professor Leah Litman argues, this is because the Court does not take into consideration the "independent, formal legal standards" of certain remedies or the "practical limits" that make those remedies unavailable in certain situations.[337] For example, in *Abbasi,* the Court considered the "hypothetical"[338] availability of injunctive relief or a writ of habeas corpus as

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330 *Id.* at paras. 166, 173.

331 *Id.* at para. 173.

332 *Id.*

333 *Id.* at paras. 180–81.

334 *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Hernandez v. Mesa, 140 S. Ct. 735 (2020).

335 *See, e.g.*, *Conseil scolaire francophone*, 2020 SCC at para. 334; Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28 (Can.); Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44 (Can.).

336 *Constitutional Remedies* – Bivens *Actions* – Ziglar v. Abbasi, 131 HARV. L. REV. 313, 318–19 (2017) [hereinafter *Constitutional Remedies*]; *see* Litman, *supra* note 5, at 1512. Litman refers to this as "disingenuous substitution." Litman, *supra* note 5, at 1512.

337 Litman, *supra* note 5, at 1512.

338 Pfander & Formo, *supra* note 153, at 746 n.137 (citing *Abbasi*, 137 S. Ct. at 1858).

supporting the denial of a *Bivens* claim.[339] As for injunctive relief, under *City of Los Angeles v. Lyons*[340] the respondents would have had to seek an injunction prior to their injury or show that they were likely to suffer from that injury again in the future—which would have been functionally impossible—to have standing.[341] With regard to habeas petitions, the Court acknowledged that habeas relief had not yet been held to apply to cases challenging a detainee's conditions of confinement, as opposed to a detainee's confinement itself.[342] Furthermore, under the facts of *Abbasi*, the respondents alleged that they were under a "communications blackout" and that "their families and attorneys did not know where they were being held[.]"[343] It is highly unlikely that the respondents would have been able to file a petition for a writ of habeas corpus or seek injunctive relief under these conditions.[344] It is also worth noting that these remedies would not have helped the respondents in their situation. As the dissent pointed out, "[n]either a prospective injunction nor a writ of habeas corpus . . . will normally provide plaintiffs with redress for harms they have *already* suffered."[345] At this point in the litigation, the only remedy available to the respondents was damages.[346]

On the other hand, the SCC engages in rigorous analysis of the alternative remedies available to a claimant, paying attention to whether such alternative remedies are (or were) in fact available in a particular case.[347] In *Ernst*, the SCC held Charter damages were not available against a quasi-judicial regulatory board due to good governance concerns and the availability of judicial review as an "alternative, and more effective, remedy[.]"[348] In so holding, the SCC evaluated the availability of judicial review specifically in the claimant's case.[349] The SCC highlighted the claimant's argument that the Board's decision to bar her communications was an abuse of its discretion and a violation of her Charter rights.[350] The SCC analyzed that judicial review was an available, and not hypothetical, remedy in this situation because judicial review is the "time-tested

339 *Abbasi*, 137 S. Ct. at 1862; *see* Litman, *supra* note 5, at 1509–10.

340 City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983); Litman, *supra* note 5, at 1513.

341 *Lyons*, 461 U.S. at 111; *see* Litman, *supra* note 5, at 1513, 1515. *Lyons* held that past injury is not sufficient to have standing to sue for injunctive or declaratory relief; instead, claimants must show that they are likely to suffer an injury in the future. 461 U.S. at 111; *see* Litman, *supra* note 5, at 1513.

342 *Abbasi*, 137 S. Ct. at 1862–63; *see* Litman, *supra* note 5, at 1514.

343 *Abbasi*, 137 S. Ct. at 1879 (Breyer, J., dissenting); *see* Litman, *supra* note 5, at 1515.

344 *See* Litman, *supra* note 5, at 1515.

345 *Abbasi*, 137 S. Ct. at 1879 (Breyer, J., dissenting).

346 *Id.* at 1880.

347 *See, e.g.*, Ernst v. Alberta Energy Regulator, 2017 SCC 1, [2017] 1 S.C.R. 3 (Can.).

348 *Id.* at paras. 30, 41.

349 *Id.* at paras. 35–36.

350 *Id.* at para. 35.

and conventional challenge to an administrative tribunal's decision[.]"[351] Although Charter damages would not be available under judicial review,[352] the SCC's analysis concluded that judicial review could provide timely relief, vindicate the Charter right, clarify the Board's obligations under the Charter, and deter future violations.[353] Importantly, the SCC highlighted that *Ward* does not require that alternative remedies offer the exact same relief as Charter damages, just that they fulfill one or more of the functional objects of compensation, vindication, and deterrence.[354] In this way, the SCC effectively considers both the practical availability of alternative remedies and their adequacy in ways that the U.S. Supreme Court does not.

### *B. A Functional Analysis of Remedies*

Under the *Ward* framework in Canada, the state raises the issue of alternative remedies under step three (countervailing factors) to show that other remedies are available to the claimant that would satisfy the functional objects of Charter damages.[355] The burden is on the state to show not only that alternative remedies exist, but also that those remedies would "adequately meet the need for compensation, vindication and/or deterrence" in that case.[356] This framework offers courts the flexibility to award Charter damages instead of, and in addition to, other remedies to ensure a "functional approach" to remedying Charter violations.[357] Furthermore, the SCC highlighted in *Ward* that "[t]he existence of a potential claim in tort does not [] bar a claimant from obtaining damages under the *Charter*."[358] While the SCC emphasized that "double compensation" is not permitted,[359] the framework does give courts the ability to award Charter damages and tort damages together in certain situations due to their different functions.[360] For example, in *Carr v. Ottawa Police Services Board*,[361] the claimant sued various officers and the Ottawa Police Services Board for damages after the officers arrested her without a warrant, severely injured her,

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351 *Id.* at para. 90 (Abella, J., concurring).

352 *Id.* at para. 37 (majority opinion).

353 *Id.* at paras. 35–37. Justice Cromwell noted that if the claimant's allegations were proven through judicial review, a court could have nullified the Board's decision to bar the claimant's communications and "order[ed] corrective action[,]" which would have "go[ne] a long way towards vindicating [the claimant's] *Charter* rights." *Id.*

354 *Id.* at para. 37.

355 *Id.* at paras. 32–37.

356 Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28, para. 34 (Can.).

357 *Id.*

358 *Id.* at para. 36.

359 *Id.*

360 *See id.* at paras. 35–36; Fisher, *supra* note 185, at 43.

361 Carr v. Ottawa Police Services Board, 2017 ONSC 4331 (Can.).

strip-searched her, and subsequently left her in a cell naked for hours.[362] The Ontario Superior Court held that the claimant was entitled to tort damages for false arrest, false imprisonment, excessive use of force, and negligent investigation in addition to Charter damages for the violation of her Charter rights when she was left naked in a holding cell.[363] The court reasoned that the tort damages fulfilled the functional objective of compensation,[364] while the Charter damages fulfilled the goals of deterrence and vindication.[365] Thus, the framework promoted by the SCC enables courts to adequately vindicate the Charter violation itself "as an independent wrong, worthy of compensation in its own right."[366] As the SCC noted in *Ward*, sometimes "vindication or deterrence [will] play a major and even exclusive role" in the awarding of Charter damages.[367]

In contrast, *Bivens* jurisprudence makes clear that state tort law is sufficient to displace a *Bivens* action altogether.[368] In *Minneci v. Pollard*,[369] the Court considered whether a federal prisoner had a cause of action for damages under the Eighth Amendment against employees of a federal private prison who failed to provide him with necessary medical care.[370] The Court denied the *Bivens* action because the "claim focuse[d] upon a kind of conduct that typically f[ell] within the scope of traditional state tort law"[371] and the employees could be sued under state tort law.[372] The Court reasoned that state tort law was able to adequately compensate the victim and deter the officer from violating the Constitution.[373] It did not matter that state tort law could impose limits on the amount of recoverable damages or impose procedural hurdles to obtaining relief.[374] The Court stated that "the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply

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362 *Id.* at paras. 65–66, 142, 154.

363 *Id.* at paras. 248, 254; *see* Fisher, *supra* note 185, at 45.

364 *Carr*, 2017 ONSC at paras. 245, 254.

365 *Id.* at paras. 243–46. The trial judge correctly noted that the granting of private tort law damages to the claimant did not bar an award of Charter damages, but emphasized that he was "mindful" that the tort damages largely "put [the claimant] in the same position she would have been had her *Charter* rights not been infringed." *Id.* at para. 245; *see* Fisher, *supra* note 185, at 45.

366 Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28, para. 55 (Can.).

367 *Id.* at para. 47; *see* Fisher, *supra* note 185, at 113–19.

368 *See, e.g.*, Minneci v. Pollard, 565 U.S. 118 (2012); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001).

369 *Minneci*, 565 U.S. at 118.

370 *Id.* at 121.

371 *Id.* at 125.

372 *Id.*

373 *Id.* at 127.

374 *Id.* at 129.

with the Eighth Amendment while also providing roughly similar compensation to victims of violations."[375]

As John Preis points out, one concern regarding the incorporation of alternative state law remedies into the *Bivens* analysis is that "a court hearing a constitutional tort action will never be able to know with any certainty whether state law will in fact provide a remedy."[376] If an individual's *Bivens* claim is dismissed due to an alternative state law remedy and the state law remedy turns out not to apply, that individual would be left without any remedy whatsoever for the violation of his constitutional rights.[377] Unlike the framework in Canada discussed above, the *Bivens* framework does not sufficiently prioritize the remedial goal of vindicating the constitutional right.[378]

### *C. Another Kind of "Remedy"—Settlements and Apologies*

Though not an "alternative remedy" within the meaning of *Bivens* and *Ward*, one form of relief has developed in Canada for particularly heinous constitutional violations—a settlement award and formal apology from the Government of Canada.[379] Specifically, there is a pattern of the Canadian government settling claims with individuals who have been detained and tortured abroad due, in part, to some action taken by the Canadian government.[380] Particularly relevant is the case of Maher Arar, who brought cases against the governments of both the United States and Canada. The *Bivens* action in the United States was denied, but Arar received a settlement and apology from the Government of Canada.[381]

Upon information from Canada that Arar was affiliated with Al Qaeda,[382] the U.S. government detained Arar at JFK airport, held him for almost two

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375 *Id.* at 130.

376 John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 755 (2008).

377 *See id.* at 755.

378 *See Minneci*, 565 U.S. at 132 (Ginsburg, J., dissenting) ("Pollard may have suffered 'aggravated instances' of conduct state tort law forbids, . . . but that same aggravated conduct, when it is engaged in by official actors, also offends the Federal Constitution[.]").

379 *See* Fisher, *supra* note 185, at 123.

380 *See* Fisher, *supra* note 185, at 123; *see*, *e.g.*, Ian Austen, *Canada to Pay $9.75 Million to Man Tortured in Syria*, N.Y. TIMES (Jan. 27, 2007), https://www.nytimes.com/2007/01/27/world/americas/27canada.html; Monique Scotti, *Trudeau: Canadians Rightfully Angry After Ottawa Pays $31.25M to Men Falsely Imprisoned in Syria*, GLOB. NEWS (Oct. 26, 2017, 8:55 AM), https://globalnews.ca/news/3826253/ottawa-pays-settlement-of-31-25m-to-3-men-falsely-imprisoned-in-syria.

381 *See* Austen, *supra* note 380; Fisher, *supra* note 185, at 123.

382 Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009) (en banc), *cert. denied*, 560 U.S. 978 (2010); *see* Fisher, *supra* note 185, at 123.

weeks in harsh conditions, and subsequently removed him to Syria for interrogation and torture.[383] Arar, a dual citizen of Canada and Syria, remained in Syria for over a year while being tortured.[384] The information provided to the United States by Canada was later determined to be incorrect.[385] After he was released to Canada, Arar filed a *Bivens* action against various U.S. national security officials for the violation of his substantive due process rights under the Fifth Amendment.[386]

Prior to the resolution of his case in the United States, Arar requested an official inquiry into his circumstances by the Canadian government to determine what role Canada played in the situation.[387] The inquiry was launched and a report, which determined that Canada had given the United States incorrect information, was published in 2006.[388] In early 2007, Arar accepted a $9.75 million dollar settlement and formal apology from the Canadian government for its role in his detention and torture.[389]

In *Arar v. Ashcroft*, the Second Circuit denied Arar's *Bivens* claim because it found that "extraordinary rendition"[390] was a new context and special factors counselled hesitation,[391] namely separation of powers principles and concerns regarding national security and foreign relations.[392] The Second Circuit highlighted that there were many "alternative remedial schemes" regarding immigration,[393] including the Immigration and Nationality Act (INA) and the Torture Victim Protection Act (TVPA).[394] Nevertheless, the Second Circuit noted that the TVPA did not apply to Arar's situation,[395] and that the INA may also have been unavailable to Arar because he claimed that he was barred from seeking any relief during his detention.[396] Ultimately, the Second Circuit

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383 *Arar*, 585 F.3d at 563; *see* Fisher, *supra* note 185, at 123.

384 *Arar*, 585 F.3d at 566; *see* Fisher, *supra* note 185, at 123.

385 COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFS. IN REL. TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR – ANALYSIS AND RECOMMENDATIONS (2006), http://publications.gc.ca/collections/Collection/CP32-88-1-2006E-AR.pdf.

386 *Arar*, 585 F.3d at 563.

387 Erin Craddock, *Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions Cure the Due Process Deficiencies in U.S. Removal Proceedings*, 93 CORNELL L. REV. 621, 636 (2008).

388 *See* Fisher, *supra* note 185, at 123.

389 *See* Austen, *supra* note 380; Fisher, *supra* note 185, at 123.

390 *Arar*, 585 F.3d at 563–64. The Second Circuit defined extraordinary rendition as "the *extrajudicial* transfer of a person from one [country] to another." *Id.* at 564 n.1.

391 *Id.* at 563.

392 *Id.* at 574–75.

393 *Id.* at 572.

394 *Id.*

395 *Id.*

396 *Id.* at 573.

refrained from deciding whether Arar had alternative remedies available to him because it found that the *Bivens* claim was foreclosed due to special factors counselling hesitation, regardless of the existence or absence of an alternative remedy.[397] Arar sought a writ of certiorari from the U.S. Supreme Court, but it was denied.[398]

This case illustrates a stark difference between the United States and Canada. Despite the obvious constitutional violations and egregiousness of this case, the U.S. government, especially its court system, failed to supply Maher Arar with any remedy.[399] *Bivens* proved to be useless in compensating Arar and deterring deplorable conduct by high level federal officials due to the restraints the U.S. Supreme Court has placed on the doctrine.[400] On the other hand, the Canadian government admitted it was wrong, apologized, and attempted to compensate the victim by providing him with almost ten million dollars.[401] This is another example of how individuals who seek redress in Canada for constitutional violations tend to walk away with *some* type of remedy, while those in the same situation seeking help from courts in the United States walk away with nothing.

## IV. PROPOSAL

To decrease the instances in which individuals are left with no remedy for violations of their constitutional rights by federal officials, the U.S. Supreme Court should incorporate pieces of the SCC's functional approach to Charter damages into its *Bivens* analysis.[402] Before finding that another remedy forecloses the application of the *Bivens* doctrine, the Supreme Court should follow the lead of the SCC by rigorously analyzing whether that alternative remedy is both legally and practically available.[403] For example, the Court should ensure that the potential alternative remedies are not "hypothetical"[404] due to some restrictive legal doctrine, such as the *Lyons* standing doctrine,[405] or

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397 *Id.*

398 *Id.* at 559.

399 *Id.*

400 *See id.* Moreover, this case occurred before the doctrine was further restricted by *Abbasi* and *Hernandez*. *See* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Hernandez v. Mesa, 140 S. Ct. 735 (2020).

401 *See* Austen, *supra* note 380; Fisher, *supra* note 185, at 123.

402 *See* Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28, para. 24 (Can.).

403 Litman, *supra* note 5, at 1512; *see* Ernst v. Alberta Energy Regulator, 2017 SCC 1, [2017] 1 S.C.R. 3 (Can.).

404 Pfander & Formo, *supra* note 153, at 746 n.137.

405 City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983); Litman, *supra* note 5, at 1513.

some factual limitation on the plaintiff's ability to seek a remedy,[406] as was the case with both Abbasi and Arar.[407]

The SCC's functional approach also analyzes the adequacy of an alternative remedy.[408] This approach ensures that whatever remedy the court awards is targeted and able to redress the Charter violation at issue by focusing on whether the alternative remedy would adequately compensate the claimant, vindicate the Charter right, and/or deter unconstitutional conduct.[409] In the past, the U.S. Supreme Court robustly analyzed the differences in a *Bivens* remedy and an alternative remedy.[410] For example, in *Carlson v. Green*, the Court went through the specific reasons as to why a remedy under *Bivens* was more effective than a FTCA remedy.[411] The Supreme Court should resurrect that careful analysis while incorporating the SCC's functional lens.

Under the Canadian framework, to negate a Charter-damages award on the basis of an alternative remedy, the defendant must show that the other remedy would adequately fulfill those goals.[412] Similarly, the Supreme Court should place the burden on the defendant to establish that whatever alternative remedy the defendant proposes as sufficient is functionally justified. The mere existence of an alternative remedy should not displace a *Bivens* action if the alternative remedy is incapable of compensating the plaintiff and vindicating the constitutional right at issue.

By incorporating these pieces of the Canadian framework, victims of constitutional violations by federal officials would have a better chance of securing a remedy for those violations. Of course, this proposal alone will not drastically increase the access to justice under *Bivens* given the restrictive nature of the *Bivens* doctrine as a whole. Nevertheless, these suggestions would still improve plaintiffs' prospects under the alternative remedies analysis, especially for those whose claims fall within the recognized contexts of *Bivens*, *Davis*, and *Carlson*.[413]

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406 Litman, *supra* note 5, at 1512.

407 *Id.* As discussed previously, in *Abbasi* the alternative remedies of injunctive and habeas relief suggested by the Court were not truly available to the plaintiff because he was being detained and prevented from communicating with people on the outside. *Id.* Arar also alleged that he was kept from pursuing any remedy while detained. Arar v. Ashcroft, 585 F.3d 559, 573 (2d Cir. 2009) (en banc), *cert. denied*, 560 U.S. 978 (2010).

408 Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28, para. 24 (Can.).

409 *Id*. at para. 34.

410 *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980).

411 *Id.* at 20–23.

412 *Ward*, 2 S.C.R. at para. 34.

413 *See Constitutional Remedies*, *supra* note 341, at 313.

## CONCLUSION

Under the *Bivens* analysis, the U.S. Supreme Court has considered the existence of potential alternative remedies since the doctrine's conception.[414] However, the Court has diminished its consideration of the adequacy and practical availability of these alternative remedies to such an extent that many individuals whose constitutional rights have been violated by a federal officer walk away from a *Bivens* claim with no remedy at all.[415] On the other hand, individuals who seek a remedy in Canada are more likely to obtain *some* form of relief to redress their violated Charter rights.[416] To address this issue in the United States, the Supreme Court should adopt a functional approach to the alternative remedies analysis in line with the SCC's approach to Charter damages in *Ward*.[417] By incorporating pieces of the SCC's functional framework into the *Bivens* analysis, the Supreme Court can better protect and vindicate constitutional rights while ensuring more effective remedies for *Bivens* claimants overall.

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414 Litman, *supra* note 5, at 1509.

415 *See id.* at 1512–18.

416 *See, e.g.*, Conseil scolaire francophone de la Colombie-Britannique v. British Columbia, 2020 SCC 13 (Can.); *Ward*, 2 S.C.R. at 28; Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44 (Can.).

417 *Ward*, 2 S.C.R. at para. 24.

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