

Spring 2011

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Peter Margulies  
*Roger Williams University*

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Online ISSN: 2643-7759

### Recommended Citation

Peter Margulies, *Noncitizens' Remedies Lost?: Accountability for Overreaching in Immigration Enforcement*, 6 FIU L. Rev. 319 (2011).

DOI: <https://dx.doi.org/10.25148/lawrev.6.2.10>

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# Noncitizens' Remedies Lost?: Accountability for Overreaching in Immigration Enforcement

*Peter Margulies\**

Remedies for government overreaching in immigration cases have always embodied a dilemma. On the one hand, the government sometimes acts excessively, failing to provide allegedly removable noncitizens with appropriate process,<sup>1</sup> using excessive force in arrests,<sup>2</sup> or detaining noncitizens too long or under poor conditions.<sup>3</sup> On the other hand, particularly since the government has legitimate concerns about both immigration violations and the threat of terrorism from noncitizens, overly broad or expansive remedies may chill government efforts and leave the nation vulnerable.<sup>4</sup> While such competing concerns exist in any area involving suits against government officials,<sup>5</sup>

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\* Professor of Law, Roger Williams University. I thank participants at the Florida International University School of Law Immigration Law Conference, particularly Ediberto Roman and the staff of the Law Review, for conversations that made this Article possible; all mistakes are my own.

<sup>1</sup> See *Arar v. Ashcroft*, 585 F.3d 559, 576-77 (2d Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3409 (2010).

<sup>2</sup> See *Argueta v. U.S. Immigrations & Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011); cf. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (permitting suit for damages against federal agents who behaved in abusive and insulting fashion during search of residence).

<sup>3</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (reciting facts but rejecting liability); PETER MARGULIES, *LAW'S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION* 29 (2010); DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 30-31 (2007) (discussing the post-9/11 roundup of undocumented noncitizens from Middle East and South Asia, most of whom had no ties to terrorism); see also DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 8-9 (2007).

<sup>4</sup> See *Iqbal*, 129 S. Ct. at 1951 (declining to impose supervisory liability for officials who allegedly knew about, but failed to address abusive conditions of confinement).

<sup>5</sup> Compare George D. Brown, *Accountability, Liability, and the War on Terror – Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 234-37 (2011) (warning of unintended effects of tort liability), and Peter H. Schuck, *Suing Government Lawyers for Giving Dubious Legal Advice in a National Security Crisis: Notes on How (Not) to Become a Banana Republic*, \_\_ ST. THOMAS L. REV. \_\_ (forthcoming 2011) (on file with author) (critiquing suits for damages against officials as chilling exercise of judgment), with Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability*

these concerns are particularly salient in the immigration context. This brief paper aims to carve out space where those injured by government overreaching can seek relief, without creating the negative externalities that would hamper legitimate enforcement efforts.

The dilemma parallels the relationship in human inference between myopia and hindsight bias. Remedies such as damage suits are useful for deterring the myopia that can afflict government officials.<sup>6</sup> Like other human beings, officials tend to have a limited time horizon. Events and concerns that are immediate and vivid receive a disproportionate share of attention, while intermediate and long-term effects fade from view.<sup>7</sup> Too often, officials act on short-term concerns, with a hasty consideration of techniques that seem expedient or require less time, without pondering the effectiveness of those techniques. The groundbreaking case that established law enforcement officials' liability under the United States Constitution involved agents forcing their way into a home and humiliating a suspect in front of his family.<sup>8</sup> The agents never considered whether obtaining a warrant or securing the suspect's consent – both techniques used repeatedly – would have been appropriate. Some of this same heedlessness has seeped into immigration enforcement.<sup>9</sup>

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*Model*, 62 STAN. L. REV. 809 (2010) (arguing that suits for damages promote accountability); see also Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law After the Bush Administration*, in WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 183, 201-06 (Austin Sarat & Nasser Hussain eds., 2010) (discussing risks and benefits of spectrum of sanctions, including suits for damages); cf. Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195 (2010) (courts should not categorically preclude or allow suits for damages against officials, but instead should analyze whether damage action in particular context would encourage alternatives to overreaching).

<sup>6</sup> See Margulies, *Judging Myopia in Hindsight*, *supra* note 5, at 204-11.

<sup>7</sup> See 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) (people inappropriately discount future costs); Daniel Read, *Intertemporal Choice*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 424, 428-29 (Derek J. Koehler & Nigel Harvey eds., 2004) (individuals prefer “smaller-sooner reward,” even when rational person would wait longer for significantly larger pay-off); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443 (1997) (people employ “commitment mechanisms” such as insurance policies or savings plans to correct 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 errors in discounting over time).

<sup>8</sup> See also James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in FEDERAL COURTS STORIES 275 (Vicki C. Jackson & Judith Resnik eds., 2010) (discussing background of *Bivens* case).

<sup>9</sup> See *Douglas v. United States*, 796 F. Supp. 2d 1354 (M.D. Fla. 2011) (Plaintiff, who had obtained derivative citizenship through mother's naturalization, was needlessly detained for more than eight months on immigration charges because when he submitted detailed letter to United States Immigration and Customs Enforcement (ICE) agent regarding his citizenship

However, a countervailing value here is hindsight bias.<sup>10</sup> Human beings often believe that harms are preventable. In fact, a dense web of circumstance often blocks a different result. Courts review official decisions from the cozy recliner of retrospect. Hindsight bias comes with the territory. Hemmed in by fear of hindsight bias, immigration enforcement officials would lose the flexible judgment that decisive action requires. By chilling difficult decisions that serve the public interest, excessive liability would trigger substantial opportunity costs. Courts have constrained damage suits to forestall this possibility.<sup>11</sup>

Courts have generally been more considerate about the dangers of hindsight bias than the risks of myopia. As a result, both Congress and the courts have constrained damage suits in a number of ways. Congress has written language into the Immigration and Nationality Act that could be read to severely restrict damage suits as well as other litigation.<sup>12</sup> Moreover, courts generally require that a plaintiff first exhaust administrative remedies.<sup>13</sup> In addition, a *Bivens* action against a federal official cannot proceed if courts believe that “special factors counsel[] hesitation” in allowing such a suit.<sup>14</sup> Even if the plaintiffs leap this hurdle, they must overcome the qualified immunity of the official, which permits liability only if the official has acted in violation of settled law.<sup>15</sup> Plaintiffs who are stymied by these requirements may

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status, the agent declined to look into matter and merely said, “Talk to the judge”; the court granted summary judgment to Plaintiff on malicious prosecution claim).

<sup>10</sup> See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 7, at 95 [hereinafter Rachlinski, *Positive Theory in Hindsight*] (notions 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 [hereinafter Roese, *Twisted Pair*] (because of hindsight bias, people “believe that an event was predictable before it occurred even though for the perceiver it was not”).

<sup>11</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

<sup>12</sup> See 8 U.S.C. § 1252(g) (2006) (barring “any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders . . .”).

<sup>13</sup> See *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 273 (D. Conn. 2008).

<sup>14</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Arar v. Ashcroft*, 585 F.3d 559, 576-77 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

<sup>15</sup> See *Harlow*, 457 U.S. at 807; *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011); see also *Pearson v. Callahan*, 555 U.S. 223 (2009) (allowing court to find that official had immunity due to absence of clearly settled law without first determining whether plaintiff’s rights were violated); cf. Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117 (2009) (arguing that *Pearson* holding encouraged undue deference for official decisions); Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. R. 595, 608-12 (2009) (discussing rationale for *Pearson* holding); see generally Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV.

be able to sue under the Federal Tort Claims Act (FTCA), but there, another barrier awaits: the court must find that the challenged decision did not arise from a “discretionary function” of the agency that courts should not second-guess.<sup>16</sup>

These barriers are even more formidable in the immigration context. Courts often extend themselves to defer to officials in damage suits involving immigration enforcement.<sup>17</sup> This compounds the courts’ pervasive deference in the immigration arena. According to precedent, Congress has plenary power over immigration, where it is able to impose classifications that would violate equal protection in any other realm.<sup>18</sup> In addition, Bill of Rights guarantees mean far less in the immigration setting. For example, uncertainty exists regarding the First Amendment rights of aliens.<sup>19</sup> Laxity also prevails for Fourth Amendment rights – a search or seizure must be not only unreasonable, but egregiously so, to result in exclusion of evidence or sanctions against the government.<sup>20</sup>

The result of procedural and substantive restraints on suits for damages is what I call the specificity two-step. To perform the specificity two-step, courts narrowly construe a term or element when that

281 [hereinafter Schuck, *Suing Our Servants*] (arguing that failure to curb damages actions leads to undue official risk-aversion).

<sup>16</sup> 28 U.S.C. § 2680(a) (2006); see *United States v. Gaubert*, 499 U.S. 315 (1991) (construing exception).

<sup>17</sup> See *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011); see generally Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1412-18 (2009) (analyzing rationale for deference in national security cases).

<sup>18</sup> See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). For critiques of the plenary power doctrine, see KANSTROOM, *supra* note 3, at 113-16; Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059-60 (1994); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights*, 41 VILL. L. REV. 725 (1996); see also Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437 (2002) (critiquing judicial deference to Congress in administration of territories); see generally GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996) (analyzing consequences of territoriality under Constitution); cf. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (arguing that courts have developed approaches to statutory interpretation to mitigate harshness to noncitizens caused by plenary power doctrine).

<sup>19</sup> See Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 715 (2003) (“Congress may to some extent infringe on the rights on noncitizens in ways that would be impermissible if done to citizens.”).

<sup>20</sup> See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (O’Connor, J., plurality opinion) (Fourth Amendment exclusionary does not ordinarily apply in removal proceedings, but might apply in context of “egregious” violations); Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507 (2011).

serves government interests, but pivot to a broader construction when a narrower approach would hold government accountable. For example, in adjudicating claims that officials did not adequately supervise subordinates in immigration enforcement, one court has narrowly construed the notice that officials must receive of subordinates' misconduct.<sup>21</sup> Because of this narrow reading, courts view even notice of systemic problems as isolated anecdotes that do not trigger liability. In contrast, in considering whether an agency sued under the FTCA can claim that its acts were a discretionary function, courts have been prone to finding that even isolated acts of heedless habit have systemic implications that courts should not second-guess.<sup>22</sup> The specificity two-step upsets law's careful balance between official myopia and hindsight bias.

To counter the specificity two-step, this Article suggests a sliding scale test to address *Bivens* actions for damages against immigration officials and the scope of the "discretionary function" exception to liability under the FTCA. Instead of buying into categorical deference or interventionism, a sliding scale test provides a flexible means for easing both myopia and hindsight bias. Use of a sliding scale has significant implications for suits against immigration officials and agencies. A sliding scale approach would narrowly define the "factors counseling hesitation" that preclude *Bivens* actions. This narrow definition would allow for more fine-grained analysis of individual cases. In suits against supervisors, the sliding scale approach would permit liability if an official *knew* of ongoing violations by subordinates and failed to act. In suits involving an alleged failure by supervisors to train subordinates, the sliding scale approach would consider the pre-employment experience of subordinate officials and the nature of the interests affected by enforcement overreaching. In the qualified immunity context, the test would broadly define "clearly established law" that overcomes immunity if the official's actions were egregious, and the opportunity costs of a decision for plaintiffs were low. Similarly, in the FTCA arena, the approach would narrowly define the "discretionary function" exception when a decision for plaintiffs involved heedless habits whose modification would not alter policy deliberations.

The Article is in four parts. Part I discusses the relationship between remedies for official action and cognitive biases. Part II discusses threshold objections to suits for damages, such as exhaustion

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<sup>21</sup> See *Argueta*, 643 F.3d at 74-75.

<sup>22</sup> See *Castro v. United States*, No. C-06-61, 2007 U.S. Dist. Lexis 9440, at \*32 (S.D. Tex. Feb. 9, 2007), *aff'd*, 608 F.3d 266 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 902 (2011).

and statutory bars to relief. It concludes that these concerns would not preclude most suits. Part III discusses the present state of the law and the specificity two-step, which threatens to sharply narrow relief under *Bivens* and the FTCA for victims of overreaching in immigration enforcement. Part IV suggests the sliding scale approach as a remedy for the pro-government tilt of the specificity two-step.

### I. COGNITIVE BIASES AND REMEDIES

Humans are subject to cognitive biases that distort decisionmaking.<sup>23</sup> One bias is myopia, which dwells on short-term outcomes with steep discounting of future results. Another is hindsight bias, which makes every official error seem preventable and every official a dunce for failing to head off mistakes. Balancing these biases is both challenging and necessary in fashioning remedies.

The Framers appreciated the perils of myopia. Hamilton commented that legislatures were subject to the “effects of occasional ill humors in the society.”<sup>24</sup> Since the political branches are fickle, popular whim or paranoia can lead to excessively volatile government. Courts can supply a more extended perspective to curb these “pendular swings.”<sup>25</sup>

Actions for damages also play a significant part in remedies for myopia. Dating back to the Founding Era, courts have awarded monetary relief to individuals injured by official action.<sup>26</sup> More recently, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>27</sup> the Court held that a victim of an unreasonable search could recover damages.

Yet myopia is not the only bias relevant to remedies: a countervailing factor is the danger of hindsight bias. Hindsight bias heightens

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<sup>23</sup> The following account is based on Margulies, *Judging Myopia in Hindsight*, *supra* note 5, at 204-11.

<sup>24</sup> See THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>25</sup> See *Boumediene v. Bush*, 553 U.S. 723, 742 (2008).

<sup>26</sup> See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (monetary relief ordered for improper seizure of neutral vessel); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 173, 177, 179 (1804) (damages ordered for seizure of vessel in violation of a statute); *The Paquete Habana*, 175 U.S. 677 (1900) (ordering monetary relief for owner of a coastal fishing vessel seized during Spanish-American war); 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 without congressional authorization 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, 1597-1607 (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).

<sup>27</sup> 403 U.S. 388 (1971).

the perceived likelihood that another person could have prevented harm.<sup>28</sup> In reality, harm often emerges from a confluence of causes.<sup>29</sup> Officials weary of continual second-guessing will often “play it safe,” shrinking from tough decisions. To cope with hindsight bias, courts have taken a range of measures. They have granted officials qualified immunity that shields those who have not violated “clearly settled” law.<sup>30</sup> Even more fundamentally, they have barred lawsuits with factors, such as national security, that “counsel hesitation” about the appropriateness of a damages remedy.<sup>31</sup> The FTCA similarly bars lawsuits concerning the military<sup>32</sup> or the formulation of policy.<sup>33</sup>

Hindsight bias, like myopia, dovetails with other cognitive flaws such as the availability heuristic.<sup>34</sup> In the imperfect realm of human inference, vivid images affect assessments of probability: an individual who recalls a vivid event with its accompanying imagery will exaggerate the likelihood of that event's recurrence, while discounting the likelihood of more mundane events. For example, people exaggerate the probability of harm stemming from air travel because the images of plane crashes and aviation disasters are so memorable.<sup>35</sup> On the other hand, most people markedly *underestimate* the likelihood of harm stemming from automobile accidents. Paradoxically, one reason for this lowered estimate is the ordinary nature of car accidents – these mishaps are too pervasive to be remarkable.<sup>36</sup> Similarly, a vivid harm that has already occurred serves as an “anchor” for assessment

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<sup>28</sup> See Rachlinski, *Positive Theory in Hindsight*, *supra* note 10; Roese, *Twisted Pair*, *supra* note 10, at 258.

<sup>29</sup> See W. Kip Viscusi, *Punitive Damages: The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 300 (1998) (juries err in assessing liability for low-probability but high-stakes events). *But see* CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA 109-12 (2001) (praising practical wisdom and sound moral judgment in jury verdicts).

<sup>30</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011); *Brown*, *supra* note 5; Schuck, *Suing Our Servants*, *supra* note 15; *cf.* Vladeck, *supra* note 5 (recommending caution in paring away remedies).

<sup>31</sup> See *Arar v. Ashcroft*, 585 F.3d 559, 580 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).

<sup>32</sup> See *Feres v. United States*, 340 U.S. 135 (1950).

<sup>33</sup> See *United States v. Gaubert*, 499 U.S. 315 (1991) (interpreting FTCA's “discretionary function” exception to liability).

<sup>34</sup> 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 89, 97 (noting that vivid risks skew judgments of probability).

<sup>35</sup> See Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62-70 (2002).

<sup>36</sup> See Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 7, at 567, 575-76 [hereinafter Rachlinski, *Heuristics and Governance*].

of the chain of events that failed to prevent that harm.<sup>37</sup> With a vivid harm as the anchor, viewers typically fault those acts or omissions, even when officials acted reasonably based on the information available to them. This sentiment, if allowed to proceed unhindered, would result in damages judgments that would chill official decisions. To avoid this problem, Congress and the courts have shielded executive decisionmaking. A court will dismiss a suit for damages for violation of the Constitution if the court believes that the context of the case includes “factors counseling hesitation” such as the possibility of disclosure of national security information.<sup>38</sup> If a plaintiff leaps this hurdle, courts have ruled that officials retain qualified immunity from suit unless they have violated “clearly settled” law.<sup>39</sup> When a plaintiff sues the United States under the FTCA because of alleged official wrongdoing, Congress has declined to waive the government’s sovereign immunity when the decision involves a “discretionary function.”<sup>40</sup>

Immigration is in need of curbs on myopia. Too often, government action against immigrants seems driven by the need to demonstrate that officials are doing something, *anything*, to deal with perceived threats.<sup>41</sup> Moreover, just as for *Bivens*, the remedy for noncitizen subjects of government overreaching is “damages or nothing.”<sup>42</sup> A noncitizen who has been victimized by overreaching in immigration enforcement often has no remedy because the Supreme Court has severely limited the exclusionary rule in immigration proceedings.<sup>43</sup>

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<sup>37</sup> On anchoring, see Daniel Kahneman, Ilana Ritov & David Schkade, *Economic Preferences or Attitude Expressions?: An Analysis of Dollar Responses to Public Issues*, in CHOICES, VALUES, AND FRAMES, 642, 665-68 (Daniel Kahneman & Amos Tversky eds., 2000); Gretchen B. Chapman & Eric J. Johnson, *Anchoring, Activation, and the Construction of Values*, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 115, 144 (1999); cf. Rachlinski, *Heuristics and Governance*, *supra* note 36, at 569 (noting marked increase in research subjects’ view of need to take precautions once researchers told subjects that flood with ten percent probability of occurrence in particular year had actually happened).

<sup>38</sup> See *Arar v. Ashcroft*, 585 F.3d 559, 576-77 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

<sup>39</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

<sup>40</sup> See *United States v. Gaubert*, 499 U.S. 315 (1991).

<sup>41</sup> See *KANSTROOM*, *supra* note 3, at 147-48 (citing rationale for post-World War I raids against suspected noncitizen seditionists ordered by Attorney General A. Mitchell Palmer).

<sup>42</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (Harlan, J., concurring); see also *Brown*, *supra* note 5, at 851-52 (discussing relationship between Harlan’s position and practice of implying private rights of action in statutes).

<sup>43</sup> See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); cf. Treadwell, *supra* note 20 (discussing abuses in immigration searches); Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008); Katherine Evans, *The ICE Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561 (2009); Kevin R. Johnson, *How Racial Profiling in America Became the “Law of the Land”*: United

While the Court in *Lopez-Mendoza* contended that federal immigration officials had successfully implemented a “comprehensive scheme for deterring Fourth Amendment violations,”<sup>44</sup> the Court may have been too optimistic. In the traditional enforcement context of a workplace raid, enforcement questioning is often based on behavioral cues that can be ambiguous and susceptible to subjective interpretation.<sup>45</sup> A trained agent may well be able to interpret these cues effectively in most circumstances, reducing the risk of false positives – individuals thought to be undocumented who are actually citizens or legal residents. However, agents are human, and mistakes are likely. The *Lopez-Mendoza* Court asserted that the immigration enforcement authorities had a procedure in place for disciplining errant agents.<sup>46</sup> However, the Court did not disclose how many times and with what rate of success this procedure had been used. In the comparable case of errant immigration judges, discipline has historically been lax.<sup>47</sup>

That said, immigration cannot entail unduly broad remedies for fear of chilling officials dealing with genuine threats. Remedies should not require officials to second-guess themselves continually in individual cases despite the caseload pressure created by well over a million cases annually.<sup>48</sup> The threat of liability for damages could impair the timely processing of those cases or tempt officials to look the other way at obvious illegality. Neither result would serve the public interest.

## II. THRESHOLD BARRIERS: EXHAUSTION AND STATUTORY PRECLUSION

Before exploring obstacles to suits for damages in greater detail, it will be useful to deal with threshold barriers to such relief. These barriers include exhaustion and statutory preclusion. The following paragraphs deal with each in turn.

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States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering, 98 GEO. L.J. 1005 (2010).

<sup>44</sup> *Lopez-Mendoza*, 468 U.S. at 1045.

<sup>45</sup> *Id.* at 1037 (noting that appellee Sandoval-Sanchez had appeared “evasive” and sought to avoid questioning by immigration agent).

<sup>46</sup> *Id.*

<sup>47</sup> For discussions of systemic flaws in decisions by immigration judges, see Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOKLYN L. REV. 467 (2008); cf. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85 (2007); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006).

<sup>48</sup> See *Lopez-Mendoza*, 468 U.S. at 1049; Schuck, *Suing Our Servants*, *supra* note 15; Brown, *supra* note 5.

## A. Exhaustion of Administrative Remedies

Exhaustion is often a problem with litigation concerning particular results in administrative proceedings. When claimants for particular relief, such as receipt of government benefits, seek recourse in federal court without first petitioning the agency with primary jurisdiction over their claims, courts typically require claimants to exhaust their administrative remedies.<sup>49</sup> Exhaustion provides courts with a more complete record on which to base their decision. It also allows administrative agencies “first crack” at a case, which enhances agency expertise and vindicates Congress’s design in conferring jurisdiction on the agency.<sup>50</sup> However, exhaustion should not be a problem in damages suits over immigration overreaching. In these cases, the claimant is not seeking to litigate a question that the agency decides, such as the noncitizen’s removability.<sup>51</sup> The noncitizen’s present immigration status is rarely, if ever, at issue in suits for damages. Instead, the claimant is litigating the collateral question of the lawfulness of immigration enforcement.<sup>52</sup> Because of the limited reach of the exclusionary rule in immigration proceedings, even clear violations will rarely affect the noncitizen’s removal. Such exhaustion should not be required.

## B. The REAL ID Act and 1996 Limits on Federal Court Jurisdiction

The next question is whether Congress has barred jurisdiction over the claim pursuant to provisions in the Immigration and Nationality Act (INA). Congress has repeatedly legislated to streamline the removal process, believing that judicial review of removal outside of specific channels could cause delay and eventually bring the process to a halt.<sup>53</sup> These provisions guard against a multiplicity of judgments on the central issue of a noncitizen’s deportability. However, these provisions do not bar a properly framed damage suit.

The most important provision is section 1252(g), which bars “any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate

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<sup>49</sup> See, e.g., *Jones v. Bock*, 549 U.S. 199, 211 (2007) (discussing statutory exhaustion rule in prisoner’s rights suits).

<sup>50</sup> See Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 10-20 (1985).

<sup>51</sup> See *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 273 (D. Conn. 2008) (discussing *Heck v. Humphrey*, 512 U.S. 477 (1994)).

<sup>52</sup> *Id.*

<sup>53</sup> See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

cases, or execute removal orders . . . .”<sup>54</sup> Section 1252(g) established a procedure for judicial review of removal orders in the federal circuit courts.<sup>55</sup> To limit the impact of hindsight bias, Congress barred review of decisions to initiate proceedings or execute deportation orders, reasoning that if the government’s effort to remove a noncitizen was groundless, the appropriate forum for that determination was a removal proceeding in Immigration Court, subject to statutorily specified judicial review.<sup>56</sup>

However, courts have often interpreted section 1252(g) narrowly. The provision itself does not include any mention of suits for damages.<sup>57</sup> Moreover, other claims, such as those involving the length of conditions of detention or the circumstances of arrest, are not clearly barred by section 1252(g). Decisions about arrest or detention are “separate and discrete” from the commencement of deportation proceedings.<sup>58</sup> This view is consistent with the Supreme Court’s decision in *Zadvydas v. Davis*,<sup>59</sup> in which the Court permitted a constitutional and statutory challenge to indefinite detention of noncitizens whom the government could not return to their country of origin because that country had declined to accept them. At first blush, *Zadvydas* involved a challenge to the execution of a removal order, or, at the very least, to government action pending removal. However, the *Zadvydas* Court, which upheld the challenge, framed the issue not as execution of a removal order, but as the constitutionality of detention when removal appeared impossible.<sup>60</sup> A broad reading of section 1252(g) would have denied noncitizens access to the courts to test their detention, thus triggering constitutional problems.<sup>61</sup> Driven in part by the need to avoid deciding whether Congress could limit such access to the courts, courts have narrowly construed the statute, viewing claims of prolonged detention after entry of a removal order as involving not *execution* of a removal order, but “*failure* to execute a

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<sup>54</sup> 8 U.S.C. § 1252(g) (2006).

<sup>55</sup> See Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133 (2006).

<sup>56</sup> See *Reno*, 525 U.S. 471.

<sup>57</sup> See *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 265 (D. Conn. 2008).

<sup>58</sup> *Id.* at 266.

<sup>59</sup> 533 U.S. 678 (2001).

<sup>60</sup> *Id.* at 688.

<sup>61</sup> *Cf.* *El Badrawi v. United States*, 787 F. Supp. 2d 204, 223 (D. Conn. 2011); see also *Crowell v. Benson*, 285 U.S. 22, 60-61 (1932) (referring to canon that courts should construe statutes to avoid constitutional problems); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680-81 (1986) (presumption that statutes does not preclude judicial review); *Webster v. Doe*, 486 U.S. 592, 603-05 (1988); *cf.* Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 924, 937-38 (1988).

removal order.”<sup>62</sup> Moreover, as one court noted, a suit for damages after completion of a removal proceeding is collateral to that proceeding. It does not seek to “re-litigate” the removal proceeding and, hence, poses no risk of the “deconstruction, fragmentation, and . . . prolongation” of proceedings that the Supreme Court believed was Congress’s principal concern.<sup>63</sup> However, even a narrow reading of section 1252(g) will bar a suit for damages where the noncitizen had another remedy available that the Immigration and Nationality Act specifically authorizes.<sup>64</sup>

### III. GUARDING OFFICIAL DISCRETION: *BIVENS*, THE FTCA, AND COURTS’ “SPECIFICITY TWO-STEP”

Section 1252’s jurisdictional bar is only the beginning of the obstacles plaintiffs face. Both *Bivens* actions and suits under the FTCA face further limits. Those limits form a pattern that I call the “specificity two-step.” In this maneuver, courts read a statutory term or doctrinal element narrowly when that construction serves the government. However, courts pivot to a *broader* reading of other terms when that interpretation serves government interests. The specificity

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<sup>62</sup> *El Badrawi*, 579 F. Supp. 2d at 267 (emphasis added) (distinguishing *Duamutef v. INS*, 386 F.3d 172 (2d Cir. 2004)).

<sup>63</sup> *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 487 (1999); *cf. Sameer Ahmed*, Comment, *INA Section 242(g): Immigration Agents, Immunity, and Damages Suits*, 119 *YALE L.J.* 625 (2009); *see also Aguilar v. U.S. Immigration & Customs Enforcement Div. of Dep’t of Homeland Sec.*, 510 F.3d 1, 11-12 (1st Cir. 2007) (holding that 8 U.S.C. § 1252(b)(9), which channels review of claims “arising from any action taken or proceeding brought to remove” a noncitizen, does not bar claims that are independent of or collateral to removal decision; claims that noncitizens arrested in factory raid were denied counsel were *not* collateral to removal proceedings, and therefore had to be raised in the first instance in those proceedings).

<sup>64</sup> *See Sissoko v. Rocha*, 509 F.3d 947, 949-50 (9th Cir. 2007) (in expedited removal where detention was mandatory after entry of a deportation order, alien seeking release could have filed habeas petition under section 1252(e)(2)(B), claiming that he had not yet received a hearing on the issue of his deportability); *cf. Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001) (holding that section 1252(g) barred suit for damages against officials for removal of noncitizen who had failed to appear for scheduled hearing and received in absentia removal order); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061 (N.D. Ill. 2007), *appeal dismissed*, 539 F.3d 782 (7th Cir. 2008) (holding that section 1252(g) barred claims for damages based on arrest and detention after start of removal proceedings, but did not preclude claims based on interrogation by officials prior to start of removal proceedings); *see also Arar v. Ashcroft*, 585 F.3d 559, 570 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010) (in case of alien who was detained briefly and then subject to “extraordinary rendition” to Syria, court declined to consider suit for damages because of concern that suit would reveal sensitive information, but reserved decision on applicability of section 1252(g), noting that immigration officials may have undermined alien’s ability to seek alternative remedy of habeas by hindering access to attorney and failing to timely serve alien with removal order). *But see Medina v. United States*, 92 F. Supp. 2d 545, 554 (E.D. Va. 2000) (more expansive availability of remedies).

two-step upsets law's careful balance between official myopia and judicial second-guessing.

Recent cases reveal increased resort to the specificity two-step. Courts have preserved a broad ambit for official discretion, precluding *Bivens* actions when they find that the need for speedy and secret official decisions "counsel[s] . . . hesitation" about remedying wrongs,<sup>65</sup> and barring FTCA suits when an act bears even a tangential relationship to discretionary functions and hence to policy.<sup>66</sup> Conversely, courts require very specific evidence that officials had notice of facts and law that should have tempered official decisions. In the realm of facts, plaintiffs must submit proof that senior officials knew subordinates' lack of training could cause the misconduct alleged.<sup>67</sup> In the realm of law, a court may dismiss a suit on qualified immunity grounds if case law did not squarely prohibit identical official conduct.<sup>68</sup> While each element of the specificity two-step sounds plausible in isolation, the move makes the government's advantage the principal touchstone of interpretation in suits for damages against officials.

#### A. *Bivens* and Factors Counseling Hesitation

In immigration cases, courts have too readily cited the *Bivens* language barring actions for damages because of "special factors counselling hesitation."<sup>69</sup> This trend builds on the courts' reluctance to permit *Bivens* claims outside of specific, narrowly defined contexts.<sup>70</sup> The broad deference generally accorded to the government on immigration matters<sup>71</sup> exacerbates courts' unwillingness to entertain immigration-related *Bivens* claims.

*Bivens* suits have foundered where they might exacerbate collective action problems or outrun the judiciary's institutional competence. Collective action problems can occur if claimants use actions for damages to hold out against a comprehensive remedial regime in

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<sup>65</sup> See *Arar*, 585 F.3d at 576-77.

<sup>66</sup> See *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 902 (2011).

<sup>67</sup> See *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011).

<sup>68</sup> See *Labadie v. United States*, No. C09-1276 MJP, 2011 U.S. Dist. Lexis 62909 (W.D. Wash. June 14, 2011).

<sup>69</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

<sup>70</sup> See *Wilkie v. Robbins*, 551 U.S. 537 (2007).

<sup>71</sup> See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *cf.* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (discussing interaction of President's use of power delegated by Congress and claims to inherent presidential authority over some immigration matters).

which Congress has provided for more limited relief.<sup>72</sup> Courts have also frequently expressed doubts about *Bivens* actions in the fluid realms of national security and foreign affairs where executive branch officials' access to information may exceed the courts' information-gathering capabilities.<sup>73</sup>

This rationale threatens to extinguish suits for damages in immigration matters, even where official misconduct appears egregious. Consider *Arar v. Ashcroft*,<sup>74</sup> in which the court held that “factors counselling hesitation”, such as the diplomatic fallout from embarrassment to other nations and the risk of disclosure of state secrets, barred claims related to the alleged rendition to Syria of a Canadian national arrested during a layover at JFK airport.<sup>75</sup> The court admitted that the threshold was “remarkably low” for this determination.<sup>76</sup> In precluding a remedy, the court declined to address whether safeguards such as those in the Classified Information Procedures Act could have protected sensitive information.<sup>77</sup>

At least one court has echoed *Arar* in precluding a *Bivens* remedy for alleged official misconduct with only a slender tie to national

<sup>72</sup> *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (social security disability claims); *cf.* *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (holding that availability of remedy under Federal Tort Claims Act (FTCA) did not bar *Bivens* action); *Hui v. Castaneda*, 130 S. Ct. 1845 (2010) (availability of remedy under FTCA barred *Bivens* action against officials of Public Health Service); *cf.* John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663 (2009) (discussing cases).

<sup>73</sup> *Cf.* *United States v. Stanley*, 483 U.S. 669, 681 (1987) (refusing to authorize remedy for victims of LSD experiments in military); *see also* *Chappell v. Wallace*, 462 U.S. 296, 298 (1983) (precluding suits for damages by minority service personnel claiming racial discrimination); *Feres v. United States*, 340 U.S. 135 (1950) (barring suits against United States for actions arising out of military service); *Christopher v. Harbury*, 536 U.S. 403 (2002) (declining to consider suit based on amorphous allegations that United States officials failed to provide plaintiff with information necessary to reduce impact of government lawbreaking abroad). For a more categorical ruling against such suits, *see* *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (precluding suit against President Reagan for alleged “Contra” abuses in Nicaragua); *see generally* Chesney, *supra* note 17 (discussing rationales for judicial deference).

<sup>74</sup> 585 F.3d 559, 580 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

<sup>75</sup> *Id.* at 573-76. Although the plaintiff had no links to terrorism, Syrian officials kept him in a cell the length and breadth of a grave and beat him repeatedly. *See* Scott Shane, *On Torture, 2 Messages and a High Political Cost*, N.Y. Times, Oct. 30, 2007, at A18 (discussing case); *U.S. Policy in the Middle East: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 110-131 (2007) (documenting acknowledgment by Secretary of State Condoleezza Rice, in response to Rep. William Delahunt (D-MA), that handling of *Arar* matter triggered “appropriate” concerns). For more on the *Arar* case and rendition, *see* MARGULIES, *supra* note 3, at 73-74; Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

<sup>76</sup> 585 F.3d at 574.

<sup>77</sup> *See* Margulies, *Judging Myopia in Hindsight*, *supra* note 5, at 224; Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, HUMAN RIGHTS FIRST (2008), [http://www.law.yale.edu/documents/pdf/Alumni\\_Affairs/USLS-pursuit-justice.pdf](http://www.law.yale.edu/documents/pdf/Alumni_Affairs/USLS-pursuit-justice.pdf) (analyzing criminal prosecutions involving sensitive information).

security policy.<sup>78</sup> In *El Badrawi v. Department of Homeland Security*, the court viewed *Arar* as precluding a *Bivens* claim by a noncitizen against officials who had detained him for unarticulated national security reasons. The officials never formally charged the plaintiff with security-related immigration violations, and the court determined that the stated basis for the plaintiff's arrest and detention conflicted with applicable agency rules.<sup>79</sup> Nevertheless, the court found that the officials' mere mention of a national security link barred plaintiff's *Bivens* claim.<sup>80</sup>

## B. Supervisory Liability

Viewed from the vantage point of courts' broad invocation of national security concerns to justify preclusion of *Bivens* claims, courts' handling of supervisory liability claims that survive the initial cut illustrates the second phase of the specificity two-step: the turn toward narrow definitions. Balancing the need to curb both official myopia and judicial second-guessing is particularly difficult with supervisory liability. Sweeping supervisory liability would make senior officials insurers for the wrongs of their subordinates and arguably make senior officials unduly risk-averse. Since undue risk-aversion can disserve the public as much as risk-prone behavior can, this solution is unwise. However, unduly lax standards for supervisors do not check the reckless conduct of subordinates.

Two recent cases, *Ashcroft v. Iqbal*<sup>81</sup> and *Connick v. Thompson*,<sup>82</sup> suggest that the Supreme Court is veering toward the second extreme. In *Iqbal*, the Supreme Court ruled that senior officials could not be held liable for allegedly discriminatory conditions of confinement experienced by persons detained in the post-9/11 immigration roundup,

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<sup>78</sup> See *El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 263-64 (D. Conn. 2008). Declining to fully execute the specificity two-step, the court later awarded relief based on the FTCA, asserting that officials had acted in violation of clear policies promulgated by immigration authorities. See *El Badrawi v. United States*, 787 F. Supp. 2d 204 (D. Conn. 2011).

<sup>79</sup> *El Badrawi*, 787 F. Supp. at 216-22 (finding that regulations contradicted officials' assertion that Plaintiff, who had timely applied for an extension of his H-1B worker's visa, was out of status). The basis, if any, for the officials' concerns is not clear from the record, although it was apparently related to worries that Al Qaeda might use noncitizens in the United States to plot a follow-up to the Madrid train bombings. *Id.* at 210. The State Department had earlier executed a Certificate of Revocation of the plaintiff's visa, but the certificate provided that the revocation would only become effective once the plaintiff had left the United States. *Id.* at 209. The State Department's action, taken before the Madrid bombings, does not indicate that United States authorities considered the plaintiff an imminent threat to national security.

<sup>80</sup> *El Badrawi*, 579 F. Supp. 2d at 263-64.

<sup>81</sup> 129 S. Ct. 1937 (2009).

<sup>82</sup> 131 S. Ct. 1350 (2011).

even if those officials were on notice of the poor conditions.<sup>83</sup> For the Court, supervisory liability was akin to respondeat superior, even though respondeat superior imposes a far higher burden on the plaintiff by not requiring that a supervisor have notice of subordinates' misconduct.<sup>84</sup>

To curb supervisory liability, the *Iqbal* Court stated that the "plaintiff must plead that each Government-official defendant, *through the official's own individual actions*, has violated the Constitution."<sup>85</sup> This language could indicate that the Court will disfavor any theory of liability based on tacit conduct by senior officials, including a lack of proper supervision.<sup>86</sup> At the very least, *Iqbal's* requirement that plaintiffs plead specific misconduct<sup>87</sup> by officials hinders supervisory liability claims, which are often based on omissions.<sup>88</sup>

An even more recent case, *Connick v. Thompson*,<sup>89</sup> imposes particularly onerous restrictions on a type of supervisory liability - liability for failure to provide adequate training. In an opinion by Justice Thomas, the Court declined to hold the New Orleans District Attorney liable for repeated failures by prosecutors in a capital case to produce exculpatory evidence.<sup>90</sup> The Court noted that to prevail on a claim alleging a failure to train, the plaintiff must show deliberate indifference to violations of constitutional rights.<sup>91</sup> The Court also required a substantial quantum of evidence to demonstrate deliberate indifference, cautioning that a broader view of liability for failure to train would invite the second-guessing of official decisions.<sup>92</sup> Generally, the Court noted, a plaintiff would have to show that defendants had notice of a "pattern of similar . . . violations" committed by untrained employees.<sup>93</sup> Moreover, the Court held that a plaintiff who overcame this hurdle would also have to show causation by proving

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<sup>83</sup> 129 S. Ct. at 1949.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1948 (emphasis added).

<sup>86</sup> I took this view in an earlier piece. See Margulies, *Judging Myopia in Hindsight*, *supra* note 5, at 222-23. However, newer decisions have persuaded me that a narrower interpretation is appropriate. See, e.g., *Plair v. City of New York*, 789 F. Supp. 2d 459, 465 (S.D.N.Y. 2011) (noting that courts have continued to find supervisory liability in the Fourth and Eighth Amendment contexts).

<sup>87</sup> Cf. Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. REV. 145, 172-79 (2011) (arguing that *Iqbal's* specificity requirement reflected incompletely examined assumptions about both existence of discrimination and frequency of frivolous lawsuits).

<sup>88</sup> See, e.g., *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011) (failure to train immigration officers).

<sup>89</sup> 131 S. Ct. 1350 (2011).

<sup>90</sup> *Id.* at 1366.

<sup>91</sup> *Id.* at 1358-60.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1360.

that the inadequate training gave rise to the challenged conduct of subordinates.<sup>94</sup> Ruling that the plaintiff had not met his burden of showing deliberate indifference, the Court held that the defendant could reasonably assume that lawyers working under him had learned in law school about the importance of disclosing exculpatory evidence.<sup>95</sup> Based on this stirring confidence in the efficacy of legal education, the Court distinguished a prior decision involving alleged violations of constitutional rights by police officers with no formal legal training.<sup>96</sup>

A recent Third Circuit case, *Argueta v. Immigration and Customs Enforcement*,<sup>97</sup> applies this restrictive approach to damages claims that arose from August 2006 to April 2008 based on the immigration enforcement program Operation Return to Sender (ORTS).<sup>98</sup> ORTS was an aggressive program that sought to locate, arrest, and remove individuals who had failed to comply with deportation orders.<sup>99</sup> The agency's stated objectives reflected legitimate enforcement priorities. However, the implementation of those priorities apparently caused a number of serious problems. While senior officials from Immigration and Customs Enforcement (ICE) acknowledged that ICE agents needed consent from occupants to search residences,<sup>100</sup> the *Argueta* plaintiffs alleged that agents had repeatedly failed to obtain occupants' consent.<sup>101</sup> Furthermore, the plaintiffs alleged that agents had behaved in an intimidating and deceptive manner by surrounding residences in early-morning hours, working with local police officers to conceal their official affiliation, pounding on doors and windows until frightened occupants allowed them to enter, and treating occupants (including children) with a lack of respect.<sup>102</sup> Citing *Iqbal*,<sup>103</sup> the court held that plaintiffs had failed to plausibly allege that ICE senior officials had notice of these claimed violations.<sup>104</sup>

The *Argueta* court's analysis was both artificially narrow and incomplete. The court rigidly defined reasonable notice of the risk of overreaching, excluding reports of violations in implementation of

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<sup>94</sup> *Id.* at 1358.

<sup>95</sup> *Id.* at 1361.

<sup>96</sup> *Id.* at 1361-62 (citing *City of Canton v. Harris*, 489 U.S. 378, 390 (1989); *Bd. of Commissioners, Bryan County v. Brown*, 520 U.S. 397 (1997)).

<sup>97</sup> 643 F.3d 60 (3d Cir. 2011).

<sup>98</sup> *Id.* at 62.

<sup>99</sup> *Id.*; see Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F.L. REV. 307, 331 (2009).

<sup>100</sup> *Argueta*, 643 F.3d at 75.

<sup>101</sup> *Id.* at 64-65.

<sup>102</sup> *Id.*; see Aldana, *supra* note 43; Evans, *supra* note 43; Treadwell, *supra* note 20.

<sup>103</sup> *Argueta*, 643 F.3d at 67-75.

<sup>104</sup> *Id.* at 74-75.

ORTS from another state.<sup>105</sup> Since ICE employees have roughly equivalent qualifications throughout the country, a senior federal official administering a nationwide initiative should view problems in one district as indications of trouble elsewhere.<sup>106</sup>

The *Argueta* court, although it did not cite *Connick*, also adopted the latter case's casual approach to appropriate training. Conceding that some officers had *not* completed a three-week training course,<sup>107</sup> the court did not view lack of specific training as a warning sign. It was sufficient, the court explained, that all officers completed "some form of basic law enforcement training . . . which presumably would have covered basic principles governing . . . the entry into a private residence without a judicial warrant."<sup>108</sup> The Third Circuit's confidence seemed misplaced, paralleling the Supreme Court's blind faith in legal education.

*Argueta*, together with Supreme Court cases like *Connick* and *Iqbal*, takes a counterproductive view of the function and responsibility of senior officials. Indeed, the Third Circuit's stress on the senior status of officials<sup>109</sup> turns tort theory on its head. Senior officials are the quintessential "cheapest cost avoiders" under Calabresi's classic formulation: They can readily obtain information on costs stemming from subordinates' wrongful conduct and change practices to reduce

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<sup>105</sup> *Id.*

<sup>106</sup> The court's assertion that some of the reports and lawsuits relied on by plaintiffs post-dated the New Jersey raids, *id.* at 74-75, glided over at least one important counter-example. One lawsuit, *Mancha v. U.S. Immigrations & Customs Enforcement*, No. 1:06-CV-2650-TWT, 2009 U.S. Dist. Lexis 27620 (N.D. Ga. Mar. 31, 2009), arose from alleged events that occurred in September, 2006, near the beginning of the time-span of the conduct alleged in *Argueta*. In *Mancha*, a fifteen-year-old United States citizen was at home getting ready for school when ICE agents appeared looking for her mother, who was also a citizen, and engaged in intimidating behavior. *See id.* at \*11-13 (declining to dismiss FTCA claims). *Mancha* stemmed from an enforcement action targeting employees at a poultry plant and apparently did not involve ORTS. *Id.* at \*2-3. However, the egregious facts of the case, in which several ICE agents entered the home of a United States citizen, should arguably have been a red flag for senior officials. The case received nationwide publicity. *See* Jenny Jarvie, *Five Georgians Say They Were Caught Up in Raids for Illegal Immigrants*, L.A. TIMES, Nov. 2, 2006, at A10; *cf. Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H.R. Judiciary Comm.*, 110th Cong. 34-36 (Feb. 13, 2008) (including Marie Mancha's testimony); *Arias v. U.S. Immigrations & Customs Enforcement*, No. 07-1959, 2008 U.S. Dist. Lexis 34072 (D. Minn. Apr. 23, 2008); *Arias v. U.S. Immigrations & Customs Enforcement*, No. 07-1959, 2009 U.S. Dist. Lexis 61519 (D. Minn. July 17, 2009) (awarding summary judgment for senior officials on qualified immunity grounds in case involving overly aggressive conduct by subordinates during enforcement action; facts also supported view that senior officials lacked reasonable notice that such alleged abuses would occur).

<sup>107</sup> *Argueta*, 643 F.3d at 75; *see Connick v. Thompson*, 131 S. Ct. 1350, 1361 (2011).

<sup>108</sup> *Argueta*, 643 F.3d at 75.

<sup>109</sup> *Id.*

costs.<sup>110</sup> While senior officials cannot prevent the isolated wrongs of subordinates, legal norms should encourage diligent inquiry about the risks and benefits of action. An artificially narrow view of notice merely encourages senior officials' myopia.

### C. Qualified Immunity

The specificity two-step recurs in qualified immunity cases. To overcome the government's assertion of immunity, the plaintiff must show that the official acted in disregard of "clearly established" law.<sup>111</sup> Increasingly, courts have viewed "clearly established law" narrowly, insisting on precedents that precisely match the fact pattern in the case at bar.

As in other settings, legitimate concerns about hindsight bias drive the courts.<sup>112</sup> Consider *Ashcroft v. al-Kidd*,<sup>113</sup> where the Supreme Court held that detention of a material witness in a terrorism investigation for the mixed purpose of preserving the witness's testimony and probing the witness's own role was not a violation of settled law.<sup>114</sup> In ruling this way, the Court implicitly recognized that authorities, particularly early in an investigation, will not always be able to distinguish between those with information about a conspiracy and the conspirators themselves. Forcing the government to make a mechanical distinction, or one based on incomplete information, would be a classic example of hindsight bias. The Court viewed the Ninth Circuit as falling into the hindsight bias trap when the appellate court found a violation of clearly established law based merely on the "history and purpose of the Fourth Amendment."<sup>115</sup> Justice Scalia, writing for the Court, noted that this nebulous test was pitched at an overly "high level of generality."<sup>116</sup> Qualified immunity would have little meaning if officials had to guess at the result of such an amorphous test.

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<sup>110</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1118 (1972); cf. Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 16 (2010) (explaining Calabresi and Melamed's argument).

<sup>111</sup> See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

<sup>112</sup> Cf. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (requiring specific pleading and limiting supervisory liability).

<sup>113</sup> *al-Kidd*, 131 S. Ct. 2074.

<sup>114</sup> *Id.* at 2083-85. Indeed, the Court held that the challenged practice did not violate the plaintiff's rights. *Id.* at 2080-83. In a concurrence, Justice Kennedy suggested that detaining a material witness when officials could readily preserve the witness's testimony with a deposition might violate the Fourth Amendment. *Id.* at 2085-86 (Kennedy, J., concurring).

<sup>115</sup> *Id.* at 2084 (citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

<sup>116</sup> *Id.*

*Al-Kidd*, however, did not deter lower courts from going to the other extreme and requiring undue specificity in precedents. Since facts always vary to some degree, a mechanical insistence that the facts in precedents precisely align with facts in a case at issue allows most official defendants to argue that no precedent prohibited their particular conduct.<sup>117</sup> Officials aware of this test *ex ante* have no incentive to avoid the temptations of short-term thinking.

Consider here the recent case of *Labadie v. United States*,<sup>118</sup> in which Customs and Border Patrol (CBP) agents at a Canadian border crossing physically subdued a noncitizen who had simply asked why he was being returned to Canada.<sup>119</sup> The court held that qualified immunity barred the plaintiff's claim for damages based on a violation of the First Amendment. The court asserted that noncitizens' rights to free speech were not "clearly established" at the time of the alleged assault and that qualified immunity therefore protected the agent.<sup>120</sup> While the First Amendment rights of noncitizens are unsettled in some respects,<sup>121</sup> it seems hard to imagine that an agent has the power to physically assault a noncitizen - or anyone else for that matter - who merely asks a question.<sup>122</sup> Requiring chapter and verse in existing precedent merely incentivizes reckless behavior.

#### D. The FTCA and the Expanding Discretionary Function Exception

The "discretionary function" exception of the FTCA<sup>123</sup> completes the specificity two-step that shields officials. This exception applies when the government action involves "an element of judgment or choice," and the choice "is the kind that the discretionary function exception was designed to shield."<sup>124</sup> While courts construing the exception rightly accord some deference to official decisions, too many courts have interpreted the exception with sweeping breadth, discerning policy in officials' recklessness, indifference, or heedless habit.

<sup>117</sup> *Id.*

<sup>118</sup> *Labadie v. United States*, No. C09-1276 MJP, 2011 U.S. Dist. Lexis 39527 (W.D. Wash. Apr. 12, 2011).

<sup>119</sup> The plaintiff alleged that one of the Border Patrol agents involved in the episode "held his neck and punched him in the face." See *Labadie v. United States*, No. C09-1276, 2011 U.S. Dist. Lexis 62909, at \*2 (W.D. Wash. June 14, 2011) (dismissing FTCA claims against individual agents, since FTCA only permits suits against United States).

<sup>120</sup> *Labadie*, 2011 U.S. Dist. Lexis 39527, at \*10-11.

<sup>121</sup> See *Bosniak*, *supra* note 18.

<sup>122</sup> The court denied several defendants' motions for summary judgment on plaintiffs' claims of excessive force and unlawful arrest. *Labadie*, 2011 U.S. Dist. Lexis 39527, at \*19-27.

<sup>123</sup> Federal Tort Claims Act, 28 U.S.C. § 2680(a) (2006).

<sup>124</sup> *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991).

The Supreme Court set the tone early in *Dalehite v. United States*,<sup>125</sup> holding that the discretionary function exception shielded government recklessness in packing and storing fertilizer that the government planned to ship overseas. A cargo of fertilizer that had been kept at an overly high temperature exploded, killing 560 people, wounding thousands, and destroying shipping facilities at a Texas town.<sup>126</sup> Despite abundant evidence that officials knew the risks of storing the fertilizer at high temperatures<sup>127</sup> and failed to take protective measures or warn workers of the risks of explosion,<sup>128</sup> the Court ruled that officials could invoke the exception to liability.<sup>129</sup> Indeed, the Court viewed officials' manifest recklessness as *supporting* the argument that the exception applied. According to the Court, officials exercised discretion by deciding that protective measures such as giving the fertilizer more time to cool prior to packaging would have raised the costs of the program, which supplied fertilizer to countries such as South Korea.<sup>130</sup> Ironically, the fertilizer explosion *hindered* officials' stated goals by reducing the number of qualified workers and destroying shipping capacity. Official indifference to this foreseeable risk was not a policy decision worthy of respect, but a predilection for Russian roulette that the law should deter.

At least one recent appellate decision in the immigration context shows the folly of an overly broad definition of policy content under the FTCA. In *Castro v. United States*,<sup>131</sup> the court ruled that the discretionary function exception shielded Border Patrol agents who deported a United States citizen child along with her noncitizen father, despite pleas from the child's citizen mother to allow the child to remain in this country in her custody.<sup>132</sup> To prevent this train wreck, the Border Patrol needed no power of clairvoyance or cornucopia of re-

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<sup>125</sup> 346 U.S. 15, 35-6 (1953).

<sup>126</sup> *Id.* at 48 (Jackson, J., dissenting).

<sup>127</sup> *Id.* at 39-41.

<sup>128</sup> *Id.* at 55 (Jackson, J., dissenting).

<sup>129</sup> *Id.* at 41-42.

<sup>130</sup> *Id.* at 40-41.

<sup>131</sup> 608 F.3d 266 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 902 (2011).

<sup>132</sup> *Id.* at 269-70. The mother had sought an emergency modification of custody which a family court would probably have approved. *Castro v. United States*, 560 F.3d 381, 385 (5th Cir. 2009). In custody decisions, the governing standard is the "best interests of the child." While immigration status should not be the sole determinant of custody, it can be one of the factors considered by the court. *See Rico v. Rodriguez*, 120 P.3d 812 (Nev. 2005); *cf.* David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 509-10 (2008) (discussing *Castro* case and suggesting that ICE, in permitting noncitizen father to take along citizen child upon his removal, "determined [custody] without process and without any consideration of the interests of the child"). In *Castro*, the United States citizen mother eventually received custody and the daughter returned to the United States, but this process took another three years.

sources. Officials need only have detained the noncitizen father for a couple of days instead of removing him immediately. Rather than encourage this common-sense result, the court took a sweeping view of the policy content in the Border Patrol's conduct. According to the court, detaining the father for even a couple of days would have resulted in increased cost to the government.<sup>133</sup> It therefore entailed a policy choice that fit within the discretionary function exception.<sup>134</sup> The court did not consider that such split-custody cases are thankfully rare in immigration law, thus limiting the drain on government budgets. The result in *Castro* did not protect the Border Patrol from hindsight bias. It merely cloaked heedless routine in the mantle of policy.

#### IV. THE SLIDING SCALE APPROACH AND THE RETURN TO COMMON SENSE REMEDIES

Fortunately, case law also demonstrates an alternative to the specificity two-step. The sliding scale approach rejects the categorical deference of the specificity two-step, substituting a more granular analysis of the opportunity costs that a remedy would yield. In rejecting categorical deference, a sliding scale approach would narrow the "factors counseling hesitation" that preclude *Bivens* actions; officials would have to do more than slap a "national security" label on problematic decisions. Similarly, a sliding scale approach would not bar suits based on supervisory liability. In cases against supervisors for failure to train subordinates, the sliding scale approach would consider subordinates' pre-employment experience and the nature of the interests affected. In the qualified immunity context, the test would consider whether liability would unduly chill official decisions. When a challenged action is so egregious that it is fundamentally different in kind from the broad range of acceptable decisions, courts should broadly define "clearly established law." In the FTCA arena, courts should narrowly define the "discretionary function" exception to exclude official action that results from heedlessness or habit.

Sliding scales are common in law. For example, preliminary injunctions balance the prevention of irreparable harm against hardship to the other party and the movant's ultimate likelihood of success on the merits.<sup>135</sup> Tort liability balances the probability and gravity of an

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<sup>133</sup> See *Castro v. United States*, No. C-06-61, 2007 U.S. Dist. Lexis 9440, at \*32 (S.D. Tex. Feb. 9, 2007), *aff'd*, 608 F.3d 266 (5th Cir. 2010).

<sup>134</sup> *Id.* at \*31-33.

<sup>135</sup> See *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); cf. Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005) (modeling approach to remedies). But see Jared A. Gold-

event: the more serious the possible harm, the lower the probability will be of the event's occurrence.<sup>136</sup> In procedural due process, the court will balance the significance of individual and state interests against the likelihood of error.<sup>137</sup> The sliding scale here is an extension of that approach.

Moreover, courts have often tempered categorical limits on access to courts with escape hatches that allow relief where the conduct challenged is sufficiently egregious. In *Reno v. American-Arab Anti-Discrimination Committee*,<sup>138</sup> the Court left open the possibility of judicial review when a noncitizen contesting removal alleged selective enforcement that amounted to "outrageous" discrimination. In *INS v. Lopez-Mendoza*,<sup>139</sup> the Court said that the exclusionary rule might be an appropriate remedy for "egregious" violations of liberty and fairness in immigration enforcement.<sup>140</sup> Finally, the Court in qualified immunity cases has warned against undue rigidity in determining whether egregious official actions violated "clearly established" law.<sup>141</sup> In the following sections, I discuss how to apply this sliding scale approach to factors "counselling hesitation" under *Bivens*, along with qualified immunity, supervisory liability, and the discretionary function exception to the FTCA.

#### A. The Sliding Scale and Availability of *Bivens* Actions

A sliding scale approach would check courts' tendency to categorically preclude *Bivens* actions when officials allege a national security connection. As I have discussed in an earlier piece,<sup>142</sup> categorical deference sends the wrong signal to officials. A more nuanced ap-

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stein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485 (2010) (critiquing balancing test as unduly subjective and amorphous).

<sup>136</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>137</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (applying *Mathews* formula to reject categorical due process right to counsel for indigent parents facing civil contempt for failure to pay child support, while imposing other procedural safeguards); cf. Linda Kelly Hill, *The Right to be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011) (arguing that due process formula requires counsel for alien children abandoned by their parents, who otherwise risk inappropriate detention).

<sup>138</sup> 525 U.S. 471, 491 (1999).

<sup>139</sup> 468 U.S. 1032, 1050-51 (1984).

<sup>140</sup> See Anonymous, *Immigr. Ct., Exec. Office Immigr. Rev., U.S. Dep't of Justice (N.Y. Co. July 1, 2011)* (on file with the author) (Ferris, Immigr. Judge) (suppressing evidence and dismissing removal proceeding based on egregious search that included agents forcing their way into noncitizen's home); see also Treadwell, *supra* note 20 (discussing need for Fourth Amendment remedies in removal cases).

<sup>141</sup> See *Hope v. Pelzer*, 536 U.S. 730 (2002).

<sup>142</sup> See Margulies, *Judging Myopia*, *supra* note 5.

proach will be more effective in curbing both myopia and hindsight bias.

A re-thinking of *Bivens* remedies would permit a suit when the agency needed a prod toward innovation. If a plaintiff shows that a violation is egregious, as in the extraordinary rendition of Maher Arar to Syria or the failure to follow the agency's own rules in *Badrawi*, the burden should shift to the official to demonstrate that the official has treated other like cases in a lawful manner.<sup>143</sup> Making this showing would cast the violation at issue as an isolated occurrence where a remedy will not improve official performance. However, the recent rash of lawsuits about immigration searches, arrests, and detention conditions suggests that officials will not be able to meet this standard.<sup>144</sup> Moreover, *Bivens* remedies have traditionally been available for violations involving searches<sup>145</sup> and conditions of confinement.<sup>146</sup> At least in the broad run of immigration cases, no other factors suggest the need for caution.

Similarly, an official should *not* be able to use the “factors counseling hesitation” prong of *Bivens* to insulate conduct by slapping a “national security” label on a challenged decision. Recall *Badrawi*, where immigration officials invoked unsupported national security concerns to justify disregarding clear guidelines on the legal status of noncitizens on temporary employment visas.<sup>147</sup> Rather than follow agency rules, the immigration officials in *Badrawi* in effect made their own law.<sup>148</sup> Under a sliding scale approach, the responsible agents would have been obliged to consider alternatives, such as seeking a warrant to conduct surveillance on *Badrawi* at his workplace or using other investigative techniques that did not require a warrant. The opportunity costs of this approach would have been low. A different calculus would have applied if *Badrawi* had been likely to abandon his job and go underground to complete a terrorist plot. However, *Badrawi*'s request for an extension of his H-1B visa indicated that he wished to keep his position.<sup>149</sup> *Badrawi*'s consistent pattern of cooperation with immigration authorities could have been an elaborate ruse. However, viewing a pattern of cooperation as evidence of untrustworthiness recalls the stereotypes that infected the government's

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<sup>143</sup> See *El Badrawi v. United States*, 787 F. Supp. 2d 204 (D. Conn. 2011).

<sup>144</sup> See, e.g., *Argueta v. U.S. Immigrations & Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011) (alleging excesses during search).

<sup>145</sup> See Pfander, *supra* note 8.

<sup>146</sup> See *Carlson v. Green*, 446 U.S. 14, 19-20 (1980).

<sup>147</sup> See *El Badrawi*, 787 F. Supp. 2d 204.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 209-10.

assessment of Japanese-Americans during World War II.<sup>150</sup> Treating both cooperation and defiance as evidence of untrustworthiness smacks of “heads I win, tails you lose.” Obliging officials to abandon such stereotypes is not an opportunity cost that should trigger deference.

## B. Supervisory Liability and Failure to Train

In the supervisory liability context, courts should similarly reject a categorical approach and narrowly interpret the two precedents in this area, *Iqbal* and *Connick*. *Iqbal* should be read as preserving supervisory liability when the supervisor has the state of mind necessary to prove the underlying constitutional violation. *Connick* should be read as permitting failure to train cases to proceed under a sliding scale approach with two interactive variables: 1) the pre-employment experience of subordinate personnel, and 2) the nature of the interests violated.

### 1. Intent Not Required

A threshold question here is whether *Iqbal* categorically bars claims based on supervisory liability. A categorical approach would clash with the sliding scale approach recommended here. Fortunately, a more tempered reading of *Iqbal* is plausible. On this view, *Iqbal* only bars claims based on supervisory liability where the plaintiff has not plausibly pleaded<sup>151</sup> that the supervisor has the state of mind required for the underlying constitutional violation. The violations of equal protection at issue in *Iqbal* required proof of discriminatory intent.<sup>152</sup> However, a plaintiff need not show intent to prove that officials violated other constitutional provisions.

When the underlying violation, as in the Fourth Amendment arena, does not require intent, *Iqbal* should not bar the claim. For example, in *Argueta v. ICE*,<sup>153</sup> plaintiffs alleged that ICE agents, acting on orders from superiors and without adequate training, had violated the Fourth Amendment by entering homes without the consent of occupants, verbally abusing those inside, and manhandling children.

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<sup>150</sup> ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II 16-18 (2007) (analyzing government stereotypes of Japanese-Americans); Joseph Margulies, *Evaluating Crisis Government*, 40 CRIM. L. BULLETIN 627, 638-39 (2004) (discussing other World War II measures singling out Asian-Americans and Pacific islanders).

<sup>151</sup> See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); Sherry, *supra* note 87.

<sup>152</sup> *Iqbal*, 129 S. Ct. at 1948-49.

<sup>153</sup> *Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 64 (3d Cir. 2011).

The district court held that proof of the officials' knowledge of these practices was sufficient in the Fourth Amendment context.<sup>154</sup> The Third Circuit expressly reserved this issue.<sup>155</sup>

## 2. Failure to Train, Experience, and the Nature of Underlying Interests

This still leaves the question of liability for failure to train subordinates. The Court's decisions in *Iqbal*, *Connick v. Thompson*, and *Ashcroft v. al-Kidd* suggest the need for limits on actions based on failure to train.<sup>156</sup> However, these actions remain viable, using a sliding scale approach that considers the pre-employment experience of the subordinates and the nature of the interest allegedly violated.

Suppose that subordinate personnel, instead of having a law school degree like the subordinates in *Connick*, have little or no pre-employment legal training.<sup>157</sup> Since problems with compliance would be even more foreseeable in this context, a reasonable supervisor should take greater precautions. The case for training would be even stronger if the enforcement measure involved a sensitive area where immigration authorities have historically been reticent, such as the home.

Viewed with a sliding scale approach, consider the facts alleged in *Diaz-Bernal v. Myers*.<sup>158</sup> According to the plaintiffs, in an early-morning raid in June 2007, ICE personnel entered homes without warrants and arrested individuals without probable cause.<sup>159</sup> ICE officials also detained the plaintiffs without knowing their immigration status and failed to inform the plaintiffs of their rights.<sup>160</sup> Each person was detained for 3 to 27 days before being released.<sup>161</sup>

Factors that support the liability of senior officials in *Diaz-Bernal* include the modest amount of legal training provided to subordinates; reports from other districts of problems with similar measures;<sup>162</sup> and

<sup>154</sup> *Argueta v. U.S. Immigrations & Customs Enforcement*, No. 08-1652, 2010 U.S. Dist. Lexis 6912, at \*18-19 (D.N.J. Jan. 27, 2010), *rev'd on other grounds*, 643 F.3d 60 (3d Cir. 2011); *Plair v. City of New York*, 789 F. Supp. 2d 459, 466 (S.D.N.Y. May 31, 2011).

<sup>155</sup> *Argueta*, 643 F.3d at 68.

<sup>156</sup> See *Scott v. Fischer*, 616 F.3d 100, 110 (2d Cir. 2010) (analyzing supervisory liability after *Iqbal*).

<sup>157</sup> *Connick v. Thompson*, 131 S. Ct. 1350, 1361-63 (2011).

<sup>158</sup> *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106 (D. Conn. 2010). In a recent settlement, the federal government agreed to pay damages and provide immigration relief to the *Diaz-Bernal* plaintiffs. See Mary E. O'Leary, *11 Immigrants Arrested in 2007 Raids in New Haven Win \$350K Settlement with Feds, Won't Be Deported*, NEW HAVEN REGISTER, Feb. 15, 2012.

<sup>159</sup> *Id.* at 112-13.

<sup>160</sup> *Id.* at 113.

<sup>161</sup> *Id.* at 114.

<sup>162</sup> *Id.*

the operation's focus on residences, where overzealous enforcement could also impair privacy interests and affect children who might be United States citizens.<sup>163</sup> Moreover, perhaps because of the greater privacy protections that attach in an individual's home, immigration enforcement actions have historically centered on other sites.<sup>164</sup> New programs are more prone to error, requiring more attention by senior officials. The failure to provide this attention suggests an absence of deliberation that accountability should remedy. In addition, while the Third Circuit questioned in *Argueta* whether reports from other districts could be appropriate notice of potential problems,<sup>165</sup> discounting such reports should be evidence of senior officials' lack of due diligence. Federal programs should be replicable across the country. Officials becoming aware of such reports should investigate further to eliminate systemic causes rather than assume that "bad apples" caused the problems. If an investigation revealed evidence of systemic problems, senior officials should modify the training provided or the program itself. A more deferential judicial stance merely encourages senior officials' heedlessness.

### C. Qualified Immunity

The sliding scale approach to qualified immunity would consider two factors: the egregiousness of the official action and the specificity of precedent. When conduct is egregious, a plaintiff can invoke even general precedents as "clearly established" law.<sup>166</sup> This balance explains decisions that appear inconsistent under the present test, which asks only whether the challenged action has violated settled precedents.

A sliding scale approach would best curb both myopia and hindsight bias. It would not consign plaintiffs to the often impossible mission of finding precedents that exactly matched the facts alleged. On the other hand, a sliding scale approach would stabilize the opportunity costs of a decision against officials.

To see how a sliding scale would work in the qualified immunity context, consider *Hope v. Pelzer*,<sup>167</sup> in which the Court ruled that

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<sup>163</sup> See Aldana, *supra* note 43; Treadwell, *supra* note 20.

<sup>164</sup> See Hing, *supra* note 99.

<sup>165</sup> See *Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 74-75 (3d Cir. 2011) (suggesting that reports from other immigration districts, some of which concerned violations that occurred after events alleged in instant case, did not constitute adequate notice of possible violations).

<sup>166</sup> The plaintiff must plead plausible facts demonstrating that qualified immunity does not require dismissal of a cause of action. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

<sup>167</sup> 536 U.S. 730 (2002).

clearly established law barred officials from tying the plaintiff, a state prison inmate, to a hitching post in the hot sun for seven hours. The Court ruled that clearly established law barred this practice even in the absence of a judicial decision that squarely addressed the particular facts at issue.<sup>168</sup> According to the Court, the Fifth Circuit had taken an unduly “rigid” approach by requiring prior precedent that expressly prohibited such conduct.<sup>169</sup> Justice Souter, writing for the Court, noted that qualified immunity does not require such a painstaking match.<sup>170</sup> Instead, the Court viewed precedent more broadly as establishing that once officials have secured an inmate’s compliance with rules, punishment for past rule infractions should not endanger an inmate’s physical health.<sup>171</sup> Viewed in this light, overcoming qualified immunity in *Hope* did not increase opportunity costs. After the decision, an official might avoid a swath of conduct wider than the precise conduct at issue. For example, instead of merely refraining from chaining a prisoner to a hitching post for seven hours, a reasonable official would probably avoid even a six hour stint. However, this reluctance would not compromise valid prison administration concerns.<sup>172</sup>

Such an approach would have yielded a different approach in *Labadie v. United States*,<sup>173</sup> in which a Canadian national seeking to enter the United States alleged that a Border Patrol agent had resorted to using force in response to a polite question. Instead of looking in a mechanical way at the lack of clear case law on entering non-citizens’ First Amendment rights, a court would consider whether permitting such a lawsuit to proceed to discovery would yield substan-

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<sup>168</sup> *Id.* at 740-41; see also *United States v. Lanier*, 520 U.S. 259, 271 (1997) (noting that child welfare official who sold foster child into slavery would be liable, despite absence of cases expressly declaring such conduct illegal); *Anderson v. Creighton*, 483 U.S. 635, 640 (qualified immunity doctrine does not require that the “very action in question has previously been held unlawful”). But see *al-Kidd*, 131 S. Ct. at 2084 (in case where Court found that detention of material witness under presumptively valid warrant to ensure witness’s testimony in terrorism case did not violate Fourth Amendment, even though government may have also wished to investigate witness’s own terrorist ties, Court warned against defining clearly established law at a “high level of generality”).

<sup>169</sup> See *Hope v. Pelzer*, 536 U.S. 730, 742 (2002).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> This is different from the situation in *al-Kidd*, where finding an official liable for detaining a witness in a terrorism investigation prior to the witness’s flight to Saudi Arabia might encourage future officials to let a future witness get on the plane, even when compulsory process might not run to that jurisdiction. *al-Kidd*, 131 S. Ct. at 2084. In that scenario, officials might have lost important evidence, thereby raising opportunity costs. *Id.*; see Margulies, *Judging Myopia*, *supra* note 5, at 233.

<sup>173</sup> *Labadie v. United States*, No. C09-1276, 2011 U.S. Dist. Lexis 62909 (W.D. Wash. June 14, 2011).

tial opportunity costs. If permitting the lawsuit would chill effective border control, the court would hold that qualified immunity required dismissal. However, permitting discovery would likely not chill enforcement if courts also required an entering noncitizen to plead plausibly that he or she had behaved in a respectful manner.

Refining qualified immunity doctrine in this fashion would encourage greater official diligence and promote efficient dispute resolution. Agents would have an incentive to promptly document occasions when they deemed it necessary to use force. In considering whether the officer's response was egregious or tailored to the situation, a court could also consider any past episodes that might have heightened the officer's concern.<sup>174</sup> Officials would develop a more nuanced institutional memory to inform their conduct, heading off incidents before they happen. When litigation does result, information that clarified issues would be available to both the court and opposing parties, enhancing the prospects of a quick settlement.<sup>175</sup> A sliding scale approach would have positive systemic effects, without the opportunity costs that qualified immunity doctrine has sought to reduce.

#### D. The FTCA and the Appropriate Scope of Discretionary Functions

A sliding scale would also make sense in the FTCA context, tempering the deference that has too often distorted development of the "discretionary function" exception to liability. When opportunity costs are low, courts should require a closer nexus between the challenged action and the management of policy.

A first category of FTCA claims involves violations of clear constitutional or statutory rights. Where the law is clear, there is no discretion. Thus, even senior officials' acts would not be covered by the exception if those acts entailed blinking at clear unconstitutional conduct,<sup>176</sup> such as entering residences without a warrant or consent. Similarly, a decision hinging on a patently erroneous interpretation of a

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<sup>174</sup> *Id.* at \*2-3 (discussing past physical altercation between plaintiff and one of the Border Patrol agents named as a defendant in the instant case).

<sup>175</sup> This inquiry into the parties' conduct would entail some preliminary consideration of the underlying merits of the case. However, as the Court has recently recognized in the class action context, such an inquiry is often necessary to ensure that justice is done. *See Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2552 (2011) (asserting that proof of commonality between class members' claims "necessarily overlaps with . . . [the] merits" of plaintiffs' claim that defendant engaged in widespread discrimination).

<sup>176</sup> *U.S. Fidelity & Guar. Co. v. U.S.*, 837 F.2d 116, 120 (3d Cir. 1988) ("conduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation. Federal officials do not possess discretion to violate constitutional rights or federal statutes").

federal statute or rule would not involve “judgment or choice” within the meaning of the exception.<sup>177</sup>

A sliding scale approach would have led to a different result in *Castro v. United States*,<sup>178</sup> in which the court held that the discretionary function exception applied to Border Patrol agents who deported a United States citizen child along with her noncitizen father. The Border Patrol ignored a request from the child’s citizen mother to allow the child to stay. The agents’ choice was appropriate only if one accepts the premise that the Border Patrol had to remove the father immediately. However, the agents would not have impaired immigration enforcement if they had detained the father for a few days to allow Castro to obtain a custody order. Only a handful of cases involve a choice in custody of a citizen child between a citizen parent and an undocumented parent. Detaining a handful of noncitizens for the brief period necessary for an emergency custody hearing would not raise costs overall. Given such low opportunity costs, the sliding scale approach would have found the discretionary function exception inapplicable.<sup>179</sup>

## V. CONCLUSION

Remedies for alleged overreaching in immigration enforcement create a dilemma. Unduly sparse remedies promote official myopia. Overly plentiful remedies encourage hindsight bias and chill official discretion. With the specificity two-step, courts have avoided the sec-

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<sup>177</sup> *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991). The FTC also waives sovereign immunity for claims of false arrest and imprisonment, malicious prosecution, and other traditional torts arising out of law enforcement activities. See 28 U.S.C. § 2680(h). In *El Badrawi v. United States*, 787 F. Supp. 2d 204 (D. Conn. 2011), the court granted summary judgment to the plaintiff on his false arrest claim, rightly declining to defer to regional immigration officials’ ad hoc rewriting of a federal regulation. Officials had taken the view that a noncitizen was not lawfully present in the United States when the noncitizen had complied with a regulation that granted an extension of authorized employment for H-1B visa-holders who filed a timely request for an extension of their visa status. See *id.* at 217 (citing 8 C.F.R. § 274a.12(b)(20)). According to the court, the regulation clearly extended the noncitizen’s period of lawful presence since no reasonable drafter could have contemplated that a noncitizen on an employment visa be authorized to work yet not be lawfully present. Because immigration officials’ decision to arrest the plaintiff rested on this indefensible ground, the court found for the plaintiff on his false arrest claim. *Id.* at 216-224; cf. *Douglas v. United States*, 796 F. Supp. 2d 1354, 1366 (M.D. Fla. 2011) (granting summary judgment on malicious prosecution claim where plaintiff was detained because ICE agent ignored detailed letter regarding his citizenship status).

<sup>178</sup> *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 902 (2011).

<sup>179</sup> For a case where application of the exception was appropriate, consider *Rodriguez v. United States*, 415 Fed. Appx. 143 (11th Cir. 2011), in which the court ruled that the exception covered a decision to leave exercise equipment unattended, which allegedly caused an injury to a detainee who used equipment in an unsafe manner. Requiring constant supervision of exercise equipment would make recreation programs for immigration detainees more expensive, either limiting their availability or curtailing other valuable programs.

ond problem but exacerbated the first. The result has been a dilution of *Bivens* and causes of action under the FTCA. A sliding scale approach redresses the balance, leaving discretion intact but encouraging a second look at heedless habits that do not serve enforcement goals.