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PEOPLES V. CCA DETENTION CENTERS: THE TENTH CIRCUIT LIMITS INMATE CONSTITUTIONAL RIGHTS

INTRODUCTION

The costs of operating state-run prison systems are becoming increasingly prolific. As a result, many states have resorted to using privately-run prisons to defray the costs, a strategy that appears to be working.[1] Practical and moral arguments regarding the privatization of prisons aside, this development has also given rise to various legal questions. One of these questions is whether federal prisoners may bring a damages suit against the employees of these private prisons for constitutional violations.

In 1971, the Supreme Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[2] in which it held that federal agents may be held liable for monetary damages for constitutional violations.[3] The increasing privatization of prisons has raised the issue of whether an analogous suit may be brought against the employees of privately-run prisons. In *Peoples v. CCA Detention Centers*,[4] a split decision, the Tenth Circuit was the first circuit court to hold that the existence of a state remedy precluded the need for a federal cause of action and thus denied Mr. Peoples relief.[5] This decision was later vacated by a twelve judge en banc decision that split 6-6.[6] Subsequently, the Fourth Circuit, citing *Peoples*, also held that these claims do not state a federal cause of action when there is an adequate state law remedy.[7] However, district courts in other circuits have held that the existence of a state law cause of action does not preclude federal relief.[8] Thus, this issue has divided not only the Tenth Circuit judges, but also the circuits them-

1. On average, states with 20% or more privately-run prisons had an average increase in prison costs from 1997-2001 of 24.34%. This is significantly less than the increase for states with less than 20% privately-run prisons, 32.72%. Importantly, of the six states in the Tenth Circuit, Colorado, New Mexico, and Oklahoma have more than 20% privately-run prisons. In Utah, a state with less than 20% privately run prisons, the cost per diem is $125.40, whereas in Oklahoma, the cost is $43.34. Paul Guppy, Policy Brief, *Private Prisons and the Public Interest: Improving Quality and Reducing Cost through Competition*, WASH. POLICY CENTER, Feb. 2003, *available at* http://www.washingtonpolicy.org/ConOutPrivatization/PBGuppyPrisonsPublicInterest.html.

2. 403 U.S. 388 (1971).

3. *Bivens*, 403 U.S. at 389.

4. 422 F.3d 1090 (10th Cir. 2005) (2-1 decision), *vacated*, 449 F.3d 1097 (10th Cir. 2006) (en banc).

5. *Peoples*, 422 F.3d at 1108.

6. *Peoples*, 449 F.3d at 1099.

7. Holly v. Scott, 434 F.3d 287, 296 (4th Cir. 2006).

8. *See* Vector Research Inc. v. Howard & Howard Attorneys, 76 F.3d 692, 695 (6th Cir. 1996); Showengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1331 (9th Cir. 1987).

selves and is a subject that, as stated by Circuit Judge Ebel in his dissenting opinion in *Peoples*, "ought to be decided by the Supreme Court."[9]

Part I of this article discusses the background of how causes of action against federal officers evolved from related statutory provisions. Part II discusses the majority and dissenting opinions from *Peoples v. CCA Detention Centers*. Part III discusses related decisions from other circuits. Part IV analyzes these conflicting views and argues that the Tenth Circuit's position on this issue is inconsistent with *Bivens*' underlying rationale. Finally, in Part V, this comment concludes that this is an issue that will likely reoccur frequently and will thus necessitate a Supreme Court decision.

I. BACKGROUND

Officers in state-run prisons may be sued for constitutional violations under 42 U.S.C. § 1983.[10] In addition, since 1949, the Supreme Court has held that federal officers may be sued for injunctive relief for federal violations.[11] However, until 1971, the Supreme Court had yet to rule whether a plaintiff could sue federal officers for constitutional violations for money damages.[12] In *Bivens*, the Court answered this question in the affirmative.[13] An analysis of the question whether private prison employees should be subject to suits for damages flowing from constitutional violations requires discussion of *Bivens* and its progeny.

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9. *Peoples*, 422 F.3d at 1108 n.2 (Ebel, J., dissenting).

10. 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

Thus, in order to prevail in a suit against a State under § 1983, a plaintiff must prove "that there was state action. The reason for this is fundamental. The [F]ifth and [F]ourteenth Amendments, which . . . guarantee due process of law, apply to the acts of state and federal governments, and not to the acts of private parties or entities." Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 577 (1989). However, this potential for liability is tempered by the availability of qualified immunity. *See* Paul Howard Morris, *The Impact of Constitutional Liability on the Privatization Movement After* Richardson v. McKnight, 52 VAND. L. REV. 489, 504-08 (1999).

11. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 588 (4th ed. 2003) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)).

12. *Id.*

13. *Bivens*, 403 U.S. at 389.

A. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics

Mr. Bivens alleged that federal narcotics agents entered his apartment, arrested him in front of his family, and thoroughly searched his home for drugs.[14] In addition, he was later forced to submit to a visual strip search.[15] He was never prosecuted.[16] Mr. Bivens brought suit in district court, claiming the searches were in violation of his Fourth Amendment rights.[17] He sought money damages from the officers for his humiliation and pain and suffering.[18] The district court and Second Circuit Court of Appeals both dismissed the case, holding that it "failed to state a cause of action."[19] Specifically, the Court of Appeals held that "the Fourth Amendment does not provide a basis for a federal cause of action for damages arising out of an unreasonable search and seizure."[20] The courts concluded that Mr. Bivens' proper avenue of relief was through a state law trespass claim.[21]

The Supreme Court reversed, holding that a violation of the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures "gives rise to a cause of action for damages consequent upon . . . unconstitutional conduct."[22] Specifically, the Court held that a constitutional claim should not be confined to a state cause of action because "the interests protected by state laws regulating . . . the invasion of privacy[] and those protected by the Fourth Amendment[] . . . may be inconsistent or even hostile."[23] In addition, the Court held that the Fourth Amendment protections are not "co-extensive to those found under state law."[24] Finally, the Court concluded that even though the Fourth Amendment does not explicitly allow for an award of money damages for its violation, "'it is well settled that 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.'"[25] Thus, the Court reasoned that it may imply a constitu-

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

15. *Id.* Specifically, Mr. Bivens "claimed to have suffered great humiliation, embarrassment, and mental suffering." *Id.* at 389-90.

16. MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 350 (3d ed. 2001).

17. *See Bivens*, 403 U.S. at 389.

18. *Id.* at 390.

19. *Id.*

20. CHEMERINSKY, *supra* note 11, at 591 (citing Bivens. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718, 719 (2d. Cir. 1969), *rev'd*, 403 U.S. 388 (1971)).

21. *See Bivens*, 409 F.2d 718, 726 (2d. Cir. 1969), *rev'd*, 403 U.S. 388 (1971); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. 12, 15 (E.D.N.Y. 1967).

22. *Bivens*, 403 U.S. at 389.

23. *Id.* at 394.

24. Lumen N. Mulligan, *Why* Bivens *Won't Die: The Legacy of* Peoples v. CCA Detention Centers, 83 DENV. U. L. REV. 685, 688 (2005) (citing *Bivens*, 403 U.S. at 392-94).

25. *Bivens*, 403 U.S. at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

tional cause of action when three conditions were met.[26] First, there must be a federal statute granting a right to sue.[27] Second, there must be no "special factors counseling hesitation."[28] Finally, there must be no special congressional declaration stating that money damages may not be awarded for constitutional violations.[29] As none of these three considerations were present, the Court held that money damages were appropriate.[30]

B. Bivens' *Progeny*

Since *Bivens* was decided, the Court has consistently refused to expand its scope. In *Davis v. Passman*,[31] the Court faced the question of whether a congressman's female aide, who was fired because the congressman wanted a male aide, could bring a *Bivens* claim.[32] The Court determined that *Bivens* was not necessary because the Fifth Amendment directly implied a cause of action.[33]

In *Carlson v. Green*,[34] a mother sued prison officials on behalf of her deceased son, who she claimed was the victim of a violation of the Eighth Amendment's guarantee from cruel and unusual punishment.[35] She alleged that there had been gross inadequacies at the federal prison where he had been incarcerated.[36] For the first time, the Court was faced with a situation where an alternate federal remedy was available, in this case under the Federal Tort Claims Act (FTCA).[37] In response to the prison's claims that the FTCA precluded the *Bivens* claim, the Court referenced language in *Bivens* and *Davis* that stated that the alternative congressional remedy must be "explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[38] In addition, the Court held that there were four other reasons why the *Bivens* claim should be allowed.[39] First, the *Bivens* claim "in addition to compensating victims, serves a deterrent purpose."[40] Second, punitive damages were available in *Bivens* actions, but statutorily prohibited in FTCA actions.[41] Third, jury trials are allowed in *Bivens* actions,

26. Mulligan, *supra* note 24, at 689 (citing *Bivens*, 403 U.S. at 396-97).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. 442 U.S. 228 (1979).
32. *Davis*, 442 U.S. at 230.
33. *See id.* at 243-44.
34. 446 U.S. 14 (1980).
35. *Carlson*, 446 U.S. at 16.
36. *Id.* at 16 n.1.
37. CHEMERINSKY, *supra* note 11, at 598.
38. *Carlson*, 446 U.S. at 18-19 (citing *Bivens*, 403 U.S. at 397; *Davis*, 442 U.S. 245-47).
39. *Carlson*, 446 U.S. at 20-21.
40. *Id.* at 21.
41. *Id.* at 21-22.

but forbidden under the FTCA.[42] Finally, the FTCA claims exist only if "the [s]tate in which the alleged misconduct occurred would permit a cause of action."[43] For these reasons the Court concluded that Ms. Green's *Bivens* claim stated a valid cause of action. However, *Davis* and *Carlson* are the only two instances when the Court has allowed money damages against federal officers for constitutional violations.[44]

Most of the subsequent litigation involving *Bivens* claims has restricted the cause of action's scope.[45] For example, in *Bush v. Lucas*,[46] a NASA employee sued under the First Amendment, claiming he had been demoted for critical statements he had made about the agency.[47] The Supreme Court upheld the district court's ruling that a *Bivens* cause of action did not exist because of "the comprehensive procedural and substantive provisions giving meaningful remedies."[48] Moving away from the "equally effective" language of *Carlson*, the Court held that a congressionally created remedy would be sufficient to bar a *Bivens* claim, if it provides a "meaningful remed[y]" . . . even if the other remedy does not "provide complete relief for the plaintiff."[49] Similarly, in *Schweiker v. Chilicky*,[50] the Court found the existence of merely adequate alternative congressional remedies to be dispositive.[51] In *Schweiker*, social security beneficiaries sued federal officers for violation of their due process rights when they were denied their social security.[52] The Court held that "[w]hen 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."[53] Thus, both *Bush* and *Schweiker* limited *Bivens* actions to circumstances in which created remedies are inadequate. They dispensed with the notion that these remedies must provide equal relief as those given by a *Bivens* cause of action.

In addition to these restrictions, the Court also held in *FDIC v. Meyer*[54] that *Bivens* claims are not available against federal agencies.[55] A unanimous Court held that "an extension of *Bivens* to agencies of the

42. *Id.* at 22.
43. *Id.* at 23.
44. Mulligan, *supra* note 24, at 689.
45. *Id.* at 689 (writing that *Davis* and *Carlson* are the only two cases where Bivens claims for monetary damages against federal officers have been allowed.); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001).
46. 42 U.S. 367 (1983).
47. *Bush*, 42 U.S. at 367.
48. *Id.* at 368.
49. *Id.* at 386-88.
50. 487 U.S. 412 (1988).
51. *Schweiker*, 487 U.S. at 425.
52. *Id.* at 417-19.
53. *Id.* at 423.
54. 510 U.S. 471 (1994).
55. *Meyer*, 510 U.S. at 486.

federal government is not supported by the logic of *Bivens* itself."[56] Justice Thomas, writing for the majority, stated "[i]t must be remembered that the purpose of *Bivens* is to deter *the officer*."[57]

Similarly, in *Correctional Services Corporation v. Malesko*,[58] the Court considered whether a federal inmate may bring a *Bivens* claim against a privately run halfway house under contract with the Bureau of Prisons.[59] Mr. Malesko, who had a heart condition that entitled him to use an elevator to get to his fifth floor room, was forced by an employee to use the stairs.[60] He suffered a heart attack.[61] In its decision, the Court, relying heavily on *Meyer*, held that the purpose of *Bivens*, is "to deter individual federal officers from committing constitutional violations."[62] Also, the Court reasoned that because prisoners in federal institutions are precluded from suing the Bureau of Prisons for constitutional violations, a *Bivens* claim would be inappropriate.[63] Finally, the Court held that the existence of alternative remedies through the Bureau of Prisons precluded a *Bivens* claim.[64] However, the Court also made note that state law tort claims were also available that are "unavailable to prisoners housed in [g]overnment facilities."[65] This observation is especially surprising in light of *Bivens* and *Carlson*, which stated that state tort causes of action are insufficient to protect constitutional interests.[66]

Thus, while *Bivens* created a cause of action for damages claims against federal officers for constitutional violations, subsequent decisions have limited its scope. In *Carlson*, the Court held that only an equally effective alternate remedy could prevent *Bivens*' application.[67] Later, in *Bush* and *Schweiker*, the Court held that even comparatively incomplete remedies could bar a *Bivens* claim.[68] Similarly, in *Meyer* the Court held that Bivens claims are not available against federal agencies.[69] Finally, in *Malesko* the Court concluded that the existence of alternate causes of actions precluded *Bivens* from applying to suits against private organizations.[70] Thus, the next logical question is whether employees of private

56. *Id.*
57. *Id.* at 485.
58. 534 U.S. 61 (2001).
59. *Malesko*, 534 U.S. at 63.
60. *Id.* at 64.
61. *Id.*
62. *Id.* at 70; *see also* Mulligan, *supra* note 24, at 693 (characterizing this as the "no-entity-liability principle").
63. *Malesko*, 534 U.S. at 71-72; *see also* Mulligan, *supra* note 24, at 694 (characterizing this as the "symmetry principle").
64. *Malesko*, 534 U.S. at 74; *see also* Mulligan, *supra* note 24, at 694 (charactering this as the "alternative-relief principle").
65. *Malesko*, 534 U.S. at 72-73.
66. Mulligan, *supra* note 24, at 694 (describing the Malesko decision as "quite exceptional given [the Court's] rulings in *Bivens* and *Carlson* . . . ").
67. *Carlson*, 446 U.S. at 18-19.
68. *Bush*, 42 U.S. at 368; *Schweiker*, 487 U.S. at 425.
69. *Meyer*, 510 U.S. at 486.
70. *Malesko*, 534 U.S. at 74.

organizations may be sued for constitutional violations under *Bivens*, a situation addressed in *Peoples v. CCA Detention Centers*.[71]

II. *PEOPLES V. CCA DETENTION CENTERS*

A. Facts

Mr. Peoples was a federal prisoner being held in a pretrial detention center in Leavenworth, Kansas.[72] The center was run by Corrections Corporation of America (CCA), a for-profit corporation under contract with the U.S. Marshals Service.[73] When Mr. Peoples arrived at the detention center in July 2001, the Marshals Service directed CCA to hold him at the Leavenworth facility while he awaited trial in Missouri.[74] CCA placed Mr. Peoples in isolation for thirteen months.[75] Initially, Mr. Peoples was segregated for administrative reasons.[76] However, the Marshals Service and CCA determined that Mr. Peoples was an escape risk and continued to keep him segregated without telling him why he was being kept out of the general population.[77] In addition, he was not allowed a hearing on his segregation status for five months and did not have access to a law library.[78] He could, however, obtain legal materials through an attorney, though he was limited to cases for which he had exact citations.[79] In addition, Mr. Peoples believed that his phone calls to his attorneys were being monitored by CCA staff.[80]

After thirteen months, Mr. Peoples was released into Pod-H of the general population.[81] Once there, he began to file several informal and formal grievances to the CCA staff. In these complaints, he voiced his concerns that he would be physically assaulted by the Mexican Mafia gang, who were also in Pod-H, because of his affiliation with the Moorish Science Group.[82] Nonetheless, CCA did not transfer him.[83] On the morning of August 1, 2001, the Mexican Mafia assaulted Mr. Peoples.[84] Again, he was not transferred.[85] Later that same day, the gang attacked

71. 422 F.3d 1090 (10th Cir. 2005).
72. *Peoples*, 422 F.3d at 1093.
73. *Id.*
74. *Id.*
75. *Id.* at 1094.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 1093.
82. *Id.*; *see also* Brief for Appellant at 5, Peoples v. CCA Detention Ctrs., 449 F.3d 1097 (10th Cir. 2004) (No. 04-3071).
83. *Peoples*, 422 F.3d at 1093.
84. *Id.*
85. *Id.* at 1093-94.

him again.[86] This time, however, they used padlocks, chains, and full soda cans.[87] After this attack, CCA transferred Mr. Peoples to Pod-A.[88]

Mr. Peoples filed suit in the District of Kansas (*Peoples I*), alleging violations of his Eighth Amendment rights.[89] He sought punitive and compensatory damages and the court construed his claim to implicate a *Bivens* cause of action.[90] Citing *Malesko*, the court held that because "other remedies [were] available—including state negligence actions—the Supreme Court would not extend *Bivens* to private employees of government contractors."[91] Accordingly, the court dismissed for lack of jurisdiction.[92]

Mr. Peoples also filed a *Bivens* action in connection with his thirteen-month segregation and for his allegedly monitored phone calls (*Peoples II*).[93] The district court rejected the defendants' jurisdictional arguments.[94] Instead, the court found that "because the Tenth Circuit has not fully addressed the issue, the court will assume arguendo that a *Bivens* action against individual employees is available and will examine the sufficiency of the plaintiff's complaint."[95] The judge then granted all of the defendants' motions to dismiss.[96] Mr. Peoples appealed both rulings to the Tenth Circuit Court of Appeals.[97]

B. The Majority Opinion

The Tenth Circuit, in a two-judge ruling (over a vigorous dissent from Judge Ebel), began by addressing whether the court had proper subject-matter jurisdiction.[98] The court held that Mr. Peoples' claims "easily [met] the basic requirements for federal-question jurisdiction" and thus both district courts had proper subject-matter jurisdiction.[99]

Next, the court addressed whether a person may bring a *Bivens* claim against employees of a private prison.[100] After first discussing *Bivens* and its progeny, the court held that "there is no implied private right of action for damages under *Bivens* against employees of a private prison for alleged constitutional deprivations when alternative state or

86. *Id.* at 1094.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 1094-95.
96. *Id.* at 1095.
97. *Id.* at 1094-95.
98. *Id.*at 1095.
99. *Id.* at 1095-96.
100. *Id.* at 1096.

federal causes of action for damages are available to the plaintiff."[101] The court based its holding on *Malesko*, which held "that the purpose of *Bivens* is only to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally [as in *Carlson*], or to provide a cause of action for a plaintiff who lacked *any alternative remedy* [as in *Davis*]."[102]

The court then anticipated the argument that *Carlson* should control this case.[103] It distinguished between *Carlson* and Mr. Peoples' claim by arguing that *Carlson* involved a situation where the FTCA allowed suit against the United States, but there was no cause of action against individual officers.[104] In other words, the cause of action against private individuals was "otherwise nonexistent."[105] To buttress this reading of *Carlson*, the court admitted that it recognized the tension between *Carlson* and *Malesko*, but resolved to side with the last decided case.[106] In conclusion, the court held:

> [A] *Bivens* claim should not be implied unless the plaintiff has no other means of redress or unless he is seeking an otherwise nonexistent cause of action against the individual defendant. Therefore, we will not imply a *Bivens* cause of action for a prisoner held in a private prison facility when we conclude that there exists an alternative cause of action arising under either state or federal law against the individual defendant for the harm created by the constitutional deprivation.[107]

Accordingly, the court looked to whether Mr. Peoples could have brought his claims in Kansas courts to determine the existence of alternative causes of action.[108] For Mr. Peoples' Eighth Amendment claims, the court found that Kansas law provides that the prison guards owe a duty to prevent "reasonably foreseeable injuries caused by fellow inmates" and therefore Mr. Peoples could have brought a negligence action against the individual guards.[109] Thus, because an alternative cause of action existed, Mr. Peoples' Eighth Amendment *Bivens* claim could not be implied.[110] In addition, the court found that Mr. Peoples' Fifth Amendment claims regarding his thirteen-month segregation and lack of access to a law library did not rise to the level of a constitutional violation and were

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101. *Id.* at 1101.
102. *Id.* (quoting *Malesko*, 534 U.S. at 70).
103. *Peoples*, 422 U.S. at 1101.
104. *Id.* at 1102.
105. *Id.*
106. *Id.*
107. *Id.* at 1103.
108. *Id.*
109. *Id.* at 1104. Actually, the court first looked to Kansas precedent in deciding that this is the proper duty owed to an inmate. *Id.*
110. *Id.* at 1105.

therefore properly dismissed under Rule 12(b)(6).[111] As to his allegation that his calls to his lawyer were being monitored, the court found that "Kansas law criminally prohibits third parties from unlawfully monitoring phone calls without the permission of at least one of the communicants."[112] Thus, because all of Mr. Peoples' claims could have either been brought under Kansas law or failed to state a claim, the court denied him relief.[113]

C. *Judge Ebel's Concurrence and Dissent*

Judge Ebel agreed that the court had proper subject matter jurisdiction.[114] However, he believed that precedent, parallelism, uniformity, and deterrence demanded a *Bivens* cause of action for Mr. Peoples' claims.[115] First, he argued that, contrary to the majority's opinion, the plaintiff in *Carlson* could have brought a state law tort claim.[116] Specifically, he stated, "If a state tort suit brought against a federal employee is not a meaningful substitute for a constitutional right of action, then an identical suit brought against a private prison employee similarly should not be a meaningful substitute for a constitutional right of action."[117] Second, he argued that the majority's opinion violates *Malesko*'s public and private symmetry principle because a prisoner in a governmentally-run prison may sue individuals but, according to the majority's opinion, a prisoner in a privately-run prison may not.[118] Third, Judge Ebel criticized the majority for making *Bivens* remedies, which are constitutional in nature, contingent upon state laws.[119] This results in a lack of uniformity that the *Carlson* Court sought to avoid.[120] Finally, he argued that the majority opinion undermines one of *Bivens'* primary goals, which is to deter individual officers from committing constitutional violations.[121]

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111. *Id.* Federal Rule of Civil Procedure 12(b)(6) states:
> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

FED. R. CIV. P. 12(b)(6).

112. *Peoples*, 422 U.S. at 1108 (citing KAN. STAT. ANN. § 21-4002 (West 2005); State v. Roudybush, 686 P.2d 100, 108 (Kan. 1984)).

113. *Peoples*, 422 U.S. at 1108.

114. *Id.* (Ebel, J., dissenting).

115. *Id.* at 1108-13 (Ebel, J., dissenting).

116. *Id.* at 1109 (Ebel, J., dissenting).

117. *Id.* (Ebel, J., dissenting).

118. *Id.* at 1110-11 (Ebel, J., dissenting).

119. *Id.* at 1112-13 (Ebel, J., dissenting).

120. *Id.* at 1112 (Ebel, J., dissenting). Specifically, the Court stated "it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." *Carlson*, 446 U.S. at 23.

121. *Peoples*, 422 U.S. at 1113.

The Tenth Circuit reviewed Mr. Peoples' claims again in an en banc decision.[122] The twelve-judge panel split evenly on whether a "*Bivens* action is available against employees of a privately-operated prison."[123] Thus, because there was no majority, the court vacated the Tenth Circuit's initial decision, and affirmed the district court's holding in *Peoples II*.[124]

III. OTHER CIRCUIT DECISIONS THAT DISCUSS THE AVAILABILITY OF A *BIVENS* CLAIM AGAINST EMPLOYEES OF PRIVATE PRISONS

There is a split of authority about whether a *Bivens* claim may be brought against a private individual acting under federal authority.[125] Many of these cases have dealt with whether the private authority that employed the defendants was acting in concert with federal authority.[126] Importantly, these cases operate under the assumption that if the private entity and its employees are operating under the color of government authority, a *Bivens* action is appropriate. These cases support the idea that private actors may be sued under *Bivens* if they are acting as federal agents. In essence, these courts have looked at Mr. Peoples' claims from a different direction.

However, only three district courts and one other circuit court have determined whether a state law remedy precludes a *Bivens* claim against an employee of a privately-operated prison.[127] The District of Rhode Island is particularly divided. In the 2003 case *Sarro v. Cornell Corrections, Inc.*,[128] it held that a federal prisoner may bring a *Bivens* claim against employee-guards of a private-prison operator.[129] Specifically, the court held that "a private party acting under color of federal law may be liable under *Bivens*."[130] In addition, the court was persuaded by the fact that "there is no manifestation of any Congressional intent to preclude

122. Peoples v. CCA Detention Ctrs., 449 F.3d 1097 (10th Cir. 2006) (en banc).

123. *Peoples*, 449 F.3d at 1099.

124. *Id.* The Tenth Circuit en banc decision only upheld the district court's holding from *Peoples II* because the court in *Peoples I* held that it did not have subject matter jurisdiction and therefore never reached a decision on whether a suit could be brought against employees of privately-operated prisons. *Id.* at 1098.

125. CHEMERINSKY, *supra* note 11, at 610.

126. CHEMERINSKY, *supra* note 11 at 609-10. *Compare* Kauffman v. Anglo-Am. Sch. of Sofia, 28 F.3d 1223 (D.C. Cir. 1994) (holding that school established in Bulgaria for American and British diplomats' children was not a federal agency and therefore exempt from *Bivens* liability), *with* Vector Research, Inc. v. Howard & Howard Attorneys P.C., 76 F.3d 692, 698 (6th Cir. 1996) (holding that company's attorneys who had conducted a search with U.S. Marshalls at a competitor's premises were "federal agents"), *and* Dobyns v. E-Sys., 667 F.2d 1219, 1225 (5th Cir. 1982) (holding that a government contractor whose peacekeeping mission was a "function which undoubtedly is traditionally exclusively reserved to the state" and therefore was subject to *Bivens* liability) (citation omitted). *See also* Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1333 n.3 (9th Cir. 1987) (holding that employee of government contractor could bring *Bivens* claims against private defendant because defendant was a "federal actor[]").

127. *Peoples*, 422 F.3d at 1100.

128. 248 F. Supp. 2d 52 (D.R.I. 2003).

129. *Id.* at 52

130. *Id.* at 58.

courts from awarding damages to prisoners at privately-operated prisons for violations of their constitutional rights to the same extent that damages might be awarded to prisoners in publicly-operated prisons."[131] The *Sarro* court also addressed whether the plaintiff could have brought a § 1983 action against the defendants.[132] The court held that because § 1983 requires a violation to be committed "under color of state law," the plaintiff's state action could not be allowed because "maintaining custody of *federal* prisoners is neither a power 'possessed by virtue of *state* law' nor one that has been 'traditionally exclusively reserved to the state.'"[133] The court also looked to *Malesko's* statement that the purpose of *Bivens* was "to deter individual federal officers from committing constitutional violations."[134]

A year and half later, in *Lacedra v. Donald W. Wyatt Detention Facility*,[135] a very similar claim came before another District of Rhode Island judge against the same defendants.[136] This time, however, the court held that the very same institution was a private corporation and found *Malesko* dispositive.[137] In the alternative, it held that "the individual prison guards at the Wyatt Facility carry out the traditional public function, derive their authority over the Plaintiff from state and, therefore, act under color of state law for purposes of § 1983."[138] Thus, the guards were state actors who "had no federal authority to act." [139]

In addition to the *Sarro* court, the District of New Jersey also held that a federal prisoner may bring a *Bivens* claim against individual employees of a private company.[140] In *Jama v. U.S. Immigration and Naturalization Service*,[141] the court was persuaded by the *Sarro* court's reasoning that private-prison guards were "federal actors, performing public functions."[142] Also, the court found the *Sarro* court's interpretation of *Malesko* to be persuasive: "[M]aking the federal remedies available to a prisoner at a privately-operated institution contingent upon whether there are adequate state law remedies . . . would cause the availability of a *Bivens* remedy to vary according to the state in which the institution is located, a result that *Bivens*, itself sought to avoid."[143] However, it

131. *Id.* at 61.
132. *Id.* at 63-64.
133. *Id.* (citation omitted).
134. *Id.* at 62 (citation omitted).
135. 334 F. Supp. 2d 114 (D.R.I. 2004)
136. *Lacedra*, 334 F. Supp. 2d at 114. The Donald Wyatt Detention Facility is run by Cornell Corrections, Inc., the named defendant in *Sarro*. *Sarro*, 248 F. Supp. 2d at 52. The facility was a named defendant in the *Sarro* case. *Id.*
137. 334 F. Supp. 2d at 138. However, this part of the opinion seems to make no mention of the claims against the individual officers.
138. *Id.* at 142.
139. *Id.* at 141.
140. Jama v. INS, 343 F. Supp. 2d 338, 338 (D.N.J. 2004).
141. 343 F. Supp. 2d 338 (D.N.J. 2004).
142. *Jama*, 343 F. Supp. 2d at 362.
143. *Id.* at 362-63 (quoting *Sarro*, 248 F. Supp. 2d at 63).

should be noted that the *Jama* court made specific mention of the fact that a § 1983 action was unavailable.[144] Nonetheless, because the *Jama* court adopted *Sarro*'s reasoning, it can assumed that it was also persuaded by *Sarro*'s holding that the private-prison guards are not acting "'under color of' state law."[145]

Only one other circuit court has directly addressed whether a prisoner may bring a damages claim against the individual guard employees of a privately-run prison.[146] In *Holly v. Scott*, the Fourth Circuit expressly adopted the *Peoples* court's reasoning.[147] The court stated that they agreed that "an 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."[148]

IV. ANALYSIS

The debate about whether a prisoner is able to bring a *Bivens* claim for damages against officers in privately run prisons is only likely to intensify. In 2001, 12.3% of all federal prisoners were incarcerated in privately run prisons, and that number is likely to increase.[149] As more and more prisoners are incarcerated in private prisons, the instances of prisoner constitutional violation claims will also increase. Thus, this will be an issue that is likely to pervade our courts for the foreseeable future and ultimately must be resolved by the Supreme Court. The question, then, is how the Supreme Court should decide these claims. Should it side with the Tenth Circuit, and hold that the existence of a state law cause of action precludes a *Bivens* claim for damages? Or should it side with the *Sarro* court and Judge Ebel, and find that *Bivens* actions should be allowed in spite of the existence of a state law cause of action?

When *Bivens* and its progeny are viewed in their entirety and in light of their rationale, it is clear that the Supreme Court must rule in favor of allowing *Bivens* claims for damages against officers in privately-run prisons. First, the existence of state law causes of action do not provide the same remedies that federal causes of action for constitutional causes of action provide. Second, the Tenth Circuit's reliance on *Malesko* was unwarranted because the *Malesko* Court was operating on the assumption that claims against officers in privately-run prisons were permissible. Third, the purpose of *Bivens* and its progeny, as stated in *Malesko*, is to deter individual officers from committing constitutional

144. *Id.* at 361.
145. *Sarro*, 248 F. Supp. 2d at 64.
146. Holly v. Scott, 434 F.3d 287 (4th Cir. 2006).
147. *Holly*, 434 F.3d at 296.
148. *Id.*
149. Brief for Appellant, *supra* note 82, at 4 (citing PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE BULLETIN NCJ195189, PRISONERS IN 2001 1 (2002)).

violations. Fourth, as demonstrated by precedent and by the prior stipulation of CCA, officers in these private prisons are essentially government actors. Fifth, not allowing *Bivens* claims against officers in private prisons would have the anomalous result of allowing federal constitutional claims only when the offense was committed in a federal prison or if a privately-held prisoner brings a claim under a state cause of action. Finally, it is unlikely that an elected body can be relied upon to protect inmate constitutional rights and therefore it must fall to the courts.

A. State Law Causes of Action Provide Incomplete Remedies

The existence of a state law cause of action has never been dispositive in determining whether a *Bivens* cause of action is available.[150] In fact, *Bivens* and its progeny state the opposite. For example, in *Bivens*, the Court held that a federal cause of action was available "regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act . . . ."[151] In fact, the defendant in *Bivens* argued that the existence of a state tort claim precluded the plaintiff from bringing a federal claim, but the Court held that state tort law might not provide an adequate remedy.[152] In addition, in his concurrence, Justice Harlan stated that the availability of a federal remedy should not depend on where the violation occurs because this idea is "incompatible with the presumed availability of federal equitable relief."[153] In essence, this situation will provide for "inconsistent and uncertain" remedies for constitutional violations.[154] This concern was also present in *Carlson*, where the Court allowed a *Bivens* claim despite the existence of a state tort cause of action.[155] The Court stated that the "liability of federal agents for the violation of constitutional rights should not depend on where the violation occurred."[156] Prisoners should not have to depend on state law to provide a remedy for the abuse of federal power.

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150. *See* Peoples v. CCA Detention Ctrs., 422 F.3d 1090, 1109 (10th Cir. 2005) (Ebel, J., dissenting) ("A state tort cause of action (not predicated on a constitutional violation) is not an adequate alternative remedy for a constitutional violation."); *see also* Brief for Appellant, *supra* note 82, at 20 ("The district court's conclusion that state law tort remedies automatically provide a substitute for *Bivens* is incorrect . . . .").

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

152. *Bivens*, 403 U.S. at 394-95.

153. *Id.* at 400 (Harlan, J., concurring); *see also Peoples*, 422 F.3d at 1112 (Ebel, J., dissenting) (arguing that under the majority's approach, a private-prison employee's liability will "depend on the varying contours of state law").

154. Brief for Appellant, *supra* note 82, at 24 (citing *Bivens*, 403 U.S. at 409 (Harlan, J., concurring)).

155. Carlson v. Green, 446 U.S. 14, 18 (1980).

156. *Carlson*, 446 U.S. at 24; *accord Peoples*, 422 F.3d at 1109 (Ebel, J., dissenting) ("If the presence of a tort claim against individual officers was not sufficient to preclude a *Bivens* remedy against those officers in *Carlson*, so too should the availability of state-law tort claims against the instant defendants here be an insufficient substitute for the constitutional cause of action *Bivens* provides.").

Furthermore, state law tort claims are, by definition, related to state tort law. They do not implicate federal constitutional law. Without a *Bivens* cause of action, Mr. Peoples would be completely unable to bring a claim for the violation of one of his most fundamental rights, freedom from cruel and unusual punishment.[157] In addition, this difficulty is multiplied by the realities of our federal prison system. In many cases, state law remedies will be unable to provide a remedy for constitutional violations because most federal prisoners are transferred frequently and have limited access to lawyers.[158] This makes it very difficult for them to bring state law tort actions for a state in which they are no longer imprisoned.

Thus, Supreme Court precedent, the inherent inconsistency of state law, and the realities of our federal prison system virtually guarantee that state law remedies provide incomplete protection for inmate rights. As a consequence, the existence of a state law cause of action should not be a dispositive factor in determining whether a *Bivens* cause of action for damages against officers in private prisons should be allowed. Indeed, "[c]onstitutional rights cannot be adequately safeguarded by a patchwork of state tort law . . . ."[159]

B. The Tenth Circuit's Reliance on Malesko *is Unwarranted*

In *Peoples*, the Tenth Circuit based its holding on an incomplete consideration of *Malesko*, which held "that the purpose of *Bivens* is only to provide an otherwise nonexistent cause of action against *individual officers* . . . ."[160] In the end, the Court held that *Bivens* actions could not be maintained against private corporations. However, it is important to note that both parties in *Malesko* had assumed that a *Bivens* cause of action could be brought against the individual officers of a private corporation.[161] In fact, this assumption formed the basis for the Court's rationale for holding that the company that employed those officers could not be sued. The Court stated that if it held that the corporation could be sued, "claimants will focus their [attention] on it, and not the *individual*

157. Brief for Appellant, *supra* note 82, at 20-21; *see also Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting) ("[I]t is true that a state-law tort remedy could be brought against the individual prison guards as to one of the claims, but perhaps not as to the other two claims which involve different conduct . . . .").

158. Brief for Appellant, *supra* note 82, at 21 n.5. *See also Peoples*, 422 F.3d at 1112 (Ebel, J., dissenting) ("Non-uniform rules of liability . . . do little to protect constitutional rights and may undermine the settled expectations of prisoners and prison guards, who may be transferred among different privately-run federal prison facilities located in different states.").

159. Brief for Appellant, *supra* note 82, at 22.

160. *Peoples*, 422 F.3d at 1101 (majority opinion) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001)).

161. Brief for Appellant, *supra* note 82, at 14 (citing Brief for Petitioner at 13, *Malesko*, 534 U.S. 61 (2001) (No. 00-860) and Brief for Respondent at 8, 12, *Malesko*, 534 U.S. 61 (2001) (No. 00-860)); *see also Peoples*, 422 F.3d at 1110 (Ebel, J., dissenting) (stating that the Court in *Malesko* "clearly assumed the availability of a [*Bivens*] remedy against the employees of [the] prison.").

directly responsible for the alleged injury."[162] Furthermore, Justice Stevens, in his dissent, stated that "the reasoning of the [majority] opinion relies, at least in part, on the availability of a remedy against employees of private prisons."[163] In other words, the precedent heavily relied upon by the Tenth Circuit in *Peoples* actually assumed the opposite position, that officers in private corporations could be sued for damages under a *Bivens* claim. Thus, the Tenth Circuit's reading of *Malesko* is limited at best, and ignores a fundamental assumption upon which the Court based its holding. Instead, the Tenth Circuit based its holding on peripheral language that clearly was not intended to be construed in a way that prevented inmates from bringing *Bivens* claims against individual officers in private prisons.[164] This is especially true given that both parties and the Court assumed that this was permissible.[165]

C. Officers in Private Prisons Are Government Actors

In holding that a prisoner could bring a *Bivens* claim against officers of a private prison, the *Sarro* court recognized that the power to incarcerate people "whether done publicly or privately, is the exclusive prerogative of the state. This is a truly unique function and has been traditionally and exclusively reserved to the state . . . [this] function is not altered [if] the government contract[s] to have criminal defendants incarcerated at privately operated institutions."[166] These guards serve the exact same function as their federal counterparts. They exercise the same uniquely governmental authority of depriving citizens of their right to liberty.[167] Principles of symmetry and consistency demand equal treatment of federally-run and privately-run prisons.[168]

In addition, the D.C. district court has historically viewed CCA as a government actor when it is under contract with state governments or the District of Columbia.[169] Moreover, CCA's officers have been sued for constitutional violations under 42 U.S.C. § 1983 actions, and in those cases CCA never argued that their officers were not government ac-

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162. *Malesko*, 534 U.S. at 71 (emphasis added); *see also* Brief for Appellant, *supra* note 82, at 26.

163. *Malesko*, 534 U.S. at 79 n.6 (Stevens, J., dissenting); *see also* Brief for Appellant, *supra* note 82, at 26-27.

164. The Tenth Circuit based its holding on the phrase "otherwise nonexistent cause of action" in *Malesko*. *Peoples*, 422 F.3d at 1101 (majority opinion) (citing *Malesko*, 534 U.S. at 70). However, given that state law causes of action provide incomplete remedies for federal rights, a remedy for a constitutional violation is "otherwise nonexistent."

165. *See supra* note 161 and accompanying text.

166. Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 61 (D.R.I. 2003) (citation omitted); *see also* United States v. Thomas, 240 F.3d 445, 448-49 (5th Cir. 2001) (holding that a guard at a private prison was a public official for the purposes of a federal bribery statute).

167. Brief for Appellant, *supra* note 82, at 12.

168. *Peoples*, 422 F.3d at 1110-11 (Ebel, J., dissenting) (criticizing the majority opinion as undercutting "the important policy objective of promoting public-private symmetry" of liability).

169. Brief for Appellant, *supra* note 82, at 13.

tors.[170] In fact, in one of its Supreme Court briefs, CCA even admitted that its employees were acting under color of state law.[171] Thus, it is difficult to imagine why CCA would be a government actor in a state law scenario and not in a federal scenario. In fact, this situation is even more difficult to imagine if it is followed to its logical conclusion. If *Bivens* claims are not allowed against officers at private prisons, then causes of action for federal constitutional violations will be allowed when the prison contracts with a *state government* and will not be allowed when the prison contracts with the *federal* government.[172]

D. Bivens' *Central Goal of Deterrence is Severely Limited*

As stated in *Malesko*, "*Bivens* from its inception has been based . . . on the deterrence of individual officers who commit unconstitutional acts."[173] Essentially, the purpose of *Bivens* is to prevent those exercising government authority from committing constitutional violations.[174] For example, in *Carlson*, the Court stated that "because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the government."[175] If *Bivens*' central goal is to deter individual officers, there is no reason why officers in privately-run prisons who are acting under color of federal law should be allowed to commit constitutional violations without the threat of a *Bivens* claim.[176] Deterring officers in privately-run prisons from committing constitutional violations is just as important as deterring officers in federal institutions.

In fact, it could be argued that deterring constitutional violations is even more vital in privately-run prisons. On average, private prisons have a staff-to-prisoner ratio 15% below public prisons.[177] This higher frequency of unsupervised prisoners might very well lead to a higher rate

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170. *Id. See generally* Beaudry v. Corrections Corp. of America, 331 F.3d 1164 (10th Cir. 2003). *See supra* note 10 for a discussion of § 1983 litigation.

171. Brief for Appellant, *supra* note 82, at 13-14 (citing Brief of Petitioners at 19, Richardson v. McKnight, 521 U.S. 399 (1997) (No. 96-318)).

172. Brief of Appellant, *supra* note 82 at 14 (describing this situation as "untenable") (citation omitted).

173. *Malesko*, 534 U.S. at 71; *see also* FDIC v. Meyer, 510 U.S. 471, 485 (1994) ("[T]he purpose of *Bivens* is to deter the *officer*.").

174. Brief for Appellant, *supra* note 82, at 15; *see also Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting) (stating that individual deterrence is the "primary goal of a *Bivens* remedy").

175. *Carlson*, 446 U.S. at 21. The Court also stated that "[i]t is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." *Id.*

176. Brief for Appellant, *supra* note 82, at 16; *see also Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting) ("[S]tate-law claim[s] may be more limited than would be a *Bivens* action. Accordingly, any deterrent value provided by individualized tort suits against private prison guards is significantly undercut.").

177. Brief for Appellant, *supra* note 82, at 18 (citing JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, BULLETIN NCJ 181249, EMERGING ISSUES ON PRIVATIZED PRISONS 52 (2001)).

of dangerous occurrences at these private prisons.[178] In addition, in order to maximize profits, private prisons accept more violent prisoners than their federal counterparts.[179] These factors translate to a higher risk of frequent, violent occurrences that will necessarily require guard and inmate conflicts. A *Bivens* cause of action is needed in these situations because of this higher potential for constitutional violations and in no event should the standard be lower for officers in privately-run institutions.

E. Not Allowing Bivens *Claims for Officers in Private Prisons Will Produce Anomalous Results*

If *Bivens* claims are not allowed against officers at private prisons, inconsistent situations will result. For example, guards at privately-run prisons under contract with state governments are liable for constitutional violations under 42 U.S.C. § 1983.[180] However, if *Bivens* claims are not allowed against employees of private prisons under contract with the federal government, then state officers will be subject to greater liability than federal officers in the area of constitutional violations.[181] Clearly, not only is this unfair to victims at federally-contracted prisons, but also this is at odds with the idea of federalism.[182] This result is even more bizarre in specific reference to CCA, which contracts with both state and federal governments.[183] To hold the same officers liable for constitutional violations only according to their employer's contract is strange at best, and at worst, patently affects the substantive constitutional rights of inmates.

In addition to the inconsistency that varies according to state and federal contracts, there is an anomaly between the liability of federal officers and private officers.[184] Simply stated, *Bivens* allows for an inmate to bring a claim for constitutional violations against a federal officer. However, in the Tenth Circuit, if a federal officer happens to be employed by a government contractor, that inmate has no remedy for constitutional violations. This inconsistency has no basis. Furthermore, in *Malesko*, the Court held that an important reason why prisoners could not sue private entities was that their federal counterparts were immune

178. Brief for Appellant, *supra* note 82, at 18.

179. *See id.* (citing Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 33 n.201 (2003)).

180. *See supra* note 10 for a discussion of § 1983 litigation.

181. Brief for Appellant, *supra* note 82, at 29; *see also Peoples*, 422 F.3d at 1111 (Ebel, J., dissenting) ("The Court . . . has recognized sound jurisprudential reasons for parallelism [between state and federal actor liability], as different standards for claims against state and federal actors would be incongruous and confusing.").

182. *See* Brief for Appellant, *supra* note 82, at 30 (quoting *Carlson*, 446 U.S. at 22 ("The 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression.")).

183. Brief for Appellant, *supra* note 82, at 30.

184. *See Peoples*, 422 F.3d at 1111 (Ebel, J., dissenting) (describing this as "public-private symmetry"); *see also* Brief for Appellant, *supra* note 82, at 31-32.

from suit.[185] Specifically, the Court argued that "*no federal prisoners* enjoy" the right to sue the organization that incarcerates them.[186] There is no reason for this symmetry to be disrupted when determining the liability of individual officers. Indeed, this may very well result in the federal government choosing to increase the number of prisoners held by private prisons because of the limited liability of officers employed privately.[187]

F. If the Courts Don't Do It . . . .

The majority opinion in *Peoples* acknowledges and even agrees with the dissent's assertions that "there are certainly significant policy arguments that favor extending *Bivens* to the case at hand . . . . In our view, however, extending this judicially created remedy so that it more closely mirrors a statutory remedy is a decision best left for Congress."[188] However, it seems highly unlikely that Congress as an elected body will ever want to answer to constituents about legislation that extends prisoner rights. The courts have historically played a role in the American system to safeguard of the rights of citizens that may not be able to protect themselves. However, because the majority agrees that there are significant reasons to allow a *Bivens* claim but then does nothing, it is certain that these policies will go unfulfilled.

CONCLUSION

Given the ever-increasing number of private prisons, the question of whether prisoners may sue employees of those prisons is one that will continue to plague our courts. Moreover, the important constitutional implications have led to strong opinions on both sides of the issue. The Supreme Court's inconsistent jurisprudence on the issue has led to confusion and that confusion will continue to create a division among the circuit courts on the issue. This will eventually lead to some circuits allowing *Bivens* claims for constitutional violations and some not. Because a scenario where prisoners will only be allowed to sue for constitutional violations based on where they are being held is untenable, the Supreme Court will need to determine whether a *Bivens* claim may be brought against employees of private prison corporations.

On a more local level, in *Peoples*, the Tenth Circuit severely limited the rights of inmates. This decision has far-reaching constitutional implications. Unfortunately, given *Bivens* and its progeny's ultimate goal, deterrence, these implications were not intended by the Supreme Court. In fact, the case relied on most heavily by the Tenth Circuit, *Malesko*, actually supports the conclusion that *Bivens* claims should be allowed

185. *Malesko*, 534 U.S. at 71-72; *see also* Brief for Appellant, *supra* note 82, at 31-32.
186. *Malesko*, 534 U.S. at 71-72.
187. *See* Brief for Appellant, *supra* note 82, at 30.
188. *Peoples*, 422 F.3d at 1103 (majority opinion).

against officers in private prisons. In addition, the Tenth Circuit's decision will produce anomalous results because not only will employees of state-run prisons be subject to greater liability for constitutional violations than their federal counterparts, but also employees of federal prisons will be subject to greater liability than employees of federally-contracted private prisons. Finally, instead of safeguarding the rights of those without the power to do so, the Tenth Circuit urged Congress, a political body, to pass legislation. Given these powerful reasons for allowing *Bivens* claims against officers at private prisons, combined with the majority's hesitation in not allowing these claims, it is likely that this decision will be revisited many times in the future

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