

SYMPOSIUM
INSIDE AMERICA’S CRIMINAL JUSTICE SYSTEM:
THE SUPREME COURT ON THE RIGHTS OF THE
ACCUSED AND THE INCARCERATED

KEYNOTE ARTICLE:
THE MODEST EFFECT OF
***MINNECI V. POLLARD* ON**
INMATE LITIGANTS

*Alexander Volokh**

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* Associate Professor, Emory Law School, avolokh@emory.edu. I am grateful to Thomas C. Arthur, Thomas A. Eaton, Jonathan R. Nash, Robert A. Schapiro, Margo Schlanger, Eric J. Segall, Frank J. Vandall, Eugene Volokh, Vladimir Volokh, and Michael L. Wells for their helpful comments. I am also grateful to Kedar Bhatia and Julia Hueckel for their able research assistance, and to the law librarians at Emory Law School.

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I. THE SUPREME COURT'S CRIMINAL PROCEDURE JURISPRUDENCE

It is commonplace to observe that judicial conservatives on the Burger, Rehnquist, and Roberts Courts, for the last several decades, have been cutting back on the constitutional rights of criminal defendants. Perhaps. But the evolution has hardly been all in one direction,¹ nor can it always easily be mapped onto a conservative-liberal divide.²

This Symposium, on the recent Supreme Court Term's criminal procedure jurisprudence, illustrates these complexities. Of the five "cases" discussed here,³ three come out in a "liberal" direction and two come out in a "conservative" direction. Nor do the results merely stem from Justice Kennedy's swing vote (though he was in the majority in all of these cases); one of the "liberal" cases was decided by a majority of seven Justices,⁴ and one of the "conservative" ones was decided by a majority of eight.⁵ Looking at these cases together is a good way of reminding us to be wary of simplistic generalizations about either the trajectory or the partisanship of the Supreme Court's thinking on criminal procedure.

In *Florence v. Board of Chosen Freeholders*,⁶ the Supreme Court upheld jail officials' suspicionless "visual cavity" searches of detainees. Three of our authors provide their takes on this controversial case. The *Florence* Court ruled, based on a balancing of privacy and security interests, that the searches were reasonable once people had arrived at the detention center and were going to be placed in the general population. In his article, *Factoring the Seriousness of the Offense into Fourth Amendment Equations: Strip Searches in Detention Facilities—Atwater Strikes Again*, William Schroeder argues that the ruling itself was correct, but that the problem is with the eleven-year-old case

1. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

2. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (Scalia, J.); *Crawford v. Washington*, 541 U.S. 36 (2004) (Scalia, J.); *Blakely v. Washington*, 542 U.S. 296 (2004) (Scalia, J.); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (Scalia, J.); see also *United States v. Comstock*, 130 S.Ct. 1949, 1970 (2010) (Thomas, J., dissenting); *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

3. Counting *Maples* and *Martinez*, see *infra* text accompanying notes 12–14, as one "case."

4. *Maples v. Thomas*, 132 S. Ct. 912 (2012); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

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

6. 132 S. Ct. 1510 (2012).

Florence relied on, *Atwater v. City of Lago Vista*,⁷ which established that people could be arrested even for trivial offenses.⁸ Schroeder suggests limiting *Atwater* to incorporate the seriousness of the offense into the standard for arrest.⁹ Wayne Logan likewise finds fault with *Atwater*, writing in *Florence v. Board of Chosen Freeholders: Police Power Takes a More Intrusive Turn*, that “the stark constitutional reality remains that nothing in *Florence* necessitates that anything other than the intrusive techniques experienced by Albert Florence will be deployed in the nation’s jails and detention centers.”¹⁰ In *Bright Lines, Black Bodies: The Florence Strip Search Case and its Dire Repercussions*, Theresa Miller argues that *Florence*, with its one-size-fits-all approach that ill-matches the diversity of jail populations, inappropriately privileges the administrative concerns of law enforcement officials and encourages overreaching by law enforcement, including immigration officials.¹¹

Florence was 5–4 and pitted conservatives against liberals. But Giovanna Shay writes on a pair of cases that came out the other way—*Maples v. Thomas*¹² and *Martinez v. Ryan*,¹³ where a 7–2 majority (with only Justices Scalia and Thomas dissenting) expanded the circumstances under which ineffective assistance of counsel in state postconviction proceedings can excuse a procedural default at the federal habeas stage.¹⁴ In *The New State Postconviction*, Shay argues that these opinions, aside from being good in themselves, could also “have a salutary effect on the development of . . . federal constitutional criminal procedure.”¹⁵ After the Antiterrorism and Effective Death Penalty Act, federal habeas courts no longer give full review to state-court judgments of federal constitutional questions, and so state postconviction proceedings are the only stage where inmates’ constitutional claims can get “unfettered review.” To the extent these decisions lead to the appointment of more qualified state postconviction counsel, the result could be not only better results for prisoners but also a more robust state

7. 532 U.S. 318 (2001).

8. See 46 AKRON L. REV. 331 (2013).

9. *Id.*

10. 46 AKRON L. REV. 415, 431 (2013).

11. 46 AKRON L. REV. 433 (2013).

12. 132 S. Ct. 912 (2012).

13. 132 S. Ct. 1309 (2012).

14. Giovanna Shay has commented on my work before, see Giovanna Shay, *One Market We Do Not Need*, 160 U. PA. L. REV. PENNUMBRA 319 (2012) (commenting on Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779 (2012)), and now I’m returning the favor. See also *infra* notes 52, 81 (me citing her some more).

15. 46 AKRON L. REV. 475, 474 (2013).

postconviction procedure.

Other decisions, some of our authors argue, are a mixed bag. In *Developmental Detour: How the Minimalism of Miller v. Alabama Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, Mary Berkheiser writes about *Miller v. Alabama*,¹⁶ which struck down mandatory life without parole sentences for juvenile homicide offenders.¹⁷ On the one hand, Berkheiser hails the ruling as an “advance.”¹⁸ On the other hand, she finds it only a “small step” forward insofar as the decision does no more than ban *mandatory* sentences; life without parole for juvenile homicide offenders is still permitted as long as the jury gives the offenders individualized consideration and considers mitigating factors.¹⁹ And such individualized consideration, Berkheiser argues, is “no friend to youth.”²⁰ How could the Supreme Court purport to rely on precedents like *Roper v. Simmons*²¹ and *Graham v. Florida*,²² and yet “veer [so] far from the principles of those cases”?²³ Berkheiser lays the blame at the feet of the current brand of judicial conservatism in vogue on the Supreme Court: Chief Justice Roberts’s “judicial minimalism.”²⁴ Of course *Miller* was a 5–4 decision in which Justice Kennedy sided with the liberals, so the blame belongs neither to conservatism in a narrow sense nor to Chief Justice Roberts specifically. Rather, it is a more general minimalism that “all but the Court’s two most conservative jurists have embraced . . . in one form or another”²⁵ that prevented the Court from taking the more ambitious step that Berkheiser would prefer—a holding that life without parole for juveniles is cruel and unusual in all cases.

The rhetoric of judicial conservatism is also on display in Christopher Smith’s article, *Brown v. Plata, the Roberts Court, and the Future of Conservative Perspectives on Rights Behind Bars*. Smith discusses *Brown v. Plata*,²⁶ where the Supreme Court, in a 5–4 liberal vs. conservative opinion, upheld a population limit that a lower court had imposed on the California prison system to remedy

16. 132 S. Ct. 2455 (2012).

17. 46 AKRON L. REV. 489 (2013).

18. *Id.* at 490.

19. *Id.* at 490–91.

20. *Id.* at 490.

21. 543 U.S. 551 (2005).

22. 130 S. Ct. 2011 (2010).

23. Berkheiser, *supra* note 17, at 501.

24. *Id.* at 515.

25. *Id.*

26. 131 S. Ct. 1910 (2011).

unconstitutionally overcrowded conditions.²⁷ Smith takes the decision as an opportunity to explore the divergent rhetorical styles of two different kinds of judicial conservatives. On the one hand, we have “doctrinaire, relatively extreme, [and] strident” conservatives such as Justices Thomas and Scalia who, in Smith’s view, have a limited influence on their colleagues: “The tone and choice of words in Scalia’s opinion seem[s] designed to bludgeon rather than persuade.”²⁸ On the other hand, we have the more recently appointed conservatives, Chief Justice Roberts and Justice Alito, who, with their softer-spoken style and emphasis on practical concerns, may represent a “more persuasive next generation.”²⁹

But first, let me begin this Symposium with a discussion of *Minnecci v. Pollard*,³⁰ where the Supreme Court, with only Justice Ginsburg dissenting, held that where a federal prisoner sues employees at a private federal prison for violations of the Eighth Amendment, he can’t get damages under the judicially created remedy of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*³¹ “where that conduct is of a kind that typically falls within the scope of traditional state tort law.”³² *Minnecci* is somewhat harmful to federal inmate litigants in that it removes a potentially useful cause of action, and it may have been wrongly decided as a matter of *Bivens* doctrine. However, I argue here that it’s probably not nearly as harmful as some have charged, once one takes into account how hard it is to sue public prisons and how relatively generous are the tort-law regimes that govern private prisons.

II. THE POSSIBLE HARMLESSNESS OF *MINNECI*

The constitutional damages remedy, first recognized by the Supreme Court in Justice Brennan’s opinion in *Bivens* in 1971, enjoyed nine years of expansion but has now experienced thirty-three years (and counting) of contraction.³³ Justices Scalia and Thomas characterize *Bivens* as “a relic of the heady days in which [the Supreme] Court assumed common-law powers to create causes of action by

27. Christopher E. Smith, Brown v. Plata, *The Roberts Court, and the Future of Conservative Perspectives on Rights Behind Bars*, 46 AKRON L. REV. 519 (2013).

28. *Id.* at 539.

29. *Id.* at 541.

30. 132 S. Ct. 617 (2012).

31. 403 U.S. 388 (1971).

32. *Minnecci*, 132 S. Ct. at 626.

33. See, e.g., Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 26 (2007) (characterizing the *Bivens* doctrine as being “on life support with little prospect of recovery”).

constitutional implication,”³⁴ and, as such, would limit *Bivens* and its expansive progeny “to the precise circumstances that they involved.”³⁵ Justices Scalia and Thomas don’t speak for the rest of the Court on this point, but there has consistently been a Supreme Court majority for limiting the *Bivens* remedy when there have been (even imperfect) alternative remedial schemes³⁶ or (what a majority has seen as) special reasons counseling hesitation.³⁷ And occasionally such contractions have been affirmatively harmful, leaving litigants with no remedy at all for injuries caused by unconstitutional acts.³⁸

Minnecci v. Pollard expands the set of alternative remedial schemes that are sufficient to bar the *Bivens* action, so—at least on its surface—it seems like it belongs to this *Bivens*-contracting tradition. But, as we’ll see, it’s a lot less threatening to civil rights claimants than it may seem to be at first glance.

Richard Lee Pollard, a federal inmate at a prison run by Wackenhut Corrections Corp.,³⁹ asserted a variety of claims against the corporation’s employees, including Margaret Minnecci, Administrator of Health Services at the correctional facility in which he was housed.⁴⁰ Among other things, he claimed that in the course of transporting him to a medical clinic for treatment, they forced him to wear a jumpsuit and arm restraints that caused him excruciating pain. Pollard also charged that they failed to follow clinic instructions to put his elbow in a splint, failed to provide physical therapy, deprived him of basic hygienic care,

34. *Minnecci*, 132 S. Ct. at 626 (Scalia, J., concurring, joined by Thomas, J.) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)) (internal quotation marks omitted).

35. *Id.*

36. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 388–89 (1983) (civil-service review process).

37. *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296 (1983) (military-related special factors).

38. *See, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537 (2007); Tribe, *supra* note 33, at 25, 70; Natalie Banta, Note, *Death by a Thousand Cuts or Hard Bargaining?: How the Court’s Indecision in Wilkie v. Robbins Improperly Eviscerates the Bivens Action*, 23 *BYU J. PUB. L.* 119 (2008). Tribe writes that, in *Wilkie*:

[T]he [Supreme] Court . . . for the first time since *Bivens* . . . held, without any indication from Congress that it disfavored the application of a *Bivens* remedy in such circumstances, that a private citizen could not sue a government official for a constitutional violation, even in the absence of any alternative to such a suit that would operate to deter that kind of violation or at least redress it when deterrence failed.

Tribe, *supra* note 33, at 70.

39. Wackenhut Corrections Corp. is now called the GEO Group. *See* Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 *STAN. L. REV.* 1197, 1229 n.131 (2008).

40. *Pollard v. Wackenhut Corr. Corp.*, No. CV F 01 6078, 2006 WL 2661111, at *1 (E.D. Cal. Sept. 14, 2006) (misspelling Minnecci’s name as “Minnici”).

and gave him insufficient medicine.⁴¹

But this is within the core of what's traditionally covered by state tort law. As the Supreme Court wrote:

Pollard's claim . . . is a claim for physical or related emotional harm suffered as a result of aggravated instances of the kind of conduct that state tort law typically forbids. That claim arose in California, where state 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."⁴²

Moreover, state tort law is in many ways⁴³ superior to constitutional tort litigation:⁴⁴ most obviously, the negligence standard is far broader than the Eighth Amendment's "deliberate indifference" standard,⁴⁵ though one could also add other considerations like the availability of respondeat superior liability.⁴⁶

So *Bivens*, the Court held, is unavailable here. The idea that *Bivens* remedies can be limited when some alternative relief is available is nothing new; rather, it's that this alternative relief needn't have been contemplated by Congress and needn't even be federal or uniform. In this case, the alternative remedial scheme is state tort law, and so that's what the prisoner is stuck with, even if it doesn't overlap with the *Bivens* remedy in every particular.⁴⁷

Commentators have been quick to charge that *Minnecci* "shut[s] the federal courthouse doors to inmates who suffer as a result of" shoddy private-prison practices,⁴⁸ "create[s] new obstacles for civil rights plaintiffs,"⁴⁹ "radically reduces the scope of *Bivens* relief," allows the

41. *Minnecci v. Pollard*, 132 S. Ct. 617, 620–21 (2012).

42. *Id.* at 624 (citing CAL. CIV. CODE ANN. §§ 1714(a), 1714.8(a) (West 2013); *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 384 (App. 2008)).

43. Though not all ways. See *infra* text accompanying note 172.

44. See John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 726, 744 (2008).

45. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

46. Compare *FDIC v. Meyer*, 510 U.S. 471 (1993) (no *Bivens* remedy against the employer), and *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (extending *Meyer* to *Bivens* suits against private parties), with RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.").

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

48. *Minnecci v. Pollard*, ALLIANCE FOR JUSTICE, <http://www.afj.org/connect-with-the-issues/the-corporate-court/minnecci-v-pollard.html> (last visited Jan. 23, 2013).

49. Erwin Chemerinsky, *Chemerinsky: Civil Rights Cases Will Face New Hurdles*, ABAJOURNAL.COM (Feb. 1, 2012, 8:50 AM CST), <http://www.abajournal.com/news/>

federal government to extinguish the *Bivens* remedy through privatization, and makes the doctrine incoherent.⁵⁰ But these fears are probably overblown: *Bivens* is only unavailable because the alternative remedial regime is actually pretty attractive.

* * *

To make sense of this, we need to discuss tort remedies and constitutional law together. This isn't a natural move for con-law scholars who don't usually think in terms of state tort law when they think about litigation by inmates in prisons and jails.⁵¹ They might think of "'court-order' cases—litigation in which groups of inmate plaintiffs, represented by counsel, seek court-enforceable orders to govern some general set of prison or jail practices."⁵² The most prominent recent example of this sort of litigation is *Brown v. Plata*,⁵³ where the Supreme Court upheld a population limit for the California prison system to remedy widespread Eighth Amendment violations. They would also think of cases brought by individual inmates seeking damages or accommodations—and within this category, they would probably primarily think of constitutional litigation. There, what's striking is the odd compartmentalization of the field—a compartmentalization that *Minnecci* makes even more stark.

The greatest doctrinal divide in constitutional damages litigation is between state and federal remedies. Inmates in *state* prisons can use § 1983 to sue and collect damages from prison employees who have violated their constitutional rights. These employees are "near[ly] universal[ly]" indemnified by their employer,⁵⁴ so these lawsuits are

article/chemerinsky_new_hurdles_for_civil_rights_cases.

50. Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minnecci*, 90 WASH. U. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042175.

51. The inclusion of jails is essential when talking about litigation in the correctional context, since about a third of the inmate population is housed in jails, and jail inmates account for perhaps between 6% and 20% of total inmate litigation. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1579–82 & n.77 (2003). Nonetheless, for simplicity, I'll often use the shorthand "prisons" in what follows.

52. *Id.* at 1561; see also Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993); Giovanna Shay, *Ad Law Incarcerated*, 14 BERK. J. CRIM. L. 329, 332–35 (2009); sources cited in Schlanger, *supra* note 51, at 1561 n.16.

53. 131 S. Ct. 1910 (2011).

54. See Schlanger, *supra* note 51, at 1676 n.391 (noting that, though vicarious liability is unavailable under § 1983 and *Bivens*, "the typical arrangement, usually by statute, is that the correctional agency indemnifies its officers unless the act... was outside the 'scope of employment' or was intentional or malicious"); see also Cornelia Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 78 & n.61 (1999); David Zaring, *Three Models of Constitutional Torts*, 2 J. TORT L. 3, at 10 (2008);

against the government in all but name, with an overlay of individual defenses like qualified immunity. Private prisons work just like public ones as far as §1983 liability is concerned,⁵⁵ except that private prison employees lack qualified immunity⁵⁶—so private prison inmates even (at least in this respect) get more favorable treatment by federal courts.⁵⁷

Federal inmates, on the other hand, look like state inmates' poor cousins. Not having a statute like § 1983 to cover constitutional torts—the sins of federal agents weren't on the minds on the post-Civil War Congressmen who passed the statute—federal inmates have to make do with the judge-made doctrine of *Bivens*. *Bivens* and § 1983 are similar in terms of issues like indemnification⁵⁸ and qualified immunity,⁵⁹ but

Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 811 n.2, 850 & n.184 (2010). Courts often ignore, as a legal matter, the possibility of such indemnification. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (in the *Bivens* context); *Jama v. INS*, 343 F. Supp. 2d 338, 363 (D.N.J. 2004) (in the *Bivens* context). *But see* *Richardson v. McKnight*, 521 U.S. 399, 409–11 (1997) (using the possibility of indemnification in the private sector as an argument against extending qualified immunity to private employees in §1983 suits). Note also that, in light of near-universal indemnification in the public sector, the *Richardson* argument just mentioned seems incorrect. *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 805–09 (2007); *see also* *Richardson*, 521 U.S. at 420 (Scalia, J., dissenting) (“[C]ivil-rights liability is insurance is no less available to public entities than to private employers.”).

55. The Supreme Court has never ruled that private prisons are state actors, though it has assumed as much, *see Richardson*, 521 U.S. at 413, and circuit courts have held this, mostly based on the “exclusive public function” theory. *See, e.g.*, *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991); *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460–61 (5th Cir. 2003); *Smith v. Cochran*, 339 F.3d 1205, 1215–16 (10th Cir. 2003). *Cf.* *West v. Atkins*, 487 U.S. 42, 54–57 (1988). This has certainly been right: state action is present when a private party exercises powers “traditionally exclusively reserved to the State,” *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974), and surely imprisonment fits within this category. (While the private sector has been involved in incarceration throughout American history, *see, e.g.*, Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450–55 (2005), the requirement that one be locked up has always, in the United States, come from the government.). Thus, private prisons are subject to the full panoply of constitutional protections that apply in public prisons. That *public* prisons are state actors is not only obvious but is also implied by *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974). Accordingly, § 1983 lawsuits against private prison employees are unproblematic. *See also* Volokh, *supra* note 14, at 813 & n.161; Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1006–10, 1028 (2011).

56. *See Richardson*, 521 U.S. 399.

57. *See Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1880–82 (2002) (Part III of the *Developments* article is my student note) [hereinafter *Developments in the Law*].

58. *See supra* note 54.

59. *See* *Butz v. Economou*, 438 U.S. 478, 504 (1978); *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (citing a *Bivens* case, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), for a point about qualified immunity under § 1983); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 78 n.4 (2001) (citing a § 1983 case denying qualified immunity to private prison guards, *Richardson v. McKnight*, 521 U.S. 399, 412 (1997), for the proposition that private prison guards would lack qualified

where they differ the most is in whether the remedy is available at all.⁶⁰ In principle, *Bivens* remedies, first devised in a Fourth Amendment context, are available for Fifth Amendment⁶¹ and Eighth Amendment⁶² violations (since 1979 and 1980, respectively). But the availability of adequate alternative relief has always been a reason for limiting the remedy's availability; "of course," the Court has said, "were Congress to create equally effective alternative remedies" for federal inmate victims of constitutional torts, "the need for damages relief might be obviated."⁶³ The alternative remedies noted are usually federal ones,⁶⁴ but state remedies have been relevant from the very beginning.⁶⁵

Contrast this with § 1983, where the availability of alternative relief under state law is mostly,⁶⁶ though not entirely,⁶⁷ irrelevant. Alternative *federal* relief *may* bar a § 1983 action, but it seems as though Congress's alternative scheme must, at a minimum, intend to displace § 1983, track the § 1983 remedy closely in terms of coverage, and provide relief against individuals.⁶⁸ In some cases, too, sufficient post-deprivation

immunity under *Bivens*).

60. See also William N. Evans, Comment, *Supervisory Liability After Iqbal: Decoupling Bivens from Section 1983*, 77 U. CHI. L. REV. 1401, 1403 (2010) (arguing that supervisory liability should exist under § 1983 but not under *Bivens*).

61. *Davis v. Passman*, 442 U.S. 228 (1979); see also *Muhammad v. Carlson*, 739 F.2d 122, 123-25 (3d Cir. 1984) (applying *Davis* in the prison context).

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

63. *Davis*, 442 U.S. at 248; *Carlson*, 446 U.S. at 18-19.

64. See *Carlson*, 446 U.S. at 18-19 (looking into not just whether there was a federal remedy but whether "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective") (emphasis added); *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 63 (D.R.I. 2003) ("[S]tate law remedies cannot be construed as a manifestation of Congressional intent to preclude the application of *Bivens*."); *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1101 (10th Cir. 2005) (quoting *Sarro*, 248 F. Supp. 2d at 63), *rev'd by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006).

65. *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 394 (1971); *Davis*, 442 U.S. at 245; *Wilkie v. Robbins*, 551 U.S. 537, 551 (2007). But see *Reinert & Mulligan*, *supra* note 50, at 17-18 (arguing that the existence of state remedies is only relevant "if the Court concludes that Congress intended to rely upon state-law remedies as an alternative remedy").

66. See *Home Tel. & Tel. Co. v. City of L.A.*, 227 U.S. 278, 294-95 (1913); *Screws v. United States*, 325 U.S. 91, 108 (1945); *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("[T]he fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court."); *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (state judicial or administrative exhaustion not required); *Preis*, *supra* note 44, at 732, 734-38.

67. See *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 326-27 (2005); *Preis*, *supra* note 44, at 732-33.

68. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009); James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 142-43 (2009).

relief may suffice to avoid violating the plaintiff's constitutional rights in the first place.⁶⁹ But generally, alternative relief is much more of a deal-killer in *Bivens*-land than for § 1983 actions.

The result in *Minneci* was thus always potentially in the air, but now we know for sure: *Bivens* is entirely unavailable for a whole class of claims. But only for *federal* inmates, of course, for such is the nature of *Bivens*. And only for inmates in *private* prisons, since, as we'll see, only they can benefit from state tort-law remedies; federal *public-prison* inmates' tort-law claims must be brought against the federal government under the Federal Tort Claims Act (FTCA),⁷⁰ and we know from *Carlson v. Green*⁷¹ that this alternative remedy is insufficient to preclude *Bivens*.

The federal constitutional landscape for prisoner litigation (whether in state or federal courts) thus looks like the following matrix, with the lower right-hand corner looking strangely empty:⁷²

	Public prisons	Private prisons
State	§ 1983, no entity liability ⁷³	§ 1983 (no qualified immunity), ⁷⁴ typically no entity liability ⁷⁵
Federal	<i>Bivens</i> , ⁷⁶ no entity liability ⁷⁷	no <i>Bivens</i> in areas covered by state tort law, ⁷⁸ no entity liability ⁷⁹

69. See *Zinermon v. Burch*, 494 U.S. 113, 128-30 (1990); Pfander & Baltmanis, *supra* note 68, at 145-46.

70. See *infra* Part III.A.

71. 446 U.S. 14 (1980).

72. For a similar table, see *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1111 (10th Cir. 2005) (Ebel, J., concurring and dissenting), *rev'd by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006).

73. Because of state sovereign immunity. See *Quern v. Jordan*, 440 U.S. 332, 341 (1979).

74. *Richardson v. McKnight*, 521 U.S. 399, 413 (1997).

75. This is one difference between my table and Judge Ebel's: Judge Ebel says that there is § 1983 liability for a private prison, while I say there isn't. Judge Ebel cites *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941-42 (1982), for the proposition that corporations can be liable under § 1983, but in *Lugar* the state action was exercised by the corporation itself, so there was no question of respondeat superior liability. *Lugar* thus doesn't speak to whether a private prison company can be sued on a purely respondeat superior theory. As to that point, Richard Frankel explains that courts have used the doctrine of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which limits respondeat superior liability for municipalities in § 1983 actions, to similarly limit respondeat superior liability for private employers; I thus write here that there *typically* isn't entity liability. See Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449 (2009); see also Evans, *supra* note 60, at 1408.

76. *Carlson*, 446 U.S. 14.

77. *FDIC v. Meyer*, 510 U.S. 471 (1994).

78. This is the new addition from *Minneci*.

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

So much for federal constitutional litigation. But what we don't usually think about are the "good many suits, about which far less is known, brought under state law and non-civil rights federal causes of action."⁸⁰ On the federal level, we have administrative claims and lawsuits under the federal or state Administrative Procedure Acts, often "relating to discipline and other grievances, including those about lost and damaged property and workplace injuries."⁸¹ And the little-studied area of state-court inmate litigation is also "an important piece of the litigation landscape: a very gross estimate might be that about a quarter of what prison and jail officials think of as inmate litigation is currently filed in state court."⁸² The tort-law matrix looks quite different than the constitutional matrix above. Instead, we have:

	Public prisons	Private prisons
State	lots of tort-law immunity doctrines	(mostly) full exposure to state tort law ⁸³
Federal	lots of FTCA exceptions to liability	

As with constitutional litigation, state-law tort litigation can take place in either state court or federal court (if the prisoner and the prison defendants are of diverse citizenship); FTCA litigation, though, must take place in federal court.⁸⁴

If you're a litigant, the tort table above suggests that there are various reasons to prefer litigating as a private prisoner than as a public one. In Part III, I'll explain the many barriers to tort claims against both state and federal *public* prisons. In Part IV, I'll explain how many of

80. Schlanger, *supra* note 51, at 1573.

81. *Id.* at 1573 n.52 (citing 28 C.F.R. § 541.19; *id.* pt. 542; *id.* §§ 543.30–32; 18 U.S.C. § 4126(c)(4); *Thompson v. U.S. Fed. Prison Indus.*, 492 F.2d 1082, 1084 & n.5 (5th Cir. 1974)). The federal Bureau of Prisons and correctional departments in seventeen states are subject to their respective APAs, but twenty-eight states explicitly exempt prison rules from their APAs wholly or partially, and another half-dozen do so by judicial interpretation. *See* Shay, *supra* note 52, at 344–47; *see also id.* at 376–94 (collecting state regimes).

82. Schlanger, *supra* note 51, at 1573 n.52 (doing a "not very satisfactory" back-of-the-envelope calculation and also citing Dean J. Champion, *Jail Inmate Litigation in the 1990s*, in *AMERICAN JAILS: PUBLIC POLICY ISSUES* 197, 211 (Joel A. Thompson & G. Larry Mays eds., 1991)).

83. On the state level, some tort claims are limited by state Prison Litigation Reform Acts. *See infra* Part V.

84. *See infra* text accompanying notes 87–89.

these tort barriers fall away when you're suing *private* prisons. In Part V, I'll note to what extent these conclusions may be changed by the existence of the federal and state Prison Litigation Reform Acts. In Part VI, I'll see what this tells us about *Bivens* doctrine as a whole. Part VII concludes.

III. TORTS AND PUBLIC PRISONS

A. *Suing Federal Prisons*

Suing public prisons on a tort theory is difficult, primarily due to sovereign immunity.

The federal government has partially waived its sovereign immunity in the Federal Tort Claims Act (FTCA), which makes the federal government liable for tort claims “in the same manner and to the same extent as a private individual under like circumstances,”⁸⁵ incorporating the law of the place where the allegedly wrongful act occurred.⁸⁶ The FTCA gives federal district courts exclusive jurisdiction over tort suits against federal employees acting within the scope of their employment.⁸⁷ Once the Attorney General certifies that the employee was acting within the scope of his employment, the claim (if brought in a state court) is removed to a federal district court,⁸⁸ and the United States is substituted as the defendant.⁸⁹

So far, so good for the tort claimant. Indeed, in *United States v. Muniz*,⁹⁰ the Supreme Court explicitly, and unanimously, held that the FTCA was available to federal prisoners.⁹¹ But any prison-based lawsuit against the federal government is likely to run into a few serious problems, chief among which are exceptions to the FTCA's waiver of sovereign immunity—that is, no-liability (and, indeed, no-jurisdiction) rules. These are *features* of the FTCA framework according to the *Muniz* Court, statutory protections for the government that prevent prisoner suits from “seriously handicap[ping] efficient government operations.”⁹² I'll mention two of these exceptions here: the detained

85. 28 U.S.C. § 2674 (West 2013).

86. *Id.* §§ 1346(b)(1), 2674.

87. *Id.* § 1346(b)(1).

88. *Id.* § 2679(d)(2).

89. *Id.* § 2679(d)(1).

90. 374 U.S. 150 (1963).

91. *Id.* at 150 (Justice White didn't participate in the case).

92. *Id.* at 163–64 (discussing the discretionary function and intentional tort exemptions, *see infra* text accompanying notes 97–110).

property exception and the discretionary function exception.

First, the FTCA doesn't waive sovereign immunity if the claim arises "in respect of . . . the detention of . . . property by . . . any . . . law enforcement officer."⁹³ The term "law enforcement officer" includes Bureau of Prisons (BOP) officers⁹⁴ and the exception is interpreted broadly to include both negligent and intentional conduct.⁹⁵ So, if, on being transferred from one federal prison to another, you find, as did the luckless Abdus-Shahid M.S. Ali, that the BOP has somehow misplaced your Qur'an and prayer rug, you're out of luck.⁹⁶

Second, there's the FTCA exception for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government"; sovereign immunity is retained even if the discretion is abused.⁹⁷ This exception is limited to acts where some discretion is permitted (i.e., non-ministerial acts)⁹⁸ and where the type of decision is "susceptible to policy analysis."⁹⁹

Take, for instance, the case of Faustino Calderon, a federal prison inmate in Oxford, Wisconsin who was attacked by fellow inmate Luis Perez for informing on one of Perez's relatives.¹⁰⁰ Though Calderon had told four BOP officials of Perez's threats, no one at the prison took any steps to protect him.¹⁰¹ But the BOP's decision not to segregate Calderon and Perez was based on a consideration of various factors listed in BOP regulations, "balancing the need to provide inmate security with the rights of the inmates to circulate and socialize within the prison";¹⁰² and so, Calderon lost his claim under the discretionary function exception. Obviously, whether the BOP had considered the factors correctly or negligently, or whether the factors were even correct, played no role in the resolution of the case.

The discretionary function can even preclude liability where it would otherwise be explicitly granted, as where a law enforcement

93. 28 U.S.C. § 2680(c) (2006).

94. *Ali v. Fed. Bur. of Prisons*, 552 U.S. 214, 216, 218–28 (2008).

95. *Kosak v. United States*, 465 U.S. 848, 854 (1984).

96. *Ali*, 552 U.S. at 216.

97. 28 U.S.C. § 2680(a) (2006). The same subsection also retains sovereign immunity for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." *Id.*

98. *See, e.g., United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

99. *Gaubert*, 499 U.S. at 325.

100. *Calderon v. United States*, 123 F.3d 947, 948 (7th Cir. 1997).

101. *Id.*

102. *Id.* at 949–51.

officer commits an intentional tort like battery.¹⁰³ What if a battery by a law enforcement officer is *also* the result of an exercise of discretion? Does the law enforcement proviso to the assault-and-battery exception govern (in which case we would have liability), or is liability foreclosed by the discretionary function exemption? The circuits differ: in the Fifth and Eleventh Circuits, the proviso governs and liability can attach,¹⁰⁴ while five other circuits—the Second, Third, Fourth, Ninth, and D.C. Circuits—have gone the other way.¹⁰⁵

Finally, the FTCA provides an additional handful of procedural hurdles.¹⁰⁶ For instance, plaintiffs can't get a jury trial,¹⁰⁷ nor can they get pre-judgment interest or punitive damages.¹⁰⁸

B. *Suing State Prisons*

The FTCA is a waiver of the *federal government's* sovereign immunity, so naturally it applies only to tort suits against the federal government or its employees or agencies.¹⁰⁹ If, as a state inmate, you want to bring a tort suit against state prison employees, a state prison, or a state government, the sovereign immunity of the United States doesn't come into play and so the foregoing FTCA-based limitations are irrelevant. State sovereign immunity, though, is as great a bar here as federal immunity is for federal inmates. In fact, “[a]s a general matter, state waivers of immunity are narrower than the federal government’s.”¹¹⁰

Perhaps most harmful for the prisoner tort plaintiff, the FTCA's discretionary function exception has an analogue in state immunity doctrines for discretionary conduct.¹¹¹ Some states provide for a discretionary function exception by statute;¹¹² others do so by judicial decision. Washington, for instance, alone among the states, makes governmental defendants “liable in tort on the same terms as private

103. 28 U.S.C. § 2680(h).

104. See *Nguyen v. United States*, 556 F.3d 1244, 1252–53 (11th Cir. 2009); *Sutton v. United States*, 819 F.2d 1289, 1295–97 (5th Cir. 1987).

105. See *Nguyen*, 556 F.3d at 1257 (citing cases from various circuits).

106. See also *infra* text accompanying note 223.

107. 28 U.S.C. § 2402 (1997); see also *Carlson v. Green*, 446 U.S. 14, 28 n.1 (1980).

108. 28 U.S.C. § 2674 (1997); see also *Carlson*, 446 U.S. at 28 n.1.

109. See *supra* text accompanying notes 85–89.

110. Preis, *supra* note 44, at 746 (citing Rosenthal, *supra* note 54, at 805–09).

111. See generally 1 CIV. ACTIONS AGAINST STATE & LOC. GOV'TS §§ 2:7, :11, 3:17.

112. Compare, e.g., MISS. CODE ANN. § 11-46-9(d) (West 2012) with 28 U.S.C. § 2680(a) (2006); see also OKLA. STAT. ANN. tit. 51, § 155(5) (West 2013).

tortfeasors,”¹¹³ but even there the Washington Supreme Court has read a discretionary exception into the statute.¹¹⁴ The language from the Washington decision captures the sort of considerations involved:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom.¹¹⁵

The Washington Supreme Court later clarified that, to benefit from the discretionary exemption, the state must show that an actual, conscious balancing of risks actually took place.¹¹⁶

Moreover, just as in FTCA law, particular instances of *carrying out* a discretionary policy may be held to be ministerial and therefore not immune from liability—the doctrine is often called the “planning-operational test,”¹¹⁷ indicating that (discretionary) planning decisions are generally immune from liability while (non-discretionary) operational decisions aren’t.¹¹⁸ For instance, when Florida prisoner Thomas

113. Rosenthal, *supra* note 54, at 804 (citing WASH. REV. CODE ANN. §§ 4.92.090, 4.96.010 (West 2013)).

114. *Evang. United Brethren Church of Adna v. State*, 407 P.2d 440, 443–45 (Wash. 1965).

115. *Evang. United*, 407 P.2d at 445. This test has been cited in various prison cases, for instance *Barnum v. State*, 435 P.2d 678 (Wash. 1967); *Swatek v. County of Dane*, 516 N.W.2d 789 at *5 (Wis. App. 1994) (table), *rev’d*, 531 N.W.2d 45 (Wis. 1995).

116. *King v. City of Seattle*, 525 P.2d 228 (Wash. 1974).

117. 1 CIV. ACTIONS AGAINST STATE & LOC. GOV’TS § 2:7 (2012).

118. Iowa has abandoned the bright-line planning-operational test and instead adopted the two-prong test of *Berkovitz v. United States*, 486 U.S. 531 (1988). See *Goodman v. City of LeClaire*, 587 N.W.2d 232 (Iowa 1998). But this is just another way of implementing the discretionary function exemption. See *Walker v. State*, 801 N.W.2d 548 (Iowa 2011) (applying the

Dunagan was attacked by a fellow inmate who strangled him into unconsciousness and drove ballpoint pens into his eyes, a county sheriff was held liable for not following policies regarding opening and closing of cell doors¹¹⁹—even if there might have been no liability for failing to adopt such a policy in the first place.

Still—again, just as in FTCA law—this discretionary doctrine can bar recovery for many prisoner plaintiffs. Thus, when an Indiana juvenile inmate was sexually assaulted by other juvenile inmates and sued the county for not allocating sufficient resources to security, it was unclear whether the county that ran the juvenile detention center had actually engaged in a policy analysis in deciding on resource allocation.¹²⁰ What was clear was that if further factual development revealed that a policy analysis had been done, the county would be immune from liability.¹²¹

In addition, statutes in many states further limit prisoner tort plaintiffs' prospects. Every state is different and has its own exclusions, so let me provide a small, somewhat arbitrary sample of such laws, some of which relate to sovereign immunity (the immunity of the state), some of which relate to official immunity (the personal immunity of the employee), and some of which relate to both:¹²²

- In California, with some exceptions, “neither a public entity nor a public employee is liable for failure to provide a prison, jail or penal or correctional facility or, if such facility is provided, for failure to provide sufficient equipment, personnel or facilities therein.”¹²³ Similar provisions appear in the laws of several states;¹²⁴ Mississippi law is barely more generous, requiring only that “reasonable use of available appropriations ha[ve] been made to provide such personnel or facilities.”¹²⁵
- Oklahoma goes beyond California and also excludes governmental liability arising out of the “operation or

Berkovitz test in a prison context and holding that discretionary-function exception didn't apply).

119. *Dunagan v. Seely*, 533 So. 2d 867 (Fla. Dist. Ct. App. 1988).

120. *Lake Cnty. Juv. Ct. v. Swanson*, 671 N.E.2d 429, 439 (Ind. Ct. App. 1996).

121. *Id.* at 439–40.

122. *See generally* 1 CIV. ACTIONS AGAINST STATE & LOC. GOV'TS § 3:17 (2012).

123. CAL. GOV'T CODE § 845.2 (West 2013). The exceptions include anything in “Chapter 2 (commencing with Section 830),” which can include, for instance, dangerous conditions of public property, *id.* § 840.2.

124. *See, e.g.*, 745 ILL. REV. STAT. 10/4-103 (West 2013); N.J. STAT. ANN. § 59:5-1 (West 2013).

125. *See* MISS. CODE ANN. § 11-46-9(1)(r) (West 2012).

maintenance” of prisons, jails, or juvenile facilities;¹²⁶ West Virginia is similar.¹²⁷ Ohio—after having generally immunized political subdivisions—then specifically makes them liable for injury “caused by the negligence of their employees and that occurs within the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function”; but specifically *excluded* from this extension of liability are jails and other detention facilities.¹²⁸

- Utah simply states that immunity of governmental entities is not waived if the injury arises out of “the incarceration of any person in any state prison, county or city jail, or other place of legal confinement”;¹²⁹ New York has a similar statute covering employees;¹³⁰ Mississippi has a statute covering both.¹³¹ South Carolina immunizes governmental entities in a similarly blanket way, though it makes an exception for gross negligence.¹³²
- Arizona excludes governmental and employee liability for prisoner-on-prisoner violence, as long as there was no intentional or grossly negligent conduct by the state employee;¹³³ California also immunizes public entities (though not public employees) for such violence.¹³⁴ Several states also exclude liability for injuries caused by escaped or escaping prisoners.¹³⁵
- Illinois specifically excludes both governmental and employee liability “for injury proximately caused by the failure of the employee to furnish or obtain medical care,” though it does impose liability on an employee who, “acting within the scope of his employment, knows from his observation of conditions that the prisoner is in need of immediate medical care and, through willful and wanton

126. OKLA. STAT. ANN. tit. 51, § 155(24)–(25) (West 2013).

127. W. VA. CODE ANN. § 29-12A-5(a)(14) (West 2013).

128. OHIO REV. CODE ANN. § 2744.02(B)(4) (West 2013); *see also* W. VA. CODE ANN. § 29-12A-4(c)(4).

129. UTAH CODE ANN. § 63G-7-301(5)(j) (West 2012).

130. N.Y. CORRECT. LAW § 24 (McKinney 2013).

131. MISS. CODE ANN. § 11-46-9(m) (West 2012).

132. S.C. CODE ANN. § 15-78-60(25) (2012).

133. ARIZ. REV. STAT. ANN. § 12-820.02(A)(4) (West 2013).

134. CAL. GOV'T CODE § 844.6(a), (d) (West 2013).

135. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-820.02(A)(2); CAL. GOV'T CODE § 845.8(b); ILL. REV. STAT. ch. 745, ¶ 10/4-106(b) (West 1991); N.J. STAT. ANN. § 59:5-2(b) (West 1998).

conduct, fails to take reasonable action to summon medical care.”¹³⁶

Lawrence Rosenthal summarizes: “thirty-three states recognize discretionary-function immunity, twenty-three recognize immunity for injuries caused by reliance on statutes or other enactments, . . . seventeen immunize specified intentional torts of public employees, and forty states confer immunity from punitive damages.”¹³⁷ “In addition, forty-two states limit the damages recoverable from a governmental defendant or a public employee.”¹³⁸ Of course, all these numbers are below fifty, which means that some other states don’t have such immunity,¹³⁹ but the fact remains that in many states, whether by common law or by statute, a state inmate suing his prison may be in just as bad a position as his federal counterpart.

IV. TORTS AND PRIVATE PRISONS

A *Suing Federal or State Governments Themselves*

Bottom line: good luck if you want to bring a tort claim against a private prison, whether state or federal. But when it comes to suing private prisons, several of these limitations are entirely absent.

Of course, for federal private-prison inmates, suits against the United States directly are out. The FTCA waives sovereign immunity only for acts of *employees* of the government.¹⁴⁰ Government employees are defined to include (among others) officers, employees, and persons working on behalf of “any federal agency,” and “federal agency,” in turn, specifically *excludes* contractors.¹⁴¹

Thus, when federal prisoner Reagan Logue hanged himself in a county jail awaiting trial, Logue’s parents were unable to sue the United States for the negligence of the jail employees who failed to keep him under surveillance.¹⁴² The FTCA, the Supreme Court held, incorporates the common-law distinction between employees and contractors based on the principal’s “authority . . . to control the physical conduct of the contractor in the performance of the contract,” and that authority was

136. 745 ILL. REV. STAT. 10/4-105 (West 2013).

137. Rosenthal, *supra* note 54, at 805–06.

138. *Id.* at 810.

139. Preis, *supra* note 44, at 746.

140. 28 U.S.C. § 1346(b) (2013).

141. *Id.* § 2671.

142. *Logue v. United States*, 412 U.S. 521 (1973).

lacking as between the federal government and the county officials.¹⁴³ Nor could the county officials be characterized as “acting on behalf of a federal agency in an official capacity”; if they could, so could most contractors, which would make the explicit exclusion of contractors in the definition of “federal agency” kind of pointless.¹⁴⁴

What was true in *Logue* for local officials is also true for people and corporations that are more conventionally thought of as contractors.¹⁴⁵ The United States is liable neither for the negligence of its independent-contractor physicians¹⁴⁶ nor for that of private prison companies contracting with the federal government.¹⁴⁷ Thus, if you’re like Vernice Garvin, an inmate at the Northeast Ohio Correctional Center in Youngstown, Ohio, trying to hold the United States liable because he was negligently housed with an inmate with a staph infection, you lose: NEOCC is operated by the Corrections Corporation of America, a federal contractor.¹⁴⁸

Much the same is true for state private-prison inmates: state tort claims acts, the state analogues of the FTCA, also waive state sovereign immunity for the acts of employees, not contractors.¹⁴⁹ As a result, suing the state directly typically seems to be out.

B. *Suing Prison Firms: The Common Law*

But if suits against the United States under the FTCA by federal inmates are out, suits against the companies themselves under ordinary

143. *Id.* at 526–30.

144. *Id.* at 530–32.

145. *See* *United States v. Orleans*, 425 U.S. 807 (1976); *cf. Jama v. INS*, 343 F. Supp. 2d 338, 355–57 (D.N.J. 2004).

146. *See, e.g., Jones v. United States*, 305 F. Supp. 2d 1200 (D. Kan. 2004).

147. *See, e.g., Vega v. United States*, No. C11-632-RSM, 2011 WL 6014853 (W.D. Wash. Dec. 2, 2011).

148. *Garvin v. Corr. Corp. of Am.*, No. 4:11CV02054, 2012 WL 262725 (N.D. Ohio Jan. 27, 2012).

149. *See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 101.001* (West 2013) (“‘Employee’ means a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, *but does not include an independent contractor, an agent or employee of an independent contractor*, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.”) (emphasis added); *Thomas v. Harris Cnty.*, 30 S.W.3d 51 (Tex. App. 2000); *see also* Josephine R. Potuto, *Forum Choice in Constitutional Litigation*, 78 NEB. L. REV. 550, 569 (1999). For a useful summary of state tort claims acts, *see State Sovereign Immunity and Tort Liability*, NAT’L CONF. OF STATE LEGIS. (updated Sept. 8, 2010), <http://www.ncsl.org/issues-research/transport/state-sovereign-immunity-and-tort-liability.aspx>.

Note that, in 1989, Ira Robbins characterized the applicability of state tort claims acts to private contractors as an open question. Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 650–52 (1989).

tort law aren't—whether for federal or state inmates. In *Correctional Services Corp. v. Malesko*,¹⁵⁰ John Malesko sued the corporation running the community correction center in which he was housed, charging that the corporation and some of its employees were “negligent in failing to obtain requisite medication for [his] condition and were further negligent by refusing [him] the use of the elevator.”¹⁵¹ Because he was a federal inmate, he brought his claim under *Bivens*. The Supreme Court denied the *Bivens* claim primarily on a no-entity-liability theory¹⁵² (foreshadowed in the public context by *FDIC v. Meyer*¹⁵³), but it was also quick to point out his alternative remedies:

[A]lternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*. For example, federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities. This case demonstrates as much, since respondent's complaint in the District Court arguably alleged no more than a quintessential claim of negligence. . . . [T]he heightened “deliberate indifference” standard of Eighth Amendment liability would make it considerably more difficult for respondent to prevail than on a theory of ordinary negligence.¹⁵⁴

The *Malesko* dissent denied that the existence of alternative remedies should doom a *Bivens* claim,¹⁵⁵ but didn't deny that these attractive alternative remedies existed.

These same considerations were on display in *Minnecci* itself, where the Court finally said what one could have guessed from *Malesko*: *Bivens* relief is not only unavailable against a corporation but is also not necessarily available even against an individual in the private-prison Eighth-Amendment setting.¹⁵⁶

As I mentioned above,¹⁵⁷ Richard Lee Pollard complained of being mistreated by employees of the federal private prison in which he was housed; allegedly he was forced to wear very painful restraints and was deprived of therapy, hygienic care, and sufficient medicine. The Court wrote, sensibly enough, that these claims are within the core of state tort

150. 534 U.S. 61 (2001).

151. *Id.* at 64–65. Malesko couldn't sue the employees because they were time-limited out by the statute of limitations. *Id.* at 65.

152. *Id.* at 70–72.

153. 510 U.S. 471 (1993).

154. *Corr. Servs. Corp.* 534 U.S. at 72–73 (citations omitted).

155. *Id.* at 79–80.

156. *Minnecci v. Pollard*, 132 S. Ct. 617, 623–26 (2012).

157. *See supra* text accompanying notes 39–41.

law, including in California, where this claim arose.¹⁵⁸ The Fourth Circuit commented similarly on Ricky Lee Holly's claim of inadequate medical care, pointing to North Carolina law;¹⁵⁹ and the Tenth Circuit (in a short-lived opinion) likewise noted that Kansas law "gives rise to a negligence claim" for Cornelius Peoples's claim that his jailors failed to protect him from an attack by gang members.¹⁶⁰

A recent California case cited by the Supreme Court illustrates the different treatment of public and private actors. Denisha Lawson was a California prisoner in a community-based correctional facility operated by Center Point, Inc., where she lived with her infant daughter Esperanza.¹⁶¹ Lawson sued the state and its employees, and Center Point and its employees, for the physical injury that Esperanza experienced, and the emotional distress that she herself experienced, when the defendants failed to get medical treatment for Esperanza's respiratory infection.¹⁶² Esperanza wasn't a prisoner, so let's just focus on Denisha Lawson's own emotional distress claim. Her claim was dismissed as to the state and its employees based on concepts of governmental immunity,¹⁶³ as discussed above.¹⁶⁴ But as to Center Point and its employees, the story was quite different:

The Petition cites no authority, and we are aware of none, that extends the governmental immunity set forth in the Tort Claims Act to a private entity working under contract for the State Accordingly, we conclude that Center Point is not a "public entity" and thus is not entitled to claim the immunity set forth in the Tort Claims Act.¹⁶⁵

Nor is this just a California rule. The Restatement (Second) of Torts provides that "[o]ne who is required by law to take or who

158. *Id.* at 624 (citing CAL. CIV. CODE §§ 1714(a), 1714.8(a) (West 2013); *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 384 (App. 2008)).

159. *Holly v. Scott*, 434 F.3d 287, 296 (4th Cir. 2006) (citing *Summey v. Barker*, 573 S.E.2d 534, 536 (N.C. App. 2002)). In *Summey v. Barker*, hemophiliac Joseph Patrick Summey sued a county sheriff, a jailor, and medical providers for negligence in treating his nosebleed while he was a detainee. He lost, but it was on the merits (no one acted negligently). *Summey*, 573 S.E.2d at 536. See also *Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008) (Georgia tort law is an adequate avenue to challenge CCA's policy of skimping on medical care).

160. *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1103-04 (10th Cir. 2005) (citing *Washington v. State*, 839 P.2d 555 (1992)), *rev'd by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006).

161. *Lawson v. Superior Court*, 103 Cal. Rptr. 3d 834, 839 (App. 2010).

162. *Id.* at 839.

163. *Id.* at 843-46.

164. See *supra* text accompanying notes 122-136; CAL. GOV'T CODE §§ 815, 815.2, 815.6, 844.6, 845.6 (West 2013).

165. *Lawson*, 103 Cal. Rptr. 3d at 855.

voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection” has a duty “(a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.”¹⁶⁶ Jailors are also under a duty to reasonably control third persons to prevent them from harming their charges.¹⁶⁷ An illustration shows jailors’ general duty of care—which would apply just as well to public jailors but for the immunity doctrines discussed above.¹⁶⁸

A is imprisoned in a jail, of which B is the jailor. A suffers an attack of appendicitis, and cries for medical assistance. B does nothing to obtain it for three days, as a result of which A’s illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.¹⁶⁹

Such duties exist in all states that have federal prisons.¹⁷⁰

This is not to say that state remedies are always the same as what one might get under *Bivens*. Most obviously, as I’ve noted, state remedies are more attractive because the general negligence standard is more plaintiff-friendly than the “deliberate indifference” required under the Eighth Amendment and because tort law’s respondeat superior doctrine is unavailable under *Bivens*.¹⁷¹ On the other hand, the determination of whether the defendant was negligent will inevitably be colored by the realities of prison life and the necessity of keeping discipline; and inmates may not always make the most sympathetic plaintiffs (though private prison companies may also be unpopular). Moreover, tort-reform measures can sometimes make state remedies less attractive: the *Minnecci* Court noted damage caps, bars on recovery for emotional suffering without physical harm, or miscellaneous other procedural obstacles.¹⁷²

166. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

167. *Id.* § 320.

168. *See supra* text accompanying notes 122–136.

169. RESTATEMENT (SECOND) OF TORTS, *supra* note 173, § 314A, illust. 6 (based on *Farmer v. State*, 79 So. 2d 528 (Miss. 1955); *Dunham v. Village of Canisteo*, 104 N.E.2d 872 (N.Y. 1952) (jailor not a prisoner); *Winston v. United States*, 305 F.2d 253 (2d Cir. 1962) (en banc) (FTCA case), *aff’d sub nom.* *United States v. Muniz*, 374 U.S. 150 (1963), *see supra* text accompanying notes 91–92; *Thomas v. Williams*, 124 S.E.2d 409 (Ga. App. 1962); *Smith v. Miller*, 40 N.W.2d 597 (Iowa 1950); *O’Dell v. Goodsell*, 30 N.W.2d 906 (Neb. 1948)).

170. *Minnecci v. Pollard*, 132 S. Ct. 617, 624–25 (2012) (citing cases from California, Georgia, Mississippi, New Mexico, North Carolina, Ohio, Pennsylvania, Texas).

171. *See supra* text accompanying notes 45–46.

172. *Minnecci*, 132 S. Ct. at 625 (citing CAL. CIV. CODE § 3333.2(b) (West 2013); *Pollard v.*

But, the *Minneeci* Court concluded, particular procedural quirks don't matter; all that's required is a system with *roughly similar* compensation rules that produces *roughly similar* incentives for defendants.¹⁷³ Chief Justice Warren, recognizing FTCA liability for prison negligence in *United States v. Muniz*,¹⁷⁴ had refused to import "the casuistries of municipal liability for torts" by giving effect to divergent state immunity rules,¹⁷⁵ and *Bivens* cases have also pointed to the desire to avoid subjecting plaintiffs to the "niceties"¹⁷⁶ or "vagaries"¹⁷⁷ of state tort law. Indeed, it does seem somewhat incongruous that a constitutional violation, which is judged by the same rules in California as in Georgia, should be differently compensated under California and Georgia tort law. *Muniz* is still good law for the FTCA treatment of federal immunity at federal public prisons; but for *Bivens* liability of federal private prisons, the new rule is that, when state schemes are roughly similar, we *are* subject to the vagaries of state tort law. Sometimes this will produce better results for plaintiffs, sometimes worse; it seems hard to maintain that the result will be generally worse for plaintiffs. Tellingly, Justice Ginsburg's lone dissent focused on the vagaries, not the inadequacy of the state remedy.¹⁷⁸

C. *Suing Prison Firms: Immunity Statutes*

The common-law approach I've sketched above is the approach taken by most states. In the absence of a statute providing otherwise, private prison firms are treated just like any other kind of firm. Nor is the government contractor immunity recognized in *Boyle v. United*

GEO Group, Inc., 629 F.3d 843, 864 (9th Cir. 2010); ME. REV. STAT. ANN., tit. 24, § 2853 (West 2013); MASS. GEN. LAWS, ch. 231, § 60(B) (West 2013)).

173. *Minneeci*, 132 S. Ct. at 625; *see also* *Alba v. Montford*, 517 F.3d 1249, 1255 (11th Cir. 2008) (requiring that a tort plaintiff in a medical malpractice case file an expert affidavit doesn't negate the adequacy of the state-law remedy, because the indigent inmate would be in the same position as a free citizen who is poor); *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1104–05 (10th Cir. 2005) (punitive damages cap doesn't negate adequacy), *rev'd by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006).

174. *United States v. Muniz*, 374 U.S. 150, 150 (1963).

175. *Id.* at 164 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65 n.1 (1955)) (internal quotation marks omitted).

176. *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 394 (1971).

177. *Carlson v. Green*, 446 U.S. 14, 23, 28 n.1 (1980); *Bivens*, 403 U.S. at 409–410 (Harlan, J., concurring).

178. *Minneeci*, 132 S. Ct. at 626–27 (Ginsburg, J., dissenting); *see also* *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1112 (10th Cir. 2005) (Ebel, J., concurring and dissenting), *rev'd by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006).

*Technologies Corp.*¹⁷⁹ available for federal private prisons, at least not unless the conduct complained of was specifically mandated by the federal government.¹⁸⁰

Perhaps out of an excess of caution, Tennessee has even passed legislation explicitly foreclosing the application of sovereign immunity to private prisons: a state statute provides that “[t]he sovereign immunity of the state shall not apply to the contractor.”¹⁸¹ The statute requires that private prison contractors carry liability insurance, “specifically including insurance for civil rights claims,”¹⁸² and “[n]either the contractor nor [its] insurer . . . may plead the defense of sovereign immunity in any action arising out of the performance of the contract.”¹⁸³

New Mexico’s statutory regime, which requires private prison contractors to “assume[] all liability caused by or arising out of all aspects of the provision or operation of the facility,”¹⁸⁴ and carry adequate liability insurance,¹⁸⁵ seems to grant somewhat more immunity to private prison employees who perform the functions of correctional officers. The statute classifies these employees as “correctional officers” for the purposes of two statutory sections and “no other purpose of state law.”¹⁸⁶ One of these sections relates to the qualifications of correctional officers (adult citizens of good moral character with at least a high school education and having passed certain physical and aptitude exams).¹⁸⁷ Another grants correctional officers the “power of a peace officer with respect to arrests and enforcement of the laws” in certain circumstances.¹⁸⁸ The section also provides that “[n]o correctional officer or other employee of the corrections department shall be convicted or held liable for any act performed pursuant to this section if a peace officer could lawfully have performed the same act in the same circumstances.”¹⁸⁹ So private prison guards seem to be as immune as public prison guards while making arrests and enforcing the law.

But, notably, the statute does *not* incorporate the statutory section

179. 487 U.S. 500 (1988).

180. *See id.* at 512; *Adorno v. Corr. Servs. Corp.*, 312 F. Supp. 2d 505 (S.D.N.Y. 2004).

181. TENN. CODE ANN. § 41-24-107(b) (West 2013).

182. *Id.* § 41-24-107(a)(2).

183. *Id.* § 41-24-107(b).

184. N.M. STAT. § 33-1-17(D)(2) (West 2013).

185. *Id.* § 33-1-17(D)(3).

186. *Id.* § 33-1-17(E).

187. *Id.* § 33-1-11.

188. *Id.* § 33-1-10.

189. *Id.*

granting general tort immunity to all public employees.¹⁹⁰ So private prison guard immunity apparently doesn't extend to their day-to-day activities that can't be classified as arrests or law enforcement.

North Carolina has gone all the way and actually immunized private prison employees to the same extent as public ones. The statute makes "[c]ustodial officials employed by a private confinement facility . . . agents of the Secretary of Public Safety,"¹⁹¹ and as such, they (and their employers, the private prison firms, under respondeat superior) are entitled to assert the same public official immunity as their public counterparts.¹⁹² (Public officers in North Carolina aren't liable for mere negligence unless an exception applies, for instance unless their conduct is shown to be "malicious, corrupt, or outside the scope of official authority."¹⁹³) But while official immunity protects the officers, North Carolina does waive its sovereign immunity, at least up to the amount of a statutory bond,¹⁹⁴ so inmates aren't without a remedy.

As far as I can tell, North Carolina is the only state to have extended such broad immunity. Thus, in most states, the liability of private prison firms and their employees is governed by regular common-law negligence rules.

V. THE POSSIBLE NEUTRALITY OF THE PLRA(S)

A. *The Federal PLRA*

I still haven't mentioned one aspect of prison litigation—the Prison Litigation Reform Act, which adds even more procedural restrictions on prisoner litigation and has been responsible for a massive decrease in federal prisoner litigation since its adoption in 1996.¹⁹⁵ Here are its main provisions:

- Prospective relief in litigation over prison conditions must be narrowly tailored to the violation identified.¹⁹⁶ Essentially, the PLRA took a standard that had always applied to prospective relief stemming from a final judgment and

190. *Id.* § 41-4-4(A).

191. N.C. GEN. STAT. ANN. § 148-37(g) (West 2013).

192. *Robinson v. Corr. Corp. of Am.*, No. 1:02cv78, 2002 WL 31770492, at *3 (W.D.N.C. Aug. 26, 2002).

193. *See Epps v. Duke Univ.*, 468 S.E.2d 846, 852–53 (N.C. App. 1996).

194. N.C. GEN. STAT. ANN. § 58-76-5 (West 2013); *Summey v. Barker*, 544 S.E.2d 262, 265 (N.C. App. 2001).

195. *See Schlanger*, *supra* note 51, at 1634–44.

196. 18 U.S.C. § 3626(a) (West 2013).

applied it to consent decrees as well.¹⁹⁷ Parties are still free to enter into “private settlement agreements” that are enforceable as contracts in state court,¹⁹⁸ though it remains to be seen how effective such agreements will be.¹⁹⁹ Similarly, consent decrees are now easier to terminate.²⁰⁰ This was Congress’s attempt to cut down on “population caps and other inappropriate regulatory orders imposed on prisons and jails by prisoners’-rights crusader [judges] who had seized control of state and local systems.”²⁰¹

- Where once the requirement that prisoners must exhaust their administrative remedies was a matter of court discretion and depended on the adequacy of the administrative procedures, now the exhaustion requirement is mandatory, even if the administrative procedure can’t grant the remedy sought.²⁰² (This aspect of the statute, which attracted little notice at first, has since been identified as one of the statute’s most powerful provisions for cutting down on inmate litigation.²⁰³)
- Indigent inmates have to “pay filing fees in nonhabeas civil actions if they have any money in their prison accounts.”²⁰⁴ Similarly, if costs are awarded against a defendant, courts no longer have the discretion to give indigent inmate plaintiffs a break.²⁰⁵
- There’s a “frequent filer” penalty: “Inmates who have had three prior actions or appeals dismissed as frivolous or malicious, or for failing to state a claim upon which relief may be granted . . . may not proceed in forma pauperis at all unless they face ‘imminent danger of serious physical harm.’”²⁰⁶
- Complaints are screened by district courts before docketing,

197. JOHN BOSTON, THE PRISON LITIGATION REFORM ACT 8 (Feb. 27, 2006), available at http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf; Alison Brill, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 658 (2008).

198. 18 U.S.C. § 3626(c)(2).

199. See generally Brill, *supra* note 197.

200. 18 U.S.C. § 3626(b)(1), (3).

201. Schlanger, *supra* note 51, at 1566; see also Brill, *supra* note 197, at 656–57.

202. 42 U.S.C. § 1997e(a) (1996); see also Schlanger, *supra* note 51, at 1627–28.

203. Schlanger, *supra* note 51, at 1650; see generally *id.* at 1649–54.

204. Schlanger, *supra* note 51, at 1628, 1645–48; see also 28 U.S.C. §§ 1914, 1915(b)(1)–(2) (West 2013).

205. Schlanger, *supra* note 51, at 1629; see also 28 U.S.C. § 1915(f)(2)(A).

206. Schlanger, *supra* note 51, at 1628–29, 1648–49; see also 28 U.S.C. § 1915(g).

and can be dismissed “without motion, notice to the plaintiff, or opportunity to respond.”²⁰⁷

- Defendants can fail to respond without their failure being deemed an admission,²⁰⁸ and courts can’t order a response unless “the plaintiff has a reasonable opportunity to prevail on the merits.”²⁰⁹
- Inmates can’t recover for mental or emotional injury without a prior showing of physical injury.²¹⁰
- Any amounts recovered have to be diverted “directly to satisfy any outstanding restitution orders pending against the [inmate].”²¹¹
- And the PLRA limits attorneys’ contingent rates to 25%,²¹² limits the total fees that inmates’ attorneys can recover to 150% of the judgment,²¹³ and limits hourly fees to 150% of court-appointed counsel rates.²¹⁴

The PLRA was part of a broad movement to restrict prisoner litigation. Around the same time, Congress also required federal legal services providers to stop representing inmates²¹⁵ and (in the Antiterrorism and Effective Death Penalty Act) restricted the availability of habeas relief,²¹⁶ and the Supreme Court adopted a more restrictive view of inmates’ constitutional right of access to a law library.²¹⁷

But none of these sections distinguish between prisoners in public and private prisons. For example, with respect to several of the provisions listed above, “prisoner” is defined as “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law

207. Schlanger, *supra* note 51, at 1629–30; *see also* 28 U.S.C. § 1915A(a), (b)(1)–(2).

208. 42 U.S.C. § 1997e(g)(1) (West 2013).

209. *Id.* § 1997e(g)(2); *see also* Schlanger, *supra* note 51, at 1630.

210. 42 U.S.C. § 1997e(e); *see also* 28 U.S.C. § 1346(b)(2) (2011), *added by* Pub. L. No. 104-134, § 806, 110 Stat. 1321 (1996); Schlanger, *supra* note 51, at 1630.

211. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 807, 110 Stat. 1321-75 to -76, *reprinted in* 18 U.S.C. § 3626; *see also* Schlanger, *supra* note 51, at 1631.

212. 42 U.S.C. § 1997e(d)(2).

213. *Id.*; *see also* Schlanger, *supra* note 51, at 1631.

214. 42 U.S.C. § 1997e(d)(3); *see also* Schlanger, *supra* note 51, at 1631, 1654–57.

215. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15), 110 Stat. 1321, 1321-55; *see also* Schlanger, *supra* note 51, at 1632.

216. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253–2255 and adding new sections, 28 U.S.C. §§ 2261–2266); *see also* Schlanger, *supra* note 51, at 1632–33.

217. *Lewis v. Casey*, 518 U.S. 343 (1996).

or the terms and conditions of parole, probation, pretrial release, or diversionary program.”²¹⁸ This definition is quite broad and, in particular, makes no mention of the identity of the prison manager. For the section on injunctive relief and settlements, the definition of “prisoner” refers to “any facility,”²¹⁹ and “prison” means “any Federal, State, or local facility that incarcerates or details juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law”²²⁰—again not distinguishing between public and private.²²¹

So while the PLRA has had a huge effect on inmate litigation as a whole, it seems to have little obvious *comparative* effect on the attractiveness of federal-law litigation by inmates in the public or private sector.²²² (This federal-law litigation would certainly include *Bivens* and § 1983 litigation, and, I suppose, also tort litigation against federal public prisons, which proceeds under the FTCA.²²³) State-law litigation against federal private prisons, especially in state courts, emerges from the PLRA relatively untouched, which is again an advantage of litigation against private prisons.

B. *State PLRAs*

Inmates have to deal not only with the federal PLRA but also with parallel state PLRAs.

The following are a few examples. The Louisiana PLRA,²²⁴ like the federal version, has a requirement of narrowly tailored remedies,²²⁵

218. 42 U.S.C. § 1997e(h).

219. 18 U.S.C. § 3626(g)(3) (West 2013).

220. *Id.* at § 3626(g)(5).

221. *See also* Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (private prison inmates must comply with PLRA).

222. The PLRA requirements typically apply to litigation under federal law. *See, e.g.*, 42 U.S.C. § 1997e(a), (c), (f)(1), (g); 18 U.S.C. § 3626(g)(2). But note that different PLRA sections have their own coverage; thus, the limitation on recovery for emotional injuries in § 1997e(e) applies to all federal civil actions (including, I suppose, diversity actions in federal court based entirely on state law); *see also* 28 U.S.C. § 1915(g) (West 2013).

223. The FTCA already contains many PLRA-like restrictions. FTCA plaintiffs also have to exhaust their administrative remedies; they must file administrative claims within two years, and file their federal district court suit within six months after their administrative claim is denied. 28 U.S.C. § 2401(b) (West 2013). Attorney fees under the FTCA are capped at 20% of any administrative settlement made before the lawsuit or 25% of any other settlement or judgment. *Id.* § 2678. Further, felons can’t sue for emotional injury only (a restriction added by the PLRA itself). 18 U.S.C. § 1346(b)(2) (West 2013), *added by* Pub. L. No. 104-134, § 806, 110 Stat. 1321 (1996).

224. LA. REV. STAT. § 15:1181–1193 (West 2013).

225. *Id.* § 15:1182.

an exhaustion requirement,²²⁶ a ban on emotional recovery without physical injury,²²⁷ limitations on attorney fees,²²⁸ restrictions on in forma pauperis filings,²²⁹ and frequent filer penalties.²³⁰ The Pennsylvania PLRA²³¹ has restrictions on in forma pauperis filings,²³² frequent filer penalties,²³³ and a requirement of narrowly tailored remedies.²³⁴ The Michigan PLRA²³⁵ has an exhaustion requirement,²³⁶ restrictions on in forma pauperis filings,²³⁷ frequent filer penalties,²³⁸ a ban on emotional recovery without physical injury,²³⁹ and a requirement of narrowly tailored remedies.²⁴⁰

And these aren't flukes: around the time the federal PLRA was passed,

state attorneys general and departments of corrections expected to see some movement from federal to state court. Indeed, the National Association of Attorneys General pushed hard for state PLRAs Largely as a result of this push, all but a few states now have some kind of system that specially regulates inmate access to *state* court.²⁴¹

State PLRAs generally seem to apply very broadly: to public as well as private prisons, state as well as federal prisons, tort as well as state and federal constitutional claims, and even in federal court to the extent the claims are based on state law.²⁴² I'm aware of one court, the Maryland Supreme Court, that has held that its own statute, the Prison

226. *Id.* § 15:1184(A)(2).

227. *Id.* § 15:1184(E).

228. *Id.* § 15:1185(B).

229. *Id.* § 15:1186.

230. *Id.* § 15:1187.

231. 42 PA. CONS. STAT. ANN. §§ 6601–6608 (West 2013).

232. *Id.* § 6602(a)–(e).

233. *Id.* § 6602(f).

234. *Id.* § 6604.

235. MICH. COMP. LAWS §§ 600.5501–.5531 (West 2013).

236. *Id.* § 600.5503(1).

237. *Id.* § 600.2963.

238. *Id.* § 600.5507.

239. *Id.* § 600.5511.

240. *Id.* § 600.5517.

241. See Schlanger, *supra* note 51, at 1635; see also *id.* at 1635 n.272 (giving a table of state statutes); Brill, *supra* note 197, at 676–78.

242. See, e.g., LA. REV. STAT. ANN. § 15:1181(2) (West 2013) (“prisoner suit” includes “any civil proceeding with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison”); 42 PA. CONS. STAT. ANN. § 6601 (West 2013) (similar); MICH. COMP. LAWS § 600.5501 (West 2013) (similar). State PLRAs would obviously be applied in federal court under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), but this would even have been true in the days of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

Litigation Act (PLA), doesn't apply to—or at least doesn't require exhaustion of administrative remedies for—inmates at private prisons,²⁴³ on grounds that seem somewhat dubious.²⁴⁴ But the Maryland Court's reasoning is probably idiosyncratic. Chances are that any prison litigation, regarding any prison, on any theory, in any court, will be severely limited by *some* PLRA, whether state or federal.

And this, indeed, is why I've left the discussion of the PLRAs to fairly late in this Article. At worst, a PLRA will limit *any* prison litigation, so that the existence of PLRAs won't alter the relative attractiveness of private-prison vs. public-prison litigation. At best, an inmate may find himself in some PLRA gap—for instance, because his state has no state PLRA or because he's in a state like Maryland—in which case litigation against private prisons may be somewhat more attractive.

VI. WHAT DOES THIS TELL US ABOUT *BIVENS* DOCTRINE?

None of which is to say that *Minnecci* was correctly decided. There are cogent arguments that the Supreme Court has been far too hostile to the *Bivens* remedy. I have no Grand Theory of *Bivens*, civil rights litigation, or immunity, but I do tend toward the following views. Fully defending them would require an entirely separate article, but here they are in summary form.

A. *Preliminaries*

Perhaps federal sovereign immunity is a bad idea, for both ex post compensatory and ex ante deterrence/accountability²⁴⁵ reasons, though

243. *Adamson v. Corr. Med. Servs., Inc.*, 753 A.2d 501, 505–19 (Md. 2000).

244. The state Prison Litigation Act defined “civil action” broadly, as “a legal action seeking money damages, injunctive relief, declaratory relief, or any appeal filed in any court in the State that relates to or involves a prisoner’s conditions of confinement.” MD. CODE ANN., CTS. & JUD. PROC. § 5-1001(c)(1) (West 2012). The statute even specified that “civil action” includes, among other things, “[a]ny action alleging a violation of civil rights against a custodian, the custodian’s officers and employees, or any official or employee of the Department.” *Id.* § 5-1001(c)(2)(4). These sections seem on their face to include private prisons and their employees as possible defendants, especially since “custodian” is also defined broadly, as “the institution or agency that has custody of the prisoner.” *Id.* § 5-1001(e). Nonetheless, the Court held that “a plain reading” of the statute, together with legislative history and purposive considerations, “overwhelmingly demonstrate that the PLA administrative remedy exhaustion requirement does not apply to lawsuits filed by inmates against private contractors alleging a claim of medical malpractice.” *Adamson*, 753 A.2d at 517. Part of the reasoning relied on the grievance system’s being useless for private inmates, but part of the reasoning rested on the definition of “civil action,” so it’s possible that *none* of the state PLA applies to private prisons.

245. See *Developments in the Law*, *supra* note 57, at 1880–82; Alexander Volokh,

the arguments for both prongs of this argument are far from airtight.²⁴⁶ However, I also incline to the view that making the federal government pay damages without statutory authorization is probably foreclosed by the Appropriations Clause, which provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”²⁴⁷ So perhaps the best approach would be, as others have already suggested, a beefed-up FTCA that would (bypassing individual officers’ defenses like qualified immunity) allow constitutional tort suits directly against the government.²⁴⁸

However, even with federal sovereign immunity for damages as a constitutionally mandated baseline, *Bivens* may still be valid. Liability for officials in their individual capacity really does come out of individual pockets and thus doesn’t implicate the concern that Congress authorize appropriations. Nor is this just a silly fiction:²⁴⁹ if it’s true that indemnification is near-universal,²⁵⁰ this is only because government agencies—presumably authorized by Congress²⁵¹—find it almost always advantageous to offer such indemnification as a term of employment. That’s their choice, and indeed, they routinely deny indemnification in some (admittedly rare) cases, like where the employee is being criminally investigated or prosecuted for the same conduct.²⁵² Individual liability, and individual defenses like qualified immunity, still serve a real purpose, despite the ubiquity of indemnity.

Privatization and the Elusive Employee-Contractor Distinction, 46 U.C. DAVIS L. REV. 133, 147–52 (2012).

246. Cf., e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 566–81 (1986) (making the argument in the related context of whether to compensate losers for changes in policy).

247. U.S. CONST., art. I, § 9. On the Appropriations Clause argument for federal sovereign immunity as to damages, see Rosenthal, *supra* note 54, at 802–03; Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 543–46 (2003); OPM v. Richmond, 496 U.S. 414, 424–26 (1990); Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009). But see Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 344 n.263 (1995) (arguing that “a *Bivens* award is an appropriation made under the Constitution, and hence by law”); J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162, 1168 (arguing that “the conventional notion of Congress’s ‘power of the purse’ rests on an unstated (and unsubstantiated) assumption that ‘by Law’ envisions only legislation”); see also Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 38–46 (2002) (arguing that government liability stems from the treatment of suits against the United States as within the judicial power).

248. Reinert, *supra* note 54, at 815 n.20, 814 n.18 (collecting sources), 816 n.23.

249. Pillard, *supra* note 54, at 67.

250. See *supra* note 54 and accompanying text.

251. See Pillard, *supra* note 54, at 77 n.54.

252. See *id.* at 77 n.56.

Moreover, despite a common view that *Bivens* suits are almost universally failures and that qualified immunity is an important bar to recovery, Alexander Reinert has found that *Bivens* suits are more successful than has previously been supposed, based on a new analysis that takes account of “unpublished case reports and dockets.”²⁵³ According to his analysis, qualified immunity isn’t a very important bar to recovery.²⁵⁴ If this is so, maybe some form of *Bivens* all by itself is just fine;²⁵⁵ revamping the FTCA, as suggested above,²⁵⁶ might not even be necessary.

How much *Bivens*, then, do we need? It’s quite plausible that courts have been too stingy with *Bivens*. Courts have expressed a concern that *Bivens* “is implied without any express congressional authority whatsoever”²⁵⁷ or that adding “a federal damages remedy to existing avenues of [private-prison] inmate relief might well frustrate a clearly expressed congressional policy”²⁵⁸ and would be “overreaching”²⁵⁹; this decision, courts have said, is “best left for Congress.”²⁶⁰ But perhaps these concerns are misplaced: it looks as though Congress has already recognized the *Bivens* remedy in some form.²⁶¹ The Westfall Act, enacted in 1988, provides that the FTCA remedy, as well as the possibility of administrative adjustment of claims,

253. Reinert, *supra* note 54, at 837, 838 fig.1 (raw success rates for *Bivens* suits in a survey of five districts is sixteen percent); *id.* at 827–32 (summarizing flawed conventional wisdom that most *Bivens* suits are meritless).

254. *Id.* at 813, 843–44. *But see* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 136 n.65, 145 n.109 (1999) (arguing the contrary, but only based on reported cases), *cited in* Reinert, *supra* note 54, at 813 n.16; *id.* at 844 (suggesting that perhaps qualified immunity plays a role in the selection of which cases to file); Pillard, *supra* note 54, at 80 (“Qualified immunity is undoubtedly the most significant bar to constitutional tort actions.”).

255. Reinert, *supra* note 54, at 851 (arguing that the high rates of plaintiff success in *Bivens* cases “do not support the view that a system of formal governmental liability would better serve the interests of deterrence or full compensation”); *id.* at 849 (suggesting “a hybrid form of liability,” where liability would be individual but the defendant could join the federal government if he could show that he was carrying out government policy).

256. *See supra* text accompanying note 246.

257. *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006).

258. *Id.* at 290.

259. *Id.* at 295.

260. *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1103 (10th Cir. 2005), *rev’d by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006); *see also* *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (“[A]ny damages remedy for actions by Government employees who push too hard for the Government’s benefit may come better, if at all, through legislation.”); Pfander & Baltmanis, *supra* note 68, at 136 (“[T]he Court should simply recognize that Congress has presumed the availability of suits against federal officials for constitutional violations and has foreclosed all alternative remedies. . . . [T]he Court should no longer consider the possible existence of state common law remedies as a reason to proceed cautiously.”).

261. Pfander & Baltmanis, *supra* note 68, at 132–38; Reinert & Mulligan, *supra* note 50.

“is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter” against the relevant employee,²⁶² but that this preclusion of other damages actions doesn’t apply to civil actions against government employees for constitutional violations.²⁶³ Congress assumed that civil actions against government employees for constitutional violations exist; therefore, they must exist.²⁶⁴

But this reasoning still doesn’t tell us how far the *Bivens* remedy should extend. After all, some of the retrenchment of *Bivens* in light of alternative remedies, including *Bush v. Lucas*²⁶⁵ and *Schweiker v. Chilicky*,²⁶⁶ had already taken place by the time the Westfall Act was passed. Should *Bivens* exactly track what the Supreme Court had held by 1988? Or should the Westfall Act instead be read, like the antitrust statutes,²⁶⁷ as a delegation to the judiciary to continually develop standards for *Bivens* actions—or perhaps, less ambitiously, just as a recognition that the Supreme Court was in the process of doing so?

B. Two Parallelisms

Perhaps the best arguments for the optimal scope of *Bivens* are practical ones. If only to avoid “incongru[ity] and confusi[on],”²⁶⁸ it seems attractive to maintain the “traditional parallelism”²⁶⁹ with § 1983 actions,²⁷⁰ where state law is mostly irrelevant²⁷¹ and alternative Congressional remedies can only override § 1983, if at all, to the extent

262. 28 U.S.C. § 2679(b)(1) (West 2013), added by Pub. L. 100-694, § 5, 102 Stat. 4563 (1988).

263. *Id.* § 2679(b)(2)(A); see also H. Allen Black, Note, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733, 771–73 (1991) (arguing that the Westfall Act should have swept more broadly and exempted federal officials from constitutional tort liability as well).

264. For those who like legislative history, see also the legislative materials cited in *Carlson v. Green*, 446 U.S. 14, 19–20 (1980).

265. 462 U.S. 367 (1983).

266. 487 U.S. 412 (1988). *Schweiker* preceded the Westfall Act by about five months.

267. See Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1165 (1988) (characterizing the view that the antitrust states are “a standardless delegation to the federal courts to make national competition policy” as the “prevailing” view); *id.* at 1219–35 (laying out an alternative view, more grounded in the statutes themselves).

268. *Butz v. Economou*, 438 U.S. 478, 499 (1978) (quoting *Economou v. USDA*, 535 F.2d 688, 695 n.7 (2d Cir. 1976) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 456 F.2d 1339, 1346 (2d Cir. 1972) (on remand))) (internal quotation marks omitted).

269. Reinert & Mulligan, *supra* note 50.

270. Pfander & Baltmanis, *supra* note 68, at 139–41 (“With the recognition that Congress has confirmed the *Bivens* action in the Westfall Act, distinctions between the right to sue state and federal officials seem equally untenable.”); Reinert & Mulligan, *supra* note 50; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 81–82 (2001) (Stevens, J., dissenting).

271. See *supra* text accompanying notes 66–67.

they have been explicitly contemplated by Congress.²⁷²

This was basically the position taken in *Carlson v. Green*,²⁷³ where the Court held that *Bivens* was available for a federal public-prison inmate despite the availability of the FTCA. The Court's retreat from that part of the *Carlson* rationale is now quite complete, though other parts of the argument suggest that *Carlson* itself would come out the same way today: the *Carlson* Court's rationale also included the view that FTCA suits aren't a substitute for *Bivens* because they aren't brought against individual officers. (This point only makes sense if we ignore the government's ability to discipline its individual officers and assume that entity liability has no effect on individual deterrence.²⁷⁴ But such an assumption is probably wrong.²⁷⁵) We might also buy Justice Powell's argument that the FTCA remedy, because of all the exemptions, "simply is not an adequate remedy."²⁷⁶ It's thus a stretch to say that *Carlson* has been quietly overruled, but certainly not all of the reasoning holds up well today in light of current doctrine.

Adopting a § 1983-like structure and mostly ignoring alternative remedies would also have the virtue of avoiding contingent debates about whether particular remedies at a particular time are adequate, leaving the choice of remedies instead to the litigant.²⁷⁷ There are many reasons—some good, some not so good—for preferring *Bivens* to state law. Maybe litigants (like John Malesko) sometimes choose *Bivens* because they don't know any better.²⁷⁸ Or they may prefer to be in federal court. Or they may want a forum where they can litigate a specifically *constitutional* value,²⁷⁹ or they may want to avoid the

272. See *supra* text accompanying note 68.

273. 446 U.S. 14 (1980).

274. See *Carlson*, 446 U.S. at 21 ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States."); *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (if agencies could be sued under *Bivens*, plaintiffs would always sue agencies instead of individuals, and "the deterrent effects of the *Bivens* remedy would be lost"); *Malesko*, 534 U.S. at 70–71 (discouraging corporate harms "has no relevance to *Bivens*, which is concerned solely with deterring the unconstitutional acts of individual officers"). Cf. *also supra* note 54 and accompanying text (discussing indemnification).

275. *Carlson*, 446 U.S. at 44–45 (Rehnquist, J., dissenting) (arguing that "other sanctions on employees—such as a threat of deductions in pay, reprimand, suspension, or firing"—may be effective "in promoting the desired level of deterrence"). But see *Richardson v. McKnight*, 521 U.S. 399, 410–11 (1997) (suggesting that civil service rules make disciplining public employees difficult). But see on the other hand Rosenthal, *supra* note 54, at 820 (arguing that *Richardson* was wrong on this point).

276. *Carlson*, 446 U.S. at 28 (Powell, J., concurring in the judgment).

277. Erwin Chemerinsky has taken a similar position. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 300–26 (1988).

278. *Malesko*, 534 U.S. at 80 n.8 (Stevens, J., dissenting).

279. See *infra* Part VI.D.

various state-law limitations I've discussed earlier.²⁸⁰ Allowing the litigant to choose frees judges and scholars from having to decide which system is more adequate.

But maintaining the other big parallelism—that between the public and private sectors²⁸¹—is tougher. The *Malesko* Court noted the desire to maintain such parallelism as a reason against recognizing entity liability under *Bivens*: federal public prisoners can't sue the BOP because of sovereign immunity, so neither should federal private prisoners be able to sue the private prison firm.²⁸² Perhaps. But the Court has already given up on the desire to maintain public-private parallelism: in the § 1983 context, *Richardson v. McKnight*²⁸³ denied private prison guards the qualified immunity enjoyed by public guards. Exceptions then built upon exceptions: when a case like *Minneci* came up in the Fourth Circuit, Judge Wilkinson—assuming that private qualified immunity would likewise be absent under *Bivens*—used this as an argument against extending *Bivens*.²⁸⁴

More fundamentally, talk about public-private parallelism is somewhat ambiguous, because the public and private sectors work differently as an empirical matter. Without rehashing the private prisons debate,²⁸⁵ suffice it to say that cost-cutting incentives are strong in the private sector and weak in the public sector, the effectiveness of monitoring can be expected to differ as between the sectors, the presence of competition is different, and so on.²⁸⁶ Moreover, as this Article has

280. See *supra* text accompanying note 172.

281. Reinert & Mulligan, *supra* note 50; Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 63 (D.R.I. 2003); Purkey v. CCA Detention Ctr., 339 F. Supp. 2d 1145, 1150 (D. Kan. 2004); Peoples v. CCA Detention Ctrs., 422 F.3d 1090, 1101 (10th Cir. 2005) (citing Sarro), *rev'd by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006); *id.* at 1110–11 (Ebel, J., concurring and dissenting). But see *id.* at 1103 (majority opinion) (“This asymmetry, however, existed prior to today’s holding; it was not created by this decision. An implied right, by definition, is created by the courts and therefore cannot exist until it is judicially announced.”).

282. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001); see also Peoples v. CCA Detention Ctrs., 422 F.3d 1090, 1111–12 (10th Cir. 2005) (Ebel, J., concurring and dissenting) (arguing that state-federal and public-private parallelism were hard to achieve simultaneously in *Malesko* but would be easy to achieve in the individual private officer case by recognizing the *Bivens* remedy), *rev'd by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006).

283. 521 U.S. 399 (1997).

284. Holly v. Scott, 434 F.3d 287, 294 (4th Cir. 2006).

285. See, e.g., Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 128, 129 (Jody Freeman & Martha Minow eds., 2009) (“Isn’t everything to be said on [private prisons] already in print?”).

286. See generally *Developments in the Law*, *supra* note 57, at 1868–91.

taken pains to show, the background legal regime of the public and private sectors is massively different. Any given legal regime, such as qualified immunity²⁸⁷ or *Bivens* will, accordingly, function differently in the public and private sectors; perhaps it will be necessary in one sector and not in the other. We can maintain parallelism of formal *Bivens* remedies and end up with a more effective regime in one sector than in another. Or we can seek equal levels of accountability, a different form of “parallelism,” which will require us to vary the availability of *Bivens*.

Bring in the decisions of the government actors who decide whether to privatize, and the analysis becomes harder still. Suppose, as the *Richardson* majority suggested, the private sector is more responsive to liability because of the greater flexibility of private business.²⁸⁸ We thus impose greater liability on the private sector—not because the private sector does worse, but because liability can do greater good there. It could even be (hypothetically) that liability does such a great job in the private sector that quality is substantially better there than in the public sector, where incentives are more sluggish. The result, however, will be that private prisons become more expensive relative to public ones. How will this affect the choice to privatize? If privatization is driven by an overall cost-benefit analysis, the private sector might be chosen despite its higher cost. But if, as Justice Scalia suggests in his *Richardson* dissent,²⁸⁹ privatization is primarily driven by cost-saving considerations, the system will wrongly choose the public provider even though the private system has higher quality. There’s thus a potential tradeoff between two kinds of efficiency—efficiency in service provision (which might require more liability) and efficiency in provider selection (which might require less liability).²⁹⁰

This was a hypothetical, of course. Many believe that private prisons are worse than public prisons because of harmful cost-cutting incentives;²⁹¹ for these people, liability is necessary *because* private

287. See, e.g., Clayton Gillette & Paul Stephan, *Richardson v. McKnight and the Scope of Immunity after Privatization*, 1 SUP. CT. ECON. REV. 1 (2000).

288. *Richardson*, 521 U.S. at 409–11.

289. *Id.* at 418–21 (Scalia, J., dissenting).

290. This flavor of tradeoff is familiar in many areas, for instance antitrust, regulated industries, and intellectual property, where allocative efficiency requires marginal-cost pricing while productive efficiency requires that producers be allowed to make sufficient profits to make production worthwhile. See, e.g., W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 408–23 (4th ed. 2005) (discussing how to manage the tradeoff between marginal cost pricing and cost recovery); *id.* at 865–81 (discussing the same problem with patents).

291. See, e.g., Dolovich, *supra* note 55; *McKnight v. Rees*, 88 F.3d 417, 424–25 (6th Cir. 1996). But see *Richardson*, 521 U.S. at 421–22 (Scalia, J., dissenting) (arguing that this theory is implausible and noting that the Supreme Court majority didn’t adopt it).

prisons are worse, and so the greater expense of private prisons under *Bivens* correctly reflects private prisons' worse performance. My point here is merely that the relative quality of public vs. private prisons is an intensely empirical debate, one that's unfortunately conducted without a lot of good data; and the debate over proper remedies should be conducted with this in mind.

Why not simply follow the approach I endorsed above for federal-state parallelism? Why not allow more remedies rather than fewer, avoiding contingent debates about the effectiveness of public vs. private, and leaving the choice of remedies to the litigant?²⁹² Because increasing the cost of state vs. federal incarceration is unlikely to alter the allocation of state vs. federal criminal work, either for better or for worse, so the tradeoff between efficiency in service provision and efficiency in provider selection is unlikely to arise. It's not logically impossible that voters would support more aggressive federal law enforcement and less aggressive state law enforcement when state incarceration becomes more expensive, but the prospect seems somewhat remote to me. I don't think the same can be said about increasing the cost of public vs. private incarceration, where cost considerations are very salient.

In short, I'm sympathetic to a robust *Bivens* doctrine that basically tracks § 1983, but it doesn't follow that there should be public-private parallelism in either *Bivens* or § 1983. Perhaps those who feel that private prisons are a blight on the criminal justice system²⁹³ should favor even *stricter* remedies for the private sector; I myself think private prisons haven't lived up to their boosters' expectations, but neither have they been a humanitarian disaster as compared to public prisons.²⁹⁴ I generally favor robust accountability regimes and am sympathetic to the idea of liability in the prison context, if only to alleviate private prisons' legitimacy deficit in the public mind, but I do recognize the importance of evaluating whatever accountability mechanisms already exist in deciding whether more are needed. In light of all this, it's possible that *Minnecci* might have been wrongly decided as a matter of *Bivens*

292. See *supra* text accompanying note 277.

293. See, e.g., Dolovich, *supra* note 55.

294. See GERALD G. GAES, THE CURRENT STATUS OF PRISON PRIVATIZATION RESEARCH ON AMERICAN PRISONS 9–12 (Aug. 2010), available at http://works.bepress.com/gerald_gaes/1/ (no strong conclusions to be drawn about recidivism resulting from incarceration in public vs. private prisons); *id.* at 26 (giving examples of rigorous public-private quality comparisons); *id.* at 32 (public and private sector “seem to have equal performance” where quality is concerned, though author himself isn't convinced by this because of “lack of quality assessment and weak methodology” of comparisons).

doctrine, but it was certainly non-crazy.²⁹⁵

C. *No Doomsday*

Moreover, even if *Minnecci* was wrongly decided, doomsday scenarios about its effect on prisoner rights seem unlikely to materialize.

I doubt that *Minnecci* will “permit a *Bivens* cause of action to be contracted away by federal entities who outsource their responsibilities to private corporations.”²⁹⁶ Well, more precisely, *Bivens* itself *can* be contracted away, as *Minnecci* shows, but that’s not the same as contracting away accountability. Unless actual, bottom-line accountability is harmed in this way, it’s hard to argue that *Minnecci* will lead to a harmful slippery slope. It’s true that privatization has the potential to mute constitutional accountability and reduce, or even eliminate, liability.²⁹⁷ But in the prison context, constitutional accountability hasn’t suffered.²⁹⁸ First, *West v. Atkins*²⁹⁹ made it clear that private doctors providing health-care services at public prisons are state actors. Next, *Richardson v. McKnight*,³⁰⁰ assuming that private prisons are state actors,³⁰¹ denied qualified immunity to private correctional officers (though it left open the possibility of a good-faith defense).³⁰² And now, *Minnecci* has denied *Bivens* remedies in a

295. John Preis has raised objections to having available state-law actions be a bar to *Bivens* in a case-by-case way, because a *Bivens* remedy would be approved or denied at the start of litigation, when it might be unclear whether the conduct complained of would fit within tort law. Preis, *supra* note 44, at 727, 749–58. But the *Minnecci* Court’s solution avoids these specific problems, since the inquiry into whether state law is adequate isn’t case-by-case but rather in bulk, looking into whether state law provides roughly comparable remedies over the broad run of cases.

The new state-law focus could also have some marginal effect in helping to validate “converse-1983 actions,” hypothetical state statutes subjecting federal actors violating the constitution to liability under state law. See John F. Preis, *The False Promise of the Converse-1983 Action*, 87 IND. L.J. 1697, 1719–20 (2012).

296. Reinert & Mulligan, *supra* note 50, at 20.

297. See Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

298. Though other, non-constitutional, forms of accountability have indeed decreased as a result of privatization. See, e.g., Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 301–02 (1995).

299. 487 U.S. 42 (1988).

300. 521 U.S. 399 (1997).

301. Correctly: see *supra* text accompanying note 55.

302. *Richardson*, 521 U.S. at 401. The *Richardson* Court also left open, among other issues, whether “a private individual briefly associated with a government body” could get qualified immunity. *Id.* at 413. In *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), the Court held that a private attorney hired by a city to do a particular job *could* get qualified immunity, explaining that *Richardson*’s holding was dictated by the specific incentives characteristic of the private-prison market. *Id.* at 1667.

(substantial³⁰³) range of private-prison Eighth Amendment cases, but only because of the broad overlap with and relative attractiveness of state-law remedies.³⁰⁴

Moreover, the *Minneeci* Court left open the possibility that *Bivens* might survive in other Eighth Amendment cases with no clear tort-law analogues,³⁰⁵ as, I suppose, in other constitutional areas without tort-law analogues like due process or equal protection or the limited prisoner rights that exist under the Fourth Amendment.³⁰⁶ (Not that these non-Eighth-Amendment areas *necessarily* lack a tort analogue: a due process claim stemming from, say, having one's phone calls with one's attorney monitored, which happened to Cornelius Peoples, could, at least in Kansas, give rise to an "intrusion upon seclusion" claim.³⁰⁷)

The Ninth Circuit panel that the *Minneeci* Court reversed suggested a few such cases: the wanton deprivation of a toilet, personal hygiene items, or physical exercise—or perhaps prolonged exposure to human waste—might rise to the level of an Eighth Amendment violation but might not fit within the Restatement's focus on physical harm.³⁰⁸ Some of Wesley Purkey's claims against his private jailors were also of this sort. For instance, his claims that he was subject to disciplinary action because he filed grievances and helped other inmates do the same³⁰⁹ might not have been tortious—even though others, like destruction of papers, unsafe shower conditions, and excessive use of force,³¹⁰ could fit comfortably into a tort framework. Same with Hawa Abdi Jama and Samson Brown's claims against the Esmor guards at their INS detention facility: torture, beating, and inadequate medical treatment can fit within

303. See Schlanger, *supra* note 51, at 1571 & n.48 (noting that assaults and medical care account for a substantial portion of inmate litigation, with due process litigation over disciplinary sanctions and more general living-conditions claims also accounting for a substantial portion).

304. Admittedly, even though this is a roughly equivalent level of accountability, one could argue over whether it's *constitutional* accountability. Maybe not; see *infra* Part VI.D.

305. See *Minneeci v. Pollard*, 132 S. Ct. 617, 625–26 (2012).

306. See *Reinert & Mulligan*, *supra* note 50, at 30 n.169; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 80 (2001) (Stevens, J., dissenting). As to the Fourth Amendment, inmates' rights are quite limited, given the needs of prison security; for instance, an inmate has no "reasonable expectation of privacy" in his prison cell. See *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984). But inmates may still retain Fourth Amendment rights against, for instance, body searches. See, e.g., *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 42 & n.5 (1st Cir. 2009).

307. *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1107–08 (10th Cir. 2005), *rev'd by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006).

308. *Pollard v. GEO Group, Inc.*, 629 F.3d 843, 864 (9th Cir. 2010) (citing *DeSpain v. Uphoff*, 264 F.3d 965 (10th Cir. 2001); *Vinning-El v. Long*, 482 F.3d 923 (7th Cir. 2007) (per curiam); *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979)); see also *Preis*, *supra* note 44, at 753.

309. *Purkey v. CCA Detention Ctr.*, 339 F. Supp. 2d 1145, 1152–53, 1154–55 (D. Kan. 2004).

310. *Id.* at 1151–52, 1153–54, 1155.

tort law; inadequate sanitation and exercise, maybe not.³¹¹ Judge Ebel's partial dissent in *Cornelius Peoples's* case suggests other possibilities: perhaps monitoring attorney calls intrudes upon seclusion, but what if the prison had merely insisted on having a guard and court reporter in the room when *Peoples* met with his lawyer?³¹²

Perhaps *Bivens* might even survive in a state that at some point lacks meaningful tort protections for private prisoner plaintiffs, though unfortunately *Minnecci* isn't clear on this.³¹³

D. *The Receding Value of Vindication*

One can still complain that the labeling matters, and that replacing a constitutional suit with a state-law tort suit doesn't really "enforce the constitutional norm," even if they're equal with respect to compensation and deterrence.³¹⁴ Perhaps importing tort rhetoric into the constitutional sphere has harmful effects, whether in the doctrinal sense (by importing doctrines of fault or cost-benefit analysis) or in a more expressive sense (by reconceptualizing the relationship between state and citizen).³¹⁵ Or perhaps the issue is just that constitutional tort is a more effective tool against the grand scale of government. "[A]ll causes of action for damages" are not "fungible units," says the Ninth Circuit,³¹⁶ or, as *Bivens* says, we can't "treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens".³¹⁷

311. *Jama v. INS*, 343 F. Supp. 2d 338, 346 (D.N.J. 2004).

312. *Peoples*, 422 F.3d at 1113 (Ebel, J., concurring and dissenting). Note that Judge Ebel may not be right that this hypothetical case wouldn't be tortious. According to the Second Restatement, intrusion upon seclusion can occur whenever "[o]ne . . . intentionally intrudes . . . upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1965). The reasonable offense prong suggests that possibly, given an inmate's expectation of confidential communications with his attorney, even Judge Ebel's hypothetical might be actionable.

313. Alexander Reinert and Lumen Mulligan also point out, intriguingly, that firms operating federal prisons try to use the government contractor doctrine to avoid state-law liability. These attempts have (rightly) failed, but to the extent they succeed, their preemption of state law would conceivably resurrect the *Bivens* action. Reinert & Mulligan, *supra* note 50, at 33–34; see also *supra* text accompanying notes 179–180.

314. Reinert & Mulligan, *supra* note 50, at 27 n.56; *Peoples*, 422 F.3d at 1109–11 (Ebel, J., concurring and dissenting).

315. Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1738–50 (1989).

316. *Peoples*, 422 F.3d at 1109 (Ebel, J., concurring and dissenting).

317. *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 391–92 (1971).

[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.³¹⁸

But if that's the theory, the Supreme Court retreated from it long ago, having long recognized that alternative (federal) non-constitutional remedies are sufficient to bar the *Bivens* action. Michael Wells argues that the modern cases have abandoned seeking *vindication* as a distinctive constitutional value; vindication is not served by merely providing adequate compensation and deterrence, but requires at least the opportunity to raise and obtain a ruling on one's constitutional claim.³¹⁹ To go that route here would require overruling *Schweiker v. Chilicky*,³²⁰ where the Social Security appeals process was held sufficient. (In *Bush v. Lucas*,³²¹ at least the claimant could raise a constitutional claim to show a violation of the civil-service statutes, so the decision there may be consistent with vindication.³²²)

Minneci underscores, then, that constitutional vindication as a distinct value isn't considered very important. (Perhaps denying *Bivens* and relying on alternative, nonconstitutional, remedies can be seen as a limited way for the Court to exercise constitutional avoidance.) I don't take a position in this Article on whether vindication *should* be considered important; my point here is narrower, that at least compensation and deterrence values, which are also important, continue to be served.

VII. CONCLUSION

I opened this Article with an allusion to the Supreme Court's uneasy relationship with criminal defendants' rights; *Minneci* can be easily read as fitting within a conservative anti-defendant tradition. But, while the retrenchment of *Bivens* has often been a conservative project, the partisanship of that move can be overstated: only Justices Marshall

318. *Id.* at 392; see also Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 758 (2006); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 686 (1997); Preis, *supra* note 44, at 750.

319. Michael L. Wells, *Reviving the Value of Vindication in Constitutional Tort Law* (2012) (unpublished draft, manuscript) (on file with author).

320. 487 U.S. 412 (1988).

321. 462 U.S. 367 (1983).

322. Wells, *supra* note 319.

and Blackmun dissented in *Bush v. Lucas*,³²³ *Chappell v. Wallace*³²⁴ was unanimous, and only Justices Ginsburg and Stevens dissented in *Wilkie v. Robbins*.³²⁵ This case likewise illustrates how the liberal-conservative divide doesn't govern every case: only Justice Ginsburg dissented here,³²⁶ even though Justice Breyer, who agreed with Justice Stevens's critique of the state-law argument in *Malesko*,³²⁷ could have joined her, and new Justices Sotomayor and Kagan likewise joined the majority.

It would be interesting to see how the law, or at least the dissent, would have been different if Justice Stevens were still around. Justice Stevens might have continued to press his view that alternative remedies shouldn't necessarily dispose of a *Bivens* claim,³²⁸ as well as his more general view that the Court needn't be sparing with implied rights of action.³²⁹ But, for now, it seems that even the Court's liberal wing is unwilling to take a strong stand on *Bivens*.

Moreover, while the case might well have been wrongly decided, and while it presumptively disadvantages federal private prison litigants to some extent in that it removes a cause of action that they might have found attractive, it's not a disaster for inmate rights. Private-prison inmate litigation will continue in a different form and partly in different venues; the vagaries of state tort law will play a rejuvenated role; and these vagaries may, on balance, be quite positive.

323. 462 U.S. 367, 390 (1983) (Marshall, J., dissenting).

324. 462 U.S. 296 (1983).

325. 551 U.S. 537, 568 (2007) (Ginsburg, J., dissenting).

326. 132 S. Ct. 617, 626 (Ginsburg, J., dissenting).

327. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.).

328. *See id.* at 78–79. *But see* *Schweiker v. Chilicky*, 487 U.S. 412, 430 (Stevens, J., concurring in part and concurring in the judgment) (agreeing with the majority, and disagreeing with a dissent by Justice Brennan, that *Bivens* could be restricted where the Social Security appeals process was available).

329. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (Stevens, J., dissenting).