
ARTICLES

MAKING RIGHTS

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By adjudicating cases, courts make constitutional rights. This Article considers the conditions under which this constitutional rights-making should take place. Ideally, constitutional rights-making should occur simultaneously in multiple remedial, factual, and procedural contexts. In reality, however, many rights are undesirably confined to a single context. This situation has negative consequences for the endeavor of constitutional rights-making.

As a case study in rights-making, the Article offers a comprehensive quantitative and qualitative analysis of the Fourth Amendment. It presents an original data set cataloging every instance of Fourth Amendment rights-making in the federal appellate courts from 2005 to 2009. That data set shows that most areas of Fourth Amendment doctrine are litigated either in suppression hearings or in civil actions for money damages – rarely both – even though in theory both remedies are available for each violation. The Article then describes the way this phenomenon distorts rights by developing a comprehensive, precedent-based account of three areas of Fourth Amendment doctrine: investigatory stops, excessive force, and unlawful detention.

This original analysis lays the groundwork for a broader conclusion: rights made in a single context are distorted by the idiosyncrasies of that context. Any context emphasizes certain interests and circumstances at the expense of others, and when rights are made only in a single context, those interests and circumstances deform the right over time. By contrast, rights made in multiple contexts are richer, more balanced, and more comprehensive. By surveying several rights where the existence of single or multiple litigation contexts affects the substance of the right, the Article shows that this phenomenon is not limited to the Fourth Amendment.

The Article then argues that we should not treat context as inevitable. If too much or too little rights-making is occurring in a particular context, judges and legislators can and should change the rate of rights-making by increasing the availability of remedies in the desired context and eliminating other barriers to litigation. A substantial scholarly literature documents the way that availability of remedies affects the rate of litigation in a particular context, but none of it has suggested that we should adjust remedies if we think doing so would benefit the rights-making endeavor. This Article therefore begins the project of envisioning how we might intentionally construct remedies to produce better rights-making.

INTRODUCTION

Consider two hypothetical warrantless searches, identical in every respect save one: the first yields a knife drenched in the blood of a murder victim, while the second yields nothing. Suppose that both searches are then

challenged in court under the Fourth Amendment – the first in a suppression hearing in a criminal prosecution for murder, the second in a civil suit for money damages under 42 U.S.C. § 1983.

That evidence was found in one case and not the other makes no constitutional difference: the Fourth Amendment protects the innocent and the guilty alike. Commentators routinely argue, however, that the exclusionary remedy sought in the first case may affect both the actual outcome of the case and the legal principles that the decision articulates. It has become a truism that the strong medicine of exclusion causes doctrinal distortion because courts are loath to suppress evidence when doing so means a criminal will go free.¹

This well-worn narrative is intuitively appealing and in some ways accurate. But it also misperceives the nature of the distortion and dramatically understates its scope. The problem is not that one particular remedy distorts the shape of the Fourth Amendment or, more broadly, the shape of any constitutional right. Rather, the problem is that litigation in *any* context – a word I use throughout this Article to refer to a given set of remedial, factual, and procedural circumstances – affects the shape of rights defined in that context. And when litigation of a particular right takes place only in *one* context, as is the case for many if not most constitutional rights, the inherent features of that context begin to distort the right. Like a plant that grows in the shape of its container, a right elaborated in a single context gradually becomes deformed.

In this Article, I provide a novel account of the harms that ensue from single-context rights-making. Any given context tends to foreground certain interests and circumstances while downplaying others. As a result, rights-making that takes place in a single context tends to focus courts on some variables at the expense of others. This limited focus produces law that less effectively takes account of the various interests at stake, less accurately recognizes the various individuals whose behavior it will bind, less thoroughly considers the various circumstances in which it will apply, and less compellingly reflects the relationship of particular doctrines to our legal regime as a whole. Put plainly, single-context rights-making results in worse law.

We need not resign ourselves to this unsatisfactory reality. Rather, the grave deficiencies of single-context litigation invite a provocative realization: context is not inevitable. Parties choose to enforce constitutional rights in particular contexts in response to decisions by legislators and judges that determine the ease of seeking recourse for certain constitutional injuries and the reward for doing so successfully. To the extent we believe that single-context litigation is undesirable, then, it is within the power of those same authorities to adjust incentives so that litigation flourishes freely in multiple contexts and the ensuing rights-making contemplates a rich array of interests and circumstances.

¹ See *infra* note 101.

In advancing these ideas, I begin by locating my discussion in the literature. Part I summarizes three discourses concerning rights-making.² The first discourse asserts the role of courts in articulating rights and, more recently, emphasizes that rights-making is so desirable that in some instances we should craft doctrine to facilitate such rights-making. This discourse, however, is concerned with the quantity of rights-making; it has no normative vision for how we ensure the *quality* of the resulting rights. To begin an exploration of how we might ensure the quality of rights-making, I introduce two other discourses: one that examines the relationship between rights and remedies and another that critiques cases as vehicles for lawmaking. These discourses provide a useful starting point for my broader discussion of context in subsequent Parts.

With this theoretical framework as a foundation, I then undertake a case study of the influence of context in rights-making by offering a comprehensive quantitative and qualitative analysis of the Fourth Amendment. Part II presents an original data set cataloging every instance of Fourth Amendment rights-making in the federal appellate courts from 2005 to 2009. That data set shows that most areas of Fourth Amendment doctrine are litigated *either* in suppression hearings *or* in civil actions for money damages – but seldom both – even though in theory both remedies are available for each violation. Part III then describes the way this phenomenon distorts rights by developing a thorough account of three areas of Fourth Amendment doctrine: investigatory stops, excessive force, and unlawful detention. Relying on precedent and scholarship, I narrate the effect of remedial, factual, and procedural variables on these Fourth Amendment rights.

As this analysis of Fourth Amendment doctrine reveals, single-context rights-making superimposes the idiosyncrasies of a particular context on courts' decisionmaking, engendering a narrow and distorted vision of rights. And such negative consequences are not limited to the Fourth Amendment. Rather, as I argue in Part IV, they apply everywhere constitutional rights-making is confined to a single context.³

² Here and elsewhere, when I refer to “making” rights, I am not advocating any particular theory of constitutional interpretation or any particular judicial role. My terminology is intended as simply a descriptive account of judges' work. Judges decide issues presented by litigants. In turn, their decisions yield doctrinal pronouncements that build precedent. This ongoing process of construction is what I call making rights. Used in this way, the terminology is not novel. *See, e.g.*, Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 883 (2006) (citing Oliver Wendell Holmes and accepting his hypothesis that when common law judges decide individual cases that put forward general principles, they in effect make new law).

³ Although many constitutional rights are adjudicated in both the civil and criminal contexts, some are not. But those rights are still generally adjudicated in multiple contexts, given my definition of a context as a particular combination of remedy, facts, and procedural posture. For example, the remedy may vary depending on whether a civil plaintiff seeks damages, injunctive, or declaratory relief. I will expand upon this idea in Part

The perils of single-context lawmaking invite a reframing of our current thinking about rights and remedies – a reframing that I state generally here and will elaborate in depth in future work.⁴ Existing literature has thus far overlooked the critical reality that the context in which rights-making occurs is malleable, resulting from decisions that affect incentives for litigation. Where constitutional rights-making currently occurs only in a single context, therefore, nothing prevents the modification of remedial incentives to ensure that right is also litigated in other contexts. I propose, in other words, a paradigm in which rights-making is more than merely the byproduct of judges deciding cases. Our decisions about context should be made mindfully in order to assure adequate conditions for the intelligent evolution of the law.

I. RIGHTS-MAKING AND REMEDIES

Courts and commentators acknowledge that courts not only resolve disputes but also make law and, moreover, that such lawmaking is proper and desirable. They have emphasized the importance of this lawmaking function in relation to constitutional rights and, in recent years, have gone so far as to advocate doctrinal frameworks that will encourage the elaboration of constitutional rights.⁵ Yet despite this acknowledgment of the importance of rights-making, scholars have paid little attention to the conditions under which rights are made and have not thought systematically about the conditions necessary for the intelligent development of constitutional rights.

The omission invites theoretical exploration. As an entry point to this exploration, I turn to two discourses, each of which draws attention to conditions that are extrinsic to the merits of the case but that nonetheless influence substantive rights-making. The first discourse examines the relationship between rights and remedies, demonstrating that the availability and scope of particular remedies affects the substantive development of constitutional rights. The second discourse reveals the shortcomings of cases as vehicles for lawmaking and, provocatively, suggests that the fact that judicial rights-making occurs in the shadow of individual cases often negatively affects the quality of the resultant constitutional rights.

Together, these discourses set the stage for my subsequent examination of the variables that comprise the context in which rights are made and that

IV. Moreover, remedial, factual, and procedural circumstances are not the only possible components of context; many other variables influence courts' articulations of constitutional rights. I have chosen to focus on these three important variables without excluding the possibility that others also matter.

⁴ See Nancy Leong, *Making Remedies* (unpublished manuscript) (on file with author).

⁵ When I discuss constitutional rights-making, I refer to the decisions of the federal appellate courts and the Supreme Court. Although federal district courts also adjudicate constitutional rights, their decisions do not “make law” in the sense relevant for present purposes because they do not bind future courts – including the district court that reached the decision.

ultimately shape their contours. The discourses also suggest a way to begin thinking about the other conditions that influence substantive rights-making. Understanding these conditions is the first step in understanding how rights-making *should* take place.

A. *Saying What the Law Is*

Most scholars acknowledge that “we are all realists now,”⁶ at least in the sense that we agree that judges do not simply apply rules in a mechanical fashion. It is relatively uncontroversial to say that adjudication involves building doctrine through judicial pronouncements rather than merely deciding disputes according to preexisting principles.⁷ This judicial function finds support in the foundational cases of our jurisprudence. Both *Marbury v. Madison*⁸ and *McCulloch v. Maryland*,⁹ for example, established broad legal propositions rather than simply deciding the outcome in the cases at hand, and *Marbury* claimed for the judiciary the ability to “say what the law is.”¹⁰

Commentators have emphasized the importance of this judicial function in the articulation of constitutional rights. The most important role of courts, Owen Fiss has influentially explained, “is not to resolve disputes, but to give the proper meaning to our public values.”¹¹ Henry Monaghan concurs that “the process of constitutional adjudication now operates as one in which courts discharge a special function: declaring and enforcing public norms.”¹² Such public values and public norms quite naturally include the individual freedoms embodied in our Bill of Rights.

Moreover, both courts and commentators have at times acknowledged not only that courts *do* articulate rights as they decide cases but also that courts *should* articulate rights, even, in some instances, when doing so is not strictly necessary to resolve the dispute before them.¹³ Rights elaboration is an

⁶ See, e.g., Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988) (“All major current schools of thought are, in significant ways, products of legal realism.”).

⁷ See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 235 (1995) (“Everyone professionally involved with law knows that, as Holmes put it, judges legislate ‘interstitially,’ which is to say they make law, only more cautiously, more slowly, and in more principled, less partisan, fashion than legislators.”).

⁸ 5 U.S. (1 Cranch) 137, 176-78 (1803) (asserting the primacy of Supreme Court in interpreting all cases arising under the Constitution, rather than merely deciding the instant one).

⁹ 17 U.S. (4 Wheat.) 316, 316-17 (1819) (pronouncing generally on the limits of Congress’s powers).

¹⁰ *Marbury*, 5 U.S. (1 Cranch) at 177.

¹¹ Owen Fiss, *The Supreme Court, 1978 Term – Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979).

¹² Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 279-80 (1984) (claiming that the function of courts transcends dispute resolution).

¹³ Some would term this judicial work product “dicta.” See Michael C. Dorf, *Dicta and*

independent goal, one sufficiently important to justify a doctrinal structure that facilitates it.¹⁴ Although some commentators have questioned the proper *scope* of courts' rights-making activities,¹⁵ they do not dispute the value of the basic rights-making function.¹⁶ The view of courts as rights-making entities and of judicial rights-making as normatively desirable is thus virtually unanimous, with disagreement only over the precise range of situations in which courts may or should elaborate the structure of constitutional rights.¹⁷

Consequently, the independent benefits of rights-making are increasingly used to justify intentional judicial articulation of constitutional principles. Recent decisions have spoken candidly about the importance of articulating constitutional rights and have even structured doctrine to facilitate such development. The evolution of qualified immunity doctrine provides a particularly clear example. That doctrine provides immunity to government officers sued under 42 U.S.C. § 1983 if the plaintiff is unable to demonstrate a violation of clearly established law of which a reasonable officer would have known. Qualified immunity protects government officers from crippling damages for actions they would not reasonably have known were unconstitutional, thereby avoiding deterring officials from actions that would benefit the public good.¹⁸ But the doctrine presents a conundrum: if courts simply hold that the law was not clearly established without stating whether a constitutional violation has occurred, then the law never *becomes* clearly established, and thus the government will never be liable for damages no matter how many times a particular action is repeated.¹⁹

Article III, 142 U. PA. L. REV. 1997, 2005-09 (1994). For my purposes, I believe it unnecessary to parse the holding-dictum distinction. Regardless of whether particular statements within opinions are categorized as "holding" or "dictum," they undoubtedly guide future courts. *See, e.g.*, *SEC v. Rocklage*, 470 F.3d 1, 7 n.3 (1st Cir. 2006) ("Even dicta in Supreme Court opinions [are] looked on with great deference."). By issuing such statements, then, courts are "making" law in any functional sense of the word.

¹⁴ *See, e.g.*, John M.M. Greabe, *Mirabile Dictum! The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 407 (1999) (explaining that rulings on novel constitutional questions serve "important notice-giving" functions); Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 GEO. MASON L. REV. 53, 63-64 (2008) (advocating merits-first decision making in qualified immunity adjudication).

¹⁵ *See* Dorf, *supra* note 13, at 2040-49; Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 936 (2005).

¹⁶ *See* Healy, *supra* note 15, at 934 (explaining that courts should sometimes make law even when nothing requires them to do so because "[t]his way, courts will continue to establish new rights").

¹⁷ *See supra* notes 11-16 and accompanying text.

¹⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

¹⁹ *See* Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 676-84 (2009) (outlining rationales for and criticisms of

In light of this difficulty, the Supreme Court indicated first a preference²⁰ and later a mandate that courts decide the constitutional merits of the claim before determining whether the law was clearly established in qualified immunity adjudications. In *Saucier v. Katz*,²¹ Justice Kennedy, writing for the majority, explained that adjudication

is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.²²

As a result, the Court held that lower courts should address the qualified immunity inquiry in a mandatory two-step sequence: the "initial inquiry" must be whether "the officer's conduct violated a constitutional right" and only then should the court ask "whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."²³ *Saucier* thus plainly acknowledged rights articulation as a goal of adjudication and stressed the importance of facilitating such rights-making.

Although most federal appellate courts obediently adopted the merits-first procedure following *Saucier*,²⁴ the prescribed sequence provoked protest from lower courts,²⁵ commentators,²⁶ and several individual members of the Supreme Court.²⁷ *Saucier* was unanimously overruled only eight years after it was decided, by *Pearson v. Callahan*,²⁸ with the Supreme Court holding that deciding the merits question was discretionary rather than mandatory.²⁹ But

qualified immunity doctrine).

²⁰ See *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

²¹ 533 U.S. 194 (2001).

²² *Id.* at 201.

²³ *Id.*

²⁴ See *Leong*, *supra* note 19, at 688 (finding that avoidance of the constitutional merits declined from 28.6% before the Court advocated the merits-first procedure to 6.4% after *Saucier*).

²⁵ Some courts discreetly declined to apply the merits-first procedure. See, e.g., *Hatfield-Bermudez v. Aldanondo-Rivera*, 496 F.3d 51, 59 (1st Cir. 2007); *Roberts v. Ward*, 468 F.3d 963, 970 (6th Cir. 2006); *Koch v. Town of Brattleboro*, 287 F.3d 162, 168 (2d Cir. 2002).

²⁶ See, e.g., *Leong*, *supra* note 19, at 690-93; Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1277-79 (2006).

²⁷ Justices Breyer, Ginsburg, and Scalia repeatedly criticized mandatory sequencing on the ground that it would require courts to decide difficult constitutional questions unnecessarily. See *Leong*, *supra* note 19, at 679 n.66 (collecting examples from opinions in post-*Saucier* Supreme Court cases).

²⁸ 129 S.Ct. 808 (2009).

²⁹ *Id.* at 818.

even in *Pearson* the Court reiterated the desirability of articulating rights: “Although we now hold that the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial.”³⁰ Moreover, the Court added that “the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.”³¹ *Pearson* thus affirms the idea that rights-making is important and that qualified immunity provides a valuable vehicle for such rights-making.³² Rights-making is so important that in many circumstances it trumps other reservations we may have about various disadvantages associated with merits-first qualified immunity adjudication.³³

The value assigned to rights articulation in qualified immunity adjudications is illustrative rather than exceptional. Although less explicitly than in the qualified immunity context, courts have also required or approved the articulation of legal principles not necessary to resolve a dispute in other areas.³⁴ In harmless error analysis, for example, the Court has indicated that courts should decide whether a constitutional error occurred before determining whether that error was harmless in the larger context of the trial.³⁵ Likewise, in ascertaining whether the fruits of a particular search are not subject to the exclusionary rule because the search was undertaken in good faith, courts have the discretion to decide whether the search was *in fact* constitutional, not merely whether the officer reasonably believed it to be so.³⁶

³⁰ *Id.*

³¹ *Id.*

³² Various commentators have protested *Pearson*, arguing that *Saucier*'s sequencing mandate is preferable because without such a mandate, constitutional law will fail to develop. Such commentary reflects and reinforces the prevailing view that courts' articulations of law and rights are important. See, e.g., Jack M. Beerman, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 149; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 117; Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 887-88 (2010); Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 730 (2011).

³³ Potential disadvantages include undermining the process of appellate review and impairing judicial efficiency, among others. See Leong, *supra* note 19, at 676-81.

³⁴ My analysis in this paragraph has been shaped by Thomas Healy's work. See Healy, *supra* note 15, at 871-95.

³⁵ *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) (“Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed.”). Courts have not, however, always read this statement as a mandate. See Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 53-55 (2002).

³⁶ *United States v. Leon*, 468 U.S. 897, 925 (1984) (“If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before

Other instances regularly emerge.³⁷ Although the consensus is not unanimous, a critical mass of courts and commentators has acknowledged the systemic value of judicial rights-making.

The prior discussion illuminates the importance we assign to the act of judicial rights-making and the corresponding importance we assign to the adjudication of cases as vehicles for rights-making. In light of this importance, it is surprising that we have not thought more about the *conditions* under which most rights-making currently takes place or how those conditions affect the quality of the resulting right. I begin that undertaking in the next section.

B. *The Problem with Cases*

As we have seen, much of the recent discourse on rights-making emphasizes the importance of creating sufficient opportunities for rights-making – that is, the importance of adjudicating a sufficient number of cases. Yet this literature about the virtues of adjudication exists in tension with other literatures that raise concerns about the *quality* of case-based rights-making that flow from the nature of case-by-case adjudication itself.

One such literature examines the relationship between rights and remedies. The opinions expressed in this literature divide into two crude categories, which commentators have called the “decision rules” and “pragmatist” theories.³⁸ Because others have summarized this debate quite extensively,³⁹ I will describe it only briefly here to provide the foundation for subsequent discussion.

Those whose work is loosely aligned with the decision rules model propose “an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues.”⁴⁰ The former is often called an “operative proposition,” the latter a “decision rule.”⁴¹ Under this model, rights – or operative propositions – exist at a conceptual point independent of and prior to the mechanisms for their

turning to the good-faith issue.”).

³⁷ See, e.g., Kamin, *supra* note 35, at 73 (discussing harmless error review); Orin Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1118 (2011) (arguing that the good-faith exception should not apply to reliance on overturned case law because the suppression remedy creates incentives for defendants to challenge existing legal precedents and for courts to reexamine them).

³⁸ See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 43-50 (2004); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1007-08 (2010).

³⁹ See Berman, *supra* note 38, at 43-50.

⁴⁰ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

⁴¹ This vocabulary is Berman’s, and I will adopt it throughout the Article whenever I discuss the decision rules model. Berman, *supra* note 38, at 57-61.

enforcement. Practical difficulties inherent in implementing rights through remedial mechanisms lead to slippage between the actual scope of the right and the scope of the right available for enforcement through a remedial mechanism. Consequently, rights are not coextensive with the judicial standards – or decision rules – used to enforce them.⁴² Scholars rely on the notion of freestanding constitutional ideals to elaborate various descriptive and normative ideas relating to rights-making.⁴³ But the underlying assumption is the same: there is a divide between pure constitutional law and its application in practice.⁴⁴

Opposing the decision-rules model, others have staked out what has come to be known as the “pragmatist” position. Commentators frequently identify Daryl Levinson with this school of thought.⁴⁵ Levinson’s work critiques what he calls “rights essentialism” – the view that a right is a “pure constitutional value” that is subsequently “corrupted by being forced into a remedial apparatus.”⁴⁶ He instead advocates a paradigm he terms “remedial equilibration,” under which the scope of a right is inherently determined by the

⁴² I have drawn on both Berman’s and Sager’s work for the description of the decision rules model in this paragraph. *See id.* at 43-44; Sager, *supra* note 40, at 1220-21.

⁴³ *See, e.g.*, Berman, *supra* note 38, at 51 (arguing that judicial output is, indeed, divisible into “operative propositions” and “decision rules”); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1276 (2006) (positing a gap between values that the Constitution reflects and values as implemented due to the need for “judicially manageable standards”); Fiss, *supra* note 11, at 52-53 (positing a gap between constitutional rights and their associated remedies and arguing that judges’ work is to translate the former into the latter); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) (describing remedies as realizations of constitutional norms); Henry P. Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (describing rules that “draw[] their inspiration and authority from, but [are] not required by, various constitutional provisions”); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655-57 (2005) (discussing the decision rules model); Sager, *supra* note 40, at 1213-19 (arguing that constitutional norms are generally under-enforced as a result of concerns about federalism and judicial competence but that the full conceptual scope of a constitutional norm remains binding on government actors).

⁴⁴ *See, e.g.*, Berman, *supra* note 38, at 50-51.

⁴⁵ Commentators also assign David Strauss to the pragmatist school of thought. His work examines what he calls “prophylactic rules” – “rule[s] that impose[] additional requirements beyond those of the Constitution itself” – and emphasizes that courts do not distinguish between what the Constitution requires and what the rule they have announced requires when they decide cases. David Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195 (1988). From an institutional perspective on the judiciary, therefore, prophylactic rules are equally legitimate expressions of constitutional law. *See id.* at 208-09; *see also* Berman, *supra* note 35, at 18 n.53, 43-50 (contrasting decision rules and pragmatist positions and identifying latter with Strauss, Levinson, and others).

⁴⁶ Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

nature of the available remedy.⁴⁷ He couches the distinction in terms of the direction of causation. The rights essentialist view is that rights are defined first and only then are remedies designed, instrumentally, to implement those rights. Remedial equilibration, in contrast, begins with the available remedy and from there extracts the content of the right.⁴⁸ The broader point of the pragmatist position is that rights and remedies are inextricable from one another. Talking about rights without talking about remedies makes no sense because remedies inherently dictate the nature of rights.⁴⁹

Despite the many points of tension between the two models, a recent essay by Kermit Roosevelt suggests a way of harmonizing the two. Roosevelt agrees with Levinson that “remedial considerations exert an important influence over the shape of” the standards courts adopt to implement constitutional rights, or what Roosevelt and others have called “decision rules.”⁵⁰ Roosevelt argues that Levinson’s rejection of “a supposed dichotomy between rights and remedies . . . is not in fact a challenge to the decision rules model” because decision rules are criteria that courts apply to evaluate whether rights have been violated rather than rights themselves.⁵¹ Decision rules, according to Roosevelt, are sensitive to remedies in the way Levinson describes; operative propositions, however – the true essence of constitutional rights – remain untouched.⁵²

Roosevelt’s work highlights that the decision rules and pragmatist positions share an important characteristic: the available remedy influences the content of the right that courts articulate in a given case. Put another way, the two discourses concur that concerns extrinsic to the substantive merits shape rights-making. Decision rules proponents describe such judicial work as the construction of decision rules to implement constitutional operative propositions. Roosevelt, for example, usefully enumerates a set of factors that influence the shape of decision rules.⁵³ The pragmatist approach is even more explicit about the act of judicial construction, positing that rights are

⁴⁷ *Id.*

⁴⁸ *Id.* at 884.

⁴⁹ Without identifying themselves explicitly as pragmatists, many other scholars have alluded to the influence of remedies on rights. *See, e.g.,* Ann Althouse, *Saying What Rights Are – In and Out of Context*, 1991 WIS. L. REV. 929, 945-46 (explaining that whether a decision applies retrospectively determines whether courts must immediately confront the administrative burdens their decisions created and may therefore influence the scope of the right they articulate).

⁵⁰ Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193, 194 (2006).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Roosevelt’s self-described non-exhaustive list of factors involved in constructing decision rules includes institutional competence, costs of error, frequency of unconstitutional action, legislative pathologies, enforcement costs, and the desire to provide guidance for other governmental actors. Roosevelt, *supra* note 43, at 1655-67.

inextricable from the remedies available for their vindication.⁵⁴ True, Roosevelt calls this remedially-influenced content the “decision rule,” while Levinson simply claims that the remedy defines the right itself. But they agree that the remedy influences judges’ deliberations about the content of a right – and out in the real world, the felt consequences of interaction between right and remedy are indistinguishable regardless of the terminology attached to them.

Collectively, the scholarship on rights and remedies suggests one reason that cases are imperfect vehicles for lawmaking: the available remedy in any given dispute inevitably influences judges’ conception of the substantive right. This concern, shared by the decision rules and pragmatist models, is related to a concern expressed in another literature examining the problems associated with cases as vehicles for lawmaking more generally.

Frederick Schauer, for example, argues that in at least some circumstances, making law in the context of a specific case may result in law of worse quality than law generated in other ways. He emphasizes the “extent to which even ordinary cases impress their facts on the judges who have to decide them.”⁵⁵ Judges become overly preoccupied with the case before them and mistakenly think that case is representative of a broader set of circumstances than it actually is.⁵⁶ Because the circumstances of the particular case are more salient to the judge, she becomes vulnerable to an array of cognitive biases that shape the general principle that the case ultimately produces.⁵⁷ And because the very definition of the judge’s task is to decide the case before her, it becomes especially difficult for her to ignore its particular facts.⁵⁸ Collectively, then, the biases flowing from the hyper-salience of the particular case result in lawmaking tailored to the “concrete case” rather than “the full array of events that the ensuing rule or principle will encompass.”⁵⁹

Other features of our legal system tend to exacerbate these problems. For example, Schauer argues that in a common law system a litigated case tends not to be representative of all cases that the resultant rule would likely govern. The common law process tends to “focus[] on the imperfect application[] of even the best rules,” with the result that close cases – or at least those cases believed close by the parties – are more likely to be litigated.⁶⁰ Such cases often involve unusual and unrepresentative facts that likely emphasize the distortion in general legal principles resulting from the hyper-salience of any individual case.⁶¹

⁵⁴ See Levinson, *supra* note 46, at 858.

⁵⁵ Schauer, *supra* note 2, at 885.

⁵⁶ *Id.* at 893-94.

⁵⁷ Such biases include anchoring, availability, and issue framing. *Id.* at 894-97.

⁵⁸ *Id.* at 899.

⁵⁹ *Id.* at 884.

⁶⁰ *Id.* at 908, 909-10.

⁶¹ *Id.*

Schauer's conclusions are not limited to cases presenting constitutional issues, and other commentators have noted the application of his reasoning in specific rights-making realms.⁶² We might speculate that the concern for the hyper-salience of case-specific facts is, if anything, more prominent in the constitutional context, where individual cases often receive a great deal of public interest and attention and where concern for the equities of a particular case sometimes eclipses concern for the contour of the right that will result from that case's decision. At any rate, nothing suggests that our concerns with cases as lawmaking vehicles are any *less* prominent with constitutional rights-making than with any other kind of lawmaking.

C. *Putting Rights in Context*

The two literatures I have summarized above offer insight into the factors, apart from the merits of a case, that influence rights-making. Yet both of these literatures tend to focus on specific aspects of the rights-making process, rather than on the pathologies of the process as a whole. So while they undoubtedly further our understanding of specific aspects of rights-making, they also tend to understate the way that various concerns related to case-based rights-making interact with and amplify one another. Consequently, we sometimes underestimate the problems associated with rights-making on a case-by-case basis. The result is that – as discussed in Part I.A – courts and commentators increasingly impress upon us the importance of deciding enough cases in order to clarify the scope of constitutional rights, yet they do so without considering whether deciding more cases will actually result in an optimal construction of constitutional rights.⁶³

In this Article, I begin laying the groundwork for a systemic examination of case-based rights-making by introducing the notion of context. As I use the term here, context consists of the remedy available for a particular right, as well as the factual circumstances and procedural posture associated with that remedy. By examining context, my work undertakes an evaluation of courts' rights-making function in light of the literature on the relationship between rights and remedies.

In particular, this Article focuses on a notably under-examined phenomenon: the confinement of rights-making, in certain areas of doctrine, to a single context. Of course, scholars have made various arguments that a particular remedy, factual circumstance, or procedural posture exerts an influence on the shape of a particular doctrine. But no work has undertaken a broad critique of the substantive differences between rights made in single and multiple contexts. Commentators often take the opposite approach, viewing

⁶² See, e.g., Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 MARQ. L. REV. 477, 482 n.26, 486 nn.53-54, 489 (2009) (examining how strategic selection of cases for appeal by the government influences the development of Fourth, Fifth, and Sixth Amendment rights).

⁶³ See *supra* Part I.A.

litigation in a single context as self-evidently sufficient. Recognizing the widespread view of remedies strictly as alternatives, Jennifer Laurin recently coined the term “remedial rationing” to describe a process in which “enforcement of a given criminal procedure right is committed *either* to the criminal *or* the civil realm.”⁶⁴ In effect, our thinking about remedies is largely binary – and unreflectively so. As a result of this binary thinking, most scholars have not explicitly examined the interaction of multiple remedies – or the lack thereof – and the process of lawmaking.⁶⁵

Where the Fourth Amendment is concerned, for example, the exclusionary remedy and the damages remedy are often presented either explicitly or implicitly as alternatives rather than complements.⁶⁶ No purpose is served by making more than one remedy available, the prevailing logic implies – indeed, to do so would be redundant. Justice Scalia relied on this logic in *Hudson v. Michigan*⁶⁷ in holding the exclusionary remedy unavailable for knock-and-announce violations: because § 1983 damages actions had (he claimed) become much more widely available since *Mapp*, the necessity for exclusion had concomitantly diminished.⁶⁸ More telling is the scholarly commentary that has emerged in response to *Hudson*. Even scholars who dispute the sort of reasoning Justice Scalia relied on in *Hudson* focus on the empirical claim that § 1983 provides a remedy for knock-and-announce violations; they do not criticize the assumption that one remedy is enough.⁶⁹

⁶⁴ Jennifer E. Laurin, *Melendez-Diaz v. Massachusetts, Rodriguez v. City of Houston, and Remedial Rationing*, 109 COLUM. L. REV. SIDEBAR 82, 83 (2009). While I agree with Laurin’s identification of this phenomenon, I have somewhat less confidence that commitment to one remedial regime or another always arises with the intentionality that the term “rationing” seems to connote. Although the availability of alternative remedies sometimes drives decision making about what remedies are available – as in *Hudson* – in other instances my intuition is that single-context litigation arises more or less unintentionally as the byproduct of other judicial machinations.

⁶⁵ There are a few exceptions, although they have focused on particular doctrinal areas rather than on single-context litigation as a transsubstantive phenomenon. See generally Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35 (contrasting the influence of remedy in litigation of civil damages actions and wrongful prosecution claims); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998) (examining the relationship between rights and remedies under the Fourth Amendment and Equal Protection Clause in criminal adjudication).

⁶⁶ See, e.g., Jeffries, *supra* note 32, at 117-18 (“The role of money damages – or indeed of any mechanism for vindicating constitutional rights – depends on the alternatives.”).

⁶⁷ 547 U.S. 586 (2006).

⁶⁸ *Id.* at 597-98.

⁶⁹ See, e.g., Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 510 (2009); James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1848 (2008).

Certainly scholars have articulated concern for rights-making where, practically speaking, *no* context is available for rights-making. John Jeffries argues forcefully that we must “avoid ossification and irrelevance” of the law by ensuring that the law has adequate opportunities to develop and change in response to changes in society.⁷⁰ “Constitutional innovation” is both necessary and desirable, so much so as to justify a fault-based qualified immunity defense to ensure that such innovation happens.⁷¹ Moreover, the importance of doctrinal evolution justifies mandatory merits-first qualified immunity adjudication in most, if not all, suits under § 1983.⁷²

Orin Kerr expresses a similar concern with respect to the Fourth Amendment by advocating that the good-faith exception to the exclusionary rule should not apply to searches undertaken in compliance with overruled law.⁷³ Kerr’s aim is to assure sufficient adversarial process for courts to reconsider bad law. He explains, “The core question is whether the exclusionary rule provides a significant mechanism for appellate courts to encounter the arguments they need to recognize that the law has gone off-track.”⁷⁴ But the overall thrust of his argument is the same as Jeffries’: courts need adequate opportunities to make – or remake – constitutional rights.

Because scholars have lavished so much attention on the problem of law stagnation where *no* context exists for litigation, it is surprising that no one has compared rights-making in single and multiple contexts. For many commentators, it seems to be enough that lawmaking occurs *somewhere*, while the conditions of lawmaking in that location remain relatively unexamined. From reading such scholarship, one might assume that lawmaking contexts are interchangeable. It does not matter in which context rights are made, or whether rights are made in multiple contexts or only one, so long as they are made somewhere. Jeffries argues, without explaining further, that “money damages and exclusion of evidence are substitutes” in the context of the Fourth Amendment – the quality of the law articulated does not seem to factor into the calculus.⁷⁵ Kerr similarly bypasses discussion of how context might affect

⁷⁰ John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 97 (1999).

⁷¹ *Id.* at 91-110.

⁷² Jeffries, *supra* note 32, at 116-17.

⁷³ Kerr, *supra* note 37, at 16.

⁷⁴ *Id.* at 1089.

⁷⁵ John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 283 (2000). Although Jeffries raises and credits criticisms of the remedial structure of the Fourth Amendment, he nonetheless states that it is a “different question whether the exclusionary rule provides adequate opportunities for the definition of Fourth Amendment rights,” and he answers that question in the affirmative. Jeffries, *supra* note 32, at 134. He goes so far as to argue that the exclusionary rule works *better* for purposes of law articulation than it does for other aspects of maintaining the criminal procedure regime: “For rights definition – the process of articulating, specifying, and clarifying what conduct is allowed – the limitations on exclusion are far less costly.” *Id.*

substance. In advocating exclusion as a remedy for searches undertaken in compliance with overruled law, he takes pains to explain that alternative remedies cannot fully substitute for the law-facilitation function of the exclusionary rule, explaining, in turn, why actions under § 1983 for damages, injunctive relief, and declaratory relief, as well as prosecutions under 18 U.S.C. § 242, provide insufficient opportunities for courts to refine the law.⁷⁶ Yet nowhere in Kerr's discussion does he address the possibility that the *substance* of the law would differ – perhaps dramatically – if these alternative remedies were also available and utilized by courts.

Like Jeffries, Kerr, and others, I am troubled by the possibility that certain rights may not be articulated in any context and that the law in these areas will stagnate as a result. Such concerns have understandably multiplied following *Pearson v. Callahan*⁷⁷ and *Hudson v. Michigan*.⁷⁸ It is still too soon to assess empirically the combined effect of *Pearson* and *Hudson*, as both criminal defendants and civil litigants continue to explore the parameters of available remedies in the aftermath of those decisions. It seems likely, though, that some decrease in rights-making will occur.

But simply creating opportunities for law articulation without regard for the effect that context will have on substantive rights is an incomplete solution to the problem of insufficient lawmaking. Such a solution may actually create new problems. By positing that we should *also* think about whether the contexts available for law articulation allow for the intelligent development of the law, this Article thus goes a step further than scholarly work solely concerned with the opportunity for law articulation.

My focus on context ultimately reveals that, while the discourses described in this Part are descriptively powerful, they do not answer the question of how we *should* decide where and under what circumstances courts make rights. I begin to explore this question in Part IV. To lay the groundwork for that exploration, however, I next turn to both quantitative and qualitative data concerning the making of a specific right.

II. THE FOURTH AMENDMENT: A QUANTITATIVE PROFILE⁷⁹

Many constitutional rights are litigated both in criminal proceedings and in civil suits under § 1983.⁸⁰ I selected the Fourth Amendment as a vehicle for

⁷⁶ Kerr, *supra* note 37, at 1095-97.

⁷⁷ 555 U.S. 223 (2009).

⁷⁸ 547 U.S. 586 (2006); *see* Jeffries, *supra* note 32, at 117 (“For other rights, money damages are central. For those rights, refusal to reach the merits of constitutional tort claims will cut to the bone.”); Karlan, *supra* note 32, at 877 (“[T]he Court may be embarking on a shell game, in which it uses the presence of each as a rationale for weakening the other.”); Marceau, *supra* note 32.

⁷⁹ The full database for the data used in this Article is an excel spreadsheet, which is on file with the *Boston University Law Review* and is available at bu.edu/law/lawreview (under Volume 92, Number 2 (March 2012)).

examining the influence of context on litigation because almost any Fourth Amendment claim could theoretically be litigated in either the civil or criminal context. My original quantitative research, however, reveals that most Fourth Amendment claims are in fact litigated almost entirely in one context or the other.

To get an overview of Fourth Amendment litigation, I assembled a database containing every published⁸¹ federal⁸² appellate decision from the past five years that articulated a Fourth Amendment principle, a total of 1297 claims.⁸³ During the calendar years 2005 through 2009, a total of 359 Fourth Amendment claims were adjudicated in published federal appellate cases in civil actions under § 1983 or *Bivens* actions.⁸⁴ Of these, virtually all sought money damages, and 204 involved claims of excessive force, while 155 involved other issues. During the same time period, 926 Fourth Amendment claims were adjudicated in published federal appellate cases involving appeals from suppression hearings.⁸⁵ Finally, twelve claims were adjudicated in other

⁸⁰ See *Pearson*, 555 U.S. at 242-43.

⁸¹ I limited the data set to published cases for two reasons. First, many unpublished decisions, particularly in criminal cases, do not elaborate the facts and reasoning in sufficient detail to categorize the case. Second, because I am interested in rights-making, only published federal appellate decisions make rights for purposes of binding future courts. I believe there is merit to the argument that unpublished decisions sometimes function to delineate the scope of rights, but in terms of formal binding precedent only published opinions count.

⁸² I included only federal cases, although many state criminal cases also articulate Fourth Amendment principles, in order to examine the same set of rights-makers – federal judges – for both criminal and civil cases. Federal cases are also more useful because, to the extent interplay does exist between the criminal and civil contexts, it occurs between cases articulated in federal proceedings, not between cases decided in federal proceedings and those decided in state proceedings. Last, even if I were to include the state cases decided during the same time period, these data would make my findings even more pronounced: among state cases, most Fourth Amendment rights are articulated predominantly in criminal proceedings. I recognize that the types of fact patterns that arise in federal cases are idiosyncratic and that perhaps there are some non-trivial differences between federal and state cases, but the concerns listed here are more important and so I chose to limit my data set as I did. Future work might usefully compare Fourth Amendment claims in state and federal criminal proceedings.

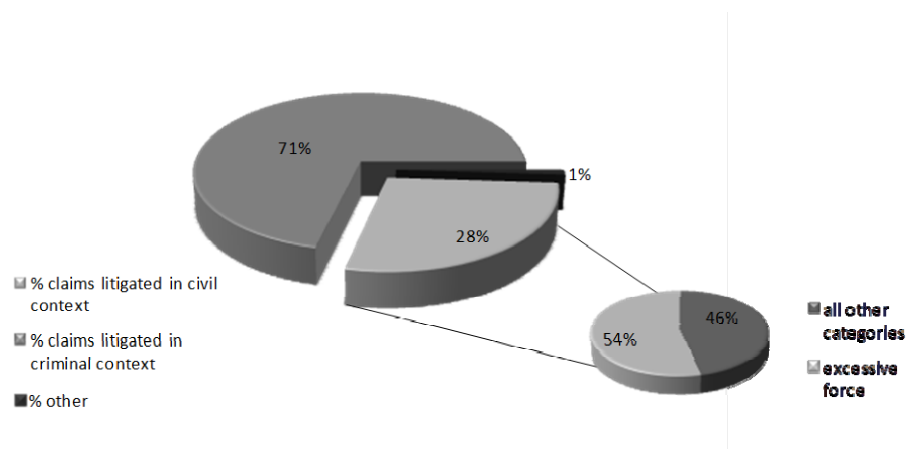
⁸³ To generate an initial list of cases, I ran the following query in the CTA database on Westlaw: da(aft 12/31/2004) & da(bef 01/01/2010) & (“fourth amendment”) % ci(“not selected for publication”). The query returned 2106 results. I removed those that did not articulate a Fourth Amendment principle – for example, they may have mentioned the Fourth Amendment but involved a different issue, such as costs or jurisdiction.

⁸⁴ Throughout the Article, wherever I refer to § 1983 I also include the analogous action against federal officers under *Bivens*. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

⁸⁵ Forty-two cases presented more than one Fourth Amendment claim (thirty-four presented two claims, and eight presented three claims). For example, one series of events

proceedings.⁸⁶ Figure 1 provides a summary of the location of Fourth Amendment litigation. Figure 2 provides the same information with excessive force claims removed from the data because such claims are litigated almost exclusively in the civil context.

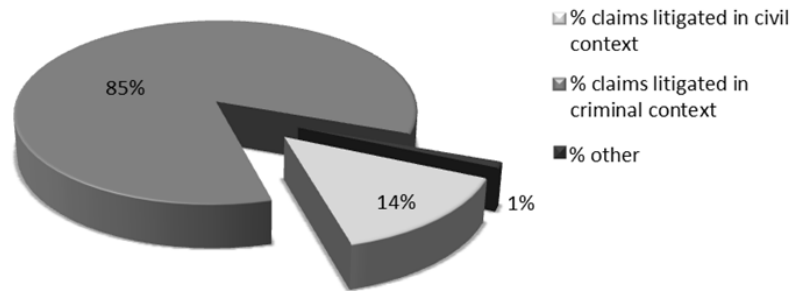
Figure 1: All Fourth Amendment Claims 2005-2009



leading to litigation might involve both a *Terry* stop and a consent search. Therefore, the number of claims is not the same as the number of cases. Because my interest is in the articulation of substantive principles, a case in which two claims are adjudicated is counted twice because it articulated two substantive principles. Where a § 1983 plaintiff or a criminal defendant won a partial victory on a Fourth Amendment issue, I counted that claim as a victory for that party. *See, e.g.*, *Mack v. City of Abilene*, 461 F.3d 547, 557 (5th Cir. 2006) (holding that a Fourth Amendment violation occurred with respect to one of two car searches). By so doing, I have, if anything, overstated the extent to which Fourth Amendment rights are articulated expansively.

⁸⁶ This small number of other proceedings included civil forfeiture hearings, habeas review, immigration proceedings, and prosecutions of police officers for excessive force under 18 U.S.C. § 242.

**Figure 2: Fourth Amendment Claims Excluding Excessive Force
2005-2009**



The claims were then coded⁸⁷ into twelve categories according to the type of law enforcement activity that was challenged:

- 1 = search warrant
- 2 = arrest warrant
- 3 = investigatory stop
- 4 = other unlawful detention
- 5 = exigent circumstances
- 6 = plain view search
- 7 = special needs search
- 8 = consent search
- 9 = vehicle exception search
- 10 = excessive force
- 11 = probable cause determination
- 12 = other

A brief explanation is necessary. Investigatory stops (category 3) were distinguished from other unlawful detentions (category 4) based on the claimed scope of law enforcement authority. That is, where the police claimed only authority to conduct an investigatory stop, the case was placed in category 3; where the police claimed authority to conduct a more significant detention, the

⁸⁷ Two researchers coded each case independently. Their results were compared, and all discrepancies were reconciled. Discrepancies were found in less than 5% of entries.

case fell into category 4.⁸⁸ Cases raising probable cause determinations were coded twice. They were placed in the category of the challenged police behavior – for example, an unlawful search warrant. They were also coded as a distinct category to facilitate comparison of all claims in which the quantum of evidence supporting a particular police action, as opposed to the action itself, was disputed.⁸⁹ Thus, each claim counted in category 11 is also counted in at least one other category. Finally, the “other” category was quite heterogeneous, including an array of idiosyncratic claims that did not fit in other categories.⁹⁰

The coding revealed substantial disparities in the rate at which different types of claims are litigated in the civil and criminal contexts. Some categories of Fourth Amendment claims are litigated almost entirely in the criminal context. These include consent claims (96% criminal), *Terry* claims (95% criminal), and cases involving the vehicle exception (97% criminal). In contrast, 98% of excessive force claims are litigated in the civil context.⁹¹ Still other categories of claims, such as claims involving arrest warrants (46% criminal), unlawful detention (60% criminal), or even exigent circumstances (80% criminal), are litigated meaningfully – albeit not necessarily equally – in both contexts.⁹² Figure 3 shows the location of litigation for each doctrinal category.

⁸⁸ Category 4 included arrests as well as other detentions more intrusive in length and nature than investigatory stops.

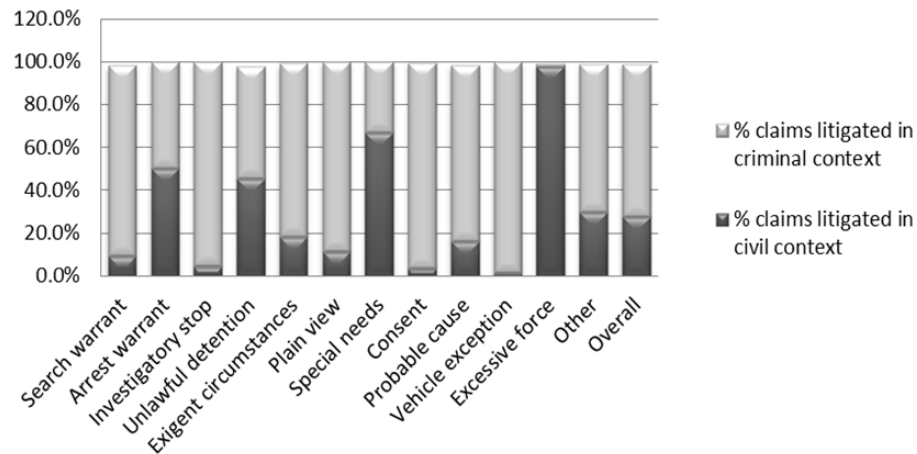
⁸⁹ See, e.g., *Johnson v. Walton*, 558 F.3d 1106 (9th Cir. 2009) (categorized as both a search warrant claim and a probable cause claim).

⁹⁰ A few examples: pat-downs prior to entry into a sports stadium, employee drug testing, DNA extraction, and various searches involving criminal offenders.

⁹¹ My data also included three excessive force claims litigated in the criminal context (1.4%) and two excessive force claims litigated in criminal prosecutions of law enforcement officers under 18 U.S.C. § 242 (about 1%).

⁹² The literature is replete with generalizations about the location of Fourth Amendment litigation. See, e.g., Laurin, *supra* note 64, at 85 (claiming, based on three anecdotal examples, that “[w]here criminal and civil litigation both afford mechanisms for enforcing criminal procedure rights, the Court is likely to channel enforcement into one regime or the other”); William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 450 (1997) (“[F]or purposes of defining Fourth Amendment law, exclusionary rule litigation is Fourth Amendment litigation.”). My data allow objective evaluation of these generalizations.

Figure 3: Percent of Claims Litigated in Civil and Criminal Context by Doctrinal Category



In suits where Fourth Amendment issues are raised, the government is somewhat more likely to win. This was true across both civil and criminal cases: the government won in 90% of claims raised in criminal cases and 52% of all claims raised in cases brought under § 1983, and the government success rate in civil cases rose to 61% when claims alleging excessive force were excluded. Figure 4 depicts the likelihood of success by each party in each context for all Fourth Amendment claims, while Figure 5 depicts the same information for all claims except excessive force claims.

Figure 4: Context of Litigation and Likelihood of Success⁹³

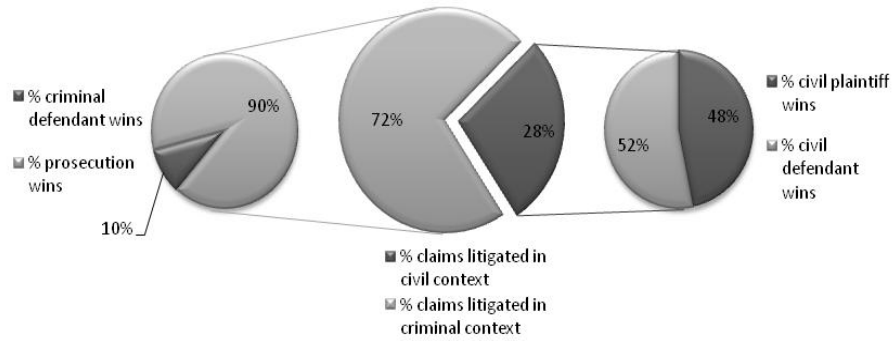
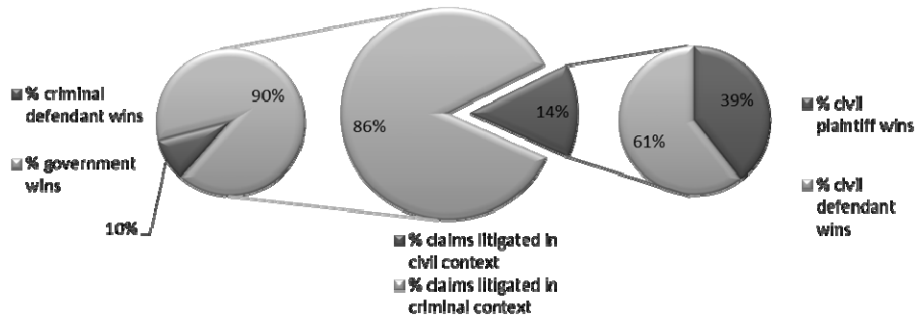


Figure 5: Context of Litigation and Likelihood of Success Excluding Excessive Force



⁹³ Both Figure 4 and Figure 5 include only cases litigated in the civil and criminal contexts – that is, they exclude the 1% of cases litigated in other contexts that appear in Figures 1 and 2.

These results confirm two existing intuitions. First, most Fourth Amendment law is made in criminal proceedings.⁹⁴ During the years studied, only 28% of all Fourth Amendment claims were adjudicated in civil proceedings. And when excessive force claims are removed from the calculation, only 14% of all Fourth Amendment principles were articulated in civil proceedings.

The second intuition my data confirm is that criminal defendants are less likely than civil plaintiffs to prevail on Fourth Amendment claims. During the time period studied, the plaintiff prevailed on 48% of all Fourth Amendment claims raised in the civil context: 52% of excessive force claims and 39% of all other claims excluding excessive force claims litigated in civil proceedings. Criminal defendants were about four times less likely to succeed on claims other than excessive force claims, with only a 10% success rate in those cases. These percentages reflect the rate of success in published appellate cases⁹⁵ and therefore correspond to the number of instances of Fourth Amendment law articulation that favored civil plaintiffs and criminal defendants, the phenomenon I am studying here.

These data should not be read to measure the overall likelihood of success of either civil plaintiffs or criminal defendants who raise Fourth Amendment issues. For example, many criminal cases are summarily affirmed on appeal and not published.⁹⁶ Likewise, the data should not be read to say anything about the relative merits of civil and criminal cases. I suspect that the average criminal case in the data set is less meritorious than the average civil case because criminal defendants have few disincentives to press even their weakest claims, while civil plaintiffs often have monetary constraints and may be more likely to heed their attorneys' advice about which claims are best. There is also some anecdotal evidence for the proposition that criminal defendants, who are highly motivated and guaranteed counsel, are more likely to appeal adverse suppression rulings than the government, which balances other considerations such as fairness and resource constraints.⁹⁷

With these caveats about the relative merits of civil and criminal claims, the fact remains that the body of law catalyzed by civil plaintiffs is more

⁹⁴ See also RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 336 (2d ed. 2005) (estimating the number of suppression motions at about 175,000 annually, with the number of civil lawsuits against police numbering only a few thousand and criminal prosecutions against police officers a few dozen).

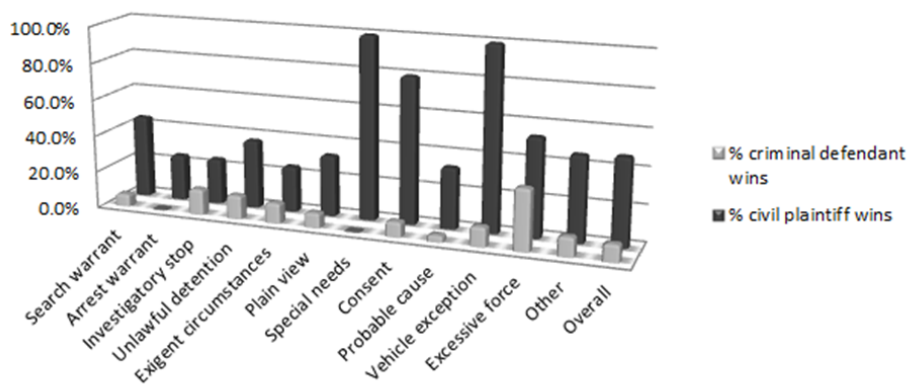
⁹⁵ I limited my examination to published cases in part because so many unpublished criminal decisions do not describe the facts or the claims raised in any detail. Appellate courts virtually always publish decisions that reverse district court holdings. Coupled with the fact that the defendant lost in most criminal cases presented on appeal, this suggests that defendant victories are likely to be overrepresented among published opinions.

⁹⁶ In other words, I suspect that the percentage of all criminal defendants who prevail on suppression motions at the appellate stage is actually much lower than these numbers suggest.

⁹⁷ I thank Jonathan Witmer-Rich for this insight.

hospitable to the Fourth Amendment proponent. Although the Fourth Amendment proponent's success rate varied depending on the category into which the claim fell, a Fourth Amendment civil plaintiff was more likely to prevail than a Fourth Amendment criminal defendant in *every* category of claim, although the magnitude of the discrepancy varied from one category to the next. For example, civil plaintiffs were about nine times more likely to prevail on claims involving consent searches or challenges to probable cause, six times more likely to prevail on claims involving search warrants, and four times more likely to prevail on claims involving plain view searches than were criminal defendants who asserted rights that fell into those categories.

Figure 6: Likelihood of Success in Civil and Criminal Context by Doctrinal Category



The most important points to draw from the data are these. First, Fourth Amendment law is not articulated equally in civil and criminal contexts. Far more Fourth Amendment law is made in the criminal context than in the civil context. Second, the disparity differs from one doctrinal category to the next. Some rights are made almost exclusively in the criminal context; others are made predominantly in the civil context. Third, as a general matter, civil plaintiffs are more likely to succeed in advocating an expansive view of the Fourth Amendment than are their criminal counterparts, but we should not infer from this statistic that judges are more likely to rule in favor of civil plaintiffs, because the claims of the two groups may not be equally meritorious. And finally, the disparity in likelihood of success also varies from one doctrinal category to the next. The next Part explores the implications of these findings.

III. THE FOURTH AMENDMENT: A NARRATIVE BIOGRAPHY

The data presented in Part II reveal that most types of Fourth Amendment claims are litigated almost entirely in either the criminal context or the civil damages context. This provides an opportunity to analyze the effect of single context litigation by examining how the remedial, factual, and procedural idiosyncrasies of each context affect the substantive law that courts create there.

To that end, I first develop a general account of the influence of each context on Fourth Amendment rights-making. I then substantiate this account using case law from two areas of Fourth Amendment doctrine: investigatory stops and excessive force. In each instance, the contour of the right clearly reflects the characteristics of the single context in which it is litigated. The resulting doctrine overemphasizes some interests to the exclusion of others. I contrast such single-context rights-making with the development of unlawful detention doctrine, one of the few Fourth Amendment rights that *is* litigated at a meaningful rate in both the criminal and the civil damages contexts and that, as a result, reflects a more balanced and comprehensive consideration of relevant interests.

A. *Three Influences*

As I outlined in Part I.B, a considerable literature examines the relationship between rights and remedies and the influence of remedies in shaping the scope of rights. I define context more broadly to encompass not only the influence exerted by available remedies but also the factual circumstances and procedural posture associated with the litigation of claims in particular contexts. Of course, these factors are not an exhaustive list of possible contextual influences. I have chosen to focus on them because of their importance in influencing courts' articulations of Fourth Amendment principles in civil and criminal proceedings.⁹⁸

1. Remedies

In criminal proceedings, the exclusionary remedy influences how courts think about Fourth Amendment rights. The consequences of exclusion are extreme. Often the charges against the defendant are reduced or even dismissed. As a result, recognizing and remedying a violation arguably creates a windfall for the criminal defendant. Judges and justices view exclusion of evidence as strong medicine. In *Hudson v. Michigan*, for example, the majority described exclusion as a "massive remedy" resulting in the "jackpot" of a "get-out-of-jail-free card" and a "last resort" rather than a "first impulse."⁹⁹

⁹⁸ Other influences – for example, the availability and motivation of counsel, which I discuss only briefly here – would provide fruitful avenues for future research.

⁹⁹ *Hudson v. Michigan*, 547 U.S. 586, 591, 595, 599 (2006).

Commentators generally agree that courts are hesitant to allow exclusion in marginal cases and that this desire to avoid exclusion shapes outcomes. As Akhil Amar puts it, “Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated.”¹⁰⁰ Other commentators consistently express the same sentiments.¹⁰¹ The data I have collected do reveal a lesser likelihood of success on Fourth Amendment claims in criminal cases where exclusion is the remedy.¹⁰² I do not want to overstate the significance of this statistic, which is partially explained by the stronger incentives of criminal defendants to bring claims, the free representation defendants receive, and the resultant higher percentage of non-meritorious claims in the criminal context. Still, the idea that judges’ aversion to exclusion affects outcomes comports with common sense and certainly does not contradict available data.

More importantly, the exclusionary rule not only shapes outcomes but also dictates the focus of judicial inquiry, the structure of analysis, and the contours of the resulting doctrine. William Stuntz explains, “[I]n exclusionary rule cases, judicial attention naturally focuses on the propriety of finding things: on what the police can look for, and where, and when, and on what they have to know before they look.”¹⁰³ When exclusion is the remedy, the evidence the police found is always front and center. Stuntz concludes, “The result is a bias toward rules limiting evidence gathering as opposed to the other sorts of things

¹⁰⁰ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994).

¹⁰¹ See, e.g., Samuel Estreicher & Daniel P. Weick, *Opting for a Legislative Alternative to the Fourth Amendment Exclusionary Rule*, 78 UMKC L. REV. 949, 951 (2010) (“The prospect of suppression is thought to be so problematic that it acts as a negative hydraulic causing judges to distort substantive Fourth Amendment law in order to avoid this consequence.”); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisted*, 95 CALIF. L. REV. 1387, 1407 (2007) (“Difficulties arise in borderline cases, where the mere fact that the constable blundered seems an inadequate reason to set the criminal free. One suspects that many courts in many places strain to avoid that result.”); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 403 (“[R]emoving the threat of exclusion should make judges who hear Fourth Amendment claims more willing to discredit factual assertions made by the police.”); George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 149 (1993) (arguing that exclusionary remedy “encourages judges to warp Fourth Amendment doctrine and engage in creative fact-finding”).

¹⁰² During the time period that I studied, the plaintiff prevailed on 39.2% of all Fourth Amendment claims litigated in civil proceedings, excessive force claims excluded. Criminal defendants were four times less likely to succeed, with only a 9.5% success rate in those cases.

¹⁰³ Stuntz, *supra* note 94, at 450.

police might do that one would want to regulate, such as striking people or shooting at them.”¹⁰⁴

The money damages remedy available under § 1983 creates its own set of incentives.¹⁰⁵ Some alleged Fourth Amendment violations may be difficult to quantify in financial terms. How does one value the harm to an innocent plaintiff illegally detained for five minutes in order to perform a stop and frisk that yielded no evidence? In civil suits, a court’s willingness to acknowledge a constitutional violation may be greater for injuries that translate easily to monetary terms, such as medical bills for injuries suffered or valuation of property damage.

Relatedly, the damages remedy calls into focus the harm to the plaintiff. This focus does not necessarily cut in favor of or against an expansive version of the Fourth Amendment; that will depend on the harm’s severity and whether the court perceives that the plaintiff did something to deserve the harm. But focusing on harm distances the analysis from the various law enforcement interests at stake: either the government must act on its own initiative to explain why various policing techniques were used, or the court must solicit that information.

Perhaps most importantly, the money damages remedy exerts a powerful influence on the development of Fourth Amendment rights in suits under § 1983 because of its close connection to the previously discussed¹⁰⁶ qualified immunity defense. Qualified immunity has become an increasingly difficult hurdle for plaintiffs to overcome.¹⁰⁷ Beyond the obstacles posed by the doctrine itself, qualified immunity also interacts with pretrial procedure and other features of the civil litigation context to frustrate plaintiffs’ claims. The Supreme Court has held that a plaintiff’s complaint must “plead factual matter that, if taken as true, states a claim that [the government official] deprived him of his clearly established constitutional rights.”¹⁰⁸ As Alan Chen observes, this requirement forces plaintiffs not only to plead in anticipation of an affirmative defense but also to do so with heightened specificity to demonstrate the law was clearly established.¹⁰⁹

Due to the obstacles it presents for plaintiffs, qualified immunity suppresses lawmaking in a couple of ways. First, it discourages plaintiffs from bringing

¹⁰⁴ *Id.*

¹⁰⁵ Plaintiffs may also seek injunctive and declaratory relief under § 1983. After *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), however, the threshold for establishing standing is so high that these remedies are unavailable to most plaintiffs.

¹⁰⁶ See *supra* Part I.A for a thorough discussion of qualified immunity doctrine.

¹⁰⁷ See Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. REV. 889, 910-11 (2010); Karlan, *supra* note 32, at 886-87.

¹⁰⁸ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1943 (2009).

¹⁰⁹ Chen, *supra* note 107, at 912; see also Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 80 (1997).

suit at all by tasking them with the formidable burden of showing that the law was clearly established. Second, where plaintiffs do file suit, the current qualified immunity analysis allows courts to resolve cases without addressing the merits. Instead, the court can simply hold that the law was not clearly established without doing anything further to clarify those legal principles.¹¹⁰ Thus, as a direct result of qualified immunity, the overall rate of lawmaking is lower than it would be otherwise, resulting in fewer opportunities to refine the general principles of reasonableness that apply in many areas of Fourth Amendment doctrine.

The effect of *Pearson* in further slowing lawmaking has not yet been empirically assessed, although I suspect it may be overstated by some commentators. Many courts do continue to articulate constitutional principles following *Pearson*, and a return to the baseline level of constitutional law articulation that preceded the Court's initial advocacy of merits-first adjudication in *Siegert v. Gilley*¹¹¹ more than twenty years ago seems unlikely. My guess is that the habit of deciding constitutional issues will prove persistent to some degree, although *less* lawmaking will likely occur in qualified proceedings under *Pearson* than under *Saucier*.

More importantly, even where plaintiffs do proceed with Fourth Amendment suits that result in lawmaking, qualified immunity tends to distort the ensuing legal principles. Sheldon Nahmod argues that the presentation of constitutional issues in the context of an affirmative defense – qualified immunity – tends to “privilege” defendants’ narratives while “marginaliz[ing]” those of plaintiffs.¹¹² Likewise, in previous work, I argue that qualified immunity determinations exert a gravitational pull on courts’ resolutions of substantive constitutional issues: where a court knows it will not grant a remedy to the plaintiff in the form of money damages, the court may be disinclined to acknowledge the existence of a constitutional violation.¹¹³ This is particularly true for Fourth Amendment doctrines involving reasonableness, such as excessive force, where the merits and immunity determination are especially difficult to separate.¹¹⁴ The effect of *Pearson* on this mechanism remains to be seen, but it seems probable that in at least some cases courts will either make law hostile to constitutional rights or refrain from making law at

¹¹⁰ As noted in Part I.A, the Supreme Court attempted a short-lived experiment in requiring resolution of the constitutional issue in *Saucier v. Katz*, with the explicit goal of facilitating the development of the law from case to case, but the Court overruled that approach in 2009 in *Pearson*.

¹¹¹ 500 U.S. 226, 231 (1991).

¹¹² Sheldon Nahmod, *The Restructuring of Narrative and Empathy in Section 1983 Cases*, 72 CHI.-KENT L. REV. 819, 821 (1997).

¹¹³ See Leong, *supra* note 19, at 702-08.

¹¹⁴ See Nancy Leong, *Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries*, 105 NW. U. L. REV. 969 (2011).

all, thereby increasing the proportion of law that is hostile to constitutional rights.

Of course, the exclusionary remedy and the civil damages remedy are not separated by an impenetrable barrier. In recent work, Jennifer Laurin notes the influence of qualified immunity doctrine on the exclusionary rule. She demonstrates that the good faith exception to the exclusionary rule was “borrowed” from the reasonable mistake standard of qualified immunity and explains how the two doctrines have “converged” as a result of that initial borrowing.¹¹⁵ One consequence of this convergence is that “where the good faith exception render[s] the exclusionary rule available or unavailable, an equivalent outcome would generally flow in the realm of civil liability by operation of qualified immunity.”¹¹⁶ Laurin’s claim that those specific doctrines are facially similar is persuasive. But even given that similarity, the fact that certain categories of Fourth Amendment claims are litigated only in one context means that other contextual factors – the factual circumstances, the procedural posture, whether the remedy focuses on money or on evidentiary exclusion – nonetheless cause the *contour* of the articulated rights to vary.¹¹⁷ Thus, to the extent that certain aspects of the exclusionary remedy and the § 1983 money damages remedy have converged, other contextual factors continue to differentiate the law made in suppression hearings and civil damages actions.

2. Facts

The characteristics of the parties themselves and the circumstances surrounding the alleged Fourth Amendment violation also influence rights-making. That criminal defendants and civil plaintiffs are not, in the aggregate, similarly situated is uncontroversial. Criminal defendants tend to be poor, uneducated, and generally unsympathetic. Relative to this baseline, civil plaintiffs tend to be advantaged, and their alleged victimization may elicit judicial sympathy. Further, criminal cases presenting Fourth Amendment issues are by definition cases in which a search yielded some kind of incriminating evidence, often contraband. Thus, criminal defendants are generally either suspected or convicted of socially undesirable behavior. In contrast, civil plaintiffs are never charged with a crime in the immediate proceeding and are often entirely innocent of criminal wrongdoing.¹¹⁸

¹¹⁵ Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 688 (2011).

¹¹⁶ *Id.* at 711.

¹¹⁷ I do not read Laurin’s argument to create tension with mine; rather, I believe they raise separate but complementary concerns. Her focus is on the availability of remedy. Mine is on the law that actually results depending on where a right is actually litigated – a circumstance resulting from the availability of remedy.

¹¹⁸ Of course, a § 1983 action may be brought following a criminal proceeding, but *Heck v. Humphrey* bars such actions to the extent they would imply the invalidity of a conviction,

Criminal defendants thus inspire hostility to Fourth Amendment rights. When courts see such rights asserted by defendants as a means to exclude evidence strongly indicating their guilt, they are likely to view the claims of these unsympathetic proponents more skeptically. If a court encounters a claim for damages under § 1983 that is factually identical in every way save for the presence of contraband, the same skepticism would not ensue.

It matters, therefore, that most claimed Fourth Amendment violations are litigated in the criminal context – 72% of all claims and 86% of all claims not including excessive force.¹¹⁹ As a result, judges encounter an unsympathetic criminal fact pattern far more frequently than a relatively sympathetic civil fact pattern. The prevalence of criminal defendants as Fourth Amendment enforcers has a cumulative effect on judges' thinking. Beyond intuition and common sense, well-established principles of cognitive psychology suggest that criminal facts affect judicial analysis. Christopher Slobogin cites two well-known and widely-accepted heuristics that may lead courts to rule against criminal defendants. The first heuristic is representativeness – “the common human tendency to reason by anecdote and stereotype rather than through the use of group-based knowledge.”¹²⁰ Because “drug dealers and their like represent the typical searched person to the suppression hearing judge,”¹²¹ those judges' rulings may come to reflect principles best suited to that small subset of the population rather than principles that take account of the many innocent people searched every day. The second heuristic is availability – “the tendency to make predictions about whether an event will occur based not on the actual frequency of the event but on one's memory of how often it occurs.”¹²² Because in suppression hearings virtually everyone is guilty of possessing contraband – or at least of possessing incriminating evidence – judges will likely come to view police searches as accurate and likely to yield evidence. As a result, they are likely to craft rules that are deferential to the police.

These two heuristics are generally accepted within cognitive psychology scholarship¹²³ and have gained traction with legal scholars as well.¹²⁴ For

unless the underlying conviction has been reversed, expunged, or otherwise nullified. 512 U.S. 477, 486-87 (1994).

¹¹⁹ See *supra* Part II figs.4 & 5.

¹²⁰ Slobogin, *supra* note 101, at 403; see also Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 23, 24-25 (Daniel Kahneman et al. eds., 1982).

¹²¹ Slobogin, *supra* note 101, at 404.

¹²² *Id.*

¹²³ See, e.g., THOMAS GILOVICH, DALE GRIFFIN & DANIEL KAHNEMAN, HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 2-15 (2002); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1130 (1974).

¹²⁴ Running the search “representativeness /p availability /p heuristic” in the JLR database on Westlaw yields over two hundred results, the majority from the past decade.

Fourth Amendment doctrine in particular, the heuristics are likely to influence judges' cognitive processes. Fourth Amendment doctrine is replete with abstract concepts such as reasonable suspicion, totality of the circumstances, and probable cause. The lack of concrete guidelines removes one potential check on judges' vulnerability to these common heuristics.

Naturally, an array of other cognitive factors may also influence judges' thinking as they adjudicate Fourth Amendment issues. But facts are so fundamental to any legal dispute – and particularly Fourth Amendment disputes, with their broad standards of reasonableness – that the unappealing facts undergirding criminal proceedings likely influence both the outcome and the contours of the claims litigated in such proceedings.

3. Procedures

In criminal proceedings, most Fourth Amendment rights-making involves the adjudication of weak claims. This tendency exists because only appellate rights-making binds future courts, and better Fourth Amendment claims usually do not reach appellate courts. At the outset, almost ten percent of all criminal charges filed in federal court conclude in dismissal.¹²⁵ The Fourth Amendment arguments of defendants whose cases are dismissed are likely to be stronger than those of defendants whose cases terminate in a plea or a verdict. The problem is that this subset of cases never reaches appellate lawmakers. Furthermore, even if a defendant wins her motion to suppress or is acquitted by a jury, the Fourth Amendment issue her case raises is unlikely to reach an appellate court; courts tend to see cases where the defendant has *lost* her motion to suppress and has subsequently been convicted by a jury or entered a conditional guilty plea.¹²⁶

The posture in which most Fourth Amendment rights-making occurs has several consequences. First, at the appellate level the court only reviews the facts for clear error. Assuming the defendant lost at the trial level, this factual review is conducted in the light most favorable to the government.¹²⁷ With respect to swearing contests between police officers and defendants, this leaves the district court's credibility determinations untouched, and where the defendant has lost, such determinations virtually always favor the officer. The result is that the bulk of Fourth Amendment law is made in situations where the factual narrative is heavily slanted against the proponent of the Fourth Amendment right. Second, by the time a criminal case reaches an appellate court, the cost of disrupting the lower court's decision is quite high. In a case on appeal, the lower court has already ruled against the defendant on a motion

¹²⁵ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2008 – STATISTICAL TABLES 18 tbl.4.2 (2010), available at <http://www.bjs.gov/content/pub/html/fjsst/2008/fjs08st.pdf>.

¹²⁶ Occasionally the government files an interlocutory appeal from the grant of a suppression motion, but such cases are relatively rare.

¹²⁷ See *United States v. Simpson*, 520 F.3d 531, 534 (6th Cir. 2008).

to suppress, and in many instances there has already been a trial at which a jury found the defendant guilty. As a result, reversing a conviction negates a great deal of process as well as a considerable investment of resources by both the trial judge and jury. This weighty procedural baggage may influence a judge to view criminal defendants' claims skeptically on appeal. Finally, even assuming that a judge is wholly unmoved by the determinations of previous decision makers, defendants who have lost are, in the aggregate, less likely to have convincing Fourth Amendment claims than defendants who have won.

Courts' ex post evaluation of evidence-gathering poses a separate type of procedural hurdle for defendants seeking to prove a Fourth Amendment violation. It is challenging to write an opinion holding that the police lacked probable cause to believe that the evidence that they in fact found was in the place they were in fact looking. Thus, judges' ex post assessments of probable cause may be biased by the fact that incriminating evidence was actually discovered.¹²⁸ Moreover, law enforcement officers testifying at suppression hearings may tailor their testimony – either consciously or subconsciously – to validate the actual contours of the search.¹²⁹ This ex post perspective augments the likelihood that judges considering Fourth Amendment issues in suppression hearings will come to see the contour of the right the same way the police do.

In the context of civil damages actions, by contrast, Fourth Amendment lawmaking generally occurs when the appellate court hears an interlocutory appeal from a denial of qualified immunity or an appeal from a grant of qualified immunity on a motion to dismiss. An appellate court that holds in favor of a plaintiff does not disrupt a weighty process akin to that leading to a criminal conviction and appeal. Moreover, such a decision creates relatively minimal redundancy – it simply allows the case to move forward, rather than requiring an entirely new trial. In short, the consequences of creating law recognizing a Fourth Amendment violation are much costlier in the criminal context than in the civil context; the fact that far more law is made in the criminal context therefore seems likely to diminish courts' overall willingness to recognize Fourth Amendment rights.

Still, longstanding principles of preclusion and collateral attack influence the development of Fourth Amendment rights in actions for money damages. Many claims brought under § 1983 result from an incident that also gives rise to criminal charges against the plaintiff. Such a criminal proceeding casts a shadow over civil adjudication of § 1983 claims. This can occur formally as the result of preclusion. Under *Heck v. Humphrey*,¹³⁰ if a successful § 1983 action for damages would imply the invalidity of a criminal conviction, a plaintiff cannot pursue the claim until the underlying conviction is reversed,

¹²⁸ William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 915-18 (1991).

¹²⁹ *Id.* at 916-17.

¹³⁰ 512 U.S. 477 (1994).

invalidated, expunged, or otherwise nullified.¹³¹ Alternatively, the criminal proceeding can informally influence the civil proceeding when a judge in a civil suit is aware of the outcome of a prior criminal proceeding. Even where a criminal conviction does not technically preclude a civil action, the fact that one has arisen out of the facts at issue inevitably influences courts' analysis. For example, the knowledge that an excessive force plaintiff was convicted of a crime – particularly a violent one – indisposes a court to hold that excessive force was used. The court may, on some level, believe that the violent offender deserved what she got.

From a procedural perspective, then, the outlook for both criminal defendants and civil plaintiffs is rather bleak. The posture in which Fourth Amendment disputes arise induces judicial skepticism of a party's claim that law enforcement officers violated her Fourth Amendment rights. The strength of that influence may vary from one case to the next, but it affects both contexts.

The remedies, facts, and procedures associated with particular contexts allow an inference that the context in which a Fourth Amendment issue is litigated will influence the scope of the ensuing right. Of course, one might argue that, despite these factors inherent to the adjudication of rights in the criminal context, courts would still be able to craft Fourth Amendment principles mediating between the unsavory defendants before them and the general population. But such rule-crafting may be more easily proposed than executed. If, for example, judges do not see factual situations involving innocent citizens searched by the police, they may simply assume that the police only search the guilty.

To buttress the descriptive account developed in this section, I next analyze three areas of doctrine that illustrate how the remedial, factual, and procedural components of context result in distortion. First, I examine investigatory stops, also known as *Terry* stops or stop and frisks, for which 95% of litigation takes place in the criminal context. I then turn to the litigation of excessive force claims, of which 98% of claims are raised in the civil context. Finally, by way of contrast, I examine unlawful detention claims, of which 60% are litigated in the criminal context and the rest in the civil context, to examine how rights-making occurs differently when not confined to a single context.

B. *Investigatory Stops*

The law governing investigatory stops – police interactions with citizens that involve only a limited search and therefore require only reasonable suspicion for justification – begins with *Terry v. Ohio*.¹³² In *Terry*, Officer McFadden – a thirty-nine year veteran of the force – noticed Terry and two

¹³¹ *Id.* at 486-87.

¹³² 392 U.S. 1 (1968); see also John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 767-769 (1998) (describing *Terry's* background and the circumstances surrounding its decision).

other men walking back and forth on the sidewalk outside a jewelry store and peering in the store window.¹³³ He suspected the men of planning a robbery and feared that they might be armed.¹³⁴ McFadden approached the men, identified himself, and asked their names.¹³⁵ When they “mumbled something” in response, he “grabbed petitioner Terry, spun him around so that they were facing the other two . . . and patted down the outside of his clothing,” finding a pistol in the pocket of Terry’s overcoat.¹³⁶

The Supreme Court held that “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous,” the officer “is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.”¹³⁷ To justify such a stop, a law enforcement officer must be able to point to “specific and articulable facts which, taken together with rational inferences from those facts,” provide more than an “inchoate and unparticularized suspicion or ‘hunch’” of criminal activity.¹³⁸ In subsequent cases, the Court emphasized that *Terry*’s “reasonable suspicion” standard is “less demanding . . . than probable cause” and “considerably less than preponderance of the evidence.”¹³⁹ *Terry* requires a holistic, contextual approach to evaluating the legality of a stop: reasonable suspicion is a “nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”¹⁴⁰

Terry and its progeny have prompted criticism. Many have labeled the reasonable suspicion standard so vague as to be meaningless.¹⁴¹ Others worry that it rests too much discretion in the hands of police officers, providing little to no restraint on officers’ abilities to search whomever they wish for any

¹³³ *Terry*, 392 U.S. at 5-6.

¹³⁴ *Id.* at 6.

¹³⁵ *Id.* at 6-7.

¹³⁶ *Id.* at 7.

¹³⁷ *Id.* at 30.

¹³⁸ *Id.* at 21, 27.

¹³⁹ *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

¹⁴⁰ *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (internal quotation marks omitted).

¹⁴¹ *See, e.g., United States v. Cortez*, 449 U.S. 411, 417 (1981) (stating that lower courts have used a broad array of terms in attempting to describe what constitutes reasonable suspicion, such as “articulable reasons” and “founded suspicion,” none of which provide clear guidance that can be applied as a per se rule); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393-94 (1974) (describing the vagueness of the *Terry* standard).

reason.¹⁴² Still others argue that *Terry* authorizes harassment of minorities and the poor by implicitly sanctioning police targeting of those who “look suspicious” to them.¹⁴³

Relatively little attention, however, has focused on how the predominantly criminal context in which investigatory stops are litigated has shaped the development of the law. Because exclusion of evidence is the remedy in such proceedings, courts tend to focus on what was done to find evidence rather than on other aspects of the interaction between officer and citizen, including the use of force. *Terry* itself is instructive on this point. The Court’s description of the initial physical contact between Officer McFadden and Terry is vivid: the officer grabbed the suspect and spun him around. Yet this striking use of force is wholly absent from the subsequent analysis. Indeed, later references to that initial contact are sanitized. The decision states that McFadden “took hold of [Terry] and patted down the outer surfaces of his clothing.”¹⁴⁴ The Court’s analysis of the constitutionality of the interaction repeatedly glosses over the initial use of force: the issue is “whether there was justification for McFadden’s invasion of Terry’s personal security by searching him for weapons”; the individual’s concern is that “[e]ven a limited search of the outer clothing for weapons . . . must surely be an annoying, frightening, and perhaps humiliating experience”; and the opinion ultimately holds that under the circumstances an officer may “conduct a carefully limited search of the outer clothing.”¹⁴⁵ At one point, the Court observes that “Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed,”¹⁴⁶ never mentioning whether Officer McFadden’s grabbing and spinning of Terry was also minimally necessary.

The remedial context explains the Court’s preoccupation with the extent of Officer McFadden’s examination of Terry’s clothes and pockets. Terry sought the only remedy available to him in a criminal proceeding – that is, he sought to invoke the exclusionary rule to prevent the court from admitting the revolver seized from him.¹⁴⁷ The result is that the Court’s focus is entirely on the search of Terry’s outer clothing, and the prior use of force is written out of the analysis. As Stuntz observes, “If McFadden had discreetly approached Terry

¹⁴² See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 585-88 (1997).

¹⁴³ See, e.g., Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 225-36 (1983); Randall S. Susskind, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 334-38 (1994); Lisa Walter, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 258-66 (2000).

¹⁴⁴ *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (emphasis added).

¹⁴⁵ *Id.* at 23-24, 30.

¹⁴⁶ *Id.* at 30.

¹⁴⁷ See *id.* at 1-2.

and his friends, quietly telling them not to walk away and to empty their pockets, never laying a hand on them[,] . . . it would have made no legal difference.”¹⁴⁸

Following *Terry*'s lead, courts routinely ignore the use of force in analyzing the legality of an investigatory stop. In *United States v. Ruidiaz*,¹⁴⁹ for example, the defendant swore at police officers and refused to step out of his car.¹⁵⁰ One officer “grabbed the defendant’s right arm and pulled him from the vehicle,” while another “came to his partner’s assistance,” “grabbed the defendant’s left arm and helped to force the defendant to the ground.”¹⁵¹ A subsequent pat-down revealed a “loaded handgun tucked into the defendant’s waistband.”¹⁵² This force is surely not negligible, yet it receives no mention in the First Circuit’s legal analysis. Likewise, in *United States v. Robinson*,¹⁵³ officers struggled to subdue an individual suspected of possessing a weapon, tasered him, and recovered a loaded weapon from his person.¹⁵⁴ The use of a taser is extreme force – indeed, one organization has argued that it should be viewed as lethal force¹⁵⁵ – yet the Seventh Circuit does not even mention it in evaluating the legality of the investigatory stop that led to the recovery of the defendant’s weapon.¹⁵⁶

In other instances – again following *Terry*'s lead – courts sanitize their description of force. In *United States v. Lucky*,¹⁵⁷ the police pulled over an SUV that matched the description of a car driven past a street corner shooting.¹⁵⁸ When the driver refused to step out of the vehicle, the officers “pulled” him from the car, “placed” him on his stomach, and handcuffed him.¹⁵⁹ Subsequently, the police “rolled [him] over,” at which point they saw a

¹⁴⁸ William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1066 (1995). Stuntz’s close analysis of *Terry* has influenced my own. But although Stuntz traces the analysis in *Terry* primarily to the Fourth Amendment doctrine’s emphasis on privacy – rather than on other considerations, such as coercion – my own conclusion is somewhat different. In my view, the fact that the *Terry* issue was decided in a criminal proceeding, with the exclusionary rule as a remedy, is the explanation for the shape of the Court’s analysis.

¹⁴⁹ 529 F.3d 25 (1st Cir. 2008).

¹⁵⁰ *Id.* at 27-28.

¹⁵¹ *Id.* at 28.

¹⁵² *Id.*

¹⁵³ 537 F.3d 798 (7th Cir. 2008).

¹⁵⁴ *Id.* at 800.

¹⁵⁵ *Tasers: Unnecessary and Deadly Force*, AMNESTY INT’L USA (Mar. 25, 2009, 9:42 AM), <http://blog.amnestyusa.org/us/tasers-unnecessary-and-deadly-force/> (explaining that from June 2001 to March 2009 more than 334 people died after being shocked by tasers).

¹⁵⁶ *Robinson*, 537 F.3d at 801-02.

¹⁵⁷ 569 F.3d 101 (2d Cir. 2009).

¹⁵⁸ *Id.* at 103.

¹⁵⁹ *Id.*

gun tucked into his waistband.¹⁶⁰ Although the court's description of the events suggests that the defendant lay docilely while the police extracted him from his car, one strongly suspects that was not the case. Yet more colorful and more accurate descriptors are absent from the opinion.¹⁶¹

Sanitized descriptions of force similar to those in *Ruidiaz*, *Robinson*, and *Lucky* are commonplace,¹⁶² and those are the cases in which courts bother to include police use of force in their recitation of the facts. Because the degree of force is ultimately immaterial to the availability of exclusion, it seems likely that courts often fail to mention any use of force described by the briefs. Of course, this is not entirely a judicial oversight: lawyers who know that the use of force will not sway courts may not bother describing it in their briefs.

The immateriality of force to the analysis of investigatory stops has three consequences. The first is to make irrelevant the degree of force used to accomplish police objectives in investigatory stops. With respect to the cases I have described, I am not necessarily suggesting that the courts should have found a Fourth Amendment violation in any or all of them if the use of force was taken into account. But when courts are routinely mute as to the propriety of such force, their silence normalizes that force and inures us to its use. Indeed, silence implicitly sanctions the use of force, signaling to officers that such conduct is acceptable. Officers know that it will not matter, for purposes of determining whether evidence must be excluded, if a suspect promptly steps out of his car in response to a polite request or is yanked from his vehicle by one arm and then pinned to the ground. The result with respect to exclusion is the same in either case, so there is no incentive for police to use the least effective level of force rather than the most efficient level for their purposes. As a result, the use of moderate force in investigatory stops – justified only by the low quantum of reasonable suspicion – has become depressingly common and wholly unremarkable.¹⁶³

¹⁶⁰ *Id.*

¹⁶¹ See also *United States v. Vickers*, 540 F.3d 356, 359 (5th Cir. 2008) (stating that the defendant was “subdued” – strongly suggesting that a struggle took place – yet providing no details regarding that struggle).

¹⁶² See, e.g., *United States v. Stachowiak*, 521 F.3d 852, 854 (8th Cir. 2008) (failing to mention force in its analysis when the suspect was “brought to the ground and handcuffed” after he obeyed a police officer’s command to step out of his vehicle but then “immediately attempted to pull away from the police officer”); *United States v. Thomas*, 512 F.3d 383, 386 (7th Cir. 2008) (failing to note in its Fourth Amendment analysis that the officer “grabbed” the defendant’s arm and that “a struggle ensued while” officers attempted to handcuff the defendant and continued until an officer threatened to tase the defendant); *United States v. Ellis*, 501 F.3d 958, 960 (8th Cir. 2007) (failing to analyze force used by an officer who “grabbed” the defendant’s arm to detain him, using sufficient force that “the two men lost their balance and both fell onto the sofa”).

¹⁶³ I do not mean to imply that there are no checks on police use of force. A defendant who challenges an investigatory stop in a suppression hearing can later bring suit alleging excessive force under § 1983. But the obstacles to such suits are considerable, particularly

The second consequence of the immateriality of force is the overdevelopment of some areas of the law at the expense of others. Because searches of individuals during investigatory stops trigger the exclusionary remedy while the use of force does not, we see intensely detailed analyses of whether police officers can look in or feel the contents of jacket pockets and suitcases, while incidents involving police grabbing, pulling, and tackling suspects receive little mention.¹⁶⁴ Although surely both types of interaction are intrusive, most citizens view the latter as at least as troubling as the former.¹⁶⁵

The final consequence of judicial indifference to the use of force in investigatory stops is the artificial segregation of searching activities from the use of force. The result is an atomized version of the Fourth Amendment under which courts never evaluate the entirety of a police-citizen interaction because the available remedies provide no reason and no opportunity to do so. As a result, courts do not consider the effect that the use of force has on the dynamic of a situation – for example, the use or threat of force may result in nervous behavior in a suspect that in turn justifies an elevated level of “reasonable” suspicion and thus a search greater in scope.¹⁶⁶ Moreover, courts never consider whether the Fourth Amendment significance of the whole of an interaction might be greater than the sum of its parts. That is, a given interaction might raise Fourth Amendment concerns – about privacy, about coercion, about *reasonableness* – even if the constituent elements, neatly divided into searching activities and usage of force, do not.

Beyond the influence of the exclusionary remedy, the facts commonly presented in the criminal context – namely, the discovery of contraband – tend to validate police hunches in a way that encourages courts to apply the already-minimal reasonable suspicion standard even more deferentially. Challenges to investigatory stops in criminal proceedings arise, by definition, when a police search has yielded some sort of evidence and the defendant seeks to suppress it. The incriminating evidence the police found therefore frames and shapes courts’ analysis of the legality of the search – for example, the fact that Terry and his friends were armed implicitly legitimates the intrusion into their pockets and outer garments.

Thus, when courts are aware that evidence was found, they are more inclined to hold that the search was reasonable. One particularly clear example

for would-be plaintiffs who have been convicted of crimes.

¹⁶⁴ A comparison of *Terry* with *Ruidiaz*, *Robinson*, and *Lucky* is illustrative in this regard.

¹⁶⁵ See Stuntz, *supra* note 148, at 1065-67.

¹⁶⁶ Searches justified in part by a suspect’s “nervous” behavior are legion. See, e.g., *United States v. Branch*, 537 F.3d 328, 332 (4th Cir. 2008) (explaining that the officer noticed the suspect’s hand was shaking and that the suspect failed to make eye contact); *United States v. Branch*, 537 F.3d 582, 585 (6th Cir. 2008) (discussing how the officer noticed the suspect’s “level of nervousness”); *United States v. Donnelly*, 475 F.3d 946, 950 (8th Cir. 2007) (“Donnelly appeared nervous in a manner noticeably different from that of a shaken-up accident victim.”).

of such reasoning arose in *United States v. Wright*,¹⁶⁷ in which the First Circuit reversed the district court's determination that the police had reasonable suspicion to stop a suspect.¹⁶⁸ The police had arrested the defendant after he fled upon seeing a police caravan, running with "one hand on the right side of his sweatshirt, grabbing or holding onto the sweatshirt pocket."¹⁶⁹ When the officers caught up to the defendant, they frisked him, recovering a pistol from the pocket of his sweatshirt, and the defendant was arrested and charged with being a felon in possession of a firearm.¹⁷⁰

The defendant challenged the legality of the investigatory stop on the ground that the police lacked reasonable suspicion to stop him. The question, then, was whether the fact that he ran while holding onto his sweatshirt pocket established reasonable suspicion.¹⁷¹ At the suppression hearing, the district court judge summarized his reasoning: "Can I reason backwards [to establish reasonable suspicion] from the fact that what happened next was that the police officers discovered the weapon on Mr. Wright? I think it is undisputed he was carrying a weapon and I do so reason."¹⁷² As the First Circuit correctly held, such reasoning relies impermissibly on the fact that the defendant *did* have a weapon in concluding that the police had reasonable suspicion to stop him and perform the frisk that yielded that weapon.¹⁷³ As the court stated, "It is a central tenet of Fourth Amendment jurisprudence that the fruits of a search cannot be used to establish that same search's validity."¹⁷⁴

Because the district court's use of self-described "backwards" reasoning was so clear in *Wright*, the First Circuit was able to reverse. Ironically, the flagrancy of the error made the reversal possible. In many other cases, however, the error may be subtler. The district court's reasoning in *Wright* thus provides a window into judges' intellectual conundrum and demonstrates the difficulty in determining whether the police had reasonable suspicion to find a weapon while ignoring that they in fact *found* a weapon. That contraband is found in the vast majority of investigatory stop claims litigated in criminal proceedings surely influences the outcome of those claims, particularly given the minimal and essentially standardless quality of the reasonable suspicion standard. The result is that the jurisprudence governing investigatory stops renders prevailing on such claims extraordinarily difficult.

Finally, the procedural posture associated with rights-making in the criminal context influences the articulation of the law governing investigatory stops. For the reasons described in Part III.A.3, the deck is usually stacked against

¹⁶⁷ 485 F.3d 45 (1st Cir. 2007).

¹⁶⁸ *Id.* at 51.

¹⁶⁹ *Id.* at 47.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 51.

¹⁷² *Id.* at 48.

¹⁷³ *Id.* at 51-52.

¹⁷⁴ *Id.* at 51.

criminal defendants by the time an appellate court is in a position to make law regarding their claims. The cases described in this section – all appeals from losses by the defendant – lend support to this model.

Counterfactually, we might consider how *Terry* itself would have been decided with three differences: first, Terry was unarmed; second, the case was therefore brought as a claim for damages under § 1983; and third, the case reached the Supreme Court on an appeal from a victory by Terry. None of these differences is material to the Fourth Amendment analysis. The permissible scope of the police-citizen interaction is the same regardless of whether evidence is found, where the constitutionality of the interaction is litigated, and the procedural posture of the litigation. But these differences almost certainly would have yielded a different legal analysis. The Court would likely have examined McFadden's decision to grab and spin Terry in assessing the reasonableness of the entire interaction. The fact that no weapons were found might well have caused the Court to view McFadden's assessment of the situation with more skepticism. And the consequence of a decision in Terry's favor would not be overruling both a district court's decision on a motion to suppress *and* potentially vacating a jury verdict or a guilty plea.

Perhaps *Terry*'s outcome would not have been different had the claim been decided in the civil context. Reasonableness is a close issue when a police officer, outnumbered three to one, decides to forcibly grab, spin around, and frisk an individual whose behavior suggests an armed robbery may be imminent. But the decision of *Terry* in the idiosyncratic criminal context still influences the Court's analysis and, by extension, the contour of the resulting law.

C. *Excessive Force*

In contrast to the criminal grounding of investigatory stop doctrine, the doctrine of excessive force has evolved almost exclusively in the civil context in actions pursuant to § 1983. The Court laid the foundation for its excessive force jurisprudence in *Tennessee v. Garner*,¹⁷⁵ in which a police officer, responding to a report of a prowler, shot a fifteen-year-old boy in the back of the head as the boy attempted to escape over a fence.¹⁷⁶ The Court held that to determine the reasonableness of a police officer's use of force the court must balance an individual's interests against those of the government by looking at the "totality of the circumstances."¹⁷⁷ In *Garner*, the individual's "unmatched" interest in his own life and the social interest in "judicial determination of guilt and punishment" outweighed the government's interest in enforcing its criminal laws through the use of force.¹⁷⁸ Consequently, deadly force "may

¹⁷⁵ 471 U.S. 1 (1985).

¹⁷⁶ *Id.* at 3-4.

¹⁷⁷ *Id.* at 8-9.

¹⁷⁸ *Id.*

not be used unless it is necessary to prevent . . . escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”¹⁷⁹

The Court refined this analysis for cases involving non-deadly uses of force in *Graham v. Connor*,¹⁸⁰ in which the police handcuffed a diabetic man suffering from insulin shock, threw him into the back of a police car, and refused to allow him to drink orange juice brought by a friend in order to restore his blood sugar level.¹⁸¹ Reiterating the approach of balancing individual and government interests, the court then articulated a non-exhaustive list of factors useful in evaluating excessive force, including “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹⁸²

The Court’s most recent statement on excessive force came in *Scott v. Harris*.¹⁸³ That case involved a high-speed chase culminating in a police officer ramming the plaintiff’s car with a police cruiser.¹⁸⁴ The plaintiff’s car fell down an embankment and the plaintiff was left a quadriplegic. The Supreme Court held that the officer’s actions did not violate the Fourth Amendment.¹⁸⁵ The Court balanced governmental and individual interests, reasoning that the government’s interest in protecting civilians and officers outweighed the risk of injury posed by ramming the plaintiff’s car with the police cruiser.¹⁸⁶ In resolving the case, the Supreme Court explicitly stated that *Garner* could not be applied to the “vastly different facts” of the officer’s use of force in *Scott*; likewise, the Court paid little heed to the *Graham* factors.¹⁸⁷ *Scott* thus effectively eliminated any standards in the use of force beyond the vague balancing of state and individual interests implicit in the reasonableness test.

As commentators have observed, excessive force doctrine is extraordinarily abstract.¹⁸⁸ It is also under-theorized and fails to provide guidance to police officers.¹⁸⁹ It leaves ambiguous what interests excessive force doctrine is

¹⁷⁹ *Id.* at 3.

¹⁸⁰ 490 U.S. 386 (1989).

¹⁸¹ *Id.* at 388-89.

¹⁸² *Id.* at 396.

¹⁸³ 550 U.S. 372 (2007).

¹⁸⁴ *Id.* at 375.

¹⁸⁵ *Id.* at 381.

¹⁸⁶ *Id.* at 383-86.

¹⁸⁷ *Id.* at 383.

¹⁸⁸ See Rachel Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1143 (2008); John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 860-61 (2010).

¹⁸⁹ See Harmon, *supra* note 188, at 1127; Gregory Howard Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 HARV. BLACKLETTER J. 79, 89-90

intended to promote.¹⁹⁰ How courts should take those interests into account also is unclear.¹⁹¹ In part, these deficiencies are a function of the fact that other strands of Fourth Amendment law – particularly those influenced by the exclusionary paradigm – ignore force altogether.¹⁹² It is telling that one leading criminal procedure treatise devotes a mere two pages to the doctrine of excessive force, of which only a few sentences concern non-deadly force.¹⁹³ This uncertainty in legal authority results in a lack of institutional guidance and leaves police officers to exercise their own discretion.

The civil context affects the contour of excessive force doctrine. The money damages remedy determines which cases courts encounter. For example, suits in which the plaintiff suffers serious injury are overrepresented, while non-trivial uses of force resulting in minimal injury are relatively rare. The money damages remedy in § 1983 suits is also intimately linked to the qualified immunity defense.¹⁹⁴ That defense makes it more difficult for plaintiffs to recover in suits for money damages under § 1983. This effect is magnified in the excessive force context, where the defense is *uniquely* difficult for plaintiffs to overcome. The principles that the Supreme Court and the federal appellate courts have developed to govern police uses of force are so general that plaintiffs can seldom show that the law was clearly established.¹⁹⁵ The Court has offered no guidance beyond the vague reasonableness principles of *Garner*, *Graham*, and *Harris*, and appellate courts, understandably perplexed by these principles, have done little to clarify. My survey of appellate cases reveals that courts tend either to evaluate police procedures at such a minute level of detail that future courts have difficulty extracting a principle on which to decide a future case¹⁹⁶ or to apply these general principles unelaborated.¹⁹⁷ These decisions reveal appellate courts' struggle to apply the broad reasonableness standards handed down from the Supreme Court: although the result itself is plausible, the decisions convey principles providing limited help to future courts.

(1993).

¹⁹⁰ Harmon, *supra* note 188, at 1127.

¹⁹¹ *Id.*

¹⁹² See Stuntz, *supra* note 92, at 450 (“The result is a bias toward rules limiting evidence gathering as opposed to the other sorts of things police might do that one would want to regulate, such as striking people or shooting at them.”).

¹⁹³ WAYNE R. LAFAVE ET AL., 2 CRIMINAL PROCEDURE § 3.5(a), at 210-12 (3d ed. 2007).

¹⁹⁴ See *supra* Part III.A.1.

¹⁹⁵ See Harmon, *supra* note 188, at 1140-43.

¹⁹⁶ *E.g.*, *Jennings v. Jones*, 499 F.3d 2, 15 (1st Cir. 2007) (holding that excessive force occurred when an officer “increas[ed] pressure on [the plaintiff’s] ankle after [the plaintiff] stopped resisting for several seconds and stated that [the officer] was using force that hurt his previously injured ankle”).

¹⁹⁷ *E.g.*, *Nance v. Sammis*, 586 F.3d 604, 611 (8th Cir. 2009) (holding simply that “the right . . . to be free from the use of deadly force was clearly established in June 2007”).

As a result of this amalgam of overly general and overly specific legal principles amounting to little more than a command that officers act reasonably, courts are much more likely to find that the law was not clearly established and to grant qualified immunity in suits alleging excessive force.¹⁹⁸ In so doing, courts are likely to articulate law unfriendly to plaintiffs. The qualified immunity determination exerts a gravitational pull on the constitutional merits determination, rendering courts more skeptical of the merits of plaintiffs' constitutional claims in cases where they intend to grant qualified immunity.¹⁹⁹ If qualified immunity is more likely in suits alleging excessive force than in § 1983 suits generally, we can infer that the merits decision will also likely be more hostile to plaintiffs.

Qualified immunity also steers excessive force doctrine on a course less friendly to plaintiffs for another reason. The general command that police use only "reasonable" force seemingly duplicates the reasonableness requirement of the qualified immunity analysis.²⁰⁰ The Supreme Court has acknowledged as counterintuitive the idea that an officer might simultaneously act "unreasonably" within the meaning of the Fourth Amendment yet "reasonably" for purposes of qualified immunity analysis.²⁰¹ But the Court nonetheless insists that the two reasonableness standards are distinct, explaining that "[h]ad an equally serviceable term, such as 'undue' searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument . . . would not be available."²⁰²

Practically, however, the double reasonableness standard poses a serious barrier to plaintiffs' recovery and, by extension, to the articulation of excessive force doctrine favorable to plaintiffs. Diana Hassel observes that the "apparent duplication of the objective reasonableness standard of the Fourth Amendment in excessive force cases and the same objective reasonableness standard in the qualified immunity doctrine has created a nearly impenetrable defense to excessive force claims."²⁰³ Undoubtedly courts struggle to draw an

¹⁹⁸ See Jeffries, *supra* note 188, at 859-60 ("[Qualified immunity] works least well when constitutional doctrine is stated at a very high level of generality unaccompanied by particularizing doctrine."). Courts have been known to deny qualified immunity even where there was no previous case on point when the alleged force was obviously unreasonable, but such decisions are quite rare. See, e.g., *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1999) (holding that the excessive force suit survived summary judgment when, on facts taken in light most favorable to plaintiff, the officer broke the "docile," unresisting plaintiff's arm while handcuffing him, while acknowledging that it is a "very close case" and that the plaintiff's allegations were "barely" beyond the "hazy border between permissible and forbidden force").

¹⁹⁹ See Leong, *supra* note 19, at 701-06.

²⁰⁰ See *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

²⁰¹ *Id.* at 643.

²⁰² *Id.*

²⁰³ Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 118 (2009); see also Jeffries, *supra* note 160, at 861 (explaining that – practically speaking – the general

intellectually rigorous distinction between reasonableness in the constitutional sense and reasonableness in the qualified immunity sense because each form of reasonableness is situated at rather similar points on the excessive force continuum. The fact that qualified immunity requires courts to draw such a distinction places an extra buffer of reasonableness between officers and plaintiffs' challenges.

Qualified immunity in the excessive force context thus diminishes the likelihood that courts will articulate rights expansively. Excessive force doctrine is either too general or too specific to clearly establish principles in future cases. The overlapping reasonableness standards pose dauntingly high hurdles for plaintiffs to overcome.²⁰⁴ And, as my previous work suggests, where plaintiffs cannot overcome qualified immunity, they are less likely to prevail on the merits. Consequently, the intimate connection between the money damages remedy and the qualified immunity defense creates a climate in which courts are likely to be skeptical of excessive force claims. The result is that the right to be free from excessive force is made narrowly.

Moreover, increasingly robust qualified immunity protection is also a symptom of a larger judicial skepticism about money damages. Aware that the damages imposed on officers will generally be paid out of public funds due to indemnification statutes,²⁰⁵ courts are often loath to permit money damages. Some have insinuated that recent years have seen the creation of a massive industry of § 1983 litigation.²⁰⁶ The availability of money as a remedy inherently influences courts' thinking about the contour of the right they articulate, encouraging courts to construe Fourth Amendment rights narrowly on motions for summary judgment if they think sending a certain claim to the jury will likely result in a large jury verdict. Money damages risk public disapprobation in cases where the general consensus is that the verdict was too large, and anecdotal evidence suggests that judges frequently reduce awards or even grant judgment as a matter of law to defendants when plaintiffs receive large jury verdicts.

True, money arguably fosters certain benefits. Akhil Amar argues, "Money is more visible and quantifiable, and therefore democratic; the public can more

reasonableness test of excessive force doctrine "would seem to encompass all relevant concerns, including reasonable mistakes that an officer might make").

²⁰⁴ Hassel, *supra* note 203, at 118.

²⁰⁵ See Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 812-13 nn.51-52 (2007) (collecting indemnification statutes).

²⁰⁶ See *Hudson v. Michigan*, 547 U.S. 586, 597-98 (2006). Available data do not support Justice Scalia's assessment. Although the numbers vary from year to year, one casebook estimates that about 175,000 suppression motions are filed annually nationwide in comparison to only a few thousand civil lawsuits. See ALLEN ET AL., *supra* note 94, at 80. And scholars have persuasively documented the considerable obstacles to finding representation as an initial step in pressing a claim. See Chen, *supra* note 107, at 914-15.

easily see the costs of bad police conduct.”²⁰⁷ Additionally, money damages may be calibrated to the degree of harm, whereas exclusion is binary.²⁰⁸ Yet the visible and public nature of money damages also inclines courts to be skeptical of excessive force claims if the citizenry will resent an apparent windfall to an individual who may have been acting out in some way. Moreover, the value of money damages in facilitating lawmaking is relative rather than absolute, and in comparison to remedies such as injunctive or declaratory relief, the money damages remedy focuses courts on the facts and interests implicated by the immediate case rather than on crafting an appropriate general rule.

The facts present in the civil damages context also shape rights. First, the plaintiffs that courts see are often more appealing than the average person on whom force is used. They are more likely to be innocent of criminal activity and are perhaps more likely to be well-educated and socioeconomically advantaged,²⁰⁹ and thus more likely to inspire empathy in appellate judges. Of course, many excessive force plaintiffs were charged with or even convicted of criminal activity, or at least were alleged to have created a disruption; many, however, are entirely innocent of wrongdoing.

When an appealing plaintiff raises an excessive force issue, the court again focuses on the harm to the specific plaintiff, and the force that was used to cause that harm, rather than on the role of force in policing more generally. Consider, for example, *Nance v. Sammis*,²¹⁰ in which the police received information that two or three black men would rob a certain convenience store after dark.²¹¹ Having staked out the convenience store, police saw two individuals – one who appeared to have a gun tucked into the waistband of his pants, which he may or may not have removed at some point during the interaction – walking towards a nearby apartment building. The officers yelled at the suspects to get on the ground and drop the gun; the officers may or may not have identified themselves as police officers. When the apparently armed suspect was slow to comply, an officer opened fire, killing him. Only after the shooting did the police realize that the target was twelve-year-old DeAunta Farrow and that the item tucked into his pants was a toy gun.²¹² The Eighth

²⁰⁷ Amar, *supra* note 100, at 798.

²⁰⁸ See *United States v. Watson*, 558 F.3d 702, 705 (7th Cir. 2009) (holding that a criminal defendant who raised an excessive force claim has “an adequate remedy by way of a civil action – a remedy better calibrated to the actual harm done the defendant than the exclusionary rule would be”).

²⁰⁹ Although I know of no empirical evidence to support this point and therefore express it tentatively, the logistical and financial hurdles to finding a lawyer and litigating a damages action under § 1983 seem likely to weed out many less educated and less advantaged potential litigants.

²¹⁰ 586 F.3d 604 (8th Cir. 2009).

²¹¹ *Id.* at 606.

²¹² *Id.* at 607.

Circuit held that factual issues precluded summary judgment as to whether the shooting constituted excessive force.²¹³

We cannot know where the truth lies in *Nance*. My point is simply this: had DeAunta Farrow been an adult would-be robber carrying a real gun, the court's solicitous consideration of his § 1983 suit seems far less likely. Courts sometimes undervalue concerns such as public safety and prevention of criminal activity because civil plaintiffs often do not present those issues.

Moreover, the fact that excessive force plaintiffs are often innocent of criminal activity prompts both courts and parties to focus on the nature and degree of force and the resulting injury, at the expense of other aspects of the interaction between the law enforcement officer and the citizen. This tendency fragments courts' consideration of policing objectives. Courts focus on the threat of civilian violence – most frequently the justification for the use of force – rather than on the other policing interests that the use of force arguably serves, such as gathering evidence, preventing and detecting crime, and bringing suspects within the criminal justice system.

*Smith v. Kansas City, Missouri Police Department*²¹⁴ illustrates this point. There, following a woman's report of domestic violence, the police went to a house and arrested a man they initially thought was the perpetrator but who turned out to be his brother. According to the plaintiff, two officers effectuated the arrest by pulling the plaintiff outside in his bathrobe by his forearm and forcing him against the railing, bringing him to the ground on a concrete walkway and injuring his knees, and shoving his face into the concrete and placing their knees on his back as they handcuffed him.²¹⁵ The court denied qualified immunity to the officers on summary judgment, explaining, with respect to one officer, that the "lack of exigent circumstances, the lack of an immediate safety threat, and the lack of active resistance to arrest" did not justify the force used.²¹⁶ Although I tend to agree with the court's conclusion that the plaintiff's version of facts describes excessive force, the more important point for present purposes is the court's failure to acknowledge other policing interests that the use of force may have served. The police might, for example, have wished to employ force to further their search of the premises for evidence of domestic violence by subduing the suspect more quickly. Whether the force was *justified* by that goal is a separate question entirely, but it is a question worth asking, and it is a question that the civil context tends to suppress.

The very few cases in which criminal litigants have (albeit unsuccessfully) sought exclusion as a remedy for excessive force do reflect a much more holistic judicial inspection of the way force relates to law enforcement activity.

²¹³ *Id.* at 612-13.

²¹⁴ 586 F.3d 576 (8th Cir. 2009).

²¹⁵ *Id.* at 578.

²¹⁶ *Id.* at 581 (internal quotation marks omitted).

In *United States v. Ankeny*,²¹⁷ for example, a criminal defendant raised an excessive force challenge to a search of his home that ultimately yielded an illegal firearm.²¹⁸ The police had obtained a warrant to search his house, which was executed at 5:30 a.m. by a team of forty-four officers whose execution tactics included throwing two flash-bang devices, one causing first-degree burns to the defendant and the other igniting a mattress on which two people were sleeping; throwing the burning mattress out the window; and shooting out the windows of the house with rubber bullets.²¹⁹ Although the Ninth Circuit held that it “need not determine whether the entry was unreasonable” because exclusion of evidence was unavailable as a remedy for the use of excessive force,²²⁰ it did engage in a close examination of the relationship between the tactics the police used and the recovery of evidence. It noted, for example, that “the destruction of property and use of force arguably were necessary to carry out the search safely and effectively” due to the defendant’s known dangerous characteristics and that “[t]he fact that a gun was found stuffed into the cushions of the chair in which Defendant was sitting when the police entered suggests [that] if officers had entered more gently, perhaps Defendant would have had a chance to draw his weapon and injure or kill an officer or be injured or killed himself.”²²¹ The court’s decision thus reflects a relatively rare consideration of the relationship between the execution of the search warrant, the recovery of the contested evidence, and the use of force.²²²

As these rare cases demonstrate by contrast, the litigation of excessive force almost exclusively in the civil context skews lawmaking by focusing courts’ attention on innocent plaintiffs – who may be unrepresentative of all those on whom force is used – and on law enforcement interests relating to civilian violence and officer safety – which may fail to capture many significant law enforcement interests. The result is an excessive force analysis that engages a relatively small subset of the circumstances involving the use of force.

Finally, longstanding principles of preclusion and collateral attack influence the development of excessive force law. Many excessive force adjudications brought under § 1983 arise out of an incident that also gives rise to criminal

²¹⁷ 502 F.3d 829 (9th Cir. 2007).

²¹⁸ *Id.* at 834.

²¹⁹ *Id.* at 833.

²²⁰ *Id.* at 837.

²²¹ *Id.* at 836.

²²² Other criminal cases in which defendants raise excessive force similarly reflect a more holistic examination. *See, e.g.,* *United States v. Alvarez-Tejeda*, 491 F.3d 1013, 1016-18 (9th Cir. 2007) (considering whether force used in staging minor car accident to effectuate arrest of suspected drug dealer resulted in overall law enforcement interaction being conducted in unreasonable manner); *United States v. Copening*, 506 F.3d 1241, 1248-49 (10th Cir. 2007) (considering whether police used excessive force in executing a felony takedown such that the investigatory stop was converted into an arrest, thereby examining the relationship between force and restraint on liberty).

charges against the excessive force plaintiff. The criminal proceeding casts a shadow over civil adjudication of § 1983 claims, both formally as a result of preclusion and informally as a result of civil courts' knowledge about the outcomes of criminal proceedings.

Under *Heck v. Humphrey*,²²³ if a successful § 1983 action for damages would imply the invalidity of an underlying criminal conviction, the would-be plaintiff cannot pursue the claim until the underlying conviction is reversed, invalidated, expunged, or otherwise nullified.²²⁴ Thus, *Heck* may bar a plaintiff convicted of resisting arrest or assaulting a police officer from bringing a claim for excessive force.²²⁵ The bar is not absolute; for example, if the excessive force occurs *after* the suspect is already handcuffed and subdued, the § 1983 action would not imply the resulting criminal conviction was invalid.²²⁶ Whether *Heck* forecloses the claim is therefore dependent on the circumstances.

The *Heck* rule overlaps with general principles of collateral estoppel. Under those principles, a plaintiff's § 1983 claim may be barred by a previous state court conviction based on general principles of collateral estoppel; state law determines whether the claim is in fact barred.²²⁷ The *Restatement (Second) of Judgments* lists four prerequisites to the application of collateral estoppel: (1) the issue in the new action is identical to the issue in the previous action; (2) the issue was actually litigated in a court of competent jurisdiction; (3) by the party being estopped from litigating the issue in the new action; and (4) the previous judgment required this issue to be decided.²²⁸ Twenty-six jurisdictions require all four of these factors to be met; twenty-five do not require the fourth factor.²²⁹

In practice, this means that many excessive force claims are precluded by prior state criminal proceedings, either due to *Heck*,²³⁰ collateral estoppel,²³¹ or both.²³² The obvious effect is to deny a remedy for those claims. A more

²²³ 512 U.S. 477 (1994).

²²⁴ *Id.* at 486-87.

²²⁵ *See id.* at 487 n.7.

²²⁶ *See* Sanford v. Motts, 258 F.3d 1117, 1119-20 (9th Cir. 2001) (holding that excessive force used after an arrest would not imply the invalidity of a previous conviction for resisting an officer).

²²⁷ 28 U.S.C. § 1738 (2006).

²²⁸ RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

²²⁹ *See* Joshua M. D. Segal, Note, *Rebalancing Fairness and Efficiency: The Offensive Use of Collateral Estoppel in § 1983 Actions*, 89 B.U. L. REV. 1305 app. A at 1337 (2009).

²³⁰ *See, e.g.,* Cunningham v. Gates, 312 F.3d 1148, 1153-55 (9th Cir. 2002) (holding that the § 1983 plaintiff's incarceration on state convictions for felony murder and attempted murder barred § 1983 claim asserting excessive force).

²³¹ *See, e.g.,* Brown v. City of Chicago, 599 F.3d 772, 773 (7th Cir. 2010).

²³² *See, e.g.,* Colliton v. Donnelly, 399 F. App'x 619, 620 (2d Cir. 2010) (affirming the district court's finding that plaintiff's "claims [are] barred by *Heck v. Humphrey* and by collateral estoppel" (internal citation omitted)).

interesting and subtle possibility is that the claims that *are* litigated are, by virtue of not being collaterally estopped, less likely to involve criminal activity and therefore more likely to present judges with attractive plaintiffs and facts. I was surprised, however, at the number of state court convictions that courts held did *not* bar a § 1983 suit alleging excessive force.²³³

But even where a criminal conviction does not technically preclude an excessive force action, the fact that one has arisen out of the facts at issue – even if the charges were dropped or the defendant was found not guilty – inevitably influences courts’ analyses. The fact that an excessive force plaintiff was convicted of a crime – particularly a violent one – disinclines courts to find that excessive force was used on such an individual.²³⁴

The overlapping remedial, factual, and procedural circumstances present in the civil context lead to the following descriptive generalizations about the way in which the right against excessive force is made. Section 1983 plaintiffs who raise excessive force claims tend to generate more empathy, based on the surrounding factual circumstances, than their criminal counterparts who bring excessive force claims. But other factors negate this plaintiff-favorable impulse. Qualified immunity distorts excessive force doctrine, both by suppressing the overall rate of law articulation and by inclining courts to find in favor of defendant officers, and given that civil excessive force actions often take place in the shadow of criminal proceedings, courts are unlikely to look favorably on such actions. Moreover, the money damages remedy prompts a disproportionate focus on the physical harm the plaintiff suffered, emphasizing the government’s interest in subduing violence over other interests that the use of force might vindicate. In general, then, although the *outcomes* of excessive force adjudications tend, on balance, to favor the government, the *contour* of the resulting doctrine reflects a failure by courts to weigh all the relevant government interests, likely undervaluing some as a result.

Judge Reinhardt’s dissent in *Ankeny* suggests an alternative to current excessive force doctrine.²³⁵ The dissent concluded that in cases such as this where “the search was permeated with illegality,” suppression was entirely appropriate.²³⁶ It then examined the execution of the search holistically, noting

²³³ See, e.g., *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1125, 1127 (10th Cir. 1999) (holding that an excessive force suit was not barred by conviction for resisting arrest under *Heck* and that collateral estoppel did not preclude the suit); *Donovan v. Thames*, 105 F.3d 291, 295 (6th Cir. 1997) (holding that conviction for resisting arrest did not bar a § 1983 suit for damages); *Wilson v. Keske*, No. 09 CV 8063, 2010 WL 4065665, at *4-5 (N.D. Ill. Oct. 15, 2010) (holding that the plaintiff’s guilty plea to a single count of aggravated battery did not bar a § 1983 suit for excessive force under either *Heck* or principles of collateral estoppel); *Domitrovich v. Monaca*, No. 2:08cv1094, 2010 WL 3489137, at *7 (W.D. Pa. Sept. 1, 2010) (stating that a plea of *nolo contendere* to resisting arrest and simple assault did not foreclose a § 1983 suit for excessive force).

²³⁴ See, e.g., *Brooks v. Rothe*, 577 F.3d 701 (6th Cir. 2009).

²³⁵ 502 F.3d 829 (9th Cir. 2007) (Reinhardt, J., dissenting).

²³⁶ *Id.* at 844.

the “military-style invasion” of the defendant’s home “with the concomitant destruction of physical property and infliction of serious personal injuries,” as well as the activation of the flash-bang device in a way that resulted in first- and second-degree burns to the defendant.²³⁷ This holistic examination led the dissent to conclude that the search was executed in an unreasonable manner. Under such circumstances, “the remedy of suppression is hardly inappropriate . . . where a search executed with excessive and unreasonable force *directly* results in the discovery of the seized evidence.”²³⁸

Judge Reinhardt’s holistic inquiry and “reasonable manner” analytic framework allows for a considered examination of the entirety of the individual and law enforcement interests at stake. On the side of individual interests, he took account of the interest in avoiding the risk of injury to both people and property, as well as “the sanctity of a person’s home.”²³⁹ On the side of law enforcement interests, he acknowledged the evidence-gathering interest,²⁴⁰ the interest in avoiding violence,²⁴¹ the interest in officer safety,²⁴² and the interest in avoiding injury to innocent bystanders.²⁴³ In light of these interests, Judge Reinhardt concluded that the manner in which the search was conducted – including, but not limited to, the force that was used – displayed “intolerable intensity” and was therefore unreasonable in violation of the Fourth Amendment.²⁴⁴ Judge Reinhardt would have permitted exclusion of evidence as a remedy in the case.²⁴⁵ Although it is difficult to extrapolate, perhaps allowing consideration of excessive force in criminal cases would allow a more complete evaluation of the Fourth Amendment interests at stake.

Judge Reinhardt’s holistic approach, however, did not gain traction even with his colleagues on the *Ankeny* panel, and the consensus among courts is to relegate excessive force to the realm of civil damages. Such segregation inexorably affects the development of Fourth Amendment law. Courts cannot separate the merits of such actions from the surrounding remedies, facts, and procedural circumstances. The resulting law thus bears the indelible mark of § 1983 rather than framing Fourth Amendment principles that make sense across all contexts.

D. *Unlawful Detention*

Unlawful detention claims are one of the few categories of Fourth Amendment claims that are litigated at a meaningful rate in both the criminal

²³⁷ *Id.* at 842.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 848.

²⁴¹ *Id.* at 849 n.5.

²⁴² *Id.*

²⁴³ *Id.* at 849.

²⁴⁴ *Id.* at 848.

²⁴⁵ *Id.* at 844-45.

and civil damages contexts. During the time period I examined, about 60% of all such claims raised in federal court were litigated in the criminal context, with the remainder litigated in the civil context.²⁴⁶ The doctrine therefore provides a unique opportunity to examine the difference in the way rights-making occurs when courts blend principles from multiple contexts in elaborating the shape of rights.

In striking contrast to the cases involving investigatory stops and excessive force, the leading cases governing unlawful detentions arose in different contexts. The Court articulated the principles governing detention of citizens in *Michigan v. Summers*,²⁴⁷ an appeal from a motion to suppress in a criminal case, in which the Court upheld the detention of an individual after police intercepted him leaving a house for which they had a warrant to search for narcotics.²⁴⁸ The Court listed several law enforcement interests that justified the reasonableness of such a detention during the execution of a search warrant, including “preventing flight,” “minimizing the risk of harm to the officers,” preventing “frantic efforts to conceal or destroy evidence,” and facilitating “the orderly completion of the search.”²⁴⁹

The Court then refined these principles in *Muehler v. Mena*,²⁵⁰ which, in contrast, involved a suit for money damages under § 1983.²⁵¹ There, the plaintiff was detained in handcuffs for two to three hours while the police executed a search warrant of a house where they believed gang members resided who had been involved in a drive-by shooting.²⁵² The Court again upheld the plaintiff’s detention, finding the length of the detention reasonable and the fact that she was handcuffed also reasonable given that the search warrant authorized a search for weapons and that a suspected gang member resided on the premises.²⁵³

Although the police action was ultimately held to have been reasonable in both *Summers* and *Mena*, these two leading cases and other unlawful detention cases help to illustrate the interplay between rights-making in civil and criminal contexts. The fact that a significant number of claims are litigated in each context helps mediate between the interests that are most salient in each one and offers fertile ground for inter-contextual borrowing of ideas to take root.

As a result, the body of case law governing unlawful detentions differs from other Fourth Amendment doctrines in one immediately obvious way: criminal cases cite civil cases, and civil cases cite criminal cases. The cases comprising

²⁴⁶ See *supra* Part II.

²⁴⁷ 452 U.S. 692 (1981).

²⁴⁸ *Id.* at 693.

²⁴⁹ *Id.* at 702-03.

²⁵⁰ 544 U.S. 93 (2005).

²⁵¹ *Id.* at 95.

²⁵² *Id.* at 95-96.

²⁵³ *Id.* at 99-100.

most other doctrines – those governing consent searches, investigatory stops, search warrants, vehicle searches, and excessive force – cite only cases from one context or the other. The reason for this is obvious: the doctrine is mostly *litigated* in a single context, and the bulk of available precedent is therefore from that context. Nonetheless, the difference is striking. Moreover, the citation phenomenon is self-perpetuating: when most cases in a doctrinal area arise in a single context, courts may not think to draw on cases from other contexts or may worry that doing so will seem anomalous and less persuasive.

The cross-pollination evident in this inter-contextual citation has a range of valuable consequences. Perhaps most obviously, precedents arising in multiple contexts call a broader range of factual scenarios to courts' attention. In *Summers*, the Fourth Amendment proponent was the owner of a house in which drugs were found, and when searched, drugs were in fact found on him; such an individual is unlikely to inspire judicial sympathy. In contrast, the plaintiff in *Mena* – a “5-foot-2-inch young lady” wholly innocent of criminal wrongdoing – was awakened from her sleep, handcuffed, “forced to walk barefoot through the pouring rain” from the house to the garage, and detained for several hours.²⁵⁴

That Iris Mena was a sympathetic figure prompted the Court to devote particular attention to the use of handcuffs during the detention. Although it ultimately held their use reasonable, the Court emphasized that the handcuffs were “undoubtedly a separate intrusion” and that the detention was “more intrusive” than that upheld in *Summers*.²⁵⁵ The Court then analyzed the use of handcuffs closely, finding it justified, but only after noting that the gang and weapons activity posed a heightened safety risk and emphasizing that “this was no ordinary search.”²⁵⁶ By emphasizing these extraordinary factors, the opinion tacitly communicates that in *Mena* the police were close to the unreasonableness line, and that they might have crossed it had the search involved less inherent danger. Justice Kennedy's concurrence says as much by emphasizing that it is “a matter of first concern that excessive force is not used on the persons detained, *especially when these persons, though lawfully detained . . . are not themselves suspected of any involvement in criminal activity.*”²⁵⁷ Both the majority's relative solicitude and Kennedy's proposal that police should heed the potential for handcuffs to cause pain or discomfort to the detainee were prompted by Mena's own innocence of criminal activity and other sympathetic characteristics. Had the drug-carrying defendant in *Summers* been handcuffed, in contrast, the court likely would not have extended him the same solicitude. The court might simply have overlooked, and therefore implicitly validated, the incrementally greater intrusion of the handcuffs or else stated tersely that such an intrusion was reasonable.

²⁵⁴ *Id.* at 105-07 (Stevens, J., concurring).

²⁵⁵ *Id.* at 99-100 (majority opinion).

²⁵⁶ *Id.* at 100.

²⁵⁷ *Id.* at 102-03 (Kennedy, J., concurring) (emphasis added).

The fact that unlawful detention claims are litigated in both civil and criminal contexts also creates a more permeable boundary between the two domains. The result is a fusion of the interests and concerns that each context brings to the foreground. First, adjudication of unlawful detention claims in multiple contexts allows principles of excessive force to be imported more fluidly and translated more readily between contexts because courts are not always focused on exclusion as a remedy and evidence-finding as its trigger. The lineage of such a case typically involves both criminal and civil decisions and, as a result, the interests emphasized by each context. Because *Mena* arose under § 1983, for instance, the Supreme Court readily invoked *Graham v. Connor* in analyzing whether the force used to handcuff the plaintiff rendered the plaintiff's detention unreasonable, even though the plaintiff did not explicitly raise an excessive force claim.²⁵⁸ Other unlawful detention decisions display a similar willingness to import excessive force principles,²⁵⁹ and because of the permeability between contexts, this sort of analysis then later infuses criminal cases.

In *United States v. King*,²⁶⁰ for example, an officer who noticed a firearm tucked under a driver's thigh ordered the driver and passenger out of their vehicle by pointing her firearm at the driver and "threatening to shoot . . . if he did not comply," handcuffing the driver, and seizing drugs, cash, and the gun.²⁶¹ The Tenth Circuit held that, although the officer was entitled to "separate [the driver] from the gun for her own safety," the officer's threat to shoot the driver and the officer's application of handcuffs "went far beyond what was necessary to ensure her safety."²⁶² The court held the seizure unreasonable and suppressed the items seized.²⁶³ Counterfactually, we can imagine that without civil importation of force analysis into unlawful detention decision, the court in *King* would have been unlikely to consider such force, given that force does not generally trigger the exclusionary remedy central to criminal proceedings. Because previous civil precedents incorporated force, however, the court willingly incorporated force into its analysis.

Such criminal cases then influence § 1983 claims, often with an enhanced regard for officer safety prompted by the claim's filtration through the criminal process. *King* is one authority discussed in *Novitsky v. City of Aurora*,²⁶⁴ a case in which a "twist lock" hold applied to a plaintiff by a police officer was

²⁵⁸ *Id.* at 99-100 (majority opinion) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

²⁵⁹ *See, e.g.,* *Lykken v. Brady*, 622 F.3d 925, 932-33 (8th Cir. 2010); *Binay v. Bettendorf*, 601 F.3d 640, 647-48 (6th Cir. 2010).

²⁶⁰ 990 F.2d 1552 (10th Cir. 1993).

²⁶¹ *Id.* at 1562.

²⁶² *Id.* at 1563.

²⁶³ *Id.*

²⁶⁴ 491 F.3d 1244 (10th Cir. 2007).

litigated under the rubric of unlawful detention rather than excessive force.²⁶⁵ The court also discussed other cases, both criminal and civil, involving the application of force during detentions.²⁶⁶ The court's decision firmly reflects an analysis that considers force as part of the totality of the police-citizen interaction when analyzing the legality of a detention. The more holistic analysis resulting from the development of unlawful detention doctrine in both civil and criminal contexts thus allows for greater judicial consideration of that use of force in assessing the overall reasonableness of a detention in *either* context.

Second, adjudication of unlawful detention claims in multiple contexts yields a richer and more searching analysis of officers' states of knowledge in relation to the existence of arguable probable cause. Because qualified immunity, with its focus on what a reasonable officer would have known or believed, arises so frequently in § 1983 actions, a court's examination of such claims tends to look more closely at what officers knew and with respect to whom. This inspection diminishes judicial vulnerability to theories of guilt by association – an attitude that then infuses unlawful detention doctrine generally as courts import those precedents to the criminal context.

Consider *Holmes v. Kucynda*,²⁶⁷ a damages action under § 1983.²⁶⁸ There, the police arrived at a house after a domestic violence call. Although the quantity and location of the plaintiff's clothing and possessions suggested that she was merely a visitor to the house, the police nonetheless arrested her after discovering an envelope of cocaine in her sometime-boyfriend's things. After looking closely at the chronology of events, the Eleventh Circuit determined that the officers knew nothing that could establish probable cause to arrest the plaintiff. The bare fact that she was staying in the house where drugs were found did not yield probable cause to arrest her for a drug offense.²⁶⁹ The same court later transferred *Kucynda*'s close scrutiny of the officers' knowledge to the criminal context in *United States v. Virden*.²⁷⁰ There, the court explained that at the time of the detention, the officers only knew that “(1) [the defendant] left a location of suspected drug activity, (2) he appeared to have control over the garage because the garage door closed without anyone else being seen, and (3) he misstated exactly where he had been to the police.”²⁷¹ This analysis ultimately led to a similar finding of insufficient probable cause in *Virden*, which cited *Kucynda* for the proposition that “mere

²⁶⁵ *Id.* at 1248.

²⁶⁶ *Id.* at 1254-57 (citing numerous cases – both criminal and civil – involving the use of force during detentions).

²⁶⁷ 321 F.3d 1069 (11th Cir. 2003).

²⁶⁸ *Id.* at 1073.

²⁶⁹ *Id.* at 1081.

²⁷⁰ 488 F.3d 1317, 1322 (11th Cir. 2007).

²⁷¹ *Id.*

presence at a crime scene without more is insufficient to establish probable cause.”²⁷²

Third, litigation in multiple contexts enhances courts’ understandings of the offense of arrest in § 1983 cases alleging false arrest. In *Blankenhorn v. City of Orange*,²⁷³ the plaintiff was arrested for trespassing under a relatively obscure section of the California Penal Code.²⁷⁴ The Ninth Circuit’s detailed analysis of whether there was probable cause to arrest him for that offense, however, was richly informed by previous Fourth Amendment claims arising in the criminal context involving such issues as the meaning of the word “interfere” in the trespass statute, the threshold of conduct imposed by the intent requirement in the statute, and the role of requests to leave.²⁷⁵ Criminal cases, where the majority of substantive challenges to statutes arise, invite such close parsing of the statute as defendants try to argue that their conduct was outside its ambit. This judicial elaboration of the statute’s scope is useful in informing courts’ understandings of the contours of the offense of arrest when unlawful arrest claims do arise.

Finally, the litigation of unlawful detention claims at meaningful rates in both the civil and criminal contexts allows for the development of sensible standards that resonate in both contexts. The analysis of the duration of the detention in *Mena* provides one example of this context-bridging. There, the Court held that the officers’ questioning of Mena regarding her immigration status did not render the detention unlawful because the questioning did not prolong the length of the detention.²⁷⁶ Federal appellate courts subsequently incorporated that analysis into criminal cases and applied it in different contexts. *United States v. Mendez*,²⁷⁷ for example, explicitly acknowledged the importation and dispersion of *Mena*’s holding that police questioning does not render a detention unreasonable so long as it does not prolong the detention. Although the standard was developed in *Mena* in the setting of home searches, the Ninth Circuit stated that it “is equally applicable in the traffic stop context.”²⁷⁸ *United States v. Turvin*²⁷⁹ reached a similar holding, concluding that an officer who pauses to ask questions while writing a ticket does not violate the spirit of *Mena*.²⁸⁰

The law resulting from the importation of standards across contexts has a number of advantages. It is easier for the police to administer. It is easier for judges to apply. It strikes a balance that works across a range of situations. If

²⁷² *Id.* (citing *Kucynda*, 321 F.3d at 1081).

²⁷³ 485 F.3d 463 (9th Cir. 2007).

²⁷⁴ *Id.* at 472-73.

²⁷⁵ *Id.* at 474-75.

²⁷⁶ *Muehler v. Mena*, 544 U.S. 93, 101-02 (2005).

²⁷⁷ 476 U.S. 1077 (9th Cir. 2007).

²⁷⁸ *Id.* at 1080.

²⁷⁹ 517 F.3d 1097 (9th Cir. 2008).

²⁸⁰ *Id.* at 1103.

that balance is a little off when the standard is imported from one context to the next, courts can refine the standard to incorporate concerns existing in the exporting context and concerns specific to the importing context. Although such importation might not be appropriate in every situation, thinking cross-contextually promotes useful comparison of contexts and consideration of the similarities and differences between the two.

In particular, unlawful detention doctrine reveals a promising complementarity between the criminal and civil contexts where it is currently litigated by blending features of the two contexts in a way that better takes account of the interests inherent in each. This is not to say that unlawful detention doctrine is perfect, nor is it to say that any particular case comes out the right way. Given the culture of segregation between contexts, even where issues are litigated relatively equally in two contexts, the borrowing between those contexts is not as robust as it could be, and doctrinal movement from one context to the other is not as fluid.

The incompleteness of the interaction between civil and criminal unlawful detention cases is particularly evident when the fact pattern is paradigmatically criminal. Traffic stops are a classic example. Unlawful detention claims that essentially amount to an argument that a traffic stop went on too long are generally consigned to an analysis derived from criminal cases. This happens for several reasons. First, the fact pattern invokes other areas of the Fourth Amendment, such as consent searches, where traffic stops arise frequently and where claims are litigated almost exclusively in the criminal context. Second, the sheer number of similar cases in the criminal context renders it unnecessary for courts to look outside that context for applicable precedent. The lack of incentives for would-be plaintiffs to bring unlawful detention claims on the ground that a traffic stop went on too long likely accounts for this disparity. The upshot, though, is that this genre of unlawful detention remains largely consigned to the criminal context; the analysis proceeds along conventional lines, tends to credit police officers' accounts of the stop, and almost always results in denial of the motion to suppress.²⁸¹

Unlawful detention doctrine thus incompletely synthesizes the criminal and civil contexts. There is substantial room for improvement, for a more robust and self-aware practice of borrowing ideas.²⁸² But the doctrine nonetheless gestures at possibility. The difference between unlawful detention doctrine and investigatory stop doctrine is particularly telling. Although the two are rather close in subject matter – many unlawful detentions are simply *Terry*

²⁸¹ Many cases originating in a traffic stop and alleging unlawful detention draw only upon criminal precedents for their decision. *See, e.g.*, *United States v. Rivera*, 570 F.3d 1009 (8th Cir. 2009); *United States v. Loera*, 565 F.3d 406 (7th Cir. 2009); *United States v. Ford*, 548 F.3d 1 (1st Cir. 2008); *United States v. Munoz-Nava*, 524 F.3d 1137 (10th Cir. 2008); *United States v. Gill*, 513 F.3d 836 (8th Cir. 2008).

²⁸² *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 511-21 (2010).

stops extended in duration and scope – they are worlds apart in terms of how courts approach them. The fact that unlawful detentions are litigated in multiple contexts explains the difference: it allows for the incorporation of force analysis, for example, and promotes closer scrutiny of officers' states of knowledge. Unlawful detention doctrine therefore reveals how the doctrine governing investigatory stops might look if such claims were litigated more frequently under § 1983. Courts would be more likely to import force analysis – as they often do in unlawful detention claims – if they were less distracted by the exclusionary remedy and its emphasis on finding evidence.

Our legal culture is steeped in the unspoken and unexamined convention that criminal cases are best cited in criminal cases and civil cases in civil cases. The parity in litigation rates of unlawful detention claims in the two contexts invites, allows, and even causes a freer exchange of ideas between the two. The synthesis is, as of yet, incomplete: the exchange takes place mostly in certain circumscribed areas. But it provides a powerful example of what could be: courts taking account of interests, facts, and circumstances as the result of insights drawn from both contexts. It suggests a way of deriving constitutional operative propositions with greater accuracy and translating them into decision rules with greater facility. It gestures at rights-making in its ideal form.

IV. MAKING RIGHTS RIGHT

When rights-making occurs in a single context, the characteristics of that context begin to distort the law. As I have shown, this is true of many areas of Fourth Amendment law, and it is also true of other rights relegated to development in a single context. By contrast, rights that emerge through litigation in more than one context reflect a richer and more nuanced conception of doctrine. Rights-making in multiple contexts is rights-making as it *should* occur.

Moreover, the ideal of rights-making in multiple contexts is not merely a thought experiment. We too often forget that the context in which a right develops is a direct result of the remedies we choose to make available for violations of that right, as well as the other incentives and obstacles associated with litigation of that right. Thus, the context in which rights-making occurs is entirely within our control. We need not accept single-context litigation as an undesirable but inevitable reality. Rather, we can and should think normatively about where we want rights-making to take place.

A. *Distortion: The Result of Single-Context Litigation*

Many rights are distorted by the context in which they are litigated. But the problem does not lie with the context per se. In the Fourth Amendment arena, for example, the criminal context is not ill-suited for the articulation of rights governing investigatory stops, nor is the civil damages context inappropriate for excessive force litigation. Rather, the distortion of these rights occurs because in both instances litigation takes place *only in one context*. Features of that single context structure the interests courts consider and the facts on which

they focus. Thus, when rights are made in a single context the idiosyncrasies of that context distort the development of the law.²⁸³

These negative consequences emerge in several ways. With respect to the Fourth Amendment, for example, single-context rights-making focuses courts on certain individual and law enforcement interests at the expense of others. In any given interaction with the police, individuals have a range of interests: they are concerned for their privacy, their personal safety, their physical liberty, and the integrity of their possessions. The police also have a range of interests: they wish to protect the safety of citizens, preserve order, prevent crime, gather evidence of illegal activity, bring criminals within the justice system, and protect themselves from harm. Although these lists are by no means comprehensive, they include many of the interests that encounters between individuals and police officers implicate.

Any context tends to highlight some of these interests while relegating others to the background. I have outlined several examples of this effect in Part III. With investigatory stops, for instance, the exclusionary remedy prompts courts to focus on what was done to find the evidence – searches of pockets and outer clothing, for example – at the expense of examining non-trivial uses of police force that contribute to a coercive environment.²⁸⁴ The evidence-gathering interest of law enforcement therefore receives most of a court’s attention and analysis, while other interests that may or may not justify the use of force during the same police-citizen interaction receive little examination. The result is that courts give insufficient consideration to whether the police interest in conducting a search in an orderly fashion can justify pulling a suspect from his car by one arm²⁸⁵ or wrestling him onto a sofa.²⁸⁶ Perhaps other police interests – such as maintaining order and protecting officer safety – justify these uses of force. Perhaps they do not. Either way, because courts myopically focus on actions taken to find evidence

²⁸³ Laurin agrees that single-context litigation is undesirable. She argues that such litigation “is misguided both in underestimating the structural limitations of criminal and civil litigation to achieve regulatory goals and in disregarding potential synergies that may be generated by recursive criminal procedure remedies.” Laurin, *supra* note 64, at 83. Although Laurin’s concern for regulation is consonant with my work, my greater concern lies with the skewing effect that single-context litigation exerts on constitutional rights, an issue that Laurin does not explore.

²⁸⁴ See *supra* Part III; see also Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1916 (2007) (“We have a far better code of conduct governing the conditions for police searches than for police uses of force.”); Stuntz, *supra* note 148, at 1068 (“A focus on privacy has led to a great deal of law – sometimes fairly protective, sometimes not – about what police officers can *see*. The doctrine pays a good deal less attention to what police officers can *do*. This is part of the cost of a Fourth and Fifth Amendment culture that has worried too much about privacy and too little about everything else.”).

²⁸⁵ *United States v. Ruidiaz*, 529 F.3d 25, 28 (1st Cir. 2008).

²⁸⁶ *United States v. Ellis*, 501 F.3d 958, 960 (8th Cir. 2007).

when considering the exclusionary rule, the interests implicated by other police behavior during investigatory stops are under-examined.

Moreover, single-context litigation artificially segregates different doctrines from one another. In Fourth Amendment rights-making, this usually forecloses consideration of the totality of a police-citizen interaction. Many interactions between citizens and law enforcement involve, for example, both investigatory stops and the use of some degree of force, but under current law, the former is litigated in criminal proceedings and the latter in civil suits for money damages. Rarely is the entirety of the police-citizen interaction presented for consideration, and as a result, it is difficult even to think holistically about police-citizen interactions. We have no framework for undertaking such an analysis in many areas and an incompletely developed one in the few areas, such as unlawful detention, where rights-making occurs in multiple contexts.

The negative consequences of single-context litigation extend beyond the contour of the right itself. The compartmentalization of the suite of rights contained by the Fourth Amendment manifests itself throughout legal scholarship. When people write about the Fourth Amendment, they usually write about searches first, detention second, and force not at all. On this point, recent influential articles are illuminating. Akhil Amar does not mention excessive force in *Fourth Amendment First Principles*.²⁸⁷ Carol Steiker and David Sklansky are likewise silent on the topic in recent comprehensive works.²⁸⁸ These articles undoubtedly make valuable contributions to our understanding of the Fourth Amendment, but they fail to situate police use of force within that understanding. Indeed, police use of force is generally mentioned only when it is the central topic of an article.²⁸⁹ William Stuntz is one of a very few scholars who have discussed – if only briefly – the interrelation of force and other aspects of policing.²⁹⁰

Legal education displays similar compartmentalization. Many professors of criminal procedure do not discuss § 1983 in their classes, as though the law articulated pursuant to that statute is somehow a less accurate statement of the Fourth Amendment. The typical Fourth Amendment casebook likewise provides a telling insight into the separation of excessive force from everything else. In one deservedly popular text, a subsection on “Reasonableness and Police Use of Force” awkwardly follows a subsection on special needs searches and precedes one on consent searches; the section as a whole bears

²⁸⁷ Amar, *supra* note 100. Force is also nowhere discussed in the article’s sequel. Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN’S L. REV. 1097 (1998).

²⁸⁸ See generally David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

²⁸⁹ See generally Harmon, *supra* note 188.

²⁹⁰ Stuntz, *supra* note 94, at 449-51.

the vague title of “Reasonableness.”²⁹¹ The section makes no effort to integrate excessive force into the larger picture of police practices; rather, it simply reproduces *Garner*, *Graham*, and *Harris* with little commentary.²⁹²

As a result of this atomization, single-context rights-making results in worse law. By “worse,” I mean that the law less effectively takes account of the interests at stake, less accurately recognizes the individuals whose behavior it will bind, less thoroughly considers the circumstances in which it will apply, and less compellingly reflects the relationship of particular doctrines to our legal regime as a whole. In sum, law made in a single context fails to consider, in a unified fashion, the various interests encompassed by a particular constitutional guarantee – here, the Fourth Amendment right to be free from unreasonable searches and seizures. By this definition, single-context rights-making leaves worse off various individual doctrines, as well as the totality of Fourth Amendment jurisprudence and our understanding of Fourth Amendment rights.

By contrast, when rights-making occurs in multiple contexts presenting a rich array of remedial, factual, and procedural considerations, the resulting legal principles are better able to take account of all relevant interests, parties, and circumstances than are principles formulated exclusively in a single context. Courts both synthesize and cross-pollinate doctrine as they draw freely on precedents from multiple contexts in articulating the scope of the right. Unlawful detention claims are an example of such rights-making, albeit an imperfectly realized one.²⁹³

Although this sort of synergy between contexts is vastly under-theorized in the literature, by incorporating precedent from multiple contexts courts achieve some of the benefits that Nelson Tebbe and Robert Tsai ascribe to the phenomenon they term “constitutional borrowing” – the practice of “importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends.”²⁹⁴ They discuss a variety of potential benefits of borrowing, explaining that one engaged in borrowing might wish “to achieve a durable synthesis of areas of law whose connections have been neglected; to take advantage of accumulated wisdom; to blur doctrinal boundaries and unsettle existing categories deliberately; or to secure

²⁹¹ ALLEN ET AL., *supra* note 94, at 658-68.

²⁹² *Id.* at 334. The excessive force section seems out of place, an impression reinforced by the book’s introduction to the Fourth Amendment, which defines that provision’s purpose as “protecting individual privacy and regulating the police.” *Id.* That definition provides at most indirect acknowledgment of the individual interest in bodily integrity that police use of force most compromises. Of course, police regulation *includes* regulation of the use of force, but the *purpose* for that regulation – protecting the individual interest in freedom from excessive force – remains unacknowledged.

²⁹³ See *supra* Part III.D.

²⁹⁴ Tebbe & Tsai, *supra* note 282, at 461 (describing a practice of “importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends”).

a perceived strategic advantage in debate more generally.”²⁹⁵ Tebbe and Tsai examine borrowing primarily from one doctrinal area into another – for example, appropriating notions of equality from equal protection doctrine and applying them in a proceeding involving due process.²⁹⁶ But their discussion translates usefully to areas of rights-making – for example, many areas of Fourth Amendment doctrine – where borrowing from one *context* to another would also produce valuable results.²⁹⁷

My preference for rights-making in multiple contexts also resonates with Jennifer Laurin’s research on rights-adjudication across contexts.²⁹⁸ Her work proposes a process of “rights translation” for redefining what she describes as “constitutional criminal procedure rights” in the civil context.²⁹⁹ Laurin demonstrates that these “dual remedial regimes” currently create dissonance when a right adjudicated in the criminal context is later adjudicated in the civil context.³⁰⁰ For example, she traces the evolution of the *Brady* right in the criminal context then explains how factors unique to the civil context – the identity of parties to the suit and the role of fault and causation – result in a narrower construction of the *Brady* right outside the criminal context.³⁰¹

Rights translation, as Laurin conceives of it, nicely complements the preference for multiple-context litigation that I advocate in this Article. First, the very necessity of translation powerfully demonstrates the effect of context: a right brought to bear in the criminal context simply will look different from the same right enunciated in the civil context. Second, the same considerations that lead to dissonance between contexts – for example, the divergent roles of fault and causation in criminal and civil matters – lead to an enriched understanding of the right. Perhaps judges sometimes struggle, and even fail, to implement the right in a completely coherent manner across contexts, but that tension serves to illuminate the effects of the right and forces judges to consider its application in multiple contexts. Finally, the difficulty posed by translating a right from one context to the next reveals the need for increased theorization of the process. Because the rights Laurin addresses are adjudicated mostly in one context, judges have little experience in translating the right from one context to another. Because judges have little experience in translation, they sometimes execute the task imperfectly when they attempt it.

²⁹⁵ *Id.* at 467-68.

²⁹⁶ *Id.* at 464.

²⁹⁷ Tebbe and Tsai’s analysis would be particularly useful in many areas of Fourth Amendment rights-making.

²⁹⁸ Notably, Laurin’s work bridges the decision rules and pragmatist models by acknowledging the influence of remedy while maintaining a decision-rules-reminiscent concern that the integrity of the right survives translation.

²⁹⁹ Laurin, *supra* note 38, at 1007.

³⁰⁰ *Id.* at 1013-14.

³⁰¹ *Id.* at 1016-34.

Laurin's work therefore helps to demonstrate both the promise of and the challenges posed by multiple context litigation.

I have focused thus far on the Fourth Amendment, but the distortion resulting from single-context litigation of that right is exemplary rather than isolated. The next section, therefore, briefly discusses several other rights whose contours display the influence of the context in which they are litigated.

B. *Extension: The Transsubstantive Implications of Context*

I have employed the Fourth Amendment as a case study throughout much of this Article to provide a detailed quantitative and qualitative analysis demonstrating that single-context litigation distorts the shape of rights and that rights-making is better undertaken in multiple litigation contexts simultaneously. But these conclusions are not limited to the Fourth Amendment. To the contrary, context has such an obvious and dramatic effect on Fourth Amendment rights-making that the influence of context in shaping other substantive rights is virtually self-evident.

This section briefly examines a number of other substantive rights and begins the project of elaborating how their contours have been shaped by the context in which they were made. Developing a detailed account of each of these rights is a considerable undertaking far beyond the scope of this Article, but the value of considering context when we think about lawmaking transcends substantive boundaries.

1. Racial Discrimination in Jury Selection

Context undoubtedly influences the development of the right to a jury selection process untainted by race discrimination. Currently, that right, flowing from the Equal Protection Clause under *Batson v. Kentucky*,³⁰² is litigated almost exclusively in criminal proceedings by criminal defendants.³⁰³ Somewhat oddly, the defendant is essentially asserting by proxy the equal protection rights of the excluded juror.³⁰⁴ Such a violation, if proven, constitutes "structural error," which requires the strong medicine of reversal rather than review for harmlessness.³⁰⁵

Commentators have argued that the potency of the remedy has led courts to define the *Batson* right narrowly because they do not wish to overturn otherwise valid convictions – what Levinson calls "remedial deterrence."³⁰⁶ As my work on the Fourth Amendment implies, other contextual influences include unappealing facts and a procedural posture that requires a view of

³⁰² 476 U.S. 79, 86 (1986).

³⁰³ Nancy Leong, *Civilizing Batson*, 97 IOWA L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956115.

³⁰⁴ See Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 95-96 (1996).

³⁰⁵ *Id.* at 117-18.

³⁰⁶ Levinson, *supra* note 46, at 889-92; see also Karlan, *supra* note 65, at 2014-23.

those facts in a light unfavorable to the defendant. In short, the remedial, factual, and procedural context surrounding the *Batson* right influences courts to draw the right narrowly and to focus on the harm to the defendant – which is difficult to conceptualize – rather than on the harm to the excluded juror – a dignitary harm both concrete and readily accessible to judges.

In light of the hostile environment in which *Batson* claims are currently litigated, it is worthwhile to examine closely how the doctrine might be different if such claims were *also* regularly asserted by jurors themselves. As a preliminary matter, the Supreme Court has indicated that such a claim is cognizable. In *Carter v. Greene County Jury Commission*,³⁰⁷ the Supreme Court considered a claim of racially discriminatory exclusion from jury service that was “the first case to reach the Court in which an attack upon alleged racial discrimination in choosing juries has been made by plaintiffs seeking affirmative relief, rather than by defendants challenging judgments of criminal conviction.”³⁰⁸ It held that civil plaintiffs *could* assert a claim of discriminatory exclusion:

The District Court found no barrier to such a suit, and neither do we. Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion. Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here.³⁰⁹

That civil plaintiffs do not usually bring such suits is therefore a product of remedial and other incentives, not of a doctrinal prohibition.

There are obvious difficulties with bringing such a claim, including prosecutorial immunity and informational deficiencies on the part of prospective plaintiff jurors. Still, we can predict that the shape of equal protection doctrine with respect to juror discrimination might be quite different if jurors were allowed to bring civil suits for modest but non-negligible amounts of damages based on discrimination on the basis of race. One can imagine that a court might be much more sympathetic to a prospective juror who took her civic obligations seriously, arranged to be away from her job for the day, waited patiently at the courthouse, submitted to voir dire, and yet was ultimately struck from the jury on the basis of her skin color. The factual circumstances are entirely different, and the case comes with none of the procedural baggage of *Batson* claims as currently litigated. But under current doctrine, claims are not litigated in this more favorable context, and as a result such scenarios escape judicial notice.

³⁰⁷ 396 U.S. 320 (1970).

³⁰⁸ *Id.* at 329.

³⁰⁹ *Id.* at 329-30.

2. Obscenity

Courts currently assess whether material is obscene and therefore unprotected by the First Amendment primarily in two contexts. Obscenity doctrine initially evolved in criminal prosecutions against individuals for possession of obscene materials in violation of the penal code. *Miller v. California*,³¹⁰ for example, involved a prosecution for mailing unsolicited sexually explicit materials in violation of state criminal law.³¹¹ There, the Court held, “A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”³¹² The trier of fact evaluates the offense according to the standards of the relevant community.³¹³

Later, obscenity law also began to develop in civil suits to enjoin enforcement of statutes that would allegedly proscribe materials protected by the First Amendment. In *Erznoznik v. City of Jacksonville*,³¹⁴ for example, the Court considered a facial challenge to a statute prohibiting the showing of films containing nudity on drive-in movie screens visible from public places.³¹⁵ And in *Brockett v. Spokane Arcades*,³¹⁶ the Court considered a facial challenge to a “moral nuisance” law brought by various purveyors of adult material.³¹⁷

Although litigation of obscenity issues now occurs with some frequency in both contexts, the influence of the primarily criminal origin of the doctrine is still visible. First, the “community standards” rationale is closely linked to the state criminal offenses with which the defendants in the foundational obscenity cases were charged. Because the offense was local, so too became the standard evaluating whether First Amendment protection accrued. Moreover, the parties to these early criminal actions undoubtedly shaped the Court’s thinking: it looks quite different when a lone aficionado of sexually explicit materials, interested primarily in solitary gratification, attempts to shelter behind the First Amendment than when an organization of uncontested social value, such as a bookstore or a health clinic, claims that the First Amendment protects the freedom of expression critical to its mission. The definition of obscenity might have been less expansive had reputable bookstores rather than criminal defendants sought First Amendment protection at the outset. For example, the standard might have been a “no value” rather than a “no *serious* value” standard. Procedural factors endemic to each context also play a role in differentiating the criminal context and the civil context: the former results in

³¹⁰ 413 U.S. 15 (1973).

³¹¹ *Id.* at 16-17.

³¹² *Id.* at 24.

³¹³ *Id.* at 30-31.

³¹⁴ 422 U.S. 205 (1975).

³¹⁵ *Id.* at 206.

³¹⁶ 472 U.S. 491 (1985).

³¹⁷ *Id.* at 493-94.

overturning a conviction and often invalidating a portion of the criminal code, while the latter merely returns an area of citizen conduct to its pre-government-regulation state.

The influence of the criminal context evident in the early obscenity cases has subsequently been balanced by the simultaneous litigation of obscenity issues in civil actions. Currently, quite a bit of cross-pollination occurs between contexts, facilitating this intermingling. One recent case illustrates this integration. In *Powell's Books, Inc. v. Kroger*,³¹⁸ a coalition consisting of "a broad cross-section of booksellers; non-profit literary, legal, and health organizations; and a concerned grandmother" argued that a set of Oregon statutes violated the First Amendment.³¹⁹ The statutes were intended to combat sexual abuse by prohibiting certain uses of sexually explicit materials: they criminalized the act of providing children under age thirteen with sexually explicit materials, as well as the act of providing those under age eighteen with "visual, verbal or narrative descriptions of sexual conduct for the purpose of sexually arousing the minor or the furnisher, or inducing the minor to engage in sexual conduct."³²⁰ The Ninth Circuit agreed with the booksellers' coalition that the statute was overbroad, refusing to extend the variable standard for obscenity for minors to the conduct proscribed by the statute.³²¹

One can imagine that the Court was substantially more sympathetic to the First Amendment interests forwarded by the booksellers' coalition than it would have been had the constitutionality of the statute arisen in a criminal prosecution of a confirmed child abuser. The constitutionality of the statutes likely would not have been upheld in either instance, but the court may have analyzed the statutes' role in protecting minors more carefully in a criminal prosecution rather than simply dismissing the statute as overbroad.³²² *Powell's Books*, therefore, demonstrates the value of litigation in multiple contexts by revealing how the distortions that arise when obscenity is litigated in one context may be corrected when claims subsequently arise in a different context.

3. Self-Incrimination

The right against the introduction at trial of self-inculpatory statements made during custodial interrogation, as defined by *Miranda v. Arizona*,³²³ is articulated almost exclusively in criminal proceedings. In *Hannon v.*

³¹⁸ 622 F.3d 1202 (9th Cir. 2010).

³¹⁹ *Id.* at 1207.

³²⁰ *Id.* at 1206-07.

³²¹ *Id.* at 1215.

³²² *See id.*

³²³ 384 U.S. 436, 444-45 (1966) (announcing the rule that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination").

Sanner,³²⁴ the plaintiff was previously convicted of murder, but the Minnesota Supreme Court reversed the conviction because the police continued interrogation of Hannon after he invoked his right to counsel.³²⁵ Hannon subsequently brought suit under § 1983 seeking money damages for the Fifth Amendment violation that had occurred.³²⁶ The Eighth Circuit dismissed his claim, holding that the only remedy for a violation of *Miranda* is suppression at a criminal trial.³²⁷

A slight majority of circuits share the Eighth Circuit's view,³²⁸ although a few have held that a *Miranda* violation may give rise to a civil claim under § 1983 when statements obtained illegally were introduced at trial.³²⁹ The more important point, however, is that very few claims of *Miranda* violations are in fact litigated in the context of money damages actions under § 1983 when compared with the scores of *Miranda* decisions raised in criminal proceedings.

The distortion that results from the predominantly criminal litigation of *Miranda* violations bears some resemblance to the distortion of the Fourth Amendment rights litigated primarily in criminal contexts.³³⁰ Because exclusion is the remedy and the proponent of the right a usually confessed criminal appealing her conviction, courts will view the claim skeptically and hesitate to award the strong medicine of exclusion.

More specifically, however, the current contour of the right against self-incrimination also bears indicia of the focus and rationale prompted by exclusion. As in the Fourth Amendment context, the exclusionary remedy concerns itself with evidence obtained by law enforcement, and as a result, the focus is on what law enforcement did that resulted in finding evidence. That is, it results in an exhaustive analysis of police behavior: where the interrogation took place; what the police said; how long the questioning lasted; whether its tone was coercive; and whether it rendered the defendant's statements involuntary. *Miranda* itself adopts this focus by asking whether *the police* issued the now-famous quadripartite warning. If they did, and if the

³²⁴ 441 F.3d 635 (8th Cir. 2006).

³²⁵ *Id.*

³²⁶ *Id.* at 636.

³²⁷ *Id.*

³²⁸ *See, e.g.,* Jones v. Cannon, 174 F.3d 1271, 1291 (11th Cir. 1999); Neighbour v. Covert, 68 F.3d 1508, 1510 (2d Cir. 1995); Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976).

³²⁹ *See, e.g.,* Crowe v. Cnty. of San Diego, 593 F.3d 841, 860, 862-66 (9th Cir. 2010); Best v. City of Portland, 554 F.3d 698, 702-03 (7th Cir. 2009); McKinley v. City of Mansfield, 404 F.3d 418, 437-38 (6th Cir. 2005). The Third Circuit has also suggested this view, holding that "questioning a plaintiff in custody without providing *Miranda* warnings is not a basis for a § 1983 claim as long as the plaintiff's statements are not used against her at trial." Renda v. King, 347 F.3d 550, 557-58 (3d Cir. 2003).

³³⁰ *See supra* Part III.A-B.

surrounding circumstances were not suspect, courts generally allow the introduction of the statements.

This focus, however, obscures another possible reading of the right, a reading centered on the harm to a person interrogated and subjected to the introduction of her own statements at trial. The harm, under this alternative construction, is a dignitary injury – the injury of having her own words involuntarily brought to bear against her. The text of the Fifth Amendment, with its prohibition on an individual being “compelled in any criminal case to be a witness against himself,” suggests, by reference to a case, a central focus on the role of the court and the introduction of the statements themselves – not merely the compelled extraction of those statements by the police.³³¹ If litigation of the right against self-incrimination took place more frequently in the § 1983 context, perhaps these dignitary injuries would rise to the fore and would prompt examination not only of police conduct but also of individual harm in assessing the proper scope of the right.

4. Ineffective Assistance of Counsel

Another substantive area in which rights would likely look different if they were made in multiple contexts is the Sixth Amendment right to effective assistance of counsel. In *Polk County v. Dodson*,³³² the Court held that public defenders may not be sued for Sixth Amendment deprivations as “state actors” under § 1983.³³³ Litigation regarding ineffective assistance of counsel therefore takes place exclusively in the context of habeas relief or, outside the federal court system, in the context of state malpractice claims. It takes little imagination to predict how well ineffective assistance of counsel claims will fare when litigated – for purposes of federal lawmaking – exclusively as habeas claims in the criminal context. Courts are likely to be hostile to an expansive definition of ineffective assistance as a result of the factual circumstances and procedural posture present throughout criminal and criminally-adjacent proceedings. Those already convicted of crimes are unappealing advocates for the claims that their convictions should be overturned as a result of insufficient effort by their overworked, state-funded lawyer, and courts likely find it difficult to ignore the significant amount of process that vacating a conviction would disrupt.

Counterfactually, we might consider how the law would have developed differently had *Polk* been decided to allow suits under § 1983. Freed from the criminal context, courts might be more receptive to such suits, perhaps importing more demanding requirements for lawyerly conduct from malpractice law or even from ethical canons. For instance, the standard for establishing ineffective assistance of counsel set forth in *Strickland v.*

³³¹ U.S. CONST. amend. V.

³³² 454 U.S. 312 (1981).

³³³ *Id.* at 324-25 & n.18.

*Washington*³³⁴ requires the petitioner to show both constitutional injury *and* prejudice;³³⁵ *Strickland* has generally been read to apply only to “direct consequences” of conviction, not to “collateral consequences” such as conditions of probation.³³⁶ Were ineffective issues litigated in the civil context, however, courts might take a more expansive view of the obligations of counsel. Such a view might even encompass some of the obligations of zealotry, confidentiality, and loyalty routinely cited in malpractice petitions.

5. Keeping and Bearing Arms

In *District of Columbia v. Heller*³³⁷ – a challenge to a District of Columbia law that banned the possession of handguns within the District and mandated that shotguns and rifles be stored unloaded³³⁸ – the Supreme Court decided a Second Amendment case for the first time in nearly seventy years. The Court sustained the challenge to the statute and, in a subsequent case, held that the Second Amendment applies to its full extent against the states.³³⁹ Those decisions have increased the attention directed at the Second Amendment and prompted an influx of cases raising claims under that constitutional provision.³⁴⁰ This revitalization of a doctrinal area in which rights-making was relatively dormant provides a unique opportunity to consider and perhaps influence the role of context in shaping the contours of a right.

Following *Heller*, the vast majority of Second Amendment rights elaboration has occurred in criminal proceedings in which a defendant raises the Amendment as a defense to his prosecution. Challenges to convictions under the felon-in-possession statute are particularly common,³⁴¹ but other potential contexts for litigation are undeniably available. In *Justice v. Town of Cicero*,³⁴² for example, a homeowner challenged under § 1983 a municipal ordinance requiring registration of all firearms following a search of his residence that yielded several firearms.³⁴³ In *Bach v. Pataki*,³⁴⁴ a citizen

³³⁴ 466 U.S. 668 (1984).

³³⁵ *Id.* at 687.

³³⁶ See *The Supreme Court, 2009 Term – Leading Cases*, 124 HARV. L. REV. 179, 199 (2010).

³³⁷ 554 U.S. 570 (2008).

³³⁸ *Id.* at 574-75.

³³⁹ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

³⁴⁰ The query “Heller & ‘second amendment’” in the CTA database on Westlaw yields thirty-one cases from 2010 alone.

³⁴¹ See, e.g., *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010).

³⁴² 577 F.3d 768 (7th Cir. 2009).

³⁴³ *Id.* at 770-71.

³⁴⁴ 408 F.3d 75 (2d Cir. 2005).

likewise raised a challenge under § 1983 to a New York handgun licensing scheme that excluded non-residents.³⁴⁵

These litigation contexts provide a rich opportunity to present courts with the full array of facts and circumstances surrounding gun ownership, the right to possess guns, and the harms arguably related to such possession. Yet the Court chiefly confronts and articulates principles in cases involving criminal defendants – a decidedly unrepresentative set of the population. Had some of the subsequent challenges brought in criminal proceedings involved prospective challenges brought by citizens not charged with criminal offenses, courts may have viewed them more sympathetically. *Heller* itself supports this thesis. There, the Court did articulate an expansive construction of the Second Amendment, and notably, the case involved a § 1983 suit by a special law enforcement officer.³⁴⁶ Had it instead involved a felon seeking to invalidate the District of Columbia's possession ban, the Court might have been more skeptical of his claim and might have written its decision more narrowly. Likewise, the consequences of recognizing a Second Amendment right are quite different in the criminal context and the civil context: the former results in overturning a conviction and often invalidating a statute, while the latter merely returns an area of citizen conduct to its pre-government-regulation state.

Ultimately, however, the point is not that litigation in a particular mix of contexts would yield a particular substantive result. The point is that litigation at a significant level in a broader array of contexts would yield a better substantive understanding of the important constitutional interests at stake.

6. Other Possibilities

We might also consider how the availability of a civil remedy might affect other rights currently considered “criminal procedure rights.” One such example would be the due process requirement, as elaborated in *Brady v. Maryland*,³⁴⁷ that the prosecution disclose evidence favorable to the accused.³⁴⁸ Alternatively, we might consider how constitutional rights might look were criminal prosecutions against government officers under 18 U.S.C. § 242 more common.³⁴⁹ We might even ask how prisoners' rights under the Eighth Amendment – currently funneled into a very narrow context by the protocols of the Prison Litigation Reform Act³⁵⁰ – might look were they litigated in other forums.

³⁴⁵ *Id.* at 76-77.

³⁴⁶ 554 U.S. 570, 575 (2008).

³⁴⁷ 373 U.S. 83 (1963).

³⁴⁸ *Id.* at 87.

³⁴⁹ Only a few such cases exist, and none is recent. *See, e.g.*, *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966).

³⁵⁰ Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 101 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, & 42 U.S.C.).

In short, context has quite expansive implications for how we think about rights-making. I have not examined every constitutional right here, but litigation inherently occurs in a context, and it seems plausible that doctrinal development for each of these various rights reflects the context in which they occur. Moreover, the same insights about the danger of single-context litigation might be transported, with appropriate modifications, to other federal statutes or even to private law. Such transfers, however, remain for future examination.

The next question, for present purposes, is what should be done with the knowledge that single-context rights-making is inferior to rights-making that takes place in multiple contexts. Departing from commentators who see context as an inevitable by-product of the gradual process of law development, I view context as neither inevitable nor unworthy of intervention. The next section, therefore, takes up the question of how we might affirmatively facilitate lawmaking in contexts where we deem it beneficial.

C. *Correction: Intentional Decisions About Remedies*

Context is not inevitable. Rather, the context in which rights articulation currently occurs is the product of decisions we have made in the past. The fact that we have not made these decisions intentionally or consciously does not make them any less a product of our decision making. The considerable literature on the relationship between rights and remedies suggests that the amount of law articulation that occurs in a particular context is within our control. By shaping the remedies available for the violation of a given right, we can influence how often a particular right is adjudicated by particular parties in a particular context.

As a precursor to that discussion, however, this section examines how the availability of remedies determines the context in which litigation occurs. In so doing, I return briefly to the example of the Fourth Amendment. That discussion sets the stage for a much broader examination of rights-making and remedies that invokes and then expands upon the literature introduced in Part I.

The remedies available for violations of the Fourth Amendment, coupled with the obstacles and incentives for such litigation, establish the context in which such claims are litigated. The exclusionary rule bears significant responsibility for the large amount of Fourth Amendment lawmaking that takes place in the criminal context. The reward for a successful Fourth Amendment claim in that arena is valuable: if evidence is excluded, often the related charges must be dropped or downgraded. As a result, criminal defendants have a considerable incentive to litigate Fourth Amendment issues. They are also highly motivated for other reasons: they seek to avoid incarceration, heavy monetary penalties, and blight on their records. The consequences of losing are minimal or nonexistent: the worst-case scenario is that the status quo is maintained, the evidence is admitted, and the attorney has spent time and resources on the litigation. And the costs to the defendant are essentially zero: although many jurisdictions report severe overburdening of their public

defenders, the defendant shoulders those costs only very indirectly as a taxpayer.

In contrast, the remedy for many Fourth Amendment search violations in the civil context is minimal and the barriers to litigation are high. Even when the intrusion on privacy is egregious, it may be difficult for the defendant to show harm that translates into money damages. The monetary gain associated with a victory in such cases is speculative, particularly given the obstacle of qualified immunity. As a result, finding representation may be difficult.³⁵¹ Ultimately, litigation may provide a burden rather than a benefit for a prospective plaintiff who prefers to distance herself from an unpleasant law enforcement encounter.

The fact that excessive force litigation nonetheless takes place at a substantial rate in the context of civil damages actions confirms, rather than undermines, this account. In comparison to many other Fourth Amendment injuries, excessive force actions provide a relatively easy way of monetizing damages: the plaintiff often can itemize hospital bills, lost wages, and so forth. Moreover, because the monetary payoff is, on average, greater, plaintiffs may be better positioned to find counsel willing to represent them. And the higher rate of excessive force litigation does not mean that filing an excessive force lawsuit is *easy*: these factors simply explain why excessive force is litigated more than any other type of Fourth Amendment issue in actions for money damages.

Meanwhile, plaintiffs file very few actions for injunctive or declaratory relief. Litigation seeking such relief is severely curtailed due to the current requirements of standing doctrine, under which a plaintiff needs to show that he is likely to be injured again.³⁵² The same is true of prosecutions of law enforcement officers under 18 U.S.C. § 242, which criminalizes the act of depriving another of rights “under color of any law.”³⁵³ The social costs to prosecuting police officers are considerable, and the likelihood that a prosecutor will succeed is relatively low due in part to solidarity among officers. Such factors tend to suppress the rate at which such prosecutions occur.³⁵⁴

³⁵¹ See Chen, *supra* note 107, at 914-15; Karlan, *supra* note 32, at 887-88.

³⁵² See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (“Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles . . .”).

³⁵³ 18 U.S.C. § 242 (2006) (“Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned . . .”).

³⁵⁴ From 2005 to 2009, only two federal prosecutions under § 242 articulated a Fourth Amendment principle. See *United States v. Coté*, 544 F.3d 88 (2d Cir. 2008); *United States v. Perkins*, 470 F.3d 150 (4th Cir. 2006). That low figure is at least in part a result of the intent requirement in § 242 itself. Ultimately, many or most disputes arising under that statute are resolved by the court based on the intent requirement, rather than turning to the

This intentionally broad-brush survey of the remedies available for possible Fourth Amendment violations provides a clear explanation for the current rates of litigation of Fourth Amendment rights in the civil and criminal contexts. I revisit this territory to emphasize that the current rate and location of lawmaking is the product of decisions about remedial availability and other litigation incentives: exclusion is a judge-created remedy, money damages are the product of a statutory provision, qualified immunity is a judge-made doctrine, the scope of standing is judicially delineated, and Congress defined the offense codified in 18 U.S.C. § 242.

We can easily envision ways in which these incentives might be different. Suppose that Congress passed legislation eliminating qualified immunity altogether. A major disincentive for individuals to bring Fourth Amendment claims for money damages would disappear overnight, and the rate of litigation of such claims in civil suits would escalate. Or suppose that exclusion of evidence was a remedy for the use of excessive force. Undoubtedly the number of criminal defendants who raised such claims would increase dramatically. Of course, there would be repercussions from these adjustments, perhaps including increased judicial reluctance to recognize violations. The point is that the rate of litigation is far from inevitable, and we could produce significant changes to that rate.

These insights about the rate at which litigation takes place in various contexts and the effect of that rate on the overall shape of the law provide an idea for picking up where the literature on the relationship between rights and remedies leaves off. Both the decision rules and pragmatist projects are descriptively powerful but leave unanswered normative questions. The scholarship invoking operative propositions and decision rules, for example, takes great pains to demonstrate the distinction between these two constitutional “outputs.” The literature is persuasive on the point that our identification of the operative proposition may influence our understanding of the proper decision rule,³⁵⁵ yet it is silent on how we should identify the correct operative proposition – or, practically speaking, how we should ensure that the judges actually charged with implementing the Constitution do so. And work commonly identified as pragmatist displays a similar normative vacuum. Levinson, for example, develops a better understanding of the influence of remedy in courts’ interpretation of constitutional rights.³⁵⁶ But he does not say to what end this better understanding should be put. His account of remedial

Fourth Amendment issue.

³⁵⁵ See Roosevelt, *supra* note 50, at 195-96 (explaining that the decision rule of strict scrutiny for racial classifications that disadvantage minorities might be justified by various operative propositions, such as “equal protection must protect everyone equally” or “discrimination that arises from a lack of equal concern and respect for the burdened group” is prohibited).

³⁵⁶ Levinson, *supra* note 46, at 857-858 (reasoning that although remedies are best discussed in light of the rights they are designed to implement, the rights themselves are best thought of in complete isolation from their remedies).

equilibration is a descriptive one, a way of thinking about the process by which rights are defined and refined. For all its considerable contributions, then, his work on remedial equilibration offers no clear answers to the question of how we *should* structure remedies.³⁵⁷

The literature on rights and remedies thus fosters a deeper understanding of “how the law becomes what the court does,”³⁵⁸ yet it has thus far left largely untouched the separate question of whether and how we should intervene in that law-creation process. Attention to the context in which rights-making occurs shows promise for filling that gap. Creating remedies intentionally, with the explicit goal of facilitating intelligent rights-making via litigation in multiple contexts, addresses several concerns implicit in but unaddressed by the literature on rights and remedies.

One such concern resides in the process by which courts implement the Constitution – a concern that proponents of the operative proposition/decision rule model would call the development of decision rules. The literature is largely silent on this question of process. On the somewhat different subject of assessing qualifications for judicial office, Richard Fallon gestures at the need for attention to the mechanics of judicial lawmaking. He emphasizes that “pertinent intellectual attributes” for “good judging” include “[f]actual knowledge about the myriad contexts for which legal rules must be fashioned and in light of which their success or failure should be judged.”³⁵⁹ Fallon’s suggestions are sensible in themselves as criteria for assessing candidates for the judiciary, but the underlying concern – that judges should have a good factual understanding of the situations in which legal principles will apply – also highlights the value of taking context into account in considering how we should structure remedies. When available remedies have the practical effect of confining lawmaking to a single context, judges’ understanding of the relevant circumstances will be both biased and incomplete. Attention to context, therefore, addresses one acknowledged gap in the literature: “many prominent theories of constitutional interpretation offer accounts of what the Constitution means, but not of how courts should necessarily decide cases.”³⁶⁰

Moreover, context has direct implications for some of the fundamental preoccupations of the literature on rights and remedies. For example, scholars identified with the decision rules model have described the under-enforcement of certain constitutional rights as the result of institutional constraints, such as the limited ability of the federal courts to prescribe standards for other government actors to follow.³⁶¹ Other scholars have noted the over-

³⁵⁷ *Id.* at 917-24.

³⁵⁸ Roosevelt, *supra* note 43, at 1649.

³⁵⁹ Fallon, *supra* note 42, at 1322. Of course, Fallon’s use of the word “contexts” is different from mine; he refers to different situations that laws must govern, while I refer to given combinations of remedial, factual, and procedural circumstances.

³⁶⁰ *Id.* at 1279.

³⁶¹ *See id.* at 1278; Sager, *supra* note 37, at 1219-20; *see also* Roosevelt, *supra* note 50,

enforcement of other constitutional rights, which occurs when the courts craft rules that arguably extend beyond the requirements of the Constitution – the paradigmatic example is the quadripartite warning system the Court created in *Miranda*.³⁶² Implicit in the preoccupation with both under-enforcement and over-enforcement is the notion that, in general, courts should strive to tailor the decision rules they develop for implementing constitutional rights as closely as possible to the operative propositions that animate those guarantees. Sager, for example, argues that rights should be under-enforced only as a result of constraints on the role of the courts.³⁶³ Deviations that under-enforce or over-enforce the Constitution are sometimes necessary for institutional reasons, but they should be undertaken with particular care and should not be viewed as statements about the scope of the constitutional norm.³⁶⁴ Attention to context in lawmaking therefore serves the goal of thoughtful enforcement by increasing the likelihood that courts will accurately discern the range of situations in which a particular decision rule will apply and will, within the parameters of their institutional role, consequently develop decision rules that provide an appropriate fit across that full range of situations.

Sensitivity to lawmaking context also allows more explicit acknowledgment of the dynamic nature of operative propositions, a reality that the existing literature mentions only in passing.³⁶⁵ Nonetheless, our Constitution is a living document,³⁶⁶ and judicial and social understanding of its provisions evolves over time. This dynamism is particularly notable for rights, including but not limited to Fourth Amendment rights, whose contours evolve in response to emerging technology. There, the need for doctrine to reflect the living nature of the Constitution is particularly compelling.³⁶⁷ When lawmaking occurs in multiple contexts, rather than only one, courts are more likely to encounter changing social attitudes, interests, technologies, and practices, and are also more likely to become aware of the effect of these changes across a variety of factual circumstances. This heightened awareness of change and its consequences will facilitate judicial understanding of operative propositions

at 197-99.

³⁶² See Monaghan, *supra* note 43, at 2-3; Strauss, *supra* note 45, at 195-207.

³⁶³ Sager, *supra* note 40, at 1217-18.

³⁶⁴ *Id.* at 1214-21.

³⁶⁵ One exception is Kermit Roosevelt, who has discussed the possibility that operative propositions evolve over time. See Roosevelt, *supra* note 50, at 200-01.

³⁶⁶ This is not an entirely uncontroversial statement, but I believe that even the most ardent originalist would agree that the meaning and interpretation of constitutional provisions may respond to changes in society. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”).

³⁶⁷ See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 66-74 (2005); Marceau, *supra* note 32, at 699-73.

and improve the judiciary's ability to implement those operative propositions by developing appropriate decision rules.

Prescriptively speaking, where do these thoughts on context lead? As a first step in recognizing the role of context, we should explicitly acknowledge that single-context litigation is inherently undesirable. The logical next step is to identify areas of doctrine where litigation currently takes place in a single context and to facilitate rights-making in other contexts. In the Fourth Amendment realm, I have identified investigatory stops and excessive force as two such areas, although there are many others.³⁶⁸ The rate of rights-making need not be equal in each context. But it should be meaningful. That is, enough decisions should be made in each context to ensure that the interests, parties, and circumstances that tend to arise in that context are represented in the aggregate development of the right in question.

I will not attempt here to develop a comprehensive plan for facilitating more law in more contexts. I leave for my future work the project of establishing precisely where and how law should be made,³⁶⁹ with the hope that I have here established *why* this project is important. Possible mechanisms for facilitating litigation in a certain area might include expanding the availability of attorneys' fees, providing statutory damages, cabining official immunity, or reducing jurisdictional barriers to structural reform litigation. We might also consider more radical measures, such as a so-called constitutional court.³⁷⁰ Such a tribunal would adjudicate constitutional issues in an explicitly advisory fashion; its decisions would be insulated from concerns about remedies or other pragmatic consequences. Although I harbor no illusions about the likelihood of implementing such a scheme, contemplating this extreme possibility is useful because it leads us to consider seriously how other modifications less foreign to our current system might improve upon the rights-making status quo.

A skeptic might question the wisdom of manipulating adjudicatory mechanisms to exert control over the opportunities courts have to make law. As a policy matter, how can we justify structuring remedies with certain rights-making ends in mind?

I have two points in response. First, influencing the rate of lawmaking in a particular context by setting a particular level of remedial availability is not a radical new step. Our current remedial structure *already* represents a choice about where law will be articulated. That we have not chosen consciously does not undermine the reality of the choice.

³⁶⁸ Vehicle searches, consent searches, and plain view searches are also notably underlitigated outside the criminal context. *See supra* Part II, fig.3.

³⁶⁹ *See* Leong, *supra* note 4.

³⁷⁰ As described by Levinson, a constitutional court is an institution to implement a "Dworkinian, top-down process of constitutional adjudication that is entirely immune from consequentialist concerns about implementation or remediation." Levinson, *supra* note 46, at 939.

Second, nothing is sacred about the current rate of rights articulation in the civil and criminal contexts. Indeed, the Supreme Court's overruling of *Saucier* a mere eight years after it was decided clearly reveals the malleability of lawmaking avenues. Although courts have described lawmaking as desirable,³⁷¹ they do not systematically structure remedial incentives to ensure that lawmaking occurs in particular contexts. In short, we have arrived at the current regime without considering whether it optimizes courts' abilities to articulate well-considered law. Common sense suggests it might not: criminal defendants are likely over-motivated to press their claims due to the desire to avoid incarceration or other punishment. Meanwhile, civil plaintiffs are likely under-motivated due to the prospect of qualified immunity, the low monetary value of many Fourth Amendment violations, and the difficulty of obtaining attorneys' fees.

Because no particular rationale justifies the status quo, the project of thinking about where and how we want courts to go about making law seems both appropriate and desirable. Consideration of the ideal conditions for rights-making is long overdue.

CONCLUSION

The evolution of our Fourth Amendment jurisprudence teaches us that the context in which rights are defined matters. How and where courts make rights affects the contours of the rights they make. I have argued that we should not shrug our shoulders at the reality that context influences substance. Context is not inevitable. We should therefore explicitly embrace the rights-making function of the courts, and we should do our best to optimize courts' ability to do this important work. Given the right-remedy dialectic and its effect on the context in which courts articulate law, we should act intentionally to ensure that rights-making occurs in contexts likely to assure that judges take account of all the interests those rights serve to vindicate and protect.

³⁷¹ See *supra* Part I.A (discussing circumstances in which courts have explicitly permitted or required lawmaking, including qualified immunity, harmless error, and the good faith exception to the exclusionary rule).