Correctional Services Corporation v. Malesko: Unmasking the Implied Damage Remedy

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I. INTRODUCTION

In *Marbury v. Madison,* Justice Marshall held that, “the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.” A century and a half later, the right to claim protection of the law surfaced as the central issue in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.* In *Bivens,* the Supreme Court inferred a damage remedy where an equally effective remedy did not otherwise exist. The Court justified the inference by holding that “federal courts may use any available remedy to make good the wrong done.”

Since *Bivens,* the implied damage remedy has been criticized as a transgression of judicial power. As a result, the use of the *Bivens* inferred damage remedy has been subjected to judicial limitation. The limitations placed on the *Bivens* remedy are es-

1. 5 U.S. (1 Cranch) 137 (1803).
2. *Id.* at 163.
4. *Id.* at 410–11 (Harlan, J., concurring).
5. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
7. See, e.g., FDIC v. Meyer, 510 U.S. 471, 485 (1994) (finding that the extension of *Bivens* to include a damages remedy against federal agencies would mean the evisceration of the *Bivens* remedy); Schweiker v. Chilicky, 487 U.S. 412, 421 (1988) (indicating that the Court has “responded cautiously to suggestions that *Bivens* remedies be extended into new contexts”); Bush v. Lucas, 462 U.S. 367, 378 (1983) (finding that in the absence of legislation, the federal courts should look for special factors that counsel hesitation before authorizing a new kind of federal remedy); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (concluding that the need for decisive military action would be undermined by a *Bivens* remedy that exposed military personnel to liability).
pecially apparent in the recent decision of Correctional Services Corp. v. Malesko.8

This note examines the Malesko decision and its effect on Bivens. Part II reviews the history of the Bivens cause of action. Part III examines the majority opinion, concurrence, and dissent of Malesko. Part IV analyzes the underlying rationale behind Malesko and Malesko's effect on Bivens. Finally, Part V discusses the future of a Bivens cause of action.

II. IMPLYING A DAMAGE REMEDY: THE BIVENS METAMORPHOSIS

A. The Arrival of Bivens

In Bell v. Hood,9 the plaintiff alleged that officers of the FBI violated his Fourth and Fifth Amendment rights when they illegally arrested him, falsely imprisoned him, and illegally searched and seized his property.10 The plaintiff sought relief solely on the grounds of the officers' alleged constitutional violations.11 The Supreme Court recognized that the legality of the plaintiff's request for relief based solely on constitutional claims "ha[d] never been specifically decided by [the] Court."12 The Court left the legality of the request unanswered.13 The question remained unanswered until the Bivens Court affirmed the validity of relief based entirely on the grounds of a federal officer's constitutional violations.14

In Bivens, agents of the Federal Bureau of Narcotics, acting under their federal authority, entered into Bivens's apartment

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10. Id. at 679–80.
11. Id. at 681 ("[I]t is clear from the way [the complaint] was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments.").
12. Id. at 684.
13. See id. at 684–85.
14. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) ("Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." (citation omitted)).
without a warrant or probable cause.\textsuperscript{15} The agents "searched the apartment from stem to stern," arrested Bivens, and threatened his family.\textsuperscript{16} Bivens sought damages under the Fourth Amendment\textsuperscript{17} for having "suffered great humiliation, embarrassment, and mental suffering."\textsuperscript{18} The Supreme Court relied on Bell's language that "federal courts may use any available remedy to make good the wrong done," in order to imply a damage remedy in favor of Bivens.\textsuperscript{19}

Justice Brennan, author of the \textit{Bivens} opinion, indicated that the courts should not imply a remedy in two instances.\textsuperscript{20} First, he noted that courts should not apply a \textit{Bivens} remedy if there are "special factors counselling hesitation."\textsuperscript{21} Second, the courts should not invoke a \textit{Bivens} remedy when there is an "explicit congressional declaration... equally effective in the view of Congress."\textsuperscript{22} Justice Brennan concluded that \textit{Bivens} was not restricted by either of these limitations.\textsuperscript{23} Therefore, Justice Brennan allowed the inferred damage remedy.\textsuperscript{24}

Justice Harlan concurred with the majority opinion that federal courts have the power to infer damages directly from the Constitution.\textsuperscript{25} However, he delineated a different method to determine when courts should use this power.\textsuperscript{26} Justice Harlan believed that courts should only infer a damage remedy when it is necessary to vindicate the plaintiff's constitutional interests.\textsuperscript{27} He

\begin{footnotesize}
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\item \textsuperscript{15} \textit{Id.} at 389.
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").
\item \textsuperscript{18} \textit{Bivens}, 403 U.S. at 389–90.
\item \textsuperscript{19} \textit{Id.} at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). According to Justice Brennan, an implied remedy was necessary because there was no congressional authorization allowing for a damage remedy based on a constitutional violation, nor was there a damage award explicit in the Fourth Amendment. \textit{Id.} at 397.
\item \textsuperscript{20} See \textit{id.} at 396–97.
\item \textsuperscript{21} \textit{Id.} at 396. An example of a special factor counseling hesitation would be Congress's expertise in situations involving the military. See, e.g., Chappell v. Wallace, 462 U.S. 296, 304 (1983).
\item \textsuperscript{22} \textit{Bivens}, 403 U.S. at 397.
\item \textsuperscript{23} \textit{Id.} at 396–97.
\item \textsuperscript{24} \textit{Id.} at 397.
\item \textsuperscript{25} \textit{Id.} at 398–99 (Harlan, J., concurring).
\item \textsuperscript{26} \textit{Id.} at 409–10 (Harlan, J., concurring).
\item \textsuperscript{27} \textit{Id.} at 407 (Harlan, J., concurring).
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concluded that for Bivens "it [was] damages or nothing." Therefore, Justice Harlan, like Justice Brennan, allowed the inferred damage remedy.

B. The Evolution of Bivens

1. The “Equally Effective” Approach: A Short-Lived Extension

In the years following Bivens, the Court extended the damage remedy beyond Fourth Amendment jurisprudence. First, in Davis v. Passman, an implied damage remedy was granted to a deputy administrative assistant whose Fifth Amendment rights were violated by the Congressman who employed her. After Davis, Justice Brennan created a two-prong test in Carlson v. Green based on principles that the Court formulated in Bivens. Specifically, the test provided that a Bivens action was permissible unless: (1) special factors counseled hesitation; or (2) Congress had explicitly provided an alternative remedy viewed as “equally effective.” The Court allowed Carlson, a federal prisoner, to recover damages from a federal officer under the Eighth Amendment using the two-prong test.

The Carlson decision illustrated a narrow application of the equally effective prong of Justice Brennan’s test. In Carlson, the implied damage remedy was upheld despite the availability of an alternative remedy through the Federal Tort Claims Act

28. Id. at 409–10 (Harlan, J., concurring). According to Justice Harlan, other forms of remediation, such as injunctive relief, would be inconsequential to Bivens because Bivens did not face a realistic threat of future harm from federal agent misconduct. Id. (Harlan, J., concurring).
29. Id. at 411 (Harlan, J., concurring).
31. See, e.g., id. at 18–20; Davis v. Passman, 442 U.S. 228, 244 (1979).
32. 442 U.S. 228 (1979).
33. Id. at 230–31, 244.
34. 446 U.S. 14 (1980).
35. Id. at 18–19.
36. Id. (emphasis added).
37. Id. at 20. Carlson was able to recover under the Cruel and Unusual Punishment Clause of the Eighth Amendment because federal officials did not give him adequate medical care. Id. at 16.
38. See id. at 19–23.
The Court held that the FTCA was not viewed as an equally effective alternative remedy. The Court reasoned that the FTCA remedy did not replace a Bivens remedy because it was made “crystal clear” by Congress that the FTCA and Bivens were to serve as complimentary, not alternative, causes of action. The broad reading of the second prong of Brennan’s test made the discovery of an equally effective remedy difficult and led to more successful Bivens actions than are found today.

2. Criticism of Bivens and Its Progeny

From its inception, Bivens was wrought with controversy. One prevalent criticism, authored by Chief Justice Burger, was that a judicially created damage remedy “not provided for by the Constitution and not enacted by Congress” violated the separation of powers doctrine. The separation of powers doctrine was derived from the idea that the legislative and executive branches of government should be separate entities and that this division would subsequently impart a balanced government. A necessary aspect


40. Carlson, 446 U.S. at 19–23. The Court explained that there was no congressional declaration that a person may not recover money damages for violations of the Eighth Amendment. Id. at 19. The Court also indicated that the Bivens remedy is superior to the FTCA remedy because it acts as a deterrent, allows for punitive damages, allows a plaintiff to opt for a jury, and permits a plaintiff to bring an action without state approval. Id. at 19–23.

41. Id. at 19–20.

42. The Court permitted Bivens actions in Carlson and Davis because the Court viewed the statutory remedies as unable to provide relief as effective as damages. Id. at 19; Davis v. Passman, 442 U.S. 228, 247 (1979). Arguing that the majority’s opinion in Carlson was unnecessarily broad, Justice Powell, in his concurring opinion, stated that “today’s opinion apparently will permit Bivens plaintiffs to ignore entirely adequate remedies if Congress has not clothed them in the prescribed linguistic garb.” Carlson, 446 U.S. at 27 (Powell, J., concurring). For a discussion on federal court decisions following Carlson, see David C. Nutter, Note, Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution is Necessary: The Changing Scope of the Bivens Action, 19 GA. L. REV. 683, 708–13 (1985).

43. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); id. at 428 (Black, J., dissenting) (asserting that Bivens would “choke” the courts with lawsuits and prognosticating that a Bivens remedy would open the door for frivolous suits that would inevitably delay an already slow path of justice).

44. Id. at 411 (Burger, C.J., dissenting).

45. DAAN BRAVEMAN, WILLIAM C. BANKS & RODNEY A. SMOLLA, CONSTITUTIONAL
of the separation of powers model was the checks and balances it placed on the branches of government. The intended balance in the American governmental system is illustrated through the Constitution's grant of power to each of the three branches. "[T]he Constitution assigned primary responsibility for lawmaking to the legislature, for law enforcing to the executive, and for law deciding to the courts." Along with the grant of power, the framers "built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."

Chief Justice Burger continued to criticize the Court's encroachment on Congress's power in the majority's pro-Bivens decisions of Davis and Carlson. In Davis, Chief Justice Burger admitted that Congress can "make Bivens-type remedies available . . . but it has not done so." As such, the Court transgressed the boundaries of the separation of powers doctrine when it provided remedies that Congress had not legislated. Additionally, Justice Rehnquist's dissent in Carlson highlighted the separation of powers controversy when he called the creation of Bivens-type remedies "a task that is more appropriately viewed as falling within the legislative sphere of authority."

46. See INS v. Chadha, 462 U.S. 919, 957–958 (1983) ("To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."); see also CONSTITUTIONAL LAW, supra note 45, § 2.01.

47. See Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803).

48. CONSTITUTIONAL LAW, supra note 45, § 2.03[B].


52. Id. at 250 (Burger, C.J., dissenting) ("[U]ntil Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed. The Court today encroaches on that barrier.").

53. Carlson, 446 U.S. at 34 (Rehnquist, J., dissenting).
3. A Response to the Critics

Following *Carlson*, the Court has been cautious in its extension of the *Bivens* doctrine.\(^5\) This reluctance is noted in the Court's analytical transformation of Justice Brennan's *Bivens* doctrine.\(^5\) Central to this change was Justice Harlan's concurrence in *Bivens*, in which he allowed a *Bivens* remedy only if no alternative forms of compensation existed for the constitutional wrong done.\(^6\) Justice Harlan's approach is distinguishable from Justice Brennan's because a remedy that is not equally effective still may be upheld as long as it supplies some meaningful redress.\(^5\) In *Bush v. Lucas*,\(^5\) the Court acknowledged that the "civil service remedies were not as effective as an individual damages remedy and did not fully compensate [the petitioner] for the harm he suffered."\(^7\) Despite this acknowledgement, the Court subsequently dismissed the plaintiff's *Bivens* claim, indicating an abandonment of Justice Brennan's "equally effective" approach and an acceptance of Justice Harlan's "damages or nothing" approach.\(^6\)

Equally as important as Justice Harlan's concurrence in *Bivens* was the emphasis placed on the special factors prong of the implied remedy test.\(^5\) The special factors prong became the primary tool to dismiss a *Bivens* action following *Carlson*.\(^6\) The Court

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55. See Bush v. Lucas, 462 U.S. 367, 388–90 (1983); Chappell v. Wallace, 462 U.S. 296, 298–300 (1983); see also Nutter, supra note 42, at 694 (noting that after *Davis* and *Carlson* the Court abandoned the "equally effective" approach and adopted the "damages or nothing" approach).


57. See Schweiker, 487 U.S. at 429 ("Congress, however, has addressed the problems created by state agencies' wrongful termination of disability benefits."); see also Bush, 462 U.S. at 390 ("Congress is in a better position to decide whether or not the public interest would be served by creating [a new substantive legal liability].").


59. Id. at 372 (footnotes omitted).

60. See id. at 388–90. Just as the FTCA remedy was found lacking in *Carlson v. Green*, 446 U.S. 14, 19–23 (1980), the proposed remedies in *Bush* and *Schweiker* would likely have been found lacking if the equally effective approach remained the dominant approach. See Nutter, supra note 42, at 698–701. For further discussion on the acceptance of the "damages or nothing" approach in lieu of the "equally effective" approach, see id. at 701–08.


62. Chappell, 462 U.S. at 304 ("Taken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors'
used this analysis to show that a congressionally supplied remedy (even if less effective than damages) was a special factor that counseled hesitation.\footnote{63}

For example, in \textit{Schweiker v. Chilicky},\footnote{64} Congress created an elaborate remedial scheme that did not include money damages.\footnote{65} The Court refused to apply a \textit{Bivens} remedy despite the lack of monetary damages under Congress's regime.\footnote{66} The Court reasoned that where a government program suggests that Congress has provided what it considers a sufficient remedy, a \textit{Bivens} action must be dismissed.\footnote{67} Additionally, the Court has held since \textit{Carlson} that the legislature is far more competent than the judiciary in making decisions involving congressional expertise.\footnote{68} When cases of this nature arise, the courts are to view this as a reason to "counsel[ ] hesitation"\footnote{69} and dismiss a \textit{Bivens} claim.\footnote{70} The Court cited Congress's expertise in the military and administrative fields in dismissing \textit{Bivens} actions in \textit{Chappell v. Wallace}\footnote{71} and \textit{Bush}.\footnote{72}

In subsequent \textit{Bivens} cases, the Court continued to respond "cautiously to suggestions that \textit{Bivens} remedies be extended into new contexts."\footnote{73} For example, in the unanimously decided \textit{FDIC v. Meyer},\footnote{74} the Court did not support the extension of \textit{Bivens} liability to federal agencies.\footnote{75} In \textit{Meyer}, an employee brought an action against the Federal Savings and Loan Insurance Corporation which dictate that it would be inappropriate to provide enlisted military personnel a \textit{Bivens}-type remedy . . . .\footnote{63. See Bush, 462 U.S. at 372 (allowing the congressional remedy despite the fact that the remedy "did not fully compensate [the plaintiff] for the harm he suffered"); see also Schweiker v. Chilicky, 487 U.S. 412, 425 (1988) ("Here, exactly as in \textit{Bush}, Congress has failed to provide for 'complete relief' . . . .").}

\footnote{64. 487 U.S. 412 (1988).}
\footnote{65. \textit{Id.} at 426.}
\footnote{66. \textit{Id.} at 426–27.}
\footnote{67. \textit{Id.} at 421–23.}
\footnote{68. See, e.g., \textit{Bush}, 462 U.S. at 390; \textit{Chappell}, 462 U.S. at 304.}
\footnote{70. \textit{Id.} at 304.}
\footnote{71. 462 U.S. 296 (1983).}
\footnote{72. See \textit{id.} at 303–04 (neglecting to mention the alternative remedy prong); see also \textit{Bush}, 462 U.S. at 388–90.}
\footnote{73. \textit{Schweiker}, 487 U.S. at 421.}
\footnote{74. 510 U.S. 471 (1994).}
\footnote{75. \textit{Id.} at 486.}
THE IMPLIED DAMAGE REMEDY

("FSLIC") alleging that his termination violated his Fifth Amendment right to procedural due process. The Supreme Court found that FSLIC could not be found liable under a Bivens cause of action. They reasoned that if an agency was open to Bivens liability, then Bivens plaintiffs would sue federal agencies instead of federal officers in an effort to avoid the officer's qualified immunity defense. The Court emphasized that "the purpose of Bivens [was] to deter the officer," not the agency, from unconstitutional conduct. Therefore, the Court found that affording Bivens liability to federal agencies would eviscerate the deterrent purpose of Bivens. The Court's willingness to extend Bivens was tested soon after the restrictions set by Meyer in Correctional Services Corp. v. Malesko.

III. CORRECTIONAL SERVICES CORP. V. MALESKO: THE DEATH KNELL FOR BIVENS?

In 1992, John E. Malesko was convicted of federal securities fraud. While imprisoned, Malesko was diagnosed with a heart condition and prescribed medication. He was subsequently transferred to a halfway house in February 1994. The house was operated by Correctional Services Corporation ("CSC") on behalf of the Federal Bureau of Prisoners ("BOP"). CSC instituted a policy that prevented anyone living below the sixth floor of the house from using the elevator for travel to and from the lobby. Malesko lived on the fifth floor, which would ordinarily prevent him from using the elevator. However, he was exempt from the policy because of his heart condition. After attempting to use the

76. Id. at 473–74. FSLIC's statutory successor, Federal Deposit Insurance Corporation, took over the litigation on behalf of FSLIC. Id. at 474.
77. Id. at 486.
78. Id. at 485.
79. Id.
80. Id.
82. Id. at 64.
83. Id.
84. Id.
85. Id. at 63–64.
86. Id. at 64.
87. Id.
88. Id.
elevator, Jorge Urena, a CSC employee, told Malesko to use the stairs. Despite Malesko’s protest, Urena insisted. On his ascent, Malesko suffered a heart attack and injured himself from the subsequent fall.

Approximately three years after the incident, Malesko filed a pro se action against CSC and ten unknown defendants for violations of his constitutional rights. Two years later, with the assistance of counsel, Malesko amended his complaint. In the amended complaint, he substituted Jorge Urena as the first unknown defendant. Malesko’s final complaint alleged that CSC, Urena, and unnamed defendants were negligent in his treatment.

The United States District Court for the Southern District of New York treated Malesko’s suit as a Bivens claim. It held that private corporations like CSC were not amenable to Bivens actions, based on Meyer’s finding that Bivens claims could only be maintained against individuals. Therefore, it dismissed the action. The United States Court of Appeals for the Second Circuit reversed in part, holding that CSC “should be held liable under Bivens to ‘accomplish the . . . important Bivens goal of providing a remedy for constitutional violations.’” The Supreme Court granted certiorari and reversed.

89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id. at 64–65.
96. Id. at 65.
97. Id.
98. Id. In addition, Malesko’s Bivens action against Urena was dismissed because the statute of limitations had expired. Id.
100. Id. at 66.
A. Majority Opinion

Chief Justice Rehnquist began the majority opinion with a detailed history of the Bivens claim, emphasizing the Court's caution in its extension of Bivens. Rehnquist then gave two primary motives for dismissing the Bivens action against CSC. First, corporate liability in a Bivens action would eviscerate its deterrent effect on individual unconstitutional conduct. Second, Malesko had alternative available remedies available to him.

1. The Deterrent Effect

The Court has made it clear since its emphasis in Meyer that a primary function of Bivens is to deter individual federal officers from committing constitutional violations. In the deterrence discussion, Chief Justice Rehnquist equated the private corporation (CSC) with the federal agency (FSLIC). The Court theorized that the higher success rates of Bivens suits against corporations would inevitably lead to Bivens plaintiffs bringing actions with greater frequency against corporations rather than individuals. Therefore, as in Meyer, the Court stated that allowing employer liability, as opposed to employee liability, would reduce suits against individuals. In turn, this would reduce the deterrent impact on the individual. While the Court recognized that corporate liability may have a deterrent effect, it insisted...
that this form of liability was not contemplated in *Bivens*. Therefore, corporate liability should not apply without congressional approval.

2. Alternative Remedies

In *Carlson*, Justice Brennan formulated the two-prong test which mandated "equally effective" alternative remedies. Since *Carlson*, the test has changed to the less stringent "effective remedy" analysis. This change is especially evident in *Malesko*.

The *Malesko* opinion presented a narrower version of the second prong, thus negating Justice Brennan's original creation in *Carlson*. *Malesko* established that a *Bivens* action is dismissed if the claimant has "any alternative remedy," not the "equally effective remedy" that Justice Brennan posed. Chief Justice Rehnquist stipulated, as Justice Harlan did in his *Bivens* concurrence, that the *Bivens* remedy will not apply unless the Court is confronted with a "damages or nothing" situation. The Court interpreted an "effective remedy" narrowly and determined that Malesko had two effective alternative remedies. The first was a state tort action against CSC. The Court determined that Malesko had the opportunity to bring a state negligence action against CSC for its failure to obtain medication and for its refusal of

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112. *Id.*
113. *Id.* at 72 ("Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide."); *see also* Davis v. Passman, 442 U.S. 228, 249 (1979) (Burger, C.J., dissenting) (admitting that Congress can "make *Bivens*-type remedies available . . . but it has not done so").
116. *See Malesko*, 534 U.S. at 72–74 (noting that because Malesko had alternative remedies at his disposal, though maybe not equally effective, there was no need for a *Bivens* remedy).
117. *Id.* at 70.
118. *Carlson*, 446 U.S. at 18–19.
120. *Malesko*, 534 U.S. at 72 ("Nor are we confronted with a situation in which claimants in respondent's shoes lack effective remedies.")
121. *Id.* at 72–74.
122. *Id.* at 73.
Malesko's elevator privileges. Additionally, Malesko could have sought relief through the BOP's remedial mechanisms. This would provide Malesko with injunctive relief and the means to have CSC's unconstitutional actions brought to the attention of the BOP.

In short, the Court did not characterize Malesko as a "damages or nothing" plaintiff. He had the strategic choice of bringing either a state tort action or an action through the BOP's remedial mechanisms. Therefore, the Court was unwilling to sacrifice the individual deterrent effect of Bivens in order to extend a doctrine that had not been extended in three decades.

B. Concurrence

In the brief concurrence, Justice Scalia, joined by Justice Thomas, emphasized an inclination (which has also been the Court's inclination since Carlson) to continue to construe Bivens narrowly. Justice Scalia stated that even under a narrow interpretation he would not extend Bivens to new constitutional contexts. He cited the fact that Congress did not have a chance to review the Bivens decision as a primary reason to limit its application. Justice Scalia also indicated that Bivens was an implied constitutional remedy. He characterized the doctrine of implied constitutional remedies as a "relic" that has been abandoned.

123. Id. at 73. The district court originally construed Malesko's complaint as raising an Eighth Amendment claim, and Malesko accepted this theory of liability in lieu of alternative claims. Id. Thus, unlike the plaintiff in Bivens, Malesko had a state tort law remedy at his disposal. Id.
124. Id. at 74.
125. Id.
126. Id. at 72.
127. Id. at 72–74.
128. See id. at 68 ("Since Carlson we have consistently refused to extend Bivens liability to any new context or new category of defendants.").
129. Id. at 75 (Scalia, J., concurring) ("I join the opinion of the Court because I agree that a narrow interpretation of the rationale of [Bivens] would not logically produce its application to the circumstances of this case.").
130. Id. (Scalia, J., concurring).
131. Id. (Scalia, J., concurring).
132. Id. (Scalia, J., concurring).
133. Id. (Scalia, J., concurring); see also Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (indicating that the practice of implying remedies has been abandoned).
Based on these comments, it is apparent that the concurrence has a distaste for *Bivens* and for judicial legislation.\textsuperscript{134}

C. Dissent

Justice Stevens began the dissent by characterizing Malesko’s claim as an exception rather than an extension of *Bivens*.\textsuperscript{135} Justice Stevens cited appellate decisions where corporations acting under federal title were viewed as individual human agents.\textsuperscript{136} He maintained that because these courts do not perceive allowing a *Bivens* action against a private corporation as an extension, then neither should the Supreme Court.\textsuperscript{137}

Justice Stevens challenged the majority’s rationale by first noting that *Meyer* is not dispositive precedent for the outcome reached in *Malesko*.\textsuperscript{138} He attempted to distinguish *Meyer* from *Malesko* by revealing that *Meyer* contained no discussion of corporations or corporate agents.\textsuperscript{139} Rather, *Meyer* dealt entirely with a federal agency.\textsuperscript{140} The dissent further distinguished *Meyer* by noting that *Meyer* did not deal with a well-recognized *Bivens* cause of action.\textsuperscript{141} In contrast, the cause of action in *Malesko* “falls in the heartland of substantive *Bivens* claims.”\textsuperscript{142}

Furthermore, Justice Stevens attempted to dismantle the majority’s rationale that Malesko had effective alternative remedies and that *Bivens* liability on private corporations would not have the deterrent value that *Bivens* envisioned.\textsuperscript{143} First, he focused on

\begin{footnotes}
\footnotetext[134]{See *Malesko*, 534 U.S. at 75. (Scalia, J., concurring).}
\footnotetext[135]{Id. at 76–77 (Stevens, J., dissenting). Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer.}
\footnotetext[136]{See id. at 77 n.3 (Stevens, J., dissenting).}
\footnotetext[137]{Id. at 76–77 (Stevens, J., dissenting) (indicating that it was evident from the appellate decisions that corporations were treated as an exception to the *Bivens* action).}
\footnotetext[138]{Id. at 77 (Stevens, J., dissenting) (“*Meyer*... does not lead to the outcome reached by the Court [in *Malesko*]”).}
\footnotetext[139]{Id. (Stevens, J., dissenting).}
\footnotetext[140]{Id. (Stevens, J., dissenting). See generally FDIC v. *Meyer*, 510 U.S. 471 (1994) (discussing the financial burden that suing a federal agency would have on the federal government).}
\footnotetext[141]{*Malesko*, 534 U.S. at 78 (Stevens, J., dissenting). *Meyer* dealt with a Fifth Amendment claim, which has been treated differently in past *Bivens* actions. *Meyer*, 510 U.S. at 489 & n.9.}
\footnotetext[142]{*Malesko*, 534 U.S. at 78 (Stevens, J., dissenting).}
\footnotetext[143]{Id. at 78–81 (Stevens, J., dissenting).}
\end{footnotes}
the majority's "any alternative remedy" rationale.\textsuperscript{144} The dissent pointed out that the plaintiff in \textit{Bivens} could have theoretically brought a suit against the defendant officer under state tort law.\textsuperscript{145} Additionally, in both \textit{Carlson} and \textit{Bivens}, plaintiffs had available FTCA remedies.\textsuperscript{146} Thus, the dissent argued that if Malesko's claim was dismissed because of alternative remedies, then claims against individual defendants in cases like \textit{Carlson} and \textit{Bivens} also should have been dismissed.\textsuperscript{147}

Justice Stevens went on to attack the majority's reliance on the state tort remedy.\textsuperscript{148} He conceded that a \textit{Bivens} plaintiff might find state tort relief in constitutional claims which traditionally implicate negligence, such as an Eighth Amendment cruel and unusual punishment claim.\textsuperscript{149} Justice Stevens emphasized, however, that there were other constitutional claims which were less likely to be associated with a traditional tort remedy.\textsuperscript{150} Thus, the lack of state tort remedies for all constitutional claims would jeopardize the protection of constitutional rights and would make state tort claims an ineffective alternative remedy.\textsuperscript{151}

The second basis for the majority's holding was that corporate liability would not satisfy \textit{Bivens}'s deterrent purpose.\textsuperscript{152} The dissent perceived \textit{Bivens} liability on corporate employers to have a deterrent effect equal to liability on the employees.\textsuperscript{153} The dissent cited \textit{Richardson v. McKnight}\textsuperscript{154} and its finding that "private firms adjust their behavior in response to the incentives that tort suits provide" as evidence of effective corporate deterrence.\textsuperscript{155}

\begin{itemize}
\item \textsuperscript{144} \textit{Id.} at 78–80 (Stevens, J., dissenting).
\item \textsuperscript{145} \textit{Id.} at 78–79 (Stevens, J., dissenting).
\item \textsuperscript{146} \textit{Id.} at 79 (Stevens, J., dissenting).
\item \textsuperscript{147} \textit{Id.} (Stevens, J., dissenting) (noting that the claim in \textit{Carlson} was not dismissed).
\item \textsuperscript{148} \textit{Id.} at 79–80 (Stevens, J., dissenting) "It is ironic that the Court relies so heavily for its holding on this assumption that alternative effective remedies . . . are available to respondent." \textit{Id.} at 79 (Stevens, J., dissenting).
\item \textsuperscript{149} \textit{Id.} at 80 (Stevens, J., dissenting).
\item \textsuperscript{150} \textit{Id.} (Stevens, J., dissenting) (attempting to show the remedy's ineffectiveness by illustrating that the uniformity of federal law will be undermined if the courts depend on state tort remedies to alleviate constitutional wrongs).
\item \textsuperscript{151} \textit{See id.} (Stevens, J., dissenting).
\item \textsuperscript{152} \textit{Id.} at 70–71.
\item \textsuperscript{153} \textit{Id.} at 80–81 (Stevens, J., dissenting) ("It cannot be seriously maintained, however, that tort remedies against corporate employers have less deterrent value than actions against their employees.").
\item \textsuperscript{154} \textit{521 U.S.} 399 (1997).
\item \textsuperscript{155} \textit{Malesko}, 534 U.S. at 81 (Stevens, J., dissenting) (quoting \textit{Richardson}, 521 U.S. at
Further, the dissent viewed the lack of liability imposed on CSC as a danger to the constitutional rights of thousands of CSC inmates. Justice Stevens theorized that corporations will continue to sacrifice the rights of prisoners as a cost-cutting measure because of the lack of tort liability pressure on private corporations.

Finally, the dissent questioned the integrity of the majority's opinion. Justice Stevens cited the critical discussion of Bivens as evidence that "the driving force behind the Court's decision [in Malesko] is a disagreement with the holding in Bivens itself." The dissent described Bivens as "a well-recognized part of our law" that should be applied and enforced as settled law.

IV. THE DRIVING FORCE BEHIND MALESKO AND ITS EFFECT ON BIVENS

A. Is Bivens Dead?

The history of Chief Justice Rehnquist's language concerning the strength of Bivens gives validity to Justice Stevens's statement that the Court's disagreement with the Bivens holding is the "driving force" in the Malesko decision. In Justice Rehnquist's Carlson dissent, he stated, "to dispose of this case as if Bivens were rightly decided would . . . be to start with an unreality." Malesko, however, does not represent the death of Bivens. On the contrary, Chief Justice Rehnquist confirmed that Bivens and its progeny are still good law if they are construed narrowly. Nevertheless, it would be accurate to say that Justice Brennan's version of Bivens is dead.
The absence of Justice Brennan’s two-prong doctrine in Male-skos is evidence of its absolution. Male-skos established that a Bivens action is dismissed if the claimant has any effective remedies, rather than the equally effective remedy that Justice Brennan posed. This metamorphosis into a narrower version of Bivens was years in the making. Since Schweiker and Bush, the Court has been willing to accept remedies that are not as equally effective as Bivens’s implied remedy. The acceptance of inferior remedies shows the Court’s deference to the legislature and emphasis on respect for separation of powers. Critics have said that inferior remedies do not protect “the right of every individual to claim the protection of the laws.” While it is true that the Rehnquist Court’s narrower application of Bivens may limit the recovery of constitutional victims, it serves what the Court views as the greater purpose “of striking a wise balance between liberty and order.”

B. Does Malesko Really Provide a Remedy?

Chief Justice Rehnquist based the majority opinion on the rationale that Malesko had alternative remedies at his disposal.

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of Bivens is still good law, but the Court will find anything beyond the core premise unacceptable. Id.

165. See Carlson, 446 U.S. at 18–19.

166. See Malesko, 534 U.S. at 66–74 (providing background on Bivens and cases following without mention of Justice Brennan’s two-prong test). Chief Justice Rehnquist’s Malesko decision does not mention “special factors” (excluding the historical summary). Id. It does focus on alternative remedies, but not the “equally effective remedies” that were first contemplated by Justice Brennan. Id. at 72–73.

167. Id. at 72–74.

168. Chief Justice Rehnquist provided a summary of Bivens and the later decisions that illustrated the “narrowing” of Bivens. See id. at 66–71.


170. See, e.g., Schweiker, 487 U.S. at 424–27; Bush, 462 U.S. at 390; see also Nutter, supra note 42, at 705 (“The Court in [Bush and Chappell] placed relatively greater weight on separation of powers concerns and less on redressing constitutional wrongs.”).

171. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); see also Bush, 462 U.S. at 372.


173. Malesko, 534 U.S. at 72–74. “It was conceded at oral argument that alternative remedies are at least as great, and in many respects greater, than anything that could be had under Bivens.” Id. at 72.
But do these remedies always provide compensation? Both the state tort remedy and injunctive relief that Chief Justice Rehnquist suggested in Malesko were found to be lacking in Bivens.\textsuperscript{174} The majority in Bivens characterized Chief Justice Rehnquist's state tort suggestion as "inconsistent or even hostile" to an individual's constitutionally protected rights.\textsuperscript{175} Additionally, Justice Harlan's concurrence in Bivens illustrated the ineffectiveness of injunctive relief when he stated that "[i]t will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court."\textsuperscript{176} Justice Harlan's concurrence rings true for Malesko. It is unlikely that Malesko was concerned about future misconduct from prison officials. Instead, he wanted to receive compensation for past harms.

Ultimately, the Court recognized that the alternative remedies available would not compensate Malesko fully for the harm he suffered.\textsuperscript{177} However, the Court reasoned that Malesko would have had redress if he had "timely pursue[d]" the remedy that the Court had sanctioned in Meyer.\textsuperscript{178} The Court held that Malesko's limited remedy was due to his "strategic choice."\textsuperscript{179} The Court further noted that other claimants in Malesko's position had remedies "at least as great" as those available under Bivens.\textsuperscript{180} Thus, the Court declined to extend Bivens by creating a judge-made remedy.\textsuperscript{181}

C. A Look Behind the Mask of Malesko

Chief Justice Burger, dissenting in Bivens, illustrated a point central to the Bivens debate when he suggested that a judicially

\begin{itemize}
\item \textsuperscript{175} \textit{Id.} at 394; see also Malesko, 534 U.S. at 80 (Stevens, J., dissenting) ("[B]ut other unconstitutional actions by prison employees, such as violations of the Equal Protection or Due Process Clauses, may find no parallel causes of action in state tort law.").
\item \textsuperscript{176} Bivens, 403 U.S. at 410 (Harlan, J., concurring).
\item \textsuperscript{177} Malesko, 534 U.S. at 72–74.
\item \textsuperscript{178} \textit{Id.} at 72.
\item \textsuperscript{179} \textit{Id.} at 74.
\item \textsuperscript{180} \textit{Id.} at 72.
\item \textsuperscript{181} \textit{Id.} at 72–74. In declining to extend Bivens, the Court returned to its reasoning in Bush that remedies created by Congress "foreclosed the need to fashion a new, judicially crafted cause of action." \textit{Id.} at 68.
\end{itemize}
created damage remedy violates the separation of powers doctrine. The implied damage remedy violates the separation of powers doctrine.

Judicial legislation has historically been a topic of intense scrutiny, one for which Chief Justice Rehnquist has had a particular aversion. Chief Justice Rehnquist asserted deterrent effects and alternative remedies as the rationales behind the Malesko opinion. However, when analyzing Malesko, it is impossible to ignore Chief Justice Rehnquist's past distaste for Bivens. He likely saw Malesko as an opportunity to emphasize his opinion that Bivens is "an exercise of power that the Constitution does not give us." Malesko gave Chief Justice Rehnquist the majority of Justices needed to put the "restraint[ ] upon this Court's depart[ing] from the field of interpretation to enter that of law-making," which was lost when Bivens was decided.

D. The Role of Stare Decisis in Malesko

Justice Stevens criticized the Court's holding in Malesko for not giving full respect to a decision that had been recognized for over thirty years. He accused the Court of revising the law in accordance with its own notions of policy rather than applying stare decisis. The criticism is ironic when one considers that Bivens was created through a lack of respect for the well-recognized separation of powers doctrine. The Malesko decision establishes

182. Bivens, 403 U.S. at 411–12 (Burger, C.J., dissenting) (noting that Bivens impinges on Congress's function to make the law).

183. See, e.g., Carlson v. Green, 446 U.S. 14, 34 (1980) (Rehnquist, J., dissenting) (stating that this is a "task that is more appropriately viewed as falling within the legislative sphere of authority"); Roe v. Wade, 410 U.S. 113, 171–77 (1973) (Rehnquist, J., dissenting) (finding that the majority's decision was a violation of the separation of powers doctrine and the three trimester rule amounted to judicial legislation); Lochner v. New York, 198 U.S. 45, 74–75 (1905) (Holmes, J., dissenting) (indicating that the Court was basing their decision on their views of economic policy, rather than the substance of the Constitution).

184. Malesko, 534 U.S. at 70–74.

185. See Carlson, 446 U.S. at 34 (Rehnquist, J., dissenting).

186. Id. (Rehnquist, J., dissenting) (quoting Bivens, 403 U.S. at 428 (Black, J., dissenting)).


188. Malesko, 534 U.S. at 83 (Stevens, J., dissenting).

189. Id. at 82–83 (Stevens, J., dissenting).

the Court's distaste for the ancient implied remedy regime by returning to the status quo prior to the "heady days" of Bivens. 191

The Malesko Court's departure from Bivens is justified for two reasons. First, as Justice Scalia pointed out, "stare decisis has less force where intervening decisions 'have removed or weakened the conceptual underpinnings from the prior decision.'" 192 In Bivens, the Court intervened and weakened the conceptual underpinning of the separation of powers doctrine. 193 Therefore, the Malesko majority is effectively returning the Court to the order it enjoyed before the implied remedies of Bivens. Additionally, a recently invented law cannot be afforded the full power of stare decisis. 194 Justice Stevens provided as support for stare decisis that Bivens has been recognized for over thirty years. 195 However, thirty years is trivial compared to the two centuries that the separation of powers doctrine has existed. 196

The contention that the judicial activism which created Bivens should be extended based on stare decisis is paradoxical. Since Bivens, Chief Justice Rehnquist and other members have criticized the Court for practicing judicial legislation through the implied Bivens remedy. 197 These Justices have recognized that pro-Bivens cases "simply ignore[ ] the constitutional doctrine of separation of powers." 198 To allow stare decisis to continue to extend a Bivens decision that the Malesko majority perceives as an overstepping of judicial powers would "be to start with an 'unreality.'" 199

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191. Malesko, 534 U.S. at 75 (Scalia, J., concurring).
195. Malesko, 534 U.S. at 83 (Stevens, J., dissenting).
196. Myers v. United States, 272 U.S. 52, 293 (Brandeis, J., dissenting) (stating that "[t]he doctrine of the separation of powers was adopted by the Convention of 1787").
199. Carlson, 446 U.S. at 32 (Rehnquist, J., dissenting) (quoting Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring)).
In short, the *Malesko* Court pays tribute to stare decisis by allowing a very narrowly construed acceptance of *Bivens, Davis*, and *Carlson*. The majority, however, does not want history to repeat itself. Thus, the majority does not extend *Malesko*, thereby protecting the statutory field from judicial invention.

E. Malesko and the Government Contractor

Tasks that have historically been federal government undertakings are being administered by government contractors with increased regularity. The increased privatization of traditional governmental functions is attributable to the efficiency and beneficial competition that a government contractor provides. *Malesko* presents an illustration of the type of privatization that is becoming commonplace and the complications that arise from a private entity's assumption of a federal function.

In *Malesko*, the Court found that private entities like CSC were not amenable to a *Bivens* cause of action. The Court's reluctance to extend *Bivens* liability to corporations favors the government contractor. In effect, it makes the government contractor immune from *Bivens* liability. However, this does not mean that a government contractor is judgment proof. On the contrary, the Court left the liability door open for the government contractor by indicating that a contractor could be liable in a common law tort suit.

With the increased privatization of government roles, the availability of sovereign immunity to governmental contractors

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201. See id. at 71.
202. Id. at 75 (Scalia, J., concurring) ("I do not mean to imply that, if the narrowest rationale of *Bivens* did apply to a new context, I would extend its holding. I would not.").
204. Sabatino, supra note 203, at 181–82.
206. Id. at 63, 74.
207. Id. at 72–74 (recognizing the availability of a state tort remedy).
208. Id.
(like CSC) and the proper scope of government contractor liability has become a controversial issue. Sovereign immunity provides that an injured citizen cannot sue a government entity for an injury arising out of that entity’s completion of a federal task. The Court has, at times, “derivatively extended [sovereign] immunity to private parties acting as agents of the government.” This extension of sovereign immunity is illustrated in Boyle v. United Technologies Corp. In Boyle, an independent contractor that supplied a military helicopter with design defects to the United States was deemed immune from liability. The Court identified this type of immunity as the government contractor defense. The Court reasoned that in some instances “where the government has directed a contractor to do the very thing that is the subject of the claim . . . a special circumstance [arises] where the contractor may assert a defense.”

The Malesko Court recognized the availability of the Boyle contractor defense, but concluded that the record in Malesko “would provide no basis for such a defense.” The Court’s hesitation to apply the contractor defense to CSC should raise red flags to the government contractor because it represents a limited application of a government contractor’s immunity. Their immunity is dependent on a particular fact scenario and on claims brought on a

209. See Sabatino, supra note 203, at 177, 186-90 (discussing the “heightened importance” of the accountability of government contractors).


211. Sabatino, supra note 203, at 177.


213. Id. at 503-04, 512.

214. Id. at 513. The Court stated that liability of independent contractors performing work for the government is an area of uniquely federal concern, thereby requiring federal law to trump state law in an adjudication of tort claims against contractors performing work for the government. Id. at 512-13. The Court further held that when manufacturing defects cannot be linked to government approval of specifications, applying the government contractor defense to such defect claims would distort the purpose of the defense. See id. at 510.


216. Id.

217. The government contractor defense has three elements: “(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.” Boyle, 487 U.S. at 512. Thus, the defense in Boyle is limited and likely would not apply to many government contractors.
THE IMPLIED DAMAGE REMEDY

particular legal theory (such as a *Bivens* cause of action).\(^{218}\) Therefore, while the *Malesko* Court freed the government contractor from liability under a *Bivens* cause of action, it made clear that a government contractor does not have the blanket sovereign immunity enjoyed by government entities.\(^{219}\)

The inapplicability of *Bivens* liability to private corporations clearly benefits the government contractor.\(^{220}\) Nevertheless, the Court's narrow reading of the contractor defense could invoke hesitation on the part of the government contractor and detract from the supply of willing contractors.\(^{221}\) However, it is unlikely that the contractor's exposure to the same kind of tort liability that a private corporation faces daily would change the government contractor's role dramatically. If the contractor's liability was a concern, the contractor could simply look at the potential costs of liability and the potential benefit of performing services for the government.\(^{222}\) As with any business, if the potential costs outweigh the potential benefits, then the contractor would have the opportunity to refuse the government's business.\(^{223}\)

**V. CONCLUSION**

The Court has been reining in the power of *Bivens* since *Carlson*, and *Malesko* marks its final resting place. The majority has instituted an order to the Court that was lost in the "heady days" of the *Bivens* epoch.\(^{224}\) *Malesko* cemented the idea that the Court cannot overstep its judicial barriers in order to do what it thinks is morally right.\(^{225}\) Instead, the Court is bound by the governmen-

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218. The defendants are not liable if they fit within the acceptable fact scenario of the contractor defense, detailed in *Boyle*, or are sued based on a *Bivens* cause of action, as is evident from *Malesko*.

219. See *Malesko*, 534 U.S. at 74 (denying a *Bivens* action, but indicating that CSC would not escape liability from a tort action).

220. See *id*.

221. See *Boyle*, 487 U.S. at 507 ("The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price.").


223. *Id*.; see also *Boyle*, 487 U.S. at 507.


tal structure that the founding fathers created. It is the judicial branch's duty to interpret the law and the legislature's duty to make the law. Therefore, until the legislature deems otherwise, the Malesko majority and their respect for separation of powers will continue to reign supreme over the desire to extend Bivens.

It is well established that § 1983 provides a damages remedy against state actors that parallels the relief available under a Bivens cause of action. However, § 1983, unlike the Bivens remedy, allows some governmental liability. The availability of governmental liability under § 1983 and the lack thereof under Bivens could be interpreted as a need for congressional action. Since the present Supreme Court denounced the judicial legislation that led to the implied damage remedy under Bivens, perhaps it is time for Congress to legislate a consistent remedy in the federal and state systems that has been lacking. This would likely alleviate the majority's claims of judicial activism and the dissent's allegations of insufficient remedies for constitutional violations.

Matthew G. Mazefsky

U.S. 388, 397 (1971) (determining that it is more important to provide constitutional victims with the maximum amount of compensation rather than to uphold the separation of powers doctrine).

226. See supra notes 45–49 and accompanying text.

227. See supra text accompanying note 48.

228. 42 U.S.C. § 1983 (2000). This provision makes anyone acting under color of state law liable to an injured party if they deprive that party "of any rights . . . secured by the Constitution and laws." Id.

229. Pastore, supra note 203, at 874–75.


231. See supra Part IV.C.

232. Pastore, supra note 203, at 875 ("[S]urely [the Court] can determine whether a federal contractor is liable to suit under Bivens, as they have specifically addressed that issue in reference to § 1983.").

233. See supra Part IV.C.

234. See supra notes 143–51 and accompanying text.