

IMPROVING RIGHTS

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INTRODUCTION

COURTS and commentators regularly emphasize the importance of judicial rights-making. Within our judicial system, judges not only resolve disputes, but also articulate principles that determine the scope of constitutional rights. Rights-making is so highly valued that, in some instances, courts have structured doctrine so as to facilitate opportunities for rights-making,¹ and distinguished commentators have argued in favor of adopting further measures in that direction.²

Despite the importance attached to rights-making, commentators have thus far focused inadequate attention on the conditions under which rights-making occurs. In a previous article, I presented original quantitative and qualitative research to demonstrate the influence of context—a term I use to refer to the remedies, facts, and procedures associated with a particular venue in which constitutional rights are litigated.³ I concluded that the context in which appellate courts articulate a constitutional right shapes the contour of that right. For example, addressing a Fourth Amendment violation resulting from an unlawful investigatory stop in a suppression motion means the judge is likely to focus heavily on what the police did to find the evidence at issue, unlikely to address the use of force, and likely to be influenced by the fact that the proponent of the right either pled guilty or was found guilty by a jury.⁴ Conversely, addressing the identical Fourth Amendment violation in a civil rights suit for damages under 42 U.S.C. § 1983 will result in the judge looking more holistically at the encounter, but will also lead to an overemphasis

¹ See, e.g., *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001) (requiring decision of constitutional merits prior to decision of immunity); *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (modifying *Saucier* to allow rather than require constitutional decision prior to immunity decision); *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) (instructing courts to announce whether error has occurred *before* determining whether error was harmless); *United States v. Leon*, 468 U.S. 897, 925 (1984) (explicitly authorizing courts to announce scope of Fourth Amendment rights before determining whether officer acted in good faith).

² See, e.g., John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 *Sup. Ct. Rev.* 115, 116–17, 120 (2010); Orin Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 *Geo. L.J.* 1077, 1079–80, 1118 (2011).

³ Nancy Leong, *Making Rights*, 92 *B.U. L. Rev.* 405, 407 (2012) [hereinafter *Leong, Making Rights*].

⁴ *Id.* at 436–37, 440–43.

on culpable conduct by law enforcement officers as a result of the focus prompted by the frequently invoked qualified immunity defense.⁵ In short, context matters when it comes to articulating rights.

The lack of attention to context in rights-making regularly leads to two related conclusions. First, courts and commentators alike regularly presume that a single avenue for rights-making is sufficient—that is, if damages are available under Section 1983 as a remedy for a Fourth Amendment violation, then there is no need for exclusion of evidence. In *Hudson v. Michigan*, the Court cited the availability of civil damages as a justification to withhold exclusion as a remedy for a conceded violation of the Fourth Amendment’s knock-and-announce requirement for the execution of warrants,⁶ and commentators have sometimes failed to acknowledge that rights-making in different contexts is not indistinguishable.⁷ Second, courts and commentators often assume that current rights-making conditions are impervious to correction—that is, even if a particular rights-making avenue leads to undesirable rights-making conditions, there is little that could or should be done about it. Both conclusions are mistaken.

First, as I will show in Part II, there are various reasons to think, based on psychology research regarding decision-making, that judicial rights-making would be better undertaken in multiple contexts. That is, the rights that would emerge from multiple-context litigation would more closely resemble the rights that judges would articulate if they considered all the information relevant to the right itself, and only that information, freed from bias, cognitive errors, and the influence of non-substantive contextual factors.

As I will explain, multiple-context rights-making improves rights in a number of ways: it provides judges with more information about the various circumstances in which a particular constitutional right will apply; it ensures that the interests of all those who will be affected by the right will be adequately represented to the judiciary; it prevents the procedural idiosyncrasies of a particular context from skewing litigation; and, in doing all of these things, it helps to eliminate or mitigate judges’ cognitive

⁵ Id. at 445, 447–48, 454.

⁶ 547 U.S. 586, 596–99 (2006).

⁷ Jeffries, *supra* note 2, at 117, 132–36; Kerr, *supra* note 2, at 1080, 1095–97, 1118. Kerr elsewhere does acknowledge the importance of remedy in shaping law development. See, e.g., Orin Kerr, Lifting the “Fog” of Internet Surveillance: How a Suppression Remedy Would Change Computer Crime Law, 54 *Hastings L.J.* 805, 806 (2003).

biases. For these reasons, multiple-context rights-making improves rights. In many areas of our legal system that do not involve constitutional rights, we explicitly embrace similar considerations in creating judicial decision-making environments. My advocacy of rights-making in multiple contexts, therefore, is a logical extension of the principles our legal system already incorporates to facilitate good decisions by judges and other actors within the judicial system.

Second, if rights-making in multiple contexts is superior, then governmental actors can and should affirmatively facilitate those conditions, whether through constitutional or sub-constitutional measures. Under certain circumstances, judges, executive branch officials, and legislators can take measures to adjust the rate and circumstances of rights-making in various contexts by increasing the availability of remedies and removing other obstacles to litigation. A skeptic might protest that attempting to change the rate of litigation in a particular context equates to inappropriate meddling in the normal course of litigation. Yet there is no reason to assume that the status quo is the “normal” course of litigation, nor to assume that the current rate of litigation is the “correct” rate. The current conditions of litigation didn’t just happen—rather, they were determined by affirmative governmental decisions regarding available remedies, incentives to litigate, and procedural hurdles. The fact that governmental actors did not always make these decisions with explicit attention to the conditions under which rights should be litigated does not mean that their decisions were inevitable or desirable. What I advocate, then, is a practice of *deliberate* decision-making regarding available remedies, incentives to litigate, procedural hurdles, and other factors that affect the rate of litigation. Guiding that deliberate decision-making should be the understanding that facilitating rights-making in multiple contexts results in improving rights.

The Article is organized in four parts. Part I surveys the existing terrain of rights-making. Courts and commentators increasingly emphasize the law articulation function of the judicial branch, yet have given little attention to the conditions under which rights-making should occur. This neglect is misguided. As my previous work reveals, context is of paramount importance in influencing the development of constitutional rights.

Part II explains why rights-making in multiple contexts is more desirable than rights-making in a single context. To do so, it turns to cognitive psychology research regarding the causes of cognitive errors in de-

cision-making and the mechanisms for correcting such errors. Multiple-context rights-making provides these better decision-making conditions. Such rights-making exposes judges to a broader range of governmental and private actors, factual circumstances, and social interests, allowing them to see the full array of considerations relevant to defining the proper contour of the right. These conditions tend to correct cognitive errors and, consequently, improve judicial rights-making.

Part III explains that attention to decision-making conditions such as those described in the previous Part is neither unprecedented nor even particularly remarkable within areas of our legal system other than constitutional rights-making. In a range of doctrinal areas, including prudential standing, class certification, and the rules of evidence, courts have already constructed rules with attention to the same considerations that militate in favor of multiple-context rights-making.

Finally, Part IV offers a suite of reforms and interventions that would facilitate multiple-context rights-making while causing minimal disruption in current institutional practices. The Part also considers some of the obstacles to implementation and addresses possible objections.

I. MAKING RIGHTS

Rights-making is more than merely an inevitable byproduct of adjudication. Rather, it is an important end in itself, one so important that the U.S. Supreme Court has increasingly structured doctrine so as to facilitate rights-making. Despite the recognition of rights-making's importance, little attention has focused on the conditions under which rights-making occurs. As my previous work has shown both analytically and empirically, however, context—a term I use to refer to the remedies, facts, and procedures applicable to a particular litigation of a constitutional right—matters a great deal to the ultimate content of rights.

The importance of context calls into question courts' repeated suggestion that one adjudicatory context is enough. Because the contour of a constitutional right varies greatly depending on the context in which the right is articulated, the decision about where such articulation takes place is *also* a decision about what the resultant right will look like. This realization invites us to question how we can create the optimal rights-making conditions.

A. The Pursuit of Rights-Making

By deciding cases, courts create and refine constitutional rights. Moreover, as I have previously explained, courts not only “do articulate rights as they decide cases but also *should* articulate rights, even, in some instances, when doing so is not strictly necessary to resolve the dispute before them.”⁸ In some instances, courts even structure doctrine to facilitate rights-making.⁹ Courts and commentators are thus virtually unanimous in viewing judicial articulation of constitutional rights as a desirable activity.¹⁰

Recent cases have explicitly acknowledged the importance of articulating constitutional rights and have even structured doctrine intentionally so as to facilitate such articulation. One example is qualified immunity doctrine, which provides immunity to government officers sued under 42 U.S.C. § 1983 when the plaintiff cannot demonstrate that the officer violated clearly established law of which a reasonable officer would have known. Qualified immunity thus protects government officers from burdensome financial liability for actions they would not reasonably have known were unconstitutional, thereby avoiding over-detering officers from engaging in legal actions that would benefit the public good.¹¹ But the doctrine also raises the concern that if courts hold that the law was not clearly established without deciding whether a constitutional violation took place, the law will never become clearly established so as to allow liability for future violations.¹²

The Supreme Court addressed the qualified immunity problem by first allowing¹³ and subsequently requiring lower courts to decide the constitutional merits before determining whether the law was clearly established. In *Saucier v. Katz*, the Court explained that adjudication

⁸ Leong, Making Rights, *supra* note 3, at 410.

⁹ 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).

¹⁰ Leong, Making Rights, *supra* note 3, at 411.

¹¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

¹² See Nancy Leong, The *Saucier* Qualified Immunity Experiment: An Empirical Analysis, 36 Pepp. L. Rev. 667, 676–84 (2009) [hereinafter Leong, The *Saucier* Qualified Immunity Experiment] (outlining rationales for, and criticisms of, qualified immunity doctrine).

¹³ See *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

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.¹⁴

The Court then imposed a mandatory two-step sequence for qualified immunity adjudications: The "initial inquiry" must be whether "the officer's conduct violated a constitutional right," and only then "whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."¹⁵ *Saucier* thus plainly acknowledged rights articulation as a goal of adjudication and stressed the importance of facilitating such rights-making.¹⁶

Saucier attracted considerable criticism from lower courts,¹⁷ commentators,¹⁸ and individual members of the Supreme Court,¹⁹ and the Supreme Court unanimously overruled the case after only eight years with its decision in *Pearson v. Callahan*, which held that deciding the merits question was discretionary rather than mandatory.²⁰ Still, *Pearson* reaffirmed rights articulation as an important goal, stating: "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."²¹ Moreover, *Pearson* emphasized that *Saucier* "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

¹⁴ 533 U.S. 194, 201 (2001).

¹⁵ *Id.*

¹⁶ This explanation is drawn from Leong, *Making Rights*, *supra* note 3, at 412. Some quotation marks have been omitted for ease of reading.

¹⁷ Some courts discreetly declined to apply the merits-first procedure. See, e.g., *Hatfield-Bermudez v. Aldanondo-Rivera*, 496 F.3d 51, 59–60 (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).

¹⁸ See, e.g., Leong, *The Saucier Qualified Immunity Experiment*, *supra* note 12, at 690–93; Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1277–79 (2006).

¹⁹ Justices Breyer, Ginsburg, and Scalia consistently raised the unnecessary decision of difficult constitutional questions as an argument against mandatory sequencing. See Leong, *The Saucier Qualified Immunity Experiment*, *supra* note 12, at 679 n.66 (collecting examples).

²⁰ 129 S. Ct. 808, 818 (2009).

²¹ *Id.*

frequently arise in cases in which a qualified immunity defense is unavailable.”²² *Pearson* thus reinforces the importance of rights-making and maintains qualified immunity adjudication as a vehicle for such rights-making.²³

Moreover, the priority placed upon rights articulation in qualified immunity adjudications is just one example of a broader phenomenon. As I and others—most notably, Thomas Healy—have previously explained, courts have also required or approved the articulation of constitutional principles not necessary to resolve a dispute in other areas, including harmless error analysis, the good faith exception to the exclusionary rule, and other instances.²⁴

The prior discussion illuminates the importance we assign to the continued development of rights as well as to the importance of cases as vehicles for judicial 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. Remedial Rationing

Courts and commentators often assume that litigation in any context is fungible with litigation in any other context. Where the Fourth Amendment is concerned, for example, courts and commentators generally treat exclusion and money damages as mutually exclusive alternatives rather than as complementary possibilities.²⁵ This approach sug-

²² *Id.*

²³ 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 law articulation is important. See, e.g., Jack M. Beerman, Qualified Immunity and Constitutional Avoidance, 2009 Sup. Ct. Rev. 139, 149–50 (2010); Jeffries, *supra* note 2, at 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 Marceau, The Fourth Amendment at a Three-Way Stop, 62 Ala. L. Rev. 687, 723–29 (2011).

²⁴ Leong, Making Rights, *supra* note 3, at 413 (explaining the Court's attention to rights-making in doctrinal areas other than qualified immunity). As I also noted in Making Rights, my analysis of the issues discussed in this paragraph owes much to Thomas Healy's work. See Thomas Healy, The Rise of Unnecessary Constitutional Rulings, 83 N.C. L. Rev. 847, 871–72, 882–95 (2005).

²⁵ See, e.g., Jeffries, *supra* note 2, at 117 (“The role of money damages—or indeed of any mechanism for vindicating constitutional rights—depends on the alternatives.”).

gests that no purpose is served by making more than one remedy available. Indeed, to do so would be redundant.

A majority of the Court relied on this logic in *Hudson v. Michigan* in holding the exclusionary remedy unavailable for knock-and-announce violations: Because Section 1983 damages actions had (the majority claimed) become much more widely available since *Mapp v. Ohio*,²⁶ the exclusionary remedy had become unnecessary.²⁷ More telling is the scholarly commentary responding to *Hudson*. Even commentators who disagree with the Court's conclusion in *Hudson* focus on the empirical claim that Section 1983 provides a remedy for knock-and-announce violations; they do not criticize the assumption that one remedy is enough.²⁸

The view that a single avenue for rights vindication is sufficient permeates constitutional doctrine. The Court has declined to allow suits pursuant to *Ex parte Young*²⁹ when Congress has created an alternative remedial scheme that would allegedly be undermined by such suits.³⁰ Likewise, when analyzing whether *Bivens*³¹ actions are available for constitutional rights violations, the Court generally answers that question in the negative when alternative remedial measures are available.³² The same is true in the habeas context: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings"³³—that is, a single forum for adjudication is sufficient. With respect to litigation by prison-

²⁶ 367 U.S. 643 (1961).

²⁷ *Hudson v. Michigan*, 547 U.S. 586, 597–98 (2006).

²⁸ 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, 1881–82, 1885 (2008).

²⁹ 209 U.S. 123 (1908).

³⁰ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73–76 (1996) (holding *Ex parte Young* did not apply in light of remedial provisions of Indian Gaming Regulatory Act).

³¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

³² See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70, 72–74 (2001) (holding *Bivens* action unavailable when both state tort remedies and Bureau of Prisons administrative remedies were available); *Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012) (similar); *Hui v. Castaneda*, 130 S. Ct. 1845, 1848 (2010) (holding that Public Health Service Act precludes *Bivens* actions against Public Health Service personnel for constitutional violations arising out of their official duties).

³³ 28 U.S.C. § 2254(d) (2006). See generally Kent Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 888–92 (1998) (describing Congress's authority to limit habeas corpus in federal courts under § 2254).

ers more generally, the Court has held that the existence of the Prison Litigation Reform Act makes any alternative remedial scheme unavailable until the prisoner has exhausted available remedies under the Act,³⁴ thereby suggesting that a single channel for adjudication is sufficient. And in many other circumstances, the Court has also held that the existence of one remedy renders others unnecessary.³⁵

Recognizing the widespread view of remedies strictly as alternatives, Jennifer Laurin uses the term “remedial rationing” to refer to the judicial practice in which “enforcement of a given criminal procedure right is committed *either* to the criminal *or* the civil realm.”³⁶ As a result, courts’ logic regarding remedies “is largely—and, for the most part, unexamined—binary.”³⁷ This binary thinking has also infected legal scholarship. Most scholars have not explicitly considered the way that the availability of multiple remedies—or the lack of such availability—influences the process of rights-making.³⁸

³⁴ Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803, § 7(a), 110 Stat. 1321-66, 1321-70 to -73 (1996) (codified as amended at 42 U.S.C. § 1997e (2006)).

³⁵ See, e.g., *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2492, 2497 (2011) (noting existence of administrative remedies as justification for limitation on application of Petition Clause and emphasizing that plaintiff had already prevailed in union grievance process); *United States v. Denedo*, 129 S. Ct. 2213, 2220 (2009) (holding that “extraordinary” remedy of *coram nobis* is unavailable “when alternative remedies, such as habeas corpus, are available”); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (holding that habeas is only remedy for action challenging fact or duration of confinement and holding civil rights action under § 1983 not available). But see *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009) (holding that Title IX was neither intended to be exclusive mechanism for enforcing gender discrimination in schools nor substitute for § 1983 suit for enforcing constitutional rights). Cf. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 764 (2008) (“A complaint alleging a facially valid constitutional tort should not be dismissed merely upon the *possibility* that the complaint presents a claim under state law.”).

³⁶ Jennifer E. Laurin, *Melendez-Diaz v. Massachusetts, Rodriguez v. City of Houston*, and Remedial Rationing, 109 Colum. L. Rev. Sidebar 82, 83 (2009). As I noted in *Making Rights*:

I agree with Laurin’s identification of this phenomenon but 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.

Leong, *Making Rights*, *supra* note 3, at 419 n.64.

³⁷ Leong, *Making Rights*, *supra* note 3, at 419.

³⁸ There are a few exceptions, although they have focused on particular doctrinal areas rather than examining single-context litigation as a transsubstantive phenomenon. See generally Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*,

Certainly scholars have articulated concern for rights-making where, practically speaking, *no* context is available for rights-making.³⁹ Yet many commentators appear to be satisfied with the knowledge that lawmaking occurs *somewhere*, while the conditions of lawmaking in that particular context receive little or no scrutiny. After 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.”⁴⁰

Certainly it is cause for concern if no context exists for the development of certain rights, with the result that the law in these areas will stagnate. This concern is particularly valid in the aftermath of cases such as *Pearson* and *Hudson*, which limit available remedies and have prompted scholarly consternation.⁴¹

But as I have previously explained, “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—and, indeed, may create new problems.”⁴² This Article thus continues my expansion upon the work of commentators who have demonstrated the importance of providing *an* opportunity for law articulation by emphasizing that we should *also* analyze whether the contexts available for law articulation allow for intelligent development of the law. In the next Section, I will use the Fourth Amendment to

2005 Wis. L. Rev. 35, 37–42 (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, 2004–05, 2029–30 (1998) (examining relationship between rights and remedies under Fourth Amendment and Equal Protection Clause in criminal adjudication).

³⁹ Scholars such as John Jeffries and Orin Kerr have emphasized the need to avoid stagnation in the development of constitutional principles in the context of, respectively, qualified immunity and the good-faith exception to the exclusionary rule. See John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 97 (1999); Kerr, *supra* note 2, at 1118.

⁴⁰ Leong, Making Rights, *supra* note 3, at 420 (explaining how Jeffries and Kerr omit discussion of rights-making context).

⁴¹ See Jeffries, *supra* note 2, 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 23, 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 23, at 699.

⁴² Leong, Making Rights, *supra* note 3, at 421.

demonstrate that rights-making that occurs in multiple contexts is superior to rights-making that occurs in a single context.

C. Context Matters

As the previous discussion reveals, the literature on the effect of law articulation environment is relatively sparse. Both courts and commentators appear content with the knowledge that rights articulation occurs somewhere, while the conditions under which that articulation occurs remain neglected by contrast. This Section summarizes my previous research providing a fuller account of these conditions.⁴³

Contrary to this conventional approach, the contour of a constitutional right depends enormously on the context in which that right is litigated. The Fourth Amendment provides a telling example. As I have described in detail in previous work,⁴⁴ and will summarize here, Fourth Amendment doctrine is warped because most types of Fourth Amendment claims are litigated *either* in criminal prosecutions *or* in civil actions for money damages.⁴⁵ As a result, the remedial, factual, and procedural characteristics of the respective contexts influence the substantive law that courts articulate. In the rare instance—for example, unlawful detention—in which the Fourth Amendment is enforced at a meaningful rate in both criminal and civil contexts, the resulting right is far better informed by all the relevant interests.⁴⁶

The effect of context on the contour of Fourth Amendment rights manifests itself in a number of ways. First, the exclusionary remedy available in criminal proceedings causes courts to be more hostile to an expansive version of Fourth Amendment rights than does the money damages remedy. The consequences of exclusion are extreme: Often the charges against the defendant are reduced or even dismissed, and as a result judges and justices sometimes hesitate to exclude evidence. In *Hudson*, for example, the Court characterized exclusion as a “massive remedy”⁴⁷ resulting in the “jackpot”⁴⁸ of a “get-out-of-jail-free

⁴³ The empirical data in this Section are drawn from Part II of Making Rights, and the findings are presented here as important context for upcoming analysis rather than as a novel empirical contribution. *Id.* at 421–29.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 428–30.

⁴⁷ 547 U.S. at 595.

⁴⁸ *Id.*

card,”⁴⁹ and a “last resort”⁵⁰ rather than a “first impulse.”⁵¹ This ambivalence about exclusion may be outcome-determinative in marginal cases.⁵² More importantly, though, the exclusionary rule not only determines outcomes, but also “dictates the focus of judicial inquiry, the structure of analysis, and the contours of the doctrine that results.”⁵³ William Stuntz explains that, “in 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.”⁵⁴ Stuntz concludes: “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.”⁵⁵

In contrast to exclusion, the money damages remedy available under Section 1983 creates a distinct set of considerations that, in the aggregate, leaves courts more kindly disposed to an expansive version of the Fourth Amendment.⁵⁶ In civil suits, courts may be more willing to acknowledge constitutional violations when the injury in question translates easily to monetary terms, such as medical bills for injuries suffered or valuation of property damage. Relatedly, the damages remedy directs

⁴⁹ *Id.*

⁵⁰ *Id.* at 591.

⁵¹ *Id.*

⁵² Akhil Reed Amar, Fourth Amendment First Principles, 107 *Harv. L. Rev.* 757, 799 (1994); 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 Revisited, 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”).

⁵³ Leong, *Making Rights*, *supra* note 3, at 431.

⁵⁴ William J. Stuntz, The Virtues and Vices of the Exclusionary Rule, 20 *Harv. J.L. & Pub. Pol’y* 443, 450 (1997).

⁵⁵ *Id.*

⁵⁶ Plaintiffs may also seek injunctive and declaratory relief under § 1983. After *City of Los Angeles v. Lyons*, however, the threshold for establishing standing is so high that these remedies are unavailable to most plaintiffs. 461 U.S. 95, 111–13 (1983).

judicial attention to the harm the plaintiff has suffered. This focus might or might not favor an expansive version of the Fourth Amendment. That outcome depends on how serious the harm was and whether the court perceives that the plaintiff did something to deserve it, among other factors. Either way, the point is that focusing on the harm to the plaintiff necessarily diminishes the emphasis placed on 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. The comparatively lesser focus on policing behavior seems likely to influence the contour of the right that courts articulate, and perhaps even the outcomes of individual cases in some circumstances. Finally, the money damages remedy exerts a powerful influence on the development of Fourth Amendment rights in suits under Section 1983 because of its close connection to the qualified immunity defense: This factor may cut against courts' willingness to rule in favor of plaintiffs on the merits.⁵⁷

Factual considerations also predispose courts to hostility to Fourth Amendment rights in the criminal context. Few would disagree that the average criminal defendant and the average civil plaintiff are not similarly situated. Criminal defendants tend to be poor, uneducated, and generally unsympathetic; relative to this baseline, civil plaintiffs tend to be relatively advantaged, and their apparent victimization may elicit judicial sympathy. Moreover, 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 already 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.⁵⁸ Criminal defendants thus inspire relative hostility to Fourth Amendment rights. When courts see such rights asserted by de-

⁵⁷ Qualified immunity has become an increasingly difficult hurdle for plaintiffs to overcome. 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. 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 23, at 886–87.

⁵⁸ Of course, a § 1983 action in theory may be brought following a criminal proceeding, but such actions are relatively infrequent because they are precluded if they would imply the invalidity of a conviction unless the underlying conviction has been reversed, expunged, or otherwise nullified or called into question. See *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994).

fendants as a means to exclude evidence strongly indicating their guilt, they are likely to view the claims of these unattractive proponents more skeptically. If a court encountered a claim for damages under Section 1983 that was factually identical in every way save for the presence of contraband, the same skepticism would not ensue.

Finally, procedural mechanisms make the criminal context a more difficult rights-making venue for the advocate of an expansive version of Fourth Amendment rights. In criminal proceedings, courts make Fourth Amendment rights on the worst claims. For purposes of binding future courts, only appellate rights-making counts, and—paradoxically—better claims tend not to reach appeal. This occurs for several reasons. First, almost ten percent of all criminal charges filed in federal court result in dismissal.⁵⁹ The Fourth Amendment arguments of defendants whose cases are dismissed tend, on average, to have stronger Fourth Amendment arguments than those of defendants whose cases terminate in a plea or a verdict—that is, there is a reason that dismissed cases are not tried to a verdict, and at least some of the time that reason is that unconstitutionally obtained evidence was excluded at trial. Importantly, this subset of cases never reaches appellate lawmakers. And if a case is not dismissed but the defendant wins her motion to suppress or is acquitted by a jury, the Fourth Amendment issue her case raises is likewise unlikely to reach an appellate court; rather, courts 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.⁶⁰

The circumstances under which most Fourth Amendment rights-making occurs has several consequences. First, in the appellate setting, the court reviews the facts only for clear error and, assuming the defendant has lost, in the light most favorable to the government.⁶¹ Where a case involves a credibility contest between a police officer and a defendant, this leaves the district court's credibility findings intact, and, where the defendant has lost, these findings virtually always favor the officer.

⁵⁹ Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 231822, Federal Justice Statistics, 2008—Statistical Tables 18 tbl.4.2 (2010), <http://www.bjs.gov/content/pub/html/fjsst/2008/fjs08st.pdf> (providing dispositions of criminal cases terminated between October 2007 and October 2008, by offense).

⁶⁰ The government may file an interlocutory appeal from the grant of a suppression motion. Anecdotally, both prosecutors and defense attorneys have told me that this is relatively rare, although it is more common where the government believes reversal likely. The practice also varies from one office to the next.

⁶¹ See *United States v. Simpson*, 520 F.3d 531, 534 (6th Cir. 2008).

The result is that the bulk of Fourth Amendment rights-making occurs in situations where the factual narrative is highly unfavorable to the proponent of the Fourth Amendment right. Second, by the time a criminal case reaches an appellate court, considerations of judicial efficiency weigh against disrupting the result below. The lower court has already ruled against the defendant on a motion to suppress, and in many instances there has already been a trial at which a jury found the defendant guilty. Reversing a conviction therefore inherently negates a great deal of process as well as a considerable investment of resources by both the trial judge and jury. This considerable procedural history may exert some degree of influence on a judge, subtly encouraging her to view a criminal defendant's claims skeptically on appeal. And 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 presents defendants seeking to prove a Fourth Amendment violation with a different type of procedural hurdle. Judges might understandably find it difficult 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, *ex post* judicial assessments of probable cause may be biased by the fact that incriminating evidence was actually discovered.⁶² Moreover, law enforcement officers testifying at suppression hearings may tailor their testimony—either consciously or subconsciously—to validate the actual contours of the search.⁶³ 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 light of these remedial, factual, and procedural features of the criminal and civil contexts, it matters to the scope of the resultant right that most claimed Fourth Amendment violations are litigated in the criminal context—71% of all claims, and 85% of all claims not including excessive force.⁶⁴ This disparity highlights the skewing effect on particular categories of Fourth Amendment rights made almost exclusively in a

⁶² William J. Stuntz, Warrants and Fourth Amendment Remedies, 77 Va. L. Rev. 881, 915–18 (1991).

⁶³ *Id.* at 914–15.

⁶⁴ Leong, Making Rights, *supra* note 3, at 428.

single context. For example, investigatory stops, also known as *Terry* stops, are litigated 95% of the time in criminal proceedings,⁶⁵ which often leads courts to overlook non-trivial instances of profiling and uses of force.⁶⁶ Likewise, excessive force claims are litigated over 98% of the time in the civil context,⁶⁷ which causes courts to ignore the interaction between force and investigative objectives.⁶⁸

As my empirical data reveal, individual categories of Fourth Amendment rights are generally litigated *either* in the criminal context *or* in the civil context. But when Fourth Amendment rights are litigated at meaningful levels in both contexts—as they are for claims governing unlawful detentions—the law is better for it. 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.⁶⁹ The doctrine therefore provides a unique opportunity to explore the difference in the way rights-making occurs when courts blend principles from multiple contexts in elaborating the shape of rights.

As a point of comparison to the cases involving investigatory stops and excessive force, the leading cases governing unlawful detentions arose in different contexts⁷⁰—namely, in *Michigan v. Summers*⁷¹ and *Muehler v. Mena*.⁷² The interplay between these two leading cases and other unlawful detention cases help to illustrate the interplay between rights-making in civil and criminal contexts. As I will discuss, 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.

First, 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 cross-pollination evident in the citation between criminal and civil cases has a range of valuable consequences. Perhaps most obviously, precedents arising in multiple contexts present a broader range of factual sce-

⁶⁵ *Id.*

⁶⁶ *Id.* at 438–42.

⁶⁷ *Id.* at 428.

⁶⁸ *Id.* at 445–55.

⁶⁹ *Id.* at 426.

⁷⁰ For a detailed discussion of the contours of unlawful detention doctrine, see *id.* at 455–62.

⁷¹ 452 U.S. 692 (1981).

⁷² 544 U.S. 93 (2005).

narios for courts to consider. Because unlawful detention claims are litigated in both civil and criminal contexts, the boundary between the two domains is also less rigid. The result is a fusion of the interests and concerns that each context brings to the foreground. For example, 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.⁷³ Unlawful detention decisions in the civil context also display willingness to import excessive force principles,⁷⁴ and because of the permeability between contexts, this sort of analysis then later infuses criminal cases. 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.

The adjudication of unlawful detention claims in both civil and criminal contexts has other consequences. Adjudication in multiple contexts yields a richer and more detailed analysis of officers' state 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 Section 1983 actions, courts' examination of such claims tends to look more closely at what officers knew and with respect to whom, adding an additional dimension to the case. Litigation in multiple contexts also enhances courts' understanding of the offense of arrest in Section 1983 cases alleging false arrest.⁷⁵ 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.⁷⁶

⁷³ See Leong, Making Rights, *supra* note 3, at 458 (“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.” (citing *Mena*, 544 U.S. at 98–100 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)))).

⁷⁴ See, e.g., *Binay v. Bettendorf*, 601 F.3d 640, 647–48 (6th Cir. 2010); *Lykken v. Brady*, 622 F.3d 925, 932–33 (8th Cir. 2010).

⁷⁵ See, e.g., *Blankenhorn v. City of Orange*, 485 F.3d 463, 472–73 (9th Cir. 2007).

⁷⁶ See Leong, Making Rights, *supra* note 3, at 460 (“The analysis of the duration of the detention in *Mena* provides one example of this context-bridging. There, the Court held that

Importing standards across contexts presents a number of attractive advantages. Cross-contextual standards are easier for the police to administer because such standards take into account a range of interests. Standards developed in multiple contexts simultaneously strike a balance that works across a range of situations, and, if the balance is not quite right when the standard is imported from one context to another, courts can refine the standard in light of a full understanding that takes account of both the context where the standard originated and the other contexts where it is applied. Although such importation might not be appropriate in every situation, thinking about translation between contexts promotes useful comparison of contexts and consideration of the similarities and differences between the two.

As I noted in *Making Rights*, “unlawful detention doctrine reveals a promising complementarity between the criminal and civil contexts where it is currently litigated, blending features of the two contexts in a way that better takes account of the interests inherent in both.”⁷⁷ Of course, unlawful detention doctrine is not perfect, and my claim is not that any particular case implicating that doctrine is decided in an ideal way. For example, courts’ tendency to segregate civil and criminal contexts results in less frequent cross-citing of cases than we might expect, even where issues are litigated with similar frequency in both contexts. Whether by intent or by unexamined habit, courts sometimes cite exclusively criminal cases in criminal decisions, and exclusively civil cases in civil decisions, even when ample precedent from both sources exists.⁷⁸ Nonetheless, a comparison of unlawful detention doctrine and investigatory stop doctrine reveals important differences. Although the two doctrines involve closely related subject matter—many unlawful detentions are simply *Terry* stops extended in duration and scope—courts approach

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. Federal appellate courts subsequently incorporated that analysis into criminal cases and applied it in different contexts. *United States v. Mendez*, 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.’” (footnotes omitted) (citations omitted)); see also *United States v. Turvin*, 517 F.3d 1097, 1102–04 (9th Cir. 2008) (noting that other courts of appeals have applied *Mena* in the traffic stop context).

⁷⁷ Leong, *Making Rights*, supra note 3, at 461.

⁷⁸ See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 Mich. L. Rev. 459, 511–21 (2010).

them in a dramatically different manner. The fact that unlawful detentions are litigated in multiple contexts explains the difference: In particular, the doctrine incorporates analysis of officers' use of force. Unlawful detention doctrine therefore reveals how more frequent litigation of investigatory stop claims under Section 1983 might result in modifications to the doctrine governing investigatory stops. Courts would be more likely to import analysis of force into adjudication of investigatory stop claims—as they often do in unlawful detention claims—if they were less distracted by the exclusionary remedy and its emphasis on finding evidence.

As I have explained,

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 unlawful detention 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.⁷⁹

As I will show in the next Part, unlawful detention doctrine provides a road map that guides us toward better rights-making. Such rights-making would result from judges considering all the information relevant to the right and only that information, freed from bias, cognitive errors, and the influence of other contextual factors.

II. DECIDING WELL

This Part develops a conception of an improved rights-making environment by considering what conditions are conducive to good judicial decision-making. In so doing, it turns to cognitive psychology research. It first surveys the existing theoretical terrain, ultimately adopting the “heuristics and biases” school of thought as a frame. Based on empirical research, it catalogues the conditions under which people—including judges—often suffer from cognitive errors. It then turns to the challenge of correction. We can help judges make better decisions by exposing them to a broader range of governmental and private actors, factual cir-

⁷⁹ Leong, *Making Rights*, *supra* note 3, at 462.

cumstances, and social interests. Such exposure will better capture the full array of considerations relevant to defining the proper contour of the right at issue.

Ultimately, these steps will help improve the quality of the rights that result from litigation. That is, multiple-context rights-making will yield rights that more closely resemble those that judges would construct if they considered only the information relevant to the right itself, freed from bias, cognitive errors, and the influence of other irrelevant contextual factors.⁸⁰

A. Cognitive Obstacles

Legal scholars have argued for decades that judges' decision-making is influenced by factors apart from the legal merits of the case. The legal realists argued that judges' decision-making is arbitrary,⁸¹ or that judges' decision-making simply reflects preexisting ideological commitments.⁸² Those identified with the critical legal studies movement posited that judges tend to decide cases in ways that privilege existing structures of power and systems of hierarchy.⁸³ Scholars of law and economics contend that judges—like everyone else—are influenced by self-interest.⁸⁴

Over the past few decades, theoretical models from other disciplines have informed the debate among legal scholars regarding the way that

⁸⁰ Some will argue that a “good” judicial decision must not only *be* a good decision but must also *appear* good to the people it will govern—that is, it must have legitimacy in the eyes of the people. I agree, although such legitimacy is not the focus of this particular Article. I note, as a predicate for future work, that many of the features necessary for good decision-making also usefully further the noble goal of democratic legitimacy. For example, given the adversary system from which constitutional rights-making arises, legitimate rights-making requires vigorous advocacy for the position of every party to a dispute. See generally Nancy Leong, *Gideon's Law-Protective Function*, 122 *Yale L.J.* 2460 (2013). Democratic legitimacy requires thorough representation of the position of all individuals and groups who have a stake in the scope of the ultimate right. *Id.* at 2471. Likewise, good rights-making should occur after judges have considered available information. See discussion *infra* Section II.B.

⁸¹ Jerome Frank, *Law and the Modern Mind* 100–17 (1930); Jerome Frank, *What Courts Do in Fact* (pt. 1), 26 *Ill. L. Rev.* 645, 653–56 (1932).

⁸² William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 *Mich. L. Rev.* 707, 710 (1991) (“[C]ritical legal realists . . . argued that all law is politics and thereby impugned the neutrality and legitimacy of law.”).

⁸³ See, e.g., Mark Kelman, *A Guide to Critical Legal Studies* 45–48 (1987).

⁸⁴ Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 *Sup. Ct. Econ. Rev.* 1, 2–3 (1993).

judges make decisions. Perhaps the most active debate has pitted the rational choice model of decision-making against the so-called “heuristics and biases” school of thought. Rational choice theory is derived from economics, and it posits that in making decisions people rationally evaluate the relative utility of each option and then select the option that increases their own net gain.⁸⁵ In contrast, the heuristics and biases school arises from research in cognitive psychology, and it argues that people are not very good at evaluating utility rationally, that they are subject to a range of cognitive errors, and that various biases tend to impair the ability to make the correct or best decision.⁸⁶ The differences between the two schools suggest divergent policy implications: Rational choice theory, if correct, supports a position of non-regulation because people will come to the right decision on their own, while the heuristics and biases school favors a regulatory stance of limited paternalism designed to mitigate the effects of known biases.

In recent work Mark Kelman has also drawn attention to the “fast and frugal” school—a separate school of thought within cognitive psychology that challenges some of the precepts of the heuristics and biases school.⁸⁷ In brief, the fast and frugal school’s innovation is the idea that we simply *cannot* look at all the factors relevant to a decision, either rationally (as rational choice theory posits) or irrationally (as the heuristics and biases school would argue).⁸⁸ Rather, we make decisions on the basis of a very few factors or prompts, such as what we have done in the past or whatever the prevailing community norm happens to be.⁸⁹

The fast and frugal school thus offers a provocative challenge to both rational choice theory and the heuristics and biases school of thought.⁹⁰

⁸⁵ See Richard A. Posner, *Economic Analysis of Law* 3–4, 19–21 (5th ed. 1998) (describing the way that rational choice theory is applied within law and economics scholarship); Herbert Simon, *Models of Man* 241–45 (1957) (describing origins and tenets of rational choice theory).

⁸⁶ See, e.g., Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, in *Choices, Values, and Frames* 159, 159–70 (Daniel Kahneman & Amos Tversky eds., 2000).

⁸⁷ Mark Kelman, *The Heuristics Debate* (2011).

⁸⁸ *Id.* at 50–69.

⁸⁹ *Id.*; see also Gerd Gigerenzer & Peter M. Todd, *Fast and Frugal Heuristics: The Adaptive Toolbox*, in Gerd Gigerenzer, Peter M. Todd & the ABC Research Group, *Simple Heuristics That Make Us Smart* 3, 3–7, 14–15 (1999) [hereinafter *Simple Heuristics*] (describing precepts of fast and frugal school).

⁹⁰ Robin West provides an intriguing analysis of the relationship among rational choice theory, the heuristics and biases school, and the fast and frugal school. Her claim is that the

For purposes of my work here, however, I will largely assume the frame of the heuristics and biases school. My reasons are threefold. First and perhaps most importantly, much heuristics and biases research involves decision-making environments in which quick decisions are unnecessary or even impossible, while the fast and frugal school often assumes some, and occasionally considerable, time constraint.⁹¹ Therefore, the heuristics and biases school operates within an environment that more closely resembles the judicial rights-making environment.⁹² Second, in creating an ideal rights-making environment, the difference between what I would advocate if the heuristics and biases school offered the best description of the world often would not differ from what I would advocate if the fast and frugal school provided the better description—that is, the differences between the two schools are not material to my particular project.⁹³ Third and finally, most cognitive psychology research that has

fast and frugal school is the outlier. Rational choice theory and the heuristics and biases school, she argues, are in fact far more similar to one another than either one is to the fast and frugal school. This is because rational choice theory and the heuristics and biases school both accept as a premise that choice is *possible*—whether rational or irrational. In contrast, “[t]he fast and frugal school puts both utility and choice in doubt” —that is, “[w]hen we are faced with a decision, at least some of the time, according to the [fast and frugal] theorists, we don’t ‘choose’ at all, whether rationally or not.” Robin West, *Adjudging the Heuristics Debate*, JOTWELL (Feb. 1, 2013), <http://juris.jotwell.com/adjudging-the-heuristics-debate/>. Perhaps West is descriptively correct. But to the extent we are trying to *improve* decision-making outcomes, it does not necessarily matter whether we start from a point in which people make irrational choices or a point where people are not making choices at all. As I hope to show, in either case the same interventions will mend both concerns.

⁹¹ See, e.g., Jörg Rieskamp & Ulrich Hoffrage, *When Do People Use Simple Heuristics, and How Can We Tell?*, in *Simple Heuristics*, supra note 89, at 141, 141–42.

⁹² See, e.g., Jeffrey J. Rachlinski, *Selling Heuristics*, 64 Ala. L. Rev. 389, 395–96 (2012) (explaining mismatch between fast and frugal approach and many decision-making environments).

⁹³ That is, the theories overlap in many important respects, and to the extent they do not, it is usually unnecessary to choose one for my current purposes. Both schools of thought provide insight into the prerequisites for good decision-making, and many of the insights are similar. See Kelman, supra note 83, at 4 (“[A]ll [those who research heuristics] agree that it is often easier or preferable to change the environment in which decision makers function or to delegate decisions from a badly positioned to a well-positioned decision maker than to try to change how each individual processes fixed cues.”); id. at 229 (“It is debatable whether there is a ‘heuristics debate’ at all. . . . [A]t some very high level of generality, they can be seen to have a similar picture of what heuristics are and how people use them.”). Both also offer suggestions for correcting cognitive errors, which often—although, again, not always—overlap. Id. at 236. Given that we are starting from a point of *no* attention to the conditions under which judges make decisions, many initial interventions would be the same under either model. More sophisticated and nuanced interventions—ones that require determining which model is correct—can wait for future work.

been incorporated into legal scholarship, as well as most cognitive psychology research that directly examines judges, lies firmly within the heuristics and biases school.⁹⁴ From here on, I will therefore focus primarily on the heuristics and biases model, while occasionally flagging the ways in which a particular issue might have different implications under the thinking of the fast and frugal school.

With respect to the way heuristics and biases research has been applied in the legal arena, recent work has both improved our understanding of the way that heuristics and biases operate and has made clear that judges are affected by such heuristics and biases just as other humans are.⁹⁵ In prior work and in Part I of this Article, I summarized work in which I and others have suggested that judges are influenced by the context in which particular legal issues arise.⁹⁶ The suggestion is intuitively appealing: People are often influenced by the circumstances surrounding a decision. My goal in the following Subsections is to add empirical weight to this intuition. To that end, I supplement the original quantitative and qualitative data I accumulated in *Making Rights*⁹⁷ with cognitive psychology research in order to offer a thicker and more detailed explanation for the influence of context. More specifically, cognitive psychology offers us insight into an array of well-known and theoretically verified cognitive illusions. Here, I will discuss three that are particularly relevant to rights-making: hindsight bias, representativeness heuristic, and availability heuristic. All three have been studied extensively by researchers within cognitive psychology. All three have also been applied—both as a theoretical matter and through experimental research—to legal actors.

1. Hindsight Bias

Hindsight bias is the phenomenon of “perceiving past events to have been more predictable than they actually were.”⁹⁸ As Baruch Fischhoff explains, “In hindsight, people consistently exaggerate what could have

⁹⁴ *Id.* at 5.

⁹⁵ As I will explain, judges are sometimes less fallible to certain heuristics, but are by no means immune. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *Cornell L. Rev.* 777, 784 (2001).

⁹⁶ Leong, *Making Rights*, *supra* note 3, at 430–62.

⁹⁷ See *supra* Section I.C. for a description of the way that extralegal contextual factors influence decision-making.

⁹⁸ Guthrie et al., *supra* note 95, at 784.

been anticipated in foresight.”⁹⁹ That is, “They not only tend to view what has happened as having been inevitable but also to view it as having appeared ‘relatively inevitable’ before it happened.”¹⁰⁰ This tendency can prevent us from examining our own predictions about the past with sufficient rigor. As Fischhoff says: “If, in hindsight, we systematically underestimate the surprises that the past held and holds for us, we are subjecting those hypotheses to inordinately weak tests and, presumably, finding little reason to change them.”¹⁰¹ The risk of unexamined hindsight bias, then, is that we are more likely to think that things that happened should have been anticipated.

In the legal context, Guthrie et al. have studied hindsight bias by presenting three groups of judges with a hypothetical for which one of three outcomes was possible. They then told each group that a different outcome had occurred, and asked each group how likely that outcome was.¹⁰² Although the hypothetical was different for all three groups, each group predicted that the outcome that they were told had actually happened was the most likely to have occurred by a substantial margin.¹⁰³ The result strongly suggests that judges are likely to overestimate the likelihood of a past event when that event did in fact take place.

The influence of hindsight bias is of concern in constitutional rights-making generally. As other commentators have discussed, the Fourth Amendment provides a particularly compelling illustration.¹⁰⁴ When judges evaluate the constitutionality of a search, the analysis often requires them to assess whether what an officer knew at the time she undertook the search was sufficient to establish the relevant quantum of evidence—generally either probable cause or reasonable suspicion. But, as William Stuntz observes, this task poses a considerable cognitive challenge: “It must be much harder for a judge to decide that an officer

⁹⁹ Baruch Fischhoff, For Those Condemned to Study the Past: Heuristics and Biases in Hindsight, *in* Judgment Under Uncertainty: Heuristics and Biases 335, 341 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) [hereinafter Judgment Under Uncertainty].

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 343.

¹⁰² Guthrie et al., *supra* note 95, at 801–03.

¹⁰³ *Id.* at 802–03.

¹⁰⁴ See, e.g., Jerome H. Skolnick, Justice Without Trial 221 (2d ed. 1975) (“The illegality of a search is likely to be tempered—even in the eyes of the judiciary—by the discovery of incriminating evidence on the suspect.”); Slobogin, *supra* note 52, at 376 n.41; Stuntz, *supra* note 62, at 912.

had something less than probable cause to believe cocaine was in the trunk of a defendant's car when the cocaine was in fact there."¹⁰⁵

Some empirical evidence supports the theoretical conclusion. In one study, two different groups considered fifty search and seizure scenarios. One group was told that evidence was found; the other did not know whether evidence had been found. The former group was far less likely to deem a particular investigation "intrusive."¹⁰⁶ Another study reached different results, finding that judges were not affected by hindsight bias to a significant degree.¹⁰⁷ There, one group of judges was given a factual scenario and asked whether they would issue a warrant; the other was given the same scenario and told that the police had searched the car without a warrant and found contraband.¹⁰⁸ The judges' responses did not differ to a significant degree, which surprised the researchers, and led to their conclusion that more investigation is paramount in determining the exact contours of hindsight bias in affecting judges.¹⁰⁹ Given the considerable evidence of hindsight bias, the conclusion of the study in question seems to favor nuance in thinking about the presence of hindsight bias, rather than a conclusion that it does not affect outcomes.

Moreover, hindsight bias concerns many judges in real life. Opinions reveal evidence of judges struggling, sometimes quite explicitly,¹¹⁰ to confine their analysis to what the police officer would have known or suspected at the time of the search, and many judges recognize the reality of the cognitive problem.¹¹¹ Thus, hindsight bias illuminates the men-

¹⁰⁵ Stuntz, *supra* note 62, at 912.

¹⁰⁶ Christopher Slobogin & Joseph E. Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 *Duke L.J.* 727, 759–60 (1993).

¹⁰⁷ Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 *U. Pa. L. Rev.* 1251, 1313–17 (2005).

¹⁰⁸ *Id.* at 1314–15.

¹⁰⁹ *Id.* at 1317–18.

¹¹⁰ See, e.g., *United States v. Wright*, 485 F.3d 45, 51–53 (1st Cir. 2007).

¹¹¹ *Florida v. White*, 526 U.S. 559, 570 (1999) (Stevens, J., dissenting) (noting the "inherent risks of hindsight at postseizure hearings"); *Andresen v. Maryland*, 427 U.S. 463, 493 (1976) (Brennan, J., dissenting) ("The question is not how those warrants are to be viewed in hindsight, but how they were in fact viewed by those executing them."); *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976) (noting that one purpose of the warrant preference "is to prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure"); *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or

tal gymnastics that judges must perform in order to assess the constitutionality of the search: They must determine whether the police officer had enough information to justify a search for evidence in a place where evidence was in fact found.

2. *Representativeness Heuristic*

Another common heuristic is representativeness, defined as “the degree to which [an event] is: (i) similar in essential properties to its parent population; and (ii) reflects the salient features of the process by which it is generated.”¹¹²

Put another way, it is the phenomenon of “ignoring important background statistical information in favor of individuating information.”¹¹³ Kahneman et al. explain that the representativeness heuristic often arises when people try to address probabilistic questions: for example, the probability that object *A* belongs to class *B*, or that event *A* originates from process *B*.¹¹⁴

The cognitive error associated with the representativeness heuristic is as follows: People may believe that certain events are more *probable* simply because they are more *representative*. A common example is that of Kahneman and Tversky’s “engineering student” study.¹¹⁵ Subjects

search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.”); *Ker v. California*, 374 U.S. 23, 40 n.12 (1963) (“A search of the record with the aid of hindsight may lend some support to the conclusion that, contra the reasonable belief of the officers, petitioners may not have been prepared for an imminent visit from the police.”); *United States v. Hawkins*, 811 F.2d 210, 221 (3d Cir. 1987) (Rosenn, J., concurring in part and dissenting in part) (“The advantage of hindsight distorts the reasonableness inquiry in fourth amendment cases. Once we know that a search did turn up evidence of crime, we are more likely to view as well-founded suspicions which at the time would have appeared groundless, and arbitrary action of police as intuitive and discerning.”); *United States v. Scott*, 522 F.2d 1333, 1334 (D.C. Cir. 1975) (Robinson, J., dissenting from denial of rehearing en banc) (“[An objective reasonableness standard for wiretaps creates a] grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretaps. This, in turn, is bound to generate a strong temptation to wiretap first and then use the fruits of the interception in an effort to demonstrate that the intrusion was justified.”).

¹¹² Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, in *Judgment Under Uncertainty*, supra note 99, at 32, 33.

¹¹³ Guthrie et al., supra note 95, at 784.

¹¹⁴ Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, in *Judgment Under Uncertainty*, supra note 99, at 3, 4.

¹¹⁵ Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, in *Judgment Under Uncertainty*, supra note 99, at 48, 49.

were provided with a description of an individual meant to evoke a stereotypical engineering student, as follows:

Tom W. is of high intelligence, although lacking in true creativity. He has a need for order and clarity, and for neat and tidy systems in which every detail finds its appropriate place. His writing is rather dull and mechanical, occasionally enlivened by somewhat corny puns and by flashes of imagination of the sci-fi type. He has a strong drive for competence. He seems to have little sympathy for other people and does not enjoy interacting with others. Self-centered, he nonetheless has a deep moral sense.¹¹⁶

Subjects were then asked to estimate the probability that Tom W. was a student in one of nine majors.¹¹⁷ As expected, the students were far more likely to estimate that Tom W. was an engineering student than was warranted by the *actual percentage* of engineering students.¹¹⁸ The study thus reveals that people tend to estimate probability based on how much a particular event or individual reminds them of some larger category—not on the actual mathematical probability involved.

In the legal context, Guthrie et al. examined the representativeness heuristic in their study of judges. To get at this phenomenon, they presented the judges with a description of a tort suit in which a barrel had broken loose that required them to estimate the probability that a given barrel broke loose because it was negligently secured. They were provided with the following information: “(1) when barrels are negligently secured, there is a 90% chance that they will break loose; (2) when barrels are safely secured, they break loose only 1% of the time; [and] (3) workers negligently secure barrels only 1 in 1,000 times.”¹¹⁹ The correct probability is 8.3%.¹²⁰ Yet over 40% of the judges in the study indicated that the probability that the barrel broke loose because it was negligently secured was between 76% and 100%.¹²¹

The effect of the representativeness heuristic is likewise exacerbated by single-context litigation of particular constitutional rights. Consider

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Id. at 50.

¹¹⁹ Guthrie et al., *supra* note 95, at 808.

¹²⁰ Id. at 808–09. For an explanation, see *id.* at 809 tbl.3.

¹²¹ Id. at 809. One cannot rule out the possibility that judges’ struggles are mathematical rather than cognitive. Still, the striking propensity to guess high suggests that the fact that the barrel broke loose influenced many judges’ estimates.

two examples drawn from litigation of Fourth Amendment rights that take place primarily in a single context.¹²² First, judges may be aware in the abstract of the frequency of police officers' low-level use of force on compliant subjects; the incidence of officers conducting intrusive searches with no evidence that would support reasonable suspicion, let alone probable cause; and the disproportionate likelihood that people of color, particularly young men, will suffer racial profiling.¹²³ Yet despite this background knowledge, judges may overestimate the probability that the particular police conduct before them is constitutional because it reminds them of—that is, it is *representative of*—certain conduct that previous courts have nearly always upheld in the past. This risk is exacerbated by the fact that the vast majority of Fourth Amendment litigation takes place in suppression hearings: The police conduct appears more similar to previous cases and is thus more likely to trigger the representativeness heuristic, and there are very few counterexamples from other contexts to cause judges to revise their thinking. Indeed, even when the conduct is different in certain arguably material ways—the frisk was a little more forceful; the justification for the search a little less convincing—the representativeness heuristic may induce judges to uphold the conduct because it is still relatively close to what previous courts have done. Put another way, courts are likely to view the probability that the police conduct was constitutional as greater when it represents to them other conduct that was previously upheld.

The second example involves the way the judges evaluate determinations of reasonable suspicion of probable cause. Despite many judges' awareness in the abstract of evidence of racial profiling and searches that yield nothing, when an individual criminal defendant in front of a judge is a person who was found in proximity to contraband following a stop and frisk, and when that individual reminds the judge of other defendants the judge has seen—as the result of race, class, other demographic characteristics, factual similarities, and so forth—that resemblance may trigger the representativeness heuristic and supersede all the background information. That is, the judge may find it difficult to engage in rational consideration of information about fruitless searches and

¹²² Leong, *Making Rights*, supra note 3, at 462–65.

¹²³ See, e.g., Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* 5–6 (2007) (acknowledging the existence of profiling while arguing that “criminal law enforcement and correctional institutions should be blind to predictions of criminality based on group characteristics”).

racial profiling when the person in front of her is a prototypical defendant. Indeed, prosecutors are aware of this fact: The Supreme Court recently denied certiorari in a case in which the prosecutor said to a jury: “‘You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, This is a drug deal?’”¹²⁴ While this example does not directly implicate *judicial* decision-making, it does reinforce the intuitive idea that we have preexisting associations with certain factual scenarios in the criminal context, and that we tend to think these scenarios are more probable than not.

The fact that most types of Fourth Amendment claims are litigated almost exclusively in suppression hearings in criminal proceedings exacerbates the effect of the representativeness heuristic. Because judges relatively rarely see Section 1983 lawsuits for money damages in which the plaintiff alleges a Fourth Amendment violation,¹²⁵ nothing challenges the prototypical vision of a criminal defendant who was found in proximity to contraband and who (usually) loses her motion to suppress. That rarity increases the likelihood that the prevailing prototypical individual criminal defendant—one not entitled to exclusion as a remedy—will trump even relatively uncontroversial background data in judges’ minds.

3. Availability Heuristic

A final cognitive error particularly relevant to constitutional rights-making is the availability heuristic. That heuristic is the tendency to “assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind.”¹²⁶ A classic example is the tendency to overestimate the probability of a hurricane, fire, or traffic accident when one has recently seen such an event.¹²⁷ Likewise, we estimate the probability of contracting various

¹²⁴ Calhoun v. United States, 133 S.Ct. 1136, 1136 (2013) (Sotomayor, J., statement) (quoting Transcript of Record at 127). But see *id.* (“I write to dispel any doubt whether the Court’s denial of certiorari should be understood to signal our tolerance of a federal prosecutor’s racially charged remark. It should not.”).

¹²⁵ The exception is excessive force, which is primarily litigated under § 1983. See Leong, Making Rights, *supra* note 3, at 445.

¹²⁶ Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, *in* Judgment Under Uncertainty, *supra* note 99, at 3, 11.

¹²⁷ *Id.* at 11.

diseases by how easily we can recall instances of the disease occurring, not by reference to the actual frequency of the disease.¹²⁸ And the availability heuristic explains why people are far more likely to fear flying than driving, even though, statistically speaking, the former is far safer.¹²⁹

Some research has considered how the availability heuristic affects decision-making in the Fourth Amendment context. For example, Christopher Slobogin has argued that in proceedings seeking exclusion of evidence, the heuristic “translates into a judicial penchant for affirming police pronouncements that sufficient suspicion of crime existed.”¹³⁰ This heuristic tendency arises from the set of cases that judges see: “In the official ‘judicial memory,’ comprised solely of data from suppression hearings, everyone searched or stopped is guilty.”¹³¹

Slobogin’s account does not address the possible effect of Fourth Amendment claims raised under Section 1983 on the “judicial memory”—that is, that possibility that such claims might also become available to the judicial memory and thus correct the skew created by the availability of information from proceedings under the exclusionary rule. But given how few such cases there are, the omission is unsurprising. Indeed, the relevance of the availability heuristic to the Fourth Amendment context is even more striking when we recall that over 86% of Fourth Amendment claims (excluding excessive force) arise in the criminal context.¹³² And the percentages are much higher for stops and frisks (95%), consent searches and seizures (96%), and vehicle searches and seizures (97%).¹³³ In the criminal context, law enforcement officers have almost always found incriminating evidence. The result is that examples of cases in which an individual subjected to a search was in possession of contraband or other incriminating evidence are likely to be much more readily available to judges from a cognitive perspective, while examples of cases in which searched individuals were entirely innocent of wrongdoing—even if such instances are far more common in the real world—are less easily retrieved.¹³⁴

¹²⁸ Kelman, *supra* note 87, at 22.

¹²⁹ *Id.*

¹³⁰ Slobogin, *supra* note 52, at 404.

¹³¹ *Id.*

¹³² Leong, *Making Rights*, *supra* note 3, at 435.

¹³³ *Id.* at 425.

¹³⁴ Slobogin, *supra* note 52, at 403.

The availability heuristic also has broader implications for rights-making that commentators have not, thus far, explored. Certain ways of writing opinions may come more easily to mind. For example, a judge may find it easier to omit discussion of mild to moderate use of force if she cannot recall another instance of an opinion doing so, even if in a vacuum she might find that force relevant to evaluating the reasonableness of a search or seizure. Or she may fail to consider what, aside from a guilty conscience, might have accounted for the flight of a young black man who was tackled and searched after running away from an officer, if many similar opinions discussing flight that come to mind simply omit any such discussion. My general point is this: When nearly all litigation of most types of Fourth Amendment claims occurs in the criminal context, judges will find certain types of opinions more readily available from a cognitive perspective. This availability will affect the opinions they write and, more importantly, the contour of the rights they articulate.

4. Summary

Rights-making that occurs only in one context tends to exacerbate the three cognitive errors I have described. While I have so far focused on the Fourth Amendment, the same is true of many other constitutional rights. An appellate judge who always encounters challenges to discriminatory peremptory strikes in the context of a convicted defendant seeking the strong medicine of reversal will be more hostile to those claims than a judge who also encounters such claims litigated under Section 1983 by a struck juror whose only desire was to fulfill her civic obligations.¹³⁵ A judge who encounters obscenity doctrine in the context of a post-hoc First Amendment defense in a criminal trial will likely view that doctrine quite differently than in a civil suit seeking a declaratory judgment to invalidate a prior restraint.¹³⁶ And a judge who encounters claims of unconstitutional custodial interrogation only when a criminal defendant who made inculpatory statements seeks to exclude them at trial will have a more skeptical view of the Fifth Amendment than a judge

¹³⁵ See, e.g., Nancy Leong, *Civilizing Batson*, 97 Iowa L. Rev. 1561, 1572–74 (2011).

¹³⁶ Nancy Leong, *Making Remedies* 18 (Jan. 22, 2012) (unpublished manuscript), available at <http://law.fiu.edu/wp-content/uploads/2012/01/Leong.pdf>.

who also hears challenges to such interrogations under Section 1983 by former defendants who were ultimately exonerated.¹³⁷

Ultimately, the important point is that rights-making conditions that render judges vulnerable to cognitive errors are likely to result in a distorted version of constitutional rights. And the reality is that most rights-making—because it takes place in only one context—occurs under such conditions. Part IV begins the project of envisioning better conditions for the rights-making endeavor.

B. Cognitive Correction

In addition to highlighting specific situations in which cognitive errors are likely to occur, heuristics and biases researchers have also developed mechanisms for minimizing the distortive effects of such cognitive errors. Research suggests that the way in which information is presented can improve the accuracy of opinion formation.¹³⁸ The point at which improvement occurs often depends on the magnitude or quantity of the evidence that has been presented—that is, it often requires a certain amount of evidence to reach the tipping point.¹³⁹ Of course, more information is not a perfect solution, as the entire premise of the heuristics and biases school is that cognitive limitations do not allow full processing even when perfect information is available.¹⁴⁰ Indeed, that is the

¹³⁷ See, e.g., Jennifer E. Laurin, Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure, 110 *Colum. L. Rev.* 1002, 1008–09 (2010).

¹³⁸ See, e.g., Robert B. Cialdini, *Influence: The Psychology of Persuasion* 74–81 (rev. ed. 1993) (collecting studies); Carl I. Hovland et al., *Communication and Persuasion: Psychological Studies of Opinion Change* 23–24 (1953) (describing foundational studies on opinion change); Craig A. Anderson et al., Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information, 39 *J. Personality & Soc. Psychol.* 1037, 1045 (1980) (describing conditions necessary for opinion change); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 *Cornell L. Rev.* 1, 16–29 (2007) (collecting studies relating to judicial decision-making); Guthrie et al., *supra* note 95, at 788–803 (collecting studies relating to decision-making).

¹³⁹ Cialdini, *supra* note 138, at 90; see also John R. Zaller, *The Nature and Origins of Mass Opinion* 247 (1992) (discussing improved information digest in political opinion formulation); Matthew A. Baum & Tim Groeling, Shot by the Messenger: Partisan Cues and Public Opinion Regarding National Security and War, 31 *Pol. Behav.* 157, 167–82 (2009) (indicating that certain quantities of partisan information can affect opinions on armed conflict). But see Scott L. Althaus & Kevin Coe, Priming Patriots: Social Identity Processes and the Dynamics of Public Support for War, 75 *Pub. Opinion Q.* 65, 80 (2011) (finding that tone and magnitude of new information are secondary to social identity as a cause of opinion change).

¹⁴⁰ Kelman, *supra* note 87, at 236; see also Noah E. Friedkin & Eugene C. Johnsen, Social Influence Networks and Opinion Change, 16 *Advances Group Processes* 1, 3–11 (1999) (of-

foundation of the difference between the heuristics and biases school and rational choice theory. But more information is a necessary prerequisite, because if relevant information is not available at all, such information cannot rise to the foreground of decision-making and in so doing correct cognitive errors.

This empirical literature on decision-making lays the groundwork for the conclusion that rights-making in multiple contexts is superior to rights-making in a single context. Rights-making that occurs in multiple contexts thus does more to assure adequate conditions for the intelligent evolution of the law.

Multiple-context rights-making improves the law via several mechanisms. First, when rights are litigated in multiple contexts simultaneously, the people and factual circumstances presented are more likely to be roughly representative of the people and factual circumstances to which the resulting legal principles will be applied. There is less likelihood that judges will overlook a large portion of the population. For example, if investigatory stops are only litigated when the police find incriminating evidence and a criminal prosecution ensues, judges will be less likely to think of the effect of the rights they articulate on innocent people; in contrast, if investigatory stops are litigated in actions for damages under Section 1983 in civil contexts as well, judges will consider the effect of such stops on both the innocent and the guilty.¹⁴¹

Second, multiple-context litigation also expands the universe of precedent available to judges. Even if a judge with an exclusively criminal docket has never personally overseen the adjudication of a Section 1983 challenge to an investigatory stop, research regarding the standards applicable to such a stop will unearth decisions on such challenges by other judges. Such challenges will expose the criminal-docket judge to new factual considerations, and the rules of precedent will give significance to the holding of the civil rights cases even in the criminal context,

fering mathematical models to explain the collective and separate influence of group actors); Herbert C. Kelman, *Processes of Opinion Change*, 25 *Pub. Opinion Q.* 57, 62–66 (1961) (listing three theories of opinion change that consider social role pressures); Sjoerd F. Pennekamp et al., *In Matters of Opinion, What Matters is the Group: Minority Group Members' Emotional Reactions to Messages about Identity Expression*, 45 *J. Experimental Soc. Psychol.* 778, 785–86 (2009) (finding that group opinion is especially salient for opinion formation in members of minority groups).

¹⁴¹ Cf. Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 *Mich. L. Rev.* 1229, 1272 (1983) (explaining that courts should, but often do not, focus on the privacy rights of the innocent in articulating doctrine).

thereby enriching the criminal-docket judge's consideration of the law. And for judges who do hear both civil and criminal cases, adjudication of constitutional rights in multiple contexts will, over the course of a judge's career, broaden her understanding of the rights at issue.

To improve the rights-making project, facilitating litigation in multiple contexts would also require us to structure litigation incentives so as to ensure that judges see a range of governmental and private actors, factual circumstances, and social interests that implicate the Fourth Amendment. This intentional structuring would ensure that, across many cases, judges see a representative range of parties and factual circumstances, and that in the process they receive adequate information to make good decisions. In Part IV, I will consider how we might engage in such a structuring of incentives; here, however, I wish first to explain in more detail why multiple-context rights-making is desirable, so much so that we should take active measures to promote it. None of this is to say that multiple-context rights-making is the *only* mechanism available to improve rights-making conditions. But multiple-context rights-making is particularly desirable for a number of reasons.

First, multiple-context rights-making addresses the three important cognitive errors described in Section II.A. Most obviously, it corrects errors flowing from the representativeness heuristic by ensuring that courts do not overestimate the likelihood of certain types of factual scenarios—as Guthrie et al. put it, “Judges may be able to reduce the effect of some cognitive illusions by approaching decisions from multiple perspectives.”¹⁴² It also corrects for hindsight bias by presenting particular disputes in a way that does not inexorably lead to a particular conclusion about the outcome—for example, Fourth Amendment cases both where evidence was and was not found. And multiple-context litigation helps address the availability heuristic by ensuring that the most easily available example to which judges have access is not one that is a significant outlier. These cognitive errors result from litigation that takes place only in one context, and facilitating litigation in other contexts ensures that concerns particular to an idiosyncratic context will not dominate judges' rights-making.

Second, rights-making in multiple contexts fosters consideration of concrete concerns related to the circumstances in which laws will actually be applied. Where appropriate, this approach allows for attention to

¹⁴² Guthrie et al., *supra* note 95, at 822.

empirical data, social science research, and the effect of legal rules on the behavior of real-world actors. Several noted scholars of constitutional law have called for such attention, including Judge Richard Posner and Cass Sunstein.¹⁴³ Seeing various factual contexts allows judges to take account of those contexts in articulating legal principles. As Ashutosh Bhagwat has explained, “Courts are generally better at formulating doctrinal rules over time, through the device of resolving disputed cases, since such a process gives them access to more empirical data, as well as the insight of a greater number of decision-makers and perspectives, spread over a longer time period.”¹⁴⁴ In turn, this bank of empirical information continues to facilitate correction of cognitive errors.

Third, fostering litigation in multiple contexts is ideologically neutral with respect to the development of the law. Ensuring that courts see a range of governmental and private actors, factual circumstances, and social interests does not cut in favor of any particular conclusion; it simply means that courts make their decisions under conditions approximating full information as nearly as possible. This value helps to reduce partisan suspicion and encourages confidence in our judiciary as an institution.¹⁴⁵ This generalization might not hold true to the extent that some people believe that in certain situations advocates of expansive readings of constitutional rights should not have too many remedies available to them. But this caveat simply counsels in favor of careful evaluation of the limited set of situations in which this perception might arise, not a wholesale rejection of multiple-context rights-making as ideologically biased.

Finally, litigation in multiple contexts anchors the articulation of constitutional law to *all* the people that law will eventually regulate, not just to a small and atypical subset. Myriam Gilles has written of the value of “the eyes, experiences, motivation, and resources of millions of Americans who bear witness to institutionalized wrongdoing.”¹⁴⁶ Linking the

¹⁴³ See Richard A. Posner, *Overcoming Law* 207–10 (1995); Cass R. Sunstein, *Legal Reasoning and Political Conflict* 82–83 (1996); Richard A. Posner, *Against Constitutional Theory*, 73 *N.Y.U. L. Rev.* 1, 11–22 (1998); Cass R. Sunstein, *From Theory to Practice*, 29 *Ariz. St. L.J.* 389, 398–400 (1997).

¹⁴⁴ Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,”* 80 *B.U. L. Rev.* 967, 999–1000 (2000).

¹⁴⁵ See Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 *Harv. L. Rev.* 1, 8–9 (2011).

¹⁴⁶ Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 *Colum. L. Rev.* 1384, 1387 (2000).

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articulation of constitutional law to a broad sample of “we the people” ensures that the law made will, in fact, reflect consideration of the lives of all of us.

I have discussed why, in the abstract, litigation in multiple contexts is a valuable way of improving the rights-making environment so as to filter out or counteract some of the distortions caused by the interaction of specific litigation contexts with well-established cognitive distortions. But is proactively facilitating litigation in multiple contexts in order to improve decision-making a radical departure from our current approach to litigation? The next Part reveals that, in fact, affirmative solicitude for good decision-making already infuses our jurisprudence.

III. VALUES IN ACTION

This Part aims to demonstrate that multiple-context rights-making furthers values that our legal system already embraces—in particular, our concern for correcting cognitive errors by strategically managing the information that judges receive. The idea that we should foster multiple-context rights-making in order to further these values may seem foreign at first blush, even backwards. Why would we intentionally determine the level of litigation we want in order to shape the conditions under which rights emerge from that litigation?

But an examination of our current jurisprudence reveals that affirmative efforts to further the values discussed in Section II.B are, in fact, not uncommon at all. That is, in certain situations we *already* intuitively structure doctrine in ways that minimize cognitive errors. This Part provides examples of solicitude for error correction by exploring the doctrines governing standing, class certification, and the rules of evidence. In short, the concept of structuring litigation with an eye toward assuring good decision-making by judges is not foreign to our legal system. Rather, it is something courts already do with some frequency. To be clear, my point is not that the mechanisms I will describe are always effective at reducing cognitive errors, although I think that in many cases they are. For present purposes, though, the point is simply that efforts at mitigating cognitive errors are not foreign to our legal system. This suggests that to engage in such error mitigation in the situation of constitutional rights-making would be an extension of current practices rather than a radical departure.

A. Third-Party Standing

Article III requires the existence of a case or controversy for adjudication. That requirement leads to the three familiar prerequisites to establish standing: injury, causation, and redressability.¹⁴⁷ The standing requirement is designed to “assure[] an actual factual setting in which the litigant asserts a claim of injury in fact” rather than some hypothetical harm.¹⁴⁸

Standing doctrine also largely prohibits individuals from asserting the rights of third parties in court.¹⁴⁹ Although recent decades have arguably seen some liberalization in the rules allowing the assertion of third-party standing,¹⁵⁰ the general prohibition remains. This limitation is justified on three primary grounds. First, third parties are not well situated to advocate vigorously for the interests of the true parties-in-interest to a dispute.¹⁵¹ Second, the justice system will work more efficiently if it limits standing to those true parties.¹⁵² Finally, third parties may seek to vindicate a right that a true party-in-interest wishes to forego.¹⁵³ The Supreme Court elaborates that these requirements “assure th[e] concrete adverse-ness which sharpens the presentation of issues upon which the court so largely depends.”¹⁵⁴

¹⁴⁷ Erwin Chemerinsky, *Federal Jurisdiction* 83 (3d ed. 1999).

¹⁴⁸ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982).

¹⁴⁹ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498–501 (1975); Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 187–88 (4th ed. 1996).

¹⁵⁰ See Henry P. Monaghan, *Third Party Standing*, 84 *Colum. L. Rev.* 277, 277–78 (1984); *United Food & Commercial Workers Union Local 151 v. Brown Grp.*, 517 U.S. 544, 551–58 (1996).

¹⁵¹ See, e.g., *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 80 (1978); *Singleton v. Wulff*, 428 U.S. 106, 113–15 (1976) (plurality opinion); cf. Ethan J. Leib, *Friendship and the Law*, 54 *UCLA L. Rev.* 631, 703–05 (2007) (acknowledging the general rule against third-party standing while advocating a narrow carve out for situations in which a friend of an individual might adequately represent that individual’s interests).

¹⁵² See, e.g., *Duke Power*, 438 U.S. at 80; *Singleton*, 428 U.S. at 113–14.

¹⁵³ See, e.g., *Duke Power*, 438 U.S. at 80; *Singleton*, 428 U.S. at 113–14 (“[T]hird parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts’ decisions under the doctrine of *stare decisis*.”).

¹⁵⁴ *Baker v. Carr*, 369 U.S. 186, 204 (1962); see also *Holden v. Hardy*, 169 U.S. 366, 397 (1898) (stating that the assertion of third parties’ rights would come with “greater cogency” from the third parties themselves).

Collectively, these concerns for the values of the true parties-in-interest may be conceptualized as an intuitive concern for minimizing the cognitive errors discussed in Part II. In a narrow sense, the concern is that the third party may not adequately represent the rights of the true party-in-interest. In a much more general sense, however, the concern is that the third party's litigation will not represent the interests of all future parties-in-interest whose rights will be defined by the outcome of the litigation. Thus, the prudential limitation on third-party standing in fact expresses the concern that the law that emerges from a particular instance of litigation will not fairly reflect the interests of those to whom it will apply. Closely linked to this concern for representativeness is the concern that judges should make law with sufficient information. Third parties may not present judges with adequate information, or, worse, may offer them a skewed view of the interests pertinent to the decision in the immediate case as well as to the rule that should come out of the decision.

The prudential limitation on third-party standing also implicates broader trends in constitutional rights-making. Monaghan traces the move towards an expanded vision of third-party standing to a broader shift in our understanding of constitutional litigation and articulation of constitutional rights. He explains: "Constitutional adjudication has . . . evolved beyond its private rights origins [T]he process of constitutional adjudication now operates as one in which courts discharge a special function: declaring and enforcing public norms."¹⁵⁵ This concern resonates with the heightened concern for rights articulation discussed in Part I. Monaghan agrees that "protection of individual rights is an important judicial concern" and, therefore, that "[m]any third party standing cases ought to be understood in first party terms: the litigant is simply asserting a violation of his own right to be regulated in accordance with a constitutionally valid rule."¹⁵⁶ A claim by an individual who presents a third-party claim not susceptible of first-party reformulation is, however, constitutionally suspect.¹⁵⁷

From this analysis, we can draw two conclusions. The first is that our legal system offers a general understanding that one function of constitu-

¹⁵⁵ Monaghan, *supra* note 150, at 279–80.

¹⁵⁶ *Id.* at 282. For example, Monaghan argues that overbreadth doctrine may be understood as a superficial third-party standing claim reformulated as a conventional first-party standing claim. *Id.* at 282–83.

¹⁵⁷ *Id.* at 282.

tional litigation is to elaborate individual rights, and that standing doctrine should be drawn so as to facilitate that function. The second is that standing doctrine is still meant to provide limitations on which parties can bring claims. Third parties—who cannot be relied on to adequately represent the interests of others, and who may present judges with incomplete or warped versions of the relevant information—remain disallowed. The net effect, then, is that doctrine is structured in a manner consonant with the correction of cognitive errors discussed in Part II.

B. Class Certification

Concern for the conditions of adjudication also arises in the requirements for class certification. Rule 23(a) of the Federal Rules of Civil Procedure includes four prerequisites to a class action:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

These criteria again reflect an implicit concern for the correction of cognitive bias. In particular, the third and fourth criteria address the availability and representativeness heuristics by avoiding or mitigating the possibility that class representatives will dominate the decision-making process in a way that leads to errors.¹⁵⁸ The requirement of typicality—“the claims or defenses of the representative parties are typical of the claims or defenses of the class”¹⁵⁹—aims to ensure that over-salient outliers do not adjudicate claims in a way that will bind dissimilar members of the class. And the requirement of adequacy—“the representative parties will fairly and adequately protect the interests of the class”¹⁶⁰—likewise aims to ensure that parties are not too wrapped up in their own interests to make those of others available to judges as well. Likewise, the fourth criterion also displays concerns that resonate with the representativeness heuristic. The notion that the class representatives will

¹⁵⁸ I am not claiming that the drafters actually were aware of the relevant cognitive psychology research on heuristics and biases, but only that they may have had an intuitive awareness of certain potential errors in human reasoning and that the rule expresses a desire to foreclose those errors.

¹⁵⁹ Fed. R. Civ. P. 23(a)(3).

¹⁶⁰ Fed. R. Civ. P. 23(a)(4).

“fairly and adequately protect the interests of the class” requires that the class representatives will present judges with the information necessary to adjudicate the dispute fairly and develop appropriate forward-looking legal principles.¹⁶¹ The representativeness heuristic might unfairly result in judges basing an assessment of harm on the extent to which the class representative’s circumstances remind them of familiar harms; the fourth criterion, however, serves as an important reminder that the purpose of the class representative is to represent the *class*, and the extent to which the representative also resembles some prototypical harm is irrelevant.¹⁶²

More specifically, the prerequisite of typicality is rooted in the notion “that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives,”¹⁶³ or, as the U.S. Courts of Appeals for the Fourth and Sixth Circuits have put it, “as goes the claim of the named plaintiff, so go the claims of the class.”¹⁶⁴ More specifically, the interests between the class representative and other class members must be sufficiently “aligned,”¹⁶⁵ “reasonably co-extensive,”¹⁶⁶ “the same or similar,”¹⁶⁷ or “directly related.”¹⁶⁸ The decisions demonstrate that the typicality requirement is far from pro forma. The requirement is motivated, rather, by a strong intuition that a decision that will affect the interest of some members of the class should be engendered by advocates whose interests are representative—*typical*—of the class as a whole.

Likewise, the prerequisite of adequacy also reflects a concern for the appropriateness of a proposed representative. The class representative acts as a fiduciary to the rest of the class, and must consequently ad-

¹⁶¹ *Id.*

¹⁶² See discussion *supra* Subsection II.A.2.

¹⁶³ *Hillis v. Equifax Consumer Servs.*, 237 F.R.D. 491, 502–03 (N.D. Ga. 2006) (quoting *Cooper v. Southern Co.*, 205 F.R.D. 596, 608–09 (N.D. Ga. 2001)).

¹⁶⁴ *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 340 (4th Cir. 1998) (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)).

¹⁶⁵ *Sprague*, 133 F.3d at 399 (quoting *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996)).

¹⁶⁶ *Blackwell v. SkyWest Airlines*, 245 F.R.D. 453, 462 (S.D. Cal. 2007) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

¹⁶⁷ *In re GenesisIntermedia Sec. Litig.*, 232 F.R.D. 321, 329 (D. Minn. 2005) (quoting *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269, 1275 (8th Cir. 1990)); *Yapp v. Union Pac. R.R.*, 229 F.R.D. 608, 622 (E.D. Mo. 2005) (quoting *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977)); see also *Jones v. GPU, Inc.*, 234 F.R.D. 82, 97 (E.D. Pa. 2005) (citing *Barabin v. Aramark Corp.*, 210 F.R.D. 152, 159 (E.D. Pa. 2002)).

¹⁶⁸ *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 572 (6th Cir. 2004) (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082).

vance the interests of other class members.¹⁶⁹ Courts examine whether the class representative “possess[es] the same interest and suffer[s] the same injury as the [other] class members,”¹⁷⁰ and any conflict between the interest of the class representative and the class members renders the representation unsuitable.¹⁷¹

Adequacy encompasses not only an alignment of interests between the class representative and the members of the class, but also an assurance that the class representatives will present the judge with roughly the same information as would the class as a whole. The requirement therefore furthers cognitive error correction—in particular, the availability heuristic—by mitigating the greater salience of the class representative.

C. Federal Rules of Evidence

One radical view of the Federal Rules of Evidence is that they should not exist. That is, there should be a single rule—the equivalent of the bare relevance standard of Rule 401—and any evidence that meets that standard should be admissible.¹⁷²

But these are not the rules we have chosen, either in the Federal Rules of Evidence or in the rules codified in a majority of states.¹⁷³ Rather, the Federal Rules reflect considered judgments about the impact of certain types of evidence in affecting or distorting the judgment of the trier of fact. While we might disagree with certain judgments by the drafters of the various evidentiary codes, few would argue that such attention to limiting the evidence that forms the factual record and ultimately shapes

¹⁶⁹ *Rocco v. Nam Tai Elecs.*, 245 F.R.D. 131, 136 (S.D.N.Y. 2007) (quoting *Kline v. Wolf*, 88 F.R.D. 696, 700 (S.D.N.Y. 1981)).

¹⁷⁰ *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998) (quoting *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977)) (internal quotation marks omitted).

¹⁷¹ *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1768, at 326 (2d ed. 1986)).

¹⁷² See, e.g., 1 Jeremy Bentham, *Rationale of Judicial Evidence* 3–5 (London, Hunt & Clarke 1827); James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 264–67, 269, 529–30 (Boston, Little, Brown & Co. 1898).

¹⁷³ Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 Okla. L. Rev. 293, 293 (1990) (noting that thirty-four states have codified a version of the Federal Rules, three have considered and rejected such a codification, and three had already adopted a version of the previous Uniform Rules of Evidence).

the decision-making process is exotic, inappropriate, or even particularly noteworthy.

Consider a few examples. At the outset, Rule 403, which allows the exclusion of evidence that might result in “unfair prejudice, confusing the issues, misleading the jury,” and various efficiency harms,¹⁷⁴ overtly allows the exclusion of evidence of “unquestioned relevance” that would nonetheless result in harm to the decision-making process if admitted.¹⁷⁵ As Edward Imwinkelried has explained, “An item of evidence can be excluded under the rule when its admission realistically would jeopardize logical jury decision-making Drawing on his knowledge of juror psychology, the judge tries to forecast the probable response of the typical juror to the item of evidence.”¹⁷⁶ This characterization of Rule 403 resonates with the notion of guarding against the biases described in Section II.A.

The specialized relevance rules operate similarly. These rules prohibit introduction of certain categories of information for many purposes: “Subsequent Remedial Measures,”¹⁷⁷ “Compromise Offers and Negotiations,”¹⁷⁸ “Offers to Pay Medical . . . Expenses,”¹⁷⁹ “Plea Discussions,” and insuredness.¹⁸⁰ Here, there is no balancing of costs and benefits of admission—rather, “Each of these five rules reflects the rule-writers’ judgment that, as a matter of law, the evidence it governs fails a Rule 403 weighing test.”¹⁸¹ The wisdom of the specialized relevance rules is not beyond debate. For example, Dan Kahan has recently critiqued the exclusion of subsequent remedial measures on the ground that it may lead to inaccurate results—that is, the risk of erroneous imposition of li-

¹⁷⁴ Fed. R. Evid. 403.

¹⁷⁵ Fed. R. Evid. 403 advisory committee’s note.

¹⁷⁶ Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 *Vand. L. Rev.* 879, 894–95 (1988).

¹⁷⁷ Fed. R. Evid. 407. The subsequent remedial measures rule is a classic example of protection against hindsight bias. That is, the idea that someone took remedial measures after the fact might incite a decision-maker to believe that the problem requiring remediation should have been anticipated. *Id.* advisory committee’s note (guarding against presupposition that “because the world gets wiser as it gets older, therefore it was foolish before” (quoting *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 *L.T.R.N.S.* 261, 263 (1869))).

¹⁷⁸ Fed. R. Evid. 408.

¹⁷⁹ Fed. R. Evid. 409.

¹⁸⁰ Fed. R. Evid. 411.

¹⁸¹ Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence: Practice Under the Rules* § 4.11, at 263 n.8 (2d ed. 1999).

ability when evidence of subsequent remedial measures is admitted may in fact be outweighed by the risk of erroneous failure to impose liability when evidence of such measures is excluded.¹⁸² For present purposes, the critique is useful for two reasons. First, it reveals the extent to which the heuristics and biases school of thought influences our analysis of the evidentiary rules. Second, and more importantly, it makes clear that application of such analysis is utterly unremarkable. Whether Kahan is correct or not matters less than the fact that conscious efforts to improve the decision-making environment are a normal part of our approach to the rules of evidence.

Among the Federal Rules of Evidence, the rules governing character evidence are perhaps most explicitly designed to correct decision-maker bias. This network of rules is designed to exclude evidence that would lead a trier of fact to conclude inappropriately that a party is a bad *person*, rather than to conclude appropriately that a party did the bad *act* at issue in the litigation.¹⁸³ Moreover, provisions of the character evidence rules provide mechanisms to keep character information *balanced* to the extent that it is admitted. For example, an accused can choose to introduce pertinent evidence of good character, but if she does so, then the prosecution may rebut with evidence of bad character.¹⁸⁴

I could provide many more examples, but these suffice to prove the basic point. The rules of evidence collectively represent an inclination to ensure that the information that reaches the trier of fact is both sufficient to allow an educated decision and balanced such that the decision-maker is to some degree protected from heuristics that cause cognitive errors. Indeed, we can view them as a crude and intuitive attempt to correct for some of the heuristics and biases I catalogued in Part II. But whether the various federal and state evidentiary codes are successful at achieving their goal is less important than the fact that they were put in place precisely to achieve the goal of shaping the information that decision-makers hear. That goal, then, is a familiar one for us within the evidentiary realm as well.

¹⁸² See Dan M. Kahan, The Economics—Conventional, Behavioral, and Political—of “Subsequent Remedial Measures” Evidence, 110 Colum. L. Rev. 1616, 1617–18, 1648 (2010).

¹⁸³ See Fed. R. Evid. 404 advisory committee’s note.

¹⁸⁴ Fed. R. Evid. 404(a)(2)(A).

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D. Familiar Values

As the doctrine of third-party standing, the requirements for class certification, and the Federal Rules of Evidence reveal, we strive to ensure that adjudication—both in the sense of individual dispute resolution and in the sense of law creation—takes place under circumstances of sufficient information, and we manage that information to avoid cognitive errors. That is, thinking normatively about the conditions of adjudication is already part of our legal culture in many areas.

Indeed, the doctrine governing third-party standing, the requirements for class certification, and the Federal Rules of Evidence resonate with the adjudication of constitutional issues and, more broadly, the articulation of constitutional rights. Once again, consider the Fourth Amendment as an example. Although standing doctrine and Fourth Amendment adjudication differ in important ways, the general concern for representativeness undergirding the standing requirement translates readily to the context of Fourth Amendment adjudication. Although criminal defendants are asserting their own rights when they seek exclusion of incriminating evidence, they also assert the rights of innocent persons to the extent they advocate for the court to construct a rule that will bind everyone. Given the Supreme Court's comment that courts are best situated to construe rights "when the most effective advocates of those rights are before them,"¹⁸⁵ a person not charged with a crime is undoubtedly a more appealing proponent of a particular Fourth Amendment interest than a criminal defendant, particularly a criminal defendant against whom incriminating evidence has been found. And the Court's hesitation to craft a rule in a third-party adjudication that will bind the actual holder of the right is parallel to the concern that a right developed in a suppression hearing will later bind criminally innocent individuals going about their daily lives.

Class certification also raises certain parallels. Of course, criminal defendants are not class representatives in the literal sense. But the Fourth Amendment governs the expectation of privacy that *everyone* has—not just those who come into contact with the criminal justice system—and so there is a way in which we are all unnamed class members in each adjudication of a Fourth Amendment issue. The court's decision, and its articulation of the substantive right, affects the scope of each of our rights. Although we do not speak of civil rights actions as class actions,

¹⁸⁵ Singleton v. Wulff, 428 U.S. 106, 114 (1976) (plurality opinion).

the results of such adjudications affect all of our rights similar to the rights of a class, and the same concern for representativeness should attach.¹⁸⁶ Of course, courts cannot refuse to hear claims brought by unrepresentative parties. The next best thing is to increase the likelihood that a judge's Fourth Amendment docket, in the aggregate, provides adequate representation of all the Fourth Amendment interests at stake—or, at least, that the aggregate of all Fourth Amendment dockets provides adequate representation.

And finally, the Federal Rules of Evidence reflect a concern that the decision-maker receive evidence that is not merely relevant, but also not prejudicial in certain critical ways. Where such evidence might come in, the evidentiary rules provide explicitly for limiting instructions or for the introduction of other evidence that might present a more balanced picture. The same concern holds true with Fourth Amendment doctrine: We are, or should be, concerned with the prejudicial impact of rights articulation under circumstances when judges see almost exclusively criminal defendants in many categories of Fourth Amendment cases. This skewed perspective is prejudicial—not unlike the harm that the rules of evidence are designed to avoid.

It is therefore cause for concern that most individual Fourth Amendment litigants are not typical of the rest of us. Particularly with respect to criminal defendants, their factual circumstances are distasteful in ways that are alien to many of us and the remedy they seek is not a remedy of value to those of us not charged with crimes. With criminal defendants as proponents, Fourth Amendment rights are delineated in a factual and remedial context inapposite to the circumstances of most citizens.

Likewise, the adequacy of both criminal defendants and civil plaintiffs as delegated enforcers of Fourth Amendment rights is open to question. Nearly all defendants, and many plaintiffs,¹⁸⁷ are unconcerned with the rights of the rest of us. They do not care what broad rule comes out

¹⁸⁶ Moreover, in class action litigation, courts do not try to determine which class member has the “average” or “median” claim and then make that person the class representative. Rather, they engage in a more searching inquiry to determine whether the claims are similar enough in the first place to make class certification appropriate. Of course, judges who encounter criminal defendants or civil plaintiffs make no such inquiry to determine whether a particular individual will adequately represent the interests of the millions of others whose rights will be affected by the instant litigation.

¹⁸⁷ I view plaintiffs in actions brought by organizations that specialize in impact litigation as a distinct category. For such plaintiffs, the very purpose of the litigation is often to move the law in a direction that will represent the interests of citizens generally.

of their cases or what the effect of that rule will be on the citizenry as a whole. Rather, they are preoccupied with their own circumstances: for defendants, with suppressing incriminating evidence and escaping or reducing their punishment; for plaintiffs, with obtaining a monetary reward. In no way, then, do these parties individually serve as adequate fiduciaries for the rights of the rest of us, and we cannot count on them to raise to judges the issues that are of most pressing concern to the rest of us.

The concern for adequate representation and sufficient information present in our doctrines relating to standing, class certification, and the rules of evidence thus translates to Fourth Amendment doctrine, and to constitutional rights articulation more generally. In light of this value, the litigation of certain rights only by criminals—and the criminal-centric jurisprudence that results—should not be seen as inevitable. Nothing says that the current rate of adjudication by criminals is the normative baseline. Rather, we should view this state of affairs as a policy choice resulting from our decisions about what avenues we make available for the adjudication of Fourth Amendment disputes and the articulation of rights. If it bothers us that criminals are catalyzing all or nearly all the law articulation in some areas of jurisprudence—and both the values embedded in our jurisprudence and common sense indicate that the unrepresentativeness should trouble us—then we should create mechanisms that go further toward ensuring representative adjudication of Fourth Amendment rights.

Thus, adequate representation and sufficient information are values our jurisprudence already embraces. Although the idea that these values should drive decisions about constitutional remedies may seem foreign at first blush, we in fact already turn to representativeness to determine whether and under what conditions litigation should take place in a variety of settings. From there it is a relatively small step to the conclusion that we should take representativeness into account as one factor in determining how we should structure remedies and other barriers to and incentives for constitutional rights-making so as to ensure litigation in an appropriately representative array of contexts. In Part IV, I will demonstrate that these considerations justify the facilitation of multiple-context litigation.

IV. IMPROVING RIGHTS-MAKING

We should not shrug our shoulders at the reality that context influences substance. Rather, we should explicitly embrace the rights-making function of the courts and do our best to optimize courts' ability to do this important work. To that end, we should act deliberately to ensure that judges have sufficient information—that is, that they encounter a broad range of governmental and private actors, factual circumstances, and social interests when they engage in constitutional rights-making.

I argue here that one useful mechanism to accomplish this objective is the facilitation of multiple-context rights-making. Of course, multiple-context litigation is by no means the only measure by which we might improve judicial rights-making, and so evaluating the desirability of multiple-context rights-making involves a comparison of possible alternatives. I therefore begin by describing an intentionally radical solution—claim sanitizing—targeted to filter out cognitive cues that should be irrelevant to the scope of the right. While claim sanitizing is an intriguing thought experiment, it is ultimately impractical. I argue, therefore, that facilitating multiple-context litigation achieves many of the same aims while providing a more realistic alternative. Throughout this Part, I return to the Fourth Amendment to provide concrete material for my analysis. Where possible, however, I explain how the conclusions I draw apply not only to the Fourth Amendment, but to rights-making more generally.

A. Claim Sanitizing

I begin with an intentionally fanciful thought experiment. We might attempt to improve the conditions of lawmaking in a particular context as directly as possible by removing the factors that result in distortion of the doctrine. That is, we could attempt to strip away the extralegal contextual factors that currently skew rights-making. I will call this approach claim sanitizing. This approach would foster exposure to a range of information and would therefore help to mitigate the cognitive errors, discussed in Section II.A, that tend to impair good decision-making.

We would have to approach the project of claim sanitizing differently in different doctrinal areas. In the Fourth Amendment arena, one important method of sanitizing would separate the rights-making endeavor from contextual factors that currently result in skew—for example, factors such as the exclusionary remedy, the presence of criminal defend-

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ants as proponents, and the procedural posture (appeal from conviction) in which criminal defendants generally advocate for Fourth Amendment rights.

We might accomplish this goal by severing the merits adjudication from the remedial adjudication for both criminal *and* civil cases. Thus, at the trial stage, we could designate “search and seizure” judges who would hear evidence about what happened during a particular search and would then rule on whether that search was constitutional. Crucially, context-identifying information—such as whether the underlying proceeding was civil or criminal, what the charge was in criminal cases, whether the search yielded evidence, and if so, what that evidence was—would all be inadmissible as irrelevant to the Fourth Amendment issue in the case. In short, the constitutional claim would be adjudicated without reference to aspects of the case that would situate the case in the criminal context and lead to the warping of doctrine discussed in Section I.C.

The search and seizure judge would thus determine whether a constitutional violation occurred and articulate the scope of the constitutional right relevant to the situation. The judge’s decision would then bind subsequent proceedings in the case. If the search and seizure judge found, in a criminal proceeding, that the evidence was improperly seized, that evidence would be suppressed. The trial judge in that case would then have to rule on motions flowing from that decision—for example, a motion to dismiss by the defendant. If the search and seizure judge found that the evidence was not improperly seized, the trial would simply proceed with the evidence admitted (unless, of course, the evidence was inadmissible on other grounds). If the search and seizure judge found, in a civil proceeding, that a Fourth Amendment violation occurred, then the trial judge in that case would then consider defenses such as qualified immunity.¹⁸⁸ And if the search and seizure judge found, in a civil case, that no Fourth Amendment violation occurred, that claim, and possibly the whole lawsuit, would be dismissed.

¹⁸⁸ We can imagine less dramatic versions of the claim-sanitizing proposal. For instance, we might structure litigation so that the Fourth Amendment issue is always decided as early as possible and the parties are prohibited from mentioning whether a search actually uncovered evidence or what the evidence was. Likewise, on appeal, the appellate panel could be required to resolve the Fourth Amendment issue without knowing what evidence was found, the crime for which the defendant was convicted, or the sentence that was imposed.

The same division of labor could be enforced on appeal, with one panel of judges first considering the Fourth Amendment issue in isolation. If that panel found a Fourth Amendment violation, a second panel would determine whether the case should have been dismissed (in the criminal context) or whether other defenses such as qualified immunity applied (in the civil context). Indeed, in light of the fact that prospectively binding rights-making occurs only in the appellate courts, many of the advantages of the sanitizing approach might be obtained by implementing that approach *only* in the appellate courts.

Although the notion of claim sanitizing—of having a court essentially tasked with resolving constitutional issues—is novel, it is not wholly unanchored from our legal tradition. Rights and remedies, loosely defined, are sometimes adjudicated separately.¹⁸⁹ And commentators from time to time have toyed with the idea of a “constitutional court,” tasked with developing constitutional standards for the guidance of other courts and citizens outside the distractions of specific lawsuits.¹⁹⁰ Indeed, *Saucier v. Katz*¹⁹¹ itself might be read as an imperfect attempt toward this end.

Claim sanitizing has several advantages. Most importantly for purposes of improving rights-making, the approach would allow consideration of Fourth Amendment issues and development of Fourth Amendment law unconstrained by many of the remedial and factual idiosyncrasies of the criminal context. Judges would thus be more likely to consider the implications of their resolution of the Fourth Amendment issue for *both* the criminal and civil contexts, or for *both* individuals who are concealing contraband and individuals who are not.¹⁹²

¹⁸⁹ For example, a different judge or jury will sometimes decide the guilt and penalty phases in a criminal trial. Or in civil cases where the issue of what the remedy should be will require considerable expert testimony, courts will sometimes proceed with the liability determination, and will allow discovery and other litigation related to damages only if necessary subsequent to the liability determination.

¹⁹⁰ See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 939 (1999) (imagining the possibility of “a Dworkinian, top-down process of constitutional adjudication that is entirely immune from consequentialist concerns about implementation or remediation”).

¹⁹¹ 533 U.S. 194 (2001).

¹⁹² Scholars have argued in favor of entrusting juries with the Fourth Amendment reasonableness issue. See, e.g., Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 *U.C. Davis L. Rev.* 1169, 1170–71, 1192 (1995). This notion makes good sense for a number of reasons. It also raises concerns regarding the protection of minorities—that is, unelected judges may be better equipped to look out for the interests of unappealing plaintiffs than ju-

The sanitizing approach would also help unify criminal and civil jurisprudence in the Fourth Amendment arena. My previous work notes the disjunction between our analysis of evidence-gathering and our analysis of the use of force when rights-making is confined to one context or the other, and has explained that disjunction by reference to the different contexts where various types of Fourth Amendment claims are litigated.¹⁹³ In a similar vein, Jennifer Laurin has articulated difficulties with “translat[ing]” rights from one context to another.¹⁹⁴ Sanitizing would do much to address such concerns within the Fourth Amendment arena. The result would be a Fourth Amendment doctrine that speaks with one voice and that delivers a single coherent message, rather than one riddled with conflicting messages and unresolved tensions.¹⁹⁵

The sanitizing approach is intriguing to consider, yet its implementation—particularly given our baseline approach to Fourth Amendment litigation—would be rife with complications. Some would be minor. Case captions, for example, would have to be redacted to avoid revealing whether a particular issue arose in the criminal context. Or judges might recognize repeat players such as prosecutors or public defenders, and, as a result of their presence, realize that the Fourth Amendment claim arose in a criminal proceeding. Perhaps we would have to rethink the relative segregation of our criminal and civil bars, or, alternatively, employ a dedicated “search and seizure” bar responsible for litigation of such issues in both civil and criminal contexts.

More significantly, we would also have to work out the procedure for cases in which not all evidence is found at once, and the presence of the evidence found first bears on the legality of the search yielding the later evidence. Say that a police officer approaches a man getting out of his car, performs a frisk pursuant to *Terry*, and finds cocaine in his pocket. The officer arrests the man, and, pursuant to that arrest, searches the en-

ries. See generally Henry P. Monaghan, First Amendment “Due Process,” 83 Harv. L. Rev. 518, 526–32 (1970) (discussing the evolution of First Amendment doctrine to allocate most responsibility for protecting unpopular minority speech to the insulated judiciary). In any event, the involvement of the jury does not directly implicate better rights-making—my primary concern here.

¹⁹³ Leong, Making Rights, *supra* note 3, at 438–54.

¹⁹⁴ Laurin, *supra* note 137, at 1007–09.

¹⁹⁵ Compare, for example, the attention to police force in unlawful detention cases with the inattention to force in cases involving investigatory stops. See Leong, Making Rights, *supra* note 3, at 438–45, 455–62.

tire passenger compartment of the vehicle,¹⁹⁶ uncovering a significant quantity of illegal narcotics and contraband. Two separate events of Fourth Amendment interest have taken place here: the initial *Terry* stop and the search of the vehicle incident to the man's arrest. The search and seizure judge's resolution of the legal issue embedded in the former event—whether the officer had reasonable suspicion¹⁹⁷ to approach the man and perform the pat-down—might well be influenced by the post hoc reality of the contraband in the car.

Claim sanitizing would also involve considerable costs, both in time and in money. Involving two judges—or two appellate panels—in every case featuring a Fourth Amendment claim would create a great deal of inefficiency. In some instances, the duplication might be less than we would think. If a search and seizure judge finds a Fourth Amendment violation, the task of the trial judge will be, in most cases, relatively straightforward, while in the civil context, if the search and seizure judge finds that no Fourth Amendment violation occurred, the case will simply be dismissed. And if search and seizure judges served for relatively lengthy terms, they would become exceedingly knowledgeable about the precedent and practices in their own jurisdiction, which might actually expedite suppression hearings. Or sanitizing claims of unappealing consequences might facilitate efficient resolution of certain cases. For example, judges will spend less time agonizing that making a correct Fourth Amendment rule will result in releasing a bad person onto the streets. Still, it is difficult to contest the argument that involving multiple judges in every Fourth Amendment adjudication would result in a significant increase in the consumption of time and monetary resources.

A more troubling issue is that severing rights adjudications from remedy adjudications may have other unintended consequences for the development of the law. If search and seizure judges, uninfluenced by remedial and factual considerations, enunciate broad Fourth Amendment rights, then trial judges who actually see the consequences of those rights may well become stingier with their remedies.¹⁹⁸ Judges may develop a more robust interpretation of qualified immunity, for example.

¹⁹⁶ See *Arizona v. Gant*, 129 S. Ct. 1710, 1717–19 (2009).

¹⁹⁷ See *Terry v. Ohio*, 392 U.S. 1, 27–30 (1968).

¹⁹⁸ Levinson, *supra* note 190, at 889–99 (discussing the phenomenon of “remedial deterrence”); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. Ill. L. Rev. 1199, 1254–55 (“The fact that in the modern era federal

Some might also view the loss of information about whether evidence was found, and what that evidence was, as a loss relevant to rights-making. Sherry Colb has argued that Fourth Amendment violations encompass both a privacy harm (the invasion of areas in which one has an objectively reasonable expectation of privacy) and a targeting harm (the singling out by the police for investigation).¹⁹⁹ People concealing contraband at most suffer only the latter because they have already forfeited their privacy interest in areas where contraband is concealed.²⁰⁰ William Stuntz takes a different approach in making a similar claim regarding the relevance of whether evidence was found. He argues that one of the “virtues” of the exclusionary rule is that it makes the costs of allowing criminals to go free salient to the judge and the parties.²⁰¹ Sanitizing claims divorces the Fourth Amendment issue from consideration of its social costs. Of course, many scholars also hold the opposing viewpoint—that, if anything, criminal procedure should be tailored to the innocent, and consideration of guilty persons’ situations and interests provides a distraction to developing a jurisprudence suited to the lives of law-abiding citizens.²⁰² Still, there is a cognizable cost to having all consideration of remedy utterly removed from the rights-making context, even if in most situations we do not want judges to consider remedy to any appreciable degree.

Finally, sanitized rights-making raises concerns regarding the proper scope of the judicial role. Issuing a pronouncement about the scope of a constitutional right that does not actually resolve a dispute might be viewed, in the alternative, as pure dicta²⁰³ or treading into legislation.²⁰⁴ In the qualified immunity setting, for example, critics of mandatory merits-first adjudication protested that such rights-making was dicta and hence contrary to our conception of the role of the judiciary.²⁰⁵ In addi-

courts have broadened substantive rights makes even more poignant the reciprocal limitations on remedies.”).

¹⁹⁹ Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 *Colum. L. Rev.* 1456, 1464 (1996).

²⁰⁰ See *id.* at 1522.

²⁰¹ Stuntz, *supra* note 54, at 444, 446–47.

²⁰² Loewy, *supra* note 141, at 1229–31.

²⁰³ Michael C. Dorf, *Dicta and Article III*, 142 *U. Pa. L. Rev.* 1997, 2005–09 (1994).

²⁰⁴ Indeed, many if not most commentators view the judiciary as increasingly politicized, and criticisms that judges simply “legislat[e] from the bench” are common. Suzanna Sherry, *Democracy’s Distrust: Contested Values and the Decline of Expertise*, 125 *Harv. L. Rev. F.* 7, 12 (2011).

²⁰⁵ Leval, *supra* note 18, at 1277–79.

tion to the numerous pragmatic and conceptual problems with claim sanitizing, then, the approach also raises larger, and unanswered, institutional concerns.

B. Claim Facilitating

While claim sanitizing, in the abstract, offers an intriguing way of improving rights-making, the pragmatic, conceptual, and institutional concerns render the approach ultimately infeasible. I therefore propose facilitation of multiple-context rights-making as a more practical alternative that will have many of the same salutary consequences. I have already explained the many benefits that would flow from the litigation and articulation of Fourth Amendment rights at a meaningful level in both criminal and civil proceedings.²⁰⁶ Here, I will develop in more detail how we can facilitate rights-making at meaningful levels in multiple contexts.

First, we should not regard the existence of a particular remedial avenue as evidence against making another remedial avenue available. As I have described, the Supreme Court and lower courts frequently regard the availability of one remedial avenue as proof that another is unnecessary.²⁰⁷ In my view, we should discard this presumption. Different remedies serve different functions, and there is no obvious reason that the possibility of exclusion at a criminal trial should foreclose a civil damages remedy—or, indeed, the opposite. Thus, the existence of a particular remedy should be read as irrelevant—with no presumption in either direction—as to whether another remedy should be available for the same alleged rights violation. This more sensible approach will remove one obstacle to facilitating multiple-context litigation.

Second, given that most Fourth Amendment claims are litigated primarily in criminal proceedings, we should adjust incentives in order to increase the number of civil rights suits alleging Fourth Amendment claims brought under Section 1983.²⁰⁸ The reason that more Fourth Amendment claims are not currently filed is that, under the current regime, available remedies—money damages as well as injunctive and declaratory relief—provide an insufficient incentive for plaintiffs to bring claims. In some cases this means that the amount of actual damages as-

²⁰⁶ See discussion *supra* Section I.C.

²⁰⁷ See discussion *supra* Section I.B.

²⁰⁸ See Leong, *Making Rights*, *supra* note 3, at 407, 435.

sociated with the claim is too low for plaintiffs to take the trouble. In other cases this means that the value of the violation would provide an incentive, but doctrinal obstacles prevent plaintiffs from recovering—for example, qualified immunity.

The most direct mechanism would be to prescribe, through legislation, a meaningful minimum amount of damages automatically available for a proven Fourth Amendment violation. I have discussed above how under the current regime the damages associated with Fourth Amendment violations are often too low to inspire arguably injured parties to press their claims. Associating a minimum dollar amount with each Fourth Amendment violation will provide the necessary incentive. Statutory damages would also advance the norms associated with the Fourth Amendment by conveying that society values these norms at greater than nothing; the minimum amount need not be extremely high to get the message across. It would draw a more direct connection between right and remedy than is currently present in the exclusionary rule.²⁰⁹ And such measures would cohere with the considerable legal scholarship evincing “hostility to limitations on the recovery of money damages for constitutional violations.”²¹⁰

Along the same lines, we should make attorney’s fees more readily available to increase the likelihood that plaintiffs can find attorneys willing to represent them. Under current law, fees are available only if the plaintiff secures a victory on the merits *and* overcomes qualified immunity.²¹¹ Courts could alter that default by awarding fees for attorneys who successfully facilitate the change in the law that their clients sought.²¹² A skeptic might argue that it sends an odd message to improve the reward for *attorneys* to prosecute civil rights violations suffered by their clients. But we may rehabilitate the argument by casting the attorney’s fees as simply a way of removing an obstacle to citizens exerting the legal power they could if they were able to represent themselves or if money were no object to their representation.

²⁰⁹ See, e.g., Jeffries & Rutherglen, *supra* note 52, at 1394.

²¹⁰ *Id.* at 1389.

²¹¹ 42 U.S.C. § 1988(b) (2006); *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (“[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim.”).

²¹² Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from Saucier to Camreta (and Beyond)*, 80 *Fordham L. Rev.* 643, 667–69 (2011).

Third, we should relax jurisdictional obstacles to suit under Section 1983. *City of Los Angeles v. Lyons* limits standing to sue for injunctive relief to parties who will be similarly injured again in the future²¹³—a difficult bar to meet for many Fourth Amendment injuries.²¹⁴ Many commentators have critiqued for substantive reasons the stringent standing requirements applicable under *Lyons*.²¹⁵ I agree with these critiques, but for purposes here, I wish to focus on an additional reason to revise *Lyons*: Its requirements foreclose much Fourth Amendment rights-making in the civil context. When plaintiffs lack standing to sue for injunctive relief under *Lyons*, and the available money damages are relatively minimal, whole areas of Fourth Amendment doctrine remain largely unlitigated—for example, investigatory stops, when the prospective plaintiff has neither suffered an injury warranting substantial monetary recovery nor is likely to be able to show that she will be stopped again. Moreover, loosening the requirement for standing to seek injunctive and declaratory relief would improve rights-making conditions in another way, aside from incentivizing more plaintiffs to bring civil claims. It would also increase the number of opportunities for courts to articulate forward-looking doctrine in a context that encourages consideration of that doctrine's effects on a broad range of people.

Fourth, we should encourage a more robust amicus practice at the trial and appellate court levels. This intervention would complement increased rights-making in multiple contexts by, effectively, adding information about additional contexts to any particular pending litigation. A range of techniques might improve the quantity and quality of amicus participation. Judges could proactively appoint amici in particular cases. Or courts could reduce barriers to amicus participation. For example, they could eliminate the requirement that prospective amici must file a motion to participate in favor of a rule allowing general participation.

²¹³ 461 U.S. 95, 96 (1983).

²¹⁴ Brandon Garrett has suggested that perhaps *Lyons* would not preclude suits by individuals who bring claims alleging racial profiling under the Equal Protection Clause because certain groups are far more likely to suffer such harms. Brandon Garrett, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 Colum. L. Rev. 1815, 1834–39 (2000).

²¹⁵ See, e.g., Gilles, *supra* note 146, at 1399 (“The equitable standing doctrine articulated in *Lyons* effectively relegates private individuals aggrieved by police misconduct to damages suits under 42 U.S.C. § 1983.”); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 Fordham L. Rev. 1913, 1917 (2007) (describing *Lyons* as a “flawed decision”); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677, 679–80 (1990) (arguing that *Lyons* would have been justiciable if analyzed for mootness).

More radically, courts might even allow attorney's fees for amici whose participation significantly and positively influences the result in a particular case.

Qualified immunity poses a potential obstacle to some of the interventions I have proposed to facilitate litigation in multiple contexts. Even if a compensatory damage minimum would, hypothetically, encourage more people to bring claims, and even if jurisdictional hurdles were more easily surmountable, the availability of qualified immunity might continue to act as a deterrent. That is, if plaintiffs and their attorneys believe that even claims that would succeed on the merits are unlikely to yield damages, they still might not bring them.

If we chose to undertake one or more of the interventions I have described, and if we found that qualified immunity did, in fact, continue to deter the filing of civil damages claims, we might choose to adapt to that consequence by setting the threshold for qualified immunity higher either across the board or for claims that are under-litigated in the civil context. The effect of this intervention would be as follows: Government officers would be less likely to assert qualified immunity successfully, plaintiffs would be more likely to overcome qualified immunity and recover damages, and, in theory, more plaintiffs would then file civil damages actions, resulting in more law articulation in the civil context.

But the drawbacks of such a move are significant, and cannot be easily minimized. First, many of us would have reservations about shaping the substantive doctrine of official immunity in order to facilitate law articulation. Such an approach seems perverse, akin to allowing the abstract goal of law articulation to impose very concrete costs on the government officers who will have to stand trial. We might also question the effectiveness of such an intervention. It certainly depends on a relatively informed set of plaintiffs, who would recognize the implications of a higher threshold for qualified immunity for the success of their claims. The approach of adopting different qualified immunity thresholds for different areas of the law is also questionable, as it would create different standards of liability (at least in the sense of having to stand trial) for identically culpable mental states, although some scholars have persuasively advanced the claim that we need not approach constitutional torts transsubstantively.²¹⁶ Qualified immunity may also be difficult to manipulate: The doctrine is complex and comes with its own set of cogni-

²¹⁶ Jeffries, *supra* note 2, at 259, 283.

tive incentives that may influence the rate of law articulation or the substance of the law articulated.²¹⁷ Finally, as Jennifer Laurin argues, the fault requirement inherent in the qualified immunity context may itself influence the substantive results of adjudication in actions under Section 1983.²¹⁸ One possible compromise would be to award attorney's fees if a plaintiff succeeds on the merits of the constitutional claim even if the court ultimately grants qualified immunity. This approach would at least ensure that plaintiffs are able to find counsel who are willing to represent them on important constitutional issues, even if the likelihood of overcoming qualified immunity is uncertain.

I emphasize that—for all of the interventions I have described—the goal is the ideologically neutral one of facilitating litigation in multiple contexts.²¹⁹ Multiple-context rights-making does not inherently favor any particular party, and the desire to see Fourth Amendment rights litigated in multiple contexts is not motivated by any particular substantive outcome. With that said, I think it probable that courts have construed Fourth Amendment rights that are litigated almost entirely in the criminal context more narrowly than they would were they to consider the application of those rights to innocent parties, and it therefore makes sense to put a broader range of facts in front of courts. Consider, for example, investigatory stops: Approximately ninety-five percent of these cases are adjudicated in criminal proceedings, with the result that courts seldom see claims brought by anyone other than the clearly guilty, and the rights courts articulate tend to be less protective of individual privacy interests.²²⁰

For Fourth Amendment rights that are litigated only in the civil context, I have the opposite concern: that the protections provided did not sufficiently take into account the law enforcement interests in safety and investigation. Consider, for instance, excessive force claims: Because

²¹⁷ Leong, *The Saucier Qualified Immunity Experiment*, supra note 12, at 670–71 (arguing that judges are reluctant to recognize constitutional violations in cases where they intend to grant qualified immunity because announcing a right without prescribing a remedy creates cognitive dissonance).

²¹⁸ Laurin, supra note 137, at 1022–25.

²¹⁹ Admittedly facilitating more litigation under § 1983 is not ideologically neutral. The stereotypically conservative view is that too many § 1983 suits are brought already, and the stereotypically liberal view is that there should be many more. My point here, though, is that the bare claim that litigation should occur at a meaningful level in more than one context does not, in itself, favor either ideology.

²²⁰ Leong, *Making Rights*, supra note 3, at 438–45.

exclusion is unavailable as a remedy for excessive force, such claims are litigated only in Section 1983 suits. This context reduces the likelihood that courts will consider excessive force as applied to people who are engaged in criminal conduct, and likewise that certain uses of force may actually further evidence-gathering objectives, with the result that government officials may be overly constrained in their use of appropriate force.²²¹ In short, the aim of multiple-context litigation is not that any one case or series of cases should reach a particular result—rather, the aim is that rights-making will take a fuller array of interests into account.

Some might object that it seems ill-advised to manipulate 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 law articulation ends in mind? I offer two responses. First, we should not view it as a radical new policy to adjust remedies, procedures, or other litigation incentives. Such structures *already* represent choices about where law will be articulated—they just are not choices that we have made consciously. Second, from a rights-making perspective, nothing is inherently superior about the current rate of litigation of various rights in the civil and criminal contexts. Although courts and legislatures have posited lawmaking as a desirable event,²²² they do not systematically structure remedial incentives with lawmaking in mind—in short, we have arrived at the current state of affairs with no consideration of whether it is optimal from a rights articulation standpoint. Indeed, common sense suggests it might not be: Criminal defendants are likely over-motivated to press their claims due to the desire to avoid incarceration or other punishment, while civil plaintiffs are likely under-motivated due to the prospect of qualified immunity. And finally, there are some limited circumstances in which we *already* adjust doctrine to facilitate rights-making. I have explained the example of qualified immunity in some detail, and courts likewise relax doctrine to allow overbreadth challenges by parties who are not themselves the subject of unconstitutional regulation.²²³

²²¹ Id. at 445–55.

²²² See supra Section I.A (discussing circumstances in which courts have explicitly permitted or required lawmaking, including qualified immunity, harmless error, habeas review, and the good faith exception to the exclusionary rule).

²²³ See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 611–13 (1973); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 846–47 (1970).

Since no particular rationale justifies the current status quo, we are free to undertake the project of improving the way that courts go about articulating constitutional law. While this project potentially has many facets, I have here recommended one: that of multiple-context rights-making. Considering how to improve rights is long overdue.

CONCLUSION

Facilitating rights-making in multiple contexts allows us to pursue rights-making in its ideal form. While the idea of fostering adjudication of rights in certain contexts may seem foreign at first blush, deliberate attention to the conditions under which constitutional rights-making takes place is both desirable and harmonious with the current approach in other doctrinal areas.

Ultimately, my hope is to suggest that we can and should make decisions about rights-making conditions deliberately. If too much or too little rights-making is occurring in a particular context, judges and legislators can and should make adjustments to available remedies, incentives to litigate, and procedural hurdles. In so doing, we can intentionally improve the process of rights-making so as to improve the content and texture of our precious constitutional rights.