

MINNECI V. POLLARD AND THE UPHILL CLIMB TO BIVENS RELIEF

ELLIOT J. WEINGARTEN*

I. INTRODUCTION

If an inmate at a privately operated prison facility is the victim of Eighth Amendment violations, does he have an implied right to sue the prison employees? In *Bivens v. Six Unknown Named Agents*,¹ the Supreme Court created an implied right of action against federal employees for federal constitutional violations. *Minnecci v. Pollard*² asks the Supreme Court to expand this implied right of relief against employees of a privately operated prison facility.³ Over the past thirty years, the Court has consistently denied *Bivens* expansion to new categories of plaintiffs. Indeed, Harvard Law Professor Laurence Tribe wrote that *Bivens* is “on life support with little prospect of recovery.”⁴ 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.

II. FACTS

Respondent Richard Pollard is a federal prisoner serving a twenty-year sentence for drug trafficking and firearms offenses.⁵ Pollard alleges that he slipped and fell at the Taft Correctional Institution (TCI), was diagnosed with possible fractures of both elbows, and was referred to an outside orthopedic clinic.⁶ Before

* J.D. Candidate 2013, Duke University School of Law. I would like to thank Professor Stephen Sachs for his help and guidance in writing this commentary.

1. 403 U.S. 388 (1971).
2. *Minnecci v. Pollard*, No. 10-1104 (U.S. argued Nov. 1, 2011).
3. Brief for Petitioners at i, *Minnecci*, No. 10-1104 (U.S. July 22, 2011).
4. Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 26 (2007).
5. Brief for Petitioners, *supra* note 3, at 3.
6. *Id.* at 4. The Taft Correctional Institution (TCI) is a privately owned correctional

being transported, Pollard was forced to wear a restrictive “jumpsuit” and a “black box”⁷ mechanical restraint device, despite complaining of severe pain while wearing them.⁸ The orthopedic clinic recommended that Pollard wear a posterior splint around his elbow for two weeks.⁹ Pollard, however, was unable to wear the splint because of inadequate facilities.¹⁰ In the following weeks, Pollard could not feed or bathe himself because of his injury and the prison staff failed to make alternative arrangements.¹¹ Pollard was required to return to work before his injuries healed and again was forced to wear a “black box” restraint when returning to the orthopedic clinic for a subsequent appointment.¹²

In 2001, Pollard filed a civil complaint in the United States District Court for the Eastern District of California and named eight TCI employees as defendants.¹³ He alleged Eighth Amendment violations and sought damages against the individual TCI employees for providing inadequate medical care while he was housed at the prison.¹⁴ The district court adopted the recommendation of the magistrate judge and dismissed the case because the allegations lacked an implied remedy under *Bivens* and because alternative remedies were available to Pollard.¹⁵

III. LEGAL BACKGROUND

After *Bivens* was decided, the Court expanded the doctrine over the following decade to include both Fifth and Eighth Amendment violations in limited circumstances. Since then, however, the Court has not allowed any new category of plaintiff access to a *Bivens* remedy.

facility in California that contracts with the Federal Bureau of Prisons (BOP) to house federal inmates. *Id.* Pollard was housed at TCI when the accident occurred. *Id.*

7. *Id.* at 4–5 (“[T]he term generally refers to a plastic box that covers the lock of a prisoner’s handcuffs. A chain runs through the box and around the prisoner’s waist and secures his hands to his stomach.”).

8. *Id.*

9. *Id.* at 5.

10. *Id.*

11. *Id.*

12. *Id.* at 6.

13. *Id.* at 8.

14. *Id.*

15. *Id.* at 7–8.

A. *Bivens and Its Expansion*

The remedy Pollard seeks was created forty years ago by the Supreme Court as a remedy for constitutional violations by federal officers. The original case, *Bivens v. Six Unknown Named Agents*, created an implied damages remedy for victims of Fourth Amendment violations by federal agents.¹⁶ In that case, after federal agents searched and arrested Webster Bivens without a warrant or probable cause, the agents handcuffed him and threatened to arrest his family as well.¹⁷ The officers then took Bivens to a federal court where he was “interrogated, booked, and subjected to a visual strip search.”¹⁸ The unreasonable search and seizure—and the perverse conduct of the officers—violated Bivens’s Fourth Amendment rights and subjected him to “great humiliation, embarrassment, and mental suffering.”¹⁹ The Court deemed a state law remedy inadequate for a federal constitutional violation²⁰ and created an implied right of relief, allowing Bivens to recover money damages from the offending officers.²¹

Eight years later in *Davis v. Passman*,²² the Court expanded the *Bivens* doctrine to include Fifth Amendment due process violations.²³ Shirley Davis, a female secretary to Congressman Otto Passman, was terminated from her position because Passman believed “that it was essential that [his secretary] be a man.”²⁴ Davis brought a suit alleging that Passman’s conduct sexually discriminated against her and violated her Fifth Amendment rights.²⁵ Passman claimed that “no private right of action” existed for the claim.²⁶ The Court disagreed and again recognized an implied right of action for the deprivation of a constitutional right because “the Due Process Clause of the Fifth

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

17. *Id.*

18. *Id.*

19. *Id.* at 389–90.

20. *See id.* at 392 (observing that the Fourth Amendment acts as a limit to federal power, and thus causes of action under the Fourth Amendment cannot be limited by state law or to tort actions under state law).

21. *Id.* at 397.

22. 442 U.S. 228 (1979).

23. *Id.* at 234–35.

24. *Id.* at 230 (quoting Letter from Otto E. Passman, Congressman, to Shirley Davis, Petitioner) (internal quotation marks omitted).

25. *Id.* at 231.

26. *Id.* at 232 (quoting Brief for Respondent at 4, *Davis*, 442 U.S. 228 (No. 78-572)) (internal quotation marks omitted).

Amendment forbids the Federal Government to deny equal protection of the laws.”²⁷

Finally, in *Carlson v. Green*,²⁸ the Court expanded the doctrine yet again and recognized that victims of Eighth Amendment violations can also obtain *Bivens* relief.²⁹ The administratrix of an estate sued on behalf of her son because the deliberate indifference of prison medical staff caused his death.³⁰ Relief under state law was unavailable but the parties disputed the availability of relief under federal law.³¹ Although the Federal Tort Claims Act (FTCA)³² created a remedy for torts of this kind, the Court found that the FTCA does not preempt a *Bivens* remedy because employees are not individually liable under that statute.³³ Rather, the intention of Congress was to allow for FTCA claims against the United States and *Bivens* claims against the individual employees.³⁴ Making the FTCA and *Bivens* complementary causes of action creates “a more effective deterrent” against individual officers than an exclusive FTCA remedy.³⁵

B. *Bivens* Contraction

Since *Carlson*, however, the Court has refused to extend *Bivens* remedies to new categories of plaintiffs even when no adequate alternative remedies exist. Just three years after *Carlson* in *Bush v. Lucas*,³⁶ the Court denied *Bivens* relief for a First Amendment violation by a federal employer.³⁷ In *Bush*, a NASA engineer’s pay was downgraded significantly after he stated publicly that his job was a “travesty and worthless.”³⁸ The engineer sued his employer, alleging a First Amendment violation and seeking damages under the

27. *Id.* at 235 (internal citations and quotation marks omitted).

28. 446 U.S. 14 (1980).

29. *Id.* at 19–20.

30. *Id.* at 16 n.1.

31. *Id.* at 24.

32. 28 U.S.C.A. § 1346 (West 2011).

33. *Carlson*, 446 U.S. at 19. Since the implementation of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100–694, § 5, 102 Stat. 4563 (codified as amended at 28 U.S.C.A. § 2679(b)(1) (West 2011)), *Bivens* provides the only remedy against federal employees covered by the FTCA. The United States is the sole defendant in FTCA actions.

34. *Carlson*, 446 U.S. at 19–20.

35. *Id.* at 21.

36. 462 U.S. 367 (1983).

37. *Id.* at 390.

38. *Id.* at 369 (citation omitted).

rationale of *Bivens*.³⁹ The Court determined that the administrative system created by Congress “provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies,” and denied *Bivens* relief.⁴⁰

The Court has also made *Bivens* relief unavailable to military personnel harmed through activity incident to service.⁴¹ In *Chappell v. Wallace*,⁴² the Court denied military personnel *Bivens* remedies when plaintiffs alleged equal protection violations by their superiors that resulted in the “fail[ure] to assign [the plaintiffs] desirable duties, threat[s], . . . low performance evaluations, and penalties of unusual severity.”⁴³ The Court found “factors counseling hesitation”⁴⁴ in “[t]he need for special regulations in relation to military discipline and consequent need and justification for a special and exclusive system of military justice.”⁴⁵ Moreover, the Constitution explicitly gives Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”⁴⁶

Additionally, the Court found in *Schweiker v. Chilicky*⁴⁷ that wrongful denials of Social Security benefits resulting in due process violations do not give rise to *Bivens* liability.⁴⁸ The remedy sought was “consequential damages for hardships resulting from an allegedly unconstitutional denial of [Social Security benefits].”⁴⁹ A *Bivens* remedy, however, was refused because “Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program” and the administrative process provided adequate relief.⁵⁰

39. *Id.* at 370–72.

40. *Id.* at 385–86.

41. *United States v. Stanley*, 483 U.S. 669, 686 (1987); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983).

42. *Chappell*, 462 U.S. 296.

43. *Id.* at 297.

44. *Id.* at 298 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1976)).

45. *Id.* at 300; *see also Stanley*, 483 U.S. at 684 (“[N]o *Bivens* remedy is available for injuries that ‘arise out of . . . activity incident to [military] service.’” (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950))).

46. *Chappell*, 462 U.S. at 300 (quoting U.S. CONST. art. I, § 8, cl. 14) (internal quotation marks omitted).

47. 487 U.S. 412 (1988).

48. *Id.* at 414.

49. *Id.* at 428.

50. *Id.* at 429.

In *FDIC v. Meyer*,⁵¹ the Court held that *Bivens* relief is not available against federal agencies.⁵² In *Meyer*, the FDIC took over an insolvent thrift institution and terminated a senior officer.⁵³ The senior officer then sued the FDIC alleging that the summary discharge deprived him of a property right in violation of the Fifth Amendment.⁵⁴ According to the Court, the “logic of *Bivens*” did not support the remedy sought by the employee because the FDIC had authority to “take such action as may be necessary to put [the thrift] in a sound solvent condition.”⁵⁵

Similarly, in *Corrective Services Corp. v. Malesko*,⁵⁶ the Court refused *Bivens* relief against a private corporation operating a halfway house under contract with the Federal Bureau of Prisons (BOP) because a *Bivens* claim must be alleged against an individual.⁵⁷ Moreover, “no federal prisoners enjoy[ed] [Malesko’s] contemplated remedy.”⁵⁸ The Court stated that federal prisoners in government-run facilities alleging constitutional violations could bring *Bivens* claims against the offending officers.⁵⁹ A prisoner cannot, however, bring a *Bivens* claim against “the officer’s employer, the United States, or the BOP.”⁶⁰ Furthermore, the presence of adequate alternative remedies weighed against providing an additional *Bivens* remedy.⁶¹

In *Wilkie v. Robbins*,⁶² the most important case in recent *Bivens* jurisprudence, a landowner sought *Bivens* damages against Bureau of Land Management (BLM) employees who extorted him into granting an easement.⁶³ In denying the landowner *Bivens* relief, the Court, with Justice Souter writing for the majority, created a test to determine if *Bivens* relief is available. First, the Court must ask whether an alternative, existing process exists.⁶⁴ Although this can be a convincing reason to refrain from creating a new remedy, this question is not

51. 510 U.S. 471 (1994).

52. *Id.* at 473.

53. *Id.*

54. *Id.* at 473–74. The plaintiff claimed a Fifth Amendment right to continued employment under California law. *Id.*

55. *Id.* (quoting 12 U.S.C. § 1729(b)(1)(A)(ii) (repealed 1989)).

56. 534 U.S. 61 (2001).

57. *Id.* at 71–72.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 74.

62. 551 U.S. 537 (2007).

63. *Id.* at 547–48.

64. *Id.* at 550.

always dispositive on its own. The Court must look to the second question: whether there are “special factors counseling hesitation.”⁶⁵ Even if there are no existing alternative processes, those special factors may prevent the Court from authorizing a remedy.⁶⁶ In *Wilkie*, the landowner had alternative and adequate administrative and judicial processes for “vindicating virtually all of his complaints”; thus, the Court denied *Bivens* relief.⁶⁷

C. *Decisions of Other Circuits*

The Supreme Court has not yet addressed the specific issue in this case—whether private employees are liable under *Bivens*—but three circuit courts addressed this issue and denied *Bivens* relief.⁶⁸ In *Holly v. Scott*,⁶⁹ for example, a diabetic federal prisoner housed in a private prison facility attempted to sue the employees of the facility for inadequate medical care.⁷⁰ The Fourth Circuit denied the plaintiff *Bivens* relief because of two factors, “each of which independently preclude[d] the extension of *Bivens*.”⁷¹ First, as employees of a private corporation, the defendants did not act under the color of federal law.⁷² Second, the availability of an alternative and superior cause of action under state negligence law counseled hesitation.⁷³ Thus, because state law would have provided the plaintiff with an adequate alternative remedy, “[t]his [was] not a circumstance under which the extension of a judicially implied remedy [was] appropriate.”⁷⁴

65. *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

66. *Id.*

67. *Id.* at 553–54.

68. *Holly v. Scott* 434 F.3d 287, 288 (4th Cir. 2006); *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090, 1100 (10th Cir. 2005) (dismissing a *Bivens* suit against private employees because of available state remedies and because “[t]he caution toward extending *Bivens* remedies into any new context . . . foreclose[d] such an extension here”); *Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008) (disposing of a *Bivens* claim against private prison employees because the employees were not federal actors and a state tort remedy was available).

69. *Holly*, 434 F.3d at 287.

70. *Id.* at 288.

71. *Id.* at 290.

72. *See id.* at 292 (“Defendants are not federal officials, federal employees, or even independent contractors in the service of the federal government.”).

73. *Id.* at 295.

74. *Id.* at 297.

IV. HOLDING

Despite these holdings, a split Ninth Circuit panel allowed Pollard to pursue *Bivens* relief.⁷⁵ Because *Bivens* provides a cause of action only against an official “acting under the color of federal law,”⁷⁶ the court first determined whether private prison employees act under color of federal law using the “public function” test.⁷⁷ Under this test, a private entity engages in state action when exercising “powers traditionally exclusively reserved to the State.”⁷⁸ The court found that imprisonment is fundamentally a public function, regardless of whether the facility is managed by the government or a private entity.⁷⁹

The court then used the two-part *Wilkie* test to determine if *Bivens* relief was available.⁸⁰ First, the court found that an “alternative, existing process” was in place, but that an existing process does not necessarily prevent the judicial branch from creating a new judicial remedy.⁸¹ The court stated that “the mere availability of a state law remedy” does not prevent the allowance of a *Bivens* cause of action.⁸² According to the court, the policy underlying *Bivens* is that “the liability of federal officials for violations of citizens’ constitutional rights should be governed by uniform rules.”⁸³ If state tort law precluded *Bivens*, the liability of federal officials would not be uniform because state tort law varies widely by state.⁸⁴ Thus, state tort remedies alone cannot “displace a *Bivens* remedy under the first prong of the *Wilkie* test.”⁸⁵

75. Pollard v. GEO Group, 629 F.3d 843, 850 (9th Cir. 2010), cert. granted sub nom. Minneci v. Pollard, 131 S. Ct. 2449 (U.S. argued Nov. 1, 2011) (No. 10-1104).

76. *Id.* at 854 (quoting Morgan v. United States, 323 F.3d 776, 780 (9th Cir. 2003)) (internal quotation marks omitted).

77. *Id.* at 855. This test is traditionally used to determine if private individuals act under the color of state law for the purposes of 42 U.S.C.A. § 1983 (West 2011). *Id.*

78. *Id.* (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974)) (internal quotation marks omitted).

79. *Id.* at 857 (“The relevant function here is not prison management, but rather incarceration of prisoners, which has of course traditionally been the State’s ‘exclusive prerogative.’” (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982))).

80. *Id.* at 859 (citing Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

81. *Id.* at 859–60.

82. *Id.* at 860.

83. *Id.* at 862 (quoting Carlson v. Green, 446 U.S. 14, 23 (1980)) (internal quotation marks omitted).

84. *Id.* at 862–63.

85. *Id.* at 863.

Second, the court found no “special factors counseling hesitation” that prevented the panel from allowing *Bivens* relief.⁸⁶ The court considered the following as past special factors, which had previously disallowed *Bivens* remedies: (1) “whether it is feasible to create a workable cause of action”;⁸⁷ (2) whether extending a remedy would undermine *Bivens*’s deterrence goals;⁸⁸ (3) whether extending *Bivens* imposes asymmetric liability costs on privately operated facilities compared to government-run facilities;⁸⁹ and (4) whether a unique attribute of the area gives reason to believe that congressional action is deliberate.⁹⁰ After consideration of each factor, the panel concluded that none caused enough hesitation to warrant the denial of a *Bivens* remedy and that Pollard could proceed in his quest for *Bivens* relief.⁹¹

V. ARGUMENTS

A. *Petitioner Minneci’s Arguments*

Minneci argues that Pollard’s alternative remedies are adequate substitutes for a *Bivens* remedy and, alternatively, if the Court finds that those remedies are not adequate, that Minneci’s status as a private employee is a factor counseling hesitation.

1. Pollard’s alternative remedies are adequate and superior substitutes for a *Bivens* remedy.

Minneci argues that Pollard’s alternative remedies are adequate for four reasons. First, Minneci contrasts this case with the three cases in which a *Bivens* remedy was made available.⁹² In each previous case—*Bivens*, *Davis*, and *Carlson*—no adequate alternative remedies were available for the plaintiffs.⁹³ Here, Pollard has an adequate alternative remedy in state tort law.⁹⁴ Thus, Pollard should be denied *Bivens* relief because the Court “respond[s] cautiously to suggestions that *Bivens* remedies be extended into new contexts.”⁹⁵

86. *Id.*

87. *Id.* (citing *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007)).

88. *Id.* at 863 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70–71 (2001)).

89. *Id.* (citing *Malesko*, 534 U.S. at 72).

90. *Id.* (citing *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)).

91. *Id.* at 869.

92. Brief for Petitioners, *supra* note 3, at 15.

93. *Id.*

94. *Id.*

95. *Id.* at 13 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988)).

Second, Minneci contends that Pollard is most similar to the plaintiff in *Malesko* because Pollard’s alternative remedies are “at least as great, and in many respects greater, than anything that could be had under *Bivens*.”⁹⁶ *Malesko*, like Pollard, was “‘not a plaintiff in search of a remedy’ like *Bivens* or *Davis*.”⁹⁷ Instead, *Malesko* only sought an extension of *Bivens*, and the Court is cautious toward such expansion.⁹⁸ Because Pollard is similarly situated to *Malesko* and seeks *Bivens* expansion, Minneci believes Pollard should also be denied relief.⁹⁹

Third, Minneci disagrees with the Ninth Circuit’s determination that an alternative to *Bivens* relief must be federally created. According to Minneci, a state tort remedy is an adequate substitute for *Bivens* and alternative remedies need not be governed by uniform federal rules.¹⁰⁰ The Ninth Circuit’s concern with state law remedies—that plaintiffs in different jurisdictions might face different procedural requirements or be subject to limits on damages—should not concern the Court because these requirements “merely place all plaintiffs on the same footing when they bring suit for the same sorts of injuries.”¹⁰¹ Thus, Minneci claims that alternative state remedies suffice as long as all plaintiffs in a particular jurisdiction enjoy equal remedies.¹⁰²

Finally, Minneci argues that the state law remedies available to Pollard are superior to a *Bivens* remedy because of California law.¹⁰³ A general duty of care applies to all citizens¹⁰⁴ and a heightened duty of care applies specifically to jailers because of a “special relationship between jailer and prisoner.”¹⁰⁵ If Pollard could prove “injury resulting either from negligence or . . . [the] duty to protect him from foreseeable harm,” he would be entitled to damages.¹⁰⁶ Additionally, a

96. *Id.* at 20 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001)) (internal quotation marks omitted).

97. *Id.* (quoting *Malesko*, 534 U.S. at 74).

98. *Id.* (quoting *Malesko*, 534 U.S. at 74).

99. *Id.*

100. *Id.* at 73 (finding that a state tort remedy against a private prison management company was an adequate alternative to *Bivens*).

101. *Id.* at 23.

102. *Id.*

103. *Id.* at 25.

104. *Id.* at 26 (proposing that “as a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person” (quoting *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992)) (internal quotation marks omitted)).

105. *Id.* (quoting *Giraldo v. Cal. Dep’t of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 383 (Cal. Ct. App. 2008)).

106. *Id.* at 27.

constitutional violation under the Eighth Amendment requires Pollard to prove that defendants were “deliberat[ly] indifferen[t] to serious medication needs,” causing “unnecessary and wanton infliction of pain.”¹⁰⁷ Because “deliberate indifference describes a state of mind more blameworthy than negligence,”¹⁰⁸ Pollard’s odds of succeeding in *Bivens* are less likely than in a negligence suit.¹⁰⁹

2. Even if the alternative remedies are not sufficient to deny *Bivens* relief, Petitioners’ status as private employees gives rise to a factor counseling hesitation that independently warrants reversal.

Minneci also argues that as private employees they “lack the recognized immunities of their governmental counterparts, resulting in asymmetrical liability risks and eliminating a principal rationale for recognition of the *Bivens* doctrine.”¹¹⁰ Federal employees can claim qualified immunity when sued under *Bivens*, which decreases a plaintiff’s chances of success because qualified immunity “permits courts expeditiously to weed out suits . . . without requiring time-consuming preparation to defend the suit on its merits.”¹¹¹ Minneci believes that lack of qualified immunity should concern the Court because *Bivens* claims against private prison contractors would be more successful than those against employees at government-run prisons.¹¹² According to Minneci, authorizing asymmetric liability in *Bivens* suits is not a decision for the Court because of the hesitation “to create an anomaly whereby private defendants face greater constitutional liability than public officials.”¹¹³ Minneci argues that Congress, not a court, should decide whether Pollard is entitled to *Bivens* relief.¹¹⁴

107. *Id.* at 28 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)) (internal quotation marks omitted).

108. *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 835 (1994)).

109. *Id.* at 28–29.

110. *Id.* at 36.

111. *Id.* at 38–39 (quoting *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)) (internal quotation marks omitted).

112. *Id.* at 37–38 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001)).

113. *Id.* at 39 (quoting *Holly v. Scott*, 434 F.3d 287, 294 (4th Cir. 2006)) (internal quotation marks omitted).

114. See *Malesko*, 534 U.S. at 72 (stating that authorizing *Bivens* liability “is a question for Congress, not [the Court], to decide”).

B. Respondent Pollard's Arguments

Pollard presents two main arguments to demonstrate that a *Bivens* remedy is available here. First, Pollard argues that the *Bivens* doctrine encompasses all Eighth Amendment violations. Second, Pollard believes that the existence of state law remedies alone does not preclude a *Bivens* remedy.

1. Pollard advances three arguments supporting the claim that the *Bivens* doctrine encompasses all Eighth Amendment violations.

Pollard argues that since *Carlson*, the Court has never distinguished between public and private employees acting under the color of federal law for the purpose of a *Bivens* remedy.¹¹⁵ Pollard analogizes the issue at hand to that in *Carlson* because, like that victim, Pollard is a federal prisoner who was tried, convicted, and sentenced for a violation of federal law.¹¹⁶ Additionally, Pollard claims Eighth Amendment violations by federal agents.¹¹⁷ Thus, Pollard argues that the application of *Carlson* permits him to receive a *Bivens* remedy.¹¹⁸

If *Carlson* does not provide a *Bivens* remedy, Pollard argues that “privately held federal prisoners would be the *only* prisoners in the country unable to enforce their Eighth Amendment rights through a damages action.”¹¹⁹ In privately operated prisons, federal prisoners are often held in the same facilities, and even in neighboring cells, as state prisoners. If two prisoners held in the same prison suffer the same constitutional violation, two different remedies are available to them: state prisoners may pursue a § 1983 claim, while federal prisoners may only pursue a tort claim.¹²⁰ Pollard believes the remedies should be uniform because private and public employees are not distinguished in *Bivens* cases.¹²¹ Indeed, Pollard contends that there is no significance to a company’s private status because in *Malesko* the private prison company was “in every meaningful sense, the same” as

115. Brief for Respondent at 4-5, *Minneci v. Pollard*, No. 10-1104 (U.S. Sep. 12, 2011), 2011 WL 4100439, at *4-5.

116. *Id.* at 7.

117. *Id.*

118. *Id.* at 8.

119. *Id.* (arguing that prisoners in publicly operated federal facilities can bring damages actions under *Bivens*, while prisoners in both publicly and privately operated state facilities can bring § 1983 actions).

120. *Id.*

121. *Id.* at 9.

the FDIC in *Meyer*.¹²²

Pollard similarly argues that *Malesko* supports his cause of action because Malesko brought suit not only against the private prison facility where he was held, but also against an employee at the facility.¹²³ When the suit reached the Court, “the parties, the United States as amicus curiae, and the Court itself all assumed that a *Bivens* action against the employee would have been proper.”¹²⁴ Despite denying the plaintiff *Bivens* relief against the facility, the Court stated that “remedies available to a privately held federal prisoner for a ‘constitutional deprivation’ ought to mimic the remedies available to a publicly held federal prisoner for the deprivation—namely, ‘a *Bivens* claim against the offending individual officer.’”¹²⁵ Pollard believes that this dicta supports his cause of action even though the plaintiff in that case never pursued a *Bivens* claim because the statute of limitations expired.¹²⁶

2. The existence of state law remedies does not independently preclude a *Bivens* action.

Pollard argues next that *Bivens* relief is appropriate because privately held prisoners have no alternative federal remedies and because state remedies are not uniform.¹²⁷ The purpose of the *Bivens* doctrine is the “deterrence of individual officers who commit unconstitutional acts.”¹²⁸ This deterrence goal is grounded in separation of powers principles: although the Court can award damages to the victim of a constitutional violation, only Congress can create a statutory cause of action or prevent a *Bivens* remedy

122. *Id.* at 9–10 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001)) (internal quotation marks omitted).

123. *Id.* at 10.

124. *Id.*; see also Brief of CSC at 13–14, *Malesko*, 534 U.S. 61 (No. 00-860) 2001 WL 535666 (arguing that privately held federal prisoners do not need *Bivens* remedies against the privately owned prison management companies because plaintiffs can bring actions against the individual employees who committed constitutional violations); Brief of United States as Amicus Curiae Supporting Petitioner at 22, *Malesko*, 534 U.S. 61 (No. 00-860) 2001 WL 558228 (“[I]nmates in private [federal] institutions already have remedies, remedies that parallel those available to (and adequate for) their publicly housed counterparts.”).

125. Brief for Respondent, *supra* note 115, at 12 (quoting *Malesko*, 534 U.S. at 72).

126. *Id.* at 10; see also *Laubach v. Scibana*, 301 Fed. Appx. 832, 837 (10th Cir. 2008) (finding that “*Bivens* actions follow the same statute of limitations that applies to personal injury suits in the state where the action accrues”).

127. Brief for Respondent, *supra* note 115, at 5.

128. *Id.* at 24 (quoting *Malesko*, 534 U.S. at 71) (internal quotation marks omitted).

altogether.¹²⁹

Pollard cites four *Bivens* cases to demonstrate that the availability of state law remedies alone does not preclude a *Bivens* action.¹³⁰ First, in *Bivens* itself, the plaintiff could have pursued his claim under state trespass law, but whether he could succeed in tort was unclear even though his Fourth Amendment rights were violated.¹³¹ Therefore, the tort remedy was found ineffective because of its inconsistency with the Fourth Amendment.¹³² Pollard believes that state tort law is ineffective to deter not just Fourth Amendment violations, but also Eighth Amendment violations because of this inconsistency.¹³³ Second, *Carlson* recognized that because liability under the FTCA relies on tort law of the state where the misconduct occurred, the enforcement of federal constitutional rights should not be “left to the vagaries of the law of the several States.”¹³⁴ Third, *Malesko* rejected a *Bivens* action not because state law remedies were available, but because of concerns that holding a corporate defendant subject to *Bivens* liability would undermine the deterrence rationale.¹³⁵ The case was dismissed because a “suit against an individual’s employer was not the kind of deterrence contemplated by *Bivens*.”¹³⁶ Finally, *Wilkie* was dismissed because of the availability of multiple non-federal remedies, and not state law remedies alone.¹³⁷ Thus, Pollard argues that the existence of a state tort remedy does not automatically disqualify him from *Bivens* relief.¹³⁸

129. *See id.* at 24–25.

130. *Id.* at 26.

131. *See id.* (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971)). While it was clear that *Bivens* suffered a Fourth Amendment violation, if a federal officer could have raised a consent defense to the state trespass suit, *Bivens* may not have recovered damages. *Id.* Thus, an independent cause of action was needed to ensure that constitutional rights were protected. *Id.*

132. *Id.*

133. *Id.* Much of the majority opinion in *Bivens* explains that state tort law does not protect the same interests as the Fourth Amendment because many Fourth Amendment violations are not torts. *Bivens*, 403 U.S. at 392–94. Due to this gap, the creation of an implied remedy was necessary. Brief for Respondent, *supra* note 115, at 26. Pollard believes the same gap exists between Eighth Amendment violations and tort law. *Id.*

134. Brief for Respondent, *supra* note 115, at 26–27 (quoting *Carlson v. Green*, 446 U.S. 14, 23 (1980)) (internal quotation marks omitted).

135. *Id.* at 27 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001)).

136. *Id.* (quoting *Malesko*, 534 U.S. at 70) (internal quotation marks omitted).

137. *Id.* at 29–30 (citing *Willkie v. Robbins*, 551 U.S. 537, 554 (2007)).

138. *Id.* at 31.

VI. ANALYSIS AND LIKELY DISPOSITION

Despite his creative arguments, Pollard will face difficulty in convincing the Supreme Court to affirm the Ninth Circuit. Indeed, Justice Scalia wrote that “*Bivens* is a relic of the heady days in which [the Supreme Court] assumed common-law powers to create causes of action.”¹³⁹ The Court likely will agree with the holdings of the Fourth, Tenth, and Eleventh Circuits and reverse the Ninth Circuit because it appears that any alternative remedy will suffice to displace *Bivens*. To defeat the more likely outcome, Pollard will face the difficult task of convincing the Court that he seeks a remedy currently available under *Bivens* and that he is not arguing for expanding the doctrine.

A. Pollard must first prove that private prison employees are federal actors.

First, Pollard must demonstrate that privately contracted prison officials act under the color of federal law. While the Ninth Circuit answered this question affirmatively, convincing the Supreme Court is no easy task. The Court previously stated that “private individuals operated local jails in the 18th century” and “private contractors were heavily involved in prison management during the 19th century.”¹⁴⁰ Because of the long history of private jail operation, “correctional functions have never been exclusively public.”¹⁴¹ Also, privately employed citizens cannot claim qualified immunity, and without this defense, labeling them federal actors is unfair. Finally, private citizens have never been held liable under *Bivens*.¹⁴² Thus, the Court could reverse because of this factor alone.

Pollard counters these assertions by stating that the use of private prisons does not prevent private prison guards from engaging in federal action. Just last year, the Court recognized that when incarcerated, “[p]risoners are dependent on the State for food, clothing, and necessary medical care.”¹⁴³ Moreover, where the function

139. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

140. *Richardson v. McKnight*, 521 U.S. 399, 405 (1997) (citations omitted).

141. *Id.* at 404–05.

142. Federal employees are the sole defendants in *Bivens* actions. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 16 (1980) (involving federal prison officials); *Davis v. Passman*, 442 U.S. 228, 230 (1979) (Congressman); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (agents of the Federal Bureau of Narcotics).

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

of the contractor is identical to the function of a government employee, the state is not relieved of its constitutional duty.¹⁴⁴ If the state fails in its duty, “the courts have a responsibility to remedy the resulting Eighth Amendment violation” whether the prison is government-run or privatized.¹⁴⁵ It seems unlikely, but the Court could agree with this analysis and find that TCI employees perform the same federal function—incarcerating citizens for federal crimes—as the BOP employees sued in *Carlson*. If so, however, Pollard would then proceed to an analysis under the two-part *Wilkie* test.

B. The Court should find that Pollard’s alternative remedies are adequate to displace a Bivens remedy.

Next, Pollard must convince the Court that his alternative remedies are inadequate. This is difficult because Pollard is advantaged in a California negligence case. In California, a special duty exists between jailers and prisoners to protect them from foreseeable harm.¹⁴⁶ Additionally, Pollard’s allegations are actionable against both medical personnel in a malpractice action and against non-medical personnel in a negligence action. Pollard could also bring tort claims against the prison management company under a *respondeat superior* theory of liability¹⁴⁷ not available in *Bivens*.¹⁴⁸ The standard of abuse that Pollard would need to demonstrate in order to succeed under state tort law is much lower than what he would need to prove in an Eighth Amendment *Bivens* case.¹⁴⁹ Accordingly, existing state law protects the same interests as the Constitution and, despite Pollard’s argument to the contrary, is sufficient to deny *Bivens* relief.¹⁵⁰ Pollard has access to alternative remedies here, and the Court should find them adequate to address his injuries.

144. *West v. Atkins*, 487 U.S. 42, 56 (1988) (holding that when a state contracts physicians for prisoners, the states are not relieved of their constitutional duty to protect prisoners from Eighth Amendment violations).

145. *Brown*, 131 S. Ct. at 1928.

146. *Giraldo v. Cal. Dep’t of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 387 (Cal. Ct. App. 2008).

147. *Pollard v. GEO Group*, 629 F.3d 843, 871 n.1 (9th Cir. 2010), *cert. granted sub nom. Minneci v. Pollard*, 131 S. Ct. 2449 (U.S. argued Nov. 1, 2011) (No. 10-1104) (citing *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 907 P.2d 358, 360 (Cal. 1995)).

148. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (recognizing that *respondeat superior* liability is not available in *Bivens* because personal involvement is needed for *Bivens* liability).

149. *See Wilson v. Seiter*, 501 U.S. 294, 305 (1991) (finding that “mere negligence” is insufficient to satisfy the burden of deliberate indifference).

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

Pollard must convince the Court that tort law and constitutional law do not protect the same interests, such that he needs a *Bivens* remedy to protect his Eighth Amendment rights. Pollard reads *Bivens* to suggest that state tort remedies are problematic because they under-protect federal rights.¹⁵¹ Although he believes *Bivens* supports him here, he is misguided. The Court in *Bivens* found that a federal officer might violate a citizen's Fourth Amendment rights without committing a tort.¹⁵² Thus, an independent remedy was needed to protect the gap between tort and Fourth Amendment law.¹⁵³ *Bivens* is silent, however, regarding whether a similar gap exists between tort and Eighth Amendment law. Even *Carlson*, which authorized *Bivens* relief for Eighth Amendment violations, was predicated on the assumption that the plaintiffs could not recover in tort because of a technicality in state law.¹⁵⁴ Pollard's allegations, conversely, fit squarely within California negligence law, allowing him to easily recover in state court. Thus, because there is no gap between tort law and Eighth Amendment law here, Pollard does not need a *Bivens* remedy to attain proper relief.

Furthermore, the Court is likely to agree with Minneci's separation of powers argument—that Congress, not the Court, should determine whether a *Bivens* remedy is available. Pollard claims that the Court has declined *Bivens* remedies when Congress created an alternative remedial scheme.¹⁵⁵ Thus, the Court should inquire not just whether alternative remedies are available, but whether the alternative remedies demonstrate “that Congress expected the Judiciary to stay its *Bivens* hand.”¹⁵⁶ Here, Pollard asserts that because the briefs and

151. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (holding that “state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised”) (citations omitted).

152. *Id.* at 394–95.

153. *Id.* at 395.

154. See *Carlson v. Green*, 446 U.S. 14, 18 (1980) (“Indiana law, if applied, would ‘subvert’ the policy of allowing complete vindication of constitutional rights.”) (citations omitted).

155. Brief of Law Professors as Amici Curiae in Support of Respondents at 8, *Minneci v. Pollard*, No. 10-1104 (U.S. Sep. 19, 2011).

156. *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007); see also *Schweiker v. Chilicky*, 487 U.S. 412, 424–25 (1988) (denying a *Bivens* remedy because Congress established a remedial scheme); *Bush v. Lucas*, 462 U.S. 377, 388 (1983) (questioning whether an “elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy”); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (“[A] judicial response by way of [a *Bivens*] remedy would be plainly inconsistent with Congress’ authority in this field.”).

the Court's dicta in *Malesko* conceded the availability of a *Bivens* remedy against privately operated prison employees, the Court already found that Congress did not intend state remedies to preclude *Bivens* here. The Court, however, is not bound by this conclusion and is likely to consider all of Pollard's alternative remedies in determining their adequacy as a substitute for *Bivens*.

C. Factors counseling hesitation independently warrant the denial of Bivens here.

Finally, the second prong of the *Wilkie* test asks if there are "special factors counseling hesitation" that might cause the Justices to hesitate in administering the remedy. Here, allowing Pollard to proceed in *Bivens* creates two special factors counseling hesitation, each of which independently warrants the denial of *Bivens*. First, it would undermine the *Bivens* deterrence rationale because private employees do not have the qualified immunity defense that federal employees do. Second, granting *Bivens* liability here imposes asymmetric liability costs on public and private prison employees.

First, *Malesko* recognized that "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."¹⁵⁷ Granting Pollard a *Bivens* remedy does not promote this goal because privately employed prison guards—who are already liable as individuals in tort and cannot claim qualified immunity—are deterred from committing constitutional violations without being liable in *Bivens*. Additionally, the plaintiff in a tort claim against a private employee must prove only negligence, as opposed to a heightened constitutional standard such as deliberate indifference.¹⁵⁸ Thus, because of the prospect of being individually liable in a tort claim and the substantial overlap between tort law and Eighth Amendment law, private employees are deterred from committing constitutional violations without being liable in *Bivens*. By contrast, *Bivens* is necessary for government employees because the FTCA substitutes the United States as a defendant in tort claims against them.¹⁵⁹ This insulates federal employees from being individually

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

158. *See Wilson v. Seiter*, 501 U.S. 294, 305 (1991) (finding that "mere negligence" is insufficient to satisfy the burden of deliberate indifference).

159. Federal Tort Claims Act, 28 U.S.C.A § 1346 (West 2011); *see also* Westfall Act, § 5, Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act"), Pub. L. No. 100-694, 28 U.S.C.A § 2679(b)(1) (West 2011).

liable for torts. As such, federal employees are only deterred from committing constitutional violations through the individual liability imposed by *Bivens*. Thus, because private employees are deterred from committing constitutional violations without the threat of *Bivens* liability, allowing Pollard to pursue a *Bivens* remedy does not promote the deterrence rationale.

Second, the availability of a qualified immunity defense for federal government employees would impose asymmetrical liability costs if *Bivens* were allowed in this situation. Greater remedies would be available against private facilities than government-run facilities because of the qualified immunity defense. Because federal employees can claim qualified immunity while private employees cannot, and because qualified immunity “permits courts expeditiously to weed out suits,” a plaintiff’s chances are greater against private employees than federal employees.¹⁶⁰ If plaintiffs are more likely to succeed against private employees, then private employees face greater liability costs than their government counterparts. *Malesko* made clear that Congress, not the courts, should determine the resolution of the asymmetry.¹⁶¹ If the Court believes that Congress should resolve this asymmetry, Pollard’s chances of success are slim.

VII. CONCLUSION

Pollard faces an uphill battle to be granted *Bivens* relief. A holding in Pollard’s favor would expose government contractors to a substantial increase in liability and would open the door to federal courts to a broad class of plaintiffs. Such a holding would also contradict recent cases that denied extensions of *Bivens* into this area because of the availability of alternative remedies and other factors counseling hesitation. Thus, the Court likely will reverse the holding of the Ninth Circuit and deny Pollard *Bivens* relief.

160. Brief for Petitioners, *supra* note 3, at 38–39 (quoting *Siebert v. Gilley*, 500 U.S. 226, 232 (1991)).

161. *Malesko*, 534 U.S. at 72 (“Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide.”); *see also Wilkie*, 551 U.S. at 562 (“‘Congress is in a far better position than a court to evaluate the impact of a new species of litigation’ against those who act on the public’s behalf.” (quoting *Bush*, 462 U.S. at 389)).