11-2010

Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law

Peter Margulies
Roger Williams University School of Law

Judging Myopia in Hindsight: *Bivens* Actions, National Security Decisions, and the Rule of Law

Peter Margulies[*]

ABSTRACT: Liability in national security matters hinges on curbing both official myopia and hindsight bias. The Framers knew that officials could be short-sighted, prioritizing expedience over abiding values. Judicial review emerged as an antidote to myopia of this kind. However, the Framers recognized that ubiquitous second-guessing of government decisions would also breed instability. Balancing these conflicting impulses has produced judicial oscillation between intervention and deference.

Recent decisions on Bivens *claims in the war on terror have defined extremes of deference or intervention. Cases like* Ashcroft v. Iqbal *and* Arar v. Ashcroft *display a categorical deference that rewards officials' myopia. On the other hand, courts in* Padilla v. Yoo *and* al-Kidd v. Ashcroft *manifest an equally categorical interventionism that institutionalizes hindsight bias. To break with the categorical cast of both deferential and interventionist decisions, this Article proposes an innovation-eliciting approach. Inspired by remedies for cognitive bias and regulatory failure, it gives officials a stake in developing alternatives to both overreaching and abdication. Officials who can demonstrate they have implemented alternatives in other contexts that are both proportional and proximate in time to the instant case buy flexibility and dismissal of the lawsuit before the qualified immunity phase. By leveraging officials' experiences and expertise, the innovation-eliciting approach tames the "pendular swings" in policy that Justice Kennedy in* Boumediene v. Bush *viewed as undermining both liberty and security.*

* Professor of Law, Roger Williams University. I thank George Brown, Sudha Setty, Bill Simon, and Steve Vladeck for comments on a previous draft.

I. INTRODUCTION

National security can turn on which flight to take. An official can put a suspected terrorist on a plane with over a hundred innocent passengers, or select a flight to another country, where the suspect gains first-hand experience of "enhanced interrogation techniques." One influential court recently cited this stark choice in a decision on the availability of damages to redress extraordinary rendition.[1] Unsurprisingly, the court ruled that "special factors" barred the claim.

The choice-of-flights dilemma exemplifies one of two conflicting images of government action in national security cases. In decisions on access to habeas corpus, the Supreme Court has portrayed the government as manipulating the Constitution to evade accountability.[2] Providing detainees with access to habeas corpus curbed this manipulation and promoted deliberation about the risks of monolithic political power. In cases barring damage remedies, however, the same officials received a miraculous makeover. In this domain, the Court has portrayed government as eminently rational[3] and plaintiffs as manipulating the system.[4] These conflicting images are not new. In the past as well, the Court has tried to maximize

---

1. Arar v. Ashcroft, 585 F.3d 559, 580 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

2. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2258 (2008) (holding that "basic charter cannot be contracted away" by the government's placement of detainees at Guantanamo and that provisions of the Military Commissions Act of 2006 that stripped federal courts' jurisdiction over detainees' petitions for habeas corpus violated the Suspension Clause). For commentary on the Supreme Court's decision in *Boumediene*, see David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007–2008 CATO SUP. CT. REV. 47, and Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1. For additional insight, compare Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301 (2009) (arguing that judicially imposed rules are necessary to compensate for short-sighted executive policies), with Eric A. Posner, *International Law and the War on Terror:* Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUP. CT. REV. 23, 39–46 (criticizing *Boumediene* as unduly extending protections of American law to noncitizens not on American soil).

3. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009) (describing the round-up of undocumented Muslim noncitizens after September 11th as a "legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks"). The government's own report portrayed the round-up in a different light. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 41–42 (2003), *available at* http://usdoj.gov/oig/special/0306/full.pdf (concluding that arrests in the vast majority of cases occurred because of "chance encounters or tenuous connections" rather than because of "genuine indications" of terrorist ties or the possession of useful information); *see also* DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 30–31 (2007) (discussing the post-9/11 round-up).

4. *See Iqbal*, 129 S. Ct. at 1953 (warning of excessive discovery burdens imposed on officials by plaintiffs who will skew the theory of the case to unfairly target defendants).

deliberation by limiting the volatility that crises often generate.[5] However, the gap between images of government in the most recent decisions threatens to accelerate the "pendular swings" that the Court feared.[6] Closing that gap requires an approach to damages claims that departs from judicial trends.

Historically, the Court has sought to correct for errors in two perennial perspectives on national security crises. Presentist bias (or "myopia")[7] often afflicts officials, who order short-term fixes like mass detentions or curbs on free speech with troubling long-term consequences.[8] To remedy this bias, the courts have preserved detainees' access to habeas corpus and inferred the availability of a cause of action for damages under the Constitution.[9]

---

5. *Compare* Korematsu v. United States, 323 U.S. 214 (1944) (upholding constitutionality of statute criminalizing failure to comply with executive order that Japanese–Americans on the West Coast evacuate their homes), *with Ex parte* Endo, 323 U.S. 283, 294 (1944) (holding that Congress had not granted the President authority to detain concededly loyal Japanese–Americans).

6. *Boumediene*, 128 S. Ct. at 2246. *See generally* Patrick O. Gudridge, *Remember* Endo?, 116 HARV. L. REV. 1933 (2003) (analyzing these decisions).

7. I use the terms "myopia" and "presentist bias" to describe a cluster of phenomena that continue to challenge experimental psychologists. These terms have in common the willingness of individuals to prefer, to a degree not consistent with expected-utility theory, a smaller gratification available immediately rather than a larger good that is delayed. *See* Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1158–66 (1986); *see also* Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, *in* BEHAVIORAL LAW AND ECONOMICS 13, 45–46 (Cass R. Sunstein ed., 2000) (noting a tendency to inappropriately discount future costs); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443 (1997) (arguing that individuals use "commitment mechanisms" such as insurance policies or savings plans to compensate for tendency to unduly discount the future); George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Projection Bias in Predicting Future Utility*, 118 Q.J. ECON. 1209 (2003) (analyzing flaws in discounting over time); Daniel Read, *Intertemporal Choice*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 424, 428–29 (Derek J. Koehler & Nigel Harvey eds., 2004) (noting tendency of individuals to prefer "smaller-sooner reward").

8. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (requiring due-process protections because giving an executive a "blank check" would threaten framework of liberty); *cf.* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 151 (2007) (warning that legal memos with expansive view of presidential authority, prepared by Justice Department Office of Legal Counsel and later withdrawn by Goldsmith as assistant attorney general, could have provided officials with "blank check" for wrongdoing). Sophisticated commentators preferring a more deferential approach accept the general notion that temporal discounting is suboptimal, but disagree that courts are competent to cope with this deficit. They argue that countervailing factors, such as hindsight bias, may impair courts' ability to evaluate political branches' actions. *Compare* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1029 (2008) (observing that governmental institutions have a limited "time horizon" that fails to factor in harms to future generations), *with* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 4–6 (2007) (noting flaws in courts' decisions when reviewing responses to crises).

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

Courts also correct for hindsight bias.[10] Graced with the omniscience of hindsight, courts and juries overestimate officials' ability to correctly decide whom to arrest, detain, or interrogate. To avoid separation-of-powers issues prompted by punishing officials for mere mistakes, courts have ruled that officials retain qualified immunity from suit unless they have violated "clearly settled" law.[11]

While judicial correctives for both myopia and hindsight bias vindicate values like due process and the separation of powers, they also reduce volatility. Myopia and hindsight bias hold the rule of law hostage to wide political oscillations. These occur because people facing losses are risk-prone.[12] Behavioral substitutions that adjust to changes in the law[13] may

---

10. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight, in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 7, at 95, 95 (noting that maxims such as "hindsight . . . is '20/20'" stand for the proposition that "[l]earning how the story ends . . . distort[s] our perception of what could have been predicted"); Neal J. Roese, *Twisted Pair: Counterfactual Thinking and the Hindsight Bias, in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 7, at 258, 260–61 (defining hindsight bias as "the tendency to believe that an event was predictable before it occurred, even though for the perceiver it was not"); *see also* sources cited *infra* note 66 (discussing hindsight bias in greater detail).

11. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Richard H. Fallon, Jr., *Some Confusion About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 338–39 (1993) (discussing the Supreme Court's effort to seek equipoise between protecting constitutional rights and preserving domain of official discretion in damages actions); *see also* Pearson v. Callahan, 129 S. Ct. 808 (2009) (revising sequence of analysis regarding qualified immunity to allow the court to find that an official had immunity due to absence of clearly settled law without first determining whether a plaintiff's rights were violated); Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 608–12 (2009) (discussing rationale for *Pearson* holding); *cf.* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117 (2009) (arguing that the *Pearson* holding encouraged undue deference for official decisions). *See generally* Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281 (arguing that failure to curb damages actions leads to undue official risk-aversion).

12. *See* Thierry Post, Martijn J. van den Assem, Guido Baltussen & Richard H. Thaler, *Deal or No Deal? Decision Making Under Risk in a Large-Payoff Game Show*, 98 AM. ECON. REV. 38, 40, 48–49 (2008) (analyzing betting behavior); Emily Pronin, Carolyn Puccio & Lee Ross, *Understanding Misunderstanding: Social Psychological Perspectives, in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636, 639 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) (noting individuals' "willingness to take foolish risks in order to avoid certain losses"); George A. Quattrone & Amos Tversky, *Contrasting Rational and Psychological Analyses of Political Choice, in* CHOICES, VALUES, AND FRAMES 451, 453–58 (Daniel Kahneman & Amos Tversky eds., 2000).

13. *See* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 530 n.3 (2006). Substitutions include legal behavior undertaken when other behavior is criminalized. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 575 (2001) (discussing a drift toward legal gambling that would occur if only specific types of gambling such as numbers rackets were prohibited). Substitutions can also entail conduct that is illegal, but not penalized as severely, or behavior that is more difficult to detect or deter. *See* Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1174–75 (2004) (discussing substitution effects).

entail risk-seeking that undermines the potential for deliberation among divergent stakeholders. For example, when political dissenters lose faith in the prospects for a peaceful transition from myopic policies, they may substitute revolutionary action for reformist speech.[14] Having staged a revolution, some erstwhile rebels learn the wrong lesson, using the machinery of the state to police the purity of adherents.[15] Remnants of the former regime recoup, citing the rebels' excesses. In each phase of the cycle, differentiation from the previous phase becomes a proxy for soundness on the merits. A carefully crafted damages remedy restrains official myopia and thereby curbs this counterproductive cycle. Viewed in that light, judicial solicitude for free speech is not only an expression of constitutional principle; it is also an institutional mechanism for safely containing the sometimes volatile "experiment" of popular governance.[16]

Hindsight bias's role in the promotion of volatility compounds the challenges that judicial review must confront. Theorists have observed that subjects of regulation who fear regulators' hindsight bias become alienated

---

14. *See* CHARLES TILLY, FROM MOBILIZATION TO REVOLUTION 39 (1978) (discussing movements' "repertoire of collective action"); CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE 34 (2003) (discussing incentives for tactical choices by political entrepreneurs); Colm Campbell & Ita Connolly, *A Deadly Complexity: Law, Social Movements and Political Violence*, 16 MINN. J. INTL. L. 265, 276 (2007) ("[I]f the state represses nonviolent protest, dissenters are likely to switch to violent tactics."). Those who distrust the judiciary's ability or inclination to protect liberty will favor measures closer to popular constitutionalism, such as the regular calling of constitutional conventions. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 45–46 (2004) (discussing Jefferson's views). Constitutional conventions are also risky undertakings, since once convened they may not be easy to control. *Id.* at 59–61. In contrast, when people oppressed by myopic governmental restrictions nonetheless trust the system, they can mobilize to force political changes, as the outcry over the Alien and Sedition Acts demonstrated early in our history. *Id.* at 136–38; *cf.* Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1204 (discussing the Founding Era debate over the Alien and Sedition Acts and noting that "constitutional meaning was hammered out informally through political contestation"); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1599–1615 (2005) (book review) (analyzing arguments against constitutional interpretation by people and elected officials).

15. *See* HANNAH ARENDT, ON REVOLUTION 98 (Penguin Books 1990) (1963) (noting that the French Revolution, "before it proceeded to devour its own children, had unmasked . . . the chief actors" as lacking sufficient revolutionary spirit).

16. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1826–28, 1835 (2009) (discussing the institutionalist vision of international and constitutional law as coordinated games in which parties bind themselves to accept less desired outcomes in the short term in order to ensure gains over time). Cases like *Boumediene* suggest that the government's extreme actions are more likely to trigger adverse judicial decisions that restore constitutional equilibrium. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2246 (2008) (expressing concern about political volatility); *see also* GOLDSMITH, *supra* note 8, at 124–25, 134–35 (arguing that extremes in the Bush Administration's responses to terrorism caused a backlash in courts).

from the entire legal regime.[17] They view the status quo as intolerable and take unwise risks that undermine compliance. Since defendants in *Bivens* actions are subject to regulation by judges and juries, fear of hindsight bias can make them unduly risk-prone. Officials who fear future retaliation may cling stubbornly to power, doubling down on repressive measures because they view the status quo as trending in the wrong direction.[18] This risk-prone behavior exacerbates the cycling that the *Boumediene v. Bush* Court sought to curb. To reduce cycling and enhance deliberation, courts must strive for an equilibrium that corrects for both myopia and hindsight bias.

Unfortunately, recent judicial decisions have abandoned this search for an equilibrium and embraced categorical deference or intervention. In *Ashcroft v. Iqbal*[19] and *Arar v. Ashcroft*,[20] categorical deference carried the day. Viewing qualified immunity as insufficient to protect against hindsight bias, *Iqbal* dismissed claims that senior officials turned a blind eye to the mistreatment of post-9/11 detainees. *Arar* precluded claims that defendants aided an "extraordinary rendition" to Syria. Neither decision discussed whether official myopia might have led to the brutal treatment that the plaintiffs alleged. Instead, these decisions viewed responses to risk as binary, requiring that officials choose between abusing detainees and abdication in the face of terror.[21]

---

17. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 4–5, 35–41 (1992).

18. *See* Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 354 (2009) (noting importance of transitions to the rule of law of pacts that provide business, military, and political elites with guarantees of stability to discourage risk-seeking by potential "losers" in regime change); *see also* DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY 135 (2009) (discussing rationale for pacts between elites); Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. TORONTO L.J. 341, 369 (2009) (noting that governments facing popular discontent "may be stampeded . . . into the precipitous adoption of new policies or institutions" that exacerbate underlying problems).

19. 129 S. Ct. 1937 (2009); *see infra* notes 129–36, 145–48 and accompanying text (analyzing *Iqbal*).

20. 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010); *see infra* notes 137–44, 149–55 and accompanying text (analyzing *Arar*).

21. For thoughtful defenses of this categorical turn, see George D. Brown, *"Counter-Counter-Terrorism via Lawsuit"—The* Bivens *Impasse*, 82 S. CAL. L. REV. 841 (2009) (arguing that Congress should create remedies), Richard Klingler, *The Court, the Culture Wars, and Real Wars*, 30 A.B.A. NAT'L SECURITY L. REP., June 2008, at 1, 4, and Julian Ku, *Accountability for the Torture Memo: The Wrongheaded and Dangerous Campaign To Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT'L L. 449 (2009). For further insight, see David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 317–18 (2009) (arguing that *Bivens* actions can enlist courts as unwilling participants in policy disputes).

The categorical-deference approach has an interventionist counterpart.[22] In *al-Kidd v. Ashcroft*[23] and *Padilla v. Yoo*,[24] courts evaluated officials' decisions from the cozy recliner of retrospect. *Padilla*, involving a formerly detained alleged enemy combatant's claim for damages, asked only whether the plaintiff's rights were violated. The court collapsed qualified immunity's core distinction between the present legal status of the plaintiff's rights and their status at the time of the official defendant's decision. The court in *al-Kidd*, a case involving a former material witness's claim that he was wrongly detained, insisted on a distinction between witness and target that would deprive officials of needed flexibility in transnational terrorism cases. Ironically, the interventionist decisions posit the same binary choice as the categorical-deference model: overreaching or abdication. Categorical deference and intervention thus undermine hopes for equilibrium between presentist and hindsight biases.

To salvage that equilibrium, this Article proposes an innovation-eliciting approach to *Bivens* remedies in national security cases. Utilizing insights from literature on remedying cognitive biases[25] and regulatory failure,[26] it gives officials a stake in the development of a broader repertoire of national security strategies. Officials must show that in other cases they implemented alternatives to the conduct alleged in the lawsuit. When the alternative dispositions are congruent, proportional, and proximate in time to the actions at issue, the court rewards the official by dismissing the lawsuit prior to the qualified immunity phase. Put simply, the approach exchanges

22. For scholarship justifying activism in constitutional damages claims, see Susan Bandes, *Reinventing* Bivens*: The Self-executing Constitution*, 68 S. CAL. L. REV. 289 (1995), Marsha S. Berzon, Lecture, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 691–98 (2009), Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1145–53 (1989) (arguing for elimination of "special factors" test for availability of *Bivens* action), and Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006–2007 CATO SUP. CT. REV. 23 (arguing that the Court had engaged in undue deference to the government in *Robbins*).

23. 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

24. 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

25. *See* Baruch Fischhoff, *Heuristics and Biases in Application*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 12, at 730, 731 (discussing the importance of feedback that subjects perceive as fair and impartial); Richard P. Larrick, *Debiasing*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 7, at 317, 327 (discussing the value of group analysis of alternatives).

26. *See* AYRES & BRAITHWAITE, *supra* note 17 (arguing that regulatory approaches stressing cooperation are more successful than command-and-control strategies); Robert A. Kagan, Neil Gunningham & Dorothy Thornton, *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 LAW & SOC'Y REV. 51, 73–74 (2003) (noting the lack of efficacy of legal sanctions); Orly Lobel, *Citizenship, Organizational Citizenship, and the Law of Overlapping Obligations*, 97 CALIF. L. REV. 433, 470–73 (2009) (discussing new models of governance emphasizing cooperation and dialog).

officials' liability in a specific case for an overall increase in the cultivation of alternatives. Over time, the innovation-eliciting approach will yield an equilibrium between myopia and hindsight bias, limiting the "pendular swings" in policy that Justice Kennedy identified in *Boumediene* as a central threat to constitutionalism.

The Article proceeds in four parts. Part II describes both presentist and hindsight biases. It traces these biases not only through the cognitive-psychology literature, but also through the Framers' concerns and the Founding Era's reactions to the revolution in France. The discussion of the effect of the French Revolution illustrates courts' concerns with seeking an equilibrium between myopia and hindsight bias. A tilt toward either extreme magnifies risk-seeking and volatility at deliberation's expense.

Part III critiques the categorical deference and interventionism that have upset the landscape of constitutional damages claims in recent national security cases. The binary choice that deference posits between overreaching and abdication actively discourages the development of alternatives that vindicate both liberty and security. The result in practice is categorical impunity for officials. However, categorical interventionism does not improve on deference. Interventionism also depicts officials' choices as binary. In pushing officials toward abdication, interventionism fails to generate nuanced alternatives. Moreover, the turn toward intervention weakens the barrier against burdensome discovery that qualified immunity provided. Categorical intervention in lower courts thus bolsters the argument by champions of deference that qualified immunity cannot adequately protect officials against hindsight bias.

Part IV advances the innovation-eliciting approach as an alternative to the instability created by both categorical deference and interventionism. Like prescriptions for debiasing decisionmaking subject to cognitive flaws, this approach focuses on generating alternatives. As in proposals for cooperative regulation, the innovation-eliciting approach turns away from top-down models and instead enlists the expertise of the regulated entity to craft solutions. Alternatives developed in this manner will have valuable demonstration effects, building habits that diffuse the binary choices of the categorical approaches.

Part V considers objections to the approach. Critics might assert that the innovation-eliciting model encourages strategic behavior, allowing officials to "bank" alternatives in unimportant cases to provide a safe harbor in a major case. However, other constraints such as criminal law remain in place to curb such conduct. Another criticism is the approach's apparent downgrade of compensation. If the premises of the model are correct, however, over time, harms will decrease as alternatives take hold, making compensation less of an issue. Moreover, other doctrines, such as qualified immunity and evidentiary privileges, limit compensation in the name of more effective policy. Champions of deference may also argue that requiring

officials to provide evidence of implemented alternatives expands discovery in a fashion inconsistent with the Court's concerns about the burdens of litigation. Here, courts can fashion doctrines that insulate official discretion in particularly sensitive settings, such as military attacks. While each objection is powerful, none trumps the benefits of encouraging official innovation through a flexible approach to damages claims.

II. COGNITIVE BIASES IN CONSTITUTIONAL RIGHTS AND REMEDIES

Scholars have argued for decades that pervasive biases infect human cognition, producing distortions in decisions.[27] Yet a pragmatic understanding of these biases preceded this empirical investigation, playing a key role in the deliberations of the Framers. The Framers understood that political officials, courts, and the public share these biases, particularly the presentist bias, which disproportionately stresses short-term outcomes, and the hindsight bias, which makes every official mistake seem avoidable. Correcting for one of these biases is difficult enough. In addition, correction of one bias tends to magnify the other's effect. Corrections trigger path-dependent perspectives on risk, as each correction intensifies the countervailing bias and response. As an example, correcting for presentism

27. Cognitive psychologists call such distortions biases and heuristics—the latter referring to simple guides to inference and prediction that serve humans well in many common decisions, but can also lead individuals astray. *See* Gideon Keren & Karl H. Teigen, *Yet Another Look at the Heuristics and Biases Approach*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 7, at 88, 97 (noting that vivid risks skew judgments of probability); Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 30–31 (1998) (discussing importance of salience in human inference and judgment); Steven J. Sherman et al., *Imagining Can Heighten or Lower the Perceived Likelihood of Contracting a Disease: The Mediating Effect of Ease of Imagery*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 12, at 98, 101 (noting that vivid images, such as an illness with identifiable symptoms, raise probability estimates of contracting disease even without objective evidence); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973) [hereinafter Tversky & Kahneman, *Availability*] (discussing the empirical findings on vividness or "availability"); *see also* Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 12, at 19, 34 (discussing the "representativeness" heuristic, which describes the tendency to draw causal connections between attributes or events that are superficially similar). For applications of heuristics and biases to areas of substantive law, see Donald C. Langevoort, Essay, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-deception, Deceiving Others, and the Design of Internal Controls*, 93 GEO. L.J. 285 (2004) (securities law), and Peter Margulies, *"Who Are You To Tell Me That?": Attorney–Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 232–39 (1990) (unintended consequences and public-interest law). *See also* Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?*, 112 YALE L.J. 1011, 1019 (2003) (discussing cognitive biases in the war on terror); Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 158–63 (same).

(or myopia as some scholars have called it)[28] often requires robust judicial review of official action. Without this check, officials have little incentive to avoid reckless decisions. However, fear of hindsight bias in a post hoc evaluation, such as a damages award to a victim of a government decision, also distorts officials' incentives. The result is volatility that undermines constitutional deliberation.

A. *PRESENTIST BIAS: SHORTSIGHTEDNESS, POLITICAL CHANGE, AND THE ROLE OF COURTS*

Human beings suffer from myopia or presentist bias. They stress short-term risks and benefits, and inappropriately discount the long term.[29] Cognitively speaking, people perceive time the way the New Yorker in the Saul Steinberg cartoon perceives location. The difference between today and tomorrow is huge, like the distance between New York and New Jersey in the artist's depiction;[30] the difference between tomorrow and next year is slim, like the exaggerated proximity of New Jersey and the Pacific Ocean in the cartoon. Based on myopia, people will forego valuable investments that incur up-front costs or engage in self-destructive behaviors like substance abuse that are gratifying in the short term.[31]

The dangers of a presentist bias were not lost on the Framers. Hamilton observed that the legislature was often susceptible to the "effects of occasional ill humors in the society."[32] These effects could prompt "serious

28. *See* George Loewenstein & Ted O'Donoghue, *"We Can Do This the Easy Way or the Hard Way": Negative Emotions, Self-regulation, and the Law*, 73 U. CHI. L. REV. 183, 183 (2006) ("[H]umans are inherently myopic.").

29. *See* Shane Frederick, George Loewenstein & Ted O'Donoghue, *Time Discounting and Time Preference: A Critical Review*, *in* TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE 13, 32–34 (George Loewenstein, Daniel Read & Roy F. Baumeister eds., 2003); Jolls, Sunstein & Thaler, *supra* note 7, at 46; Laibson, *supra* note 7; Loewenstein, O'Donoghue & Rabin, *supra* note 7. For a different perspective that nonetheless supports the case for judicial review, see Nira Liberman & Yaacov Trope, *Construal Level Theory of Intertemporal Judgment and Decision*, *in* TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE, *supra*, at 245, 247–56. Liberman and Trope argue that changes in preference over time occur because people construe near- and long-term events at different levels of generality, with more concrete images formed for near-term events and more abstract concepts for longer-term events. According to the authors, incidental features of choice that cause anxiety or inconvenience are discounted heavily over time but are prominent in short-term decisions. Experimental subjects who feel visceral states such as hunger overestimate the likelihood that they will experience such states in the future.

30. *See* Jeanne English Sullivan, *Copyright for Visual Art in the Digital Age: A Modern Adventure in Wonderland*, 14 CARDOZO ARTS & ENT. L.J. 563, 616 (1996) (describing Steinberg's cartoon as a depiction of New Yorkers' myopic view of the world).

31. *See* Drazen Prelec, *Decreasing Impatience: A Criterion for Non-stationary Time Preference and "Hyperbolic" Discounting*, 106 SCANDINAVIAN J. ECON. 511, 513 (2004) (explaining procrastination).

32. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

oppressions of the minor party in the community."[33] Reinforcing this theme, Madison noted that "indirect and remote considerations ... will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole."[34]

From the Founding Era to the present, presentist bias has posed a special risk in the domain of national security. Justice Powell warned against the "tendency of Government ... to view with suspicion those who most fervently dispute its policies."[35] The ease of applying the national security rubric to targets of convenience heightens the risk of overreaching.[36] The secrecy that shrouds national security decisions compounds the risk.[37] While Powell was alluding to the excesses of the Nixon Administration, his description also fits the early years of the Republic. Most prominently, the Alien and Sedition Acts sought to curb dissent from groups that sprang up to support the French Revolution's aims.[38]

1. Constitutional Cycling: Myopia and Path-Dependence

Path-dependence can exacerbate myopia's effects. Social scientists have discovered that a decision hinges more on the outcome of a previous decision than on a rational examination of a proposal's stand-alone merit.[39] Path-dependent effects can increase cycling and volatility.[40] Cycling emerges

---

33. *Id.*

34. THE FEDERALIST NO. 10, *supra* note 32, at 80 (James Madison).

35. United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div., 407 U.S. 297, 313–14 (1972), *cited in* Mitchell v. Forsyth, 472 U.S. 511, 523 (1985).

36. *Id.*

37. *Mitchell*, 472 U.S. at 522.

38. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 590–93 (1993). For a superb discussion of the lead-up to the enactment of the Alien and Sedition Acts, see Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1536–51 (2004), and Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUM. RTS. L. REV. 547, 566 (2007) (discussing Alien and Sedition Acts). *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1789 TO THE WAR ON TERRORISM 13 (2004) (discussing history of governmental attempts to stifle free speech).

39. *See* Frederick, Loewenstein & O'Donohue, *supra* note 29, at 36–38 (noting that people evaluate outcomes based on perceived departures from a current reference point); George Loewenstein & Erik Angner, *Predicting and Indulging Changing Preferences*, *in* TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE, *supra* note 29, at 351, 372–74 (noting that an individual's current state, such as hunger, will lead to incorrect predictions of his or her state in the near future; the prediction made by the individual hinges on the current state, not on the merits of the future decision).

40. *See* Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 11–12 (2009) (discussing Condorcet's Voting Paradox); *cf.* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815–21 (1982) (arguing that, because of cycling, a multimember body, such as an appellate court, will display intransitivity in preferences that violates principles of rationality). Path-dependence can also generate more stability than is optimal when coupled with a strong preference for precedent. *See* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 109–10 (2009) ("[W]here the common

in multimember systems, including appellate courts or an electorate consisting of Democrats, Republicans, and Independents. In these scenarios, previous decisions will spawn a backlash and shifting coalitions, which will in turn elicit a response and a counter-response. Each outcome will hinge more on the prior sequence than on "bipartisan" or cooperative decisionmaking independent of these agenda effects.[41]

Path-dependence also influences attitudes about risk. Prospect theory suggests that an individual's immediate past experiences will influence his or her attitude toward risk in a fashion that is inconsistent with utility. People are loss-averse; i.e., they dislike losses more than they like gains. So framing a current decision against a background of losses will encourage risk, as people try to "change their luck."[42] Under conditions of path-dependence, entities, such as corporations, may also choose less-than-optimal results because of historical influences on their rules and structure.[43] Path-dependence is a notoriously "sticky" phenomenon: the responses that it generates resist modification and revision.[44] Similarly, partisans persist in their posturing, although their obstinacy guarantees that the cycling will continue.[45]

Under conditions of path-dependence, myopic measures can trigger risky substitutions to drive a cycle of civil unrest. To illustrate these "pendular swings," Justice Kennedy in *Boumediene v. Bush* cited the bloody contests in seventeenth-century Britain between the King and Parliament

---

law starts, which is typically random . . . constrains where it can go, and how quickly."); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 606–22 (2001); *see also* Vincy Fon, Francesco Parisi & Ben Depoorter, *Litigation, Judicial Path-Dependence, and Legal Change*, 20 EUR. J.L. & ECON. 1, 10–13 (2005) (noting how a strong system of precedent generates consolidation in legal rules).

41. *See* Vermeule, *supra* note 40, at 11–12.

42. *See* Quattrone & Tversky, *supra* note 12, at 457. In contrast, framing the same decision within a domain of gains will typically encourage risk-aversion, as people strive to keep what they have already acquired. *See* Pronin, Puccio & Ross, *supra* note 12, at 639; Kurt Weyland, *Toward a New Theory of Institutional Change*, 60 WORLD POL. 281, 288, 307–10 (2008). For example, parties in litigation who could settle for a certain loss will often elect to go to trial, even when the low probability of prevailing and the cost of continued litigation make the net expected outcome of settlement superior. Post, van den Assem, Baltussen & Thaler, *supra* note 12, at 67–68; Pronin, Puccio & Ross, *supra* note 12, at 639.

43. *See* Lucian Arye Bebchuck & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 134–42 (1999) (seeking to explain variations from optimal business models among corporations chartered in different nations).

44. *See* Chris Mantzavinos, Douglass C. North & Syed Shariq, *Learning, Institutions, and Economic Performance*, 2 PERSP. ON POL. 75, 76–77 (2004).

45. Partisan maneuvers may spring from a prisoner's dilemma game in which each side executes the strategy that promotes short-term success. If we assume that both sides ultimately benefit from cooperative solutions, the short-term strategy is another example of presentist bias. *See* Jonathan Remy Nash, *Allocation and Uncertainty: Strategic Responses to Environmental Grandfathering*, 36 ECOLOGY L.Q. 809, 837 n.126 (2009) (describing tragedy of the commons in which multiple players exploit nonrenewable resources to the detriment of public welfare as "multiplayer prisoners' dilemma").

over the writ of habeas corpus.[46] Charles I had sought to imprison four individuals who had declined to lend money to the spendthrift monarch.[47] Parliament sought to curb this power. Upping the ante against a background of loss in prestige and authority, the King dissolved Parliament. Threatened by loss of liberty as a result of the King's action, the forces of Parliament became convinced of the need for even riskier action. At this point, observed Justice Kennedy, "[c]ivil strife . . . soon followed,"[48] including Charles I's beheading.[49] In due course, the turmoil of the time led to restoration of the monarchy.

During this volatile period in British history, decisions about governance hinged on excesses that had previously occurred, as opposed to the merits of underlying disputes.[50] Parliament's views were more consistent with what the British call the "ancient Constitution."[51] Nevertheless, the risk-seeking on each side produced a cycle of unrest that went well beyond the dictates of necessity, as the Framers recognized.[52]

2. Myopia and Judicial Remedies

Mechanisms such as judicial review and the separation of powers institutionalize the Framers' insight.[53] Justice Kennedy indicated in *Boumediene* that habeas corpus provided greater accountability for the

46. Boumediene v. Bush, 128 S. Ct. 2229, 2245 (2008). For insight into the intellectual underpinnings of revolution that illustrates this volatility, see MICHAEL WALZER, THE REVOLUTION OF THE SAINTS: A STUDY IN THE ORIGINS OF RADICAL POLITICS 290–96 (1965) (discussing origins of a turn toward violent change during the Puritan Revolution).

47. *Boumediene*, 128 S. Ct. at 2245.

48. *Id.*

49. *See* Daniel Bell, *Ethics and Evil: Frameworks for Twenty-First-Century Culture*, 63 ANTIOCH REV. 207, 210 (2005).

50. Wise leaders understand this dynamic and reject myopic restrictions. For example, while President Washington distrusted the societies favorable to the French Revolution that arose during his administration, he recognized that criminal prosecutions would only "make them grow stronger." Chesney, *supra* note 38, at 1559 n.168 (quoting Letter from President George Washington to Governor Henry Lee (Aug. 26, 1794), *in* 33 THE WRITINGS OF GEORGE WASHINGTON 476 (John C. Fitzpatrick ed., 1940)) (internal quotation marks omitted).

51. *See* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 44–45 (1957); Larry May, *Magna Carta, the Interstices of Procedure, and Guantanamo*, 42 CASE W. RES. J. INT'L L. 91, 99 (2009).

52. *See* Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 15–19, 40 (1999) (discussing factions and volatility in history of English impeachments and noting that Madison structured the impeachment process to preserve accountability while "protecting the chief executive from the direct factional pressures of public sentiment"). *See generally* Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479 (1994) (discussing the Framers' distrust of "faction").

53. *See* Goldsmith & Levinson, *supra* note 16, at 1831–33.

political branches, thus tempering myopia.[54] Courts have crafted other constitutional remedies to mitigate myopia's effects. For example, from the early days of the Republic, courts have awarded monetary relief to individuals injured by official action in national security matters.[55]

Constitutional damages claims reached a new plateau when the Warren Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[56] While *Bivens* expanded the traditional palette of relief, the Court's decision rested on the courts' equitable power to craft remedies. Justice Harlan's concurrence famously opined that for Bivens, the remedy for concededly egregious constitutional violations was "damages or nothing."[57] As an individual whom the Court assumed was innocent, Bivens had no recourse to the exclusionary rule that the Court had recently crafted to deter overreaching by law enforcement.[58] Moreover, as Harlan suggested, the courts' willingness to fashion a remedy was also an object lesson in the value of the rights that the government had violated.[59] Sending this message was important even—or perhaps, especially—when few people would actually litigate such claims.[60]

---

54. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2245–46 (2008); *see also* Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165 (discussing importance of habeas as check on political branches).

55. *See* Paquete Habana, 175 U.S. 677 (1900) (ordering after Spanish–American War that the government provide monetary relief to the owner of a Cuban coastal fishing vessel that the Navy had seized during the conflict); Little v. Barreme, 6 U.S. (2 Cranch) 170, 173, 177, 179 (1804) (ordering Navy captain to pay damages for seizing a vessel in violation of a statute, observing that instructions from the executive could not "legalize an act which without those instructions would have been a plain trespass"); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (ordering Navy commander to pay damages for improperly seizing a vessel owned by a national of a neutral power); *see also* Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (ordering relief from official's attempt during War of 1812 to condemn as enemy property cargo on a vessel chartered by a British company); Ingrid Brunk Wuerth, *The President's Power To Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1597–607 (2004) (analyzing *Brown*). *But see* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 67–72 (1999) (discussing limits of early decisions regarding monetary relief); *infra* notes 82–88 and accompanying text (discussing relationship between early cases and *Bivens* remedies). *See generally* Berzon, *supra* note 22, at 691–98 (same).

56. 403 U.S. 388 (1971).

57. *Id.* at 410 (Harlan, J., concurring); *see also* Brown, *supra* note 21, at 851–52 (discussing the relationship between Harlan's position and the practice of implying private rights of action in statutes); *cf.* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1545–46 (1972) (same).

58. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). Subsequent research has cast doubt on Bivens's factual innocence, which does not justify law enforcement's abusive conduct. *See* James E. Pfander, *The Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *in* FEDERAL COURTS STORIES 275, 290–91 (Vicki C. Jackson & Judith Resnik eds., 2010).

59. *Bivens*, 403 U.S. at 411 (Harlan, J., concurring).

60. *Id.*

At the same time, Harlan recognized that countervailing factors could counsel against affording relief.[61] Harlan's caveat echoed the prudential note in Justice Brennan's majority opinion that "special factors counselling hesitation"[62] may preclude a claim for damages in other contexts.[63] Despite this caveat, the Court may not have considered the full force of another cognitive flaw: hindsight bias.

B. *HINDSIGHT BIAS AND RISK: THE PERILS OF DOUBLING DOWN*

Like Karl Llewellyn's canons of statutory interpretation,[64] biases often come in opposing pairs. If presentist bias was the only problem afflicting the government in national security cases, vigorous judicial review might adequately deal with the situation. However, courts must also consider the role of hindsight bias. Afflicted by hindsight bias, people overestimate the probability that harm could have been prevented.[65] In reality, the perfect storm is easiest to spot in retrospect: a harm often stems from an unforeseeable confluence of causes.[66] As the Framers understood, fear of hindsight bias by courts, superiors, or the public can distort an official's analysis of risk. The resulting path-dependence undermines stability in government. While the Court's post-*Bivens* decisions sought to take hindsight bias into account, the analysis in these decisions was often one-dimensional.

---

61. *Id.* at 409 n.9 (citing Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring)).

62. *Id.* at 396 (majority opinion).

63. The majority placed the burden of legislative inertia on those asserting that such a remedy was unwise by observing that Congress had not expressly ruled out a right to damages. *Id.* at 397.

64. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

65. *See* Baruch Fischhoff, *For Those Condemned To Study the Past: Heuristics and Biases in Hindsight*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 335, 342 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) ("Consider decision makers who have been caught unprepared by some turn of events and who try to see where they went wrong . . . . If, in retrospect, the event appears to have seemed relatively likely, they can do little more than berate themselves for not taking the action that their knowledge seems to have dictated."). If the decisionmakers are not sufficiently quick to blame themselves, the public will be happy to pick up the slack. *Id.* For more discussion of hindsight bias, see Rachlinski, *supra* note 10, and Roese, *supra* note 10.

66. *See* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 300 (1998) (explaining hindsight bias in juries assessing liability for low-probability but high-stakes events); *see also* Fischhoff, *supra* note 65, at 348 (noting tendency of historians to assemble tidy narrative, "with all the relevant details neatly accounted for and the uncertainty surrounding the event prior to its consummation summarily buried"). *But see* CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA 109–12 (2001) (arguing that jury verdicts in product-liability cases are not excessive or unreasonable).

Hindsight bias, like myopia, feeds on other cognitive flaws such as the availability heuristic.[67] Just as people overweigh present harms that prompt vivid images and neglect more diffuse effects,[68] a harm that has already occurred serves as an "anchor" for assessment of the acts or omissions that failed to prevent that harm.[69] With a visible and vivid harm as anchor, viewers typically find those acts or omissions wanting, even when officials acted reasonably based on the information at hand.

In counterterrorism and ordinary law enforcement, hindsight bias skews reactions to both false negatives and false positives. Consider false negatives first. Suppose that a judge releases a defendant on bail after concluding that the defendant was neither a flight risk nor a danger to the community. The defendant then commits a serious crime. While the judge may have failed to adequately evaluate the evidence, the risk may also have turned on factors that were not accessible to the court. Despite this possibility, people influenced by hindsight bias assume that the judge erred.[70]

Reaction to false positives features the same dynamic. Suppose that officials detain someone based on the assessment that the individual is dangerous, but subsequent events demonstrate that the individual poses no threat. In this context, people view the initial assessment as flawed. In the glare of hindsight, the decision did not merely turn out badly, as any option might given the multitude of variables that decisionmakers cannot fully

---

67. *See* Keren & Teigen, *supra* note 27, at 97; Tversky & Kahneman, *Availability*, *supra* note 27.

68. *See* Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 7, at 567, 575–76.

69. *See* Gretchen B. Chapman & Eric J. Johnson, *Anchoring, Activation, and the Construction of Values*, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 115, 144 (1999) (discussing anchoring); Daniel Kahneman, Illana Ritov & David Schkade, *Economic Preferences or Attitude Expressions?*, *in* CHOICES, VALUES, AND FRAMES, *supra* note 12, 642, 665–68 (same); *cf.* Rachlinski, *supra* note 68, at 569 (noting marked increase in research subjects' view of need to take precautions once researchers told subjects that a flood with ten-percent probability of occurrence in particular year had actually happened).

70. *See* Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility, and Accountability*, 40 AM. CRIM. L. REV. 1443, 1488 (2003) (noting public-safety concerns associated with false negatives in prediction of dangerousness); Michael L. Perlin, *"There's No Success Like Failure/and Failure's No Success at All": Exposing the Pretextuality of* Kansas v. Hendricks, 92 NW. U. L. REV. 1247, 1253 (1998) (noting "worst-case-disaster" of false negatives who are released and commit further violent acts in discussing Supreme Court decision permitting detention of sex offenders after completion of their sentences); Saleem A. Shah, *Legal and Mental Health System Interactions*, 4 INT'L J.L. & PSYCHIATRY 219, 238 (1981) (arguing that public condemnation associated with false negatives skews underlying predictions). Fear of false negatives helps account for juries' willingness to accept expert predictions of future dangerousness in capital cases. *See* Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 311–16 (2006).

know or control. Instead, hindsight suggests that the harm flowed directly from obvious errors that a better decisionmaker would not have made.[71]

The Framers appreciated the volatility that hindsight bias could yield in conjunction with path-dependence. In *Federalist No. 10*, Madison decried the toxic interaction of hindsight bias with attributions of bad faith among political adversaries. Madison cautioned that because of "mutual animosities [between factions] . . . the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts."[72] For Madison, the readiness to cast blame bolstered by hindsight bias had doomed previous attempts at democracy as "spectacles of turbulence and contention . . . as short in their lives as they have been violent in their deaths."[73] In *Federalist No. 49*'s warning about overuse of constitutional conventions, Madison sounded a similar note, explaining that frequent resort to constitutional conventions would "carry an implication of some defect in the government . . . [and] deprive the government of that veneration which time bestows on everything, and without which . . . the wisest and freest governments would not possess the requisite stability."[74]

1. The Reign of Error: Fear of Hindsight Bias and the French Revolution

The Founding Era's response to the French Revolution also showed an awareness of the perils posed by hindsight bias. Washington and his cabinet expressed dismay at the maneuvers of the French Ambassador, Edmond Genet, during the Neutrality Controversy.[75] Genet's pursuit of risky

71. Those concerned about the significant problem of false positives will reason backward in exactly the same way as those concerned about false negatives. *See* Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 12, at 103, 112–13. As with aversion to false negatives, aversion to false positives may entail a mix of cognition, ideology, and principle. Informed opponents of capital punishment concede, for example, that lists of "'the exonerated' include defendants who were not wholly blameless." *See* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 597–98 (2005). Inflation of the number of factually innocent defendants reflects a willingness to view assessments of evidence as easier than they actually are. A decrease in false positives requires not merely the rhetoric of "innocence," but also systemic reforms regarding evidence, including greater attention to the problem of inaccurate eyewitness identification. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 78–81 (2008).

72. THE FEDERALIST NO. 10, *supra* note 32, at 79 (James Madison).

73. *Id.* at 81.

74. THE FEDERALIST NO. 49, *supra* note 32, at 314 (James Madison).

75. Genet's rash acts included public disrespect for Washington and the outfitting of privateers in the United States to prey on British shipping. *See* ELKINS & MCKITRICK, *supra* note 38, at 332–53; Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling over Presidential Power Outside the Courts*, *in* PRESIDENTIAL POWER STORIES 21, 44 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

strategies suggested that he feared the tendency of the Revolution's constituents to distrust their leaders.[76]

Leaders of the French Revolution, consumed by the threat of backsliding, engaged in further risky behavior. For example, they methodically impeded the development of institutional memory that arises with continuing leadership by adopting Maximilien Robespierre's suggestion to bar members of the constituent assembly from service in the legislature.[77] In another display of hindsight bias's willingness to second-guess, Robespierre disagreed with those who deplored the Reign of Terror. "Terror," Robespierre proclaimed, "is nothing more than swift, severe, and inflexible justice."[78] As Robespierre soon discovered for himself, during the Reign of Terror, mobs convened as rump juries to convict and punish leaders not deemed sufficiently risk-seeking.[79]

The French Revolution's hindsight bias made an impression on the American most influential in the development of judicial review: John Marshall. Marshall saw the risk-seeking behavior of French officials firsthand during the infamous "XYZ Affair." As envoy to France prior to his appointment to the Supreme Court, Marshall, along with his colleagues, tried unsuccessfully for months to negotiate with Charles-Maurice de Talleyrand, the French foreign minister. With France nearing financial ruin, Talleyrand methodically declined to address the envoys' substantive concerns, apparently believing that shaking down the Americans for cash and threatening war over trade policy was a sounder strategy.[80] Marshall noted to his colleagues that this risk-seeking approach failed to achieve French objectives.[81] As Chief Justice, Marshall sought to curb the risk-

76. Indeed, the catalysts for the initial revolt also comprise a case study in hindsight bias. These causes included not merely the cruel despotism of the French nobility, but also the people's resulting willingness to blame aristocrats for uncontrollable events, such as adverse weather that spoiled a harvest and ushered in a relentless winter. *See* Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 360–61 (2000).

77. *Id.* at 387. This suggestion would have deprived the United States of the service of most of the Framers.

78. *See* Robert M. Maniquis, *Filling Up and Emptying Out the Sublime: Terror in British Radical Culture*, 63 HUNTINGTON LIBR. Q. 369, 374 (2000) (quoting Robespierre's February 5, 1794 speech) (internal quotation marks omitted).

79. *See* 2 ALBERT J. BEVERIDGE, A LIFE OF JOHN MARSHALL 27, 43 (1916). The first eight years of the French Revolution saw fifteen foreign ministers, including eleven who had been executed, imprisoned, or exiled. Even Talleyrand, one of the most celebrated diplomats in history, in 1797 was too insecure in his new position to offer candid advice to his colleagues. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 195 (1996); *see also* ELKINS & MCKITRICK, *supra* note 38, at 567–68 (discussing Talleyrand's precarious position with the Directory that ruled France during the interlude between the Reign of Terror and the ascendancy of Napoleon).

80. *See* 2 BEVERIDGE, *supra* note 79, at 314–15; *see also* ELKINS & MCKITRICK, *supra* note 38, at 568 (noting the Directory's risk-seeking approach to dealing with both the U.S. and European governments).

81. ELKINS & MCKITRICK, *supra* note 38, at 575–77.

seeking that fear of hindsight bias yields. Although Marshall awarded monetary relief against American officials in national security cases, he also warned that the exigent circumstances faced by officials counseled against "vindictive or speculative damages."[82]

Marshall's caution suggests the folly of reading too much into early cases that awarded monetary relief against government officials.[83] All of these cases concerned the recovery of property, either in admiralty courts or directly under the Fifth Amendment's Takings Clause, which bars taking property without just compensation.[84] In such litigation, the text of the Constitution itself authorizes relief,[85] as it authorizes issuance of a writ of habeas corpus to remedy deprivations of liberty.[86] Moreover, in directing that an official restore property to its rightful owner, these cases dovetail with decisions permitting purely prospective relief against specific government officials to prevent ongoing deprivations of constitutional rights.[87] The early cases thus do not support a free-floating warrant to award damages for any and all official conduct that a judge or jury happens to deem wrongful.[88] Viewed with appropriate modesty, these cases are consistent with judicial concern about the counterproductive effects of hindsight bias.

2. Regulation and Risk-Seeking

Events have justified this judicial concern. Just as officials during the French Revolution and its aftermath took *greater* risks because they feared hindsight bias,[89] other more recent players have done the same. National

---

82. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 124 (1804) (reducing damages paid for confiscation of neutral vessel).

83. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 173, 177, 179 (1804) (awarding damages for seizure of vessel returning from France).

84. U.S. CONST. amend. V; *see* Brauneis, *supra* note 55, at 121 (tracing rationale in early cases to language, purpose, and logic of Takings Clause).

85. *See* Jacobs v. United States, 290 U.S. 13, 16 (1933); United States v. Lee, 106 U.S. 196, 218–20 (1882).

86. *See* U.S. CONST. art. I, § 9, cl. 2; *see also* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1124–25 (1969) (arguing that denying remedy in property cases would have sanctioned continuing wrong, analogous to deprivation of personal liberty redressable via habeas corpus).

87. *See Ex Parte* Young, 209 U.S. 123, 167–68 (1908); Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 512 (2006) (noting tensions between permitting injunctive relief against specific government officials and doctrine of sovereign immunity, which bars monetary relief against governments); Pfander, *supra* note 58, at 3–4 (discussing *Ex Parte Young*).

88. Indeed, judges in the early nineteenth century took the power to decide legal questions away from juries, in part to promote stability in the law. *See* KRAMER, *supra* note 14, at 164.

89. *See* ELKINS & MCKITRICK, *supra* note 38, at 569 (recounting the Directory's nullification of elections and resort to a coup to counter popular discontent); *see also* Josh

elites facing economic pressure and popular discontent may throw their weight behind an authoritarian leader promising radical change. This phenomenon characterized much of Europe in the 1920s and spread to Latin America.[90] Elites authorize such measures when the status quo does not offer stability and things seem to be "slipping away."[91] Moreover, risk-seeking solutions of this kind often create contagion effects. Once a solution becomes widely known, other officials and constituencies facing similar problems embrace it, even when the landscape they face has a fundamentally different character.[92] Truth and reconciliation commissions have emerged because the threat of more formal modes of accountability can promote risk-seeking among governing elites, impeding transitions to the rule of law.[93]

A dwindling stake in the status quo can also drive risk-seeking behavior in law enforcement. Scholarship suggests that risk-seeking conduct occurs when police officers believe that a court will inappropriately second-guess their decisions. Officers see themselves as a last line of defense against lawlessness and view courts using hindsight bias *against* police as lacking legitimacy.[94] Indeed, contemporary commentary cited by Justice Harlan in his concurrence in *Bivens*[95] suggests that Harlan viewed the *Bivens* remedy as a substitute for the hindsight bias embodied in the Warren Court's creation of the exclusionary rule.[96] Distinguished commentators also suggested that

---

Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1100–16 (2009) (noting upward spiral of Charles I's risk-seeking, including his repeated dissolutions of Parliament).

90. *See* Weyland, *supra* note 42, at 307–08.

91. *Id.* at 309.

92. *Id.* at 309–10 (arguing that Mussolini's coup had influence in the Iberian world because of long-standing cultural and historical connections).

93. *See* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 148 (2007) (praising restorative-justice mechanisms that promote a "forgiveness process characterized by truth telling, redefinition of the identity of the former belligerents, partial justice, and a call for a new relationship" (quoting WILLIAM J. LONG & PETER BRECKE, WAR AND RECONCILIATION: REASON AND EMOTION IN CONFLICT RESOLUTION 3 (2003) (internal quotation marks omitted)); Laurel E. Fletcher, Harvey M. Weinstein & Jamie Rowen, *Context, Timing, and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 184–85 (2009) (same).

94. *See* Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1044–46 (1996) [hereinafter Slobogin, *Testilying*]; Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 383 [hereinafter Slobogin, *Exclusionary Rule*].

95. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) (citing Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 182–85 (1969)).

96. *See* Hill, *supra* note 95, at 184 ("If the essential purpose of the exclusionary rule is deterrence . . . adequate substitutes may be judicially developed."); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811–16 (1994) (proposing damages regime in place of exclusionary rule); *cf. Bivens*, 403 U.S. at 408 (Harlan, J., concurring) (approving "traditionally available . . . judicial relief" made available in *Bivens* while declining to endorse "special prophylactic measures" such as the exclusionary rule); Pfander, *supra* note 58, at 10 (discussing Justices' interest in this point during oral argument). Justices have also

the exclusionary rule (at least as applied to searches) could not possibly deter a police officer from making a decision "on the spot."[97] The Supreme Court has crafted exceptions to the exclusionary rule based on officers' good faith[98] and exigent circumstances[99] to mitigate hindsight bias in this context.[100]

---

asserted that the right to substantive due process allows the subject of an egregiously abusive interrogation to seek damages in cases where *Miranda* does not apply; for example, where the prosecution does not seek to try the subject of the interrogation. *See* Chavez v. Martinez, 538 U.S. 760, 779 (2003) (Souter, J., concurring); John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After* Chavez v. Martinez, 39 GA. L. REV. 733, 829–30 (2005).

In part because of concerns about undue hindsight bias, the Court has expanded the "good faith exception" to the exclusionary rule. *Compare* Herring v. United States, 129 S. Ct. 695, 700 (2009) (holding that the Fourth Amendment did not require exclusion of evidence obtained after police arrested defendant pursuant to information that had been inaccurately recorded in a database on outstanding warrants), *with id.* at 708–10 (Ginsburg, J., dissenting) (arguing that exclusion of evidence in *Herring* would have provided incentive for modernization of law-enforcement databases). For debate about whether the exclusionary rule and related criminal procedure doctrines such as the mandate to provide *Miranda* warnings are constitutionally required or exercises of the Court's remedial authority, see *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (asserting that *Miranda* warnings are constitutionally required and do not pose undue burdens for law enforcement), Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 30–50 (2004) (discussing formulation of prophylactic rules such as *Miranda* that help prevent violations of constitutional rights), Henry P. Monaghan, *The Supreme Court, 1974 Term–Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (same), and David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (same).

97. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952 (1965) (noting that a police officer conducting a search that was subsequently determined to violate the Fourth Amendment was "without a set of the *United States Reports*").

98. *See Herring*, 129 S. Ct. at 700 (expanding good-faith exception to law-enforcement databases). *Herring* reflects the interaction of rights and remedies that scholars have identified in many constitutional realms. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999) (arguing that over time courts will define rights to mitigate difficulties encountered in rigid remedial regimes). The exclusionary rule also triggered a political backlash that drove other substantive changes. Holdings such as *Miranda v. Arizona*, 384 U.S. 436 (1966), which limited law-enforcement interrogation techniques, angered legislators, which caused them to broaden substantive offenses, including the laws criminalizing drug possession. Because drugs seized in an arrest are typically dispositive evidence of the offense, it was less important to gain a confession from the suspect. As a result, the Fifth Amendment rights established by the Court posed less of an obstacle to prosecution. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 29 (2007); Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2236–60 (2003) (discussing factors that broaden the scope of criminal liability under federal statutes); Stuntz, *supra* note 13. Since courts generally defer to legislative definition of substantive offenses and imposition of penalties, the legislative response reduced judicial review of law-enforcement decisions.

99. *See* New York v. Quarles, 467 U.S. 649 (1984).

100. Commentators have noted that fear of hindsight bias from courts can prompt risk-seeking behavior in other fields. *See* Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 774–75, 778–81 (2004) (noting that punishing mere

Some police officers seek to preempt second-guessing at suppression hearings by offering inaccurate testimony.[101] Knowingly providing inaccurate testimony is a risk-seeking strategy, since detection would involve employee discipline, possible criminal prosecution, and loss of reputation in the community. Nevertheless, faced with a certain loss as a result of perceived hindsight bias, some officers will take this risk.[102]

The same dynamic regarding risk-seeking, stake, and hindsight bias has occurred in the area of environmental regulation. Here, too, when institutional reform proceeds through a command-and-control model, officials lack a stake. Students of new governance and regulatory reform have noted that command-and-control decisionmaking enhances polarization.[103] Regulated parties often believe that the entity with the

---

mistakes in marketing of securities undermines deterrence by leading managers to reason that they should double down on risk since even a mere mistake will trigger sanctions). However, correcting for hindsight bias is a tricky business. A court wary of imposing hindsight bias on a defendant may overcompensate for the bias, imputing responsibility to the *plaintiff* for failing to avoid problems that seem obvious only in retrospect. *See id.* at 793–94 (critiquing courts' use of "bespeaks caution" doctrine in securities cases as tilt toward defendants who issue boilerplate warnings that a reasonable investor would disregard). *But see* Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986) (outlining "bespeaks caution" rationale); Jennifer O'Hare, *Good Faith and the Bespeaks Caution Doctrine: It's Not Just a State of Mind*, 58 U. PITT. L. REV. 619 (1997) (defending the doctrine).

101. *See* United States v. Restrepo, 890 F. Supp. 180, 191 (E.D.N.Y. 1995) (finding that police officers lied about basis for search); I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 868–71 (2008); Slobogin, *Testilying*, *supra* note 94, at 1044–46; Slobogin, *Exclusionary Rule*, *supra* note 94, at 376, 387–88.

102. Countervailing factors would suggest caution in invoking fear of hindsight bias to dismantle criminal procedure protections. A system that fails to insist on high standards of policing may alienate constituencies whose cooperation is essential for effective law enforcement. *See* Capers, *supra* note 101, at 838–43 (discussing attitudes within communities of color); *see also* Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365 (2010) (using social-science data to argue that perceptions of governmental legitimacy affect cooperation with counterterrorism efforts). Some might argue that the legal system should respond to inaccurate testimony by instituting more perjury prosecutions. Capers, *supra* note 101, at 838–43. However, the system has not responded this way, perhaps recognizing that close relationships within the criminal justice system make such a response unlikely. *See* Slobogin, *Exclusionary Rule*, *supra* note 94, at 387–88. Discussion of appropriate criminal procedure norms is beyond the scope of this Article. My point here is a descriptive one: legal restraints can lead to risk-seeking, rather than risk-averse, behavior. *Cf.* Schuck, *supra* note 11, at 299–300, 305–13 (stressing risk-aversion as reaction to damages claims against officials).

103. *See* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 107–19 (1982); Neil Gunningham & Darren Sinclair, *Regulation and the Role of Trust: Reflections from the Mining Industry*, 36 J.L. & SOC'Y 167, 176–83 (2009) (noting a decline in disclosure, reporting, and self-investigation of incidents after mining disaster prompted shift toward criminal prosecution for negligence in mine operation); Kagan, Gunningham & Thornton, *supra* note 26, at 73–74 (noting that plant managers who invested in technology and developed belief systems consistent with better environmental quality achieved better results than those focused on compliance with legal norms); Christine Parker, *The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW &

luxury of hindsight, be it a court or agency, has failed to consider the regulated party's standpoint. Like other individuals who perceive a deficit of procedural justice,[104] regulated parties become alienated from the system. Rather than buy into compliance, regulated parties develop strategies to undermine it, often engaging in risky substitutions that further frustrate reform. Companies subject to unduly rigid environmental regulations will engage in resistance, including stonewalling on provision of information to regulators, exploitation of regulatory loopholes, attempts to remove particularly zealous regulators, lobbying to impose new checks on perceived overzealous regulation, and a "scorched earth" approach to litigation.[105] Because of a lack of trust, companies will be less inclined to volunteer information to regulators, thereby enhancing regulation's cost. Moreover, regulated parties' concerns about unfairness have an adverse multiplier effect, which multiplies cases of noncompliance, thereby exhausting the resources of both plaintiffs and courts.

3. Cutting Back on *Bivens*

The courts' correction of hindsight bias has centered on shielding officials with qualified immunity. In its decisions, the Supreme Court has stressed the dangers of official risk-aversion, not risk-seeking. The Court has recognized that the public interest and principles of separation of powers suffer when officials find themselves in protracted litigation because of "mere mistakes in judgment."[106] The prospect of subsequent litigation can disrupt the President's ability to obtain candid policy advice[107] and respond

---

SOC'Y REV. 591, 592–93 (2006) (regulated parties are "likely to interpret [a rigid approach to sanctions] as unfair or stigmatizing," thus adversely affecting compliance and leading to lobbying to replace regulatory staff and impose checks on perceived overzealous regulation); Clifford Rechtstaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1204 (1998) (analyzing failures of the command-and-control model); *cf.* Dorothy Thornton, Robert A. Kagan & Neil Gunningham, *When Social Norms and Pressures Are Not Enough: Environmental Performance in the Trucking Industry*, 43 LAW & SOC'Y REV. 405 (2009) (discussing difficulties of improving environmental performance in a mobile, decentralized industry, like trucking). On the interplay of self-regulation and enhanced compliance in the occupation-safety arena, see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-regulation*, 105 COLUM. L. REV. 319, 344–45 (2005).

104. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 163 (1990) (discussing difficulties with sanction-based compliance and conditions for voluntary compliance).

105. *See* AYRES & BRAITHWAITE, *supra* note 17, at 47–50.

106. Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (citing Butz v. Economou, 438 U.S. 478, 507 (1978)).

107. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817 n.28 (1982) (noting importance of ability to "explore alternatives in the process of shaping policies . . . and to do so in a way many would be unwilling to express except privately" (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)) (internal quotation marks omitted)); Schuck, *supra* note 11, at 324–27; *see also* David L. Noll, Note, *Qualified Immunity in Limbo: Rights, Procedures, and the Social Costs of Damages Litigation Against Public Officials*, 83 N.Y.U. L. REV. 911, 918–19 (2008) (discussing the Court's rationale). The Court has struck the balance differently regarding claims of absolute immunity.

to unforeseen events.[108] Without qualified immunity, an official making a difficult decision becomes a hostage to hindsight bias, which transforms mistakes into products of "dishonest or vindictive motives."[109] This tendency to attribute bad motives to opponents pervades times of political transition.[110]

In addition to recognizing qualified immunity for government officials, the Supreme Court has also curbed the influence of hindsight bias by cutting back directly on *Bivens* actions, finding in several contexts "special factors counselling hesitation" in the recognition of a *Bivens* claim. Courts have refused to recognize claims for damages where Congress has established comprehensive remedial schemes.[111] The Court has also declined to recognize a *Bivens* action in cases arising out of military service.[112] In addition, the Court has cast doubt on the availability of damages under the Constitution where a claim concerned conduct abroad that allegedly injured a foreign national.[113]

However, in its eagerness to prevent inappropriate second-guessing of official action, the Court has overcompensated. Correcting for hindsight bias against defendants often yields hindsight bias against *plaintiffs*. In the

---

See Davis v. Passman, 442 U.S. 228, 246 (1979) (finding absolute immunity for a member of Congress based on Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1); Hill, *supra* note 86, at 1148. *But see* Mitchell v. Forsyth, 472 U.S. 511, 521–23 (1985) (no absolute immunity regarding allegations of illegal wire-tapping; absolute immunity would be inappropriate since secrecy of national security decisions would otherwise heighten risk of abuse and overreaching).

108. *See Harlow*, 457 U.S. at 819 (noting the importance of the President's capacity to act "with independence and without fear of consequences" (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)) (internal quotation marks omitted)).

109. *Id.* at 815 n.23 (citing Tenney v. Brandhove, 341 U.S. 367, 378 (1951) (barring suit against legislative antisubversive committee).

110. *See id.* (noting influence of "political passion" (quoting *Tenney*, 341 U.S. at 378) (internal quotation marks omitted)); *cf.* Rachlinski, *supra* note 68, at 568–69 (discussing cognitive tendency, known as "fundamental attribution error," to impute bad motives to individuals, which can prejudice defendants).

111. Schweiker v. Chilicky, 487 U.S. 412 (1988) (denying claims for damages arising from improper denial of social-security disability benefits); *cf.* Carlson v. Green, 446 U.S. 14, 19–20 (1980) (holding that the availability of a remedy under the Federal Tort Claims Act ("FTCA") did not bar *Bivens* action); Castaneda v. United States, 546 F.3d 682, 692 (9th Cir. 2008) (holding that the availability of a remedy under the FTCA did not bar *Bivens* action against officials of the Public Health Service), *rev'd sub nom.*, Hui v. Castaneda, 130 S. Ct. 1845 (2010); John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663 (2009) (discussing cases).

112. *See* Chappell v. Wallace, 462 U.S. 296, 298 (1983) (barring *Bivens* action by minority service personnel charging racial discrimination); Feres v. United States, 340 U.S. 135 (1950) (barring FTCA suits against the United States for actions arising out of military service); *cf.* United States v. Stanley, 483 U.S. 669, 681 (1987) (declining to create remedy for victims of LSD experiments in the military).

113. *See* Christopher v. Harbury, 536 U.S. 403 (2002). For a more categorical ruling against such actions, see *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985), which precluded suit against President Reagan for alleged "Contra" abuses in Nicaragua.

most criticized case, *Wilkie v. Robbins*,[114] the Court refused to permit a *Bivens* remedy for a property owner who alleged that officials had retaliated against him when he refused the federal government's demand for an easement. The Court seemed to suggest that the plaintiff should have availed himself of other remedies despite their futility,[115] or perhaps even acceded to the government's demands, which the Court charitably described as tough negotiation[116] rather than a pattern of egregious harassment.[117] Another case, *Hartman v. Moore*,[118] which also concerned a claim of government retaliation, further presaged the categorically deferential results in *Ashcroft v. Iqbal* and *Arar v. Ashcroft*. In *Moore*, the Court held that a plaintiff had to prove the absence of probable cause to prevail on a claim that officials had engineered a prosecution in retaliation for his opposition to government policy.[119] The Court imposed this burden on the plaintiff despite his submission of concrete evidence that the defendants had harbored a retaliatory animus.[120] As Justice Ginsburg noted in her dissent, shifting the burden to the defendant upon such a showing would have been fairer and more efficient.[121]

Three additional factors suggest that the Court would be wise to view the availability of a *Bivens* remedy as the default position instead of regarding it as the exception. First, the Court's reluctance clashes with the liability of state officials under 42 U.S.C. § 1983.[122] This liability differential encourages officials to manipulate the allocation of roles in joint state–federal operations.[123] Second, Congress has arguably acquiesced in the broader availability of *Bivens* actions through reenactment of statutes that addressed federal officials' exposure. Congress expressly exempted *Bivens* actions when it enacted the Westfall Act, which largely immunized federal officials from state-law tort liability.[124] Third, regardless of Congress's stance, Justice Harlan had a point in tying *Bivens* actions to enforcement of constitutional norms: in some situations, no other relief will provide adequate vindication for constitutional protections.

---

114. 551 U.S. 537 (2007).

115. *Id.* at 552–53.

116. *Id.* at 558 n.10.

117. *See* Tribe, *supra* note 22.

118. 547 U.S. 250 (2006).

119. *Id.* at 263–64.

120. *Id.*

121. *Id.* at 266 (Ginsburg, J., dissenting).

122. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 140–41 (2009); Hill, *supra* note 86, at 1154–55.

123. *See* Pfander & Baltmanis, *supra* note 122, at 140.

124. *See* Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (codified at 28 U.S.C. § 2679(b)(2)(A) (2006)), *discussed in* Pfander & Baltmanis, *supra* note 122, at 122–23.

C. SUMMARY

Protections against both myopia and hindsight bias exist in an uneasy balance in the jurisprudence of constitutional remedies. Without remedies, myopia has free reign. However, unduly intrusive remedies can foster either official paralysis, or (even worse) a culture of reckless risk-seeking. Ultimately, it is the courts' responsibility to shape remedies to avoid hindsight bias and decide when the lack of a remedy undermines constitutional compliance.[125] Courts may learn too late that blocking *Bivens* remedies undermines constitutional protections. At that point, hindsight will be of no help. This caveat fits the courts' categorical approach in recent national security cases.

III. THE INADEQUACY OF CATEGORICAL APPROACHES

While dealing with the presentist and hindsight biases requires careful analysis of institutional structure and incentives, courts have largely responded with categorical approaches. In decisions that appear most likely to be influential, courts have displayed categorical deference, precluding *Bivens* actions and encouraging officials' unwise risk-seeking behaviors.[126] Other cases opt for categorical interventionism.[127] Both approaches have their perils.

A. DEFERENTIAL COURTS

A number of decisions have expressed a categorical deference to executive decisions, either ruling out theories of liability for senior officials or holding that special factors ruled out even making a *Bivens* claim available.[128] Building on precedents like *Wilkie v. Robbins*, these cases have

125. *See* Webster v. Doe, 486 U.S. 592, 603, 604–05 (1988) (favoring availability of judicial review); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 680–81 (1986) (same); *see also* Nken v. Holder, 129 S. Ct. 1749 (2009) (finding that the Judiciary Act of 1789 embodies presumption that interim remedies are available to facilitate judicial review); *cf.* Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2125–35 (2009) (discussing precedent).

126. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied* 130 S. Ct. 3409 (2010).

127. *See* al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98); Padilla v. Yoo, 633 F. Supp. 2d 1005, 1031 (N.D. Cal. 2009). Ironically, interventionist cases may ultimately bolster the trend toward deference by suggesting that qualified immunity is insufficient protection for official decisions.

128. In addition to *Iqbal* and *Arar*, other courts have expressed deference. Wilson v. Libby, 535 F.3d 697 (D.C. Cir. 2008) (denying relief), *cert. denied*, 129 S. Ct. 2825 (2009); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 108–12 (D.D.C. 2010) (ruling against Guantanamo detainees on both qualified immunity and "special factors counseling hesitation" grounds); *see also In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 93–107 (D.D.C. 2007) (barring *Bivens* remedy for Iraq and Afghanistan detainees); *cf.* Stephen I. Vladeck, Essay, *National Security and* Bivens *After* Iqbal, 14 LEWIS & CLARK L. REV. 255 (2010) (criticizing cases for making *Bivens* remedy generally unavailable in national security cases). *Compare* Rasul v. Myers (*Rasul II*), 563

further marginalized *Bivens*. To reach this result, courts have relied on a rigid view of causes of action, officials' tactical options, and the nature of official decisionmaking. Courts have also failed to acknowledge that depriving victims of remedies for official overreaching can trigger substitutions that often have more disruptive consequences.

Consider *Ashcroft v. Iqbal*, in which the Court held that senior officials could not be liable for failing to properly supervise subordinates who engaged in abuse of post-9/11 immigrant detainees.[129] The Court ruled that senior officials were not accountable even if they had knowledge of the abuse.[130] The Court's preclusion of supervisory-liability claims against senior officials was precipitous at best. Media reports of widespread abuse of detainees by jailers and other inmates were rampant shortly after the round-up began.[131] This evidence was ample to allow the inference that officials had "turn[ed] a blind eye" toward the abuse committed by subordinates.[132] Federal appellate judges, including then-Judge Roberts, had repeatedly held that such recklessness sufficed for liability.[133] An appropriately tailored decision could have protected officials from undue chilling effects, while still permitting the plaintiffs to prove that officials knew early on about abuse of detainees and did nothing to stop it.

Rather than adopt this approach, the Court equated all forms of supervisory liability with respondeat superior, asserting that in *Bivens* actions,

---

F.3d 527, 529–32 (D.C. Cir. 2009) (holding that defendants were entitled to qualified immunity because application of the Constitution to Guantanamo detainees was unclear before the Court's decision in *Boumediene*), *cert. denied*, 130 S. Ct. 1013, *with* Rasul v. Myers (*Rasul I*), 512 F.3d 644, 672–73 (D.C. Cir. 2008) (Brown, J., concurring) (arguing that *Bivens* remedy is barred for "alleged enemy combatants"), *vacated and remanded*, 129 S. Ct. 763 (2008).

129. *Iqbal*, 129 S. Ct. 1937; *see* OFFICE OF THE INSPECTOR GEN., *supra* note 3, at 43–80 (discussing excess time in detention after detainees were cleared of terrorism charges); *id.* at 130–49 (describing lack of access to counsel and claims of physical abuse, which the OIG found credible). The round-up that gave rise to the claims centered on noncitizens from the Middle East and South Asia. For a discussion of profiling and counterterrorism policy, see Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675 (2003) (discussing pros and cons of a range of profiling techniques).

130. *Iqbal*, 129 S. Ct. at 1952 ("[Officials] cannot be held liable unless they themselves acted *on account of* a constitutionally protected characteristic." (emphasis added)).

131. *See, e.g.*, William Carlsen, *Rights Violations, Abuses Alleged by Detainees; Beatings, Lack of Legal Representation Cited*, S.F. CHRON., Oct. 19, 2001, 2001 WLNR 5774244; Edward Hegstrom, *Foreign Student Tells of Beatings by Inmates in Mississippi Cell*, HOUS. CHRON., Sept. 29, 2001, 2001 WLNR 11722903 (detailing abuses just over a week after round-up began); Richard A. Serrano, *Many Held in Terror Probe Report Rights Being Abused*, L.A. TIMES, Oct. 15, 2001, at A1.

132. Int'l Action Ctr. v. United States, 365 F.3d 20, 28 (D.C. Cir. 2004) (quoting Jones v. City of Chi., 856 F.2d 985, 992 (7th Cir. 1988)) (internal quotation marks omitted).

133. *See id.* A recent district court decision narrowly construed this portion of the *Iqbal* holding, finding that U.S. citizens detained by the American military in Iraq on suspicion of aiding rebels could proceed with their claim that former Secretary of Defense Rumsfeld had personally ordered the use of harsh interrogation tactics against them. *See* Vance v. Rumsfeld, 694 F. Supp. 2d 957, 971 (N.D. Ill. 2010).

"masters . . . [should] not answer for the torts of their servants."[134] However, as Justice Souter noted in his dissent, supervisory liability differs significantly from respondeat superior. In the latter, an entity is liable for the acts of its employees, whether or not senior officials actually knew or could have known about the employees' wrongdoing.[135] In contrast, as Justice Souter pointed out, the supervisory-liability theory advanced by the *Iqbal* plaintiffs hinged on the recklessness or indifference of the senior officials themselves. However, this distinction was lost on the Court.[136]

Similarly, in *Arar v. Ashcroft*, which concerned the plaintiff's alleged extraordinary rendition to Syria, the court made a categorical distinction between habeas petitions and damages claims. The *Arar* court argued that damages claims could result in disclosure of sensitive information such as dealings between the United States and other nations.[137] However, this risk is also present in detainee habeas proceedings[138] and criminal

134. *Iqbal*, 129 S. Ct. at 1949.

135. *See id.* at 1958 (Souter, J., dissenting) (citing RESTATEMENT (THIRD) OF AGENCY § 2.04 (2005)).

136. The Court in *Iqbal* could also have avoided the supervisory-liability issue. The defendants had conceded that liability was appropriate if they had been "deliberately indifferent" to reports of abuse. *Id.* at 1956. As a result, the parties never briefed the existence vel non of supervisory liability. *Id.* at 1957 (citing Pearson v. Callahan, 129 S. Ct. 808, 820 (2009) (noting dangers of "bad decisionmaking" when briefing is "woefully inadequate")).

137. Arar v. Ashcroft, 585 F.3d 559, 576–77 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010). In other cases involving extraordinary rendition, the government has asserted the state-secrets privilege, which can either be a substantive basis for dismissal of a lawsuit or an evidentiary privilege that will result in nondisclosure of certain information. *Compare* El-Masri v. United States, 479 F.3d 296, 306–13 (4th Cir. 2007) (dismissing claim), *with* Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 953–58 (9th Cir. 2009) (refusing to dismiss claim against private contractor allegedly involved in rendition program despite government's assertion of state-secrets privilege), *rev'd*, No. 08-15693, 2010 WL 3489913 (9th Cir. Sept. 8, 2010) (dismissing claim). *See generally* United States v. Reynolds, 345 U.S. 1 (1953) (recognizing substantive privilege); Tenet v. Doe, 544 U.S. 1 (2005) (same); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007) (analyzing doctrine and suggesting alternative formulations that would better reconcile the government's legitimate need to protect information and plaintiffs' access to the courts). In addition to the need to protect sensitive information, the government may invoke the privilege to conceal evidence that is embarrassing. STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 1043 (4th ed. 2007) (noting that disclosures after the *Reynolds* decision indicated that the government invoked the privilege to conceal evidence of human error).

138. *See* BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, THE BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 39–41 (2010) (discussing evaluation of redacted intelligence reports submitted by the government in habeas proceedings); Matthew C. Waxman, *Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT'L L. 245, 258–63 (2009) (comparing analysis of intelligence reports by habeas courts with standard for targeted killing of suspected terrorists).

prosecutions.[139] The criminal context has seen the most sophisticated approach, hinging on the government's use of in camera and ex parte presentations, followed by agreed-upon summaries and substitutions like those provided for under the Classified Information Procedures Act.[140] The expertise cultivated by courts in this complex area is transferable to the *Bivens* context.[141]

Detainees' access to habeas and other forms of contemporaneous judicial review is also subject to unusual barriers. Arar alleged that the government had systematically deprived him of his right to seek judicial review of his deportation by serving him with a deportation order after officials had placed him on a flight to the Middle East.[142] In *Boumediene v. Bush*, which struck down the portion of the Military Commissions Act of 2006 limiting access to habeas corpus for Guantanamo detainees, Justice Kennedy observed that a number of detainees had waited six years without meaningful judicial review.[143] This hardly makes habeas the kind of regularly available remedy that supplanted *Bivens* actions in earlier cases.[144]

1. Deference and Plausibility Pleading

The deferential approach has also interacted with the Court's new "plausibility pleading" jurisprudence[145] to make senior officials practically immune from suit. In *Iqbal*, once the Court had dismissed the supervisory-liability claim, it readily disposed of a claim asserting that the senior officials had ordered the post-9/11 detentions because of religious, national, or

---

139. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 165–67 (2d Cir. 2008) (discussing measures taken to protect sensitive information), *cert. denied* 130 S. Ct. 1050 (2010).

140. *See* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUM. RTS. FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 81–90 (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf (analyzing criminal prosecutions).

141. The *Arar* majority also asserted that it is best to preclude a claim altogether rather than risk the distrust generated by procedures to accommodate the government's need for secrecy. *Arar*, 585 F.3d at 576–77. However, this argument proves too much. All legal proceedings hinge on compromises of various kinds—ordinary evidentiary privileges, such as the attorney–client privilege, also conceal information. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981). We live within these constraints because the alternative would be the abandonment of accountability.

142. *Arar*, 585 F.3d at 571.

143. Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008) ("[T]he costs of delay can no longer be borne by those who are held in custody.").

144. *See* Schweiker v. Chilicky, 487 U.S. 412 (1988) (dealing with hearings pursuant to social-security-disability-claims procedure); *cf.* Carlson v. Green, 446 U.S. 14, 19–20 (1980) (holding that the FTCA did not preempt a *Bivens* action).

145. *See generally* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6):* Twombly, Iqbal, *and the Paradox of Pleading*, 62 STAN. L. REV. 905 (2010).

ethnic bias.[146] According to the Court, the plaintiffs had not included specific facts in their pleadings that would have made such a charge plausible.[147] However, this holding put plaintiffs in a catch-22. Officials rarely trumpet their biases or announce animus. Evidence of such bias typically requires discovery. By holding that the Court's prior decision in *Bell Atlantic Corp. v. Twombly*[148] mandated dismissal of a complaint that did not make concrete and plausible allegations, *Iqbal* hindered plaintiffs' access to the discovery needed to support such factual claims. Here, too, officials may read the Court's decision as a signal that animus could prevail, as long as officials were careful to launder their public statements.

Similarly, in *Arar*, the Second Circuit's reluctance to hold senior officials accountable led the court to dismiss on plausibility-pleading grounds claims that officials had denied Arar his right to a deportation hearing and access to counsel. These claims concerned conduct within the United States.[149] Consequently, they did not require the sensitive information regarding foreign sovereigns that led the court to preclude a *Bivens* remedy. Nevertheless, having disposed of the central claims in the case, the court had a substantial incentive to get rid of the rest.[150] Acting on this incentive, the court ruled that the plaintiff had not shown concrete evidence that senior officials intentionally truncated procedures. However, the logic of the majority opinion on the rendition allegations undermined its holding on the remaining claims. The majority declined to recognize a *Bivens* remedy for the rendition claim because of the extraordinary diplomatic maneuvering in the case.[151] Those maneuvers culminated in Arar's abrupt removal from the United States to Syria. If senior officials were involved in the diplomacy, it seems reasonable to infer that they authorized the truncated process that facilitated Arar's rendition.[152] However, preclusion of the *Bivens* claim based on Arar's extraordinary rendition paved the way for disposal of the remaining claims.

2. Binary Options and False Dichotomies

The *Arar* court's discussion of the government's choices was also categorical. The court presented the government's options as binary. On the one side was extraordinary rendition to Syria. The other option was

146. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–52 (2009).

147. *Id.*

148. 550 U.S. 544 (2007).

149. Arar v. Ashcroft, 585 F.3d 559, 569 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

150. *See* Bone, *supra* note 145, at 870 (noting that *Iqbal* reflects "an implicit policy judgment . . . to screen suits more aggressively").

151. *Arar*, 585 F.3d at 574–75.

152. *Id.* at 615–19 (Parker, J., dissenting); *cf. id.* at 594 (Sack, J., dissenting) (arguing that the plaintiff had met the plausibility-pleading standard).

permitting a suspected terrorist to "board his plane and go on to his destination."[153] However, the court's stark portrait of policy options failed to do justice to the options available. Officials could have detained Arar for a reasonable period of time to properly gauge the nature of the threat, if any, that he posed. Indeed, in *Boumediene*, the Supreme Court acknowledged that a reasonable screening period might be appropriate for foreign nationals apprehended outside the country and detained under effective U.S. jurisdiction and control.[154] Comparable authority would probably exist with respect to foreign nationals like Arar detained at a port of entry.[155] While this path had been open to officials, it failed to appear on the court's radar screen.

In *Iqbal*, Justice Kennedy hewed to this categorical approach. In describing the round-up of undocumented Muslim noncitizens after September 11th as a rational policy focused on persons with a "suspected link to the attacks,"[156] Kennedy implied that the only alternative for officials was to allow suspected terrorists to remain at large. However, the government's own reports suggested that the round-up was far more chaotic from the start. Prominent officials just below the most senior level appreciated soon after the detentions began that virtually all the detainees were routine immigration violators without terrorist ties.[157]

While officials knew early on that most detainees had no terrorist connections, they also had ample access to reports that the detainees had suffered significant abuse while in custody.[158] Officials at this juncture did not have to choose between detaining suspected terrorists and releasing them willy-nilly. Instead, their choice was between two more concrete

153. *Id.* at 580 (majority opinion). For more on extraordinary rendition, see Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

154. Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008).

155. *See* Zadvydas v. Davis, 533 U.S. 678, 695–96 (2001) (counseling greater deference to the political branches when detention may be necessary to prevent terrorism in order to leave "no unprotected spot in the Nation's armor" (quoting Kwong Hai Chew v. Colding, 334 U.S. 590, 602 (1953)) (internal quotation marks omitted)).

156. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

157. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 3, at 11, 16–17 (recounting one tip among 96,000 received that identified the target only as working in a grocery store "operated by numerous Middle Eastern men" (internal quotation marks omitted)); *see also* ERIC LICHTBLAU, BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE 47–48 (2008) (describing then-INS Commissioner James Ziglar's opposition to continued detentions). This disjuncture has been characteristic of other mass detentions in American history, such as the Japanese-American internment. PETER IRONS, JUSTICE AT WAR (1983); ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II 116–21 (2007) (analyzing government stereotypes in assessments of Japanese-Americans' loyalty); Joseph Margulies, *Evaluating Crisis Government*, 40 CRIM. L. BULL. 627, 638–39 (2004) (discussing other World War II-era restrictions targeting Asian-Americans and Pacific Islanders, including imposition of martial law in Hawaii).

158. *See, e.g.*, Hegstrom, *supra* note 131.

options. On the one hand, officials could have deported undocumented aliens in a timely fashion, while not turning a blind eye to abuses. The alternative was the path that officials chose: protracted detention for aliens who could have been safely deported and failure to address reports of abuse. Officials would not have prejudiced national security by choosing the first course. A simple memorandum that directed facility managers to treat detainees humanely would have sufficed, and also provided compelling evidence in defense of any subsequent *Bivens* action.[159] By rejecting supervisory liability, *Iqbal* signaled to senior officials that expressing and documenting such concerns were responsibilities they could safely discount. Judicial signaling of this kind exacerbates myopia with its neglect of future costs and benefits.

3. Deference and Bureaucratic Decisionmaking

Deferential decisions also reinforce myopia because they view policy decisions made without court intervention as a unitary, optimal baseline. In reality, decisionmaking is often a group process,[160] with a spectrum of inputs that are sensitive to either judicial intervention or deference. An official considering a move such as extraordinary rendition of a suspected terrorist will receive input from internal champions and opponents of this course. Officials in the latter camp may argue that extraordinary rendition is a myopic policy that will increase violence by alienating important global audiences. Members of those constituencies will decide against working with the United States or engaging in peaceful dissent, and will throw in their lot with groups already allied against us.[161] Deferential courts tend to assume

---

159. Indeed, the Court has required analogous prophylactic measures in other law-enforcement contexts. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) (noting that *Miranda* warnings have "become embedded in routine police practice to the point where the warnings have become part of our national culture").

160. *See* GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 55–61 (1971) (discussing group decisionmaking on responses to Soviet siting of missiles in Cuba); ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 29–43 (1974) (same).

161. *See also* Letter from Gen. David H. Petraeus, Commanding Officer of Multi-National Force-Iraq, to Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen Serving in Multi-National Force-Iraq (May 10, 2007), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/petraeus_values_051007.pdf (noting strategic importance of U.S. forces' compliance with legal norms); *cf.* JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 35 (2002) (warning that tactics perceived as overreaching will result in the loss of "important opportunities for cooperation in the solution of global problems such as terrorism"); Christopher J. Borgen, Essay, *Hearts and Minds and Laws: Legal Compliance and Diplomatic Persuasion*, 50 S. TEX. L. REV. 769, 774–78 (2009) (discussing importance of global reputation with both governing elites and citizenry of other nations); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1605 (2009) ("[T]he prisoner abuse scandals have produced predominately negative consequences for U.S. national security."); Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1803 (2009) (discussing importance of

that their stance will permit the policy debate to proceed unimpaired.[162] However, the dynamics of executive-branch decisionmaking spur doubts.

Despite common assertions that lawsuits chill vigorous responses to threats,[163] deferential decisions may impose a deeper chill on myopia's internal opponents. Bureaucratic opponents already face intra-institutional costs, particularly in the aftermath of crisis. Hawks within the agency may question opponents' regard for the public's safety.[164] They may also label opponents as captives of an antiquated precrisis mentality. As a result, opponents may be taken out of the loop on sensitive questions or abstain from the debate, even when the institution would be better off heeding their advice.[165] Viewed in this light, a deferential court decision is not "neutral"; it serves to hinder internal dissent.[166] The result is a mix of inputs[167] that tilts toward unduly risk-*seeking* behavior. Over time, behavior of this kind will exacerbate volatility by triggering a backlash toward undue risk-aversion.[168]

---

winning over populations in counterterrorism efforts); Philip Zelikow, *Legal Policy for a Twilight War*, 30 HOUS. J. INT'L L. 89, 92 (2007) (arguing that legal policy on interrogation and related issues must consider "enforcement of international, criminal, or civil law and the policies for the effective administration of justice").

162. *See* Arar v. Ashcroft, 585 F.3d 559, 580 (2d Cir. 2009) (en banc) (disclaiming any intent to suggest that rendition is a sound policy), *cert. denied*, 130 S. Ct. 3409 (2010).

163. *See* Schuck, *supra* note 11.

164. *See What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Judiciary Comm.*, 111th Cong. 662–89 (2009) (statement of Philip Zelikow, White Burkett Miller Professor of History, University of Virginia) (discussing reaction among some White House officials when Zelikow, former director of 9/11 Commission and then-counselor to Secretary Rice, circulated a memo in 2005 detailing problems with the United States' legal position on interrogation); GOLDSMITH, *supra* note 8, at 71 (recounting anger of Vice President Cheney's counsel, David Addington, at author's refusal to endorse "an important counterterrorism initiative"; Addington told Goldsmith that "the blood of the hundred thousand people who die in the next attack will be on *your* hands"); JANE MAYER, THE DARK SIDE: THE INSIDE STORY ON HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 316–18 (2008) (describing resistance by officials serving under Secretary of State Condoleezza Rice, such as Legal Advisors John Bellinger, Matthew Waxman, and Philip Zelikow, to efforts to temper U.S. interrogation policy during President Bush's second term); Zelikow, *supra* note 161, at 92 (discussing Zelikow's 2005 memo).

165. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 4–5 (1970) (arguing that organizations can benefit when dissenters use "voice" to address disagreement, rather than "exit" by keeping silent or leaving altogether).

166. *See* Gregory S. McNeal, *A Retrospective on the Military Commission: Organizational Culture, Professional Ethics and Guantanamo*, 42 CASE W. RES. J. INT'L L. 125, 129–34 (2009) (discussing robust culture of resistance to political influence within military); *cf.* Lobel, *supra* note 26, at 459–60 (discussing functional benefits organizations obtain through internal dissent); Peter Margulies, *True Believers at Law: Legal Ethics, National Security Agendas, and the Separation of Powers*, 68 MD. L. REV. 1, 33–34 (2008) (discussing blind spots in national security decisionmaking).

167. For a groundbreaking study on randomness in policymaking, see Michael D. Cohen, James G. March & Johan P. Olsen, *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1 (1972).

168. *See* GOLDSMITH, *supra* note 8, at 124–25, 134–35.

In contrast, a decision that denies policymakers categorical impunity may strengthen internal dissenters' resolve and enhance overall deliberation.[169]

4. The Whistleblower's Revenge

The categorical-deference approach also fails to acknowledge that those stymied by the lack of formal redress can substitute for litigation other paths that pose greater danger. For example, consider the perspective of the official who leaks a document, not to advance a personal agenda, but to focus public attention on government policy.[170] Whistleblowers of this kind, like Daniel Ellsberg, who leaked the Pentagon Papers to the *New York Times*,[171] are advancing a constitutional vision of their own in which senior

---

169. *See generally* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1412–18 (2009) (discussing institutional barriers to sound decisionmaking within the executive branch). The success of bureaucratic opponents of myopia grew in President Bush's second term, occurring after court decisions that imposed accountability on the executive branch. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (requiring due process for a U.S. citizen–detainee); *cf.* MAYER, *supra* note 164, at 316–18 (discussing the pace and timing of bureaucratic opposition).

While courts practicing categorical deference exalt executive-branch decisionmaking, they take a stilted view of plaintiffs. In *Arar*, the court made much of the plaintiff's ability to secure an unfair advantage on the merits by threatening "graymail"; i.e., the disclosure of sensitive national security information. *See* Arar v. Ashcroft, 585 F.3d 559, 578–80 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010). The court painted the plaintiff as being interested largely in payment and political posturing. *Id.* Filling out the details of this off-putting portrait, it reduced a congressional hearing on the case to another lucrative opportunity for the litigant. *See id.* at 580 n.13 ("It is telling that . . . Mr. Arar and his attorney went to the United States Congress and requested—without success—that it . . . 'give [Mr. Arar] reparations.'" (quoting Transcript of Oral Argument at 49, *Arar*, 585 F.3d 559 (No. 06-4216-CV)). However, reducing such mobilization efforts to the quest for cash ignores the gains of public education and the official accountability that these efforts produce. The same hearings that provoked the majority's caricature of the plaintiff also provided a forum for Secretary of State Rice to admit that the government had "mishandled" Arar's case. *See* Scott Shane, *On Torture, 2 Messages and a High Political Cost*, N.Y. TIMES, Oct. 30, 2007, at A18. Since Secretary Rice did not make such concessions lightly, the Secretary's acknowledgment buttressed Arar's narrative of horrendous abuse. A less categorical court would see value in such accountability, which might not have occurred without the pendency of Arar's lawsuit. *See generally* Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 Nw. U. L. Rev. 1683 (2009) (discussing advocacy efforts to promote accountability for treatment of detainees). The *Arar* court's jaundiced view of the plaintiff clashes with the depiction of habeas petitioners as keeping the government honest. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008). Ironically, these opposing portraits of litigants actually depict the same person. Today's detained habeas petitioner is tomorrow's *Bivens* plaintiff—only the time frame is different.

170. *See* Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 40, 48 (reporting that Department of Justice attorney Thomas M. Tamm acted as the source for *New York Times* reporters who wrote about the government's warrantless Terrorist Surveillance Program ("TSP")).

171. *See* Adam Liptak, *Keynote Address: Secret Evidence in the Age of National Security*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 93 (2006).

officials have strayed from the limits of the original understanding.[172] If the courts and Congress do not work to restore the balance, the whistleblower engages in self-help. Because leakers are risk-seekers who believe the status quo is unacceptable, they lack courts' interest in safeguarding sensitive information. Policy shaped by blowback from leaks is far more volatile than policy reacting to judicial precedent.[173]

Similarly, the media has a constitutional role to play that includes investigative reporting. The media will step up its efforts if other institutions like courts take a more deferential stance.[174] When government hides information, the media's sense of its own role leads to greater distrust of government and a willingness to both uncover and publish more information. On some occasions, the First Amendment will oblige us to tolerate journalists' disclosure of operational details of covert programs.[175] Journalists will understandably view government's claims that information is sensitive with greater skepticism when government has methodically locked down information in other settings. Similarly, shutting off damage suits regarding terrorism issues leaves other kinds of litigation, including litigation the government has initiated. Journalists and activists will seek to scrutinize and mobilize around these cases, even if the avenue of civil suits is closed. Indeed, activism may be distorted in these other venues when they are the only game in town. For example, journalists may be more inclined to credit even outlandish claims made by some lawyers on behalf of detainees when the government has a track record of concealing information.[176]

---

172. *See* KRAMER, *supra* note 14; *see also* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing how individuals and groups formulate and articulate constitutional visions in opposition to the prevalent governmental view); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 280 (2010) ("Unauthorized leaks typically occur when a secret-keeper is unhappy with the activities of colleagues and cannot have her position vindicated internally.").

173. The Court has not protected internal whistleblowers, who therefore become even more likely to take their concerns to the larger public. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that adverse job actions taken against a prosecutor who complained internally about the alleged mishandling of a case did not violate the First Amendment); *see also* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (holding that an official who had allegedly conspired to take adverse job action against Pentagon whistleblowers was entitled to qualified immunity); *cf.* Lobel, *supra* note 26, at 451–55 (discussing *Garcetti* and arguing for greater coherence in law regarding whistleblowers).

174. *See* LICHTBLAU, *supra* note 157, at 154–55 (reporting on the efforts of the author, one of two *New York Times* reporters who broke the story about TSP); Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 383–85 (2009).

175. *See* Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A1 (discussing logistics of renditions of suspected terrorists).

176. *See* H. Candace Gorman, *The Hippocratic Oath Dies in Gitmo*, IN THESE TIMES, Mar. 2008, http://www.inthesetimes.com/article/3540/the_hippocratic_oath_dies_in_gitmo/ (discussing how a lawyer supported the insinuation that a detainee contracted AIDS at Guantanamo by asserting that the detainee had arrived at Guantanamo Bay in healthy condition, but

While some might argue that courts should not speculate about future conduct of third parties, a court that makes empirical predictions about the effect of liability should not selectively ignore major unintended consequences of its holding.

There are parallel developments in international law. Some countries have prosecuted criminal cases against American agents who allegedly were complicit in extraordinary renditions. In Italy, a number of American government employees and personnel were convicted in absentia because of legal action generated by popular pressure.[177] U.S. public-interest organizations, like the Center for Constitutional Rights, have encouraged these assertions of universal jurisdiction. These prosecutions occurred because of officials' sense that they were above the law. Judicial remedies available in the United States can check these officials, thereby reducing the incidence and impact of universal-jurisdiction proceedings in the future.

B. INTERVENTIONIST COURTS

If categorical deference is problematic because it fails to address presentism, categorical interventionism is problematic because it does not acknowledge hindsight bias. Categorical interventionism has resulted in lower courts inappropriately finding that officials could not meet the standard for qualified immunity.[178] Categorical interventionism has two pernicious effects. First, it entails hindsight bias that distorts official incentives. Second, such decisions in lower courts drive the Supreme Court to the other extreme of categorical deference in order to police inappropriate interventionism.[179]

---

subsequently the doctors there told the detainee that he had AIDS); *see also* Nicholas D. Kristof, Op-Ed., *A Prison of Shame, and It's Ours*, N.Y. TIMES, May 4, 2008, at WK13 (reporting allegation that doctors had told detainee he had AIDS); *cf.* Al-Ghizzawi v. Bush, No. 05-2378(JDB), 2008 WL 948337, at *1 (D.D.C. Apr. 8, 2008) (noting that lawyer had conceded inaccuracy of her most serious charges); Margulies, *supra* note 174, at 391–93 (critiquing lawyer's approach).

177. *See* Rachel Donadio, *Italy Convicts 23 Americans, Most Working for C.I.A., of Abducting Muslim Cleric*, N.Y. TIMES, Nov. 5, 2009, at A15. These prosecutions are not necessarily productive avenues for reforming U.S. practices. They may prompt a backlash by domestic constituencies concerned about possible hindsight bias among foreign or transnational tribunals. *See* Margulies, *supra* note 174, at 393–99.

178. *See* al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98); Padilla v. Yoo, 633 F. Supp. 2d 1005, 1031 (N.D. Cal. 2009).

179. Policing the lower courts was a prime rationale for the Court's modification of the qualified immunity test, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and for its recent adoption of more stringent pleading rules, see *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *See also* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (2008) (holding that the equitable principle of balancing hardships precluded issuance of a preliminary injunction against naval training exercises that allegedly harmed marine mammals, thereby preventing undue intrusion on the military); Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 486–90 (2010) (criticizing *Winter*).

Scholars continue to debate the success and impact of *Bivens* litigation. One insightful commentator has argued that the government's indemnification of most *Bivens* defendants and

1. Intervention and Time's Omniscience

Interventionist decisions share with deferential rulings a categorical view of time. In deferential decisions, courts have viewed time solely from the standpoint of the earliest official option, thus masking more moderate options that developed in the intermediate term. In contrast, interventionist courts adopt the temporal perspective of a court pondering the matter after the crisis has passed. With the omniscience hindsight bias offers, the government's response to national security challenges often seems overwrought.

To illustrate this categorical view of time, consider *al-Kidd v. Ashcroft*, in which the Ninth Circuit held that Attorney General John Ashcroft had violated the rights of the plaintiff, whom the government had detained as a material witness in a terrorism investigation.[180] The plaintiff had received $20,000 from an individual indicted for terrorist activity, Sami Al-Hussayen,[181] and had met with that individual's associates after returning from a trip to Yemen.[182] At the time of his arrest pursuant to a material-witness warrant, the plaintiff was about to board a flight to Saudi Arabia.[183] The government released al-Kidd after two weeks, but did not call him as a witness at Al-Hussayen's trial, which occurred over a year after the plaintiff's arrest.[184]

The majority in *al-Kidd* seemed to view the government's failure to call al-Kidd as proof that his detention as a material witness was purely pretextual and lacking in probable cause.[185] According to the majority, the government

---

the impact of qualified immunity erode any deterrent such litigation serves. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65 (1999). However, public officials also care about their reputations. A congressional subpoena to an official to explain the facts behind a lawsuit still has an impact. *See* Shane, *supra* note 169 (reporting on the congressional hearing regarding the Arar extraordinary-rendition case, featuring testimony from Secretary of State Condoleezza Rice, who had not yet assumed her post when the alleged events took place); *see also* Zaring, *supra* note 21, at 317, 331–33 (discussing links between *Bivens* suits and policy advocacy). *See generally* Margulies, *supra* note 174, at 364–71 (discussing advocacy repertoire of lawyers for detainees, which includes media relations and community education as well as litigation). A recent empirical investigation asserts that *Bivens* actions succeed far more often than scholars had previously supposed and that qualified immunity rarely plays a dispositive role. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 809–10 (2010).

180. *al-Kidd*, 580 F.3d 949.

181. *Id.* at 982 (Bea, J., concurring in part and dissenting in part).

182. *Id.* at 952 (majority opinion).

183. *Id.* at 952–53.

184. *Id.* at 953–54. Al-Hussayen was acquitted of the most serious charges. The district court declared a mistrial on the other counts in the indictment. The government ultimately deported Al-Hussayen to Saudi Arabia after he admitted making misrepresentations in immigration documents. *Id.* at 953 n.4.

185. *Id.* at 963–64.

had detained the plaintiff solely to investigate his own possible involvement in a terrorist conspiracy.[186] However, the roles of target and witness are not mutually exclusive in conspiracy cases. Suspected participants often have useful information, and the difference between target and witness can hinge on the passage of time.[187] Forcing the government to choose at an early point in the case hamstrings enforcement. In *al-Kidd*, the facts conceded by the parties suggested that al-Kidd possessed relevant information, which might have been lost to the government if the plaintiff had traveled to Saudi Arabia.[188] Nevertheless, for the majority in *al-Kidd*, the government could have dodged liability only by allowing the plaintiff to board the plane. This was the very choice that the Second Circuit in *Arar* cited in precluding a *Bivens* claim.[189]

---

186. *Id.* at 970.

187. *See* Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 55, 107–09 (2006) (discussing how cooperation at the corporate level can facilitate institutional reform); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 69–71 (1995) (discussing cooperation and legal ethics); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 33–42 (2003) (arguing that cooperation can be a reflection of remorse and atonement, instead of a merely utilitarian calculus); Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 992–95 (2002) (same); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 614 (1999) (discussing treatment of cooperators under federal sentencing guidelines). *But see* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 931–33 (1999) (describing incentives for dishonesty among cooperators).

188. *al-Kidd*, 580 F.3d at 982 (Bea, J., concurring in part and dissenting in part). Moreover, there are many reasons why the government decides not to call particular witnesses. These include the availability of other sources and the taking of plea deals. *Id.* at 993. The selection of witnesses at trial is also a core element of the prosecutor's advocacy function, which typically enjoys absolute immunity. *Compare id.* at 957–63 (majority opinion) (rejecting absolute immunity), *with* Koubriti v. Convertino, 593 F.3d 459, 466–69 (6th Cir. 2010) (holding that a prosecutor had absolute immunity against a claim that he failed to disclose exculpatory evidence in a terrorism case), *cert. denied*, No. 09-1322, 2010 WL 1739236 (U.S. Oct. 4, 2010).

189. The majority discounted Supreme Court precedent by asserting that the government's motive in detaining al-Kidd rendered an otherwise legal detention unlawful. *See al-Kidd*, 580 F.3d at 967–68 (distinguishing Whren v. United States, 517 U.S. 806, 813 (1996) (holding that a police officer's motive was irrelevant under the Fourth Amendment as long as probable cause supported the search)). The majority's eagerness to second-guess the defendants was also evident in its use of dicta from another circuit. To establish that the defendants had violated clearly settled law, the majority cited a Second Circuit case that actually *upheld* the material witness detention of an individual who knew two of the 9/11 hijackers. *See id.* at 970 (citing United States v. Awadallah, 349 F.3d 42, 59 (2d Cir. 2003) (suggesting that while detention was appropriate on those facts, law did not support material witness detention for purposes of criminal investigation)). The search for clearly settled law should not end with dicta. Moreover, the majority conveniently failed to cite dicta from the same circuit suggesting that the government might have discretion to detain an individual as a material witness in a terrorism case. *See* Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003) (noting that alleged enemy combatant could be detained, if appropriate, as a material witness), *rev'd on other grounds*, 542 U.S. 426 (2004). While this second helping of dicta is hardly conclusive authority for the defendants, it indicates that the law was not clearly against them. That said, al-Kidd would have

A similarly stark view typifies *Padilla v. Yoo*,[190] in which erstwhile alleged enemy combatant Jose Padilla sued former Justice Department attorney John Yoo, who drafted many of the Bush Administration's memos on detention and interrogation.[191] A raft of commentators has rightly criticized Yoo's aggressively unilateralist view of executive power and strained use of statutory analogies.[192] It is tempting to start from the accurate premise that Yoo's work enabled much of the Bush Administration's overreaching,[193] and

---

had a far stronger argument if the government had failed to show probable cause for his detention. Moreover, as a policy matter, material-witness detention should be a last resort, used in cases where a witness may otherwise resort to flight, particularly flight to another country, which will pose legal and logistical difficulties for compulsory process. *See* Peter Margulies, *Detention of Material Witnesses, Exigency, and the Rule of Law*, 40 CRIM. L. BULL. 599, 600 (2004). For a balanced and insightful analysis, see Orin Kerr, al-Kidd v. Ashcroft*: Is Pretextual Use of the Material Witness Statute Unconstitutional?*, THE VOLOKH CONSPIRACY (Sept. 7, 2009, 12:53 PM), http://volokh.com/archives/archive_2009_09_06-2009_09_12.shtml#1252123900.

190. 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

191. *See, e.g.*, Memorandum from Jay Bybee, Assistant Att'y Gen., U.S. Dep't of Justice, to John Rizzo, Acting Gen. Counsel, CIA (Aug. 1, 2002), http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf. For a comprehensive discussion and critique of the Office of Legal Counsel memos, including those that specifically authorized waterboarding and other "enhanced interrogation techniques," see PETER MARGULIES, LAW'S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION 59–66 (2010). For a historical analysis of American policy on interrogation at home and abroad, see JOHN T. PARRY, UNDERSTANDING TORTURE 135–51 (2010), and John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1004–31 (2009).

192. *See* HAROLD BRUFF, BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR (2009); David Luban, *The Torture Lawyers of Washington*, *in* LEGAL ETHICS AND HUMAN DIGNITY 162, 176–80, 200–02 (2007); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455 (2005); Stephen Gillers, *Legal Ethics: A Debate*, *in* THE TORTURE DEBATE IN AMERICA 236, 237–38 (Karen J. Greenberg ed., 2005); Margulies, *supra* note 166; Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT'L L. 389 (2009); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 80–85 (2005); *cf.* Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579 (2009) (discussing need for disclosure of legal-policy positions); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1975–76 (2008) (noting role of ideology in Yoo's advice). The Justice Department recently decided against referring Yoo's case to state-bar authorities, although it criticized his unduly aggressive view of the law. *See* Memorandum from David Margolis, Assoc. Deputy Att'y Gen., to the Att'y Gen. & Deputy Att'y Gen. (Jan. 5, 2010), http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

193. For accounts that discuss the issues with law and policy during this period, see GOLDSMITH, *supra* note 8 (arguing that the Bush Administration failed to recognize the need for buy-in from other branches of government), BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008) (arguing for a greater role for Congress in setting standards on detention), and Richard Abel, *Contesting Legality in the United States After September 11*, *in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 361 (Terence Halliday, Lucien Karpik & Malcolm Feeley eds., 2008) (arguing that courts and the legal profession struggled after September 11th to protect values of accountability and individualized adjudication crucial to the rule of law).

then reverse-engineer legal vehicles to make him accountable.[194] Indeed, poetic justice seems to virtually dictate this result, given Yoo's inclination to employ a similar approach with suspected terrorists. The court surrendered to this understandable temptation, finding that Yoo was not entitled to qualified immunity. However, precedent requires more.

While deferential decisions seem to shield all officials, *Padilla* hurtled to the other extreme, targeting an official for harms lacking a clear link to the defendant's conduct. The simple facts of geography underline this lack of linkage.[195] Yoo limited his advice to detainees *outside* the United States.[196] The government detained Padilla, a U.S. citizen, *within* the United States. All of Yoo's most controversial formal advice on interrogation, therefore, excluded Padilla by its terms.[197]

The *Padilla* decision also presented a mirror image of the deferential courts' view of time. In rejecting Yoo's claim of qualified immunity, the court took the leisurely perspective marked by Padilla's conviction in federal court in 2007.[198] From this perspective, efforts to detain Padilla *outside* the criminal justice system appeared both lawless and unnecessary. In accord with this omniscient vantage point, the court declined to credit a Fourth

194. This is a perennial lure for both the left and right in American jurisprudence. *See* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006).

195. Portions of this discussion are based on analysis in Margulies, *supra* note 174, at 410–11.

196. *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (limiting advice to "conduct of interrogations outside of the United States"). A more recent memo by Yoo contained the same territorial limitation. *See* Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. (Mar. 14, 2003), http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

197. The *Padilla* court sought to restore the nexus by asserting that Yoo had written that he was closely involved in Padilla's case and had advised the government to detain Padilla as an enemy combatant. *See* Padilla v. Yoo, 633 F. Supp. 2d 1005, 1014, 1033 (N.D. Cal. 2009) (quoting JOHN YOO, WAR BY OTHER MEANS 15, 38–39 (2006)). For all those who rightly deplored Yoo's lawyering, playing "gotcha" never seemed so sweet. However, while Yoo's book is principally an exercise in polemic and self-promotion, the quotes from the volume do not bear the weight the court's opinion demanded. Yoo nowhere suggested that he had authorized behavior that Padilla alleged, such as "threats to cut [Padilla] with a knife and pour alcohol into the wounds," *see id.* at 1013, or that he had knowledge of such conduct if it had occurred. Indeed, Padilla seemed to concede this point in his pleadings, which characterized Yoo's conduct in the vaguest terms. *See* Complaint at 13, 20, *Padilla*, 633 F. Supp. 2d 1005 (No. C 08-0035 JSW), 2008 WL 135201 (claiming that Yoo had "fostered" a "climate" that violated Padilla's rights); First Amended Complaint at 9, 12, *Padilla*, 633 F. Supp. 2d 1005 (No. C 08-0035 JSW), 2008 WL 2433172 (claiming that Yoo "encouraged" and gave a "green light" to such tactics). Padilla's allegations regarding Yoo's level of knowledge of the particulars of his interrogation do not meet *Iqbal*'s standard and would cry out for summary judgment even under an unreconstructed notice-pleading regime.

198. *See* Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1.

Circuit decision holding that the government had authority to detain Padilla.[199] The *Padilla* court held that this precedent did not show that Padilla's rights were uncertain at the time of the conduct cited in his pleadings, although the court undercut its analysis with the acknowledgement that "the legal framework relating to [Padilla] ... *was developing* at the time of the conduct alleged in the complaint."[200] In short, the *Padilla* court adopted a temporal perspective as categorical as the one adopted in *Arar*, although one located at the other end of the timeline.[201]

2. The Attack of the Drones

Interventionist decisions like *al-Kidd* and *Padilla* demonstrate the same failure to grapple with substitutions that marks the categorical-deference model. Officials who feel unduly constrained by the hindsight bias of interventionist courts have substitutions at their disposal. Those officials can seek to practice a kinder, gentler version of rendition of detainees to third countries.[202] Suppose that courts intervene to make renditions more difficult,[203] at least where the primary purpose of the rendition is subjecting

---

199. *See* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). Indeed, the Supreme Court twice rejected the opportunity to rule on Padilla's rights. *See, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (declining to reach the merits on the ground that the courts in the Second Circuit, where Padilla had initially brought his habeas petition, lacked jurisdiction). The Court should have reached the merits and ruled that the government could not continue to hold Padilla as an enemy combatant without a far more extensive factual showing. *See* Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 408–31 (2004); *cf.* Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1032–49 (2008) (critiquing the Supreme Court's jurisdictional holding in Padilla's case).

200. *Padilla*, 633 F. Supp. 2d at 1036–37 (emphasis added). For an incisive critique of the failure of the *Padilla* court to follow the applicable legal standard or acknowledge the policy rationale for qualified immunity, see Peter H. Schuck, *Immunity, Not Impunity*, AM. LAW., Nov. 2009, at 51.

201. While the interventionist tack of the *Padilla* court was misguided, the categorical deference sought by the Justice Department in the case would be equally inappropriate. In an amicus brief, the Justice Department argued that "special factors counseling hesitation" should preclude a *Bivens* claim against *any* executive-branch lawyer providing national security advice. *See* Brief of the United States as Amicus Curiae, Padilla v. Yoo, No. 09-16478 (9th Cir. Dec. 3, 2009), *available at* http://www.harpers.org/media/image/blogs/misc/doj_amicus.pdf. This argument is a bridge too far, since it would encourage reckless or intentionally unlawful advice.

202. *See* Munaf v. Geren, 553 U.S. 674 (2008) (declining to halt detainee's transfer to Iraq for purposes of criminal prosecution); *see also* James E. Baker, *A Running Start: Getting "Law Ready" During a Presidential Transition*, 30 A.B.A. NAT'L SECURITY L. REP., Sept./Oct. 2008, at 2, 6 (positing that making detention more difficult will increase incidence of rendition).

203. For a recent decision wisely upholding a brief border detention, see *Tabbaa v. Chertoff*, 509 F.3d 89, 93 (2d Cir. 2007) (rejecting constitutional challenge to government's brief detention for questioning of individuals returning from conference on Islam in Canada, where the court's in camera review confirmed that the government had specific intelligence that some attendees at the conference associated with terrorist groups and that the conference would allow terrorists to "coordinate operations, ... raise funds intended for terrorist activities, [and] exchange ... travel or identification documents"); *cf.* Adrian Vermeule, *Our Schmittian*

the detainee to coercive interrogation. In that event, officials may substitute a strategy of using lethal force, including the drone attacks that have become commonplace in Pakistan over the past year.[204]

IV. AN INNOVATION-ELICITING MODEL

If both categorical deference and intervention are inappropriate to manage the combination of presentism and hindsight bias, courts should adopt an innovation-eliciting approach. This approach controls the volatility that mars both categorical approaches by allowing officials the opportunity to devise alternatives. Under the innovation-eliciting approach, the government prevails prior to the qualified immunity stage if it shows that it *actually utilized* less restrictive alternatives in (1) congruent cases that were (2) proportionate in scope and (3) proximate in time to the case at issue.

Implementing alternatives buys officials greater flexibility in a particular case. For example, suppose officials in the extraordinary rendition case *Arar v. Ashcroft* confronted a similar case six months later in which they initially detained a suspected foreign terrorist at a port of entry. In that case, the officials determined after detaining and screening the individual that the information they had received was inaccurate. The officials allowed the individual to proceed to his destination, with notice to the receiving country. Under the innovation-eliciting approach, submission of proof of this implemented alternative would trigger dismissal of Arar's suit before the qualified immunity phase.

To ensure that the proffered alternative scenario is not an outlier or red herring, officials would have to meet the congruency, proportionality, and temporal-proximity tests noted above. The congruency element would require that officials proffer a materially similar case. This case would have to entail stakes comparable to the case at bar. Comparable stakes would demonstrate that officials were serious about the alternatives they pursued.

Administrative Law, 122 HARV. L. REV. 1095, 1130–31 (2009) (discussing *Tabbaa* as a reasonable judicial response to exigent circumstances). *See generally* Schuck, *supra* note 200 (arguing a need for broad immunity for officials to preserve the distinction between law and politics).

204. *See* Orin Kerr, *Perceptions of Necessity and the Choice Between Killing and Detaining/Interrogating Terrorist Suspects*, THE VOLOKH CONSPIRACY (Dec. 24, 2009, 7:26 PM), http://volokh.com/2009/12/24/perceptions-of-necessity-and-the-choice-between-killing-and-detaininginterrogating-terrorist-suspects/; *see also* Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346 (Benjamin Wittes ed., 2009) (discussing the historical development and current U.S. position on targeted killing); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679–81 (2003) (discussing international- and domestic-law justifications for targeted killing in carefully tailored circumstances); *cf.* Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) (discussing continuum between detention and other tactics such as targeted killing). *But see* Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009) (arguing for *Bivens* actions in cases of targeted killings and intra-executive review).

In the extraordinary-rendition scenario, for example, the proffered case rejecting rendition would have to involve individualized suspicion of terrorist ties, not merely suspicion based on crude profiling criteria, such as noncitizen status. Rejecting rendition in the latter case would be too easy. Only rejecting rendition in the former case would demonstrate a sincere commitment to reform.

Proportionality centers on the volume of claimed violations. If the case at hand concerned a single transaction or occurrence, demonstration of one alternative would suffice to meet the proportionality element. However, if the case at hand involved multiple alleged deprivations of rights, officials would have to show that they had implemented less restrictive alternatives of a proportionate scope. For example, the officials in *Ashcroft v. Iqbal* who arguably turned a blind eye to the horrendous conditions of confinement the plaintiffs endured would have had to demonstrate that they had sought to prevent abuses in a similarly large sample of cases involving undocumented aliens suspected of terrorist ties.

Officials would also have to proffer implemented alternatives that were proximate in time. Alternative cases that occurred more than a year before or after could be outliers. Such cases could involve different officials whose conduct was irrelevant to the responsibility of the defendants in the case at bar. Indeed, earlier counterexamples could encompass previous administrations, or officials terminated to make way for a more aggressive approach. Citing such examples would show backsliding, not the refinement of alternatives.

Fine-tuning each of these elements therefore enhances the potential for evolution in policymakers' responses. Evolution of this kind aims for more than a single counterexample. Ultimately, it seeks an entire regime of reform.[205]

A. *THEORETICAL BASES FOR INNOVATION*

The innovation-eliciting approach makes sense from an ex ante perspective. Categorical deference and intervention both generate either inappropriate risk-seeking or risk-aversion. In contrast, the innovation-eliciting approach gives officials a stake in crafting more nuanced alternatives. In a particular case, like the extraordinary rendition at issue in *Arar*, the government may not have explored other options. However, if a rule like the one described had been in place, the government would have had a greater incentive to find such avenues. As in more formal experiments, officials could have then examined the results of less intrusive alternatives and decided dispassionately whether those results safeguarded

205. *Cf.* Kathleen G. Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 562–64 (2009) (discussing litigation that encourages experimentation in the child-welfare arena).

national security. Put another way, the innovation-eliciting approach wagers that officials encouraged to experiment with less intrusive alternatives will resort to them first instead of turning immediately to a more brutal mode such as extraordinary rendition.[206]

The innovation-eliciting approach borrows from the literature on remedying cognitive biases and regulatory failure. First, consider the cognitive dimension. The focus on generating alternatives in the innovation-eliciting approach is central to what psychologists call "debiasing" efforts. Dislodging presentist and hindsight biases requires structures that enhance deliberation and promote experimentation. Cultivating habits of deliberation[207] entails imagining alternatives. Groups that consider alternatives are more willing to abandon their own preconceptions and shift strategies to accommodate changing facts.[208] For example, studies suggest that people can improve deliberation and free themselves from the contamination of cognitive bias by imagining different outcomes. Considering an opposite hypothesis can often undo "one-sided thinking."[209] When litigants are asked to do a role-play exercise to consider the perspective of their adversary, they develop a stake in seeing things differently and add habits that enhance this aptitude.[210] Focusing on concrete alternatives that have been implemented, rather than merely

206. For a balanced view of the efficacy of coercive interrogations by a former State Department official and staff director of the 9/11 Commission, see Philip Zelikow, *A Dubious C.I.A. Shortcut*, N.Y. TIMES, Apr. 24, 2009, at A27 (observing that information from interrogations using "enhanced" techniques was "a critical part of the intelligence flow, but rarely—if ever—affected a 'ticking bomb' situation").

207. *See* ARISTOTLE, NICOMACHEAN ETHICS 33 (Martin Ostwald trans., 1962) ("Moral virtue . . . is formed by habit, *ethos*.").

208. *Cf.* Larrick, *supra* note 25 (explaining the tendency for group members to share errors and the importance of diversity to maximize the success of group decisionmaking); Philip E. Tetlock, *Theory-Driven Reasoning About Plausible Pasts and Probable Futures in World Politics*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 12, at 749, 757–60 (discussing close-call counterfactuals and possible defenses).

209. *See* Fischhoff, *supra* note 25 (discussing the importance of "task restructuring," including "asking [research] subjects to consider alternative explanations and contrary evidence"); Timothy D. Wilson, David B. Centerbar & Nancy Brekke, *Mental Contamination and the Debiasing Problem*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 12, at 185, 197; *see also* Chapman & Johnson, *supra* note 69 (noting that experiments reduced anchoring bias, in which superficially similar information acts as a baseline for a later decision, by asking subjects to consider features of the object or task at hand that differed from the anchor). Other debiasing strategies, including simply educating people about biases without seeking to restructure deliberation, do not work as well. *See* Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 34–36 (2009).

210. *See* Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913 (1997).

considering alternatives, enlists another bias—availability—which suggests that people respond to concrete information better than abstraction.[211]

One value of the innovation-eliciting approach is enhancing officials' stake in institutional reform. Debiasing strategies succeed when subjects perceive themselves as working with a *peer group* to enhance overall peer decisionmaking.[212] Seeing peers work through alternatives creates demonstration effects, as others believe that such benefits are possible and wish to join the effort.[213] It creates a stake in change, allowing subjects to "own" institutional reforms. When parties feel that a procedural regime treats them fairly, they expand their compliance and cooperation.[214] Increased stake also reduces the incidence of risk-seeking substitutions that frustrate change. For example, in working with teens on risk behaviors such as drunk driving, stressing the riskiness of the behavior has little effect. Indeed, since teens tend to be risk-seeking,[215] stressing this element is counterproductive. However, since teenagers also wish to conform to the behavior of other teens, highlighting the surprisingly high base rates of *responsible* behavior among teens has a positive impact.[216]

This approach echoes regulatory reform in environmental law.[217] Polluters proliferate pollution because they enact a tragedy of the commons, in which immediate self-interest triumphs over the public welfare.[218] Polluters seeking to avoid costly investments in new technology use old technology that compromises the public good of clear air. However, traditional command-and-control mechanisms such as outright prohibitions

---

211. *See* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 212 (2006); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1085–90 (2000) (discussing availability).

212. *See* Robyn M. Dawes et al., *Cooperation for the Benefit of Us—Not Me, or My Conscience*, *in* BEYOND SELF-INTEREST 97 (Jane J. Mansbridge ed., 1990).

213. *See* Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681, 700–01 (2008) (arguing that granting state and local governments flexibility on climate-change policies will promote intergovernmental learning).

214. *Cf.* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 857 n.28, 858, 863 (1984) (noting the EPA's views that the bubble concept encouraged voluntary improvements in technology); Edward Rubin, *The Citizen Lawyer and the Administrative State*, 50 WM. & MARY L. REV. 1335, 1359 (2009) (discussing compliance and stake).

215. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (citing literature on risk-seeking and cognition in teenagers to support striking down juvenile death penalty); *see also* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 811–17 (2005) (discussing literature on adolescent development and trial competence).

216. *See* Fischhoff, *supra* note 25, at 747.

217. *See* BARDACH & KAGAN, *supra* note 103; Kagan, Gunningham & Thornton, *supra* note 26, at 73–74; *cf.* Eric A. Posner & Cass R. Sunstein, *Should Greenhouse Gas Permits Be Allocated on a Per Capita Basis?*, 97 CALIF. L. REV. 51, 76 (2009) (discussing optimal mix of ex ante and ex post effects in cap-and-trade regime).

218. *See* Nash, *supra* note 45.

on old technology are not effective, since polluters devote substantial effort to undermining regulatory compliance and develop no shared stake in regulation.[219] Approaches that give polluters a cost incentive to develop new technology and phase out old methods address both the tragedy of the commons and regulatory efficacy. They give regulated industries a stake in developing alternatives and elicit expertise that regulators lack.[220]

Similarly, "new governance" approaches that stress collaboration in rulemaking channel the parties toward solving problems and away from the adverse substitutions that litigation breeds.[221] New-governance approaches use the expertise of decisionmakers in regulated fields to develop solutions that are innovative and efficient. Decisionmakers in regulated areas "own" these decisions and work to promote compliance.[222] Parallel initiatives have

219. *See* BARDACH & KAGAN, *supra* note 103.

220. *See* Nash, *supra* note 45, at 846–47; *see also* John S. Applegate, *Bridging the Data Gap: Balancing the Supply and Demand for Chemical Information*, 86 TEX. L. REV. 1365, 1398–404 (2008) (analyzing market-based models); Wendy Wagner, *Using Competition-Based Regulation To Bridge the Toxics Data Gap*, 83 IND. L.J. 629, 640–46 (2008) (discussing certification based on proof of superiority of one toxic substance and accompanied by a possible ban of others). *But see* David M. Driesen, *Is Emissions Trading an Economic Incentive Program? Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 343–47 (1998) (noting arguments for incentives while expressing skepticism that this approach will necessarily improve compliance); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 267 (2009) (arguing that properly calibrated retribution through punitive damages serves important expressive interests and also promotes future compliance). While this Article argues that damage suits against officials can be counterproductive, the innovation-eliciting approach would promote changes in official strategy. It would thus reject expansive grandfathering rules that protect decisions or practices from changes in legal regimes. *See* Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1724–28 (2007) (criticizing Bush Administration proposals that grandfathered in more old sources of emissions and permitted renovation instead of construction of new plants with cleaner technology).

221. *See* Lobel, *supra* note 26, at 470–73; Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1246–51 (2009).

222. *See* AYRES & BRAITHWAITE, *supra* note 17, at 4–5, 35–41; *see also* Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 310–14 (2004) (discussing how regulators use incentives to promote voluntary disclosure).

encouraged experimentation in the delivery of social services[223] such as education,[224] housing,[225] child welfare,[226] and criminal justice.[227]

The innovation-eliciting approach to national security torts has the same dynamic. Officials with a short-term perspective can compromise public goods, such as the United States' "soft power," in a system where force has limits and goodwill is necessary to secure international cooperation.[228] However, damages claims that proceed too readily can encourage efforts by officials to cover up matters, thereby frustrating attempts at regulation.[229] Encouraging innovation addresses this problem. While cap-and-trade approaches give industrial polluters a cost incentive to innovate and introduce new technology, an innovation-eliciting approach to *Bivens* actions gives officials a litigation incentive to innovate in solving national security problems.[230]

---

223. *See* William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 170–81 (2004) (outlining more flexible approaches to defining community interests); *cf.* Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 325–30 (2007) (describing more collaborative models of advocacy); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1021 (2004) (discussing innovation in public-interest litigation).

224. *See* Susan P. Leviton & Justin A. Browne, *Students Schooling Students: Gaining Professional Benefits While Helping Urban High School Students Achieve Success*, 38 J.L. & EDUC. 359, 387–92 (2009) (discussing virtues of partnership between law-school clinic and small urban school with flexible approach to governance structure and curriculum).

225. *See* Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL'Y 117 (2009) (discussing advantages of flexibility in new-governance paradigm, while also recommending preservation of legal protections for subordinated groups).

226. *See* Noonan, Sabel & Simon, *supra* note 205, at 533–48.

227. *See* Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645 (highlighting merits of promoting flexibility and innovation in reform of criminal justice processes such as interrogation and eyewitness identification).

228. *See* Borgen, *supra* note 161, at 774–78; NYE, *supra* note 161, at 35. For a discussion of the need to consider international goodwill in the establishment and implementation of military commissions, see Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT'L L. 427, 471–90 (2009) (arguing that military commissions do not promote commitment to counterterrorism within global communities).

229. *See* Scott Shane, *Prosecutor To Review Official Handling of C.I.A. Tapes*, N.Y. TIMES, Feb. 10, 2008, at A23.

230. As a remedial approach that will promote reform by leveraging stakeholders' expertise, the model here also draws from the "metadoctrinal" conception of interpretation. *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 38 (2001) (discussing norms and values that help shape formulation of legal tests); Berman, *supra* note 96 (discussing factors that shape legal standards in criminal procedure); Monaghan, *supra* note 96 (same); *see also* Chesney, *supra* note 169 (applying metadoctrinal approach to national security law).

B. APPLYING THE PARADIGM

Application of the innovation-eliciting paradigm would temper the excesses of categorical deference and intervention. The results in *Iqbal* and *Arar* would be different, with plaintiffs able to pursue their claims, at least through the qualified immunity phase, and possibly beyond. The result in *Padilla v. Yoo* would also change, ending the lawsuit prior to the qualified immunity stage.

The congruency, proportionality, and temporal elements would often work to temper categorical deference. Congruency would do most of the work in *Arar*. The *Arar* result would be different if the government did not show that it had used a less intrusive alternative to extraordinary rendition in a similar case. Instead of dismissing the lawsuit, plaintiffs would have reached the qualified immunity stage and tested whether intentional rendition to a country that practiced torture violated "settled law." The result would have heightened accountability for an indefensible practice.

Proportionality would temper categorical deference in other contexts. For example, in *Iqbal*, senior officials would have had to show that after September 11th they requested humane treatment of another comparably large group of detained noncitizens from South Asia and the Middle East. If officials had failed to make this showing, plaintiffs would have moved on to the qualified immunity stage, where they would have been able to test the legal sufficiency of officials' acquiescence in the abusive treatment of detainees. In cases involving alleged mistreatment of Guantanamo detainees, officials would have been able to avoid proceeding to the qualified immunity stage with a proffer that treatment of a significant cohort of Guantanamo detainees had complied with the Geneva Convention.[231] Absent this showing, the lawsuit would have continued.

In other cases, the temporal proximity of the proffered alternative could play a dispositive role. In *al-Kidd v. Ashcroft*, for example, the government would have to show that it had released a material witness in a temporally proximate terrorist prosecution after taking his deposition.[232] Without this showing, the plaintiff would have been able to continue the litigation.

The government would have been able to use the innovation-eliciting approach to secure a dismissal of *Padilla* prior to the qualified immunity phase. In *Padilla*, the government would have argued that it had used a less restrictive alternative—the criminal justice system—to incapacitate significant numbers of terrorists. Specific examples would include the

231. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3(1), Aug. 12, 1949, 6 U.S.T. 3516, 5 U.N.T.S. 287 (barring torture and cruel, inhuman, and degrading treatment).

232. *See* United States v. Awadallah, 349 F.3d 42, 59–61 (2d Cir. 2003) (interpreting statutory conditions for detention to secure witness's grand-jury testimony).

planners of the embassy bombings in Kenya and Tanzania;[233] James Ujaama, who admitted to a plot to establish a terrorist training camp;[234] and Zacarias Moussaoui, who pleaded guilty to participation in the conspiracy that yielded the 9/11 attacks.[235] The total number of criminal defendants vastly outnumbered the total of three people detained in the United States as enemy combatants.[236] Moreover, the criminal prosecutions were proximate in time. The prosecutions showed that institutional competition between the Justice Department and other parts of the government was working to minimize the number of detainees and channel most cases through the criminal justice system, with its many procedural safeguards.[237] Courts would still have the power to order appropriate relief for detainees on writs of habeas corpus.[238] However, detainees such as Padilla would not have remedies under *Bivens*.[239] The Justice Department's relative success in intragovernmental contests would buy officials this flexibility.

---

233. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93 (2d Cir. 2008).

234. *See* Matthew Preusch, *National Briefing Northwest: Washington: 2-Year Term in Taliban Case*, N.Y. TIMES, Feb. 14, 2004, at A16 (noting Ujaama's plea, premised on his cooperation).

235. *See* United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010) (affirming denial of Moussaoui's motion to withdraw his guilty plea).

236. In addition to Padilla and Yaser Esam Hamdi, the government detained Ali Al-Marri, who subsequently pleaded guilty to criminal charges. *See* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (upholding Al-Marri's detention, while requiring due-process protections), *vacating as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009); John Schwartz, *Plea Agreement Reached with Agent for Al Qaeda*, N.Y. TIMES, May 1, 2009, at A16.

237. *See* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 429–33 (2007) (discussing competition between criminal prosecution and detention models). *See generally* ZABEL & BENJAMIN, *supra* note 140 (analyzing criminal prosecutions).

238. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2258 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004). For discussions of alternatives in the detention and adjudication of suspected terrorists, see WITTES, CHESNEY & BENHALIM, *supra* note 138 (arguing that habeas courts since *Boumediene* have failed to establish clear standards about who should be detained), ZABEL & BENJAMIN, *supra* note 140 (arguing for criminal justice system as first resort), Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (arguing for convergence of paradigms entailing protection for classified information and due-process safeguards), David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 732–40 (2009) (arguing that the Constitution would authorize detention of persons acting on behalf of al Qaeda or the Taliban in hostilities against the United States, or members of these groups who played a "direct role in furthering military ends"), Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87 (2008) (recommending creation of national security court), and Waxman, *supra* note 204 (arguing for a regime with escalating procedural safeguards).

239. This result would not be a substantial departure from current law. Under proper analysis of qualified immunity, a court would have dismissed Padilla's suit (and al-Kidd's) in any event. *See supra* Part III.B.1–2 (discussing problems with decisions in *al-Kidd* and *Padilla*). The analysis here would merely allow the government to seek termination of discovery at an earlier point.

V. CRITICISMS OF THE INNOVATION-ELICITING MODEL

The innovation-eliciting approach triggers a number of concerns. First, one can argue that it gets ex ante incentives wrong and will actually encourage risky substitutions. Second, because it stresses the ex ante perspective of policymakers, it may give short shrift to the ex post value of compensation. Third, from a more deferential standpoint, one could argue that the approach unduly intrudes on executive-branch officials.

The innovation-eliciting approach may encourage strategic behavior from policymakers. For example, if officials believe that next month they will detain a hardened suspected terrorist who has valuable information but will resist conventional interrogation, they may detain a less important suspect today and treat that person with kid gloves to document that they implemented alternatives.[240] Having "banked" this alternative, they would then have a safe harbor (at least regarding damages claims) for the use of tougher interrogation methods on the suspected terrorist they detain next month.

While such strategic behavior is a legitimate concern, there is reason to think it will be less significant in practice. First, civil liability is not the only constraint on policymakers; criminal law and other constitutional remedies, such as habeas corpus, also play a role. Second, officials in this scenario may end up outsmarting themselves. As they use standard interrogation techniques, such as building rapport with the subject, they may get more useful information than they expect from the lower-level detainee.[241] Such success will encourage use of proven interrogation techniques on higher-value detainees as well. This development of best practices is the prime rationale for the innovation-eliciting approach.

Progressive critics can also argue that the stress on ex ante perspectives in the innovation-eliciting approach shortchanges the value of compensation. In some situations, individuals who have suffered from official conduct that violates legal norms will not be made whole. Such a result seems to violate the age-old maxim *ubi jus, ubi remedium*—where there is a right, there is a remedy.[242]

This, too, is a powerful argument with several responses. First, if the intuition about the ex ante effect of encouraging alternatives is correct, the problem of compensation will largely be a transitional issue, since fewer

240. *See* Posner & Sunstein, *supra* note 217 (analyzing perverse incentives created by a cap-and-trade regime that reduces obligation for high-population states, who then have an incentive to encourage further population growth and resulting overconsumption).

241. Veteran FBI interrogators used traditional interrogation methods to get information from Ibn al-Shaykh al-Libi. *See* MAYER, *supra* note 164, at 105–06. Al-Libi provided information about al Qaeda camps and a plot to attack the American embassy in Yemen. *Id.* CIA operatives later used more coercive techniques, which resulted in misinformation about links between Saddam Hussein and September 11th. *Id.*

242. *See* Vladeck, *supra* note 128.

wrongs will be committed under an innovation-eliciting regime. The problem of undercompensation will be no worse than the problem under the qualified immunity doctrine, when the first generation of victims is left remediless because official action did not violate clearly settled norms. Second, compensation is always merely one goal among many, including deterrence of future wrongdoing and repose for defendants. Statutes of limitation and evidentiary privileges[243] also hinder compensation on policy grounds; however, the legal system views the trade-off as worthwhile.[244] Finally, the model does not preclude compensation in cases where senior officials can demonstrate they employed alternatives. Victims simply have to look elsewhere to obtain redress, including direct appeals to the political branches. Political avenues have sometimes been productive when the courts did not find a redressable wrong.[245] Appeal to the political branches has always been part of the democratic system and appeals here may also be effective. Moreover, in many national security cases, where abusive treatment while detained is part of the lawsuit, lower-ranking officials may be answerable, even if senior officials are not. In suits involving the post-9/11 detainees, the government settled for considerable sums.[246] So plaintiffs received compensation even without *Bivens* liability for senior officials.

One could also argue that an innovation-eliciting approach would be unduly intrusive on decisionmakers. In some situations, such as combat, requiring documentation of alternatives would be burdensome. Avoiding this prospect could push commanders in the field to be either inappropriately risk-averse or risk-seeking, with the disadvantages attached to either course.

Courts should tailor the innovation-eliciting approach to minimize these concerns. In some cases, the government would be allowed to submit evidence regarding such processes in camera and/or ex parte to avoid security risks.[247] Courts should also preclude damage actions involving military attacks overseas, where the stakes are highest for American

---

243. *See* Flaminio v. Honda Motor Co., 733 F.2d 463, 471 (7th Cir. 1984) (discussing Federal Rule of Evidence 407, which bars evidence of subsequent repairs to promote "social policy of encouraging people to take, or least not discouraging them from taking, steps in furtherance of added safety").

244. *See generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1789 (1991) (arguing that while having a remedy for every right is an aspirational goal, pragmatic factors will always cause courts to fall short).

245. For an example taken from American history, see the Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. § 1989 (2006)) (acknowledging injustice of Japanese–American internment during World War II and providing compensation). Of course, in such cases the political process may work slowly, which provides a strong argument for judicial redress.

246. *See* Nina Bernstein, *U.S. To Pay $1.2 Million to 5 Detainees over Abuse Lawsuit*, N.Y. TIMES, Nov. 3, 2009, at A22.

247. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 548 F.3d 276 (2d Cir. 2008).

personnel. Courts have typically used threshold or procedural-avoidance mechanisms such as the political question doctrine to insulate such matters from judicial second-guessing.[248] They could continue this practice or rule that such matters are committed to the unreviewable discretion of military personnel.[249] This would minimize the intrusiveness of judicial involvement and mitigate hindsight bias that would otherwise distort the process.

VI. CONCLUSION

Like most currency, the coin of constitutional remedies has two sides. One side corrects myopia, using remedies such as habeas corpus to counter officials' addiction to a short-term perspective. The other side tames hindsight bias, limiting damages to head-off undue risk-aversion. However, privileging either of these perspectives is a perilous choice. Courts should address both biases. Without a comprehensive approach, we could end up with the worst of both worlds: a remedies regime that stifles risk-taking when the national interest requires it, yet perversely encourages it when less drastic alternatives will serve.

Sadly, recent decisions on the availability of *Bivens* remedies for alleged violations of constitutional rights in the war on terror live out the pessimistic prophecy ventured above. Cases like *Iqbal* and *Arar* display a categorical deference, depicting choices as binary. The *Arar* court insisted that officials faced the stark choice between rendering a suspected terrorist to Syria for torture and letting him board a plane peopled by unwary passengers. On the other hand, cases like *Padilla* and *al-Kidd* manifest an equally categorical interventionism as they ponder time from the convenient perch of retrospect.

Clearly, a better way is needed. The innovation-eliciting approach breaks with the categorical cast of both deferential and interventionist decisions. Drawing from literature on debiasing cognitive flaws and remedying regulatory failure, the innovation-eliciting approach focuses on actual, implemented alternatives to the official-defendants' actions. That focus gives officials a stake in developing and refining alternatives. When the alternative dispositions are both proportional and proximate in time to the actions at issue in the lawsuit, it rewards the official with dismissal of the lawsuit prior to the qualified immunity phase. By encouraging the habit of considering alternatives, the innovation-eliciting approach navigates between undue risk-aversion and risk-seeking. This approach reduces path-

248. *See* El-Shifa Pharm. Indus. Co. v. United States, 559 F.3d 578 (D.C. Cir. 2009) (holding that a lawsuit against the United States for an attack on a pharmaceutical factory in the Sudan that officials believed was tied to Osama bin Laden constituted a political question), *petition for cert. filed*, 79 U.S.L.W. 3141 (U.S. Sep. 7, 2010) (No. 10-328); *cf.* Brown, *supra* note 21, at 851 (discussing the relationship between the political question doctrine and a deferential approach to *Bivens* actions that leaves decision about liability to Congress).

249. *See* United States v. Stanley, 483 U.S. 669, 681 (1987).

dependence and controls the "pendular swings" in policy that Justice Kennedy in *Boumediene* viewed as antithetical to the rule of law.

Ultimately, to paraphrase Justice Holmes, constitutional remedies, like "all life[, are] an experiment."[250] Remedial theories gamble the legal system's integrity at every turn, whether they presume the availability of damages or their absence. Rewarding experiments will strike a better balance between liberty and security. Given the instability wrought by current approaches to constitutional remedies, that gamble is worth the risk.

250. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).