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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

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I. INTRODUCTION

The Federal Bill of Rights was designed to codify the civil rights of the citizens of a newly founded nation and guarantee protection from the government’s invasion of those rights.\(^1\) Those rights were codified and essentially guaranteed, but they served as a check on the government, not as a mechanism for individuals to assert violations of their rights against the government in the courts.\(^2\) The idea that an individual could assert a cause of action and collect damages against a government official for violation of constitutional rights is a relatively recent phenomenon. The Supreme Court provided for recovery against government officials for violation of individual constitutional rights in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.\(^3\) Since that decision, the Court has reluctantly implied causes of action directly under the Constitution. This note seeks to analyze the reasoning for this reluctance through an analysis of the Court’s decision in *Correctional Services Corp. v. Malesko*.\(^4\)

In *Malesko*, the Supreme Court declined to imply a *Bivens* cause of action under the Constitution for damages against a private corporation acting under contract with the Federal Bureau of Prisons.\(^5\) The Court held,

> There are only two circumstances that warrant an extension of *Bivens*; to provide for 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.\(^6\)

The majority noted that since the plaintiff had an alternative cause of action and allowing recovery would not further the *Bivens* goal of deterrence, Plaintiff Malesko should not be permitted recovery under the *Bivens* theory.\(^7\)

The most significant aspect of the *Malesko* decision was the plain expression of the two contrary approaches to implied causes of action.\(^8\) The two approaches first

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* Class of 2004, University of New Mexico School of Law. I would like to thank Professor Michael Browde for his input and guidance throughout the entire writing process. I would also like to thank Susan Johnson for her continued support, especially throughout the editorial phase of this piece.

2. *Id.*
5. *Id.* at 63.
6. *Id.* at 68.
7. *Id.* at 71-73. Malesko could have filed a negligence action against the individual officer or suit in federal court for injunctive relief.
8. Compare *id.* at 63 (internal citations omitted) with *id.* at 76 (Stevens, J., dissenting).
emerged in *Bivens*, when the Court created an implied cause of action under the Fourth Amendment.\(^9\) The dissent in *Malesko* presented the issue not as an extension of *Bivens*, but as a straightforward application of the *Bivens* remedy under the Eighth Amendment to the Constitution.\(^10\) The dissent took the position that federal agents working for a private corporation, operating under the color of federal law, should be liable for an Eighth Amendment violation under a *Bivens* action.\(^11\) Reminiscent of Justice Harlan’s view of the Bill of Rights first articulated in *Bivens*,\(^12\) the *Malesko* dissenter focused on the judiciary’s responsibility to remedy constitutional violations.\(^13\)

This note describes the historical context and origin of the *Bivens* action and its subsequent applications, focusing on the contrast between the Court’s expansion and subsequent rejection of implied causes of action. Realizing the rise of private correctional facilities, this note examines the implications of *Malesko*, focusing on the effect the decision will have on state correctional facilities under both 42 U.S.C. § 1983 actions and implied causes of action under state constitutions.

## II. STATEMENT OF THE CASE

The Federal Bureau of Prisons (BOP) operates Community Corrections Services (CSC), a private entity, and other facilities that house federal prisoners and detainees.\(^14\) Le Marquis Community Correctional Center (Le Marquis) is a halfway house located in New York City operated by CSC under the BOP.\(^15\)

John E. Malesko is a former federal inmate who was convicted of federal securities fraud in December 1992 and was sentenced to an eighteen-month term under the BOP.\(^16\) While serving his sentence, Malesko was diagnosed with a heart condition that limited his ability to engage in physical activity such as climbing stairs.\(^17\) The BOP transferred Malesko to Le Marquis in February of 1993, where he was to serve the remainder of his sentence.\(^18\) At Le Marquis, Malesko was assigned to living quarters on the fifth floor.\(^19\)

In March 1994, CSC instituted a new policy at Le Marquis requiring inmates residing below the sixth floor to use the staircase rather than the elevator to travel from the first floor to their rooms.\(^20\) Malesko was exempt from this policy due to his heart condition.\(^21\) He alleged that shortly after this policy was enacted, Jorge Urena, a CSC employee, forbid him to use the elevator to access his room on the fifth floor.

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11. *Id.* at 76 (Stevens, J., dissenting).
14. *Id.* at 63.
15. *Id.* at 64.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
When Malesko protested that he was permitted elevator access due to his heart condition, Urena adamantly refused him access. Malesko then climbed the stairs, suffered a heart attack, and fell, injuring his left ear.

Three years after sustaining his injury, Malesko filed a pro se action against CSC and unnamed CSC employees in the U.S. District Court for the Southern District of New York and amended the complaint two years later. The amended complaint alleged that Urena, CSC, and unnamed defendants were "negligent in failing to obtain requisite medication for [respondent's] condition and were further negligent by refusing [respondent] the use of the elevator." Malesko alleged he injured his left ear and aggravated a pre-existing condition "[a]s a result of the negligence of the Defendants." Malesko requested damages of $3 million in anticipated future damages and punitive damages. The district court treated the amended complaint as raising claims under Bivens and dismissed the cause of action against CSC because Bivens only maintained actions against individuals. Therefore, an action against CSC, as a private corporation, could not be maintained under Bivens. The court dismissed the remaining allegations against Urena and the unnamed defendants on statute of limitations grounds.

The Second Circuit Court of Appeals affirmed in part, reversed in part, and remanded. The court affirmed the dismissal of Malesko’s claim against the individual defendants as barred by the statute of limitations. The court of appeals reversed the lower court with respect to the CSC. The court of appeals reasoned that, despite the Supreme Court’s explicit refusal to extend Bivens actions to federal agencies, private entities like the CSC should be held liable under Bivens to "accomplish the...important Bivens goal of providing a remedy for constitutional violations." The Second Circuit articulated the important fundamental view of the Fourth Amendment that was first articulated by Justice Harlan in his concurring opinion in Bivens. As will become apparent, this important goal of providing remedies for constitutional violations eventually fades from the policy goals the Court later articulates in subsequent Bivens actions.

22. Id.
23. Id.
24. Id.
25. Id. Malesko and his attorney filed the amended complaint.
26. Id. at 65.
27. Id.
28. Id.
29. Id. (relying on FDIC v. Meyer, 510 U.S. 471 (1994)).
30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id. (citing FDIC v. Meyer, 510 U.S. 471 (1994)).
36. Id. (quoting Corr. Servs. Corp. v. Malesko, 229 F.3d 374, 380 (2d Cir. 2000)).
37. Bivens, 403 U.S. at 407 (Harlan, J., concurring).
38. See Davis v. Pasm, 442 U.S. 228, 245 (1994) (awarding damages for violation of due process clause of the Fifth Amendment under Bivens because there was no alternative cause of action and there were "no special factors counseling hesitation"); see also Carlson v. Green, 446 U.S. 14, 22 (1980) (awarding damages for violation of the Eighth Amendment under Bivens in order to deter such violations). Although those cases permitted recovery
The Supreme Court granted certiorari and reversed, holding a Bivens action would not be extended to provide damages against private corporations acting under the color of federal law. 39

III. HISTORICAL BACKGROUND

In the thirty-two years that followed Bivens, the Court dramatically retreated from its former position on constitutional torts. 40 The current Court has radically drawn back from the expansive view of constitutional tort jurisprudence articulated in Davis v. Passman. 41 This shift is expressed in the Court’s most recent opinion, the five-to-four decision of Malesko. An examination of Bivens, and the cases leading up to Malesko, illustrates the Court’s unwillingness to imply a cause of action.

A. An Implied Cause of Action Is Created

In Bivens, the Supreme Court was presented with a cause of action for damages arising out of a violation of the plaintiff’s Fourth Amendment rights under the federal Constitution. 42 Bivens alleged he was subjected to unlawful (warrantless) entry of his home, search, and subsequent arrest, without probable cause and in front of his wife and children. 43 He requested that, upon proof of injury as a result of the violation of his Fourth Amendment rights, he be awarded damages. 44 The Court granted his request and cited three reasons for doing so. 45

The Court reasoned that the protective scope of the Fourth Amendment applied to violations of constitutional rights in both state and federal courts of law. 46 “Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged by private persons, be condemned by state law.” 47 Perhaps the Court was compelled to this conclusion given its decision in Monroe v. Pape. 48 If individuals could bring causes of actions against state agents

under Bivens, the important goal of providing remedies for constitutional violations was not the policy reason behind either decision. 39. Malesko, 534 U.S. at 66.
40. Compare Bush v. Lucas, 462 U.S. 367 (1983) (holding that, where Congress had created an “elaborate remedial scheme,” an employee of the federal government could not sue his superior for alleged violation of his First Amendment rights through a Bivens action), with Schweiker v. Chilicky, 487 U.S. 412 (1988) (holding that a Bivens action would not be implied for alleged due process violation of the Fifth Amendment where damages were not included in an “elaborate remedial scheme” devised by Congress), and FDIC v. Meyer, 510 U.S. 471 (1994) (holding that Bivens action cannot be brought against a federal agency).
42. Bivens, 403 U.S. at 389.
43. Id.
44. Id.
45. Id. at 392-96. First, “[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.” Id. at 392. Second, “[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment’s guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.” Id. at 394. And finally, “[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officers should hardly seem a surprising proposition.” Id. at 395.
46. Id. at 392.
47. Id.
48. 365 U.S. 167 (1961) (holding that 42 U.S.C. § 1983 creates a federal remedy cognizable in federal court, and that remedy is available even if the official’s conduct is wholly unauthorized under state law).
for violating constitutional rights, individuals could also bring a similar cause of action against a federal agent. 49

The interests protected by state laws regulating trespass were inconsistent with the guarantees protected by the Fourth Amendment and thus Bivens was without an alternative remedy. 50 Since federal agents hold a distinct position of authority, they are generally permitted entrance into the home because refusal would be futile or even result in a crime. 51 Conversely, private individuals lack any authority other than their own and must obtain consent to enter the home or face liability under state trespass laws. 52 The Court drew a distinction between these two interests: the Fourth Amendment guarantees rights against unreasonable searches and seizures, but state trespass law enforces the individual's right to refuse entry into the home. Since federal officers are in the position of authority, they can usually obtain admittance. 53 Accordingly, because Bivens was subjected to an unreasonable search and seizure by federal agents, he had no remedy under state trespass law. 54 The Court concluded, "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government professing to act in its name." 55

Damages have been the historical means of redress for "an invasion of personal interests in liberty," 56 and "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." 57 The federal courts have power to grant damages for violations of the Fourth Amendment and, thus, the power to grant a general right of access to federal courts. 58

The Court recognized that a claim for damages against federal officers for violations of the federal Constitution might not be appropriate in all instances. 59 First, implying a cause of action for damages might be inappropriate when a case presents "special factors counseling hesitation in the absence of affirmative action by Congress." 60 The Court provided two examples of such special factors. 61 The

49. Id. In this case, thirteen Chicago police officers broke into the Monroe's home, routed them from bed, made them stand naked in the living room, and ransacked every room. Mr. Monroe was then taken to the police station and detained on "open" charges for 10 hours, while he was interrogated about a two-day-old murder; he was not taken before a magistrate, though one was accessible; he was not permitted to call his family or attorney; and he was subsequently released without criminal charges against him. The officers acted without a search warrant "under color of the statutes, ordinances, regulations, customs, and usages" of Illinois and the City of Chicago. Federal jurisdiction was asserted under 42 U.S.C. § 1983. The Court held that 42 U.S.C. § 1983 creates a federal remedy cognizable in federal court and that remedy is available even if the official's conduct is wholly unauthorized under state law. Id. at 389.
50. Bivens, 403 U.S. at 394.
51. Id. at 397.
52. Id.
53. Id.
54. Id. at 395.
55. Id.
56. Id.
57. Id. at 397.
58. Id.
59. Id. at 396-97.
60. Id. at 396.
61. Id.
first is when a question of “federal fiscal policy” is involved. The second is in actions against congressional employees for exceeding the authority delegated to them by Congress. Second, the Bivens Court indicated that a damages remedy might not be appropriate where Congress addressed specific types of constitutional violations by creating a statutory scheme intending to be a substitute for a judicial remedy.

In his concurrence, Justice Harlan articulated two views of the Fourth Amendment, one instrumental and the other fundamental, and those views are the heart of the Bivens rationale. The instrumental view is deterrence and prevention of police abuse. The fundamental view is the recognition that constitutional violations require their own remedy and federal courts are the only appropriate means of effectuating that relief through protection of those rights. Justice Harlan reiterated the important goal of deterring unconstitutional conduct on the part of federal officers. He then added a separate policy goal in favor of implying a cause of action for damages directly under the Fourth Amendment. Justice Harlan stated, “The appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct.” He noted the importance of the “personal interests” protected by the Fourth Amendment and the necessity of protecting those personal interests of “privacy.” Justice Harlan concluded, “the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment.” Justice Harlan reasoned that since the Court had authorized damages in order to effectuate the congressional underpinning of a statute, the Court could similarly authorize damages relief under the provisions of the Constitution. According to this fundamental view, it is the federal judiciary’s role to “vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominately at restraining the Government as an instrument of the popular will.”

Justice Harlan’s fundamental view did not necessarily compel the result he reached in Bivens. He concluded that, because Bivens was without an alternative remedy, he must be monetarily compensated: “It is apparent that some form of damages is the only possible remedy for someone in Bivens’ alleged position.”
Injunctive relief did not adequately remedy the harm done to Bivens, nor was a suit against the government possible. The other judicially created remedy, the exclusionary rule, would also not remedy the harm done to Bivens because he was innocent. Therefore, "[f]or people in Bivens' shoes, it is damages or nothing." Justice Harlan reached this conclusion because of his fundamental view of constitutional rights and the recognition that the federal judiciary was authorized to afford monetary relief for constitutional violations.

Even though the next two cases represent the "high-water mark" of the Court's Bivens jurisprudence, the fundamental view that was so central in Bivens had begun to fade. This fading signals the limitation of Bivens actions that is yet to come.

B. The Implied Cause of Action "Extended"

The Court's two decisions following Bivens suggested that the implication of a damages remedy under the Constitution would be close to automatic. In doing so, the Court effectively created the two hypothetical situations posited by the Bivens Court into solid exceptions, and where those exceptions did not apply, Bivens recovery was permitted. Davis v. Passman presented a Bivens action arising out of the Due Process Clause of the Fifth Amendment. In Davis, the Court awarded damages but qualified the Bivens holding and created a test. "In appropriate circumstances a federal district court may provide relief in damages for violation of constitutional rights if there are 'no special factors counseling hesitation in the absence of affirmative action by Congress.'" The Court fashioned the test based on one of the hypothetical situations originally articulated in Bivens. The Court used the same reasoning used in Bivens. Since Davis had no alternative cause of action, "it is damages or nothing." Further, "although a suit against a Congressman for

77. Id.
79. Bivens, 403 U.S. at 410.
80. Id.
82. The fading of the fundamental view is demonstrated in Davis v. Passman, 442 U.S. 228, 245 (1994) and Carlson v. Green, 446 U.S. 14, 22 (1980).
84. See Davis, 442 U.S. at 245 (holding that "[i]n appropriate circumstances a federal district court may provide relief in damages for violation of constitutional rights if there are 'no special factors counseling hesitation in the absence of affirmative action by Congress'"; see also Carlson, 446 U.S. at 18 (holding that Bivens permits recovery against federal officials, in federal court, for violations of constitutional rights unless one of the two Bivens exceptions applies).
85. 442 U.S. 228, 244 (1979).
86. Id. That case involved a dispute between a former congressman and his former assistant who alleged that he discriminated against her on the basis of her sex. Id. at 230.
87. Id. at 245.
88. Id. (quoting Bivens, 403 U.S. at 396) (internal citations omitted).
89. Id. at 246-47 (quoting Bivens, 403 U.S. at 397).
90. Id. at 245.
91. Id. (quoting Bivens, 403 U.S. at 410) (Harlan, J., concurring).
putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause. Finally, the Court reasoned there was no explicit declaration by Congress that claimants in Davis's position should not be allowed to recover damages. The dissenters, including the future Chief Justice Rehnquist, foreshadowed the limitations that were to come. Relying on a separation of powers rationale, the Justices thought they had a judicial duty to hesitate in implying causes of action. Similarly, in Carlson v. Green the Court further qualified the Bivens holding. In that case, the mother of a deceased federal prisoner brought suit alleging he suffered personal injuries because federal officials violated his Due Process, Equal Protection, and Eighth Amendment rights. The Court held a Bivens remedy was available, even though there was a possible suit against the United States under the Federal Tort Claims Act (FTCA). The Court construed Bivens as allowing recovery against federal officials, in federal court, for violations of constitutional rights unless one of the two Bivens "exceptions" applied. The Court cited four additional factors that demonstrated that a Bivens remedy was appropriate. First, "the Bivens remedy, in addition to compensating victims, serves as a deterrent purpose and since Bivens remedies are recoverable against individuals as opposed to FTCA remedies against the United States it is a more effective deterrent than [the] FTCA." Second, punitive damages are available in Bivens actions but are not in FTCA actions. Third, a plaintiff can opt for a jury in a Bivens suit but not in an FTCA action. Finally, an action under the FTCA depends upon whether state law permits a cause of action and the action is therefore subject to state law. The Court held that liability of federal officials for violations of a citizen's constitutional rights should be governed by uniform rules of federal law.

92. 446 U.S. 14 (1980).
93. 426 U.S. 14 (1980).
94. 426 U.S. 14 (1980).
95. 426 U.S. 14 (1980).
96. 426 U.S. 14 (1980).
98. 426 U.S. 14 (1980).
100. The Bivens "exceptions" were articulated as applying where "special factors counsel[] hesitation in the absence of affirmative action by Congress," and "when the defendants show that Congress has provided an alternative remedy which it explicitly declares to be a substitute for recovery directly under the Constitution and viewed as equally effective." Id. at 18-19. Neither was held to apply in Carlson since there were no special factors counseling hesitation, and the federal officials had qualified immunity to ensure that such suits would not inhibit them from performing their official duties. Id. at 19 (quoting Davis, 245 U.S. at 245-47). Nor was there an explicit declaration from Congress that the Federal Tort Claims Act was to supplant Bivens recovery. In fact, the Court noted that the 1974 amendments to the FTCA "made it crystal clear that Congress view[ed] FTCA and Bivens as parallel, complementary causes of action." Id. at 18-19.
101. Id. at 20.
102. Id. at 21.
103. Id. at 22.
104. Id.
105. Id. at 23.
106. Id.
The limitation on implied causes of action was foreshadowed in Carlson, just as in Davis. In his dissenting opinion in Carlson, Justice Rehnquist highlighted the reasons against implying a cause of action. These reasons would soon become the majority view of Bivens actions rather than the dissenting view. Justice Rehnquist noted the disparaging views and the controversy that surrounded Bivens actions:

*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 as few cases come here for adjudication.

Justice Rehnquist reaffirmed the view of the dissenters in Davis, stating that creating causes of action is an "exercise of power that the Constitution does not give us." In the years following, what was formally only a foreshadowing would come to the forefront.

C. The "Exception" Becomes the Rule

In Bush v. Lucas, the Court held that an aerospace engineer employed by the federal government could not sue his superior for violation of his First Amendment rights. The Court noted Congress had not expressly denied a private cause of action or provided an adequate alternative remedy but concluded there were "special factors counseling hesitation." Congress constructed an "elaborate comprehensive scheme" that prescribed the scope of relief for federal employees whose First Amendment rights had been violated by their superiors. The Court focused its analysis not on the merits of that scheme, but on who should decide whether such a remedy should be provided. Given the extensive history of congressional effort to alleviate the "problem of politically-motivated removals," the Court concluded the system should not be "augmented by the creation of a new judicial remedy." Although that system did not allow for damages, the Court concluded it provided "meaningful remedies for employees" and was convinced that "Congress is in a better position to decide whether or not the public interest

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107. *Id.* at 31 (Rehnquist, J., dissenting).
108. *Id.* at 34-54 (Rehnquist, J., dissenting).
109. *Id.* at 32 (Rehnquist, J., dissenting).
110. *Id.*
111. *Id.*
112. *Id.* at 34 (Rehnquist, J., dissenting).
114. *Id.* at 368.
115. *Id.* at 378-79 (citing Bivens, 403 U.S. at 396). "When those words were first used in Bivens, we illustrated our meaning by referring to United States v. Standard Oil Co., 332 U.S. 301, 311, 316, 67 S. Ct. 1604, 1609, 1612, (1972) (per curium) and United States v. Gilman, 347 U.S. 507, 74 S. Ct. 695 (1954)." *Id.* at 379. "The special factors counseling hesitation in the creation of a new remedy in Standard Oil and Gilman did not concern the merits of the particular remedy that was sought. Rather, they related to the question of who should decide whether such a remedy should be provided." *Id.* at 380.
116. *Id.* at 385-86.
117. *Id.* at 379.
118. *Id.* at 383.
119. *Id.* at 388.
120. *Id.* at 386.
would be served by creating a damages remedy."

Justice Marshall concurred in the opinion but wrote separately to emphasize that in his view "a different case would be presented if Congress had not created a comprehensive scheme that was specifically designed to provide full compensation and that affords a remedy that is substantially as effective as a damages action."

The Court extended the approach of Bush in Schweiker v. Chilicky. In Schweiker, the Court refused to imply a Bivens action for an alleged due process violation of the Fifth Amendment in the denial of social security disability benefits. The Court found the remedy was not included in the "elaborate remedial scheme" devised by Congress and there were "special factors counseling hesitation in implying one." The Court noted that Congress had paid "frequent and intense" attention to the problems that had arisen in the administration of social security benefits. The Court equated that congressional attention with the attention the Court noted in Bush. Given the amount of congressional attention and the history of efforts by Congress to alleviate problems in the administration of social security benefits, the Court declined, as it had in Bush, "to create a new substantive legal liability...because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it."

Accordingly, the Court found special factors counseling hesitation in implying a cause of action for damages.

In Federal Deposit Insurance Corp. (FDIC) v. Meyer, the Court refused to permit a Bivens recovery against a federal agency. In that case, an employee of a failed savings and loan association, allegedly discharged in violation of due process, sued the Federal Savings and Loan Insurance Corporation. The Court unanimously refused to permit recovery against the agency. The absence of authority supporting recovery and the underlying logic of Bivens did not support

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121. Id. at 390.
122. Id. (Marshall, J., concurring). Justice Blackmun joined the concurrence.
123. Id. at 390 (Marshall, J., concurring).
125. Id. at 414.
126. Id.
127. Id. at 423.

In sum, the concept of "special factors counseling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies.

Id.

128. Id. at 425.
129. The Bush Court devoted a greater part of the opinion to documenting the history of the civil services remedies, especially noting, the "[c]ongressional attention [paid] to the problem of politically-motivated removals...." Bush, 462 U.S. at 380-88.
130. Schweiker, 487 U.S. at 427 (quoting Bush, 462 U.S. at 390) (internal citations omitted).
131. Id. at 429.
133. Id. at 486.
134. Id. at 474.
135. Id. at 471.
such an extension. The Court noted its hesitation in former cases from extending Bivens into new categories. The central reasons for denying recovery against the federal agency were twofold. Primarily, permitting actions against federal agencies would result in litigation against the agencies alone. This would allow claimants to avoid qualified immunity protection invoked by many Bivens defendants and circumvent the Bivens goal of deterring the conduct of the individual. In addition, the special considerations "exception" applied because the creation of a damages remedy against the federal agency would create a potentially enormous financial burden for the federal government, a matter affecting fiscal policy that is better left to Congress.

In Bush and Schweiker, the Court determined that if Congress provided a remedial statutory scheme and congressional attention had been dedicated to the problem, demonstrated by a history of congressional effort to alleviate the problem, there were special factors counseling hesitation and the Court refused to imply a cause of action. While recognizing that Congress had not explicitly provided a statutory mechanism as a substitute for a judicial remedy, the Court examined the congressional remedy provided and determined there were special factors counseling hesitation. In considering the special factors, the Court looked at the remedy Congress provided and essentially determined that given the congressional effort to afford one, the Court should hesitate in creating a judicial remedy because Congress was better suited to determining whether one should be created. In Meyer, the Court used the special factors consideration as the rule and held that the special factors foreclosed relief without first considering if an alternative cause of action existed.

Meyer and the Bivens line of cases following Carlson indicate a trend that the current Court is more than hesitant to imply a cause of action where Congress has not explicitly provided one. This trend toward congressional deference extends beyond the Bivens context. An examination of the two cases that follows only
further demonstrates the limitations the current Court has placed on litigants seeking damages through implied causes of action, either statutory or constitutional rights.

The Supreme Court declined to imply a private cause of action under a federal statute in *Alexander v. Sandoval*. The Court held there is no private right of action to enforce disparate-impact regulations promulgated under Title VII of the Civil Rights Act of 1964. Pursuant to Alabama’s 1990 state constitutional amendment making “English the official language of the state,” and to advance public safety, the Alabama Department of Public Safety changed its policy and administered driver’s license tests only in English. Due to this English-only policy, Sandoval sued under Justice Department regulations forbidding contractors with the federal government from engaging in conduct that has a disparate impact, based on race, gender, or national origin. The Court noted the narrow issue presented by the case, “whether there is a private cause of action to enforce the regulation.” In the analysis of Title VII, the Court stated that whether there is a private right of action to enforce a disparate impact regulation promulgated pursuant to section 602 is an open question, even though private individuals may sue to enforce the purposeful discrimination provision of section 601 of the Act. The Court began its inquiry by observing that the earlier understanding that “it is the duty of the courts[] to provide such remedies as are necessary to make effective the congressional purpose” was no longer accepted. That understanding was first expressed in *J.L. Case Co. v. Borak* and had been rejected in favor of a strict adherence to “congressional intent” as expressed by the words of the applicable statute. The Court found the search involving the “text and structure” of Title VII had no “rights creating” language in section 602 because it focused on neither the people being protected nor the persons regulated. Furthermore, the duties imposed on the regulator by section 602 contradicted a congressional intent to create a private right of action, and later amendments added no contrary legislative intent. Given the Court’s position that the judiciary’s task is to search out the intent of Congress, not to create rights that Congress has not created, the Court found no such congressional intent and foreclosed a private cause of action.

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149. Id. at 285.
150. Id. at 275.
151. Id.
152. Id. at 279-83 (citing to section 601).
153. Id. at 280-83.
154. Id. at 287.
155. 377 U.S. 426, 433 (1964) (holding that a private party had a right to sue under section 14(a) of the Securities Exchange Act of 1934).
157. Id. at 288-89.
158. Id.
159. Id. at 291-92.
160. Id. at 293.
The Court created a parallelism between implied causes of action and private rights of action under rights conferring statutes.\textsuperscript{161} Although 42 U.S.C. § 1983 allowed for vindication of federal statutory rights, the Court declined to imply rights under a federal statute.\textsuperscript{162} In \textit{Gonzaga University v. Doe},\textsuperscript{163} the Court held that a student’s private right of action was foreclosed because the relevant provisions of the Family Educational Rights and Privacy Act (FERPA) created no enforceable personal rights under 42 U.S.C. § 1983.\textsuperscript{164} A student enrolled at Gonzaga intended to become an elementary school teacher and needed an affidavit of good moral character from the university.\textsuperscript{165} The teacher certification specialist at the university overheard a discussion that the student had engaged in sexual misconduct.\textsuperscript{166} The certification specialist launched an investigation, contacted the state teacher certification agency, revealed the name of the student, and told the student he would not get the requisite affidavit from the university.\textsuperscript{167} The student sued in state court under section 1983, alleging a violation of FERPA.\textsuperscript{168} Steadfast in its trend toward limiting private causes of action, the Court noted that anything short of an unambiguously conferred right would not support a cause of action under section 1983.\textsuperscript{169} The Court went a step further and drew a direct parallel between section 1983 cases and implied rights of action cases: “our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.”\textsuperscript{170} The Court set the stage for an analysis akin to that of Alexander, an analysis that strictly interpreted Congress’s intent to provide a private right of action where one was not explicitly provided.\textsuperscript{171} The \textit{Gonzaga} Court reasoned that, while the inquiry into an implied cause of action and the inquiry into what “rights” are enforceable through section 1983 may be different, they overlap in one meaningful respect: the Court must determine whether Congress intended to create a federal right.\textsuperscript{172} The Court found that for a statute to create such rights it must be “phrased in terms of the persons benefited.”\textsuperscript{173} In Alexander the statute lacked “rights creating” language.\textsuperscript{174} FERPA spoke only in terms of institutional policy and practice and provided review and enforcement mechanisms through the department of education.\textsuperscript{175} The Court concluded that if Congress intended to create new rights enforceable under section 1983 it must do so unambiguously, “no less and no more

\textsuperscript{161} See \textit{Gonzaga}, 536 U.S. at ___, 122 S. Ct. at 2275.
\textsuperscript{162} Id. at ___, 122 S. Ct. at 2276.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{169} \textit{Gonzaga}, 536 U.S. at ___, 122 S. Ct. at 2275.
\textsuperscript{170} Id.
\textsuperscript{171} \textit{Gonzaga}, 536 U.S. at ___, 122 S. Ct. at 2276.
\textsuperscript{172} Id. at ___, 122 S. Ct. at 2275.
\textsuperscript{173} Id.
\textsuperscript{174} Id. (quoting Alexander, 532 U.S. at 288-89).
\textsuperscript{175} Id.
than what is required for Congress to create new rights enforceable under an implied private right of action.” 176

Each of these cases is a clear demonstration of the Court’s refusal to imply causes of action where Congress has not explicitly granted them the authority, regardless of policy considerations. 177 The two former cases, combined with the Bivens line of cases previously discussed, set the stage for the Malesko opinion. In Malesko, the Court furthers the limitations on implied private causes of action to a new category. 178

IV. RATIONALE

The situation in Malesko is unique and presents a possible new problem for the enforcement of constitutional rights against federal officials. Before examining the potential problem, it is essential to understand the Court’s dilemma.

A. Majority’s Position

The theme of the majority’s opinion is caution; hence, the issue in the case is analyzed as an extension of Bivens. 179 “The caution toward extending Bivens remedies into any new context, a caution consistently and repeatedly recognized for three decades, forecloses an extension here.” 180 Recognizing that Bivens had only been “extended” twice, in Davis and Carlson, the majority found Malesko’s situation was distinguishable from either of those situations. 181 “Since Carlson, we have consistently refused to extend Bivens liability to any new context or new category of defendants.” 182

The Court reasoned that suits against private corporations would not serve the deterrence goal of Bivens, at least not in the same way as suits against the officers in their individual capacities. 183 However, the majority did not address the other policy goal underlying the Bivens rationale, namely the fundamental aspect of the Fourth Amendment articulated by Justice Harlan. 184

Writing for the majority, Chief Justice Rehnquist also reasoned the holding in Meyer “made clear that the threat of suit against an individual’s employer was not the kind of deterrence contemplated by Bivens.” 185 Chief Justice Rehnquist analogized that since neither the federal agency nor the corporation is an individual

176. Gonzaga, 536 U.S. at ___, 122 S. Ct. at 2279.
177. See Alexander, 532 U.S. at 287. “Having sworn off the habit of venturing beyond Congress’ intent, we will not accept respondent’s invitation to have one last drink.” Id. See also Gonzaga, 536 U.S. at ___. 122 S. Ct. at 2277. “Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.” Id.
179. Id. at 74.
180. Id.
181. Id. at 70.
182. Id. at 68.
183. Id. at 70-71.
184. Recall Justice Harlan’s fundamental view: “the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment,” Bivens, 403 U.S. at 407 (Harlan, J., concurring).
185. Malesko, 534 U.S. at 70.
neither should be subject to *Bivens* liability.\(^\text{186}\) "[I]f a corporate claimant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury."\(^\text{187}\) The Chief Justice concluded the *Bivens* deterrence goal would not be achieved if private corporations were available for suit.\(^\text{188}\)

Additionally, the Court noted, "Malesko is not a plaintiff in search of a remedy as in *Bivens* and *Davis*\(^\text{189}\) since there were other alternative causes of action available to Malesko.\(^\text{190}\) "It was conceded at oral argument that alternative remedies are at least as great as, and in many cases greater than, anything that could be had under *Bivens*.\(^\text{191}\) The majority argued Malesko could have filed a grievance with the BOP against the officers for an injunction or pursued a parallel tort remedy against them.\(^\text{192}\)

The majority argued and concluded that since Malesko had alternative remedies available to him that simply were not pursued,\(^\text{193}\) his situation was not similar enough to *Davis* or *Carlson* to allow a cause of action under *Bivens*.\(^\text{194}\) Instead, the Court stated that the "extension" of *Bivens* sought by Malesko thwarted the deterrence goals of *Bivens* and could not be permitted.\(^\text{195}\)

**B. Dissent’s Position**

The dissent’s first point of contention with the majority’s opinion was with the manner in which the issue was framed: "the question presented by this case is whether the Court should create an exception to the straightforward application of *Bivens* and *Carlson*, not whether it should be extend[ed]."\(^\text{196}\) While the majority relied heavily on *Meyer*, the three dissenting Justices needed to distinguish it.\(^\text{197}\) The *Meyer* holding does not lead to the outcome reached by the majority.\(^\text{198}\) Rather, *Meyer* drew a distinction between “federal agents” and an “agency of the Federal Government,”\(^\text{199}\) yet the majority used *Meyer* as precedent to create an analogy between an agency of the federal government and a private corporation.\(^\text{200}\) Furthermore, the *Bivens* “exception” of special factors counseling hesitation applied in *Meyer* because there were special concerns that the damages sought directly from federal agencies would create a potentially enormous financial burden for the

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186. Id. at 71.
187. Id.
188. Id.
189. Id. at 72-73.
190. Id. at 72.
191. Id.
192. Id. at 73-74. Note that in *Bivens* injunctive relief did not adequately remedy the harm done. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).
193. The majority argued that Malesko could have filed a grievance with the BOP against the officers for an injunction or pursued a parallel tort remedy against them. *Malesko*, 534 U.S. at 74.
194. Id.
195. Id.
196. Id. at 75 (Stevens, J., dissenting).
197. Justice Stevens wrote the dissent, joined by Justices Souter, Ginsburg, and Breyer. Id.
198. Id. at 77 (Stevens, J., dissenting).
199. Id.
200. Id. at 76 (Stevens, J., dissenting).
federal government.\textsuperscript{201} These concerns simply do not apply to private corporations.\textsuperscript{202} Therefore, the dissent concluded the Meyer holding did not preclude relief for Malesko.\textsuperscript{203}

According to the dissent, the majority incorrectly concluded that for a Bivens remedy to be available there must be no other cause of action available.\textsuperscript{204} On the contrary, the dissent noted Bivens theoretically had a cause of action against the individual officer under state tort law, and yet the Court held Bivens had an implied cause of action under the Fourth Amendment.\textsuperscript{205} Similarly, the dissent pointed out that in Carlson there was an alternative cause of action available under the FTCA and yet a cause of action was implied under the Eighth Amendment.\textsuperscript{206} The dissent warned that the majority’s reliance on state tort law and alternative remedies undermined uniformity of federal law and jeopardized the protection of constitutional rights.\textsuperscript{207} The dissent sought to reapply the fundamental view originally articulated by Justice Harlan in his concurrence in Bivens, the view that it was the federal judiciary’s role to assure the vindication of constitutional rights.\textsuperscript{208} Justice Stevens stated, “Like Justice Harlan, I think it ‘entirely proper that these injures be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability.’”\textsuperscript{209}

Providing relief against private corporations is not a disservice to the Bivens goal of deterrence.\textsuperscript{210} The dissent in Malesko argued that private corporations are distinguishable from federal agencies because the “organizational structure” of private prisons “is one subject to the competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments.”\textsuperscript{211} Consequently, the dissent argued the majority’s opinion will encourage privately run correctional facilities to implement cost-saving policies that will jeopardize constitutional rights.\textsuperscript{212}

Providing liability in the present case would mean that prisoners in both private and public institutions would be unable to sue the principal, the government, but would be permitted to sue the primary federal agent, either the government official or the corporation acting under color of federal law.\textsuperscript{213} According to the dissent, the majority’s decision produced asymmetry since state prisoners may sue a private

\begin{itemize}
  \item \textsuperscript{201} Id.
  \item \textsuperscript{202} Id. at 81 (Stevens, J., dissenting).
  \item \textsuperscript{203} Id. at 78 (Stevens, J., dissenting).
  \item \textsuperscript{204} Id.
  \item \textsuperscript{205} Id. at 79 (Stevens, J., dissenting).
  \item \textsuperscript{206} Id.
  \item \textsuperscript{207} Id. at 81 (Stevens, J., dissenting).
  \item \textsuperscript{208} Bivens, 403 U.S. at 407 (Harlan, J., concurring).
  \item \textsuperscript{209} Malesko, 534 U.S. at 79-80 (quoting Bivens, 403 U.S. at 409) (internal citations omitted).
  \item \textsuperscript{210} Id. at 80-81.
  \item \textsuperscript{211} Id. (quoting Richardson v. McKnight, 521 U.S. 399, 412 (1997)) (holding that private prison guards who are employees of a private prison management firm in contract with the state to operate a prison are not entitled to qualified immunity from suit by prisoners charging a violation of section 1983).
  \item \textsuperscript{212} Id. at 81.
  \item \textsuperscript{213} Id.
\end{itemize}
prison for deprivation of constitutional rights under 42 U.S.C. § 1983, while federal prisoners are denied a remedy for such a deprivation. The dissent recognized the Court had never indicated that actions under section 1983 and Bivens were identical, yet a parallelism has been acknowledged.

Finally, the dissent suggested the true reason behind the majority’s opinion was simply disagreement with the Bivens holding.

It is apparent from the Court’s critical discussion of the thoughtful opinions of Justice Harlan and his contemporaries, and from its erroneous statement of the question presented by this case as whether Bivens “should be extended”…that the driving force behind the Court’s decision is a disagreement with the holding in Bivens itself.

This is unacceptable since Congress has practically ratified the Bivens remedy and stare decisis precludes such treatment. “[A] rule that has been such a well-recognized part of our law for over 30 years should be accorded full respect by the Members of this Court.”

V. IMPLICATIONS

The symmetry argument proffered by the dissent hinted at the problem that will inevitably surface: the problem posed by private prisons acting under the color of federal law. “Indeed, a tragic consequence of today’s decision is the clear incentive it gives to corporate managers of privately operated custodial institutions to adopt cost-saving policies that jeopardize the constitutional rights of the tens of thousands of inmates in their custody.” Under Malesko, federal prisoners will not be permitted to recover from the corporation itself. Instead, they will have to pursue a traditional Bivens claim against the officers in their individual capacities. The majority declines to “extend” such a cause of action on separation of powers grounds. “Whether it makes sense to impose a cause of asymmetrical liability costs on private prison facilities is a question for Congress, not us, to decide.” This rationale ignores the role the federal judiciary must play in assuring constitutional violations are remedied. Until Congress recognizes such a cause of action, federal prisoners in private prisons are left in limbo. The gravity of this
problem is readily apparent once an examination of the increase in the number of private prisons is realized.\textsuperscript{226}

The effect \textit{Malesko} will have on prisoners housed in correctional facilities operating under the color of state law is of even greater significance. While \textit{Malesko} resolved the issue of whether a federal cause of action against a private corporation acting under the color of federal law is available to litigants whose constitutional rights have been violated, the parallel issue at the state level may remain unresolved.\textsuperscript{227} There are two options for litigants seeking to recover damages against private corporations acting under the color of state law.\textsuperscript{228} The litigant may seek to recover damages against the private corporation acting under the color of state law by pursuing a cause of action under 42 U.S.C. § 1983.\textsuperscript{229} The litigant may also attempt to pursue a \textit{Bivens} action under the state constitution.\textsuperscript{230}

\section*{A. The Rise of Private Prisons and the Malesko Problem at the State Level}

The origins of the modern private prison business can be traced to the mid-1980s during the anti-government, pro-free enterprise sentiments of the Reagan era.\textsuperscript{231} At that time across the country, prisons were bulging as a result of harsher drug laws and stricter sentencing rules, yet taxpayers were resisting paying for more correctional facilities.\textsuperscript{232} The private contractors offered the perfect solution since they could house some of the inmates and do so at a lower cost than government-operated prisons.\textsuperscript{233} As officials in a number of states were lured by cheaper incarceration costs, state legislatures began enacting statutes permitting private corporations to perform what had previously been considered a function that should be performed exclusively by the government.\textsuperscript{234}

Since then there has been an exponential increase in the number of private prisons and the prisoners they hold.\textsuperscript{235} Over the last two decades, the industry overcame considerable skepticism to become a billion-dollar business.\textsuperscript{236} As of

\begin{itemize}
\item \textsuperscript{227} See \textit{Malesko}, 534 U.S. at 81-82 (Stevens, J., dissenting).
\item \textsuperscript{228} See Lawson v. Liburd, 114 F. Supp. 2d 31 (D.R.I. 2000) (discussing the possibility of affording relief for an inmate who allegedly suffered a violation of his constitutional rights at the hands of a private detentional facility).
\item \textsuperscript{229} See \textit{id.} at 38; see also \textit{Giron v. Corr. Corp. of Am.}, 14 F. Supp. 2d 1245 (D.N.M. 1998) (holding that a correctional officer was acting under color of state law for purposes of section 1983 when he raped a female inmate).
\item \textsuperscript{231} \textit{The Rise and Decline of Private Prisons}, supra note 226.
\item \textsuperscript{232} Id.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id.
\item \textsuperscript{235} \textit{RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY} 2 (1997).
\item \textsuperscript{236} \textit{The Rise and Decline of Private Prisons}, supra note 226.
\end{itemize}
2001, there were 151 privately operated adult correctional facilities in the United States. In privatization, "the state remains the ultimate paymaster and the opportunity for private profit is found only in the ability of the contractor to deliver the agreed services at a cost below the negotiated sum." In delegating some of its police power to the private sector, the state inevitably delegates some of its authority to the private sector and the key issue becomes "whether there still is present that degree of public accountability and control that must always be requisite when the state exercises its police power over the citizen." One means of assuring public accountability is by allowing litigants whose constitutional rights have been violated to pursue an action against the corporation acting under color of state law pursuant to 42 U.S.C. § 1983. A secondary means is to imply a cause of action against the state under the state constitution when the state delegates its authority to private corporations.


A defendant in a civil rights action filed under 42 U.S.C. § 1983 is liable only if the challenged conduct occurred "under the color of state law." A person acts under color of state law when she exercises the power possessed by virtue of state law because she is clothed with the authority of state law. In West v. Atkins, the Supreme Court held that a physician who was under contract with the state to provide medical services to inmates at a state prison hospital on a part-time basis acted "under color of state law" for purposes of section 1983 when he treated an inmate. Since then, however, the Court has declined to specifically address the issue of whether private corporations under contract with the state to operate correctional facilities are liable under section 1983. Thus, district courts have been left to interpret the state action problem and determine whether private corporations have been sufficiently clothed with state authority so as to render them liable under section 1983. The district courts have varied somewhat in their application of section 1983 liability against private actors clothed with state authority. While some district courts have foreclosed section 1983 recovery against private entities, others have incorporated that avenue of relief as a part of their state law.

237. Thomas, supra note 226.
238. HARDING, supra note 235, at 2.
239. Id.
241. See Brown v. State, 674 N.E.2d 1129, 1141 (N.Y. 1996) (holding cause of action to recover damages may be asserted against state for violation of equal protection and search and seizure clauses of the state constitution, citing Bivens).
244. Id.
245. Id. at 57.
246. Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that private prison guards who are employees of a private prison management firm in contract with the state to operate a prison are not entitled to qualified immunity from suit by prisoners charging a violation of section 1983 and explicitly declining to determine whether the defendants acted under color of state law).
The District Court of Rhode Island, in *Lawson v. Liburdi*, 247 denied the plaintiff any relief under either a *Bivens* or section 1983 action against a private detention facility. 248 In that case, a federal pretrial detainee filed a complaint against employees of a private detention facility that was owned by a public corporation created by the city. 249 Although not originally pled by the plaintiff, the court sua sponte requested that the parties brief and argue the issue of whether the named defendants, employees of a private corporation, acted "under color of state law" for purposes of a *Bivens* or a section 1983 action. 250

In addressing the liability of the private corporation under 42 U.S.C. § 1983, the main issue was whether the federal constitutional deprivations alleged by the plaintiff at the hands of the defendants constituted state action for the purposes of the statute. 251 In determining whether there was direct state action, the district court analogized to the Supreme Court case of *Lebron v. National Railroad Passenger Corp.* 252 Accordingly, because the city did not maintain permanent control over the detention center, the district court concluded the defendants were not directly linked to the state and did not constitute an "arm of the state." 253

The district court analyzed the actions of the detention facility under the three state action tests articulated by the Supreme Court 254 and did not find a link between the defendant and the state to make it liable under section 1983. 255 First, in order to establish liability under the nexus test, the state must have exercised coercive power over the decision of the private corporation or provided significant encouragement, either covert or overt. 256 Since the state had no connection with the defendant's decision to refuse the plaintiff a vegetarian diet, the nexus test was not satisfied. 257 Second, because the private detention center was not financed by the state, and no judgment rendered against employees of the private detention center would be paid

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248. *Id.* at 33. Plaintiff brought claims pursuant to *Bivens*, alleging that the employees violated the First Amendment's Free Exercise Clause, the Eighth Amendment's prohibition against cruel and unusual punishment, and the Fourteenth Amendment's Equal Protection Clause.
250. *Id.* at 33. With respect to the *Bivens* claim, the district court concluded, "*Bivens* is more restrictive than 42 U.S.C. § 1983 and applies only to federal officials acting under federal authority to deprive a person of their rights under the Constitution and laws of the United States." *Id.* at 33 (relying on Fletcher v. R.I. Hosp. Trust Nat'l Bank, 496 F.2d 927, 932 n.8 (1st Cir. 1974)). Defendants in that case were employees of a private facility, hired by a public corporation created by the city to operate the detention facility. *Id.* at 37. Thus, they were not affiliated with the federal government in any way and consequently not subject to liability under *Bivens*. *Id.*
251. *Id.* at 38.
252. 513 U.S. 374 (1995) (holding that Amtrak was a part of the federal government for the purposes of a First Amendment claim because the federal government created it by enactment of special legislation to further governmental objectives and retained permanent control over the corporation's activities).
254. *Id.* The Supreme Court has developed three tests: the nexus test, which focuses on the government's involvement in the activity of the private party; the symbiotic relationship test, which looks to the mutual interdependence of the private party with the government; and the traditional public function test, which holds constitutionally accountable private entities performing a function that has been the exclusive domain of the government. See Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (the nexus test); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (symbiotic relationship test); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (traditional public function test). See also Rodriguez-Garcia v. Davila, 904 F.2d 90, 96 (1st Cir. 1990).
256. *Id.* at 39 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).
257. *Id.* at 41.
out of the state treasury, the symbiotic relationship test was not satisfied.\textsuperscript{258} Finally, the district court relied on the Supreme Court’s holding in \textit{Richardson v. McKnight}\textsuperscript{259} that “correctional facilities have never been exclusively public” and, therefore, the public function test was not satisfied.\textsuperscript{260}

Although \textit{Lawson v. Libardi}\textsuperscript{261} is an example of a district court declining to impose section 1983 liability on a private detention facility, that case is easily distinguishable from other cases involving contracts between private corporations and state correctional facilities. The nature of the relationship between the state and the private detention facility was far too attenuated to conclude the private entity operated under color of state law.\textsuperscript{262} However, cases in which the nature of the relationship between the private entity and the state are not so attenuated produce a different result.\textsuperscript{263}

In \textit{Richardson}, the Supreme Court held that employees of a private prison management firm were not entitled to qualified immunity from suit by prisoners charging a violation of section 1983.\textsuperscript{264} However, the Court declined to address whether the defendants were liable under section 1983, even though they were employed by a private firm,\textsuperscript{265} stating instead, “it is for the district court to determine whether, under this Court’s decision in \textit{Lugar v. Edmondson Oil Co.},\textsuperscript{266} defendants actually acted under color of state law.”\textsuperscript{267} Since \textit{Richardson}, several district courts have applied the public function test and found private contractors who run prisons acted under color of state law for purposes of section 1983.\textsuperscript{268}

In \textit{Giron v. Corrections Corp. of America},\textsuperscript{269} the District Court of New Mexico held that a correctional officer was acting under color of state law when he raped a female inmate.\textsuperscript{270} Further, the officer was not immune from suit as a state employee under the state Tort Claims Act and thus could be liable for compensatory and punitive damages.\textsuperscript{271} The plaintiff in \textit{Giron} was an inmate at the New Mexico Women’s Correctional Facility (NMWCF) in Grants, New Mexico.\textsuperscript{272} The

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{258} Id. at 40 (quoting Rodriguez-Garcia v. Davila, 904 F.2d 90, 98 (1st Cir. 1990)).
\item\textsuperscript{259} 521 U.S. at 405.
\item\textsuperscript{260} Lawson, 114 F. Supp. 2d at 39.
\item\textsuperscript{261} Id.
\item\textsuperscript{262} Id. at 41. The complaint was filed against employees of a private detention facility owned by a public corporation created by the city.
\item\textsuperscript{263} See Giron v. Corr. Servs. Corp. of Am., 14 F. Supp. 2d 1245 (D.N.M. 1998) (holding that a correctional officer was acting under color of state law for purposes of section 1983 when he raped a female inmate).
\item\textsuperscript{264} Richardson, 512 U.S. at 13.
\item\textsuperscript{265} Id.
\item\textsuperscript{266} 457 U.S. 922 (1982).
\item\textsuperscript{267} Id. at 935.
\item\textsuperscript{268} See Street v. Corr. Servs. Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996) (holding that a private company performing the function of incarcerating inmates was acting under color of state law); Kesler v. King, 29 F. Supp. 2d 356, 370-71 (S.D. Tex. 1998) (same); Blumel v. Mylander, 919 F. Supp. 423, 426-27 (M.D. Fla. 1996) (holding that private contractor that contracted with Florida county jail was state actor for purposes of section 1983); Lemoine v. New Horizons Ranch & Ctr., 990 F. Supp. 498, 502-03 (N.D. Tex. 1998) (holding that private company that contracted with state to assume state’s responsibility for care of troubled juveniles was a state actor for purposes of section 1983 under public function analysis).
\item\textsuperscript{269} 14 F. Supp. 2d 1245 (D.N.M. 1998).
\item\textsuperscript{270} Id. at 1251.
\item\textsuperscript{271} Id.
\item\textsuperscript{272} Id. at 1246.
\end{enumerate}
\end{footnotesize}
Corrections Corporation of America (CCA), a private for-profit corporation, operated the NMWCF pursuant to a contract with the State of New Mexico Corrections Department. The court applied the public function test and concluded the defendant was able to gain entry and access to the plaintiff's cell to commit the constitutional violation only because he was authorized as a corrections officer to administer routine checks of the inmates. In the analysis of the public function test, the court rejected the notion that the Supreme Court's decision in Richardson foreclosed its determination that the operation of correctional facilities is a traditional governmental function. The court went on to state, "The function of incarcerating people, whether done publicly or privately, is the exclusive prerogative of the state." Since the operation of correctional facilities is a traditional government function, private entities that are delegated that government function by the state are subject to liability under the federal Constitution. The court concluded, "government function doctrine applies in New Mexico when the state delegates the running of a prison to a private contractor." Because the defendant used his badge of authority to gain access to the plaintiff's cell, he acted under color of state law. Therefore, his conduct was a result of state action.

The court next addressed the defendant's immunity from suit under the state Tort Claims Act. The defendant argued that if he was considered a state actor acting under the color of state law, then he should be immune from suit because the New Mexico Tort Claims Act had not waived immunity for state corrections officers. However, the court concluded the defendant was not a public employee of the state but rather an employee of a private corporation acting under the color of state law. Accordingly, the defendant was not immune from liability because he was not a public employee within the meaning of the New Mexico Tort Claims Act. The Act defines a "public employee" as "any officer, employee or servant of a governmental entity, excluding independent contractors except for individuals defined in Paragraphs (7), (8), (10) and (14) of this subsection." Under that definition, the defendant was an employee of an independent contractor, not a public employee, and he was not immune from suit.

The holding in Giron was compelled by the close relationship between the private contractor and the state, a relationship that did not exist in Lawson.
District courts are charged with determining whether private entities in contract with the state are acting under color of state law for purposes of section 1983 liability and, thus, the results in any given case will vary. The decisions in Lawson and Giron provide useful guidelines as they present two different situations, and the holding in each was compelled by the relationship between the state and the private contractor.

If there is no cause of action under 42 U.S.C. § 1983, litigants must look for another mechanism to remedy the injury. The injury could be a violation of the state constitution. The inquiry then becomes whether a cause of action can be implied under the state constitution and whether the Tort Claims Act would bar that action. If the Tort Claims Act does not bar action, there must be sufficient action by the state in delegating some of the state’s police power to the private corporation.

C. Bivens Actions under State Constitutions

States that have recognized the existence of implied causes of action against both individuals and governments for monetary damages for violations of state constitutions typically have patterned their reasoning on section 874A of the Restatement (Second) of Torts, analogies to Bivens actions, or common-law antecedents to constitutional provisions. Other state courts considering the issue have refused to imply a cause of action for violations of state constitutional provisions, usually on the grounds that adequate alternative remedies existed.

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corporation that the city statutorily created. Lawson, 114 F. Supp. 2d at 40.
288. Richardson, 521 U.S. at 413. Compare Giron, 14 F. Supp. 2d at 1248 (holding that an employee of a private corporation was a state actor for purposes of section 1983 since the function of incarcerating people, whether done privately or publicly, was the exclusive prerogative of the state) with Lawson, 114 F. Supp. 2d at 40-41 (holding that a private corporation was not a state actor for purposes of section 1983 since operating a prison has never been the exclusive prerogative of the state).
289. See supra notes 284-285.
292. See Caillouette v. Hercules, 113 N.M. 492, 496 (N.M. Ct. App. 1992) (declining to imply a cause of action for damages under the New Mexico Constitution since there was no waiver of immunity under the New Mexico Tort Claims Act); Blea v. City of Espanola, 117 N.M. 217, 220-22 (N.M. Ct. App. 1994) (declining to imply a cause of action for damages under the New Mexico Constitution; citing Caillouette, 113 N.M. at 496).
293. See Brown, 674 N.E.2d at 1141.
States that recognize implied causes of action under state constitutions are more likely to provide monetary relief for violations of state constitutions against a private corporation because those states are concerned with the policies of deterrence and remedying the violation of constitutional rights. These were essentially the policy reasons behind Bivens that were articulated by Justice Harlan in his concurrence. State courts concerned with such policies are not likely to refrain from providing relief when a private corporation or an employee of that corporation has committed the constitutional violation because the same policy goals apply: permitting recovery would deter such violations and remedy the impermissible violation of constitutional rights.

The concerns expressed by those states bear a striking resemblance to the concerns articulated by the dissent in Malesko. Each is concerned with the full protection of constitutional rights. The dissent in Malesko warns that the majority’s reliance on state tort law and alternative remedies “jeopardizes the protection of constitutional rights.” Similarly, in Brown v. State, the New York court held that an implied cause of action for damages against the state was necessary and appropriate to ensure the full realization of the rights guaranteed in its constitution and that no other remedy, injunctive or declaratory, would relieve the constitutional violation. Therefore, the states that are aligned with the dissent’s position are likely to provide for monetary relief against private corporations acting under the color of state law, as the dissenters in Malesko would have. This is demonstrated by the policy concerns shared by both: the protection of constitutional rights and the deterrence of such violations, whether state or federal.

On the other hand, state courts declining to recognize an implied cause of action under the state constitution are not likely to provide monetary relief against private corporations because those states are concerned with separation of powers and would prefer to defer to the legislative body to make such decisions. In addition,
those states are concerned with duplicative avenues of relief and, if an adequate alternative remedy is available, those courts refuse to recognize another.\textsuperscript{308}

Those states are drawing from the same analysis as the majority and concurring opinions in \textit{Malesko}.\textsuperscript{309} That position centers its analysis on the limitations rather than the expansions of \textit{Bivens} actions.\textsuperscript{310} The majority in \textit{Malesko} presented the issue as an “expansion” of \textit{Bivens}.\textsuperscript{311} The majority also noted Malesko had alternative avenues of relief,\textsuperscript{312} a concern echoed by those states declining to recognize an implied cause of action.\textsuperscript{313} That position is bolstered by deference to the legislative bodies, both state and federal.\textsuperscript{314} The Ohio Supreme Court,\textsuperscript{315} examining the \textit{Bivens} line of cases, noted that the federal judiciary “has generally exercised extreme caution” in fashioning monetary remedies for violations of individual constitutional rights.\textsuperscript{316} Therefore, given the separation of powers doctrine relied upon by that position, it is unlikely that those states will imply a cause of action under the state constitution against private corporations, just as the majority declined to do in \textit{Malesko}.\textsuperscript{317}

\textbf{D. Implied Causes of Action under the New Mexico Constitution}

New Mexico courts have never directly addressed the issue of whether an implied cause of action for damages under its constitution should be recognized against a private corporation or otherwise.\textsuperscript{318} New Mexico has no statute that directly authorizes suits for damages for violations of the state constitution.\textsuperscript{319} Furthermore, in New Mexico, the Tort Claims Act governs sovereign immunity.\textsuperscript{320} The Tort Claims Act was passed by the legislature in response to \textit{Hicks v. State}.\textsuperscript{321} in which the New Mexico Supreme Court effectively abolished sovereign immunity

\begin{itemize}
\item \textsuperscript{308} \textit{See, e.g.,} Provens v. Stark Cty. Bd. of Mental Retardation & Dev. Disabilities, 594 N.E.2d 959 (Ohio 1992) (holding that if statutory remedies exist for violations of constitutional provisions, private employees do not have a private cause of action for violations of their state constitutional rights).
\item \textsuperscript{309} \textit{Malesko}, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); \textit{id.} at 74.
\item \textsuperscript{310} \textit{id.} at 74.
\item \textsuperscript{311} \textit{id.} at 70.
\item \textsuperscript{312} “[\textit{Malesko}] is not a plaintiff in search of a remedy as in \textit{Bivens} and \textit{Davis}.” \textit{id.} at 74.
\item \textsuperscript{313} Provens, 594 N.E.2d at 959 (holding that if statutory remedies exist for violations of constitutional provisions, private employees do not have a private cause of action for violations of their state constitutional rights).
\item \textsuperscript{314} “There is even greater reason to abandon [inventing implications] in the constitutional field, since an ‘implication’ imagined in the Constitution can presumably not even be repudiated by Congress.” \textit{Malesko}, 534 U.S. at 75 (Scalia, J., concurring).
\item \textsuperscript{315} Provens, 594 N.E.2d 959.
\item \textsuperscript{316} \textit{id.} at 962.
\item \textsuperscript{317} \textit{Malesko}, 534 U.S. at 67 n.3.
\item \textsuperscript{318} \textit{See} Owen, \textit{supra} note 290, at 174 (providing a more in-depth analysis of relevant New Mexico case law).
\item \textsuperscript{319} At least two states, Arkansas and Maine, have fashioned Civil Rights Acts that provide for direct causes of action for damages of their state constitutions. \textit{ARK. CODE ANN.} \textsection{16-123-103 (Michie 1987); ME. REV. STAT. ANN. tit. 5, \textsection{4682 (West 1993).}
\item \textsuperscript{320} \textit{N.M. STAT. ANN.} \textsection{41-4-4(A) (Michie 1996) provides:}
\begin{quote}
A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978.
\end{quote}
\item \textsuperscript{321} 88 N.M. 588, 544 P.2d 1153 (N.M. 1975).
\end{itemize}
in its entirety.\footnote{322} The Act reinstated sovereign immunity for any governmental entity and any public employee for all torts except for those specifically waived by the Act.\footnote{323} The legislature specifically mentioned state constitutional violations in two provisions of the Tort Claims Act.\footnote{324} Specifically, section 41-4-4(D)(2) of the Act requires that a governmental entity must pay any damage award assessed against a government employee acting within the scope of his employment if that award was a result of a violation of rights guaranteed by the New Mexico Constitution.\footnote{325} The Act fails to enumerate the specific causes of action that permissibly state a claim for a “violation of [the] rights” noted in section 41-4-4(D)(2).\footnote{326} However, the damages provision of the Act\footnote{327} specifically waives immunity of law enforcement officers for violations of “any rights, privileges or immunities secured by the constitution and laws of...New Mexico....”\footnote{328} Therefore, in New Mexico, the state is immune from liability for a violation of a state constitutional right except when a law enforcement officer commits the violation.\footnote{329} Since the Tort Claims Act waives immunity for law enforcement officers acting under the scope of their employment, it provides an avenue of relief for plaintiffs who seek damages from private corporations operating correctional facilities, since those private actors are law enforcement officers.\footnote{330}

New Mexico courts have considered the issue of whether to recognize a damages action against law enforcement officers subject to the waiver of immunity under the Tort Claims Act. In Caillouette v. Hercules, Inc.,\footnote{331} a widow brought claims for wrongful death and violations of the decedent’s state constitutional rights to safety and happiness.\footnote{332} The court held there was no waiver of sovereign immunity for violations of article II, section 4 of the New Mexico Constitution,\footnote{333} claiming, “If we were to base a waiver of sovereign immunity on these provisions, the exceptions thus created would eliminate the principle of sovereign immunity.”\footnote{334} However, the court did not explain why there would be no waiver of sovereign immunity for those provisions. Conceivably, the court’s reluctance to apply the waiver of sovereign immunity to law enforcement officers stems from the ambiguous language contained in article II, section 4.\footnote{335} The Caillouette court determined that an
official’s immunity for violation of article II, section 4 precluded that section from providing cognizable rights.\textsuperscript{336}

The court of appeals readdressed the issue of whether a law enforcement officer could be sued for violation of constitutional rights based on the waiver of sovereign immunity contained in the Tort Claims Act in \textit{Blea v. City of Espanola}.\textsuperscript{337} In that case the plaintiffs sued police officers and their supervisor seeking recovery for wrongful death, personal injuries, and violations of article II, sections 4 and 18 of the New Mexico Constitution.\textsuperscript{338} The court summarily dismissed the claims under article II, section 4 relying on \textit{Caillouette}, stating that a “[w]aiver of immunity based on such constitutional grounds would emasculate the immunity preserved in the Tort Claims Act.”\textsuperscript{339} The court declined to decide whether the claims for damages under article II, section 18 were subject to the waiver of sovereign immunity under the Tort Claims Act.\textsuperscript{340} Instead, the case was remanded to the trial court to determine whether the plaintiffs should be permitted to proceed under a theory of waiver of sovereign immunity under article II, section 18, and, if so, what the remedies allowable under that theory would be.\textsuperscript{341} As a result, the \textit{Blea} holding failed to provide guidelines for future litigants seeking monetary redress against law enforcement officers for violations of their state constitutional rights based on the waiver of immunity contained in the Tort Claims Act.

As of 2001, there were eight privately owned and operated adult correctional facilities in New Mexico.\textsuperscript{342} Therefore, the \textit{Malesko} problem is likely to arise in New Mexico. After examining the approaches of other states and the current status of constitutional tort jurisprudence in New Mexico, it is difficult to determine if a cause of action for damages against a private corporation acting under the color of state law would be permitted. Unlike the concerns expressed by other states, the relevant cases in New Mexico do not articulate the same policy concerns as those articulated by the dissenters in \textit{Malesko}.\textsuperscript{343} Recall that those states were aligned with the concerns of the dissenters in \textit{Malesko}, namely, full protection of constitutional guarantees and deterrence of such violations.\textsuperscript{344} However, the New Mexico cases on point do not articulate these policy concerns.\textsuperscript{345} The chief concern seems to be compliance with the Tort Claims Act, and reluctance to apply the

\textsuperscript{336} \textit{Caillouette}, 113 N.M. at 495, 827 P.2d at 1310.
\textsuperscript{337} 117 N.M. 217, 870 P.2d 755 (N.M. 1994).
\textsuperscript{338} \textit{Id.} at 219-22, 870 P.2d at 759-60.
\textsuperscript{339} \textit{Id.} at 221, 870 P.2d at 759 (citing \textit{Caillouette}, 113 N.M. at 407, 827 P.2d at 1311).
\textsuperscript{340} \textit{Id.} at 222, 870 P.2d at 760.
\textsuperscript{341} \textit{Id.}
\textsuperscript{342} Thomas, \textit{supra} note 226.
\textsuperscript{343} \textit{Compare Caillouette}, 113 N.M. at 497, 827 P.2d at 1311 (declining to imply a cause of action under state constitution because there was no waiver of sovereign immunity) and \textit{Blea}, 117 N.M. at 221, 870 P.2d at 759 (declaring to imply a cause of action under state constitution; citing \textit{Caillouette}) with \textit{Malesko}, 534 U.S. at 80 (stating that in denying to imply a cause of action the majority position jeopardizes the protection of the full scope of constitutional rights).
\textsuperscript{344} \textit{Compare Brown v. State}, 674 N.E.2d 1129, 1141 (N.Y. 1996) (stating that “[b]y recognizing a narrow remedy for violations of sections 11 and 12 of article I of the State constitution, we provide appropriate protection against official misconduct at the State level”) with \textit{Malesko}, 534 U.S. at 80 (Stevens, J., dissenting) (stating that “aside from undermining uniformity, the Court’s reliance on state tort law will jeopardize the protection of the full scope of federal constitutional rights”).
\textsuperscript{345} \textit{See supra} note 343.
waiver of sovereign immunity to law enforcement officers stems from that concern.\textsuperscript{346} However, at the same time, the relevant New Mexico cases do not appear to be directly aligned with the policy concerns of the majority opinion in \textit{Malesko}, nor those states that decline to imply causes of action for damages for violations of their respective constitutions.\textsuperscript{347} The policies of \textit{Malesko} and those states declining to imply causes of action under their constitutions were compliance with the doctrine of separation of powers and absence of alternative remedies.\textsuperscript{348} Although the New Mexico Court of Appeals in \textit{Blea} refused to apply the waiver of sovereign immunity for law enforcement officers to article II, section 4, the court specifically left open the issue of whether the waiver applied to article II, section 18.\textsuperscript{349} Moreover, the policies expressed by the court of appeals in \textit{Blea} in refusing to apply the waiver of sovereign immunity were not separation of powers or lack of alternative remedies.\textsuperscript{350} The court was concerned with compliance with the Tort Claims Act and the policies surrounding it and its exceptions.\textsuperscript{351} Therefore, the relevant New Mexico cases do not express the concerns articulated by the Supreme Court in \textit{Malesko} or by states refusing to imply causes of action under their constitutions.\textsuperscript{352}

The issue in New Mexico of whether an implied cause of action for damages against a law enforcement officer would be permitted is still wide open. The courts in New Mexico have not directly aligned themselves with either side of the debate. Litigants in the state have an opportunity for recovery against a private corporation, provided the litigant jumps the sovereign immunity burden that prevents most from recovery against the state and its actors.\textsuperscript{353} However, other than article II, section 4, the courts in New Mexico have not directly addressed the issue of whether constitutional violations committed by law enforcement officers are subject to the waiver of immunity contained in the Tort Claims Act.\textsuperscript{354} In this respect, the Tort Claims Act itself is a "statute that authorizes suits for damages," at least with respect to law enforcement officers.

\begin{flushright}
\textsuperscript{346} \textit{Id.}
\textsuperscript{347} Compare \textit{Figuero}, 604 P.2d at 1205-06 (declining to recognize an implied cause of action under its state constitution because there was no waiver of sovereign immunity and the court held it was not free to abolish the state's sovereign immunity) and \textit{Provens}, 594 N.E.2d 959 (holding that if statutory remedies exist for violations of constitutional provisions, private employees do not have a private cause of action for violations of their state constitutional rights) and \textit{Malesko}, 534 U.S. at 67 n.3 ("We have retreated from our previous willingness to imply a cause of action where Congress has not provided one.") with \textit{supra} note 343.
\textsuperscript{348} \textit{Malesko}, 534 U.S. at 67 n.3; \textit{Figuero}, 604 P.2d at 1205-06 (using separation of powers rationale to deny cause of action); \textit{Provens}, 594 N.E.2d at 963-64 (using existence of adequate alternative remedies as rationale to deny cause of action).
\textsuperscript{349} \textit{Blea}, 117 N.M. at 222, 870 P.2d at 760.
\textsuperscript{350} \textit{Id.} at 221, 870 P.2d at 759.
\textsuperscript{351} \textit{Id.} at 222, 870 P.2d at 760 ("However, the issue in this case is not what our constitution protects or does not protect. The issue is the scope of the acts for which the legislature has waived immunity.").
\textsuperscript{352} See \textit{supra} note 344.
\textsuperscript{353} See \textit{Caillouette}, 113 N.M. at 497-98, 827 P.2d at 1311-12 (N.M. Ct. App. 1992) (declining to imply cause of action under article II section 4 of state constitution because of sovereign immunity); \textit{Blea}, 117 N.M. at 221-22, 870 P.2d at 759-60 (declining to imply cause of action under state constitution; citing \textit{Caillouette}).
\textsuperscript{354} See \textit{Blea}, 117 N.M. at 222, 870 P.2d at 760 (declining to imply a cause of action under article II, section 4 of state constitution because of sovereign immunity but declining to address whether the waiver of sovereign immunity applies to article II, section 18 of state constitution).
VI. CONCLUSION

Although the effect *Malesko* will have on state constitutional tort jurisprudence is uncertain, the two positions surrounding the debate have been made sufficiently clear by the opinion.\textsuperscript{355} By examining the policies surrounding the constitutional tort jurisprudence in any given jurisdiction, a future litigant seeking monetary recovery against a private corporation acting under the color of state law will have a good indication of how his or her state court will determine the issue. The policies expressed by the majority and dissenting opinion in *Malesko* serve as a guide to future state litigants. Those states aligned with the policies expressed by the majority in *Malesko* likely will decline to recognize a cause of action under the state constitution for damages. Meanwhile, those states closely aligned with the policies expressed by the dissent in *Malesko* more than likely will imply a cause of action for damages under the state constitution.

\textsuperscript{355} Compare *Malesko*, 534 U.S. at 63 with *id.* at 78 (Stevens, J., dissenting).