UCLA LAW REVIEW

Enforcing Rights

Nancy Leong & Aaron Belzer

ABSTRACT

Courts frequently confine constitutional litigation to a single remedial avenue. For example, courts typically allow enforcement of Fourth Amendment rights by providing either exclusion of evidence or a civil remedy under 42 U.S.C. § 1983, but not both. Yet this practice is at odds with judicial treatment of remedies in other arenas. Courts rarely limit common law litigants to a single remedy, for instance. Is there a reason that constitutional litigants should be treated differently from others?

This Article answers that question in the negative. It begins by exposing the pervasive yet underexamined phenomenon of courts limiting constitutional litigants to a single remedial avenue. It then demonstrates that this judicial practice lacks justification. That is, the doctrinal and policy reasons that courts typically advance for foreclosing multiple remedial avenues in the constitutional context cannot withstand careful scrutiny, particularly given that multiple remedial avenues are entirely normal for common law claims. The Article subsequently builds on previous work by demonstrating that limiting plaintiffs to a single remedial avenue has negative consequences for the articulation of constitutional rights. After explaining why this is so, the Article proposes a number of doctrinal and practical innovations to better enforce constitutional rights via multiple remedial avenues.

AUTHORS

Nancy Leong is an Associate Professor at the University of Denver Sturm College of Law. Aaron Belzer earned a J.D. from the University of Denver Sturm College of Law, in 2014 and is currently an Associate at Rathod Mohamedbhai.

We are grateful for the feedback of Robin Effron, Charlotte Garden, Tara Leigh Grove, Lee Kovarsky, Justin Marceau, Justin Pidot, Judith Resnik, Allan Stein, and Kevin Walsh. This paper benefited from presentation at the Sixth Junior Faculty Federal Courts Conference. Finally, we appreciate the careful and thorough editing by members of the UCLA Law Review, including Emily Given, Ankush Dhupar, Galen Phillips, Melanie Rollins, and Ryan Hicks.

TABLE OF CONTENTS

INTRODUCTION

Courts readily allow common law plaintiffs to pursue multiple remedial avenues.[1] They are untroubled by the possibility that a single party may pursue multiple causes of action to address a particular harm that she has suffered. Consider, for example, a builder who breaches a contract with a buyer by building the house so poorly that an entire wing of the house collapses, narrowly missing the buyer when she arrives on the premises to inspect her new home: In many states, the buyer can pursue both a contract remedy for breach and a tort remedy for negligent infliction of emotional distress. Or consider a publisher who breaches a contract with an author by publishing an unreleased manuscript: The author can pursue both a breach of contract remedy and a copyright infringement remedy. Or consider a person who trespasses on his neighbor's property to harvest timber in breach of a contract forbidding such harvesting: The owner of the timber may pursue remedies for both trespass and breach of contract.

Yet in constitutional litigation, the availability of multiple remedial avenues is the subject of resistance, not acceptance.[2] The U.S. Supreme Court has held that the availability of relief in a civil action under 42 U.S.C. § 1983 sometimes negates the need for an exclusionary remedy.[3] The existence of the exclusionary remedy precludes pursuit of many constitutional claims on habeas. In such situations prisoners are consigned to either a § 1983 remedy or habeas relief—they cannot pursue both.[4] And even when multiple remedial avenues are not doctrinally prohibited, various circumstances often foreclose them as a practical matter.[5]

1. At the outset, we wish to define with precision what we mean when we discuss "multiple remedial avenues." The term "remedy" is defined variously throughout the literature. One influential description is "what the court will do to correct or prevent the violation of legal rights that gives rise to liability." Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 164 (2008). For our purposes, the more important concept is that of "multiple remedial avenues," which exist when a single party may pursue more than one cause of action for injuries arising from a single harm.
2. The Court's trend of limiting remedial avenues is not, in fact, limited to constitutional claims. As we note, it extends to a range of statutory circumstances as well. *See infra* note 16 and Part II.B. While these contexts are potential avenues of future inquiry, we focus on the constitutional context because, as we explain, the consequences of constitutional remedial limitation are more troubling than those of non-constitutional remedial limitation.
3. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 591–92 (2006); *see also* Part I.A.1.
4. *See* Preiser v. Rodriguez, 411 U.S. 475, 489–90 (1973); *see also* Part I.A.2.
5. *See infra* Part I.B.

Is this discrepancy between constitutional rights and other sorts of claims justified? This Article argues that it is not, rebutting the argument that multiple remedial avenues are inappropriate or unnecessary in the constitutional context. In so doing, it emphasizes the argument in favor of facilitating multiple remedial contexts that scholars have advanced elsewhere.

This Article offers three novel contributions. First, as a descriptive matter, it demonstrates the dichotomy between the availability of multiple remedial avenues in many circumstances[6]—including nearly all common law contexts—and the substantially more limited availability of multiple remedial avenues in the constitutional context. Second, it argues that there is no doctrinal or policy basis for limiting the availability of multiple remedial avenues for constitutional violations. This provocative conclusion strongly suggests that a great deal of constitutional doctrine limiting remedial availability is founded on false premises. Third and finally, the Article suggests ways that doctrine and discourse should change to recognize that permitting multiple remedial avenues for constitutional violations is not only unproblematic but also, in fact, affirmatively desirable. To illustrate these conclusions concretely, we turn primarily to Fourth Amendment doctrine as a case study that demonstrates both the limitations of current doctrine and the benefits of multiple remedial avenues.

The Article proceeds in four Parts. Part I systematically surveys the phenomenon of "remedial rationing"[7]—that is, channeling the articulation of constitutional rights into a single litigation context through both doctrinal requirements and practical obstacles. Part I also lays the foundation for our critique of remedial rationing.

Part II reveals the lack of doctrinal reasons to preclude multiple remedial avenues in the constitutional context. First, it offers an overview of multiple remedial avenues at common law. Common law doctrine seldom limits the availability of multiple remedial avenues, and the rarity of such limitations actually reinforces, rather than contradicts, the general rule. Moreover, the government can often pursue multiple avenues when it litigates to enforce the Constitution, calling into question the rationale for such limitations as applied to constitutional litigants.

Part III demonstrates a concomitant lack of compelling policy reasons for limiting or prohibiting multiple remedial avenues in the constitutional context. The Part first surveys the extensive literature on the relationship between rights

6. *See supra* note 2 for an explanation of the scope of the project.

7. We adopt Jennifer Laurin's terminology for this phenomenon. Jennifer E. Laurin, Melendez-Diaz v. Massachusetts, Rodriguez v. City of Houston*, and Remedial Rationing*, 109 COLUM. L. REV. SIDEBAR 82, 83 (2009).

and remedies, taking account of the broad agreement that the two are inextricably linked. With this literature as a foundation, it then elaborates on several reasons that multiple remedial avenues are desirable from a policy perspective.

If doctrinal and policy considerations both favor multiple remedial avenues for constitutional rights litigation, how should courts and other governmental entities respond? Part IV offers concrete ways in which courts and other legal actors can facilitate multiple remedial avenues and discusses the limitations of our conclusions.

I. CONSTITUTIONAL LAW AND REMEDIAL RATIONING

In contrast to common law and most other areas of the law, when it comes to constitutional law, courts engage in "remedial rationing"[8]—a term that Jennifer Laurin has used to describe the practice of limiting available remedies to a single litigation context.[9] Remedial rationing describes the trend of the "enforcement of a given criminal procedure right [being] committed *either* to the criminal *or* the civil realm."[10] Laurin argues that remedial rationing is misguided because criminal and civil litigation achieve important yet distinct goals in regulating the behavior of governmental and private actors.[11] Despite increasing recognition that the "enforcement of criminal procedure rights is effectuated both by defendants in criminal proceedings as well as by plaintiffs in civil actions under federal remedial schemes," that enforcement is cabined into *either* a civil *or* a criminal remedial context.[12] We agree with Laurin's description of remedial rationing in criminal trials and wish to expand her useful definition to include rights that arise outside that context. For example, the Court frequently adopts an either/or approach to remedies when two civil remedies are both ostensibly available—as, for example, with § 1983 and habeas relief. We will discuss such situations in subsequent sections. Here, we wish to emphasize that we do not think that remedial rationing is limited to situations where there is both a criminal and a civil remedy.

Moreover, the Court increasingly justifies restricting remedies in the criminal context by pointing to the availability of a civil remedy under § 1983.[13] Recent decisions reveal a trend: "Where criminal and civil litigation both afford

8. *See infra* Part I.A.
9. Laurin's terminology is consonant with what we describe as multiple remedial avenues.
10. Laurin, *supra* note 7, at 83.
11. *Id.*
12. *Id.* at 83–84.
13. *Id.* at 84.

mechanisms for enforcing criminal procedure rights, the Court is likely to channel enforcement into one regime or the other."[14] The Court also appears to be doing so "in full cognizance of the regulatory implications of criminal procedure rights, viewing alternative rather than recursive remedies as generally adequate to deter undesirable law enforcement conduct."[15]

This Part demonstrates the under-recognized practice of remedial rationing in constitutional law by cataloguing many examples of the phenomenon. Subpart A provides evidence that remedial rationing in constitutional doctrine is a trend, examines courts' proffered justifications for engaging in the practice, and flags some of the negative consequences. Subpart B illustrates that even where multiple remedial avenues are not foreclosed as a matter of doctrine, courts often restrict their availability as a matter of practice. Subpart C revisits the concept of remedial rationing in more depth, and discusses the effect it has on our underlying rights.

A. Remedial Rationing in Constitutional Doctrine

Courts frequently foreclose a particular remedy, often with the justification that another remedy is capable of serving the same purpose. Remedial rationing of constitutional rights is only one example of courts' general trend of constricting rights.[16] But the trend has, as yet, received relatively little scholarly or judicial attention, and therefore serves as our focus here.[17]

First, in many instances courts either recognize a § 1983 remedy for civil damages or allow exclusion of evidence at a criminal trial, but not both. Second, courts bar a § 1983 suit where a win by the plaintiff might undermine the underlying conviction, leaving a habeas claim as the only possible alternative. Third, courts foreclose a habeas remedy for individuals who had unconstitutionally obtained evidence used against them in a criminal trial after unsuccessfully litigating an exclusionary claim. Fourth, courts heavily emphasize exhaustion, a tactic that often precludes multiple remedial avenues. And fifth, courts sometimes foreclose constitutional remedies by insisting on exclusively administrative ones. The next five Subparts will discuss each of these five points in turn.

14. *Id.* at 85.
15. *Id.*
16. *See, e.g.*, David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199 (discussing the expansion of federal statutory and constitutional rights taking place alongside an expansion of remedy-limiting doctrines). We are indebted to Judith Resnik for highlighting to us the constriction of remedies occurring beyond constitutional doctrine, although such remedies exceed the scope of our Article.
17. See *supra* note 2 for an explanation of our decision to focus specifically on constitutional rights.

1. Either Exclusion or Civil Damages

Recent Supreme Court cases reveal a reluctance to provide both exclusion and civil damages to plaintiffs. Consider several examples from the Fourth Amendment context. *Hudson v. Michigan*,[18] for example, demonstrates the Court's frequent practice of foreclosing one remedy—exclusion of evidence—and justifying that foreclosure by reference to the supposed availability of another remedy—a § 1983 civil suit. In that case, police officers executing a search warrant entered Hudson's home too soon after announcing their presence. The government conceded that the police failed to knock-and-announce in compliance with the Fourth Amendment,[19] meaning that the only issue at stake was the availability of exclusion as a remedy.[20]

In an opinion authored by Justice Antonin Scalia, the Court held that the exclusionary rule was unavailable as a remedy for the failure to comply with the knock-and-announce rule in violation of the Fourth Amendment, and that § 1983 therefore provided the sole remedy.[21] The Court justified this remedial foreclosure by declaring that the deterrent value of a civil § 1983 suit outweighs the deterrent effect of exclusion on police conduct.[22] Although it examined the rationale underlying the knock-and-announce rule earlier in its opinion,[23] the

18. 547 U.S. 586 (2006).

19. Absent exigent circumstances, the Fourth Amendment requires police officers to knock and announce their presence before entering a dwelling to execute a warrant. *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927, 934–35 (1995).

20. *Hudson*, 547 U.S. at 590.

21. *Id.* at 593–94.

22. As another justification, Justice Scalia noted that it might not be worth the trouble for a court to determine whether officers had waited a reasonable amount of time before they executed a search warrant. The Court stated: "[D]eterrence benefits [are] a necessary condition for exclusion," adding that "the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot." *Id.* at 596; *see also* Chavez v. Martinez, 538 U.S. 760, 790, 797 (2003) (Kennedy, J., concurring in part and dissenting in part) (finding, generally with respect to *Miranda* violations, the "exclusion of unwarned statements" is "a complete and sufficient remedy" and § 1983 should only be available when officers exploit pain and suffering to coerce statements); Nix v. Williams, 467 U.S. 431, 446 (1984) (asserting similar rationale to preclude application of the exclusionary rule to violations of Sixth Amendment assistance of counsel).

23. *See Hudson*, 547 U.S. at 594 (noting that the interests protected are life, property, and privacy, and that the rule affords "individuals 'the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.'" (quoting Richards v. Wisconsin, 520 U.S. 385, 393 n.5 (1997))). Justice Kennedy, concurring in the judgment, stated that "privacy and security in the home are central to the Fourth Amendment's guarantees as . . . understood since the beginnings of the Republic. This common understanding ensures respect for the law . . . and it is an instrument for transmitting our Constitution to later generations undiminished in meaning and force." *Id.* at 603 (Kennedy, J., concurring in part and concurring in the judgment). Despite this heady language, Hudson calls those guarantees into question. Further, it is difficult

Court casually dismissed the Fourth Amendment right in the knock-and-announce context as merely "the right not to be intruded upon in one's night-clothes."[24] Moreover, the Court claimed, the increased number of § 1983 suits since the days of *Mapp v. Ohio* and *Monroe v. Pape* had made those suits a more effective deterrent. Thus, the Court concluded, a § 1983 remedy is sufficient to deter and remedy this brand of Fourth Amendment violation.[25] Even conceding that knock-and-announce violations will often produce only minimal damages (thus logically undercutting the argument that § 1983 is an efficacious deterrent), the Court held that "civil liability is an effective deterrent here."[26]

In any event, *Hudson* provides a prime example of the Court's aversion to multiple remedial avenues. The Court's justification for the sweeping decree that the exclusionary rule does not apply in knock-and-announce cases was that a § 1983 suit provides an adequate remedy for the victim of such a violation, and serves as a sufficient deterrent for future knock-and-announce Fourth Amendment violations. Citing the (supposed) availability of one remedy to justify withholding another is paradigmatic remedial rationing.

The Court further demonstrated its opposition to multiple remedial avenues in *Herring v. United States*[27] when it deprived plaintiffs of the exclusionary remedy for Fourth Amendment violations resulting from police negligence. In *Herring*, the Court held the exclusionary rule inapplicable to evidence obtained as a result of police recordkeeping errors, despite conceding that a Fourth Amendment search violation occurred.[28] Although *Herring* is less explicitly illustrative than *Hudson* of the remedial "shell game,"[29] the availability of a § 1983 remedy likely emboldened the Court to withhold exclusion, and the case therefore sheds light on the Court's hostility to multiple remedial avenues.

In *Herring*, a law enforcement officer recognized the defendant in a police impound lot and asked a clerk to check for any outstanding arrest warrants. The clerk informed the investigator that Herring had an outstanding warrant. Herring was pulled over leaving the impound lot and arrested. A search incident to Herring's arrest revealed methamphetamine and a handgun, which, as a felon, he was prohibited from possessing.[30]

---

to characterize the Fourth Amendment as "undiminished in meaning and force" after this decision diluting its core protection of the home.

24. *Id.* at 597 (majority opinion).
25. *Id.*
26. *Id.* at 598.
27. 555 U.S. 135 (2009).
28. *Id.* at 137, 147–48.
29. Rudovsky, *supra* note 16, at 1212.
30. *Herring*, 555 U.S. at 137.

Shortly thereafter, the police department determined the warrant had been recalled, but by that time Herring had already been arrested.[31] Herring moved to suppress the evidence uncovered by the search on the ground that the initial arrest was illegal.[32] The Court acknowledged the Fourth Amendment violation but held the exclusionary rule inapplicable, claiming that exclusion of evidence would not deter future mistakes.[33]

The Court found it critical that the error was a result of negligence, and was not deliberate, reckless or systemic, holding that by itself, the error was insufficient to warrant "the extreme sanction of exclusion."[34] The Court further noted that "the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence.'. . . In addition[,] the benefits of deterrence must outweigh the costs."[35] While the Court did not explicitly discuss the availability of a civil action under § 1983, the inevitable consequence of the Court's decision to foreclose exclusion is that only civil damages remain available as a remedy.[36]

Although less explicitly than in *Hudson*, the *Herring* Court couched its hostility to affording an exclusionary remedy in terms of deterrence. But the Court left unexplained how the potential availability of a § 1983 remedy might or might not operate to deter Fourth Amendment violations. If the concern is truly for deterring violations, then the availability of other remedies should be part of the calculus, and when it comes to a warrant violation, the deterrent value of a § 1983 remedy is virtually nonexistent: Herring was in jail, the damages would be minimal, and given the officers' lack of knowledge about the defective warrant, Her-

31. *Id.* at 137–38.
32. *Id.* at 138.
33. *Id.* at 138–39. The deterrence rationale notwithstanding, this is an example of ignoring a citizen's rights. Herring did not behave in a manner that warranted a legal search and his right to be free from unreasonable searches did not appear to enter into the Court's calculus, although Justice Ginsburg discussed it in her dissent.
34. *Id.* at 140 (citing United States v. Leon, 468 U.S. 897, 916 (1984)); *see also* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) (discussing the influence that constitutional tort doctrine has on exclusionary rule jurisprudence). In requiring a heightened showing of misconduct, the *Herring* Court "borrowed" qualified immunity jurisprudence to narrow the exclusionary rule, and the gradual effect of that sort of borrowing results in convergence of the two bodies of law, ultimately aligning exclusionary rule and constitutional tort doctrines. For example, "*Leon*'s good faith exception [to the warrant requirement] is functionally equivalent to the qualified immunity clearly established law standard, and brings with it the same risk that officers will conform their conduct to the remedial standard as opposed to the substantive requirements of probable cause." Rudovsky, *supra* note 16, at 1247.
35. *Herring*, 555 U.S. at 141 (alteration in original) (citation omitted) (quoting *Leon*, 468 U.S. at 909).
36. *See id.* at 140 (noting that "exclusion 'has always been our last resort, not our first impulse.'" (quoting *Hudson*, 547 U.S. at 591)); *id.* at 146 (conceding an innocent person had been arrested and jailed but finding that "not so objectively culpable [enough] as to require exclusion.").

ring would be unlikely to overcome qualified immunity. If the Court's concern is truly for deterrence, it bypassed the only remedy that could conceivably have deterred anyone from future rights violations.

As Justice Ginsburg correctly noted in her dissent: "The exclusionary rule… is often the only remedy effective to redress a Fourth Amendment violation. Civil liability will not lie for 'the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice.'"[37] Thus, although the result in *Herring* was less explicitly justified by the availability of another remedy than was the result in *Hudson*, the *Herring* majority proscribed the exclusionary remedy, and thus effectively foreclosed all remedies for Herring.[38] If, as one of us has argued elsewhere, "one can tell how important the [C]ourt thinks a particular right is by the remedy afforded when it has been violated,"[39] the *Herring* decision suggests that the Court views Fourth Amendment rights as rather insignificant.

Regarding the importance of deterrence, the *Herring* Court failed to acknowledge that the "exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search. The rule thus strongly encourages police compliance with the Fourth Amendment in the future."[40] That is, applying the exclusionary rule to Herring's case would preserve a remedial avenue that functions to deter future police negligence regarding important constitutional rights. Perhaps more importantly, it would remedy the harm Herring suffered—his wrongful arrest. "[T]he 'most serious impact' of the Court's holding will be on innocent persons 'wrongfully arrested based on erroneous information

37. *Id.* at 153 (Ginsburg, J., dissenting) (alterations in original) (citations omitted) (quoting Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983)).

38. Specifically with regard to Herring, Justice Ginsburg pointed out:

> [B]y restricting suppression to bookkeeping errors that are deliberate or reckless, the majority leaves Herring, and others like him, with no remedy for violations of their constitutional rights. There can be no serious assertion that relief is available under 42 U.S.C. § 1983. The arresting officer would be sheltered by qualified immunity, and the police department itself is not liable for the negligent acts of its employees. Moreover, identifying the department employee who committed the error may be impossible

Id. at 156 (citations omitted). Furthermore, although "the Court has stressed the deterrence rationale of the exclusionary rule, it has refused suppression of evidence where the rule would be most effective—when an official acts with the intent of violating the Fourth Amendment." Rudovsky, *supra* note 16, at 1247.

39. Aaron Belzer, Comment, *The Audacity of Ignoring* Hope*: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights*, 90 DENV. U. L. REV. 647, 683 (2013).

40. *Herring*, 555 U.S. at 148 (Ginsburg, J., dissenting).

[carelessly maintained] in a computer data base.'"[41] A remedy that fails to keep wrongfully arrested persons out of jail is not a meaningful one. Yet the Court justifies its prohibition of a meaningful remedy with the fiction that a civil suit will both remedy and deter these harms.[42]

Courts also reveal their hostility to multiple remedial avenues by limiting a Fourth Amendment excessive force remedy to § 1983 suits thus depriving defendants of the exclusionary remedy. In *United States v. Ankeny*,[43] the Ninth Circuit held that when police use unreasonable force to execute a warrant, exclusion of evidence is not required.[44] In *Ankeny*, police officers executing a warrant for Ankeny at his home announced their presence and broke down the door about one second later.[45] Ankeny, who had been sleeping on a recliner near the front door, stood up when the officers broke down the door. One officer instructed Ankeny to show his hands and get down on the floor; at the same time a different officer threw a flash-bang grenade into the room. Ankeny went to the floor, and the device exploded near his upper body, causing him to suffer "first- and second-degree burns to his face and chest and second-degree burns to his upper arms."[46] The officers—executing a warrant for just one person, and with no reported resistance—also shot out the windows of the home with rubber bullets, threw a second flash-bang grenade into a room where two people were lying in bed, lit a mattress on fire and threw it out of a second story window, kicked in several doors, burned the carpet, and put holes in the ceiling and walls using rubber bul-

41. *Id.* at 148–49 (second alteration in original) (quoting Arizona v. Evans, 514 U.S. 1, 22 (1995) (Stevens, J., dissenting)).

42. Furthermore, the public may begin to doubt the integrity of constitutional principles when police officers can use evidence obtained in contravention of the Constitution by claiming negligence as to probable cause. "Beyond doubt, a main objective of the rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Id.* at 152 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). It also "'enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,' and it 'assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.'" *Id.* (alteration in original) (quoting United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

43. 502 F.3d 829 (9th Cir. 2007).

44. *Id.* at 837–38; *see also* United States v. Ramirez, 523 U.S. 65 (1998). In *Ramirez*, the Supreme Court noted that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." *Id.* at 71. Although the Court concluded that the police conduct in that case did not violate the Fourth Amendment, the Court noted that, had the search been unreasonable, it then would have had to determine "whether . . . there was [a] sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression . . . ." *Id.* at 72 n.3.

45. *Ankeny*, 502 F.3d at 833.

46. *Id.*

lets.[47] In something of an understatement, the court summarized: "Extensive damage was done to the house during the entry."[48]

Ankeny argued that the excessively violent and destructive nature of the officers' actions upon entry was unreasonable and therefore violated the Fourth Amendment. Ankeny thus sought to exclude the evidence obtained in the calamitous search.[49] The court refused to "determine whether the entry was unreasonable because . . . suppression is not appropriate,"[50] finding the unreasonable manner of the search too attenuated to the evidence obtained to warrant exclusion.[51]

The *Ankeny* Court, responding to the dissent's charge that after this decision police officers could employ egregious methods as long as they had a warrant, commented that, "[s]eparate from the question of exclusion, '42 U.S.C. § 1983 and the *Bivens* doctrine have made tort damages an effective remedy for constitutional violations by federal or state law enforcement officers.'"[52] The *Ankeny* Court relied less on a deterrence rationale than did the Court in *Hudson* or *Herring*. Instead, its justification for foreclosing an exclusionary remedy was that Ankeny's individual right to be free from unreasonable searches could be completely remedied by a civil suit under § 1983. Yet this reasoning overlooks the way that the use of force and other searching techniques are often intertwined,[53] while simultaneously ignoring the desirability of deterring excessive police force with the exclusionary rule.[54]

47. *Id.*
48. *Id.* Once in the home, the police officers found several firearms, including a 9mm semiautomatic handgun and a sawed-off shotgun, along with ammunition, cash, and suspected drugs and drug paraphernalia. *Id.* at 833–34.
49. *Id.* at 836.
50. *Id.* at 837.
51. The court noted that "[t]he alleged Fourth Amendment violation and the discovery of the evidence lack the causal nexus that is required to invoke the exclusionary rule. The principle that the exclusionary rule applies only when discovery of evidence results from a Fourth Amendment violation is well-established." *Id.* Further, the court held that since the police officers would have executed the warrant and uncovered the evidence anyway, the manner of executing the search was too attenuated to the evidence obtained to warrant exclusion. *Id.* at 837–38.
52. *Id.* at 838 n.5 (quoting United States v. Langford, 314 F.3d 892, 895 (7th Cir. 2002)).
53. *See, e.g.*, William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 450 (1997) ("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.").
54. Not for nothing, the deterrence rationale was obvious here, but since it did not suit the *Ankeny* Court to justify the prohibition on multiple remedial avenues with the same "deterrence" trope, they went with the time-honored "we declare that this is complete relief" approach. Somehow we doubt that Ankeny found a great deal of solace in this approach, from his jail cell, while trying to determine how to pay for repairs to his home.

As *Ankeny* demonstrates, courts limit litigation of excessive force claims to only the civil context, which confines lawmaking there. Moreover, courts virtually never grant injunctive relief for excessive force claims.[55] Channeling remedies into a single context means some remedies are, practically speaking, unavailable, which ultimately disincentivizes litigation of those cases. And meritorious individual claims often settle. Thus, claims that are litigated are disproportionately likely to have bad facts and establish bad law. The fact that plaintiffs cannot employ the broader law-reform possibilities of injunctive relief[56] thus leads to the following situation: (1) no excessive force lawmaking in criminal proceedings; (2) a lopsided universe of cases for excessive force lawmaking in damages suits; and (3) a roadblock to injunctive relief due to *City of Los Angeles v. Lyons*.[57] Undoubtedly these circumstances have negative consequences for the articulation of constitutional rights, including but not limited to the right to be free from the use excessive force.

2. Either Civil Relief or Habeas

The Court also fails to provide complete relief for constitutional rights by foreclosing § 1983 remedies for prisoners and justifying the foreclosure by pointing to habeas relief. In *Preiser v. Rodriguez*,[58] although the Court conceded that the statutory language of § 1983 literally applied to an inmate's complaint, the Court nonetheless held that habeas corpus was the sole remedy for prisoners whose § 1983 actions, if successful, would lead to an immediate or speedier release.[59] In *Preiser*, state prisoners brought a § 1983 action challenging as unconstitutional the deprivation of good-time credits lost as a result of disciplinary proceedings. The prisoners sought injunctive relief to compel the restoration of those credits, which would have led to their immediate release from prison.

55. A search for cases in which courts have granted injunctive relief in excessive force cases turned up only four. *See* Thomas v. Cnty. of Los Angeles, 978 F.2d 504 (9th Cir. 1992) (reversing a district court's grant of preliminary injunction because broad scope not supported by record); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (finding injunctive relief "indispensible" to cure multiple ongoing constitutional violations, including pattern of excessive force, in state prison); Fisher v. Koehler, 718 F. Supp. 1111 (S.D.N.Y. 1989) (adopting, with some modifications, city correctional facility's proposed plan to reduce violence by staff and inmate against inmates in order to comply with Eighth Amendment); Commonwealth v. Adams, 624 N.E.2d 102 (Mass. 1993) (affirming grant of injunctive relief enjoining defendant officers from using excessive force in performance of police duties).

56. Thanks to *City of L.A. v. Lyons*, 461 U.S. 95 (1983) (holding that plaintiff subjected to chokehold by police lacked standing to sue because he was unable to show a plausible threat of future injury).

57. *Id.*

58. 411 U.S. 475 (1973).

59. *Id.* at 487–88.

The district courts[60] found that the suits had been properly brought under § 1983 and that the habeas relief sought was merely an incidental or adjunct claim to ensure full relief should the § 1983 suit be successful.[61] After consolidating the cases, on rehearing, the court of appeals affirmed the ruling of the district courts.

The Supreme Court, however, disagreed. It held that the prisoners' claims fell within the "core of habeas" because they attacked the duration of confinement, and thus the prisoners could have "obtained fully effective relief through federal habeas corpus proceedings."[62]

The Court then addressed the court of appeals' holding that the prisoners were nonetheless entitled to bring suit under § 1983, since the claims plainly came within the broad language of that statute, and avoid the necessity of seeking relief in a state forum. It held that the "broad language of § 1983 . . . [was] not conclusive of the issue," because § 1983 was a "general" statute and, "despite the literal applicability of its terms, the question remains whether" habeas was "historically designed to provide the means for a state prisoner to attack the validity of his confinement [and] must be understood to be the exclusive remedy available in a situation like this where it so clearly applies."[63]

Ironically, to reach its conclusion, the Court reframed the issue: Instead of the specific challenge the prisoners actually brought—the unconstitutional deprivation of good-time credits—the Court characterized the claim as a broad challenge to the validity of the confinement itself. The Court thus prohibited a § 1983 remedy, "despite the literal applicability," and justified that prohibition by announcing that habeas "cover[ed] that situation."[64] As Justice William Brennan pointed out in his dissent, the Court's proposition was "analytically unsound . . . [and t]he net effect of the distinction is to preclude respondents from maintaining

60. *Preiser* was actually three consolidated cases, but the factual circumstances and district court holdings are similar.

61. *Preiser*, 411 U.S. at 478–82.

62. *Id.* at 487–88. Justice Brennan, in his dissent, pointed out that "[t]he Court's conclusion . . . is assertedly justified by invocation of a concept, newly invented by the Court today, variously termed the 'core of habeas corpus,' the 'heart of habeas corpus,' and the 'essence of habeas corpus.'" *Id.* at 503 (Brennan, J., dissenting).

63. *Id.* at 489 (majority opinion).

64. *Id.* Notably, the Court found the policy reasons underlying habeas to support its decision, stating that "[t]he rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity. That principle was defined . . . as 'a proper respect for state functions,' and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked." *Id.* at 491(quoting Younger v. Harris, 401 U.S. 37, 44 (1971)). But this is directly counter to the purpose of § 1983, which is meant to provide a federal remedy where the state is unwilling or unable to do so. By requiring exhaustion of state remedies before a prisoner can seek a § 1983 remedy, the Court essentially gave control of the gateway availability of § 1983 back to the state. *See id.* at 513–18 (Brennan, J., dissenting).

these actions under § 1983, leaving a petition for writ of habeas corpus the only available federal remedy."[65]

A similar line of reasoning emerges in cases relating to preclusion. In *Heck v. Humphrey*,[66] the Court held that a state prisoner seeking to recover damages under § 1983—but not injunctive relief, such as release—"must prove that the conviction or sentence has been reversed . . . , expunged . . . , [invalidated] by a state tribunal . . . , or called into question by a federal court's issuance of a writ of habeas corpus" if the award of damages would call into question the legitimacy of the original conviction.[67]

The facts of *Heck* reveal the oddity of precluding § 1983 as a remedial avenue. After Roy Heck's conviction for manslaughter, he filed a § 1983 suit in federal court claiming that officers had unlawfully investigated him, destroyed exculpatory evidence that could have proven his innocence, "and caused 'an illegal and unlawful voice identification procedure' to be used at [his] trial."[68] The Supreme Court found *Preiser* inapposite because Heck was "seek[ing] not immediate or speedier release, but monetary damages," and therefore could not obtain relief via habeas.[69]

After *Heck*, even where a successful § 1983 claim might expose the unconstitutionality of the conviction, the "claim is [not] cognizable under § 1983 at all."[70] Thus, plaintiffs like Heck who have exhausted state appeals and are seeking only compensatory money damages for allegedly unconstitutional imprisonment are left with no remedy unless they first are successful at invalidating their underlying conviction via habeas or an executive order. This is an odd result in light of the purpose of § 1983.[71]

65. *Id.* at 501.
66. 512 U.S. 477 (1994).
67. *Id.* at 486–87.
68. *Id.* at 479.
69. *Id.* at 481.
70. *Id.* at 483.
71. *See* Monroe v. Pape, 365 U.S. 167, 175–76 (1961) ("[T]he [§ 1983] remedy created was [a remedy] against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law."), *overruled on other grounds by* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978); *cf.* Wilkerson v. Dotson, 544 U.S. 74, 82 (2005) (holding that state prisoners could use a § 1983 action to challenge parole procedures, because those procedures did not *necessarily* implicate the fact or duration of incarceration, and thus did not lie at the "core of habeas.").

3. Either Exclusion or Habeas

Yet another example of the Court's animosity to multiple remedial avenues is its preclusion of a habeas remedy for some state prisoners. In *Stone v. Powell*,[72] the Court foreclosed federal habeas review of convictions resting on the admission of unconstitutionally obtained evidence for state prisoners who had a full and fair opportunity to litigate the Fourth Amendment claim while seeking exclusion of evidence during a criminal trial.[73] The decision rested, in part, on the idea that the exclusionary rule's deterrent effect was too attenuated in habeas proceedings to actually decrease future Fourth Amendment violations.[74] Not surprisingly, the Court summarily dismissed the integrity of the Constitution as a potential justification for exclusion.[75]

Stone stands for the proposition that where an individual fails to exclude unconstitutionally obtained evidence at trial, habeas is an inappropriate remedy to resolve the resultant unconstitutional incarceration—even though the incarceration flows from a constitutional violation.[76] The Court reached this holding

72. 428 U.S. 465 (1976).

73. *Id.* at 481–82. *Stone* has been upheld, and in some cases extended, by the courts of appeals. *See, e.g.*, Good v. Berghuis, 729 F.3d 636, 639 (6th Cir. 2013) (finding that *Stone* presented a bar to habeas review regardless of adequacy of the procedure used at trial to resolve Fourth Amendment claim); United States v. Ishmael, 343 F.3d 741, 742 (5th Cir. 2003) (extending the *Stone* rule to federal prisoners); Janecka v. Cockrell, 301 F.3d 316, 320 (5th Cir. 2002) (holding that *Stone* bars habeas review of Fourth Amendment claims whether or not defendant takes advantage of the opportunity to fully and fairly litigate the issue at trial); Willett v. Lockhart, 37 F.3d 1265, 1273 (8th Cir. 1994) ("[A] Fourth Amendment claim is *Stone*-barred, and thus unreviewable by a federal habeas court, unless either the state provided no procedure by which the prisoner could raise his Fourth Amendment claim, or the prisoner was foreclosed from using that procedure because of an unconscionable breakdown in the system."); Capellan v. Riley, 975 F.2d 67, 71 (2d Cir. 1992) (*Stone* requires "only that the state courts provide an *opportunity* for full and fair litigation of a fourth amendment claim unless, of course, the petitioner can demonstrate that the state failed to provide a corrective process, or can point to an 'unconscionable breakdown' in that corrective process." (citation omitted) (quoting Gates v. Henderson, 568 F.3d 830 (2d Cir. 1977)); Gilmore v. Marks, 799 F.2d 51, 56 (3d Cir. 1986) (relying on *Stone* to preclude federal habeas corpus review of state courts' determination that Fourth Amendment violation was harmless error).

74. *See Stone*, 428 U.S. at 491–93.

75. *See id.* at 485–86.

76. As Justice Brennan summarized:

> When a state court admits such evidence, it has committed a *constitutional* error . . . it follows ineluctably that the defendant has been placed 'in custody in violation of the Constitution' . . . [I]t escapes me as to what logic can support the assertion that the defendant's unconstitutional confinement obtains during the process of direct review, no matter how long that process takes, but that the unconstitutionality then suddenly dissipates at the moment the claim is asserted in a collateral attack on the conviction.

Id. at 509–10 (Brennan, J., dissenting) (citation omitted) (quoting 28 U.S.C. § 2254).

despite the fact that the purpose of habeas is to afford relief to prisoners confined unconstitutionally, and the purpose of the exclusionary rule is to deter police from unconstitutional searches and seizures.[77] *Stone*'s effect was to strip lower federal courts of the ability to ensure states' compliance with the Fourth Amendment via habeas.[78] In other words, although "federal courts sitting in habeas must stand ready to rectify any constitutional errors,"[79] after *Stone* habeas petitioners are precluded from challenging convictions premised on constitutional error.[80]

Stone "sharply curtail[ed] the previously recognized right to a federal forum for the determination of all constitutional claims."[81] Before *Stone*, the Court would proceed "directly to the merits of claims that state courts had misapplied the exclusionary rule." But with its decision in *Stone*, the Court road-blocked a significant remedial avenue by requiring consideration of the propriety of habeas relief, thus depriving petitioners of several opportunities for review.[82] The net effect is to deny a federal forum to plaintiffs seeking to remedy particular Fourth Amendment claims.[83]

4. Exhaustion Requirements

In addition to rationing available remedies, the Court has adopted a stringent approach to exhaustion requirements as a hurdle to pursuing multiple—or, sometimes, any—remedial avenues. Exhaustion requirements remove one remedial avenue from the table, which often leaves only one avenue available. For

77. *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 489 (1973) (stating the "habeas corpus statute [is] explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement"); Mapp v. Ohio, 367 U.S. 643, 648 (1961) (noting exclusion is a "clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard" of the Fourth Amendment).

78. Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 712 (2011). Additionally, "[w]ithout the power to enforce the Fourth Amendment against states, lower federal courts have an emaciated role in articulating the content of an evolving right." *Id.*

79. *Stone*, 428 U.S. at 529 (Brennan, J., dissenting).

80. *See supra* note 76. Justice Brennan's dissent highlights the relationship between rights and remedies. He noted that the issue was not "the right of a defendant to have evidence excluded from use against him in his criminal trial . . . [but rather,] the question of the availability of a *federal forum* for vindicating those federally guaranteed rights." *Id.* at 503.

81. *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 216 (1976).

82. *Id.*; *see, e.g.*, Cardell v. Lewis, 417 U.S. 583 (1974) (considering reasonableness of search in habeas proceeding); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (similar); *see also* Marceau, *supra* note 78, at 712–13 (cataloguing the Supreme Court's systematic closure of avenues for litigation and vindication of Fourth Amendment rights).

83. *See Stone*, 428 U.S. at 503 (Brennan, J., dissenting).

example, in *Bivens* actions,[84] although the Court initially expanded the availability of the remedy,[85] it has since placed limitations on its availability. The Court has announced in several contexts that "special factors" limit the availability of a *Bivens* remedy. For example, where an alternative remedial scheme already exists, plaintiffs may not pursue a *Bivens* action.[86]

Similarly, the Prison Litigation Reform Act (PLRA)[87] prohibits a prisoner from bringing a § 1983 action to vindicate a constitutional harm until all administrative remedies have been exhausted.[88] Those exhaustion requirements have been judicially interpreted to apply "to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[89] So even in the most egregious cases of constitutional violations, prisoners must exhaust all remedies, and "those remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.'"[90] This requirement even applies when "the prisoner seeks relief not available in grievance proceedings, notably money damages."[91] And the exhaustion requirement has far-reaching consequences. As the Court has acknowledged, the exhaustion requirement in habeas cases effectively precludes petitioners from bringing class actions, thus foreclosing a potentially different remedial avenue.[92]

Finally, in *Heck v. Humphrey*, the Court held that prisoners seeking a § 1983 remedy must first demonstrate the invalidity of the underlying conviction;[93] otherwise the suit is barred.[94] As discussed above, prisoners "must prove that the

84. *Bivens* provides a federal analog to civil damages suits under 42 U.S.C. § 1983 (2006).
85. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (holding *Bivens* remedy is available even where Federal Tort Claims Act could provide cause of action); Davis v. Passman, 442 U.S. 228 (1979) (extending *Bivens* cause of action to Fifth Amendment Due Process violations).
86. Bush v. Lucas, 462 U.S. 367, 374–80 (1983).
87. 42 U.S.C. § 1997e(a) (2012) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").
88. *Id.*; *see, e.g.*, Porter v. Nussle, 534 U.S. 516, 532 (2002). Of course, the Prison Litigation Reform Act (PLRA) is congressionally enacted rather than judicially imposed. Nonetheless, the Court's view of its preclusive effect reflects its larger practice of remedial rationing.
89. *Nussle*, 534 U.S. at 532; *see also* Rudovsky, *supra* note 16, at 1241–44 (discussing the combined effect of the legislative and judicial implementations that the PLRA has had on limiting remedies available to prisoners).
90. *Nussle*, 534 U.S. at 524 (quoting Booth v. Churner, 532 U.S. 731, 739 (2001)).
91. *Id.*
92. *See* Calderon v. Ashmus, 523 U.S. 740, 747–48 (1998).
93. Heck v. Humphrey, 512 U.S. 477, 486–87 (1994).
94. *Id.* Further,

> This is true even though the state court might have determined that a violation of rights had occurred, but denied relief on harmless error grounds, or where a state court erroneously determined that there was no constitutional violation of the de-

conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus" before bringing suit under § 1983. Thus in many instances *Heck* effectively imposes exhaustion requirements on prisoners' § 1983 suits despite the absence of such requirements in text of the statute.

5. Channeling Toward Administrative Remedies

The Court's hostility to multiple remedial avenues for constitutional harms also emerges in its efforts to channel litigants toward administrative remedies rather than judicial ones. For example, the Court has precluded judicial resolution of a First Amendment claim where municipal administrative grievance procedures exist. In *Borough of Duryea v. Guarnieri*,[95] the Court foreclosed protection to public employees who attempted to bring claims under the Petition Clause of the First Amendment by citing the existence of administrative remedies.[96] In *Guarnieri*, a police chief fired by the Borough filed a union grievance that led to his reinstatement, at which point the Borough Council issued to him a number of unpleasant directives regarding his duties.[97] Guarnieri filed suit under 42 U.S.C. § 1983, claiming the directives were retaliation for his grievance in violation of the Petition Clause of the First Amendment. After the suit was filed, the Borough denied Guarnieri's overtime request. Guarnieri then amended his complaint to include the denial of overtime, alleging that the § 1983 suit was a petition and the denial of overtime was in retaliation for having filed the suit.[98]

The Court held that a "government employer's allegedly retaliatory actions against an employee do not give rise to liability under the Petition Clause unless the employee's petition relates to a matter of public concern."[99] Additionally, the Court noted that application of the Petition Clause "would be unnecessary," be-

> fendant's rights, and under waiver, procedural default or deferential habeas corpus review, appellate and federal courts refused to vacate the conviction.
>
> Rudovsky, *supra* note 16, at 1228.

95. 131 S.Ct. 2488 (2011).
96. *Id.* at 2497.
97. *Id.* at 2492.
98. *Id.*
99. *Id.* at 2489. The Court also noted that "[a]dopting a different rule for Petition Clause claims would provide a ready means for public employees to circumvent the public concern test's protections and aggravate potential harm to the government's interests by compounding the costs of complying with the Constitution." *Id.* at 2490; *see also* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that when public employees make statements pursuant to official duties, they are not citizens for First Amendment purposes and have no meaningful First Amendment protection).

cause "there is already protection for the public employees' rights to file grievances and litigate."[100] The Court justified this remedial roadblock in part by pointing to the various "statutory and regulatory mechanisms [available] to protect the rights of employees against improper retaliation or discipline" that could be adopted by the government.[101] Moreover, "[e]mployees who sue under federal and state employment laws often benefit from generous and quite detailed antiretaliation provisions. . . . The Petition Clause is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances."[102] In failing to explain why the fact that a dispute was an "ordinary workplace grievance" precluded protection under the Petition Clause, the Court not only offered Guarnieri the same remedy for which he had been retaliated against, but also barred his constitutional remedy for a right protected by the First Amendment.

The foregoing examples highlight the trend of remedial rationing—and general rights-constriction—in constitutional doctrine. But such constriction is not limited to doctrine: As the next section will explain, practical obstacles also channel particular remedies into a specific litigation context.

B. Remedial Rationing in Constitutional Practice

The availability of remedies creates incentives for parties to litigate their cases in some contexts and to forgo litigation in others.[103] When a particular remedy is only available in a particular context, courts can foreclose plaintiffs' pursuit of that remedy for all practical purposes by making it exponentially more difficult to litigate in that context, even where doctrine does not prohibit multiple remedial avenues.[104] This section will discuss such pragmatic obstacles.

One example is qualified immunity. Although qualified immunity does not explicitly limit the pursuit of multiple remedial avenues, the doctrine often imposes insurmountable hurdles for plaintiffs, making even an attempt to bring a

100. *Guarnieri*, 131 S.Ct. at 2497.
101. *Id.*
102. *Id.*
103. *See* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 407 (2012); Rudovsky, *supra* note 16, at 1245 (noting that in the criminal context, there are simple certain violations that cannot be remedied: "[f]or example, Fourth Amendment violations that do not result in the seizure of evidence, instances of excessive or unreasonable force, and coercive interrogation techniques that run counter to Fifth Amendment protections (but do not result in statements that are introduced at trial)").
104. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185; Rudovsky, *supra* note 16, *passim*.

§ 1983 suit futile.[105] Qualified immunity protects government actors from monetary liability for reasonable mistakes; the purpose is to avoid deterring officials from acting out of fear that their conduct will lead to crippling financial liability.[106] But in practice, qualified immunity is often a near-total bar to plaintiffs. To overcome qualified immunity, plaintiffs must prove the law was clearly established—a standard whose interpretation fluctuates greatly depending on the court applying it—as well as that the facts present at the time of the alleged violation would have put the officer on notice that his conduct violates the law.[107] In addition to doctrinal obstacles, the Court now requires a plaintiff's complaint to "plead factual matter that, if taken as true, states a claim that [the government official] deprived him of his clearly established constitutional rights," which requires plaintiffs to plead "with heightened specificity to demonstrate the law was clearly established."[108] Moreover, judicial skepticism about imposing money damages against government actors, paid from public funds, has led to "increasingly robust qualified immunity."[109] Thus, the difficulty in succeeding on a § 1983 suit effectively forecloses many constitutionally harmed plaintiffs from pursuing damages—particularly those on the margin of potentially worthwhile lawsuits.

Similarly, civil suits for allegedly unconstitutional investigatory stops, commonly known as *Terry* stops, are exceptionally rare as a result of both judicially imposed barriers and practical considerations. Although courts have not explicitly announced that stop-and-frisk litigation must take place only in criminal proceedings, 95 percent of such litigation does, in fact, occur in such proceedings.[110] Civil litigation of *Terry* stops is difficult when no evidence is actually obtained. One reason incentives to litigate are low is the difficulty in showing monetarily compensable harm.[111] Another reason is that the reasonable suspicion standard is itself so vague, meaning that parties hesitate to litigate

105. Rudovsky has characterized qualified immunity as a "rights defining doctrine." Rudovsky, *supra* note 16, at 1203.

106. *See* Wilson v. Layne, 526 U.S. 603 (1999); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

107. *See* Belzer, *supra* note 39, at 659–61 (discussing two qualified immunity cases with remarkably similar facts, decided within the same circuit and only five months apart, that nonetheless reached different qualified immunity determinations because of the subjectivity of the "clearly established" standard).

108. Leong, *Making Rights*, *supra* note 103, at 432 (alteration in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662 (2009)) (internal quotation marks omitted).

109. *Id.* at 449.

110. *Id.* at 438.

111. *See* Elizabeth J. Norman & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1559–65 (2002); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 354–55 (2001).

outside of the criminal context in light of the low probability that they will win and the low reward even if they do prevail.[112] A recent high-profile case challenging the stop-and-frisk policy in New York provides an example. In the original civil suit in *Floyd v. City of New York (Floyd I)*, David Floyd, an African American man, was outside of his family-owned home when a tenant locked out of his basement apartment asked for Floyd's help in gaining entry. Unsure of the correct key, Floyd retrieved a set of keys and began trying the various keys on the tenant's basement door. "However, before they could open the door, three NYPD officers approached them[,] . . . asked the two men what they were doing, told them to stop, and proceeded to frisk them. The officer who frisked Floyd reached into both of his front pockets."[113] No contraband was discovered during the search.[114] The court granted summary judgment to the New York Police Department (NYPD) on Floyd's Fourth Amendment claim, justifying the stop-and-frisk on the rationale that "two [b]lack men trying to unlock the front door of a house in the middle of the afternoon using keys" combined with the fact the "officers were aware of a midday burglary pattern in the neighborhood" created a reasonable suspicion.[115] For Floyd—who committed no crime, was outside of his *own home* in the middle of the day, and was openly attempting to open a door *with keys*—the court foreclosed any avenue to relief. This was possible simply because the reasonable suspicion standard was so low.

In addition to reasonable suspicion, other judicially imposed standards impede access to relief. *City of Los Angeles v. Lyons*[116] limits standing to sue for injunctive relief to parties who will be similarly injured again in the future.[117] The *Lyons* standing requirement presents a substantial remedial obstacle to plaintiffs who wish to bring § 1983 suits for injunctive relief, particularly where challenged

112. *See* Leong, *supra* note 103, at 438–54, 476; *see also* Floyd v. City of New York (*Floyd I*), 813 F. Supp. 2d 417, 424, 440–43 (S.D.N.Y. 2011) (illustrating challenges in applying the reasonable suspicion standard); Randall S. Susskind, Note, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 332 (1994) (discussing the difficulty in defining "reasonable suspicion" and the "inadequate judicial scrutiny" on the issue of race in criminal suspicion); *cf.* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1065–67 (1995) (explaining that the focus on privacy has led to a stunting of discussion of force in police encounters, with a concomitant reduction in regulation of force).

113. *Floyd I*, 813 F. Supp. 2d at 424.

114. *Id.*

115. *Id.* at 443. On a motion for reconsideration, the court found that, although all of the officers had testified that they were aware of a midday burglary pattern in the neighborhood, there was, in fact, no evidence to support their claims that such a pattern existed. Thus, the court reinstated Floyd's claims arising out of the stop-and-frisk. Floyd v. City of New York (*Floyd II*), 813 F. Supp. 2d 457 (S.D.N.Y. 2011).

116. 461 U.S. 95 (1983).

117. *Id.* at 111.

investigatory stops result in minimal tangible harm.[118] Because most plaintiffs are unable to meet the requirement of showing they are likely to suffer the same harm again, *Lyons* presents a veritable roadblock to injunctive relief.[119]

More generally, the incentives for pursuing civil and criminal litigation are quite disparate. Criminal defendants have powerful incentives to litigate Fourth Amendment claims—if successful, the evidence is excluded and the charges are often dropped—and very little disincentive, because they are entitled to a public defender if they cannot afford to hire an attorney. Conversely, the costs associated with civil suits for allegedly unconstitutional searches generally outweigh the benefits: As discussed, "the barriers to litigation are high [and e]ven when the intrusion on privacy is egregious, it may be difficult for the defendant to show harm that translates into money damages."[120] The result is that civil damages—even when theoretically available—are, practically speaking, unattainable.

Abundant exceptions to the warrant requirement and the exclusionary rule's applicability likewise eliminate incentives to litigate civil claims, thus practically precluding litigants from pursuing multiple remedial avenues for Fourth Amendment violations.[121] That is, for criminal defendants who lose on suppression motions, courts in subsequent § 1983 suits are unlikely to find the search unconstitutional and award damages. Because the criminal trial resulted in a ruling that the evidence—albeit unconstitutionally obtained—would have been found anyway, a civil court is likely to find the harm would have occurred anyway and thus that no damages are warranted.

Judicially imposed obstacles to attorney's fees also misalign incentives for pursuing multiple remedial avenues. For example, to receive an award of attorney's fees in a § 1983 suit, a party must effectively litigate to judgment and win.[122] Given the cost and uncertainty of most § 1983 actions, and in light of qualified

118. *Id.* (requiring "sufficient likelihood that [plaintiff] will again be wronged in a similar way" in the future). Similarly, in Clapper v. Amnesty International, the Court held that rather than demonstrating an "objectively reasonable likelihood" of impending injury, a party seeking injunctive relief must show that the threatened injury is "certainly impending." Clapper v. Amnesty Int'l, 133 S.Ct. 1138, 1141 (2013).

119. Indeed in *Lyons*, the plaintiff presented compelling statistical evidence that he was at least relatively likely to be targeted by police and suffer the same harm. Nevertheless, his claim for injunctive relief was held non-justiciable. *Lyons*, 461 U.S. at 100–01.

120. Leong, *Making Rights*, *supra* note 103, at 476.

121. *See, e.g.*, Murray v. United States, 487 U.S. 533, 537 (1988) (independent source exception); United States v. Leon, 468 U.S. 897, 919–21 (1984) (good faith exception); Nix v. Williams, 467 U.S. 431, 444–46 (1984) (the inevitable discovery exception).

122. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604 (2001) (holding that in order to get attorney's fees there must be an enforceable judgment on the merits that alters the legal relationship of the parties); *see also id.* at 598 (giving the Court's interpretation of "prevailing party" under 42 U.S.C. § 1988).

immunity, the lack of entitlement to fees is a disincentive for lawyers to even attempt much § 1983 litigation. Furthermore, fees awarded under 42 U.S.C. § 1988, the statute authorizing attorneys' fees in § 1983 claims, are discretionary, and courts can deny the award of attorney's fees—even to prevailing parties—for separate claims on which the party does not prevail. The potential result is that an award may not cover the entire cost of litigation, particularly where some claims are unsuccessful. Thus, attorneys are generally disincentivized from pursuing § 1983 actions because the prognosis for payment is so uncertain.

These examples demonstrate that even where doctrine does not explicitly ration remedial avenues, unavailability of remedies for practical reasons may still result in what amounts to remedial rationing.

C. Other Examples

In addition to the examples we have explored in depth in the previous two sections, constitutional litigation reveals many other examples of hostility to multiple remedial avenues. Although the following examples are less explicit instances of remedial rationing, they demonstrate the Court's general antipathy to remedies by highlighting its trend of closing off at least one remedial avenue.

Claim and issue preclusion prohibit plaintiffs from pursuing multiple remedial avenues by denying plaintiffs the opportunity to litigate claims in federal court that they have had a full and fair opportunity to litigate in state court. Thus, a criminal defendant who would prefer to litigate a § 1983 claim in federal court is forced to do so in state court where she is facing charges.[123] This also discourages the presentation of novel legal theories, such as an attempt to benefit from the exclusionary rule on excessive force claims, which poses a significant impediment to the development of the law.

Absolute prosecutorial immunity bars plaintiffs from pursuing remedies against prosecutors.[124] So if prosecutors withhold exculpatory evidence at trial, although the wrongful conviction may eventually be overturned, those wrongfully

123. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984) (claim preclusion has same effect in federal court as it would have under state law in state court); Allen v. McCurry, 449 U.S. 90, 103–04 (1980) (noting that issues a party had a full and fair opportunity to litigate in state court cannot be raised in federal court). In theory, a criminal defendant could forgo raising an issue in state court in order to preserve it for a federal forum, but the cost amounts to forgoing a potential defense.

124. Absolute immunity also applies to judicial and legislative functions. *See* Stump v. Sparkman, 435 U.S. 349, 356–57 (1978) (judicial); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (prosecutorial); Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (legislative); *see also* Rudovsky, *supra* note 16, at 1213–17 (explaining that judicial and legislative functions receive absolute immunity, creating a bar to litigation).

convicted individuals have no remedy to compensate them for their time spent behind bars.[125] Thus, prosecutors' discretionary actions are essentially unrestrained, and individuals constitutionally injured by prosecutorial misconduct have no remedies.[126]

Obstacles to municipal liability likewise pose a substantial remedial hurdle to constitutionally harmed plaintiffs by requiring a custom or policy in order to establish § 1983 liability.[127] Although on its face the standard seems reasonable, judicial interpretation has "erected culpability and causation requirements that make it quite difficult to establish" municipal liability.[128] To do so, a plaintiff must show a failure to train, supervise, or discipline, a standard that actually means an inadequacy so obvious and so likely to result in constitutional harm that the municipality's policymakers were "deliberately indifferent."[129]

Additionally, the Court has limited equitable remedies such as "[i]njunctive and declaratory relief[, which] are powerful tools in preventing future misconduct and in securing governmental compliance with constitutional norms."[130] At one time, the justiciability component of standing to seek equitable relief essentially meant that a plaintiff had a personal stake in the case.[131] But in *City of Los Angeles v. Lyons*, "the Court imposed a stricter test," requiring an additional element:

125. *See* Connick v. Thompson, 131 S.Ct. 1350 (2011) (Prosecutor who failed to turn over exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), which resulted in Thompson spending eighteen years in prison—fourteen of those on death row—was entitled to absolute immunity from § 1983 suit). Rudovsky also points out that courts have upheld absolute prosecutorial immunity despite qualified immunity providing sufficient protection for any act reasonably believed to be lawful. Rudovsky, *supra* note 16, at 1216.

126. Rudovsky, *supra* note 16, at 1216.

127. *See* Monell v. N.Y.C. Dept. of Soc. Servs., 436 U.S. 658, 690 (1978); Matthew J. Cron et al., *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. U. L. REV. 583, 586-88 (2014).

128. Rudovsky, *supra* note 16, at 1231; *see also Connick*, 131 S.Ct. at 1359–60 (requiring deliberate indifference to known violations of the rights of citizens by policymakers in order for municipal liability to attach); City of L.A. v. Lyons, 461 U.S. 95, 120 (1983) (explaining that municipal liability requires proof that the conduct in question is the result of an official but unconstitutional policy).

129. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 390 (1989); Rudovsky, *supra* note 16, at 1233. Municipal liability can also be established by showing the actions of a final policymaker represented the municipality, but few policymakers actually meet this definition. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 123–24 (1988).

130. Rudovsky, *supra* note 16, at 1235.

131. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975) ("A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'" (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973))); Allee v. Medrano, 416 U.S. 802, 828–29 (1974) ("If . . . union members were subject to unlawful arrest and threats of arrest in their First Amendment protected organizational activity on behalf of the union, the union would have derivatively suffered or have been in the position to suffer derivatively real injury and would have standing . . . ."); Rudovsky, *supra* note 16, at 1236.

likelihood of future harm.[132] By requiring plaintiffs to show they were likely to suffer the same harm by the same party, the Court effectively barred equitable remedies for many plaintiffs.

Harmless error doctrine also precludes remedies for constitutional violations by creating a mechanism for judges to declare constitutional errors trivial and unworthy of correction or reversal.[133] As David Rudovsky has explained, the practice means that "the defendant is left without any cognizable remedies."[134]

Together, the doctrines we have discussed in this section indirectly contribute to further unavailability of remedial avenues. Drawing together several of the doctrines we have mentioned, Rudovsky elaborates: "Absolute immunity will protect judges and prosecutors; qualified immunity will protect police officers involved in the prosecution; exhaustion principles will preclude any civil suit that would 'necessarily imply the invalidity of [the] conviction; and equitable relief will be barred by standing and related principles."[135] Collectively, claim and issue preclusion, various immunity doctrines, limitations on municipality liability, standing requirements, and harmless error doctrine effectively foreclose remedies without directly eliminating them.

We have shown that doctrinal, practical, and other obstacles operate together to constrict remedial avenues. The next two Parts explore why and how this has happened.

II. DOCTRINAL BASES FOR MULTIPLE REMEDIAL AVENUES

This Part and the next systematically debunk the arguments against multiple remedial avenues, ultimately demonstrating the fallacy of remedial rationing. Specifically, this Part traces the contemporary doctrinal acceptance of multiple remedial avenues, while the next addresses considerations flowing from policy. Collectively, they reveal that arguments opposing multiple remedial avenues lack merit, and, moreover, that remedial rationing has significant negative consequences.

This Part begins by examining the contemporary availability of multiple remedial avenues in many non-constitutional arenas. It emphasizes that such remedial availability is unremarkable. Subpart A reveals the lack of

132. Rudovsky, *supra* note 16, at 1236; *see Lyons*, 461 U.S. 95, 108, 111; *see also* Clapper v. Amnesty Int'l, 133 S.Ct. 1138, 1147 (2013) ("certainly impending" requirement).

133. *See* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 8 n.18 (2002) (collecting sources).

134. Rudovsky, *supra* note 16, at 1252.

135. *Id.* at 1252–53 (alteration in original) (footnote omitted).

limitations on multiple remedial avenues for non-constitutional harms. Subpart B bolsters that illustration by noting a few exceptions that prove the rule. Finally, Subpart C explains that the government can and does pursue both civil and criminal remedies in the same proceeding, even in constitutional settings—despite foreclosing that opportunity for individuals in most constitutional contexts. Collectively, these examples reveal that multiple remedial avenues are both common and uncontroversial in a broad range of circumstances.

A. Multiple Remedial Avenues as Common Law Default

Today, litigants in common law cases generally may pursue multiple remedial avenues. Although the generalization is not absolute, it holds true across a range of subject areas. For example, a plaintiff may pursue remedies for both tort and contract claims arising out of the same event.[136] Courts generally allow contract claims and tort claims to proceed in tandem because the contract claims are grounded in a breach of the obligations resulting from promises parties have made to each other, while the tort claims are grounded in the breach of a legal duty owed.[137] Thus, although the two species of claim stem from the same event, the legal bases are different, and courts allow both causes of action and the pursuit of multiple remedial avenues to proceed concurrently.[138]

Three examples—typical, rather than exceptional—readily illustrate courts' willingness to permit multiple remedial avenues in non-constitutional cases. The first case reveals that courts allow both contractual and declaratory relief simultaneously. In *Pennsylvania National Mutual Casualty Ins. Co. v. City of Pine Bluff*,[139] the Eighth Circuit allowed an insurance company to pursue multiple remedial avenues against a city for losses the insurance company suffered after the city released funds for which the company was the surety. After an ice storm damaged

136. *See* cases cited *infra* note 154.

137. Additionally, an examination of statutory law reveals statutes that provide no remedies for statutorily defined harms leave the remedial determination up to courts for effectuating the law's purpose. In those situations, statutory law is very similar to common law in that the remedies are judge-determined. And, like common law, multiple remedial avenues are often created. Furthermore, as we will discuss, plaintiffs may be awarded statutory and common law remedies concurrently. *See infra* Part II.B. Because the treatment is similar, our discussion will focus on common law remedies for the sake of brevity.

138. Contract remedies generally include compensatory damages for the expected specific performance of the subject matter of the contract. Tort damages, independent of the contractual damages, can go above and beyond compensatory damages—in the same proceeding—and include, for example, emotional distress and punitive damages.

139. 354 F.3d 945 (8th Cir. 2004).

the City of Pine Bluff, the City applied for Federal Emergency Management Agency (FEMA) funds and hired a private contractor to clean up the aftermath. The contractor agreed to pass along payments to any subcontractors. As work was underway, the City began to argue with the contractor over pricing and FEMA eligibility; ultimately the contract was terminated.

The City disputed the final contract price and indicated to Penn National that it had received $2.8 million in claims from unpaid subcontractors. Penn National requested that the City not release any project funds without Penn National's written consent while it investigated the unpaid subcontractor claims and asserted potential subrogation rights to the contract funds. Despite this, the City paid the contractor and its creditors roughly $2 million in a settlement. Penn National sued the City seeking declaratory judgment for priority to the contract funds. Penn National then settled with two subcontractors who it determined had valid claims, and amended its complaint to include recovery of those funds in addition to declaratory relief.

In its defense, the City asserted the doctrine of election of remedies,[140] arguing that Penn National's request to recover the funds from other parties, in addition to the declaration of priority to contract funds was "repugnant to a recovery from city coffers."[141] In ruling on the threshold matter, the Eighth Circuit court said: "Designed to prevent double recovery for a single injury . . . [t]he rule does not prohibit assertion of multiple causes of action, nor does it preclude pursuit of consistent remedies, even to final adjudication."[142]

The court found that seeking "a declaration of priority to funds and pursuing judgment in an equal amount" was not inconsistent because, "[t]o establish that the City paid the wrong party and should be liable, the court must first conclude that Penn National was entitled to priority payment."[143] Thus, the *Penn National* Court permitted the pursuit of both remedies.

The second case reveals that courts allow the same party to pursue two different damages remedies—one as a plaintiff and one as a defendant—for two different takings-related injuries to the same property. In *J.K.S. Realty v. City of Nashua*,[144] the plaintiff, a real estate trust, contested the amount of damages paid by the Department of Transportation after a declaration of a partial taking

140. That doctrine is discussed in detail *infra* at notes 162–167.
141. *Pine Bluff*, 354 F.3d at 950.
142. *Id.* at 950–51 (citations omitted).
143. *Id.* at 951; *see also* 25 AM. JUR. 2D, *Election of Remedies* § 21 (2013) ("The doctrine of election of remedies does not apply if the available remedies are consistent and concurrent or cumulative. If the remedies are alternative and concurrent, there is no bar until satisfaction has been obtained." (footnotes omitted)).
144. 55 A.3d 941 (N.H. 2012).

of their property. Before that proceeding, the trust had sought damages against the City for a total taking of the same property under an inverse condemnation theory. The City moved to dismiss, arguing that it was inconsistent for the trust to seek damages for a total taking which allegedly occurred in 2004 and also for a partial taking allegedly occurring in 2010, because they could "recover twice for a single alleged wrong."[145] The trust responded that in the partial takings proceedings, they were "merely defendants whose participation is limited to protecting their rights."

In deciding whether to dismiss, the Supreme Court of New Hampshire stated that the purpose of limiting multiple remedial avenues is to "prevent[] a litigant from presenting inconsistent causes of action or testimony before a court [and not to] prohibit assertion of multiple causes of action [or] pursuit of consistent remedies."[146]

Although the court ultimately held in favor of the City on the merits, it did not preclude J.K.S. from pursuing both remedies. It reasoned that J.K.S could apply the outcome of the partial takings proceedings, where it was a defendant, to its total takings claim, where it was a plaintiff. In denying the City's motion to dismiss, the court held:

> [Petitioners] do not intend to collect twice. They contend that if they prevail in this appeal, the deposit paid to them in the BTLA [the partial takings] proceeding would be applied to the damages owed under any inverse condemnation award in this case. They further maintain that if they do not succeed in this appeal, the declaration of taking will proceed before the BTLA and they will be entitled only to damages awarded in that proceeding. Thus, the petitioners are not attempting to collect twice on the same cause of action.[147]

The final case, *BanxCorp v. Costco Wholesale Corp.*,[148] illustrates a court allowing four distinct causes of action to proceed, including two federal claims and two state claims.[149] It also demonstrates that courts permit plaintiffs to pursue statutory remedies alongside common law claims.[150] There, BanxCorp published indices of banking data used to measure banking and

145. *Id.* at 945.
146. *Id.*
147. *Id.* at 945.
148. 723 F. Supp. 2d 596 (S.D.N.Y. 2010).
149. *Id.* at 609, 611, 614, 617.
150. Courts treat statutory claims much like common law claims with respect to the availability of multiple remedial avenues. The exceptions are those statutes that explicitly provide a single, exclusive remedy. *See, e.g.*, Woodbury v. Porter, 158 F.2d 194, 194–96 (8th Cir. 1946) (affirming finding that two statutory causes of action were distinct and could proceed).

mortgage markets. BanxCorp entered into a non-transferable licensing agreement with Capital One, which allowed Capital One to use the indices for limited purposes. BanxCorp alleged that Capital One had previously entered into an agreement with Costco, and that when Capital One entered into the Agreement with BanxCorp it was actually acting on behalf of Costco without disclosure. Thus, BanxCorp alleged that Capital One breached the licensing agreement by redistributing the indices to Costco in order to benefit the co-branded banking services. Banxcorp further alleged that the data from the indices were "distributed by Capital One and Costco" in various public mediums.[151]

BanxCorp pursued two federal and five state causes of action.[152] Defendants moved to dismiss all claims. The court held the two federal causes of action—copyright infringement and violation of the DMCA—could proceed along with two of the state causes of action: hot news misappropriation and breach of contract.[153]

The takeaway from these cases—as well as many others[154]—is that courts routinely and without resistance allow litigants to pursue multiple remedial avenues in common law cases.[155]

151. *BanxCorp*, 723 F. Supp. 2d at 599.

152. The two federal claims were copyright infringement and violation of the Digital Millennium Copyright Act (DMCA). The state claims were hot news misappropriation, fraud, breach of contract, unfair competition, and unjust enrichment. *Id.* at 600.

153. *Id.* at 609, 611, 614, 617. The court did hold, however, that the Copyright Act preempted the claims of unfair competition and unjust enrichment, and that the fraud claim was duplicative of the contract claim and was thus dismissed. *Id.* at 618, 620.

154. *See, e.g.*, Koehler v. PepsiAmericas, Inc., 268 F. App'x 396, 408 (6th Cir. 2008) (upholding a district court ruling that awarded plaintiff liquidated damages pursuant to a federal statute, compensatory damages for breach of contract, and punitive damages under a state law tort claim); Level 3 Commc'ns, LLC v. Liebert Corp., 535 F.3d 1146, 1165 (10th Cir. 2008) (permitting tort claims of negligent misrepresentation and fraudulent concealment to proceed to the jury on remand along with a breach of contract claim); Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 879 (9th Cir. 2007) (allowing recovery in tort was not barred by the economic loss rule where the harm was purely monetary and based on a contractual transaction, because the defendant's breach of a legal duty was intentional and in addition to breach of contract); Fort Vancouver Plywood Co. v. U.S., 860 F.2d 409, 414–15 (Fed. Cir. 1988) (allowing contract and tort claims to proceed because the legislative scheme only allowed each claim to proceed in specific context, and court should not handicap plaintiffs because of the bifurcated nature of procedures for government contracting); Newport News Shipbuilding & Drydock Co. v. U. S., 226 F.2d 137, 140–41 (4th Cir. 1955) (allowing both breach of contract claim for inadequate performance in repairing ship and tort-based negligence claim for liability to the damaged cargo when that ship went to sea to proceed); Carpenter v. Donohoe, 388 P.2d 399, 401 (Colo. 1964) (allowing both action to recover damages for fraud and action for breach of implied warranty to proceed where builder constructed a house so defectively that it became hazardous to occupy it); Riverview Co-op., Inc. v. First Nat. Bank & Trust Co. of Mich., 337 N.W.2d 225 (Mich. 1983) (permitting claim for fraud, conversion, and breach of fiduciary duty to proceed along with claim

The Federal Rules of Civil Procedure also demonstrate contemporary acceptance of multiple remedial avenues—in particular, those rules governing the joinder of claims.[156] Under the procedural rules, a "common core of operative facts" often permits or compels the consolidation of multiple causes of action into the same proceeding.[157] Supplemental jurisdiction relies on a "common nucleus of operative fact" in order to combine state and federal causes of action into a single proceeding appropriately heard by an Article III court.[158] The Supreme Court has even stated that "joinder of claim, parties and remedies is strongly encouraged."[159] Thus, rather than attempting to determine and separate the legal theories involved, courts considering hearing multiple causes of actions in a single proceeding should ask: "How many accidents were involved?"[160] The acceptance of parties pursuing multiple remedial avenues is unremarkable; "it is the aim of modern practice to dispose in one litigation of all rights and obligations existing between the parties involved."[161] Thus, foreclosing multiple causes of action (remedial avenues) in the constitutional context is contrary to policy in non-constitutional contexts.

B. Exceptions Proving the Rule

This Subpart examines various doctrines governing the extent to which multiple remedial avenues exist in many non-constitutional contexts with few or no limitations. Ultimately, the few ostensible limitations on pursuing multiple remedial avenues prove the general rule that courts do not limit multiple remedial avenues for non-constitutional harms. This Subpart catalogues the few limitations on multiple remedial avenues in the common law and statutory context, examining the doctrine of election of remedies, the economic loss rule, and the irreparable injury rule.

---

of breach of contract for checks drawn on depositor's account by a party not authorized to do so; even though the plaintiff had already obtained judgment against converter, the court held that two separate and distinct wrongs had occurred with respect to the plaintiff and the bank).

155. The same is often also true of statutory claims, although the story is more complex. For purposes of our project, the common law normalization of multiple remedial avenues is sufficient to establish that nothing inherently precludes multiple avenues and, indeed, that they are common.

156. FED. R. CIV. P. 13, 18, 19, 20; *see also* 28 U.S.C. § 1367 (2012) (supplemental jurisdiction).

157. Douglas D. McFarland, *Seeing the Forest for the Trees: The Transaction or Occurrence and the Claim Interlock Civil Procedure*, 12 FLA. COASTAL L. REV. 247, 248–50 (2011).

158. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

159. *Id.* at 724.

160. McFarland, *supra* note 157, at 255 n.54.

161. Rolls-Royce, Ltd., v. United States, 364 F.2d 415, 419 (Ct. Cl. 1966).

1. Election of Remedies

Where a claim sounds both in tort and in contract, the election of remedies doctrine "requires a plaintiff to embrace only one of two or more *inconsistent* remedies, rights, or theories of recovery."[162] Election of remedies is implicated "where the plaintiff has suffered one species of wrong from the act complained of. . . . Thus, an essential element of an election of remedies is the availability of at least two remedies for the same wrong, or there must be at least two viable legal theories upon which recovery may be had."[163]

Although at first blush the doctrine seems to limit the available remedies, "[t]he election is limited to a choice by a party between *inconsistent remedies* or rights or theories of recovery or modes of procedure and relief, the assertion of one being *necessarily repugnant to*, or a repudiation of, the other."[164]

Thus, the hallmark of the doctrine is that, where two or more remedies are available, it limits remedies only to the extent that they are inconsistent with one another. "Where two causes of action that are not inconsistent arise from a single course of events, the doctrine of election of remedies does not preclude a plaintiff from asserting both claims."[165]

Consequently, the existence of this doctrine indicates that, not only do multiple remedial avenues exist for non-constitutional claims sounding in both tort and contract, but also instances in which multiple remedial avenues are available arise frequently enough that courts found it necessary to articulate a doctrine prohibiting plaintiffs from pursuing remedies that are incompatible with one another. Notably, this doctrine does not require plaintiffs to choose among inconsistent remedies when the causes of action are different until they reach the "time of judgment or verdict."[166] Furthermore, the doctrine explicitly notes that where two remedies are not inconsistent with one another, election is not required.[167]

162. Marjorie A. Shields, Annotation, *Application of Doctrine of Election of Remedies Where One Claim Sounds in Tort and Other Claim Sounds in Contract,* 39 A.L.R. 6TH 155, 169 (2008) (emphasis added).

163. *Id.*

164. *Id.* (emphasis added).

165. Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253, 298 (S.D.N.Y 2011) (quoting *In re* Riverside Nursing Home, 144 B.R. 951, 957 (S.D.N.Y. 1992)).

166. Which seems in some tension with the Fourth Amendment remedies of exclusion and § 1983 damages being rationed, since one could argue the underlying causes of action are actually (slightly) different.

167. Here, again, under this model, arguably the remedies under § 1983 and exclusion are not mutually exclusive. A defendant in a criminal case could seek exclusion of evidence obtained illegally while also pursuing damages as a plaintiff in a civil case. The two remedies do not, or at least not obviously, present challenges to the enforcement of each other.

2. Economic Loss Rule

The economic loss rule is "intended to maintain the sometimes blurred boundary between tort law and contract law."[168] It holds that plaintiffs suffering only economic loss from the breach of a contract have no tort cause of action unless an independent duty of care exists under tort law.[169] The aim of the economic loss rule is to prohibit plaintiffs seeking punitive and other kinds of damages not available under contract law from bringing standard contract claims as tort claims. Thus, absent an independent basis, the tort claim cannot simply restate the contract claim as a tort.

The rule suggests, however, that a tort and a contract claim with independent legal bases arising from the same factual circumstance can both proceed.[170] For example, in a situation where an intentional tort also constitutes a breach of contract, the doctrine generally permits a plaintiff to pursue both causes of action.[171] Although this doctrine is somewhat more limiting than election of remedies, it nevertheless demonstrates that where two viable causes of action exist for a single harm, plaintiffs may pursue both remedies.

3. Irreparable Injury Rule

The irreparable injury rule states that no equitable remedy will issue if there is an adequate remedy at law; equity will act only to prevent a harm that is legally irreparable.[172] So if damages will suffice to remedy a particular harm, courts (in

168. A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862, 865 (Colo. 2005).

169. *See, e.g.*, Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523 (2009). Specific articulations of the economic loss rule vary from state to state, but they are largely similar; this is thus a somewhat generalized interpretation.

170. *See, e.g.*, Level 3 Commc'ns, LLC v. Liebert Corp., 535 F.3d 1136, 1165 (10th Cir. 2008) (reversing district court ruling and holding that the tort claims of negligent misrepresentation, fraudulent concealment, along with a breach of contract claim, could all proceed to the jury on remand); Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 879 (9th Cir. 2007) (holding in part that appellants' recovery in tort was not barred by the Economic Loss Rule where the harm was purely monetary and based on a contractual transaction, but where the defendant's breach of a legal duty was intentional and not simply a failure "to perform what was promised in the contract."); Grams v. Milk Products, Inc., 699 N.W.2d 167, 180 (Wis. 2005) (The court held that tort claims based solely on the failed performance expectations under a contract were barred by the Economic Loss Rule. The court noted, though, that courts should "prevent tort from drowning in a sea of contract.").

171. *See supra* note 154.

172. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990); *see* Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1032 (2011).

theory) will not provide equitable relief. The rule's foundation is in the separate courts of law and equity, and served partly to define the jurisdiction between the two courts. Although some commentators argue that the rule has little force anymore[173]—because when the choice of remedy matters to a plaintiff the rule is ostensibly satisfied—it does serve to illustrate a point. Where compensatory damages are insufficient to remedy a harm, courts may act in equity by issuing an injunction or declaratory relief.

Although lawyers and judges also understand the irreparable injury rule as a limitation on equitable relief, the rule in fact allows plaintiffs to pursue both damages and equitable relief concurrently. Plaintiffs may seek damages to compensate for completed past harms, and equitable relief—such as an injunction—to prevent future harms from occurring. Notably, plaintiffs often do seek both equitable relief (to prevent harms) and legal relief (to recover for completed harms) in the same proceeding[174]—unless of course that plaintiff is seeking to do so under constitutional principles. As with election of remedies and the economic loss rule, then, the irreparable injury rule provides a relatively minimal constraint on a plaintiff's pursuit of multiple remedial avenues.

C. Government Litigants

The Court's remedial rationing in constitutional litigation is particularly dissonant given that the government can pursue multiple remedial avenues in a broad range of situations—including some with constitutional dimensions.[175]

173. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 297–305 (4th ed. 2012); Laycock, *supra* note 172, at 692–93; *cf.* Roberts, *supra* note 172, at 1034, 1058 (explaining the lingering effects and confusing application of the irreparable injury rule). *But see* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2756–57 (2010); Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20–22 (2008); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391–92 (2006).

174. *See, e.g.*, Epic Metals Corp. v. Souliere, 181 F.3d 1280, 1284 (11th Cir. 1999) (holding that damages and injunctive relief are not mutually exclusive); Forster v. Boss, 97 F.3d 1127, 1129–30 (8th Cir. 1996) (holding that plaintiffs must choose between injunction and compensatory damages to avoid double recovery, but that plaintiffs were entitled to retain punitive damages); Rogers v. Runfola & Assocs., Inc., 565 N.E.2d 540, 544 (Ohio 1991) (holding in part that an injunction to enforce a non-compete covenant was reasonable and damages for past harm could also be awarded if determined warranted by a jury on remand).

175. Some might argue that the government should not be treated the same as an ordinary private litigant. While there are describable qualitative differences between litigation involving the government and litigation involving private parties, these distinctions do not undermine our basic point: that the Court has no objection to multiple remedial avenues for government litigants, thereby acknowledging that such avenues serve distinct valuable purposes. Moreover, given that the unexamined default is that the government can bring multiple suits, the burden falls on those who claim that private parties are different to explain why this is so; we can think of no reason why it should be.

For example, the government can augment criminal prosecutions by seeking civil sanctions and vice versa.[176] Such litigation may occur even in cases one might assume implicate double jeopardy.[177] Mary Cheh has examined the "tendency for the government to punish antisocial behavior with civil remedies such as injunctions, forfeitures, restitution, and civil fines."[178] Indeed, civil litigation may "completely supplant criminal prosecutions as certain behavior is 'decriminalized,' or as offenders are treated as ill instead of guilty."[179]

Even more frequently, the government will blend or supplement civil remedies with criminal sanctions—such as with forfeiture in drug cases.[180] Additionally, many states use civil "law techniques to check domestic violence, drug trafficking, weapons possession, and racial harassment."[181] Furthermore, "the

176. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325–27 (1991); *see, e.g.*, Karen Reynolds & Landie Landry, *Procedural Issues*, 41 AM. CRIM. L. REV. 973, 993–1009 (2004).

177. Double jeopardy traditionally only applied where a defendant's second case was also criminal, not civil: "The government, like a private individual, was entitled to a civil remedy for its losses even if the defendant previously had been criminally convicted." Cheh, *supra* note 176, at 1373. The only important inquiry under this straightforward approach was whether the first trial was in fact criminal and the second trial in fact civil. For a time, an individual who had been convicted in a criminal prosecution for her conduct may not be subjected to any additional civil sanctions for that same conduct to the extent the sanctions were punitive, as opposed to remedial, in nature. The government, like a private citizen, was still entitled to be compensated for harm, but imposing a (second) punitive sanction amounted to double jeopardy. Thus, where the government pursues civil sanctions in the first trial, it remains free to subsequently pursue a criminal case against the same defendant. *See* Hudson v. United States, 522 U.S. 93, 93 (1997). Moreover, "[d]ouble jeopardy also is not in issue if the government pursues conventional criminal penalties like incarceration coupled with punishments like forfeiture in a single criminal proceeding, where the additional penalties actually are incorporated into the criminal sentence. In such instances, the punishments . . . are not multiple in the double jeopardy sense." Cheh, *supra* note 176, at 1377 (emphasis omitted); *see also* Reynolds & Landry, *supra* note 176, at 993–1009 (discussing the concerns of concurrent civil and criminal trials, which include: the constitutional implications of a civil proceeding undermining a defendant's Fifth Amendment privilege in the criminal trial with respect to self-incrimination; Fifth Amendment protection from double jeopardy and due process; the discovery implications where different standards apply; disclosure to a grand jury; Sixth Amendment right to counsel and confrontation; and Eighth Amendment excessive fines).

178. Cheh, *supra* note 176, at 1325.

179. *Id.* at 1326.

180. As an example, Cheh points to the "widespread use of forfeiture in drug cases." *Id.* at 1326.

181. *Id.*; *see also, e.g.*, CONN. GEN. STAT. ANN. § 46b-15 (West 2013) (authorizing civil protection orders in domestic violence cases); FLA. STAT. § 932.701-03 (2013) (allowing seizure of property on probable cause that it was used in transporting contraband); MASS. GEN. LAWS ANN. ch. 12, § 11H (West 2013) (authorizing civil suits by the state for equitable relief to protect civil rights); Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73 (1999) (discussing the use of involuntary civil commitment as a means of keeping sex offenders incarcerated); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural*

federal government, through the Racketeer Influenced and Corrupt Organizations Act (RICO), is using divestiture and treble damage actions to strike at businesses run by white collar criminals and members of organized crime."[182]

Although "using civil remedies to redress criminal behavior is not new . . . the current phenomenon of civil remedies blending with criminal sanctions never has been more actively or consciously pursued."[183] The government accomplishes this blending in three ways. The first is by incorporating civil remedies into a criminal proceeding—for example, by prescribing forfeiture or restitution into part of a criminal sentence. The second is by selecting the civil remedy as an explicit alternative to a criminal sanction where the criminal conduct is either too petty to warrant traditional criminal penalties (such as driving or parking offenses), or where offenses are too difficult to prove under the burden the government carries in criminal prosecutions. Additionally, legislatures may simply believe "that some harms, like spousal abuse, are better dealt with as mental health or family law matters."[184] And the third is by supplementing a criminal penalty with civil remedies. In this situation, "[t]he same activity that forms the basis for a criminal prosecution also serves as the basis for a civil sanction. In other words, the civil remedy is linked directly to the underlying criminal activity."[185]

When the government augments criminal proceedings with civil penalties, double jeopardy is not a bar to multiple remedial avenues. The Supreme Court has indicated that the Double Jeopardy Clause does not prohibit criminal sanctions after civil sanctions have already been imposed; it only prohibits repeated criminal punishment.[186] The Court has thus explicitly contemplated concurrent multiple remedial avenues for the government in non-constitutional settings where one such avenue is criminal prosecution.

The foregoing discussion illustrates that not only are multiple remedial avenues unexceptional in the non-constitutional context, but also that even in con-

Boundaries, 94 VA. L. REV. 79, 82 (2008) (noting the encroachment of civil law on criminal law and vice versa).

182. Cheh, *supra* note 176, at 1326. Additionally, "[t]he federal government also has reinvigorated the *qui tam* action, which effectively deputizes private citizens to enforce monetary penalties against persons who have defrauded the government." *Id.* at 1326–27.

183. *Id.* at 1327. Cheh notes that

> [a] criminal who injured or robbed another traditionally faced two potential trials—a criminal prosecution by the government to adjudge her guilty and punish her for the offense, and a civil action by the victim for recompense. Similarly, in the administrative or regulatory sphere, the federal government long has pursued antitrust and securities law violators with civil injunctions as well as criminal complaints.

Id.

184. *Id.* at 1333.

185. *Id.* at 1333–34.

186. *See* Hudson v. United States, 522 U.S. 93, 98–99 (1997).

stitutional settings the government may, and frequently does, pursue multiple sanctions—readily reconceptualized as remedies—against individuals. Such evidence further calls into question the validity of remedial rationing for individual constitutional litigants

III. POLICY BASES FOR MULTIPLE REMEDIAL AVENUES

As we demonstrated in Part II, remedial rationing lacks compelling support in doctrine. This Part further argues that the trend of remedial rationing is not justified by public policy considerations—rather, policy considerations favor multiple remedial avenues.

In order to lay the foundation for the subsequent analysis, Subpart A examines various ways of conceptualizing the relationship between constitutional rights and remedies. Subpart B then explains the negative public policy consequences of remedial rationing. In particular, by channeling constitutional violations into a single remedial context, courts distort the underlying substantive rights. Thus, policy considerations cut firmly in favor of multiple remedial avenues. And, by extension, a great deal of constitutional doctrine limiting remedial availability is founded on false premises.

A. Rights Discourse

Scholars have devoted considerable attention to the relationship between rights and remedies. The three principal models that have emerged to describe that relationship are (1) the decision rules model, according to which the right and remedy are separate and distinguishable; (2) the pragmatist model, which conceives of the right and remedy as fundamentally inextricable; and (3) the hybrid model, which holds that the difference between the two models is mostly semantic.

The decision rules model envisions a "distinction between constitutional operative propositions (essentially, judge-interpreted constitutional meaning) and constitutional decision rules (rules that direct courts how to decide whether a given operative proposition has been, or will be, complied with)."[187] That is, the "judicial determinations of the meaning of a constitutional provision," or operative propositions, are separate from decision rules, which are "the rule courts should apply when [deciding] whether the judicially interpreted meaning is com-

187. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004); *see also* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

plied with."[188] The two serve different functions: Operative propositions are rights that "exist at a conceptual point independent of and prior to the mechanisms for their enforcement,"[189] while decision rules are applied to "adjudicate constitutional meaning,"[190] or to apply those rights in concrete contexts.

The pragmatist model, most clearly articulated in Daryl Levinson's theory of "remedial equilibration,"[191] rejects the "supposed dichotomy between rights and remedies"[192] that exists under the decision rules model—what he terms the "rights essentialism" model.[193] Levinson's model posits that the appropriate way to think about rights is that "the actual, tangible remedy for the violation of that right is really what defines the contours of the right itself."[194] Levinson's remedial equilibration model holds that "rights and remedies are inextricably intertwined. Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[195] Thus, because "[r]ights are often shaped by the nature of the remedy that will follow if the right is violated,"[196] in the absence of meaningful remedy, a right is "essentially worthless."[197] Consequently, "[t]he only way to see the constitutional right . . . is to look at remedies."[198]

Emphasizing that rights are shaped by the remedies afforded for their violation, Levinson bluntly articulates the practical value of a right as "nothing more than what the courts . . . will do if the right is violated. Consequently, rights can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies."[199] The linkage between rights and remedies is grounded in realism and underscores the importance of the Court more deliberately working to improve rights by improving remedies. When courts restrict remedial options for constitutional rights by quarantining rights-making to a single context, the rights themselves become constricted and diluted.

Kermit Roosevelt offers a way of harmonizing the two models. He argues the distinction between the remedial equilibration and rights essentialism models

188. Berman, *supra* note 187, at 57.
189. Leong, *supra* note 103, at 414–15.
190. Berman, *supra* note 187, at 66.
191. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 *passim* (1999).
192. Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193, 194 (2006).
193. Levinson, *supra* note 191, at 857–58.
194. Belzer, *supra* note 39, at 673–74.
195. Levinson, *supra* note 191, at 858.
196. *Id.* at 874.
197. *Id.* at 888.
198. *Id.* at 880.
199. *Id.* at 887.

is unclear; remedial considerations merely influence the shape of constitutional decision rules insofar as "[t]he consequences and feasibility of awarding a particular remedy will affect a court's assessment of enforcement costs and costs of error," which is different than saying "such considerations exert an influence over the shape of constitutional operative propositions or rights."[200] Roosevelt argues that the "[d]ecision rules straddle the right-remedy divide that Professor Levinson attacks," and are simply "rules that courts apply to determine whether rights have been violated . . . not statements about the actual contours of rights . . . ."[201]

Thus, Roosevelt suggests the two models are not inconsistent. He emphasizes "that the decision rules and pragmatist positions share an important characteristic: the available remedy influences the content of the right that courts articulate in a given case. Put another way, the two discourses concur that concerns extrinsic to the substantive merits shape rights-making."[202] For all purposes important to our project here, the literature agrees that to varying degrees the available remedies influence the underlying right.

A more radical discourse runs orthogonal to the conversation we have just described. That discourse, known as the "critique of rights," was first promulgated by Mark Tushnet,[203] and continues to resurface in various literatures.[204] The central theme of the critique-of-rights literature is that the indeterminacy of constitutional rights makes them dependent on the social setting in which they're enforced. The meaning of a right, in other words, is inextricable from the context in which the right arises; the right itself has no inherent meaning independent of that context. But this critique of the (in)determinacy of the Constitution actually bolsters the rationale for remedial rationing that we will discuss in more detail in the next Subpart—namely, that judicial decisions largely, if not entirely, determine the shape of constitutional rights.[205]

200. Roosevelt III, *supra* note 193, at 194.

201. *Id.*; *see also* John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 *passim* (1999) (explaining that currently available remedies are an imperfect enforcement mechanism for constitutional rights); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 *passim* (1983) (noting a deficiency in remedies jurisprudence, basically what slips through the gap when implementing remedies for constitutional rights).

202. Leong, *supra* note 103, at 416.

203. Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993).

204. *See, e.g.*, Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

205. *See, e.g.*, Leong, *supra* note 103, at 419; Rudovsky, *supra* note 16; Belzer, *supra* note 39.

B. Against Remedial Rationing

Constitutional rights have steadily narrowed since the 1960s.[206] And because of the tight relationship between rights and remedies, when courts foreclose certain remedies for constitutional harms, they are actually and actively constricting the underlying rights. As one of us has explained elsewhere: "[A] right is defined by its remedy; or at least one can tell how important the court thinks a particular right is by the remedy afforded when it has been violated."[207] Likewise, we have both previously demonstrated that removing particular remedies from a litigation context leaves judges with limited ways to address constitutional harms.[208] And to compound the problem, judges may have an aversion to granting a particular remedy even if it is available—for example, the perennially maligned remedy of exclusion.[209] Such remedial limitation often results in judges either awarding an inappropriate remedy or—perhaps worse—concluding that no violation of the underlying right actually occurred. Declaring that a right was not violated inherently "constrict[s] the protections of the [underlying right]"[210]—that is, announcing that no violation took place creates an outer limit on the potential scope of the right. Even worse, it "leads judges to become accustomed to the practice of deciding cases in a rights-constrictive manner, rather than a rights-expansive approach."[211] Moreover, by closing the avenues to relief when constitutional rights are violated, but not for other types of harms, courts are not only distorting the shape of our rights, but also sending a message that our constitutional rights are somehow less important.

This background returns us to the central issue of this Article: Is there any reason that multiple remedial avenues should not be available for constitutional violations? We have already demonstrated that—outside the constitutional context—there is substantial precedent for the availability of multiple remedial avenues, with relatively few limited exceptions.[212] This Subpart will ex-

206. *See* Rudovsky, *supra* note 16, at 1206 n.37 (noting the remedial limitations that function to constrict the underlying rights in Fourth, Fifth, and Sixth Amendment doctrine).
207. Belzer, *supra* note 39, at 683.
208. *See id.*; *see also* Leong, *supra* note 103, at 430–32.
209. *See* Belzer, *supra* note 39, at 670; *see also* Leong, *supra* note 103, at 431.
210. Belzer, *supra* note 39, at 670; *see also* Leong, *supra* note 103, at 431.
211. Belzer, *supra* note 39, at 670.
> If a judge routinely rules on Fourth Amendment claims against unsavory criminal defendants who have been caught with contraband and seek to exclude unreasonably obtained evidence, then what could compel a judge used to that routine to grant monetary damages to a plaintiff who ostensibly suffered no harm at all?

Id. at 671.
212. *See supra* Part I.

plain that, likewise, there is no compelling policy reason to limit the availability of multiple remedial avenues. Scholars have thus far failed to discuss the broad implications of the availability (or lack thereof) of multiple remedies. Although a discourse has emerged regarding various limitations on specific remedies,[213] no research has yet examined the phenomenon as a broad trend with significant consequences for constitutional litigation.

This Subpart discusses three ways in which policy considerations not only leave open the possibility of multiple remedial avenues for violations of constitutional rights, but in fact militate in favor of multiple remedial avenues. First, remedial rationing ignores the ineluctable relationship between rights and remedies—that is, it dismisses the considerable literature discussed in the previous Subpart regarding the relationship(s) between the two. Permitting multiple remedial avenues explicitly acknowledges and subjects to public scrutiny the relationship between particular remedies and the rights they vindicate. Second, multiple remedial avenues provide recognition that particular wrongs may require multiple forms of recourse to address them. Finally and most importantly, remedial rationing stunts the development of the law by limiting the circumstances in which courts consider particular rights. By contrast, multiple remedial avenues present courts with a broader array of facts, parties, and circumstances, and thus a fuller picture of the situations in which the right will apply.[214]

1. Exposing the Relationship Between Rights and Remedies

Multiple remedial avenues are desirable because they facilitate doctrinal acknowledgment of a reality widely recognized among scholars of constitutional litigation—namely, that remedies influence the scope of substantive rights.[215] While the brief description in the previous Subpart reveals divergence among scholars as to precisely how rights and remedies relate to one another,[216] virtually no one disputes the proposition that the remedy exerts a degree of gravitational pull on the scope of the right. Providing multiple remedial avenues is desirable because it provides explicit acknowledgment of this reality.

Such acknowledgment will, first, encourage judges to engage in greater self-reflection when they decide cases. For example, the knowledge that ex-

213. *See, e.g.*, Laurin, *supra* note 7; Leong, *supra* note 103.
214. *See generally* Leong, *Improving Rights*, 99 VA. L. REV. 377 (2014) (explaining that presenting courts with a more complete understanding of the contexts in which a right applies leads to better judicial decisionmaking).
215. *See supra* Part III.A.
216. *See supra* Part III.A.

clusion and civil damages are both remedies for a particular violation of the Fourth Amendment will prompt judges to think more explicitly about how the articulation of a particular principle will affect both situations where an individual is innocent of criminal activity and situations where an individual is guilty of such activity.[217]

More to the point, the proliferation of multiple remedial avenues will encourage judges to examine their own tendencies in particular remedial contexts. For example, a judge who tends to be skeptical of the strong medicine of exclusion for particular Fourth Amendment claims may realize that she feels quite differently about such claims in the civil damages context, where there is no evidence of criminal wrongdoing to exclude.[218] Such realizations may prompt more even-handed judging that takes account of the realities of both contexts. One of us has previously noted the various heuristics and biases that may lead to subconscious skewing in judicial decisionmaking, and how multiple remedial avenues will encourage correction of such biases.[219] That is, different remedial possibilities bring to light different considerations, and these different considerations help to ensure that the right develops in a way that takes account of the different circumstances to which it applies.

Likewise, an explicit acknowledgment of the benefits of multiple remedial avenues will enhance public confidence in the way that constitutional rights develop. Both litigants and bystanders may view the availability of remedies in some circumstances and not others as arbitrary, or perhaps even as a way of the judicial system boxing out less powerful parties from gaining recourse of any kind. From a layperson's perspective, it is difficult to understand why exclusion would be available for a warrantless entry but not for a knock-and-announce violation. The Fourth Amendment was violated in both instances, so why is a particular remedy available in one and not the other? It is no answer to respond that a knock-and-announce violation is not the but-for cause of the discovery of incriminating evidence, while a warrantless search provides but-for causation. Both situations are but-for causes in some instances: With respect to the knock-and-announce violation, consider a situation in which had the police not entered thirty seconds more quickly than was constitutionally permissible, a suspect might have disposed of drugs or hidden a gun.[220] With respect to the warrantless

217. In previous work, I have examined how such acknowledgement leads to better-considered lawmaking in the context of unlawful detentions. *See* Leong, *supra* note 103, at 455–62.

218. *See generally* Stuntz, *supra* note 53, at 447–48 (noting judicial antipathy to exclusionary remedy).

219. *See* Leong, *supra* note 214, at 396–412 (describing cognitive obstacles to good decisionmaking).

220. We are not, of course, claiming that it is affirmatively good for suspects to get away with drug disposal or weapons concealment. The point is merely that people do have certain expectations of privacy in their houses that are protected by the knock-and-announce requirement, and that, in

search, consider, for example, cases in which probable cause for obtaining a warrant was overwhelming, and its failure to do so a mere technicality.[221] Ultimately, a theory of remedial availability that does not view the (supposed) availability of one remedy (such as § 1983) as a bar to another remedy (such as exclusion) will help to improve public confidence in the judicial system and in the legal standards it produces by producing fewer reported incidents in which a constitutional right remains unvindicated.[222]

2. Matching Remedies to Violations

Just as common law claims sounding in tort, property, or contract often prompted a range of remedies of which a claimant might avail herself, claims of constitutional violations also deserve remedies appropriately tailored to the nature of the violation. Remedial rationing defeats this goal by promoting a one-size-fits-all approach to remediation, while multiple remedial avenues allow a more nuanced view of the appropriate response to constitutional harm and provide individuals whose constitutional rights have been violated the opportunity to select the remedy that best addresses the manner in which their rights have been infringed.

As the previous Subpart explained, remedial rationing is arbitrary. Moreover, it results in a mismatch between the constitutional violation that has occurred and the remedy that is available. Consider, for example, a police officer who enters a house without knocking and announcing his presence and finds contraband. Under *Hudson v. Michigan*,[223] such an entry would trigger a remedy only under § 1983; exclusion would be unavailable.[224]

For a criminal defendant who is facing charges for the contraband discovered as a result of the unconstitutional entry, withholding exclusion as a remedy withholds the only remedy capable of fully vindicating the denial of the right.

---

some instances, when those expectations are violated it is outcome determinative in yielding incriminating evidence.

221. *See* Flippo v. W. Virginia, 528 U.S. 11, 11–12 (1999) (no "murder scene" exception to warrant requirement); Mincey v. Arizona, 437 U.S. 385, 389–90 (1978) (similar). The Court's recent attempt to distinguish the two situations on such grounds is a transparent effort that diminishes confidence in the judiciary by lower courts, commentators, and laypeople alike.

222. True, perhaps some members of the general public are unaware of the various potential remedies available for a violation. But given the frequency of arguable misconduct by governmental officers, they will certainly be aware when people they know personally remain uncompensated for violations they suffer. And communities where more such violations occur, such as poor communities and communities of color, will be even more aware of the shortfall because it will be more likely to affect people they themselves know.

223. 547 U.S. 586 (2006).

224. *Id.* at 599.

Civil damages won't make this person whole, nor will an injunction, nor, indeed, would prosecution of the police officers involved under 18 U.S.C. § 242. The harm that person suffered is having evidence gathered in violation of the Fourth Amendment and having that evidence introduced at trial. The only remedy that addresses that wrong is suppression: Nothing else will vindicate the right in a way that is meaningful to the person whose rights were violated in the first place.

The broader point is that when only a single remedial avenue is available, it exponentially increases the likelihood of a mismatch between constitutional violation and remedial vindication. By engaging in remedial rationing, courts diminish the likelihood that plaintiffs will be able to pursue a remedy appropriate to ameliorating the rights violation they have suffered.

3. Facilitating the Development of Law

On a broader scale, the existence of multiple remedial avenues also facilitates the sensible development of the law. To return to Laurin's definition, remedial rationing occurs when the "enforcement of a given criminal procedure right is committed *either* to the criminal *or* the civil realm."[225] Moreover, the Court has subtly "refashioned remedial doctrine to make the burdens of proof for criminal defendants and civil rights plaintiffs essentially identical, thus effectively streamlining two potential remedial routes into one."[226] Laurin suggests that "remedial rationing is misguided" because it fails to recognize both the shortcomings of each context, and the "potential synergies that may be generated by" enforcing rights across contexts.[227]

The potential coordinate advantages and complementarity between civil and criminal remedies for criminal procedure rights are relatively unexplored. Laurin suggests that criminal litigation possesses advantages over civil litigation with respect to generating specific deterrence, while civil litigation possesses advantages in generating general deterrence.[228] The two "are also interdependent in critical respects that are defeated by remedial rationing," in particular, in removing incentives to litigate across contexts.[229]

225. Laurin, *supra* note 7, at 83; *see supra* Part II.
226. Laurin, *supra* note 7, at 84; *see, e.g.*, Herring v. United States, 555 U.S. 135 (2009).
227. Laurin, *supra* note 7, at 83.
228. *Id.* at 90.
229. *Id.* at 91. Laurin uses *Herring* as an example of this, stating that the Court "advanced the view in *Herring* that application of the exclusionary rule might be limited to instances where a pattern of Fourth Amendment violations could be shown—a standard that tracks the showing required for municipal liability under § 1983. Yet in the absence of any criminal *remedy* for the assertion of a Fourth Amendment violation, there is no incentive for defendants to litigate the issue; lack of adjudication of the right in the criminal context curtails the data collection that is required ever to

In an in-depth empirical study, one of us considered the qualitative and quantitative effect of remedial rationing on constitutional rights.[230] The central conclusion of the study is that remedial rationing has negative consequences for the shape of those underlying rights whose enforcement is confined to a single context, either criminal or civil. That is: "Like a plant that grows in the shape of its container, a right elaborated in a single context gradually becomes deformed."[231]

Examination of the broader relationship between rights and remedies, "demonstrat[es] that the availability and scope of particular remedies affects the substantive development of constitutional rights."[232] And because the context in which rights are litigated can prescribe the available remedies, those rights that are made in a single context,

> produce[] law that less effectively takes account of the various interests at stake, less accurately recognizes the various individuals whose behavior it will bind, less thoroughly considers the various circumstances in which it will apply, and less compellingly reflects the relationship of particular doctrines to our legal regime as a whole. Put plainly, single-context rights-making results in worse law.[233]

Another concern with rights-making, particularly rights-making confined to a single context, is that "cases are imperfect vehicles for lawmaking: the available remedy in any given dispute inevitably influences judges' conception of the substantive right."[234]

The cognitive biases and preoccupation with the immediate case influence the contours of the rights that are articulated.[235] Thus, confining rights-making to a specific context creates worse law than that which would emerge from various different contexts, since the considerations taken into account by the judge

---

meet the 'pattern of violations' standard in the civil context." *See also* Leong, *supra* note 214, at 384–95 (misaligned incentives); Leong, *supra* note 103, at 430–438 (same).

230. *See* Leong, *supra* note 103.

231. *Id.* at 407.

232. *Id.* at 409.

233. *Id.* at 407.

234. *Id.* at 417.

235. *Id.*

> Judges become overly preoccupied with the case before them and mistakenly think that case is representative of a broader set of circumstances than it actually is. Because the circumstances of the particular case are more salient to the judge, she becomes vulnerable to an array of cognitive biases that shape the general principle that the case ultimately produces. And because the very definition of the judge's task is to decide the case before her, it becomes especially difficult for her to ignore its particular facts.

Id. (citations omitted).

are likely to be less representative of the true range of cases than considerations taken into account for rights litigated across multiple remedial contexts.[236]

Ultimately, an increase in lawmaking without regard to the context is an incomplete solution to making more holistic rights.[237] Correction of those biases, and balance in rights-making, can be achieved with a deliberate and deliberative effort to making rights in multiple contexts.[238] Thus, to solve the problem of insufficient lawmaking, "we should also think about whether the contexts available for law articulation allow for the intelligent development of the law."[239] In recent work, one of us has proposed a number of incentives and deliberate steps to take in order to encourage more sensible development of the law and ultimately to ensure a better rights-making process.[240] One core improvement to the rights-making process is to approach remedial rationing with skepticism and to instead encourage balanced, multicontext rights-making.

For a number of reasons, making multiple remedial avenues available to address specific harms is desirable from a policy standpoint. Other scholars have noted this desirability. For example, Professor Hanoch Dagan suggests that this "multiplicity of potential remedies" is an important means for the law to refine doctrines and "accommodate qualitative (and normatively attractive) distinctions between different types of rights."[241] Dagan is writing about the common law, but we see no reason why his conclusions would not translate with equal or greater force to the constitutional context given the paramount importance of rights articulated in that setting.

The availability of multiple remedial avenues allows for the expression of the nuances of rights, a function lost as a result of the evolution from the writ system to our contemporary legal system and the consolidation of those rights established under the writ system.[242] Dagan, focusing specifically on property law, claims that "property law is composed of a distinct, though not infinite, number

236. *Id.* Other work demonstrates the potential positive effect of making rights in multiple contexts—specifically, how litigating *Batson* claims in a civil remedial context would improve the doctrine. *See* Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561, 1569–75 (2012).

237. *See* Leong, *supra* note 214; Leong, *supra* note 103; *see also* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259 (2000) (discussing the costs of constitutional innovation); Jeffries, Jr., *supra* note 201.

238. *See* Leong, *supra* note 214.

239. Leong, *supra* note 103, at 421.

240. *See* Leong, *supra* note 214.

241. Hanoch Dagan, *Remedies, Rights, and Properties*, 4 J. TORT L. 1, 1 (2011).

242. *See* Laycock, *supra* note 172, at 689; Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1032 (2011); G. Edward White, *The Intellectual Origin of Torts*, 86 YALE L.J. 671, 672 (1977). The relation of writs to the development of multiple remedial avenues is a fertile basis for inquiry that one of us is currently pursuing in other work.

of property institutions, each reflecting a particular balance of values attached to a specific category of social contexts and a specific category of resources. These property institutions do share a family resemblance."[243] He further argues that remedies are a constitutive part of our rights, and focusing on the diversity of remedies forces us to recognize the multiplicity of rights—the "complex and nuanced structure" of the content contained within those rights.[244]

The law development thesis also provides a response to the critique of rights. When fewer remedial options are available to judges, that scarcity influences the shape of the underlying rights.[245] So if the critique of rights is fundamentally a criticism that the Constitution is indeterminate, the solution is to impute more definition to those rights. That clarification of the contours of rights is accomplished not only by litigating often and across multiple contexts, but also by maximizing the number of remedial options—or at least making available as many as are afforded in non-constitutional arenas.[246] Whether one believes that there actually is determinacy in the Constitution is unimportant: The Constitution's use and enforcement continues, and its remedial options should be analogous to non-constitutional laws.[247]

In any event, our purpose here is not to argue the nuances of constitutional interpretation, or make the claim that the Constitution is infallibly determinate. Rather, we want to emphasize the numerous advantages provided by the existence of multiple remedial avenues available for violations of constitutional rights. Even if the rights embodied in the Constitution are crystal clear without judicial interpretation, courts and judges are unlikely to fall into disuse anytime soon. Thus, when constitutional violations occur, the available remedies should at least be on par with the remedies available for violations of non-constitutional rights. By that process we can impart balance into the rights-making process by reducing bias and cognitive dissonance and infuse determinacy into constitutional rights.

243. Dagan, *supra* note 241, at 2.

244. *Id.*; *see also* Karl N. Llewellyn, THE BRAMBLE BUSH 88 (11th prtg. 2008) ("Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do.").

245. And confining rights-making to a single litigation context reduces the universe of remedies that judges can select from to remedy a particular harm. Leong, *supra* note 103; Belzer, *supra* note 39, at 669–71.

246. *See* Leong, *supra* note 214.

247. Belief in the Constitution's inherent determinacy—or lack thereof—is also unimportant because judges continually provide constitutional determinacy by making decisions. And remedial considerations and litigation context affect judges' decisions, which in turn broadly affects the underlying rights. In response to the critique of rights, all this is simply to say that perhaps making multiple remedial avenues available for constitutional plaintiffs is a way of achieving some of the determinacy that the critique-of-rights scholars so desire.

The preceding discussion articulates several compelling policy justifications for permitting multiple remedial avenues for constitutional violations. In conjunction with the doctrinal acceptance of multiple remedial avenues in many areas, there remains little reason to foreclose multiple remedial avenues in the constitutional context. The next Part will explain how we should go about facilitating this change.

IV. ENCOURAGING MULTIPLE REMEDIAL AVENUES

The two previous Parts have revealed the paucity of doctrinal and policy-based reasons for opposition to multiple remedial avenues. Indeed, history, doctrine, and policy favor multiple remedial avenues, rather than the reverse. This Part therefore takes up the project of suggesting ways that we might encourage multiple remedial avenues where appropriate, while addressing the question of limitations on the wholesale proliferation of remedies.

A. Proposals

In Part III, as well as in other work, we have 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.[248] Here, we develop in more detail a way of facilitating rights-making at meaningful levels in multiple contexts.

First, courts, legislators, and other governmental actors should consciously adjust incentives to avoid situations where a particular right is litigated almost exclusively in a single context. The Fourth Amendment provides an obvious example: 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 § 1983.[249] Commentators generally agree that 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 associated with the claim is too low for plaintiffs to bother. 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.

248. *See supra* Part III; *see also* Leong, *supra* note 214, at 424–36; Leong, *supra* note 103, at 462–80.
249. *See* Leong, *supra* note 103, at 135–36.

The most direct mechanism to incentivize litigation of the Fourth Amendment would be to prescribe, through legislation, a meaningful minimum amount of damages automatically available for a proven Fourth Amendment violation. Under the current regime, damages associated with Fourth Amendment violations are often too low to inspire arguably injured parties to press their claims. This is particularly true given that the Supreme Court has held in *Memphis Community School District v. Stachura*[250] that the fact that a harm was constitutional in nature does not warrant increased damages—that is, "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages in such cases."[251] But nothing proscribes a legislative solution to the problem of insufficient incentives for the litigation of certain constitutional rights. Associating a minimum dollar amount with each Fourth Amendment violation would provide the necessary motivation while avoiding the concerns relating to arbitrariness by juries that the Court articulated in *Stachura*.[252] More pragmatically, it would create incentives for lawyers to litigate cases that might otherwise result only in nominal damages. One obstacle, of course, would be the potential political unpopularity of legislation that creates governmental (and, by extension, taxpayer) liability for constitutional violations. But given that literally every citizen would potentially benefit from such liability, it might still be politically feasible so long as the implications were properly explained.

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 communicate this message. It would communicate to the population at large that violating the Constitution comes with a price. Such legislation would draw a more direct connection between right and remedy than the exclusionary rule currently provides.[253] And it would cohere with the considerable legal scholarship expressing concerns for courts' "hostility to limitations on the recovery of money damages for constitutional violations."[254] Furthermore, a statutorily defined damages award for Fourth Amendment violations would allow legislative bodies to take into ac-

250. 477 U.S. 299 (1986).
251. *Id.* at 310; *see also* Carey v. Piphus, 435 U.S. 247, 248 (1978) (holding that deprivation of constitutional right to due process is not actionable for money damages absent showing of "actual injury").
252. *See Stachura*, 477 U.S. at 310.
253. *See, e.g.*, John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1394 (2007).
254. *Id.* at 1389.

count the concerns and interests of government actors (namely police), thereby reducing the often arbitrarily high awards afforded by some juries.

Conversely, revising doctrine to make available an exclusionary remedy for all Fourth Amendment claims—including excessive force claims—would facilitate a more comprehensive enforcement and articulation of constitutional norms. Currently, exclusion is unavailable for Fourth Amendment excessive force claims—thus, courts can concede a violation of the right, but nevertheless not provide a remedy. Furthermore, if exclusion were available as a remedy for excessive force, then in situations such as in *Ankeny* and *Hudson*, courts would be able to provide a meaningful remedy for a conceded Fourth Amendment violation rather than merely providing constitutionally harmed individuals the sad consolation prize of trivial damages (in the event that the plaintiff could overcome qualified immunity) awarded while the individual is incarcerated. That is, making the exclusionary remedy an available avenue would afford courts the option of enforcing Fourth Amendment rights with a fuller range of considerations.

Toward the same goal, courts and legislators should make attorneys' fees for prevailing parties more readily available to increase the likelihood that plaintiffs with meritorious claims 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.[255] Courts could alter that default by awarding fees for attorneys who successfully facilitate the change in the law that their clients sought.[256] This situation occurs more often than one might think: For example, one study found that in 8.8 percent of federal appellate cases between 2006 and 2007 the court found a constitutional violation but granted qualified immunity.[257] If attorneys' fees were available, it would likely incentivize more such cases. 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 awarding attorney's fees is simply a way of removing an obstacle to citizens exerting the legal power they could if they were able to represent themselves or if

255. 42 U.S.C. § 1988 (2012); 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.").

256. *See* 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, 668 (2011).

257. Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 710 tbl.2 (2009).

money were no object to their representation.[258] After all, some plaintiffs' objective is actually to facilitate a change in the law and prevent unconstitutional conduct in the future, rather than to personally recover money damages or, indeed, to capture any personal benefit.

Another potential avenue for facilitating increased litigation of civil Fourth Amendment claims might be to create a "public plaintiff's attorney," similar to a public defender. Admittedly this is a radical proposal—one that warrants an Article of its own to explore the various social, political and economic dimensions. We mention it here as something of a thought experiment—a way of considering how we might wish to construct our lawmaking systems if we were to start from scratch. A public plaintiff's attorney's sole responsibility would be to litigate constitutional civil claims on the plaintiff side. Obviously this is not a terribly cost-effective solution for the government, but it would provide a dedicated plaintiff-side civil rights attorney to fill the private attorney general role that both Congress and the courts have suggested is an important function for enforcing constitutional rights.[259] As to the cost effectiveness of such a position: In theory, as more claims are litigated and decided—thereby adding determinacy to rights and clarity to what amounts to a violation—government officers would be more informed and therefore less likely to commit violations. Ultimately, this would eventually lessen the need for the public plaintiff's attorney.

We should also facilitate litigation by rethinking jurisdictional obstacles to suit under § 1983. *City of Los Angeles v. Lyons*[260] limits standing to sue for injunctive relief to parties who will be similarly injured again in the future[261]—a difficult bar to meet for many Fourth Amendment injuries.[262] Many commentators have critiqued for substantive reasons the stringent standing requirements applicable under *Lyons*.[263] We agree with most of these critiques, but for present purposes

258. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 619 (1986) (describing the obstacles to individuals' access to legal services because "the law is rationed through the market").

259. *See, e.g.*, 42 U.S.C. § 1988 (2006); Hernandez v. Kalinowski, 146 F.3d 196, 199 (3d Cir. 1998) (noting the purpose of § 1988 is "to encourage litigation to enforce the provisions of the civil rights acts and constitutional civil rights provisions"); Riddell v. Nat'l Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980) (noting one purpose of § 1988 is to "encourage private attorneys general to enforce fundamental constitutional rights").

260. 461 U.S. 95 (1983).

261. *Id.* at 110.

262. 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 (2000).

263. *See, e.g.*, Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677 (1990) (arguing that *Lyons* would have been justiciable if analyzed for mootness); Myriam E. Gilles,

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, expanding the scope of 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.

Qualified immunity poses a potential obstacle to some of the interventions we 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 we 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 the articulation of law. 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

Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 COLUM. L. REV. 1384, 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").

depends on having a relatively informed set of plaintiffs, who would recognize the implications that a higher threshold for the complex doctrine qualified immunity would have on 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.[264] Qualified immunity may also be difficult to manipulate: The doctrine is complex, and comes with its own set of cognitive incentives that may influence the rate of law articulation or the substance of the law articulated.[265] 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 § 1983.[266] One possible compromise would be the one we have described above—that is, to award attorneys' 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 willing to represent them on important constitutional issues, even if the likelihood of overcoming qualified immunity is uncertain.

For all of the interventions we have described, the goal is the substantively neutral one of facilitating litigation in multiple contexts.[267] 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, we think that, practically speaking, 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 ostensibly innocent parties. This provides an additional reason to present courts with a broader range of facts. Return, for a moment, to investigatory stops: Around 95 percent of these cases are adjudicated in criminal proceedings, with the result that courts seldom see claims brought by anyone other than the

264. *See, e.g.*, Jeffries, Jr., *Disaggregating Constitutional Torts*, *supra* note 237, at 283.

265. *See* Leong, *supra* note 257, at 704 (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).

266. Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1015–42 (2010).

267. Admittedly, facilitating more litigation under § 1983 is not ideologically neutral. The stereotypically conservative view is that there is already too much such litigation, and the stereotypically liberal view is that there should be much more. Our 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.

clearly guilty, and the rights courts articulate tend to be less protective of individual privacy interests.[268] If judges more frequently saw innocent plaintiffs who had been subjected to the intrusion and humiliation of an investigatory stop, the law might look quite different than it currently does.

For Fourth Amendment rights that are litigated only in the civil context, we have the opposite concern: that the protections provided do not sufficiently take into account the law enforcement interests in safety and investigation. Consider, for instance, excessive force claims: Because exclusion is unavailable as a remedy for excessive force, such claims are litigated only in § 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.[269] 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.

To complement these incentives, we should also encourage a more robust amicus practice at the trial and appellate court levels.[270] 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, not unlike the way special masters are currently appointed in a range of 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. More radically, courts might even allow attorneys' fees for amici whose participation significantly and positively influences the result in a particular case.

No individual intervention is either necessary or sufficient to the project of encouraging multiple remedial avenues and thus facilitating better lawmaking. But collectively, the possibilities we have described here indicate that the project is entirely feasible.

268. Leong, *supra* note 103, at 438–45.

269. *Id.* at 445–55.

270. Leong, *supra* note 214, at 432. *See generally* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315 (2008) (arguing that amicus participation is important to democratic and constitutional principles); Carl Tobias, *Resolving Amicus Curiae Motions in the Third Circuit and Beyond*, 1 DREXEL L. REV. 125 (2009) (suggesting that courts of appeals should relax standards for permitting amicus participation in order to facilitate increased participation).

B. Potential Objections

This brief Subpart deals with two potential questions relating to our advocacy of multiple remedial avenues. One is a question with prudential implications: 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? To this question, we offer two responses.

First, adjusting remedies, procedures, and other litigation incentives is not a radical departure from current practice. We have already made decisions about these incentives, albeit not always with attention to the consequences of our decisions.[271] But some such structures are deliberate—for example, rules regarding joinder,[272] or the very division of criminal and civil courts. Outside of the judicial context, legislatures frequently statutorily define jurisdiction, remedies, and so on in order to effectuate policy.

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,[273] 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, an assessment of the current state of affairs suggests that criminal defendants may be over-motivated to litigate their claims to the fullest extent possible in order to avoid incarceration or punishment, while civil plaintiffs may be under-motivated due to obstacles to recovery such as qualified immunity and practical considerations such as the availability of counsel. And finally, there are some limited circumstances in which we already adjust doctrine to facilitate rights-making. We 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.[274]

The other challenge is whether there is any limiting principle to our conclusions. Are multiple remedial avenues always better without limit? What if the

271. *See, e.g.*, Leong, *supra* note 214, at 435.

272. *See supra* Part II.A.

273. *See, e.g.*, Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005) (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).

274. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 604 (1973); Lewis Sargentich, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845–50 (1970).

remedies in question number not two, but five? Should there be some cap on the number of remedies available? Again, we offer two responses.

The first is that, pragmatically speaking, limitations will occur naturally regardless of our preferences. Given the existing composition of the Supreme Court, the pace of legislative action, and the leisurely rate at which legal change generally occurs, we think it unlikely that remedies will suddenly proliferate like wildfire. We have not seen that happen in the non-constitutional context despite the pervasive availability of multiple remedial avenues. There, the specific harm typically determines the appropriate remedy or remedies, but not the scope of the universe of available remedies. Optimistically, we think that providing two contexts for litigation of each constitutional right would be an ambitious goal—one we would be fortunate to see fulfilled. But nothing indicates that increasing the number of tools in the remedial toolbox will hinder judges from carrying out their constitutional duty.[275] Unless bound by statute, judges are free to choose not to award a remedy to a party; why not offer the opportunity to choose any remedy?

Relatedly, our second response to the question of limiting principles is simply that there is no logical limitation on the number of remedies. When doctrine and policy point unanimously at a system supportive of plural remedies, we see no reason to impose artificial constraints on that system based on some arbitrary number of "correct" remedies.

The correct number of remedies is the number that will provide sufficient opportunities to litigate a constitutional right in such a way as to provide injured parties complete redress for their harms and allow for the sensible development of constitutional rights. We see no need to provide further constraints.

CONCLUSION

Building on prior work, this Article has shown that historical, doctrinal, and policy-based objections to multiple remedial avenues are either nonexistent or vastly exaggerated. After discrediting these objections and articulating the many compelling reasons to provide multiple remedial avenues for constitutional harms, we think the way forward is clear. We should take affirmative steps to facilitate constitutional litigation in multiple contexts, both

275. In fact, just the opposite might be true. *See* Leong, *supra* note 214, at 392. We concede that judicial efficiency could be a potential consideration, but only if requesting a large number of remedies becomes a problem that judges cannot deal with through current tactics of docket management. Presumably parties already petition judges for more remedies than judges grant, and judges have strategies to deal with the excess. And as this Article has shown, we are a long way away from an over-abundance of remedies.

in theory and in practice, in order to better enforce our precious constitutional rights.