A Final Frontier in Prisoner Litigation: Does *Bivens* Extend to Employees of Private Prisons Who Violate the Constitution?

"[N]o iron curtain [exists] between the Constitution and the prisons of this country."[1]

I. INTRODUCTION

Over the past few decades, corporate America has accrued influence and power in a most unlikely arena: the nation's prison system.[2] States and the federal government, citing economic and logistical advantages, have enlisted corporations to construct, staff, and operate their correctional facilities.[3] As the federal inmate population skyrockets, the federal government's reliance on prison corporations has become pronounced in recent years.[4] The industry's success produced controversy, as critics have argued that the corporations' focus on profitability compromises inmate welfare.[5] The news media reports of abusive conditions in private prisons corroborate these suspicions.[6]

Coincident with the rise of private prisons, inmates began suing private prison employees for alleged constitutional violations.[7] These inmates filed

1. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

2. *See* MARTIN P. SELLERS, THE HISTORY AND POLITICS OF PUBLIC PRISONS: A COMPARATIVE ANALYSIS 47-48 (1993) (discussing private sector's involvement in prison operations); *see also* Douglas C. McDonald, *Private Penal Institutions*, 16 CRIME & JUST. 361, 379-81 (1992) (explaining history of private involvement in corrections).

3. *See* Sarah Armstrong, *Bureaucracy, Private Prisons, and the Future of Penal Reform*, 7 BUFF. CRIM. L. REV. 275, 294 (2003) (summarizing governments' motivation to privatize prisons); Charles W. Thomas & Charles H. Logan, *The Development, Present Status, and Future Potential of Correctional Privatization in America*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 213, 217-18 (Gary W. Bowman et al. eds., 1994) (explaining federal government's use of correctional corporations to accommodate inmate population surplus).

4. *See* McDonald, *supra* note 2, at 381-92 (describing federal government's extensive use of private prisons); David Crary, *Federal Business Helps Private Prisons Rebound*, CHARLESTON GAZETTE & DAILY MAIL, July 31, 2005, at 6A (noting federal government's increased use of private prisons between 2000 and 2005).

5. *See* Sasha Abramsky, *Incarceration, Inc.: Private Prisons Thrive on Cheap Labor and the Hunger of Job-Starved Towns*, THE NATION, July 19, 2004, at 22 (asserting prison corporations more interested in profits than prisoners' rights); *see also Developments in the Law, A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1871-79 (2002) [hereinafter *Developments in the Law*] (summarizing critiques of prison privatization).

6. *See infra* notes 69-71 and accompanying text (summarizing news media accounts of prison abuse).

7. *See, e.g.*, Holly v. Scott, 434 F.3d 287 (4th Cir. 2006); Peoples v. CCA Det. Ctr (*Peoples II*), No. Civ.A. 02-3298-CM, 2004 WL 2278667 (D. Kan. Mar. 26, 2004), *aff'd by an equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (en banc); Jama v. U.S. I.N.S., 343 F. Supp. 2d 338 (D.N.J. 2004); Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52 (D.R.I. 2003).

suit pursuant to *Bivens*, a cause of action that exposes "federal agent[s] acting under color of [their] authority" to monetary damages for violating an individual's constitutional rights.[8] The lower courts were divided on whether the inmates could maintain these suits, some allowing the claims and others barring them.[9] The courts' dissention appears inevitable given the Supreme Court's tendency to "explain[] its approach to *Bivens* claims in a variety of ways" since it first implied the cause of action in 1971.[10] Recently, in *Correctional Services Corp. v. Malesko*,[11] the Supreme Court complicated matters further by drastically limiting the circumstances under which courts may extend the *Bivens* action.[12] Divergent interpretations of this decision and its predecessors gave rise to the current split among lower courts.[13]

This Note begins by surveying the history of private prisons and explaining the federal government's recent move toward privatization.[14] After reviewing various remedies available to inmates, this Note examines the evolution of the *Bivens* remedy.[15] It then explores key decisions by three courts regarding whether inmates held in private prisons may sue prison employees under *Bivens*.[16] Finally, this Note argues that courts should extend *Bivens* to privately-incarcerated federal inmates, but concludes that a recent Supreme Court decision regarding *Bivens* may foreclose this option.[17]

II. PRISON PRIVATIZATION: A BRIEF HISTORY

Private individuals and entities have long had a hand in administering America's penal system.[18] After the Civil War, southern states privatized correctional functions to defray penal costs and satisfy the urgent need for labor generated by emancipation.[19] The states criminalized petty crimes, imprisoned

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

9. *Compare Sarro*, 248 F. Supp. 2d at 59-63 (allowing inmate's *Bivens* suit against private prison employee), *with Holly*, 434 F.3d at 296-97 (rejecting inmate's *Bivens* claim against private prison employee).

10. Peoples v. CCA Det. Ctr., 422 F.3d 1090, 1102 (10th Cir. 2005), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc).

11. 534 U.S. 61 (2001).

12. *See id.* at 72-74 (holding inmates' *Bivens* claim untenable because alternative state-law and administrative remedies available).

13. *See infra* Part IV (discussing lower court decisions regarding private prison employees' susceptibility to *Bivens* suits).

14. *See infra* Part II (surveying involvement of private parties and entities in U.S. corrections).

15. *See infra* Part III (explaining state-law, administrative, and constitutional remedies inmate plaintiffs may pursue); *infra* Part III.B.ii (explaining *Bivens* and subsequent Supreme Court decisions concerning *Bivens*'s applicability and limitations).

16. *See infra* Part IV (summarizing court decisions for and against extending *Bivens* to inmates held in private prisons).

17. *See infra* Part V (endorsing extension of *Bivens* to federal inmates in claims against private prison officers).

18. *See* McDonald, *supra* note 2, at 367-92 (chronicling involvement of private firms in penal systems).

19. *See* McDonald, *supra* note 2, at 380-81 (discussing shift in state and private party roles in adult corrections administration). *See generally* William A. Trine, Annotation, *Litigating Civil Rights Violations by*

former slaves who violated these revised laws, and then leased the inmates to private individuals and entities who put them to work.[20] In an arrangement that typified these convict leasing programs, a Kentuckian merchant

> offered to pay the state . . . all prisoners in the Frankfort prison, which had been ineffectively run and was costly to the state. In return for the right to work these convicts at hard labor, Scott [the merchant] would feed, clothe, and house them, as well as pay the state one-half of the net profit he might make from the use of the convict labor.[21]

Although this account observed that "no allegations of ill treatment were reported," indescribable inmate abuses plagued most convict leasing programs.[22] Ultimately, many states outlawed these programs, but private corrections firms re-emerged during the mid-twentieth century, offering low-security correctional services.[23] States and the federal government relied on corporations to operate halfway houses and residential treatment programs, as well as detain illegal aliens awaiting deportation.[24] Corporations also supplied prisons with discrete services relating to health care, counseling, vocational training, education, maintenance, and food provisions.[25]

Social and economic forces propelled private firms to the next tier of corrections, namely high-security jails and prisons.[26] Beginning in the mid-1970s and continuing through the Reagan and Clinton administrations, the governments' war against crime and illegal drugs netted thousands of criminals.[27] Simultaneously, law enforcement officials assumed a hard-line stance against criminal offenders, favoring incarceration over disproved

For-Profit Private Prisons, 2 ASS'N OF TRIAL LAWYERS OF AM. 1489 (2006).

20. *See* Sharon Dolovich, *State Punishments and Private Prisons*, 55 DUKE L.J. 437, 451-52 (2005) (discussing use of "convict leasing"). For example, the Mississippi legislature amended its larceny statute in 1876 to subject otherwise petty criminals, most of whom were former slaves, to long prison terms. *Id.* at 452.

21. *See* McDonald, *supra* note 2, at 380 (describing convict lease arrangement).

22. *See* McDonald, *supra* note 2, at 380; Dolovich, *supra* note 20, at 452-53 (citing abuse and inadequate living conditions among inmate leasing programs' deficiencies).

23. *See infra* text accompanying note 24 (explaining services private firms offered governments initially).

24. *See* McDonald, *supra* note 2, at 382 (discussing return of private participation in prison operations); *id.* at 362 (explaining enduring relationship between government and private industries). In 1989, private organizations controlled 60% of the country's psychiatric hospitals and two-thirds of its juvenile correctional facilities; in 1991, 75% of persons undergoing residential drug treatment lived in private facilities. *Id.* These institutions stand apart from correctional facilities because they provide health services and other assistance to clients and patients while prisons protect the public and punish criminals. *Id.* at 363. The industry's involvement in psychiatric and juvenile facilities appears less objectionable than its association with prisons because the former improve their residents' welfare while the latter exact their residents' punishment. *Id.* at 363.

25. *See* McDonald, *supra* note 2, at 361-62 (describing peripheral involvement of private firms in correctional facilities).

26. *See infra* text accompanying notes 27-28 (summarizing forces prompting private corrections industry to expand corrections services).

27. *See* Thomas & Logan, *supra* note 3, at 214-15 (explaining state and federal governments' pursuit of anti-crime legislation and mandatory sentencing).

rehabilitative methods.[28] These measures boosted inmate populations nationwide, but governments could not build detention facilities to keep pace with this growing demand.[29] Moreover, states with strained budgets could ill afford additional construction costs.[30] To illustrate, between 1988 and 1989, the national prison population increased at a rate demanding the construction of approximately one 700-bed jail and one 1,600-bed prison every day for the entire year at a cost of $115 million weekly and $5.98 billion annually.[31] In 1985, building a new high-capacity, medium-security facility could cost nearly $140 million, or $240 million in 2003 dollars.[32]

Unable to keep pace with exploding prison populations, federal and state governments sought aid from private firms.[33]

In this new climate, industry's role evolved as corporations began owning and controlling prisons outright.[34] As one commentator explained, privatizing prison ownership and control exploited Corporate America's collective experience with running large, people-centered operations:

> [t]he government is not going to give us better prisons, better programs, or better personnel. It has tried but it can't . . . . So it is time to get government out of the prison business. Who could take over? The same people who run other large institutions such as hospitals and colleges. The same people who have developed techniques for serving thousands of meals and for housing travelers. The same people who run most of the job training programs in this Country: Private Industry.[35]

28. *See* Thomas & Logan, *supra* note 3, at 214-15 (explaining governments' new posture towards criminal offenders). Incarceration gained popularity among law enforcement officials after research exposed the shortcomings of rehabilitative methods. *Id.* at 215.

29. *See* Dana C. Joel, *The Privatization of Secure Adult Prisons*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 51, 52 (Gary W. Bowman et al. eds., 1994) (explaining state's economic burden coinciding with inmate population surge).

30. *See infra* text accompanying notes 31-32 (quantifying the burden rising prison populations placed on federal government's correctional system).

31. *See* Thomas & Logan, *supra* note 3, at 216 (discussing prison population increase). During the same one-year period, the national prison population increased by 84,466 prisoners. *Id.*

32. *See* Dolovich, *supra* note 20, at 456 n.62 (discussing costs of building new prisons).

33. *See* Thomas & Logan, *supra* note 3, at 218 (observing prevalence of government outsourcing of public services prior to correctional privatization movement). Historically, state and federal governments relied on private firms to provide non-penal essential public services, including waste disposal, building maintenance, public transportation, and child day-care. *Id.*; *see also* Alexander M. Holsinger & Tom Hughes, Correctional Services Corporation v. Malesko*: Boss, "They Can't Hurt You Now"*, 14 CRIM. JUST. POL. REV. 451, 453 (2003) (explaining prison privatization gained popularity when government privatized other functions). The Federal Bureau of Prisons (BOP) is authorized statutorily to house federal inmates in private correctional facilities. 18 U.S.C. § 4013(b) (2000). Privatization "stirred up competition in a field long the purview of largely unaccountable state bureaucrats." *See* Abramsky, *supra* note 5, at 23.

34. *See* McDonald, *supra* note 2, at 364-67 (outlining degrees of private involvement in corrections). Public and private involvement in correctional administration assumes various forms: prisons may be private, privately owned but publicly operated, government-owned but privately operated, or fully public. *Id.*

35. *See* SELLERS, *supra* note 2, at 47 (arguing for privatization of industry by professionals equipped to handle prisons).

Indeed, prison corporations could build facilities more quickly than the federal government and use inventive architectural designs and technology to prevent escapes and control inmate behavior.[36] Observers debated whether governments saved money by ceding responsibility to private firms.[37] More critically, they argued that the governments' focus on cost-savings, in conjunction with industry's desire to realize a profit, yielded an inevitable tension:

> [i]f the state is to reduce the cost of its prisons through contracting out to the private sector, the contract price must be less than the total cost the state would otherwise incur in operating the facility. And if private providers are likewise to make money on the venture, they must spend less to run the prisons than the contract price provides. For such arrangements to be remunerative for both parties, therefore, private prisons must be run at a considerably lower cost than the state would otherwise incur. At the same time, contractors must not allow either the quality of conditions of confinement or inmate safety to drop below existing levels . . . .[38]

In the end, enough states viewed privatization positively to sustain the corrections industry for years.[39]

Recently, however, the industry's state prison business slowed.[40] Between December 2000 and December 2005, the number of state inmates held in private prisons increased just 7%.[41] Corrections Corporation of America (CCA), a leading correction firm, spent $106 million constructing a prison in the California desert, but the facility sat empty after no contract with the state materialized.[42] The industry viewed CCA's failure in California as a bellwether of declining state-generated business.[43] Several forces slowed the

36. *See* Abramsky, *supra* note 5, at 23 (explaining advantages of private prison construction); Joel, *supra* note 29, at 57-59 (same). CCA's chief executive commented that the federal government, unlike the private prison sector, must "plan eight years in advance" to increase prison capacity. *See* Crary, *supra* note 4, at 6A; *see also* McDonald, *supra* note 2, at 393-94 (noting appeal of private sector's financial and operational arrangements to federal and state governments).

37. *Compare* Bill Deener, *Prison Companies' Stocks See Hefty Gains*, DALLAS MORNING NEWS, Jan. 18, 2005, at 3D (estimating 10-15% savings due to privatization), *with* Tracy F.H. Chang & Douglas E. Thompkins, *Corporations Go to Prisons: The Expansion of Corporate Power in the Correctional Industry*, 27 LAB. STUD. J. 45, 51-52 (2002) (deeming cost reductions associated with privatization "miniscule" and arguing they compromise quality), *and* McDonald, *supra* note 2, at 394-404 (surveying cost-effectiveness research and concluding findings ambivalent).

38. *See* Dolovich, *supra* note 20, at 460 (noting economic challenges private prisons face).

39. *See* Abramsky, *supra* note 5, at 23-24 (demonstrating upsurge in prison privatization by states in 1990s).

40. *See* Crary, *supra* note 4, at 6A (reporting prison business trends).

41. *See* BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 2005 5 (2006) [hereinafter PRISONERS IN 2005], *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

42. Joseph T. Hallinan, *Bailed Out: Shaky Private Prisons Find Vital Customer in Federal Government*, WALL ST. J., Nov. 6, 2001, at A1 (describing disappointment among private prison corporations). A zealous prison guards' union and a stagnate prison population bear partial blame for CCA's struggle. *Id.*

43. *See infra* text accompanying notes 44-45 (explaining industry's declining successes in other states).

industry's state growth. Many state legislatures bowed to the industry's opponents, including prison guard unions, bar associations, and lawyers groups, who all lobbied to curb privatization.[44] Further, states eased the sentencing laws that propelled prison privatization during previous decades, thus reducing demand for prison beds.[45] Violence, escapes, declines in prison population growth rates, and questions about privatization's true cost-savings also contributed to the industry's downturn.[46] By the end of the twentieth century, CCA "teetered near bankruptcy."[47]

The federal government, facing a fast-rising inmate population, reversed the industry's misfortunes.[48] Between 1995 and 2005, the federal inmate population grew about 7% annually, compared with a 2.5% climb in the state prison population.[49] Private facilities benefited enormously from the surge in federal inmates: between December 2000 and December 2005, the number of federal inmates held in private facilities rose 74%, compared to a 7% increase on the state level.[50] Further, data suggests that federal facilities, which operated at 34% above capacity by December 2005, cannot withstand the crush of federal inmates.[51]

The federal prison population exploded as a result of several forces. Increases in unemployment rates, racial tensions, and income inequalities landed more citizens in prison.[52] Toughened sentencing laws for drug-related offenses also contributed to the boom, as 57% of federal inmates in 2003 were drug offenders, compared to just 30% in 1984.[53] More significantly, the Bush administration's aggressive immigration policies and its post-September 11th "War on Terror" altered the federal detention landscape.[54] The federal

44. *See* Chang & Thompkins, *supra* note 37, at 53-54 (chronicling various groups' lobbying efforts aimed at halting prison privatization).

45. *See* Hallinan, *supra* note 42, at A1 (noting decline in prison population).

46. *See* Crary, *supra* note 4, at 6A (discussing forces causing downturn in prison industry).

47. Crary, *supra* note 4, at 6A.

48. *See* Crary, *supra* note 4, at 6A (linking private prisons' business surge to federal government's soaring prison needs); Deener, *supra* note 37, at 3D (discussing strong stock performance of private prison companies). Recently, new federal contracts revived CCA's business; the company doubled its federal inmate population between 2001 and 2005 to 18,200 inmates, 29% of its inmate population. Crary, *supra* note 4, at 6A.

49. *See* PRISONERS IN 2005, *supra* note 41, at 2 tbl.1 (comparing federal and state prison populations). Between 1995 and 2005, the federal inmate population increased from 89,538 inmates to 179,220 inmates. *Id.* During the same period, the states' inmate population grew from 989,004 inmates to 1,259,905 inmates. *Id.*

50. *See* PRISONERS IN 2005, *supra* note 41, at 5 (comparing increases in private and public prison populations).

51. *See* PRISONERS IN 2005, *supra* note 41, at 8 (quantifying operating capacities among prison systems).

52. *See* Chang & Thompkins, *supra* note 37, at 47 (explaining sociopolitical origins of increasing incarceration rates). Criminologists have found that incarceration rates fluctuate according to unemployment rates, income inequalities, racial conflicts, and political conservatism. *Id.*

53. Judith Greene, *Bailing-Out Private Jails*, *in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 142 (Tara Herivel & Paul Wright eds., 2003) (quantifying increased incarceration for drug-related offenses).

54. *See* Teresa A. Miller, *Blurring the Boundaries between Immigration and Crime Control after*

government tightened the country's borders, enabling it to ensnare and imprison thousands of illegal immigrants.[55] The Bureau of Immigration and Customs Enforcement (ICE) contracted with private facilities to house these detainees.[56] Between 1995 and 2005, the number of detainees held in private prisons on ICE's behalf increased by 263%.[57]

The federal government's dependence on private prisons has benefited corrections corporations enormously. In January 2007, CCA and its competitor, Cornell Companies, Inc., signed four-year contracts with the federal government worth $119.6 million and $268.8 million, respectively.[58] Evidencing further that "crime pays," *Forbes* noted that CCA's earnings per share increase 130% in 2006.[59] Such deals and corporate earnings explain why investors watch private prison firms closely and bet on crime-level increases.[60] *Forbes* commented that, fortunate for CCA and its investors, "criminals are never in short supply and there aren't enough bars to put them behind."[61]

In light of the prison industry's explosive growth, experts have debated how prison privatization affects inmate welfare.[62] Privatization opponents contend poor officer training and lower pay scales jeopardize inmate welfare.[63] They argue further that the corporate focus on economy can yield troubling results.[64]

September 11th, 25 B.C. THIRD WORLD L.J. 81, 110-11 (2005) (linking federal prison population increase to "heightened enforcement of immigration law" before and after September 11, 2001).

55. *See* Crary, *supra* note 4, at 6A (tying immigrant detainee influx to post-September 11th border control regulations); Meredith Kolodner, *Private Prisons Smiling Over Illegal Immigration*, INT'L HERALD TRIBUNE, July 20, 2006 (discussing corporation's business increase associated with immigration reform). Detention of individual U.S immigration officials increased three-fold between 1995 and 2005, and federal anti-terrorism legislation, passed in December 2004, requires 40,000 beds by 2010 to accommodate aliens awaiting deportation. *Id.* Looking forward, the "echo" generation, comprised of the Baby Boomers's grandchildren, is approaching the age at which statistics show its members will begin committing crimes. *See* Deener, *supra* note 37, at 3D (ascribing investor confidence in prison corporations to "echo" generation's anticipated criminal activity).

56. *See* PRISONERS IN 2005, *supra* note 41, at 10 (citing population statistics for private prisons under contract with ICE).

57. *See* PRISONERS IN 2005, *supra* note 41, at 10 (citing ICE's increased reliance on private facilities to accommodate detainees).

58. Associate Press, *Corrections Corp. Wins Federal Contract Worth Up to $111.9M to House Inmates*, INVESTREND, Jan. 19, 2007.

59. Amanda Schupak, *The Best of the Best*, FORBES, Jan. 8, 2007, at 96 (reviewing CCA's 2006 earnings).

60. *See generally* Deener, *supra* note 37 (attributing increased stock prices to anticipated crime increases). University of North Florida criminologist Michael Hallett commented that "[w]e've gotten so extreme in overusing incarceration that we have for-profit industries with an interest in high crime rates." Crary, *supra* note 4, at 6A.

61. *See* Schupak, *supra* note 59, at 96 (reporting CCA expands prisons ahead of demand intentionally).

62. *Compare infra* notes 63-68 and accompanying text (explaining opposition to private prisons because of profit motives' effects on inmates' welfare and rights), *with* McDonald, *supra* note 2, at 408-10 (concluding prison privatization not objectionable).

63. *See* Crary, *supra* note 4, at 6A (summarizing critical arguments alleging privatization jeopardizes inmate welfare); Dan Shingler, *Prisoners for Profit?*, ALBUQUERQUE TRIB., July 26, 2004, at B1 (citing aspects of critical opposition to correctional privatization).

64. *See* Dolovich, *supra* note 20, at 461.

They point, for example, to the private prison in Youngstown, Ohio, where prison officials received maximum-security inmates from an overcrowded public prison and "reclassified" them as medium security inmates in order "to fill the beds," circumventing security requirements.[65] Supporters, on the other hand, argue that privatization heightens the accountability of those who interact with prisoners on a daily basis.[66] They argue that judges and juries, with little patience for corporate wrongdoing, subject companies to heightened scrutiny when prisoners allege mistreatment.[67] Moreover, proponents argue that market incentives, such as the need to avoid negative publicity and protect shareholder value, deter corporate misconduct.[68] Neither side can ignore, however, the

65. *See* Dolovich, *supra* note 20, at 461 (explaining scheme employed by Youngstown prison operator). The Youngstown prison also experienced increased inmate-on-inmate assaults and the death of one inmate who, due to a bed shortage, was forced to reside with men who had threatened his life. *Id.*

66. *See Developments in the Law*, *supra* note 5, at 1878-79 (highlighting arguments supporting privatization).

67. *See Developments in the Law*, *supra* note 5, at 1879-80 (noting juries' historic hostility toward corporate defendants and corporations' lack of sovereign immunity).

68. *Compare* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 81 n.9 (2001) (Stevens, J., dissenting) (observing corporations' devotion to stockholders affects prisoner welfare adversely), *with* Richardson v. McKnight, 521 U.S. 399, 418-19 (1997) (Scalia, J., dissenting) (arguing market pressures do not compromise prisoner welfare). *See also* Robin Miller, Annotation, *Rights of Prisoners in Private Prisons*, 119 A.L.R. 5TH 1, § 7 (2004-05) (summarizing *Malesko* Court's determination of liability deterring wrongdoing). Miller notes that, in *Malesko*, the Supreme Court

> rejected the contention that implying a suit against private corporations acting under color of federal law is still necessary to advance the core deterrence purpose of *Bivens*, in that, because corporations respond to market pressures and make decisions without regard to constitutional obligations, requiring payment for the constitutional harms they commit is the best way to discourage future harms. That may be so, the Court replied, but it has no relevance to *Bivens*, which is concerned solely with deterring the unconstitutional acts of individual officers.

Id. Justice Scalia, dissenting in *Richardson*, disputes Justice Stevens's assessment of how corporate pressures affect inmate well-being:

> it is fanciful to speak of the consequences of 'market' pressures in a regime where public officials are the only purchaser, and other people's money the medium of payment. Ultimately, one prison-management firm will be selected to replace another prison-management firm only if a decision is made by some *political* official not to renew the contract. This is a government decision, not a market choice.

Richardson, 521 U.S. at 418-19 (Scalia, J., dissenting) (citations omitted). Further, Scalia rejected the lower court's conclusion that

> officers of private prisons are more likely than officers of state prisons to violate prisoners' constitutional rights because they work for a profit motive . . . . The [lower court] offered no evidence to support its bald assertion that private prison guards operate with different incentives than state prison guards, and gave no hint as to how prison guards might possibly increase their employers' profits by violating constitutional rights. One would think that private prison managers, whose § 1983 damages come out of their own pockets, as compared with public prison managers, whose § 1983 damages come out of the public purse, would, if anything, be more careful in training their employees to avoid constitutional infractions. And in fact, States having experimented with

news media's reports of abuse at private prisons.[69] In Texas, poorly trained employees of a private jail, who had only forty hours of classroom training, were videotaped "forcing prisoners to crawl, kicking them, and encouraging dogs to bite them."[70] Other "cost-conscious" operators have been accused of failing "to provide adequate meals, staffing, and sanitation" and "failing to attend to the medical needs of an indigent prisoner because, in part, the prisoner could not pay for his treatment."[71]

III. INMATES' REMEDIES

Public scrutiny, along with the federal government's renewed interest in private prisons, invite inquiry into inmates' legal rights. The District Court of Massachusetts court explained that prisoners, "as a marginalized group," require judicial protection because

> [they] are not a sympathetic minority; certainly in this country, there are few places where a politician will win votes by standing up for the rights of prisoners. Few prisoners have any substantial wealth with which to influence elections or even public policy debates, and . . . the prison population draws

prison privatization commonly report that the overall caliber of the services provided to prisoners has actually improved in scope and quality.

Id. at 421-22.

69. *See Denver "Cowboy" Guards Must Remain in Jail, Judge Says*, ROCKY MOUNTAIN NEWS, July 3, 2003, at 32A (reporting conviction of prison guards for violating inmates' civil rights); Ken Johnson, *Jail Guard Given Prison Sentence*, PATRIOT LEDGER, Mar. 10, 2004, at 10 (reporting prison sentence in detainee beating cover-up); Jason Van Derbeken & Susan Sward, *Probe of Chief's Son Called Unusual*, S.F. CHRON., Dec. 7, 2003, at A29 (alleging prisoners endured repeated civil rights violations); Press Release, Bureau of Prisons, Three Former Federal Bureau of Prison Guards Sentenced for Violating Inmates' Civil Rights (Nov. 21, 2003). In 2003, a federal jury convicted three Bureau of Prison employees of civil right violations. Press Release, Bureau of Prisons, *supra*. In furtherance of the conspiracy, the convicted guards fabricated reports of injury to themselves and falsely reported inmate prison misconduct to legitimize their use of unnecessary force. *Id.* In another episode, prisoners' rights advocates allege that John J. Geoghan, the defrocked priest convicted of child molesting who was murdered by a fellow inmate in 2003, sustained daily abuse at the hands of correctional guards who defecated in his cell, knocked into him, and called him "Lucifer" and "Satan." Farah Stockman & Anne Barnard, *Group Assails Geoghan Guards, Says Prison Culture Fosters Harassment*, BOSTON GLOBE, Aug. 29, 2003, at A1 (reporting the inmate was "'suffering daily' at the hands of correctional officers"). These advocates contend that the abuse resulted in Geoghan's transfer to the prison's maximum security unit, where he was eventually killed by another inmate. *Id.* Prison officials attribute the cause of death to Geoghan's disciplinary problems but recognize that data on inmate abuse is scarce. *Id.* State officials admit that prison superintendents receive several complaints weekly from prisoners, prisoners' families, and lawyers, but that many of the complaints are "vague, unsubstantiated, or even made up by disgruntled prisoners." *Id. See generally* Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980) (summarizing officer-inmate abuse in Texas penal system), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982).

70. *See* Prison Privatization is no Panacea, HARTFORD COURANT, Aug. 24, 1997, at C2; *see also* Kim Bell, *Texas Jail says Incident was Overblown*, ST. LOUIS POST-DISPATCH, Aug. 26, 1997, at 1A.

71. *See* Douglas W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1495 (1986) (recounting allegations of improper treatment and care levied against private prison operators).

> largely from groups who are already marginalized in our society, including the poor, the mentally ill, and to a frightening degree, racial minorities.[72]

Affirming the need to afford inmates judicial protection and permit them to vindicate constitutional injuries, the Supreme Court has warned that "no iron curtain [exists] between the Constitution and prisons of this country."[73]

A. State Law and Administrative Remedies

Federal inmates detained in private prisons enjoy expansive state-law remedies when challenging the unconstitutional conduct of prison employees and operating entities.[74] For instance, inmates may sue employees and—under the theory of respondeat superior—prison corporations for common-law and statutory torts.[75] By filing these state tort claims, inmates avoid the having to comply with the Federal Prison Litigation Reform Act (PLRA), which requires inmates to exhaust administrative remedies before filing a § 1983 suit or any other federal suit.[76] Further, private prison inmates who sue in state court avoid the Federal Tort Claims Act (FTCA),[77] which, at least according to its critics, imposes "limits, exclusions, and procedural requirements" that hamstring state tort claims.[78]

72. Kane v. Winn, 319 F. Supp. 2d 162, 175-76 (D. Mass. 2004) (citation omitted). The District of Massachusetts recognized further that "[u]nlawful physical violence at the hands of prison guards certainly occurs, [but] for obvious reasons reliable statistics are hard to come by." *Id.* at 184.

73. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). The Supreme Court has also explained that "[t]he Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." Farmer v. Brennan, 511 U.S. 825, 832 (1994) (citation omitted).

74. *See infra* notes 75-78 and accompanying text (describing state-law remedies available to inmates).

75. *See* Trine, *supra* note 19, at III.1 (explaining state remedies available to private prison inmates).

76. *See* Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (2000). Section 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *Id.* Section 1997e's exhaustion requirement applies to federal and state inmates held in both private and public facilities. *See* Boyd v. Corr. Corp. of Am., 380 F.3d 989, 993 (6th Cir. 2004) (applying exhaustion requirement to inmates detained in private state prisons); Ross v. County of Bernalillo, 365 F.3d 1181, 1184 (10th Cir. 2004) (holding exhaustion requirement applies to inmates held in privately-operated state and federal prisons); Butler v. Gardner, 71 F. App'x 510, at *1-2 (6th Cir. July 30, 2003) (dismissing federal inmate's § 1983 suit against private prison corporation and officers for failure to exhaust); Murphy v. Jones, 27 F. App'x 826, at *1 (9th Cir. 2001) (dismissing state inmates' § 1983 claim for failure to exhaust); Lavista v. Beeler, 195 F.3d 254, 256 (6th Cir. 1999) (concluding statute requires all prisoners exhaust administrative remedies before bringing *Bivens* claim in federal court). Further, § 1997e applies to both § 1983 and *Bivens* suits. *See Murphy*, 27 F. App'x at *1 (rejecting state inmate's § 1983 suit for failure to exhaust administrative remedies); *Lavista*, 195 F.3d at 256 (requiring federal inmate to exhaust administrative remedies before bringing *Bivens* suit in federal court); Garrett v. Hawk, 127 F.3d 1263, 1265 (10th Cir. 1997) (holding § 1997(e) exhaustion requirements applies to *Bivens* suits brought by federal prisoners against federal officials), *abrogated on other grounds by* Booth v. Churner, 532 U.S. 731 (2001). The statute's exhaustion requirement applies to plaintiffs seeking money damages otherwise unavailable in administrative channels. *See* Yousef v. Reno, 254 F.3d 1214, 1216 n.1 (10th Cir. 2001) (barring *Bivens* claims to inmate seeking money damages who failed to exhaust administrative remedies).

77. Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2000).

78. Brief for the United States as Amicus Curiae Supporting Petitioner, Corr. Servs. Corp. v. Malesko,

Private prison inmates may also pursue relief through administrative channels.[79] The Federal Bureau of Prisons, for example, offers an Administrative Remedy Program (ARP), that allows federal inmates "to seek formal review of an issue relating to any aspect of his/her own confinement."[80] Under the ARP, aggrieved inmates approach staff to resolve their concerns informally before filing requests for formal administrative action.[81] The PLRA requires federal inmates to follow the ARP to fulfill the statute's exhaustion requirement.[82]

B. Constitutional Remedies: Section 1983 and the Bivens Remedy

In addition to using state and administrative remedies, inmates may challenge unconstitutional actions and policies through constitutionally based remedies.[83] To vindicate constitutional injuries, inmates in state prisons invoke 42 U.S.C. § 1983, while inmates in federal prisons rely on the *Bivens* cause of action.[84] Plaintiffs use § 1983 and *Bivens* to challenge conditions of their confinement, not the fact of their confinement.[85] The contours of these

534 U.S. 61 (2001) (No. 00-860), 2001 WL 558228, at *24 n.14 (citing limitations FTCA imposes on state tort claims).

79. *See infra* notes 80-82 and accompanying text (explaining administrative remedies available to inmates).

80. U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, ADMINISTRATIVE REMEDY PROGRAM, PROGRAM STATEMENT 1330.13 (stating Bureau's policies and procedures).

81. *See* 28 C.F.R. § 542.13 (2006) (outlining Administrative Remedy Program procedures).

82. *See* 42 U.S.C. § 1997e(a) (2000); *see also* Porter v. Nussle, 534 U.S. 516, 523 (2002); Davis v. Keohane, 835 F.2d 1147, 1148 (6th Cir. 1987) (explaining administrative remedy exhaustion requirement).

83. *See* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1119 (1989) (explaining constitutional damages claims available against state and federal officials).

84. *See generally* 42 U.S.C. § 1983 (2000); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Section 1983 provides, in relevant part,

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.

§ 1983. The Seventh Circuit further explains that

> [i]f the prisoner is seeking what can be fairly described as a quantum change in the level of custody—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, . . . then habeas corpus is his remedy. But if he is seeking a different program or location or environment, then he is challenging the conditions rather than the fact of his confinement and his remedy is under civil rights law . . . .

Glaus v. Anderson, 408 F.3d 382, 386-87 (7th Cir. 2005) (*citing* Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991) (citations omitted)).

85. *See Glaus*, 408 F.3d at 386-87 (explaining appropriate uses of *Bivens* and § 1983).

remedies track each other closely, but not identically.[86] As such, "courts have generally relied upon the principles developed in the case law applying section 1983 to establish the outer limits of a *Bivens* claim against federal officials."[87]

i. The "State Action" Requirement

Both § 1983 and *Bivens* liability extend only to persons who act under color of state or federal law, respectively.[88] The "state action" doctrine circumscribes this requirement, demanding that the "conduct allegedly causing the deprivation of a federal right be fairly attributable to the State."[89] State action may arise when a private entity or person exercises a public function "traditionally exclusively reserved to the state."[90] In the § 1983 context, several lower courts maintain that the conduct of private prisons and their employees constitutes state action.[91] The Supreme Court has not adopted this view expressly, however, it declared recently that state inmates held in private prisons "already enjoy a right of action against private correctional providers" under § 1983.[92] Further, the Supreme Court recognizes that private actors may be state actors for § 1983 purposes.[93] Despite these decisions and the

86. *See* Hartman v. Moore, 126 S. Ct. 1695, 1700 n.2 (2006) (deeming *Bivens* action the "federal analog to suits brought against state officials under" § 1983); Glover v. Eight Unknown D.E.A. Agents/Drug Task Force Agents From Birmingham, Ala. Task Force, No. 06-13061, 2007 WL 559805, at *2 (11th Cir. Feb. 23, 2007) (explaining "*Bivens* actions are analogous to § 1983 actions, and we will generally apply § 1983 law to *Bivens* cases"); Holly v. Scott, 434 F.3d 287, 292 (4th Cir. 2006) (noting although *Bivens* and § 1983 share features, the Supreme Court has never deemed remedies identical). For example, in *Wilson v. Lane*, the Supreme Court explained that both *Bivens* and § 1983 plaintiffs may seek money damages for Fourth Amendment violations, and that the "qualified immunity analysis is identical under either cause of action." 526 U.S. 603, 609 (1999).

87. Wrench Transp. Systems, Inc. v. Bradley, No. 05-3498, 2006 WL 3749594, at *2 (3d Cir. Dec. 21, 2006) (quoting Schrob v. Catterson, 948 F.2d 1402, 1409 (3rd Cir. 1991)).

88. Richardson v. McKnight, 521 U.S. 399, 402 (1997) (noting § 1983 "imposes liability only where a person acts 'under color' of state law"); *Bivens*, 403 U.S. at 392 (imposing damages liability on "federal agent acting under color of his authority").

89. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (establishing "state action" doctrine standard). The "state action" limitation "maintain[s] the Bill of Rights as a shield that protects private citizens from the excesses of government, rather than a sword that they may use to impose liability upon one another." *Holly*, 434 F.3d at 292.

90. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

91. *See, e.g.*, Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (deeming private prison firms and their employees state actors subject to § 1983 suit); Street v. Corr. Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996) (same); Palm v. Marr, 174 F. Supp. 2d 484, 487-88 (N.D. Tex. 2001) (same); Giron v. Corr. Corp. of Am., 14 F. Supp. 2d 1245, 1250 (D.N.M. 1998) (holding private prison employee state actor for § 1983 purposes).

92. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 n.5 (2001); *see also Richardson*, 521 U.S. at 412, 413 (denying qualified immunity to private prison employees without deciding whether the employees were state actors for liability purposes). Dissenting in *Richardson*, Justice Scalia and two others protested the Court's distinguishing of public and private prison employees. *Id.* at 414 (Scalia, J., dissenting). They argued that the majority's decision makes public and private prison employees "indistinguishable in the ultimate source of their authority over prisoners, and indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owe toward prisoners . . . ." *Id.* at 422.

93. *See Lugar*, 457 U.S. at 939 (articulating tests under which private persons held to act under color of

consensus among courts in § 1983 cases, lower courts remain divided on whether private prisons employees are "federal actors" under *Bivens*.[94] The Federal District Court for the District of Rhode Island found state action by looking at the historical involvement of private corporations in prisons and reasoning that prison corporations execute a function "traditionally" performed by the state.[95] This court found persuasive the holdings in § 1983 cases on the same issue.[96] Conversely, the Fourth Circuit concluded no state action existed in prison corporations, citing the prison employees' status as private employees and historical evidence showing that operating prisons is not an "exclusively" public function.[97]

ii. Section 1983

Inmates incarcerated in state prisons may bring § 1983 suits to challenge the conditions of their confinement.[98] To establish a claim under § 1983, an inmate must establish that a state actor, acting under color of law, deprived the inmate of a right secured by the Constitution or federal law.[99] Section 1983 suits typically involve alleged First or Eighth Amendment violations based on prison officials' failure to protect inmates from their peers, failure to provide adequate medical care, and use of excessive force.[100] Notably, § 1983 addresses the conduct of state actors, not federal actors.[101] Congress did not pass anything

state law). *Cf.* Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970) (asserting "to act 'under color' of law does not require that the accused be an officer of the state").

94. *Compare* Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 60-61 (D.R.I. 2003) (deeming private prison employees federal actors in *Bivens* claim), *and* Jama v. U.S. I.N.S., 343 F. Supp. 2d 338, 363 (D.N.J. 2004) (following reasoning in *Sarro* without discussion), *with* Holly v. Scott, 434 F.3d 287, 293 (4th Cir. 2006) (concluding private prison employee is not a state actor), *and* Alba v. Montford, No. CV 305-159, 2006 WL 2085432, at *4 (S.D. Ga. Jul. 24, 2006) (following *Holly* in holding private prison employees not governmental actors). *Cf.* Peoples v. CCA Det. Ctr., 422 F.3d 1090, 1102 (10th Cir. 2005) (holding *Bivens* claim against private prison employee untenable without addressing state action issue), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc).

95. *See Sarro*, 248 F. Supp. 2d at 60-61 (finding government's "traditional" involvement in corrections sufficient to satisfy "public function" test).

96. *See Sarro*, 248 F. Supp. 2d at 61 (finding state action holding "consistent with the weight of authority holding [private prison employees] to be state actors" under § 1983).

97. *See Holly*, 434 F.3d at 291-94 (listing argument opposing state action finding).

98. *See* Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 460 (5th Cir. 2003) (entertaining § 1983 suit by state prison inmate alleging Eighth Amendment violation).

99. *See* West v. Atkins, 487 U.S. 42, 48-49 (1988) (enunciating showing of rights violation required in a § 1983 action).

100. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 833-34 (1994) (holding, in *Bivens* suit, failure to protect constitutes Eighth Amendment violation); Hudson v. McMillian, 503 U.S. 1, 4 (1992) (holding, in § 1983 suit, excessive physical force violates Eighth Amendment); Estelle v. Gambel, 429 U.S. 97, 104 (1976) (holding, in *Bivens* suit, deliberate indifference to serious medical needs amounts to Eight Amendment violation).

101. *See* Dist. of Columbia v. Carter, 409 U.S. 418, 424-25 (1973) (asserting "actions of the Federal Government and its officers are at least facially exempt from [§ 1983's] proscriptions."); McCloskey v. Mueller, 446 F.3d 262, 271 (1st Cir. 2006) (explaining "a section 1983 claim ordinarily will not lie against a federal actor").

analogous to § 1983 to create a cause of action against federal actors who violate the Constitution.[102] The Supreme Court filled this void in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[103]

iii. The Bivens Remedy

In *Bivens*, the petitioner alleged that federal agents conducted a warrantless search of his home in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures.[104] The Supreme Court ruled that the federal agents, acting "under color of [their] authority," breached the petitioner's Fourth Amendment right.[105] Finding that no statute conferred a remedy for this constitutional injury, the Court implied a cause of action under the Fourth Amendment and permitted the petitioner to seek money damages from the federal agents.[106]

The *Bivens* Court outlined two circumstances precluding it from extending the implied cause of action to other contexts. First, the Court would refuse to extend the cause of action when faced with "special factors counseling hesitation in the absence of affirmative action by Congress."[107] This inquiry ensured that the judiciary did not entangle itself in decisions suitable for other governmental branches.[108] Second, the Court would refuse to extend the cause

102. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 427 (1971) (Black, J., dissenting) (noting absence of statutory cause of action against federal officials for constitutional violations).

103. 403 U.S. 388 (1971).

104. *Id.* at 389 (explaining case's factual underpinnings). In *Bivens*, agents of the Federal Bureau of Narcotics arrested the petitioner after executing a warrantless search of his home. *Id.* The petitioner sought damages from each officer on account of the "humiliation, embarrassment, and mental suffering" the search caused him. *Id.* at 389-90. The district court dismissed the complaint for failure to state a claim. *Id.* at 390.

105. *Id.* at 397 (holding officers' actions violated petitioner's Fourth Amendment rights).

106. *Id.* at 397 (holding officer's unconstitutional conduct gave rise to action for damages). The Court derived its power to imply this constitutional tort from its "general jurisdiction to decide all cases arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (citing § 1331 as source of Court's power to create *Bivens* action). The *Bivens* remedy amounts to a constitutional tort. *See Malesko*, 534 U.S. at 73 (referring to *Bivens* claim as "an implied constitutional tort remedy"); FDIC v. Meyer, 510 U.S. 471, 476 (1994) (same). The Court has created other non-statutory remedies for constitutional violations, such as the *Ex Parte Young* remedy, which entitles plaintiffs to seek prospective injunctive relief from state officials, and the exclusionary rule, which bars from criminal cases any evidence seized in violation of the Fourth Amendment. *See Ex parte* Young, 209 U.S. 123, 167-68 (1908) (establishing so-called Ex Parte Young remedy); Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing exclusionary rule). Plaintiffs who invoke *Bivens* may proceed against federal officers in their individual, not official, capacities. *See* Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987) (limiting *Bivens* claims to defendant federal officials sued in their individual capacities).

107. *Bivens*, 403 U.S. at 396 (establishing first exception for *Biven* claim's applicability).

108. *See* Nichol, *supra* note 83, at 1146 (calling "Constitutional 'independence'" the "core of . . . special factors exception"). In later cases, the Court classified increased government financial liability and interference with the military's disciplinary schemes as "special factors" barring *Bivens*'s application. *See Meyer*, 510 U.S. at 486 (deeming increase in government's financial liability a factor counseling hesitation when creating *Bivens* damages remedy); Schweiker v. Chilicky, 487 U.S. 412, 421-23 (1988) (deeming conflict with federal fiscal policy a special factor); Chappell v. Wallace, 462 U.S. 296, 298, 304 (1983) (holding military's disciplinary

of action if Congress provided an equally effective *substitute* remedy.[109]

The Supreme Court has extended *Bivens* restrictively and recognized *Bivens* actions in just two additional circumstances.[110] In *Davis v. Passman*,[111] the Court allowed a plaintiff to seek redress for a Fifth Amendment violation under *Bivens* because the plaintiff lacked another remedy.[112] Later, in *Carlson v. Green*,[113] the Court permitted an inmate to raise an Eighth Amendment violation under *Bivens* because the Court deemed the plaintiff's alternative remedy—a suit against the United States—less effective than the *Bivens* remedy.[114] Acknowledging its hesitation to extend *Bivens* beyond the original Fourth Amendment context, the Court has argued that Congress stands in a better position "to decide whether or not the public interest would be served"

structure a "special factor[] counseling hesitation" in soldier's *Bivens* claim against superior officer). *But see* Davis v. Passman, 442 U.S. 228, 246 (1979) (finding possible job interference not a special factor counseling hesitation in citizen's *Bivens* claim against Congressman). Special factors are case-specific and may include, among other factors, whether a party occupies an independent status in the constitutional scheme, such that judicial remedies against the party would be inappropriate, and whether the prospect of personal liability would deter parties from performing their official duties. This list is not short by design, but instead reflects the Court's reluctance to explain what might constitute "special factors." *See* Nichol, *supra* note 83, at 1126 (observing Court's failure to define or illustrate "special factors" in *Bivens* jurisprudence).

109. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (establishing second exception for *Bivens* claim's applicability). To decide whether Congress created an equally effective substitute remedy, a court may scrutinize statutory language and legislative history, searching for evidence of such congressional intent. *See* Carlson v. Green, 446 U.S. 14, 19-20 (1980) (analyzing statutory language to decipher congressional intent to pre-empt *Bivens* or create equally-effective alternative remedy). For example, 28 U.S.C. § 2679(b) creates an exclusive remedy in cases involving federal employees' operation of motor vehicles, and 42 U.S.C. § 247b(k) creates an exclusive remedy in cases involving the manufacture of swine flu vaccines. *Id.* at 20. A court also may look beyond the statute's plain text and consider the *Bivens* claim's purpose as a deterrent mechanism and whether *Bivens* and some remedial substitute afford a plaintiff the same rights. *Id.* at 20-21 (citing additional factors employed in determining whether Congress intended to limit respondent's avenues of redress). When *Bivens* and the alleged remedial substitute are, however, parallel and complimentary remedies, no preemption occurs and *Bivens* applies. *Id.* at 19-23 (illustrating existence of parallel and complimentary causes of action).

110. *See* Nichol, *supra* note 83, at 1118-21 (chronicling Court's extending *Bivens* to Fifth Amendment and Eighth Amendment claims). *See generally* Matthew G. Mazefsky, Case Note, Correctional Services Corp. v. Malesko*: Unmasking the Implied Damage Remedy*, 37 U. RICH. L. REV. 639, (2003) (predicting demise of *Bivens*); Andrea Robeda, Note and Comment, *The Death of Implied Causes of Action: The Supreme Court's Recent* Bivens *Jurisprudence and the Effect on State Constitutional Tort Jurisprudence:* Correctional Services Corp. v. Malesko, 33 N.M. L. REV. 401 (2003) (same).

111. 442 U.S. 228 (1979).

112. *Id.* at 243-45 (recognizing cause of action under Fifth Amendment because, for petitioner, "it is damages or nothing").

113. 446 U.S. 14 (1980).

114. *Id.* at 18-20 (holding plaintiff's potential FTCA claim does not preclude extending *Bivens* liability to individual officer). The *Carlson* Court deemed *Bivens* a more effective remedial device than a claim against the United States under the Federal Tort Claims Act (FTCA) because: (1) *Bivens* serves an individual purpose but an action against the U.S. government would not deter future officer misconduct; (2) punitive damages are permissible in a *Bivens* suit but barred in an FTCA suit; (3) jury trials are available to a *Bivens* plaintiff but not to an FTCA plaintiff; and (4) "an action under the FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct . . .[,] [y]et it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." *Id.* at 20-23.

by a "new substantive legal liability."[115] Justice Stevens presents an opposing view, contending that the Court's restrictive approach reverses a "historic presumption favoring the provision of remedies for violations of federal rights."[116]

Since *Bivens*, the Supreme Court has weighed several factors when deciding whether to extend the remedy beyond the Fourth Amendment context. For example, the Court may defer to Congressional inaction.[117] In *Schweiker v. Chilicky*[118] and *Bush v. Lucas*,[119] the Court confronted claims relating to federal statutes through which Congress established elaborate remedial mechanisms.[120] Neither statute allowed persons injured by a federal agent's alleged constitutional violation to sue the agent for money damages.[121] In each case, the Court conceded that its ruling would leave the plaintiff with less than "complete relief."[122] Despite this outcome, however, the Court rejected the plaintiffs' *Bivens* claims in both cases.[123]

115. Schweiker v. Chilicky, 487 U.S. 412, 426-27 (1988); *see* Sosa v. Alvarez-Machain, 542 U.S. 692, 695 (2004) ("decision to create a private right of action is better left to legislative judgment . . . ."); Bush v. Lucas, 462 U.S. 367, 390 (1983) (emphasizing Congress's preeminent role in creating new causes of action); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 73 (2001) (noting reluctance to extend *Bivens* where alternative remedies available); FDIC v. Meyer, 510 U.S. 471, 486 (1994) (cautioning against over-extending *Bivens*). The Fourth Circuit explained that when deciding whether to create a new legal remedy, Congress, unlike the Court, may hold hearings, debate policies, and "[implement] potential safeguards—e.g., procedural protections or limits on liability—that may or not be at issue in a particular dispute." Holly v. Scott, 434 F.3d 287, 290 (4th Cir. 2006).

116. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 223 (Stevens, J., dissenting). *Cf.* Lumen N. Mulligan, *Why* Bivens *Won't Die: The Legacy of* Peoples v. CCA Detention Centers, 83 DENV. U. L. REV. 685, 687 (2006) (arguing "the Court's post-1980 *Bivens* jurisprudence may be fairly characterized as a 'slow death' of the implied constitutional cause of action").

117. *See infra* notes 120-123 and accompanying text (discussing cases where Congressional inaction affected Court's decision to extend *Bivens*).

118. 487 U.S. 412 (1983).

119. 462 U.S. 367 (1983).

120. *See Schweiker*, 487 U.S. at 424-29 (considering whether Social Security Act remedial mechanisms preclude *Bivens* claim); *Bush*, 462 U.S. at 368, 380-90 (considering whether "comprehensive procedural and substantive provisions" that govern employment relationship preclude *Bivens* claim).

121. *See Schweiker*, 487 U.S. at 425 (explaining no damages available under Social Security Act to wrongfully discharged claimant). The *Schweiker* Court explained that under the Social Security system, persons denied disability benefits "have not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits." *Id.* The *Bush* Court observed that "Congress has not expressly authorized the damages remedy the petitioner asks us to provide." *Bush*, 462 U.S. at 373.

122. *Id.* (characterizing congressional remedy as "less than complete"); *see also Schweiker*, 487 U.S. at 425 ("[t]he creation of a *Bivens* remedy . . . offer[s] the prospect of relief for injuries that must now go unredressed"). Justice Brennan, refusing to bow unconditionally to Congress's will, wrote in his *Schweiker* dissent that "[b]ecause I believe legislators of 'normal sensibilities' would not wish to leave such traumatic injuries [the Schweiker plaintiffs suffered] unrecompensed, I find it inconceivable that Congress meant by mere silence to bar all redress for such injuries." *Schweiker*, 487 U.S. at 432 (Brennan, J., dissenting).

123. *See id.* at 429 (1988) (explaining Court could not revise Congressional remedy for wrongful termination of disability benefits); *Bush*, 462 U.S. at 389-90 (holding legislative schemes governing employer-civil servant relationship preclude extending *Bivens*). The Court's willingness to accept incomplete relief in these cases mirrors the Court's position in procedural due process cases, in which the Court does not view

The Supreme Court consistently observes that the *Bivens* action serves to deter individuals, not entities, from violating the Constitution.[124] In *FDIC v. Meyer*,[125] the Court rejected a plaintiff's *Bivens* claim against the FDIC, a federal agency.[126] Similarly, in *Correctional Services Corp. v. Malesko*,[127] the Court refused to allow a federal inmate to sue a prison corporation.[128] In each case, the Court reasoned that if plaintiffs could sue agencies and entities under *Bivens*, they would, and "[t]o the extent aggrieved parties had less incentive to bring a damages claim against individuals, the deterrent effect of *Bivens* would be lost."[129] Moreover, persons facing the specter of litigation and personal liability are more likely, the Court has reasoned, to act within the bounds of the Constitution.[130]

The Court's opinions also reveal a preference to subject federal and state actors and entities to symmetrical liability standards.[131] The Court has claimed that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules."[132] For this reason, the Court may reject a *Bivens* claim if it may create asymmetrical, "incongruous[,] and confusing" standards.[133] In *Butz v. Economou*,[134] an early *Bivens* case, the Court declined to impose different qualified immunity rules on *Bivens* and §

state-law remedies as inadequate just because they provide a plaintiff less relief than he might obtain under § 1983. *See* Parratt v. Taylor, 451 U.S. 527, 544 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986). In *Parratt*, the Court held that "[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Id*.

124. *See infra* notes 126-130 and accompanying text (discussing deterrent purpose of *Bivens*).

125. 510 U.S. 471, 484-86 (1994).

126. *Id.* at 473-74, 485-86. The Court explained that the threat of litigation will deter individual officer misconduct despite the availability of qualified immunity, indemnification by the officer's employer, or the officer's acting in according with an employer's policy. *Id.* at 486.

127. 534 U.S. 61 (2001).

128. *Id.* at 70-71 (arguing imposing *Bivens* liability on private prisons undermines remedy's goal).

129. *Id.* at 69-71 (*citing Meyer*, 510 U.S. at 485) (explaining how agency and private entity liability under *Bivens* might weaken remedy's individual deterrent effect). *But see id.* at 81-82 (Stevens, J., dissenting) (*citing* Richardson v. McKnight, 521 U.S. 399, 412 (1997) (asserting competition causes private firms to "adjust their behavior in response to the incentives that tort suits provide"). For this reason, Justice Stevens observed that the prison in *Malesko*, a private firm, is distinguishable from the FDIC in *Meyer*, a government department. *Id.* at 81. Justice Stevens concluded that the majority eviscerated any incentive private firms had to operate constitutionally-compliant prisons. *Id.*

130. *See id.* at 70 (acknowledging litigation and personal liability under *Bivens* deter officers' misconduct); Carlson v. Green, 446 U.S. 14, 21 (1980) (describing as "axiomatic" notion of damages threats deterring officers' misconduct).

131. *See Malesko*, 534 U.S. at 72 (citing BOP's immunity under *Bivens* as justification for rejecting *Bivens* claim against prison corporation); *see also* Butz v. Economou, 438 U.S. 478, 499 (1978) (holding federal and state officials in *Bivens* and § 1983 enjoy parallel degrees of qualified immunity). *Cf.* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (observing Constitution prohibits states from racially segregating schools and the federal government is subject to same standard).

132. Carlson v. Green, 446 U.S. 14, 23 (1980).

133. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting) (citing *Butz*, 438 U.S. at 499) (explaining imposition of parallel standards on claims against state and federal actors).

134. 438 U.S. 478 (1978).

1983 defendants.[135] The *Butz* Court explained that "[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."[136] Later, the Court in *Meyer* shielded federal agencies from *Bivens* suits, extending to these agencies the same protection state agencies already enjoyed in § 1983 suits.[137] Although the *Meyer* decision did not address symmetry expressly, Justice Stevens observed later that *Meyer* furthered the "value of parallelism."[138] Finally, in *Malesko*, the Court avoided creating asymmetrical entity liability by shielding private prisons from *Bivens* liability just as it previously immunized the Federal Bureau of Prisons (BOP) from *Bivens* claims.[139]

In its most recent *Bivens* decision, *Correctional Services Corp. v. Malesko*,[140] the Court emphasized that alternative remedies may preclude a *Bivens* action.[141] Citing the facts underlying *Davis* and *Carlson* decisions as touchstones, the Court explained that it would only extend *Bivens* "to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's

135. *Id.* at 504. The *Butz* Court explained that

> without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions.

Id.

136. *Id.*

137. *See* FDIC v. Meyer, 510 U.S. 471, 486 (1994) (holding federal agencies not subject to *Bivens* suits).

138. *See Malesko*, 534 U.S. at 82 (Stevens, J., dissenting) (arguing Court's *Meyer* holding illustrated Court's interest in imposing symmetrical liabilities).

139. *See id.* at 71-72. Justice Stevens, dissenting in *Malesko*, sought a different sort of parallelism. *Id.* at 81-82 (Stevens, J., dissenting). He argued that extending *Bivens* liability to prison corporations would still create parallelism because "both private and public prisoners would be unable to sue the principal (i.e., the Government), but would be able to sue the primary federal agent (i.e., the Government official of the corporation)." *Id.* at 81 (explaining symmetry resulting from imposing *Bivens* liability on CCA). Justice Stevens characterized the Corrections Services Corporation (CSC), the prison corporation, as a "federal agent" employed by the BOP to execute functions that federal employees would otherwise perform. *Id.* at 76. Assuming this agency status, Justice Stevens argued that extending *Bivens* to the CSC would be consistent with the circuit courts' holdings that corporate entities performing federal functions are proper *Bivens* defendants. *Id.* Justice Steven's reasoning relied, however, on his rejecting the majority's holding that, per *Meyer*, both public federal agencies and their equivalent private entities enjoy *Bivens* immunity. *Id.* at 77.

140. 534 U.S. 61 (2001).

141. *Id.* at 69 (illustrating Court grants alternative remedies substantial weight when deciding whether to extend *Bivens*).

unconstitutional conduct."[142] Accordingly, the Court rejected a federal inmate's *Bivens* claim against a prison corporation in part because the inmate could have sought redress through other avenues: the BOP's administrative mechanisms; in federal court through an injunction; in state court via a negligence action; or, the Court suggested, through a *Bivens* claim against the prison's employees.[143] Further, the Court clarified that the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the employees responsible for the violation."[144]

On several fronts, *Malesko* departed from earlier *Bivens* decisions.[145] First, the Court required "effective" alternative remedies but not alternative remedies as "equally effective" as *Bivens*.[146] While the Court concluded that *Malesko* enjoyed alternative remedies "at least as great [as], and in many respects greater, than anything that could be had under *Bivens*," it did suggest that alternative remedies offering incomplete relief would have produced a different outcome.[147] Second, the *Malesko* Court cast *Bivens* and its progeny as cases where the plaintiff lacked "any alternative remedy," again refusing to establish any standard for the *quality* of the alternative remedy required to preclude a *Bivens* claim.[148] The Court limited its holding only by indicating that

142. *Id.* at 70 (listing situations permitting *Bivens*'s extension). The majority viewed the plaintiff as seeking an extension of *Bivens*, a request the Court was disinclined to grant. *Id.* at 63 (stating question before Court concerns extension of *Bivens* to permit recovery against private prison corporation). Justice Stevens disagreed with the Court's posture and argued that because the Court previously recognized the Eighth Amendment tort in its *Carlson* decision, applying it in *Malesko* would establish a "new class of tortfeasors" but not a "new constitutional tort." *Id.* at 78 n.5 (Stevens, J., dissenting).

143. *Id.* at 72 (listing alternative remedies available inmates lacking remedy under *Bivens*). The Court did not conclude expressly that the respondent could have sued the prison employee under *Bivens*, but it implied as much by noting that he did not "timely pursue" this remedy. *Id.* at 72; *see also id.* at 79 n.6 (Stevens, J., dissenting) (arguing majority "relies, at least in part, on the availability of a remedy against employees of private prisons"). Prior to *Malesko*, the Court had held that administrative remedies could preclude *Bivens* claims. *See* Bush v. Lucas, 462 U.S. 367, 378 n.14, 386-88 (1983) (rejecting federal employee's *Bivens* claim because adequate redress available through administrative review mechanisms); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (rejecting *Bivens* claim because alternative administrative remedies exist).

144. *Malesko*, 534 U.S. at 69 (quoting Schweiker v. Chilicky, 487 U.S. 412, 421-22 (1988)).

145. Cf. Peoples v. CCA Det. Ctr., 422 F.3d 1090, 1102 (10th Cir. 2005), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc). After *Malesko*, the Tenth Circuit remarked 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." *Id.*

146. *Compare* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) (noting plaintiff enjoyed "effective" alternative remedies without expressing need for "equally effective" remedies), *with* Carlson v. Green, 446 U.S. 14, 19 (1980) (noting only "equally effective" federal statutory remedy may preclude *Bivens* claim), *and* Davis v. Passman, 442 U.S. 228, 248 (1979) (same).

147. *See Malesko*, 534 U.S. at 72 (agreeing plaintiff enjoyed favorable alternative remedies).

148. *See id.* at 70 (original emphasis removed); *see also id.* at 78 (Stevens, J., dissenting) (noting Court's historical willingness to extend *Bivens* only when plaintiff lacked "*any alternative remedy*"). *Cf.* Ryan D. Newman, Note, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 487 n.114 (2006) (listing pre-*Malesko* rulings allowing *Bivens* claims even when alternative remedies available).

alternative remedies "inconsistent or hostile to" recovery under *Bivens* might not preempt a *Bivens* action.[149] Still, the decision suggests that state-law remedies, "standing alone," would prevent a plaintiff from bringing a *Bivens* claim.[150] If *Malesko* stands for this proposition, the Court, arguably, "has radically departed from its past *Bivens* jurisprudence."[151]

Justice Stevens disagreed sharply with the *Malesko* majority.[152] In dissent, he argued against defining "effective" alternative remedies broadly.[153] He asserted that not all alternative remedies should preclude *Bivens* actions, and that "the Court's reliance on state tort law will jeopardize the protection of the full scope of federal constitutional rights."[154] He continued that "some unconstitutional actions . . . may find no parallel causes of action in state tort law."[155] Justice Stevens disagreed with the Court's assessment of its *Bivens* jurisprudence by noting that the Court had historically allowed *Bivens* actions even when plaintiffs could have pursued alternative remedies.[156]

C. Remedies Compared

If private prison inmates can establish state action, they may find *Bivens* and § 1983 suits more effective than state-law remedies because state law may not create liability for the conduct underlying the inmate's § 1983 or *Bivens* claim.[157] Professor Jack M. Beerman of Boston University explains this discrepancy by arguing that constitutional claims "may not have clear state law

149. *Malesko*, 534 U.S. at 73-74. The *Malesko* Court distinguished the case's facts from those in *Bivens*, where the plaintiff would have foreclosed a tort action against the officer had he admitted the officer into his home but would have committed a crime had he refused to grant the officer entry. *Id.* at 73-74 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394-95 (1971)). Comparatively, the *Malesko* plaintiff's negligence or deliberate indifference claims required no resistance to official action and the plaintiff's lack of alternative tort remedies resulted from his strategic choice. *Id.*

150. Mulligan, *supra* note 116, at 694. "[T]he *Malesko* decision raises the further question of whether the existence of alternative federal remedies, alternative state-law remedies, or both barred Mr. Malesko's *Bivens* claim." *Id.* at 694-95.

151. Mulligan, *supra* note 116, at 695.

152. *See generally* Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (Stevens, J., dissenting)

153. *See id*. at 78-79 (rejecting majority's view that state law and administrative remedies preempt *Bivens*).

154. *Id.* at 80 (attacking majority's view that all alternative remedies block *Bivens* actions). Justice Stevens asserted further that while the majority's reasoning may apply in situations where plaintiffs plead Eighth Amendment claims as negligence claims in state court, the reasoning fails when plaintiffs plead constitutional claims that do not resemble traditional torts, like Due Process and Equal Protection violations. *Id.*

155. *Id.* at 80.

156. *Id.* at 78-79 (noting availability of state tort claim directly against officer). Further, Justice Stevens noted that all *Bivens* plaintiffs "have remedies available under the FTCA." *Id*. at 78-79.

157. *See Malesko*, 534 U.S. at 80 (Stevens, J., dissenting) (claiming "some unconstitutional actions . . . may find no parallel causes of action in state tort law"); *see also* Jack M. Beerman, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 14 (2004) (discussing rationale for bringing § 1983 suits instead of state tort claims). *But see* Menteer v. Applebee, No. 05-3052, 196 F. App'x 624, at *2 (10th Cir. 2006) (suggesting state negligence claim, which requires lesser showing, preferable to Eighth Amendment-based *Bivens* claim).

equivalents. State law may not . . . subject privately employed . . . prison administrators to the same restraints to which they are subjected by federal constitutional law."[158] While state statutes may cap non-economic and punitive damages, § 1983, and presumably *Bivens*, allow more liberal recovery.[159] Federal courts offer longer statutes of limitation and will award attorney's fees.[160] By suing in federal court, inmates may also avoid state-law-imposed procedural impediments.[161]

D. Parties Subject to Section 1983 and Bivens Suits

While federal constitutional claims present numerous advantages over state-law remedies, they pose one significant disadvantage: some responsible parties stand beyond their reach. Section 1983 plaintiffs may target several categories of "state actors," including employees of public and private prisons.[162] They may also sue the corporations that operate private prisons.[163] State correctional agencies, however, enjoy sovereign immunity from § 1983 suits.[164] Federal inmates suing under *Bivens* face a more limited universe of potential defendants. Those held in public and private prisons have no recourse under *Bivens* against prison entities; federal corrections agencies enjoy sovereign immunity and the Supreme Court has already shut the door on suits against prison corporations.[165] Employees of public prisons remain subject to *Bivens*

158. *See* Beerman, *supra* note 157, at 25 (quotations omitted); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 80 (2001) (Stevens, J., dissenting) (noting state law may not redress injuries caused by Equal Protection and Due Process violations).

159. *See* Beerman, *supra* note 157, at 19 (explaining state-law limits on punitive damages do not apply in § 1983 suits); Trine, *supra* note 19, at III.2 (explaining § 1983 imposes fewer limits on damage recovery than state-law remedies); *see also* Smith v. Wade, 461 U.S. 30, 56 (1983) (holding punitive damages permissible in § 1983 suits); Carlson v. Green, 446 U.S. 14, 21-22 (1980) (noting Court's decisions indicate punitive damages available in *Bivens* suits).

160. *See* Beerman, *supra* note 157 at 14, 23.

161. *See* Beerman, *supra* note 157 at 14. Examples of state-law impediments include notice of claim requirements and mandatory pre-screening for claims by inmates alleging inadequate medical care. *Id. But see* Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (2000) (requiring inmates to exhaust administrative remedies before filing federal suit).

162. *See, e.g.*, Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (deeming private prison employees state actors for § 1983 purposes); Street v. Corr. Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996) (ruling private prison employees susceptible to § 1983 suits because they act under color of state law); Antaca v. Prison Health Servs., 769 F.2d 700, 703-04 (11th Cir. 1985) (holding private prison employees subject to § 1983 suits because they engage in state action).

163. *See Rosborough*, 350 F.3d at 461 (recognizing § 1983 claim available against private prison corporations); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991) (holding private prison corporation susceptible to suit under § 1983). *See generally* Miller, *supra* note 68 (listing cases recognizing private prisons susceptible to § 1983 suits). While the Supreme Court has not held explicitly that state inmates may sue private prison corporations under § 1983, it has ruled that private corporations exercising state action are susceptible to § 1983 claims. *See* Lugar v. Edmunson Oil Co., 457 U.S. 922, 941-42 (1982) (permitting § 1983 suit against private corporation exercising state action).

164. *See* Quern v. Jordan, 440 U.S. 332, 338-44 (1979) (ruling state agencies immune to § 1983 actions).

165. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71 (2001) (holding *Bivens* liability does not extend to

suits but may invoke qualified immunity.[166] The following table distills this constellation of remedies:

TABLE: Categories of Defendants Subject to Bivens *Suits by Federal Inmates and § 1983 Suits by State Inmates*[167]

DEFENDANT	PLAINTIFF	
	FEDERAL INMATE	STATE INMATE
	BIVENS	§ 1983
PUBLIC PRISON		
Operating Entity	No[168]	No[169]
Officer	Yes[170]	Yes[171]
PRIVATE PRISON		
Operating Entity	No[172]	Yes[173]
Officer	?	Yes[174]

private entities acting under color of federal law); FDIC v. Meyer, 510 U.S. 471, 477 (1994) (rejecting terminated employee's *Bivens* claim against former employer FDIC for Fifth Amendment Due Process violation).

166. *See* Johnson v. Fankell, 520 U.S. 911, 914-15 (1997) (noting officials who perform discretionary function shielded from *Bivens* and § 1983 suits).

167. *See* Peoples v. CCA Det. Ctr., 422 F.3d 1090, 1111 (10th Cir. 2005) (Ebel, J., concurring in part and dissenting in part), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc).

168. *See Meyer*, 510 U.S. at 484-86.

169. *See* Will v. Mich. Dept. of State Police, 491 U.S. 58, 64 (1989) (holding state not a "person" within meaning of § 1983); *Quern*, 440 U.S. at 338-40 (holding Congress in enacting § 1983 did not abrogate states' Eleventh Amendment immunity). When discussing state prisons, this Note refers exclusively to state prisons operated by state agencies. Different case law governs prisons owned and operated by local governing entities, such as counties and municipalities. Pursuant to the Supreme Court's decision in *Monell v. Dept. of Social Services of the City of New York*, local governing entities may incur § 1983 liability for constitutional deprivations caused by their official policies, customs, or practices. 436 U.S. 658, 691 (1978). Courts apply the *Monell* standard in § 1983 suits by inmates against prisons operated by local governing entities. *See* Payne for Hicks v. Churchich, 161 F.3d 1030, 1043 (7th Cir. 1998) (applying *Monell* in § 1983 suit by inmate's estate against municipality operating prison); Redman v. County of San Diego, 942 F.2d 1435, 1443-44 (9th Cir. 1991) (applying *Monell* in § 1983 suit by pretrial detainee against county operating prison). Further, local governing entities may incur § 1983 liability for the customs, policies, and practices of the corporations they retain to operate their prisons. *See* Herrera v. County of Santa Fe, 213 F. Supp. 2d 1288, 1292 (D.N.M. 2002) (holding *Monell* liability extends to county for customs and policies of prison corporation it retained).

170. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (subjecting federal agents to suit for damages based on Fourth Amendment violation).

171. *See* 42 U.S.C. § 1983 (2000).

172. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66-67 (2001) (holding prison corporations not subject to suit under *Bivens*).

173. *See* Lugar v. Edmondson Oil. Co., 457 U.S. 922, 941-42 (1982) (allowing § 1983 suit against private corporations engaged in state action). The Supreme Court has not held explicitly that inmates may sue officers of private prisons under § 1983, although in *Malesko* the Court suggested in dicta that "state prisoners . . . already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983." 534 U.S. at 522 n.5. Various lower courts have ruled that inmates may sue private prison operators under § 1983. *See* Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991).

This table reveals that the only class of defendants whose liability remains undefined are employees of federal, privately-operated prisons. The Supreme Court has not ruled on this question, and lower courts nationwide are divided on the issue.[175] Moreover, the court's membership has changed considerably since deciding *Malesko*, which raises questions about the present Court's views on the *Bivens* remedy and what factors it would emphasize if asked to extend *Bivens* to a new context.[176]

IV. MAY INMATES SUE PRIVATE PRISON OFFICIALS UNDER *BIVENS*?

Only a few courts permit federal inmates to sue private prison officials under *Bivens*.[177] In *Sarro v. Cornell Corrections, Inc.*,[178] the U.S. District Court for the District of Rhode Island ruled that a federal inmate could sue private prison

174. The Supreme Court has not decided whether inmates may sue private prison officials under § 1983, but several lower courts have allowed such a suit. *See Rosborough*, 350 F.3d at 461 (holding private prison employees subject to § 1983 suit); Street v. Corr. Corp. of Am., 102 F.3d 810, 814-15 (6th Cir. 1996) (holding private prison employees subject to § 1983 suit).

175. *See* Peoples v. CCA Detention Centers, 422 F.3d 1090, 1099 n.4 (10th Cir. 2005) (observing Supreme Court has not decided whether *Bivens* extends to private prison employees), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc). On this point, lowers courts have observed palpable tension in the Court's *Bivens* decisions. The *Sarro* court recognized an inmate's *Bivens* claim after noting that "at first blush, the decisions of the Supreme Court that bear on this issue appear to be irreconcilable." Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 56 (D.R.I. 2003). On the other hand, the Tenth Circuit in *Peoples* denied an inmate's *Bivens* claim but cautioned that "this is not to say . . . that we do not recognize the tension between [the Court's leading *Bivens* cases,] *Carlson* and *Malesko*. . . . The Court has explained its approach to *Bivens* claims in a variety of ways in the thirty-four years since *Bivens* itself was decided." *Peoples*, 422 F.3d at 1102. Reflecting this tension, lower courts have divided on the issue of whether inmates may sue private prison employees under *Bivens*. *Compare* Holly v. Scott, 434 F.3d 287, 296-97 (4th Cir. 2006) (denying federal inmate's *Bivens* claim against private prison officials), *and Peoples*, 422 F.3d at 1108 (denying federal inmate's *Bivens* claim against private prison officials), *with Sarro*, 248 F. Supp. 2d at 59 (recognizing federal inmate's *Bivens* claim against private prison officers), *and Holly*, 434 F.3d at 298-302 (Motz, J., dissenting) (arguing private prison employees governmental actors subject to suit under *Bivens*), *and Peoples*, 422 F.3d at 1110 (Ebel, J., dissenting) (concluding *Bivens* extends to private prison employees).

176. *See* Warren Richey, *For Supreme Court's New Term: Rise of a New Centrist*, CHRISTIAN SCI. MONITOR, Oct. 2, 2006, at 2. Richey explains that

> [l]ast term was a year of historic transition for the court with the passing of Chief Justice William Rehnquist and the retirement of O'Connor. It marked the arrival of Mr. Roberts as chief justice and Samuel Alito as an associate justice. The change in the high court's roster is expected to swing the balance of power to the right. . . . Although it is not clear how Roberts and Justice Alito will vote in these cases, many analysts suggest they are likely to align with the court's conservative wing,

which includes Justice Scalia. *Id.*

177. *See* Purkey v. CCA Det. Ctr., 339 F. Supp. 2d 1145, 1151 (D. Kan. 2004) (allowing federal inmates' *Bivens* action against private prison employees). As noted, several courts disagree with the *Purkey* decision. *See* Peoples v. CCA Det. Cent., 449 F.3d 1097 (10th Cir. 2006) (en banc)); Jama v. U.S. I.N.S., 343 F. Supp. 2d 338, 363 (D.N.J. 2004) (holding inmate may sue private prison guards under *Bivens*); *Sarro*, 248 F. Supp. 2d at 57-63 (same).

178. 248 F. Supp. 2d 52 (D.R.I. 2003).

officials under *Bivens* for alleged constitutional deprivations.[179] The *Sarro* case involved an inmate held at the Donald Wyatt Detention Center (Wyatt), a facility under contract with the U.S. Marshals Service and operated by Cornell Corrections Inc. (Cornell).[180] The plaintiff alleged that he sought protective custody after several inmates threatened him but that prison officials disregarded his request.[181] During a fire drill, a guard left the plaintiff unattended and several inmates beat him viciously.[182] The plaintiff alleged that, following the attack, the prison's program director failed to provide him with adequate medical care.[183] The plaintiff sued several of Cornell's employees, alleging Eighth Amendment and Fifth Amendment violations.[184]

The *Sarro* court determined preliminarily that the defendant officers, though employed by a private, non-governmental company, were federal actors for *Bivens* purposes.[185] Turning to Sarro's *Bivens* claim, the court considered, and failed to find, Congressional intent to preclude prisoners held in privately-operated facilities from seeking damages award under *Bivens*.[186] It reasoned that extending *Bivens* would not frustrate or otherwise interfere with specific government-sponsored programs.[187] The court reasoned further that extending *Bivens* liability to prison officials in private federal prisons advanced *Bivens*'s "core premise," namely to deter individual officers from violating the Constitution.[188] Citing the Supreme Court's legal parallelism argument from *Malesko*, the *Sarro* court reasoned that its decision created parity between the

179. *Id.* at 56-57 (recognizing plaintiff may invoke *Bivens* against private prison officials).

180. *Id.* at 55 (establishing plaintiff as federal detainee held at for-profit correctional facility). The Wyatt Detention Center's history illustrates the interplay between municipalities, state governments, and private corporations in funding, building, and operating private prisons. The Rhode Island legislature, seeking to promote economic growth and provide a facility in which the U.S. Marshals Service could house pretrial detainees, passed legislation authorizing municipalities to create corporations that could own and operate detention facilities. *Id.* at 54. Pursuant to this statute, the City of Central Falls's created the Central Falls Detention Facility Corporation (CFDFC), constructed the prison, and contracted with the U.S. Marshals Service to house detainees. *Id.* at 55. The CFDFC also contracted with Cornell Corrections, Inc. (Cornell), a private prison operator, to operate Wyatt and employ its staff. *Id.*

181. *Id. at 55* (describing plaintiff's request for protective custody).

182. *Sarro*, 248 F. Supp. 2d at 55 (explaining circumstances exposing plaintiff to attack by fellow inmates).

183. *Id.* (setting forth plaintiff's allegations against prison employees)

184. *Id.* (establishing basis for plaintiff's Fifth and Eighth Amendment claims against prison corporation and its employees). Pursuant to *Malesko*, which bars *Bivens* claims against private prison operators, the court dismissed Sarro's claim against Cornell. *Id.* at 62 (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71-72 (2001)).

185. *See id.* at 58-61 (reasoning private prison officers act under color of federal law because they perform "public function").

186. Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 61-62 (D.R.I. 2003) (finding no congressional intent to preclude privately held federal inmates from collecting damages under *Bivens*).

187. *Id.* at 62 (finding "no significant factors counseling hesitation").

188. *Id.* at 62-63 (citing *Malesko*, 534 U.S. at 70) (distinguishing plaintiff's claim against individual officer from *Malesko* plaintiff's claim against corporate employer); *see also* Jama v. U.S. I.N.S., 343 F. Supp. 2d 338, 362 (D.N.J. 2004) (recognizing *Sarro* court's emphasis on *Bivens*'s "core premise"); Purkey v. CCA Det. Cent., 339 F. Supp. 2d 1145, 1149 (D. Kan. 2004) (endorsing *Sarro* court's "core premise" analysis).

rights of prisoners at public and private prisons.[189] Specifically, because federal inmates in government-run prisons may file *Bivens* suits against prison employees for constitutional violations, the court reasoned that federal inmates in privately-run prisons ought to enjoy the same right.[190]

Distinguishing the case from *Malesko*, the *Sarro* court observed that the plaintiff, unlike the *Malesko* plaintiff, lacked alternative remedies.[191] While agreeing with the *Malesko* Court that the "existence of *state* law remedies [may be] a factor to be considered," the *Sarro* court protested that such remedies "cannot be construed as a manifestation of Congressional intent to preclude the application of *Bivens*."[192] Allowing state-law remedies to preclude *Bivens* actions would force every court hearing a *Bivens* claim to review state-law remedies on a case-by-case basis.[193] This outcome would, the court concluded, yield differing application of *Bivens* depending on the location of a plaintiff's detention center.[194]

Following *Sarro*, most courts to consider the issue barred *Bivens* claims by inmates against private prison officials.[195] In *Peoples v. CCA Detention Centers*,[196] the United States District Court for the District of Kansas barred an

189. *Sarro*, 248 F. Supp. 2d at 63 (explaining how parallelism argument influenced *Malesko* Court). The *Malesko* Court declined to extend *Bivens* because doing so would skew the rights of inmates in private and federal prisons (i.e., it ensures that federal inmates in neither public nor private prisons may sue prison operators under *Bivens*). Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71-72 (2001). Similarly, the *Sarro* ruling aligned inmates' rights by allowing federal inmates in private prisons, like their counterparts in public prisons, to sue prison officials. *Sarro*, 248 F. Supp. 2d at 63; *see also Purkey*, 339 F. Supp. 2d at 1150-51 (endorsing *Sarro*'s parity argument).

190. *See Sarro*, 248 F. Supp. 2d at 63 (equating remedy available to federal inmates in public prisons with court's proposed remedy for plaintiff); *see also* Carlson v. Green, 446 U.S. 14, 18-20 (1980) (allowing federal inmate to sue prison official under *Bivens* for Eighth Amendment violation).

191. *Sarro*, 248 F. Supp. 2d at 63 (distinguishing remedies available to *Sarro* plaintiff from those available to *Malesko* plaintiff). The BOP Administrative Remedy Program, while available to plaintiffs like Malesko who resided in half-way houses under contract with the BOP, does not apply to persons like Sarro who are detained in non-federal facilities. *Id.* at 62. Accordingly, the *Sarro* plaintiff lacked the "effective remedies" available to the *Malesko* plaintiff. *Id.* at 63 (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001)).

192. *Id.* (asserting state-law remedy does not evince congressional intent to preclude *Bivens* action).

193. *See id.* (summarizing consequences plaintiff would face if state law precluded *Bivens* action).

194. *See id.* (asserting *Bivens* intended to deter case-by-case state law analyses and inconsistent *Bivens* application by state). The court argued that "remedies for constitutional violations should not depend on the law of the state in which the violation occurred." *Id.* (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971)).

195. *See, e.g.*, Holly v. Scott, 434 F.3d 287, 296-97 (4th Cir. 2006); Soto v. Pugh, No. CV 306-092, 2007 WL 113945, at *2 (S.D. Ga. Jan. 10, 2007) (contending alternative remedies preclude *Bivens* action against private prison employee); Akinsuroju v. Corr. Corp. of Am., No. CV 306-32, 2006 WL 2548075, at *3 (S.D. Ga. Sept. 1, 2006) (refusing to extend *Bivens* to private prison employee because alternative remedies exist); Brown v. Pugh, No. CV 306-25, 2006 WL 2439859, at *3 n.3 (S.D. Ga. Aug. 18, 2006); Kundra v. Johnson, No. H-06-710, 2006 WL 1061913, at *3 (S.D. Tex. Apr. 21, 2006) (assuming court has no jurisdiction over inmate's *Bivens* claim when alternative remedies available); *Peoples II*, No. Civ.A. 02-3298-CM, 2004 WL 2278667 (D. Kan. Mar. 26, 2004), *aff'd by an equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (en banc).

196. *Peoples II*, 2004 WL 2278667 (D. Kan. Mar. 26, 2004), *aff'd by an equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (en banc).

inmate's *Bivens* claims against a private prison's officials.[197] Peoples, a pretrial detainee, resided at Leavenworth, a federal prison operated by the Corrections Corporation of America (CCA).[198] Initially, CCA staff isolated Peoples because they believed he would flee.[199] While segregated, Peoples lacked access to the prison's law library and endured random monitoring of most of his communications.[200] After thirteen months, CCA staff released Peoples into the general inmate population, at which time he grew fearful that a prison gang would attack him.[201] He requested a transfer to another location within Leavenworth, but CCA staff refused to relocate him.[202] After the gang attacked Peoples, CCA staff refused to transfer him to another prison. Soon after, the gang struck again, attacking Peoples with chains, soda cans, and padlocks.[203]

Peoples sued CCA and its employees, alleging Fifth and Eighth Amendment violations.[204] The district court dismissed the *Bivens* suit against the individual defendants for failure to state a claim.[205] While the court arrived at its decision by assuming arguendo that Peoples could sue the officers under *Bivens*, it observed that "considering the restrictive standards the Supreme Court set forth for maintaining a *Bivens* action in *Malesko*, this court finds that it is unlikely plaintiff could maintain a *Bivens* action against the individual CCA employees, especially when alternative remedies are available to him."[206] The Tenth Circuit panel affirmed the district court's dismissal without reaching a majority opinion on the *Bivens* issue.[207] Rehearing the case *en banc*, the Tenth Circuit remained evenly divided on the same question and thus affirmed the district

197. *Id.* The plaintiff filed two complaints seeking damages under *Bivens*; the court dismissed the first for lack of subject matter jurisdiction and the second for failure to state a claim. Peoples v. CCA Det. Ctr. (*Peoples I*), No. 03-3129-KHV, 2004 WL 74317, at *7 (D. Kan. Jan 15, 2004) (dismissing case for lack of subject matter jurisdiction over inmate's *Bivens* claim), *rev'd* 449 F.3d 1097 (10th Cir. 2006) (en banc); *Peoples II*, No. Civ.A. 02-3298-CM, 2004 WL 2278667 (D. Kan. Mar. 26, 2004) (taking jurisdiction but dismissing inmate's *Bivens* suit for failure to state claim), *aff'd by an equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (en banc).

198. *Peoples I*, 2004 WL 74317, at *1, *rev'd* 449 F.3d 1097 (10th Cir. 2006) (en banc).

199. *Id.*

200. *Peoples II*, 2004 WL 2278667, at *4-6, *aff'd by an equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (en banc).

201. *Id.*

202. *Id.*

203. *Peoples I*, 2004 WL 74317, at *7-8.

204. *Peoples II*, No. Civ.A. 02-3298-CM, 2004 WL 2278667, at *1 (D. Kan. Mar. 26, 2004); *Peoples I*, No. 03-3129-KHV, 2004 WL 74317, at *1 (D. Kan. Jan. 15, 2004), *rev'd* 449 F.3d 1097 (10th Cir. 2006) (en banc).

205. *Peoples II*, 2004 WL 2278667, at *7; (dismissing *Bivens* suit for failure to allege facts supporting due process claim), *aff'd by an equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (en banc).

206. *Id.* at *4 (reading *Malesko* to limit *Bivens*'s applicability when alternative state law remedies available). The court assumed this point arguendo only because the Tenth Circuit had not yet considered whether private prison inmates were subject to *Bivens* suits. *Id.*

207. *See generally* Peoples v. CCA Det. Ctr., 422 F.3d 1090 (10th Cir. 2006) (limiting holding to plaintiff's failure to state claim upon which relief could be granted), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc).

court's ruling against Peoples.[208]

While the Tenth Circuit's panel opinion lacks precedential value, its thorough analysis—and the vigorous dissent—demand consideration. The panel opinion relied heavily on *Malesko*.[209] Shunning the "special factors" and "Congressional intent" tests common in early *Bivens* decisions, the panel focused on how alternative remedies affect a *Bivens* claim.[210] The panel held that where an alternative cause of action exists, whether based on state or federal law, an individual cannot recover under *Bivens*.[211] The panel affirmed the case's dismissal after identifying an alternative remedy in Kansas tort law, which enabled the plaintiff to sue prison guards in negligence for injuries caused by conduct unlawful under the Eighth Amendment.[212]

In dissent, Judge Ebel criticized the majority for allowing state-law remedies to preclude the plaintiff's *Bivens* claim.[213] Judge Ebel would not permit all state-law remedies to preempt *Bivens* claims.[214] Instead, he argued, the court should only allow a "constitutional cause of action," not state tort claims, to preempt a *Bivens* claim.[215] Echoing the *Sarro* court's reasoning, Judge Ebel contended that because state law remedies vary, a plaintiff who finds relief in one state's tort law might be shut out by another state's law.[216] Citing *Bivens*, Judge Ebel argued further that state tort remedies cannot regulate the citizen-federal agent relationship:

> a remedial scheme based on state tort law "[seeks] to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, [this approach] ignores the fact that power, once granted does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit

208. *See* Peoples v. CCA Det. Ctr., 449 F.3d 1097, 1099 (10th Cir. 2006) (en banc) (dividing on *Bivens* issue and affirming district court ruling).

209. *See generally* Peoples v. CCA Det. Ctr., 422 F.3d 1090 (10th Cir. 2005), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc).

210. *Id.* at 1099-1102 (exploring Supreme Court and lower court decisions in considering how alternative remedies affect *Bivens* claims).

211. *Id.* at 1103 (ruling existing state and federal law remedies bar *Bivens* claims against private prison officials).

212. *Id.* at 1103-05 (citing alternative remedies available to plaintiff under Kansas state law).

213. *Peoples*, 422 F.3d at 1109 (Ebel, J., concurring in part and dissenting in part) (criticizing majority for treating state tort action as "adequate remedy for constitutional violation").

214. *Id.* at 1108 (disagreeing with majority's reading of *Malesko*).

215. *Id.* at 1109 (rejecting majority's view deeming state law remedies adequate substitutes for *Bivens* recovery). Judge Ebel explained that the Supreme Court created *Bivens* because it concluded state law remedies were inappropriate tools for governing the unique relationship between private citizens and federal actors. *Id.* at 1109 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391-92 (1971)). Judge Ebel argued further the Supreme Court previously had allowed a *Bivens* claim even though the plaintiffs could have obtained relief against individual officers through state tort law. *Id.* at 1108-09 (citing Carlson v. Green, 446 U.S. 14, 24 (1980).

216. *See id.* at 1112-13 (noting, under majority's ruling, "standard of liability [will] depend on the varying contours of state law"); *see also* Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 63 (D.R.I. 2003) (arguing reliance on alternative state law remedies causes *Bivens*'s application to vary by state)

> unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[217]

To allay these concerns and circumvent state law vagaries, Judge Ebel suggested courts should subject federal officers to uniform *Bivens* liability irrespective of where the officers' alleged unconstitutional conduct occurred.[218]

Judge Ebel searched *Malesko* for support. First, he argued, the *Malesko* Court rejected the plaintiff's *Bivens* claim against the prison corporation because it "assum[ed] that . . . a [*Bivens*] remedy would be appropriate against the *employees* of [the] private prison."[219] Second, he contended that subjecting private prison officers to *Bivens* would promote the legal parallelism the Supreme Court sought in *Malesko*.[220] He wrote that the "important policy objective of promoting public-private symmetry" requires courts to permit privately held inmates, like publicly held inmates, to sue officers under *Bivens*.[221] Judge Ebel reasoned further that by extending *Bivens*, the court would deter private prison officers from acting unconstitutionally.[222] Last, he observed that the panel's majority "significantly undercut" *Bivens*'s "deterrent value" by replacing *Bivens*, which allows uncapped money damages against individual officers, with incomplete state law remedies that may offer limited recovery.[223]

Early in 2006, the Fourth Circuit joined the Tenth Circuit in shielding private prison officials from *Bivens* liability.[224] In *Holly v. Scott*,[225] the

217. *See* Peoples v. CCA Det. Ctr., 422 F.3d 1109 (10th Cir. 2005) (Ebel, J., concurring in part and dissenting in part) (citing *Bivens*, 403 U.S. at 391-92), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc) .

218. *Id.* at 1112-13.

219. *Id.* at 1110; *see* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) (establishing "only remedy" for constitutional deprivation "lies against the individual; a remedy . . . Malesko did not timely pursue.")

220. *See Peoples*, 422 F.3d at 1110-13 (Ebel, J., concurring in part and dissenting in part) (citing *Malesko*, 534 U.S. at 66-72).

221. *Id.* at 1112. Judge Ebel noted a tension in *Malesko* "between furthering public-private symmetry and state-federal symmetry." *Id.* at 1111. The *Malesko* majority rejected the plaintiff's *Bivens* claim against the private prison operator because it did not permit *Bivens* claims by federal prisoners against the BOP, which operates public prisons. *Id.* at 1110-11 (citing *Malesko*, 534 U.S. at 72). Conversely, the dissenting Justices in *Malesko* would have recognized the plaintiff's *Bivens* claim against the prison corporation—which they considered an agent of the government and, therefore, identical to a private individual—because state prisoners may sue private prison officers under § 1983. *Id.* at 1112 (citing *Malesko*, 534 U.S. at 81 (2001) (Stevens, J., dissenting)). Judge Ebel argued that recognizing an inmate's *Bivens* claim against an individual officer would resolve *Malesko*'s public-private and state-federal tensions by aligning the rights of state and federal prisoners and the rights of publicly and privately held prisoners. *See id.* at 1111-12 (comparing *Bivens* and § 1983 liabilities of state, federal, public, and private individuals and entities graphically).

222. *Id.* at 1113 (citing *Bivens*'s deterrence objective and reasoning *Bivens* liability would deter misconduct by private prisoner officers).

223. *Id.* at 1113 (noting inadequacy of state law relief).

224. *See* Holly v. Scott, 434 F.3d 287, 288 (4th Cir. 2006) (refusing to extend *Bivens* liability to private prison employees). The Fourth Circuit decided *Holly* after the Fifth Circuit's *Peoples* panel decision but before the en banc decision.

plaintiff, a federal inmate, lived at Rivers Correctional Institution, a BOP facility operated by GEO Group, Inc (GEO).[226] In his suit, he alleged the facility's warden and physician, both GEO employees, failed to provide adequate medical care in violation of the Eighth Amendment.[227]

Resurrecting the analysis common in earlier *Bivens* decisions, the *Holly* court refused to extend *Bivens* because of two "special factors counseling hesitation."[228] Like the *Peoples* court, the Fourth Circuit first identified several state-law remedies through which the plaintiff could pursue relief, such as negligence and medical negligence claims against the officials as well as a respondeat superior claim against GEO.[229]

The *Holly* court's second factor—"counseling hesitation"—implicated an issue *Peoples* and other courts ignored: whether private prison employees are "federal actors" for *Bivens* purposes.[230] The Fourth Circuit noted that although the *Malesko* Court did not answer this question expressly, its "logic rested in part on its conclusion that *Bivens* creates individual liability rather than corporate liability."[231] The Supreme Court has only extended constitutional remedies to circumstances involving state action or, in other words, conduct "fairly attributable to the state."[232]

Applying the "federal actors" test, the Fourth Circuit concluded that the prison officers' actions were not "fairly attributable" to the federal government because the officers were not "federal officials, federal employees, or even independent contractors in the service of the federal government. Instead, they

225. 434 F.3d 287 (4th Cir. 2006).

226. *Id.* at 288 (identifying plaintiff as inmate in privately run federal prison).

227. *Id.* (citing lack of adequate medical care as basis of plaintiff's suit against prison officials).

228. *Id.* at 290 (identifying government action and lack of other legal remedies as "special factors"); *see also supra* notes 107-108 and accompanying text (explaining "special factors" inquiry used in *Bivens* and its progeny).

229. *See Holly*, 434 F.3d at 296 (identifying available causes of action under North Carolina law).

230. *Id.* at 291 (finding lack of "occasion" by other courts for considering private citizen *Bivens* liability).

231. *Id.* at 291 n.2 (4th Cir. 2006) (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63-65 (2001)) (concluding *Malesko* does not answer whether *Bivens* creates private individual liability).

232. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (establishing test for determining state action); Holly v. Scott, 434 F.3d 287, 291-92 (4th Cir. 2006) (recognizing limit of state action doctrine on private persons' liability). The Supreme Court's *Lugar* decision concerned a § 1983 suit, but the *Holly* court extended the *Lugar* Court's reasoning to the *Bivens* context. *See Holly*, 434 F.3d at 291-92. In *Lugar*, the Supreme Court explained that

> [c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests . . . . Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State.

Lugar, 457 U.S. at 936-37.

are employed by . . . a private corporation."[233] The court buttressed its reasoning by noting the lack of governmental interest in the prison corporation.[234]

The Fourth Circuit invoked the legal parallelism objective to support its holding.[235] The court explained that qualified immunity enjoys identical characteristics under § 1983 and *Bivens*, and noted that the Supreme Court held previously that private prison employees do not enjoy qualified immunity in § 1983 suits.[236] Accordingly, the *Holly* court observed that extending *Bivens* would advantage private prison inmates over public prison inmates because their targets—the prison employees—could not raise a qualified immunity defense.[237] The Fourth Circuit rejected Holly's argument that the corporation's business, corrections, evinced sufficient "federal action" on the employees' part.[238] It cited the historical commingling of private and public entities in the corrections sector as evidence that the United States government does not lay exclusive claim to corrections.[239]

Judge Motz, concurring in *Holly*, rejected the majority's conclusion that private prison officials are not federal actors.[240] Specifically, she attacked the majority for relying on *Richardson v. McKnight*,[241] a § 1983 decision about qualified immunity, to decide a *Bivens* liability case.[242] Judge Motz contended that the Supreme Court, when it denied qualified immunity to private prison employees in *Richardson*, dealt only with "immunity from liability," not the employees' liability as governmental actors.[243] Judge Motz concurred in the

233. *See Holly*, 434 F.3d at 292 (explaining why defendants are not state actors).

234. *Id.*

235. *Id.* at 294.

236. *Id.* at 292-93 (citing Butz v. Economou, 438 U.S. 478, 504 (1978)) (drawing no distinction in qualified immunity law between § 1983 and *Bivens* suits); *see also* Richardson v. McKnight, 521 U.S. 399, 401 (1997) (holding, in § 1983 suit, private prison guards not entitled to qualified immunity).

237. *See* Holly v. Scott, 434 F.3d 287, 294 (4th Cir. 2006). The *Holly* court explained this "favorable position": "[the inmates] would be eligible to recover damages even where the unconstitutionality of the prison officials' conduct had not been clearly established by prior judicial decisions." *Id.*

238. *Id.* at 293.

239. *Id.*; *see also supra* notes 18-21 and accompanying text (explaining historical involvement of private entities in corrections).

240. *See id.* at 297 (Motz, J., concurring) (claiming majority "ignores or misreads" previous Supreme Court cases concerning state action).

241. 521 U.S. 399 (1997).

242. *Holly*, 434 F.3d at 299-300 ((Motz, J., concurring) (distinguishing *Richardson* decision, which addressed private party immunity from liability); *see* Richardson v. McKnight, 521 U.S. 399, 401 (1997) (holding private prison guards not entitled to qualified immunity under § 1983); *see also supra* note 92 (discussing *Richardson* holding).

243. *See* Holly v. Scott, 434 F.3d 287, 297 (4th Cir. 2006) (Motz, J., concurring). Judge Motz noted that Supreme Court remanded *Richardson* for findings about the officer's liability, but that it would not have done so had the Court intended its holding to extend to the question of liability. *Id.* at 300. Further, Judge Motz noted that numerous Supreme Court decisions support her conclusion that private prison employees are governmental actors for *Bivens* purposes. *Id.* at 297-99 (citing West v. Atkins, 487 U.S. 42 (1998); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Rendell-Baker v. Kohn, 457 U.S. 830 (1982)).

majority's opinion, however, because she endorsed its view that alternative remedies extinguished Holly's *Bivens* action.[244]

V. ANALYSIS

The *Holly*, *Peoples*, and *Sarro* decisions reveal confusion about whether *Bivens* case law supports extending the *Bivens* remedy to inmates held in private prisons.[245] Addressing this question, the lower courts confronted a near-impossible task; namely, reconciling the Supreme Court's *Malesko* decision with earlier *Bivens* decisions.[246] Under the rationale advanced in some of the Supreme Court's decisions, exposing private prison employees to *Bivens* suits appears permissible because it would create legal symmetry and honor the remedy's deterrent function.[247] Conversely, the court's holding in *Malesko* precludes these claims because of the variety of state-law and administrative remedies private-prison inmates may invoke.[248]

Only federal actors are susceptible to *Bivens* suits, and the Supreme Court will likely conclude that private-prison employees meet this requirement. Though lower courts have not considered the issue extensively in the *Bivens* context, they agree that private prison employees are state actors for purposes of § 1983.[249] The Supreme Court assumed as much in *Malesko* when it observed, without further discussion, that inmates held in private prisons "already enjoy a right of action against private correctional providers" under § 1983.[250] This assertion, considered in light of the prevailing view that § 1983 and *Bivens* are analogs, supports the inference that private prison employees are "federal actors" under *Bivens*.[251]

Though *Malesko* supplies evidence that the Court would find state action in a *Bivens* suit against a private prison employee, the case's sweeping view of preemptive alternative remedies erects a virtual gauntlet that no *such* claim could survive.[252] The holding departs substantially from earlier *Bivens*

244. *See id*. at 297, 303 (agreeing *all* alternative remedies, "[c]onstitutional and otherwise," displace *Bivens*) (citing Schweiker v. Chilicky, 487 U.S. 412 (1988); Bush v. Lucas, 462 U.S. 367 (1983)).

245. *See supra* Part IV (summarizing *Sarro*, *Peoples*, and *Holly* courts' disagreement about whether *Bivens* extends to private prison employees).

246. *See infra* text accompanying notes 247-259 (explaining Court's *Bivens* decisions both support and undermine exposing private prison employees to *Bivens* claims).

247. *See infra* notes 263-277 and accompanying text (arguing deterrence and legal symmetry rationales support extending *Bivens*)

248. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 73-74 (2001) (discussing sufficient federal, state, and administrative remedies available to private prison inmate).

249. *See supra* note 91 (citing § 1983 cases concluding private prison firms and employees state actors).

250. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 n.5 (2001); *see also* supra note 92 (discussing denial of qualified immunity without deciding state employee status in Richardson v. McKnight, 521 U.S. 399, 412, 413 (1997)).

251. *See supra* notes 86-87 and accompanying text (citing cases describing *Bivens* and § 1983 as analogous remedies).

252. *See Malesko*, 534 U.S. at 70 (cataloguing "effective" state law and administrative remedies plaintiff

decisions.[253] Specifically, the Court in earlier cases allowed plaintiffs to pursue *Bivens* claims even though plaintiffs may have also invoked state-law remedies. In *Bivens* and *Carlson*, for example, the Court recognized *Bivens* claims even though state tort claims may have redressed the plaintiffs' injuries.[254] Further, prior to *Malesko*, the Supreme Court suggested that not all state-law remedies were adequate substitutes for *Bivens*.[255] The *Malesko* Court contradicted this precedent by allowing a host of alternative remedies to bar an inmate's claim for damages under *Bivens*.[256]

Further, *Malesko* presents inconsistent views about whether inmates may sue private prison employees under *Bivens*. Initially, the *Malesko* majority noted that the respondent could have sued CCA's employee under *Bivens*, thus suggesting it would have accepted that claim had he pursued it.[257] Justice Stevens, in dissent, observed that

> [b]oth CSC [the defendant prison corporation] and respondent have assumed *Bivens* would apply to these individuals, and the United States as *amicus* maintains that such liability would be appropriate under *Bivens*. It does seem puzzling that *Bivens* liability would attach to the private individual employees of such corporations—*subagents* of the Federal Government—but not to the corporate agents themselves. However, the United States explicitly maintains this to be the case, and the reasoning of the Court's opinion relies, at least in part, on the availability of a remedy against employees of private prisons.[258]

In barring the respondent's claim against CCA, the majority explained that the respondent could remedy his injury through state law, BOP administrative channels, or a federal suit for injunctive relief.[259] This latter point, however, frustrates the former because inmates who sue private prison employees under *Bivens* have access to the same alternative remedies that precluded the respondent's *Bivens* claim against CCA.[260] Thus, had the *Malesko* respondent

may employ to redress constitutional injury); *supra* text accompanying notes 141-149 (explaining *Malesko* test and Court's willingness to allow alternative remedies to displace *Bivens* claims).

253. *See supra* notes 145-151 and accompanying text (explaining how *Malesko* departs from earlier Supreme Court cases concerning *Bivens*); *supra* notes 152-156 and accompanying text (summarizing Justice Stevens's criticism of *Malesko* decision).

254. *See* Carlson v. Green, 446 U.S. 14, 18-20 (1980) (extending *Bivens* despite availability of FTCA claim against government); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (allowing damages action against federal agents despite availability of state tort remedies).

255. *See Bivens*, 403 U.S. at 394 (reasoning that the separate interests state laws and the Constitution protect may be "hostile or inconsistent"); *see also Carlson*, 446 U.S. at 23 (asserting Congress should decide whether "vagaries of [state law]" should control suits alleging constitutional violations).

256. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72-73 (2001) (explaining remedies respondent may pursue to vindicate alleged constitutional injury).

257. *See* id. at 72 ("[w]ith respect to the alleged constitutional deprivation, his only remedy lies against the individual . . . which respondent did not timely pursue").

258. *Id.* at 79 n.6 (Stevens, J., dissenting).

259. *Id.* at 74 (majority opinion). The Court explained that "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id.*

260. *See supra* notes 75-82 and accompanying text (cataloguing state law and administrative remedies

sued CCA's *employees* under *Bivens* as the Court suggested, his claim would have been barred by the same alternative remedies that blocked his claim against CCA.[261] This result appears untenable because it contradicts the "logic" on which the Court relied when it barred the respondent's claim against CCA.[262]

Given the inconsistencies *Malesko* poses, decisions about whether inmates may sue private prison employees under *Bivens* should not turn on it alone. Other Supreme Court *Bivens* decisions advance considerations that favor allowing private prison inmates to sue prison employees under *Bivens*.[263] For instance, subjecting private prison employees to *Bivens* suits would further the remedy's deterrent function. Employees who face the financial consequences a *Bivens* action may impose—namely the prospect of paying compensatory and punitive damages—are less likely to violate inmates' constitutional rights.[264] The Supreme Court has repeated this "deterrence" mantra in nearly every *Bivens* opinion it issues, providing further evidence that the deterrent function weighs heavily in the Court's mind in cases seeking an extension of *Bivens*.[265] Recently, the Court in *Malesko* reaffirmed that "*Bivens* from its inception has been based . . . on the deterrence of individual officers who commit unconstitutional acts."[266] The *Sarro* court recognized that extending *Bivens* to private prison employees would deter unconstitutional conduct.[267] The *Holly* court disregarded the deterrence rationale, contending that it does not apply in the absence of state action.[268] The *Holly* court's reasoning is unpersuasive, though, because it relies on an incorrect conclusion that private prison

inmates may invoke to challenge conditions of confinement).

261. *Malesko*, 534 U.S. at 74 (citing administrative and federal remedies private prison inmates may invoke against prison corporations).

262. *See* Holly v. Scott, 434 F.3d 287, 291 n.2 (4th Cir. 2006) (agreeing that the rationality of *Malesko* depends on the availability of a *Bivens* suit against private prison employee). Even the Fourth Circuit, which rejected an inmate's *Bivens* claim against private prison employees, acknowledged that the *Malesko* decision's "logic rested in part on its conclusion that *Bivens* creates individual liability rather than corporate liability." *Id.*

263. *See supra* notes 117-139 and accompanying text (summarizing factors Supreme Court considers when deciding whether to extend *Bivens* to new contexts).

264. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71-72 (2001) (summarizing Supreme Court precedent explicating *Bivens*'s deterrence function); *supra* notes 124-130 and accompanying text (explaining threat of *Bivens*'s financial consequences deters individuals from acting unconstitutionally).

265. *See, e.g.*, *Malesko*, 534 U.S. at 70 (explaining "purpose of *Bivens* is to deter individual officers from committing constitutional violations"); FDIC v. Meyer, 510 U.S. 471, 485 (1994) (same); Carlson v. Green, 446 U.S. 14, 21 (1980) (same).

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

267. *See* Sarro v. Cornell Corrections, Inc., 248 F. Supp. 2d 52, 62-63 (D.R.I. 2003) (explaining prospect of *Bivens* liability deters private prison employees from acting unconstitutionally); *see also* Peoples v. CCA Det. Ctr, 422 F.3d 1090, 1111 (10th Cir. 2005) (reasoning state tort damages accomplish *Bivens*'s deterrence effect), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc); Jama v. U.S. I.N.S., 343 F. Supp. 2d 338, 363 (D.N.J. 2004) (following *Sarro*).

268. *See* Holly v. Scott, 434 F.3d 287, 291 (4th Cir. 2006) (arguing deterrence rational inapplicable because private prison employees not governmental actors); Alba v. Montford, No. CV 305-159, 2006 WL 2085432, at *4 (S.D. Ga. July 24, 2006) (same).

employees do not exercise government action for *Bivens* purposes.[269] Assuming private prison employees constitute federal actors under *Bivens*, subjecting them to the threat of damages would promote constitutional conduct to the same degree the Supreme Court sought when it confronted the Federal Bureau of Narcotics agents' misconduct in the original *Bivens* case.

Moreover, extending *Bivens* to private prison employees would create legal symmetry between the rights of state and federal private prison inmates, as well as federal public and private prison inmates.[270] The need for symmetry derives from *Malesko*, in which the Supreme Court underscored its preference for imposing parallel liabilities on defendants in constitutional tort actions.[271] Though the *Malesko* majority and dissent disagreed on whether the plaintiff could sue the prison corporation under *Bivens*, both agreed that legal symmetry should inform the result.[272] Their disagreement centered only on the nature of the symmetry, whether along private-public or state-federal lines.[273] Allowing a private prison inmate to sue prison employees under *Bivens* would create symmetry along *both* axes.[274] First, it would align the rights of state and federal inmates because state inmates may currently sue employees of private prisons under § 1983.[275] Second, it would align the rights of federal public and private inmates because federal inmates may sue public prison employees under *Bivens*.[276] Ruling otherwise would create asymmetrical legal rights among inmates held in private prisons, a result the *Malesko* Court deemed unacceptable.[277]

269. *See supra* notes 249-251 and accompanying text (arguing, contrary to *Holly* court's findings, private prison employees are considered federal actors for *Bivens* purposes).

270. *See supra* notes 131-139 and accompanying text (explaining Supreme Court's preference for legal symmetry support extending *Bivens*); *supra* text accompanying notes 220-221 (same).

271. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) (asserting Congress should decide whether private prisons should face "asymmetrical liability costs"); *id.* at 82 (Stevens, J., dissenting) (observing parallelism necessary to avoid subjecting claims against state and federal actors to different standards); *see also Peoples*, 422 F.3d at 1111 (Ebel, J., concurring in part and dissenting in part) (arguing full Court sought legal symmetry when considering plaintiff's *Bivens* claim against prison corporation), *vacated in part on reh'g by* 449 F.3d 1097 (10th Cir. 2006) (en banc).

272. *See Malesko*, 534 U.S. at 71 (reasoning symmetry supports rejecting plaintiff's *Bivens* claim); *id.* at 81-82 (Stevens, J., dissenting) (arguing symmetry requires Court to recognize plaintiff's *Bivens* claim); *see also supra* note 221 (explaining Justices' parallelism-based reasoning for rejecting or accepting plaintiff's *Bivens* claim).

273. *See Malesko*, 534 U.S. at 71 (seeking public-private symmetry); *id.* 81-82 (Stevens, J., dissenting) (urging state-federal symmetry).

274. *See* Peoples v. CCA Det. Ctr, 422 F.3d 1090, 1110-12 (10th Cir. 2005) (Ebel, J., concurring in part and dissenting in part) (explaining how extending *Bivens* would align liabilities along public-private and state-federal lines).

275. *See supra* note 174 and accompanying text (citing cases holding state inmates may sue private prison employees under § 1983).

276. *See supra* note 170 and accompanying text (explaining federal inmates' right to invoke *Bivens* against federal officials).

277. *See supra* notes 131-138 and accompanying text (explaining Court's preference for imposing symmetrical legal liabilities).

VI. CONCLUSION

In recent years, the federal government has relied increasingly on private corporations to accommodate its expanding prison population. These companies, with vast capital resources and logistical expertise, provide service at a level of sophistication and efficiency that the government's own corrections agency cannot match. Observers contend, however, that prison corporations cannot pay equal allegiance to government customers, shareholders, and the inmates they incarcerate. Instead, private prison inmates endure less-than-constitutional conditions as prison managers streamline costs to please investors and fill more beds.

In light of the corrections industry's rise and the growing number of federal inmates held in private prisons, the lack of clarity about these inmates' legal options is disconcerting. The *Bivens* remedy affords inmates who sustain constitutional injury unparalleled access to complete relief in the federal forum. Yet, in a growing number of jurisdictions, inmates must settle for something less, namely inadequate relief in state court or before administrative bodies. Lower courts interpret *Malesko* as literally barring *Bivens* claims against private prison employees whenever alternative remedies *of any type* exist. These courts reject *Bivens* claims while overlooking strong policy reasons that support extending liability to private prison employees. Without Supreme Court intervention on this issue, the District of Rhode Island's decision in *Sarro* seems destined to become a curiosity.

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