THE CIRCUIT SPLIT CREATED BY POLLARD V. GEO GROUP, INC.: THE DANGERS OF ALLOWING A BIVENS ACTION WHERE ADEQUATE ALTERNATIVE STATE REMEDIES EXIST

Student Note

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I. INTRODUCTION

"[T]he States . . . expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution."[1] The above quotation is from the preamble to the Bill of Rights of the United States Constitution. The Bill of Rights was amended to the Constitution to further ensure the protection of citizens' rights against governmental infringement.[2] A large influence on the

[1] U.S. CONST. BILL OF RIGHTS pmbl.

[2] 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, 401 (2003).

drafters of the Bill of Rights was Sir William Blackstone, who deemed personal security, personal liberty and personal property as absolute rights.[3] These ideas are also present in James Madison's writings on property.[4] Madison defined property broadly, stating that:

> In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right . . . . [A] man has a property in his opinions, and the free communication of them. He has a property of peculiar value in his religious opinions . . . . He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties, and free choice of the objects on which to employ them. . . . Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions. . . . Government is instituted to protect property of every sort.[5]

While our Bill of Rights embodies these ideas, our history shows the government has nonetheless infringed upon these rights. However, these rights were only intended to be "a check on the government" as opposed to being an avenue for citizens to haul the government into court for individual violations of such rights.[6]

Congress did provide some remedy for the violation of these constitutional rights in 42 U.S.C § 1983; however, its application is limited to suits against the states and does not extend liability

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[3] David C. Grossack, *Suing Your Federal Government for Civil Rights Violations*, CONST. BUS. (Citizen's Just. Programs, Mass.) 1994, *available at* http://www.constitution.org/grossack/bivens.htm.

[4] James Madison, Property, *in* 14 THE PAPERS OF JAMES MADISON, 266-68 (William T. Hutchinson et al. eds., Univ. Press of Virginia 1962).

[5] *Id.*

[6] *See* Robeda, *supra* note 2, at 401 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402 n.3 (1971)).

to federal government actors.[7] Before 1971, a dilemma of this nature existed in regard to the inability to hold federal actors liable for constitutional violations, therefore providing no compensation for the victims of these actors.[8] This created a gap between rights and remedies,[9] but without remedies, rights are virtually insignificant.[10] Rights and remedies are closely related: "[w]ithout an available and enforceable remedy, a right may be nothing more than a nice idea."[11] Therefore, "any meaningful discussion of rights . . . must focus on remedies available to implement the rights."[12]

It was not until 1971, when the United States Supreme Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[13] that a constitutional violation by a federal employee could sustain a cause of action for monetary damages in federal court, finally granting a remedy for a violation of the rights mentioned above.[14] These causes of action are now known as *Bivens* actions, and without them, the ability to hold federal actors personally liable for violations of constitutional rights is greatly limited due to the immunity they generally enjoy.[15] It was this judicially created cause of action that began to close the right-remedy gap.[16] But, where lies the basis for creating such a cause of action? There is no express or

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[7] 42 U.S.C. § 1983 (1996); *see also* Grossack, *supra* note 3.

[8] *See* Grossack, *supra* note 3; David W. Lee, Handbook of Section 1983 Litigation 26-28 (2009).

[9] John C. Jefferies, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87 (1999).

[10] Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 735-36 (1992).

[11] *Id.*

[12] *Id.* at 736.

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

[14] *Id.*

[15] Grossack, *supra* note 3.

[16] *See* Friedman, *supra* note 10, at 751-52.

implied authority for such an action in the Constitution or any statute; instead, it is an implied cause of action created by the courts.[17]

The *Bivens* decision had a tremendous impact on federal government accountability, and rightfully so, for every wrong should be remedied, especially when the actor "possesses a far greater capacity for harm" as is the case with federal employees.[18] While the ability to hold federal actors personally accountable is an invaluable tool to protect constitutional rights, it is also a powerful tool that must be limited, as noted by post-*Bivens* decisions.[19] *Bivens* actions have been applied to only three constitutional amendments thus far: the Fourth, Fifth and Eighth Amendments.[20] In addition, it is not only the holding of *Bivens* that is interesting, but the conditions the Court placed on this new implied cause of action as well. While it has been noted that every right should have a remedy when violated, the Court refused to create an absolute right in this case.[21] Instead, the remedy was granted based on two conditions: an absence of factors counseling hesitation and the lack of an adequate alternative remedy created by Congress.[22]

Initially, it was understood that only congressionally created alternative remedies could bar a *Bivens* claim.[23] The justification for this limit was that state law may be inconsistent with or hostile to constitutional rights[24] and that state courts may fail to enforce the law "by reason of prejudice, passion,

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[17] *See* SHRIVER CTR., FED. PRACTICE MANUAL FOR LEGAL AID ATTORNEYS, § 5.2 (2011) [hereinafter FED. MANUAL], *available at* http://federalpracticemanual.org/node/30.

[18] *Bivens*, 403 U.S. at 392.

[19] *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); Schweiler v. Chilicky, 487 U.S. 412 (1988); Bush v. Lucas, 462 U.S. 367 (1983).

[20] FED. MANUAL, *supra* note 17, at § 5.2.A.

[21] Friedman, *supra* note 10, at 752.

[22] *Id.*

[23] *Bivens*, 403 U.S. at 401-02.

[24] *Id.* at 394.

neglect, [or] intolerance."[25] However, these ideas now have little validity in today's society, which is why state law has had increasing relevance in the realm of constitutional torts. As a result, the evolution of the Supreme Court's interpretation of *Bivens* has now come to generally accept certain state remedies as adequate alternatives that may displace a *Bivens* action as well.[26] Subsequent decisions by the Fourth and Eleventh Circuit Courts of Appeals have followed this rationale and precluded *Bivens* actions where an adequate alternative state remedy is available to the plaintiff.[27] However, the recent decision in *Pollard v. Geo Group, Inc.*[28] by the Ninth Circuit Court of Appeals has created a circuit split on the issue, finding that adequate state remedies do not preclude *Bivens* claims.[29]

This note will examine the *Bivens* doctrine and how it has changed over the past forty years, up until the circuit split created by *Pollard*. Part II discusses the history of the doctrine, including the rationales and justification for the implied cause of action, as well as the expansions and limitations on the claim. Part III will then explore a new limit on *Bivens*: the possibility of displacing the doctrine with adequate alternative state remedies. Part IV examines how circuit courts have interpreted the *Bivens* doctrine, and Part V provides an analysis of the interpretation by the different circuits. Finally, Part VI provides recommendations of how *Pollard* should have been decided, along with future *Bivens* claims in which state remedies are available. Part VII contains conclusory comments.

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[25] Monroe v. Pape, 365 U.S. 167, 180 (1961).

[26] *See* Robeda, *supra* note 2, at 414-15.

[27] *E.g.*, Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (holding that the inquiry into whether a *Bivens* action will be sustained requires the Court to determine if "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy to damages").

[28] Pollard v. Geo Group, Inc., 607 F.3d 583 (9th Cir. 2010).

[29] *Id.* at 588.

II. HISTORY OF THE *BIVENS* ACTION

A. BIVENS V. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS

Bivens, as previously stated, is the 1971 case in which the Supreme Court created the implied cause of action for individuals whose constitutional rights had been violated by federal actors.[30] This meant that individuals could now sue for these violations directly under the Constitution itself, holding the actors personally liable.[31] In *Bivens*, Federal Bureau of Narcotics agents, acting in their capacity as federal agents, entered the home of Webster Bivens without a warrant and proceeded to search his home and arrest him in front of his wife and children.[32] After suffering humiliation and embarrassment, Bivens brought suit in Federal District Court for the violation of his Fourth Amendment right against unreasonable search and seizure.[33] The District Court dismissed Bivens' suit for failure to state a claim because, traditionally, the Fourth Amendment did not provide a recognized cause of action, and the Court of Appeals affirmed this decision.[34] On appeal, however, the Supreme Court found that Bivens could, in fact, bring an action based on a violation of the Fourth Amendment itself.[35]

The Court found federal jurisdiction for the action "through a particular remedial mechanism normally available in the federal courts."[36] As a matter of fact, jurisdiction may be justified under 28 U.S.C. § 1331, granting district courts original jurisdiction for

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[30] *Bivens*, 403 U.S. at 388.

[31] *See* Note, Bivens *Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251, 1251 (1988).

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

[33] *Id.* at 389-90; U.S. CONST. amend. IV.

[34] *Bivens*, 403 U.S. at 390.

[35] *Id.* at 397.

[36] *Id.*

issues of federal question.[37] The Court also advanced several reasons for creating the implied cause of action. First, it noted that "[a]n agent acting-albeit 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."[38] In other words, a federal actor has the means to impose greater harm than a private individual, and therefore some remedy should exist for victims of such federal actors. Also, regarding private individuals, the Court noted, "[o]ur cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law."[39] Furthermore, the Court recognized that damages have historically been "regarded as the ordinary remedy for an invasion of personal interests in liberty."[40]

While the Court noted that in some instances state tort law might provide an avenue for compensation, it still proceeded with creating the federal cause of action due to the notion that state laws were insufficient and "may be inconsistent or even hostile."[41] While it will later be discussed that these fears are no longer material, it is this rationale that has led to the controversy among the courts as to whether state remedies can preclude *Bivens* actions. Nevertheless, the Court noted

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[37] 28 U.S.C. § 1331; *See also* Michael A. Rosenhouse, Bivens *Actions – United States Supreme Court Cases*, 22 A.L.R. Fed. 2d 159, I § 3 (2011).

[38] *Bivens*, 403 U.S. at 392.

[39] *Id.*

[40] *Id.* at 395.

[41] *Id.* at 394. The reluctance to rely on state law in *Bivens* seems to be linked to the specific state remedy available in the case, the state tort law for trespass, and not to state tort law in general. The Court specifically names trespass and invasion of privacy laws as those that may be inconsistent or hostile. In explaining its reasoning, the Court stated that a private citizen, lacking any authority, will not be liable for trespass if he is ultimately granted entry. However, "[t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry . . . and a claim of authority to enter is likely to unlock the door as well." In such instances, the citizen has no safety. "There remains to him but the alternative of resistance, which may amount to crime." *Id.* at 394-95.

that"[f]or people in Bivens' shoes, it is damages or nothing."[42] *Bivens* actions are important for several reasons: to hold federal employees personally liable for civil rights violations and encourage deterrence of such behavior, to expand relief where it is otherwise limited, and to grant monetary damages for constitutional violations committed by federal actors. However, the decision still captures the tension that exists between "the principle of the self-executing Constitution and the principle of deference to Congress and state law."[43]

B. EXPANSION OF THE *BIVENS* ACTION

Since the *Bivens* decision, the Court has been reluctant to expand the remedy. In fact, it has only been expanded twice to also include the Fifth and Eighth Amendments.[44] However, at the time of its expansion, it appeared that a constitutional recovery of damages under *Bivens* would almost be automatic. The first expansion came in 1979 with the Supreme Court decision in *Davis v. Passman*.[45] Davis, a former employee of Congressman Passman, alleged that Passman violated her Fifth Amendment right to equal protection under the Due Process Clause by firing her based on Passman's preference that a man hold the position.[46] The Court followed the Bivens rationale and found that Davis had "no effective means other than the judiciary to vindicate these rights"[47] and could sue directly under the Fifth Amendment.[48] "For Davis, as for Bivens, 'it is damages or nothing.'"[49] It is this factor that weighed heavily in

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[42] *Id.* at 410.

[43] Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 291 (1995).

[44] *See* Robeda, *supra* note 2, at 409-12.

[45] Davis v. Passman, 442 U.S. 228 (1979).

[46] *Id.* at 230.

[47] *Id.* at 243.

[48] *Id.* at 248-49.

[49] *Id.* at 245.

both Bivens and Davis. The Court also noted that "[i]n appropriate circumstances a federal district court may provide relief in damages for violations of constitutional rights if there are 'no special factors counseling hesitation in the absence of affirmative action by Congress.'"[50] Here, again, emphasis was placed on the lack of a congressional remedy, as opposed to a state remedy, which allows the Bivens action to proceed if there are no hesitating factors.

Finally, in 1980, the Supreme Court again expanded *Bivens*, this time to include the Eighth Amendment.[51] In *Carlson v. Green*, a mother brought suit in district court on behalf of her deceased son, who allegedly suffered injuries resulting in his death due to federal officers violating his Due Process, Equal Protection and Eighth Amendment rights.[52] However, the *Bivens* remedy here was not granted on the "damages or nothing" rationale that *Bivens* and *Davis* had been.[53] The Plaintiff could have brought a suit against the United States under the Federal Tort Claims Act (FTCA); however, the Court found this remedy to be inadequate.[54] In addition to the factors used in *Bivens* and *Davis*—factors counseling hesitation and an alternative remedy from Congress—the Court outlined four additional factors to be used in the analysis as to whether the FTCA would suffice as an alternative remedy to displace a *Bivens* action.[55] First, the Court stated that a *Bivens* remedy should serve as a deterrent, and because a claim under the FTCA is against the United States, it is not as effective in deterring individual actors as a *Bivens* remedy.[56] Second, it was noted that punitive damages are available in *Bivens* actions but not FTCA actions, and therefore provide better compensation.[57]

[50] *Id.* (quoting *Bivens*, 403 U.S. at 396).

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

[52] *Id.* at 16.

[53] *See Davis*, 442 U.S. at 245.

[54] *Carlson*, 446 U.S. at 28.

[55] *Id.* at 20.

[56] *Id.* at 21.

[57] *Id.* at 22.

Third, a jury trial is available with a *Bivens* suit but not with the FTCA.[58] Finally, the Court stated liability for constitutional violations should be governed by uniform federal rules.[59] Therefore, because the remedy available to the Plaintiff would hold the government and not the individual actors responsible for the injuries, it did not comport with the purpose of *Bivens* claims.[60]

It is important to note that *Carlson* should not be interpreted to mean that a *Bivens* action would prevail regardless of the existence of an alternative remedy. Instead, it should be taken to mean that when an available remedy exists, a *Bivens* claim would only be allowed against the individual actors if that remedy were inadequate to compensate the victim.[61] If such an alternative adequate remedy does exist, however, a claim under *Bivens* would not be appropriate. Regardless, after *Carlson*, the trend began to change, in the Court's opinion, on the availability of a *Bivens* remedy, especially in the instance of an alternative remedy. To understand the origins of this idea, it is important to discuss the dissenting opinions in the *Bivens* jurisprudence until this point, for it was these dissenting opinions that would foreshadow the future limitations applied to the doctrine.[62]

C. THE DISSENTERS

After the *Bivens*, *Davis* and *Carlson* opinions, it appeared that *Bivens* would be an ever-expanding remedy for constitutional violations by federal officials. However, the concerns expressed in the dissents of these opinions would soon begin to rein in the Court's willingness to expand such a remedy. As these dissenters saw it, such implied causes of action for

[58] *Id.*

[59] *Id.* at 23.

[60] *Carlson*, 446 U.S. at 21.

[61] *Id.* at 21-22.

[62] *See* Robeda, *supra* note 2, at 409.

constitutional violations are at odds with the separation of powers, equating to "judicial legislation."[63]

Much of the dissenters' opinions involved the concern that allowing a *Bivens* action would exceed the Court's power as designated in the Constitution and impinge on the functions of Congress.[64] Furthermore, in his dissent in *Bivens,* Justice Black pointed out "the fatal weakness in the Court's judgment is that neither Congress nor the State . . . has enacted legislation creating such a right of action."[65] His mentioning of an act of the State in creating a right of action suggests the idea that a state remedy may displace a *Bivens* action. Additionally, Chief Justice Burger noted in his dissent in *Carlson* that the FTCA was, in fact, an adequate remedy, which should have ended the matter.[66] It was his understanding of *Bivens* that the remedy "was limited to those circumstances in which a civil rights plaintiff had no other effective remedy."[67] He went on to say that "[n]ow it would seem that implication of a *Bivens*-type remedy is permissible even though a victim of unlawful official action may be fully recompensed under an existing statutory scheme" and that the Court would have to retreat from the language of this decision in the future.[68]

Another concern that the dissenters expressed was that of over-burdening the federal courts. The United States courts are "choked with lawsuits" and the Supreme Court docket is at an

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[63] *Bivens*, 403 U.S. at 430 (Blackmun, J., dissenting). *See also id.* at 412 (Burger, C.J., dissenting) ("Legislation is the business of the Congress, and it has the facilities and competence for that task - as we do not.").

[64] *See, e.g., id.* at 418 (Burger, C.J., dissenting) (stating that the Court's decision was "impinging on the legislative and policy functions that the Constitution vests in Congress."); Davis v. Passman, 442 U.S. 228, 249 (1979) (Burger, C.J., dissenting) ("[T]he case presents very grave questions of separation of powers . . . . Congress could . . . make *Bivens*-type remedies available . . . but it has not done so."); *Carlson*, 446 U.S. at 34 (Rehnquist, J., dissenting) ("[I]t is an exercise of power that the Constitution does not give us.") (internal quotation and citation omitted).

[65] *Bivens,* 403 U.S. at 428 (Black, J., dissenting).

[66] *Carlson,* 446 U.S. at 30 (Burger, C.J., dissenting).

[67] *Id.* at 31.

[68] *Id.*

"unprecedented volume."[69] Furthermore, as Black noted in his *Bivens* dissent, the number of frivolous lawsuits has risen, specifically against law enforcement officers, and the task of "poring over hundreds of thousands of pages of factual allegations" is very time-consuming.[70] Justice Blackmun legitimated this concern in his dissent as well, noting that the Court's decision "opens the door for another avalanche of new federal cases."[71]

The concerns expressed in the dissenters' opinions above would prove to be a glimpse into what would come in the *Bivens* jurisprudence.[72] After *Carlson*, opinions shifted and no longer would the Court expand the *Bivens* remedy. Instead, limitations were set, relying on the dissenters' concerns expressed above. As Justice Rehnquist noted, "Bivens is a decision 'by a closely divided court, unsupported by the confirmation of time,' and, as a result of this weak precedential and doctrinal foundation, it cannot be viewed as a check on 'the living process of striking a wise balance between liberty and order . . . ."[73]

D. THE *BIVENS* LIMITATIONS

Looking solely at these early cases, the majority opinions appear to indicate that *Bivens* remedies would be "broadly available to fill gaps in federal damage remedies."[74] However, the Court's unwillingness to allow this to happen is apparent in the cases that followed, as they consistently began to restrict the scope of the remedy.[75] The once sweeping view of the *Bivens*

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[69] *Bivens*, 403 U.S. at 428 (Black, J., dissenting).

[70] *Id.*

[71] *Bivens*, 403 U.S. at 430 (Blackmun, J., dissenting) ("Whenever a suspect imagines . . . that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court. This will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical.").

[72] *See* Robeda, *supra* note 2, at 408.

[73] *Carlson*, 446 U.S. at 32.

[74] FED. MANUAL, *supra* note 17, at § 5.2.A.2.

doctrine expressed in earlier decisions has now been drastically restricted.[76]

The limit of *Bivens* began with *Bush v. Lucas* where a federal employee sued his employer for violating his First Amendment rights after the employee was demoted in both position and pay after exercising his right to speak on a public matter.[77] Despite the fact that the remedies available to the plaintiff would not provide complete relief, the Court refused to expand *Bivens* where Congress had already created a "comprehensive scheme" for settling such issues.[78]

The Court reasoned that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees"[79] and that it would be inappropriate to supplement such a scheme by creating a new judicial remedy.[80] Coming to such a decision, while noting that a *Bivens* claim may provide better compensation to the plaintiff,[81] suggests that the Court does not require an equal remedy to displace *Bivens*, but instead, merely an adequate one. This complies with the *Carlson* opinion, which specifically noted the inadequacy of the alternative remedy.[82]

This concept was later employed in *Schweiker v. Chilicky*, in which the Plaintiff claimed a Fifth Amendment violation for what he perceived as the inappropriate termination of his Social Security benefits.[83] Here again, the Court denied expanding

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[75] *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 378 (1983) (denying a *Bivens* claim by a federal employee against his employer for a First Amendment violation because Congress had already created a remedy, even though the remedy would not fully compensate the employee).

[76] *See* Robeda, *supra* note 2, at 404.

[77] *Bush*, 462 U.S. at 367.

[78] *Id.* at 385.

[79] *Id.* at 389.

[80] *Id.* at 368.

[81] *Id.* at 373.

[82] *Carlson*, 446 U.S. at 28.

[83] *Id.*

Bivens when Congress had already acted, even when the remedy provided by Congress was not equal to what a *Bivens* remedy would provide.[84] Thus, as Justice O'Connor pointed out in the majority opinion, when Congress creates what it perceives as an adequate remedy, a *Bivens* action will not be granted.[85] As this hesitation to expand *Bivens* continued, it appeared that the once adamant dissenters would prevail in greatly limiting the doctrine on the basis of an adequate remedy provided for by Congress; however, future decisions would also provide for the possibility of displacing a *Bivens* action on the basis of an adequate alternative state remedy as well.

III. EXPLORING THE POSSIBILITY OF ADEQUATE ALTERNATIVE STATE REMEDIES AS A BAR ON *BIVENS* CLAIMS

Until this point, the courts had only considered congressional remedies as a means of displacing *Bivens* actions; however, the possibility of displacing *Bivens* with state remedies as well was about to take hold. This stemmed from the concern that the doctrine would become too broad and encroach on the separation of powers. Therefore, a *Bivens* action should be limited to cases where no other remedy existed, whether create by Congress or a state.[86]

A. CORRECTIONAL SERVICES CORP. V. MALESKO

The idea that a *Bivens* claim could be displaced by any alternative adequate remedy, as opposed to solely a congressionally created one, was most likely first planted by the Supreme Court in 2001 in *Correctional Services Corp. v. Malesko,* making it a significant case in the *Bivens*

[84] Schewiker v. Chilicky, 487 U.S. 412, 425 (1988) ("Here, exactly as in *Bush*, Congress has failed to provide for 'complete relief'. . . . The creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed. Congress, however, has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were.").

[85] *Id.* at 423.

[86] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001).

jurisprudence. Not only did the *Malesko* Court deny an expansion of the *Bivens* doctrine, it also went out of its way to express a desire to limit it.[87] The Court was faced with the issue of whether to allow an Eighth Amendment *Bivens* claim by a federal inmate against a private corporation that operated the correctional center under a contract with the Federal Bureau of Prisons.[88] The inmate had suffered a heart attack after being forced to climb stairs with a known heart condition.[89] To dispose of the action, the Court noted that *Bivens* was a "limited holding"[90] and that it had "consistently refused to extend Bivens liability to any new context or new category of defendants" since Carlson.91 While the facts of Malesko were easily distinguishable from Bivens and could have been used to end the matter simply, the Court decided to go even further in its opinion to express its desire to limit the remedy.[92]

The Court expressed two reasons for denying a *Bivens* remedy in this case. The first basis relied on the fact that a private corporation ran the facility, as opposed to a federal entity, which had been the case in the *Bivens* jurisprudence thus far. If a remedy were available here, the Court feared that the original purpose of *Bivens*, to deter constitutional violations by individual federal officers, would not be furthered if those actors were replaced by the government as the defendant.[93] The second basis for denying a *Bivens* action was that there was an alternative cause of action available.[94] It was this discussion of alternative remedies, which involved available state tort remedies as well, that opened the door for the preemption of a *Bivens* claim on the basis of state law, and not only acts of Congress.

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[87] *Id.*; FED. MANUAL, *supra* note 17, at 5.2.A.2.

[88] *Malesko,* 534 U.S. at 63-64.

[89] *Id.*

[90] *Id.* at 66.

[91] *Id.* at 68.

[92] *See* FED. MANUAL, *supra* note 17, at § 5.2.A.2.

[93] *Malesko,* 534 U.S. at 70-71.

[94] *Id.* at 71-73.

This was the first time the Court considered "any alternative remedy" as a means of displacing *Bivens* claims.[95] Whether the remedy came out of congressional actions, agency remedies, or state tort law, the presence of any remedy that could adequately compensate the plaintiff could warrant hesitation in expanding the remedy.[96] Here, the Plaintiff had full access to remedial mechanisms that could adequately compensate him.[97] The majority, however, did not specify which one of the two factors it considered dispositive. Instead, the Court stated, "[i]n sum, respondent is not a plaintiff in search of a remedy as in Bivens and Davis. Nor does he seek a cause of action against an individual officer, otherwise lacking, as in Carlson."[98] Therefore, it is not clear whether the existence of an adequate state remedy would necessarily displace *Bivens* on its own. But the *Malesko* Court made it a possibility by choosing to go further than they had gone in the earlier cases that limited *Bivens*.[99] As a result, it appears that the *Bivens* doctrine has reached its limit and will only be further expanded in extremely limited situations.

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[95] *Id.* at 61.

> In 30 years of *Bivens* jurisprudence we have extended its holding only twice, 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 unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens*, often for reasons that foreclose its extension here.

Id.

[96] *Id.*

[97] *Id.* at 74.

[98] *Id.*

[99] *Malesko*, 534 U.S. at 71-74 (Whereas in earlier cases, like *Bush* and *Schweiker* that specified congressional acts as barring a remedy, the Court in *Malesko* specifically discussed state tort remedies as possibly providing relief to the plaintiff). *See also* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 730-31 (2008).

B. WILKIE V. ROBBINS[100] AND THE WILKIE TEST

While *Malesko* did not make the existence of an adequate state remedy dispositive, the Court's later decision in *Wilkie v. Robbins* did manage to strengthen the notion by again refusing to extend *Bivens* where the factor of available state remedies was present, among others. In *Wilkie*, the owner of a ranch claimed that employees of the Bureau of Land Management used extortion in an effort to compel the owner to grant the Bureau an easement to the ranch.[101] In denying to extend a *Bivens* remedy, the Court reasoned that the Plaintiff "had some procedure to defend and make good on his position" and "had the means to be heard," even though those remedies did not necessarily stem from an act of Congress.[102]

Additionally, the Court laid out a two-part test to be used when deciding whether or not to recognize a *Bivens* action.[103] In stating that *Bivens* did not set out an "automatic entitlement no matter what other means there may be to vindicate a protected interest," the Court asserted that Bivens claims are actually unjustified in most instances.[104] To determine the justification of granting the remedy, the Court outlined a rule that reflected the Court's Bivens jurisprudence.[105]

> [T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must

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

[101] *Id.* at 537.

[102] *Id.* at 551-52.

[103] *Id.* at 550.

[104] *Id.*

[105] *Id.*

> make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation."[106]

Ultimately, the two-part test boils down to: (1) whether any adequate alternative remedy exists, and (2) whether there are special factors that would warrant hesitation.[107] Here, as in *Malesko,* the Court again used the language of "any" remedy, as opposed to constraining it to remedies provided for only by Congress. By doing so, the Court provided more strength for interpreting *Bivens* in a way that would allow the displacement of the remedy by state tort law. As it looks now, it appears unlikely that the Supreme Court will go any further in expanding the *Bivens* doctrine, and initially it appeared that the lower courts were unlikely to interpret the *Bivens* jurisprudence in an expansive manner as well.[108]

IV. CIRCUIT COURT INTERPRETATION OF THE *BIVENS* DOCTRINE – THE CIRCUIT SPLIT

After the *Malesko* decision, circuit courts seemed to follow the narrow interpretation of *Bivens* and deny a claim where adequate alternative state remedies existed.[109] Both the Fourth and Eleventh Circuits have adopted this interpretation and have taken *Malesko* to mean that an available state remedy can preclude a *Bivens* action if such a remedy is adequate to compensate the plaintiff.[110] However, recently, the Ninth Circuit

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

[107] *Id.*

[108] *See* FED. MANUAL, *supra* note 17.

[109] *See* Alba v. Montford, 517 F.3d 1249, 1255 (11th Cir. 2008) ("[T]he affidavit requirement does not render the state tort remedy inadequate for the purpose of Bivens liability."); Holly v. Scott, 434 F.3d 287, 296 (4th Cir. 2006) ("[A]n inmate in a privately run federal correctional facility does not require a Bivens cause of action where state law provides him with an effective remedy.").

[110] *Id.*

has come to a drastically different conclusion and allowed for damages under *Bivens* even when a state remedy existed that would deter unconstitutional conduct and even provide an easier avenue for compensation for the Plaintiff.[111]

A. THE FOURTH AND ELEVENTH CIRCUITS: ADEQUATE STATE REMEDIES DISPLACING *BIVENS*

In *Holly v. Scott*, a Fourth Circuit opinion, a federal inmate in a privately run facility under contract with the Federal Bureau of Prisons sought *Bivens* relief under the Eighth Amendment, claiming inadequate medical care for his diabetic condition.[112] The court shared the same concerns as the Supreme Court in that *Bivens* "is not amenable to casual extension."[113] In recognizing that the Supreme Court has created "well-demarcated boundaries,"[114] the *Holly* court noted the Court's desire to leave such matters to the legislature, as "'Congress is in a better position to decide whether or not the public interest would be served' by the creation of 'new substantive legal liability.'"[115] Following this rationale, the court refused to extend *Bivens* on two grounds, similar to *Malesko*. First, the court noted that the inmate was held in a private facility whose only link to the federal government was a contract with the Federal Bureau of Prisons, and therefore the private party's actions could not be fairly attributed to the federal government.[116] Secondly, and more importantly here, the court also stated that *Bivens* would not be extended "because the inmate has adequate remedies under state law for his alleged injuries."[117] Interpreting *Malesko* in a slightly more restrictive manner, the

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[111] Pollard v. Geo Group, Inc., 607 F.3d 583, 601 (9th Cir. 2010).

[112] *Holly*, 434 F.3d at 288.

[113] *Id.* at 289.

[114] *Id.*

[115] *Id.* at 290 (quoting *Schweiker*, 487 U.S. at 426-27; *Bush*, 462 U.S. at 390).

[116] *Id.* at 290.

[117] *Id.*

court made clear the effect adequate state remedies had on *Bivens* claims, treating their availability as dispositive, ultimately finding them to be an independent means of displacing *Bivens*.[118]

It is interesting to note, however, that while the *Holly* court mentioned the "any alternative remedy" language of *Malesko*, or prong one of the *Wilkie* Test, it ultimately classified the available state remedy as an "independent factor counseling hesitation," under prong two of the *Wilkie* Test.[119] In coming to such a determination, the court may have been looking to the Supreme Court's decision in *Bush*, which found that the already existing system of remedies available to the plaintiff counseled hesitation against the expansion of *Bivens*.[120] Regardless of what the court's purpose was in classifying the state remedy, not as an adequate alternative remedy in and of itself, but instead, as a special factor counseling hesitation, the court considered such a classification as an "understatement."[121] Holly's alternative state remedy was not only available, but also "arguably superior" in such a case, "[t]he dangers of overreaching in the creation of judicial remedies are particularly acute where such remedies are unnecessary."[122]

According to the court, government action coupled with the lack of a legal remedy is the very reason why *Bivens* claims exist. But, when such factors are not present, judicially inferring a *Bivens* cause of action "would be to release that doctrine from its moorings and cast it adrift."[123] Furthermore, the court noted only two grounds for the extension of a *Bivens* cause of action as set out by the Supreme Court. The first justification for a *Bivens* remedy was "to provide a cause of action for a plaintiff who

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

[119] *Id.* at 295; Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

[120] Bush v. Lucas, 462 U.S. 367, 385-87 (1983). *See also* JACK M. BEERMAN, ADMINISTRATIVE LAW 190 (2nd ed. 2006) ("The Court held . . . the existence of the complex system of civil service remedies was a special factor counseling hesitation and thus precluded the assertion of a *Bivens* claim.").

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

[122] *Id.* at 295.

[123] *Id.* at 290.

lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct."[124] The second justification was "to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally."[125] However, where neither circumstance is present, as was the case in *Holly*, the Court has denied the expansion of *Bivens*.[126]

More recently, the Eleventh Circuit has also adopted a limited interpretation of the *Bivens* jurisprudence in *Alba v. Montford*.[127] Here, as in *Holly* and *Malesko*, the plaintiff was a federal inmate held in a private facility, operating under a contract with the federal Bureau of Prisons, claiming a *Bivens* remedy under the Eighth Amendment.[128] The plaintiff in *Alba* had undergone poor throat surgery and claimed that the facility refused to approve the corrective surgery he needed as recommended by a specialist, and as a result, acted with deliberate indifference to his medical needs.[129] But, because he had a state remedy available to him, the court denied his claim for damages under the *Bivens* doctrine.[130]

Even though the factor of a private facility was present here as well, the court was sure to make note that "[e]ven assuming

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[124] *Id.* at 295 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001)). Providing a remedy for plaintiffs lacking any alternative remedy was the basis for the decisions in both *Bivens* and *Davis*. Without an implied cause of action, the plaintiffs would have gone uncompensated. *See Malesko*, 534 U.S. at 74 (noting that the plaintiffs in *Bivens* and *Davis* were "in search of a remedy,"); *Bivens*, 403 U.S. at 394 ("For people in Bivens' shoes, it is damages or nothing."); *Davis*, 442 U.S. at 245 ("For Davis, as for Bivens, 'it is damages or nothing.'").

[125] *Holly*, 434 F.3d at 296 (quoting *Malesko*, 534 U.S. at 70). Providing a cause of action against individuals as opposed to the government was the basis for the *Carlson* opinion. *Carlson*, 446 U.S. at 21 (noting that the only remedy available to the plaintiff could not hold the individual actors responsible, and instead was against the government).

[126] *Holly*, 434 F.3d at 296. *See also Malesko*, 534 U.S. at 70.

[127] Alba v. Montford, 517 F.3d 1249, 1254 (11th Cir. 2008).

[128] *Id.* at 1251; *Holly*, 434 F.3d at 288; *Malesko*, 534 U.S. at 63-64.

[129] *Alba*, 517 F.3d at 1251.

[130] *Id.* at 1251-52.

[that the private facility was] . . . a government actor for purposes of *Bivens* liability . . . alternative remedies exist by which Alba can recover from the Defendants."[131] Allowing a *Bivens* claim in this instance, even under this assumption, would do nothing to further the purpose of the doctrine, to "provide for an otherwise nonexistent cause of action . . . ."[132] With this reasoning, the court specifically disposed of the plaintiff's argument that an alternative remedy must be a federal one.[133] In distinguishing this case from *Bivens*, it is important to note that in *Bivens* it was crucial to create an implied cause of action because without it the Plaintiff would not have been able to recover damages from the actor. On the other hand, in cases such as *Alba*, as well as the other limiting cases, the plaintiffs had an avenue for damages provided for by state law.[134]

The court also pointed out that even though there may be additional steps or boundaries to recover under state law, such requirements do "not render the state tort remedy inadequate for the purpose of *Bivens* liability."[135] Furthermore, these boundaries or difficulties do not make these remedies "inconsistent or even hostile" as was the case in *Bivens*.[136] Whereas state laws regulating trespass or privacy may be inconsistent with the Fourth Amendment, the laws are not inconsistent or hostile to the rights protected under the Eighth Amendment.[137] This finding seems to assume that the inadequacies found in the state laws in *Bivens* were specific to that case and do not necessarily apply to state laws in general.

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[131] *Id.* at 1245.

[132] *Id.* (quoting *Malesko*, 534 U.S. at 70).

[133] *Id.*

[134] *Id.*

[135] *Alba*, 517 F.3d at 1255.

[136] *Id.*

[137] *See id.* at 1255-56.

B. THE NINTH CIRCUIT: *BIVENS* ALLOWED WITH THE EXISTENCE OF ADEQUATE STATE REMEDIES

Until this point, it seemed pretty clear that the current *Bivens* jurisprudence would find against any *Bivens* claim in which an adequate alternative remedy was available to the plaintiff, even one created by the state. However, the Ninth Circuit came to a drastically different conclusion in *Pollard v. Geo Group, Inc.*, finding that adequate alternative remedies do not necessarily displace *Bivens* and creating a split among the circuit courts on this issue.[138] Here, as in several other cases above, the plaintiff, Pollard, was a federal inmate in a privately owned correctional facility operating under a contract with the Bureau of Prisons.[139] Pollard was also claiming damages under *Bivens* for a violation of his Eighth Amendment rights after correctional officers denied him the proper medical care for an injured elbow.[140] Despite the similarities between *Pollard* and the cases discussed above, the court reached a different conclusion. Not only did the court find that a *Bivens* claim may proceed against the defendants of the privately run facility, but also allowed the claim when adequate alternative state remedies were available to the Plaintiff.[141] In this case, the plaintiff could seek redress in the form of a state tort action for negligence or medical malpractice.[142]

The court's decision to allow the action to proceed against employees of a private corporation conflicts with the holding in *Holly*.[143] However, the court managed to come to its decision by concluding that the employees of the private facility were acting under color of federal law in their professional capacities and therefore could be considered federal actors.[144] Stating that the

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[138] Pollard v. Geo Group, Inc., 607 F.3d 583, 597 (9th Cir. 2010).

[139] *Id.* at 585.

[140] *Id.* at 585-86.

[141] *Id.* at 588.

[142] *Id.* at 586.

[143] Holly v. Scott, 434 F.3d 287, 294 (4th Cir. 2006).

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

Supreme Court had not yet directly addressed this issue, the court held that private agents engaging in federal action cannot necessarily escape *Bivens*.[145] While *Malesko* came to a different conclusion, "the Supreme Court explicitly left open the possibility that private prison employees could act under color of federal law and therefore face *Bivens* liability" by not specifying which ground it found dispositive in the *Malesko* decision.[146]

The court then addressed the availability of a *Bivens* remedy in regard to available state remedies by applying the *Wilkie* test.[147] The court's allowance of a *Bivens* remedy on this ground directly conflicts with both *Holly* and *Alba*.[148] Again, the court was able to rely on the fact that the Supreme Court did not specifically make the availability of an alternative state remedy dispositive in *Malesko,* enabling it to once more come to a different outcome.[149] In applying part one of the *Wilkie* Test, the court relied heavily on *Carlson* to find that the Supreme Court has continuously stressed only congressionally created remedies could preclude a *Bivens* claim.[150] At the same time, the court quickly disposed of *Malesko* by stating that it only "implicitly suggested" that state remedies may also preclude a *Bivens* claim, and asserted that the Fourth and Eleventh Circuits read too far into the words of *Malesko.*[151]

Instead of simply relying on the "any alternative remedy" language put forth in *Malesko,* and later emulated in *Wilkie*, the Ninth Circuit would have us rely more on the "convincing reason" language of *Wilkie* to determine whether an alternative remedy may displace *Bivens*.[152] In the court's opinion, the

[145] *Id.* at 589.

[146] *Id.* at 592.

[147] *Id.* at 593-94.

[148] *Id.* at 588.

[149] *Id.* at 595.

[150] *Pollard*, 607 F.3d at 595.

[151] *Id.*

[152] *Id.* at 596.

inquiry into whether a remedy is adequate to replace a *Bivens* claim should rest on the language of prong one of *Wilkie* as a whole: "whether 'any alternative, existing process for protecting the interest amounts to a convincing reasons for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'"[153] The court found there is no such "convincing reason" to allow a state remedy to make such a displacement for two reasons.[154]

First, the 9th Circuit pointed to the fact that the Supreme Court considers alternative remedies because the *Bivens* implied cause of action "should yield to congressional prerogatives under basic separation of powers principles."[155] Therefore, with such deference given to Congress and the weight placed on the separation of powers, state remedies would not be able to uphold such a standard according to *Pollard*.[156] Second, the court once again relied on *Carlson* to find that constitutional violations by federal officials "should be governed by uniform rules."[157] Because tort law varies from state to state, the court found that allowing it to preclude a *Bivens* claim would no longer hold federal actors liable under uniform rules and therefore would undermine this important principle.[158] As a result, under the first prong of the *Wilkie* Test, the court found that adequate state remedies alone cannot be a basis for denying a *Bivens* claim due to congressional prerogatives and the need for uniform rules.[159]

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[153] *Id.* (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

[154] *Id.*

[155] *Id.* (citing *Wilkie*, 551 U.S. at 554). *See also* Bush v. Lucas, 462 U.S. 367, 378 (1983) (finding that a congressionally created alternative remedy may reflect its intent that the Court should not exercise its power).

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

[157] *Id.* at 596-97 (quoting Carlson v. Green, 446 U.S. 14, 23 (1980)).

[158] *Pollard*, 607 F.3d at 597 ("The substance, procedural requirements, and remedies of state tort law--especially with regard to causes of action for negligence and medical malpractice--vary widely from state to state.").

[159] *Id.*

In the same decision, the 9th Circuit court also refused to treat the existence of a state remedy as a factor counseling hesitation under prong two of the *Wilkie* Test, as it was held to be in *Holly*.[160] In evaluating this prong, the court considered only four factors: feasibility, deterrence, liability costs, and unique attributes of the area.[161] Because the court had already recognized a *Bivens* action for inmates in a federal prison, this court found it unnecessary to discuss the unique attributes, and instead focused on the remaining three factors.[162] The court found no feasibility issues because Pollard alleged a basic claim under the Eighth Amendment, which has been recognized by the Supreme Court for decades, and the standards were clear.[163] As for deterrence, the court concluded that this case did not present the same problems as other cases had in the past.[164] Allowing a *Bivens* action here would, instead, actually foster the "'core purpose' of an implied cause of action: deterring individual officers from committing constitutional violations."[165] Finally, in addressing the possibility of asymmetrical liability costs between privately operated facilities and government-operated facilities, the court noted that such asymmetries are inevitable under the *Bivens* regime in this case.[166] While being mindful

[160] *Id.* at 598-603; Holly v. Scott, 434 F.3d 287, 290 (4th Cir. 2006).

[161] *Pollard*, 607 F.3d at 598.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 601. The court distinguished the deterrence issues in this case from the concerns about deterrence in F.D.I.C. v. Meyer, 510 U.S. 471, 485 (1994), and *Malesko*. *Id.* In *Meyer*, the Court refused a *Bivens* claim against a federal agency with the fear that plaintiffs would be more inclined to bring suit against an agency than an individual who may be protected by federal immunity, therefore minimizing the deterrent effects of *Bivens*. *Meyer*, 510 U.S. at 485. Similarly, in *Malesko*, the Court denied a *Bivens* action against a private corporation with the concerns that, in the interest of collection, Plaintiffs would focus more on the corporation and less on the individual, lessening the deterrent effects. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70-71 (2001).

[165] *Pollard*, 607 F.3d at 600 (quoting *Malesko*, 534 U.S. at 74).

[166] *Id.* at 602-03 ("Unlike officers employed by public prisons, the GEO employees will not be entitled to qualified immunity, and as a result, prisoners asserting claims against them may be able to recover more often than their counterparts in government-tally [sic] run prisons . . . . On the other hand, if we

that these asymmetries are undesirable because they would be present regardless, the court found this factor to not counsel any hesitation against allowing a *Bivens* claim for Pollard.[167]

C. THE *POLLARD* DISSENT

Unsurprisingly, there was a partial dissent in *Pollard* in regard to the court's finding that adequate alternative state remedies do not necessarily displace *Bivens*.[168] Because the *Pollard* decision departed from what had appeared to be the common understanding of the alternative remedy issue, it is important to discuss the dissent, as it shares this understanding. First, the dissent looked to the rationale for originally creating a *Bivens* remedy and stated that the majority failed to see that the Supreme Court had recognized a *Bivens* claim only when federal officials enjoyed immunity from liability, therefore providing no alternative remedy for the plaintiff.[169] Furthermore, in the two instances when *Bivens* was expanded, the plaintiffs' injuries would have gone entirely un-redressed had the Court not provided a judicially created remedy.[170] As a result, the traditional *Bivens* justifications simply did not apply in this case. The Supreme Court has "consistently rejected invitations to extend *Bivens*" where adequate alternative remedies exist.[171] And, according to the dissent, those remedies existed here in the form of state tort remedies.[172] Pollard had access to relief by the state against the employees who did not enjoy immunity.[173] As a matter of fact, the remedies available to Pollard may have been

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conclude that Pollard cannot bring a suit under *Bivens,* then *only* inmates in public prisons will be able to vindicate their constitutional rights.").

[167] *Id.* at 603.

[168] *Pollard*, 607 F.3d at 603 (Restani, J., dissenting).

[169] *Id.*

[170] *Id.* at 604.

[171] *Id.* at 605 (quoting *Malesko*, 534 U.S. at 70).

[172] *Id.*

[173] *Id.*

obtained even more easily than *Bivens* damages. Therefore, the dissent felt there was no lack of alternative remedy.[174]

The dissent also felt that the availability of a potentially greater remedy should have been a convincing reason to refrain from expanding *Bivens* and focused more on the language in *Malesko* to support its argument.[175] "[W]e have retreated from our previous willingness to imply a cause of action where Congress has not provided one."[176] Consequently, "[s]o long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose . . . judicial imposition of a new substantive liability."[177] Further relying on Malesko, the dissent noted that the Supreme Court had actually considered alternative state remedies, and therefore, opened the door to use them as a displacement of Bivens.[178] Finally, the dissent noted the tension between Malesko, considering state remedies, and Carlson, stressing the availability of Congressional remedies, and concluded that the most recent case should be followed, which is Malesko.[179]

The dissent was also not convinced by the majority's argument for uniformity in rules. As previously stated, private employees do not enjoy immunity, as do federal officials.[180] The state tort laws for negligence are also universally available in instances such as this, and are relatively the same from state to state; nevertheless, even where differences in the laws do exist, alternatives do not have to be complete or equal, only adequate.[181] As a last argument, the dissent finally addressed the special factors and found that they did in fact counsel

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[174] *Pollard*, 607 F.3d at 605 (Restani, J., dissenting).

[175] *Id.* at 605-06.

[176] *Id.* at 606 (quoting *Malesko*, 534 U.S. at 67 n.3).

[177] *Id.* (quoting *Malesko*, 534 U.S. at 69).

[178] *Id.*

[179] *Id.*

[180] *Pollard*, 607 F.3d at 607-08 (Restani, J., dissenting).

[181] *Id.* at 608.

hesitation.[182] First, the dissent argued that case-by-case determinations are feasible and are actually what the Supreme Court prefers, as opposed to a blanket availability of *Bivens*.[183] It is clear in this case that the conduct would be covered by state law and would provide an easier avenue for relief to Pollard. Second, deterrence would also not be promoted with a *Bivens* claim in this case, according to the dissent, because the state law would actually allow for both punitive and compensatory damages for the conduct, providing for more relief.[184] Finally, the dissent believed that denying a *Bivens* claim for Pollard would actually prevent the asymmetrical liability costs the Supreme Court was concerned about.[185] While recognizing the existing public-private asymmetry discussed by the majority, the dissent noted that allowing a *Bivens* claim here would allow plaintiffs to pursue both *Bivens* actions and tort actions against private employees, but only *Bivens* actions against federal employees, further perpetuating the already existing asymmetries.[186]

V. ANALYSIS

The *Pollard* decision seems to reflect the idea that *Bivens* remedies should always be available unless certain factors are or are not present, creating an almost blanket application, while other circuit courts, as well as the Supreme Court, seem to hold the opposite, that *Bivens* should *not* be available unless necessary. The Ninth Circuit's take on the *Bivens* doctrine therefore colors it as more of an expansive remedy rather than one reserved only for very particular circumstances. Because this is exactly what the Supreme Court wished to prevent,[187] it

[182] *Id.*

[183] *Id.* at 608-09.

[184] *Id.* at 610.

[185] *Id.*

[186] *Pollard*, 607 F.3d at 610.

[187] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (declaring *Bivens* to be a limited holding); *id.* at 68 (noting that the Supreme Court has refused to extend *Bivens* beyond its already set boundaries since *Carlson*).

appears that *Pollard* may have been decided too broadly. Not only did the court decide that state remedies do not displace *Bivens*, it also found that private employees may be held responsible as federal actors.[188] As a result of the Ninth Circuit's liberal reputation and drastically high reversal rate on appeal, the Supreme Court may overturn *Pollard*.[189]

The Ninth Circuit relied heavily on the earlier *Bivens* jurisprudence, and on *Carlson* in particular, focusing on the congressionally created remedy aspect, and gave little weight to more recent cases and the other circuit courts that considered state remedies as well.[190] But *Carlson* did not squarely address the question of whether state law will displace a *Bivens* claim; instead, it only addressed the adequacy of one alternative remedy, the FTCA.[191] In trying to avoid denying *Bivens*, the court neglected to take some important factors into consideration. For instance, while the court pointed out that *Malesko* never clearly chose a dispositive ground for the case, it would not matter which one, or the combination of the two, was dispositive, as both of those factors were also present in *Pollard* to some extent.[192] Both *Malesko* and *Pollard* involved a federal prisoner in a privately owned facility operated under a contract with the federal Bureau of Prisons who suffered a violation of his Eighth Amendment rights.[193] Additionally, both plaintiffs had access to remedies provided for by state tort laws that would

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[188] *See supra* subpart IV(B).

[189] *See* Carol J. Williams, *Supreme Court Overturning Numerous 9th U.S. Circuit Court of Appeals Rulings*, L.A. TIMES, July 05, 2009, *available at* http://www.post-gazette.com/pg/09186/981662-176.stm.

[190] *Pollard*, 607 F.3d at 595. The court looked to *Carlson* in its evaluation of whether a state remedy could displace *Bivens*. *Id.* at 594. At the time of *Carlson*, however, state remedies were never really seriously addressed as alternatives. *Id.* The court was then able to quickly dispose of *Malesko*'s state remedy consideration by asserting that the Court never made it clear whether the availability of a state remedy was dispositive. *Id.*

[191] Preis, *supra* note 99, at 730 (citing Peoples v. CCA Det. Ctrs., 422 F.3d 1090, 1102 (10th Cir. 2005)).

[192] *Pollard*, 607 F.3d at 597-98.

[193] *Pollard*, 607 F.3d at 585; *Malesko*, 534 U.S. 63-64.

have adequately compensated the plaintiffs.[194] But the Ninth Circuit managed to overlook the fact that *Malesko*, decided twenty-one years after *Carlson*, denied the *Bivens* claim on these grounds, regardless of which one was dispositive. The other circuits faced with the same situation as well, however, found with the *Malesko* decision.[195] While alternative state remedies were not made clearly dispositive in *Malesko*, the Court did say that "it had 'consistently rejected invitations to extend *Bivens*' except 'to provide a cause of action for a plaintiff who lacked any alternative remedy,'" which should give some insight into the Court's intent to keep the doctrine limited.[196]

The court also used *Wilkie* to show that state remedies alone do not displace *Bivens*, while at the same time claiming the Supreme Court has not squarely addressed the issue and seeming to forget that prong one of the *Wilkie* test makes no mention that the alternative remedy must come from Congress.[197] If *Wilkie* stood for such a proposition, one would assume they would assert it in the two-prong test. As a matter of fact, the Court did consider Wilkie's alternative state remedies and found that many of the claims could be redressed with state law. The Court, however, "was unable to conclude whether alternative remedies—state or otherwise—were indeed available and thus resolved the suit on other grounds."[198]

Furthermore, the court only noted four, and only discussed three, factors that could possibly counsel hesitation. This seems like an intentional attempt to limit any possible hesitation the court could have found. One factor, in particular, that should have also been considered in prong two of the *Wilkie* Test as a special factor was the availability of a negligence claim under state tort law, instead of only being examined in comparison to a congressional remedy under prong one. *Bush* "broadened the scope of the special factors prong to include statutory remedies"

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[194] *Pollard*, 607 F.3d at 601; *Malesko*, 534 U.S. 73-74.

[195] *See supra* subpart IV(A).

[196] Preis, *supra* note 99, at 729 (quoting *Malesko*, 534 U.S. at 70).

[197] *Pollard*, 607 F.3d at 595-96.

[198] Preis, *supra* note 99, at 731 (citing Wilkie v. Robbins, 551 U.S. 537, 567 (2007)).

that were not necessarily equal to a *Bivens* claim in regard to compensation and damages.[199] Yet, the Ninth Circuit still mentioned the fact that a *Bivens* claim may allow for a greater recovery of damages than state tort law in some cases as a special factor.[200] This goes against the Supreme Court's finding in *Bush*, which specifically noted that even though remedies available to the Plaintiff were not as equally effective as a *Bivens* suit would be, the alternative remedial scheme was "constitutionally adequate."[201] Had the court considered state remedies as a possible factor, even if it refused to make it dispositive under prong one of *Wilkie*, they may have come to a different conclusion based on the ease and adequacy of the state remedy available.

It looks as if the Ninth Circuit sees a *Bivens* action as a right rather than a necessity. However, such an implied cause of action only becomes a right when necessity exists.[202] In the presence of adequate alternative remedies, there appears to be no such necessity. This is articulated best in *Holly*: "The dangers of overreaching in the creation of judicial remedies are particularly acute where such remedies are unnecessary."[203] The ultimate goal of *Bivens* was to provide a remedy to a right and avoid the "damages or nothing" situation.[204] However, there was no such situation present in *Pollard*. As a matter of fact, compensation under state tort law may have been easier

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[199] David C. Nutter, Note, Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution Is Necessary: The Changing Scope of the Bivens Action, 19 GA. L. REV. 683, 702 (1985). See also Bush v. Lucas, 462 U.S. 367, 385-87 (1983).

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

[201] Nutter, *supra* note 199, at 706 (quoting *Bush*, 462 U.S. at 379 n.14).

[202] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (noting that the *Bivens* claim was created in a situation where it was "damages or nothing"); Davis v. Passman, 442 U.S. 228, 243-44 (1979) (granting a *Bivens* cause of action to a plaintiff who had "no effective means other than the judiciary to vindicate these rights").

[203] Holly v. Scott, 434 F.3d 287, 295 (4th Cir. 2006).

[204] *Bivens*, 403 U.S. at 410.

than a *Bivens* claim for *Pollard*,[205] which clearly shows a lack of necessity.

The Ninth Circuit's view of *Bivens* actions could have dangerous implications for federal courts. Such a blanket determination that a *Bivens* claim is generally available in the absence of a congressionally created remedy will unduly swamp the federal courts when individual state courts could easily provide compensation where their laws are deemed adequate. Furthermore, such a broad interpretation of the doctrine amounts to legislating from the bench far more than what *Bivens* intended. Ultimately, the Ninth Circuit's decision in *Pollard* was in stark contrast to the current *Bivens* jurisprudence and other Circuits' decisions. Such a broadening of the doctrine poses several dangers to the courts and the integrity of *Bivens* itself. Therefore, the Supreme Court may overturn the decision on appeal.

VI. RECOMMENDATIONS

In order to ensure that the *Bivens* holding remains a limited one as it was intended to be, it is important to treat the doctrine as a necessity, where no other remedy would otherwise exist, rather than a presumptive right only to be displaced with special factors. There are inherent dangers in broadening the doctrine to such an extent and I would caution against it. While the *Bivens* doctrine may seem to be a doctrine in conflict, the emphasis on alternative remedies is a legitimate one, and needs to be further developed.[206] The Ninth Circuit's liberal approach in *Pollard* went too far into the realm of legislating from the bench and should have been decided differently for several reasons.

First, the original fears, as expressed in *Bivens*, allowing state remedies to compensate plaintiffs whose constitutional rights are violated by federal actors, are what seem to drive the hesitancy in explicitly declaring these state remedies as a displacement of *Bivens*. The idea that state tort laws may be

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

[206] Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1121-22 (1989).

inconsistent or hostile to federal rights may have been relevant at the time of *Bivens*, and therefore a valid justification for creating the implied cause of action. Problematic is that these original fears no longer stand justified in today's world.

The recognition of state law in regard to constitutional torts is relatively new, in part due to these fears. The federal government undertook the responsibility of enforcing civil rights after the adoption of the Fourteenth Amendment, even though states could still enforce these rights.[207] Such a system was based on the presumptions that "state courts were often controlled by 'prejudice, passion, neglect, [or] intolerance'"[208] and that "state law might be 'inconsistent or even hostile' to federal rights."[209] But state courts no longer harbor the prejudice and hostility they once did, and state tort law can now compensate plaintiffs better than a *Bivens* action could in some instances, making it harder to say they are still hostile to civil rights plaintiffs.[210]

Moreover, it would appear that the specific concerns in *Bivens* were particular to that case, especially state trespass laws. The Court was worried that a claim for trespass under state law would be unsuccessful due to the defense of consent. Although the federal agents searched Bivens home without a warrant, they first requested and were granted entry.[211] While there was a possibility the state court might find that the invocation of federal power alone would render any resistance futile and therefore find Bivens' consent to have been coerced, "state courts are prohibited from interpreting 'state law to limit the extent to which federal authority can be exercised.'"[212] Therefore, the possibility of the claim failing altogether was too high, rendering it a "damages or nothing" situation.[213] But this

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[207] Preis, *supra* note 99, at 726.

[208] *Id.* (quoting Monroe v. Pape, 365 U.S. 167, 180 (1961)).

[209] *Id.* (quoting *Bivens*, 403 U.S. at 394).

[210] *Id.* at 726.

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

[212] Preis, *supra* note 99, at 743 (quoting *Bivens*, 403 U.S. at 394-95).

[213] *Bivens*, 403 U.S. at 410.

situation is unique to this case and does not apply to *Pollard* or other Eighth Amendment claims. "There are . . . many instances where state tort law and constitutional law operate in tandem."[214] The Eighth Amendment prohibits cruel and unusual punishment,[215] including the conduct that was aimed at in *Pollard*. There is no doubt that the actions of the prison employees would also, however, be covered under the state tort law of negligence, and due to the heightened deliberate indifference standard of the Eighth Amendment, it would probably be easier to obtain compensation with state law.[216] In such a case where the negligence was obvious, state tort law should be deemed adequate. Also particular to the *Bivens* case, or perhaps to that time period, was the concern for uniformity in the laws. Nowadays, however, this need is not compelling because private employees do not enjoy the immunities of federal actors and negligence suits are universally available against such employees.[217]

While these fears may have been relevant in the time of *Bivens*, forty years later they are not. No longer are the courts prejudiced or hostile to such an extent. Nor are state laws so varied that there is a dire need to use federal law even when an alternative state remedy exists. Therefore, state tort laws today should be considered as a possible replacement for a *Bivens* action.

Allowing *Bivens* claims to proceed when there is an adequate alternative remedy, congressional or state, available to the plaintiff could have severe implications. Not only will this expansion inevitably lead to a flood of cases in an already swamped federal court system, leading to higher transactional costs, there are economic implications as well. The efficiency of a *Bivens* remedy depends on the alternative remedies available to the plaintiff because such remedies are used in the

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[214] Preis, *supra* note 99, at 744.

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

[216] *Pollard*, 607 F.3d at 605 (Restani, J., dissenting).

[217] *Id.* at 607-08.

assessment of monetary damages in such claims.[218] Hence, when no remedy is available, federal actors would be less likely to limit constitutional violations. In such a situation, "[u]nderdeterrence would occur."[219] On the other hand, when those alternative remedies are available, "a Bivens action would be redundant, perhaps subjecting federal agents to more liability than necessary. Overdeterrence would occur."[220] Therefore, to prevent both under and over-deterrence, *Bivens* actions should be allowed only when no adequate alternative exists.

Expanding *Bivens* also increases enforcement costs, leading to the possibility that, in the interest of saving money, the scope of a constitutional right may be limited. As a result, "a Bivens action could potentially jeopardize the positive expansion of a constitutional right."[221] The increase in both enforcement and transaction costs, as a result of the increase in *Bivens* cases, would wreak havoc on our federal court system. Therefore, when the costs for creating a new remedy under *Bivens* are high, the Court should be able to deny *Bivens* if the benefit to the plaintiff would be relatively low, such as when the plaintiff is able to seek adequate redress in state courts.[222]

VII. CONCLUSION

The original intent of *Bivens* was to provide redress for a plaintiff who had no way to remedy the violation of his constitutional rights by federal actors. For without a remedy, rights are rendered worthless. Had no judicial remedy been created in such a case, there would be little deterrence for federal actors to abstain from committing such acts. However, there is a delicate balance that must be struck between providing a remedy for constitutional rights violations and not

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[218] See Arpan A. Sura, Note, *An End-Run Around the Takings Clause? The Law and Economics of* Bivens *Actions for Property Rights Violations*, 50 WM. & MARY L. REV. 1739, 1743 (2009).

[219] *Id.* at 1743-44.

[220] *Id.* at 1744.

[221] *Id.* at 1759.

[222] *Id.* at 1758.

stepping on the toes of Congress and the separation of powers. Until recently, courts have done a good job at maintaining this balance, but the Ninth Circuit appears to have tipped the scales with its decision in *Pollard v. Geo Group, Inc.* The court has seemingly overlooked the fact that *Bivens* was only meant to be used against those who would otherwise have immunity and by those who would otherwise have no remedy. Neither factor was present in *Pollard*, yet the court refused to deny a *Bivens* claim. The Ninth Circuit has essentially forgotten the purpose of *Bivens* (to give plaintiffs an option to sue) and ultimately gave plaintiffs a choice of where to sue, federal or state court. Such an outcome has dangerous implications and will swamp the already overburdened federal courts. Therefore, where there is no necessity, there should be no *Bivens*.