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Some scapegoats are innocent. Some warrant blame, but not the amount they are made to bear. Either way, scapegoating can allow in-groups to sidestep social problems by casting blame onto out-groups instead of confronting such problems—and the in-groups' complicity in perpetuating them—directly.

This Essay suggests that it may be productive to view the Bivens *regime's rise as countering various exercises in scapegoating and its retrenchment as constituting an exercise in scapegoating. The earlier cases can be seen as responding to social structures that have scapegoated racial, economic, and other groups through overaggressive policing, mass incarceration, and inequitable government conduct more broadly. The later cases can be seen as scapegoating the earlier cases. Current Justices condemn their predecessors' work as legislating from the bench while seeming to do the same in and beyond the* Bivens *context. The Supreme Court thus makes a convenient sacrifice of caselaw that its majority appears to oppose on ideological grounds. And it does so while arguably continuing the supposedly errant conduct depicted as justifying the ritual in the first place—and while potentially discouraging the forces of political change from pushing Congress to get involved.*

The Essay closes by contending that legislative intervention could break the scapegoating cycle and by discussing some steps the legal community could take to advance that aim.

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INTRODUCTION

On May 16, 1993, Guido Calabresi, then the dean of Yale Law School (now a senior judge on the Second Circuit), delivered a thoughtful commencement address at Quinnipiac University School of Law.[1] The theme was scapegoats.

Calabresi recounted the story of Eddie Slovik, an army private whom the United States executed by firing squad in the waning months of World War II for running away from his unit.[2] More than 21,000 members of the American military were convicted of abandoning their units during World War II.[3] But Slovik was the only one put to death for his crime. Indeed, he remains the only American subjected to capital punishment for desertion since the Civil War.[4]

Why was Slovik singled out? In Calabresi's telling: "The Army decided that it was necessary to make an example, because if this sort of thing could happen, the war could be lost," and then-General Dwight D. Eisenhower allegedly said, "pick me a loser."[5] Having narrowed the pool down to several soldiers who had left their stations twice, Calabresi continued, the Army "sent in psychologists to interview the double deserters and came up with Eddie Slovik, who came from someplace in the middle west, did not seem to have any family, had perhaps been a petty thief before going into the army," and was considered "a loser."[6] As Slovik himself reportedly put it: "They're not shooting me for deserting the United States Army—thousands of guys have done that. They're shooting me for bread I stole when I was twelve years old."[7]

Slovik, in Calabresi's version of the story, seems to have been a scapegoat. Students of the Bible may be familiar with the literal scapegoat from the Old Testament, which foreshadowed Jesus's death in the Gospels. In Leviticus, God instructed Moses that his brother Aaron, the high priest, should select a live goat and "confess over it all the wickedness and rebellion of the Israelites—all their sins—and put them on the goat's head."[8] Aaron,

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1 *See* Guido Calabresi, Speech, *Scapegoats*, 14 QUINNIPIAC L. REV. 83, 83 (1994). At the time, the institution was called Quinnipiac College School of Law.

2 *Id.* at 83–84.

3 *See* Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194, 232 (2018).

4 *See* WILLIAM BRADFORD HUIE, THE EXECUTION OF PRIVATE SLOVIK 6 (Dell Publ'g Co. 1970) (1954) (stating that "since 1864," Slovik was "the *only* American to be executed for such an offense"); Matthew Wills, *On Military Desertion and Executions*, JSTOR DAILY (May 1, 2015), https://daily.jstor.org/on-military-desertion-and-executions/ (stating that "no American has been executed for desertion since U.S. Army Private Eddie Slovik in 1945").

5 Calabresi, *supra* note 1, at 84.

6 *Id.*

7 HUIE, *supra* note 4, at 18. For a competing narrative about what led to Slovik's execution based on the decision-making record, see Joseph Connor, *Who's to Blame for Private Eddie Slovik's Death?*, HISTORYNET (Aug. 2018), https://www.historynet.com/whos-to-blame-for-private-eddie-sloviks-death.htm.

8 *Leviticus* 16:21 (New International Version).

God said, should then "send the goat away into the wilderness," where it would "carry on itself all [the Israelites'] sins to a remote place."[9] Other cultures have apparently embraced similar rituals too.[10]

People may feel the most pity for human scapegoats that, like the animal ones of old, are innocent of the misdeeds they are made to bear. As Calabresi put it, scapegoating "can become the pogrom: racial, religious, ethnic, and put the blame on some group of innocent people."[11] From the Chosen One in Igor Stravinsky's ballet *The Rite of Spring* to Tessie Hutchinson in Shirley Jackson's short story "The Lottery" to Rue in Suzanne Collins's book series *The Hunger Games* and so many more, innocent scapegoats have captured modern audiences' imaginations.[12] But scapegoats are not always innocent. Like Slovik (incidentally the subject of a 1974 made-for-television movie starring Martin Sheen), scapegoats may be guilty of the crime for which they are punished—but so may many others for whom the scapegoat's penalty provides symbolic exculpation.[13] To borrow again from both life and television (this time an acclaimed 2019 miniseries), consider the criminal convictions of a handful of midlevel bureaucrats for the 1986 Chernobyl nuclear meltdown, a disaster that subsequent analysis attributed to higher and broader causes within the Soviet system too.[14]

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9 *Leviticus* 16:21–22 (New International Version).

10 *See* Bradley C. Bobertz, *Legitimizing Pollution Through Pollution Control Laws: Reflections on Scapegoating Theory*, 73 TEX. L. REV. 711, 717 (1995) ("[A]nthropologists have catalogued a remarkable variety of sacrifice rituals intended to expel collective sin. Despite subtle variations in form and emphasis, these ceremonies follow a remarkably similar pattern: the participants view the ritual as a necessary measure for expelling collective wrongdoing, often after some misfortune or calamity has befallen the community. Often, both the transference of the community's sins to the scapegoat object and the sacrifice of the object itself are performed by persons having special standing in the community, typically of a religious character." (footnotes omitted)); *id.* at 717 n.27 ("Objects used to embody evil in these rituals include sticks, stones, leaves, fig branches, chickens, wild boars, dogs, cattle, sheep, effigies of demons and witches, and human beings.").

11 Calabresi, *supra* note 1, at 85.

12 Probably less well known than examples like these, but always the most striking to me, is the unnamed child in Ursula K. Le Guin's composition *The Ones Who Walk Away from Omelas*. *See* Ursula K. Le Guin, *The Ones Who Walk Away from Omelas*, *in* 3 NEW DIMENSIONS 1 (Robert Silverberg ed., 1973), *reprinted in* URSULA K. LE GUIN, THE WIND'S TWELVE QUARTERS 275 (1975).

13 *See* Bobertz, *supra* note 10, at 717 n.30 (stating that in anthropological studies, "[o]ften, as in the Levitical rites and Christian theology, the sacrificial person or entity embodies purity or innocence, the opposite qualities of the sin requiring expulsion," but that "in many other rites, the sacrificial entity is seen as the *cause* of the problem itself," with "[i]ts destruction or banishment directly remov[ing] the evil, thus cleansing the community of misfortune and returning affairs to the previous status quo").

14 *See* Int'l Atomic Energy Agency [IAEA], *The Chernobyl Accident: Updating of INSAG-1*, at 23–24, IAEA Doc. Safety Series No. 75-INSAG-7 (Nov. 1992) ("The accident can be said to have flowed from deficient safety culture, not only at the Chernobyl plant, but throughout the Soviet design, operating and regulatory organizations for nuclear power that existed at the time."), https://www-pub.iaea.org/MTCD/publications/PDF/Pub913e_web.pdf.

Scapegoats have appeared across the ages and in myriad manifestations. They exist in actuality and in art. Scholars contend that scapegoats also permeate the law, both in terms of problems at which legal interventions are aimed and in terms of the purposes and impacts of legal interventions themselves.[15] Inspired by Calabresi's commentary (rather than deriving from any expertise in religion, literature, or the social sciences that have considered the concept in a more specialized light), this Essay explores two ways in which the scapegoating idea may intersect with the focus of this symposium issue, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[16] The first relates to the *Bivens* regime's rise, which allowed plaintiffs to seek money damages from individual federal officials for certain constitutional violations, and the second relates to the *Bivens* regime's retrenchment. In particular, the Essay explores the possibility that the *Bivens* regime's beginnings countered various exercises in scapegoating and that the *Bivens* regime's abatement constitutes an exercise in scapegoating. As part of the latter discussion, the Essay also proposes a potential corrective course.

Part I examines how the earlier cases can be seen as responding to social structures that have scapegoated racial, economic, and other groups through overaggressive policing, mass incarceration, and inequitable government conduct more broadly. Part II examines how the later cases can be seen as scapegoating the earlier cases. Current Justices condemn their predecessors' work as supposedly legislating from the bench while seeming to do the same in and beyond the *Bivens* context. The Supreme Court thus makes a convenient sacrifice of caselaw that its majority appears to oppose on ideological grounds. And it does so while arguably continuing the supposedly errant conduct depicted as justifying the ritual in the first place—and while potentially discouraging the forces of political change from pushing Congress to get involved. Part II closes by contending that legislative intervention could break the scapegoating cycle and by discussing some steps the legal community could take to advance that aim.

I. Early Cases as a Response to Scapegoating

According to Judge Calabresi, scapegoating's core lies in "blaming someone, rather than facing up to the underlying problem."[17] A visionary of tort law, Calabresi started there. "[W]e always think that accidents are due to somebody drinking, or to somebody speeding, or to somebody having bad brakes," he said.[18] "The fact that they almost always happen at the same

15 *See generally* Calabresi, *supra* note 1. For some additional examples of commentators asserting connections between scapegoating and the law, see generally Bobertz, *supra* note 10 (environmental regulation); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 Hastings L.J. 829 (2000) (criminal sentencing); and Katie Rose Guest Pryal, Heller*'s Scapegoats*, 93 N.C. L. Rev. 1439 (2015) (civil commitment and gun control).

16 403 U.S. 388 (1971).

17 Calabresi, *supra* note 1, at 86.

18 *Id.* at 85.

curve, at the same exit, or are made worse because we do not have airbags, is not what we focus on."[19] For "[i]t is much easier to say, 'it is that person's fault; he or she was the one who was responsible for the thing.'"[20] And while "to some degree it is true," he concluded, it can also become trite.[21] Ever heard that "[g]uns do not kill, people do"?[22]

As another legal scholar puts it, "The essence of scapegoating is the attempt to identify the sources of social problems as external to the group."[23] The crux of the practice is "a tendency to blame . . . problems on easily identifiable objects or entities rather than on the social and economic practices that actually produce them," such that "[o]nce identified as the culprit . . . , this blame-holder comes to symbolize and embody the problem itself."[24] Scapegoating, then, shifts fault for complex social challenges from in-groups to out-groups, and it should come as little surprise that disadvantaged populations may often bear the brunt of this inclination. The present Part suggests that it may be productive to view the *Bivens* regime's rise as a response to this phenomenon.

A. Bivens

Webster Bivens asserted that federal agents "entered his apartment and arrested him for alleged narcotics violations," "manacled" him "in front of his wife and children," "threatened to arrest the entire family," "searched the apartment from stem to stern," and hauled him "to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search."[25] Bivens's complaint alleged that the agents did all this without a search warrant or an arrest warrant and that they employed excessive force.[26]

"[F]airly read," the Supreme Court said, the complaint also alleged a lack of probable cause.[27] But as Jim Pfander explains in his masterful telling of the story behind the case, Bivens was "involved in drug trafficking at the time of the arrest and search of his apartment."[28] Indeed, he was "imprisoned on a federal narcotics conviction" when he filed suit against the officers.[29] And the raid took place on the advice of an Assistant U.S. Attorney who, according to one of the defendants, knew that "two different work-

19 *Id.* 85–86.

20 *Id.* at 86.

21 *Id.*

22 *Id.*

23 Kennedy, *supra* note 15, at 833.

24 Bobertz, *supra* note 10, at 716.

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

26 *Id.*

27 *Id.*

28 James E. Pfander, *The Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *in* FEDERAL COURTS STORIES 275, 291 (Vicki C. Jackson & Judith Resnik eds., 2010).

29 *Id.* at 293.

ing groups of federal agents had bought drugs from Bivens in separate undercover operations."[30]

Given all this, one might regard what happened to Bivens as "routine."[31] But the Court saw something larger than Bivens the man in *Bivens* the matter, which it decided in 1971. The Court saw allegations that spoke to problematic police conduct more broadly. "An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own," said Justice Brennan's majority opinion,[32] citing cases throughout involving assertions of improper searches and seizures by federal officials.[33] Chief Justice Burger's dissent also acknowledged that "[b]eyond doubt the conduct of some officials requires sanctions"—pointing to "cases like *Irvine* [*v. California*],"[34] which involved police officers repeatedly making warrantless entries to install listening devices in a suspect's home.[35]

In *Bivens*, the Court must have also seen allegations that echoed the treatment of James Monroe, a black man who was actually blameless of the crime that law enforcement officers cited when raiding his home and rounding up his family[36]—and whose 1961 civil rights case likewise provided an occasion to expand the constitutional tort system considerably.[37] "[A]ssuming Bivens' innocence of the crime charged," said Justice Harlan's concurrence shortly after referencing *Monroe v. Pape*, "[f]or people in [his] shoes, it is damages or nothing."[38] As Pfander explains, "In emphasizing the importance of damages as a remedy for people in Bivens' shoes, Justice Harlan was adverting to the well-pleaded shoes that Bivens wore in his 1967 complaint, rather than to the literal shoes he wore in the apartment in November 1965."[39] And even while dissenting from the Court's decision to recognize a cause of action under the Fourth Amendment without congressional input, Chief Justice Burger likewise observed that damages relief

30 *Id.* at 291–92.

31 *Id.* at 294.

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

33 *See id.* at 392–96 (citing, e.g., Katz v. United States, 389 U.S. 347 (1967); Bell v. Hood, 327 U.S. 678 (1946); Byars v. United States, 273 U.S. 28 (1927); Amos v. United States, 255 U.S. 313 (1921); Weeks v. United States, 232 U.S. 383 (1914)).

34 *Id.* at 415 (Burger, C.J., dissenting).

35 *See* Irvine v. California, 347 U.S. 128, 130–32 (1954).

36 *See* Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago:* Monroe v. Pape *as Legal Noir*, *in* CIVIL RIGHTS STORIES 41, 48–52 (Myriam E. Gilles & Risa L. Goluboff eds., 2008) (explaining how the murder victim's wife blamed the crime on "two 'young Negroes'"; picked James Monroe's picture out of a mugshot lineup; and was later given up by her boyfriend, who admitted to being the triggerman, "for planning the entire thing in order to collect on her husband's $25,000 life insurance policy").

37 *See* Monroe v. Pape, 365 U.S. 167, 187 (1961) (holding that state and local officials can be liable for conduct committed "under color of" state law within the meaning of 42 U.S.C. § 1983, even where their conduct violates state law).

38 *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

39 Pfander, *supra* note 28, at 295.

"would have the . . . advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct."[40]

Perhaps in all this the Court foresaw the ill effects the "War on Drugs," which the Nixon Administration was ramping up in earnest when *Bivens* came down in 1971,[41] would inflict on communities of color and low-income people across the country.[42] Or, just a few years past a wave of deadly riots and the ensuing Kerner Report, maybe the Justices had in mind the ways that various police forces had mistreated disadvantaged populations from coast to coast.[43] *Bivens* came down in the early days of the Burger Court, but the majority's composition (in order of seniority, Justices Douglas, Harlan, Brennan, Stewart, White, and Marshall) harkened back to the preceding era. "[T]he Warren Court turned to the special magic of the criminal courtroom to demonstrate its commitment to racial justice, economic equality, and limited government."[44] *Bivens* looks like an instance of holdover Justices doing something similar in a closely related context while opposed by President Nixon's recently minted "law-and-order" nominees (Chief Justice Burger and Justice Blackmun, dissenting alongside Justice Black).[45]

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40 *Bivens*, 403 U.S. at 422 (Burger, C.J., dissenting).

41 *See* Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 435–36 (2010) ("In 1971, Richard Nixon officially declared the War on Drugs in America. However, laws enabling that criminal war were enacted years before Nixon's speech formally initiated the new conflict. In 1968, Lyndon Johnson established the Bureau of Narcotics and Dangerous Drugs, which came to be known as the Drug Enforcement Agency . . . , to lead the charge against domestic drug use and distribution. . . . When Nixon took over the Presidency, he signed into law the Comprehensive Drug Abuse Prevention and Control Act, which established the categorization system for regulating drugs. . . . By the time of Nixon's official declaration, the War on Drugs was substantially underway." (footnotes omitted)).

42 *See* Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1048 (2010) ("The discriminatory results of the drug war are clear. Three-fourths of those imprisoned for drug offenses are black or Latino. In seven states, 80% to 90% of imprisoned drug offenders are black. Such disparities cannot be explained by disproportionate use of drugs by African Americans; blacks don't use drugs more than any other group, and some studies have even found that they use them less." (footnotes omitted)); Darren Lenard Hutchinson, Who *Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. 2388, 2400 (2018) (reviewing JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017)) ("As many commentators have demonstrated, the 'War on Drugs' has severely impacted 'low-income African American communities.'" (quoting FORMAN, *supra*, at 17)).

43 *See* NAT'L ADVISORY COMM'N ON CIV. DISORDERS, THE KERNER REPORT 301, 301–03 (Princeton Univ. Press 2016) (1968) ("In Newark, Detroit, Watts, and Harlem—in practically every city that has experienced racial disruption since the summer of 1964, abrasive relationships between police and Negroes and other minority groups have been a major source of grievance, tension, and, ultimately, disorder.").

44 Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 442 (1980) (footnotes omitted).

45 *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 192 (1983) ("Liberal defenders of the War-

What does all this say about scapegoating? As Calabresi put it, "we execute drug dealers, but do not really do much about drugs."[46] Some scholars have characterized American drug policy in the late twentieth century as "a clear case of state-power-maintenance through scapegoating" of "convenient minorities."[47] And even before that, police abuses contributed to black communities suffering from conflicts that commentators trace at least in part to white populations' unwillingness to reckon with demographic change.[48] Accordingly, one could see *Bivens* as responding to public scapegoating of vulnerable populations through swaths of the criminal justice system. Or, importantly, even if one doubts that the Court originally conceptualized *Bivens* in that light, one could still see "the continued force . . . of *Bivens* in the search-and-seizure context in which it arose,"[49] especially among lower courts, as responding to concerns like these as they became clearer over time. While civil liability in itself cannot get at the roots of problems as complex as the drug epidemic and structural racism, the Court in allowing *Bivens* claims opened up an avenue for ameliorating these issues' inequitable effects.

These impressions are speculative and contestable, of course, and I offer them in a tentative form. One might think that other cases from around the same time that permitted problematic police practices—like *Terry v. Ohio*[50] and *Schneckloth v. Bustamonte*[51]—provide counterevidence.[52] And *Bivens* occurred toward the beginning of the War on Drugs, before the most puni-

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ren Court's legacy feared that President Nixon would fulfill his campaign pledge to appoint 'law and order' Justices who would narrow the scope and practical effect of landmark decisions . . . . Nixon fueled these fears of a conservative 'counter-revolution' when he appointed Warren Burger as the new Chief Justice. Indeed, Nixon made it clear to the public that Burger's conservative views about law and order were the prime reason for his appointment to the Court. By 1972, Nixon had appointed four Justices (Burger, Blackmun, Powell and Rehnquist) . . . ." (footnotes omitted)).

46 Calabresi, *supra* note 1, at 86.

47 David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1750 (1993); *see also* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 25–27 (2012) (providing a brief history of the widespread "analogy between today's criminal justice system and Jim Crow").

48 *See* Gilles, *supra* note 36, at 42–46.

49 Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017).

50 392 U.S. 1, 30 (1968) (holding that police officers may stop and frisk suspects without a warrant on reasonable suspicion that they are involved in criminal activity and may be armed).

51 412 U.S. 218, 234 (1973) (holding that "proof of knowledge of a right to refuse" is not "the *sine qua non* of an effective consent to a search").

52 In *Terry*, however, the Court noted "[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain" and stated that "[u]nder our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." 392 U.S. at 14–15. And the majority in *Schneckloth* (Chief Justice Burger and Justices Stewart, White, Blackmun, Powell, and Rehnquist) shared only two members with the majority in *Bivens*.

tive aspects of the movement arose.[53] In any event, scapegoating concerns may have embodied a relatively minor motivation for the Court, which certainly cared about other factors (including the relationship between rights and remedies on which the opinion focused) as well. The point here is to call attention to an underappreciated strand of thought that may have played a role in the *Bivens* decision—and that may in any event help explain its narrow persistence into the present.

B. Carlson

We can view *Carlson v. Green*[54] and *Davis v. Passman*[55]—the other two cases in which the Supreme Court recognized damages actions against federal officials for constitutional violations—in a similar light. *Carlson* (decided in 1980) postdates *Davis* (1979) but shares more in common with *Bivens* itself and is therefore worth discussing first. In *Carlson*, a deceased federal inmate's mother sued prison officials under the Eighth Amendment on the ground that they were aware her son suffered from chronic asthma but failed to treat his condition appropriately, causing his death.[56]

Four years before deciding *Carlson*, the Court held in *Estelle v. Gamble* that officials' "deliberate indifference" to prisoners' "serious medical needs" violates the Eighth Amendment's prohibition against cruel and unusual punishments.[57] The Court explained this rule by stating that "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose."[58] In doing so, the Court recognized that society incarcerates individuals deemed to deserve some punishment. But the Court simultaneously sought to prevent exposing prisoners to harsher conditions than their crimes warranted and thus sought to avoid "mak[ing] the guilty ones into scapegoats,"[59] which would represent a paradigmatic problem of the kind Calabresi identified.[60]

Carlson advanced this cause, holding that the possibility of plaintiffs receiving redress from the United States under the Federal Tort Claims Act

53 *See* German Lopez, *Was Nixon's War on Drugs a Racially Motivated Crusade? It's a Bit More Complicated.*, Vox (Mar. 29, 2016), https://www.vox.com/2016/3/29/11325750/nixon-war-on-drugs ("Nixon's drug war was largely a public health crusade—one that would be reshaped into the modern, punitive drug war we know today by later administrations, particularly President Ronald Reagan.").

54 446 U.S. 14 (1980).

55 442 U.S. 228 (1979).

56 *Carlson*, 446 U.S. at 16 n.1.

57 429 U.S. 97, 106 (1976).

58 *Id.* at 103.

59 Calabresi, *supra* note 1, at 87.

60 As *Estelle* recognized, the Court had long held that the Eighth Amendment "proscribes punishments grossly disproportionate to the severity of the crime." 429 U.S. at 103 n.7 (first citing Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion); and then citing Weems v. United States, 217 U.S. 349, 367 (1910)). By focusing on whether the effects of inadequate medical care serve "any penological purpose," *Estelle* connected up with this precedent.

(FTCA) did not prevent courts from recognizing an implied cause of action against individual officials under the Constitution.[61] This aspect of the decision rested on the notion that compensating prisoners for harms suffered through unconstitutional actions did not go far enough. Instead, the Court concluded it was critical to establish a remedy that would have meaningful deterrent consequences, reasoning that a *Bivens* claim provided superior incentives to an FTCA action. "It is almost axiomatic that the threat of damages has a deterrent effect," the Court said—and "surely particularly so when the individual official faces personal financial liability."[62] Moreover, the Court said, the unavailability of punitive damages made an FTCA suit "that much less effective than a *Bivens* action as a deterrent to unconstitutional acts."[63]

Academic analysis indicates that the Court's assumptions about how deterrence works in damages suits against government actors were highly questionable,[64] with several commentators (including me) calling for increased entity liability as a means of bringing about institutional change.[65] Nevertheless, by focusing on deterrence in the first place, the Court targeted a classic scapegoating scenario, attempting to force federal officials to grapple with difficult problems regarding how to respond to serious medical needs within a custodial environment rather than just brushing the problems aside as bad things that happen to imprisoned people. By analogy to Calabresi's commencement speech, *Carlson* tried to compel officials to address "grade crossings at which trains run into cars with monotonous regularity"

61 *Carlson*, 446 U.S. at 20.

62 *Id.* at 21.

63 *Id.* at 22. The Court also addressed the counterargument "that FTCA liability is a more effective deterrent because the individual employees responsible for the Government's liability would risk loss of employment and because the Government would be forced to promulgate corrective policies." *Id.* at 21 (footnote omitted). This contention, the Court said, suggests "that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights." *Id.* The Court concluded that "[t]he more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." *Id.*

64 *See, e.g.*, James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 578–80 (2020) (compiling evidence that certain federal officials are almost always indemnified by their government employers); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–17 (2014) (same for certain state and local officials); *see also* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1028 (2010) (arguing that while policy-level deterrence is possible under certain circumstances, government entities typically fail to collect or analyze information about constitutional tort suits in ways that would foster such changes).

65 *See generally, e.g.*, Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. (forthcoming 2022) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796337) (advocating greater federal, state, and local entity liability on multiple grounds).

rather than allowing them just to say that "somebody always did something wrong or they would not have gotten crushed."[66]

A broader scapegoating situation also loomed behind *Carlson*. While the allegations underlying *Bivens* illustrate some effects of tough-on-crime policymaking on front-end investigation, the allegations underlying *Carlson* illustrate some effects of tough-on-crime policymaking on back-end incarceration. In *Carlson*, the plaintiff raised not only a deliberate indifference claim under the Eighth Amendment, but also an equal protection claim under the Fifth Amendment, asserting that the defendants' "indifference was in part attributable to racial prejudice."[67] The Court barely mentioned this allegation, but the plaintiff's brief provides additional context. The plaintiff's son was the fourth inmate, the brief says, to die "from medical care inadequacies in a seven-month period."[68] And all four of the deceased prisoners were black.[69]

Beyond *Carlson*, the mass incarceration arising from the War on Drugs would impose strikingly disproportional effects on black Americans. A 2008 study showed that, as of 1978, black people constituted approximately 20 percent of adult drug arrestees in the United States.[70] By 1989, the black "share among all arrestees exceeded 40 percent," and in the years since, the figure has "fluctuat[ed] between 32 and 40 percent."[71] For comparison purposes, between 1980 and 1990, black people made up roughly 12 percent of the population,[72] and in 2010, the proportion had risen to about 14 percent.[73]

Just as with *Bivens*, then, there are reasons to view *Carlson*—either initially or in its enduring effects—as responding to public scapegoating of marginalized communities through aspects of the criminal justice field.

C. Davis

Davis is different from *Bivens* and *Carlson* in that it does not directly implicate the criminal justice system. But the case may still fit within a scapegoating framework.

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66 Calabresi, *supra* note 1, at 86.

67 *Carlson*, 446 U.S. at 16 n.1.

68 Brief for the Respondent at 4, *Carlson*, 446 U.S. 14 (No. 78-1261), 1979 WL 199272, at *4.

69 *Id.* at *10 n.4, *14 n.10.

70 Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 24 (2008).

71 *Id.*

72 Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* tbl.1 (U.S. Census Bureau, Population Div. Working Paper No. 56, 2002), https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf.

73 News Release, U.S. Census Bureau, 2010 Census Shows America's Diversity (Mar. 24, 2011), https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn125.html.

In *Davis*, the Supreme Court allowed a former congressional staffer to bring a damages claim against the representative for whom she had worked for firing her on the basis of sex in violation of the Fifth Amendment.[74] One could make a compelling case that there are ways in which American society scapegoats women in the workforce to allow men to maintain professional ascendency.[75] But in *Davis*, the Court seems to have cared little about gender equality qua gender equality, largely relegating the case's egregious facts to a footnote and saying almost nothing about sex discrimination more broadly.[76]

Instead, the Court made clear that *Davis* stood as a synecdoche for antidiscrimination ideals generally. In reaffirming the Fifth Amendment's reverse incorporation of equal protection principles, the Court cited—and thus suggested that the decision itself embraced—cases alleging not just gender discrimination, but also race discrimination, noncitizen discrimination, age discrimination, and more.[77] And in emphasizing the history of granting equitable relief against the federal government for discrimination claims, the Court lingered on *Bolling v. Sharpe*, the famous companion case to *Brown v. Board of Education*.[78] Accordingly, while cases today characterize *Davis* as limited to suits alleging sex discrimination in congressional employment,[79] the

74 Davis v. Passman, 442 U.S. 228, 230–31, 248–49 (1979).

75 *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1759 (1998) ("Where sexual misconduct occurs, it is typically part of a broader pattern of harassment designed to reinforce gender differences and to claim work competence and authority as masculine preserves.").

76 The footnote repeats the text of a letter the congressman sent the plaintiff to terminate her employment. *See Davis*, 442 U.S. at 230–31 n.3 (stating, among other things, as follows: "My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all of the pleasure out of your work. I must be completely fair with you, so please note the following: You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion." (paragraph break omitted)).

77 *See id.* at 234 ("In numerous decisions, this Court 'has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.'" (quoting Vance v. Bradley, 440 U.S. 93, 95 n.1 (1979) (age/job-classification discrimination)) (first citing Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (noncitizen discrimination); then citing Buckley v. Valeo, 424 U.S. 1, 93 (1976) (restrictions on political-process access); then citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (gender discrimination); and then citing Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (race discrimination))).

78 *See id.* at 242–44.

79 *See, e.g.*, Byrd v. Lamb, 990 F.3d 879, 882 (5th Cir. 2021) (per curiam) (describing the suits permitted by *Davis* as involving "discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment" (quoting Oliva v. Nivar, 973 F.3d 438, 442 (5th Cir. 2020))).

Court appears to have seen *Davis* (and some lower-court judges saw *Davis*[80]) as addressing unequal treatment more broadly—or at least as laying the groundwork for future matters to do so.

The overarching connection to scapegoating concepts should be apparent. Scapegoating commonly manifests as discrimination against disadvantaged communities, for scapegoating "always help[s] the powerful," to return to Calabresi's speech.[81] The Court's equal protection jurisprudence seeks to guard against just such invidious group-based treatment. It may be easy for the majority to consign what the Court famously called "discrete and insular minorities" to scapegoat status, a danger that equal protection principles can address.[82] Or the animus that violates equal protection doctrine outside the classification analysis could signal that scapegoating is afoot,[83] to provide just a couple examples.

Other rights provisions are similar, of course, in the countermajoritarian sense that a primary purpose is to prevent unjustified incursions on the liberty interests of people without much political power. The point is not that all individual constitutional injuries, or even all equal protection violations, necessarily represent instances of social scapegoating.[84] The point is instead that the one likely correlates with the other in a great many cases—and that since this overlap seems especially probable in the equal protection context, a decision like *Davis* aimed at discrimination generally may well represent a response to scapegoating concerns.

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80 *See* Wallace v. Chappell, 661 F.2d 729, 730 n.1, 738 (9th Cir. 1981) (recognizing a *Bivens* action for racial discrimination in military activities on the ground that *Davis* "extended" *Bivens* "to fifth amendment equal protection claims" but remanding for an additional reviewability analysis), *rev'd on other grounds*, 462 U.S. 296 (1983); Marshall v. Kleppe, 637 F.2d 1217, 1219 (9th Cir. 1980) (recognizing a *Bivens* action for racial discrimination in lending on the ground that after *Davis*, "there is no longer any doubt that an individual may assert a private cause of action for damages, based on an alleged violation of the Fifth Amendment's due process clause, against a federal official").

81 Calabresi, *supra* note 1, at 88.

82 United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938); *see* Dan T. Coenen, *The Future of Footnote Four*, 41 GA. L. REV. 797, 798–99 (2007) ("The Supreme Court's decision in *United States v. Carolene Products Co.* generated the most famous footnote—and perhaps the most famous passage—in all of the American Judiciary's treatment of constitutional law.").

83 *See* United States v. Windsor, 570 U.S. 744, 770 (2013) ("The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))).

84 Much but not all free speech precedent would seem difficult to cast in that light, for example. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 192–93 (2014) (plurality opinion) (striking down "aggregate limits" on campaign contributions, which "restrict[ ] how much money a donor may contribute in total to all candidates or committees," as violating the First Amendment).

II. LATER CASES AS AN INSTANCE OF SCAPEGOATING

The foregoing discussion suggests that we can see the earlier *Bivens* cases—the ones that expanded the doctrine—as responding to social scapegoating. But what about the later *Bivens* cases?

In his commencement address, Judge Calabresi claimed that "lawlessness breeds lawlessness and scapegoats."[85] Lawyers can help break this cycle, Calabresi said, by harnessing the rule of law to address root problems. Because "the law fails, often perhaps even usually, the law fails," he continued, "the temptation is to abandon it, to act lawlessly, to scapegoat."[86] But "lawlessness and scapegoatism" as a response "always fail" and "always lead us to harm."[87] So, Calabresi concluded, "[t]he only hope, despite the failure of law, is in law—in systemic careful reform of law, in solutions to underlying problems, not in scapegoatism."[88]

There is a great deal of disagreement about whether the initial line of *Bivens* decisions was itself lawless (or at least unlawful)—and in particular, about whether these cases comply with a correct understanding of the constitutional separation of powers between federal courts and Congress. The present Part aims not to resolve this disagreement, but instead to point out that even for people who think the earlier *Bivens* jurisprudence was erroneous, the Supreme Court's response has been problematic. Indeed, we can see the later *Bivens* jurisprudence itself as an act of scapegoating against a convenient target, arguably continuing through concealment the cycle against which Calabresi warned. The present Part also discusses a potential corrective course.

A. Convenience

In a long string of cases since *Carlson* came down in 1980, the Supreme Court has refused to extend the *Bivens* remedy to additional constitutional or factual circumstances.[89] The stated reason is that creating causes of action is a task for Congress, not the courts. And the Justices have been quite critical of how their predecessors approached this area of law.

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85 Calabresi, *supra* note 1, at 87; *see also id.* at 88 ("Rodney King broke the law, and so some cops decided to act lawlessly. A jury in trying those cops may well have acted lawlessly. I believe they, the first jury, did. And the rioters responded to that lawlessness by acting lawlessly. And, as a result, some Korean shopkeepers and some African-American shopkeepers, were the ones who ended up being the scapegoats of all that lawlessness.").

86 *Id.* at 88.

87 *Id.*

88 *Id.*

89 *See* Hernández v. Mesa, 140 S. Ct. 735, 743 (2020) (first citing Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); then citing Minneci v. Pollard, 565 U.S. 118 (2012); then citing Wilkie v. Robbins, 551 U.S. 537 (2007); then citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); then citing FDIC v. Meyer, 510 U.S. 471 (1994); then citing Schweiker v. Chilicky, 487 U.S. 412 (1988); then citing United States v. Stanley, 483 U.S. 669 (1987); then citing Chappell v. Wallace, 462 U.S. 296 (1983); and then citing Bush v. Lucas, 462 U.S. 367 (1983)).

The Court's two most recent *Bivens* cases provide ample illustration. "[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation," the Court said in the 2017 case *Ziglar v. Abbasi*.[90] For "[i]t is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation."[91]

Last year's decision in *Hernández v. Mesa* spoke even more sternly about the Court's previous practices. After *Carlson*, the Court said, "we came to appreciate more fully the tension" between recognizing implied damages actions on one hand "and the Constitution's separation of legislative and judicial power" on the other.[92] While *Abbasi* called it "possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today,"[93] *Hernández* designated it "doubtful that we would have reached the same result."[94] And while *Abbasi* stated that "this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose,"[95] *Hernández* included no such qualification. Both cases criticized the initial line of *Bivens* decisions as belonging to an "*ancien regime*."[96] And *Hernández* repeated *Abbasi*'s statement that "expansion of *Bivens* is 'a "disfavored" judicial activity.' "[97]

Those were just the lead opinions. Both *Abbasi* and *Hernández* featured separate opinions blaming *Bivens* and its successors on bad judging. In *Abbasi*, Justice Thomas reiterated his previously expressed view that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action," such that "*Bivens* and its progeny" should be limited "to the precise circumstances that they involved."[98] In *Hernández*, Justice Thomas—this time joined by Justice Gorsuch—contended that "[t]o ensure that we are not 'perpetuat[ing] a usurpation of the legislative power,' " the Court should "consider discarding the *Bivens* doctrine altogether."[99] Indeed, the concurrence concluded, "[t]he analysis underlying *Bivens* cannot be defended."[100]

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90 137 S. Ct. at 1856.

91 *Id.* at 1858.

92 *Hernández*, 140 S. Ct. at 741.

93 *Abbasi*, 137 S. Ct. at 1856.

94 *Hernández*, 140 S. Ct. at 742–43 (describing *Abbasi*'s statement).

95 *Abbasi*, 137 S. Ct. at 1856.

96 *Hernández*, 140 S. Ct. at 741 (quoting *Abbasi*, 137 S. Ct. at 1855); *Abbasi*, 137 S. Ct. at 1855 (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001)).

97 *Hernández*, 140 S. Ct. at 742 (quoting *Abbasi*, 137 S. Ct. at 1857).

98 *Abbasi*, 137 S. Ct. at 1869–70 (Thomas, J., concurring in part and concurring in the judgment) (quoting Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring)).

99 *Hernández*, 140 S. Ct. at 750 (Thomas, J., concurring) (quoting Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring)).

100 *Id.* at 752.

So the Roberts Court condemns the Burger Court's practice of relying on legislative-like reasoning to make policy judgments about the availability of constitutional causes of action. As even a prominent conservative judge has recently suggested, however, there are plausible historical arguments that the earlier *Bivens* cases were not as far out of conventional remedial bounds as the later *Bivens* cases suggest.[101] To quote Steve Vladeck (who represented the petitioner in *Hernández*): "At the Founding, and for much of American history, there was no question as to whether federal courts had the power to provide judge-made damages remedies against individual federal officers."[102] Indeed, Vladeck contends that "[r]emedies against federal officers were . . . not viewed as being committed to the states' grace, and the Court suggested that in some cases 'the existence of the common law tort action for certain types of official invasions of liberty or property may itself be a constitutional requirement.'"[103] Even in *Bivens*, Vladeck continues, "the solicitor general agreed that federal courts had the power—and obligation—to fashion such relief on their own" to the extent "a federal remedy was necessary to vindicate a plaintiff's constitutional rights" and that federal courts "had been doing so for decades."[104]

Nevertheless, the Court has steadfastly refused to engage with these arguments on their own terms (to the extent it has engaged with them at all). For instance, the Court has never fully grappled with how its hostility to implied damages remedies fits with its acceptance of implied injunctive relief for constitutional wrongs.[105] This failure is especially striking given that Justice Harlan's famous concurrence in *Bivens* repeatedly leaned on the availability of unwritten equitable actions to justify allowing unwritten damages

101 *See* Byrd v. Lamb, 990 F.3d 879, 884 & n.11 (5th Cir. 2021) (Willett, J., specially concurring) (noting that "Justices Thomas and Gorsuch have called for *Bivens* to be overruled, contending it lacks any historical basis," but that "[s]ome constitutional scholars counter that judge-made tort remedies against lawless federal officers date back to the Founding") (collecting citations).

102 Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019–2020 CATO SUP. CT. REV. 263, 267.

103 *Id.* at 270 (quoting Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 121 (1997)).

104 *Id.* at 271.

105 *E.g.*, Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. It is a judge-made remedy . . . ." (citation omitted)); *see* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1135 (1989) ("[T]he present juxtaposition of a hesitancy to grant damages awards with a willingness to allow injunctive relief . . . gets the traditional interplay between law and equity exactly backwards. Equitable remedies . . . are normally available only after legal remedies have been demonstrated inadequate. . . . The implication is not ambiguous. The common law tradition's first remedial response to the deprivation of a legal interest was the fashioning of an award for damages." (footnotes omitted)).

actions too.[106] The Court, moreover, has fastened its turn away from the initial *Bivens* decisions onto the notion that *Erie Railroad Co. v. Tompkins* "held that '[t]here is no federal general common law,'" such that "federal courts today cannot fashion new claims in the way that they could before 1938."[107] But the Court has essentially ignored arguments that "*Erie* had no effect on the tort liability of rogue federal officers other than to clarify that federal courts were bound by judge-made state law in diversity cases."[108] Regardless of how one comes down on whether damages relief for constitutional claims represents an appropriate place for common-law decisionmaking by federal courts, the issue is far more nuanced than the Justices' bare *Erie* invocation acknowledges.[109]

As it turns out, *Bivens* appears to provide the Court a convenient bogeyman because—generally, not universally, speaking—the same Justices who have opposed the regime have often opposed robust recovery in constitutional tort law more broadly. Perhaps most pertinent nowadays, several of the same Justices who have recently criticized the availability of *Bivens* relief have also supported a superstrong version of qualified immunity.[110] And many of the same Justices who have historically criticized the availability of *Bivens* relief have embraced increased pleading standards,[111] administrative

106 *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring in the judgment) ("[T]he presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization.").

107 Hernández v. Mesa, 140 S. Ct. 735, 742 (2020) (alteration in original) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

108 Brief for the Petitioners at 14–15, *Hernández*, 140 S. Ct. 735 (No. 17-1678), 2019 WL 3714475, at *14–15; *see also* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 541 (2013) ("After *Erie*, Courts addressing the question of damages for constitutional violations could have framed the question as whether the previously available 'common law' remedies should now be understood to have the status of federal common law. Because the availability of such remedies had been determined by federal courts largely independently of state decisions, and given the obvious federal interests involved, the federal courts' pre-*Erie* approach could easily and properly have been retained and recharacterized in post-*Erie* terms as the application of a federal common law of remedies for constitutional violations.").

109 *See generally* Henry J. Friendly, *In Praise of* Erie *—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1 (2015).

110 *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1866–67 (2017).

111 *See* Ashcroft v. Iqbal, 556 U.S. 662, 678, 684 (2009) (extending to the constitutional tort context and beyond the plausibility pleading standard announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

exhaustion mandates,[112] municipal liability limitations,[113] and other rules favoring defendants in constitutional tort cases.[114]

This in itself is neither surprising nor scandalous. Different Justices have different views on life, law, and constitutional enforcement. Those commonly regarded as liberal are more likely to support plaintiff-friendly constitutional tort doctrine; those commonly regarded as conservative, defendant-friendly constitutional tort doctrine. Consistency of outcome does not in itself indict any particular preference on any particular issue. But consistency of outcome, especially where combined with repeated refusals to take serious counterarguments seriously, should cause analysts to question proffered justifications premised on transsubstantive principles—like the disapproval of judicial lawmaking on which the Court has grounded its *Bivens* resistance.

B. Concealment

With all the above in mind, it is worth asking to what extent the current Supreme Court majority practices what its *Bivens* decisions preach about the evils of judicial lawmaking. The answer is arguably not much. True, the Court no longer recognizes implied damages actions in the context of federal statutes, instead "interpret[ing] the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."[115] In some ways, however, the previous practice looked less like an exercise in purposeful common-law decisionmaking than a capacious approach to purposive statutory interpretation.[116] In any event, additional areas in which the Court continues to make federal common law are numerous.

Even Justice Thomas acknowledges "enclaves of federal judge-made law" governing "foreign affairs," "disputes between States," "admiralty," "certain rights and obligations of the United States," and "aspects of federal labor law."[117] But there are many more contexts in which something that looks like federal common law controls. As I explain elsewhere, for instance, there is a lengthy "list of rules that have been identified as possibly prudential"—meaning characterized as judicially "self-imposed, common law limit[s] on

112 *See* Patsy v. Bd. of Regents, 457 U.S. 496, 532–36 (1982) (Powell, J., dissenting) (arguing that exhaustion of state administrative remedies should be required under 42 U.S.C. § 1983).

113 *See* Connick v. Thompson, 563 U.S. 51, 60–62 (2011) (setting a high bar for failure-to-train claims against municipalities under 42 U.S.C. § 1983).

114 *See Iqbal*, 556 U.S. at 677 (rejecting the possibility of supervisory liability in constitutional tort suits).

115 Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) ("Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." (citations omitted)).

116 *See* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.").

117 Collins v. Virginia, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring).

federal jurisdiction designed to foster core values like federalism, separation of powers, and accuracy"[118]—in the federal courts field.[119] Pulling just from "a sampling of recent scholarship examining doctrines that the Supreme Court or some of its members have treated as prudential," these rules include the "general prohibition against third-party standing," the "zone-of-interests standing test as applied to constitutional claims," the "standing prohibition on asserting generalized grievances," the "taxpayer-standing doctrine," the "standing rule for federal-question cases about domestic relations," the "ripeness doctrine examining the fitness of the issues for review and the hardship to the parties of delay," certain "aspects of mootness," the "adverseness requirement," certain "aspects of the political-question doctrine," the "abstention doctrines," certain "aspects of state sovereign immunity," and the "act-of-state doctrine."[120] The infamous government-contractor defense also comes to mind.[121]

To be sure, the Court often vaguely characterizes these doctrines as rooted in constitutional principles. But so did *Bivens* for constitutional damages claims.[122] Some of these lines of decision, moreover, may be more justifiable on historical or structural grounds than others are. What matters for the moment is that the Court itself has never articulated a convincing theory of federal common-law decisionmaking that would distinguish the much-maligned *Bivens* regime from the bulk of judicially fashioned doctrines bearing little to no connection to constitutional or statutory text.

Perhaps starkest of all is the Court's divergent treatment of the *Bivens* analysis and the qualified immunity inquiry—even in a single case. On the *Bivens* analysis, *Abbasi* said that "[w]hen an issue 'involves a host of considerations that must be weighed and appraised,' it should be committed to 'those

118 Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 853 (2017).

119 Katherine Mims Crocker, *A Prudential Take on a Prudential Takings Doctrine*, 117 MICH. L. REV. ONLINE 39, 50 (2018).

120 *Id.* (first citing Smith, *supra* note 118, at 855–69; and then citing Ernest A. Young, *Prudential Standing After* Lexmark International, Inc. v. Static Control Components, Inc., 10 DUKE J. CONST. L. & PUB. POL'Y 149, 150–63 (2014)).

121 *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (admitting that the analysis concerned "federal law of a content prescribed . . . by the courts—so-called 'federal common law'"); *see also, e.g.*, Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 960, 962–63 (1996) (arguing that "[u]pon reading the majority's opinion in *Boyle*, it is hard to escape the conclusion that the Court exercised power that the Constitution reserves to Congress").

122 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803))); *id.* at 407 (Harlan, J., concurring in the judgment) ("[T]he judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. . . . [T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities . . . .").

who write the laws' rather than 'those who interpret them.'"[123] For we should be skeptical, the Court said, about judges trying to mediate between placing "burdens on some"—like the monetary costs accompanying "defense and indemnification" and "the time and administrative costs attendant upon intrusions resulting from the discovery and trial process"—and giving "benefits to others."[124]

On the qualified immunity question, by contrast, *Abbasi* said that the judicially crafted doctrine, which allows constitutional tort plaintiffs to recover damages only for "clearly established" rights violations,[125] "seeks a proper balance between two competing interests."[126] For "[o]n one hand," the Court continued, "damages suits 'may offer the only realistic avenue for vindication of constitutional guarantees.'"[127] But "[o]n the other hand, . . . damages suits . . . can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."[128] In the interest of "accommodat[ing] these two objectives," *Abbasi* explained, the Court had instituted qualified immunity to "give[ ] officials 'breathing room to make reasonable but mistaken judgments about open legal questions.'"[129]

To quote Jim Pfander, the Court exhibits a "Janus-faced attitude to the business of judicial lawmaking" by "express[ing] a grave reluctance to recognize what it chooses to characterize as new rights of action under *Bivens*" while "embrac[ing] judge-made law with gusto in adapting the rules of qualified immunity" and other doctrines.[130] But again, the Court rarely admits the extent to which some areas depend on its own common-law decisionmaking. Instead, the Court purports to ground all manner of justiciability doctrines in a loose interpretation of Article III,[131] relies on longstanding legal text to discover newfangled procedural hurdles for plaintiffs to overcome,[132]

123 Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

124 *Id.* at 1856, 1858.

125 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

126 *Abbasi*, 137 S. Ct. at 1866.

127 *Id.* (quoting *Harlow*, 457 U.S. at 814).

128 *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)).

129 *Id.* (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)).

130 James E. Pfander, Iqbal, Bivens, *and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN ST. L. REV. 1387, 1405 (2010); *see also* Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1446–47 (2019) (laying out the above passages from *Abbasi* and stating that they are "in some tension" because "[t]he Court's tone suggests . . . that it is largely illegitimate for the judiciary to determine which claims should proceed based on competing cost considerations in the *Bivens* context but perfectly fine for it to do the same thing in the qualified-immunity context").

131 *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does.").

132 *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 684, 678 (2009) (extending to the constitutional tort context and beyond the plausibility pleading standard announced in *Bell Atlantic Corp. v. Twombly*, which the dissent in that case described as "announc[ing] a significant

and even with respect to qualified immunity—where Justices have occasionally been forthcoming about the subjective nature of their handiwork[133]—casts about for a dizzying array of constitutional, statutory, and other justifications.[134]

All this obfuscation of the discretion underlying the Justices' federal courts jurisprudence works a real concealment of the *Bivens* regime's relative unremarkableness. To be sure, there are plausible distinctions between these areas of law. But it would be difficult if not impossible to deny that the Court has adopted dramatically different tones toward discretionary doctrines that allow lawsuits and that disallow lawsuits—and especially lawsuits against government actors.

The current Supreme Court condemns the *Bivens* regime as an area of illegitimate common-law decisionmaking despite relying on similar reasoning styles in a variety of other contexts. Indeed, the same pattern carries over into how more recent Justices have handled *Bivens* matters themselves. In the same cases where it has castigated judicial lawmaking, the Court has repeatedly manipulated doctrinal factors without admitting as much and in a way that seems related more to the majority's subjective disdain for lawsuits against government defendants than to any objective source of law. In some ways, that is, the Court's approach now looks much like its predecessor's approach during the *Bivens* regime's brief rise: the thumb is just on the other side of the scale, with the earlier cases weighted toward and the later cases weighted against allowing relief.

Consider the "special factors" inquiry. This aspect of the analysis traces back to *Bivens* itself, where the Court stated that "[t]he present case involves no special factors counselling hesitation in the absence of affirmative action by Congress."[135] The list of factors the Court has deemed relevant has grown over time. But recently, the Justices have also framed the issue in such a broad way that the exception essentially swallows the rule. As *Hernández* put it, "We have not attempted to 'create an exhaustive list' of factors that may provide a reason not to extend *Bivens*, but we have explained that 'central to [this] analysis' are 'separation-of-powers principles.'"[136] Accordingly, the

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new rule that does not even purport to respond to any congressional command," 550 U.S. 544, 596 (2007) (Stevens, J., dissenting)).

133 *See* Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting) ("We find ourselves engaged . . . in the essentially legislative activity of crafting a sensible scheme of qualified immunities . . . ."); Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (stating that the Court had "depart[ed] from history in the name of public policy, reshaping immunity doctrines in light of those policy considerations").

134 *See* Crocker, *supra* note 130, at 1415–19 (summarizing scholarship surrounding several asserted justifications).

135 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971); *see also* Carlson v. Green, 446 U.S. 14, 18 (1980) (stating that a *Bivens* claim "may be defeated" if "defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress'" (quoting *Bivens*, 403 U.S. at 396)).

136 Hernández v. Mesa, 140 S. Ct. 735, 743 (2020) (alteration in original) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017)).

Court said, we "consider the risk of interfering with the authority of the other branches, and we ask . . . 'whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.'"[137]

For the current Court, these questions appear to have predetermined answers. One could hardly doubt that the majority believes it would *always* "interfer[e] with the authority of the other branches" to recognize new *Bivens* claims.[138] One could hardly doubt that the majority believes the judiciary is *never* "well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed" under the *Bivens* framework.[139] These precepts, after all, are the very foundation on which the Court has rested its repudiation of implied damages remedies.[140] It should come as little surprise, therefore, to see a lower court pretermit even a peek at the details of a particular case by saying that the lack of a statutory damages remedy—the basis for the *Bivens* analysis in the first place—itself constitutes a special factor sufficient to reject a constitutional claim.[141] For the Justices have set up a system that encourages courts to go through the motions of considering *Bivens* actions while essentially instructing courts that they violate the Constitution by in fact considering *Bivens* actions.

The Court's about-face as to alternative remedies is also instructive. In the earlier *Bivens* cases, the absence of alternative remedies was a reason *for*

137 *Id.* (quoting *Abbasi*, 137 S. Ct. at 1858).

138 *Id.*; *see id.* at 742 ("[A] federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, and no statute expressly creates a *Bivens* remedy." (citation omitted)).

139 *Id.* at 743 (quoting *Abbasi*, 137 S. Ct. at 1858); *see id.* at 742 ("We have recognized that Congress is best positioned to evaluate 'whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government' based on constitutional torts." (quoting *Abbasi*, 137 S. Ct. at 1856)).

140 *See* Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . Without [statutory intent to create not just a private right but also a private remedy], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. 'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment))).

141 *See* Byrd v. Lamb, 990 F.3d 879, 882 (5th Cir. 2021) (per curiam) ("We must . . . determine whether any special factors counsel against extending *Bivens*. Here, . . . separation of powers counsels against extending *Bivens*. Congress did not make individual officers statutorily liable for excessive-force or unlawful-detention claims, and the 'silence of Congress is relevant.' This special factor gives us 'reason to pause' before extending *Bivens*." (citation omitted) (first quoting *Abbasi*, 137 S. Ct. at 1862; and then quoting *Hernández*, 140 S. Ct. at 743)); *see also* Oliva v. Nivar, 973 F.3d 438, 444 (5th Cir. 2020) ("[T]he separation of powers is itself a special factor."), *petition for cert. filed*, No. 20-1060 (U.S. Jan. 29, 2021).

allowing claims to proceed: recall the famous line from Justice Harlan's *Bivens* concurrence that "[f]or people in Bivens' shoes, it is damages or nothing."[142] In the later *Bivens* cases, the absence of alternative remedies has been recharacterized as a reason *against* allowing claims to proceed.[143] In the earlier *Bivens* cases, moreover, the *presence* of alternative remedies could defeat claims only if Congress "explicitly declared" the remedies "substitute[s] for recovery directly under the Constitution" and saw them as "equally effective."[144] But in the later *Bivens* cases, the presence (or even the *possible* presence) of alternative remedies can defeat claims regardless of whether Congress has deemed them equally effective replacements for constitutional tort actions.[145] Under this logic, *Bivens* actions may be damned if Congress does and damned if Congress does not provide some other avenue for redress.

These are just a couple examples of how the Court has repeatedly refashioned the standards applicable to *Bivens* suits to conform to the majority's apparent preference for precluding actions against government defendants. Joanna Schwartz, Alex Reinert, and Jim Pfander provide another possible example in their contribution to this symposium issue, arguing that the "exemption for policy challenges" articulated in *Abbasi* "can claim no support in the Court's own development of the *Bivens* doctrine, or in the principles

142 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment); *see supra* text accompanying note 38; *see also* Davis v. Passman, 442 U.S. 228, 245 (1979) (providing as a reason that "a damages remedy is surely appropriate in this case" the fact that "there are available no other alternative forms of judicial relief").

143 *See Hernández*, 140 S. Ct. at 749 ("This pattern of congressional action—refraining from authorizing damages actions for injury inflicted abroad by Government officers, while providing alternative avenues for compensation in some situations—gives us further reason to hesitate about extending *Bivens* in this case."); *Abbasi*, 137 S. Ct. at 1863 ("[I]n any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling. In the almost 16 years since September 11, the Federal Government's responses to that terrorist attack have been well documented. . . . Nevertheless, '[a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit.'" (quoting Schweiker v. Chilicky, 487 U.S. 412, 426 (1988)).

144 Carlson v. Green, 446 U.S. 14, 18–19 (1980); *see also Bivens*, 403 U.S. at 397 ("[W]e have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.").

145 *See Abbasi*, 137 S. Ct. at 1862–63 ("It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which 'it is damages or nothing.' . . . To address th[e] kinds of [policy] decisions [at issue here], detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able to challenge their confinement conditions via a petition for a writ of habeas corpus." (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment))); *id.* at 1863 ("[W]hen alternative methods of relief are available, a *Bivens* remedy usually is not.").

that animate the Court's broader approach to government accountability law."[146]

C. Correction

For what does all this count from the standpoint of a concern about scapegoating? Recall that scapegoating can allow in-groups to sidestep social problems by casting blame onto out-groups instead of confronting such problems—and the in-groups' complicity in perpetuating them—directly. Something like that seems to have happened here, with the later Supreme Court eluding larger questions about the proper scope of common-law decisionmaking in federal courts by focusing so much disapproval on the discrete *Bivens* doctrine. Indeed, the kind of collective purging that arises where the censuring entity has itself been involved in the conduct at issue—like the Soviet government punishing a handful of Chernobyl bureaucrats for sins of the bigger system[147]—represents an especially harmful form of scapegoating. Today's Justices reprimand their forerunners for engaging in a practice that still appears to pervade the Court's jurisprudence not only beyond, but also within the *Bivens* context itself. Even for people inclined to agree with the later Court's assessment of the earlier *Bivens* cases, therefore, the current methodological approach should be no way to run a railroad.[148]

A potentially more productive implication relates to Judge Calabresi's encouragement to channel the rule of law to break the scapegoating cycle. A civil justice system in which federal officials can violate constitutional rights with virtual impunity is no civil justice system at all. Accordingly, congressional codification of *Bivens*-type claims would seem like the kind of "deeper structural solution" (or at least a step toward the kind of "deeper structural solution") that Judge Calabresi urged the legal community to pursue.[149] One problem, however, is that the Court's current approach to the *Bivens* analysis may obscure the need for congressional intervention. There is reason to worry that because the Court purports to have preserved a path for some amorphous class of new *Bivens* claims to proceed, the fact that it has tried simultaneously to erect insurmountable obstacles to traversing that path may not be obvious enough to casual observers—and, therefore, may not generate the level of political pushback necessary to force meaningful reform.

Another parallel from the qualified immunity context is worth tracing here. While surreptitiously strengthening the doctrine's protections for gov-

146 Joanna C. Schwartz, Alexander Reinert & James E. Pfander, *Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based* Bivens *Claims*, 96 NOTRE DAME L. REV. 1835, 1835 (2021).

147 *See supra* text accompanying note 14.

148 Pun intended. *See supra* text accompanying note 66. A *Bivens* opponent might respond that because *Bivens* and its immediate successors were wrongly decided, the Court is justified in acting creatively to chip away at the doctrine. For a reply to thinking along these lines, see Crocker, *supra* note 130, at 1442–46.

149 Calabresi, *supra* note 1, at 89.

ernment defendants over time,[150] the Court consistently refused to declare any constitutional right "clearly established" from 2004 through 2020,[151] taking a large toll on constitutional tort claims throughout the federal court system.[152] Nevertheless, it took years for a critical mass of commentators to sound the alarm—and it took the vast movement for police reform and racial justice following George Floyd's death for the public to get behind the kind of campaign required to spur even the possibility of policy change.[153] The fact that the Court swept the real effects of its qualified immunity decisions under the rug by maintaining a veneer of receptivity to constitutional tort claims likely prolonged the reckoning now taking place.[154] It is easy to perceive a similar pattern in *Bivens* jurisprudence, pushing the possibility of congressional correction further into the future, and perhaps further out of reach, than the reality of the situation demands.

One partial solution would be for the Court to reduce the urgency of external action by more faithfully applying the earlier *Bivens* framework. But that seems unlikely any time soon. Alternatively, the Court could be more candid about what it seems to be doing. Without overruling the earlier *Bivens* cases, the Court could say in actual words what its decisions have long said between the lines: "this far and no further."[155] To be clear, I do not think damages claims for constitutional violations against federal officials should be limited to the Fourth, Fifth, and Eighth Amendment contexts of *Bivens*, *Davis*, and *Carlson* (or to the Fourth, Fifth, and Eighth Amendment contexts

150 *See* Crocker, *supra* note 130, at 1414–15. *See generally* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64 (2016).

151 *See* Katherine Mims Crocker, *The Supreme Court's Reticent Qualified Immunity Retreat*, 71 DUKE L.J. ONLINE (forthcoming 2021) (on file with author).

152 *See* Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ (reporting based on "an unprecedented analysis of appellate court records" that "[e]ven as the proliferation of police body cameras and bystander cellphone video has turned a national spotlight on extreme police tactics, qualified immunity, under the careful stewardship of the Supreme Court, is making it easier for officers to kill or injure civilians with impunity").

153 *See* Crocker, *supra* note 151 (describing the history of the pushback against qualified immunity).

154 *See* Kinports, *supra* note 150, at 78 ("In recent years, the Supreme Court opinions applying the qualified immunity defense have engaged in a pattern of describing the defense in increasingly generous terms and qualifying and deviating from past precedent—without offering any justification or even acknowledgement of the Court's departure from prior case law.").

155 To quote Justice Alito, *Hernández*'s author, "we may say that a certain precedent goes this far and no further, even though you can make the argument that the logic of the decision ought to extend much further." Samuel A. Alito, Jr., Michael W. McConnell, Kenneth W. Starr, Walter E. Dellinger III & Douglas W. Kmiec, *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33, 53 (2009). For "to say it goes this far and no further isn't overruling that decision," Alito continued, and "*[i]t's not being disingenuous in distinguishing that case.*" *Id.* at 53–54 (emphasis added). Instead, he concluded: "It's just saying that it has its limits. We're drawing a limit." *Id.* at 54.

at all). If that is the message the Court intends to convey, though, perhaps that is the message it should provide to the public, not just to insiders adept at reading coded legal opinions. Increased judicial candor can bring independent and cross-contextual benefits for the entire judicial system.[156] But in the present predicament, increased judicial candor could also help redirect reform efforts from federal courts to the other branches of government—and help crystallize these efforts' overall importance to improving government accountability. There are strong—and on balance, compelling—counterarguments against cutting off the possibility of new *Bivens* claims. Most importantly, the existing framework still allows some good-faith argumentation that judges should recognize *Bivens* actions. Lower courts occasionally do just that, permitting the possibility of monetary compensation for constitutional wrongs that may otherwise go unremedied.[157] And the Justices could someday swing back toward a willingness to provide plaintiffs relief—a prospect that preserving the present path would simplify.

At the very least, therefore, judges, scholars, and other commentators who care about increasing accountability for civil rights violations should spotlight the implications of the Court's later *Bivens* jurisprudence in service of calls for congressional reform. Judge Don Willett provided a prime example in a recent Fifth Circuit concurrence. Writing that "[m]iddle-management circuit judges must salute smartly and follow precedent," he said the panel's refusal to recognize the plaintiff's excessive force and unlawful seizure claims was "precedentially inescapable."[158] Walking through the doctrine's history, he reasoned that "*Bivens* today is essentially a relic, technically on the books but practically a dead letter."[159] But Congress, he continued, "certainly knows how to provide a damages action for unconstitutional conduct," and its failure to do so here despite allowing damages claims for constitutional violations against state and local officials "seems innately unjust."[160] Accordingly, Judge Willett concluded, "I add my voice to those

156 *See* Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2280–87 (2017) (asking and answering "[w]hat good reason do we have to care about whether judges exhibit . . . judicial candor . . . ?" (italics omitted)); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–38 (1987) (asking and answering "how strong is the case for candor in the performance of the judge's job?").

157 *See, e.g.*, Dyer v. Smith, No. 3:19-cv-921, 2021 WL 694811, at *1 (E.D. Va. Feb. 23, 2021) (holding that "no special factors counsel against recognizing implied damages remedies for either of [the plaintiff's] claims" in a case "alleg[ing] that the defendants, both TSA agents, violated [the plaintiff's] First and Fourth Amendment rights when they stopped him from recording a pat-down search of his husband and ordered him to delete the video he had already taken"). I filed an amicus brief in this case. *See* Brief of Amici Curiae Professors Katherine Mims Crocker and Brandon Hasbrouck in Support of Neither Party with Respect to Defendants' Motion to Dismiss, *Dyer*, 2021 WL 694811 (No. 3:19-cv-921).

158 Byrd v. Lamb, 990 F.3d 879, 883 (5th Cir. 2021) (Willett, J., specially concurring).

159 *Id.* at 884.

160 *Id.*

lamenting today's rights-without-remedies regime, hoping (against hope) that as the chorus grows louder, change comes sooner."[161]

Conclusion

"[L]awlessness breeds lawlessness and scapegoats," Judge Calabresi said to the graduating class of Quinnipiac University School of Law in 1993.[162] Attempting to apply Calabresi's teachings, this Essay has suggested that police abuse, inequitable and other troublesome aspects of the criminal justice system more broadly, and a wide range of equal protection violations most broadly of all bred the *Bivens* regime, which many regard as lawless (or at least unlawful). The Essay has also suggested that the *Bivens* regime in turn bred the scapegoat of its own ridicule and rejection by the later Supreme Court, whose actions others likewise regard as lawless (or, again, at least unlawful).

What could be done, at this late date, to break the scapegoating cycle? What could be done, in the context of the constitutional tort system and the primary conduct that undergirds it, to seek the kind of "deeper structural solution" that Calabresi pressed his audience to pursue?[163] Ultimately, this Essay has argued, Congress should step in and create a statutory cause of action for constitutional claims against federal officials. In the meantime, though, members of the legal community who care about increasing accountability for civil rights violations should continue calling attention to the Court's "rights-without-remedies regime."[164]

Perhaps this Essay has just scratched the surface of ways in which the *Bivens* regime and the rest of the Court's constitutional tort jurisprudence relate to the scapegoating model. As I discuss elsewhere, for instance, the Court's application of sovereign immunity to damages suits in this context inappropriately foists all the blame for some systemic problems onto individual officials rather than (also) holding the entities that employ them responsible.[165] One could characterize this as scapegoating too[166]—which both qualified immunity and employer indemnification may tacitly acknowledge. Deeper structural solutions are available here as well, including congressional creation of entity liability alongside individual accountability for constitutional violations.[167] For now, though, the scapegoat theory of *Bivens* outlined above provides a new perspective on the doctrine's rise and retrenchment—and on some modest steps toward reform.

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161 *Id.* at 885.

162 Calabresi, *supra* note 1, at 87.

163 *Id.* at 89.

164 *Byrd*, 990 F.3d at 885 (Willett, J., specially concurring).

165 *See generally* Crocker, *supra* note 65.

166 *See* Richard Henry Seamon, *U.S. Torture as a Tort*, 37 Rutgers L.J. 715, 799 (2006) ("*Bivens* liability usually rolls downhill, attaching, if at all, to the 'street-level' officials who actually inflict the injury that gives rise to the *Bivens* suit. Those officials may appear as scapegoats to the jury." (footnote omitted)).

167 *See* Crocker, *supra* note 65 (manuscript at 43–59).