Georgia Law Review

Volume 45 | Number 4 Article 6

2011

Imprisoned by Liability: Why Bivens Suits Should Not Be Available Against Employees of Privately Run Federal Prisons

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IMPRISONED BY LIABILITY: WHY *BIVENS* SUITS SHOULD NOT BE AVAILABLE AGAINST EMPLOYEES OF PRIVATELY RUN FEDERAL PRISONS

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I. INTRODUCTION

Imagine the following hypothetical: Bob is a prisoner. Prison officials ignore Bob's medical needs, thereby violating his Eighth Amendment right against cruel and unusual punishment.[1]

Now, consider the following scenarios. In scenario one, Bob is in a *state* prison. Can Bob recover damages from the individual employees that violated his constitutional rights? Bob can bring a § 1983[2] suit to recover monetary damages.[3] Can Bob recover from the prison itself? No, he cannot. Absent waiver by the state, such a suit would be barred by state sovereign immunity.[4]

Now consider scenario two. Bob is a prisoner in a state *private* prison, which is a prison operated by a corporation that has a contract with the state government. Can Bob still bring a suit for damages against the individual prison employees? Yes, assuming his claim is otherwise successful, he can recover damages through a § 1983 suit.[5] Will Bob still be barred from recovering from the prison itself? No, Bob will be able to recover damages from the prison corporation in a § 1983 action.[6]

In scenario three, Bob is now a federal prisoner in a *public, government-run* prison. What will Bob's remedies be? Bob will be able to recover damages from the individual prison guards through

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[1] U.S. CONST. amend. VIII.

[2] 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."). The majority of constitutional litigation is currently instituted under § 1983. *See generally* MICHAEL L. WELLS ET AL., CASES AND MATERIALS ON FEDERAL COURTS 12–33 (2007) (discussing the basic features of constitutional remedies).

[3] *See* Procunier v. Navarette, 434 U.S. 555, 561–62 (1978) (holding that although state prison guards are subject to § 1983 suits, they may be entitled to qualified immunity).

[4] *See* Quern v. Jordan, 440 U.S. 332, 345 (1979) (concluding that § 1983 does not abrogate state's Eleventh Amendment immunity).

[5] *See, e.g.*, Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (allowing a § 1983 suit against employees of a private prison-management company).

[6] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982) (permitting a § 1983 suit against a private corporation that acted "under color of state law").

a *Bivens* action.[7] He will not, however, be able to recover from the prison itself.[8]

The fourth and final scenario is that Bob is a *federal* prisoner in a *privately run* prison that has a contract with the federal government. No damages remedy will be available against the prison corporation.[9] Will Bob be able to recover damages for the constitutional violations against the individual employees in the private federal prison? Currently, there is a circuit split on this issue. One circuit has said yes,[10] while three others have said no.[11] Although the Supreme Court has yet to address this specific question, proponents both for and against liability of individual employees in a private federal prison can find arguments in relevant Supreme Court precedent. This Note surveys the arguments of both sides and concludes that liability should not extend to private federal prison employees.

The above scenarios demonstrate the complexity of this area of the law.[12] From the point of view of a prisoner not suing for constitutional violations, whether they are incarcerated in a public or private prison is probably inconsequential. However, as demonstrated above, these distinctions can have a significant impact in terms of available remedies when a prisoner does bring a suit. Whether an implied cause of action should be available against individual employees in private federal prisons is not just of importance to prisoner plaintiffs and prison employees. The question implicates the far-reaching issues of the privatization of prisons and the limits on the Judicial Branch based on the separation of powers.

This Note will begin by discussing the judicial creation of *Bivens* actions, and their similarities to and differences from

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[7] *See* discussion *infra* Part II.A.

[8] *See* FDIC v. Meyer, 510 U.S. 471, 484–86 (1994) (refusing to extend *Bivens* liability to a suit against a federal agency).

[9] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 74 (2001) (disallowing a *Bivens* cause of action against a private federal prison corporation).

[10] The Ninth Circuit in *Pollard v. GEO Group, Inc.*, 607 F.3d 583 (9th Cir. 2010).

[11] The Fourth, Tenth, and Eleventh Circuits in *Holly v. Scott*, 434 F.3d 287 (4th Cir. 2006), *Peoples v. CCA Detention Centers*, 422 F.3d 1090 (10th Cir. 2005), *vacated in part and aff'd by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (per curiam), and *Alba v. Montford*, 517 F.3d 1249 (11th Cir. 2008), respectively.

[12] For a graphical depiction of the contours of liability, see *infra* Table 1.

§ 1983 suits. Next, this Note will survey the Supreme Court's *Bivens* case law. Then, there will be a discussion of how the circuits have interpreted Supreme Court precedent regarding whether *Bivens* liability extends to suits against private federal prison employees. There are two potential interpretations of the Supreme Court's *Bivens* jurisprudence. The first is that the Court's initial *Bivens* decisions are still strong precedent,[13] as reaffirmed by the Court's most recent decision in *Wilkie v. Robbins*.[14] This approach to the case law suggests that *Bivens* liability should in fact apply to suits against individual private federal prison employees. On the other hand, if one reads the evolution of the Court's *Bivens* jurisprudence as a fundamental shift away from recognizing *Bivens* actions, such that the earlier cases are now weak precedent, then the most reasonable conclusion is that liability should not be extended to individual employees of a private federal prison. Ultimately, this Note argues that the second approach is preferable. This approach, coupled with the strong separation of powers concerns expressed in *Bivens* itself, suggests that liability should not be extended to private federal prison employees.

II. BACKGROUND

On June 9th, 2010, the Ninth Circuit, in deciding *Pollard v. GEO Group, Inc.*,[15] created a split in the circuits as to whether individual employees in private prisons are subject to *Bivens*[16] liability for Eighth Amendment violations. The three other circuits that have addressed this issue had concluded that there is not *Bivens* liability in this context.[17] In contrast, the Ninth Circuit in *Pollard* allowed the prisoner plaintiff to proceed with a *Bivens*

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[13] *See, e.g.*, Carlson v. Green, 446 U.S. 14, 23 (1980) (reiterating that *Bivens* suits are needed to deter federal officials from infringing federal constitutional rights).

[14] 551 U.S. 537 (2007); *see infra* Part III.B (discussing how *Wilkie* could represent a change in the Supreme Court's *Bivens* jurisprudence).

[15] 607 F.3d 583 (9th Cir. 2010).

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

[17] *See supra* note 11.

claim against the individual employees.[18] Given the split in the circuits, the Supreme Court has granted certiorari in the *Pollard* case.[19] Although all prior petitions for certiorari on this issue had been denied,[20] the Supreme Court probably was more inclined to grant certiorari in *Pollard* because of its creation of a circuit split.[21]

A. BACKGROUND OF *BIVENS* ACTIONS

A *Bivens* action is an implied cause of action for constitutional violations committed by federal actors.[22] *Bivens* actions allow plaintiffs to recover monetary damages that would otherwise be unavailable for constitutional violations by federal actors.[23] In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court first recognized a cause of action for damages implied from the Fourth Amendment for an unconstitutional search by federal agents who "act[ed] under claim of federal authority" when they searched the plaintiff's apartment.[24] Although Bivens could have had the unconstitutionally seized evidence suppressed in a trial against

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[18] *Pollard*, 607 F.3d at 603.

[19] *Pollard*, 607 F.3d 583, *cert. granted*, Minneci v. Pollard, 79 U.S.L.W. 3540 (U.S. May 16, 2011) (No. 10-1104). On December 10, 2010, the Ninth Circuit denied the defendant's petition for a rehearing en banc. *See* Pollard v. GEO Grp., Inc., 629 F.3d 843, 845 (9th Cir. 2010). Eight judges, however, strongly dissented to the denial of the rehearing based primarily on the availability of an adequate state tort remedy. *Id.* at 845–46. The defendant filed a petition for certiorari on March 9, 2011. Petition for a Writ of Certiorari, Minneci v. Pollard, No. 10-1104 (Mar. 9, 2011), 2011 WL 836711.

[20] Alba v. Montford, 517 F.3d 1249 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 632 (2008); Holly v. Scott, 434 F.3d 287 (4th Cir. 2006), *cert. denied*, 547 U.S. 1168 (2006); Peoples v. CCA Det. Ctrs., 422 F.3d 1090 (10th Cir. 2005), *vacated in relevant part and aff'd by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (per curiam), *cert. denied*, 549 U.S. 1056 (2006).

[21] *See* SUP. CT. R. 10(a) (listing a circuit split as one of the considerations the Supreme Court takes into account when deciding whether to grant certiorari).

[22] *See Pollard*, 607 F.3d at 588 ("It is widely accepted that *Bivens* provides a cause of action only against an official 'acting under color of federal law.'" (citing Morgan v. United States, 323 F.3d 776, 780 (9th Cir. 2003))).

[23] *See* WELLS ET AL., *supra* note 2, at 139 (observing that "gaps" in administrative and statutory relief led to the Supreme Court implying a remedy in *Bivens*).

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

him,[25] there was no vehicle at the time through which he could receive monetary compensation for the officers' actions. Even though Bivens could have sued the officers through a state law trespass cause of action for improperly entering his apartment, the Court denied that this was an "adequate" alternative.[26] The Court concluded that the interests implicated when an "unwelcome private intruder" trespasses into one's home are wholly different than the interests implicated when federal agents unconstitutionally enter and perform a search.[27] "When a federal officer appears at the door and requests entry, one cannot always be expected to resist. Yet lack of resistance alone might foreclose a cause of action in trespass or privacy."[28] In defending the judicial creation of a new cause of action, Justice Harlan's concurrence argued that because courts have long been providing *equitable* remedies, such as injunctions, for constitutional violations, it naturally follows that courts also have the power to award the *legal* remedy of damages even absent an express statutory provision.[29]

Bivens actions are similar to § 1983 actions in that both protect constitutional rights.[30] *Bivens*, however, provides a remedy for constitutional rights violations by federal actors, while § 1983 addresses violations by state actors.[31] Another difference is that *Bivens* is judge-created, rather than statutory.[32] Criticism of recognizing and expanding *Bivens* liability is in part grounded on the idea that, unlike § 1983, *Bivens* actions do not have statutory authority and, thus, the Judicial Branch may have violated separation of powers principles in creating *Bivens* liability.[33]

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[25] *Id.* at 413–14 (Burger, C.J., dissenting).

[26] *Id.* at 395 (majority opinion).

[27] *Id.* at 394.

[28] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 73 (2001) (citation omitted).

[29] *Bivens*, 403 U.S. at 405 (Harlan, J., concurring).

[30] WELLS ET AL., *supra* note 2, at 138–39.

[31] *See id.* (describing *Bivens* as the common law analogue to § 1983).

[32] *See, e.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293 (1995) (characterizing *Bivens* as a case where the Supreme Court "inferred [a cause of action] from the Constitution itself, with only the federal question statute for congressional authorization").

[33] *See Bivens*, 403 U.S. at 412 (Burger, C.J., dissenting) (arguing that the majority's holding ignores the separation of powers and that it would be better for Congress to make a

Rather than being found in a statute, the source of the Supreme Court's "authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in [the Court's] general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.' "[34] An implied cause of action "without any express congressional authority whatsoever. . . . is hardly the preferred course."[35] In the words of the Fourth Circuit in *Holly v. Scott*, the lack of congressional authorization for *Bivens* actions creates "a world of distinction between § 1983 and *Bivens* remedies."[36]

Despite the differences between § 1983 and *Bivens*, courts will sometimes borrow concepts from § 1983 case law in deciding *Bivens* issues. For example, courts use the same tests to determine whether there was state action.[37] These tests used for § 1983 and *Bivens* are not applicable to every context where the concept of state action arises.[38] The Supreme Court has never held that "the contours of *Bivens* and § 1983 are identical," just that there is a parallelism between them.[39]

B. SUPREME COURT'S *BIVENS* CASE LAW

Since the creation of the cause of action in *Bivens*, the Supreme Court has only twice explicitly extended *Bivens*.[40] These two

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decision on this issue); Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring) ("A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task.").

[34] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (quoting 28 U.S.C. § 1331 (2006)).

[35] Holly v. Scott, 434 F.3d 287, 289 (4th Cir. 2006).

[36] *Id.* at 295 n.4.

[37] *See, e.g.*, Pollard v. GEO Grp., Inc., 607 F.3d 583, 589 (9th Cir. 2010) (applying public function test developed in § 1983 context to determine whether there is federal action in a *Bivens* case); Morse v. N. Coast Opportunities, Inc., 118 F.3d 1338, 1343 (9th Cir. 1997) (noting that "similar tests [are used] to determine whether federal action exists to support a *Bivens* claim or to determine whether State action will permit a § 1983 cause of action").

[38] In the context of whether a private party is subject to immunity from federal antitrust law by virtue of the "state action" doctrine from *Parker v. Brown*, 317 U.S. 341 (1943), a different test is used. That test is a two-pronged test that is set forth in *California Retail Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105–06 (1980).

[39] *Malesko*, 534 U.S. at 82 (Stevens, J., dissenting).

[40] *See* Carlson v. Green, 446 U.S. 14, 17–18 (1980) (extending *Bivens* to cover Eighth Amendment violations by public federal prison employees); Davis v. Passman, 442 U.S. 228, 230–31 (1979) (holding that *Bivens* remedy was available for a congressman's former

decisions occurred within a year of each other. Since then, the Supreme Court has refused to extend *Bivens*'s scope.[41]

1. Carlson v. Green. The last case in which the Supreme Court explicitly extended the availability of a *Bivens* cause of action was *Carlson v. Green*.[42] *Carlson* is particularly relevant to the situation in *Pollard* because it also concerned individual prison workers.[43] The only difference between *Carlson* and *Pollard* is that *Carlson* involved a public prison, rather than a private one.[44] The Court allowed a *Bivens* action to proceed against the individual employees.[45] Justice Brennan, writing for the Court, applied the test from *Davis v. Passman*[46] to determine whether an implied cause of action was appropriate.[47] If there are either "special factors counselling hesitation"[48] or an alternative remedy created by Congress that had been "explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective,"[49] then a *Bivens* action should not be allowed. The Court concluded that the Federal Tort Claims Act was "not a sufficient protector of the citizens' constitutional rights" because

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employee's claim that she was fired on the basis of her gender in violation of the Fifth Amendment).

[41] In *Hartman v. Moore*, 547 U.S. 250 (2006), the issue concerned the probable cause pleading standard for First Amendment violations, not whether to extend *Bivens*. *Id.* at 252. The Supreme Court, however, appears to have implicitly accepted that a *Bivens* action would be available for a First Amendment violation. *See id.* at 256 (finding no fault with the assumption that a *Bivens* action would be available). A First Amendment *Bivens* action had not previously been recognized by the Supreme Court.

[42] *See* 446 U.S. at 25 ("A federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of a *Bivens* action.").

[43] *Id.* at 16.

[44] *Id.*

[45] *Id.* at 25.

[46] 442 U.S. 228 (1979).

[47] *Carlson*, 446 U.S. at 18–19.

[48] Some of the "special factors counselling hesitation" that the Supreme Court has considered include:

> (1) whether it is feasible to create a workable cause of action, (2) whether extending the cause of action would undermine *Bivens's* deterrence goals, (3) whether an extension of *Bivens* would impose asymmetric liability costs on privately operated facilities as compared to government-operated facilities, and (4) whether unique attributes of an area, like the military, give reason to infer that congressional inaction is deliberate.

Pollard v. GEO Grp., Inc., 607 F.3d 583, 598 (9th Cir. 2010) (citations omitted).

[49] *Carlson*, 446 U.S. at 18–19.

Congress did not wish it to preclude a *Bivens* action.[50] Finding that there were also "no special factors counselling hesitation,"[51] the Court held that the plaintiff's complaint should not be dismissed.[52]

Since the *Passman* and *Carlson* decisions, the Supreme Court has consistently refused to extend *Bivens*.[53] The Supreme Court itself has recognized this trend: "Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."[54] In his concurrence in *Malesko*, Justice Scalia stated that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."[55] Some are concerned that this reluctance may eventually lead to the abolishment of *Bivens* actions entirely.[56]

2. Schweiker v. Chilicky. As discussed in *Carlson*, one way that a *Bivens* suit is foreclosed is through congressional action. Although the Court in *Carlson* indicated that for *Bivens* actions to be foreclosed Congress must have "provided an alternative remedy

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[50] *Id.* at 23.

[51] *Id.* at 19.

[52] *See id.* at 25 (affirming the Seventh Circuit Court of Appeals and allowing the plaintiff to proceed to trial).

[53] *See* Wilkie v. Robbins, 551 U.S. 537, 541 (2007) (finding no *Bivens* claim against individual employees of the Bureau of Land Management who allegedly harassed the plaintiff for several years in an attempt to get an easement); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (concluding that no *Bivens* cause of action is available against a private prison corporation); FDIC v. Meyer, 510 U.S. 471, 484–86 (1994) (finding no *Bivens* remedy available against federal agencies); Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (holding that there was no implied right of action for due process violations caused by improperly denied social security benefits); Bush v. Lucas, 462 U.S. 367, 368 (1983) (declining to extend *Bivens* to allow individual government officials to bring a cause of action for First Amendment violations in the context of federal employment); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (finding special factors counseling hesitation in the military context). *But see* Hartman v. Moore, 547 U.S. 250, 252 (2006) (implying that a *Bivens* action is available for malicious prosecution in violation of the First Amendment).

[54] *Malesko*, 534 U.S. at 68.

[55] *Id.* at 75 (Scalia, J., concurring).

[56] *See, e.g.*, Jeffrey M. Nye, Comment and Casenote, Holly v. Scott: *Constitutional Liability of Private Correctional Employees and the Future of* Bivens *Jurisprudence*, 75 U. CIN. L. REV. 1245, 1270 (2007) (describing "the prospect of the Supreme Court's overruling *Bivens* in its entirety" as "sobering" and a "real harm").

which it explicitly declared to be a *substitute* for recovery,"[57] the Court in *Schweiker v. Chilicky*[58] articulated a more defendant-friendly standard. The *Schweiker* Court found that a *Bivens* action was not appropriate because, even though Congress had not explicitly declared that the Social Security Act foreclosed a *Bivens* suit, Congress had already established an "elaborate remedial scheme."[59] The plaintiffs in *Schweiker* were recipients of Social Security disability benefits that were improperly denied.[60] Plaintiffs received backpay for their wrongly withheld benefits but sought additional compensation for their alleged due process violation[61] through a *Bivens* suit.[62] In denying *Bivens* liability, the Court relied on the fact that Congress had thoroughly investigated the area and set up complex remedial procedures for those whose benefits were wrongly terminated.[63] Because Congress had already created what it considered to be "adequate remedial mechanisms for constitutional violations," it would be inappropriate from a separation of powers standpoint for the Court to create *Bivens* liability.[64] Allowing congressional preemption of a *Bivens* suit even where Congress has not explicitly stated an intention to preempt is evidence that, in *Schweiker*, the Court moved towards a more limited view of *Bivens*.

3. Correctional Services Corporation v. Malesko. In its 2001 decision of the *Malesko* case, the Supreme Court refused to recognize a *Bivens* action against a private prison corporation that had a contract with the federal government.[65] This is the first and only time the Supreme Court has addressed *Bivens* liability in the context of private federal prisons. The plaintiff was a federal offender who was serving the remainder of his sentence in a halfway house operated by the defendant corporation.[66] Malesko's

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[57] *Carlson*, 446 U.S. at 18.
[58] 487 U.S. 412.
[59] *Id.* at 414.
[60] *Id.* at 417–18.
[61] *Id.*
[62] *Id.* at 419.
[63] *Id.* at 429.
[64] *Id.* at 423.
[65] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).
[66] *Id.* at 64.

bedroom was located on the fifth floor.[67] The defendant corporation had a policy requiring inmates with bedrooms lower than the sixth floor to take the stairs rather than the elevator.[68] Because of a heart condition, Malesko was granted special permission to use the elevator to reach his fifth-floor bedroom.[69] On March 28, 1994, one of the defendant's employees refused to allow Malesko to take the elevator to his room despite Malesko's insistence that he had been granted special permission.[70] While climbing the stairs, Malesko had a heart attack, fell, and injured his ear.[71]

In his original suit, Malesko had named the individual prison employees as defendants but his claims against them were barred by the statute of limitations.[72] Thus, the only issue decided by the Supreme Court was the existence of a *Bivens* action against the private corporation but not "whether a *Bivens* action might lie against a private individual."[73] Much of the reasoning in *Malesko* instead focused on the deterrent effect *Bivens* liability was meant to have on *individuals*.[74]

Regarding alternative remedies, the Court held that Malesko was "not a plaintiff in search of a remedy as in *Bivens* and *Davis*"[75] because he could pursue a negligence claim[76] or the remedies provided by the Board of Prisons.[77] The Court implied that not only were there alternative remedies, but these alternatives might provide superior relief.[78] The Court noted that a state tort claim of negligence was a better option for a plaintiff in Malesko's position because of the heightened "deliberate indifference" standard that

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[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 65. Malesko did not challenge this issue. *Id.*

[73] *Id.*

[74] *Id.* at 70–72. It was on this basis that the Ninth Circuit in *Pollard* distinguished *Malesko*. Pollard v. GEO Grp., Inc., 607 F.3d 583, 601 (9th Cir. 2010).

[75] *Malesko*, 534 U.S. at 74.

[76] *Id.* at 73.

[77] *See id.* at 74 (pointing to the "remedial mechanisms established by the [Board of Prisons], including suits in federal court for injunctive relief and grievances filed through the [Board of Prisons'] Administrative Remedy Program").

[78] *Id.* at 73.

must be proven for an Eighth Amendment violation.[79] Additionally, in regards to preventing future constitutional violations, a *Bivens* remedy has "never [been] considered a proper vehicle for altering an entity's policy," whereas the injunctive relief provided by the Board of Prisons is such a vehicle.[80]

4. Wilkie v. Robbins. The latest Supreme Court opinion to address whether to extend *Bivens* liability is *Wilkie v. Robbins*.[81] That case involved a dispute between a landowner and the Bureau of Land Management over an easement.[82] The plaintiff pursued a *Bivens* action alleging that his Fourth and Fifth Amendment rights were violated.[83]

The *Wilkie* Court articulated a two-part test for determining whether a given context gives rise to *Bivens* liability. First, the court is to determine "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[84] Second, federal courts "make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."[85] Although the *Wilkie* formulation of the test essentially is just a restatement of factors expressed in earlier case law, the *Wilkie* test is significant in that it confirms that the congressional action requirement for alternative remedies from *Carlson* has been replaced. By broadening the class of adequate alternative remedies, the Supreme Court has effectively narrowed the availability of *Bivens* remedies.[86]

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[79] *Id.*

[80] *Id.* at 74.

[81] 551 U.S. 537 (2007).

[82] *Id.* at 541.

[83] *Id.* at 548.

[84] *Id.* at 550 (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)).

[85] *Id.*

[86] *See generally* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723 (2008) (discussing how a broad view of adequate alternative remedies that includes state law remedies impacts *Bivens* plaintiffs).

C. CIRCUIT SPLIT

Prior to the Ninth Circuit's decision in *Pollard*, no circuit had recognized a *Bivens* claim against individual employees of a private federal prison; the three circuits that had addressed the issue had denied liability.[87]

The first circuit to address the issue was the Tenth Circuit in *Peoples v. CCA Detention Centers*.[88] A three-judge panel held that a *Bivens* action should not be recognized.[89] A rehearing en banc was granted and an equally divided court affirmed.[90]

In *Peoples*, the plaintiff alleged that prison employees, by failing to adequately protect him from violence from other inmates, had violated his Eighth Amendment rights.[91] In holding that *Bivens* does not apply to this situation, the majority based its conclusion on the availability of alternative remedies through state law claims such as negligence.[92] As recognized by the dissent, the court conceded that it was "a very close case,"[93] but given the Supreme Court's reluctance to extend *Bivens* and the fact that Congress is better situated to decide the issue, the majority did not recognize a *Bivens* action.[94]

The next circuit "to decide whether individual employees of a privately operated prison face Eighth Amendment liability under *Bivens* and its progeny" was the Fourth Circuit in *Holly v. Scott*.[95] The plaintiff prisoner was a diabetic and alleged that the defendants had ignored his medical needs.[96] The Fourth Circuit was highly concerned with the separation of powers argument that

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[87] *See supra* note 11 (listing cases).

[88] 422 F.3d 1090 (10th Cir. 2005), *vacated in part and aff'd by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (per curiam).

[89] *Id.* at 1093.

[90] *See* Peoples v. CCA Det. Ctrs., 449 F.3d 1097, 1097, 1099 (10th Cir. 2006) (stating per curiam that the en banc panel was "evenly divided . . . on the question whether a *Bivens* action is available against employees of a privately-operated prison").

[91] *Peoples*, 422 F.3d at 1093–94.

[92] *Id.* at 1108.

[93] *Id.* at 1108 n.2 (Ebel, J., concurring and dissenting in part).

[94] *See id.* at 1103 (majority opinion) (concluding that an extension of liability is a "decision best left for Congress").

[95] 434 F.3d 287, 288 (4th Cir. 2006) (citation omitted). Interestingly, the defendants in *Holly* worked for the same prison corporation as the defendants in *Pollard*, GEO Group. *Id.*

[96] *Id.*

this sort of liability should be a decision of the Legislative Branch rather than the Judiciary, stating that

> Congress possesses a variety of structural advantages that render it better suited for remedial determinations in cases such as this. Unconstrained by the factual circumstances in a particular case or controversy, Congress has a greater ability to evaluate the broader ramifications of a remedial scheme by holding hearings and soliciting the views of all interested parties.[97]

The *Holly* court applied a three-part test.[98] Under this test, "[a] court must determine that (1) Congress has not already provided an exclusive statutory remedy; (2) there are no special factors counselling hesitation in the absence of affirmative action by Congress; and (3) there is no explicit congressional declaration that money damages not be awarded."[99] This Fourth Circuit test resembles the *Bivens*-friendly *Carlson* test in its explicit congressional requirements.[100] Although on its face the *Holly* court's test seems like it would readily allow a *Bivens* remedy, in its application, this test was less open to allowing an implied cause of action. This was because the Fourth Circuit set a low bar for congressional action and readily found special factors counseling hesitation. The court admitted that the "first and third prongs [were] satisfied by Congress's silence regarding remedies for plaintiffs in Holly's position."[101] However, the court found the second prong to be fatal to the plaintiff's claim.[102]

In general, the consideration of "special factors counselling hesitation" provides courts with the most discretion; courts that are cautious towards *Bivens* actions, like the *Holly* court, will

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[97] *Id.* at 290 (citing Bush v. Lucas, 462 U.S. 367, 389 (1983)).

[98] *Id.*

[99] *Id.* (alteration in original) (quoting Hall v. Clinton, 235 F.3d 202, 204 (4th Cir. 2000)) (internal quotation marks omitted).

[100] *See supra* notes 46–49 (discussing *Carlson* test).

[101] *Holly*, 434 F.3d at 290.

[102] *Id.*

readily find "special factors counselling hesitation."[103] On the other hand, *Bivens*-friendly courts, like the *Pollard* court, will find an absence of such factors.[104]

The *Holly* court found two "special factors counselling hesitation."[105] First, the court considered that the "defendants [were] private individuals, not government actors" as a special factor counseling hesitation.[106] The second factor counseling hesitation was that the plaintiff had an "adequate remedy against the defendants for his alleged injuries under state law" through a negligence suit.[107] The fact that the defendants were private individuals employed by a "wholly private corporation" was fatal to a *Bivens* claim.[108] The court was concerned with "the importance of a party's private status in our constitutional scheme. The Bill of Rights is a negative proscription on *public* action—to simply apply it to *private* action is to obliterate 'a fundamental fact of our political order.' "[109]

The court, like the Ninth Circuit in *Pollard*, applied the "public function test" for state action but reached the opposite conclusion.[110] The Fourth Circuit considered the "argument that the operation of a prison is a traditionally exclusive state function"[111] to be foreclosed by the Supreme Court's decision in *Richardson v. McKnight*.[112] In *Richardson*, the Court determined whether private-prison employees in § 1983 suits enjoyed qualified immunity.[113] The *Richardson* Court surveyed the historical background of prisons and concluded that "correctional functions have never been exclusively public."[114] Accordingly, the Fourth

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[103] *See, e.g., id.* (finding two different "special factors counselling hesitation").

[104] *See* WELLS ET AL., *supra* note 2, at 150 (observing the Supreme Court's movement towards a more inclusive standard for finding "special factors counselling hesitation").

[105] *Holly*, 434 F.3d at 290.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 291.

[109] *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

[110] *Id.* at 293.

[111] *Id.*

[112] 521 U.S. 399 (1997).

[113] *Id.* at 404.

[114] *Id.* at 405.

Circuit held that employees of private prisons did not pass the "public function" test.[115]

The plaintiff in *Holly* argued that the " 'function' to which [the court] should look is not the administration of a prison, but rather the power to keep prisoners under lock and key."[116] The *Holly* court, however, considered that view to be a misapprehension of the "proper nature of [the] inquiry."[117]

In *Alba v. Montford*, the Eleventh Circuit was the third circuit to address the same "narrow question of whether a federal prisoner incarcerated in a privately operated prison may pursue a *Bivens* action against employees of the private prison for allegedly violating his Eighth Amendment right."[118] The facts of *Alba* are essentially the same as the other cases raising this issue. The prisoner plaintiff was incarcerated in a private federal prison in Georgia.[119] The complaint alleged that the individual employees failed to provide him appropriate postoperative treatment after he underwent throat surgery in prison.[120]

One argument raised by the plaintiff that was unique to the *Alba* case concerned a Georgia procedural rule that the plaintiff argued left him without an alternative remedy.[121] Georgia law requires that, for a professional malpractice complaint, the plaintiff must obtain an expert's affidavit.[122] The plaintiff prisoner argued that, as an indigent, he could not comply with this requirement.[123] The court concluded that this procedural rule did not apply because the plaintiff was not bringing a professional malpractice claim.[124] The court noted, however, that even if the

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[115] *Holly*, 434 F.3d at 293.

[116] *Id.* This argument was persuasive to the Ninth Circuit in *Pollard*. Pollard v. GEO Grp., Inc., 607 F.3d 583, 590–92 (9th Cir. 2010).

[117] *Holly*, 434 F.3d at 293.

[118] Alba v. Montford, 517 F.3d 1249, 1251 (11th Cir. 2008).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 1254.

[122] *See* O.C.G.A. § 9-11-9.1(a) (Supp. 2010) (requiring that a complaint alleging professional malpractice include "an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim").

[123] *Alba*, 517 F.3d at 1254.

[124] *Id.* at 1255.

expert affidavit requirement applied, "the affidavit requirement [would] not render the state tort remedy inadequate for the purpose of *Bivens* liability."[125] The complication of filing a complaint did not make a remedy "unavailable" in the sense that a state cause of action to protect the same interests was unavailable in *Bivens*.[126] Although the issue was avoided in *Alba*, this demonstrates the potential that, depending on state law, there may be alternative remedies in one state but none in another. This potential for asymmetry has worried some.[127]

In *Pollard*, the most recent case on the issue, the prisoner plaintiff was a federal inmate incarcerated in a private federal prison.[128] Pollard alleged that he was injured when he slipped on a cart that was left in a doorway.[129] He further argued that prison employees were insensitive to his injury and required him to put on a jumpsuit and a "black box" restraint device despite Pollard's "excruciating pain."[130] Additionally, Pollard alleged that prison employees failed to put his injured elbow in a posterior splint despite an outside orthopedist's recommendation.[131] Eight individual employees of the prison were named as defendants.[132] In contrast to other circuits' holdings, the Ninth Circuit reversed the dismissal of the suit and allowed Pollard to proceed in a *Bivens* suit against the individual employees.[133]

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[125] *Id.*

[126] *Id.* at 1255–56.

[127] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring) (remarking that it is undesirable to have "different rules of liability for federal officers dependent on the State where the injury occurs"); Sarro v. Cornell Corrs., Inc., 248 F. Supp. 2d 52, 63 (D.R.I. 2003) (cautioning that "making the federal remedies available to a federal prisoner at a privately-operated institution contingent upon whether there are adequate alternative state law remedies would require a case-by-case analysis of state law and would cause the availability of a *Bivens* remedy to vary according to the state in which the institution is located, a result that *Bivens*, itself sought to avoid").

[128] Pollard v. GEO Grp., Inc., 607 F.3d 583, 585 (9th Cir. 2010).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 585. Originally, both the individual employees and GEO Group had been named as defendants. *Id.* GEO Group, Inc. was later dismissed as a defendant in the district court because a *Bivens* suit was precluded by *Malesko*. *Id.* at 586. In an apparent error on the part of Pollard, GEO's name remained in the style of the case. *Id.* at 586 n.5.

[133] *Id.* at 603.

As a "threshold question," the court addressed "whether the GEO employees can be considered federal agents acting under color of federal law in their professional capacities" for the purposes of *Bivens* liability.[134] The Ninth Circuit answered in the affirmative, although noting that this directly conflicted with Fourth Circuit law.[135] The *Pollard* court applied § 1983's "public function test" for state action[136] because of "the similarity of the § 1983 and *Bivens* doctrines."[137] The "public function" test asks whether the private entity is exercising "powers traditionally exclusively reserved to the State."[138] Unlike the Fourth Circuit, the Ninth Circuit considered "the relevant function" not to be "prison management, but rather incarceration of prisoners," which the Ninth Circuit noted has "traditionally been the State's '*exclusive* prerogative.' "[139] The *Pollard* court dismissed *Richardson*, which the Fourth Circuit had relied upon, because *Richardson* concerned the issue of whether state private prison guards were entitled to qualified immunity and "not whether those guards acted under color of federal or state law."[140] Rather than *Richardson*, the *Pollard* court identified *West v. Atkins*[141] as the relevant Supreme Court precedent and concluded that "there is no principled basis to distinguish the activities of the GEO employees in this case from the governmental action identified in *West*."[142]

Next, the Ninth Circuit applied the *Wilkie* two-part test.[143] As to the first prong, the court concluded that no alternative remedies were available, because, based on its reading of the Supreme Court's early precedent and *Wilkie*, "the mere existence of a

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[134] *Id.* at 588.

[135] *Id.* at 588–89 (referring to Holly v. Scott, 434 F.3d 287 (4th Cir. 2006)).

[136] *Id.* at 590.

[137] *Id.* at 589.

[138] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (citing cases where the Supreme Court has found state action exercised by a private entity).

[139] *Pollard*, 607 F.3d at 592 (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)); *see also* Richardson v. McKnight, 521 U.S. 399, 414 (1997) (Scalia, J., dissenting) ("[P]rivate prison management firms, who perform the same duties as state-employed correctional officials, . . . exercise the most palpable form of state police power.").

[140] *Pollard*, 607 F.3d at 591.

[141] *See* 487 U.S. 42, 57 (1988) (holding that a private doctor under contract with the State to provide medical care to prisoners was subject to suit under § 1983).

[142] *Pollard*, 607 F.3d at 590.

[143] *Id.* at 594; *see supra* notes 84–85 (articulating the *Wilkie* test).

potential state law claim did not suffice to preclude a *Bivens* action."[144] The *Pollard* court emphasized only looking at congressional alternative remedies, despite the consistent erosion of the congressional action requirement.[145] Under the second "special factors counselling hesitation" prong, the court concluded that there were no such special considerations.[146] Based on this analysis, the Ninth Circuit reversed the lower court's dismissal of Pollard's *Bivens* action.[147]

D. GOOD FAITH DEFENSE

Unlike public prison employees, private prison employees are not entitled to official immunity.[148] Potentially, they might receive protection under a good faith defense. Although still not fully developed, such a defense would give private prison employees protection that is different yet somewhat analogous to official immunity.[149] The Supreme Court, although mentioning the potential for such a defense, has never recognized a good faith defense in this context.

In *Wyatt v. Cole*, the Supreme Court discussed the possibility of a good faith defense for § 1983 suits.[150] The Court addressed "whether private defendants threatened with 42 U.S.C. § 1983

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[144] *Pollard*, 607 F.3d at 596.

[145] *Id.* First, an alternative remedy had to be explicitly declared by Congress to be a substitute. Carlson v. Green, 446 U.S. 14, 18–19 (1980). Then, the explicit declaration requirement was dropped. *See* Schweiker v. Chilicky, 487 U.S. 412, 425–27 (1988) (deeming a *Bivens* action to be foreclosed because of Congress's extensive involvement in Social Security administration, despite the lack of an explicit declaration regarding *Bivens* liability). Currently, there is significant doubt that an alternative remedy has to be congressional instead of just a state tort suit. *See* Preis, *supra* note 86, at 729 (observing that "*Malesko* appeared to hold that state remedies were meaningful alternatives which could displace a *Bivens* action").

[146] *Pollard*, 607 F.3d at 597–603.

[147] *Id.* at 603.

[148] *See* Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that individual employees in private state prisons are not entitled to qualified immunity in § 1983 suits).

[149] Official immunity for federal officials in *Bivens* actions is "designed primarily to avoid dampening the ardor of officials in the performance of their duties, [and] prevents recovery against federal officials even when they have in fact violated constitutional rights." RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 814 (5th ed. 2003). Official immunity "sharply curtail[s] the effective scope of the Bivens remedy." *Id.*

[150] 504 U.S. 158 (1992).

liability are, like certain government officials, entitled to qualified immunity."[151] The Supreme Court held that they were not.[152] The Court, however, left open the "possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.* could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens."[153] The Court left those issues for "another day."[154] As discussed later, this good faith defense could be used in the *Bivens* context to alleviate asymmetry concerns.[155]

III. ANALYSIS

A. TWO APPROACHES: *BIVENS*-SKEPTICAL VS. *BIVENS*-FRIENDLY

There are two different interpretations of the Supreme Court's *Bivens* case law. Each approach suggests a different answer to whether *Bivens* should apply to employees of private federal prisons.

1. Bivens-*Skeptical.* The first approach is to view *Bivens* as fundamentally changed. The Supreme Court explicitly extended *Bivens* twice,[156] but has resisted doing so again because of a shift in the doctrine. Justice Scalia aptly described this view in *Malesko* when he said that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . ."[157] This approach holds that whether to create a remedy is the business of Congress, under its Article III, Section 2 authority to regulate federal court jurisdiction.[158] *Bivens*-skeptics more readily find "factors counselling hesitation"[159] and set a more inclusive standard for alternative remedies. *Bivens* actions are

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[151] *Id.* at 161.
[152] *Id.* at 169.
[153] *Id.* (citation omitted).
[154] *Id.*
[155] *See infra* Part III.H.*3.*
[156] *See supra* note 40.
[157] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., dissenting).
[158] U.S. CONST. art. III, § 2.
[159] *See, e.g.*, Holly v. Scott, 434 F.3d 287, 290 (4th Cir. 2006) (finding two "factors counselling hesitation").

only appropriate when it is "damages [though a *Bivens* suit] or nothing,"[160] and nothing really means nothing. Taking this approach leads to the conclusion that *Bivens* actions should not be available in the *Pollard* situation because of the availability of an adequate alternative remedy, namely a state law negligence suit.[161]

2. Bivens-*Friendly.* The second approach is that *Wilkie* affirmed that the earliest Supreme Court cases, particularly *Carlson*, are still strong precedent. A court taking this second approach would likely recognize a *Bivens* cause of action in Pollard's case. Under the second approach, the Supreme Court has been reluctant to recognize another *Bivens* action since *Carlson*, not because there has been a change in the doctrine, but merely because the right case has not been presented.[162] The *Bivens*-friendly approach is based on the idea that Article III, Section 2 grants the courts broad remedial powers to protect constitutional rights.[163] A *Bivens*-friendly court will set a high bar for qualification as an adequate alternative remedy.[164] The court will be resistant to the idea that a state tort remedy will qualify. In the same vein, a *Bivens*-friendly court will be reticent towards finding a special factor counseling hesitation.

A good illustration of the two approaches is to contrast the majority and the dissent in the *Peoples* three-judge panel.[165] The majority is *Bivens*-skeptical, whereas the dissent is *Bivens*-friendly. The majority perceived a "tension between *Carlson* and *Malesko*,"[166] which is consistent with the *Bivens*-friendly approach's view that earlier *Bivens* cases have weak precedential

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[160] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

[161] *See infra* Part III.E.

[162] *See infra* text accompanying notes 172–73 (contrasting the language in *Wilkie* from that in *Malesko*).

[163] U.S. CONST. art. III, § 2; *see also* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1541 (1972) ("The source of the Court's power to create remedies will be found, if at all, in the spare language of article III . . . .").

[164] *See, e.g.*, Pollard v. GEO Grp., Inc., 607 F.3d 583, 595 (9th Cir. 2010) (stating that "only remedies crafted *by Congress* can have . . . a preclusive effect").

[165] Peoples v. CCA Det. Ctrs., 422 F.3d 1090 (10th Cir. 2005), *vacated in part and aff'd by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (per curiam).

[166] *Id.* at 1102.

value. Furthermore, the majority was strongly concerned with the separation of powers doctrine, which is the bedrock of the *Bivens*-skeptical approach.[167]

Conversely, the dissent believed that *Carlson* controlled the case.[168] Contrary to the majority, the dissent thought that the Supreme Court, rather than Congress, should be the ultimate decisionmaker on whether there should be an implied damages remedy in this context.[169]

B. *WILKIE*: A SHIFT BACK TO A MORE *BIVENS*-FRIENDLY APPROACH?

Wilkie is an important piece of the *Bivens*-friendly approach.[170] *Wilkie*, as the latest Supreme Court case to address whether to extend *Bivens*,[171] can be read as a move away from the anti-*Bivens* sentiment in *Malesko* and back towards *Carlson* and *Davis*. Although the Court denied the plaintiff a *Bivens* remedy,[172] the Court in *Wilkie* seemed much more open to *Bivens* actions than the Court in *Schweiker* and *Malesko*. Where the *Malesko* Court said that the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants,"[173] the *Wilkie* Court indicated a more open view towards *Bivens* actions. The *Wilkie* Court characterized the long streak of not allowing *Bivens* liability since *Carlson* as merely resulting from a stream of factually inapt cases instead of a distinct change in the Supreme Court's attitude towards *Bivens*; rather than the strong wording in previous cases, Justice Souter, writing for the *Wilkie* majority, indicated that "in most instances we have found [a] *Bivens* remedy unjustified."[174] The *Malesko* Court made it very clear that there

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[167] *See id.* at 1103 (concluding that the extension of liability is "a decision best left for Congress").

[168] *Id.* at 1109 (Ebel, J., concurring and dissenting in part).

[169] *Id.* at 1108 n.2.

[170] Wilkie v. Robbins, 551 U.S. 537 (2007).

[171] *Hui v. Castaneda*, 130 S. Ct. 1845, 1852 (2010), addresses the issue of whether the defendant employees of the Public Health Service were entitled to immunity under 42 U.S.C. § 233(a) for ignoring the health care needs of a prisoner and not whether a *Bivens* action was available. *Hartman v. Moore*, 547 U.S. 250, 252 (2006), concerned the causation requirement for violations of the First Amendment.

[172] *Wilkie*, 551 U.S. at 567.

[173] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001).

[174] *Wilkie*, 551 U.S. at 550.

was a retreat from "[the Court's] previous willingness to imply a cause of action" in both statutes and the Constitution.[175] The language in *Wilkie*, on the other hand, does not suggest such a "retreat."

One way to explain why the Ninth Circuit came out in favor of *Bivens* liability is that it is the only circuit opinion to incorporate *Wilkie* into its analysis. *Holly* and *Peoples* were both decided prior to the *Wilkie* decision. *Alba*, although decided eight months after *Wilkie*, did not cite or discuss *Wilkie*. Perhaps *Pollard* came out the other way based on a shift in the law as reflected in the Supreme Court's decision in *Wilkie*.

Hartman v. Moore may be further affirmation of this shift.[176] Although whether to extend *Bivens* was not the issue, the Supreme Court did not object to the lower court's assumption that a *Bivens* action would be available under the First Amendment.[177] An extremely *Bivens*-skeptical Court probably would not have been so willing to assume the existence of a *Bivens* remedy.

There are, however, strong arguments that proponents of the *Bivens*-skeptical approach can use to attack the argument that *Wilkie* is a shift back to *Carlson* and *Davis*. First and foremost, the characterization of *Wilkie* as more open to *Bivens* actions is a result of reading between the lines; it is an implicit attitude rather than an explicit holding. Furthermore, what the *Wilkie* Court did hold (that a *Bivens* action was not available) is consistent with the string of Supreme Court cases since *Carlson*. The *Wilkie* Court also based its decision in part on one of the strongest policy reasons against *Bivens* actions—separation of powers.[178] As the Court stated, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation . . . ."[179] Overall, although an argument can be made that *Wilkie* represents a shift in the Supreme Court's approach, this argument is not conclusive.

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[175] *Malesko*, 534 U.S. at 67 n.3.

[176] 547 U.S. 250 (2006).

[177] *See id.* at 257 (addressing the defendants' argument that without a probable cause requirement a "*Bivens* claim is too readily available" but not questioning whether a *Bivens* action would be available at all).

[178] *Wilkie*, 551 U.S. at 562.

[179] *Id.* (quoting Bush v. Lucas, 462 U.S. 367, 389 (1983)) (internal quotation marks omitted).

C. WHETHER *CARLSON* IS CONTROLLING

One argument for finding *Bivens* liability in *Pollard* is that the public/private prison distinction that separates *Carlson* and *Pollard* does not justify a different result. All that really separates *Pollard* and *Carlson* is a contract. Prisoner plaintiffs will argue that the contract makes no difference. Defendants will argue that the contract makes a world of difference because this could relieve them of liability.

The argument for having *Carlson* control is that, in allowing a *Bivens* action against individual employees in public federal prisons, it seems that the Court determined that there were no adequate alternative remedies against the prison officials. Since the alternative remedies would be the same in the private prison context, by analogy to *Carlson*, a court should determine that there are not adequate alternative remedies for plaintiffs like Pollard.

Although *Carlson* does seem to provide strong support for prisoner plaintiffs, there are two general arguments that *Carlson* does not control. First, although *Carlson* has not been overruled, the Supreme Court has since changed the doctrine so that the current standards for whether a *Bivens* suit is available are much more restrictive than when *Carlson* was decided.[180] Second, even if *Carlson* is still strong precedent, *Carlson* is distinguishable.

As previously discussed, initially the standard for whether there was an alternative remedy was very high. *Carlson* required alternative remedies to be "explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[181] The bar for an adequate alternative remedy has since been lowered. *Schweiker* recognized a congressional substitute even though it had not been explicitly declared as a foreclosure of a *Bivens* action.[182] Then, in *Malesko*, the Supreme Court seems to imply that state tort remedies can be an alternative adequate to

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[180] *See supra* note 145 (describing the evolution of adequate alternative remedies in *Bivens* suits).

[181] Carlson v. Green, 446 U.S. 14, 18–19 (1980).

[182] *See supra* Part II.B.*2* (discussing Schweiker v. Chilicky, 487 U.S. 412 (1988)).

displace a *Bivens* action.[183] Given this evolution, even though *Carlson* held that there were no alternative remedies, under the current standards, *Carlson* might have come out differently.

The argument that *Carlson* is distinguishable focuses on the private/public prison distinction. This difference can be seen as outcome determinative. Even if one concedes that the alternative-remedies prong of the *Wilkie* test is not affected by the private/public distinction, a court can find that the private prison is a "special factor counselling hesitation." The Fourth Circuit in *Holly* determined that the fact that the "defendants [were] private individuals"[184] who were employees of "a wholly private corporation in which the federal government ha[d] no stake other than a contractual relationship" was a special factor counseling hesitation.[185] The Fourth Circuit was concerned that they were "not free to ignore the importance of a party's private status in our constitutional scheme."[186]

The *Peoples* majority distinguished *Carlson* on another ground despite acknowledging that "at first blush" *Carlson* seemed to control.[187] The majority reasoned that *Carlson* only addressed whether the Federal Torts Claims Act foreclosed a *Bivens* suit, not whether a state law cause of action could foreclose a *Bivens* suit.[188]

D. WHETHER *MALESKO* IMPLICITLY SUGGESTED THAT THERE WOULD BE *BIVENS* LIABILITY FOR INDIVIDUAL EMPLOYEES

In his dissent in *Malesko*, Justice Stevens assumed that the majority recognized that there would be *Bivens* liability against the individual employees, stating that "the reasoning of the Court's opinion relies, at least in part, on the availability of a remedy against employees of private prisons."[189] The Court's statements such as, "if a corporate defendant is available for suit,

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[183] *See* Preis, *supra* note 86, at 729 ("*Malesko* appeared to hold that state remedies were meaningful alternatives which could displace a *Bivens* action.").

[184] Holly v. Scott, 434 F.3d 287, 290 (4th Cir. 2006).

[185] *Id.* at 291.

[186] *Id.*

[187] Peoples v. CCA Det. Ctrs., 422 F.3d 1090, 1101–02 (10th Cir. 2005), *vacated in part and aff'd by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (per curiam).

[188] *Id.* at 1102.

[189] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 79 n.6 (2001) (Stevens, J., dissenting).

claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury,"[190] do seem to suggest that such a *Bivens* suit would be available.[191]

An argument that *Malesko* does not support the availability of a *Bivens* remedy against individual employees is that the Court expressly stated that it was not deciding this issue.[192] At the very most, all this amounts to is dicta. Additionally, the remedy available against the employees might not be a *Bivens* suit but could be a state tort law remedy.

E. ADEQUATE ALTERNATIVE REMEDIES: WHY A *BIVENS*-SKEPTICAL APPROACH IS PREFERABLE WHEN CONSIDERING ADEQUATE ALTERNATIVE REMEDIES

A more inclusive standard is preferable when considering what qualifies as an adequate alternative remedy. State law tort actions should qualify as adequate. It is undeniable that the earliest Supreme Court cases set a high bar and required an alternative remedy to be (1) congressionally created and (2) explicitly declared[193] by Congress to be a substitute.[194] However, over the last thirty years, the bar for adequacy has been consistently lowered.[195] After *Malesko*, it appears that state tort suits will suffice. The *Malesko* Court concluded that a state law negligence suit and the Board of Prisons's remedial mechanisms constituted adequate alternative remedies.[196] The Ninth Circuit in *Pollard* ignored this aspect of *Malesko* and criticized the dissent's

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[190] *Id.* at 62 (majority opinion).

[191] *See Peoples*, 422 F.3d at 1110 (Ebel, J., concurring and dissenting in part) (arguing that the Supreme Court in *Malesko* "clearly indicate[d] that the Court based its refusal to extend *Bivens* liability to a private prison, in part, on an assumption that such a remedy would be appropriate against the *employees* of that private prison").

[192] *See Malesko*, 534 U.S. at 65 ("[T]he question whether a *Bivens* action might lie against a private individual is not presented here.").

[193] An example of what the court was looking for in an explicit declaration would be an "exclusiveness of remedy" section. *See, e.g.*, 28 U.S.C. § 2679 (2006) ("[T]he remedies provided by this title in such cases shall be exclusive.").

[194] *See* Carlson v. Green, 446 U.S. 14, 18 (1980) (requiring that an alternative remedy be "explicitly declared to be a *substitute* for recovery").

[195] *See supra* note 145 (demonstrating this proposition).

[196] *Malesko*, 535 U.S. at 73–74; *see also* Preis, *supra* note 86, at 729 ("*Malesko* appeared to hold that state remedies were meaningful alternatives which could displace a *Bivens* action.").

attention to it.[197] The *Pollard* court stated that, "[i]n evaluating whether alternative, potential remedies preclude a *Bivens* action, the Court has consistently stressed that only remedies crafted *by Congress* can have such a preclusive effect."[198] Although this statement accurately describes the Supreme Court's early cases, it omits that, in *Malesko,* neither the state negligence suit nor the Board of Prisons's remedial mechanisms were congressionally created.[199] Yet, these noncongressional remedies qualified as adequate alternatives.

Taking a *Bivens*-skeptical approach to alternative remedies and recognizing the adequacy of state tort actions does not mean that *every* state tort claim will preclude a *Bivens* suit. There will still be situations, like in *Bivens* itself, where the state tort suit protects a wholly different interest than the constitutional interest. In *Bivens*, Judge Harlan in concurrence observed that the interest violated when a stranger trespasses on one's land is wholly different than the interest violated when government actors unreasonably search one's home.[200] These interests "are substantially different in kind."[201] In *Bivens*, the state law trespass suit was inadequate per se because it concerned a wholly different interest.[202]

Clearly, whether the state law and the Constitution protect wholly different interests will vary depending on the case. In the *Pollard* fact pattern, however, the interests are not sufficiently different. In *Malesko*, the Supreme Court concluded that, when a prisoner's medical needs are neglected, the rights protected in a state law negligence suit are not wholly different than their Eighth Amendment interest.[203] The rights at issue in *Malesko* are

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[197] *See* Pollard v. GEO Grp., Inc., 607 F.3d 583, 595 n.13 (9th Cir. 2010) (accusing the dissent of misreading *Malesko*).

[198] *Id.* at 595.

[199] Perhaps there is an argument that the Bureau of Prisons's remedial mechanisms are "crafted by Congress" because Congress authorized the Bureau to create such remedies. This would, however, considerably strain the reasonable meaning of these words.

[200] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 408–09 (1971) (Harlan, J., concurring).

[201] *Id.* at 409.

[202] *Id.*

[203] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 73 (2001) (stating that the "respondent's situation [was] altogether different from *Bivens,* in which [the Court] found

the same that arise here. Therefore, the argument that a state law negligence suit involves wholly different interests is foreclosed by this language in *Malesko*.

Although the *Malesko* Court did not extensively explain its reasoning behind the conclusion that the interests were not inconsistent, the argument makes considerable sense. When someone improperly leaves a cart in the hallway like in *Pollard*, it should not fundamentally change the situation if that person was a federal actor. Likewise, when someone is negligent attending to one's medical needs, it should not fundamentally change the situation depending on whether the person was a private health care worker or a prison employee. One might argue that in nonprison settings there is some choice in health care providers, and if unhappy with the quality of care, one can choose to leave.[204] These options are not available to prisoners.[205] There are, however, frequent situations where free citizens may be limited in their ability to leave a hospital providing negligent care; a patient might be so injured that changing hospitals is dangerous. If the patient lives in a rural town, for example, there might not be another specialist or otherwise competent doctor in the area. Despite prisoners' lack of alternative health care, this distinction is not enough to rise to the level of "inconsistent or even hostile" interests as in *Bivens*.[206]

F. FEDERAL ACTION

Although a *Bivens* action should not be available for other reasons, this is clearly federal action.[207] Inquiring into whether

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alternative state tort remedies to be 'inconsistent or even hostile' to a remedy inferred from the Fourth Amendment" (quoting *Bivens*, 403 U.S. at 393–94)).

[204] *See* Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 644 (2008) (referring to patients as "consumers" who shop "in a market for medical services").

[205] *See, e.g.*, West v. Atkins, 487 U.S. 42, 55 (1988) (recognizing that while incarcerated a prisoner is denied "a venue independent of the State to obtain needed medical care").

[206] *Bivens*, 403 U.S. at 394.

[207] Although something has to be federal action for a *Bivens* suit, this section will use "state action" and "federal action" interchangeably because the concepts of "federal action" for *Bivens* and "state action" for the Fourteenth Amendment and § 1983 are similar. *See supra* text accompanying notes 37–39.

something is state action involves a variety of considerations and tests.[208] Something qualifies as state action if it falls into any one of these categories.[209] Imprisoning wrongdoers and operating a prison facility satisfies the "public function test" for state action.[210] The public function test looks at whether something is "traditionally exclusively reserved to the State."[211] The Fourth Circuit's holding that it is not state action[212] is based on artificial reasoning.

Although both the Fourth and Ninth Circuits applied the "public function" test,[213] they looked to different functions. The Ninth Circuit looked at the most natural function of the prison, the incarceration of wrongdoers.[214] Conversely, the Fourth Circuit "artificially parse[d] out that power into its constituent parts" by separating the imprisonment function from the care-providing function.[215] Perhaps caring for prisoners is "not traditionally the exclusive prerogative of the State"[216] because there is a long history of private prison operation,[217] but that is irrelevant. The proper function for analysis is the general imprisonment function, and that is clearly a power that exclusively belongs to the government. Viewed in this way, a *Bivens* claim should not be denied based on the argument that it is not federal action.

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[208] Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99, 102 (2004) (identifying the wide variety of tests and considerations that the Supreme Court has used to determine whether there is state action).

[209] *Id.*

[210] *See* Pollard v. GEO Grp., Inc., 607 F.3d 583, 592–93 (9th Cir. 2010) (concluding that the prison employees "act[ed] under color of federal law for purposes of *Bivens* liability" because their actions satisfied the public function test).

[211] Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974); *see also* Holly v. Scott, 434 F.3d 287, 293 (4th Cir. 2006) (arguing that *Richardson*'s "historical analysis" demonstrated a long tradition of "the private operation of jails and prisons" dating back to the Middle Ages).

[212] *See Holly*, 434 F.3d at 292–94 ("The alleged actions of these defendants were not of a sufficiently federal character to create constitutional liability.").

[213] *Id.* at 293; *Pollard*, 607 F.3d at 589–92.

[214] *Pollard*, 607 F.3d at 592.

[215] *See id.* (criticizing the Fourth Circuit for analyzing state action by looking at the care-giving function of prisons).

[216] *Jackson*, 419 U.S. at 353.

[217] *See* Richardson v. McKnight, 521 U.S. 399, 405 (1997) (looking back into history to find significant involvement of private individuals and private contractors in prison management and operation in the eighteenth and nineteenth centuries).

However, federal action is only a "threshold question"[218] and a *Bivens* action should be denied on other grounds.

G. THREE TO ONE OR MORE LIKE TWO TO ONE?

Although technically four circuits have addressed the issue and three have denied a *Bivens* remedy,[219] the characterization of the Tenth Circuit as not allowing a *Bivens* remedy is on shaky ground. As discussed earlier, *Peoples* was first heard by a three-judge panel. Two judges concluded that there was no *Bivens* liability[220] while one judge, the dissenter, thought that there should be liability. The case was then reheard en banc and affirmed by an equally divided court.[221] Essentially, the Tenth Circuit's determination that a *Bivens* action is not available was dependent on the vote of one judge.

Language in the majority opinion suggests that, if the Tenth Circuit reconsidered the issue after *Wilkie*, the outcome might be different. The majority in the three-judge panel opinion recognized that there were several ways to read *Carlson* and that the Supreme Court "has explained its approach to *Bivens* claims in a variety of ways in the thirty-four years since *Bivens* itself was decided."[222] Accordingly, the majority thought it "prudent to follow the Court's most recent pronouncement on the issue,"[223] which at the time was *Malesko*. Arguably, if *Peoples* had been decided after the more *Bivens*-friendly *Wilkie* case, then turning to the Supreme "Court's most recent pronouncement on the issue"[224] very well might have led to the Tenth Circuit finding *Bivens* liability. In light of these arguments, the characterization of no *Bivens* liability as a clear "majority rule" is somewhat tenuous.

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[218] *Pollard*, 607 F.3d at 588.

[219] *See supra* notes 10–11.

[220] Peoples v. CCA Det. Ctrs., 422 F.3d 1090, 1093 (10th Cir. 2005), *vacated in part and aff'd by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (per curiam).

[221] *Peoples*, 449 F.3d at 1099.

[222] *Peoples*, 422 F.3d at 1102.

[223] *Id.* (citing Harlow v. Fitzgerald, 457 U.S. 800, 822 n.2 (1982) (Burger, C.J., dissenting)).

[224] *Id.*

H. POLICY ARGUMENTS BEHIND THE *BIVENS*-FRIENDLY APPROACH

Whether an implied cause of action should be available against private federal prison employees is not a question that can be resolved based solely on case law. It is also necessary to consider policy concerns. Although there are strong rationales for both the *Bivens*-friendly and the *Bivens*-skeptical approaches, ultimately, the policies against liability are stronger.

1. Deterrence. A policy that is frequently advanced in favor of any extension of *Bivens* liability is deterrence. The Supreme Court has stated that the "core purpose" of *Bivens* liability is to deter individuals "from engaging in unconstitutional wrongdoing."[225]

Although deterrence is a significant policy behind *Bivens* liability, this alone is not enough to justify an implied cause of action. Wherever there is any liability, there is some deterrent effect.[226] Deterrence is not unique to *Bivens* liability but is shared by all forms of liability. Naturally some forms of liability deter more than others.[227]

It is far from clear that *Bivens* provides significant deterrence in the individual private prison employee context. Indeed, some commentators are unconvinced of *Bivens*'s deterrent power in *any* context.[228] For example, one year after the creation of *Bivens* liability, Walter E. Dellinger seemed skeptical that the Supreme Court in *Bivens* was really basing its decision on a desire for deterrence.[229] He considered it "likely that the Court's action in *Bivens* was based upon a view of the personal rights conferred by the fourth amendment rather than a calculation of the likely impact a damage action against federal officers will have on

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[225] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).

[226] *See, e.g.*, Hudson v. United States, 522 U.S. 93, 102 (1997) (recognizing "that all civil penalties have some deterrent effect"); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (listing deterrence as one of the "traditional aims of punishment").

[227] *See, e.g.*, Carlson v. Green, 446 U.S. 14, 21 (1980) (noting that the *Bivens* remedy "is a more effective deterrent than the [Federal Tort Claims Act] remedy").

[228] *See, e.g.*, Dellinger, *supra* note 163, at 1553 (questioning whether *Bivens* liability will actually deter unlawful official behavior); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 816 (2010) ("[T]he overriding view is that *Bivens* claims are remarkably unsuccessful: most commentators assert that *Bivens* has not worked as a means of compensation or deterrence.").

[229] Dellinger, *supra* note 163, at 1553.

federal law enforcement practices."[230] Additionally, Dellinger concluded that "judgments against individual officers, being ad hoc and random in their impact, are unlikely to induce systematic change in law enforcement."[231]

Bivens's deterrent effect on individual private prison employees is further called into question considering that often alternative state law actions will provide greater compensation. Even the *Pollard* majority seemed to concede this point when they stated that they were "not prepared to say that *Bivens* would have *no marginal* deterrent effect against individual employees."[232] State law negligence suits are generally easier to win for prisoner plaintiffs than Eighth Amendment suits because the heightened standard of "deliberate indifference" for Eighth Amendment violations makes it "considerably more difficult for [plaintiffs] to prevail than on a theory of ordinary negligence."[233] Another way that state tort remedies can "provide more meaningful relief" is that the "limitations imposed by the Prison Litigation Reform Act do not apply to state law claims."[234]

The Ninth Circuit in *Pollard* disagreed, however, and argued that in some situations, "*Bivens* may allow for recovery of greater damages" because of the cap on noneconomic damages for medical malpractice suits in California.[235] Additionally, there may be tactical reasons a plaintiff would prefer a federal forum.[236] For example, if a § 1983 claim is brought in federal court, the plaintiff may be able to receive attorney's fees or punitive damages.[237]

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[230] *Id.*

[231] *Id.*

[232] Pollard v. GEO Grp., Inc., 607 F.3d 583, 601 (9th Cir. 2010) (emphasis added).

[233] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 73 (2001) (citing Farmer v. Brennan, 511 U.S. 825, 835 (1994)).

[234] Peoples v. CCA Det. Ctrs., 422 F.3d 1090, 1102 (10th Cir. 2005); *see also* Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered titles and sections of the U.S.C.) (imposing restrictions on prisoner's suits to unclog federal courts from too much prisoner litigation).

[235] *Pollard*, 607 F.3d at 602.

[236] *See* Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 14 (2004) (discussing why some litigants prefer a § 1983 suit over a state law suit).

[237] *Id.*

2. Vindication of Constitutional Rights. Another key underlying policy in support of *Bivens* liability is the vindication of constitutional rights.[238] Without any remedial mechanism, a constitutional right loses meaning.[239] "[W]here there is a legal right, there is [also] a legal remedy."[240]

Although vindication of constitutional rights supports liability, it does not mandate it. Ideally one might want a remedy for every right but "historically [there] always have been, and predictably will continue to be, cases in which effective individual redress is unavailable."[241] In the words of Fallon and Meltzer, this is "regrettable, but tolerable."[242] A federal prisoner in a private prison can always pursue an injunction against the individual employee who was violating his Eighth Amendment rights. Some may view the need for an after-the-fact damages remedy as less of a priority than injunctive relief against ongoing violations.[243]

3. Asymmetrical Liability. A concern in the *Bivens* arena is the potential for asymmetrical liability costs.[244] This asymmetry develops because of the "special factors counselling hesitation"

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[238] *See, e.g.*, Davis v. Passman, 442 U.S. 228, 242 (1979) (cautioning that "unless [constitutional] rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights"); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) (noting that "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment").

[239] *See Bivens*, 403 U.S. at 409–10 (Harlan, J., concurring) (expressing concern that when someone is subjected to an unconstitutional search and seizure and is attempting to vindicate their constitutional right in court, it is "damages or nothing").

[240] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23); *see also* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1947 (2009) (attributing the Court's decision in *Bivens* to "the theory that a right suggests a remedy").

[241] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1789 (1991).

[242] *Id.*

[243] *See id.* at 1789–90 (stating that "our constitutional tradition recognizes a stronger interest in relief from continuing coercion").

[244] *See, e.g.*, Pollard v. GEO Grp., Inc., 607 F.3d 583, 607 (9th Cir. 2010) (Restani, J., concurring and dissenting in part) ("Uniformity of liability is sometimes important to a *Bivens* analysis.").

inquiry.[245] Ideally, "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules."[246] Unfortunately, in the area of prisoner litigation for constitutional violations, the introductory hypotheticals and the following chart illustrate that there are many asymmetrical liability costs.[247]

TABLE 1

Defendant	*Bivens* Suit (Federal Actor)	§ 1983 Action (State Actor)
Public Prison Entity	No	No
Private Prison Corporation	No	Yes
Individual Employee in Public Prison	Yes (Official Immunity Protection)	Yes
Individual Employee in Private Prison	??? (No Official Immunity Protection)	Yes

As noted in *Pollard*, asymmetry concerns cut both ways.[248] If a *Bivens* action is recognized, then individual employees in public prisons will be afforded official immunity while their counterparts in private prisons may not be.[249] Alternatively, if a *Bivens* action is not allowed, then individual employees in private state prisons will be liable for their constitutional violations while their federal counterparts will not. "This asymmetry is clearly an undesirable outcome."[250]

The argument that the Ninth Circuit put forward is that these two asymmetries cancel each other out; asymmetrical liability does

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[245] *See id.* at 598 (majority opinion) (listing "asymmetric liability costs" as a special factor that the Supreme Court has "previously considered").

[246] Carlson v. Green, 446 U.S. 14, 23 (1980).

[247] *See supra* Part III.I.

[248] *See Pollard*, 607 F.3d at 602 ("[U]nder the current *Bivens* regime, asymmetries will remain irrespective of whether we recognize or deny a *Bivens* cause of action here."). *But see* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) ("Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not [the Supreme Court], to decide.").

[249] *See* Richardson v. McKnight, 521 U.S. 399, 401 (1997) (holding that private prison employees are not entitled to official immunity in § 1983 suits).

[250] *Pollard*, 607 F.3d at 602 (citing Butz v. Economou, 438 U.S. 478, 501 (1978)).

not clearly point either for or against a *Bivens* remedy.[251] This argument assumes that the two different asymmetries are equal. Perhaps this is not the case. A plaintiff's attorney could argue against the Ninth Circuit's line of reasoning by claiming that the official immunity asymmetry is less important. Immunity is a secondary question, which should take a back seat to the primary question of liability.

The good faith defense[252] is yet another way that a prisoner plaintiff can argue that asymmetry weighs in favor of finding a *Bivens* remedy. The official immunity disparity could be alleviated by the adoption of a good faith defense. Currently, employees in public prisons enjoy the protection of qualified immunity,[253] which affords protection when the official's conduct does not violate "clearly established" law.[254] A good faith defense would provide a somewhat analogous protection when the defendant acted in good faith; an action probably would not be considered to be in good faith if it violated clearly established law. Therefore, the contours of qualified immunity and a good faith defense would be similar. Such a defense has not yet been fully developed in this context. Thus, it is not a ready-made solution. However, it has the potential to address some of the asymmetry concerns and weighs in favor of allowing a *Bivens* remedy.

I. POLICY ARGUMENTS AGAINST FINDING *BIVENS* LIABILITY

1. Separation of Powers. The key rationale behind the *Bivens*-skeptical approach is the separation of powers.[255] Separation of powers describes the "constitutional effort to allocate different sorts of power among [the] three governmental entities."[256] In the

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[251] *See id.* at 603 ("As asymmetries will persist irrespective of the outcome of this case, this consideration does not counsel hesitation in recognizing a *Bivens* remedy here.").

[252] *See supra* Part I.D.

[253] *See* WELLS ET AL., *supra* note 2, at 33 (noting that although § 1983 "says nothing about an 'immunity' defense for officials who have violated the plaintiff's constitutional rights, the Supreme Court has always granted them one").

[254] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[255] *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 428–30 (1971) (Black, J., dissenting) (criticizing the majority's creation of an implied cause of action as "an exercise of power that the Constitution does not give" the Court).

[256] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 359 (5th ed. 2005).

Bivens context, separation of powers arguments would leave some tasks to Congress, while others are left to the courts. In the words of Justice Powell, "[a] plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task."[257] The Supreme Court has said that the "principles of separation of powers" are the "bedrock" on which *Bivens* actions are based.[258] The concern, however, is that creation of liability is best left to the Legislative Branch and is not the role of courts.[259] This concern also is the rationale behind the "alternative remedies" prong of the *Bivens* liability test.[260] When there is an alternative avenue for redress, the argument for *Bivens* liability is weaker.[261] The caution associated with *Bivens* is not present in its state actor parallel, § 1983 liability, because § 1983 is grounded in a congressionally created statute. The separation of powers concern is always lurking in the background of any extension of *Bivens*. Separation of powers strongly cautions against a dangerously robust *Bivens* doctrine.[262]

2. Westfall Act: A Special Factor Counseling Hesitation. A potential "special factor counselling hesitation" that has yet to be properly addressed in any of the court of appeals' decisions is the substitution of defendants under relevant provisions of the Westfall Act.[263] As a result of the Westfall Act, if a prisoner brought a tort suit against an individual employee in a public

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[257] Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring).

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

[259] *See Bivens*, 403 U.S. at 411–12 (Burger, C.J., dissenting) (recommending that the Court suggest a solution to Congress in order to "more surely preserve the important values of the doctrine of separation of powers").

[260] *See* Pollard v. GEO Grp., Inc., 607 F.3d 583, 596 (9th Cir. 2010) ("[W]e consider alternative remedies because the judicially created *Bivens* remedy should yield to congressional prerogatives under basic separation of powers principles.").

[261] *See* Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (refusing to allow a *Bivens* remedy for improperly denied Social Security benefits because Congress had thoroughly regulated the area and created what it considered to be "adequate remedial mechanisms," which rendered it inappropriate for courts to interfere).

[262] *See, e.g.*, Holly v. Scott, 434 F.3d 287, 292 (4th Cir. 2006) ("Application of *Bivens* to private individuals simply does not find legislative sanction. Under such circumstances, the danger of federal courts failing 'to respect the limits of their own power,' increases exponentially." (citation omitted) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982))).

[263] 28 U.S.C. § 2679(d) (2006).

prison for actions that fall within the scope of the employee's duties, the federal government would be substituted as the defendant.[264] Thus, a public prison employee would not be subject to suit for a claim such as negligence when acting within the scope of employment. The employee would still be responsible for a constitutional violation through a *Bivens* suit.[265] If a *Bivens* action is allowed in the *Pollard* fact pattern, this would create another kind of asymmetry. Public prison employees would be liable for constitutional violations but not for their state law torts, while private prison employees would be liable for their constitutional violations *and* their state law torts. Add to that their lack of official immunity[266] and it is clear that there would be significant discrepancy between the potential liability for private and public federal prison employees.

IV. CONCLUSION

Viewing all the arguments for and against *Bivens* liability for private prison employees does not lead to an entirely definitive answer. It is clearly a "very close case."[267] Although recent Supreme Court cases may indicate a less hostile attitude towards *Bivens*, the most natural reading of the Court's case law after *Carlson* is to take the *Bivens*-skeptical approach and recognize a fundamental shift away from allowing an implied cause of action. Furthermore, a *Bivens* action should not be allowed against private prison guards because a state law tort action is an adequate alternative that often will provide superior compensation. The separation of powers doctrine suggests that courts should refrain from fashioning a remedy for plaintiffs like Pollard. The Supreme Court has granted certiorari to resolve this

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[264] *See id.* (substituting the United States as the defendant when it is certified that the official acted "within the scope of his office or employment").

[265] *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 134 (2009) (observing that "the Westfall Act assumes the routine availability of a *Bivens* remedy").

[266] *See supra* Part II.H.*3*.

[267] Peoples v. CCA Det. Ctrs., 422 F.3d 1090, 1108 n.2 (10th Cir. 2005) (Ebel, J., concurring and dissenting in part), *vacated in part and aff'd by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (per curiam).

circuit split. Not only will the Court be able to decide an issue that is certain to arise again,[268] but it will also be a chance for the Supreme Court to clarify how *Bivens* and its progeny should be applied in future cases.

Isabella Ruth Edmundson

[268] *See id.* at 1108 n.2 (observing that the issue of *Bivens* liability for private prison employees "will undoubtedly arise again given the increasing privatization of prison facilities").