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Remedial Convergence and Collapse

Leah Litman
University of Michigan Law School, lmlitman@umich.edu

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ABSTRACT

This Article describes and interrogates a phenomenon of spillovers across remedies—how the legal standards governing the availability of remedies in cases regarding executive violations of individuals' constitutional rights, particularly in the area of policing, have converged around similar ideas that narrow the availability of several different remedies. A similar set of limits restricts the availability of writs of habeas corpus to challenge criminal convictions, damages against government officials, the exclusion of evidence in criminal trials, and causes of action to sue federal officials for damages. The convergence results in considerable tension in the doctrine and notable effects in practice. For example, courts frequently deny one remedy on the ground that another remedy is available and preferable to the remedy that a party has sought. But when the same standard governs the availability of remedies that are supposed to substitute for one another, courts eliminate all remedies when they deny one of them. The remedial doctrines discussed in this Article primarily address executive violations of constitutional rights, particularly violations that occur in the course of policing. Denying the availability of remedies in cases that involve policing and executive power replicates the racialized effects of policing in the federal courts and forsakes oversight and accountability in an area where it might be particularly needed.

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INTRODUCTION

Much has been written about the relationship between rights and remedies. Some scholars have depicted rights and remedies as separable and distinct stages of adjudication.[1] Other scholars, drawing from *Marbury v.*

1. *See, e.g.*, Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 9, 10, 45 (1975) (distinguishing between the law of constitutional rules and implementing rules concerning remedies).

Madison,[2] have focused on how the availability of legal remedies determines the efficacy of legal rights.[3] Yet another group of scholars has suggested that remedial considerations shape the scope of rights,[4] because concerns about a particular remedy will lead a court to narrow the underlying right, and the narrowed right will then be applied in cases that involve other remedies.[5]

This Article focuses on a different kind of relationship, the relationship among the different remedies themselves. It outlines a phenomenon of spillovers across different remedies—how the rules that govern the scope of one remedy can influence the rules that govern the availability of other remedies.[6]

This Article shows how the standards that govern the availability of different remedies for actions of executive officials, often in cases related to policing, have converged around similar principles and conditions.[7] The existing scholarship that focuses on remedies rather than rights has observed that, over the last several decades, judicial decisions have narrowed the

2. 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

3. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1777–91 (1991) (explaining that remedies must be available to ensure government remains within the bounds of the law); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 165 (2008) ("A right with no effective remedy is unenforceable and largely illusory.").

4. *See, e.g.*, Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2004 (1998) (noting that exploration of "the complications that arise in the definition of rights and in the operation of remedies when the Equal Protection Clause is used in criminal adjudication"); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) ("Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence. . . . Outside of constitutional law, it has long been understood that rights and remedies are, in many important contexts, functionally inseparable.").

5. Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211 (2014); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1015–57 (2010); Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306, 345 (2015) (suggesting multiple remedial avenues should be available for constitutional rights because of slippage between rights and remedies); Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377, 382–96 (2014) (same); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 436–37, 440–45, 447–48, 454 (2012) (same).

6. This framework does not endorse any kind of inherent separability of rights and remedies but focuses on the legal rules that are formally tied to remedies, as distinct from rights, and the sources of those legal rules.

7. "Spillover across remedies" is the phrase Michael Coenen uses to describe a different phenomenon—how concerns about a particular remedy lead courts to narrow the scope of the underlying right, which then leads courts to apply that narrowed right in cases seeking other remedies. *See* Coenen, *supra* note 5, at 1218. Jennifer Laurin used the phrase "convergence" to discuss *Herring v. United States* and the trajectory of qualified immunity and exclusionary rule doctrine in a piece I will discuss. *See infra* notes 111–113, 117–124 and accompanying text. *See* Jennifer E. Laurin, *Trawling For* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) [hereinafter Laurin, *Trawling*].

availability of remedies.[8] This Article, however, focuses primarily on the mechanism by which the availability of remedies has been narrowed, i.e., the specific legal rules that have narrowed the availability of remedies in public law cases and the reasoning that animates those legal rules.[9]

Scholars have already identified some of the normative problems that arise when the Court raises the standards for obtaining many different kinds of remedies in cases challenging the lawfulness of executive action.[10] In particular, these scholars have identified how raising the various remedial standards has resulted in a kind of remedial collapse, where all of the remedies are collectively unavailable for the violation or violations of a constitutional right. The collapse of the overall system of remedies results in two divergent systems of precedent, one purporting to outline substantive rights and the other dictating when those rights will be enforced.[11] The disconnect between the two lines means that there is no robust system to enforce or potentially deter violations of constitutional rights as such; rather, constitutional rights are refracted through a demanding standard that dictates—and often limits—the availability of different remedies.[12] The disconnect between rights and judicial remedies is particularly evident in cases involving executive officials' treatment of citizens, particularly in cases involving policing, which may raise additional concerns.[13]

As this Article shows, the mechanism by which the Court has ratcheted up the standards for obtaining different remedies is convergence. The Court has

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8. *See generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017).

9. In a pair of articles, Aziz Huq has argued that the standard for obtaining writs of habeas corpus to challenge criminal convictions, and the standards for qualified immunity and the exclusionary rule, have converged on a "fault-based" standard. *See* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 29, 29, 34–40 (2015) [hereinafter Huq, *Judicial Independence*]; Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 581–93 (2014) [hereinafter Huq, *Habeas*]; *see also* Aziz Z. Huq & Genevieve Lakier, *The Triumph of Fault in Public Law*, 131 HARV. L. REV. at 47–51 (forthcoming 2018). This Article observes the remedial convergence across a broader domain that includes the availability of implied causes of action against federal and state officials for equitable relief, a topic Huq specifically brackets as not fitting within his framework. *See* Huq, *Judicial Independence*, *supra* note 9, at 66–67. It also demonstrates a deeper convergence than Huq covers, including standards for causation, systemic wrongdoing, and the levels of generality at which prior cases should be read. Huq also disclaims that his project is to "criticize" the convergence, which this Article does. *See id.* at 4 n.9.

Jennifer Laurin's piece argues that the standards for qualified immunity and the exclusionary rule borrow from one another and have converged. *See* Laurin, *Trawling*, *supra* note 7. This Article broadens the lens to include habeas corpus to challenge convictions and the availability of causes of action; it also explores the consequences of remedial convergence across this broader set of remedies.

10. *See infra* Part II.A.

11. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2532–40 (1996) (identifying concerns with this two-track system of adjudication).

12. *See infra* Part II.A.

13. *See infra* Part II.A.

systematically leveled up the standards for obtaining different remedies so that the remedial standards closely resemble one another. The legal standards that govern the availability of different remedies in cases of executive misconduct (damages against officials, exclusion of evidence, habeas corpus, and damages against entities) have converged on a similar set of principles and preconditions for obtaining the remedies. For these remedies, the party seeking relief must generally identify a prior Supreme Court case that both speaks with clarity to the precise question in the party's case and demonstrates that the party's rights have been violated. Thus, the Court has stated that a party seeking to obtain damages from state or federal officials must show that "existing precedent [has] placed the . . . constitutional question beyond debate."[14] Likewise, a prisoner seeking a writ of habeas corpus must demonstrate that "holdings, as opposed to the dicta, of th[e] [Supreme] Court's decisions" have "confront[ed] 'the specific question presented'" in the prisoner's case.[15] The Court has also directed that illegally obtained evidence should be excluded from a criminal trial "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional."[16] And the Court recently held that courts should not recognize a cause of action for damages against federal officials if a plaintiff's case is "different in a meaningful way" from "previous . . . cases decided by th[e] [Supreme] Court."[17]

The standards governing the availability of different remedies have also converged in other ways as well, such as the level of generality at which to read prior Supreme Court cases and the kinds of wrongdoing that merit a remedy. In both damages suits and habeas corpus cases, the Court has stressed that a party is not entitled to relief if "none of the [existing] cases *squarely governs*" the party's case.[18] And in both damages suits and exclusionary rule cases, a party is not entitled to relief for government wrongdoing that results from ordinary negligence,[19] but may be entitled to relief in cases of "systemic or recurrent police misconduct."[20]

14. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); *see also* City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1776 (2015) (questioning whether "controlling circuit precedent could constitute clearly established federal law" for purposes of qualified immunity).

15. Woods v. Donald, 135 S. Ct. 1372, 1376–77 (2015).

16. Herring v. United States, 555 U.S. 135, 143 (2009).

17. Ziglar v. Abbasi, 137 S. Ct. 1843, 1859 (2017).

18. Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) (quoting Brosseau v. Haugen, 543 U.S. 194, 201 (2004)) (discussing damages); Wright v. Van Patten, 552 U.S. 120, 125 (2008) (stating that petitioner is not entitled to writ of habeas corpus if "[n]o decision of th[e] Court . . . squarely addresses the issue in th[e] case").

19. City of Canton v. Harris, 489 U.S. 378, 388 (1989) (deeming a government entity liable for damages only for "deliberate indifference to the rights of persons," not for all employee wrongdoing or negligence on the part of the entity).

20. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

This Article constructs an account of these and other spillovers among different remedies and critically examines the consequences and implications of remedial convergence. Remedial convergence brings into focus a pattern of disingenuous substitution, where courts deny one remedy on the ground that another remedy can and should substitute for whatever remedy a plaintiff has sought and the court has denied. For example, in criminal cases, the Court will hold that an application of the exclusionary rule is unwarranted and point to the possibility of civil damages as an alternative remedy,[21] while in civil cases where damages are sought, the Court will hold that an officer is immune from damages and point to the exclusionary rule as an alternative remedy.[22] But when the same standard dictates the availability of different remedies that are supposed to substitute for one another, courts will be foreclosing all of the remedies when they rely on that standard to deny one of the remedies.

While this Article primarily focuses on the relationship between the different remedies, it is impossible to completely cleave those remedies away from the rights themselves. After all, one problem with systematically ratcheting up the different remedial standards is the effect on the underlying rights. And the remedial standard that the Court has applied to writs of habeas corpus, exclusion of evidence, the availability of damages, and the availability of a cause of action is tied to the nature of the underlying right, how clearly existing case law specifies that right, and how normatively egregious the violation was. Some scholars have thus described or characterized some of the legal standards as choice-of-law standards that govern litigation on the merits.[23] This Article, however, emphasizes how the standards ultimately govern the availability of particular remedies (writs of habeas corpus to state court prisoners, or damages), even though the content and structure of the standards is tied to, and thus often a part of, an adjudication of the merits.[24]

This Article proceeds in three parts. Part I describes the depth and breadth of spillover among qualified immunity from damages, writs of habeas corpus to challenge criminal convictions, exclusion of evidence from criminal trials, and the availability of causes of action against federal officials. Part II critically examines the consequences of that remedial convergence and assesses the legal reasoning behind it. After demonstrating how convergence makes little sense of the doctrine and the remedies themselves, Part III discusses some alternative

21. *Id.* at 2064 (identifying prospect of "civil liability" as reason not to apply the exclusionary rule).

22. Pearson v. Callahan, 555 U.S. 223, 242 (2009) (identifying the exclusionary rule as a mechanism to address issues that are not decided in civil cases because of qualified immunity).

23. *See, e.g.*, Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 65, 95 (2017) (identifying qualified immunity as a remedial standard, but the good faith exception to the exclusionary rule as a merits question); Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 493–95 (2018) (identifying AEDPA's relitigation bar as pertaining to the merits).

24. *Cf.* Heien v. North Carolina, 135 S. Ct. 530, 539 (2014) (noting slippage between considering the availability of a remedy and whether there was a violation of a right).

explanations for the remedial convergence (how various standards in apparently disparate areas of doctrine are turning more and more similar) and collapse (how parties seeking relief end up with no viable remedies at all).

I.
REMEDIAL CONVERGENCE

In the last several decades, the Supreme Court has established demanding thresholds that plaintiffs must satisfy to obtain damages from government officials under the doctrine of qualified immunity, stringent thresholds for prisoners to overturn convictions via a writ of habeas corpus under the doctrine of retroactivity and the judicial gloss on a statutory relitigation bar applicable to state prisoners, exacting standards for defendants to exclude unlawfully obtained evidence from their criminal trials, and narrow standards for when plaintiffs have a cause of action against federal officials for damages. All of these different remedial standards have also converged around similar ideas and limitations.

This Section shows how the different remedial standards have converged on one another in the premium they place on the existence of relevant Supreme Court precedent, the degree to which a plaintiff's case should resemble that Supreme Court precedent, the level of generality at which to read the purportedly relevant Supreme Court precedent, how obviously unlawful official conduct must be in light of that precedent, and the heightened standards for causation and liability of superior officers even in the face of systemic wrongdoing. Part I.A highlights the overlap between the qualified immunity defense and two limitations on post-conviction review: retroactivity doctrine and the Court's interpretation of the relitigation bar. Part I.B shows the overlap between those two remedial standards and the contours of the exclusionary rule. Finally, Part I.C demonstrates the overlap between qualified immunity, the retroactivity and relitigation bars, the exclusionary rule, and the standard for the availability of a cause of action against federal officials for damages.[25]

25. This Article does not focus on the separate issues and literature unique to structural injunctions, and the Court's recent actions in that domain. *See* Horne v. Flores, 557 U.S. 443 (2009) (pressing for easier modification of reform injunctions); Lewis v. Casey, 518 U.S. 343 (1996) (finding violations not widespread enough to justify injunction); Missouri v. Jenkins, 515 U.S. 70 (1995) (same); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993). While injunctions may, in some cases, be a more effective remedy than individual remediation, the heightened standing requirements for obtaining injunctions belie the suggestion that the Court is substituting more effective remedies for less effective ones. *See* City of L.A. v. Lyons, 461 U.S. 95 (1983). As numerous commentators have explained, the Court has limited aggregation litigation that results in forward-looking injunctive or declaratory relief. *See, e.g.*, Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 875–901 (2016) (describing limits of injunctive or declaratory class actions that do not raise prototypical concerns with class actions); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1399 (2000) (describing how *Lyons* forces parties to seek damages, not injunctive relief); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 11, 11 n.29 (2009) (citing cases "declar[ing] that most potential plaintiffs lack standing to sue police departments

A. Convergence of Qualified Immunity and Federal Habeas Corpus

This Section identifies how the common-law-like barriers to obtaining damages awards against federal and state officials, and to overturning convictions via writs of habeas corpus, have increasingly converged on one another.

1. Damages Suits: Qualified Immunity

The Supreme Court has held that both federal and state officials enjoy a qualified immunity from suits for damages.[26] The current qualified immunity standard originated in *Harlow v. Fitzgerald*, which held that "government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[27]

Since *Harlow*, the Court has further clarified the scope of officials' qualified immunity. In *Anderson v. Creighton*, the Court explained that, for a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[28] The Court also cautioned against defining the relevant law at a high "level of generality,"[29] and has "repeatedly" emphasized that point in subsequent cases.[30] The "dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'"[31] The "clearly established" requirement, the Court has explained, "protects officials accused of violating 'extremely abstract rights.'"[32]

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for equitable relief"); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1418 (2007) (arguing that *Lyons* and other related cases "preclude the use of systemic remedies for what are, at bottom, institutional and systemic problems").

26. Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982) (adopting modern qualified immunity standard); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397–98 (1971) (finding cause of action existing and remanding for a determination on immunity from damages); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (holding that section 1983 incorporates common law immunities).

27. 457 U.S. at 818. While section 1983 contains a cause of action for statutory and constitutional claims, this Section focuses on constitutional claims, although the qualified immunity standard applies to both.

28. 483 U.S. 635, 640 (1987).

29. *Id.* at 639.

30. *See, e.g.*, White v. Pauly, 137 S. Ct. 548, 552 (2017) (cautioning against defining rights "at a high level of generality" (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011))); City and Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1775 (2015) ("That is far too general a proposition to control this case.").

31. Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 742); *see also* Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) (explaining that the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition"); *Pauly*, 137 S. Ct. at 552 ("[T]he clearly established law must be 'particularized' to the facts of the case.") (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

32. Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) (quoting *Anderson*, 483 U.S. at 639).

The difference between generality and particularity isn't obvious from the terms themselves. The Court has used generality to refer to the articulation of generally applicable legal rules. Thus, for example, a "general principle that deadly force requires a sufficient threat" does not qualify as a clearly established right when the principle is applied to different sets of facts.[33] Meanwhile, particularity appears to mean something like pertinent or material facts about a case. To illustrate how that inquiry turns on the specifics of a particular case, the Court framed the "relevant inquiry" in one qualified immunity case as whether it was clear that an officer could not "confront[] a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer" near a road block by shooting him.[34]

In determining whether a right is clearly established, the Court has placed a high premium on the existence of case law. That is, it has, at times, suggested that an officer's conduct must be clearly unlawful in light of precedent that speaks to a plaintiff's claim, as opposed to the officer's conduct merely being normatively unambiguous, such that there wouldn't be reasonable disagreement about whether the officer's conduct is unlawful.[35] "[E]xisting precedent must have placed the statutory or constitutional question beyond debate."[36] A right may not be clearly established if "none of the cases *squarely governs*" a plaintiff's case.[37] The Court has, however, left open the possibility that some outrageous conduct would be so transparently unlawful that specific case law wouldn't be needed in order to clearly establish that the officer's conduct was unlawful.[38] But divisions among the courts of appeals and state

33. *Mullenix*, 136 S. Ct. at 309.

34. *Id.*

35. *See, e.g.*, *id.* ("The relevant inquiry is whether existing precedent placed the conclusion that [the officer] acted unreasonably in these circumstances 'beyond debate.'" (quoting *al-Kidd*, 563 U.S. at 741)).

36. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

37. *Mullenix*, 136 S. Ct. 305, 308–09 (2015) (quoting Brosseau v. Haugen, 543 U.S. 194, 199–200, 201 (2004)). Accordingly, the Court has repeatedly held that a right is not clearly established because prior cases involved different facts. *See, e.g.*, *Mullenix*, 136 S. Ct. at 310 ("The dissent can cite no case from this Court denying qualified immunity because officers entitled to terminate a high-speed chase selected one dangerous alternative over another."); Stanton v. Sims, 134 S. Ct. 3, 6 (2013) (distinguishing prior cases because they did not "involve[] hot pursuit"); Messerschmidt v. Millender, 565 U.S. 535, 555–56 (2012).

38. *See, e.g.*, *al-Kidd*, 563 U.S. at 741 ("We do not require a case directly on point, but existing precedent must have placed the . . . question beyond debate."). *Hope v. Pelzer* is arguably an example of this category. 536 U.S. 730 (2002). The conduct that courts have said is not sufficiently egregious so as to be beyond reasonable debate suggests this category is quite small. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018); *id.* at 1155–56 (Sotomayor, J., dissenting) (noting that the Court maintains that specific case law is not required, but nonetheless holds that unreasonable actions are entitled to qualified immunity); *see also* Latits v. Phillips, 878 F.3d 541 (6th Cir. 2017); Doe v. Hagenbeck, 870 F.3d 36 (2d Cir. 2017); Lincoln v. Turner, 874 F.3d 833 (5th Cir. 2017); *supra* note

courts about the right's contours and scope are evidence that the right is not clearly established.[39]

Harlow did not state whether "clearly established law" includes only the law of the Supreme Court, as opposed to other federal courts such as the courts of appeals.[40] In subsequent cases, however, the Court has declared that only a "robust 'consensus of cases of persuasive authority'" clearly establishes a right for purposes of qualified immunity.[41] It has also suggested that a plaintiff must show that the law is clearly established "in the entire United States," though perhaps only for certain officials.[42] The Court has also recently made clear that it has only ever assumed that "controlling circuit precedent could constitute clearly established federal law," even in cases where the relevant officials do not have nationwide authority.[43]

Finally, the Court has defined the scope of qualified immunity and whom it protects as "all but the plainly incompetent or those who knowingly violate the law."[44] "[S]o long as 'a reasonable officer could have believed that his conduct was justified,'" the officer is entitled to qualified immunity.[45]

2. Habeas Corpus

The Supreme Court has also fashioned two interconnected limitations on when prisoners can use writs of habeas corpus to challenge their convictions: the bar against retroactive application of new constitutional rules, and the interpretation of the relitigation bar for prisoners who were convicted in state court. Under current doctrine, the bar against retroactive application of new

37 and text accompanying notes 32–34. *But see* Thompson v. Virginia, 878 F.3d 89 (4th Cir. 2017) (denying qualified immunity).

39. *See, e.g.*, City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1778 (2015) (citing differing conclusions of the courts of appeals); Taylor v. Barkes, 135 S. Ct. 2042, 2044–45 (2015) (same); Lane v. Franks, 134 S. Ct. 2369, 2383 (2014) (same); Carroll v. Carman, 135 S. Ct. 348, 351 (2014) (same); *Stanton*, 134 S. Ct. at 5 (noting that "federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect").

40. Harlow v. Fitzgerald, 457 U.S. 800, 818, 818 n.32 (1982).

41. *al-Kidd*, 563 U.S. at 741–42. In that case, the Court stated that district court decisions—or at least one district court decision—did not qualify because "a district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction." *Id.*

42. *Id.* at 741–42; *see also id.* at 745–46 (Kennedy, J., concurring) ("The fact that the Attorney General holds a high office in the Government must inform what law is clearly established for the purposes of this case.").

43. *See, e.g.*, *Sheehan*, 135 S. Ct. at 1776; *Carroll*, 135 S. Ct. at 350 (per curiam); *Reichle v. Howards*, 566 U.S. 658, 665 (2012) ("This Court has never held that there is such a right."). *But see Franks*, 134 S. Ct at 2382 ("If *Martinez* and *Tindal* were controlling in the Eleventh Circuit in 2009, we would agree with Lane that Franks could not reasonably have believed that it was lawful to fire Lane in retaliation for his testimony.").

44. Malley v. Briggs, 457 U.S. 335, 341 (1986).

45. *Sheehan*, 135 S. Ct. at 1777.

constitutional rules applies to both federal and state prisoners,[46] whereas the relitigation bar applies only to state court prisoners. Although a statute codified the relitigation bar, the Court has largely fashioned the scope of the relitigation bar on its own, given the sparse statutory text,[47] and the relitigation bar mirrors in many respects the bar against retroactive application of new constitutional rules.[48]

a. Retroactivity Bar.

In *Teague v. Lane*, the Supreme Court held that "new" constitutional rules do not apply to cases that have become final.[49] A case becomes final when the Supreme Court denies a petition for certiorari over a defendant's appeal, or the time to file a petition for certiorari has expired.[50] Thus, *Teague*'s retroactivity bar limits what kinds of rules can be used by defendants in federal habeas proceedings that occur after a defendant's conviction has become final.[51]

Teague defined a "new" rule as a rule that "breaks new ground or imposes a new obligation on the States or the Federal Government."[52] Framed in slightly different terms, a rule is "new . . . if the result was not *dictated* by precedent."[53] After *Teague*, the Court solidified an expansive interpretation of

46. *Danforth v. Minnesota* observed that the reasoning for the retroactivity bar "seems equally applicable" to cases involving federal prisoners. *See* 552 U.S. 264, 281 n.16 (2008). *Teague v. Lane* also specifically adopted Justice Harlan's views on retroactivity, 489 U.S. 288, 310 (1989), and Justice Harlan did not distinguish between state and federal prisoners. Mackey v. United States, 401 U.S. 667, 681 n.1 (1971) (Harlan, J., concurring). In subsequent cases, the Court has noted the question without deciding it. Welch v. United States, 136 S. Ct. 1257, 1264 (2016); Chaidez v. United States, 133 S. Ct. 1103, 1113 n.16 (2013).

47. *See* 28 U.S.C. § 2254(d)(1); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1224–37 (2015) (documenting development of habeas standard).

48. The exceptions being that only Supreme Court cases are relevant in the relitigation bar and that there are two exceptions to the retroactivity bar that do not apply to the relitigation bar. *See* Greene v. Fisher, 565 U.S. 34, 44 n.* (2011) ("Whether § 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague* . . . is a question we need not address to resolve this case.").

49. 489 U.S. 288 (1989).

50. *See* Greene v. Fisher, 565 U.S. 34, 39 (2011).

51. The exceptions are for "substantive rules," *Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016), and watershed rules of criminal procedure that are fundamental to ordered liberty and affect the likelihood of convicting an innocent person. *Teague*, 489 U.S. at 311–13; *see also* Whorton v. Bockting, 549 U.S. 406, 417–18 (2007) (describing the exception as a narrow one).

52. *Teague*, 489 U.S. at 301.

53. *Id.* As several commentators have observed, that definition is itself expansive, because few Supreme Court cases are truly dictated by prior ones; rather, there are merely better and worse interpretations of prior cases. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1758–64 (1991) (using insights of legal positivism to argue that judges make law in a vast array of cases subject to constraints of reasoning); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 820–27 (1992) (explaining how many criminal procedure rights are fashioned in that way).

what rules are considered "new."[54] The bar against applying "new" rules, the Court explained, means that "reasonable," though ultimately erroneous, decisions would not be overturned.[55] And "[r]easonableness . . . is an objective standard."[56] A rule is new if it is "susceptible to debate among reasonable minds";[57] a rule is old, and dictated by precedent, if the rule would have been "apparent to all reasonable jurists."[58]

The Court also discussed what kind of evidence would establish that a rule is new: decisions of the federal courts of appeal that reach different conclusions (i.e., decisions that did not anticipate a given rule) establish that a rule is new,[59] as do similar decisions of state courts.[60] And if the decision announcing the "new rule" had dissents[61] or fractured opinions[62] or few citations,[63] that too is evidence that a rule is new. This framework often requires a Supreme Court decision that is quite similar to a prisoner's case. If a prior Supreme Court decision did not explicitly resolve the question presented in the case the prisoner relies on, the later case is likely to have fractured opinions or a dissent in the Supreme Court. And without a very on-point prior Supreme Court decision, all of the federal courts and state courts probably wouldn't have anticipated the subsequent Supreme Court decision. Indeed, without disagreement among the federal and state courts, it's not clear that the Supreme Court would have taken the case.

The Court has also emphasized that prior decisions should not be defined at a high "level of generality" to bring new, subsequent rules within the scope of old ones.[64] For example, in *Butler v. McKellar*, the Court held that a prior decision had announced a "new" rule when it forbade police from re-initiating interrogation about an unrelated crime after a suspect has requested counsel.[65] Although prior cases had held that the police may not initiate further interrogation once a suspect asks for counsel, *McKellar* explained that applying

54. In *Wright v. West*, 505 U.S. 277 (1992), the Court generated several fractured opinions on when the application of an established principle to new facts generated a new rule. *Compare* 505 U.S. at 293–95 (Thomas, J., plurality) (suggesting review of application of law to fact should be deferential), *with id.* at 311–12 (Souter, J., concurring) (same), *with id.* at 303–04 (O'Connor, J., concurring) (suggesting review of application of law to fact is *de novo*), *with id.* at 308–09 (Kennedy, J., concurring) (suggesting application of established law to fact would not generate new rules).

55. Butler v. McKellar, 494 U.S. 407, 414 (1990); *id.* at 415 (noting that "reasonable contrary conclusions" are evidence that a rule is new).

56. Stringer v. Black, 503 U.S. 222, 237 (1992).

57. *McKellar*, 494 U.S. at 415; *see also* Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013).

58. Lambrix v. Singletary, 520 U.S. 518, 527–28 (1997).

59. *McKellar*, 494 U.S. at 415 (citing the "differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits").

60. Caspari v. Bohlen, 510 U.S. 383, 395 (1994).

61. Beard v. Banks, 542 U.S. 406, 415 (2004).

62. O'Dell v. Netherland, 521 U.S. 151, 159 (1997).

63. Lambrix v. Singletary, 520 U.S. 518, 529 (1997).

64. Sawyer v. Smith, 497 U.S. 227, 236 (1990).

65. 494 U.S. 407, 414–15 (1990).

that holding to prohibit re-initiating interrogation about another crime resulted in a new rule. The Court later explained that a rule is new if prior cases did "not speak directly . . . to the issue presented" in the defendant's case.[66]

b. Relitigation Bar.

The Anti-terrorism and Effective Death Penalty Act subsequently created several restrictions on post-conviction review, including a relitigation bar that resembles *Teague*'s retroactivity bar. Under AEDPA, a federal court may not grant a state court prisoner a writ of habeas corpus on the basis of a claim that was adjudicated on the merits in state court unless "the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[67]

Terry Williams v. Taylor interpreted section 2254(d)(1)'s reference to "clearly established Federal law" to codify in substantial part the judicially created rules of retroactivity, i.e., the *Teague* doctrine.[68] *Terry Williams*, however, recognized that the relitigation bar modified *Teague* in one respect: The "old rule"—i.e., the "clearly established Federal law"—had to come from the Supreme Court, as opposed to the lower federal courts or state courts.[69]

Terry Williams also defined when a state court decision would be an "unreasonable application" of or "contrary to" a prior Supreme Court case. A state court decision is "contrary to" clearly established Supreme Court law, *Terry Williams* explained, if "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts."[70] And a state court decision is an "unreasonable application" of clearly established Supreme Court law if the decision is "objectively unreasonable" in

66. Saffle v. Parks, 494 U.S. 484, 490 (1990); *see also* Lambrix v. Singletary, 520 U.S. 518, 531–32 (1997) (distinguishing prior cases from the rule petitioner sought); Graham v. Collins, 506 U.S. 461, 475–76 (1993) (same); Gilmore v. Taylor, 508 U.S. 333, 342 (1993) (distinguishing prior case as insufficiently similar because it was a capital case); *id.* at 344 (rejecting "expansive reading" of prior cases as a way to formulate what was compelled by prior decisions).

67. 28 U.S.C. § 2254(d)(1).

68. 529 U.S. 362, 379–80 (2000); *id.* at 382 ("A rule that fails to satisfy the foregoing criteria is barred by *Teague* from application on collateral review, and, similarly, is not available as a basis for relief in a habeas case to which AEDPA applies."); *id.* at 412 ("With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1).").

69. 529 U.S. at 412 ("The one caveat . . . is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence."). Since *Terry Williams*, the Court has repeatedly emphasized that the only relevant law is law that has been established by the Supreme Court, as opposed to some other federal court. *See, e.g.*, *Parker v. Matthews*, 567 U.S. 37, 48 (2012) ("The Sixth Circuit also erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the Kentucky Supreme Court's decision.").

70. 529 U.S. at 412–13.

that it "identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case."[71]

The Court has since elaborated on when a state court decision is an "objectively unreasonable application" of clearly established Supreme Court law, both with respect to how to define the scope of Supreme Court law that is clearly established and how wrong or unreasonable the state court decision must be. "[C]learly established Federal law" in section 2254(d)(1), *Terry Williams* explained, "refers to the holdings, as opposed to the dicta, of th[e] [Supreme] Court's decisions."[72] In several subsequent decisions, the Court has explained that the "holdings" of prior cases should be construed narrowly; only cases that "confront 'the specific question presented by'" a case fall within a "holding" of a prior decision.[73] It is not enough "if the circumstances of a case are only 'similar to'" a prior case.[74] Federal courts may not "fram[e] [Supreme Court] precedents at . . . a high level of generality."[75] For example, in *Carey v. Musladin*, the Court addressed whether a state court prisoner could receive a writ of habeas corpus on the ground that he was denied a fair trial when members of the victim's family appeared at trial with buttons commemorating the victim.[76] The Supreme Court explained that prior cases concerning the guarantee of a fair trial did not clearly establish that spectator conduct could deprive a defendant of a fair trial because the prior cases involved "state-sponsored courtroom practices" like uniformed state troopers or a defendant made to wear prison clothing, rather than spectator conduct.[77]

Since *Musladin*, the Court has concluded on several occasions that prior decisions do not "clearly establish" a proposition when "[n]o decision of th[e] Court . . . squarely addresses the issue in th[e] case."[78] Along similar lines, the

71. *Id.* at 409, 407.

72. *Id.* at 412.

73. Woods v. Donald, 135 S. Ct. 1372, 1377 (2015) (quoting Lopez v. Smith, 135 S. Ct. 1, 4 (2014) (per curiam)).

74. *Id.*; *see also id.* ("[N]one of those cases dealt with circumstances like those present here.").

75. Nevada v. Jackson, 133 S. Ct. 1990, 1994 (2013); *see also* Woods v. Donald, 135 S. Ct. 1372, 1377 (2015) ("[T]he Sixth Circuit framed the issue at too high a level of generality."); Lopez v. Smith, 135 S. Ct. 1, 4 (2014) ("This proposition is far too abstract to establish clearly the specific rule respondent needs."); *Nevada*, 133 S. Ct. at 1994 (quoting 28 U.S.C. § 2254(d)(1)) (explaining that a lower federal court could transform even the most imaginative extension of existing case law into "clearly established Federal law, as determined by the Supreme Court").

76. 549 U.S. 70 (2006).

77. *Id.* at 76.

78. Wright v. Van Patten, 552 U.S. 120, 125 (2008); *see also* White v. Woodall, 134 S. Ct. 1697, 1703–04 (2014) (quoting United States v. Whitten, 623 F.3d 125, 131–32 n.4 (2d Cir. 2010) (Livingston, J., dissenting from denial of rehearing en banc) ("We have 'never directly held that *Carter* applies at a sentencing phase where the Fifth Amendment interests of the defendant are different.'"); Metrish v. Lancaster, 133 S. Ct. 1781, 1791–92 (2013) (concluding the case fell outside the scope of the holdings of two prior Supreme Court decisions); Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) (quoting *Wright*, 552 at 123) ("[T]his Court has held on numerous occasions that it is not 'an unreasonable application of' 'clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.").

Court has explained that cases applying a general standard clearly establish only the existence of that standard and the application of the standard to the particular facts of that case.[79] "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."[80]

Subsequent cases have also offered more detail about what kinds of adjudications are "objectively unreasonable." "A state court's determination," the Court has explained, is not "objectively unreasonable" "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."[81] That means "a state prisoner must" identify an error so "well understood and comprehended in existing law" that it is "beyond any possibility for fairminded disagreement."[82] The Court has also identified what kinds of evidence might establish that a state court decision was not unreasonable. For example, *Carey v. Musladin* reasoned that prior cases could not have clearly established that private spectator conduct could deprive a defendant of a fair trial because several lower courts had concluded it did not.[83]

The standards for obtaining writs of habeas corpus and overcoming officials' qualified immunity from damages have thus converged in several respects. Both standards require the party seeking relief to identify a case on point—an example where a court, and preferably the Supreme Court, has declared that the facts alleged by the party seeking relief amount to a constitutional violation.[84] Both standards caution against reading cases expansively or applying their reasoning beyond their facts. Thus, in the qualified immunity context, the Court has said that "existing precedent must have placed the statutory or constitutional question beyond debate."[85] And with respect to the litigation bar in post-conviction proceedings, the Court has said that federal habeas relief is permissible only "where there is no possibility

79. *See, e.g.*, *Knowles*, 556 U.S. at 122–23 (2009).

80. *See, e.g.*, Yarborough v. Alvarado, 541 U.S. 652, 654 (2004); *see also* Woods v. Donald, 135 S. Ct. 1372, 1377 (2015) (quoting White v. Woodall, 134 S. Ct. 1697, 1705 (2014)). Thus, Supreme Court decisions applying a general standard, such as the standard for what constitutes ineffective assistance of counsel, establish little beyond the facts of those cases. *See, e.g.*, *Mirzayance*, 556 U.S. at 123.

81. Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting *Yarborough*, 541 U.S. at 664).

82. *Metrish*, 133 S. Ct. at 1786–87 (quoting *Richter*, 562 U.S. at 101); *see also* Burt v. Titlow, 134 S. Ct. 10, 16 (2013) (same); Wetzel v. Lambert, 565 U.S. 520, 524 (2012) (same).

83. *See* 549 U.S. 70, 76–77 (2006) (citing decisions); *see also White*, 134 S. Ct. at 1703 ("The Courts of Appeals have recognized that *Mitchell* left this unresolved; their diverging approaches to the question illustrate the possibility of fairminded disagreement.").

84. *See* Lane v. Franks, 134 S. Ct. 2369, 2381 (2014) ("Eleventh Circuit precedent did not preclude Franks from reasonably holding that belief. And no decision of this Court was sufficiently clear to cast doubt on the controlling Eleventh Circuit precedent."); Wood v. Moss, 134 S. Ct. 2056, 2068 (2014) ("No decision of which we are aware, however, would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation 'to ensure that groups with different viewpoints are at comparable locations at all times.'"); *Richter*, 562 U.S. at 102.

85. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

fairminded jurists could disagree that the state court's decision conflicts with th[e] [Supreme] Court's precedents."[86]

B. Exclusionary Rule

The standard for excluding evidence in a criminal trial has also converged around principles that appear in the standard for obtaining damages and the standard for obtaining writs of habeas corpus. In *United States v. Leon*, the Supreme Court recognized a "good faith" exception to the exclusionary rule and held that evidence obtained in violation of the Fourth Amendment's warrant requirement should not be excluded from a criminal trial where the evidence was "obtained in objectively reasonable reliance on a subsequently invalidated search warrant."[87] In the course of justifying the exclusionary rule, the Court invoked Justice Harlan's proposed bar on the retroactive application of new constitutional rules, which the Court ultimately adopted in *Teague*.[88] And to explain what constitutes officers' objectively reasonable conduct, *Leon* cited *Harlow v. Fitzgerald*, the case establishing modern qualified immunity doctrine: "[T]he officer's reliance on the magistrate's probable-cause determination and on . . . the warrant . . . must be objectively reasonable."[89] This Section highlights how the exclusionary rule, as well as the scope of habeas corpus and qualified immunity, have been driven by similar animating principles, and have also converged on similar specific limitations. Part I.B.1 identifies how the generally applicable standard for the exclusion of evidence (and particularly the good faith exception to the exclusionary rule) resembles the Court's general definitions of the scope of qualified immunity and the contours of the relitigation and retroactivity bars. Part I.B.2 further shows how other features of the exclusionary rule—specifically the focus on systemic wrongdoing and heightened causation—have come to resemble the qualified immunity defense and some aspects of post-conviction review.

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86. *Richter*, 562 U.S. at 102 (internal citations omitted).

87. 468 U.S. 897, 922 (1984).

88. *Id.* at 912–13 (1984):

Similarly, although the Court has been unwilling to conclude that new Fourth Amendment principles are always to have only prospective effect, *United States v. Johnson*, 457 U.S. 537, 560 (1982), no Fourth Amendment decision marking a "clear break with the past" has been applied retroactively. *See United States v. Peltier*, 422 U.S. 531 (1975); *Desist v. United States*, 394 U.S. 244 (1969); *Linkletter v. Walker*, 381 U.S. 618 (1965). The propriety of retroactive application of a newly announced Fourth Amendment principle, moreover, has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct. *United States v. Johnson*, 457 U.S. at 560–561; *United States v. Peltier*, 422 U.S. at 536–39, 542.

89. 468 U.S. at 922 (citing *Harlow*, 457 U.S. at 815–19). In a footnote, the Court acknowledged that the "situations are not perfectly analogous." *Leon*, 468 U.S. at 922 n.23.

1. General Convergence in Federal Habeas, Qualified Immunity, and Exclusion

Formally, the standards for the exclusionary rule and qualified immunity differ in at least one key respect. Whereas the Court has rejected any focus on officers' states of mind in qualified immunity,[90] it has held out the possibility that the exclusionary rule would apply to intentional or wanton violations of the Fourth Amendment.[91] Yet the Court has continued to cite qualified immunity cases to explicate the standard for exclusion from criminal trials,[92] and exclusionary rule cases to explicate the standard for immunity in suits for damages.[93] The Court has held "that 'the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer.'"[94] It has also explained the standard for issuing writs of habeas corpus in terms of the exclusionary rule, declaring in one of the very first cases to apply *Teague* that the retroactivity bar "validates reasonable, good-faith interpretations of existing precedents."[95]

The standards for qualified immunity, habeas corpus, and exclusion of evidence have also converged around a similar, overarching principle that purports to select for unreasonably egregious actions.[96] Because qualified immunity from damages protects "all but the plainly incompetent or those who knowingly violate the law,"[97] it prevents damages in cases where "'a reasonable officer could have believed that his conduct" was lawful.[98] Retroactivity doctrine identifies errors that would have been "apparent to all reasonable jurists."[99] Finally, the Court's gloss on the relitigation bar prohibits writs of habeas corpus "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision,"[100] and corrects only errors that are so

90. Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982).

91. Herring v. United States, 555 U.S. 135, 143–45 (2009). The Court did, however, suggest that "conduct" could be "so objectively culpable as to require exclusion." *Id.* at 146.

92. Groh v. Ramirez, 540 U.S. 551, 565 n.8 (2004); *id.* at 566 (Kennedy, J., dissenting); *id.* at 578–79 (Thomas, J., dissenting); Illinois v. Krull, 480 U.S. 340, 349–50 (1987) (citing *Harlow*).

93. Malley v. Briggs, 475 U.S. 335, 344 (1986) (citing *Leon*, 468 U.S. at 897); *id.* at 350–54 (Powell, J., concurring in part and dissenting in part) (suggesting a different parallel between doctrines).

94. Messerschmidt v. Millender, 565 U.S. 535, 546 n.1 (2012) (quoting *Malley*, 475 U.S. at 344 (1986)).

95. Butler v. McKellar, 494 U.S. 407, 414 (1990) (citing *Leon*, 468 U.S. at 918–19).

96. *See, e.g.*, Huq, *Judicial Independence*, *supra* note 9; Huq, *Habeas*, *supra* note 9. But given how they have developed, the standards are selecting for actions that are unreasonably egregious in light of existing precedent, particularly Supreme Court precedent.

97. *Malley*, 457 U.S. 335, 341 (1986).

98. City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1777 (2015).

99. Lambrix v. Singletary, 520 U.S. 518, 527–28 (1997).

100. Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

"well understood and comprehended in existing law" that they are "beyond any possibility for fairminded disagreement."[101]

The Court has grafted similar concepts onto the good faith exception to the exclusionary rule, even though the standards for the remedies formally differ from one another. When determining whether to admit evidence that was obtained as a result of an unlawful search, courts consider "the purpose and flagrancy of the official misconduct."[102] Errors that are "at most negligent" do not warrant the exclusion of evidence,[103] and whether suppression is appropriate "turns on the culpability of the police."[104] The Court's exclusionary rule jurisprudence also incorporates notice standards that resemble standards used in qualified immunity and habeas corpus: "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'"[105] The good faith exception also appears to incorporate something like a requirement that the illegality of the particular officer's conduct be apparent.[106] The "good-faith inquiry" asks whether an officer "would have known that the search was illegal in light of all of the circumstances."[107]

Thus, the exclusionary rule, along with the qualified immunity defense, and the standards for post-conviction relief, has converged around the level of wrongdoing that justifies the remedies. In all three contexts, the notion is that good-faith, or reasonable actions, do not warrant remedies, while only unreasonable actions beyond any fair-minded disagreement do.

2. Specific Convergence: Mistakes of Law, Changed Law, Causation, and Systemic Wrongdoing

The standards for habeas, qualified immunity, and exclusion have also converged around more specific ideas, including (1) the relevance of legal change; (2) heightened standards for causation; and (3) exceptions for systemic wrongdoing. With respect to legal change, *Davis v. United States* held that an officer's reliance on subsequently overruled precedent fell within the ambit of

101. White v. Woodall, 134 S. Ct. 1697, 1705 (2014); Metrish v. Lancaster, 133 S. Ct. 1781, 1786–87 (2013) (quoting *Richter*, 562 U.S. at 103); Burt v. Titlow, 134 S. Ct. 10, 16 (2013) (same); Wetzel v. Lambert, 565 U.S. 520, 524 (2012).

102. Utah v. Strieff, 136 S. Ct. 2056, 2062 (2016) (quoting Brown v. Illinois, 422 U.S. 590, 604 (1975)); United States v. Leon, 468 U.S. 897, 911 (1984) ("[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of whether to apply the exclusionary rule.).

103. *Strieff*, 136 S. Ct. at 2063.

104. Herring v. United States, 555 U.S. 135, 137 (2009).

105. *Id.* at 143 (quoting Illinois v. Krull, 480 U.S. 340, 348–49 (1987)).

106. *See, e.g.*, *Leon*, 468 U.S. at 923 (noting apparent unlawfulness "depend[s] on the circumstances of the particular case").

107. *Herring*, 555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n.23) (internal quotations removed).

the good faith exception to the exclusionary rule.[108] Thus, after *Davis*, when a court has mistakenly held that an officer's actions were lawful, the good faith exception means that evidence obtained as a result of the officer's illegal action will not be excluded. Because *Davis* did not present the question of "whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled,"[109] *Davis* aligned how the standards for damages, exclusion, and habeas treat cases where precedent does not clearly indicate an officer's actions were unlawful. While *Davis* only addressed where a decision upholding the officials' conduct is subsequently overruled, subsequent cases have expanded its holding.[110]

Jennifer Laurin has explained how the standards for qualified immunity from damages and the good faith exception to the exclusionary rule have converged in another respect—causation.[111] Laurin notes how exclusionary rule jurisprudence has incorporated principles of causation from constitutional tort doctrine: "Both the 'independent source' doctrine and the 'inevitable discovery' rule are grounded in the premise that there must be a sufficient 'but-for' causal connection between the Fourth Amendment violation and recovery of the challenged evidence."[112] So too is the "attenuation" doctrine, under which illegally obtained evidence that is removed enough in time and proximity from the constitutional violation is not excluded from criminal trials.[113]

Something similar has occurred with the standard for habeas corpus, as it relates to both causation and attenuation. In ordinary criminal cases, constitutional violations warrant reversal unless the error is "harmless beyond a reasonable doubt,"[114] which means that an error warrants reversal unless the error did not cause, or is too attenuated from, the jury's ultimate determination.[115] But the Court has fashioned a more demanding standard for causation in federal habeas proceedings, similar to the ways in which the exclusionary rule and the availability of damages in constitutional tort actions depend upon a clear showing that government illegality actually caused the other party harm. The Court rejected the idea that the harmless error principle should apply in habeas proceedings and instead adopted a standard where a writ is warranted only where the error "resulted in 'actual prejudice,'" meaning

108. 564 U.S. 229, 231 (2011).

109. *Id.* at 250 (Sotomayor, J., concurring).

110. For example, a recently decided Eighth Circuit case said that exclusion is not warranted if a subsequent decision held that the evidence was lawful, even if a prior decision held that the evidence and police conduct was unlawful. *United States v. Horton*, 863 F.3d 1041 (8th Cir. 2017).

111. *See* Laurin, *Trawling*, *supra* note 7, at 711–19.

112. *Id.* at 718.

113. *Id.* at 718–19.

114. Chapman v. California, 386 U.S. 18, 24 (1967).

115. Under the doctrine of structural error, some errors are so fundamental they warrant reversal even absent a finding that they affected the verdict or outcome. *See generally* Weaver v. Massachusetts, 137 S. Ct. 1899, 1907–1908 (2017) (describing categories of structural errors).

it had "substantial and injurious effect or influence in determining the jury's verdict."[116]

Laurin further explains how the qualified immunity defense and the standard for excluding evidence in criminal trials have converged in how they approach systemic wrongdoing.[117] *Monell v. Department of Social Services* held that plaintiffs could sue governmental entities for damages,[118] but the Court has concluded in subsequent cases that entities are liable only where a formal governmental policy or custom violates the Constitution, or where a sufficiently widespread pattern of official conduct amounts to "deliberate indifference to the rights of persons."[119] And, it has explained that "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference" in a failure to train employees.[120] Further, the Court has required the constitutional violations to be similar in their facts (as opposed to general principles),[121] much like the requirement that a party seeking a writ of habeas corpus or damages from an individual officer must identify a very similar case on point. The Court's exclusionary rule jurisprudence has also moved toward a focus on systemic, widespread violations.[122] *Herring v. United States* held that ordinary negligence on the part of an individual police officer does not warrant suppression, but explained that evidence of "systemic error" or "recurring or systemic negligence" might.[123] And *Utah v. Strieff* relied on the same principle to conclude that suppression was not warranted where an unlawful stop was not "part of any systemic or recurrent police misconduct."[124]

116. Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). *O'Neal v. McAninch*, 513 U.S. 432 (1995), held that, if a judge is *uncertain* as to whether the error affected the verdict, the court should find that it did, even under *Brecht*. The Court has also suggested a possible exception to that rule in cases that involve "affirmative evidence that state-court judges" were engaged in a pattern of constitutional violations, *Brecht*, 507 U.S. at 636, an idea that is similar to the approach to systemic liability in exclusionary-rule and constitutional-tort doctrine. *See supra* text accompanying notes 117–130.

117. Laurin, *Trawling*, *supra* note 7, at 713–15.

118. 436 U.S. 658, 690–91 (1978).

119. City of Canton v. Harris, 489 U.S. 378, 388 (1989); *see also* Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

120. Connick v. Thompson, 563 U.S. 51, 62 (2011).

121. *Id.* at 62–63 (dismissing four reversals based on *Brady* violations because they "could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind.").

122. *See* Illinois v. Krull, 480 U.S. 340, 352 n.8 (1987) ("If future empirical evidence ever should undermine" the assumption "that there exists a significant problem of legislators who perform their legislative duties with indifference to the constitutionality of the statutes they enact," "our conclusions may be revised accordingly."); United States v. Leon, 468 U.S. 897, 916, 918 (1984) (noting absence of systemic violations by judges or police officers).

123. 555 U.S. 135, 144, 147 (2009).

124. 136 S. Ct. 2056, 2063 (2016).

The Court has likewise adopted common law rules about the scope of habeas review to focus on circumstances that present the potential for systemic, widespread constitutional violations.[125] In *Martinez v. Ryan*[126] and *Trevino v. Thaler*,[127] the Court held that federal courts may reach the merits of ineffective-assistance-of-trial-counsel claims that were not adjudicated in state court, in states where defendants are formally required to bring ineffective-assistance claims in post-conviction proceedings, or where the design, structure, and operation of the system encourages them to do so as a matter of practice. Generally, federal habeas courts will not adjudicate the merits of claims that were not raised in state proceedings (absent certain exceptions like a constitutional violation),[128] and the Court had previously declared that a state post-conviction attorney's failure to raise a claim did not qualify as an exception that would allow a federal habeas court to hear the claim.[129] But in *Martinez* and *Trevino*, the Court reasoned that requiring all defendants to raise an ineffective-assistance-of-counsel claim in post-conviction proceedings, where defendants have no constitutional right to an attorney, created too great a risk that the ineffective-assistance-of-counsel claim would never be heard by any court.[130] Thus, in the habeas context as well, the Court has fashioned rules that allow for easier recovery in cases where there is the potential for systemic errors.

C. Causes of Action Against Federal Officials

The standard that establishes when an individual has a cause of action to sue federal officials for damages recently converged on the standards for the application of the exclusionary rule, the issuance of writs of habeas corpus, and the scope of officials' qualified immunity from damages. No statute affords individuals a cause of action to sue federal officials for constitutional violations in the same way that section 1983 provides a cause of action to sue state officials for constitutional violations.[131] But under *Bivens v. Six Unknown*

125. *See supra* note 116 (discussing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

126. 566 U.S. 1 (2012).

127. 569 U.S. 413 (2013).

128. Coleman v. Thompson, 501 U.S. 722, 747–48 (1991); Wainwright v. Sykes, 433 U.S. 72, 84–85 (1977).

129. *Coleman*, 501 U.S. at 753–54.

130. *Trevino*, 133 S. Ct. at 1919–20 (reasoning that *Martinez* applies because "Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review"); *Martinez*, 566 U.S. at 12 ("To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney."); *cf.* Huq, *Habeas*, *supra* note 9, at 563–64 (describing *Martinez* and *Trevino* as decisions "based on concatenated error"). *Davila v. Davis* limited the reach of *Martinez* and *Trevino*, holding that the rule in those cases did not extend to ineffective assistance of appellate counsel claims. 137 S. Ct. 2058 (2017).

131. 42 U.S.C. § 1983.

Federal Narcotics Agents, courts can imply a cause of action against federal officials for constitutional violations in some circumstances.[132]

The Court's recent decision in *Ziglar v. Abbasi* made the convergence between the *Bivens* standard and the qualified immunity, habeas, and exclusionary-rule standards more explicit.[133] Before *Abbasi*, *Correctional Services Corporation v. Malesko* had introduced the idea that courts will not "extend *Bivens* liability" and recognize a cause of action "to any new context or new category of defendants."[134] *Abbasi* defined what the Court would consider a "new context" for purposes of *Bivens*, such that a court should be cautious before implying a cause of action, and likely not imply one at all.[135] First, *Abbasi* stated that whether a case presents a new *Bivens* context should be determined with reference to "previous *Bivens* cases decided by this Court," i.e., the Supreme Court,[136] similar to the standards for obtaining writs of habeas corpus or overcoming officials' qualified immunity from damages.[137] Second, and more importantly, *Abbasi* defined "new contexts" in a way that mirrors the level of specificity (and cautions against generality) in habeas corpus and qualified immunity. *Abbasi* stated that the "proper test for determining whether a case presents a new *Bivens* context" is whether "the case is different in a meaningful way from previous *Bivens* cases" of the Supreme Court.[138] "Without endeavoring to create an exhaustive list of differences that are meaningful enough," the Court offered "some examples" for "instructive" purposes.[139] A case may meaningfully differ, and thus be a new context, "because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action;" and "the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted."[140] The last factor, in particular, focuses on the specificity with which prior cases have spoken to the legality of the officers' actions, much like the qualified immunity and habeas standards.[141]

The Court in *Abbasi* also observed that "even a modest extension is still an extension,"[142] and explained its prior cases in a way that made clear most

132. 403 U.S. 388 (1971). But while both *Bivens* and qualified immunity relate to a particular remedy—damages—the two doctrines do not perform the same function or operate at the same stage of a case. *Bivens* concerns the availability of a cause of action for damages against federal officials, whereas qualified immunity represents the standard for ultimately obtaining damages against such officials. *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 734–35 (2011) (explaining the different functions of a cause of action and qualified immunity).

133. *See* 137 S. Ct. 1843 (2017).

134. 534 U.S. 61, 68 (2001).

135. 137 S. Ct. at 1856.

136. *Abbasi*, 137 S. Ct. at 1859.

137. *See supra* text accompanying notes 77, 84–100.

138. 137 S. Ct. at 1859.

139. *Id*. at 1859–60.

140. *Id*. at 1860.

141. *See supra* text accompanying notes 28–34, 64–66.

142. 137 S. Ct. at 1864.

contexts would be new.[143] The Court provided *Malesko* as one example.[144] A case prior to *Malesko* had recognized a cause of action under the Eighth Amendment against federal prison officials for their failure to provide adequate medical treatment.[145] Moreover, the plaintiff in *Malesko* sought a private cause of action against a "private prison operator in almost parallel circumstances"[146]—for the operator's failure to provide adequate medical treatment in violation of the Eighth Amendment. But the *Malesko* Court concluded that the plaintiff sought a cause of action in a new context—against the corporate prison operator, rather than the individual officer responsible for the wrongdoing.[147]

Abbasi also expanded on another aspect of *Bivens* doctrine—the "special factors" analysis—in a way that harkens to ideas in qualified immunity and habeas corpus. Previous *Bivens* cases had made clear that courts will not recognize a cause of action against federal officials where there are "special factors counseling hesitation" in doing so.[148] Prior cases had also suggested that, when evaluating whether a context was new, a *Bivens* action might not be "a proper vehicle for altering an entity's policy."[149] Expanding that cautionary note, *Abbasi* declared that a special factor counseling hesitation against a damages action is if the "claims would call into question the formulation and implementation of a general policy" and "major elements of the Government's whole response" to an event.[150] *Abbasi* also stated that "*Bivens* is not designed to hold officers responsible for acts of their subordinates . . . under a theory of *respondeat superior*."[151] That statement resembles the standard for liability against municipal officers under section 1983, where the Court has also rejected respondeat superior liability in favor of one that requires "a municipal 'policy' or 'custom.'"[152]

143. Lower courts have picked this up, dismissing several claims for damages against government officials. *See, e.g.*, Hernandez v. Mesa, 885 F.3d 811 (5th Cir. 2018) (relying on *Abbasi* to conclude there was no cause of action); Doe v. Hagenbeck, 870 F.3d 36 (2d Cir. 2017) (same); Perez v. Diaz, No. 13-cv-1417-WQH-BGS (S.D. Cal. Sept. 21, 2017) (same). *But see* Rodriguez v. Swartz, No. 15-16410, Dkt. 116-1 (9th Cir. Aug. 7, 2018) (inferring cause of action in circumstances similar to *Hernandez*, 885 F.3d 811).

144. *See* 534 U.S. 61, 70, 70 n.4 (2001).

145. Carlson v. Greene, 446 U.S. 14 (1980).

146. *Abbasi*, 137 S. Ct. at 1859.

147. Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 70, 70 n.4 (2001).

148. Wilkie v. Robbins, 551 U.S. 537, 550 (2006) (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)).

149. *Malesko*, 534 U.S. at 74.

150. *Abbasi*, 137 S. Ct. at 1860–61; *see also id.* at 1862 (speculating that "high-level policies will attract the attention of Congress," and that "when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that 'congressional inaction' was 'inadvertent'"); *id.* (noting that "respondents instead challenge large-scale policy decisions").

151. *Id.* at 1860 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009)).

152. Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 403 (1997) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)).

II.
REMEDIAL, DOCTRINAL, AND THEORETICAL COLLAPSE

This Section critically discusses the implications of the remedial convergence described in Part I. Part II.A begins, however, with some of the normative problems that arise from the Court raising the standards of relief for all of the different remedies discussed in Part I. When almost every adjudication of a right is refracted through the same, demanding remedial standard, the remedial system effectively narrows the contours of the underlying rights themselves. And because the overarching remedial standard is primarily backward-looking and focuses on existing case law, it impedes federal courts' ability to develop new constitutional rights, at least in the context of policing, where the remedial doctrines predominantly operate.[153] Policing decisions, however, may be made with little political oversight and accountability, and they have uneven distributional consequences, primarily burdening poor communities and communities of color. The collapse of federal remedies in cases related to policing only further exacerbates these disparities.

Parts II.B–D assess the reasoning behind the mechanism that the Court has used to raise the remedial standards—convergence. Convergence is inconsistent with another feature of remedial doctrine, which maintains that courts should withhold one remedy because another remedy could serve as a substitute. Because the standards for obtaining the remedies have converged on one another, withholding one remedy will often mean that the other remedies are equally unavailable. The convergence in the remedial standards also challenges the rationale behind substituting one remedy for another—that the remedies are different enough such that one remedy is better suited than the others. But the remedies do differ from one another, and so the convergence in the remedial standards results in a lack of fit with the remedies themselves. Moreover, in practice, convergence has functioned as a one-way ratchet, under which the government uniformly benefits from the convergence but the party seeking relief does not.

A. Remedial Collapse

This Section surveys how systematically raising the standards for obtaining various remedies can limit the effectiveness of those remedies and restrict access to federal courts for claims related to policing that should be aired for a variety of reasons.

153. The immunity doctrines operate to the benefit of executive officers; requests for writs of habeas corpus are premised on violations of constitutional criminal procedure, and the exclusionary rule applies in criminal proceedings. Accordingly, that remedial convergence primarily operates to limit federal courts' oversight of constitutional violations that occur in the course of policing should give one pause.

1. The Purposes of Remedies

Systematically ratcheting up the standards for obtaining various remedies detracts from their purported purpose—deterring violations of existing substantive rights. The Court has justified all of the remedies discussed in this Article—the exclusionary rule, post-conviction review (particularly of state criminal convictions), and damages actions against government officials—as ways to deter officers from engaging in constitutional violations.[154] And Richard Fallon and Daniel Meltzer have suggested that while remedies need not be available in all cases, the Constitution might require "a general structure of constitutional remedies adequate to keep government within the bounds of law."[155]

The path toward remedial convergence and collapse raises questions about whether courts have the ability to oversee and maintain a remedial system that serves the stated goal of adequately keeping the government within the bounds of the law.[156] But even if courts could ensure an overall system of remedies that is able to effectuate that goal, the current state of the doctrine is probably inadequate to the task. Systematically ratcheting up the standard for obtaining different remedies frustrates the doctrine's capacity to advance existing substantive rights and recognize new ones.[157] The substantive law regarding a particular right is mediated through the same standard that focuses on systemic wrongdoing—conduct that a previous Supreme Court case has held unlawful—and (perhaps) normatively unambiguous conduct.

Because every adjudication of a right is refracted through that remedial standard, the convergence among the different remedies narrows the mechanism that is supposed to be constraining government officials—the availability of remedies for misconduct. The Court's existing account of remedies maintains that the availability of remedies is what incentivizes the government to follow the law. If that account is correct, then there is no existing mechanism that encourages the government to follow the law on substantive rights as such. Rather, there is a system that encourages compliance with a narrow subset of the broader edifice of constitutional rights. The larger edifice of constitutional rights is not doing meaningful work; the constitutional

154. *See, e.g.*, Davis v. United States, 564 U.S. 229, 231–32 ("[T]his Court created the exclusionary rule, a deterrent sanction."); *Malesko*, 534 U.S. at 70 ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); Carlson v. Green, 446 U.S. 14, 21 (1980) (citing Imbler v. Pachtman, 424 U.S. 409, 442 (1976)) ("It is almost axiomatic that the threat of damages has a deterrent effect."); Butler v. McKellar, 494 U.S. 407, 413 (1990) (citing Teague v. Lane, 489 U.S. 288, 309 (1989)).

155. Fallon & Meltzer, *supra* note 53, at 1736.

156. *See infra* text accompanying notes 309–314 (on differing preferences of different Justices on damages versus equitable remedies); Laurin, *Trawling*, supra note 7, at 741 (raising concerns about courts' ability to interchange different remedies to arrive at an optimal level of deterrence).

157. The doctrine does, however, serve other purposes, including not deterring state actors from socially beneficial conduct.

rules as they are mediated through the remedial standard that operates across different domains is. Thus, if the Court is correct that the availability of remedies incentivizes compliance, then officers are incentivized to comply only with rights whose scope is defined by the remedial standard.

The standard on which the different remedies have converged also impedes federal courts' ability to develop new constitutional rights, at least in contexts such as policing where the remedial doctrines predominantly operate.[158] The remedial standards in both habeas corpus and suits for damages are backward-looking and focus on existing precedent: The standards place a premium on identifying cases that have already been decided, cases that already recognize a constitutional right, and cases that already define the contours of that constitutional right as applied to a very specific set of facts.[159] And the remedial standard for exclusion of evidence focuses on wanton or intentional wrongdoing whose unlawfulness is apparent, or wrongdoing that occurs on a large scale. These standards make it more difficult to address or account for government practices that evolve, or new technologies that emerge.[160] Policing practices, for example, now include things like gang injunctions, which weren't used before.[161] Police also have access to network technologies that have the capacity to locate individuals or monitor their preferences.[162] The currently operative remedial standard does not reflect how government practices are constantly changing. Rather, by foreclosing remedies in cases that present new facts or new applications of existing principles, the remedial standard restricts the development of new constitutional rights and the refinement of existing rights applied to new circumstances.

2. Remedies for Particular Violations

The remedial doctrines discussed in this Article arise primarily in the context of executive violations of constitutional rights, and policing violations in particular.[163] Accordingly, remedial convergence should give one pause for several reasons. First, the conduct of policing is not currently subject to much democratic control or accountability. For several decades scholars have

158. The Court can still recognize new rights in certain postures—such as where the reason underlying a decision to admit evidence turns on the scope of the right, rather than application of the exclusionary rule. That occurs, for example, when a court says the government's conduct didn't amount to a search or seizure. *See, e.g.*, United States v. Jones, 565 U.S. 400 (2012).

159. *Pearson v. Callahan*, 555 U.S. 223 (2009), arguably exacerbates how qualified immunity can impede the development of new rights by allowing courts to decide whether a right is clearly established before attempting to decide whether the right has been violated. *Id.* at 233–36.

160. Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1427–47 (2017) (documenting various reasons government practices change).

161. *See* Wesley F. Harward, Note, *A New Understanding of Gang Injunctions*, 90 NOTRE DAME L. REV. 1345, 1346 (2015) (highlighting the origins of gang injunctions in the late 1990s).

162. *See, e.g.*, Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 112–21 (2018).

163. *See supra* note 153.

observed and critiqued the amount of discretion there is in policing—there is very little legislative direction for policing and also, thus far, very little administrative regulation of policing.[164] More recently, Barry Friedman and Maria Ponomarenko surveyed how policing decisions are made with little transparency or evaluation.[165] The result is a kind of democratic deficit in policing—executive officers who are engaged in policing possess substantial amounts of authority, but they are neither accountable themselves to the people via elections nor subject to democratic inputs or oversight through legislative or administrative limitations on their authority.[166] Partially due to these reasons, the presumption of constitutionality and the skepticism of judicial review may be less applicable to the actions of state and federal officials.[167]

While ex ante democratic oversight of policing may be ideal, judicial oversight can function as a second-best mechanism for oversight and accountability and potentially supplement more democratized policing. Judicial oversight offers a mechanism to provide information about the government's policies and subjects the government's public justifications for its policies to some scrutiny. For example, John Lennon's lawsuits against the government revealed official documents that established a deferred action policy for deportations, under which the then-Immigration and Naturalization Services would designate certain individuals as "nonpriority" for removal.[168] A lawsuit challenging an individual's placement on the United States' "terrorist watchlist" revealed that the government had explicitly and secretly departed from the standard for keeping individuals on the watch list that it had publicly adopted and embraced.[169]

A second reason why limiting the availability of remedies in policing-related cases may be problematic is because policing has uneven distributional consequences, and so displacing remedies in policing-related cases replicates and institutionalizes those disparities in the federal courts. One of the reasons

164. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188 (1969); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 423 (1974); Carl McGowan, *Rule-Making and the Police,* 70 MICH. L. REV. 659, 690 (1972).

165. Barry Friedman & Maria Pnomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832–52 (2015).

166. More recent work has built on the critiques alluded to in *infra* note 224 to propose additional legislative or administrative oversight on policing. *See, e.g.*, Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039 (2016); Friedman & Ponomarenko, *Democratic Policing*, *supra* note 165; Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1724–25, 1758–70 (2014).

167. *See, e.g.*, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 76–82 (1969) (outlining arguments against presumption for certain kinds of executive actions).

168. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 247–48 (2010); Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1979).

169. *See* Ibrahim v. Dep't of Homeland Sec., 62 F. Supp. 3d 909 (N.D. Cal. 2014); Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1566–69 (2016).

the Supreme Court constitutionalized criminal procedure in the early 20th century was that southern states were subjecting African Americans to abuses in the criminal justice system.[170] Today, people of color bear the disproportionate brunt of policing.[171] Studies have documented how African Americans are stopped more frequently by police,[172] how African-American communities are subject to more policing[173] and how African Americans stopped by the police are searched more frequently than non-African Americans who are stopped by the police.[174] The greater frequency with which African-American communities encounter the police results in a greater frequency of African Americans experiencing police violence. If one group more frequently encounters the police, that group frequently will also experience police mistreatment more frequently.[175] Moreover, there is evidence

170. *See generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 764–66 (1991) (documenting "physically coerced confessions," discrimination in jury selection, denial of counsel, "and mob-dominated trials").

171. *See generally* Ted R. Miller et al., *Perils of Police Action: A Cautionary Tale from US Data Sets*, 23 INJ. PREVENTION 27, 30 (2017), http://injuryprevention.bmj.com/content/23/1/27 [https://perma.cc/J7SC-QSD8] (finding higher stop and arrest rate for racial minorities than whites); Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance and Race in the New Policing*, 43 FORDHAM URB. L.J. 539 (2016) (showing a study that minority neighborhoods face more police surveillance and preemptive policing); Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: Race and Order Maintenance Policing in a Safe and Changing City*, *in* EXPLORING RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS (Stephen K. Rice & Michael D. White eds., 2010) (same).

172. *See* The Stanford Open Policing Project, Findings (November 1, 2017), https://openpolicing.stanford.edu/findings/ [https://perma.cc/SJH7-WFFN] ("[O]fficers generally stop black drivers at higher rates than white drivers."); Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, https://5harad.com/papers/traffic-stops.pdf [https://perma.cc/Z6DS-MZWS] (same).

173. *See, e.g.*, JOCELYN M. POLLOCK, CRIME AND JUSTICE IN AMERICA: AN INTRODUCTION TO CRIMINAL JUSTICE 44 (2011) (describing FBI statistics that in 2009, over 40 percent of arrests for vagrancy and 68.6% of arrests for illegal gambling were of African Americans, who represented 13% of the U.S. population); Fagan, *Street Stops*, *supra* note 171, at 309, 311, 323–25, 331–32 (documenting certain police practices as being concentrated in neighborhoods that are primarily African American).

174. *See* Edmund Andrews, *Stanford Researchers Develop New Statistical Test that Shows Racial Profiling in Police Traffic Stops*, STANFORD NEWS (June 28, 2016), http://news.stanford.edu/2016/06/28/stanford-researchers-develop-new-statistical-test-shows-racial-profiling-police-traffic-stops/ [https://perma.cc/S62L-ZEPM] ("By analyzing data from 4.5 million traffic stops in 100 North Carolina cities, Stanford researchers have found that police in that state are more likely to search black and Hispanic motorists, using a lower threshold of suspicion, than when they stop white or Asian drivers."); Lynn Langton & Matthew Durose, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (2013), https://www.bjs.gov/content/pub/pdf/pbtss11.pdf [https://perma.cc/MCX2-QRVB] ("Relatively more black drivers . . . than white . . . and Hispanic . . . drivers were pulled over in a traffic stop during their most recent contact with police. . . . White drivers were both ticketed and searched at lower rates than black and Hispanic drivers."); Pierson, *supra* note 172 (making similar findings).

175. Much has been written about the forces that contribute to the violence in police practices generally. *See* RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES (2013).

that people of different groups may not be treated equally. Research on implicit bias has revealed associations between community disorder and race, as well as criminality and race.[176]

A similar dynamic has occurred in national security policy, an area where executive officials receive additional deference under both qualified immunity and *Bivens* doctrine. Applying critical insights about ordinary police practices, Amna Akbar has explained how the federal government's policy choices in the national security context "increase the presence of law enforcement in already overpoliced communities" and "further marginalize" the American-Muslim community "on the grounds of its difference."[177] Both federal and state counter-terrorism policies are premised on a narrative that purports to explain how Muslims are radicalized, but, as Akbar explains, by focusing on Islam and Muslims, the federal government's policies necessarily direct policing attention toward "visible markers and geographies" associated with Muslims.[178] Investigative and monitoring resources are "almost exclusively focused on Muslims,"[179] which, together with the theory of radicalization, cements Muslims as "figure[s] of legitimate police scrutiny."[180]

176. *See* L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); *see also* Robert J. Sampson & Stephen W. Raudenbush, *Neighborhood Stigma and the Perception of Disorder*, 24 FOCUS 7 (2005), http://www.irp.wisc.edu/publications/focus/pdfs/foc241b.pdf [https://perma.cc/4TPB-FWDZ]; Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 878 (2014); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (surveying implicit bias research); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (describing mechanisms by which implicit biases are reinforced); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (identifying implicit bias against criminal defendants); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 279–82 (2012) (explaining relationship between racial profiling and police violence on the one hand and racial stereotypes and racial biases); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 124–31 (2014) (same); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2970 (2015) (same).

177. Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 833, 843–44 (2015).

178. *Id.* at 848–49 (describing reports of radicalization that are "entirely focused on Muslims").

179. *Id.* at 876; *see also* Arun Kundnani, *Radicalisation: The Journey of a Concept*, 54(2) RACE & CLASS 3, 5–6 (2012).

180. Akbar, *supra* note 177, at 881, 885–86. There is also considerable evidence of bias toward and profiling of Muslims in national security policing. *See* Stefan Bonino, *How Discrimination Against Muslims at Airports Actually Hurts the Fight Against Terrorism*, WASH. POST (Aug. 26, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/26/how-discrimination-against-muslims-at-airports-actually-hurts-the-fight-against-terrorism/?utm_term=.fe7e613a0e9c [https://perma.cc/7MN6-XCKJ]; Sahar Aziz, *Racial Profiling by Law Enforcement Is Poisoning Muslim Americans' Trust*, GUARDIAN (Feb. 21, 2012), https://www.theguardian.com/commentisfree/cifamerica/2012/feb/21/racial-profiling-law-enforcement-muslim-americans [https://perma.cc/HDE3-YRP3].

Scholars have identified similar trends in immigration-related policing. The substantive content of immigration law has historically incorporated considerations of race and nationality,[181] and the Supreme Court has also explicitly sanctioned reliance on proxies for nationality, including race, in immigration enforcement.[182] Partially due to this reason, immigration-related policing can and does impose greater burdens on certain populations, particularly Latinx communities.[183]

A body of remedial doctrines that limits access to federal courts in cases of policing and executive officials means that the claims of constitutional right that are ousted from the federal courts will more often than not be claims brought by and claims that could benefit poor communities of color.[184] The remedial doctrines, in other words, effectuate policing's distributional consequences in another forum, and through another institution, which could contribute to the "legal estrangement . . . [felt] in the communities that are most affected" by the policing of the legal system.[185]

B. Remedial Convergence and Substitution

1. Convergence as a Formal Barrier to Remedies

The convergence of the standards governing the availability of various remedies complicates a major premise of existing remedial doctrines—namely, that one remedy should be withheld in favor of another, more suitable remedy. If the applicable standards for all of the remedies have converged on one another, then the fact that one remedy is unavailable will mean that other

181. *See, e.g.*, Jennifer M. Chacon, *Loving Across Borders: Immigration Law and the Limits of* Loving, 2007 WIS. L. REV. 345, 348–59 (2007).

182. *See, e.g.*, United States v. Brigoni-Ponce, 422 U.S. 873, 886–87 (1975) (reasoning that "Mexican appearance" is a "relevant factor" border patrol officers may consider when conducting stops); United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (similarly reasoning that "apparent Mexican ancestry" can be the grounds for referring individual to further immigration inspection); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491–92 (1999) (concluding that federal courts generally lack jurisdiction to decide claims of selective enforcement of immigration law, except in cases of outrageous discrimination).

183. *See, e.g.*, Karla Mari McKanders, *Federal Preemption and Immigrants' Rights*, 3 WAKE FOREST J.L. & POL'Y 333, 353–54 (2013) (outlining legal challenges based on evidence of selective enforcement practices on the basis of race); Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 367, 367–68 (2013) (explaining how immigration enforcement generates selective burdens on the basis of race and ethnicity); KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 29 (2004) ("In the fervor to locate and deport undocumented Mexican citizens, Mexican Americans, often stereotyped as 'foreigners' by the national community, can fall into the enforcement net.").

184. Aziz Z. Huq and Genevieve Lakier also observed this trend in *Apparent Fault*, 131 HARV. L. REV. 1525, 1574–80 (2018).

185. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2130–31, 2143–44 (2017).

remedies, which are governed by similar standards, will also likely be unavailable.

a. Exclusion From Criminal Trial

The Court frequently cites the availability of other remedies as a reason not to exclude illegally obtained evidence from criminal trials.[186] *Hudson v. Michigan* explained that the exclusionary rule was established at a time when civil suits against individual officers were not available because *Bivens* and *Monroe v. Pape*[187] had not yet been decided (*Monroe* authorized damages suits against individual, state officers who were not acting pursuant to an official state policy).[188] The Court then reasoned that the alternative remedies made the exclusionary rule less necessary.[189] The Court reasoned similarly in *Utah v. Strieff*, when it rejected the defendant's claim that not excluding the illegally obtained evidence would embolden officers to engage in illegal stops—"[s]uch wanton conduct," the Court explained, "would expose police to civil liability."[190] But if exclusion is not warranted because the officers acted reasonably in light of existing law, then damages would not be available either because the standards for the two remedies have converged.[191] The Court deployed similar analysis in *Nix v. Williams*, which concerned the exclusion of evidence obtained as a result of a violation of the Sixth Amendment right to counsel.[192] Invoking reasoning from *Bivens* cases, the Court explained that suppression was not necessary because "civil liability" was a "[s]ignificant disincentive[] [for police] to obtain[] evidence illegally."[193]

b. Habeas Corpus/Post-Conviction Review

Similarly, in habeas cases, the Court has explained that the demanding standard for issuing writs of habeas corpus does not leave prisoners without a remedy. In a decision interpreting AEDPA to bar the issuance of a writ, the Court reasoned that constitutional violations can be remedied by state courts who will exclude the constitutionally objectionable evidence, and the

186. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 596 (2006); *id.* at 597 (noting that defendant's argument "[a]ssum[es] . . . that civil suit is not an effective deterrent").

187. 365 U.S. 167 (1961).

188. *Hudson*, 547 U.S. at 597 ("We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago."); *id.* (noting that "*Monroe v. Pape* . . . was decided the same Term as *Mapp*" and that "[c]itizens whose Fourth Amendments rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens*").

189. *Id.*

190. 136 S. Ct. 2056, 2064 (2016).

191. The standard for municipal liability has evolved to encompass a deliberate indifference standard. *See supra* text accompanying notes 117–124.

192. 467 U.S. 431 (1984).

193. *Id.* at 446.

availability of Supreme Court review will ensure that state courts do so.[194] It is reasonable to question whether the Supreme Court has the capacity to ensure that state courts are correctly applying the exclusionary rule in light of the tens of thousands of petitions that are filed at the Court each year.[195] But putting that question aside, there are consequences to the convergence of the standard for habeas corpus, which focuses on the reasonableness of a state court's decision in light of Supreme Court case law, and the standard for excluding evidence from criminal trials, which similarly focuses on the reasonableness of an officer's actions in light of Supreme Court case law. The convergence can, in some cases, mean that if habeas corpus is not warranted, exclusion may not be warranted either, or at least not warranted enough to make the Supreme Court take the unusual step of deciding to hear a case solely to correct an erroneous decision of a state court.[196]

The Court's decision in *Davis v. United States* increased the possibility that the exclusion of evidence would not be warranted in cases where writs of habeas corpus should not issue. *Davis* held that illegally obtained evidence should not be excluded if, at the time of the officer's conduct, a case had erroneously held that the evidence was lawfully admitted at the defendant's trial.[197] *Davis* could mean that, in some cases, exclusion would be foreclosed where habeas is not warranted, since the existence of some judicial authority suggesting that either the officer's action or the state court decision were lawful would mean the state court decision was not an unreasonable application of clearly established Supreme Court law. While *Davis* involved a Fourth Amendment claim, which is not cognizable in habeas corpus,[198] there is a risk that a similar result could occur for Fifth and Sixth Amendment violations because the Court has incorporated aspects of the Fourth Amendment exclusionary rule into both Fifth and Sixth Amendment doctrine. For example, Fourth Amendment standards of causation and attenuation apply to evidence that was obtained as a result of a Fifth or Sixth Amendment violation.[199] Those

194. Greene v. Fisher, 565 U.S. 34, 41 (2011) ("Before applying for federal habeas, he missed two opportunities to obtain relief under *Gray*: After the Pennsylvania Supreme Court dismissed his appeal, he did not file a petition for writ of certiorari from this Court, which would almost certainly have produced a remand in light of the intervening *Gray* decision.").

195. *See* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2055–91 (1992) (relying on this point to argue that habeas review substitutes for appeals to the Supreme Court).

196. *See, e.g.*, Sup. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); Stephen M. Shapiro et al., SUPREME COURT PRACTICE 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.").

197. 564 U.S. 229 (2011).

198. Stone v. Powell, 428 U.S. 465 (1976).

199. *See* Nix v. Williams, 467 U.S. 431, 442, 443–44 (1984) (noting that fruits-of-the-poisonous-tree doctrine from the Fourth Amendment applies to the Fifth and Sixth Amendments and incorporating independent source and inevitable discovery doctrines related to causation to the Sixth

standards turn in part on the flagrancy of the officials' conduct, and an official's conduct is not likely to be flagrant if it was specifically permitted by (an albeit incorrectly decided) judicial decision. Thus, when deciding whether to exclude evidence from trial, a case suggesting that the evidence was lawfully obtained could, under *Davis*, mean that exclusion is not warranted under the good faith exception to the exclusionary rule. And the existence of a case suggesting that the defendant's trial was lawful also means that a writ of habeas corpus should not issue either.[200]

c. Bivens *Cause of Action*

Since its inception, the existence of a *Bivens* cause of action has been tied to the availability of other remedies. In *Bivens*, the Court recognized a cause of action against federal officials for a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures. Part of *Bivens*'s reasoning was that state tort law may not offer remedies for all Fourth Amendment violations, and that Congress had not provided "another remedy, equally effective."[201] Justice Harlan's separate opinion likewise invoked the absence of other remedies as a reason to imply a cause of action: "[A]ssuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing."[202] Subsequent cases have turned these statements into a reason not to recognize a cause of action where other remedies could deter unlawful action, such as administrative remedies or state tort remedies.[203] Relying on these cases, *Abbasi* held that the

Amendment); Missouri v. Seibert, 542 U.S. 600, 620–22 (2004) (Kennedy, J., concurring) (applying standard that favors admission of statements absent an "interrogation technique . . . used in a calculated way to undermine the *Miranda* warning" in violation of the Fifth Amendment); Oregon v. Elstad, 470 U.S. 298, 308 (1985) (noting that "the absence of any coercion or improper tactics," i.e., flagrant or bad faith conduct, counseled against suppression of statement made in violation of *Miranda*).

200. *See supra* text accompanying notes 67–69.

201. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392–93, 397 (1971).

202. *Id.* at 410 (Harlan, J., concurring).

203. *See, e.g.*, Minneci v. Pollard, 565 U.S. 118, 125 (2012) ("[S]tate tort law provides an 'alternative, existing process' capable of protecting the constitutional interests at stake."); Wilkie v. Robbins, 551 U.S. 537, 553 (2007) ("In sum, Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints."); Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001) (declining to recognize a cause of action against a prison because suits against prison officials sufficed to deter); Schweiker v. Chilicky, 487 U.S. 412, 425 (1988) ("Congress, however, has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were. Indeed, the system for protecting their rights is, if anything, considerably more elaborate than the civil service system considered in *Bush*."); Bush v. Lucas, 462 U.S. 367, 388 (1983) (citing "the history of the development of civil service remedies and the comprehensive nature of the remedies currently available" as a reason not to imply a cause of action); Chappell v. Wallace, 462 U.S. 296, 303 (1983) (citing the availability of "intramilitary administrative procedure" as a reason not to imply a cause of action).

mere *possibility* of another remedy may suffice as a reason not to imply a cause of action.[204]

d. Qualified Immunity/Damages Actions

In damages actions against state officials, courts have used the availability of other remedies to address concerns that qualified immunity fails to remedy constitutional violations.[205] For example, in *Pearson v. Callahan*, the Court held that qualified immunity doctrine does not require courts to first determine whether a constitutional right was violated before assessing whether the right is clearly established.[206] *Pearson* rejected the argument that allowing courts to dismiss a claim on the basis that a right is not clearly established would stunt the development of constitutional law or leave constitutional violations unremedied, because "[m]ost of the constitutional issues that are presented in [section] 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and [section] 1983 cases against a municipality."[207] But in criminal cases, the standard for excluding evidence now incorporates much of the standard for overcoming immunity in damages suits. Thus, if a right is not clearly established, it is also likely that the evidence would have been obtained in good faith; the latter would mean that the exclusionary rule is off the table, and the former would mean that damages are also unavailable. Likewise, while immunity may not be formally available in suits against municipalities, the heightened standard for municipal liability—which requires an official policy or custom that reflects deliberate indifference—closely tracks the standard for qualified immunity, which also largely requires indifference toward existing law.[208]

The convergence in the different remedial standards thus undermines the Court's reassurances that another remedy will substitute for the remedy the Court has denied, because convergence means that all remedies will effectively be displaced when the court denies one remedy.

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204. Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 (2017) (explaining that the Court having "left open the question whether [the petitioners] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus" was a reason not to imply a cause of action for damages).

205. There are also examples where the Court or individual Justices have suggested that other remedies besides damages actions are the preferable way to address particular constitutional violations. *See* Polk Cty. v. Dodson, 454 U.S. 312 (1981). Damages actions are not available for violations of the Sixth Amendment right to counsel. They are also not available for the failure to administer *Miranda* warnings in violation of the Fifth Amendment. *See, e.g.*, Chavez v. Martinez, 538 U.S. 760 (2003); *id.* at 790 (Kennedy, J., concurring in part and dissenting in part) ("The identification of a *Miranda* violation and its consequences, then, ought to be determined at trial. The exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy.").

206. 555 U.S. 223 (2009).

207. *Id.* at 242.

208. *See supra* text accompanying notes 117–120; *see also* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 430–38 (2016) (outlining how municipal liability shares conceptual roots with qualified immunity, serves similar purposes, and has parallel structures).

2. Convergence as a Challenge to Substitution's Premises

The convergence of the different remedial standards challenges remedial substitution in another way as well. Convergence challenges a key premise of the effort to substitute one remedy for another—namely that the remedies are so meaningfully different from one another that courts should deny the availability of one remedy because another remedy is preferable.

Consider the different reasons the Court has given for why each particular remedy is disfavored. In cases about the exclusion of evidence from criminal trials, the Court often cites the "substantial social costs exacted by the exclusionary rule" as a reason to deny the exclusion of evidence.[209] Because the application of the exclusionary rule results in evidence not being admitted at trial, it "impede[s] . . . the truth-finding functions of judge and jury."[210] The exclusionary rule may also "set[] the guilty free and the dangerous at large."[211] The former is unique to exclusion; the latter does not apply to suits for damages or injunctive relief, whether the suits are against individual officers or entities.[212] The latter also may not apply to some writs of habeas corpus that are predicated on the violations of constitutional rights that affect the likelihood that an innocent person has been convicted, such as ineffective assistance of counsel,[213] the prosecution's failure to disclose material, exculpatory evidence,[214] or the prosecution's failure to present evidence from which a jury could reasonably convict a defendant.[215]

The Court cites a different array of concerns about damages actions and writs of habeas corpus. The "social costs" of "permitting damages suits" "include[] the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"—i.e., deter conduct in the field that should not be deterred.[216] Damages actions "would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged," which could "prevent [officers] . . . from devoting the time and effort required for the proper discharge of their duties."[217] In habeas cases, the Court has explained that writs of habeas corpus to state court prisoners raise

209. United States v. Leon, 468 U.S. 897, 907 (1984).

210. *Id.* at 907 (quoting United States v. Payner, 447 U.S. 727, 734 (1980)).

211. Hudson v. Michigan, 547 U.S. 586, 591 (2006).

212. *See also* Herring v. United States, 555 U.S. 135, 141–42 (2009) (explaining costs of the exclusionary rule as "letting guilty and possibly dangerous defendants go free" and citing the "rule's costly toll upon truth-seeking and law enforcement objectives").

213. Strickland v. Washington, 466 U.S. 668 (1984).

214. Brady v. Maryland, 373 U.S. 83 (1963).

215. Jackson v. Virginia, 443 U.S. 307 (1979).

216. Anderson v. Creighton, 483 U.S. 635, 638 (1987); *see also* Davis v. Scherer, 468 U.S. 183, 195 (1984) (citing concerns about "public officials' effective performance of their duties").

217. Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017).

federalism concerns—they frustrate "the States' sovereign power to punish offenders"[218] and risk "friction" between the state and federal courts.[219]

It might be the case that there are unique concerns with all of the particular remedies, but that each remedy should be limited in some fashion. There are also overlapping concerns with some of the remedies—both writs of habeas corpus and the application of the exclusionary rule, for example, may result in some guilty defendants going free and may frustrate the government's ability to punish an individual. But it is not clear that the different concerns with each remedy would justify the exact same restrictions on all of the various remedies or would justify the same restrictions on two remedies that raise entirely different concerns.

3. Disingenuous Substitution?

The simultaneous convergence and ratcheting up of the remedial standards, coupled with the Court's insistence that different remedies can substitute for one another, makes the Court's gestures toward substitution appear somewhat disingenuous. The Court's commitment to faithful substitution is also questionable given its failure to account for independent, formal legal standards on the availability of alternative remedies or practical limits governing the availability of the alternative remedies.

Abbasi, for example, exemplifies how the Court holds out another remedy as a substitute while overlooking the formal, legal limits on the purportedly available remedy. *Abbasi* involved a group of undocumented individuals, many of them South Asian, Arab, and/or Muslim, who were detained by the FBI in the course of the FBI's investigation in the wake of the September 11, 2001 terrorist attacks.[220] The FBI encountered the individuals in the course of investigating public tips and held them without bail at a detention center, where they allegedly were held in tiny cells for over twenty-three hours a day, subjected to light twenty-four hours a day, shackled and strip-searched, and subjected to physical abuse.[221] *Abbasi* held that the plaintiffs did not need a cause of action to sue for damages because they could have sought injunctive relief.[222]

The problem, however, is that *City of Los Angeles v. Lyons* held that the standards for establishing standing to challenge a government policy differ

218. Harrington v. Richter, 562 U.S. 86, 103 (2011) (quoting Calderon v. Thompson, 523 U.S. 538, 555–56 (1998)).

219. Withrow v. Williams, 507 U.S. 680, 687 (1993) (justifying retroactivity bar and quoting Stone v. Powell, 428 U.S. 465, 491, 491 n.31 (1976)).

220. 137 S. Ct. at 1851–52.

221. Turkmen v. Hasty, 789 F.3d 218, 228–31 (2d Cir. 2015), *rev'd*, *Abbasi*, 137 S. Ct. 1843.

222. 137 S. Ct. at 1862–63.

depending on whether a plaintiff is seeking injunctive relief or damages.[223] If a plaintiff is seeking damages, the plaintiff need only establish that they were injured by the government conduct. But if a plaintiff seeks injunctive or declaratory relief, the plaintiff must establish that they will likely be injured by the government conduct they complain of.[224] Applied to *Abbasi*, it is difficult to see how the plaintiffs could have established that they were likely to be detained under the FBI's policy of holding certain individuals of interest before the plaintiffs were actually taken into custody. Even if the plaintiffs knew about the policy announcing detentions, they would not have known the conditions in which they would have been held while detained. Even if the plaintiffs were mistreated in detention, they might not have known that they would be mistreated again. Nor would the plaintiffs have been able to establish on what basis the FBI was choosing to detain people before the FBI actually detained them, and several of the plaintiffs' constitutional claims alleged that they were detained on the basis of their race, nationality, and religion.[225]

Abbasi's conclusion that the plaintiffs would have been able to sue for equitable relief is also complicated by recent cases that have concluded that plaintiffs are not necessarily entitled to an implied cause of action for equitable relief in the absence of congressional authorization. For example, *Armstrong v. Exceptional Child Center* held that the Supremacy Clause does not contain an implied cause of action that allows plaintiffs to sue for equitable relief.[226] The Court further held that federal courts' equitable "power . . . to enjoin unlawful executive action is subject to express and implied statutory limitations."[227] Because equitable relief can be implicitly foreclosed by statutes that do not speak directly to the availability of equitable relief, *Abbasi* may have been too quick to assume that equitable relief was available when no statute specifically authorized it.[228]

223. 461 U.S. 95, 111 (1983); *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (quoting Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

224. *See Lyons*, 461 U.S. at 111 (1983) (holding that a plaintiff must demonstrate "sufficient likelihood that he will . . . be wronged"). Subsequent cases described the standard to be that a plaintiff must demonstrate a substantial risk of future injury. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 153–54 (2010). *Clapper v. Amnesty Int'l USA* described the requirement as that a plaintiff must establish "certainly impending" injury, but also held the plaintiffs had not established a substantial risk. 568 U.S. 398, 401, 414 n.5 (2013). Subsequent cases have described sufficient risk as the required showing. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014). That may be easier to do when there is a sufficiently widespread pattern of executive action, which raises the possibility that the standard for obtaining injunctive relief places a premium on systemic wrongdoing, as do the standards for damages, the exclusionary rule, and habeas corpus. *See supra* text accompanying notes 117–130.

225. *See Abbasi*, 137 S. Ct. at 1853 ("[R]espondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment.").

226. 135 S. Ct. 1378 (2015).

227. *Id.* at 1385.

228. Indeed, *Abbasi* observed that Congress has enacted several pieces of legislation relevant to the petitioners' claims, including requiring semi-annual reports on conditions of confinement from the

Abbasi acknowledged, but failed to appreciate, another formal, legal limit on the availability of the other remedy it suggested—habeas petitions.[229] *Abbasi* explained that the plaintiffs might have been able to challenge their confinement via petitions for writs of habeas corpus.[230] But it is not clear whether the plaintiffs could actually have done so. One of the plaintiffs' claims was that the conditions of their confinement (such as the alleged shackling and physical abuse) were unlawful and violated the Fifth Amendment.[231] That claim challenges how the plaintiffs were treated during their detention, but not whether they could be detained at all. Habeas, on the other hand, is generally a challenge to the government's authority to detain an individual.[232] As *Abbasi* acknowledged, two prior cases had reserved the question of whether detainees could challenge the conditions of their confinement with petitions for habeas corpus, as opposed to suits for damages or injunctive relief.[233]

Abbasi is not the only example of the Court's failure to appreciate the formal legal limits on the availability of the other remedies that the Court holds out as alternatives. For example, the Court sometimes notes that municipal liability is a substitute for damages against individual officers, without acknowledging the heightened standard it has established for municipal liability, which tracks the qualified immunity standard in important respects.[234] Namely, the heightened standard for municipal liability requires an official policy or custom and deliberate indifference toward individuals' rights.[235]

In addition to the formal, legal limits on the availability of other potential remedies, there are also frequently practical limits on the availability of other remedies that may render those remedies equally unavailable. Again consider *Abbasi*, which suggested that the plaintiffs, who were detained in allegedly abusive conditions, should have filed habeas petitions challenging their confinement.[236] As *Abbasi* noted, the detainees "were denied access to most

Department of Justice's Office of the Inspector General. 137 S. Ct. at 1862. In *Exceptional Child Center*, the Court concluded that equitable relief was unavailable because Congress had offered another solution for violations: funding cutoffs. 135 S. Ct. at 1385.

229. *See, e.g.*, *Constitutional Remedies*—Bivens *Actions,* Ziglar v. Abbasi, 131 HARV. L. REV. 313, 318–19 (2017) ("After *Abbasi*, an alternative remedy like habeas may suffice even if . . . there is a credible argument that the suggested remedy did not, as a matter of law, exist.").

230. 137 S. Ct. at 1862–63.

231. *Id.* at 1862–63 (noting the Court had not yet held that prisoners could "challenge their confinement conditions via a petition for a writ of habeas corpus").

232. Under *Heck v. Humphrey*, habeas is "the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release," whereas section 1983 suits (whether for damages or injunctions) are for everything else. 512 U.S. 477, 481 (1994).

233. 137 S. Ct. at 1862–63 (citing Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979); Preiser v. Rodriguez, 411 U.S. 475, 499 (1973)).

234. *See* Pearson v. Callahan, 555 U.S. 223, 242–43 (2009).

235. *See supra* text accompanying notes 117–121; Smith, *supra* note 208, at 424–38.

236. Here too, *Abbasi* is not the only example. *See* Wilkie v. Robbins, 551 U.S. 537, 555 (2007) (acknowledging that alternative remedy amounted to "death by a thousand cuts"); *id*. at 576 (Ginsburg, J., concurring in part and dissenting in part) (elaborating).

forms of communication with the outside world" and held in "tiny cells for over [twenty-three] hours a day," where the lights were on for twenty-four hours a day.[237] It is not clear how the detainees, who were also undocumented and lacked legal training, would have been able to write their own habeas petitions and get those habeas petitions to their proper venue. Nor is it clear how they could have sought injunctive relief before they were detained, because they would have had to identify themselves as undocumented.

C. Lack of Fit

Convergence in the standards for obtaining different remedies also results in a set of doctrinal limits on the various remedies that do not make sense of differences between the remedies, or concerns that are particular to each remedy. A remedial standard that focuses on the apparent novelty of the governmental action and the degree to which that action resembles a prior (Supreme Court) case does not make sense for all of the various remedies given the Court's concerns about the various remedies.

Take implied causes of action for damages under *Bivens*. In *Abbasi*, the Court held that "new" causes of action should generally not be recognized, and defined "novel" as whether a cause of action resembles, in all meaningful respects, a prior decision of the Supreme Court.[238] However, whether the claims asserted in a case resemble the claims in a prior *Bivens* case decided by the Supreme Court does not capture the reasons why the Court is skeptical of *Bivens* causes of action. *Abbasi* explained that *Bivens* causes of action are disfavored because "claims against federal officials often create substantial costs, in the form of defense and indemnification."[239] But those same costs are generated in cases that enforce rights for which *Bivens* causes of action have already been recognized. If the substantial costs of defending damages actions are a primary concern with *Bivens*, the availability of a cause of action should turn on considerations such as the likely number of lawsuits that would seek to enforce that right (i.e., whether a plaintiff is asserting the kind of right or kind of violation that is likely to recur). If it is unlikely that there will be many future suits raising similar claims, then recognizing a cause of action to enforce a given constitutional right will not generate many costs.

Indeed, *Abbasi*'s "novelty" standard might even get things backwards if the goal is to minimize litigation costs. Under *Bivens*, there is a cause of action for Fourth Amendment violations that occur in the ordinary course of law enforcement, which the Supreme Court has recognized is a "common and recurrent sphere of law enforcement."[240] But under *Abbasi*, there is no cause of action to challenge the government's response to an unprecedented event (the

237. 137 S. Ct. at 1853.
238. *Id.* at 1859–60.
239. *Id.* at 1856.
240. *Id.* at 1857.

September 11 terrorist attacks)—a policy of holding persons in the United States in allegedly extreme conditions (including physical and verbal abuse), without bail or access to the outside world, on the basis of their race, religion, and nationality.[241]

Abbasi also repeatedly invoked separation-of-powers principles as a reason why courts should not imply causes of action, asserting that "the judicial task" is "limited solely to determining whether Congress intended to create the private right of action asserted."[242] Even under that account of the separation of powers,[243] it is not clear that *Abbasi*'s standard makes sense. Since *Bivens* was decided in 1971, Congress has not disapproved of *Bivens* suits. It has, instead, chosen to preserve suits "brought for a violation of the Constitution,"[244] a category that does not distinguish between constitutional provisions for which the Court has already implied a private right of action and constitutional provisions for which the Court has not.[245] There are reasons to be particularly skeptical that Congress has implicitly disagreed only with those *Bivens* actions that seek to enforce new rights: If a constitutional violation has not previously arisen, or if there is no Supreme Court case on whether there is a *Bivens* action to enforce a particular right, Congress may not have thought about whether there should be a cause of action. By contrast, if the Supreme Court has decided a case about whether to recognize a cause of action to enforce a specific constitutional right, Congress is more likely to be aware of the possibility of a private right of action to enforce a particular constitutional provision.[246]

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241. *Id.* at 1854.

242. *Id.* at 1856 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979)).

243. The Court's opinion also assumes a definition of the separation of powers under which the role of the federal courts should be restricted. As Justice Breyer's dissent made clear, there is an alternative account of the separation of powers that envisions the federal courts as having "considerable legal authority to use traditional remedies to right constitutional wrongs." 137 S. Ct. at 1874 (Breyer, J., dissenting). If the separation of powers and judges' role within the separation of powers is defined as enforcing the Constitution, then permitting *Bivens* suits to proceed furthers that role, rather than undermining it. However, the Court's contested account of the separation of powers largely assumes the answer to the question it is deciding.

244. *See* 28 U.S.C. § 2679(b)(2)(A) (2012) (providing that certain provisions of the Federal Tort Claims Act do not apply to any claim against a federal employee "which is brought for a violation of the Constitution").

245. Some scholars argue that Congress has ratified *Bivens* through these statutes. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009). Others argue the exemption "is capacious enough to preserve state law remedies." Carlos M. Vazquez & Stephen I. Vladeck, *State Law, The Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 514 (2013).

246. *See* Litman, *Debunking Antinovelty*, *supra* note 160, at 1434 n.157 (identifying doctrines that presume Congress responds to judicial decisions, rather than the absence of them). Abbe R. Gluck and Lisa Schultz Bressman's recent studies of Congress call into question how much Congress knows about Supreme Court cases, however. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory*

Moreover, if *Abbasi*'s goal is for courts to effectuate Congress's intent as to the availability of private suits to enforce constitutional rights, any standard governing the availability of a private right of action should take into account the background principles and expectations against which Congress legislates. And Congress could operate under background constitutional principles of the kind that Justice Breyer identified, such as "where there is a legal right, there is also a legal remedy," the supposition that the "federal courts [have] considerable legal authority to use traditional remedies to right constitutional wrongs," or the practice of courts implying private rights of action for equitable relief to enforce constitutional guarantees.[247] If those are the background principles against which Congress legislates, then Congress's failure to explicitly authorize a private right of action for damages is only a weak signal of Congress's expectations about the availability of a private right of action.[248]

Abbasi's reliance on the aforementioned "separation-of-powers principles" also does not explain why suits for damages raise more concerns than suits for injunctive or declaratory relief. *Abbasi* declined to recognize a damages cause of action partially because it identified separation-of-powers concerns with judges recognizing causes of action that Congress had not enacted into law.[249] But *Abbasi* also maintained that "injunctive relief" was both preferable to damages suits and available,[250] even though Congress had not authorized equitable relief either.[251] And the Court has elsewhere expressed the view that the availability of equitable relief in constitutional cases is, like the availability of suits for damages, a choice that is better left to Congress.[252] *Abbasi* also laid out concerns with judges reviewing the executive branch's national security determinations, because the executive is comparatively more accountable than judges and also has comparatively more information than

Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II, 66 STAN. L. REV. 725 (2014).

247. *Abbasi*, 137 S. Ct. at 1874 (Breyer, J., dissenting).

248. The Court has relied on a related idea in the context of implied rights of action for statutory violations—the idea that if Congress is legislating against a backdrop of courts implying rights of action, then Congress's failure to include one explicitly is not particularly probative of Congress's expectations about the existence of a cause of action. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 698 (1979) ("[D]uring the period between the enactment of Title VI in 1964 and the enactment of Title IX in 1972, this Court had consistently found implied remedies—often in cases much less clear than this."); *id.* at 718 ("Cases such as *J. I. Case Co. v. Borak, supra*, and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.") (Rehnquist, J., concurring).

249. 137 S. Ct. at 1855–56.

250. *Id.* at 1862–63.

251. Thus, when *Abbasi* observed "that high-level policies will attract the attention of Congress," that did not distinguish between suits that challenge high level policies and seek equitable relief from suits that challenge high level policies but seek damages. *Id.* at 1862.

252. *See Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1387–88 (2015).

them.[253] But the same would occur in a case seeking injunctive relief; there, too, courts would have to inquire into the lawfulness of a policy that was formulated in the name of national security.[254] A request for injunctive relief (or a habeas petition) would also challenge the executive's policy as it was being implemented, rather than after it had passed, since injunctive relief is only available if a plaintiff establishes a likelihood of future harm.[255] Suits for injunctive relief generate many of the same costs as suits for damages, including "discovery and litigation process[es] [that] would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question."[256] Thus, the separation-of-powers concerns that *Abbasi* identified with suits for damages relief do not necessarily distinguish those suits from suits for equitable relief.

D. Unidirectional Convergence

The Court's remedial convergence has also operated, in practice, only to the benefit of the government. The overlap between the remedies rarely operates to the benefit of parties seeking relief in federal court. Even when one overlapping remedial doctrine suggests that a party is entitled to relief, the Court will not interpret the other remedial doctrine in a manner favoring the party seeking relief. And when judges question the scope of one of the remedial doctrines that has converged with the others, they isolate the particular remedial doctrine they are questioning and do not attempt to make the remedies collectively converge toward standards that favor parties seeking relief. This pattern undermines the idea that convergence merely reflects similarities between the different remedies, rather than a disagreement with remedies generally.

Where two remedial doctrines intersect with one another, the Court does not rely on indications in one doctrine that the party is entitled to relief to conclude that the other doctrine entitles a party to relief as well. For example, *Davis v. United States* addressed a question about the exclusionary rule—

253. 137 S. Ct. at 1861 (explaining that the claim challenged "major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security").

254. *Abbasi* concluded by speculating that:

> [t]hese concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.

Id. However, none of the concerns *Abbasi* raised were specific to altering officials' ex ante incentives, as opposed to courts evaluating the executive's policies ex post, or in the case of equitable relief, as the policies are being implemented. *See id.*

255. *See* Stephen I. Vladeck, *Implied Constitutional Remedies After* Abbasi, *in* AMERICAN CONSTITUTION SOCIETY, SUPREME COURT REVIEW 2016–2017 179, 199 (Steven D. Schwinn ed., 2017).

256. *Id.* at 1860–61.

whether evidence that was obtained unlawfully should be excluded from a criminal trial where a prior case had mistakenly indicated that the evidence was obtained lawfully.[257] But the case was also related to a question about retroactivity—whether newly announced decisions apply to cases that have or have not become final. As a matter of retroactivity, "new" decisions (even those that overturn an earlier decision) apply to a defendant's case, and the defendant is entitled to relief because "new" rules of constitutional criminal procedure apply to cases that have not yet become final.[258] Despite the defendant's (and the dissent's) repeated attempts to borrow from retroactivity doctrine, *Davis* held that for purposes of the exclusionary rule, the defendant could not benefit from the new rule.[259] Thus, while the contours of retroactivity doctrine would have given the benefit of a new rule to the defendant, the exclusionary rule denied this benefit.[260]

The Court also does not use the overlap among the various doctrines, such as the availability of a cause of action and qualified immunity, as a reason to avoid imposing additional limits on remedies. In *Abbasi*, the Court offered several reasons why courts should be hesitant to imply causes of action against federal officials for damages, including the "substantial costs, in the form of defense and indemnification"[261] that damages actions generate, and the risk that a damages action could "prevent the[] [officials] or . . . future officials like them . . . from devoting the time and effort required for the proper discharge of their duties" by "caus[ing] an official to second-guess difficult but necessary decisions."[262] But those are the same reasons the Court has given for the existence of qualified immunity—qualified immunity from damages safeguards officials from the costs of litigation and avoids the possibility that officers would be deterred from making difficult judgements in the course of performing their duties.[263] Thus, the purposes the Court used to explain its reasons for narrowing the availability of a cause of action could and would have been served by the existence of qualified immunity.

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257. 564 U.S. 229 (2011).

258. Griffith v. Kentucky, 479 U.S. 314, 326 (1987).

259. 564 U.S. at 328.

260. *See id.* at 253 (Breyer, J., dissenting) ("Leaving Davis with a right but not a remedy, the Court 'keep[s] the word of promise to our ear' but 'break[s] it to our hope.'"); *id.* at 254 ("A new 'good faith' exception and this Court's retroactivity decisions are incompatible. For one thing, the Court's distinction between (1) retroactive application of a new rule and (2) availability of a remedy is highly artificial and runs counter to precedent.").

261. 137 S. Ct. at 1856.

262. *Id.* at 1860–61.

263. *See* Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009) ("[I]n this pleading context, . . . we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties."); Ashcroft v. al-Kidd, 563 U.S. 731, 746–47 (2011) (Kennedy, J., concurring) ("If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority. The consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security.").

Abbasi also illustrates how remedial convergence operates as a one-way ratchet because courts can peel back the limitations on one of the doctrines without doing so for the other doctrine. In *Abbasi*, Justice Thomas wrote separately to express his "growing concern with [the Court's] qualified immunity jurisprudence" and to urge the Court to "reconsider" its qualified immunity jurisprudence "[i]n an appropriate case."[264] He also noted some evidence that the scope of qualified immunity was far broader than its original scope.[265] But Justice Thomas also expressed the view that he would have narrowed the availability of a cause of action against federal officials even more than the majority in *Abbasi*.[266] Thus, while it might be the case that a federal official would not be immune for damages, the official still could not be sued for damages because there would be no implied cause of action for a plaintiff to do so.

Hernandez v. Mesa, a case decided the week after *Abbasi*, illustrates this point. In that case, the Supreme Court unanimously reversed a court of appeals' determination that a federal official was entitled to qualified immunity.[267] After concluding that the officer was not entitled to qualified immunity, the Court remanded the case to the court of appeals to determine whether, in light of *Abbasi*, the victim's family even had a cause of action to sue the officer for damages under *Bivens*.[268] Justice Thomas wrote separately to say that there was no cause of action, confirming that he would not question the other doctrine the Court had recently fashioned in the shape of qualified immunity.[269]

III.
EXPLANATIONS

This Section reflects on possible explanations for the Court's jurisprudence of convergence. Part II demonstrated how remedial convergence makes little sense in light of other doctrinal features, particularly the suggestion that the different remedies can substitute for one another. Part III therefore discusses some alternative reasons that may explain, if not justify, the remedial convergence and ratcheting up of the different remedial standards.

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264. 137 S. Ct. at 1870, 1872 (Thomas, J., concurring in part and concurring in the judgment).

265. *Id.* at 1869–72.

266. *Id.* at 1870 ("I have thus declined to 'extend *Bivens* even [where] its reasoning logically applied,' thereby limiting '*Bivens* and its progeny . . . to the precise circumstances that they involved.' . . . [I]n order for there to be a controlling judgment in this suit, I concur in the judgment . . . as that disposition is closest to my preferred approach.").

267. 137 S. Ct. 2003 (2017). The official was a customs and border patrol agent who, while standing in Texas, shot and killed a 15-year-old Mexican national who was hiding under a bridge on the Mexican side of the shared border space that connects El Paso and Juarez.

268. *Id.* at 2006–07.

269. *Id.* at 2008 (Thomas, J., dissenting). The U.S. Court of Appeals for the Fifth Circuit, on remand from the Court, held that the Hernandez family did not have a cause of action. *Hernandez v. Mesa*, 869 F.3d 357 (5th Cir. 2017).

As other scholars have noted, the availability of remedies for constitutional violations has narrowed as the Supreme Court has become more conservative.[270] Aziz Huq, however, has recently challenged whether judicial ideology, meaning the political affiliation of the administration that appointed a judge, explains the narrowing of the exclusionary rule and habeas corpus and the expansion of qualified immunity.[271] He has argued that "key precedent . . . is surprisingly bereft of sharp ideological division."[272] While the opinions in the relevant cases may not always split 5–4, other evidence complicates his description of the doctrinal changes. For example, with respect to qualified immunity, Huq notes that the Court's 2011 statement about the broad scope of qualified immunity generated no dissents.[273] But that statement merely quoted a prior case,[274] which had generated a dissenting opinion that split along ideological lines, as Huq acknowledges.[275] Moreover, while the particular opinion Huq references did not lead to dissents, it did generate

270. *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) ("In the almost thirty years since Nixon's victory, the Supreme Court's pulse-takers have offered periodic updates on the fate of the Warren Court's criminal procedure 'revolution' in the Burger and Rehnquist Courts."); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 247 (1983) (arguing that the Burger Court favored "judicial deregulation of state and federal criminal justice officials," and showed "hostility to fair process norms that impair the state's capacity to detect and punish the factually guilty"); Alan M. Dershowitz & John Hart Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1227 (1971) (noting the "[i]deological ebb and flow" in the Court's criminal procedure jurisprudence).

271. Huq, *Judicial Independence*, *supra* note 9; Huq, *Habeas*, *supra* note 9. Huq offers as an alternative explanation the judiciary's interest in caseload management and notes that crime rates and criminal prosecutions rose significantly during the 1970s and 1980s. *See* Huq, *Judicial Independence*, *supra* note 9, at 58–59. But it is less clear whether there was a similar explosion of crime rates through the 1990s and 2000s that would explain the Court's further narrowing of the general standard which it had outlined. *See supra* Part I. Indeed, during that period, crime rates fell. *See* Matt Ford, *What Caused the Great Crime Decline in the U.S.*?, ATLANTIC (Apr. 15, 2016), https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/ [https://perma.cc/7M6H-5DJL] (summarizing multiple studies showing crime has fallen over the last two decades); OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? (Feb. 12, 2015), http://www.brennancenter.org/publication/what-caused-crime-decline [https://perma.cc/6RPE-795F] (same). *See generally* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007). But there was no responsive expanding of judicial remedies, even as "smart on crime" policies became more popular with conservative and liberal politicians. *See supra* Part I; Eric Schulzke, *Why Some Republicans, Like Utah Sen. Mike Lee, Now Call Themselves 'Smart on Crime,'* DESERT NEWS (May 3, 2017), http://www.deseretnews.com/article/865679134/Why-some-conservative-Republicans-are-leading-the-fight-against-over-incarceration.html [https://perma.cc/H8BA-FZWM]; Sasha Abramksy, *How California Voters Got So Smart on Crime*, NATION (Mar. 26, 2015), https://www.thenation.com/article/how-california-voters-got-so-smart-crime/ [https://perma.cc/DF8G-PW5T].

272. Huq, *Judicial Independence*, *supra* note 9, at 47.

273. *Id.* at 48.

274. Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 457 U.S. 335, 341 (1986)).

275. Huq, *Judicial Independence*, *supra* note 9, at 48–49 (citing Anderson v. Creighton, 483 U.S. 635 (1987)).

separate opinions. The separate opinions, which were joined or written by the comparatively more liberal Justices, all offered ways to limit the majority opinion and narrow the scope of qualified immunity.[276] Huq also notes that the majority opinion in *Messerschmidt v. Millender*, which involved "a harsh application" of qualified immunity, comprised "a supermajority of Justices that include[d] both liberals and conservatives."[277] But here too, the more liberal Justices who voted in favor of qualified immunity in *Millender* offered narrower interpretations of the majority opinion (or narrower grounds to rule in favor of the officers) in their separate writings.[278] Additionally, the dissenting Justices in *Millender* were all comparatively more liberal Justices.[279] Indeed, it is difficult to find any pro-government qualified immunity opinion from the last decade where the dissent is joined by one of the more conservative Justices.[280] Thus, even if some comparatively more liberal Justices do sometimes vote for government officials in qualified immunity cases, the core group of Justices who always do so in divided cases are the more conservative Justices.

The post-conviction review cases show a similar trend. Huq writes that the Court "has coalesced into a united front in demanding that habeas petitioners satisfy *Harrington v. Richter*'s more onerous and demanding version" of section 2254(d)'s precondition to relief.[281] And, he maintains, there "is a remarkable series of decisions in which a unanimous Court . . . has reversed habeas decisions without briefing or oral argument."[282] But the evolution of section 2254(d) is more complicated than Huq's claim that a unanimous Supreme Court comprised of both liberal and conservative Justices has adopted a standard that the Court rejected at a time when it "had more

276. *al-Kidd*, 563 U.S. at 746–47 (Kennedy, J., concurring) (suggesting the majority's requirement of a nationwide precedent was appropriate for officials with nationwide authority but not others); *id.* at 750 (Ginsburg, J., concurring) (suggesting claims against FBI agents may be clearly established).

277. Huq, *Judicial Independence*, *supra* note 9, at 49; *see also* Messerschmidt v. Millender, 565 U.S. 535 (2012).

278. 565 U.S. at 556–57 (Breyer, J., concurring) (identifying both conditions listed in the majority as necessary to a finding of immunity); *id.* at 558 (Kagan, J., concurring in part and dissenting in part) (concluding reliance on one part of the warrant was unreasonable and, thus, that officers were not immune).

279. *Id.* at 560 (Sotomayor, J., dissenting).

280. *See e.g.*, Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1278 (2017) (Sotomayor, J., dissenting) (arguing summary judgment based on qualified immunity to officer was improper); White v. Pauly, 137 S. Ct. 548, 553 (2017) (Ginsburg, J., concurring) (explaining that opinion should not foreclose denial of summary judgment to officer based on qualified immunity); Mullenix v. Luna, 136 S. Ct. 305 (2015) (Sotomayor, J., dissenting); *Millender*, 565 U.S. 535 (discussed *infra*); Reichle v. Howards, 566 U.S. 658, 670 (2012) (Ginsburg, J., concurring) (explaining that "ordinary law enforcement officers" would not be entitled "to qualified immunity").

281. Huq, *Judicial Independence*, *supra* note 9, at 50–51; *see also* Harrington v. Richter, 562 U.S. 86 (2011).

282. Huq, *Judicial Independence*, *supra* note 9, at 50–51.

Republican appointees" than it does now.[283] One of the Republican appointees included in Huq's tally is Justice Stevens, who by that point typically voted with the Court's more liberal Justices in cases that divided along ideological lines.[284] Moreover, between *Terry Williams* and *Richter*, Justice Alito had replaced Justice O'Connor, which shifted the Court to the right. And as in the case of qualified immunity, while there are some unanimous opinions reversing a lower court for failing to apply section 2254(d)'s standard, there are also many such opinions with dissents, all of which are by the comparatively more liberal Justices.[285] There are also opinions that address new questions about the scope of section 2254(d)'s relitigation bar, which divide along lines of judicial ideology.[286] And in habeas corpus cases that involve the scope of judge-made rules like procedural default, several cases split along similar lines.[287]

The exclusionary rule cases also evidence considerable ideological division.[288] *Herring v. United States,* which extended the good faith exception to the exclusionary rule to cover cases of negligence by the police, was 5–4 and generated two separate dissents.[289] The most recent expansion of the good faith exception, *Utah v. Strieff*, was 5–3 and also generated two separate dissents, including a dissent by Justice Sotomayor that used language evocative of the Black Lives Matter movement and cited James Baldwin.[290]

The ideological division is also evident in statements that some Justices have made about the cases that formally recognized the relevant remedies against government officials. Some Justices have openly disagreed with cases

283. *Id.* at 51; *see also* Williams v. Taylor, 529 U.S. 362 (2000).

284. *See, e.g.*, David G. Savage, *John Paul Stevens' Unexpectedly Liberal Legacy*, L.A. TIMES (Apr. 9, 2010) ("[S]ince the mid-1990s, Justice Stevens has been the leader of the court's liberal wing and its strongest voice for progressive causes."); Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES MAG. (Sept. 23, 2007) ("Justice Stevens, the oldest and arguably most liberal justice, now finds himself the leader of the opposition.").

285. *See* Lafler v. Cooper, 566 U.S. 156 (2012); Cash v. Maxwell, 565 U.S. 1138 (2012) (Sotomayor, J., concurring) (explaining certiorari denial); *id.* at 613 (Scalia, J., dissenting) (urging reversal); Wetzel v. Lambert, 565 U.S. 520, 526 (2012) (Breyer, J., dissenting); Cavazos v. Smith, 565 U.S. 1, 9 (2011) (Ginsburg, J., dissenting).

286. White v. Woodall, 134 S. Ct. 1697, 1707 (2014) (Breyer, J., dissenting, joined by Ginsburg and Sotomayor).

287. *See* Trevino v. Thaler, 569 U.S. 413 (2013) (scope of procedural default); Davila v. Davis, 137 S. Ct. 2058 (2017) (same); Kernan v. Hinojosa, 136 S. Ct. 1603 (2016) (scope of look-through rule).

288. Huq claimed "the evidence of ideological polarization over the exclusionary rule is weaker" and that "more recent opinions . . . have attracted smaller dissents." *Judicial Independence*, *supra* note 9, at 51–52.

289. 555 U.S. 135, 148 (2009) (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer); *id.* at 157 (Breyer, J., dissenting, joined by Souter).

290. 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting, joined by Ginsburg); *id.* at 2071 (Kagan, J., dissenting); Mark Joseph Stern, *Read Sonia Sotomayor's Atomic Bomb of a Dissent Slamming Racial Profiling and Mass Imprisonment*, SLATE (June 20, 2016), http://www.slate.com/blogs/the_slatest/2016/06/20/sonia_sotomayor_dissent_in_utah_v_strieff_takes_on_police_misconduct.html [https://perma.cc/QAW8-SAQ3]. *Strieff* was one of the cases decided during the term that Justice Scalia passed away.

that established the exclusionary rule,[291] cases that recognized implied causes of actions against federal officials,[292] cases that allowed suits against state or local officers who may be violating state law, in addition to federal law,[293] and cases that permitted state court prisoners to relitigate claims in federal habeas proceedings.[294] In particular, they argue that the decisions recognizing these various remedies were acts of judicial lawmaking, with the more conservative Justices openly questioning the decisions that recognize the remedies and the more liberal Justices not doing so.

The criticism that the more conservative Justices have leveled at the different remedies, that they represent judicial (common) lawmaking, relates to another mechanism that contributes to convergence. The fact that the different remedies are creatures of common law in important ways does not mean that the remedies and their contours are judicially invented.[295] It may, however, mean that courts are drawn to rely on existing bodies of law to develop them.[296] Consider, for example, *Abbasi*, where Justice Kennedy defined a "new *Bivens* context" as a case that "is different in a meaningful way."[297] As examples of what constitutes meaningful differences, he listed "the rank of the officers involved,"[298] which is a factor that had crept into the courts' qualified immunity jurisprudence in assessing the extent to which law was clearly established as to that officer.[299] *Abbasi* also incorporated "the extent of judicial

291. Mapp v. Ohio, 367 U.S. 643 (1961); *see also* Hudson v. Michigan, 547 U.S. 586, 591 (2006) (describing exclusion as a "last resort"); Davis v. United States, 564 U.S. 229, 236 (2011) (describing exclusionary rule as a "'prudential' doctrine . . . created by [the] Court," which the Fourth "Amendment says nothing about").

292. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (referring to *Bivens* as a "relic of the heady days in which th[e] Court assumed common-law powers to create causes of action").

293. Monroe v. Pape, 365 U.S. 167 (1961); Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting) ("The § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted . . . . I refer, of course, to the holding of *Monroe v. Pape*.").

294. Brown v. Allen, 344 U.S. 443 (1953); Memorandum from John G. Roberts, Jr., Office of the Attorney General, on Possible Reforms of the Availability of Federal Habeas Corpus (Nov. 12, 1981) ("The current availability of federal habeas corpus, particularly for state prisoners, goes far to making a mockery of the entire criminal justice system.").

295. While section 1983 codifies a cause of action against state officials, it leaves everything other than the cause of action to judicial determination. *See* 42 U.S.C. § 1983. *Bivens* actions and the exclusionary rule are remedies developed using common law reasoning that isn't tied to a specific piece of text. *Bivens*, 403 U.S. 388; *Mapp*, 367 U.S. 643. Additionally, the disagreement over whether relitigation is permitted in federal habeas proceedings concerns a decision (*Brown v. Allen*) that reinterpreted a statute that had been on the books for decades. *Cf. supra* note 294.

296. *See, e.g.*, Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 63 (2015) (noting that "federal common law" includes different categories ranging from traditional principles of common law, customary practices, and rules that federal judges simply make up, and noting that describing common law as entirely judge-made law may enable more freewheeling common law practices).

297. 137 S. Ct. at 1859.

298. *Id*. at 1860.

299. *See supra* text accompanying notes 41–42.

guidance as to how an officer should respond,"[300] which also incorporates ideas from qualified immunity and post-conviction review about how "clearly established" a right is under case law.[301] Those concepts may have found their way into the scope of *Bivens* causes of action because of their familiarity, and their familiarity contributed to their persuasiveness.

The Supreme Court's interpretation of section 2254(d)'s relitigation bar proceeded similarly, and ultimately led the Court to embrace an interpretation that harkened more toward other areas of law, and specifically qualified immunity. In *Terry Williams*, the Court's original interpretation of section 2254(d)'s standard for obtaining a writ of habeas corpus, the Court had said that section 2254(d)'s standard differs from the standards for qualified immunity.[302] In doing so, the Court rejected the Fourth Circuit's interpretation of section 2254(d)(1), under which a state court decision was unreasonable if it applied federal law "in a manner that reasonable jurists would all agree is unreasonable."[303]

While the Court rejected that standard in *Williams*, it ultimately embraced something similar to it over the course of many cases that drew on the qualified immunity standard. In the damages context, the Court has held that officials are immune if "a reasonable officer could have believed that his conduct was justified,"[304] and stated that "existing precedent must have placed the statutory or constitutional question beyond debate."[305] Both of those ideas have appeared in the Court's most recent descriptions of section 2254(d), where the Court has explained that habeas is unavailable "so long as 'fairminded jurists could disagree' on the correctness of" the way a claim was adjudicated,[306] and that an error so "well understood and comprehended in existing law" is "beyond any possibility for fairminded disagreement."[307]

But the Court has also seemingly drawn from ideas in post-conviction law in order to elaborate the standard for qualified immunity. When *Terry Williams* interpreted section 2254, it noted that section 2254(d) effected a change from other areas, such as qualified immunity or retroactivity, in that section 2254(d) required clearly established *Supreme Court* rules, as opposed to rules that were

300. 137 S. Ct. at 1860.

301. *See supra* text accompanying notes 28–39.

302. Williams v. Taylor, 529 U.S. 362, 380 n.12 (2000) ("We are not persuaded by the argument that because Congress used the words 'clearly established law' and not 'new rule,' it meant in this section to codify an aspect of the doctrine of executive qualified immunity rather than *Teague*'s antiretroactivity bar.").

303. *Id.* at 409 (quoting Green v. French, 143 F.3d 865, 870 (4th Cir. 1998)).

304. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777 (2015).

305. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

306. Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

307. Metrish v. Lancaster, 133 S. Ct. 1781, 1786–87 (2013) (quoting Harrington v. Richter, 562 U.S. 86, 101 (2011)); *see* White v. Woodall, 134 S. Ct. 1697, 1705 (2014); Burt v. Titlow, 134 S. Ct. 10, 16 (2013); Wetzel v. Lambert, 565 U.S. 520, 524 (2012).

clearly established in other courts.[308] But the requirement of a relevant Supreme Court case has seeped into qualified immunity over time. In qualified immunity, the Court has, since *Terry Williams*, declared that only a "robust 'consensus of cases of persuasive authority'" clearly establishes a right for purposes of qualified immunity.[309] It has also suggested that the law may need to be clearly established "in the entire United States," though perhaps only for certain officials.[310] Thus, the common-law type reasoning that the Court is forced to rely on to develop the different remedies may drive the convergence among them.

The fact that some Justices, and perhaps a majority of Justices, question the validity of the underlying remedies provides another explanation for ratcheting up the standard that plaintiffs have to meet in order to obtain the different remedies. Ratcheting up the standards for plaintiffs to obtain these remedies may be a way to narrow the scope of the decisions recognizing the remedies without outright overruling them; some opinions frame the reasoning in these terms.[311]

There are, however, some reasons why the current system of convergence may not be justified, rather than merely explained, as a way of narrowing the relevant decisions. Bracketing whether all of the decisions are correct or not, a question that is beyond the scope of this Article, one reason to be skeptical of whether this explanation suffices as a justification is that it posits and accepts a system in which all of the remedies discussed in this Article (writs of habeas corpus, exclusion of evidence, damages actions against state and federal officers) are not and should not be available. That leads to the concerns discussed in Part II.A, namely that the state can deny people's rights in a wide range of domains and those people may have no effective recourse.

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308. It is not clear how much that differentiates section 2254(d) from *Teague*, given the Court's expansive interpretation of what constitutes a new rule. *See supra* text accompanying notes 59–63.

309. Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011). In that case, the Court stated that district court decisions—or at least one district court decision—did not qualify because "a district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction." *Id.*

310. *al-Kidd*, 563 U.S. at 741–42; *see also id.* at 745–46 (Kennedy, J., concurring) ("The fact that the Attorney General holds a high office in the Government must inform what law is clearly established for the purposes of this case."). Relatedly, the Court has repeatedly stated that it has only ever assumed that "controlling circuit precedent could constitute clearly established federal law," even in cases where the relevant officials do not have nationwide authority. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1776 (2015) (quoting Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (per curiam)); *see, e.g.*, Reichle v. Howards, 566 U.S. 658, 665 (2012) ("This Court has never held that there is such a right."). *But see* Lane v. Franks, 134 S. Ct. 2369, 2382 (2014) ("If *Martinez* and *Tindal* were controlling in the Eleventh Circuit in 2009, we would agree with Lane that Franks could not reasonably have believed that it was lawful to fire Lane in retaliation for his testimony.").

311. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–57:

Indeed, in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today. . . . Given the notable change in the Court's approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity.

Additionally, if convergence is a means to narrow the remedies, then the Court's lip service toward substitution, which Part II.B highlighted, is unnecessary and insincere. Still another reason to be skeptical is the mismatch between the limitations on the different remedies and the remedies themselves, as well as the mismatch between the limitations on the different remedies and the concerns with those remedies and the cases recognizing them that Part II.C discussed.

Another reason to be skeptical of the idea that the current system effectuates a desire to limit erroneous decisions is that there is some evidence that the denial of remedies is partially the arbitrary product of vote cycling. That is, the denial of remedies altogether is a consequence of the Court's attempt to aggregate the outcomes of multiple cases together when the Court aggregates the votes of individual judges to reach outcomes in particular cases. Consider, for example, Justice Breyer and Justice Kennedy's positions in *Ziglar v. Abbasi*[312] (or other *Bivens* cases such as *Correctional Services Co. v. Malesko*[313]) and *Armstrong v. Exceptional Child Center*.[314] Although the cases do not involve similar constitutional rights, they illustrate how vote cycling can lead to the denial of remedies altogether. In *Abbasi*, Justice Kennedy declined to recognize a damages action against a federal official, whereas Justice Breyer would have done so. The two Justices' opinions spoke about the relative unobtrusiveness of damages remedies compared to equitable ones and how to interpret congressional silence on the availability of damages remedies versus equitable ones. By contrast, in *Exceptional Child Center*, Justice Kennedy would have recognized a cause of action for equitable relief, whereas Justice Breyer declined to do so. And again, the two opinions[315] discussed how to interpret congressional silence and ambiguity in light of how much equitable relief would intrude on federal administration.[316] In *Abbasi*, Justice Breyer was in dissent, while the majority was comprised of the Chief Justice, Justice Kennedy, Justice Thomas, and Justice Alito.[317] In *Exceptional Child*, Justice Breyer was in the majority with the Chief Justice, Justice Scalia, Justice Thomas, and Justice Alito. Justice Kennedy's relative preference for equitable relief over damages and Justice Breyer's relative preference for damages over equitable relief thus generated majorities against both equitable relief and damages. But no majority on the Court would have agreed that there should be neither equitable relief nor damages.

312. 137 S. Ct. 1843 (2017).
313. 534 U.S. 61 (2001).
314. 135 S. Ct. 1378 (2015).
315. In this case, Justice Kennedy joined Justice Sotomayor's opinion. *Id.* at 1390 (Sotomayor, J., dissenting).
316. *Id.* at 1388 (Breyer, J., concurring in part and concurring in the judgment).
317. Justices Kagan and Sotomayor were recused. 137 S. Ct. 1843 (2017).

CONCLUSION

The standards that govern the availability of different remedies in public law cases related to policing—habeas corpus, causes of action, damages, and exclusion of evidence—have converged on one another. This Article has outlined the consequences of that convergence, as well as some of its causes. The convergence has resulted in the collapse of what is supposed to be an overarching and integrated system of remedies that is adequate to deter constitutional violations. The convergence and collapse has occurred by way of a kind of shell game, where the Court looks at each remedial context separately, and denies one remedy based in part on an unjustified presumption that another remedy will be available to vindicate the underlying right in a different context. The presumption is no longer workable given that the same demanding standard operates to preclude remedies in so many different contexts. Nor can the unavailability of the various remedies be explained as an effort to pare back on erroneous decisions, or as a rational system for rationing remedies—the status quo is largely a system of no remedies for constitutional rights as such, and the limits that apply to the various remedies make little sense of the remedies themselves or any concerns that may be unique to them. The overall lack of remedies is, instead, partially a byproduct of individual Justices' preferences for different remedies, but when those preferences are aggregated together it results in a system of no remedies at all.