SEXUAL ASSAULT BY FEDERAL ACTORS, #METOO, AND CIVIL RIGHTS

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Abstract: Calls for accountability for gender violence have permeated public discourse in the aftermath of the #MeToo movement. While much attention has focused on high profile individuals accused of harassment, less attention has been paid to sexual assaults of more vulnerable and marginalized people, including low wage workers, lesbian, gay, bisexual, transgender and gender non-conforming people, and immigrants. In addition, at the same time that calls for accountability have targeted Hollywood, employers, universities, and even the Catholic church, relatively little outcry has focused on the longstanding and under-recognized problem of sexual assaults by government actors. This Article focuses on sexual assault by federal officials and considers, in particular, sexual assault of immigrants, including people living in or traveling to the United States to seek asylum.

The #MeToo movement rightly has focused attention on the need for accountability by those who commit and facilitate gender violence. It has created a valuable moment for reflection and advocacy for laws and policies focused on prevention and on redress for victims and survivors. Social science makes clear that strong leadership and policies and practices holding both institutions and individuals accountable are key. Civil remedies, including remedies under civil rights laws, are an essential tool in the mix of needed responses. But advocacy efforts have not focused on the federal government’s civil rights accountability for sexual assault committed by those who act in the federal government’s name. The Bivens doctrine, which provides the avenue of redress for sexual assaults by federal officials as violations of constitutional rights, has been increasingly narrowed. It provides no mechanism for institutional accountability; with respect to individual accountability, the Supreme Court recently declared that ‘expanding the Bivens remedy is now a ‘disfavored’ judicial activity.’

This Article uses calls for reform of sexual harassment laws as a point of comparison and demonstrates that the federal government’s liability for sexual assault and harassment falls short of emerging accountability norms. It argues that the limits on federal accountability are not justified by traditional policy concerns, such as federal officials’ policy-making prerogatives and concerns about financial burdens. This historical moment calls for revisiting outdated legal doctrines to bring them in line with current understandings of accountability, so that our legal frameworks better advance fairness and equality.

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1. This Article uses the terms “victims” and “survivors” to refer to those impacted by gender violence, acknowledging that not all who are affected survive, and that some who do, do not consider themselves “victims.”

INTRODUCTION

Calls for accountability for gender violence have permeated public discourse in the aftermath of the #MeToo movement. The 2017 presidential inauguration triggered unprecedented crowds protesting gender violence at the Women’s Marches. An outpouring of revelations and public reckoning with sexual harassment in a range of contexts galvanized the #MeToo movement. While much attention has focused on

high profile individuals accused of harassment, less attention has been paid to sexual assaults of more vulnerable and marginalized people, including low wage workers, lesbian, gay, bisexual, transgender and gender non-conforming people, people of color, and immigrants. In particular, while calls for accountability have targeted Hollywood, employers, universities, and even the Catholic church, relatively little outcry has focused on the longstanding and under-recognized problem of sexual assaults by government actors. The problem of gender violence addressed by the #MeToo movement encompasses a continuum that includes sexual harassment at work, intimate partner violence, and sexual assault. To truly advance the goal of ending gender violence, advocacy and law reform should address gender violence in all its forms and contexts.

In this time of aggressive enforcement of federal immigration policies, sexual assaults by federal agents of immigrants, including people living in or traveling to the United States to seek asylum, are particularly troubling. Remedies for these violations, particularly to redress the harms as civil rights violations, are uncertain at best. Particularly egregious examples have received some press attention, but the issue is not a focus of media and advocacy campaigns, or of calls for law reform stemming from the #MeToo movement. That omission may be for good reason, given the increasingly limited scope of relief under the doctrine established under Bivens v. Six Unknown Named Agents, and under 42 U.S.C. § 1983—the two primary vehicles for civil rights accountability against federal and state actors, respectively. Longstanding advocacy efforts have sought to frame gender violence as a civil rights violation, both to recast what historically had been seen as private violence as a matter of public concern and to establish mechanisms for accountability. The spotlight shone on gender violence in the wake of the #MeToo movement suggests that the time may be ripe for reform.

The #MeToo movement has rightly focused public attention on the

4. This paper uses the terminology “gender violence” to generally reference this range of behavior.
5. See infra Part I.
9. See infra Part II.
10. See infra notes 53–56, section III.A.
need for accountability by those who commit and facilitate gender violence. The notion of accountability itself is complex, challenging us to consider what legal, policy, and cultural changes are needed to truly end gender violence. A wide range of responses are needed. These must include efforts to shift cultural norms, including public education campaigns, meaningful employment policies and ongoing training, and workplace education programs. Emerging and promising practices explore dispute resolution processes that are educational rather than punitive and that take into account the pervasiveness of gender and other forms of subordination as a baseline part of our culture. Experts increasingly concur that best practices for prevention require strong leadership at the top that makes clear that sexual harassment and other forms of bias will not be tolerated, and that makes that promise real by holding those who discriminate to account.\footnote{11. See generally U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016), [hereinafter EEOC Task Force Report], https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686310 [https://perma.cc/LL4X-XAE6] (reviewing efforts to end sexual harassment and enumerating suggestions for training and other initiatives to address the problem).}

Civil remedies, including remedies under civil rights laws, are an essential tool in the mix of needed legal responses.\footnote{12. See generally Deborah T. Eisenberg, The Restorative Workplace: An Organizational Learning Approach to Discrimination, 50 U. RICH. L. REV. 487 (2016) (discussing the potential application of restorative practices to prevent and address workplace discrimination); Lesley Wexler, Jennifer K. Robbenolt & Colleen Murphy, #MeToo, Time’s Up and Theories of Justice, 45 U. ILL. L. REV. 45 (2019) (considering the use of restorative justice practices in the workplace).} These remedies should address both institutional and individual accountability.\footnote{13. See infra notes 212–215 and accompanying text.} However, the standards for civil rights-based accountability for gender violence are not consistent across settings and the differences are not


\footnote{15. See infra notes 233–234 and accompanying text.}
necessarily warranted by the differences in context.\(^\text{16}\) The increased visibility of sexual harassment and assault occasioned by the #MeToo movement raises important questions about whether the differences in liability schemes are justified by those differences in context.

This Article focuses on one set of contrasts: the civil rights-based standards for holding individuals and institutions liable for sexual assault and harassment committed by federal actors, and the civil rights-based liability standard for harassment committed at work.\(^\text{17}\) I have selected these contexts to contrast the sharp limitations in civil rights accountability for sexual assault by federal officials with the employment-based norms foregrounded by the #MeToo movement. Using calls for reform of employment discrimination law as a point of comparison, the Article demonstrates that the federal government’s liability for sexual harassment and sexual assault committed by its officials falls far short of emerging accountability norms, and that the limitations are not justified by traditional policy concerns such as federal officials’ policy-making prerogatives and concerns about financial burdens. These shortfalls illustrate the unnecessary constraint of civil rights law’s current reach in other contexts as well, though accountability in those other contexts is beyond the scope of this Article. This Article argues that this historic moment calls for revisiting legal doctrines to bring them in line with current conceptions of accountability, so that our legal frameworks better advances fairness and equality.

Part I reviews the problem of gender violence, specifically sexual assault, committed by federal officials. It draws on reports of sexual assaults by federal law enforcement officers of asylum seekers and others at the border, especially people of color, lesbian, gay, bisexual and

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\(^{17}\) By contrasting federal civil rights accountability with workplace accountability under Title VII, this Article focuses on civil rights remedies available across contexts for sexual assaults committed by federal actors; it does not analyze context-specific statutory remedies such as the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e (2012); sexual assault by federal employees, 5 U.S.C. § 8101 (2012); or the limits of the doctrine holding state actors accountable for sexual assault under 42 U.S.C. § 1983 (2012); see also infra notes 131, 142, 149, 163, 164, 167 (discussing cases brought against state actors under 42 U.S.C. § 1983 for sexual assault).
transgender migrants, domestic violence victims and survivors, and other members of marginalized groups. Part II reviews the legal remedies available to survivors of sexual assault by federal officials, and focuses on civil rights recourse, as distinct from other potential remedies such as tort law. While there is some overlap in the remedies available under both schemes, civil rights frameworks more accurately capture the dignitary nature of the harm and should be part of the range of remedies available to redress constitutional harms. This Part discusses the applicability of the *Bivens* doctrine, the damages remedy for redressing constitutional violations by federal actors, to cases of sexual assault by federal actors. It argues that a *Bivens* remedy should be available to redress sexual assault under the current doctrine, but that recent trends render recovery uncertain.

Part III turns to the contrasting liability scheme for gender violence committed in employment. It summarizes the framework for liability under Title VII of the 1964 Civil Rights Act (Title VII) and analogous state and local employment laws, as well as reforms enacted and proposed in the wake of the #MeToo movement. These reform efforts, supported by social science data on best practices for sexual harassment prevention, highlight the importance of strong accountability measures for both individuals who commit the harm, and the institutions that foster and countenance it. Social science confirms the importance of creating institutional policies and practices making clear that sexual harassment, assault, and other forms of bias are unacceptable, and of creating accessible and meaningful avenues for complaint.

Part IV compares the respective accountability schemes and demonstrates that the scheme for federal accountability falls short of meaningful accountability norms. In particular, *Bivens*’s flat preclusion of direct institutional accountability for sexual assaults by federal agents flies in the face of the lessons from social science underscoring the importance of strong institutional, as well as individual, accountability measures. The preclusion of institutional accountability, in addition to the constrained doctrine holding individuals accountable, is out of step with best practices for accountability and prevention, and is not justified by considerations of policy, cost or deterrence.

18. This article uses the term “survivor” and “victim” to refer to those impacted by gender violence, acknowledging that not all who are impacted by gender violence survive, and that some who do survive do not consider themselves “victims.”

I. BACKGROUND: GENDER VIOLENCE AT THE HANDS OF FEDERAL AGENTS

In contrast to the wave of reports of sexual assaults by myriad high-profile individuals in industries ranging from entertainment to politics to sports, reports of sexual assaults by border agents and other federal law enforcement officers have received relatively little public attention. Of course, violence by law enforcement is not limited to abuse by federal officers or against immigrants; longstanding advocacy has sought to address sexual assault and other abuses by federal, state, and local law enforcement officers. With respect to sexual assaults by federal officials, reports reveal shocking accounts of abuse by U.S. Customs and Border Protection (CBP) agents. These reports include documentation of sexual abuse by federal


21. See generally ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017); Gabriel Arkles, Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm, 17 N.Y.U. J. LEGIS. & PUB. POL’y 801 (2014); Michelle S. Jacobs, The Violent State: Black Women’s Invisible Struggle Against Police Violence, 24 WM. & MARY J. RACE, GENDER & SOC. JUST. 39, 69 (2017); Cara McClellan, The Deafening Silence Around Police Violence Against Black Women And Girls, HUFFINGTON POST (May 5, 2018), https://www.huffingtonpost.com/entry/opinion-mcclellan-black-women-police_us_5ab5b6be4b0b8c3d634fd5 [https://perma.cc/4XG5-LDD3]; see also, e.g., Doe v. City of New York, No. 15-CV-0117 (AJN), 2018 WL 6095847, at *3 (S.D.N.Y. Nov. 21, 2018) (partially denying defendant’s motion for summary judgment, concluding that a reasonable juror could find that New York City “exhibited deliberate indifference in its investigation and discipline practices and that this deliberate indifference caused Doe to be sexually assaulted” at the detention center on Riker’s island).

actors of unaccompanied children. Sexual abuse is also rife in immigration detention. LGBTQ immigrants and immigrant detainees are
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particularly targeted.25 Despite efforts, such as the Department of Homeland Security’s adoption of regulations prohibiting sexual abuse,26 investigative protocols for allegations of sexual abuse or assault,27 and CBP’s adoption of a so-called “zero tolerance” policy,28 the problem persists.29


Violence by federal actors at the border compounds harm for many who already have been subjected to violence and abuse. Many survivors were subjected to gender-based violence in their home countries, and many then suffered attacks along their journey to the U.S. border. Some reports conclude that up to 80% of Central American girls and women crossing the border from Mexico are raped along the way by criminal gangs, traffickers, other migrants or corrupt officials. A few examples illustrate the gravity and impact of the problem. The brutal treatment of three Honduran women by CBP officer Esteban Manzanares has received some press attention; it has been described as


30. See, e.g., Gottesdiener et al, supra note 6; see infra note 31.

being unusual for its “magnitude and horror,” but not for the nature of the abuse.32 In that case, three women, M.D.C.G., her fourteen-year-old daughter, and a second teenage girl, had surrendered to Manzanares when they crossed the border.33 He locked the women in the back of his patrol truck, drove them around for an hour or two, stopped the truck in a wooded area, separated and raped both the mother and the daughter, slit M.D.C.G.’s wrists and tried to break the daughter’s neck, leaving them to die.34 He took the second teenager back to his apartment, stripped her naked, bound her to a chair, stuffed a sock in her mouth, and raped her.35 After some time, both M.D.C.G. and her daughter were able to run to seek help and encountered Border Patrol agents, who took each of them to the hospital.36 A number of hours later, federal officials tracked down Manzanares in his apartment, where he had brought and raped the other teenager.37 After the FBI announced their presence, Manzanares shot and killed himself.38

In a similar case, Aura Hernández fled Guatemala to come to the United States after facing life-threatening violence at the hands of her husband, and after hearing that domestic abuse wasn’t tolerated in the United States.39 When she crossed the Rio Grande into Texas with her nephew, she was apprehended by border agents and driven to a nearby CBP station, where a supervisory border patrol agent directed obscenities toward her, made derogatory comments about her breasts, leered at her, and then insisted that she meet with him “in private” if she “ever want[ed] the boy

33. Graff, supra note 32.
34. Id.
35. Id.
36. Id.
37. Id.
to get out of here,” where he proceeded to sexually assault her. In similar cases, the ACLU filed claims on behalf of two teenage Guatemalan sisters who asked border agents for help after crossing the border, where they were taken to a CBP field office and sexually assaulted.

Although these and other egregious cases have generated accounts in the press, and, in some cases, have led to litigation seeking redress, they have not generated mainstream calls for civil rights-based reform. The next Part reviews the legal remedies available to those who have been subjected to sexual assaults by federal officials, with a focus on civil rights redress. It argues that civil rights remedies for these violations matter, and that the #MeToo movement provides an opportunity to drive reform.

II. FEDERAL OFFICIALS’ CIVIL RIGHTS ACCOUNTABILITY FOR SEXUAL ASSAULT

A. Overview

Survivors of gender violence by federal officials who are able to reveal their stories and who have access to legal process may turn to tort or civil rights claims should they choose to seek accountability by filing a civil claim. They may be able to sue the federal government as a matter of tort law under the Federal Tort Claims Act (FTCA), though recovery is only available in limited circumstances. For example, claims may survive despite the FTCA’s many exclusions when the act was deemed to have been committed by a “federal law enforcement officer” and “within the

40. Id.
43. See infra notes 44–45.
scope of employment," or, under narrow and somewhat unpredictable circumstances, for the government’s negligence in facilitating the assault. A survivor seeking to hold the individual who committed the assault accountable under state tort law would face a number of challenges. First, the claim would have to survive likely arguments that the officer was entitled to qualified immunity. If the claim survives that defense, the next question would be whether the act was deemed to have been committed within the scope of federal employment; if it was, the Westfall Act would treat that action as an action exclusively against the government under the FTCA. In that case, the individual would be absolved of liability and the claim against the government would be subject to the FTCA limitations referenced above. If the act was not deemed to have been conducted “in the scope of employment,” then the officer could be sued in their personal capacity under state tort law. Should the claim succeed, the law would provide for monetary recovery.

44. See 28 U.S.C. § 1346; Sisk, supra note 42, section II.A.3., for a discussion of how courts have interpreted the “federal law enforcement officer” and “within the scope of employment” requirements. Nevertheless, survivors harmed by someone who was not a law enforcement officer may be able to argue that the harmful conduct also violated the Constitution, and therefore, would not be subject to the FTCA exceptions, such as the discretionary-function exception otherwise bars many claims. See, e.g., Loumiet v. United States, 828 F.3d 935, 945 (D.C. Cir. 2016) (holding that unconstitutional conduct falls outside the discretionary function exception to the FTCA); Limone v. U.S., 579 F.3d 79, 102 (1st Cir. 2009) (same); see also Sisk, supra note 42, at 746–49 (discussing law enforcement office exception). See infra sections II.B. and II.C. for a discussion of constitutional claims.

45. See Sisk, supra note 42, at section II.A.4.

46. Claims brought under the FTCA would be subject to qualified immunity defenses as well, though the Supreme Court has modified its availability for federal officers faced with a common law tort suit. See Sisk, supra note 42, at 761–65. The qualified immunity defense insulates government officials from liability for civil damages when their conduct does not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The doctrine has been narrowed such that the Court is increasingly unlikely to find clearly established law that would defeat the defense, and the doctrine increasingly is critiqued as failing to achieve its intended policy aims. See, e.g., Joanna C. Schwartz, The Case Against Qualified Immunity, 93 NOTRE DAME L. REV. 1797 (2018). For a discussion of the current debate about the impact and viability of qualified immunity, see generally Alexander A. Reinert, Qualified Immunity at Trial, 93 NOTRE DAME L. REV. 2065 (2018); Alexander A. Reinert, Does Qualified Immunity Matter?, 8 U. SAINT THOMAS L.J. 477 (2011); Joanna C. Schwartz, How Qualified Immunity Fails, 127 YALE L.J. 2 (2017); Joanna C. Schwartz, After Qualified Immunity, 120 COLUM. L. REV. (forthcoming 2020).

47. 28 U.S.C. § 2679(b)(2); see also Sisk, supra note 42, at 761–65.

48. See Sisk, supra note 42, at 761–65. Given the FTCA’s limitations, this effectively means that survivors may seek damages under Bivens, or nothing.

49. See id. Of course, if the individual was fired, or arrested, they may have limited ability to pay damages.
subject to the availability of the individual’s assets. Although some cases result in criminal prosecutions, the criminal justice process does not directly redress the harm to survivors in the aftermath of abuse.

Survivors may also pursue a case under civil rights law. Historically, civil rights laws have played a significant role in advancing accountability for discrimination. In particular, reframing sexual harassment as a form of impermissible sex discrimination has been a cornerstone of efforts to shift public awareness so that sexual harassment is seen as a public rather than a private problem, and as a reflection of historic, entrenched, and outdated gender stereotypes and subordination. Before courts recognized sexual harassment as a form of sex discrimination, some courts recognized harassment as a tort or a breach of contract. As more courts addressed the question—and as feminists argued that sexual harassment reflected

50. Id.

51. See, e.g., United States v. Peterson, 887 F.3d 343, 348 (8th Cir. 2018) (upholding civil rights conviction under 18 U.S.C. § 242 (2012) of probation officer who sexually assaulted probationers under threat of putting them in jail); Arizona v. Johnson, 351 F.3d 988, 998, 1000, 1001 (9th Cir. 2003) (upholding conviction for sexual assault and kidnapping when a border agent drove a young woman into the desert, handcuffed her, told her to take off her clothes, and told her that he would leave her in the desert if she did not perform oral sex on him—which he did, notwithstanding his testimony that it was consensual); cf., e.g., United States v. Lanier, 520 U.S. 259, 272 (1997) (vacating judgment reversing conviction under 18 U.S.C. § 242 for judge’s sexual assaults of judicial employees and litigants).


53. See, e.g., CARRIE N. BAKER, THE WOMEN’S MOVEMENT AGAINST SEXUAL HARASSMENT (2008) (tracing history of sexual harassment movement); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (arguing that sexual harassment is a form of sex discrimination); Katherine M. Franke, What’s Wrong with Sexual Harassment, 49 STAN. L. REV. 691 (1997) (tracing evolution of cases recognizing sex harassment and sex discrimination and arguing that sexual harassment is a form of sex discrimination because it reflects and perpetuates gender stereotypes). For further discussion of sexual harassment as sex discrimination, see, for example, Angela Onwuachi-Willig, Re-written Opinion in Meritor Savings Bank v. Vinson, in FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 309, 309–12 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) (urging consideration of biases based on race, gender and other aspects of the historical and social context in which sexual harassment occurs); Vicki Schultz, Reconceptualizing Sexual Harassment, Again, 128 YALE L.J. 22, 22 (2018) (reasserting that sexual harassment is “more about sexism than it is about sex” and arguing that structural reform to eliminate sex inequality at work is needed to eliminate sexual harassment).

and perpetuated historic and outdated sex (as well as race and other) stereotypes and systemic subordination, and worked to advance sex-based inequality at work—courts came to recognize that anti-discrimination law aptly captured the nature of the harm. Framing the problem as one of equality and civil and human rights helped shift public perception and galvanize support. Accordingly, as Part III elaborates, a robust body of case law has developed, defining the circumstances under which sexual harassment (which includes sexual assault) violates Title VII’s prohibition of sex discrimination. Sexual harassment at work may include sexual assault and other forms of sexualized violence, as well as intimate partner violence. The civil rights remedy enacted as part of the 1994 Violence Against Women Act built on Title VII’s recognition of sexual harassment as sex discrimination; the VAWA civil rights remedy similarly reflected the understanding that gender violence violates its target’s civil rights, and that a civil rights violation inflicts a harm distinct from that recognized under tort or other common law theories. Acts of gender violence—including sexual harassment at work, intimate partner violence, and sexual assault—lie on a continuum of related acts that generally reflect and perpetuate gender stereotypes. Thus, these acts should give rise to civil rights claims regardless of the context.

Although the compensatory and deterrence goals of tort and anti-discrimination law are closely related, practical and symbolic differences

55. See, e.g., BAKER, supra note 53, at 49–58, 162–76 (tracing the evolution of sexual harassment cases); Franke, supra note 53, at 698–725 (same).
remain.61 The harm of sexual violence is different from that of other torts.62 Accordingly, compensation formulas for physical injury typically used in tort cases, such as workers’ compensation schedules, do not accurately compensate for the different nature of the harm.63 Framing sexual harassment as a civil rights violation allows for a more accurate account of the nature of the offending act(s) and the resulting harm, for example, by allowing for evidence of epithets, comments, and patterns of behavior that simply might not be relevant in a tort claim. It allows for arguments naming the harm in terms of discriminatory practices, which can lead, for example, to remedies requiring policy change.64 Framing the harm as a civil rights violation rather than a private tort also supports norm shifting that challenges underlying biases.65 This framing should not diminish the availability of tort remedies, which continue to be important, particularly in an era of increasing hostility toward discrimination claims. At the same time, civil rights laws should not be abandoned, and should be invoked to redress the civil rights-based harms resulting from gender violence in a full range of contexts.

Nevertheless, no statutory civil rights remedy analogous to Title VII or 42 U.S.C. § 1983 applies to claims of sexual assault by federal officials.67


62. See generally MACKINNON, supra note 53.

63. See, e.g., MARTHA CHAMALLAS, FEMINIST LEGAL THEORY AND TORT LAW (Robin West & Cynthia Bowman, eds. 2018) (discussing ways that tort law fails to provide full compensation for injuries that disproportionately affect women); Sisk, supra note 42, at 785 (noting that “rape, sexual contact, and sexual assault are hardly accidental and are not adequately compensated by the schedule of payments for ordinary physical injuries”).

64. For example, remedies might include policies prohibiting and training concerning gender violence, including gender violence prevention. In some cases, survivors may be as or more interested in policy change that will help prevent others from being harmed, than in monetary damages.

65. See, e.g., Goldscheid, supra note 60, at 756–67.

66. See generally Bublick, supra note 61; Martha Chamallas, Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law, 75 OHIO ST. L.J. 1315 (2014); Marcia L. McCormick, Let’s Pretend that Federal Courts Aren’t Hostile to Discrimination Claims, 76 OHIO ST. L.J. 22 (2015); Sandra F. Sperino, Let’s Pretend Discrimination is a Tort, 75 OHIO ST. L.J. 1107 (2014). For further discussion of tort law’s treatment of sexual harassment and assault, see, for example, CHAMALLAS, FEMINIST LEGAL THEORY, supra note 63.

Consequently, survivors of sexual assault by federal officials seeking civil rights redress would turn to the so-called “Bivens” doctrine that applies in the absence of statutory recourse. But the possibility of recovery is starkly limited. As the following discussion of the Bivens doctrine reveals, the law has evolved to leave a survivor with no recourse directly against the government for violations of the survivor’s constitutional rights, and with an uncertain remedy against individual federal officials who either committed or facilitated the assault. This contrasts sharply with the scope of liability, and prevailing norms for prevention, for sexual assault and harassment in employment. The comparison illustrates the need for reform.

B. No Bivens Claims Against the Federal Government Itself

Civil rights recourse against federal actors for sexual assaults derives from the Supreme Court 1971 decision, Bivens, which recognized a damages remedy for constitutional violations by individual federal employees. The doctrine has been the source of controversy and has been narrowed in recent years to the point where it is said to be virtually unavailable outside cases that precisely track previously recognized contexts. Bivens’ uncertain application to cases of sexual assaults by federal agents illustrates its harsh limitations.


69. See infra Part III for discussion of the current doctrine and proposed reforms for accountability for sexual assault and harassment at work.


71. For commentary critiquing the increasingly limited interpretation of the Bivens doctrine, see, for example, Bell supra note 61; Jules Lobel, Ziglar v. Abbasi and the Demise of Accountability, 86 FORDHAM L. REV. 2149 (2018); Benjamin C. Zipursky, Ziglar v. Abbasi and the Decline of the Right to Redress, 86 FORDHAM L. REV. 2167 (2018); Steve Vladeck, On Justice Kennedy’s Flawed and Depressing Narrowing of Constitutional Damages Remedies, JUST SECURITY (June 19, 2017), https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies/ [https://perma.cc/RX93-AHBJ] (arguing that Abbasi erroneously concluded that the federal courts are powerless to provide a damages remedy in the absence of express congressional authorization even if the government systematically abused and discriminated against post 9/11 detainees). Indeed, the scope of Bivens remedies had been widely critiqued even before the Abbasi Court’s further narrowing of relief. See, e.g., James E. Pfander & David P. Baltmanis, Rethinking Bivens: Legitimacy and Constitutional Adjudication, 98 GEO. L.J. 117 (2009) (arguing that instead of the case-by-case approach of current law, federal courts should presume that a well-pleaded
In *Bivens*, the Court implied a cause of action for damages against federal agents who allegedly violated the Constitution. The suit was based on Webster Bivens's claims that agents of the Federal Bureau of Narcotics illegally entered his apartment, arrested him for alleged narcotics violations without a warrant, and used unreasonable force, and that the arrest was made without probable cause. Justice Brennan, writing for the majority, emphasized the capacity for harm associated with the abuse of federal power. The decision invoked *Marbury v. Madison*’s reminder that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” It reasoned that “no special factors” counseled hesitation in the absence of Congressional action. The Court distinguished this case from others such as those involving “federal fiscal policy” or cases in which Congress has provided an alternative, and substitute remedy. The decision concluded that Bivens was entitled to recover money damages for injuries suffered as a result of the agents’ Fourth Amendment violations.

Nevertheless, *Bivens* has been subject to criticism, and the scope of the doctrine has been narrowed in subsequent years. One dominant strand of critique questions the Court’s authority to fashion a federal common law right of action for constitutional violations. Under that view, expressed in Chief Justice Burger and Justice Black’s *Bivens* dissent, Congress, not the Court, should create new causes of action. This separation-of-powers concern has led subsequent decisions to delineate limited avenues for relief.

With respect to institutional accountability, the Court has interpreted

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73. Id. at 389.
74. Id. at 391.
75. 5 U.S. 163 (1803).
76. Id. at 397 (quoting *Marbury*, 5 U.S. at 163).
77. Id. at 396.
78. Id. at 396–97.
79. Id.
81. See *Bivens*, 403 U.S. at 411 (Burger, C.J., dissenting); *id.* at 427–28 (Black, J., dissenting).
the doctrine to flatly preclude any direct liability by the federal agency itself for constitutional wrongs committed by its employees. The *Federal Deposit Insurance Corp. v. Meyer*\(^{82}\) (FDIC) decision rejected the United States’ liability in a case alleging that the Federal Deposit Insurance Corporation (FDIC) fired John Meyer in violation of his due process rights.\(^{83}\) The decision held that the logic of *Bivens* was to deter constitutional wrongs by individual federal agents, not to imply a cause of action against the agency.\(^{84}\) It refused to extend *Bivens* to authorize a cause of action directly against a federal agency.\(^{85}\) The Court emphasized that the purpose of *Bivens* was to deter the officer’s misconduct.\(^{86}\) It reasoned that implying a damages action directly against a federal agency would allow claimants to bypass qualified immunity questions, and therefore would eviscerate the need to sue the individual wrongdoer.\(^{87}\) According to the Court, if institutions (such as the federal government) were to be held to account under *Bivens*, “the deterrent effects of the *Bivens* remedy would be lost.”\(^{88}\) Moreover, the decision concluded that “special factors counselling hesitation” weighed against implying a cause of action because recognizing a direct action would create “a potentially enormous financial burden for the Federal Government.”\(^{89}\) The Court rejected arguments that the federal government expends significant resources indemnifying employees who are held to account under *Bivens*, reasoning that “decisions involving ‘federal fiscal policy’ are not ours to make,” but rather, should be left to Congress.\(^{90}\) Accordingly, any civil rights-based liability resulting from sexual harassment or assault by federal agents would be based on the unconstitutional acts of federal officials; a survivor would not be able to hold the federal government directly to account.

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82. 510 U.S. 471 (1994).
83. Id.
84. Id. at 484–85. The Court reasoned that the *Bivens* Court authorized a cause of action based on the agents’ individual actions because a direct action against the Government was not available. Id. In *Bivens*, no direct action was available because sovereign immunity applied and no waiver authorized suit. See id. at 485 (Harlan, J., concurring) (citing *Bivens*, 403 U.S. at 389–90, 410).
85. Id. at 485.
86. Id.
87. Id.; Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 70 (2001) (confirming that “[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations”).
88. FDIC, 510 U.S. at 485.
89. Id. at 486 (quoting *Bivens*, 403 U.S. at 396).
90. Id. (quoting *Bivens*, 403 U.S. at 396) (discussing how the federal government has the discretion to indemnify employees accused of wrongdoing); see 28 C.F.R. § 50.15(c)(1) (2019). For further discussion of the role of indemnification, see infra notes 245–246, and accompanying text.
C. Limited Scope of Bivens Claims Against Federal Employees

Although Bivens established a private right of action against the federal government for a federal employee’s constitutional violations, the scope of the Bivens doctrine has been narrowed significantly, creating challenges for its meaningful use as an accountability tool. Following the Bivens decision, which upheld a claim for a federal employee’s Fourth Amendment violations (unlawful search and seizure), the Court has upheld Bivens causes of action in two additional contexts: gender discrimination in violation of the Fifth Amendment and Eighth Amendment violation of the Cruel and Unusual Punishments Clause based on federal jailers’ failure to treat a prisoner’s asthma. Over the ensuing decades, however, the Court began to limit acceptable claims.

In the 2017 decision Ziglar v. Abbasi, the U.S. Supreme Court declared (through a four-justice majority of six participating justices) that “expanding the Bivens remedy is now a ‘disfavored’ judicial activity,” and indicated that the Court will rarely, if ever, recognize a Bivens remedy in a new context. The claims in that case were brought by six men of Arab or South Asian descent who were arrested during investigations conducted after the September 11 attacks; the men were detained and then removed from the United States. Their Bivens claims alleged that their pretrial detention violated the substantive due process component of the Fifth Amendment and the Equal Protection Clause. The Court reviewed the history of Bivens claims and traced its growing concerns associated with implying a private right of action for constitutional violations. In addition to separation of powers concerns, these included the “substantial” costs of defense and indemnification and the time and administrative costs associated with discovery and trial. The Court described the shift in its general approach to recognizing implied damages remedies and suggested that the three cases in which it had recognized an implied cause of action

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92. Carlson v. Green, 446 U.S. 14 (1980). The reasoning in Carlson has been extended to Fifth Amendment substantive due process violations as well. See infra section II.D.1.

93. For discussion of this trend, see supra note 71.


95. Id. at 1857.

96. Id. at 1853.

97. Id.

98. Id. at 1856.
“might have been different if they were decided today.” Nevertheless, it confirmed the “continued force, or even the necessity,” of a *Bivens* cause of action in cases of unconstitutional searches and seizures, given the settled nature of the law and the “undoubted reliance” on it. It also noted that one factor counseling in favor of recognizing a cause of action would be if, like the claims in *Bivens* and *Davis*, the plaintiffs faced either “damages or nothing.” That reasoning is consistent with the Court’s prior recognition that *Bivens* actions advance deterrence by holding individual officers accountable for their unlawful actions.

The Court in *Abbasi* emphasized its reluctance to extend *Bivens* to new categories of defendants. It made clear that, ordinarily, Congress, and not the courts, should decide whether a damages remedy is available. Consequently, the first inquiry in any new case would be whether the suit presents a “new” *Bivens* context. If the case presents a new *Bivens* context, then a court would not uphold a claim if there were “special factors counselling hesitation in the absence of affirmative action by Congress.” That inquiry would turn 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.” The inquiry would assess the potential remedy’s “impact on governmental operations systemwide,” including “the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when [] tort and monetary liability mechanisms... are used to bring about the proper formulation and implementation of public policies.” Nevertheless, the Court recognized that a damages remedy might be necessary if equitable remedies prove

99. Id.
100. Id. at 1856–57.
101. Id. at 1862.
104. Id.
105. Id. at 1859. The Court articulated a number of factors to determine whether the case is different in a “meaningful” way from previous *Bivens* cases, and counseled considering, for example, “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. Id. at 1859–60.
106. Id. at 1857 (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)).
108. Id. at 1858.
insufficient to redress past harm and deter future violations.\textsuperscript{109} It also distinguished the circumstances raised in \textit{Abbasi}, where governmental policies were subject to challenge, from cases such as \textit{Bivens} or \textit{Davis}\textsuperscript{110} that involved individual instances of discrimination or law enforcement overreach, which the Court acknowledged, “due to their very nature are difficult to address except by way of damages actions after the fact.”\textsuperscript{111} Subsequent lower court decisions have parsed carefully the differences between the claim before the court and those previously recognized, often rejecting \textit{Bivens} claims in light of the Court’s current approach.\textsuperscript{112}

\textsuperscript{109}. See id.

\textsuperscript{110}. 442 U.S. 228 (1979).

\textsuperscript{111}. Id. at 1862.

\textsuperscript{112}. Notably, the Supreme Court granted certiorari in Hernandez v. Mesa, 885 F.3d 811, 822–23 (5th Cir. 2018) (en banc) (rejecting \textit{Bivens} claim based on cross-border shooting because it created a “new context” for which federal courts lack authority to imply a \textit{Bivens} remedy and because special factors counseled against implying private right of action), cert. granted, ___ U.S. __, 139 S. Ct. 2636 (2019); cf., e.g., Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018), petition for cert. filed, (U.S. Sept. 7, 2018) (No. 18-309) (upholding \textit{Bivens} claim that shooting by U.S. Border Patrol Agent in Mexico violated Fourth and Fifth Amendment rights). For equal protection claims, see, for example, Atterbury v. U.S. Marshals Serv., 805 F.3d 398, 403, 409 (2d Cir. 2015) (rejecting Fifth Amendment claim by terminated employee of federal contractor against federal agency because claim presented “new” \textit{Bivens} context); Patrick v Adjusters Int’l., No. 16-CV-2789 (WFK) (PK), 2017 WL 6521251 (E.D.N.Y. Dec. 18, 2017) (rejecting discrimination claim by employee of state contractor that was using federal office space; “new context and “special factors” weigh against allowing \textit{Bivens} claim).

For Eighth Amendment claims, compare Bistrian v. Levi, 912 F.3d 79, 91–96 (3d Cir. 2018) (upholding \textit{Bivens} claim for Eighth Amendment violation based on alleged failure to protect plaintiff from substantial risk of serious injury at the hands of other inmates, but rejecting \textit{Bivens} claims based on Fifth Amendment punitive detention claim and First Amendment retaliation claims, which were deemed novel and special factors counseled against extension), with Belt v. Fed. Bureau of Prisons, 336 F. Supp. 3d 428, 438–39 (D.N.J. 2018) (permitting \textit{Bivens} claim for Eighth Amendment violation based on sexual assault by prison counselor to proceed), and Gonzalez v. Hasty, 269 F. Supp. 3d 45, 63–64 (E.D.N.Y. 2017) (refusing to recognize Eighth Amendment claim challenging plaintiff’s treatment in prison because facts were significantly different than \textit{Carlson} and plaintiff failed to establish that conditions rose to the level of an Eighth Amendment violation); see also, e.g., Lanuza v. Love, 899 F.3d 1019, 1034 (9th Cir. 2018) (upholding \textit{Bivens} claim based on allegations that government immigration attorney’s falsification of evidence violated Fifth Amendment rights). \textit{But see, e.g.,} Vanderklok v. United States, 868 F.3d 189, 209 (3d Cir. 2017) (refusing to recognize \textit{Bivens} claim for First Amendment retaliation claim based on TSA screener’s false report to local police); Tun-Cos v. Perrotte, 922 F.3d 514, 525, 528 (4th Cir. 2019) (rejecting \textit{Bivens} claims by nine Latino men, alleging that ICE agents’ stops; invasions of homes without a warrant, consent, or probable cause, and illegal seizures violated the Fourth and Fifth Amendment). See generally AMERICAN IMMIG. COUNCIL, \textbf{BIVENS BASICS: AN INTRODUCTORY GUIDE FOR IMMIGRATION ATTORNEYS} 2 n.2 (2018), https://www.aila.org/infonet/bivens-an-introductory-guide [https://perma.cc/2SGC-7T4F] (citing post-\textit{Abbasi} cases in which the Court has refused to recognize a \textit{Bivens} claim).
Absence the Court’s skeptical approach, one would expect courts to easily recognize *Bivens* claims based on federal officers’ sexual assaults; indeed, those claims should be available even under that skeptical standard. The *Abbasi* Court reaffirmed the ongoing viability of *Bivens* claims against law enforcement misconduct.113 *Bivens* actions based on sexual assault should be deemed to fall within the purview of already-recognized *Bivens* claims, and thus should not be subject to *Abbasi*’s presumption against upholding a remedy. As discussed more fully below, sexual assault violates substantive due process, Fourth Amendment, Eighth Amendment, and equal protection rights, all of which have been recognized as the bases for *Bivens* causes of action.114

Even if sexual assault is deemed to be a “new” *Bivens* context, *Bivens* claims based on federal officers’ sexual assaults should be recognized notwithstanding the Court’s skeptical approach. For example, *Bivens* claims based on sexual assaults committed by federal agents do not present “special factors counselling hesitation in the absence of affirmative action by Congress.”115 Sexual assault by federal officers do not implicate policy concerns; there is no arguably defensible policy authorizing sexual assault by federal officers.116 These are not claims for

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113. *Abbasi*, 137 S. Ct. at 1856–57. The *Abbasi* Court specifically referenced the “continued force, or even the necessity” of *Bivens* claims in cases of unlawful searches and seizures by law enforcement. *Id.* at 1856. Sexual assault by federal officers constitutes an even more grievous violation of the right “to be secure in their persons” than an unlawful search or seizure of property without a warrant. U.S. CONST. am. IV.

114. See, e.g., Carlson v. Green, 446 U.S. 14, 24 (1980) (recognizing a violation of Eighth Amendment); Davis v. Passman, 442 U.S. 228, 249 (1979) (recognizing a violation of Fifth Amendment equal protection); *Bivens* v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971) (recognizing a violation of Fourth Amendment due process for unlawful search); see also infra sections II.D.2, 3, 4.

115. *Abbasi*, 137 S. Ct. at 1857. See also supra notes 106–108 and accompanying text for further discussion of the Court’s analysis of “special factors counselling hesitation.”

116. Thus, the reasoning employed by the Court in *Abbasi*, where the Plaintiffs’ challenges to detention policies were found to implicate important governmental policymaking decisions, could not apply here. See *Abbasi*, 137 S. Ct. at 1860–63. Although some cases alleging unlawful searches at border crossings might implicate immigration policies concerning transport of unlawful substances, and may raise factual questions whether a particular search was or was not unconstitutional, there can be no question that unreasonable searches involving sexual assaults are not justified by policy concerns. See, e.g., *Van Beek v. Robinson*, 879 F. Supp. 2d 707, 714–15 (E.D. Mich. 2012) (determining that intrusive search of woman crossing the border violated Fourth Amendment due process rights and denying qualified immunity and concluding that right to be free from intrusive search was clearly established); *Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1026–28, 1033–34 (N.D. Ill. 2003) (recognizing that forcible touching during pat-down searches and strip searches of African-American women while going through customs at O’Hare International Airport may violate the Fourth Amendment, but dismissing claims against individual agents based on qualified immunity).
which Congress has provided an alternative remedy intended to substitute for a constitutional claim.\textsuperscript{117} Moreover, authorizing claims for federal officers’ sexual assaults would not unreasonably or disruptively intrude on the functioning of the executive branch. Although all litigation imposes some costs and disruptions, whether against the government or an individual, the countervailing policy interest in deterring sexual assault should justify providing an avenue for relief. It would be ironic if the prevalence of sexual assault would counsel against liability; instead, the response should be to take meaningful action to prevent it, rather than eliminating the possibility of redress. Moreover, these cases are suited for judicial relief since courts are accustomed to adjudicating claims of sexual assault as civil rights violations.

In addition, cases of sexual assault by federal actors present the very type of circumstances the \textit{Abbasi} Court identified as suitable for damages relief, since equitable remedies may be insufficient to redress the harm inflicted by sexual assault.\textsuperscript{118} Sexual assault often results in economic damages, whether from medical costs, mental health consequences, or—for those in the formal economy—lost wages, and even housing, which would not otherwise be compensable.\textsuperscript{119} Monetary damages additionally

\footnotesize

\textsuperscript{117}. See \textit{Abbasi}, 137 S. Ct. at 1858, 1862–63. Although statutory schemes may provide redress for sexual assault committed by federal actors in some institutional settings, such as prisons, see PLRA, 42 U.S.C. § 1997e (2012), or federally funded educational programs, see 20 U.S.C. § 1681 et seq. (2012) (Title IX), no statutory remedy is available for survivors of sexual assault by federal actors outside of those contexts. See \textit{supra} note 67 and accompanying text; \textit{cf.}, \textit{e.g.}, Doe H. v. Haskell Indian Nations Univ., 266 F. Supp. 3d 1277, 1286 (D. Kan. 2017) (rejecting equal protection-based \textit{Bivens} claim based on sexual assault by male students in federally-owned university because alternative remedy exists through executive order prohibiting discrimination and providing procedural due process rights). Moreover, the Supreme Court has recognized that the FTCA, which might provide a tort remedy, is no substitute for a claim for constitutional violations. See F.D.I.C. v. Meyer, 510 U.S. 471, 477–78 (1994) (holding that a constitutional tort claim is not “cognizable” under the FTCA, and therefore, the constitutional tort suit properly was brought against the federal agency itself).

\textsuperscript{118}. See \textit{Abbasi}, 137 S. Ct. at 1858 (recognizing the importance of a damages remedy where equitable remedies are insufficient).

may advance the primary purpose of Bivens, deterring unconstitutional conduct by federal officers, by sending a message to officials that sexual assault by federal officials is impermissible.¹²⁰

Moreover, these claims present the case of “damages or nothing,” which the Court has recognized warrants relief.¹²¹ Survivors who are harmed outside of employment or detention settings often have no other means of statutory redress, whether for damages or injunctive relief. Bivens claims based on sexual assault, like the claims in Bivens and Davis, are typically claims seeking redress for individual constitutional violations, not challenges to institutional policy.¹²² Although tort claims may be available under the FTCA in limited cases, tort remedies for survivors of sexual violence by federal officials are riddled with exceptions that frequently preclude relief.¹²³ Tort-based relief does not provide the same redress as civil rights claims for constitutional harms.¹²⁴

Nevertheless, Bivens actions seeking to hold federal officials to account for sexual assault have met with mixed results, leading to uncertainty about whether or when a plaintiff’s claims might be sustained under the Court’s skeptical approach. The following discussion reviews how the doctrine has been applied to Fifth Amendment substantive Due Process claims, Fourth Amendment unlawful searches, Eighth Amendment cruel and unusual punishment, and Fifth Amendment equal protection claims. It summarizes how courts have evaluated both claims against the official who committed the assault, and against officials whose negligence or deliberate indifference may have served to facilitate it.

¹²⁰ See, e.g., Murray v. City of Onawa, 323 F.3d 616 (8th Cir. 2003) (recognizing, in case alleging violations of 42 U.S.C. section 1983 based on stalking and sexual assault by police officer, that liability would put police departments and cities “on notice” after mayor did nothing after hearing complaints of sexual harassment and stalking by police officer).

¹²¹ Abbasi, 137 S. Ct. at 1862.

¹²² See supra note 111.

¹²³ See notes 42–50 and accompanying text. See, e.g., Peteet v. Hawkins, No. H-17-1312, 2018 WL 4033775, at *5, *6 (S.D. Tex. July 17, 2018) (dismissing FTCA case based on allegations of sexual abuse and assault by federal prison guard, based on the conclusion that the assault was committed outside the scope of the guard’s employment and dismissing negligence claims, concluding that plaintiff failed to exhaust her administrative complaint).

¹²⁴ See supra notes 53–66 and accompanying text. Congress itself has recognized the distinction in the Westfall Act, which Congress enacted in 1988 to specify that the FTCA is the exclusive remedy for tort claims against federal employees, and which expressly preserves the ability to bring suits for constitutional violations under Bivens. See 28 U.S.C. § 2679(b)(2)(A) (2012); James E. Pfander & David Baltmanis, Whither Bivens?, 161 U. PA. L. REV. ONLINE 231, 232 (2012) (arguing that the Westfall Act preserves Bivens actions); Sisk, supra note 42, at 770–71 (same).
1. Fifth Amendment Substantive Due Process

It is well established that sexual assault violates bodily integrity and liberty interests protected by the Due Process Clause. Decisions addressing Fifth Amendment substantive due process-based Bivens claims on behalf of immigration detainees rely on Eighth Amendment doctrine in considering claims against federal officials who allegedly acted with deliberate indifference with respect to the risk of sexual violence. For example, in Doe v. Neveleff, a Texas district court considered immigrant detainees’ claims that they were sexually assaulted by Donald Dunn, a federal officer, while escorting them to airports or bus stations after they were released from detention following the determination that their asylum claims were sufficiently meritorious to be heard before an immigration court. The women sued ICE officials that they claimed were “deliberately indifferent” to the risk of sexual assault by Dunn. The court recognized their claims, reasoning that they “d[id] not differ” from the claims in Carlson, in which the Supreme Court upheld Bivens actions based on Eighth Amendment violation claims. The court rejected some defendants’ motions seeking qualified immunity,

125. See, e.g., E.D. v. Sharkey, 928 F.3d 299, 307 (3d Cir. 2019) (holding that allegations of sexual assault by detention official “could not have served a legitimate governmental objective and . . . set forth a plausible violation of her right to personal bodily integrity protected by the Due Process Clause of the Fourteenth Amendment”); Johnson v. Phillips, 664 F.3d 232, 239 (8th Cir. 2011) (holding that sexual assault by city and auxiliary police officer violated substantive due process right to bodily integrity); Alexander v. DeAngelo, 329 F.3d 912, 916 (7th Cir. 2003) (holding that rape, as opposed to “nominal or trivial[] battery,” committed under color of state law, is a deprivation of liberty without due process of law protected by the Fifth or Fourteenth Amendment); Wudtke v. Davel, 128 F.3d 1057, 1062–64 (7th Cir. 1997) (holding that sexual assault of teacher by top school district officials may violate substantive due process component of the Fourteenth Amendment); U.S. DEP’T OF JUST., ICE, LAW ENFORCEMENT MISCONDUCT, https://www.justice.gov/crt/law-enforcement-misconduct#sex [https://perma.cc/R4KT-JYMA] (stating that law enforcement officers who engage in nonconsensual sexual contact with persons in their custody deprive those persons of liberty without due process of law, which includes the right to bodily integrity).

126. For Bivens claims alleging Eighth Amendment violations, see infra section III.D.3. Notwithstanding courts’ analogies in immigration detention cases to the Eighth Amendment, a number of circuits have concluded that the legal rights of an immigration detainee are analogous to those of a pretrial detainee. See, e.g., Sharkey, 928 F.3d at 306–07 (joining and citing similar decisions from other circuits).


128. Id. at *2.

129. Id. at *6. The reported decision does not address the claims against Dunn, who was arrested and criminally charged. Id. at *11. In a number of other decisions, claims brought against officers who committed the assaults arose from illegal searches and, consequently, were analyzed as violations of the Fourth Amendment. See infra section II.D.2.

reasoning that their knowing failure to ensure that policies against sexual assault were being followed could amount to “subjective deliberate indifference” that would defeat their qualified immunity claim.\textsuperscript{131}

In other cases, courts have recognized that federal officials’ responses to physical, emotional and sexual abuse by other federal officials would violate due process rights, but have granted officials’ claims for qualified immunity. For example, in \textit{Doe v. Robertson},\textsuperscript{132} a number of female immigrants claimed that they had been sexually assaulted by a federal official while being transported from an immigration detention center.\textsuperscript{133} The official who assaulted them pled guilty to federal and state criminal charges.\textsuperscript{134} The women brought suit against other officials, alleging that they had been deliberately indifferent to violations of the women’s Fifth Amendment due process rights to “basic human needs.”\textsuperscript{135} The Fifth Circuit Court of Appeals assumed without deciding that \textit{Bivens} would be an appropriate vehicle for plaintiffs’ Fifth Amendment claims.\textsuperscript{136} It concluded that plaintiffs had alleged officials’ actual knowledge of violations of the agreement binding the facility that required that transported detainees be escorted by at least one officer of the same gender, the purpose of which was to prevent sexual assault, and that they knew of the purpose of the provision.\textsuperscript{137} Both of those conclusions supported the plaintiffs’ argument that the officials acted with “deliberate indifference.”\textsuperscript{138} Nevertheless, the court dismissed the claims on qualified immunity grounds, determining that “no clearly established law” provides that an official’s knowledge of contractual breaches of provisions aimed to prevent sexual assault, standing alone, amount to deliberate indifference in violation of a detainee’s Fifth Amendment rights.\textsuperscript{139} Thus,

\begin{itemize}
  \item \textsuperscript{131} \textit{Id.} at *8 n.6 (citing 42 U.S.C. § 1983 cases rejecting qualified immunity claims in claims of sexual assault). Notably, the court granted qualified immunity to one defendant who was off site, and therefore did not directly control the time, place, and transport of individual residents. \textit{Id.} at *9; see also \textit{Sharkey}, 928 F.3d at 306–09 (inter alia, denying summary judgment motion by county defendants on failure to protect and failure to train claims against officials based on their deliberate indifference to federal official’s sexual abuse of detainee, and denying qualified immunity to defendants, holding that plaintiff alleged violation of clearly established constitutional rights); \textit{infra} notes 132–142 and accompanying text (discussing the role of qualified immunity in cases involving sexual assault by federal and state officials).
  \item \textsuperscript{132} 751 F.3d 383 (5th Cir. 2014).
  \item \textsuperscript{133} \textit{Id.} at 385.
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{Id.} at 387.
  \item \textsuperscript{136} \textit{Id.} at 387 n.2.
  \item \textsuperscript{137} \textit{Id.} at 389.
  \item \textsuperscript{138} \textit{Id.} at 392.
  \item \textsuperscript{139} \textit{Id.} at 392–93.
\end{itemize}
by blurring the substantive analysis with the qualified immunity inquiry, the court denied the claim.\textsuperscript{140} Other courts similarly have precluded recovery in \textit{Bivens} substantive due process claims, either because they found the allegations factually insufficient, or because they granted qualified immunity to officials.\textsuperscript{141} In cases brought against state officials under 42 U.S.C. § 1983, qualified immunity similarly has shielded many, though not all, from liability.\textsuperscript{142}

2. \textit{Fourth Amendment Unlawful Search}

Courts also have drawn on the \textit{Bivens} decision itself, which was based on allegations of an unlawful search and seizure,\textsuperscript{143} to hold that claims for sexual assaults by law enforcement officials constitute unreasonable searches in violation of the Fourth Amendment. For example, a CBP officer’s search of a woman crossing the Canadian border, in which he twisted her nipples and touched her breasts, and conducted a “forceful sweep” of her groin area, violated her Fourth Amendment right against unreasonable search and seizure.\textsuperscript{144} The court upheld the claims and

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\textsuperscript{140} Id. at 394. For critiques of qualified immunity doctrine, see, e.g., supra note 46.

\textsuperscript{141} See, e.g., E.A.F.F. v. Gonzales, 600 F. App’x 205, 214 (5th Cir. 2015) (determining federal officials were entitled to qualified immunity after concluding that they lacked subjective awareness of the risk of substantial harm or that the defendants failed to respond reasonably in case alleging that eleven unaccompanied Central American minors were physically and sexually abused in federal custody); Shorter v. United States, No. 17–8911 (RMB), 2018 WL 1734061, at *5–6 (D.N.J. Apr. 9, 2018) (holding Fifth Amendment \textit{Bivens} claim of transgender prisoner who alleged that officials failed to adequately investigate sexual assault in abeyance; noting that case would constitute a “new” \textit{Bivens} context, but granting leave to amend to supplement pleadings).

\textsuperscript{142} See, e.g., Cash v. County of Erie, 654 F.3d 324, 336–39 (2d Cir. 2011) (finding prison officials deliberately indifferent and denying motion for qualified immunity when they failed to modify training and policies after a sexual assault occurred in their facility). \textit{But see, e.g.,} Rivera v. Bonner, 691 F. App’x 234, 240 (5th Cir. 2017) (determining that county sheriff and jail administrator were entitled to qualified immunity on 42 U.S.C. § 1983 substantive due process claim that they were deliberately indifferent to safety risks after guard sexually assaulted detainee; available information was “vague and inconclusive,” and deliberate indifference in hiring was precluded; and, no clearly established law indicated that limited response to previous sexual assault incidents violates the Constitution); Doe v. United States, 831 F.3d 309 318, 318–19 (5th Cir. 2016) (holding that Williamson County was not deliberately indifferent to policy violations that increased the risk of sexual assault of detainees, given deputy’s “swift action” after learning of sexual assaults by employee); Guzman-Martinez v. Corr. Corp. of Am., No. CV 11–02390–PHX–NVW, 2012 WL 2873835, at *9 (D. Ariz. July 13, 2012) (dismissing Due Process 42 U.S.C. § 1983 claims against ICE employees following sexual assault of transgender pretrial detainee by officer and other detainees given lack of legal authority establishing constitutional right to be housed in sex-specific immigration detention facility). For additional cases analyzing Section 1983 claims brought under other theories of liability, see infra notes 149, 163, 164, 167.

\textsuperscript{143} \textit{See supra} notes 70–79.

\textsuperscript{144} Van Beek v. Robinson, 879 F. Supp. 2d 707, 709–11, 712–14 (E.D. Mich. 2012) (denying summary judgment against the officer who conducted the “search” and another officer who
rejected arguments that the defendants were entitled to qualified immunity. Similarly, allegations that a corrections officer searched up and down a prisoner’s legs, whispered in his ear, “[y]ou don’t feel like a Mexican,” grabbed his genitals and subjected him to nearly daily verbal sexual comments and pat-down searches, were sufficient to state a claim that the officer violated the prisoner’s Fourth Amendment rights. In another case, U.S. Customs Service officials at Chicago’s O’Hare International Airport who conducted intrusive strip searches were found to have violated the Fourth Amendment; however, some of the officers involved in the search were granted qualified immunity. Notably, the court in that case additionally upheld claims against supervisory officials for their alleged knowledge and approval of the unlawful searches. In analogous cases against state officials, at least one court upheld a Fourth Amendment 42 U.S.C. § 1983 claim of unlawful seizure against a state prison guard who used force to keep the plaintiff in the room where she was sexually assaulted by another guard. Nevertheless, other courts have rejected similar claims, determining, for example, that sexual assault of a pretrial detainee was “meaningfully different” from prior Bivens cases, and that special factors counseled hesitation, given Congress’s legislation addressing prison conditions.

participated in her detention and was present during the “search”).

145. See, e.g., id. at 714–15 (concluding that a reasonable CBP officer would be on notice that twisting nipples, fondling breasts, and forcefully sweeping genital areas violated Fourth Amendment rights).


147. See Anderson v. Comelio, 284 F. Supp. 2d 1008, 1026–28, 1031–34 (N.D. Ill. 2003) (denying qualified immunity for some defendants since a customs service employee could not have reasonably believed that reasonable suspicion existed to support a strip search absent any facts triggering suspicion, but granting qualified immunity for other defendants, holding that it was not clearly established that pat down searches could not be conducted based on no suspicion).

148. Id. at 1029. Notably, the court also upheld claims against witnesses to the searches for their participation, observation, and failure to intervene. Id. at 1029–30.


3. Eighth Amendment Cruel and Unusual Punishment

Similarly, courts have upheld *Bivens* claims based on sexual assault by officials in conditions of confinement, recognizing that it is “well established” that sexual harassment or abuse of an inmate can constitute “serious harm” in violation of the Eighth Amendment.\(^{151}\) Immigration detainees are civil detainees, so their constitutional protections are based on the Fifth, not the Eighth Amendment.\(^{152}\) Since the Fifth Amendment is more protective than the Eighth, cases interpreting the Eighth Amendment provide a floor for minimal protection for immigrant detainees.\(^{153}\)

In *Carlson v. Green*,\(^ {154}\) the Court upheld a *Bivens* claim based on allegations that a prisoner died because prison officials failed to give him proper medical attention.\(^ {155}\) The landmark *Farmer v. Brennan*\(^ {156}\) decision built on that ruling, and upheld a *Bivens* claim against prison officials for disregarding the risk of serious harm in a case brought by a prisoner diagnosed by prison authorities as a transsexual, who was beaten and raped by another inmate.\(^ {157}\) The Court there squarely held that sexual abuse of a prisoner has no legitimate penological purpose.\(^ {158}\) Subsequent Eighth Amendment claims have succeeded against officials who committed the assaults as well as against officials who disregarded the risk of harm. For example, in *Leibelson v. Collins*,\(^ {159}\) a federal district court upheld an Eighth Amendment *Bivens* claim brought by a transgender incarcerated woman who claimed that a guard sexually assaulted her when the guard inappropriately touched the prisoner’s rectum in the course of a strip search.\(^ {160}\) The court reasoned that, even


\(^{152}\) See, e.g., *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (“[T]he more protective fourteenth amendment standard applies to conditions of confinement when detainees . . . have not been convicted’ of a crime.” (quoting Gary H. v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987)); Unknown Parties v. Johnson, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *4 (D. Ariz. Nov. 18, 2016) (immigrant detainees “are protected by both the Fifth and Eighth Amendments”).

\(^{153}\) See, e.g., *Jones*, 393 F.3d at 931.


\(^{155}\) Id. at 23.


\(^{157}\) *See Farmer*, 511 U.S. at 830. The Court held that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement if the official “knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” Id. at 847.

\(^{158}\) *Farmer*, 511 U.S. at 833–34.


\(^{160}\) Id. at *13–14 (upholding claim against officer who allegedly “inserted his finger(s) into [the plaintiff’s] rectum” during a strip search and denying qualified immunity), aff’d in part, rev’d in part, *Leibelson v. Cook*, 761 F. App’x 196, 198 (4th Cir. Feb. 22, 2019), at *3–4 (upholding denial of
though it viewed the case as presenting a new Bivens context under Abbasi, the claims were analogous to those in Carlson, and no special factors counseled hesitation since the case did “not implicate national security, prison policy, or other executive or legislative functions.”

Other decisions similarly have upheld Eighth Amendment-based Bivens claims in sexual assault cases. In analogous cases alleging Eighth Amendment violations against state officials, courts similarly have squarely recognized that “sexual harassment of prisoners by guards” is a violation of the Eighth Amendment. Courts have responded to officials’ defenses arguing that sexual relations between guards and prisoners were consensual by acknowledging the inherently coercive nature of sexual relations in prisons. At the same time, and unsurprisingly, some courts

qualified immunity for officer alleged to have committed sexual assault, but rejecting Eighth Amendment claim based on denial of food because plaintiff had abandoned the claim; see also infra note 180 (discussing the Leibelson decision’s rejection of Equal Protection arguments against other defendants).


164. See, e.g., E.D. v. Sharkey, 928 F.3d 299, 308–09 (3d Cir. 2019) (recognizing that there might be a factual dispute about whether sexual relations between guard and immigrant detainee was consensual, but identifying violation of clearly established constitutional right considering ICE policies and Pennsylvania law deeming any sexual contact between guards and detainees to be sexual abuse); Rafferty v. Trumbull Cty., 915 F.3d 1087, 1096 (6th Cir. 2019) (recognizing rebuttable presumption that sexual relations between prison guards and prisoners are not consensual); Wood v. Beauclear, 692 F.3d 1041, 1047–51 (9th Cir. 2012) (upholding Eighth Amendment 42 U.S.C. § 1983 claim based on allegations of sexual harassment by prison guard and creating rebuttable presumption of non-consent after reviewing courts’ approaches to allegedly consensual sexual relations between prisoners and guards); Cash v. Cty. of Erie, No. 04–CV–0182–JTC (JFM), 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009) (holding that prisoners lack ability to consent to sexual relations with prison guard); Carrigan v. Davis, 70 F. Supp. 2d 448, 461 (D.Del.1999) (relying on Delaware’s statutory prohibition of sexual contact between prisoner and guard to reject consent as a defense). But see, e.g., Graham v. Logan Cty, 741 F.3d 1118, 1126 (10th Cir. 2013) (recognizing that “power
have rejected claims, reasoning that particular allegations of unwanted physical and sexual advances failed to rise to the level of an Eighth Amendment violation.165

Many courts have found Eighth Amendment violations in cases against officials who ignored or dismissed the risk of sexual assault either by prison personnel or by other prisoners.166 Analogous claims have prevailed against state officials under 42 U.S.C. § 1983.167 Not

dynamics between prisoners and guards make it difficult to discern consent from coercion168 but finding overwhelming evidence of consent in instant case). For a state statute deeming any sexual contact between a guard and a prisoner non-consensual due to the inherent power differential between guards and prisoners, see N.Y. Penal Law § 130.05(3)(c)–(f) (2019). For further discussion of the role of consent in allegations of sexual assault against prison guards see infra notes 181–183 and accompanying text.

165. See, e.g., Heard v. United States, 2017 WL 5505866, at *3 (N.D. Ga. Oct. 25, 2017) (holding that one physical sexual advance and two verbal sexual advances were insufficient); Obiegbu v. Werlinger, 581 F. App’x 119, 121 (3d Cir. 2014) (holding that a single pat down frisk in which a correctional officer grabbed prisoner’s genitals through his clothing two times did not violate the Eighth Amendment); Washington v. Harris, 186 F. App’x 865, 865–66 (11th Cir. 2006) (per curiam) (holding that allegations that officer crept up behind prisoner, grabbed genitals, kissed him on the mouth, and threatened to perform oral sex were deemed de minimus injuries found insufficient to state Eighth Amendment violation); Boxer X v. Harris, 437 F.3d 1107, 1111 (11th Cir. 2006) (holding that a female prison guard’s solicitation of a male prisoner’s manual masturbation, even under the threat of reprisal, is not more than de minimus injury); Boddie v. Schnieder, 105 F.3d 857, 861–62 (2d Cir. 1997) (holding that a small number of incidents of harassment and alleged touching were insufficient to allege constitutional violation).


167. See, e.g., Makdessi v. Fields, 789 F.3d 126, 136 (4th Cir. 2015) (upholding Eighth Amendment 42 U.S.C. § 1983 claim based on prison officials’ deliberate indifference to risk of sexual assault and holding that “actual knowledge” can be proven by “circumstantial evidence that a risk was so obvious that it had to have been known”); Hostetler v. Green, 323 Fed. App’x. 653, 656–59 (10th Cir. 2009) (applying Eighth Amendment analysis to pretrial detainee’s Fourteenth Amendment 42 U.S.C. § 1983 claim that prison officials were “deliberately indifferent” to substantial risk of sexual assault by fellow prisoners and rejecting qualified immunity challenge); Tafoya v. Salazar, 516 F.3d 912, 918–21 (10th Cir. 2008) (upholding Eighth Amendment 42 U.S.C. § 1983 claim against sheriff for alleged deliberate indifference to substantial risk of sexual assault); Renee v. Peraldez, No. 7:16-CV-281, 2017 WL 3335989, at *8, *20 (S.D. Tex. Aug. 3, 2017) (upholding Eighth Amendment
surprisingly, a number of decisions have rejected claims, determining the factual allegations insufficient. Nevertheless, the Eighth Amendment should provide an analogy, and a basis for recovery, for sexual assault committed by federal agents of those in immigration detention.

4. Fifth Amendment Equal Protection

In addition to Fifth Amendment Due Process, Fourth Amendment unlawful search, and Eighth Amendment theories, Bivens claims for federal agents’ sexual assaults naturally should be recognized under established equal protection doctrine. The Supreme Court has recognized a Bivens claim based on a gender-based Equal Protection violation, so equal protection claims involving sexual assault do not present a new legal theory or area of law. In Davis v. Passman, a male congressperson terminated his female deputy administrative assistant because, although she was “able, energetic and a very hard worker,” he concluded “that it was essential that the understudy to [his] Administrative Assistant be a man.” Although the plaintiff had no statutory claim, she had a claim for a constitutional violation because, in the absence of clear direction for an issue to be addressed by a “coordinate political department,” the Court would “presume” that courts enforce constitutional rights. The Court drew on previous race discrimination claims, determined that the plaintiff

42 U.S.C. § 1983 claims based on prison officials’ deliberate indifference to sexual assault by prison guard and denial of request for medical attention following assault, and upholding claims based on municipality’s failure to train, but granting qualified immunity to all defendants except those who subjectively knew details of the assault); Ball v. Bailey, No. 7:15cv00003, 2015 WL 4591410, at *8–9 (upholding Eighth Amendment 42 U.S.C. § 1983 claim based on allegations that prison counselor rubbed and kissed prisoner, grabbed genitals, asked him to show her his penis, rubbed his buttocks, sent him sexually explicit photographs of herself, sent him love letters, performed oral sex on him, and engaged in sexual intercourse with him over his objections); Ramos, 2015 WL 13157319, at *8–10 (upholding Eighth Amendment 42 U.S.C. § 1983 claim against prison officials who were on notice of risk that employee was engaging in sexual misconduct with prisoners, but dismissing claims against other officials who took reasonable steps to mitigate risk). But see, e.g., Roberts v. Beard, No. 15cv1044-WQH-RBM, 2018 WL 4561379, at *3–4 (S.D. Cal. Sept. 24, 2018) (holding that a defendant’s alleged “rub[bing] or touch[ing] [of] [Plaintiff’s] male organ” during a pat-down search did not constitute Eighth Amendment violation).

168. See, e.g., Shorter v. United States, Civ. No. 17–8911 (RMB), 2018 WL 1734061, at *3–5 (D.N.J. Apr. 9, 2018) (denying transgender prisoner’s Bivens claim alleging Eighth Amendment violations based on failed investigations of sexual assault, finding that allegations didn’t provide a well-documented pattern of inmate sexual assaults at the prison, and did not establish defendants’ knowledge that there was an excessive risk that an inmate would commit such an attack, and further noting that allegations would constitute a “new Bivens context”).


170. Id. at 230.

171. Id. at 242.
had no other means to vindicate her rights, and upheld her claim of discrimination in violation of the Fifth Amendment. \(^{172}\) It further upheld her claim for damages, recognizing that damages relief would be judicially manageable given the courts' extensive experience litigating Title VII claims. \(^{173}\) The Court found no “special concerns counseling hesitation,” since all government actors must be subject to federal law, and acknowledged no congressional declaration prohibiting a remedy. \(^{174}\) The Court dismissed concerns that the federal courts would be deluged with claims, since any plaintiff seeking relief would first have to establish a violation, and, moreover, because “limitations... arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.” \(^{175}\) More recently, courts have recognized equal protection as a basis for \textit{Bivens} claims in other post-\textit{Davis} cases involving impermissible bias. \(^{176}\)

Title VII Supreme Court case law recognizing sexual assault (as well as harassment) as a form of impermissible sex discrimination lends additional support to the easy conclusion that sexual assault by federal officials also constitutes impermissible sex discrimination, and therefore, an equal protection violation. \(^{177}\) Courts analyzing \textit{Bivens} claims should rely on the established case law applying Title VII standards to analyses of equal protection claims in cases involving sexual assault and harassment by state actors. \(^{178}\)

\(^{172}\) See \textit{id}. at 243--44.

\(^{173}\) \textit{Id}. at 245.

\(^{174}\) \textit{Id}. at 246--47.

\(^{175}\) \textit{Id}. at 248.

\(^{176}\) For example, the D.C. Circuit Court of Appeals upheld a challenge asserting that the Trump Administration’s ban of transgender people serving in the military violated Equal Protection, based on \textit{Davis}. See \textit{Doe I v. Trump}, 275 F. Supp. 3d 167, 217 (D.D.C. 2017) (finding the plaintiffs likely to succeed in demonstrating that the military policy is unconstitutional; case sought injunctive relief, not damages). The Ninth Circuit upheld a \textit{Bivens} claim that FBI agents violated the equal protection rights of two deceased Native American men based on allegations that they failed to conduct a sufficiently thorough investigation of the deaths due to animus toward Native Americans, although the decision predates \textit{Abibi}. See \textit{Cole v. Oravecz}, 465 F. App’x 687, 688--89 (9th Cir. 2012); see, e.g., \textit{Kwai Fun Wong v. United States}, 373 F.3d 952 (9th Cir. 2004) (upholding \textit{Bivens} claim by foreign religious leader and organization based on allegations that adjustments in leader’s immigration status were based on discriminatory animus). But see, e.g., \textit{infra} notes 179--180 (discussing cases denying claims).


\(^{178}\) Courts addressing this question have grappled with how the Equal Protection Clause’s requirement of proof of discrimination squares with Title VII’s authorization of claims based on both
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Nevertheless, a few decisions have dismissed Bivens claims based on equal protection theories, either because the claims arose in military contexts, or because they arose in settings factually distinguishable from Davis and the plaintiffs had other available remedies. In a concerning turn, at least one decision addressing an equal protection claim based on a sexual assault by a state official invoked the very type of disparate treatment (intentional discrimination) and disparate impact (unintentional discrimination). See Washington v. Davis, 426 U.S. 229, 241–45 (1976) (requiring proof of discriminatory motive to prevail in constitutional discrimination claims). The Supreme Court has recognized that “[s]exual harassment under Title VII presupposes intentional conduct.” Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998). Accordingly, other courts have applied Title VII standards to equal protection sexual harassment claims without additional inquiry. See, e.g., Raspardo v. Carbone, 770 F.3d 97, 119–20 (2d Cir. 2014) (applying Title VII standards and also analyzing supervisory liability after Iqbal); Jackson v. Ala. Dep’t of Corr., 643 F. App’x 889, 891 (11th Cir. 2016) (noting that “because the elements and analysis of a sexual harassment claim is identical under Title VII and the Equal Protection Clause, [the court] jointly analyze[d] both claims under the applicable Title VII law.”); Passananti v. Cook County, 689 F.3d 655, 662 (7th Cir. 2012) (“The law is well established that both Title VII and section 1983 could support . . . plaintiff’s claims, for sexual harassment . . . .”); Bator v. State, 39 F.3d 1021, 1028–29 (9th Cir. 1994) (citing Title VII standards and recognizing that the constitution prohibits sexual harassment). But see, e.g., Huff v. Sheahan, 493 F.3d 893, 902–03 (7th Cir. 2007) (applying Title VII standards and requiring proof of discriminatory intent); Bohen v. City of East Chicago, Ind., 799 F.2d 1180, 1186–87 (7th Cir. 1986) (finding the same). See also TAYLOR FLYNN, FEDERAL EQUAL PROTECTION, IN GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE 15–1, 15–1 n.15 (Christine M. Duffy et al. eds., 2014), https://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1308&context=facschol [https://perma.cc/K2FH-TTRX] (discussing application of Title VII standards to constitutional sex discrimination claims).

179. See, e.g., Doe v. Hagenbeck, 870 F.3d 36, 43–44 (2d Cir. 2017) (rejecting Bivens claim alleging that sexual assault at military training institution violated equal protection; injuries based on “special factors” counseling abstinence); Klay v. Panetta, 758 F.3d 369, 375 (D.C. Cir. 2014) (refusing to imply a Bivens action based on sexual assault problems in the military; concerns that implying a remedy would “require military leaders to defend their professional management choices,” counsel against authorizing a remedy); Cioca v. Rumsfeld, 720 F.3d 505, 517 (4th Cir. 2013) (rejecting Bivens claim based on constitutional violations arising from military service).

180. See, e.g., Atterbury v. U.S. Marshals Serv., 805 F.3d 398, 403, 404 (2d Cir. 2015) (declining to adopt categorical rule precluding Bivens claim in action by employee of federal contractor, but identifying “special factors” counseling hesitation based in part on availability of claim under Administrative Procedure Act); Morgan v. Shivers, No. 1:14-cv-7921-GHW, 2018 WL 618451, at *5–6 (S.D.N.Y. Jan. 29, 2018) (dismissing pre-trial detainee’s Bivens claims, based, inter alia, on the fact that it arose in the prison context, a context in which Congress has legislated); Leibelson v. Collins, Civ. No. 5:15-cv-12863, 2017 WL 6614102, at *10–11 (S.D. W. Va. Dec. 27, 2017) (declining to uphold Fifth Amendment equal protection Bivens claims by transgender federal prisoner against individual officers based on, inter alia, sexual assault during strip search, refusal to provide prisoner with hygiene and cleaning supplies, threats and derogatory slurs, and failure to accommodate complaints of being unable to eat in dining hall due to threat of sexual abuse by other inmates, given limited case law analyzing equal protection claims against federal prison officials and the plaintiff’s active pursuit of FTCA claim); Patrick v. Adjusters Int’l, 16-CV-2789 (WFK) (PK), 2017 WL 6521251, at *1, *4 (E.D.N.Y. Dec. 18, 2017) (distinguishing case from Davis because the plaintiff was not a federal employee; court found insufficient facts to support claims under New York State and New York City human rights law).
outdated stereotype outlawed by the Equal Protection Clause. In *Ramos v. Swatzel*, the federal district court rejected a prisoner’s 42 U.S.C. § 1983 equal protection claim against the guard who sexually assaulted her and other officials, reasoning that nothing in the record indicated that the guard’s feelings were “based on anything but a personal attraction to [Plaintiffs],” and that there was no indication of an official policy sanctioning sexual assault of prisoners. This reasoning ignores modern understandings that any such relationship would be inappropriate due to the power imbalance between them.

As the preceding discussion illustrates, the *Bivens* doctrine provides no recourse against the federal government itself for sexual assault committed by its officials and provides an uncertain remedy against federal officials for sexual assaults they commit, given recent cramped interpretations of the doctrine. This liability scheme contrasts sharply with longstanding doctrine and emerging accountability norms for sexual assault committed at work.

III. CIVIL RIGHTS RECOURSE FOR GENDER VIOLENCE IN EMPLOYMENT

The body of case law decided under Title VII offers the most in-depth analyses of gender violence, including sexual assault, as a civil rights violation. Courts uniformly recognize that institutions hold responsibility for eliminating discrimination, including gender violence, from the workplace, notwithstanding differences about the precise contours of the scope of liability. The landmark 1986 case, *Meritor v. Vinson*, in which the Supreme Court declared that sexual harassment at work was a form of sex discrimination, derived from Mechelle Vinson’s claims that her boss conditioned her employment on acceding to his demands for sexual favors, which included sexual intercourse, unwanted touching, and forcible rape. The Court, in a unanimous opinion by Justice Rehnquist, declared that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis

182. *Id.* at *12.
183. *See, e.g.*, Wood v. Beauclair, 692 F.3d 1041, 1046–47 (9th Cir. 2012) (recognizing that prisoners cannot consent to sexual relations with staff); *infra* note 261 (citing New York state law clarifying that police officers cannot have sex with arrestees).
185. *Id.* at 60–62.
of sex.”¹⁸⁶ Twelve years later, in Oncale v. Sundowner Offshore Servs., Inc.,¹⁸⁷ the Court, in a unanimous opinion authored by Justice Scalia, affirmed that sexual assault constitutes impermissible sex discrimination.¹⁸⁸ That case involved a male shipworker’s allegations that he was subjected to ongoing sexual harassment, including sexual assault and rape, by other male employees.¹⁸⁹ Since then, courts routinely have recognized that sexual assault at work violates Title VII.¹⁹⁰ Courts similarly have recognized that sexual harassment encompasses a wide range of sexual and non-sexual conduct.¹⁹¹ Although the basic premise that sexual harassment is a form of impermissible discrimination has not been challenged, the scope of liability remains a source of sharp debate.¹⁹² The following discussion first delineates the current parameters for liability, and then reviews reforms advanced in the wake of the #MeToo revelations. This wave of reform

¹⁸⁶. Id. at 64. While readily agreeing that sexual harassment constituted a form of sex discrimination, the Court went on to opine about issues that continue to animate debates about the reach of sexual harassment law today, namely, whether “economic” or “tangible” discrimination is required and the standard for institutional liability. Id.


¹⁸⁸. Id. at 80.

¹⁸⁹. Id. at 77.

¹⁹⁰. See, e.g., Smith v. Sheahan, 189 F.3d 529, 533–34 (7th Cir. 1999) (noting that a single incident of sexual assault would constitute impermissible sexual harassment); Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995) (stating that “every rape committed in the employment setting is also discrimination based on the employee’s sex”); Hush v. Cedar Fair, L.P., 233 F. Supp. 3d 598, 603–04 (N.D. Ohio 2017) (holding that a single sexual assault of employee’s fourteen-year-old daughter was severe enough to state claim for hostile environment); Winkler v. Progressive Bus. Publ’n’s, 200 F. Supp. 3d 514, 519 (E.D. Pa. 2016) (holding that a single incident in which co-worker reached underneath employee’s clothing and placed dollar bills between her bra strap and bare skin was sufficiently severe to state hostile environment claim); E.E.O.C. v. Fred Meyer Stores, Inc., 954 F. Supp. 2d 1104, 1114 (D. Or. 2013) (holding that a single allegation of customer grabbing employee’s breast was sufficiently severe to state a hostile environment claim); Jones v. U.S. Gypsum, 126 F. Supp. 2d 1172, 1179–80 (N.D. Iowa 2000) (upholding sexual harassment claim based on assault in genital area); see also, e.g., Howley v. Town of Stratford, 217 F.3d 141, 154–55 (2d Cir. 2000) (upholding claim based on single incident of verbal assault, followed by repeated acts of harassment). But see, e.g., Hockman v. Westward Commc’n’s, LLC, 407 F.3d 317, 328 (5th Cir. 2004) (holding that a co-worker grabbing plaintiff’s breasts and behind and holding her cheeks and trying to kiss her not sufficiently severe); Brooks v. San Mateo, 229 F.3d 917, 924 (9th Cir. 2000) (holding that a single incident of co-worker forcing his hand underneath sweater and bra not sufficiently severe).

¹⁹¹. See, e.g., Schultz, supra note 53 (arguing that sexual harassment wrongly has been understood as limited to sexual conduct and that structural reform is needed to eliminate it).

¹⁹². For a summary of issues concerning the standard for liability, see, for example, Mark J. Stern, Who’s to Blame for America’s Sexual Harassment Nightmare?, SLATE: JURIS. (Oct. 17, 2017, 7:02 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/blame_the_supreme_court_for_america_s_sexual_harassment_nightmare.html [https://perma.cc/DS4D-FRVV]. For critiques of current doctrine, see infra notes 199, 210 and accompanying text. For proposed reforms to address concerns about current liability standards, see infra section III.B. and accompanying text.
reflects emerging accountability norms for addressing and preventing sexual harassment and assault.

A. **Current Doctrine**

As those familiar with sexual harassment law know well, the Supreme Court has defined actionable workplace sexual harassment as unwelcome conduct committed because of sex, that is severe or pervasive enough to objectively and subjectively alter the conditions of the target’s employment.\(^{193}\) Once a plaintiff establishes that she was subject to sexual harassment, the next question turns to whether the employer will be held liable for the harassment. The Court has firmly opined that this question would be determined by applying agency standards.\(^{194}\) The Supreme Court has distinguished between direct, or “vicarious” liability, under which an employer essentially is held strictly liable, and a negligence standard, under which an employer is liable if it knew or should have known of the harassment but failed to take remedial action.\(^{195}\) Accordingly, the Court has determined that employers are strictly liable when a “supervisor” sexually harasses an employee, if the harassment culminates in a “tangible employment action.”\(^{196}\) If the supervisor takes no tangible employment action, the employer will avoid liability if it can satisfy the affirmative defense that (1) they exercised reasonable care to prevent and correct harassing behavior and (2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities the employer provided.\(^{197}\) The Court purported to adopt this affirmative defense to affect Title VII’s deterrent purpose; it posited that limiting employer liability would encourage employers to create anti-harassment policies and effective grievance procedures.\(^{198}\) Nevertheless, with over

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193. See, e.g., *Oncale*, 523 U.S. 75, 80–81 (1998). The Court has further reasoned that an employee’s refusal to submit to a supervisor’s sexual demands itself constitutes a change in the terms and conditions of employment that is actionable under Title VII; but that sexual harassment “preceding” an adverse employment decision, such as unfulfilled threats, only will be actionable if the conduct is severe or pervasive. *See* Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 753–54 (1998).


196. *Id.* at 424. The Court reasoned that tangible employment actions require the imprimatur of the employer and, therefore, become the act of the employer for purposes of Title VII. *Ellerth*, 524 U.S. at 761–62.


198. *Ellerth*, 524 U.S. at 764; *see also* *Vance*, 570 U.S. at 430 (explaining that the affirmative
thirty years of case law behind us, this standard has been widely criticized as instead creating a compliance culture geared toward enabling employers to avoid liability, rather than supporting meaningful efforts to eliminate harassment and other forms of workplace discrimination.\textsuperscript{199} In addition to creating the affirmative defense for cases in which there is no “tangible employment action,” the Court more recently has addressed the question of when an employee is a “supervisor” or a co-worker for vicarious liability purposes. In the 2013 \textit{Vance v. Ball State University}\textsuperscript{200} decision, the Supreme Court determined that an employee is a “supervisor” for purposes of vicarious liability “if he or she is empowered by the employer to take tangible employment actions against the victim.”\textsuperscript{201} The Court sought to ensure that the “injury,” for instance, the tangible employment action, could not have been inflicted absent the agency relation.\textsuperscript{202} The \textit{Vance} decision drew a strong dissent by Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, that would hold employers liable for harassment by employees with authority to direct an employee’s daily activity.\textsuperscript{203} For cases involving sexual harassment by someone other than a “supervisor,” such as a co-worker or customer, an employer will be held liable if it was negligent in its control over working conditions. In other words, it would be liable if it knew or should have known of the harassment and failed to take prompt and effective remedial action.\textsuperscript{204} Presumably, this negligence standard is harder to satisfy than direct, or automatic, liability under a respondeat superior theory.

In contrast to this rich case law grappling with the contours of institutional accountability, courts consistently have concluded that individuals cannot be held liable for sexual harassment or other discrimination under Title VII.\textsuperscript{205} Courts have relied on Title VII’s

\textsuperscript{199}. For a collection of critiques, see, for example, infra note 210. For proposed reforms, see infra section III.B. and accompanying text.

\textsuperscript{200}. 570 U.S. 421 (2013).

\textsuperscript{201}. \textit{Vance}, 570 U.S. at 424.

\textsuperscript{202}. \textit{Id}. at 429, 431–32.

\textsuperscript{203}. \textit{Id}. at 451 (Ginsburg, J., dissenting).

\textsuperscript{204}. \textit{Id}. at 427–28; \textit{Ellerth}, 524 U.S. at 759.

\textsuperscript{205}. \textit{See}, e.g., Fantini v. Salem State College, 557 F.3d 22, 30 (1st Cir. 2009); Van Horn v. Best Buy Stores, 526 F.3d 1144, 1147 (8th Cir. 2008); Albra v. Advan, Inc., 490 F.3d 826, 830 (11th Cir. 2007); Foley v. Univ. of Houston Sys., 355 F.3d 333, 340 n.8 (5th Cir. 2003); Glebocki v. City of Chicago, 32 Fed. App’x. 149, 154 (7th Cir. 2002); Lissau v. Southern Food Serv., 159 F.3d 177, 181
statutory definition of “employer,” in concluding that the relief granted under Title VII is against the employer, not against individual employees whose actions would constitute discrimination in violation of the act.\textsuperscript{206} As one court reasoned, Title VII’s limited applicability to employers with fifteen or more employees reflects its intent not to “burden” small entities with the costs of anti-discrimination litigation.\textsuperscript{207} The court further reasoned that if small businesses would not face Title VII liability, Congress certainly did not intend individual employees to face liability.\textsuperscript{208} Moreover, courts have invoked Congress’s amendment of Title VII to include a graded damages scale depending on the size of the employer, without any enumeration of damages for which an individual would be held liable, to further support the conclusion that Title VII does not cover individual liability.\textsuperscript{209}

In summary, current anti-discrimination doctrine squarely holds employers liable for sexual harassment, including sexual assault committed by employees; however, the standards of liability have been narrowed over time. By contrast, Title VII does not provide a remedy against an individual employee, even if that individual committed sexual assault. Not surprisingly, this complex liability scheme has been subject to critique, and those critiques have sharpened in light of the #MeToo movement.

B. \#MeToo Movement and Calls for Reform

The #MeToo movement has spotlighted and prompted calls for reform in law, policy, and cultural discourse. Scholars, activists, and commentators have long critiqued the ways legal reform and cultural change have fallen short of the promise of eliminating inequality at work;

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206. See, e.g., Fantini, 557 F.3d at 28 (noting Title VII’s statutory definition of “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person”).

207. Miller, 991 F.2d at 587.

208. Id.

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in fact, many have argued that legal reform has instead served to perpetuate inequality.\textsuperscript{210} Indeed, that sexual harassment on the job persists over thirty years since the Meritor v. Vinson decision, confirms that law, or at least the legal frameworks embodied in current anti-discrimination laws, have had limited results. Structural reforms, including laws and policies directed to ending sex segregation and inequality, discrimination based on race, sexual orientation, gender identity, and national origin, must be a part of a comprehensive reform agenda.\textsuperscript{211}

The #MeToo movement has prompted widespread reflection on what policies and practices best reduce and prevent harassment at work. Social scientists and management experts identify coordinated and


comprehensive approaches that aim to transform organizational culture as best practices. Institutional leadership making clear that harassment will not be tolerated is a core component of effective prevention efforts. Comprehensive and holistic bias elimination efforts should include regular, data-driven training with ongoing evaluations, as well as regular and anonymous climate surveys, along with efforts to integrate traditionally underrepresented groups throughout the organization. Organizational culture and commitment to accountability by both institutions and individuals play a central role in determining whether sexual harassment will be tolerated at work.

Law reform should complement management and cultural strategies to reduce and eliminate sexual harassment, assault, and other forms of bias. Reform proposals offer a window into emerging accountability norms. While law reform proposals vary in their focus, they share demands for increased accountability, for strengthening civil rights protections and for institutions and individuals to take collective responsibility for addressing harassment.


213. See, e.g., GREEN, supra note 210, ch. 6 (highlighting the importance of organizations in perpetuating, and, preventing, discrimination); Frye, supra note 211 (underscoring importance of leadership making clear that harassment is neither tolerated nor acceptable); Joan C. Williams et al., What’s Reasonable Now? Sexual Harassment Law After the Norm Cascade, 2019 MICH. ST. L. REV. 139, 153 (citing norm that employers should not tolerate sexual harassment as “the norm that has [] changed most dramatically” in the wake of the #MeToo movement).

214. See, e.g., Bisom-Rapp, supra note 212, at 64, 73–75, 74 n.81.

215. See, e.g., Grossman, Culture of Compliance, supra note 210, at 37–38 (reviewing studies); Lucy Marcus, Why #MeToo is the Beginning of a Culture of Accountability, WORLD ECON. F. (Feb. 22, 2018), https://www.weforum.org/agenda/2018/02/the-sexual-harassment-reckoning [https://perma.cc/6MSV-KFVU] (underscoring leaders’ “obligation of stewardship,” which includes, “implementing credible measures to ensure that colleagues or employees are not abusing their power inside or outside the office, and holding accountable those who bring the company into disrepute”).
reinforcing clear institutional commitments to preventing sexual harassment and creating strong and meaningful avenues for redress when it occurs.216 Potential exposure to liability motivates employers to adopt workplace policies and practices to prevent sexual harassment and drives the direction of those policies.217 The law therefore should be aligned with policies and practices that promote both prevention and accountability, and that actually reduce harassment.218

The #MeToo movement has spurred a flurry of proposed and enacted legislative reform. For example, in the U.S. Congress, Senator Patty Murray and Representative Katherine Clark introduced the BE HEARD in the Workplace Act, which would expand protections for workers and safeguard existing antidiscrimination laws and protections.219 States have introduced, and have enacted, an unprecedented amount of sexual harassment

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218. See e.g., Edelman, supra note 210 (urging that employers “hold managers accountable for ensuring that their units are harassment-free – with compensation reflecting their success in doing so”).

Many of these reforms address workplace policies and practices and underscore the critical role of institutional actors (such as employers) in preventing sexual harassment and discrimination. These include laws requiring employers to adopt and implement sexual harassment policies, laws mandating and improving training programs on sexual harassment.


221. See, e.g., Frye, supra note 211; Call for Legislative Action, supra note 211, at 4.

for employees, and laws requiring disclosure of the number of sexual harassment complaints filed and the outcome of those complaints.

Other proposals would improve reporting procedures for legislators and others working in public office. Some would require elected officials to use private, and not public, funds, to pay for settlements of discrimination and harassment lawsuits.

Other reforms would strengthen institutional accountability and respond to concerns that Title VII’s current framework does not adequately hold employers accountable for sexual harassment. These

223. See, e.g., ME. REV. STAT. tit. 26, §§ 807(3)–(5) (2019) (requiring workplaces with fifteen or more employees to conduct anti-sexual harassment education and training programs for all new employees within one year of commencement of employment, and setting standards for compliance and enforcement); N.Y. LAB. LAW § 201-G(2) (2019) (requiring department of labor to produce a model sexual harassment prevention training program, consistent with specified criterion and requiring all employers to use the model program or an equivalent and provide it to all employees annually); H.R. 2148 § 102 (requiring EEOC to promulgate regulations that would require employers to provide training regarding discrimination and harassment to employees and supervisors); S. 1300, 2018 Leg., ch. 955 (Cal. 2018) (adding “bystander intervention training” to the sexual harassment training already required by California law); S.B. 1343, 2018 Leg. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1343 [https://perma.cc/H6F3-QMBC] (inter alia, extending anti-sexual harassment training requirements to employers with five or more— as opposed to fifty or more employees); Del. Gen. Assemb. H.R. 360 (Del. 2018), https://src.bna.com/Bsr [https://perma.cc/R9VC-V8PQ] (amending section 711A(e) of the Delaware Code to require employers with fifty or more employees in Delaware to provide specified sexual harassment prevention training to all new employees within a year and to existing employees every two years); La. H.R. 524, 2018 Reg. Sess. (La. 524) (revising chapter 42, section 343 of the Louisiana Revised Statutes to require public employees to be trained on preventing sexual harassment)


reforms might be grouped into reforms that strengthen institutional and individual accountability, respectively. Proposals to better hold institutions accountable include reforms to ensure that all working people are protected against harassment and discrimination. For example, some proposals address the fact that many workers who are subjected to harassment work in settings that are not covered by Title VII because their employer employs fewer than fifteen employees. Some state and local reforms have already enacted lower thresholds; for example, New York City and New York State amended their laws governing sexual harassment to apply to all employees, regardless of size.

To strengthen accountability, some recently-enacted state laws and pending proposals address the definition of who is an “employee.” These proposals would re-classify “independent contractors” and others traditionally considered “non-employees” to bring them within the coverage of sexual harassment and other anti-discrimination laws. Many employees who are vulnerable to harassment, including contractors, freelancers, home healthcare workers and domestic workers, often are

227. See 42 U.S.C. § 2000e (b) (2012) (defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees”); see e.g., H.R. 2148, 116th Cong. § 202 (amending Title VII to apply to all employers with one or more employees); Call for Legislative Action, supra note 211, at 2 (calling on Congress to extend workplace civil rights protections for all individuals in workplaces with one or more employees); Schultz, Open Letter, supra note 14, at 32 nn.53–55 and accompanying text (describing heightened vulnerability for those, such as hotel maids, private housekeepers, agricultural workers, waitresses and personal assistants, who may be particularly vulnerable to unchecked harassment and whose employers may not be subject to Title VII); id. at 44 (discussing categories of workers not covered by Title VII); see also Raghu & Suriani, supra note 205, at 2 (arguing that anti-discrimination laws should apply regardless of the size of the employers and listing states with anti-discrimination laws that cover employers with one or more employees).

228. See N.Y. EXEC. LAW § 292(5) (2018) (defining “employer” as those with four or more employees, except with respect to sexual harassment, where “employer” shall include “all employers within the state”); Int. No. 657-A, 2019 Leg. (N.Y. 2019) (amending Section 8-102(5) of the New York City Human Rights Law Administrative Code to apply provisions related to gender-based discrimination to all employers, regardless of the number of employees).

229. See, e.g., H.R. 2148 § 301, 116th Cong. (2019); Cal. S.B. 1300, ch. 955 (Cal. 2018) (amending various provisions of the California Government Code relating to employment to, inter alia, prohibit sexual harassment by nonemployees if the employer, or its agents or supervisors, knew or should have known of the conduct and fails to take immediate and appropriate corrective action); Del. H.R. 360 (2019) (amending title 19, section 711Arb) to apply sexual harassment provisions to state employees, unpaid interns, applicants, joint employees, apprentices, and individuals who work for employment agencies); N.Y. EXEC. LAW § 296-D (Consol. 2018) (extending anti-sexual harassment provisions to non-employees in an employer’s workplace when the employer, its agents or supervisors knew or should have known of the harassment and failed to take immediate and appropriate corrective action); Call for Legislative Action, supra note 211, at 2 (calling on Congress to strengthen workplace civil rights protections against harassment and discrimination for independent contractors, interns, graduate students, and guest worker recruits); Raghu & Suriani, supra note 205, at 2 (citing state laws that cover independent contractors).
classified as independent contractors, and therefore lack recourse when they are subject to harassment or other discriminatory practices at work. These proposals would address that critical gap.

Other reforms address the standards for liability. So, for example, some states have removed the “severe or pervasive” standard for liability. Other reforms address the ramifications of the Faragher/Ellerth affirmative defense and the Vance decisions, discussed above. Putting to the side for the moment which of the proposed reforms best addresses meaningful accountability, the proposals reflect a shared view that the current institutional liability scheme established by the severe or pervasive standard, the Faragher/Ellerth affirmative defense and the Vance definition of “supervisor” combine to allow many cases to fall outside the purview of current federal anti-discrimination laws. They reflect widespread concern that the current accountability scheme promotes superficial compliance

230. See, e.g., S. 3817, Reg. Sess. (N.Y. 2019); S. 7083, Gen. Assemb., Reg. Sess. (N.Y. 2019); Cal. S. 1300 (declaring that “harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim’s emotional tranquility in the workplace, affect the victim’s ability to perform the job as usual, or otherwise interfere with and undermine the victim’s personal sense of well-being”).

231. See, e.g., supra notes 195–204; Call for Legislative Action, supra note 211, at 3 (calling on Congress, inter alia, to extend the statute of limitations for filing discrimination complaints with the EEOC, defining “supervisor” for purposes of vicarious liability as those who direct employees’ daily activities, removing caps on compensatory damages, correct unduly restrictive interpretations of the “severe or pervasive” standard). Some proposals would restore the legal standard established by case law before the Supreme Court’s decision in Vance. See, e.g., H.R. 2148, 116th Cong. § 206; Fair Employment Protection Act of 2017, H.R. 4152, 115th Cong. (2017). Others would go further, for example, holding employers accountable under the same standards in which they are responsible for other types of discrimination, thus eliminating inquiries into the status of the harasser and essentially imposing strict liability for sexual harassment on the job. See, e.g., Martha Chamallas, Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law, 75 Ohio St. L.J. 1315, 1344 (2014) (arguing for a new Civil Rights Restoration Act that would hold employers strictly liable for their employees’ discriminatory acts); Grossman, Culture of Compliance, supra note 210, at 71–72 (urging elimination of the Faragher/Ellerth defense and arguing that automatic liability will produce the same incentives as the defense but will only reward employers if their actions work); Angela Onwuachi-Willig, supra note 53, at 319–20 (same); David B. Oppenheim, Twenty Years After Faragher and Ellerth, Is it Time to Re-visit Strict Vicarious Liability for On-The-Job Sexual Harassment? (Sep. 19, 2018) (unpublished research paper) (on file with UC Berkeley Center on Comparative Equality & Anti-Discrimination Law), available at https://ssrn.com/abstract=3252112 [https://perma.cc/FQE8-S6AE] (same); Schultz, Open Letter, supra note 14, at 9.1 (same); Joseph A. Seiner, The Discrimination Presumption, 94 NOTRE DAME L. REV. (forthcoming 2019) (arguing that, to address current difficulty of prevailing in workplace discrimination cases, discrimination should not be subject to the Iqbal standard and that the fact of discrimination should be presumed). Under this view, employers are “best positioned” to set standards for acceptable conduct in the workplace and therefore should be liable for conduct that takes place at work. See Onwuachi-Willig, supra note 53, at 320.
rather than meaningful accountability and is not sufficiently aligned with best practices to effectively incentivize prevention.\textsuperscript{232} Another thread of reform urges that civil rights liability for sexual harassment and assault should extend to the individuals who commit the harassment.\textsuperscript{233} To promote both compensation for survivors and deterrence on the part of those who would commit harm, both individuals and institutions should be held liable for discrimination that they commit or facilitate. Although some state and local anti-discrimination laws provide for individual liability, and although some states’ civil rights laws provide a remedy against those who commit gender motivated violence,\textsuperscript{234} that patchwork of laws is no substitute for uniform federal coverage.

Finally, reforms would modify related criteria associated with obtaining relief.\textsuperscript{235} Proposals would prohibit or limit the enforceability of non-disclosure agreements.\textsuperscript{236} They would prohibit mandatory arbitration, though some have questioned the enforceability of those provisions.\textsuperscript{237}

Notwithstanding differences about the specific triggers for liability, this wave of reform efforts underscores the value, and importance, of institutional commitments to ending sexual harassment. These proposed reforms reflect the recognition that employers are responsible for preventing sexual harassment and assault at work, and that they should be held accountable for employees who commit sexual assault with the imprimatur of the employer, and for their own negligence in knowingly allowing harassment and assault to take place in their workplaces. This view sharply contrasts with the federal government’s liability for sexual assaults committed by its agents and other federal actors.

IV. COMPARING SCHEMES

This Part compares the liability scheme for sexual assaults by federal agents with the accountability norms highlighted by the #MeToo movement. It first analyzes how the respective schemes each address institutional and individual accountability for gender violence, and then addresses the rationales invoked to justify federal officials’ limited liability. The comparison reveals how the justifications for limited recovery against federal agents are out of step with policies and practices recognized as preventing and eliminating gender violence.

A. Institutional Accountability

The most glaring difference between the civil rights liability scheme for gender violence at work as compared to the civil rights liability scheme for gender violence committed by federal officials is the way the respective approaches address the threshold question of institutional accountability. Although federal workplace antidiscrimination law readily recognizes that sexual harassment (which includes sexual assault) constitutes impermissible sex discrimination and therefore violates Title VII, no analogous federal statute provides relief for sexual assault committed by federal agents; the Bivens doctrine has been held to explicitly bar such direct institutional liability.238

In workplace cases, employers will be vicariously liable for sexual harassment and assaults committed by supervisors under prescribed circumstances and will be liable for sexual harassment and assaults
committed by non-supervisory employees, co-workers, or customers if the employer was negligent in allowing the harassment to occur.\textsuperscript{239} Although the standard has narrowed in recent years,\textsuperscript{240} and although the prevailing standards for liability have been critiqued,\textsuperscript{241} the principle that employers should be liable for sexual harassment and assault as a violation of anti-discrimination norms is not seriously in question. Proposed reforms would expand the circumstances in which employers would be held liable.\textsuperscript{242} By contrast, civil rights actions against the federal government for sexual harassment and assault committed by their employees or agents is formally and flatly precluded under the \textit{Bivens} doctrine.\textsuperscript{243}

This threshold gap is deeply problematic, both practically and symbolically. It leaves survivors without a clear path to relief from the federal government itself. It means that the federal government, as an employer, will not be held directly accountable as a civil rights matter, for sexual assault committed by officials it employs. This is inconsistent with case law recognizing that sex harassment and assault in federal workplaces violates equal protection (as well as Title VII). It is also out of step with emerging norms underscoring the importance of institutional leadership in eliminating sexual assault and harassment as well as other forms of bias.\textsuperscript{244}

The fact that the federal government has the authority to indemnify federal employees accused of constitutional wrongdoing does not eviscerate the importance of formal acknowledgement of institutional accountability.\textsuperscript{245} Although some accounts indicate that the government regularly indemnifies officers for their wrongdoing, the government may be less likely to indemnify those who are under criminal investigation or prosecution.\textsuperscript{246} If that is the case, while the federal government may

\begin{footnotesize}
\begin{enumerate}
\item 239. See \textit{supra} notes 194–204 and accompanying text.
\item 240. \textit{Id.}
\item 241. See \textit{supra} notes 210–218 and accompanying text.
\item 242. See \textit{supra} section III.B.
\item 243. See \textit{supra} section II.B.
\item 244. See, e.g., \textit{supra} notes 212–218 and accompanying text.
\item 245. See 28 C.F.R. \$ 50.15(c)(1) (2019) (authorizing the federal government to assume financial responsibility for defense and indemnification of employees accused of wrongdoing).
\item 246. See Cornelia T.L. Pillard, \textit{Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens}, 88 \textit{Geo. L.J.} 65, 76–77, & 77 n.56 (1999) (arguing that individual liability is a misnomer because the federal government will defend and indemnify federal employees alleged to have committed constitutional torts, except where the employee is under criminal investigation or prosecution); see also, e.g., Arkles, \textit{supra} note 21, at 807 (arguing that the government may refuse to indemnify prison staff who sexually abuse prisoners, citing, as an example, \textit{Dorsey v. Givens}, 209 F. Supp. 2d 850, 853 (N.D. Ill. 2001)). \textit{But see generally} Joanna C. Schwartz, \textit{Police Indemnification}, 89 N.Y.U. L. REV. 885, 902–12 (2014) (surveying data from eighty-one jurisdictions
\end{enumerate}
\end{footnotesize}
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indemnify officials whose negligence may have resulted in sexual violence, it may not indemnify those who have committed the acts of violence themselves. Regardless of how the government exercises its discretionary indemnification authority, that discretionary and unreported authority is no substitute for explicit and acknowledged accountability.

B. Individual Accountability

In some ways, workplace and federal governmental accountability standards reflect opposing limitations. While Title VII limits claims to those brought against an institution, and precludes claims against an individual, the Bivens doctrine does just the opposite, by precluding claims against the federal government itself, while recognizing liability, if at all, by the individual employee for his or her own actions. Nevertheless, the prospects for individual liability are limited, given the narrowing scope of the Bivens doctrine and the growing application of qualified immunity.

Although the respective approaches may reflect differences in the way Title VII is drafted (focused on the employer) and the historic interpretation of constitutional law (disfavoring implied rights of action), both approaches fall short of meaningfully advancing accountability. The Bivens doctrine’s rationale precluding institutional liability in order to prevent individuals from avoiding responsibility is premised on a false distinction that the prospect of institutional responsibility would preclude individual liability, and therefore, would fail to deter wrongdoing. Similarly, the notion that Title VII’s focus on employers should preclude individual liability does not serve the overarching goal of eliminating discrimination in the workplace. A meaningful accountability scheme would contemplate standards of accountability for both institutional and individual actors. The two should work hand in hand to ensure shared responsibility for eliminating discrimination in employment and in federal functions.

and finding that law enforcement almost never pays for counsel, and virtually never contribute to settlements or judgments, due to a combination of indemnification, reduction based on their limited resources, or governmental decisions not to collect judgments).

247. See supra section IV.A.

248. See, e.g., infra notes 82–90 (discussing FDIC, rejecting respondeat superior liability based on reasoning that allowing institutional liability would preclude individual accountability).

249. See Culture of Compliance, supra note 210, at 74; see also Paul S. Greenlaw & William H. Port, Military Versus Civilian Judicial Handling of Sexual Harassment Cases, 1993 LAB. L.J. 368, 373 (1993) (noting that a military system, which allows individual liability but not entity liability, may not provide sufficient incentives for military higher-ups to prevent harassment).
C. Justifications for Limited Liability

A number of justifications have been advanced for the limited liability scheme applicable to federal officials under the Bivens doctrine. This section reviews and critiques the most salient justifications for limited recourse against the federal government as they apply to cases of sexual assault.250

1. Absence of Statutory Authority

In Ziglar v. Abbasi, the Court reiterated its reluctance to imply a cause of action where Congress has not acted.251 Indeed, the Court opined that “[i]n most instances . . . the Legislature is in the better position to consider if "the public interest would be served" by imposing a “new substantive legal liability.”252 This separation of powers concern has longstanding roots.253 In Abbasi, the Supreme Court emphasized that the core question in Bivens cases is “who should decide” whether to provide a damages remedy: Congress or the courts.254 The Court decreed that the answer “most often will be Congress,” and further opined that “separation-of-powers principles are or should be central to the analysis.”255

Of course, nothing precludes Congress from responding to the limitations of the Bivens doctrine by enacting a statutory remedy for sexual assault and other constitutional violations committed by federal officials. Indeed, Congress has done just that for violations of federal rights by state officers.256 Some have suggested statutory reform as a needed response to growing restrictions on government accountability.257

250. While some of these critiques may apply as well to Bivens actions arising in different factual and legal contexts, those applications are beyond the scope of this paper.
251. 582 U.S. ___, 1856–57, 137 S. Ct. 1843, 1857 (2017) (reasoning that Congress, not the courts, should “most often” determine whether to provide for a damages remedy); see also supra notes 94–112.
252. Id. at 1857 (quotations omitted). The Court repeatedly rested its ruling on separation of powers concerns that the availability of any remedy falls within the purview of Congress, not the Court; see also id. at 1860–61, 1863.
255. Id.
2. **Federal Officials’ Policymaking Prerogatives**

The related concern that *Bivens* actions should not become a vehicle for making federal policy choices is another driving force behind the courts’ limitations on *Bivens* remedies. As the Supreme Court emphasized, separation of powers requires policy decisions to be relegated to Congress, not the courts.\(^{258}\) Yet the question of the federal government’s liability for sexual assault committed by its agents does not raise the concerns about policymaking that may be at issue in other cases. For example, the *Abbasi* decision challenged high-level Executive Branch policies relating to national security concerns.\(^{259}\) Granted, the conduct of federal officers at the border arguably implicate national security concerns, for example, in assessing the circumstances in which strip searches may legally be conducted.\(^ {260}\) However, there is simply no analogous argument that sexual assaults by federal officers advances federal policy. Indeed, recent legislation confirms what should be obvious—that police officers are banned from having sex with people in custody.\(^ {261}\) Accordingly, concerns that litigation would require disclosure of discussions leading to the formulation of national policy, simply do not apply.\(^ {262}\) Any policy-based concern here should favor outlawing sexual assault; to that end, a damages remedy would align incentives with stated policies deterring sexual assault.

3. **Deterrence**

The Court has invoked the notion of deterrence in service of its determination to preclude damages remedies against the federal government itself, by reasoning that deterrence will be best served by holding individuals liable for their own wrongdoing.\(^ {263}\) However, that reasoning may ring hollow since, as the preceding discussion makes clear, the *Bivens* doctrine has evolved to preclude institutional accountability and to render individual accountability for wrongdoing in a context at all

\(^{258}\) See *Abbasi*, 137 S. Ct. at 1860.

\(^{259}\) Id. at 1860–61.

\(^{260}\) See supra notes 144, 147–148 (describing *Bivens* claims based on strip searches).


\(^{262}\) See *Abbasi*, 137 S. Ct. at 1860–61.

\(^{263}\) Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 484–85 (1994); see also *Abbasi*, 137 S. Ct. at 1860 (reasoning that, “*Bivens* is not designed to hold officers responsible for the acts of their subordinates”).
different from those previously recognized, uncertain at best.\textsuperscript{264} Moreover, even if held accountable, an individual might be indemnified by the government.\textsuperscript{265} The combined effect renders the federal government liable for civil rights violations, if at all, only for litigation and indemnification costs, under discretionary and informal rules, and it is uncertain, and perhaps unlikely, that individuals would be held liable. As a result, the \textit{Bivens} scheme is not likely to do much work to advance the important goals of deterrence and prevention. Indeed, the \textit{Abbasi} decision, the Court’s most recent articulation of standards for individual liability, while recognizing the “continued force” and even “necessity” of \textit{Bivens} claims in the search-and-seizure context, focuses more on the burden of costs of defense and indemnification, and on the time and administrative costs associated with constitutional tort litigation, than on any concern for prevention and deterrence.\textsuperscript{266}

The resulting accountability scheme’s failure to reflect strong norms, policies and processes for redressing abuse and discrimination contrasts sharply with the accountability norms brought into focus by the #MeToo movement. Experts conclude that best practices for prevention of harassment and other forms of discrimination are strong policies advancing institutional cultures touting respectful workplaces with clear policies against bias, and with meaningful remedies against management that fails to take action in light of known risks of discrimination and against individuals who commit discriminatory acts when they occur.\textsuperscript{267} Leadership from the top is key. By contrast, the current liability scheme under \textit{Bivens}, which provides for no institutional accountability as a formal matter, and for individual accountability under limited, and uncertain circumstances, runs counter to that expert guidance.

Although the potential for liability alone will not eliminate sexual harassment and other forms of discrimination, it is a core component of meaningful accountability schemes, and should extend to both the individual and the institution, for their respective roles in facilitating and condoning the abuse.\textsuperscript{268} Both Title VII and the \textit{Bivens} doctrine fall short of best practices in this way. The Court’s reasoning about deterrence in the \textit{Bivens} context has incorrectly presumed that accountability operates in a binary manner, against either the institution or the officer. In \textit{Carlson}
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v. Green,269 the Court reasoned: “[b]ecause the Bivens remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect.”270

The Court posited that government superiors would promulgate corrective policies when an employee is found personally liable for violations of a citizen’s constitutional rights, since “responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government’s integrity.”271 Yet the Court cited no data to support this conclusion. Similarly, in FDIC,272 the Court built on this binary approach to accountability: “[i]f we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under [plaintiff’s] regime, the deterrent effects of the Bivens remedy would be lost.”273

Yet deterrence does not operate in this binary manner in other accountability schemes. Tort law, for example, contemplates different standards for liability depending on whether the wrongdoer committed an intentional act, or was being held liable for negligence.274 Workplace antidiscrimination law similarly imposes different standards for liability depending on whether the discrimination was deemed to be the act of the employer itself or based on other employees’ negligence.275 The idea that liability should run either against an institutional or against the individual is not mandated by any legal principle, is not supported by social science, and runs counter to best practices for prevention.

The fact that federal officials continue to commit sexual assault, as but one example of discriminatory wrongdoing, suggests that the current scheme is not doing the work it should to deter misconduct. The Court in Bivens recognized that those acting with the power of the state possess “a far greater capacity for harm” than private individuals committing the same act.276 While this reasoning supports the availability of a damages remedy against the individual, it need not preclude a remedy against the

269. 446 U.S. 14 (1980).
270. Id. at 21.
271. Id.
273. Id. at 485.
274. See, e.g., RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1, cmt. a (AM. LAW INST. 2000) (discussing reasons tort law distinguishes between intentional and non-intentional consequences and harms).
275. See supra notes 194–204.
institution as well. Indeed, the gross disparity of power between federal officials and others, as illustrated starkly in the power disparity between border agents and immigrants, renders the need for strong deterrent measures, in the form of institutional policies and accountability as well as accountability for individuals who commit harm, all the more important. The notion of insulating the government, but not individual agents, for their respective roles in committing or facilitating sexual assault, is particularly troubling, given that organizational culture is driven from the “top,” and that potential liability informs management practices. Not surprisingly, some commentators have endorsed the notion that agencies should be held accountable for the costs of sexual assaults by their employees as one means of holding institutions to account.

4. Financial Burden of Damages Remedies

Another concern driving the Court’s Bivens jurisprudence is the potential impact of damages remedies on the public fisc. For example, in Carlson, the Court invoked “responsible superiors’” concern for the “public fisc” in reasoning that supervisors would take appropriate actions in response to wrongdoing if the individual wrongdoer was held to account, so, presumably, a damages remedy would not be needed against the institution. In FDIC, the Court rejected arguments seeking institutional liability, based in part, on concerns that institutional liability would be too costly for the federal government. The Court has invoked concerns about costs in limiting liability by individual actors as well. For example, in Abbasi, the Court cited the “burdens on government employees who are sued personally,” and the “projected costs and consequences to the Government itself,” in justifying limiting relief.

Nevertheless, this argument proves too much, since concerns about litigation costs, both in terms of disruption and monetary damages, could be invoked to eviscerate the prospect of damages remedies entirely. While litigation no doubt is burdensome, the unilateral focus on the burden on

277. Sisk, supra note 42, at 782–83 (proposing that having the responsible federal agent bear the costs of a tort suit resulting from sexual assault by federal officials better addresses deterrence, citing the “moralizing” impact of public claims of sexual violence).


280. Abbasi, 137 S. Ct. at 1858.
defendants erases the deep and lasting emotional and economic harms of sexual assault and other constitutional violations. Indeed, courts have recognized that cost may not be invoked to justify discrimination in at least some other contexts.\textsuperscript{281} Since the potential for liability advances accountability measures, the prudent response for those concerned about preventing sexual assault and discrimination should instead be to allow a remedy, and to take appropriate policy-based steps to eliminate sexual assault as part of institutional culture.

CONCLUSION

The current moment of national reckoning with the pervasiveness of sexual harassment and assault offers an opportunity for reflection on the ways civil rights law has evolved across contexts. It prods us to consider how well current doctrine is aligned with policies and practices designed to prevent and reduce discrimination. Federal civil rights law flatly prohibiting a direct remedy against the federal government for constitutional violations is out of step with emerging understandings underscoring the importance of strong leadership and policy proscriptions of bias and discrimination. While reform is needed in both the employment and federal governmental contexts, the comparison of the state of current doctrine in both contexts at a minimum underscores the need to hold the federal government to account for sexual assault and other civil rights violations, committed in its name.

\textsuperscript{281} See Ernest F. III Lidge, \textit{Financial Costs as a Defense to an Employment Discrimination Claim}, 58 \textit{Ark. L. Rev.} 1, 7 (2005) (explaining that the Court has rejected cost defenses in cases in which an employer facially discriminates against all women because of the greater cost of employing them as a group); \textit{see e.g.}, Int'l Union v. Johnson Controls, 499 U.S. 187, 210 (1991) (“[E]xtra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender.”).