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## Bivens's Revisions: Constitutional Torts After Minneci v. Pollard

T. Ward Frampton

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# *Bivens*'s Revisions: Constitutional Torts After *Minneci v. Pollard*

T. Ward Frampton\*

*This Comment examines the current state of the Bivens doctrine in light of the Supreme Court's recent holding in Minneci v. Pollard. The author argues that, rather than another example of the Court's wariness toward "extending" Bivens to a "new context," Minneci represents a subtle but significant retreat for the doctrine itself. After critiquing the Court's application of the traditional two-step test for assessing potential Bivens claims, the Comment concludes by exploring what the Minneci Court's reasoning may portend for the future of Bivens.*

I. From <i>Bivens</i> to <i>Wilkie</i> .....	1715
A. The "Heady Days" .....	1715
B. Retrenchment .....	1717
II. Facts, Procedural History, and Supreme Court Opinions in <i>Minneci v. Pollard</i> .....	1720
A. Facts and Procedural History .....	1720
B. Supreme Court Opinions .....	1722
III. <i>Bivens</i> 's Revisions in <i>Minneci</i> .....	1725
A. Step One: Adequate, Alternative Remedies .....	1726
1. The Separation of Powers Rationale .....	1727
2. Adequacy .....	1732
B. Step Two: "Special Factors Counseling Hesitation" .....	1735
1. Deterrence .....	1736
2. Asymmetric Liability Costs .....	1737
3. Administrability .....	1739

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IV. Whither <i>Bivens</i> ? Constitutional Torts After <i>Minneeci</i> .....	1740
A. Immediate Impacts .....	1740
B. Doctrinal Developments .....	1742

*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* was a landmark case in which the Supreme Court first “implied” a private right of action directly under the Fourth Amendment in the absence of any statutory authorization for such a remedy.<sup>1</sup> In subsequent years, the Court adopted *Bivens*’s core holding in other contexts, authorizing similar damages remedies for additional categories of constitutional wrongdoing by federal agents.

In 2001, the Supreme Court considered whether to recognize a novel “*Bivens* action” brought by a federal prisoner against a private prison corporation for violating the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>2</sup> Since 1980, the Court recognized that federal prisoners detained in traditional federal prison facilities operated by the Bureau of Prisons (BOP) could bring Eighth Amendment claims against individual prison officials.<sup>3</sup> Further, the plaintiff emphasized that in suits brought against state officials under 42 U.S.C. § 1983,<sup>4</sup> courts have long allowed prisoners to sue individuals for constitutional wrongdoing regardless of whether the defendant was employed directly by the state or by a private contractor.<sup>5</sup>

Despite such precedent, the prisoner’s claim against a private corporate entity faced an uphill fight: in 1994, the Court had unanimously declined to imply a Fifth Amendment *Bivens* action against a federal agency, strongly indicating that the *Bivens* doctrine only permitted the recovery of damages from *individual* agents.<sup>6</sup> Nevertheless, the plaintiff nearly prevailed. By a 5–4 vote, the Court declined to recognize an implied cause of action against a

1. 403 U.S. 388 (1971).

2. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

3. *See Carlson v. Green*, 446 U.S. 14, 23 (1980) (holding that a *Bivens* remedy was available to plaintiff even though the allegations could also support a FTCA suit).

4. Originally enacted as part of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983 provides a remedy at law for a person deprived of constitutional rights “under color of [state law].” Until 1961, it was widely assumed that §1983 did not reach official wrongdoing carried out in *violation* of state law, custom, or usage—thus precluding recovery in the vast majority of constitutional torts—but the Court rejected this argument in *Monroe v. Pape*, 365 U.S. 167, 172–87 (1961). *Bivens* actions are often referred to as “the federal analog to suits brought against state officials under [§ 1983].” *See Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006).

5. *See West v. Atkins*, 487 U.S. 42, 57 (1988) (concluding that a private physician’s delivery of medical treatment to the plaintiff was “state action fairly attributable to the State,” and therefore under “color of state law” for purposes of § 1983).

6. *See FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (internal citation omitted) (“It must be remembered that the purpose of *Bivens* is to deter *the officer*. If we were to imply a damages action directly against federal agencies . . . there would be no reason for aggrieved parties to bring damages actions against individual officers.”).

private prison corporation, overruling a Second Circuit opinion authored by then-Judge Sonia Sotomayor.<sup>7</sup>

Almost everyone involved in *Malesko*—the private prison corporation,<sup>8</sup> the United States,<sup>9</sup> and the Court<sup>10</sup>—assumed, however, that a more traditional *Bivens* claim would still be available against the individual prison officials involved, even if a claim against the corporate entity was not.

Yet in early 2012, by a vote of 8–1, the Supreme Court held otherwise. In *Minneeci v. Pollard*, the Court rejected a *Bivens* action for Eighth Amendment violations committed by employees of a privately operated prison, despite acknowledging that these officials were “act[ing] under color of federal law.”<sup>11</sup> Justice Breyer, who would have recognized such a claim against a corporation in *Malesko*, authored the opinion of the Court, which was also joined by Justice Sotomayor.<sup>12</sup> The lone dissenter, Justice Ginsburg, offered fewer than 400 words in response.<sup>13</sup>

7. *Malesko v. Corr. Servs. Corp.*, 229 F.3d 374 (2000). Then-Chief Justice Rehnquist authored the Court’s opinion, joined by Justices O’Connor, Kennedy, Thomas, and Scalia, who, joined by Justice Thomas, also filed a concurring opinion. Justice Stevens wrote the dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined.

*Malesko* was Judge Sotomayor’s first opinion as a Second Circuit judge to be reversed by the U.S. Supreme Court since receiving her commission in 1998. Controversy over her “reversal rate” figured prominently in Justice Sotomayor’s subsequent confirmation hearings in 2009. See Stephen Dinan, *Sotomayor Reversed 60% by High Court*, WASH. TIMES, May 27, 2009, at A1.

8. Brief of Petitioner at 13, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (No. 00-860). Correctional Services Corporation (CSC) argued that “Plaintiffs In Respondent’s Shoes Have No Need For A *Bivens* Remedy Against Entities” because “the weight of authority” supported the proposition that “he could have brought a *Bivens*-type action against CSC’s individual employees who allegedly acted unconstitutionally under color of federal law.” *Id.*

9. Brief of United States as Amicus Curiae Supporting Petitioner at 17 n.6, *Malesko*, 534 U.S. 61 (No. 00-860) (“The same rationales that supported the creation of a *Bivens* remedy against federal employees—detering individuals from engaging in unconstitutional conduct, and ensuring the availability of a remedy separate and apart from state tort law . . . —support the recognition of such a remedy against private individuals who violate constitutional rights under color of federal law. *Bivens* itself, moreover, provides no reason to distinguish between employees and non-employees who exercise federal authority. The Court’s decision to recognize a federal cause of action in *Bivens* did not rest on the fact that the defendants there were formally employed by the United States; it rested on the fact that they exercised federal power.”).

10. See *Malesko*, 534 U.S. at 71–72 (faulting plaintiff for not “timely pursu[ing]” a *Bivens* claim “against the individual,” and highlighting the importance of symmetry with remedies available to other federal prisoners, who “may bring a *Bivens* claim against the offending individual officer [but not] against the officer’s employer, the United States, or the BOP”). See also *id.* at 78 (Stevens, J., dissenting) (“[C]ommon sense, buttressed by all of the reasons that supported the holding in *Bivens*, leads to the conclusion that corporate agents should not be treated more favorably than human agents.”). But see Transcript of Oral Argument at 7, *Malesko*, 534 U.S. 61 (No. 00-860) (“[Counsel for Correctional Services Corp.]: [T]here is no reason to add additional defendants under those circumstances. [J. Scalia]: Mr. Phillips, I wish somebody here were arguing on behalf of the employee. It’s—it’s certainly in your interest to say, well, of course there’s liability on the part of the employee. And it’s—it’s in the interest of—of your opponent to—to say the same.”).

11. *Minneeci v. Pollard*, 132 S. Ct. 617, 620 (2012).

12. *Id.*

13. *Id.* at 626–27 (Ginsburg, J., dissenting).

Though *Minnecci* could be read narrowly as another example of the Court's wariness toward "extending" *Bivens* to a "new context"—a posture the Court has repeatedly adopted since 1983<sup>14</sup>—closer analysis of the opinion reveals a notable break from existing *Bivens* jurisprudence. Specifically, for the first time, the Court recognized the potential availability of "roughly similar" state tort law remedies (including damages for negligence, battery, or medical malpractice) as a freestanding basis for foreclosing a constitutional claim.<sup>15</sup> This holding overlooks the separation-of-powers concerns animating previous curbs on the availability of *Bivens* remedies, engenders serious administrative headaches, and sharply limits the rights of many individuals in federal custody. Applied outside the prison context, the Court's reasoning may even undermine the viability of the *Bivens* doctrine as a whole.

This Comment examines the Court's opinion in *Minnecci* and uses it to explore "*Bivens*'s revisions" over the past several decades. Part I traces the arc of *Bivens* jurisprudence, from the early days of expansion to the marked retrenchment of implied causes of action in recent years. This history provides the backdrop for *Minnecci*, summarized in Part II. Part III then argues that the Court significantly reworked existing law in *Minnecci* by misapprehending the two-part test that has traditionally guided the Court's evaluation of new *Bivens* claims. Faithful application of this test, this Comment argues, would have caused the plaintiff in *Minnecci* to prevail.

Part IV concludes by exploring the broader impact of the *Minnecci* opinion. By its own terms, the Court's holding eliminates the availability of a damages remedy under the Eighth Amendment for a rapidly expanding segment of prisoners and immigration detainees in federal custody in private prisons.<sup>16</sup> The increasingly prominent role of privatization—a trend with far-reaching implications for the vindication of constitutional rights—goes unmentioned in all of the *Minnecci* opinions. More generally though, the Court's treatment of the interaction between fundamental constitutional rights and state tort law discounts the basic dignitary interests served by the Eighth Amendment, and the critical role of federal courts in giving substance to these rights. While couched in the modest language of "refrain[ing] from providing a new and freestanding remedy in damages,"<sup>17</sup> the Court's opinion significantly relegates constitutional interests, and may provide a foothold for those who would seek to do away with *Bivens* claims altogether.

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14. See *infra* Part II.

15. *Minnecci*, 132 S. Ct. at 625.

16. By 2009, over 34,000 federal prisoners (approximately 16 percent of the total federal prison population) were housed in for-profit facilities. Nearly 50 percent of the 363,064 individuals detained in 2010 by Immigrations and Customs Enforcement officials were housed in facilities operated by private prison companies. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2009, at 2, 33 (2010).

17. *Minnecci*, 132 S. Ct. at 621 (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

## I.

FROM *BIVENS* TO *WILKIE*

Although Congress explicitly authorized damages actions against *state* officers for constitutional deprivations with 42 U.S.C. § 1983, no such statutory approval exists for analogous suits against their *federal* counterparts.<sup>18</sup> Thus, the Court has “implied” damages actions against federal officers directly under the Constitution. While the federal courts’ power to provide injunctive relief against unconstitutional acts by federal officers has proven relatively uncontroversial,<sup>19</sup> this implied cause of action for *damages* has been fiercely contested since its inception.

A. The “Heady Days”<sup>20</sup>

The Court first implied a damages remedy for constitutional wrongdoing by federal agents in 1971 with *Bivens*.<sup>21</sup> There, the plaintiff alleged that Federal Bureau of Narcotics agents committed a series of Fourth Amendment violations: entering his apartment without a warrant; “manacl[ing] [him] in front of his wife and children”; searching the home “from stem to stern”; and finally strip-searching, arresting, and booking him, all without cause.<sup>22</sup> The government’s position, accepted by the Second Circuit, was that state privacy law should provide the remedy for such wrongdoing, and that “the Fourth Amendment does not provide a [freestanding] basis for a federal cause of action for damages.”<sup>23</sup> The Supreme Court reversed.

Rejecting the argument that state tort law must provide the exclusive damages remedy, the Court explained that a police officer acting under color of federal authority “possesses a far greater capacity for harm than an individual trespasser.”<sup>24</sup> While state tort law may adequately protect citizens from other

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18. *But see* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEORGETOWN L.J. 117, 132–38 (2009) (arguing Congress implicitly recognized legitimacy of *Bivens* actions with passage of Westfall Act of 1988).

19. *See* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949) (“[R]estraint may be obtained against the conduct of Government officials” where “the statute or order conferring power upon the officer to take action in the sovereign’s name is claimed to be unconstitutional.”).

20. *See* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., dissenting) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.”).

21. 403 U.S. 388 (1971). *Bivens* built on a case decided twenty-five years earlier, *Bell v. Hood*, 327 U.S. 678 (1946), in which the Court strongly hinted that such a cause of action would be permissible. There the Court stated: “[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” *Id.* at 684.

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

23. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 409 F.2d 718, 719 (2d Cir. 1969) (italics omitted), *rev’d*, 403 U.S. 388 (1971).

24. *Bivens*, 403 U.S. at 392.

citizens who invade their privacy, the Court emphasized that it is the Constitution that protects individuals from invasions founded on federal authority.<sup>25</sup> “[W]here federally protected rights have been invaded,” the Court held, “it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”<sup>26</sup>

Though *Bivens* addressed the availability of damages only for Fourth Amendment violations, the Court subsequently recognized that plaintiffs could bring suit “in the manner of *Bivens*” for two additional categories of constitutional wrongs. First, in *Davis v. Passman*, the Court found that money damages were available to a female staffer who alleged that a U.S. Congressman had terminated her employment on account of her sex, violating the Fifth Amendment’s guarantee of equal protection.<sup>27</sup> The plaintiff’s claim was complicated by the fact that Congress had specifically exempted congressional employees, like the plaintiff, from Title VII of the Civil Rights Act of 1964.<sup>28</sup> The Fifth Circuit interpreted this exemption as “an explicit congressional prohibition against judicial remedies for those in petitioner’s position,” and held that given such a clear command from the legislative branch, separation-of-powers concerns prohibited the judiciary from implying a cause of action.<sup>29</sup> The Supreme Court, however, declined to infer that Congress also sought to foreclose an alternative remedy directly under the Fifth Amendment.<sup>30</sup> Finding that the petitioner’s claim asserted a genuine violation of her rights under the Fifth Amendment, the Court allowed an action for monetary relief.

Most germane to the claim brought in *Minnecci* was the Court’s 1980 decision that recognized a *Bivens* remedy for violations of the Eighth Amendment’s proscription against infliction of cruel and unusual punishment.<sup>31</sup> In *Carlson v. Green*, a federal prisoner’s mother brought an action on behalf of her son’s estate after he died of an asthma attack while in federal prison.<sup>32</sup> As in *Minnecci*,<sup>33</sup> the alleged injuries were the result of prison officials’ deliberate indifference to the prisoner’s medical condition.<sup>34</sup> The Court took the

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25. *Id.* (“[A]s our cases make clear, the *Fourth Amendment* operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.”).

26. *Id.* at 392 (citing *Bell*, 327 U.S. at 684).

27. 442 U.S. 228, 234, 243–44 (1979).

28. *Id.* at 247.

29. *Id.*

30. *Id.*

31. See *Carlson v. Green*, 446 U.S. 14, 19–20 (1980) (“[W]e have here no explicit congressional declaration that persons injured by federal officers’ violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy . . . Congress views FTCA and *Bivens* as parallel, complementary causes of action.”).

32. *Id.* at 16 n.1.

33. See *infra* Part II.

34. In *Carlson*, the plaintiff alleged that prison officials kept the deceased prisoner “in [a] facility against the advice of doctors, failed to give him competent medical attention for some eight

opportunity to reaffirm the principles of *Bivens* and *Davis*, emphasizing that a damages remedy would be available despite the absence of any statute conferring such a right, unless: (1) Congress had provided an alternative remedy which it “explicitly declared to be a substitute for recovery directly under the Constitution”; or (2) the defendant could demonstrate any “special factors counseling hesitation.”<sup>35</sup> Finding neither in *Carlson*, the Court extended *Bivens* to the Eighth Amendment context.<sup>36</sup>

Notably, the Court provided a *Bivens* remedy in *Carlson* despite the fact that Congress, just six years earlier, had amended the Federal Tort Claims Act (FTCA) to permit recovery against the United States for the very wrongs at issue.<sup>37</sup> The Court held that while the FTCA did provide a remedy—one designed by Congress no less—it did not provide an *adequate* substitute. First, it did not permit punitive damages or individual liability, meaning that its deterrence effect was less than that of the *Bivens* action. Second, the FTCA did not permit jury trials, which are available under *Bivens*. Finally, the FTCA was more difficult to administer: it applied only to conduct that would be actionable under state law if committed by a private person, potentially complicating efforts to establish uniform federal standards governing liability. These considerations led the Court to recognize the availability of a *Bivens* action for Eighth Amendment violations, notwithstanding the availability of alternative, congressionally created remedies to compensate the putative victims.<sup>38</sup>

### B. Retrenchment

Since 1983, however, the Court has shown marked reluctance to imply *Bivens* remedies in contexts beyond the recognized Fourth Amendment, Fifth Amendment, and Eighth Amendment claims. Indeed, since *Carlson*, the Court has declined to imply any “new” causes of action directly under the Constitution. In each of these cases, the Court has identified either “alternative remedies” or other “special factors” as reasons for declining to allow a *Bivens* claim.

In *Bush v. Lucas*, the Court refrained from implying a *Bivens* remedy due to the availability of alternative remedies for the first time.<sup>39</sup> In *Bush*, a NASA engineer alleged that he had been demoted for exercising his First Amendment rights by publicly criticizing NASA.<sup>40</sup> The engineer, however, was able to

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hours after he had an asthmatic attack, administered contraindicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative . . . and delayed for too long a time his transfer to an outside hospital.” 446 U.S. at 16 n.1.

35. *Id.* at 18–19 (italics omitted).

36. *Id.* at 19–20.

37. *Id.* at 19.

38. *Id.* at 20–23.

39. 462 U.S. 367 (1983).

40. *Id.* at 369–71.

successfully seek reinstatement through an administrative appeals process.<sup>41</sup> Without dissent, the Court found that Congress had enacted an “elaborate, comprehensive scheme” of congressional acts, executive orders, and detailed Civil Service Commission regulations, which governed the relationship between the federal government and its employees.<sup>42</sup> Such an administrative mechanism, which Congress “constructed step by step, with careful attention to conflicting policy considerations,” provided the appropriate channel for vindicating constitutional interests.<sup>43</sup> In subsequent cases where Congress provided similarly elaborate remediation, the Court found that a cause of action under *Bivens* was not necessary.<sup>44</sup>

The Court also declined to extend *Bivens* where doing so might thwart the goal of individual deterrence. In *FDIC v. Meyer*,<sup>45</sup> for example, a discharged employee filed a Fifth Amendment *Bivens* claim directly against a federal agency. Emphasizing that the fundamental logic supporting *Bivens* itself was to deter constitutional violations by individual officers, the Court rejected the claim.<sup>46</sup> Permitting an implied cause of action against an agency, the Court reasoned, would reduce incentives to file suit against individual wrongdoers, thereby undermining *Bivens*’s deterrence rationale.<sup>47</sup> Allowing such a remedy also threatened to “creat[e] a potentially enormous financial burden for the Federal Government,” another “special factor counselling hesitation.”<sup>48</sup> Deeming the deterrence rationale poorly served and the balancing of fiscal policy a matter reserved for Congress, the Court stayed its judicial hand.

The Court relied heavily on *FDIC* several years later in *Correctional Services Corp. v. Malesko* to deny a prisoner’s *Bivens* cause of action against a private prison company.<sup>49</sup> The case involved facts closely related to those in *Minneeci*: a federal inmate housed in a privately run facility brought a suit for Eighth Amendment violations when prison officials’ disregard for his health requirements caused him to suffer a heart attack.<sup>50</sup> Malesko filed pro se against

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41. *Id.* at 370–71.

42. *Id.* at 385, 388.

43. *Id.*

44. *See* Schweiker v. Chilicky, 487 U.S. 412, 423, 429 (1988) (declining to extend *Bivens* to improper denial of disability benefits under the Social Security Act where the Act itself provided elaborate administrative and judicial remedies providing meaningful safeguards). *See also* Hui v. Castaneda, 130 S. Ct. 1845, 1851, 1854 (2010) (italics omitted) (holding that a *Bivens* action is foreclosed where Congress explicitly states that FTCA “shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee”).

45. 510 U.S. 471 (1994).

46. *Id.* at 485.

47. *Id.*

48. *Id.* at 486.

49. 534 U.S. 61 (2001).

50. Malesko suffered from a diagnosed heart condition and was being treated by prison authorities. On account of his poor health, Malesko was ordinarily allowed access to an elevator to reach his fifth-floor cell. On one occasion, however, a prison official insisted (over Malesko’s protestations and in contravention of prison policy) that Malesko use the stairs instead. Malesko

both the individual employees involved in his mistreatment and the prison corporation itself, but because the statute of limitations had run on the claims against the employees, the question for the Court was whether a *Bivens* action could lie against a corporate entity.<sup>51</sup> Rejecting the argument that a contracted private corporation was no less a “federal agent” than the BOP employee in *Carlson*, the Court declined to imply a remedy.<sup>52</sup> As in *FDIC*, the bare majority rested its refusal on “*Bivens*’s core purpose of deterring *individual officers* from engaging in unconstitutional wrongdoing.”<sup>53</sup> Though the Court seemed to presume that a *Bivens* claim would be available against the individual guards,<sup>54</sup> it would come to the opposite conclusion a decade later in *Minneeci*.

Six years later in *Wilkie v. Robbins*, the Court refused to recognize a *Bivens* remedy for a claim against federal Bureau of Land Management (BLM) officials for alleged violations of the Fifth Amendment’s Takings Clause.<sup>55</sup> There, a Wyoming ranch owner alleged that federal officers engaged in a six-year campaign of “harassment and intimidation aimed at extracting an easement across [his] private property” without compensation.<sup>56</sup> The complaint alleged that federal officers repeatedly trespassed on the plaintiff’s ranch, cancelled his grazing permits, and brought false administrative and criminal charges against him in retaliation for the rancher’s unwillingness to grant the easement.<sup>57</sup> In a 7–2 decision, the Court held that this level of misconduct could, in the aggregate, implicate the Takings Clause, even if the individual incidents did not rise to the level of constitutional violations.<sup>58</sup> But the majority emphasized that it would be difficult to devise a “workable cause of action” that fit the alleged pattern of misconduct at issue.<sup>59</sup> Ultimately, the Court concluded, the difficulty inherent in “defining limits to legitimate zeal on the public’s behalf in situations where hard bargaining is to be expected” was a

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suffered a heart attack while climbing the stairs. *Id.* at 64. Correction Service Corporation did not challenge the sufficiency of Malesko’s constitutional claim, apparently conceding that such conduct would amount to an Eighth Amendment violation under the Court’s prison administration jurisprudence. *Id.* at 76 n.2 (Stevens, J., dissenting).

51. *See id.* at 63.

52. *See id.* at 68, 71–72.

53. *Id.* at 74 (emphasis added); *see also id.* at 70 (previous extensions of *Bivens* provided “cause of action against *individual officers*”); *id.* at 71 (“*Bivens* . . . is concerned solely with deterring the unconstitutional acts of individual officers.”).

54. *Supra* notes 6–8.

55. *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

56. *Id.* at 541.

57. *Id.* at 542–47.

58. *Id.* at 555 (“It is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one’s lodge broken into, but something else to be subjected to this in combination over a period of six years, by a series of public officials bent on making life difficult. Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.”).

59. *Id.*

compelling “special factor” that counseled against the availability of a *Bivens* remedy.<sup>60</sup>

Thus, after a period of steady expansion, in recent decades the Court has resisted expanding *Bivens* liability “to any new context or [to] any new category of defendants.”<sup>61</sup> Indeed, in a 2009 civil rights case, a bare majority of the Court took pains to emphasize their view that *Bivens* remedies are generally “disfavored.”<sup>62</sup> But while the overall trajectory of the Court’s *Bivens* jurisprudence was plainly inauspicious for the plaintiff in *Minnecci*, the final result was not a foregone conclusion. After all, *Bivens* actions have been available for Eighth Amendment claims challenging the conditions of one’s confinement for the past thirty years. And in *Malesko*, although the Court denied a novel remedy against a corporation, it did so only by a bare majority. It was against this backdrop that *Minnecci v. Pollard* came before the Court in late 2011.

## II.

### FACTS, PROCEDURAL HISTORY, AND SUPREME COURT OPINIONS IN *MINNECCI V. POLLARD*

In March 2001, federal Bureau of Prison (BOP) officials transferred inmate Richard Lee Pollard to the Taft Correction Institution (TCI), a federal correctional institute then operated by Wackenhut Corrections Corporation (now The GEO Group). Shortly after his transfer to TCI, Pollard fractured both of his elbows in an accident that eventually gave rise to his Eighth Amendment claims. Coincidentally, Pollard’s injuries occurred just weeks before Bush Administration lawyers submitted their brief in *Malesko*, which asserted that the rationale of *Bivens* “support[ed] the recognition of such a remedy against private individuals who violate constitutional rights under color of federal law.”<sup>63</sup>

#### *A. Facts and Procedural History*

Pollard’s claim stems from injuries suffered while working in the TCI kitchen on April 7, 2001.<sup>64</sup> According to his complaint, Pollard slipped and

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60. *Id.* at 554.

61. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

62. *Id.* at 675; see also Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 885 n.69 (noting new barriers to enforcing constitutional limitations under both § 1983 and *Bivens*).

63. Brief of United States as Amicus Curiae Supporting Petitioner at 17 n.6, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (No. 00-860).

64. Amended Complaint and Demand for Jury Trial at 4, *Pollard v. Wackenhut Corr. Corp.*, No. CV-F-01-06078-OWW-HGB-P (E.D. Cal. Apr. 18, 2002).

severely injured himself, requiring attention from the prison's medical staff.<sup>65</sup> When an X-ray taken two days later revealed possible fractures in both of his elbows, he was referred to an orthopedist outside the prison.<sup>66</sup> A doctor's visit the following week confirmed that both of Pollard's elbows had indeed been fractured.<sup>67</sup>

Pollard alleged that he suffered at least four distinct Eighth Amendment violations at the hands of five TCI employees in connection with his injury.<sup>68</sup> First, while transporting Pollard to the orthopedist, prison employees required him to don a jumpsuit and, over his protestations, forced his broken arms into a "Black Box"—a handcuff-like device that caused him "excruciating pain."<sup>69</sup> Second, two TCI physicians deliberately ignored the orthopedist's recommendations to place Pollard's arm in a posterior splint and provide other medical care, thereby exacerbating Pollard's suffering.<sup>70</sup> Third, after both of his arms were eventually placed in casts Pollard was unable to feed or bathe himself for several weeks, yet prison officials failed to make alternative accommodations for his basic nutritional and hygiene needs.<sup>71</sup> Finally, prison staff forced him to return to work in the prison kitchen notwithstanding a declaration from the prison physician that Pollard remained unfit for work<sup>72</sup> and his hands remained "swollen and [had] turned a deep dark purplish color."<sup>73</sup> Pollard alleged that this caused him considerable pain.<sup>74</sup>

Pollard filed a pro se complaint in the U.S. District Court for the Eastern District of California, alleging violations of his Eighth Amendment rights and seeking monetary damages under *Bivens*.<sup>75</sup> A magistrate judge issued proposed findings and a recommendation (adopted in full by the district court) that his suit be dismissed for failure to state a claim.<sup>76</sup> Specifically, the magistrate concluded that a cause of action was unavailable because (1) state tort law and medical malpractice law provided Pollard with alternative remedies for his injuries, and (2) the prison employees, though under contract with the federal government, did not engage in wrongdoing "under color of federal law."<sup>77</sup> The Ninth Circuit reversed on both points, creating a conflict among the circuits as

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65. *See id.* at 4–5 (detailing Pollard's injury and subsequent interactions with prison medical staff following that injury).

66. *Id.* at 5.

67. *Id.* at 6–7.

68. *See id.* at 6–10 (detailing Pollard's allegations of mistreatment by prison employees).

69. *Id.* at 6.

70. *Id.* at 6–7.

71. *Id.* at 7.

72. *Id.* at 9–10.

73. *Id.* at 10.

74. *Id.*

75. *See generally id.*

76. *Pollard v. Wackenhut Corr. Corp.*, No. CV-F-01-6078-OWW-WMW-P, 2007 WL 1660688, at \*1 (E.D. Cal. June 7, 2007).

77. *See Pollard v. GEO Grp., Inc.*, 629 F.3d 843, 852 (9th Cir. 2010).

to whether a plaintiff could bring a *Bivens* action against individual employees of a private prison corporation.<sup>78</sup>

### B. Supreme Court Opinions

In an 8–1 opinion, the Supreme Court reversed, holding that because “state tort law authorizes adequate alternative damages actions . . . that provide both significant deterrence and compensation,” the Court could not imply an Eighth Amendment-based damages action under *Bivens*.<sup>79</sup> The Court did not challenge the Ninth Circuit’s predicate holding that the defendants acted under color of federal law, a point that the petitioners and the government effectively conceded before oral argument.<sup>80</sup>

The Court, per Justice Breyer, explained that the decision whether to recognize a *Bivens* remedy followed a familiar two-part inquiry, as summarized in *Wilkie v. Robbins*. This approach, the Court explained, “seek[s] to reflect and to reconcile” the Court’s reasoning in earlier *Bivens* cases:

In the first place, there is the question whether any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. . . . But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: “the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.”<sup>81</sup>

After surveying the Court’s earlier *Bivens* jurisprudence, the majority concluded that a *Bivens* remedy was unavailable “primarily because” Pollard’s claim “focus[ed] upon a kind of conduct that typically falls within the scope of traditional state tort law.”<sup>82</sup> Though acknowledging that state tort law might not be perfectly congruent with Pollard’s Eighth Amendment claim (or offer as robust remedies), the Court nevertheless concluded that it “provide[d] an ‘alternative, existing process’ capable of protecting the constitutional interests at stake.”<sup>83</sup>

The majority then considered and dismissed four counterarguments in favor of implying a remedy. First, the Court rejected the argument that *Carlson*,

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78. Cf. *Holly v. Scott*, 434 F.3d 287 (4th Cir. 2006) (*Bivens* action unavailable because of adequate state law remedies and lack of wrongdoing “under color of [federal law]”); *Alba v. Montford*, 517 F.3d 1249 (11th Cir. 2008) (*Bivens* action precluded by adequate state law remedies); *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090 (10th Cir. 2005), *vacated in relevant part and aff’d by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (same, in relevant part).

79. *Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012).

80. See *id.* at 627 (Ginsburg, J., dissenting) (unnumbered footnote).

81. *Id.* at 621 (alteration in original) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

82. *Id.* at 623.

83. *Id.*

under which federal prisoners may recover damages for Eighth Amendment violations committed by government-employed prison officials, squarely covered the present case.<sup>84</sup> When federal prisoners sue government employees under state tort law, the Court explained, the Federal Tort Claims Act eliminates individual liability by substituting the United States as the defendant.<sup>85</sup> Because in the private prison context “prisoners ordinarily *can* bring state-law tort actions [directly] against employees of a private firm [without substitution],” no *Bivens* remedy is necessary.<sup>86</sup>

Second, the Court dismissed the argument that, because of the vagaries of state tort law, courts should only consider *federal* law when evaluating the adequacy of alternative remedies.<sup>87</sup> The Court reasoned that “[s]tate tort law, after all, can help to deter constitutional violations as well as to provide compensation to a violation’s victim.”<sup>88</sup>

Third, the Court provided a lengthy discussion of whether California tort law adequately protects the constitutional interests reflected in the Eighth Amendment. Noting that California tort law provides that “[j]ailers owe prisoners a duty of care to protect them from foreseeable harm,”<sup>89</sup> the Court concluded that the misconduct Pollard alleged in his complaint was “the kind of conduct that [California] tort law typically forbids.”<sup>90</sup> Moreover, the Court surveyed the eight states where privately managed secure federal facilities are currently located, and found that “state law imposes general tort duties of reasonable care (including medical care) on prison employees in every one.”<sup>91</sup> Bringing a suit under state law might even be a superior option for prisoners, the Court explained, since they often do not require plaintiffs to establish prison authorities’ “deliberate indifference”—the requisite standard for Eighth Amendment claims.<sup>92</sup> The Court acknowledged that California law, like tort law in many states, often provided less generous remedies than would a *Bivens* action; for instance, California sets caps on punitive damages and prohibits recovery for emotional harms unconnected with physical harm.<sup>93</sup> Yet, the Court concluded that these concerns provided “[in]sufficient basis to determine state

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84. *Id.* at 623–24.

85. *Id.* at 622.

86. *Id.* at 623.

87. *Id.* at 624.

88. *Id.*

89. *Id.* (quoting *Giraldo v. Cal. Dept. of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 387 (Ct. App. 2008)). The extent to which California law was clear on this point was strongly contested by the parties. Pollard noted that *Giraldo*, an intermediate state court opinion, was announced several years after Pollard filed his complaint, and was the first time a “California court ha[d] apparently discussed, much less answered,” the question of whether a jailer has an affirmative duty to protect a prisoner from harm. *Giraldo*, 85 Cal. Rptr. 3d at 382.

90. *Minnecci*, 132 S. Ct. at 624.

91. *Id.*

92. *Id.* at 625.

93. *See id.*

law inadequate.”<sup>94</sup> Because state tort law here “provide[d] roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims,” it served as an adequate substitute.<sup>95</sup>

Finally, the Court considered the argument that even if state tort law adequately protected Pollard’s interests in the instant case, “there ‘may’ be similar kinds of Eighth Amendment claims that state tort law does not cover.”<sup>96</sup> The Court found this argument unconvincing and irrelevant to the resolution of the instant case. But in an important caveat, the majority conceded that such circumstances might exist “in a case where an Eighth Amendment claim or state law differs significantly from those at issue here.”<sup>97</sup>

In sum, the majority concluded:

[W]here . . . a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law . . . [w]e cannot imply a *Bivens* remedy.<sup>98</sup>

As in *Malesko*,<sup>99</sup> Justice Scalia (joined by Justice Thomas) wrote a short concurrence to emphasize his antipathy toward *Bivens* and its progeny.<sup>100</sup> Although joining the opinion of the Court, Scalia explained that he would decline to rule for Pollard “[e]ven if the narrowest rationale of *Bivens* did apply here.”<sup>101</sup> *Bivens* actions, Scalia wrote, were the regrettable results of judicial overreach—“a relic of the heady days in which this Court assumed common-law powers to create causes of action”—and should be limited “to the precise circumstances” of the cases (i.e., *Davis v. Passman*,<sup>102</sup> *Carlson v. Green*,<sup>103</sup> and *Bivens*<sup>104</sup> itself) in which the Court previously authorized such remedies.<sup>105</sup>

Justice Ginsburg penned a three-paragraph dissent, responding that the potential availability of state law remedies (even fully adequate ones) was irrelevant to the question of whether Pollard was entitled to a freestanding constitutional cause of action. “Pollard may have suffered ‘aggravated

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94. *Id.* at 625.

95. *Id.*

96. *Id.*

97. *Id.* at 626 (“[W]e concede that we cannot prove a negative or be totally certain that the features of state tort law relevant here will universally prove to be, or remain, as we have described them . . . [but] [t]he possibility of such a different future case does not provide sufficient grounds for reaching a different conclusion here.”).

98. *Id.*

99. See 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

100. *Minnecci*, 132 S. Ct. at 626 (Scalia, J., concurring).

101. *Id.*

102. 442 U.S. 228 (1979).

103. 446 U.S. 14 (1980).

104. 403 U.S. 388 (1971).

105. *Minnecci*, 132 S. Ct. at 626 (Scalia, J., concurring).

instances' of conduct state tort law forbids," Justice Ginsburg wrote, "but that same aggravated conduct, when it is engaged in by official actors, also offends the Federal Constitution."<sup>106</sup>

According to Justice Ginsburg, Pollard's case presented a much clearer question than the one that split the Court in *Malesko*. There, the majority's holding (which Justice Ginsburg did not join) hinged on the assumption that suits against a corporate employer did little to deter individual prison officials from wrongdoing. Pollard's *Bivens* claim, by contrast, had "precisely the deterrent effect the Court found absent in *Malesko*," for it ran directly against the individual officer like any traditional *Bivens* claim.<sup>107</sup>

### III.

#### *BIVENS'S REVISIONS IN MINNECI*

Even before the Court's holding in *Minnecci*, scholars had noted that the *Bivens* doctrine rested on uncertain footing. After unsuccessfully arguing for the plaintiff in *Wilkie*, for instance, Professor Laurence Tribe announced: "[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery."<sup>108</sup> Indeed, many scholars have noted the Court's "grave reluctance to recognize what it chooses to characterize as new rights of action under *Bivens*" in recent years.<sup>109</sup> In this sense, the final result in *Minnecci* was not particularly shocking.<sup>110</sup>

And yet, even within the significantly curtailed doctrinal framework established by more recent *Bivens* cases, the plaintiff in *Minnecci* should have prevailed on the merits. First, as this Comment discusses below in Section A, the Court's "adequate, alternative remedy" analysis in *Minnecci* disregarded the traditional purpose for this inquiry: to determine whether Congress, explicitly

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106. *Id.* at 627 (Ginsburg, J., dissenting).

107. *Id.*

108. Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 26.

109. James E. Pfander, Iqbal, *Bivens*, and the Role of Judge-Made Law in Constitutional Litigation, 144 PENN ST. L. REV. 1387, 1405 (2010). *See also* Karlan, *supra* note 62; Stephen I. Vladeck, *National Security and Bivens after Iqbal*, 14 LEWIS & CLARK L. REV. 255 (2010).

110. *See* Elliot J. Weingarten, *Minnecci v. Pollard and the Uphill Climb to Bivens Relief*, 7 DUKE J. CONST. LAW & PUB. POL'Y SIDEBAR 95, 95 (2012) ("Convincing the Supreme Court to grant a *Bivens* remedy is no easy task; under current law, there are many obstacles a plaintiff must overcome in order to obtain an implied right to relief."); Jeffrey M. Nye, *Holly v. Scott: Constitutional Liability of Private Correctional Employees and the Future of Bivens Jurisprudence*, 75 U. CIN. L. REV. 1245, 1246 (2007) (arguing that although *Holly v. Scott* was wrongly decided, "the Supreme Court is likely to agree with the reasoning of the majority opinion"); Matthew W. Tinkoff, *A Final Frontier in Prisoner Litigation: Does Bivens Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 982 (2007) ("[T]he courts should extend *Bivens* to privately-incarcerated federal inmates, but . . . a recent Supreme Court decision regarding *Bivens* [*Malesko*] may foreclose this option.").

or implicitly, had signaled to the judiciary *not* to imply a *Bivens* remedy.<sup>111</sup> In concluding that state tort law could foreclose an implied cause of action absent any directive from Congress, the Court quietly abandoned the separation-of-powers rationale that animated earlier *Bivens* jurisprudence. Furthermore, the Court failed to adequately evaluate the ways in which state law, in practice, may fail to constitute a meaningful substitute for an Eighth Amendment action. Second, as discussed below in Section B, the Court subsequently neglected to consider other “special factors” that might militate against, or in favor of, recognizing a new *Bivens* claim. *Minnecci* thus represents something much more than another instance in which the Court declined to “extend” *Bivens*; rather, it signals a subtle but significant retreat from the basic doctrine itself.

Before considering the Court’s analysis, however, it bears emphasis that, to the extent Pollard’s claim would have represented an “extension” of *Bivens*, it would have been a modest one at most. Pollard’s claim did not implicate any novel constitutional territory: the Court had explicitly found *Bivens* remedies to be available for Eighth Amendment deprivations over thirty years prior in *Carlson*.<sup>112</sup> Nor did Pollard’s suit require the Court to apply *Bivens*’s reasoning to a nonindividual actor as in *Meyer* (a federal agency) and *Malesko* (a private corporation).<sup>113</sup> Finally, as noted above, the parties conceded that prison officials acted “under color of federal authority.”<sup>114</sup> Thus, if ever the Court were to encounter an opportunity to further “expand” *Bivens*, Pollard’s claim would have been a prime candidate.

#### *A. Step One: Adequate, Alternative Remedies*

The main thrust of the Court’s opinion in *Minnecci* was that state tort law remedies, acting alone, provided “roughly similar incentives for potential defendants to comply with the Eighth Amendment” and “roughly similar compensation to victims of violations.”<sup>115</sup> Citing *Wilkie v. Robbins*, the Court concluded that this “alternative, existing process for protecting the [constitutionally recognized] interest” constituted “a convincing reason for the

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111. See John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 761–62 (2008) (“The purpose of inquiring into ‘alternative remedies’ is to pay heed to separation of powers principles, which properly recognize that Congress has the authority to create its own remedial schemes. State prerogatives have no place in *Bivens* suits, or the behavior giving rise to them. Such suits measure the actions of *federal* officers against the *federal* constitution, and are almost always litigated in *federal* court.”); Ryan D. Newman, *From Bivens to Malesko and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 477 (2006) (discussing “evolution of the *Bivens* dissent from a minority position based solely on formal separation [of powers concerns] to a majority, more functionalist position based on judicial deference to Congress.”).

112. See *Carlson v. Green*, 446 U.S. 14, 23–24 (1980).

113. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001); *FDIC v. Meyer*, 510 U.S. 471, 473 (1994).

114. *Minnecci v. Pollard*, 132 S. Ct. 617, 627 (2012) (Ginsburg, J., dissenting) (unnumbered footnote).

115. *Id.* at 625.

Judicial Branch to refrain from providing a new and freestanding remedy in damages.”<sup>116</sup>

However, the Court’s discussion of state tort law remedies contradicts precedent in two respects. First, earlier *Bivens* cases looked to the availability of adequate, congressionally crafted alternative remedies to discern whether Congress explicitly or implicitly aimed to foreclose the availability of an implied cause of action. If Congress *had* spoken, deference to the legislature might require the judiciary to stay its hand. However, in finding that state tort law could suffice in this regard, the Court effectively abandoned the basic separation-of-powers rationale undergirding its alternative remedy inquiry. Second, even accepting that a roughly similar state law remedy could constitute a compelling reason for courts to refrain from implying a *Bivens* action, the Court grossly underestimated the vagaries of state law upon which federal prisoners will now have to depend. These two points—(1) the rationale for inquiring into alternative available remedies, and (2) the “adequacy” of state tort law—are addressed in turn.

### *1. The Separation of Powers Rationale*

As early as *Bivens* itself, the Court indicated that the existence of alternative remedies could be a basis for declining to imply a cause of action directly under the Constitution. From the outset, however, this inquiry focused on the federal judiciary’s respect for Congress, and the fear that allowing such claims might, in certain cases, offend separation-of-powers principles. The Court’s phrasing on this point is revealing:

[W]e have here *no explicit congressional declaration* that persons injured by a federal officer’s violation of the *Fourth Amendment* may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.<sup>117</sup>

Deference to the express will of Congress, not deterrence concerns, provided the original basis for looking to “alternative remedies” in weighing a prospective implied cause of action.

That the Court in *Bivens* evinced some reluctance to fashion a remedy absent a legislative mandate is hardly surprising: “only rarely,” after all, “have plaintiffs come to the bench armed only with a general jurisdictional statute and a constitutional provision seeking to use judicial power to force affirmative action.”<sup>118</sup> With respect to constitutional torts committed by *state* actors, the Court has construed 42 U.S.C. § 1983 to provide direct authorization for the

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116. *Id.* at 621 (alteration in original) (quoting *Wilkie v. Robinson*, 551 U.S. 537, 550 (2007)).

117. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (emphasis added).

118. Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972).

recovery of damages regardless of whether state tort law provides some form of remedy.<sup>119</sup> But the *Bivens* doctrine lacks an analogous provision for federal wrongdoing. As the government argued in *Bivens* itself: “If Congress had thought that federal officers should be subject to a law other than state law, it would have had no difficulty in saying so, as it did with respect to state officers [in 42 U.S.C. § 1983].”<sup>120</sup> Legal scholars have written at length on the legitimacy of the *Bivens* doctrine, arguing that the courts’ remedial authority derives from the grant of “judicial power” in Article III,<sup>121</sup> or from “constitutional common law,”<sup>122</sup> or from retroactive “ratification” by Congress.<sup>123</sup> But animating all of this scholarship is a common anxiety—reflected in the *Bivens* Court’s approach to alternative remedies—that federal courts should tread carefully when acting without express or implied instructions from Congress.

The Court’s early *Bivens* cases clearly address this question of whether Congress had affirmatively sought to foreclose an implied cause of action. While the plaintiff in *Davis* lacked “alternative forms of judicial relief” outside of a *Bivens* action,<sup>124</sup> a concern that no doubt added urgency to her *Bivens* request, the Court still inquired whether there had been an “explicit congressional declaration” that individuals in plaintiffs’ shoes should be disallowed a damages remedy.<sup>125</sup> While the fact that the Court implied a remedy despite the explicit exemption of congressional staffers from Title VII does not evince a particularly restrained approach by the Court—indeed, the plain inference to be drawn was that Congress wanted to limit such discrimination suits—the analysis was still one framed (at least ostensibly) by deference to Congress.

In *Carlson* the Court similarly surveyed alternative remedies and, significantly, approved a *Bivens* action despite the availability of alternative legal avenues for compensation.<sup>126</sup> The Court explained that the plaintiff’s family would have been able to recover money damages through the Federal

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119. *Monroe v. Paper*, 365 U.S. 167, 183 (1961) (“It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in federal court.”).

120. Brief for the Respondents at 21–22, *Bivens*, 403 U.S. 388 (No. 301).

121. See Dellinger, *supra* note 118.

122. Henry P. Monaghan, *The Supreme Court: 1974 Term: Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 24 (1975) (“The majority opinion [in *Bivens*] apparently derives the right to damages from the fourth amendment itself. But, unless the Court views a damage action as an indispensable remedial dimension of the underlying guarantee, it is not constitutional interpretation, but common law.”).

123. Pfander & Baltmanis, *supra* note 18 (arguing Congress implicitly recognized legitimacy of *Bivens* actions with passage of Westfall Act in 1988).

124. 442 U.S. 228, 245 (1979).

125. *Id.* at 246–47.

126. 446 U.S. 14, 19–20 (1980).

Tort Claims Act (FTCA).<sup>127</sup> Nevertheless, the Court deemed the availability of such remedies an insufficient basis for foreclosing a *Bivens* claim since the “defendants [did not] show that Congress ha[d] provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.”<sup>128</sup>

Separation-of-powers concerns likewise animated many of the cases where the Court later declined to extend *Bivens*. In *Bush*, for example, the Court found that the Civil Service Reform Act—an “elaborate, comprehensive scheme” that Congress created to remedy employment disputes—precluded the availability of a *Bivens* action.<sup>129</sup> *Davis* and *Carlson* had previously indicated that Congress needed to express explicit intent and provide an adequate substitute if it sought to foreclose the availability of a *Bivens* remedy.<sup>130</sup> In *Bush*, however, the Court demonstrated a newfound flexibility, allowing a preemptive purpose to be inferred “by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself.”<sup>131</sup> Federal employment relationships, the Court concluded, were “governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States.”<sup>132</sup> In light of this elaborate congressionally created alternative, the Court in *Bush* declined to extend *Bivens*.<sup>133</sup>

But in *Malesko*, the Court began reframing the focus of these earlier “alternative remedy” inquiries, shifting from separation-of-powers concerns to those of individual deterrence. In denying a *Bivens* claim against the private prison corporation in *Malesko*, Chief Justice Rehnquist’s opinion suggested that the Court’s extension of *Bivens* was appropriate only where a

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127. *Id.* at 28.

128. *Id.* at 18–19.

129. 462 U.S. 367, 385 (1983).

130. *Carlson*, 446 U.S. at 20 (“In the absence of a contrary expression from Congress, § 2680 (h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.”); *Davis*, 442 U.S. at 246–47 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971)) (“Third, there is in this case ‘no *explicit* congressional declaration that persons’ in petitioner’s position injured by unconstitutional federal employment discrimination ‘may not recover money damages from’ those responsible for the injury.”).

131. 462 U.S. at 378. Also significant, the *Bush* Court declared that the congressionally-provided alternative remedy need not “provide complete relief” for the constitutional deprivation, so long as it was still “meaningful.” *Id.* at 388. *See also infra* Part III.A.2.

132. *Bush*, 462 U.S. at 368.

133. More recent cases reflect this trend as well. In *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988), the Court rejected a due process *Bivens* claim for improper denial of Social Security benefits. The Social Security Act, the Court explained, contained an “elaborate remedial scheme” for recovering the past due payments at issue there. And in the most recent *Bivens* case preceding *Minneci*, the Court held unanimously that *Bivens* was not available where Congress had explicitly made a FTCA remedy the “exclusive” cause of action against Public Health Service officials. *Hui v. Castaneda*, 130 S. Ct. 1845, 1851 (2010). In each case, separation of powers concerns prompted the Court not to imply a cause of action. *See Wilkie v. Robbins*, 551 U.S. 537, 554 (2007).

“plaintiff . . . lacked *any alternate remedy* for harms caused by an individual officer’s constitutional conduct.”<sup>134</sup> Though the plaintiff in *Carlson* had an alternative damages remedy available through the FTCA,<sup>135</sup> the Court now emphasized that this action ran against the United States, not the individual wrongdoer. The Court’s new inquiry was not whether Congress had “explicitly declared [an alternative remedy] to be a *substitute* for recovery directly under the Constitution,”<sup>136</sup> but rather whether the offending officer was personally liable.<sup>137</sup> This subtle revision had two main consequences: one intentional and one likely unintentional. First, it enabled the Court to more easily justify its earlier application of *Bivens* in *Carlson*, where the plaintiff lacked an alternative damages remedy directly against the individual officer, while rejecting one in *Malesko* where the plaintiff did not seek damages from an individual.<sup>138</sup> Second, *Malesko* set the stage for *Minnecci* by raising the possibility that state tort law remedies alone might foreclose an implied cause of action.

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134. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).

135. Indeed, although New York law would address only some of the official wrongdoing at issue in *Bivens*, the plaintiff there likely had some tort remedies available, too. See James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in *FEDERAL COURTS STORIES* 275, 297 (Vicki C. Jackson & Judith Resnik eds., 2010) (noting that “*Bivens* was surely entitled to bring a state common law trespass action against the responsible officers”).

This aspect of *Bivens* has been largely forgotten, in part due to misinterpretation of Justice Harlan’s concurrence, which emphasized that “[f]or people in *Bivens*’ shoes, it is damages or nothing.” 403 U.S. at 410 (Harlan, J., concurring). Subsequent cases have quoted Justice Harlan’s remark to suggest that an implied cause of action under the Constitution provided the plaintiff’s *sole* means of redress. But Justice Harlan’s point was simply that when police officers violate the Fourth Amendment rights of innocent parties, the “exclusionary rule” is irrelevant: for such people, the options are “[money] damages or nothing.” 403 U.S. at 409–10. See *Wilkie*, 551 U.S. at 555 (“*Robbins*’s situation does not call for creating a constitutional cause of action for want of other means of vindication, so he is unlike the plaintiffs in cases recognizing freestanding claims . . . *Bivens* himself was not thought to have an effective one.”); *Davis v. Passman*, 442 U.S. 288, 245 (1979) (citing *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)) (“[T]here are available no other alternative forms of judicial relief. For *Davis*, as for *Bivens*, ‘it is damages or nothing.’”); *Malesko*, 534 U.S. at 67–68 (same quote).

136. *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

137. As discussed in Part IV, *infra*, this focus on individual deterrence largely ignores the near-universal practice of indemnification.

138. *Carlson*, 446 U.S. 14; see also *Malesko*, 534 U.S. at 79 (Stevens, J., dissenting) (“[T]he Court is incorrect to portray *Bivens* plaintiffs as lacking any other avenue of relief, and to imply as a result that respondent in this case had a substantially wider array of non-*Bivens* remedies at his disposal than do other *Bivens* plaintiffs. If alternative remedies provide a sufficient justification for closing the federal forum here, where the defendant is a private corporation, the claims against the individual defendants in *Carlson*, in light of the FTCA alternative, should have been rejected as well.”).

The Court's quiet shift in *Malesko* is a critical point.<sup>139</sup> If the relevance of the "alternative remedy" inquiry is to discern whether Congress intended the judiciary to refrain from implying a constitutional cause of action, ordinary state tort law (which, of course, sheds no light on Congress' intent) is irrelevant for the "alternative remedies" analysis. If, however, the point is to assess the availability of some non-*Bivens* deterrence or compensation mechanism, state tort law remedies alone (even notably inferior ones) may be sufficient to foreclose an implied cause of action.

*Wilkie v. Robbins*, the 2007 *Bivens* case against Bureau of Land Management (BLM) officials accused of Fifth Amendment violations, demonstrates the distinction between these two analytical approaches.<sup>140</sup> In *Wilkie* the Court concluded that "Robbins ha[d] an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints."<sup>141</sup> Critically, though, the Court found that this "patchwork . . . assemblage of state and federal, [and] administrative and judicial [fora]" did not clearly show that "Congress expected the Judiciary to stay its *Bivens* hand."<sup>142</sup> Facing ambiguous legislative intent, the Court recognized that these alternatives did not "plainly answer no to the question whether [the plaintiff] should have [a constitutional cause of action]."<sup>143</sup> Though the Court ultimately denied the plaintiff's *Bivens* claim based on "special factors" rather than on "alternative remedy" grounds,<sup>144</sup> the *Wilkie* Court properly understood the underlying purpose of the "alternative remedies" inquiry to be grounded in separation of powers.

Though the *Minneeci* Court purported to "follow [*Wilkie*'s] approach," the majority's analysis did something very different: instead of scrutinizing alternative remedies as probative of Congress' intent, the Court evaluated the

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139. While the Court in *Carlson* did, in fact, note the FTCA substitution process for state law tort claims against individual officers, it did so for reasons entirely different than the Court in *Malesko*. In *Carlson*, the fact that FTCA suits ran against the government was offered as an "additional factor" that "support[ed] [the Court's] conclusion that Congress did not intend to limit [the victim] to an FTCA action." 446 U.S. at 20–21. In other words, though the Court discussed whether the alternative remedy served to deter a potential wrongdoer, the overarching purpose of this analysis was to address separation of powers concerns. Whether a non-*Bivens* deterrent against the individual officer might already exist was, at best, a secondary consideration. *Id.*

140. 551 U.S. 537.

141. *Id.* at 553.

142. *Id.* at 554.

143. *Id.*

144. The *Wilkie* Court cited the difficulty in crafting a workable judicial standard for evaluating such claims, and the fear of "invit[ing] an onslaught of *Bivens* actions," as its reason for declining to create a new *Bivens* remedy. *Id.* at 562. Skeptical of this rationale, the dissent highlighted that the majority relied upon "a special factor counseling hesitation quite unlike any [the Court] ha[d] recognized before." *Id.* at 577 (Ginsburg, J., concurring in part and dissenting in part). Other areas of law (e.g., sexual harassment jurisprudence) could provide a guide for courts in distinguishing between discrete instances of "hard bargaining" and genuinely oppressive government misconduct, and, in any event, the absence of Takings Clause claims against state officials under § 1983 allowed a safe "forecast that the flood the Court fears would not come to pass" were the Court to recognize a *Bivens* claim. *Id.* at 580–83.

effectiveness of such remedies as an alternative deterrence mechanism (as signaled in *Malesko*). Because “state tort law provides an ‘alternative, existing process’ capable of protecting the constitutional interests at stake,” the Court announced that it had a “convincing reason . . . to refrain” from allowing a *Bivens* claim, wholly independent of the express or implied wishes of Congress.<sup>145</sup> As a careful reading of *Wilkie* shows, this conclusion reflects an abandonment of the traditional rationale motivating previous “Step One” inquiries in *Bivens* cases. A faithful application of *Wilkie* would have prevented the Court from characterizing state tort law as evidence that “Congress expected the Judiciary to stay its *Bivens* hand.”<sup>146</sup> At “Step Two” of the *Bivens* analysis, the Court ordinarily “weigh[s] reasons for and against the creation of a new cause of action, the way common law judges have always done.”<sup>147</sup> Those factors, as argued below, would have militated strongly in favor of recognizing a cause of action in *Minneci*.

Proponents of *Bivens* may take some solace in the fact that *Minneci* implicitly rejects *Malesko*’s sweeping suggestion that the availability of *any* alternative remedies might be sufficient to foreclose an implied cause of action.<sup>148</sup> And Justice Breyer, somewhat tepidly, reserved the possibility that a *Bivens* remedy might one day be available in “different cases [governed by] different state laws.”<sup>149</sup> By abandoning the original purpose for the alternative remedy inquiry, however, *Minneci* may severely limit the role of the Court in fashioning relief for future constitutional claims. Instead of looking for instruction from Congress *not* to fashion relief, *Minneci* envisions an even more cautious role for the federal courts. Instead of being “alert to adjust their remedies so as to grant the necessary relief” whenever “federally protected rights have been invaded” (as “has been the rule from the beginning”),<sup>150</sup> courts should now stay their remedial powers wherever “roughly similar incentives” may exist.<sup>151</sup>

## 2. Adequacy

Another of *Minneci*’s “revisions” to existing *Bivens* doctrine concerns the Court’s inquiry into the adequacy of the existing alternative remedies. To the

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145. *Minneci v. Pollard*, 132 S. Ct. 617, 623 (2012) (quoting *Wilkie*, 551 U.S. at 550).

146. *Wilkie*, 551 U.S. at 554. See *infra* Part III.B. (“Special Factors”).

147. *Wilkie*, 551 U.S. at 554.

148. *Minneci*, 132 S. Ct. at 626.

149. *Id.* (“Pollard argues that there ‘may’ be similar kinds of Eight Amendment claims that state tort law does not cover. But Pollard does not convincingly show that there are such cases. . . . Regardless, we concede that we cannot prove a negative or be totally certain that the features of state tort law relevant here will universally prove to be, or remain, as we have described them.”). But see *id.* (emphasis added) (“[W]here, as here . . . [the allegedly unconstitutional] conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner *must* seek a remedy under state tort law.”).

150. *Bell v. Hood*, 327 U.S. 678, 684 (1946).

151. 132 S. Ct. at 625.

extent that such remedies might foreclose the availability of a *Bivens* action, the Court first announced in *Bush v. Lucas* that they need not “provide complete relief.”<sup>152</sup> Though the precise contours of what constitutes an adequate substitute have never been completely clear, the Court has repeatedly deemed roughly similar remedies inadequate precisely because of their “roughness.” In *Minneci*, however, there is good reason to believe that state tort law remedies were (and, for future plaintiffs, will be) insufficient.

Most relevant in this regard is the shift between the Court’s stance toward the adequacy of state tort law remedies in *Minneci* and the previous individual officer Eighth Amendment case, *Carlson*. In *Carlson*, where the plaintiff’s alternative remedies derived from the FTCA, the Court’s chief focus was determining whether Congress had sought to displace *Bivens*. But, significantly, the Court also evinced deep skepticism as to whether state tort law would be sufficient to vindicate Eighth Amendment interests. Specifically, the Court highlighted that FTCA remedies were inadequate because the statute barred punitive damages,<sup>153</sup> precluded the possibility of trial by jury,<sup>154</sup> and required plaintiffs to defend on “the vagaries of the laws of the several States” upon which an FTCA claim must be based.<sup>155</sup> For these reasons, the Court held that “[p]lainly FTCA [would] not [be] a sufficient protector of the citizens’ constitutional rights.”<sup>156</sup>

The Court in *Minneci* ignored many of these same concerns. For example, the Ninth Circuit opinion in *Minneci* emphasized that state law caps noneconomic tort damages at \$250,000; no such limit exists for punitive damages under *Bivens*.<sup>157</sup> Likewise, in *Holly v. Scott*, a Fourth Circuit case that helped establish the circuit split resolved by *Minneci*, punitive damages were only available under state law if the plaintiff could show “by clear and convincing evidence that defendants’ conduct was willful, wanton, or malicious.”<sup>158</sup> In *Carlson*, the Court recognized that the lack of punitive damages made FTCA a less effective deterrent than a *Bivens* action.<sup>159</sup> Nevertheless, the Court in *Minneci* found that such deficiencies failed to provide “sufficient basis to determine state law inadequate.”<sup>160</sup> “State tort law,”

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152. 462 U.S. 367, 388 (1983).

153. *Carlson v. Green*, 446 U.S. 14, 22 (1980).

154. *Id.* at 22–23.

155. *Id.* at 23.

156. *Id.*

157. *Pollard v. GEO Grp., Inc.*, 639 F.3d 843, 863 (9th Cir. 2010) (citing CAL. CIV. CODE § 3333.2).

158. 434 F.3d 287, 296 (4th Cir. 2006) (citing N.C. GEN. STAT. § 1D-15 (2003)).

159. 446 U.S. at 22.

160. 132 S. Ct. 617, 625 (2012).

the Court acknowledged, “may sometimes prove less generous than would a *Bivens* action.”<sup>161</sup>

Perhaps even more unsettling was the *Minnecci* Court’s disregard for the procedural hurdles federal inmates often face in filing state law medical malpractice suits, which will often be the tort law analog for Eighth Amendment claims alleging inadequate medical care. In *Alba v. Montford*, for example, the Eleventh Circuit rejected a *Bivens* claim filed by a federal prisoner against officers of his privately run facility alleging deliberate indifference to his medical needs.<sup>162</sup> As in *Holly v. Scott*, the Court of Appeals held that the federal prisoner should have pursued a claim under state law, rather than bringing a *Bivens* action.<sup>163</sup> Under Georgia law, however, plaintiffs must ordinarily “include with a professional malpractice complaint ‘an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist,’”<sup>164</sup> As the plaintiff in *Holly* argued, this is a requirement “with which . . . an indigent prisoner cannot, as a practical matter, comply.”<sup>165</sup> The Eleventh Circuit waved off such concerns, opining that “the affidavit requirement does not render the state tort remedy inadequate for the purpose of *Bivens* liability. [The prisoner] stands in the same shoes as anyone else in Georgia filing a professional malpractice claim and is subject to no stricter rules than the rest of Georgia’s residents.”<sup>166</sup> The majestic equality of Georgia law, apparently, still forbids rich and poor alike to sleep under bridges.<sup>167</sup>

More generally, while the Court did conduct a more thorough survey of state law than it had in *Carlson*<sup>168</sup>—and many of Pollard’s injuries were redressable through ordinary tort actions<sup>169</sup>—the *Minnecci* Court failed to adequately consider an insight that was fundamental to previous *Bivens* cases:

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161. *Id.* But see *id.* (“[E]ven if more generous to plaintiffs in some respects, [*Bivens* actions] may be less generous in others. For example, to show an Eighth Amendment violation a prisoner must typically show that a defendant acted, not just negligently, but with ‘deliberate indifference.’”).

162. 517 F.3d 1249 (11th Cir. 2008).

163. *Minnecci*, 132 S. Ct. at 621 (citing *Alba*, 517 F.3d at 1254–56; *Holly*, 434 F.3d at 288).

164. *Alba*, 517 F.3d at 1254 (citing GA. CODE ANN. § 9-11-9.1(a)).

165. *Id.* See also COLO. REV. STAT. § 13-20-602 (3)(a)(II) (2012) (requiring all plaintiffs bringing medical malpractice claims to file a certificate declaring that a medical professional has examined the facts and found the claim “not [to] lack substantial justification.”).

166. *Alba*, 517 F.3d at 1255.

167. ANATOLE FRANCE, *THE RED LILY* 95 (1910). While the Court in *Minnecci* left open the possibility it might revisit the issue should a case arise where “state law differs significantly from those at issue here,” the Court specifically identified “procedural obstacles . . . in medical malpractice cases” as an “[in]sufficient basis to determine state law inadequate.” 132 S. Ct. 617, 625–26 (2012).

168. 132 S. Ct. at 624–26.

169. As the Court noted, California tort law “provides for ordinary negligence actions, for actions based upon ‘want of ordinary care or skill,’ for actions for ‘negligent failure to diagnose or treat,’ and for actions based upon the failure of one with a custodial duty to care for another to protect that other from ‘unreasonable risk of physical harm.’” *Id.* at 624. An action under these theories would have provided relief for many of the physical and related emotional harms Pollard alleged to have suffered.

that state tort law simply does not protect the same interests as the Constitution, and that vindication of such fundamental interests should not be left to the “vagaries” of state law.<sup>170</sup> The Supreme Court has previously held that some “conditions of confinement may establish an Eighth Amendment violation ‘in combination’ when each would not do so alone . . . [as] when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise . . . .”<sup>171</sup> For example, “a low cell temperature at night combined with a failure to issue blankets” or the deprivation of access to a toilet for extended periods of time, may constitute Eighth Amendment violations actionable under *Bivens*.<sup>172</sup> So, too, might “denial of fresh air and regular outdoor exercise and recreation,”<sup>173</sup> excessive force causing only de minimis injuries,<sup>174</sup> or (as alleged in *Holly*) extended confinement in a medical unit.<sup>175</sup> The facts of Pollard’s own claim are illustrative: while state tort law would likely cover many of the harms alleged, Pollard also claimed that his Eighth Amendment rights were violated when prison officials allowed his hygiene to deteriorate and prematurely ordered him to return to work.<sup>176</sup> State tort law seems ill equipped to vindicate, much less effectively develop, such constitutional principles.

*B. Step Two: “Special Factors Counseling Hesitation”*

Even if “adequate, alternative remedies” do not foreclose the possibility of an implied cause of action, the Court traditionally asks whether “any special factors counsel[] hesitation before authorizing a new kind of federal litigation.”<sup>177</sup> While the Court ordinarily surveys reasons not to infer a *Bivens* remedy, the Court in *Wilkie* announced that “special factors” could also weigh

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170. *Carlson v. Green*, 446 U.S. 14, 23 (1980) (“The question whether respondent’s action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.”); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (“Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law.”).

171. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

172. *See id.*; *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001) (concluding that exposure to human waste, even for thirty-six hours, would constitute a sufficiently serious deprivation to violate the Eighth Amendment).

173. *See Spain v. Proconier*, 600 F.2d 189, 199 (9th Cir. 1979).

174. *See Wilkins v. Gaddy*, 130 S. Ct. 1175, 1180 (2010) (refusing to dismiss excessive force claim by prisoner “based on the supposedly *de minimis* nature of [the prisoner’s] injuries.”).

175. 434 F.3d 287, 288 (2006) (“[The prisoner] further claims that in retaliation for a written complaint regarding the medical department, [a private prison employee] ordered that [the prisoner] be locked in the medical unit for twenty-four days and threatened to keep him there for the remainder of his sentence.”).

176. *See Pollard v. GEO Grp., Inc.*, 629 F.3d 843, 850–51 (9th Cir. 2010).

177. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

*in favor* of authorizing a new cause of action.<sup>178</sup> While the Court has been less than crystalline in identifying these “special factors,”<sup>179</sup> at least three factors considered in previous *Bivens* cases were relevant for *Minneeci*: (1) the prospect of thwarting *Bivens*’s deterrent effect, (2) the creation of asymmetric liability costs, and (3) other administrability concerns such as the lack of a “workable cause of action” in *Wilkie*.<sup>180</sup> Had the *Minneeci* Court engaged in a systematic analysis of these factors, each would have supported the implication of a *Bivens* remedy.

### 1. Deterrence

The issue of deterrence *is* doctrinally relevant to the *Bivens* inquiry, though not as it relates to the issue of alternate remedies. Rather, the prospect that a particular *Bivens* remedy might be at cross-purposes with deterring unconstitutional conduct (or at least provide no additional deterrent effect) may be a “special factor counseling hesitation” against implying a new remedy.

In *FDIC v. Meyer*, for example, the Court explained that implying a *Bivens* remedy for a claim against a federal agency was inconsistent with the basic “logic” of *Bivens*.<sup>181</sup> The Court’s fear, in that case, was that allowing such a claim would reduce the incentive for plaintiffs to file suits against individual officers who ordinarily enjoy qualified immunity for unconstitutional conduct. As such, it “would mean the evisceration of the *Bivens* remedy, rather than its extension,” since there would be “no reason for aggrieved parties to bring damages actions against individual officers.”<sup>182</sup> Similar logic justified the Court’s holding in *Malesko*, where again, the petitioned-for cause of action ran against a corporate entity rather than an individual.<sup>183</sup>

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178. *Id.* at 554 (internal citation omitted) (“This, then, is a case for *Bivens* step two, for weighing reasons for and against the creation of a new cause of action, the way common law judges have always done. Here, the competing arguments boil down to one on a side . . .”).

179. See ERWIN CHEREMINSKY, FEDERAL JURISDICTION 615 (5th ed. 2007) (noting the Court’s “blurred” discussions of special factors counseling hesitation in recent years). On occasion, the Court has treated Congress’ creation of an alternative remediation scheme, and the attendant separation of powers considerations discussed in the preceding section, as another “special factor” as well. See *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (“In sum, the concept of ‘special factors counselling hesitation in the absence of affirmative action by Congress’ has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent.”).

180. 551 U.S. at 562. A fourth recognized factor, not relevant for present purposes, has been whether the injuries “arise out of or are in the course of activity incident to [military] service.” *United States v. Stanley*, 483 U.S. 669, 684 (1987) (quoting *Feres v. United States*, 340 U.S. 135, 145 (1950) (no *Bivens* remedy for alleged injuries related to undisclosed military LSD experiments)); see also *Chappell v. Wallace*, 462 U.S. 296 (1983) (no *Bivens* remedy for allegations of racial discrimination by superior officers against enlisted personnel).

181. 510 U.S. 471, 485 (1994).

182. *Id.* This, combined with the fear that allowing damages against federal agencies might create “a potentially enormous financial burden for the Federal Government,” established “special factors counseling hesitation” in *FDIC*. *Id.* at 486.

183. See 534 U.S. 61, 68, 71–72 (2001).

In *Minneci*, the defendants were typical of an ordinary *Bivens* action: individual officers, acting under color of federal authority, accused of unconstitutional conduct. While the Court's opinion concluded that state tort law "provide[s] roughly similar incentives for potential defendants to comply with the Eighth Amendment," the majority conceded that there were ways in which a *Bivens* remedy would prove more "generous" to plaintiffs.<sup>184</sup> As Justice Ginsburg's dissent highlighted, Pollard's suit "would have precisely the deterrent effect the Court found absent in *Malesko*."<sup>185</sup>

## 2. Asymmetric Liability Costs

Another reason the Court in *Malesko* declined to allow a *Bivens* claim directly against a private prison corporation was because "no federal prisoners enjoy [an analog for the] contemplated remedy" since they are unable to bring a *Bivens* claim against the United States.<sup>186</sup> Creating an implied cause of action would thus create "asymmetric liability costs on private prison facilities, [which] is a question for Congress, not [the courts], to decide."<sup>187</sup>

In contrast, applying *Bivens* in *Minneci* would have had the salutary effect of *eliminating* inconsistencies between the rights of federal prisoners in BOP-administered prisons and federal prisoners in private prisons; between the rights of state prisoners in private prisons and federal prisoners in private prisons; and between the rights of federal prisoners in private prisons in different states.

First, after *Minneci*, federal prisoners in BOP-operated prisons may bring a cause of action for Eighth Amendment violations committed by individual prison guards, but the federal government can eliminate that right simply by transferring the prisoner to a privately-operated prison. The Court's approach enshrines this arrangement, effectively allowing BOP officials to "contract away" federal prisoners' constitutional rights, forfeiting their prisoners' ability to bring a *Bivens* action. As Justice Scalia once wrote (outside the *Bivens* context), "surely it cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to

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184. 132 S. Ct. 617, 625 (2012).

185. *Id.* at 627 (Ginsburg, J., dissenting).

186. 534 U.S. 61, 71–72 (2001).

187. *Id.* The *Malesko* dissent, joined by Justice Breyer, put forth a compelling argument that such asymmetry was actually desirable, given private prison corporations' economic motivations:

As the Court has previously noted, the 'organizational structure' of private prisons is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments. Thus, the private corporate entity at issue here is readily distinguishable from the federal agency in *Meyer*. Indeed, a tragic consequence of today's decision is the clear incentive it gives to corporate managers of privately operated custodial institutions to adopt cost-saving policies that jeopardize the constitutional rights of the tens of thousands of inmates in their custody.

*Id.* at 81 (Stevens, J., dissenting) (internal citation omitted).

the corporate form.”<sup>188</sup> Indeed, now the government may, since arbitrary housing assignments made by BOP officials will control whether a federal prisoner enjoys the ability to vindicate his constitutional rights.

Second, rejecting Pollard’s claim produced an asymmetry between federal prisoners housed in private prisons and their counterparts in privately-operated state facilities. State prisoners, as noted earlier, have long enjoyed the right under § 1983 of suing prison officials for constitutional torts, regardless of whether they are housed in state-managed or privately-managed facilities.<sup>189</sup> Federal prisoners now lack this right. This disparity is especially troubling as state and federal prisoners are sometimes housed side-by-side in the same private detention facilities,<sup>190</sup> meaning that the same course of conduct undertaken by the same prison officials in the same facility now results in selective liability for Eighth Amendment violations. Recognizing a *Bivens* remedy would have ensured that identically situated prisoners enjoy equal treatment when challenging state action that violates the Eighth Amendment.

Third, *Minneeci* creates asymmetries between the rights of federal prisoners in private prisons in different states, making remedies contingent on the particular contours of state tort law in whatever jurisdiction a prisoner happens to be housed. In some states, conduct by a private prison employee might be actionable under state law; in another state, the same conduct might not. Thus, federal prisoners’ remedies for wrongdoing occurring under color of federal law now vary from state to state.

The government and the corporate defendant in *Minneeci* countered that affording Pollard a *Bivens* remedy would have also manufactured an asymmetric liability insofar as private prison guards, unlike their BOP-employed counterparts, would be exposed to *Bivens* actions without the defense of qualified immunity. But this difference would have been by design. In *Richardson v. McKnight*, the Court refused to endow private prison guards with the same qualified immunity enjoyed by federal employees in § 1983 actions.<sup>191</sup> The Court, speaking through Justice Breyer, provided a lengthy historical account of the role of private prisons in America—including a harrowing laundry list of nineteenth-century abuses committed by private jailers—and found no “‘firmly rooted’ tradition of immunity applicable to privately employed prison guards.”<sup>192</sup> Moreover, the Court reasoned, the

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188. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) (finding Amtrak to be a government actor for First and Fifth Amendment purposes).

189. *See West v. Atkins*, 487 U.S. 42 (1988).

190. *See* FRANK J. SCHMALLEGER & JOHN ORTIZ SMYKLA, *CORRECTIONS IN THE 21ST CENTURY* (2012).

191. 521 U.S. 399 (1997).

192. *Id.* at 404. *See also* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2009) (discussing forced labor of prisoners in coal mines, lumber camps, and farm plantations by private entities throughout late nineteenth and early twentieth centuries).

purposes of the immunity doctrine would be ill served by extending such protections to private prison officers.<sup>193</sup> The chief rationale for official immunity is to prevent “unwarranted timidity” by government officials; in the private prison context, however, “marketplace pressures [already] provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or ‘nonarduous’ employee job performance.”<sup>194</sup> Nowhere in *Minnecci* did Justice Breyer revisit these unique dangers that attach to for-profit incarceration, or discuss the possibility (persuasively raised in the § 1983 setting) that such an asymmetry might serve a worthwhile purpose.

### 3. Administrability

A final “special factor” that has historically counseled for (or against) the extension of *Bivens* might be termed “administrability concerns.” The Court has only implied causes of action directly under the Constitution when the alleged violation is generally well known and easily recognizable to the federal judiciary. For example, federal judges can ably assess *Bivens* actions alleging Fourth Amendment violations, since the steady flow of federal criminal cases provides scores of examples of lawful and unlawful searches and seizures. Equal protection *Bivens* claims like those at issue in *Davis* posed similarly few administrability concerns, the Court emphasized, since “[l]itigation under Title VII of the Civil Rights Act of 1964 has given federal courts great experience evaluating claims [of] illegal . . . discrimination.”<sup>195</sup>

Indeed, it was the lack of a “workable cause of action” that led the Court to not extend *Bivens* in *Wilkie*.<sup>196</sup> There, the plaintiff’s claim was that the cumulative harassment he endured at the hands of government agents amounted to a violation of the Takings Clause,<sup>197</sup> which prohibits the taking of private property for public use “without just compensation.”<sup>198</sup> Despite acknowledging that systematic coercive conduct may very well have been proscribed by the Takings Clause,<sup>199</sup> such an unfamiliar, nebulous cause of action would have created “line-drawing difficulties” that would be “endlessly knotty to work out.”<sup>200</sup> The Court was unwilling to visit these novel challenges on already overburdened district court judges.

Recognizing a *Bivens* remedy for Pollard, in contrast, would not have posed such difficulties, since evaluating claims by federal prisoners in private facilities would simply require judges to apply the same Eighth Amendment principles that they already apply in § 1983 litigation and traditional Eighth

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193. *Richardson*, 521 U.S. at 407–12.

194. *Id.* at 409–10.

195. *Davis v. Passman*, 442 U.S. 228, 245 (1979).

196. *Wilkie v. Robbins*, 551 U.S. 537, 552 (2007).

197. *Id.* at 556.

198. U.S. CONST. amend. V.

199. *Wilkie*, 551 U.S. at 555.

200. *Id.* at 557, 562.

Amendment claims. Unlike in *Wilkie*, federal courts would not need to wade into any unfamiliar factual or legal terrain. To the contrary, it would have had the salutary effect of allowing federal judges to apply uniform Eighth Amendment principles in such cases.

Ironically, though, federal courts must now resolve many of these state law claims, since BOP regularly houses federal prisoners outside of their home states. Because “courts presume that the prisoner remains a citizen of the state where he was domiciled before his incarceration,”<sup>201</sup> state law claims brought by federal prisoners against private prison guards will still end up in federal court, notwithstanding the unavailability of a *Bivens* remedy. Pollard himself, for example, was housed in a California prison, but remained a citizen of Washington throughout his incarceration.<sup>202</sup> *Minnecci* is therefore unlikely to alleviate the administrative burden on federal judges, who will now have an *increased* number of varied and potentially thorny state law claims before them.

Thus, factors that might ordinarily lead the Court to counsel hesitation—the effect on individual deterrence, asymmetric liability costs, and familiarity of the action to federal courts—all counseled in favor of granting Pollard a cause of action.

#### IV.

##### WHITHER *BIVENS*? CONSTITUTIONAL TORTS AFTER *MINNECCI*

In quietly redrawing the contours of the *Bivens* doctrine, *Minnecci* may significantly impact constitutional torts, both in terms of immediate consequences as well as future doctrinal developments. This Comment concludes by considering the implications of *Minnecci* in both regards.

##### *A. Immediate Impacts*

Most noticeably, *Minnecci* will have an instant effect on a massive number of federal prisoners and immigration detainees. In 1990, the BOP housed no prisoners in privately-run facilities.<sup>203</sup> By 2009, for-profit facilities housed nearly 35,000 federal prisoners, approximately 16 percent of the total federal prison population.<sup>204</sup> The Mexican government, which filed an amicus brief on Pollard’s behalf, noted that U.S. Immigration and Customs Enforcement (ICE) placed approximately half of the 363,064 individuals they detained in 2010 in

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201. Hall v. Curran, 599 F.3d 70, 72 (1st Cir. 2010).

202. See Amended Complaint and Demand for Jury Trial at 2, Pollard v. Wackenhut Corr. Corp., No. CV-F-01-06078-OWW-HGB-P (E.D. Cal. Apr. 18, 2002) (noting that “a substantial part of the events giving rise to this Complaint occurred” in California, but that “Plaintiff Richard Lee Pollard . . . is a citizen of the State of Washington”).

203. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTION FACILITIES, 1995, at iv (1997).

204. *Id.*

privately operated facilities.<sup>205</sup> For a substantial share of those in federal custody, then, *Minneci* forecloses the vindication of Eighth Amendment rights directly under the Constitution.

Beyond the basic worry that state tort law may not provide an adequate remedy, requiring such individuals to rely on state tort law presents no shortage of practical difficulties. For one, a prisoner or detainee is unlikely to be aware that her only available redress for a wrong suffered at the hands of a federal prison guard in a federal prison is through a state law claim. Moreover, prior to *Minneci*, many federal prisons' law libraries would have little reason to include resources concerning the finer points of state tort law.<sup>206</sup> This will presumably change over time, as private facilities adjust to provide prisoners with appropriate legal materials, but in the meantime many worthy plaintiffs may be denied their day in court.

The "asymmetries" addressed in Part III.B.2, meanwhile, could produce a host of socially undesirable outcomes, particularly with respect to the health of state tort law. When the Court in *Bivens* rejected the government's suggestion that individuals alleging Fourth Amendment violations should seek remedies through state law, its concern was *not* merely the incompatibility between the objectives of state tort protections and constitutional demands. The Court was concerned that once state tort law came to serve as the *only* way to vindicate constitutional rights, there would be a powerful incentive for state actors to curtail whatever limited relief might be available under state law.<sup>207</sup> With private prison corporations now increasingly flexing their political muscle at the state level, a "race to the bottom"—where states, at the behest of job-generating prison companies, compete to withdraw state tort law protections for prisoners—is a distinct possibility.<sup>208</sup> Particularly with respect to a politically marginalized group like federal prisoners, relying on potentially malleable state tort law as a bulwark against constitutional violations is perilous.

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205. Brief of Amicus Curiae United Mexican States in Support of Respondents at 4, *Minneci v. Pollard*, 132 S. Ct. 617 (2012) (No. 10-1104). See also Editorial, *Death by Detention*, N.Y. TIMES, May 6, 2008, at A26 (noting "secrecy, neglect, and lack of oversight that are a few of the shameful symptoms of the booming sector of the nation's prison industry—the detention of undocumented foreigners").

206. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

207. The Court was troubled by the specter that the "availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

208. In early 2012, Correction Corporation of American (CCA) sent a letter to governors in 48 states "offering to purchase prisons from states so long as they contain at least 1,000 beds and the states agree to pay CCA to operate the prisons for at least 20 years and keep the prisons at least 90 percent full." See ACLU, *ACLU Urges States to Reject CCA Offer to Privatize Prisons* (Mar. 1, 2012), <http://www.aclu.org/prisoners-rights/aclu-urges-states-reject-cca-offer-privatize-prisons>.

Finally, with the marked expansion of privatization efforts in recent years,<sup>209</sup> *Minneci* may also have immediate ramifications for civil rights actions outside of the prison context. In the past decade, the state and federal governments have increased the involvement of private entities in various fields, from waging war<sup>210</sup> to administering welfare and public benefits programs<sup>211</sup> to overseeing foster care and child placement programs.<sup>212</sup> This trend implicates “[a] foundational premise of our constitutional order,” Professor Gillian Metzger has argued, insofar as it undermines the assumption that “public and private are distinct spheres, with public agencies and employees being subject to constitutional constraints while private entities and individuals are not.”<sup>213</sup> The Court’s opinion in *Minneci*, which makes no mention of the growing role of private actors in the administration of prisons (or other core governmental functions), fails to acknowledge this new economic context in which Pollard’s Eighth Amendment claim arises.

### B. Doctrinal Developments

At the most general level, though, the Court’s reasoning in *Minneci* (and the fact that eight Justices signed on) may undermine the rationale for already-existing *Bivens* remedies, most conspicuously the Eighth Amendment action recognized in *Carlson v. Green*. The *Minneci* Court distinguished the facts of *Carlson* by emphasizing that there, the Westfall Act of 1988 provided for the substitution and replacement of the United States as the defendant in tort actions against federal employees.<sup>214</sup> *Carlson* thus “differed dramatically,” because in the private prison context “prisoners ordinarily *can* bring state-law tort actions” directly against the employees of a private firm.<sup>215</sup>

The *Minneci* Court’s logic is flawed, however, because in practice individual officers almost *never* end up personally compensating victims for constitutional wrongdoing, even when they are the named defendants in a *Bivens* lawsuit. The federal government ordinarily “indemnifies its employees

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209. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370 (2003) (defining privatization as “government use of private entities to implement government programs or provide services to others on the government’s behalf”).

210. See NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 341–45 (2007) (discussing Secretary of Defense Donald Rumsfeld’s efforts to radically increase commercial outsourcing at the Pentagon); Editorial, *Privatized War, and Its Price*, N.Y. TIMES, Jan. 11, 2010, at A16 (criticizing “government’s inability to hold [Blackwater] mercenaries accountable for crimes they commit” in Iraq).

211. Metzger, *Privatization as Delegation*, *supra* note 209, at 1383–92.

212. Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1451 (2009). See also Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1435–36 (2010) (noting that since September 11, 2001, “doormen, pilots, truck drivers, retail clerks, repairmen, and parcel couriers” have all, to varying degrees, been “deputized” by government agencies to aid in national security efforts).

213. Metzger, *Privatization as Delegation*, *supra* note 209, at 1369–70.

214. *Minneci v. Pollard*, 132 S. Ct. 617, 623 (2012).

215. *Id.*

against constitutional tort judgments or settlements . . . and takes responsibility for litigating such suits” by providing government-paid counsel.<sup>216</sup> Only in “extremely rare” circumstances does the government not indemnify the individual officer; “[a]s a practical matter . . . indemnification is a virtual certainty.”<sup>217</sup>

Taking these practical considerations seriously, the Court’s treatment of *Bivens* actions and deterrence loses much of its bite. The Court’s holding in *Minneci* seems to rest on the fiction that statutory indemnification (via the FTCA) obviates the deterrent threat of a damages action, while ordinary indemnification does not.<sup>218</sup> If Congress were to modify the substitution provision of the Westfall Act to allow tort actions directly against BOP-employed prison guards—but government agencies continued *informally* indemnifying individual officers—*Minneci*’s reasoning would seem to require overturning *Carlson* altogether.

Indeed, were the Court to scrutinize more closely the process of indemnification, it could now erode any remaining basis for the *Bivens* doctrine as a whole. Compare the circumstances of *Bivens* itself: there, after the Supreme Court remanded for further proceedings, the defendants settled the case—for an unknown final amount—by writing personal checks to Bivens for \$100 or \$200.<sup>219</sup> Today’s Court might reason that, as indemnification has become the norm over the intervening decades, implied causes of action against such officers have lost their deterrent effect. In distinguishing *Carlson*, *Minneci* elevates the importance of this analysis: whether the named defendant faces personal liability for a damages action may now be dispositive in determining whether to take the “disfavored” step of recognizing a *Bivens* remedy. If a post-*Minneci* Court were to approach indemnification as it does substitution—as eliminating the all-important deterrent value of a damages action—it is unclear whether even *Bivens* would stand.

Outside the *Bivens* context the Court continues to speak of the Eighth Amendment in lofty terms, particularly emphasizing its role in regulating conditions in American prisons. Just months after *Minneci*, the Court issued a

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216. Comelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 76 (1999).

217. *Id.* at 77 & n.56.

218. The Court likewise presumes that, provided that the economic damages are commensurate, the threat of ordinary tort liability carries the same deterrent effect as the threat of liability for violating the Eighth Amendment’s prohibition against cruel and unusual punishment. One might counter that violating a core constitutional guarantee incurs significantly greater social opprobrium, and that the Eighth Amendment has an important expressive function in shaping social norms. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032 (1996). The Court’s treatment of “deterrence,” which treats federal agents solely as rational economic actors, takes little account of such noneconomic operation of the law.

219. Pfander, *The Story of Bivens*, *supra* note 135, at 289 (noting that Bivens’s case settled after remand to the trial court “for \$500 or \$1000, [and] each of the five defendants contributed one-fifth of the sum”).

lengthy opinion affirming that “[p]risoners retain the essence of human dignity inherent in all persons,” and explaining that “[r]espect for that dignity animates the Eighth Amendment.”<sup>220</sup> Failure to provide inmates with adequate food, clothing, and medical care, the Court noted, “may actually produce physical ‘torture or a lingering death.’”<sup>221</sup> But *Minneci* seems to envision a far more cautious role for the federal courts in vindicating these core constitutional guarantees. In curtailing federal inmates’ ability to directly challenge the conditions of their confinement under the Constitution, the Court steps back from its responsibility to ensure that “such rights [not] become merely precatory.”<sup>222</sup> *Minneci* thus signals a significant retreat from the original promise of *Bivens*, and one of the doctrine’s most significant “revisions” to date.

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220. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

221. *Id.*

222. *Davis v. Passman*, 442 U.S. 228, 242 (1979).