Article

Spillover Across Remedies

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INTRODUCTION

In adjudicating claims for relief, courts often proceed as follows: First, they ask whether a violation of the law has occurred. If so, they next ask whether they may furnish the requested relief.[1] The first part of the analysis looks to the domain of *substantive law*, which allocates rights and duties among legal entities in their dealings with one another.[2] The second part of the analysis looks to the *law of remedies*, which tells courts when and how to provide redress for demonstrated legal wrongs.[3] To obtain its requested relief, then, a litigant must show both that the substantive law has been breached and that remedial law authorizes the form of relief being sought.[4]

1. *See, e.g.*, Marbury v. Madison, 1 U.S. (1 Cranch) 137, 154 (1803) (asking first, "[h]as the applicant a right to the commission he demands?" and asking second, "[i]f he has a right and that right has been violated, do the laws of his country afford him a remedy?").

2. A more complete list might also include powers, liabilities, liberties, no-rights, and other variations. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 716–66 (1917). Unless otherwise indicated, I will use the term "rights" as a sort of shorthand for the broader set of substantive entitlements that individuals and government actors might hold against one another.

3. *See, e.g.*, *Marbury*, 1 U.S. (1 Cranch) at 154. Modern opinions need not (and do not) always follow this order when issuing a denial of relief. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 230–36 (2009) (permitting judges to depart from merits-first adjudication in constitutional tort proceedings). When and to what extent judges should engage in merits-first analysis (as opposed to other forms of "decisional sequencing") is a subject of rich debate. *See*, *e.g.*, Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 1–54 (2010) (discussing the effect of sequencing rules on judicial decisionmaking). That debate, however, lies beyond the scope of this analysis. For purposes of this Article, it suffices to note that courts tend to treat substantive and remedial questions as analytically distinct.

4. Throughout this Article, I use the term "remedies" to encompass a wide range of judicial actions that give practical effect to successful substantive claims. In that sense, my definition of the term is roughly similar to what many other commentators have previously employed, *cf.* Samuel L. Bray, *Announcing Remedies*, 97 CORNELL L. REV. 753, 757 (2012) (defining "remedy" in the "broad sense of anything awarded or imposed by a court"); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 165 (2008) (defining remedies as "the practical payoff" in litigation, which

As a formal matter, the law of remedies operates independently of the substantive law. In expanding or contracting the availability of injunctions, declaratory judgments, damage awards, evidentiary exclusions, habeas corpus writs, and other forms of judicial remediation, courts do not purport to alter the rights and powers that the substantive law confers.[5] Thus, for instance, a judicial denial of redress is not necessarily tantamount to a judicial declaration that no wrongdoing occurred; courts can and do stay their remedial hand without signing off on the lawfulness of the conduct for which the remedy was sought. This is a basic feature of public law adjudication: What happens in remedial law stays in remedial law, or so we are told.[6]

As a functional matter, however, remedial law interacts with rights-based law in complex ways. Most evidently, legal remedies determine the efficacy of legal rights. A right without a remedy is like a ship without a sail—existent and identifiable, but of limited practical use to its purported beneficiaries.[7]

"[p]laintiff litigates to obtain" and "defendant litigates to avoid"). Somewhat less conventionally, I utilize the concept of a "remedy" in connection with both *civil* and *criminal* cases, treating monetary damages awarded to the plaintiff as just as much a "remedy" as the criminal sentence "awarded" to the victorious prosecutor, or the suppression order "awarded" to the defendant prevailing on an evidentiary claim. Such an expanded definition of the term is sometimes, though not always, used in the legal literature. *Compare* Bray, *supra*, at 757 (limiting discussion to civil cases), *and* Laycock, *supra*, at 165 (characterizing remedies as "the bottom line of any civil litigation"), *with* sources cited *infra* Part I.D–E (discussing "remedies" within the criminal context). To the extent there is variation here, I attribute it primarily to differing expositional choices, rather than an important conceptual disagreement.

5. *See* Laycock, *supra* note 4, at 166–67 (noting that "remedies are distinct from the underlying rules that regulate human conduct and impose liability").

6. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 223 (1983) ("The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.").

7. *See* Laycock, *supra* note 4, at 165 ("A right with no effective remedy is unenforceable and largely illusory."). That is not to say that legal entitlements unyoked to legal remedies can have *no* practical effects whatsoever. In some circumstances a bare substantive norm may suffice to induce compliance on the part of persons bound by it, regardless of whether a "remedy" comes along with it. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 57–70 (2006) (drawing on sociological research to suggest that individual compliance with criminal norms depends less on the sanctions attached to those norms and more on perceptions of a legal system's legitimacy); *see also* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1110–13 (2014) (observing that parties routinely obey declaratory judgment orders unaccompanied by

Court-ordered remedies operationalize the substantive law: they help to deter unlawful behavior, compensate victims of legal wrongs, punish law-breakers, and in other ways vindicate the interests that substantive rules exist to promote. In this sense, diminished legal remedies yield weakened substantive protections, just as augmented legal remedies make substantive protections more robust.[8]

A second sense in which substantive and remedial law interact concerns not the enforcement of the substantive law, but rather the shaping of its content. For example, before ruling on the merits of a legal dispute, courts might anticipate the remedial consequences of a legal violation, and having done so, become more or less inclined to declare that a legal violation has occurred. Some scholars have suggested, for instance, that the exclusionary remedy deters the development of strong substantive Fourth Amendment protections, as trial judges, loath to suppress damning evidence, find clever ways to declare that no constitutional violation ever occurred.[9] Along similar lines, scholars have suggested that non-retroactivity rules facilitate the expansion of individual liberties by reducing the deterrent effect that the otherwise high cost of retroactive remediation would exert on judges contemplating changes in the substan-

immediate sanctions for noncompliance, though attributing this phenomenon in part to the fact that such noncompliance can generate severe legal sanctions down the road). Even so, the central point remains: the absence of a remedial enforcement mechanism substantially diminishes the real-world value of a substantive legal norm.

8. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 887 (1999) ("[R]ights can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies.").

9. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 111, 112 (2003); *see infra* Part I.E; *see also* Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1186–89 (2008) (suggesting that the high cost of automatic reversal remedy deters appellate courts from identifying constitutional criminal procedure violations when reviewing trial court proceedings); Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 710–66 (2008) [hereinafter Starr, *Rethinking Effective Remedies*] (exploring connection between high-cost remedies applied by International Criminal Tribunals and the shaping of international human rights law); Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1515–16 (2009) (identifying a similar phenomenon in connection with prosecutorial misconduct claims). *See generally* Levinson, *supra* note 8, at 889–99 (describing this phenomenon as "[r]emedial deterrence").

tive law.[10] Remedial dynamics may affect rights-based law in subtler ways as well. They may, for instance, introduce selection biases into the pool of litigants who advance particular substantive claims.[11] Or, perhaps, they may trigger cognitive biases within the judges evaluating these claims.[12] Remedial fingerprints, simply put, lie all over the substantive law. Sometimes overtly, sometimes covertly, rules governing the redress

10. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 79 (1998) [hereinafter Jeffries, *Eleventh Amendment and Section 1983*] ("Nonretroactivity facilitated the creation of new rights by reducing the costs of innovation."); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98 (1999) [hereinafter Jeffries, *Right-Remedy Gap*] (suggesting that immunity rules in constitutional tort law "advance the growth and development of constitutional law"); *see also* Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 601 (2004) (criticizing courts' use of "remand without vacatur" remedies in administrative law on the ground that the low-cost features of the remedy "facilitate[] the use of more aggressive judicial scrutiny of agencies' reasoning process"). Professor Richard Fallon has articulated this basic insight in terms of what he calls the "Equilibration Thesis," which holds that "justiciability, substantive, and remedial doctrines are substantially interconnected and that courts frequently face a choice about which doctrine to adjust in order to achieve acceptable results overall." Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 683 (2006) [hereinafter Fallon, *Linkage*]; *see also* Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011) [hereinafter Fallon, *Asking the Right Questions*].

11. *See, e.g.*, Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 474 (2011) (documenting systematic bias in favor of patentability arising from "the asymmetric nature of appeals from the PTO to the Federal Circuit"); *see also* John M. Greabe, *Objecting at the Altar: Why the* Herring *Good Faith Principle and the* Harlow *Qualified Immunity Doctrine Should Not Be Married*, 112 COLUM. L. REV. SIDEBAR 1, 15 (2012) (noting potential substantive effects arising from the involvement of private insurance attorneys—rather than government attorneys—in representing defendants in constitutional tort suits); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 6 (1990) (noting the possible existence of "a pro-defendant bias in the application and evolution of legal standards" resulting from the government's inability to obtain reversals of acquittals in criminal cases).

12. Commentators have suggested, for example, that the exclusionary remedy triggers the application of "hindsight bias" in Fourth Amendment cases, whereby judges' *ex post* knowledge of a search's results distorts their view of whether probable cause existed to conduct the search *ex ante*. *See, e.g.*, Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 376, 403–04; William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 912 (1991); *see also* Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2019–22 (1998) (suggesting that hindsight bias might also prejudice appellate courts' after-the-fact review of *Batson* claims asserted by defendants who were convicted in the court below).

of legal wrongs influence courts' definitions of the legal wrongs themselves.

This form of right-remedy interdependence has recently attracted the attention of public law scholars. Their work has yielded valuable new insights on the age-old right-remedy distinction and has helped to underscore the importance of thinking carefully about the remedial environments from which substantive law emerges. Though varied in its evaluative approaches and prescriptive contributions, all of the scholarship in this area adheres to the basic premise that remedy-related variables affect not just the intensity with which substantive rights get enforced, but also the defining of substantive rights themselves.[13]

Left largely unaddressed by this work, however, is a basic question: Is it bad for remedies to influence the shaping of substantive law and, if so, why? Consider, for instance, the argument that the exclusionary rule problematically "distorts" Fourth Amendment protections, by making judges hesitant to declare that searches violate the Constitution.[14] Taken alone, this claim offers no meaningful criticism of the status quo. For one thing, it problematically assumes that courts would ever be capable of establishing such a thing as an "undistorted" set of Fourth Amendment protections. Unless we are prepared to call for the shaping of rights-based doctrine in a vacuum—

13. Within individual fields, commentators have drawn attention to the linkage between remedial context and substantive law, and some commentators have proposed targeted responses to particular instances of the phenomenon. *See supra* notes 5–8 and accompanying text. More systematic examinations of the phenomenon offer functional taxonomies of right-remedy relationships, exemplified by Professor Daryl Levinson's work on the "equilibration" process that results from the transposition of remedial and substantive rules. *See, e.g.*, Levinson, *supra* note 8, at 889–913; *see also* Fallon, *Linkage*, *supra* note 10, at 654–88 (building on Levinson's work to develop a general thesis regarding the interconnectivity of justiciability rules, substantive law, and remedial law). In a related vein, Professor Nancy Leong has investigated the frequency with which different types of Fourth Amendment claims arise in different remedial contexts, while also advancing the thesis that courts produce higher quality law when they adjudicate substantive rights across multiple remedial environments. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 421–75 (2012); *see also infra* Part II.C. Finally, Professor Jennifer Laurin has investigated the processes by which different remedial contexts shape the definition and implementation of criminal procedure rights, focusing in particular on ameliorating "language barriers" that materialize when courts attempt to enforce constitutional criminal procedure protections in *civil* cases. Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration*, 110 COLUM. L. REV. 1002, 1007 (2010).

14. *See infra* Part I.E.

uninfluenced by remedial considerations in every potential way—then we must concede that there is no such thing as a "pure" legal right for remedies to come in and corrupt. The harm of "distortion," in other words, cannot lie in the mere fact that remedies influence rights; that is, after all, the fact whose harm we are attempting to discover.

Perhaps, though, the "distortion" argument might go as follows: The problem with the exclusionary rule is not merely that it shapes Fourth Amendment doctrine, but that, *relative to other potential remedies*, it produces fewer judicial findings that Fourth Amendment violations have occurred. If we were to replace the exclusionary rule with a more lenient remedy—say, a small reduction in the defendant's sentence[15] or limited damages liability against the offending public entity[16]—then courts would more often invalidate searches under the Fourth Amendment and thereby create a more expansive set of Fourth Amendment requirements. But even if that premise is true, civil libertarians should not necessarily abandon the exclusionary rule. For, as we already noticed above, weakened remedies reduce the real-world effectiveness of the rights to which they attach.[17] (All else equal, for instance, the availability of the exclusionary remedy is more likely to deter unlawful behavior than the prospect of a nominal damages award.) To evaluate the exclusionary rule's desirability from this perspective, the civil libertarian would have to ask whether courts will better safeguard Fourth Amendment freedoms by remediating violations more harshly but less frequently (i.e., with the exclusionary rule), or more frequently but less harshly (i.e., with a modest monetary sanction or another remedy of roughly equivalent lenience). That is an important question, to be sure, but it relates not so much to the "distortion" of Fourth Amendment law as it does to the question of how courts should mete out limited remedial capital across a range of cases.[18]

There is, however, a very real sense in which the exclusionary rule might introduce "distortions" into substantive Fourth Amendment law. To see the problem, one must recognize that Fourth Amendment claims sometimes accompany

15. *See* Calabresi, *supra* note 9, at 116–18.

16. *See* Slobogin, *supra* note 12, at 405–18.

17. *See supra* note 7 and accompanying text.

18. To be clear, the point is *not* that such reform proposals are misguided; rather, it is that the reform proposals target something other than "distortions" within the substantive law.

remedial requests other than a criminal defendant's motion to suppress. Magistrate judges apply the Fourth Amendment when deciding whether to issue a warrant.[19] Section 1983 cases present Fourth Amendment questions linked to requests for injunctions, damages, or declaratory relief.[20] Fourth Amendment claims might even arise in criminal prosecutions under 18 U.S.C. § 241.[21] These types of cases involve remedies very different from evidentiary exclusion. And yet, judges who decide these cases are bound by Fourth Amendment precedents that derive from suppression motions in criminal cases. Thus, when remedial dynamics unique to requests for suppression deter the finding of a Fourth Amendment violation, the effects of the holding threaten to *spill over* into other remedial settings in which the same right gets adjudicated. The distortionary harm, in other words, stems not just from the fact that remedies influence substantive law, but from the further fact that substantive law applies across multiple remedial contexts. Formally speaking, we do not have different Fourth Amendment doctrines for § 1983 actions, suppression hearings, probable cause hearings, and so on. Instead, there simply is one Fourth Amendment doctrine, and it applies equally across these different remedial contexts. Thus, when a particular remedial environment influences the shaping of Fourth Amendment law, the alteration applies beyond its own remedial boundaries.

This particular problem—what I call the problem of *spillover across remedies*—is the focus of this Article. Several areas of substantive doctrine, I argue, have developed (or are at risk of developing) features that, while responsive to the demands of a single remedial environment, affect the law's application within other such environments as well. Once embedded in the substantive law, a "remedy-specific" influence becomes part of a "cross-remedial" doctrine, destined to manifest itself within other remedial environments where it would not otherwise have taken hold. The spillover problem, in other words, arises as a consequence of two bedrock features of public law adjudication: (1) the inescapable intertwinement of substantive and remedial law; and (2) the generalized application of substantive law across multiple remedial settings. When one remedy affects the scope of a substantive rule, the cross-remedial nature of

19. *See generally* Stuntz, *supra* note 12.

20. *See, e.g.*, Leong, *supra* note 13, at 421–29.

21. *See, e.g.*, United States v. Ehrlichman, 546 F.2d 910, 914–29 (D.C. Cir. 1976).

that rule threatens to distort its development within other remedial settings.[22]

With the spillover problem thus acknowledged, the question becomes how to deal with it. The central thesis of this Article is that courts can best manage spillover through strategies of *disaggregation*, which vary the applicability of substantive rules across the different remedies used to enforce them.[23] Dis-

22. Individual examples of the spillover problem have not gone entirely unnoticed within the literature. *See, e.g.*, John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 275–79 (2000); Laurin, *supra* note 13, at 1007, 1032–34; Lawrence Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2211–81 (2003); Starr, *Rethinking Effective Remedies*, *supra* note 9, at 720–24. As best I can tell, however, no one has yet offered a systematic and transsubstantive analysis of the sort this Article seeks to provide.

23. I draw this term from the scholarship of Professor John Jeffries, who has advocated for "disaggregating" remedial rules of constitutional tort law across different categories of substantive claims. *See* Jeffries, *supra* note 22, at 280 ("It is my contention that the liability rule for money damages should vary with the constitutional violation at issue."). This Article advocates a sort of converse strategy, which disaggregates substantive rules of law across different categories of remedies. I view these two projects as complementary rather than in tension with one another; both are part and parcel of a broader effort to "reject the radical dissociation of right and remedy immanent in current doctrine." *Id.* at 281. Indeed, as I hope to demonstrate further in Part III, the disaggregation of rights across remedies is facilitated, rather than hindered, by the simultaneous disaggregation of remedies across rights. The two strategies proceed along different paths, to be sure, but both paths are ultimately headed toward the same summit.

Of related significance to this project is Professor Jennifer Laurin's rich discussion of "rights translation" within the law of constitutional criminal procedure. In advocating for a process that permits certain "components" of a substantive rule to "shift in a new remedial context," Laurin*, supra* note 13, at 1007, Professor Laurin's work may be read as endorsing limited forms of disaggregation across civil-criminal boundaries. Her scholarship, however, does not focus specifically on the spillover problem, and it confines itself exclusively to the application of criminal procedure protections in civil and criminal cases. *See, e.g.*, *id.* at 1004–07. I thus regard this project as complementary to Professor Laurin's work, as it seeks to bolster the case for the disaggregated law that a "rights translation" process might sometimes yield, while covering a more expansive set of substantive and remedial terrains.

Finally, Professor Larry Sager's "underenforcement thesis" bears mention in connection with this project, insofar as it advocates for a disaggregated definition of *judicially enforceable* constitutional law on the one hand and constitutional law (full stop) on the other. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–13 (1978). Without such disaggregation, as Professor Sager points out, institutional limitations specific to the judiciary might yield unnecessary curtailments in the scope of substantive constitutional requirements that other institutional actors (such as legislators and executive officials) look to for guidance. *Id.* at 1213. This Article builds on Professor Sager's thesis by sugaggregation strategies attack spillover from the back-end. Rather than attempt to mitigate or eliminate the ways in which remedies affect rights, these strategies focus on confining remedy-specific influences on rights to the particular remedial settings in which they arise. If, for instance, we allow equal protection rules to differ based on whether a litigant seeks civil or criminal relief, considerations particular to the civil setting are less likely to influence courts' resolution of criminal equal protection claims and vice versa. If Fourth Amendment rules differ according to whether a judge is considering a suppression motion *ex post* or a warrant application *ex ante*, influences specific to the former remedial context are less likely to interfere with the Fourth Amendment's application in the latter. Simply put, the weaker the demand for cross-remedial uniformity, the weaker the threat of cross-remedial spillover.

As it turns out, many areas of the law already pursue disaggregation strategies of this sort. These strategies rely in particular on *remedial exceptions*, which limit the applicability of some (but not other) forms of relief associated with identical substantive claims.[24] These exceptions help to reduce—albeit in indirect (and sometimes blunt) fashion—spillover across remedies. Rules of qualified and absolute immunity, for instance, render constitutional rights more difficult to vindicate when raised as "offensive" swords against public actors (for example, via actions for injunctive or monetary relief) rather than "defensive" shields in criminal prosecutions.[25] Exceptions to the exclusionary rule remove some Fourth Amendment protections from the reach of criminal defendants at trial, even as those same protections might trigger the denial of a warrant application, or the granting of monetary or injunctive relief in a civil proceeding.[26] The harmless error rule creates a similar dispari-

gesting that further disaggregation can and should occur *within the category* of judicially enforceable constitutional law, so as to prevent spillover from one remedial setting into another.

24. *See infra* Part III.A.

25. *See* MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL REMEDIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION, at xxii–xxiii (2002) (distinguishing between "[d]efensive, 'shield-like' remedies," and "offensive remedies"); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972) (contrasting between defensive constitutional remedies, which employ the "sanction of nullification" of government imposed punishments, and offensive constitutional remedies, which seek "to use judicial power to force affirmative action").

26. *But see* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 673, 688–721 (2011)

ty between the broader set of procedural protections that are capable of yielding relief *during trials* and the narrower set of such protections that are capable of yielding reversals on appeal.[27] To be sure, exceptions such as these do not explicitly disaggregate the substantive law: as a formal matter, the same substantive claims—supported by the same substantive precedents—are asserted and disposed of in these different remedial contexts, and to the extent that variations in outcomes arise, the variations remain attributable to formally remedial rather than formally substantive rules. From a functional perspective, however, remedial exceptions can (and often do) produce something very much like disaggregated substantive doctrine, as they render identical substantive rules more or less susceptible to vindication depending solely on the remedial context in which these rules are litigated.[28] A primary purpose of this Article, then, is to emphasize this virtue of remedial exceptions: By disaggregating the application of substantive norms across remedial boundaries, remedial exceptions substantially mitigate the problem of spillover across remedies.

This is not to say, however, that remedial exceptions currently on the books have enjoyed unconditional success as anti-spillover devices, and this Article thus goes on to propose ways in which courts might more effectively define and deploy these exceptions to perform this role. Generally speaking, the improvements I suggest involve making remedial exceptions more particularized and substance-specific. Rather than employ a small number of broad remedial exceptions—applicable across a wide range of substantive norms—courts should employ a larger number of narrower exceptions, targeting particularized combinations of substantive and remedial rules.[29] Pushed far enough in this direction, remedial exceptions might even start to lose their "remedial" character altogether, looking less and less like discrete carve-outs to otherwise uniform rules of remedial law, and more and more like hybridized rules of "right-remedy" law, whose content depends on *both* the type of relief a litigant demands *and* the type of substantive claim she asserts.

(identifying similarities between the Court's exceptions to the exclusionary rule and its exceptions to § 1983 damages liability).

27. *Cf.* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 26 (2002) ("Unless an appellate court determines that an error is prejudicial, the Court has no authority to remedy that error, by whatever means.").

28. *See* discussion *infra* Part III.

29. *See, e.g.*, discussion *infra* Part I.F.

That transformation would further increase both the appearance and reality of cross-remedial variations in the substantive law, making, in effect, the disaggregating function of remedial exceptions more explicit and complete.

These observations tee up the final question with which this Article grapples: Is disaggregation proper? For even if courts can best manage the spillover problem by varying substantive rights across remedial boundaries, overriding considerations may nonetheless counsel against this approach. In particular, I confront four separate concerns that the disaggregation strategy presents: (1) that it improperly ascribes multiple definitions to substantive rules derived from a single textual source; (2) that it creates overwhelming problems of administrability for courts and litigants; (3) that it undermines important rule-of-law values; and (4) that, with respect to a limited category of rights and remedies, it impedes higher-level courts' ability to supervise the work of their lower-level counterparts. While I acknowledge the validity of each of these concerns, I conclude that none provides sufficient grounds for abandoning the disaggregation strategy altogether.

Here, then, is the remaining plan of attack: Part I introduces the spillover problem by offering examples from public law adjudication. Part II appraises a preliminary set of "non-disaggregation" anti-spillover strategies, each of which aims to mitigate the spillover problem while maintaining uniform enforcement of substantive rules across remedial boundaries. For example, courts could attempt to alleviate spillover by forging rules of substantive law with all applicable remedial contexts in mind. Or they could reform remedial structures with an eye toward "equalizing" the influences that different remedial structures exert on the shaping of substantive rules. Or they could seek to expand the number of remedial settings in which a given substantive rule gets applied, with the hope that a "diversified" set of remedial inputs will ensure that no single remedy predominates in affecting the content of a substantive rule. These anti-spillover strategies, I suggest, can preserve the formal uniformity of substantive rules across different remedial contexts, but they ultimately provide inadequate solutions. We should therefore consider the alternative strategy of disaggregating the substantive law according to different remedial demands.

Part III turns to the use of remedial exceptions to achieve disaggregation in the law. I first demonstrate how our current palette of remedial exceptions already functionally disaggregates the substantive law in a way that mitigates cross-remedial spillover effects, and I then suggest ways in which courts might further improve these exceptions' performance in combating spillover across remedies. Finally, Part IV offers a qualified defense of disaggregation within the substantive law, concluding that no overriding considerations should compel us to reject it categorically.

One final caveat: Lest I be misunderstood, this Article is not intended to push for the *total* disaggregation of rights across remedies. I am not enthusiastic about reviving the common law writ system, along with its myriad forms of action governed by discrete, self-contained packages of procedural, substantive, and remedial rules.[30] Nor do I advocate for the total dissolution of the formal boundaries that separate "substantive" from "remedial" law. Whatever the conceptual merits of the right-remedy distinction, it is a distinction around which the law has organized itself for quite some time, and it will remain a key organizing principle of the doctrine for years to come. I do not, then, propose a dramatic restructuring of doctrinal rules governing the judicial resolution of public law disputes. Instead, I push for more modest improvements to categorization schemes already in effect. We can, I think, achieve more disaggregation of the law (and concomitantly less spillover across remedies) without going so far as to dissolve the categories of "right" and "remedy" altogether. How far down this road we should travel is a difficult question that I won't purport to resolve here. But I do hope to suggest that there is room to move in that direction before needing to worry that we have gone too far.

I. CROSS-REMEDIAL SPILLOVER IN ACTION

To help reveal how cross-remedial spillover happens, this Part sets forth some examples of the phenomenon in action. The examples span both constitutional and nonconstitutional

30. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 63–83 (3d ed. 1990); *see also* Laycock, *supra* note 4, at 165 ("[R]emedies scholars start from a base of broadly applicable remedial principles. There is no reason to have a different law of damages, or a different law of injunctions, for each cause of action, as though we had never abandoned the writ system."). While I agree with Professor Laycock that we should avoid wholesale reinstatement of the writ system, I do not view this question—or the related question of whether we should permit some variation of substantive rules across different remedial environments—as presenting an all-or-nothing choice.

cases,[31] and reveal two important points: (1) remedies can affect the definition of substantive rules in a variety of ways; and (2) substantive holdings shaped in one remedial context can acquire precedential force within other remedial contexts as well. When these two things happen to the same substantive rule, spillover across remedies will occur.

In one sense, much of what follows should be familiar to students of the right-remedy relationship. Public law scholars have long been familiar with the ways in which remedy-specific variables can affect courts' disposition of substantive claims, and many of the examples discussed below build on descriptive observations these scholars already have offered. What have received less attention, however, are the cross-remedial aftershocks that follow from a particular remedy's point of contact with a substantive rule. It is on these aftershocks that this Part seeks to shed new descriptive light.

A. Procedural Due Process Law and Monetary Relief Under § 1983

In *Paul v. Davis*, the Supreme Court held that government-inflicted harm to "reputation alone" did not trigger procedural due process protections under the Fourteenth Amendment.[32] This holding diverged from the Court's earlier suggestion, in *Wisconsin v. Constantineau*, that due process restrictions applied whenever "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."[33] Though not purporting to overrule *Constantineau*,[34] the Court in *Paul* made clear that stigmatic injuries alone could not give rise to procedural due process claims; instead, stigmatic injuries could support such claims only when the plaintiff could identify some other "more tangible" harm, such as the loss of employment or a specific business opportunity.[35]

31. This Article's focus on rights and remedies within the public (but not private) law context reflects only an expositional choice. I do not intend to communicate any deep point concerning the prevalence (or lack thereof) of analogous forms of spillover across private law remedies.

32. 424 U.S. 693, 695 (1976).

33. 400 U.S. 433, 437 (1971).

34. *Paul*, 424 U.S. at 701–02.

35. *Id.* at 701.

Remedy-specific considerations, the Court made clear, favored its adoption of this "stigma plus" rule.[36] In contrast to *Constantineau*, where the plaintiff sought to invalidate a Wisconsin state statute via an injunction,[37] *Paul* involved a demand for monetary relief against individual police officers.[38] The officers had circulated a flyer to hundreds of local merchants, with the names and photographs of supposedly "active shoplifters," including the plaintiff, Davis.[39] Having never in fact been convicted of shoplifting, Davis sued under 42 U.S.C. § 1983, which creates a civil cause of action for individuals who claim injury based on state-based actors' violations of federal law.[40] Specifically, Davis alleged that the officers' circulation of the flyer violated his procedural due process rights, and he demanded compensation for the reputational harm he had suffered.[41] *Paul* thus resembled a garden-variety defamation suit, pigeonholed into a § 1983 action because of the public, rather than private, status of the allegedly defamatory actors. To the majority, this point mattered a great deal. If successful, the Court reasoned, the plaintiff's suit would convert the Fourteenth Amendment into a "font of tort law to be superimposed upon whatever systems may already be administered by the States."[42] And from the Court's reluctance "to derive from congressional civil rights statutes a body of general federal tort law," it followed "[*a*] *fortiori*" that "the procedural guarantees of the Due Process Clause cannot be the source of such law."[43]

The *Paul* majority marshaled other arguments in support of its "stigma plus" holding. But many commentators have suggested that the "font of tort law" concern was the primary factor underlying *Paul*'s result.[44] Simply put, the Supreme Court

36. *Id.* at 730.
37. *See Constantineau*, 400 U.S. at 435.
38. *Paul*, 424 U.S. at 696.
39. *Id.* at 695.
40. 42 U.S.C. § 1983 (2012).
41. *Paul*, 424 U.S. at 696.
42. *Id.* at 701.
43. *Id.*
44. *See, e.g.*, Barbara Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 576–77 & n.29 (1999) ("Many scholars have understood the Court's holding to result in large part from the Court's view that it could not permit the defamation claim in *Paul* without opening the door of the federal courts to a whole range of other tort-like claims involving deprivations of life, liberty, or property."); Jeffries, *supra* note 22, at 277 (hypothesizing that "*Paul v. Davis* is an example of the § 1983 tail wagging the constitutional dog"); Levinson, *supra* note 8, at 893 ("In all likelihood, *Paul* would

did not want § 1983 to authorize defamation actions against public officials. But rather than render a decision about the reach of permissible damage remedies under § 1983, it chose to discuss the Due Process Clause instead. The upshot was the creation of rights-based law, applicable beyond the immediate remedial setting that *Paul* itself presented. Thus, as Professor Jeffries has pointed out, insofar as the Court in *Paul* chose to "limit[] liability by constricting rights," its rights-based resolution of the case swept broadly across all other remedial contexts, "mean[ing] that injunctions, defenses, and other remedies [were] also precluded."[45]

And, indeed, since its adoption, the "stigma-plus" rule has applied in remedial settings that are quite different from what the Court confronted in *Paul*. Courts have grappled with the rule, for instance, when considering: (1) a corporation's request

have come out differently if the only available remedy had been an injunction.").

45. Jeffries, *supra* note 22, at 289; *see also* Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 674 (1997) ("If the Constitution is held to be inapplicable where official misconduct looks too much like the subject of tort, other remedies will be foreclosed as well."). For another example of damages-induced spillover, consider Professor Jeffries's discussion of *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) in Jeffries, *supra* note 15, at 278. In *Lewis*, the Court confronted a § 1983 action involving a high-speed police chase, in which a deputy sheriff's allegedly reckless driving caused a fatal motorcycle crash. The Court denied § 1983 damages to the parents of the crash victim (who asserted a substantive due process violation), on the grounds that the deputy sheriff did not actually intend to harm their son. (Reckless indifference or gross negligence, in other words, was simply not enough to create a deprivation of substantive due process.) *Lewis*, 523 U.S. at 854.

Professor Jeffries speculates that *Lewis*, like *Paul v. Davis*, was "another example of the prospect of monetary damages inducing a restrictive definition of the underlying right," and that, while it is impossible to know for sure, the Court might have reacted differently to the Lewises' claim had it arisen in "another remedial context." Jeffries, *supra* note 22, at 278. If so, we need not look far for examples of the *Lewis* rule yielding spillover across remedies.

Consider, for instance, the Second Circuit's holding in *Graziano v. Pataki*, 689 F.3d 110 (2d Cir. 2012) (per curiam). There, the court denied *injunctive* and *declaratory* relief to a group of prisoners who alleged that they had repeatedly been denied parole for "arbitrary or impermissible reasons," in violation of their substantive due process rights. *Id.* at 115. The court made short shrift of these claims, relying on the Supreme Court's earlier proclamation in *Lewis* that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 116 (quoting *Lewis*, 523 U.S. at 846). *Graziano*, however, arose in a remedial setting very different from the one the Court confronted in *Lewis*. Nevertheless, *Lewis*, whose holding derived largely from concerns about awarding damages relief, controlled the outcome of *Graziano*, a case where the prospect of damages relief was not on the table. *Id.*

for a declaratory judgment regarding the constitutionality of CERCLA-based regulatory procedures implemented by the EPA;[46] (2) an attorney's motion for a "name-clearing hearing" before a court that sharply criticized his conduct in a published opinion;[47] (3) several cases in which litigants sought declaratory and/or injunctive relief concerning the constitutionality of state-law sex offender registration requirements;[48] and (4) a request for an affirmative injunction mandating adoption of specialized procedural safeguards by a public commission tasked with investigating and accusing individuals of public bribery.[49] Meritorious or not, these claims gave rise to remedial requests that in no way threatened to open the floodgates to common

46. Gen. Elec. Co. v. Jackson, 610 F.3d 110, 113–14, 116, 121–23 (D.C. Cir. 2010); *see also* Asbestec Constr. Services v. EPA, 849 F.2d 765, 769 (2d Cir. 1988) ("To mount such a challenge more than reputation alone must be at stake. . . . [T]his sort of allegation of defamation is actionable only when made in the context of a denial of . . . a government contract." (citing Paul v. Davis, 424 U.S. 693, 706 (1976))).

47. United States v. Sigma Int'l, Inc., 300 F.3d 1278, 1279 (11th Cir. 2002) (en banc) (per curiam).

48. The cases here have gone both ways. *Compare, e.g.*, Schepers v. Comm'r, Ind. Dep't of Corr., 691 F.3d 909, 914 (7th Cir. 2012) (finding that Indiana's state sex offender registry did implicate valid liberty interests under *Paul*, because placement on the registry "deprives [required registrants] of a variety of rights and privileges held by ordinary Indiana citizens"), *and* Coleman v. Dretke, 409 F.3d 665, 673 (5th Cir. 2005) (Jones, J., dissenting from the denial of rehearing en banc) (arguing that a Fifth Circuit panel misapplied the law in a sex offender registry case, by "transforming the *Paul v. Davis* 'stigma-plus' test into 'plus=stigma'"), *with* Brown v. City of Michigan City, Ind., 462 F.3d 720, 729–30 (7th Cir. 2006) (upholding municipal sex offender ordinance on the ground that the city's classification of the plaintiff as a "present threat" to children, while certainly damaging to his reputation, could not "fulfill the 'plus' factor of the *Paul v. Davis* test"), Doe v. Moore, 410 F.3d 1337, 1345 (11th Cir. 2005) (citing *Paul v. Davis* for the proposition that a sex offender statute did not offend any "fundamental right," cognizable on substantive due process grounds), *and* Gunderson v. Hvass, 339 F.3d 639, 644–45 (8th Cir. 2003) (rejecting a procedural due process challenge to a Minnesota sex offender statute on the ground that the plaintiff failed to satisfy *Paul*'s "stigma-plus" requirement). Some of the inter-circuit disagreement on this question was put to rest by the Supreme Court's decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), where, rather than reach the question of whether a Connecticut sex offender statute was valid under *Paul*, the Court determined that the statute's application turned solely on the existence of a past conviction, and that the existence of a conviction was "a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Id.* at 7. Yet even the post-*Doe* cases continue to grapple with *Paul* and its stigma-plus rule, see, for example, *Schepers*, 691 F.3d at 1216, even though many of these cases present nothing akin to a common-law tort action.

49. Aponte v. Calderón, 284 F.3d 184, 195–98 (1st Cir. 2002).

law tort-like litigation under the Due Process Clause.[50] Nonetheless, they all were decided by reference to a rule that emerged from worries about converting the Fourteenth Amendment into a "font of tort law"—law, in other words, that would routinely sustain claims for civil monetary relief.[51]

B. EQUAL PROTECTION LAW AND THE CIVIL/CRIMINAL DIVIDE

A subtler example of the spillover problem involves the "discriminatory purpose" rule of *Washington v. Davis*.[52] The plaintiffs in *Davis* sought an injunction against the D.C. Police Department, alleging that a screening examination for prospective employers violated constitutional equal protection requirements.[53] Because the *Davis* plaintiffs lacked direct evidence of discriminatory intent, they based their claim on a showing of discriminatory *impact*—that is, on statistical evidence that white applicants far more often passed the exam than their black counterparts.[54] That showing was good enough for the D.C. Circuit, which found for the plaintiffs.[55] But the Supreme Court reversed, holding that discriminatory effects could not establish a constitutional violation, unless accompanied by a showing of discriminatory purpose.[56]

Animating the Court's holding was a concern about the remedial consequences of a disparate impact rule. Such a rule,

50. Paul v. Davis, 424 U.S. 693, 701 (1976).

51. *Id.*

52. 426 U.S. 229 (1976); *see also* Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979) (holding that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose"); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.").

53. *Washington*, 426 U.S. at 229.

54. *Id.* at 237.

55. Washington v. Davis, 512 F.2d 956, 965 (D.C. Cir. 1975).

56. *Washington*, 426 U.S. at 230–31. As Professor Reva Siegel has noted, *Washington v. Davis*'s disparate impact rule was rendered even more restrictive by *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), which severely limited the evidentiary means by which litigants could prove discriminatory purpose. *See* Reva Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 16–17 (2013) (noting that "*Davis* left open multiple evidentiary pathways to proving purpose," and that "it was not until [*Feeney*] that the Court moved decisively to restrict the ways that evidence of foreseeable impact could be used to prove unconstitutional purpose"). *Feeney*, like *Davis*, was a civil case, involving a request for injunctive relief. 442 U.S. at 260.

as Justice White explained for the majority, "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[57] A more exacting standard was thus necessary to prevent judicial meddling in these and other government operations.[58] Indeed, as Professor Levinson has explained, invalidating the screening exam in *Davis* would have "invited, if not compelled" the Court "to address the underlying problem of educational disadvantage, which might point toward massive structural reform of education."[59] And that, in turn, would have ultimately led the Court down a path without "any nonarbitrary stopping point for remedies short of the wholesale restructuring of the basic institutions of society to redistribute resources and power more fairly among racial groups."[60] This was, as Levinson has put it, "not the kind of project courts would be inclined (or allowed) to undertake."[61] And thus *Davis*'s discriminatory purpose requirement stemmed largely from "a concern with institutional limitations, going to remedies."[62]

Subsequent cases have confirmed that *Davis*'s rejection of disparate impact liability under the Equal Protection Clause applies within other remedial contexts.[63] Notably, the discriminatory purpose rule applies with equal force in *criminal* cases, in which defendants seek not sweeping injunctions against government agencies, but defensive relief from the specific focus of government-imposed punishment. Until recently, for instance, federal drug crimes involving one gram of crack cocaine were punished just as harshly as drug crimes involving 100 grams of

57. *Washington*, 426 U.S. at 248.

58. *Id.* at 239–40.

59. Levinson, *supra* note 8, at 899.

60. *Id*.

61. *Id*.

62. *Id.*; Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1414 (1988) (noting that the *Davis* Court "stated as an important justification [for its discriminatory purpose requirement] the need to limit the intrusiveness of federal judicial remedies").

63. *Cf.* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 952–53 (1989) ("The more important aspect of *Washington v. Davis* . . . was the Court's ruling that the discriminatory intent standard is a *comprehensive* account of what constitutes impermissible discrimination under the Equal Protection Clause."); *see also* Seigel, *supra* note 56, at 50–51.

powder cocaine.[64] The 100:1 ratio, though race-neutral on its face, exerted an obvious discriminatory impact on African-Americans, who face far greater risks of prosecution on crack-cocaine charges.[65] Notwithstanding powerful statistical confirmations of this fact, *Washington v. Davis* and its progeny stood as an impenetrable barrier to equal protection relief, as black crack-cocaine defendants never managed to gather enough evidence to satisfy *the* discriminatory purpose requirement.[66]

Perhaps the crack-cocaine sentencing regime does in fact reveal a discriminatory intent of the sort that *Davis* sought to police, or at least has such a massively disparate racial impact to raise a burden-shifting inference of such intent. The important question for our purposes, however, is whether courts in the criminal setting should even be applying the *Davis* rule at all. Two important differences between criminal and non-criminal cases suggest that they should not. First, criminal cases implicate heightened liberty interests. "Locking someone up in cage for a period of years," as Professor David Sklansky has put it, "is singularly serious business," and that fact alone might justify a less "universalist" scheme of equal protection review across civil and criminal lines.[67] Justice White himself had pointed out in a pre-*Davis* decision that in criminal cases, "where the power of the State weighs most heavily upon the individual or the group, [courts] must be especially sensitive to the policies of the Equal Protection Clause."[68] Consequently, while the practical difficulties of remediation might be enough to justify tolerating discriminatory impact in connection with education, employment, and the disbursement of other government-provided benefits, the same might not be true when the government throws its citizens behind bars.[69]

64. The ratio now stands at 18:1. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended at 21 U.S.C. § 841(b)(1) (2012)).

65. *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995).

66. *See id.* at 1303 & n.93 (citing cases for the proposition that "the [crack cocaine] defendants always have lost, and the opinions generally have been both unanimous and short").

67. *Id.* at 1316.

68. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

69. The Court would later flip this idea on its head, implying in *McCleskey v. Kemp* that, if anything, criminal cases necessitated a less rigorous set of equal protection requirements than *Davis* and its progeny had set forth. McCleskey v. Kemp, 481 U.S. 279, 297 (1987). Emphasizing that "[o]ne of society's most basic tasks is that of protecting the lives of its citizens and one of

Second, the practical difficulties of equal protection remediation may actually be easier to overcome in the criminal context. In civil cases, equalizing treatment of whites and nonwhites often amounts to a zero-sum game, in the sense that court-ordered gains for nonwhites translate directly into court-ordered losses for white beneficiaries of the status quo. Hiring more black police officers means hiring fewer white officers; reducing *de facto* school segregation means reducing white enrollment in neighborhood schools; increasing welfare benefits for black recipients means decreasing benefits for white recipients; and so on. But with criminal sentencing schemes, courts can achieve improvements for nonwhite defendants without

the most basic ways in which it achieves the task is through criminal laws against murder," the Court in *McCleskey* rejected a statistical proffer of discrimination in capital sentencing as insufficient to demonstrate purposeful discrimination. *Id.* ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."). I share Professor Sklansky's reaction to this reasoning: it reflects an "even starker illustration than the crack cases of the appalling blindness of our current approach to equal protection." Sklansky, *supra* note 65, at 1317. Powerful as the state's interest in preventing murder might be, that interest should not require courts to apply relaxed equal protection standards when reviewing capital *sentences*, which, even if invalidated, would leave states free to enforce its prohibitions on murder with the very serious alternative sentence of life imprisonment. And when viewed against the fact that a capital sentencing determination implicates nothing less than the defendant's interest in remaining alive, the *McCleskey* Court's call for more equal protection deference to a state's imposition of the death penalty (as compared to the level of deference that would apply to, say, a state's hiring practices or allocation of public benefits) seems to me bizarre and wrongheaded. *See also McCleskey*, 481 U.S. at 347–48 (Blackmun, J., dissenting) (criticizing the majority for giving a perverse "new meaning" to the notion that "death is different," by "rel[ying] on the very fact that this is a case involving capital punishment to apply a *lesser* standard of scrutiny under the Equal Protection Clause").

That being said, I also agree with Professor Sklansky that *McCleskey*'s questionable logic, even if accepted, should not extend to courts' review of crack/cocaine sentencing disparities under federal law. For one thing, *McCleskey*'s holding derived in part from the Court's desire not to intrude on sovereign states' administration of their own criminal justice systems. Such concerns are wholly absent when a federal court reviews the constitutionality of a federal sentencing scheme. Sklansky, *supra* note 65, at 1317. Second, *McCleskey*'s result depended on the highly discretionary nature of the sentencing scheme that Georgia then employed, which made it especially difficult for courts to probe "the motives and influences" underlying any given capital verdict. *McCleskey*, 481 U.S. at 296; Sklansky, *supra* note 65, at 1317 n.174. The crack/cocaine laws, by contrast, "are part of a sentencing system that has intentionally replaced broadly diffused discretion with a uniform and comprehensive set of rules," thus making it practically more feasible to determine whether the scheme as defined infringes on a defendant's equal protection rights. Sklansky, *supra* note 65, at 1317.

worsening the situation of their white counterparts, by reducing the sentences that are disproportionately experienced by one racial group while leaving unchanged the sentences that other defendants receive.[70] This is not to say that promoting racial equality in the remedial context of criminal sentencing determinations is a straightforward exercise. But at the very least, courts can engage in the enterprise without having to inflict direct costs on members of another racial group.[71]

What is notable about *Washington v. Davis*'s migration into the criminal sentencing context is not simply that the migration occurred; it is that no court even seemed to notice, much less question, its occurrence.[72] When the Court in *Davis* issued a cross-remedial holding concerning the scope of the substantive equal protection guarantee—rather than, say, a remedy-specific holding about the availability of injunctive remedies for equal protection violations—it unleashed the forces of spillover across remedies. No court thereafter deemed itself free to consider the possibility of varying disparate impact requirements across civil-criminal lines, even though different remedial dynamics might well have warranted a different substantive approach. Consequently, the same substantive equal protection law now applies in two very different remedial contexts, even

70. For a similar observation, applicable to claims of discriminatory prosecution, see Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 138 (2003).

71. In addition, as Professor Sklansky has pointed out, while the Court "has frequently expressed reluctance to insert itself into matters outside its traditional domain . . . [and] issues beyond the special competence of the judiciary[,] . . . criminal sentencing is well inside that domain and close to the core of that competence." Sklansky, *supra* note 65, at 1316.

72. None of this is to say that the *Davis* standard applies without differentiation across the entire spectrum of equal protection cases. In fact, as Professor Daniel Ortiz has observed, discriminatory intent requirements do in fact vary across several different areas of equal protection doctrine. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1107 (1989) (suggesting that the intent requirement "allocates . . . burdens [of proof between the individual and the state] differently in different contexts"); *see also id.* at 1119–35 (noting that in "jury selection, voting, and education cases," the Court allows "individuals to establish . . . inferences [of discriminatory motivation] . . . with something close to a showing of mere disparate impact"); Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 191–97 (2012). Thus, it would be incorrect to say that the Court has always shown insensitivity to context in crafting and applying the *Davis* rule. Even so, as the crack-cocaine cases illustrate, some areas of equal protection doctrine still adhere strictly to the letter of *Davis*, and within these areas, the threat of cross-remedial spillover remains.

though fundamental differences between these two contexts might well warrant disparate forms of disparate impact review.

C. HYBRID STATUTES

The examples offered to this point come from the domain of constitutional law. But spillover across remedies can occur in other fields as well. Congress sometimes enacts "hybrid statutes," which create nonconstitutional norms subject to both civil and criminal enforcement.[73] These hybrid statutes create difficulties when the civil or criminal nature of a case brings itself to bear on an unresolved question of statutory interpretation, thus creating precedent that governs within both remedial settings.

The distortions can run in both directions. Consider first what Professor Lawrence Solan calls "statutory inflation."[74] As he explains, "[d]eeply entrenched in our system of statutory jurisprudence are two complementary canons of construction: Remedial [i.e., civil] statutes are interpreted liberally; penal statutes are interpreted narrowly."[75] Consequently, for hybrid statutes, when interpretive questions first manifest themselves in the civil setting, courts might end up favoring "broad interpretations" that then "spill over to criminal cases, causing an increase in criminal liability."[76] Put another way, interpretations that courts might have rejected in stand-alone criminal cases still find their way into the criminal setting, via cross-remedial spillover of an earlier civil holding that broadens the applicability of a hybrid statute.[77]

73. *See, e.g.*, Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1030–33.

74. Solan, *supra* note 22, at 2213.

75. *Id*. at 2211–12.

76. *Id.* at 2213. Or, courts might apply *Chevron* deference to an agency's broad interpretation of a hybrid statute in a civil action and then abide by that interpretation in a subsequent criminal case. *See* Solan, *supra* note 22, at 2214 ("Although the application of the *Chevron* doctrine is consistent with the broad interpretation of remedial statutes, if Congress also decides to criminalize the willful violation of regulations, statutory inflation is likely to occur.").

77. For those who view the rule of lenity as grounded entirely in fair-notice values, statutory inflation may seem unproblematic. If a civil holding endorses a broad interpretation of a hybrid statute at Time A, then future criminal defendants should be able to anticipate that the Time A interpretation will govern their prosecution at Time B. Put another way, as long as the "inflating" civil holding *precedes* the "inflated" criminal holding, and as long as everyone understands that judicial interpretations of hybrid statutes apply uniformly across both civil and criminal cases, then everyone should get fair

Solan highlights several examples of statutory inflation.[78] Consider, for instance, insider-trading regulation under federal securities law. Neither § 10(b) of the Securities Exchange Act nor SEC Rule 10b-5 makes explicit reference to insider trading.[79] Nevertheless, in *Chiarella v. United States*, the Supreme Court deemed this practice *criminally* punishable under these laws.[80] In *Chiarella*, however, the Court was not writing on a blank slate. Instead, its ruling in the case derived from a decade's worth of "administrative decisions and circuit court decisions," all of which had involved private and administrative requests for *civil relief*.[81] In citing to these cases, the Court in *Chiarella* never paused to ask whether the criminal nature of the case before it warranted a different interpretive approach.[82] Consequently, as Solan explains, "criminal application of Rule 10b-5 in the context of insider trading grew out of the broad interpretation of the rule in civil cases, in part as the result of aggressive administrative enforcement actions brought earlier by the SEC."[83]

Hybrid statutes are just as susceptible to "deflationary" interpretations as they are to "inflationary" ones. Consider *Unit-*

notice. Not everyone, however, believes fair-notice values to be the exclusive concern of the rule of lenity. The rule also might serve, for instance, the libertarian purpose of limiting the reach of criminal statutes, *cf.* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (characterizing the rule as "founded on the tenderness of the law for the rights of individuals"), as well as the structural purposes of ensuring legislative primacy in the drafting of criminal statutes, *see* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 141–43 (1998), "compel[ling] legislatures to detail the breadth of prohibitions in advance of their enforcement," Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 887 (2004), and "compel[ling] prosecutors to charge crimes with enough specificity to indicate to voters—and juries—what conduct has been treated as criminal," *id.* Under these and other accounts of the lenity rule, statutory inflation remains a problem worth worrying about.

78. Solan, *supra* note 22, at 2238–55.

79. *Id.* at 2238; *see* 15 U.S.C. § 78j (2012); 17 C.F.R. § 240.10b-5 (2013).

80. 445 U.S. 222 (1980).

81. *See, e.g.*, Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833, 855 (2d Cir. 1968) ("[T]he securities laws should be interpreted as an expansion of the common law both to effectuate the broad remedial design of Congress and to insure uniformity of enforcement." (citations omitted)).

82. As Solan emphasizes, the Court in *Chiarella* "certainly did not consider the rule of lenity." Solan, *supra* note 22, at 2239.

83. *Id.* at 2239–40; *see also* Transcript, *Roundtable on Insider Trading: Law, Policy, and Theory After* O'Hagan, 20 CARDOZO L. REV. 7, 15 (1998) (statement of Professor Roberta Karmel) (discussing this problem in similar terms).

ed States v. Thompson/Center Arms Co.[84] In this case, an arms dealer sought a refund of a $200 tax levy, the validity of which turned on the meaning of the term "firearm" as used in the National Firearms Act (NFA).[85] A plurality of Justices resolved the statutory ambiguity by invoking the rule of lenity (which calls for resolving ambiguities in criminal statutes in the defendant's favor), even though the case before them involved civil rather than criminal remedies.[86] Justice Souter's plurality opinion justified this move by pointing to the hybrid nature of the NFA.[87] As he explained, "although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness."[88] Framed as a rule of substantive law, *Thompson/Center Arms*' interpretive holding would inevitably control in *both* civil and criminal cases. And for that reason, the plurality opted for a narrow interpretation of the statutory language, thus accommodating (albeit preemptively) the rule-of-lenity concerns that criminal cases might one day raise.[89]

The Court in *Thompson/Center Arms* thus managed to head off the sort of statutory inflation that *Chiarella* reflects. But rather than prevent spillover from happening, the decision simply diverted the spillover in a different direction. Since *Thompson/Center Arms* was a civil case, the rule of lenity would not normally have come into play. It was only the prospect of future criminal proceedings, based on the same statutory language, that triggered the Court's invocation of the lenity rule. In that sense, the *Thompson/Center Arms* plurality chose to "deflate" rather than "inflate." It artificially constricted the scope of the statute in a civil case so as to adopt what it viewed as the proper interpretation for criminal cases.

D. TRIAL ERRORS AND APPELLATE REVERSAL

Under the law of harmless error, appellate courts may excuse certain trial errors as nonprejudicial.[90] Some errors, how-

84. 504 U.S. 505 (1992). For illuminating discussions of *Thompson/Center Arms*, see Kristin E. Hickman, *Of Lenity,* Chevron*, and KPMG*, 26 VA. TAX. REV. 905, 920–21 (2007); Sachs, *supra* note 73, at 1036; and Solan, *supra* note 22, at 2253–55.

85. *Thompson/Ctr. Arms,* 504 U.S. at 505 (plurality opinion).

86. *Id.* at 506.

87. *Id.* at 517.

88. *Id.*

89. *Id.* at 518.

90. FED. R. CRIM. P. 52(a).

ever, are not subject to harmless error analysis. These errors, known as "structural errors," trigger a rule of automatic reversal; no instance of structural error may be excused as harmless, regardless of its real-world impact.[91]

Commentators have suggested that the automatic reversal remedy induces courts to define structural rights narrowly.[92] It is costly to reverse convictions and to redo trials below, so appellate courts will therefore hesitate to impose these costs on lower courts when the alleged errors seem minor.[93] When judges feel this way about non-structural errors, they are often able to uphold convictions on grounds of harmlessness, reasoning that even though errors occurred below, they were not prejudicial enough to warrant full-scale appellate relief.[94] With structural errors, however, the harmless error option is unavailable, so that the only way not to reverse is to hold that no error occurred in the first place.[95] It is this dynamic that may render appellate courts less inclined to recognize structural errors, for which reversal is mandatory, than non-structural errors, for which the harmless-error release valve is at least sometimes available.[96] In this way, the automatic reversal rule may end up diluting, rather than strengthening, structural protections.[97]

But so what? Perhaps it is just an unchangeable fact of the world that appeals court judges are disinclined to reverse convictions on supposed "technicalities." And, from the perspective of a criminal defendant, the question of whether appellate judges should avoid reversals by declaring that no error occurred or by declaring that an error was harmless, seems beside the point. From a broader societal perspective, moreover, the difference may also seem to be of little consequence. True, making harmless error analysis available for structural claims would lessen the pressure on judges to define the substantive law narrowly.[98] But permitting judges to convert "structural" errors into nonstructural ones would also result in harmless-

91. Shepard, *supra* note 9, at 1182–83.

92. Levinson, *supra* note 8, at 891 ("Automatic reversal is obviously a rather severe remedy for any criminal case."); Shepard, *supra* note 9, at 1183 (highlighting examples of cases in which courts have "weakened" structural rights "to avoid applying the drastic remedy of automatic reversal").

93. Shepard, *supra* note 9, at 1186–87.

94. *Id.*

95. *Id.*

96. *Id.* at 1188.

97. *Id.*

98. *Id.* at 1187.

error "losses" for defendants who might have prevailed under a pro-structural-error regime. The right would expand while the remedy contracted, with the sum availability of appellate relief likely remaining much the same.

This analysis of the structural error rule, however, overlooks its distinctively problematic spillover effects. The difficulty is that the rights-limiting effect of the automatic reversal remedy feeds back into *trial* court resolution of structural claims. In contrast to appellate courts, which resolve claims of trial error after the fact, trial courts resolve most such claims as they arise. Consequently, the remedial costs of recognizing an error at trial are far less significant than the costs of doing so on appeal. If, for instance, a trial court finds that testimony violates a hearsay rule, it can simply strike the testimony from the record.[99] If it finds that physical evidence was unlawfully obtained, it can prohibit introduction of the evidence.[100] If it finds that a juror has behaved improperly, it can replace that juror with an alternate.[101] In each of these instances, the substantive error gets remediated without significant disruption to the case itself. For the appellate judge, however, these same errors point to one and only one remedial option: reversing the conviction outright and requiring retrial from scratch.

Thus we encounter another instance of cross-remedial spillover. When the high remedial costs of automatic reversal prompt an appellate court to declare that no trial error occurred, the appellate court creates precedents that trial courts must follow, even though trial courts operate in a setting where the same claims of error are far less costly to vindicate. Considerations specific to the remedial request for *appellate reversal*, in other words, threaten to produce a weaker set of legal protections than what trial court judges might otherwise be willing to endorse.

Consider *Batson v. Kentucky*'s prohibition on race-based peremptory challenges.[102] *Batson* errors are structural errors, mandating automatic reversal on appeal.[103] This state of affairs has likely narrowed the scope of *Batson* protections, with appel-

99. FED. R. EVID. 3(d).

100. *See* Mapp v. Ohio, 367 U.S. 643, 654–55 (1961).

101. FED. R. CRIM. P. 24(c).

102. 476 U.S. 79 (1986).

103. The Supreme Court has never expressly declared that *Batson* errors are structural, but lower courts have unanimously characterized them as such. *See* Jason Mazzone, Batson *Remedies*, 97 IOWA L. REV. 1613, 1618 n.28 (2012).

late courts, in Professor Pamela Karlan's words, "surreptitiously redefin[ing] the right" to avoid the costly remedy of automatic reversal and full-scale retrials.[104] But remediating *Batson* errors at trial is cheap; the judge need only respond to a violation by prohibiting the exclusion of a challenged juror, or empaneling a new jury before the trial begins.[105] Left to their own devices, then, trial courts might give *Batson* more bite than appellate courts have accorded it. Instead, these courts must take their guidance from their appellate-court counterparts, who adjudicate *Batson* claims in connection with high-cost remedial requests.[106]

Another example involves the Sixth Amendment right to public trial. Most appellate courts regard this right as structural,[107] meaning that they cannot avoid automatic reversals by invoking the harmless error rule. Perhaps for this reason, several courts have grafted a "triviality standard" onto the right itself.[108] Thus, as the D.C. Circuit has explained, even unjustified exclusions of the public from trial-level proceedings may not violate the Constitution, so long as these closures do not infringe the "values served by the Sixth Amendment."[109] Although the court has insisted that applying this triviality standard does not equate to conducting harmless error analysis,[110] the two tests operate in similar ways. Both seek to screen out Sixth

104. Karlan, *supra* note 12, at 2021.

105. *See* Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 500 (1998) ("There will always be a reluctance to reverse a conviction because the costs of retrying any case are high. Trial court actors, not faced with those costs, can actually afford to be more singleminded in their devotion to the Constitution—if they want to be."). For a survey and discussion of the various ways in which trial judges have remediated *Batson* violations, see Mazzone, *supra* note 103, at 1629–30.

106. There is, to be sure, some play in the joints here. Citing Professor Karlan's work, Daryl Levinson has suggested that, in fact, "the *Batson* right as applied by trial judges, with a mild remedy, is significantly more expansive than the *Batson* right as applied by appellate judges, with a severe remedy." Levinson, *supra* note 8, at 892. If correct, such data would reveal that *Batson* law has been secretly disaggregated across the trial-court and appeals-court remedial contexts, with the former adhering to a more robust version of the doctrine than the latter. Even so, the data would not disprove the existence of cross-remedial spillover; perhaps trial judges are still enforcing the *Batson* right less generously than they would be in the absence of the appellate court guidance they currently receive.

107. Waller v. Georgia, 467 U.S. 39, 44–46 (1984).

108. *See, e.g.*, United States v. Perry, 479 F.3d 885, 890–91 (D.C. Cir. 2007); Peterson v. Williams, 85 F.3d 39 (2d Cir. 1996).

109. *See Peterson*, 85 F.3d at 43.

110. *See id.* at 42.

Amendment harms of insufficient severity to warrant reversal of a conviction on appeal. Nevertheless, a non-trivial difference marks the two rules. Unlike the harmless error doctrine, which governs only the availability of the reversal remedy, the "triviality standard" governs the availability of *all potential remedies* linked to the public-trial right. Thus, for example, if a trial judge realizes that members of the public were improperly excluded from a portion of voir dire proceedings, the triviality standard might justify her decision not to redo jury selection. In making that decision, however, the judge would be applying a standard that appellate courts had developed in the interest of preserving convictions after the fact.[111]

E. PROBABLE CAUSE AND THE EXCLUSIONARY REMEDY

Yet another instance of the spillover problem might be located in the complex interrelationship between substantive Fourth Amendment law and the remedy of suppressing unlawfully acquired evidence. Suppression motions can make or break a criminal prosecution, with success for the defendant often meaning that an obviously culpable criminal goes free.[112] While some commentators have criticized this aspect of the exclusionary rule as resulting in the over-protection of Fourth Amendment rights,[113] others have attacked it for doing precisely the opposite. "Judges," as Professor Akhil Amar has explained, "do not like excluding bloody knives."[114] Consequently, when asked to suppress evidence on Fourth Amendment grounds, judges find ways to "distort doctrine, claiming the Fourth Amendment was not really violated."[115] Other scholars

111. This claim depends on the assumption that trial court judges care more about getting the law right than they do about shielding their judgments from appellate reversal. Otherwise, a triviality exception to the public trial rule would render our hypothetical judge no more inclined to remediate a minor infringement of the right than would a rule providing for harmless error analysis on appeal. To a purely results-oriented judge, *both* a triviality exception to the right *and* a harmless error exception to the remedy reduce the likelihood of reversal on appeal, and neither rule would therefore motivate the judge to remediate a public trial violation immediately after it occurred. But for judges who seek compliance with the substantive law for its own sake, the impact of an exception to the public trial right would be more pronounced than an exception to the reversal remedy on appeal.

112. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.).

113. *See, e.g.*, *id.* at 589 (suggesting that, under an exclusionary regime, "protection for the individual would . . . be gained at a disproportionate loss of protection for society").

114. Amar, *supra* note 9, at 799.

115. *Id.*

have echoed this concern,[116] and some judges themselves have recognized this play of cause and effect.[117] Drawing on his own experience on the federal bench, for example, Judge Guido Calabresi has stated that "the exclusionary rule has been the reason for more diminutions in privacy protection than anything else going on today."[118]

In addition to judges' visceral (and some would say understandable) reluctance to grant remedial windfalls, the suppression remedy presents a further deterrent to the recognition of Fourth Amendment violations: hindsight bias. If judges are like the rest of us, then they will have a hard time preventing their ex post knowledge about the outcome of a search from affecting what is supposed to be an ex ante inquiry into its lawfulness.[119] And that poses an especially acute problem in criminal cases, where the only searches that come up for Fourth Amendment

116. *See, e.g.*, Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 959–66 (1983); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 656–60 (2011); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1407 (2007); Leong, *supra* note 13, at 431; Jack Wade Nowlin, *The Warren Court's House Built on Sand: From Security in Persons, Houses, Papers, and Effects to Mere Reasonableness in Fourth Amendment Doctrine*, 81 MISS. L.J. 1017, 1077 (2012).

117. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 76 (1992) (drawing on survey responses from judges and lawyers to suggest "that judges in Chicago often knowingly credit police perjury and distort the meaning of the law to prevent the suppression of evidence and assure conviction").

118. Calabresi, *supra* note 9, at 112.

119. *See* Jonathan D. Casper, Kennette Benedict & Jo L. Perry, *The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision Making*, 13 LAW & SOC. INQUIRY 279, 298–300 (1988) (finding evidence of hindsight bias in test jurors' assessment of hypothetical searches); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 802–05 (2001) (finding experimental evidence of hindsight bias in judges' assessment of a hypothetical Rule 11 sanctions issue); Andrew E. Taslitz, *Foreword: The Death of Probable Cause*, 73 LAW & CONTEMP. PROBS., Summer 2010, at viii ("Ample psychological theory and empirical data, albeit mostly in other contexts, supports the idea that hindsight bias is at work in the probable-cause determination."). *But see* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Probable Cause, Probability, and Hindsight* (Vand. Pub. L. Res. Paper No. 11-25, 2011) (presenting experimental evidence indicating that judges may be resistant to hindsight bias in evaluating searches for probable cause), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877125; Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1313–18 (2005) (same).

review have already yielded incriminating evidence.[120] Try as judges might to ignore the fact of a search's success, they may still sometimes succumb to hindsight bias in asking whether agents had probable cause to conduct the search in the first place. In Professor William Stuntz's words, "[i]t must be much harder for a judge to decide that an officer had something less than probable cause to believe cocaine was in the trunk of a defendant's car when the cocaine was in fact there."[121] And if that is so, the suppression remedy will produce a narrowed set of Fourth Amendment protections, especially where probable cause determinations are involved.

An oft-cited cost of these phenomena is the under-deterrence of police misconduct.[122] The longer the exclusionary remedy remains the primary means of Fourth Amendment enforcement, the more littered with loopholes the right will become, and law enforcement officers will become freer to impinge on individual privacy interests. But there is a further cost as well, which involves cross-remedial spillover in Fourth Amendment lawmaking. The exclusionary rule is not the only mechanism for enforcing Fourth Amendment rights; litigants may also raise Fourth Amendment claims in connection with requests for prospective or monetary relief. In addition, magistrate judges review warrant applications before deciding whether or not to authorize a search. Cross-remedial application of Fourth Amendment law might well expose these remedial environments to the right-limiting influences of the exclusionary rule.

Consider, for instance, the interplay between after-the-fact suppression hearings and before-the-fact evaluations of warrant applications. Warrant proceedings do not present all of the rights-constricting tendencies that affect after-the-fact decisions about the exclusionary remedy. Ex ante review of a search warrant application raises only the attenuated possibility that denying the warrant at that time will preclude the government from later prosecuting a criminal—the reviewer, after all, does not know whether the search will bear fruit or whether some later investigatory effort will turn up the evidence in

120. *See* Slobogin, *supra* note 12, at 403.

121. Stuntz, *supra* note 12, at 912.

122. *See* Lawrence Rosenthal, *Seven Theses In Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 545 (2013) (noting that "some commentators have complained that the Court's willingness to recognized exceptions to exclusion has unduly compromised its deterrent efficacy").

any event—whereas ex post review of a suppression motion presents the *certainty* that invalidating the search means withholding inculpatory evidence from a jury's eyes. For this reason, as Professor Stuntz once surmised, it may well be that in unsettled areas of law, "magistrates apply a higher standard to warrant applications before the fact than do judges in suppression hearings after the fact."[123] But it also *must* be that once the law is settled, appellate and trial judges will apply the same settled law—settled law that comes from the hands of appellate courts that act with the exclusion of evidence in mind. In other words, magistrate judges' probable cause determinations must comport with Fourth Amendment precedents their superiors have created, and these precedents often involve requests to suppress probative evidence. The remedy-specific influences of the exclusionary rule, combined with the cross-remedial uniformity of Fourth Amendment law, would thus render magistrates' review of warrants less rights-protective than they otherwise would and should be.

That, in any event, is the prima facie case for attributing cross-remedial spillover effects to the exclusionary rule. But the case requires some hedging, for two reasons. To begin, and as I will discuss further in Parts III and IV, the remedial and substantive rules in the Fourth Amendment context have already developed some safeguards against spillover. The Supreme Court, for instance, has carved out various exceptions to the exclusionary remedy,[124] which, framed in terms of the remedy rather than the right, allow courts to deny exclusionary relief without affecting Fourth Amendment protections in other remedial settings. Thus, while the exclusionary rule is *theoretically* capable of generating cross-remedial spillover effects, the law of evidentiary exclusion may have evolved to a point at which cross-remedial spillover no longer presents a serious problem.

Second, it may be incorrect to presume that magistrate judges who review warrant applications ex ante would develop a stricter set of probable cause requirements if left to their own devices. To be sure, the ex-ante warrant application process does not raise the specter of hindsight bias, and it also involves a "remedy" (namely, the denial of a warrant application) that imposes fewer expected costs on the government than the outright suppression of evidence. (In particular, denial of a search

123. Stuntz, *supra* note 12, at 936–37.

124. *See supra* Part III.A.

warrant does not let anyone go free; it simply forces law enforcement officers to develop a stronger evidentiary basis for their suspicions before conducting a search.) At the same time, the warrant-application setting may present its own set of rights-deterring forces. Most importantly, these proceedings are ex parte affairs, with repeat players on the government side arguing unopposed for the granting of a warrant application.[125] In addition, officers may sometimes file warrant applications in the course of urgent, high-pressure investigations, in which even a one-off denial might preclude the government from obtaining valuable evidence or preventing a dangerous suspect from doing further harm.[126] In these circumstances, even marginally meritorious warrant applications would enjoy a high likelihood of success, perhaps even more so than government attempts to defeat suppression motions ex post. For all of their supposed hostility to Fourth Amendment rights, then, post-search requests for the exclusionary remedy may be at least as conducive to the recognition of Fourth Amendment protections as a magistrate's review of warrant applications. And, if that is so, then the exclusionary remedy would not be responsible for causing, via spillover, an artificial narrowing of magistrate-level Fourth Amendment law.

With these two caveats in mind, however, it remains fair to say that the remedy-specific forces of the suppression-hearing context might sometimes render judges considering suppression motions less likely to vindicate Fourth Amendment rights ex post than judges considering warrant applications ex ante. And, in any event, even if the exclusionary remedy does not cause major spillover problems within the warrant-application context, it may still artificially constrict the availability of other Fourth Amendment remedies, such as monetary and prospective relief for the victims of unlawful searches and seizures. In sum, spillover problems caused by the exclusionary remedy at least present a risk worth attending to. As long as the exclusionary remedy remains an important means of enforcing Fourth Amendment protections, and insofar as the Fourth Amendment right applies uniformly across remedial contexts,

125. *See* FED. R. CRIM. P. 41 (providing for ex parte review of warrant applications).

126. The "exigent circumstances" exception to the warrant requirement, *see, e.g.*, United States v. Robinson, 414 U.S. 218, 242 (1973), should reduce the number of applications filed under emergency circumstances, but law enforcement officers might sometimes wish to err on the side of caution.

the rights-weakening forces associated with the exclusionary remedy will threaten to blunt the impact of the Fourth Amendment in cases that have nothing to do with the suppression of evidence.

F. INEFFECTIVE ASSISTANCE OF COUNSEL AND DOCTRINAL BORROWING

The preceding examples have illustrated cross-remedial spillover occurring within single, discrete areas of doctrine. Yet similar forms of spillover can also occur as a result of explicit acts of doctrinal "borrowing."[127] This practice, as Professors Nelson Tebbe and Robert Tsai have defined it, occurs when courts "import[] doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends."[128] The basic idea is straightforward: When separate doctrinal domains confront analogous problems, courts can reference their prior work from one domain to facilitate their present work in another. This process, in turn, can give rise to spillover across remedies.

Consider, for instance, the relationship between the Sixth Amendment right to effective assistance of counsel and state-based attorney malpractice law. In *Polk County v. Dodson*, the Supreme Court foreclosed the use of civil § 1983 actions to remediate Sixth Amendment violations by state public defenders, thus effectively channeling all federal ineffective assistance adjudication to collateral attacks on final criminal convictions.[129] Consequently, Sixth Amendment case law has evolved in close association with the habeas remedy itself, with considerations of finality and interstate comity exerting a powerful influence on courts' disposition of ineffective assistance claims.'[130] Simply

127. Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 460 (2010).

128. *Id.* at 461.

129. *See* Polk County v. Dodson, 454 U.S. 312, 325 & n.18 (1981) (prohibiting the use of 42 U.S.C. § 1983 to remedy ineffective assistance claims against public defenders); *see also* Massaro v. United States, 538 U.S. 500, 509 (2003) (holding that an ineffective assistance claim arising from *federal convictions* may be brought under 28 U.S.C. § 2255 regardless of whether it could have been raised on direct appeal).

130. For instance, the Court in *Strickland v. Washington* defended its adoption of a "prejudice" requirement for ineffective assistance claims by explaining that the nonprejudicial errors would not undermine "reliance on the outcome of the proceeding." 466 U.S. 668, 691–92 (1984). It also rejected an alternative standard as "inadequate because it provides no way of deciding what impairments are sufficiently serious to *warrant setting aside the outcome*

put, courts often conflate the substantive validity of an individual's ineffective assistance claim with the remedial propriety of granting habeas relief.

Standing alone, none of this is necessarily problematic. *Dodson* has effectively isolated ineffective assistance litigation to the habeas context, so Sixth Amendment adjudication presents no other remedial regime for the remedy-specific influences of the habeas remedy to distort. With no other remedies on the table, it makes no difference (from the spillover perspective) whether courts channel their reluctance to grant relief into substantive Sixth Amendment doctrine, or into remedy-specific rules of habeas doctrine Even if remedy-specific influences end up affecting the scope of the Sixth Amendment right, very few (if any) Sixth Amendment cases will arise in which these remedy-specific influences won't already be present.

Nevertheless, spillover has arisen as a result of state courts' decisions to "borrow" from the constitutional ineffective assistance standard in shaping their own standards of attorney malpractice liability.[131] This act of borrowing, some have argued, unfairly stacks the deck against malpractice plaintiffs.[132] Federal ineffective assistance claims usually arise in the course of collateral attacks on criminal convictions.[133] And in these

of the proceeding." *Id.* at 693 (emphasis added). These and other aspects of the *Strickland* decision have led some commentators to characterize it as conflating questions of right and remedy. *See, e.g.*, Peter A. Joy & Kevin C. McMunigal, *Conceding Guilt*, 23 CRIM. JUST. 57, 58 (2008) (suggesting that in *Strickland* "the contours of a violation of rights and the question of remedy bec[a]me confused"); Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G REP. 110, 111 (2012) (characterizing *Strickland* "as part of the line of habeas cases that were intended to minimize meddling by federal courts with state court judgments (especially death sentences)").

131. For example, some states apply claim preclusion rules that prohibit the bringing of malpractice claims against attorneys whose conduct has already withstood a *Strickland* challenge in a criminal case. *See* Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1270–71 (2003); Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV. 719, 720, 725–26 (1991).

132. *See* Treyz, *supra* note 131, at 721, 723; *see also* Duncan, *supra* note 131, at 1272 ("Although there is obviously value in the preservation of judicial resources, courts are wrong in concluding that ineffective assistance of counsel claims and criminal malpractice claims require equivalent findings in every instance.").

133. *Cf.* Eve Brensike Primus, 92 CORNELL L. REV. 679, 691 (2007) (noting that "defendants typically wait until their appeals are over, and then attack

contexts, as one commentator has pointed out, "[t]he institutional and societal interest in the finality of convictions may create a reluctance to reverse a conviction even where the awarding of damages would be appropriate."[134] In this way, the "borrowing" of constitutional effective assistance doctrine within state malpractice law creates undesirable spillover, rendering malpractice law more disadvantageous to plaintiffs than it otherwise would be.[135] Even though nominally separate substantive domains, constitutional ineffective assistance standards and common law malpractice standards have begun to merge into a single substantive standard with cross-remedial scope.

Remedial law and substantive law, as we have seen, are interdependent; the former dictates not just the real-world efficacy of the latter, but also, to a large extent, its shape and scope. That reality, in my view, is inevitable—and not necessarily unfortunate. As a conceptual matter, it is hard to think about rights apart from the remedial consequences of their existence.[136] Further, the interplay between remedy-related vari-

their convictions collaterally by alleging that their trial attorneys were constitutionally ineffective").

134. Treyz, *supra* note 131, at 727.

135. Nor does "spillover" occur exclusively across remedial boundaries; indeed, the phenomenon will arise any time contextual factors affect the definition of doctrinal rules that govern when these contextual factors are absent. "Spillover across space" might occur, for instance, when constitutional rights are defined in cases involving *state* government, but then govern in subsequent cases involving the *federal* government. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 129 (1970) (Harlan, J., dissenting) (worrying that the Court had "dilute[d] a federal guarantee in order to reconcile the logic of 'incorporation,' the 'jot-for-jot and case-for-case' application of the federal right to the States, with the reality of federalism"); *see also* Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005). Or "spillover across time" might occur when *stare decisis* causes a holding from Time A to maintain operative effect at a later Time B, at which point the holding might no longer make sense. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting) (advocating for a relaxation of *stare decisis* principles in the face of changed circumstances, so as to ensure that "this Court . . . bring[s] its opinions into agreement with experience and with facts newly ascertained"). Some of what this Article has to say about the spillover problem as applied to cross-remedial rules might thus carry implications for cognate forms of spillover within other areas of the law.

136. *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678–79 (1983) ("The prospect of actualizing rights through a remedy . . . makes it inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.").

ables and rights-related decisions often makes sense.[137] Some scholars, for instance, applaud the rule of lenity, citing the uniquely liberty-infringing dynamics of the criminal setting as a legitimate reason to construe criminal statutes narrowly.[138] More controversially, one might applaud, or at least refrain from condemning, judges' contraction of substantive constitutional protections in response to the exclusionary remedy. If indeed it is undesirable to let the "criminal . . . go free because the constable has blundered,"[139] some level of substantive narrowing may be an appropriate response to an especially potent means of redress.

These points suggest that the project of trying to stop remedies from affecting substantive law is a nonstarter. It does not follow, however, that we should ignore the phenomenon altogether. To the contrary, precisely because remedies influence rights, courts must consider the types of substantive outcomes that particular remedial regimes favor. And that is especially so when substantive norms are defined in multiple remedial regimes, such that the remedy-specific influences of one regime stand ready to spill over into another.

II. NON-DISAGGREGATION RESPONSES

Cross-remedial spillover occurs when two things happen: first, a remedial environment influences the definition of a substantive rule; and second, the same substantive rule carries force in a different remedial environment.[140] Efforts to mitigate spillover must therefore target at least one of these two events. That is, courts can combat spillover either by calibrating the ways in which remedial dynamics affect the definition and implementation of a given substantive rule, or by varying the application of substantive rules across different remedial contexts.

This Section identifies and evaluates strategies of the first variety, which aim to reduce spillover across remedies without in any way affecting the cross-remedial uniformity of substan-

137. *Cf.* Fallon, *Linkage*, *supra* note 10, at 692 ("There should be no normative objection to courts openly seeking to achieve the optimal balance of merits, justiciability, and remedial doctrines as long as they deal responsibly with such legally pertinent considerations as the constitutional text and judicial precedent.").

138. *See, e.g.*, Price, *supra* note 77, at 910–25; Solan, *supra* note 77, at 59–60.

139. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

140. *See supra* note 22 and accompanying text.

tive legal norms. I focus in particular on three such strategies, which I call (1) "all contexts" rights adjudication; (2) "remedial equalizing"; and (3) "remedial diversifying." All three strategies, we will see, are capable of reducing spillover across remedies, by mitigating the extent to which a single remedy distorts the cross-remedial application of substantive norms. We will also see, however, that all three strategies suffer from significant weaknesses, owing largely to their inability to accommodate variation across remedial lines.

A. "ALL CONTEXTS" RIGHTS ADJUDICATION

One anti-spillover strategy begins with a call for increased judicial awareness of the potential for the spillover problem to happen. The number one evil, on this view, is the judge who adjudicates substantive claims while wearing remedial blinders—focusing only on the particular remedial request before her without considering how the substantive law she creates will operate in other remedial settings. We thus improve the spillover situation by directing judges' attention to it; the hope is that a greater mindfulness of spillover across remedies will lead to reductions in its occurrence.

This idea has gained traction in the literature on hybrid statutes. After recognizing the "core principle" that the meaning of hybrid statutes must remain fixed across varying remedial contexts,[141] Professor Margaret Sachs has encouraged courts to abide by what she calls the "all contexts" rule: "In deciding upon the single interpretation [of a hybrid statute] courts should not focus solely on the immediate enforcement context. Rather, they should apply the 'all contexts' rule, which requires them to consider every action to enforce the prohibition under the hybrid statute and the policies pertinent to each."[142]

This strategy is reflected in Justice Souter's plurality opinion in *Thompson/Center Arms*. Recognizing the National Firearms Act's potential applicability in criminal proceedings, Justice Souter invoked the rule of lenity to resolve an interpretive ambiguity, even though the immediate case before him pre-

141. *See* Sachs, *supra* note 73, at 1033; *see also* FCC v. Am. Broad. Co., 347 U.S. 284, 296 (1994) (noting, with respect to civil and criminal enforcement of a hybrid statute, that "[t]here cannot be one construction for the [FCC] and another for the Department of Justice").

142. Sachs, *supra* note 73, at 1033–34.

sented a request for civil relief.[143] The *Thompson/Center Arms* plurality, in other words, interpreted the statute with all remedial contexts in mind. It did not let the remedial particulars of the case interfere with its resolution of a cross-remedial substantive question.

Although Professor Sachs's argument applies to hybrid statutes, we could extend the "all contexts" principle to other doctrinal areas in which spillover occurs. For instance, we might criticize the Court in *Washington v. Davis* for failing to consider how a discriminatory purpose requirement would play out in the criminal setting, just as we might criticize the Court in *Paul v. Davis* for failing to consider how its "stigma-plus" rule would play out beyond the confines of constitutional tort cases. In these and other cases, the critical error takes the form of a judicial failure to appreciate the cross-remedial nature of the rules being crafted. When judges define rules that traverse remedial boundaries, they ought at least not pretend to be doing otherwise.

But the "all contexts" approach hardly offers a panacea for spillover-related difficulties. For one thing, the rule seems ill equipped to handle the variety of subtle ways in which remedies influence the shaping of substantive law. Many of the examples we encountered in Part I reveal remedial particularities that exert a quiet, unconsidered effect on courts' adjudication of rights-related claims. When that is the case, a renewed commitment to "all contexts" rights adjudication does not seem likely to ameliorate the initial distortions that remedies are creating. Telling courts when and when not to apply the rule of lenity is one thing; but telling them when and when not to suffer from hindsight bias[144]—or when not to blanch at the prospect of reversing a conviction for structural error[145]—is altogether different.[146] These tendencies are hardwired into human

143. United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517–18 (1992).

144. *See, e.g.*, *supra* note 119 and accompanying text.

145. *See, e.g.*, *supra* note 104 and accompanying text.

146. For example, I earlier suggested that the exclusionary remedy artificially reduces the degree to which magistrate judges enforce Fourth Amendment rights at probable cause hearings. *See supra* Part I.E. The mechanism is straightforward: (1) circumstances unique to suppression hearings deter the finding of Fourth Amendment violations by trial and appellate judges; and (2) magistrate judges, operating in the absence of the rights-contracting features of suppression hearings, must nonetheless take their cues from the very same doctrines their superiors have crafted. This is an area where "all contexts" rights adjudication seems unlikely to solve the spillover problem. The deter-

psychology. Trying to consider "all remedial contexts" in the face of these impulses seems no less futile than trying not to feel them in the first place.

A second and more severe shortcoming with the "all contexts" strategy lies in its inability to mediate between the competing needs presented by different remedial environments. We saw in connection with *Thompson/Center Arms* that the plurality's resolution of hybrid-statute issue was in one sense unsatisfactory; it did account for all remedial contexts, but only in a way that favored the remedial influences of the criminal context over the civil context.[147] That fact should not surprise us, because the plurality was trying to adopt a one-size-fits-all solution for two very different remedial requests. As long as rights-based law must apply uniformly across remedial contexts, this same basic problem will arise. Suppose, for instance, that having considered all remedial contexts, the Court in *Washington v. Davis* concluded that a discriminatory purpose requirement was inapt for criminal proceedings but apt for civil proceedings. What then? Either the Court would have to stick to its guns and adopt a discriminatory purpose requirement, notwithstanding the requirement's clumsy fit with criminal equal protection claims, or it would have to discard the discriminatory purpose requirement and initiate the parade of horribles in civil cases over which the majority lost so much sleep. Openly embracing the "all contexts" approach would at least have allowed the Court to choose between the lesser of these two evils. But doing so would not have made the evils go away.[148]

In other words, the "all contexts" strategy solves the spillover problem only if we assume that one and only one substantive rule can achieve optimal results across a variety of different remedial settings. But that is a dubious premise and, once it is jettisoned, we should not expect "all contexts" rights-making to deliver much in the way of anti-spillover success. To

rent forces of the exclusionary remedy are powerful and difficult to resist, *see supra* notes 112–21 and accompanying text, so merely exhorting trial and appellate judges to ignore hindsight bias and to lighten up on criminal defendants will not much improve the situation.

147. *See Thompson/Ctr. Arms*, 504 U.S. at 517–18.

148. Professor Sachs herself has noted that the "all contexts" strategy will often require compromise of one form or another. *See* Sachs, *supra* note 73, at 1033–34 (noting that the "policies pertinent to" different remedial regimes can sometimes "conflict," and that when that is the case, "courts should seek the most appropriate compromise").

be sure, the strategy might sometimes mollify spillover across remedies by preventing considerations specific to one remedial environment from *unduly* dominating a judge's construction of a cross-remedial rule. But sometimes, even the most thorough consideration of "all remedial contexts" may fail to yield a rule that properly accommodates the divergent needs of the contexts being considered. And when that is the case, judges hoping to alleviate spillover across remedies must turn to other techniques.

B. REMEDY EQUALIZING

A second response to the spillover problem might involve the manipulation of remedies themselves. When one remedial rule produces significant substantive distortions in other remedial settings, courts could mitigate spillover effects by tinkering with the structure of the remedy on which that rule is based. If the particularities of one remedial environment are interfering with a right's application in another, then courts could make changes to one (or more) of the environments themselves, so as to equalize their effects on the definition of substantive norms.

Assume, for instance, that within Fourth Amendment law, the exclusionary remedy causes unwanted spillover into other domains where the pressures against vindicating substantive claims are less intense. In response to this problem, we could simply replace the exclusionary remedy with something more modest. We could, for instance, introduce a regime that channels all Fourth Amendment claims into damages actions under *Bivens* and § 1983;[149] we could replace the exclusionary remedy with an administrative damages remedy;[150] we could replace it with a sentencing reduction remedy;[151] we could replace it with enforcement by an internal ombudsman;[152] and so forth.[153] In

149. *See, e.g.*, Amar, *supra* note 9, at 812–15.

150. *See, e.g.*, L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 743–55 (1998); Slobogin, *supra* note 12, at 405–20.

151. *See, e.g.*, Calabresi, *supra* note 9, at 116–18.

152. *See, e.g.*, Robert P. Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH L. REV. 317 (1973); Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939 (1982).

153. *See, e.g.*, Barnett, *supra* note 116, at 969–80 (restitutionary damages remedy); Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth*

comparison to the exclusionary remedy, these and other alternative remedies might less severely deter the judicial recognition of Fourth Amendment violations.

Consequently, such replacement remedies would do less cross-remedial damage to Fourth Amendment law, evening out—to some extent—the effects on substantive Fourth Amendment law that each applicable Fourth Amendment remedy exerts. This could all be done, moreover, while maintaining absolute uniformity within the substantive law itself. The same Fourth Amendment law would apply regardless of whether a claimant sought damages, injunctions, sentencing reductions, or some other remedy for an unlawful search. But spillover would still abate as a result of our remedial reforms. No longer would one Fourth Amendment remedy exert disproportionate constricting effects on the law's application within other remedial contexts; instead, Fourth Amendment adjudication would occur against the backdrop of remedial regimes with more or less equivalent effects on substantive outcomes.

Here is another example of how the equalizing strategy might work: I earlier suggested that appellate judges will be less likely to identify "structural" trial errors on appeal in comparison to trial-level judges evaluating structural claims as they arise.[154] The culprit here is the reversal remedy, which renders after-the-fact remediation of a structural error far more costly than contemporaneous remediation of the same error at the trial level. That being so, Congress could provide for guaranteed interlocutory review of all trial-court rulings on structural claims. Appellate court judges would then confront allegations of structural error in a remedial environment similar to the one that prevails in the trial court setting. Recognizing structural error on appeal would no longer mean vacating the outcome of a completed trial; rather, it would mean reversing only a particular order issued before a trial has concluded. Again, the reform might help to "equalize" remedial influences on the rights and thereby lessen the extent of spillover from one remedial setting to another.

Even more extreme versions of this strategy might strive to isolate the adjudication of substantive norms within one and only one remedial setting. Congress, for instance, could stop passing hybrid statutes, choosing between civil or criminal

Amendment Violations as Direct Criminal Contempt, 85 CHI.-KENT L. REV. 241, 249–53 (2010).

154. *See supra* Part I.D.

penalties as the sole enforcement mechanism for each new substantive norm it enshrines. Courts could wipe out civil rights tort law, by abolishing the *Bivens* action or overruling *Monroe v. Pape*,[155] thus in effect relegating the enforcement of constitutional rights solely to "defensive" remedies invoked during government-initiated proceedings. Congress could jettison the right to an appeal from criminal convictions, reasoning that trial-level rights adjudication would thereby become less vulnerable to interference from the remedy-specific influences of appellate review. And so forth.

But by now it should be obvious that a "remedy equalizing" strategy would mitigate spillover in a highly problematic fashion. Many objectives can, do, and should factor into the design of remedial rules, and only one of these objectives is the reduction of spillover across remedies. Remedies, after all, do not exist merely for the sake of influencing courts' outlook on substantive issues; they serve the primary purpose of operationalizing and enforcing the substantive law on the ground. Thus, even when concerns about spillover might tempt us to scrap one remedial regime in favor of another, other considerations will often counsel strongly against such reform. Mandatory interlocutory appeals for claims of structural error, for instance, might well reduce the extent of spillover that the post-trial reversal remedy brings about. But it would also lengthen the life spans of criminal prosecutions, complicating the prompt presentation of witness testimony and generating extra judicial work. In similar fashion, some alternatives to the exclusionary remedy—even if less likely to generate spillover effects—might be less effective at deterring law enforcement officers from violating core Fourth Amendment guarantees. Are the benefits to be gained from spillover reduction worth the costs to be incurred from weakened Fourth Amendment enforcement? That's the sort of question we should ask when considering whether to pursue large-scale abandonment of now-extant remedial structures. Other considerations should also enter into the calculus: What remedial arrangement is fairest to the constitutional claimant? What remedial arrangement best deters government misconduct? What remedial arrangement is most easily administered by judges? And so on. None of this is to say that we should never reform remedies. Some of the remedial reforms already outlined might be well-founded

155. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Monroe v. Pape, 365 U.S. 167 (1961).

for reasons having nothing to do with the spillover problem. But the project of restructuring remedies implicates far more than the single issue of cross-remedial spillover. It is not worth launching missiles to kill mice.[156] And it may not be worth pursuing large-scale remedial reforms simply for the sake of curbing spillover across remedies.

C. REMEDY DIVERSIFYING

A final "non-disaggregation" strategy draws its inspiration from the fascinating recent scholarship of Professor Nancy Leong.[157] Her core idea involves diversifying the remedial regimes in which a given substantive right gets adjudicated, so as to improve the overall quality of rights-based law.[158] The project, to be clear, targets a somewhat different set of problems than does this Article.[159] But its basic insights might provide

156. Lucas v. S.C. Coastal Comm'n, 505 U.S. 1035 (1992) (Blackmun, J., dissenting).

157. *See* Leong, *supra* note 13.

158. *Id.* at 466.

159. As I understand Professor Leong's argument, the central worry is that the day-in, day-out implementation of a substantive norm in the same remedial setting will weaken judges' *understanding* of the norm itself. If judges do not adjudicate a substantive rule in multiple remedial contexts, Leong posits, they are likely to neglect important interests associated with the rule. *See, e.g.*, *id.* at 462 ("Rights that emerge through litigation in more than one context reflect a richer and more nuanced conception of doctrine."); *id.* at 465 (noting that "single-context rights-making leaves worse off . . . our understanding of Fourth Amendment rights"). Hence arises the need to diversify the remedial settings associated with a given right, so as to ensure that judges remain aware of the full panoply of interests that the right serves to promote. This objective would not necessarily require courts to apply substantive law uniformly across different remedial contexts—in theory, at least, courts could tailor substantive rules according to remedial particularities, while still acquiring an improved understanding of the norm itself. But Professor Leong has at least implicitly suggested that she envisions "multiple context" adjudication working in concert with a *single*, non-disaggregated body of rights-based law. *See, e.g.*, Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561, 1583 (2012) ("Litigation in multiple contexts generates better law. Courts see a wider range of interests and circumstances represented, and are more likely to craft doctrinal rules that will apply appropriately *in all circumstances*." (emphasis added)).

My concern, by contrast, is with the unwanted spillover that occurs when precedent shaped within one remedial context *binds* judges who would otherwise respond differently to cases arising in separate remedial context. The worry, in other words, is that a judge who would like to pursue one particular resolution of a case (and who is fully aware of all the interests implicated by a given substantive norm) must sometimes follow precedent that derived from considerations related to a totally different set of remedial variables. That worry does not necessarily conflict with Professor Leong's worry about deteriothe basis for a third anti-spillover strategy, which would attempt to utilize the process of cross-remedial spillover against itself.

Professor Leong has argued that courts and lawmakers should deliberately structure procedural and remedial rules to ensure that rights adjudication occurs within "multiple contexts." That is so, she argues, because "when litigation of a particular right takes place only in one context, as is the case for many if not most constitutional rights, the inherent features of that context begin to distort the right."[160] Single-context rights-making, among other things, will "tend[] to focus courts on some variables at the expense of others," and will thus generate law that "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."[161] These problems can be avoided, she asserts, if we "adjust incentives so that litigation flourishes freely in multiple contexts."[162]

These observations might form the basis of a third anti-spillover strategy, which would pursue the *diversification* of remedial inputs on substantive law. Whereas the "remedy-equalizing" strategy seeks to even out each existing remedy's effect on a substantive rule, this strategy would strive simply to increase the number of remedies (notwithstanding their divergent influences) that attach to that rule, with the effect that over time the remedy-specific influences will cancel one another out. One might say, for instance, that the centrality of some remedial contexts tends to exert distortive influences on rights-based law—for example, in the manner that the habeas remedy tends to the constrict the right to effective assistance of counsel[163]—and that's just always going to be true. But other remedies, one might say, could exert influences in the other direction—for example, in the manner that damages remedies under § 1983 might permit more frequent judicial declarations that

rated judicial understandings of substantive norms. But my prescribed solution to the problem I've identified might well undermine her prescribed solution to the problem she has identified, at least insofar as the latter requires the uniform application of rights-based law across divergent remedial settings. In my view, that would be a trade worth making.

160. Leong, *supra* note 13, at 407.

161. *Id.*

162. *Id.*

163. *Id.* at 472.

the ineffective assistance right has been violated.[164] If both remedies were to enter the picture, each could serve to moderate the other's influence on the ineffective assistance right, thus allowing judges to strike a better balance between the competing interests at stake. Thus, for instance, ineffective-assistance claimants in habeas proceedings would have more of a fighting chance if they could cite to some ineffective-assistance precedents made in § 1983 proceedings, while continued habeas adjudication of effective-assistance claims will prevent § 1983 actions from creating an effective assistance right that unduly burdens defense attorneys. In short, the diversification strategy would allow courts to use spillover to their advantage, ensuring that over time, a properly balanced—though still uniform—set of substantive rules will emerge.[165]

This strategy too, however, presents significant problems. For one thing, it is not clear that all remedy-specific influences on substantive rules require moderation of the sort that the diversification strategy would provide. Perhaps, for instance, judges in habeas cases are denying ineffective assistance claims at an appropriate rate, given the special concerns about finality that arise when habeas petitioners seek collateral relief. If so, overruling *Polk County v. Dodson* would not provide a necessary corrective to the status quo.[166] Or perhaps an expansion of § 1983 relief would, without more, strike a more appropriate balance between the competing interests in this field of law. In other words, even if the Court did reintroduce the § 1983 remedy for ineffective assistance violations, we might not wish for lower courts to be relying on habeas-based ineffective-assistance precedents when adjudicating damages-based ineffective assistance claims. Professor Leong appears to take it for granted that we should discourage remedial arrangements that "focus courts on some variables at the expense of others."[167] But why should that be? Within some remedial settings it may be sensible to downplay the significance of some variables and to play up the significance of others. (Consider, for instance, the heightened sensitivity to liberty interests—and concomitantly

164. *Id.* at 472–73.

165. The idea here is different from the "all contexts" strategy discussed in Section II.A *supra*. The "all contexts" strategy calls on judges to bear in mind all remedial contexts currently associated with a substantive rule, whereas the diversification strategy calls on judges (and lawmakers) to *increase* the number of remedial contexts associated with that rule.

166. *See* Polk County v. Dodson, 454 U.S. 312 (1981).

167. Leong, *supra* note 13, at 407.

reduced receptivity to government interests—that the rule of lenity reflects in criminal statutory interpretation cases.) And when that is so, the conscious pursuit of diversified remedial inputs would serve to frustrate rather than facilitate sensible balances that status quo regimes have already struck.

In addition, the diversification strategy might cause one remedy's influence on a substantive rule to outrun another's. Sometimes remedy-specific influences might helpfully complement one another, but that is not the only possible outcome of the cross-pollination process that the diversification strategy promotes. Suppose, for example, that we had concluded that criminal adjudication of Fourth Amendment claims is biased in favor of law enforcement interests, whereas civil adjudication of analogous claims is biased in favor of privacy interests.[168] We might envision a salutary averaging process emerging from a greater integration of these two remedial contexts, with the pro-government excesses of the criminal context neutralizing the anti-government excesses of the civil context (and vice versa). But the process might also yield a less happy equilibrium, with the doctrinal influences of the one remedial regime overcompensating for (or perhaps totally overwhelming) those of the other. Perhaps, for instance, the diversification strategy would repair Fourth Amendment analysis in criminal cases, but only at the expense of rendering it too hostile to government interests in civil cases. Or perhaps it will repair Fourth Amendment analysis in civil cases, but only at the expense of rendering it too pro-government in criminal cases. It is hard to know. Common law adjudication is a path-dependent process, whose outputs are highly sensitive to small fluctuations in the sequencing and frequency of the different inputs it digests.[169] So, while it's entirely possible that multiple-context rights-adjudication could alleviate spillover in helpful ways, the experiment could also backfire.

168. *Compare id.* at 463 (noting that that criminal adjudication of Fourth Amendment claims tends to foreground the "evidence-gathering interest of law enforcement" while giving too little attention to "other interests that may or may not justify the use of force during the same police-citizen interaction"), *with id.* at 452 (speculating that civil adjudication of Fourth Amendment claims tends to "skew[] lawmaking by focusing courts' attention on innocent plaintiffs—who may be unrepresentative of all those on whom force is used—and on law enforcement interests relating to civilian violence and officer safety—which may fail to capture many significant law enforcement interests").

169. *See* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 622–50 (2001).

Finally, even assuming that the diversification strategy would improve the quality of substantive doctrine, there remains the question of whether the game is worth the candle. Increasing the number of remedial inputs on substantive law necessarily means increasing the number of remedies available to individual litigants, whether through the direct introduction of new causes of action, or through indirect reforms to immunity doctrines, rules regarding attorneys' fees, jurisdictional and justiciability requirements, and so forth.[170] And so, we must ask: are the benefits to be gained from a more holistic, all-things-considered body of rights-based law worth the costs that will result from letting more and more claimants into the courthouse? We might worry, among other things, about an avalanche of frivolous cases, crowded judicial dockets, and unwanted chilling effects on government behavior.[171] Even more troubling is the danger that the project will create a boomerang effect, as judges faced with a significant expansion of constitutional remedies would respond with reactionary contractions in the scope of constitutional guarantees.[172] These bad results—or even the risk of them—may not be worth enduring merely to foster the development of a more cross-fertilized body of substantive law.

* * *

Each of the non-disaggregation strategies that I have outlined in this Part suffers from serious problems. These problems, moreover, stem largely from the non-disaggregating nature of the strategies themselves. Courts can adjudicate substantive law with "all remedial contexts" in mind, but they still must negotiate unsatisfactory compromises across varying remedial environments. Courts can "equalize" remedial structures, so as to reduce the extent of spillover from one domain to another, but by equalizing these structures they will tamper with a whole host of other priorities that the structures themselves have been designed to promote. And courts can diversify the remedial settings in which they fashion substantive rules,

170. *See* Leong, *supra* note 13, at 477.

171. *See generally* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013) (separating out and evaluating the validity of arguments along these lines).

172. Professor Leong herself notes this possibility. *See* Leong, *supra* note 13, at 477.

but only by incurring the risk of exacerbating rather than ameliorating spillover across remedies. The strategies all carry limited promise, in other words, because they attempt to force different types of feet into one and the same shoe.

That being so, we should look for productive ways in which to scale back the uniform, cross-remedial operation of the substantive law. Rather than target the manner in which particular remedies exert influences on the content of particular substantive rules, courts should focus their energies on preventing those influences from migrating into remedial environments where they would not otherwise have taken hold. That is, in my view, a more promising approach to the problem of spillover across remedies. It is also, as the next section shows, an approach that the law has already begun to pursue.

III. DISAGGREGATING SUBSTANTIVE LAW

Though not often admitting to it, courts have sometimes departed from the idea that substantive rules should apply uniformly across different remedial contexts. They most often have achieved the departure through the development and use of built-in *exceptions* to remedial rules. Remedial exceptions, I argue, represent the primary means by which courts manage cross-remedial spillover. When, for instance, a court cites the qualified immunity rule as the basis for denying a claim for damages under § 1983, it leaves itself free to vindicate similar substantive claims raised in connection with different remedial requests. When a court cites the good-faith exception to the exclusionary rule as the basis for its denial of a suppression motion, the decision leaves open the possibility that identical government conduct might still trigger other forms of relief. And when an appeals court cites the harmless error rule as the basis for not reversing a judgment below, it leaves trial judges free to remediate identical errors in future cases. Remedial exceptions thus enable judges to deny relief in a manner that leaves the operation of other remedies unaffected. Rather than reject a substantive claim on its merits, judges may instead reach for an exception to the *remedy* itself, and thereby create precedent that lacks cross-remedial effect.

The upshot of all of this is disaggregated rights across remedies.[173] With remedial exceptions in place, one substantive

173. A small terminological point: even though the terms "disaggregation" and "diversification" may share some connotations, the "disaggregation" strategy I discuss in this Part bears little similarity to the "diversification" strategy

claim can trigger some forms of judicial relief, but not others. And that means, in effect, that the scope of a substantive norm is varied across the different remedies used to enforce it. It is true, of course, that remedial exceptions do not inject any *formal* variation into the substantive law itself (the good faith exception to the exclusionary rule, for instance, does not purport to alter Fourth Amendment doctrine proper; it simply says that a certain remedy cannot issue when certain Fourth Amendment claims are raised).[174] But as a functional matter, remedial exceptions often exert an unmistakably disaggregating effect on substantive legal rules—rendering the same rules more or less difficult to remediate depending solely on the type of remediation sought.[175] Thus, if we desire to manage spillover by way of exceptions to remedial rules, we must also be willing to tolerate cross-remedial variation in the substantive law.

A. THE DISAGGREGATING EFFECT OF REMEDIAL EXCEPTIONS

The disaggregating effect of remedial exceptions is perhaps best illustrated by reference to the exclusionary rule. Not long after *Mapp v. Ohio*[176] did the Court begin identifying types of Fourth Amendment violations that did not warrant suppression, and the number of these carve-outs has grown over the years. The suppression remedy is not available, for instance, when officers have relied in good faith on an unlawfully issued

I discussed in Part II.C *supra*. The former involves disaggregating the *definition* of substantive norms across different remedial domains, while the latter involves diversifying the *different remedial inputs* that go into the crafting of a single, non-disaggregated substantive law.

174. *See, e.g.*, United States v. Leon, 468 U.S. 897, 923–24 (1984) (noting that "[i]n so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant").

175. In advancing the claim that remedial exceptions exert a disaggregating effect on the substantive law, I do not mean to imply that such exceptions change the essentialist meaning or content of substantive norms. This is a contested issue. *See* Levinson, *supra* note 8. *But see* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1313–17 (2006). But it is irrelevant to my central point here, which is that remedial exceptions mitigate spillover across remedies by varying *the applicability* of substantive norms across different remedial settings. I believe it is helpful to characterize this phenomenon as involving the "disaggregation" of substantive law, but one might just as well characterize it as involving "selective withholding" of different remedies from a uniformly defined substantive rule. The disaggregation strategy, in other words, should appeal to pragmatists and essentialists alike, though the latter may wish to call it by a different name.

176. 367 U.S. 643 (1961).

warrant.[177] The remedy is not available when the officers' only Fourth Amendment violation involves a failure to honor the "knock and announce" requirement,[178] or when officers have unlawfully acquired evidence that inevitably would have been discovered in the absence of the Fourth Amendment violation.[179] In these and other circumstances, the operative remedial rules allow courts to recognize that Fourth Amendment violations have occurred while still refusing to furnish exclusionary relief.[180]

These exceptions have generally struck commentators as liberty-reducing. After all, they deprive constitutional claimants of a remedy for violations of their rights, and they cause some future violations to go undeterred.[181] But these exceptions also further an important liberty-promoting goal. If we assume, not unrealistically, that features unique to the suppression-hearing context push judges to err on the side of not excluding evidence, then exceptions to the exclusionary remedy permit them to achieve this result without affecting the application of search-and-seizure protections in other remedial environments. With no remedial exceptions in place, judges would be unable to deny exclusion unless they held that the government never violated the defendant's rights. But when exceptions to the exclusionary remedy are available, judges may invoke these exceptions to uphold admission of probative evidence, while leaving unaltered the substantive content of the Fourth Amendment right itself. The result of the suppression hearing is the same, but its precedential effects are different, with the impact of a denial of relief running no further than the confines of the remedy itself.[182]

177. *Leon*, 468 U.S. at 897.

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

179. Nix v. Williams, 467 U.S. 431 (1984).

180. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2505–27 (1996).

181. *See* Steiker, *supra* note 180, at 2534 ("[T]he police are very apt to 'hear' the decision rules [i.e., remedial rules] that the Supreme Court makes (and that lower federal and state courts apply) and thus to adjust their attitudes about what behavior 'really' is required by the Court's conduct rules [i.e., substantive rules].").

182. This is not to say that remedial exceptions to the exclusionary rule have resulted in an overall expansion of Fourth Amendment liberties; the point is only that the exceptions' curtailment of Fourth Amendment liberties has been tempered by their remedy-specific scope. *Cf. id.* at 2511.

Other remedial exceptions do similar work. Professor John Jeffries has argued, for instance, that qualified immunity doctrine—which serves as a major exception to § 1983 damages liability—helps to "reduce the cost of innovation, thereby advancing the growth and development of constitutional law."[183] Professor Jeffries's argument highlights the cross-temporal dynamics of constitutional adjudication: He aims to demonstrate how the qualified immunity defense promotes the adaption of constitutional rights to changing circumstances.[184] His essential insight, however, also suggests how immunity rules can and do alleviate spillover across *remedies*: Qualified immunity doctrine targets not the law of rights but rather the law of remedies, and it thereby helps to shield other remedial environments from adverse spillover effects.[185] A similar point holds with respect to the non-retroactivity rule of *Teague v. Lane* and other "exceptions" to habeas corpus relief: if every expansion of every constitutional guarantee warranted full-scale retroactive remediation, courts would seldom expand such guarantees to begin with.[186] But by denying collateral relief through the use of remedial exceptions—rather than the narrowing of substantive protections—courts can prevent remedy-specific considerations from shaping the cross-remedial content of substantive law.

Remedial exceptions do not formally vary the content of substantive rules across different remedial settings. The same substantive definition of what constitutes probable cause applies, for instance, regardless of whether a trial court judge considers a suppression motion or a magistrate judge considers an application for a search warrant; the difference is just that additional hurdles must be cleared in order for the suppression *remedy* to issue, whereas the denial of a warrant application would follow automatically from a magistrate's identification of fatal Fourth Amendment defects. At another level, though, remedial exceptions generate disaggregated substantive law, because they produce a world in which Fourth Amendment claims

183. Jeffries, *Right-Remedy Gap*, *supra* note 10, at 98.

184. *See id.* at 99–100.

185. *See id.* at 110–11.

186. *See* Jeffries, *Eleventh Amendment and Section 1983*, *supra* note 10, at 80. The same is true of AEDPA-based restrictions on federal court review of state court convictions, which require significant judicial deference to the constitutional determinations of state courts. *See* 28 U.S.C. § 2254(b) (2012). AEDPA deference permits federal court judges to deny habeas relief without having to propound restrictive, cross-remedial principles of substantive law. *See id.*

capable of generating relief vary according to the type of relief being sought. The Fourth Amendment as applied in the exclusionary setting permits police to enter homes without announcing their presence, whereas the Fourth Amendment as applied in the § 1983 setting does not. Likewise, the Fourth Amendment as applied in the exclusionary setting permits the unreasonable acquisition of evidence that will be inevitably discovered, whereas the Fourth Amendment as applied in the warrant-issuing setting does not.

Similar points can be made about the disaggregating effect of other remedial exceptions. The harmless error rule, for instance, renders evidentiary restrictions less exacting when they underlie requests for appellate relief than when they underlie requests for trial-level relief. Qualified immunity doctrine renders the First Amendment less protective when asserted in damages actions against individual public officials than when asserted as a defense to criminal prosecution. And the rules of non-retroactivity and AEDPA deference yield a far narrower set of operative substantive rights with bite in the habeas context, as compared to the operative substantive rights with bite on direct appeal.

In short, remedial exceptions mitigate spillover by severing the connection between a decision to withhold application of a remedy and the generation of substantive precedents with cross-remedial force. That is not to say that the invocation of such exceptions leaves the substantive right unaffected; much to the contrary, as we have seen, remedial exceptions carry significant implications for the real-world efficacy of the substantive right itself. But remedial exceptions carry these implications in a *remedy-specific* way, leaving unaltered (both formally and functionally) the substantive law as it applies in connection with other remedial rules. And that is the key to understanding how remedial exceptions alleviate spillover across remedies: the dynamics of a given remedial setting exert influences on the outcome of individual substantive cases; but remedial exceptions confine these influences to the particular remedial setting that produces them.

B. LIMITATIONS

So is our work here done? Was all the above just a roundabout way of saying that remedial exceptions have already solved the problem that provoked the writing of this Article in the first place? No. In their current form, many remedial exceptions reveal their share of difficulties as anti-spillover devices. These difficulties, to be clear, are not an inescapable feature of remedial exceptions in the abstract; we can steer clear of the difficulties by modifying the exceptions on the books, rather than giving up altogether on the project of avoiding spillover through the strategic use of remedial exceptions. But most (though not all) remedial exceptions take the form of broad transsubstantive rules, and this in turn can create problems. In particular, a small set of broadly applicable exceptions will fail to capture the full range of scenarios in which judges might wish to inject disaggregation into the substantive law. And the transsubstantive nature of these exceptions means that judges can create such disaggregation only by creating new forms of spillover within the law of remedies itself.

1. Inaptness

Courts do not design remedial exceptions solely with the problem of cross-remedial spillover in mind. Other considerations factor into the shaping of standards that dictate when remedial exceptions do and do not apply: When, as a practical matter, is it too difficult to furnish relief? What, if anything, do the relevant statutes say? Would other remedies be available to enforce a right if an exception precluded enforcement in this remedial context? And so forth. Many different—and sometimes countervailing—objectives must be considered in mapping out the conditions under which substantive violations trigger different kinds of remedial action by the courts. For this reason, a given remedial exception may not always work well in guarding against spillover across remedies.

Consider, for instance, the harmless error rule. As we have already seen, harmless error analysis does not apply to so-called "structural" errors, which trigger automatic reversal whenever they occur.[187] If a court determines that a structural error at trial was too insignificant to warrant reversal of a conviction, the harmless error exception provides no help. The only way to avoid issuing the remedy is to declare, disingenuously, that no legal error ever occurred. Even beyond structural errors, moreover, there remain problems. Harmless error analysis focuses first and foremost on the variable of *prejudice*; it offers no assistance to judges who wish to affirm convictions in the face of errors with prejudicial effects. Yet there may be cir-

187. *See* discussion *supra* Part I.D.

cumstances in which even prejudicial errors will strike judges as too insubstantial to warrant full-bore appellate relief. (Imagine, for instance, that a trial judge has pushed the boundaries of a hearsay rule, admitting evidence that contributed to a jury's finding of guilt but without offending any of the substantive interests that the rule was intended to promote.) In these settings, harmless error analysis and its prejudice-based focus will still leave appellate judges reluctant to identify close-to-the-borderline violations of the substantive law, even where the primary basis for their reluctance derives from considerations specific to the reversal remedy itself.

Consider, too, damages relief under § 1983 liability. Under the status quo regime, qualified immunity doctrine provides the primary means by which courts can avoid imposing damages on public officials, regardless of the particular type of claim asserted against them.[188] Thus, for instance, had the Court wished to deny relief in *Paul v. Davis* without affecting the cross-remedial content of procedural due process doctrine (and without creating a new exception to the § 1983 damages remedy), it could have invoked the qualified immunity exception. Rather than holding that the defendant did nothing wrong as a matter of procedural due process law, the Court could have disposed of the case by declaring that the defendant never violated a clearly established constitutional right. But invoking qualified immunity in *Paul* would not have assuaged the Court's concerns about converting the Fourteenth Amendment into a "font of tort law."[189] That alternative rendering of *Paul* would have left lower courts free to establish new procedural due process requirements in future *Paul*-like cases, and those requirements, once clearly established, would have empowered future § 1983 plaintiffs to secure damages relief against public officials who ran afoul of them. A qualified immunity holding, in other words, would have worked to insulate the *Paul* defendants from damages liability under § 1983, but not future defendants in similar cases. Given what remedial exceptions were then at its disposal, the Court in *Paul* could thus have concluded that the only way to foreclose defamation-like tort actions under the Due Process Clause was to render a cross-remedial decision about the constitutional right itself.

Or, take the exclusionary remedy. Punctuated as it already is with exceptions, the remedial law of exclusion may still not

188. *See* Jeffries, *Right-Remedy Gap*, *supra* note 10, at 89.
189. Paul v. Davis, 424 U.S. 693, 701 (1976).

accommodate the full range of circumstances in which a judge's reluctance to exclude evidence renders her unwilling to declare that a violation of the law occurred. A search or seizure may not trigger any current exception to the exclusionary rule, but if the unlawfully obtained evidence is probative enough, the alleged violation insignificant-seeming enough, and the societal interest in securing a conviction strong enough, then a judge may still be looking for a way out of the troublesome task of furnishing relief. Under such circumstances, remedial exceptions will fail to prevent cross-remedial spillover; with no ready-made exception at the judge's disposal, the likely outcome of the case will be a declaration that the government at all times comported with the law.

None of this is to say that the current smorgasbord of exceptions within these and other remedial environments is wholly ineffective at mitigating spillover across remedies. Without these exceptions in place, the substantive protections of cross-remedial law would be narrower than what the status quo provides. But utilizing the exceptions on the books to combat the particular problem of cross-remedial spillover can sometimes feel like trying to fit square pegs into round holes. The status quo regime presents courts with a small number of remedial exceptions designed to resolve a large number of very different cases; these exceptions may therefore fail to capture each and every instance in which the remedial dynamics of a case militate against the granting of relief. Consequently, even for remedies with exceptions already attached to them, the threat of spillover remains.

2. Transsubstantivity

A further complication with remedial exceptions involves their generally transsubstantive character. Just as substantive rights tend to apply uniformly across remedies, so too does the law of remedies (including the remedial exceptions that belong to it) tend to apply uniformly across substantive rights. Qualified immunity protections do not change depending on whether a § 1983 plaintiff alleges a Fourteenth Amendment violation or an Eighth Amendment violation;[190] the harmless error standard does not change depending on whether a trial court misapplies

190. *See* Fallon, *Asking the Right Questions*, *supra* note 10, at 490; Jeffries, *supra* note 22, at 259.

the Fourth Amendment or the Fifth Amendment;[191] and, with a few exceptions,[192] the same nonretroactivity restrictions on habeas corpus relief apply across a wide variety of substantive claims. The transsubstantive nature of these and other remedial exceptions further reduces their effectiveness at counteracting cross-remedial spillover.

Suppose, for instance, that on an appeal from a conviction, a criminal defendant argues that the trial judge unlawfully admitted some piece of hearsay testimony proffered by the prosecution. Suppose, moreover, that, while both the merits of the claim and the harmless error analysis present a close call, the appeals court panel feels strongly that the trial court's alleged violation of the hearsay rule should not trigger the windfall remedy of a new trial. The panel's outlook on the case, in other words, stems from a mixture of remedy-based and substance-based considerations: the judges agree that the alleged violation of the hearsay rule—if in fact a violation—did not amount to a serious enough legal error to warrant the high remedial costs that a retrial would entail.

Having made up its mind that it wants to affirm the conviction, the panel then asks how to reach this result. Should the panel hold that the trial judge's admission of the hearsay testimony did not violate an evidentiary rule? Or should it hold that the admission of the hearsay testimony—whether or not erroneous—was harmless to the defendant? Much of what I've argued thus far would favor the latter route: The panel's reluctance to reverse derives from considerations unique to the context of appellate review, so rejecting the claim on its merits would result in cross-remedial precedent that binds judges at both appellate-court and trial-court levels. All else equal, then,

191. The standard does change, however, depending on whether a defendant asserts a constitutional or nonconstitutional claim. *See* Chapman v. California, 386 U.S. 18, 20 (1967) (setting forth an elevated standard for harmless error review in connection with claims of a constitutional nature). Although I have elsewhere criticized this feature of the doctrine, my criticisms focus on the constitutional/nonconstitutional distinction itself, as opposed to the more general idea of varying harmless error requirements across different substantive domains. *See* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 695–97 (2013).

192. *See* Teague v. Lane, 489 U.S. 288, 311 (1989) (withholding "new rule" requirement from "watershed" rulings of criminal procedure and laws that place "certain kinds of primary, private individual conduct beyond the power of the criminal law to proscribe"); *see also* Bousley v. United States, 523 U.S. 614, 620 (1998) (holding that *Teague* does not apply to decisions narrowing the scope of substantive criminal statutes).

the court would do better to affirm via the harmless error exception, thereby obviating the risk of spillover across remedies.

All else, however, may not be equal. For if the panel decides to invoke the harmless error rule, it runs the risk of creating spillover in a different direction: across rights. The harmless error rule, recall, is generally transsubstantive.[193] Thus, in denying relief on harmless error grounds, the panel creates a new transsubstantive precedent concerning the law of harmless error, shaping the analysis that future appellate judges will apply in connection with different substantive claims. That is a problem insofar as the original reason for invoking the harmless error rule—and thus for contributing to the transsubstantive harmlessness standard—related to the substantive particularities of the defendant's case. Considerations unique to one substantive rule shape a remedial precedent that attaches to many other substantive rules.

To take one further example, suppose a habeas petitioner alleges that a recent Supreme Court decision entitles him to retroactive relief. The government disagrees, arguing (a) that the prior decision created a "new rule" under *Teague* and therefore cannot form the basis for any post-conviction attack; and (b) that even under the new Supreme Court precedent, the defendant's conviction was not the product of legal error. Suppose that both of these issues could go either way, but that the judge considering the habeas petition regards the claim as insufficiently important to warrant the high-cost remedy of habeas relief. The same dilemma thus presents itself. The judge can deny the claim on its merits, but he will then be allowing considerations specific to the habeas remedy to shape a precedent with application in other remedial contexts. But if the judge seeks refuge in the *Teague* rule, he will then be shaping a transsubstantive remedial rule (i.e., the law governing what qualifies as a "new rule" under *Teague*) by reference to considerations specific to the particular substantive issue that the petitioner has raised.[194] There will be spillover one way or the

193. *See supra* notes 190–92 and accompanying text.

194. Consider, for instance, the Court's recent decision in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), where it denied retroactive habeas relief to a petitioner whose counsel failed to advise her of the immigration consequences of pleading guilty to a federal crime (and thereby rendered ineffective assistance of counsel under *Padilla v. Kentucky*, 559 U.S. 356 (2010)). The Court held in *Chaidez* that its earlier decision in *Padilla* created a "new rule" of Sixth Amendment law and therefore could not form the basis for retroactive relief, notwithstanding strong doctrinal arguments to the contrary. *See*

other; the only thing left for the judge to decide is whether to channel it into the law of remedies or into the law of rights.

We can generalize the point: Transsubstantive remedial exceptions facilitate the avoidance of spillover across remedies, but only at the expense of spillover across rights. When a court's motivations to deny relief are mixed—that is, grounded in considerations specific to a remedial context and considerations specific to a substantive claim—its invocation of a transsubstantive exception may therefore not always represent a viable anti-spillover strategy. The viability of the strategy will depend on the relative degree to which rights-related and remedy-related considerations factor into the court's overall assessment of a claimant's demands. The court must essentially choose between the lesser of two evils: (a) cross-remedial spillover problems caused by a remedy-motivated denial of a substantive claim, and (b) transsubstantive spillover problems caused by a substance-motivated denial of a particular form of relief. In many cases, these harms will be difficult to calculate. And even where the harms can be calculated, a fully satisfactory doctrinal solution may still not emerge.

C. BETTER DISAGGREGATION: BLENDING RIGHTS AND REMEDIES

Nothing in these preceding sections suggests that remedial exceptions are inherently unable to combat spillover in an effective way. I have leveled my criticisms at existing features of existing exceptions, and responding to these criticisms would therefore not require us to abandon the project of crafting exceptions to remedial rules. Instead, it would require us to shape and apply these exceptions in a more substance-specific and finely tailored way.[195]

Notice, however, that the more finely-tailored and substance-specific our exceptions become, the harder it is to say

Chaidez, 133 S. Ct. at 1114–21 (Sotomayor, J., dissenting). It is impossible to know precisely what motivated the Court to deny relief in *Chaidez*, but one cannot ignore that deeming *Padilla* "non-new" would have called into question a large number of pre-*Padilla* plea agreements entered into by immigrant defendants. Insofar as this consideration (tethered to the *Padilla* right itself) motivated the Court to deem *Padilla* "non-new" for purposes of habeas relief, the Court would have allowed a substance-specific consideration to dictate the shape of a transsubstantive remedial holding, thereby yielding spillover across rights.

195. Although I am not the first to advocate for reducing the transsubstantivity of remedial rules, the prior work on point has not explicitly focused on the spillover-related benefits of doing so. *See, e.g.*, Fallon, *Asking the Right Questions*, *supra* note 10, at 489; Jeffries, *supra* note 22, at 291–92.

with a straight face that these exceptions are not in fact varying the cross-remedial applicability of the substantive law. Functionally speaking, there is a vanishing difference between the act of layering multiple "substance-specific" remedial exceptions atop a formally uniform body of substantive law, and the act of declaring straight up that the dictates of the substantive law vary according to the remedial environment in which it applies. Where remedial exceptions are few in number and transsubstantive in breadth, we can more plausibly identify a conceptual separation between remedial and substantive rules: we define the remedy's availability, theoretically at least, in terms that do not depend on substantive criteria, and we may therefore characterize the remedial inquiry as totally and completely independent of whatever the substantive law provides. ("All First Amendment requirements," we can plausibly say, "are capable of generating monetary relief against individual defendants, but that relief is not available when those same First Amendment requirements have not been clearly established."). But where a remedial exception targets substance-specific criteria, this no longer becomes the case. (It becomes almost internally contradictory to say something like: "All Fourth Amendment requirements are capable of generating exclusionary relief, but exclusionary relief is not available when the Fourth Amendment requirement at issue is the knock-and-announce requirement.")

That observation helps to demonstrate how what might seem to be a quite complex and radical project of reform can actually be achieved in a simple and gradual fashion. Proliferating exceptions within the remedial law and associating each exception with precise, substance-specific criteria may sound like a daunting task. But it is really just another way of describing a more candid and minimalist approach toward substantive lawmaking, which freely *blends* together the rights-related and remedy-related elements of courts' reasoning. When remedial variables motivate substantive outcomes, the trick is simply to register these motivating effects within the doctrine itself. Doing so will inject into the precedent a limiting principle that permits differentiation in outcomes according to differentiated remedial demands. We can characterize such a decision as creating a new "substance-specific exception" to the remedy being sought, or we can characterize it as creating a new, remedy-dependent rule of substantive law. How we characterize the decision, though, is of far less significance than what it allows us to achieve: a more disaggregated set of substantive norms that better resists spillover across remedies.[196]

A useful template for this sort of "blending" approach involves the prior restraint rule of First Amendment doctrine. In simplified form, the rule calls for special First Amendment scrutiny of government efforts to secure before-the-fact *injunctions* against would-be speakers, as compared to after-the-fact *punishments* on persons who have already spoken.[197] Though not without its detractors,[198] this rule reflects a common and longstanding sentiment that pre-publication restraints on speech are "the most serious and the least tolerable infringement on First Amendment rights."[199] And were this sentiment not recognized by First Amendment doctrine, we might worry about its potential to create cross-remedial spillover.[200] Cases involving injunctions against speech would—due to the presence of a pre-speech injunction—generate rules of strict First Amendment protection, which would then limit the government's use of less offensive remedies to regulate speech of a similar character. But the prior restraint rule blocks this outcome. By reifying the idea that pre-publication injunctions against speech receive especially strict First Amendment review, the prior restraint rule ensures that the precedential effects of prior restraint cases will not run beyond the prior restraint context. Spillover is avoided—and disaggregation achieved—by nothing more than a candid judicial acknowledgment that substantive and remedial considerations should be blended together in a special way.[201]

196. One potential consequence of the characterization we adopt, which I bracket here, involves constitutional rights and remedies. Insofar as some remedies for constitutional harms are grounded in nonconstitutional rules of statutory (or common) law, then substance-specific rules of "remedial" law might be amendable by statute, whereas remedy-specific rules of constitutional law would not be.

197. *See* Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989).

198. *See, e.g.*, John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982); Scordato, *supra* note 197.

199. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

200. I am grateful to Geof Stone for bringing this point to my attention.

201. Other examples from the First Amendment context reveal an analogous approach to the spillover problem. In some areas of free-speech doctrine, courts have employed a "penalty-sensitive" approach to First Amendment analysis, reflecting the assumption that, all else equal, the harmfulness of a speech prohibition rises with the harshness of the penalty attached to it. *See*

The prior restraint rule thus represents the sort of "remedial exception" that effectively targets spillover across remedies. It is particularized and substance-specific. It blends together substance-based and remedy-based considerations. It therefore yields holdings that apply in free-speech cases involving pre-publication injunctions, but not in cases involving other speech-related remedies or other injunction-related rights. With the rule in place, the risk of cross-remedial spillover diminishes, as does the spillover risk produced by the blunt and transsubstantive remedial exceptions on which courts might otherwise end up relying. Clearly, moreover, the prior restraint rule "disaggregates" First Amendment law. It causes the strength of a speaker's First Amendment claims to fluctuate with the sort of remedy involved in the speaker's case, even keeping constant the content and societal value of the speech itself. And all of that is achieved through the courts' frank and explicit acknowledgment that a particular remedy has affected their outlook on a substantive claim.

Can courts achieve similar forms of disaggregation within other areas of the substantive law? The next Section considers that possibility.

D. THE BLENDING STRATEGY APPLIED

Consider first the Court's decisions in *Washington v. Davis*[202] and *Paul v. Davis*.[203] Both decisions alluded to remedy-related reasons for rejecting the plaintiffs' substantive claims. Neither decision, however, ended up yielding the sort of disaggregated law that one might have expected to develop. The Court in *Washington v. Davis* fretted about the intrusiveness and complexity of structural reforms to the welfare state, and it cited these difficulties as a reason for ratcheting up the difficulty of demonstrating equal protection violations.[204] The Court in *Paul v. Davis* similarly fretted about the debilitating effects of damages actions against public officials, and it cited these effects as a reason to deny procedural due process protections to

Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991 (2012). By making explicit the connection between penalty severity and First Amendment validity, the Court helps to prevent variables specific to the nature of one penalty from dictating the First Amendment doctrine that governs in cases involving very different penalties.

202. 426 U.S. 229 (1976).

203. 424 U.S. 693 (1976).

204. *Washington*, 426 U.S. at 248.

claimants suffering government-induced reputational harms.[205] Both analyses thus flirted with a blending together of remedy-related and rights-related reasoning. In the end, however, they failed to produce meaningful cross-remedial variations in the substantive law.

The better course of action in these cases would have been to identify the remedy-specific elements of the legal analysis and—critically—to leave open the possibility of different substantive outcomes in alternative remedial settings. Having noted that special features of the damages remedy rendered it less receptive to the substantive claim, the Court in *Paul v. Davis* should have gone on to hold that its "stigma plus" rule might or might not warrant application in cases where damages were not at issue. Having expressed its concerns about reallocating public resources via structural injunctions, the Court in *Washington v. Davis* should likewise have left open the possibility that equal protection claimants might satisfy a lesser standard when not seeking civil relief. Precisely what the law would have looked like in these other remedial environments need not have been decided then and there; rather, the Court should simply have identified a remedy-specific influence on its substantive holding while taking care not to imply that the holding controlled within other remedial settings.

A similar point obtains with respect to hybrid statutes. Both *Chiarella*[206] and the Court's holding in *Thompson/Center Arms*[207] suffered from a judicial unwillingness to disaggregate by blending. When implementing Rule 10b-5 in civil cases, both the Supreme Court and lower courts failed to highlight the linkage between the non-criminal nature of the remedies sought and the expansive substantive holdings that these rulings embodied. Consequently, when *Chiarella* presented the question whether the Rule permitted *criminal* insider trading prosecutions, the prior on-point precedents obscured from view an important potential basis for distinguishing them away. And while the *Thompson/Center Arms* Court did in fact acknowledge a remedial influence on its holding, its rigid adherence to cross-remedial uniformity placed it in the awkward position of following the rule of lenity in a case with nothing more than a $200 tax refund at stake.[208] The Court could have

205. *Paul*, 424 U.S. at 701.
206. Chiarella v. United States, 445 U.S. 222 (1980).
207. United States v. Thompson/Ctr. Arms Co., 504 U.S. 505 (1992).
208. *Id.* at 518.

better managed the spillover problem by resolving the statutory issue in *Thompson/Center Arms* on narrower grounds, while emphasizing the remedy-dependent nature of the holding it had rendered. That way, *Thompson/Center Arms* could have achieved an optimal substantive result with respect to civil enforcement of the National Firearms Act without interfering with future courts' handling of criminal cases under the NFA.

The Second Circuit's decision in *United States v. Plaza Health Laboratories, Inc*. reveals what a more disaggregated approach to hybrid statutes might look like.[209] The employee of a private laboratory had dumped vials of blood into the Hudson River, and the government sought to prosecute him for knowingly discharging pollutants in violation of the Clean Water Act (CWA).[210] The liability question turned on whether the dumper of the vials qualified as a "point source" of pollutants under the CWA.[211] (Suffice it to say that the statute's definition of the term—"any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged"[212] rendered the answer to this question nonobvious.) And in case the statutory question wasn't already complicated enough, the CWA subjected "point source" discharges to both civil and criminal forms of redress, thus presenting another variant on the hybrid statute dilemma.[213]

The Second Circuit dealt with this conundrum just as it should have, by blending together the substantive and remedial elements of its reasoning. Having consulted the statutory text and legislative history, it concluded that the interpretive question presented no obvious answer.[214] It then explained:

> Since the government's reading of the statute in this case founders on our inability to discern the obvious intention of the legislature to include a human being as a "point source", we conclude that the criminal provisions of the CWA did not clearly proscribe Villegas's conduct and did not accord him fair warning of the sanctions the law placed

209. 3 F.3d 643 (2d Cir. 1993).
210. *Id.* at 644.
211. *Id.* at 644–45.
212. *Id.* at 645 (quoting 33 U.S.C. § 1362(14) (2012)).
213. *Id.* at 646–47.
214. *Id.* at 649.

on that conduct. Under the rule of lenity, therefore, the prosecutions against him must be dismissed.[215]

And so, Villegas won his case, but not by way of a decision establishing that the term "point source" excluded human beings for any and all remedial purposes. Rather, he won the case by way of a holding that drew together substantive and remedial considerations to produce a remedy-specific substantive rule: As the Second Circuit made clear, the CWA's lack of clarity, acting in concert with the rule of lenity, precluded the government from *criminally* punishing humans as point sources.[216] Nothing in the court's holding, however, barred anyone from seeking civil relief under the CWA against polluters like Villegas.[217] The court determined that the statute wasn't clear enough to warrant criminal prosecution, but the court left open the question whether the "humans are point sources" argument might carry the day in a civil enforcement action.[218] *Plaza Health Laboratories* thus succeeded where both *Thompson/Center Arms* and *Chiarella* failed. Thus, while Villegas's bloody vials may well have spilled beyond the Hudson, the precedential effects of his case did not spill beyond the boundaries of the criminal law.

Consider, finally, Fourth Amendment probable cause determinations. In *Illinois v. Gates*, the Court characterized the probable cause inquiry as presenting a "commonsense, practical question,"[219] to be governed by an "assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[220] In addition, the Court stressed the need for "great deference" to a magistrate's probable cause determinations, explaining that courts should not "invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner."[221] Put another way, magistrates get to employ an indefinite standard

215. *Id.* (internal quotation marks and citations omitted).

216. *See id.*

217. Indeed, the court went out of its way to distinguish several civil cases involving the scope of the CWA's "point source" requirement, explaining that such cases had arisen in "civil-penalty or licensing settings, where greater flexibility of interpretation to further remedial legislative purposes is permitted, and the rule of lenity does not protect a defendant against statutory ambiguities." *Id.* at 648.

218. *Cf. id.* at 650 (characterizing the decision as "[c]ompelled by the rule of lenity").

219. Illinois v. Gates, 462 U.S. 213, 230 (1983).

220. *Id.* at 232.

221. *Id.* at 236 (citations and alterations omitted).

while enjoying deferential review. The consequence, as Professor Stuntz explained, is a remedial arrangement that permits magistrates (on the one hand) and higher level judges (on the other) to apply what in effect amount to "different standards"[222]—standards whose differences derive from the different substantive influences that their remedial environments present.

Stuntz suggested that this arrangement should be regarded as sensible and unproblematic from the perspective of those who worry about hindsight bias in suppression hearings.[223] More than that, the arrangement might count as positively beneficial. The *Gates* approach allows for higher-ranking courts to uphold magistrates' probable cause determinations without creating new law that binds below. The precedents generated in suppression hearings, in other words, will generally concern remedy-specific principles of deference, rather than cross-remedial principles of Fourth Amendment law. Consequently, trial courts may deny Fourth Amendment claims without inflicting collateral damage on the substantive standards that magistrates apply.

* * *

To recap the argument thus far: Remedies influence rights. Rights apply across remedies. Distortions thus arise when a particular remedy influences the scope of a substantive rule, which then imports the remedy-specific influence into other remedial environments. I have argued that the best way to attack the spillover problem is by varying rights' application across different remedial contexts. To some extent, this is what courts already do. By utilizing *exceptions* to remedial rules, courts create ways for themselves to grant some but not other forms of relief in response to otherwise identical substantive claims. Even so, courts can do a better job, by rendering the exceptions they apply more nuanced in definition and less transsubstantive in scope. That can often be accomplished by acknowledging directly the remedial elements underlying a substantive holding, thus assigning to that holding a precedential impact that extends no further than the remedial context in which it was rendered.

222. Stuntz, *supra* note 12, at 928.

223. *See id.* ("[T]here is . . . no need to constrain the warrant process with a detailed body of law.").

That may be all fine and good from the perspective of the spillover problem itself. But before we give a thumbs-up to the hidden modes of disaggregation that remedial exceptions facilitate, and to the more explicit forms of disaggregation that explicit right-remedy blending would create, we should ask whether the disaggregation strategy fits comfortably within the broader legal framework of public law adjudication. Put another way, even if we have proven it an effective means of combating the spillover problem, we must still ask whether the disaggregation strategy comports with basic values and priorities of the legal system writ large.

IV. IS DISAGGREGATION PROPER?

I see four major objections to the strategy of disaggregating substantive norms across remedial boundaries. The first objection holds that the disaggregation strategy does not reflect the unitary nature of the legal texts from which substantive rules derive. The second objection holds that the disaggregation strategy undesirably complicates the law. A third objection (related to the second) holds that disaggregating rights across remedies undermines important values associated with the law's generality. And a fourth objection holds that certain (though not all) forms of disaggregation will frustrate higher-level courts' ability to supervise the work of their lower-level counterparts. I address these four objections in turn, concluding that while each has some merit, none offers a fatal case against disaggregation as a response to cross-remedial spillover.

A. CONCEPTUAL CONCERNS

How can the same rule mean different things depending on the remedial setting in which courts interpret it? The Constitution does not contain one Fourth Amendment for suppression hearings and another for probable cause hearings. It does not contain one Due Process Clause for injunctive relief and another for damages relief. And hybrid statutes do not (by definition) provide for differentiated substantive protections in different remedial settings. Recognizing these realities may seem to pose a formidable obstacle to an anti-spillover strategy grounded in applying rights differently depending on the remedy that is sought. If the texts we interpret are unitary, then it would seem that our interpretations of those texts must be uniform.[224] The "oneness" of such texts, in other words, counsels against assigning different substantive rules to different remedial settings.

The problem with this argument lies in its failure to distinguish between two types of problems that judges confront: (1) higher-level problems of legal *interpretation*; and (2) lower-level problems of legal *implementation*.[225] Not every doctrinal dispute concerns the "meaning" of a legal text; many such disputes operate closer to the ground, focusing on how legal provisions, their meaning once gleaned, apply to discrete individual requests for judicial relief. Constitutional lawyers have long understood this point. As Professor Richard Fallon has explained, although it is true that "the Court must craft doctrine in light of judgments about what the Constitution *means*," it is also true that "determinations of constitutional meaning do not always, or perhaps even typically, dictate with full precision what constitutional doctrine ought to be."[226] Indeed, much doctrine exists not so much to resolve "uncertainty about which values the Constitution encompasses and how protected values should be specified,"[227] but rather for the less grandiose—but vitally important—purpose of "implement[ing]" the values once

224. *See, e.g.*, Sachs, *supra* note 73, at 1031 (defending "core principle" of uniform meaning by reference to the fact that Congress would have specified different levels of enforcement for hybrid statutes if that's what it had intended).

225. Some scholars use the term "construction" rather than "implementation." *See, e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95 (2010).

226. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 67 (1997) (emphasis added). Professor Fallon's statement is true in at least two different senses. First, constitutional meaning may fail to dictate a particular outcome of a particular case. Even a full understanding of a provision's semantic content, in other words, may still leave us unable to say with certainty whether a given constitutional claim should succeed or fail. Second, constitutional meaning may sometimes suggest outcomes in cases that—for pragmatic reasons—courts may nonetheless decline to dictate. Hence arises the suggestion of Professor Fallon (and that of several other scholars) that courts sometimes overenforce and/or underenforce constitutional norms, generating doctrinal results that do not directly follow from what the constitutional text would seem to require. *See, e.g.*, Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 1 (1975); Sager, *supra* note 23; David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 192 (1988).

227. Fallon, *supra* note 226, at 56.

specified.[228] Similar insights animate Professor Mitchell Berman's work on "constitutional decision rules"—the large body of presumptions, evidentiary burdens, balancing tests, means-end analyses, and other doctrinal creations that permeate judge-made constitutional law.[229] "Much of existing constitutional doctrine," he argues, "is better understood not as judicial statements of constitutional meaning (i.e., as constitutional operative propositions) but rather as judicial directions regarding how courts should decide whether such operative propositions have been satisfied."[230]

Mapping the doctrinal landscape in this way helps to demonstrate why variations in substantive doctrine need not reflect variations in textual meaning. Some constitutional cases—often of the blockbuster variety—require courts to speak in terms of what Professor Berman calls "operative propositions"[231] of constitutional law (e.g., the Fourteenth Amendment governs affirmative action; the First Amendment governs campaign finance regulation; the Commerce Clause restricts Congress's ability to regulate economic "inactivity," etc.), and it would be odd indeed to encounter cross-remedial variations in holdings stated at such high levels of generality. But in many constitutional cases, the content of the operative proposition is not at issue; what matters instead is how the proposition translates into real-world judicial outcomes. And in these sorts of cases, the unitary nature of the text provides no good reason for maintaining absolute substantive uniformity across different remedial environments. By employing a conceptual apparatus that "[c]leav[es] meaning from rules"—as Professor Jennifer Laurin has put it—courts can vary rules without destabilizing meaning.[232]

This is not to say that it will always be easy to distinguish between questions of overarching meaning and questions of implementation, or that we can cleanly articulate the difference between "operative constitutional propositions" and "constitutional decision rules." Some might say, for instance, that *Washington v. Davis*'s holding goes to the core meaning of the Equal

228. *Id.* at 62.

229. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 8–11 (2004) (discussing various aspects of judicially-created constitutional doctrine).

230. *Id.* at 12.

231. *Id.*

232. Laurin, *supra* note 13, at 1014 (internal quotation marks omitted).

Protection Clause, while others might be more inclined to view the holding as a setting forth a "decision rule" about the evidentiary burdens that equal protection claimants bear. Still others would regard these distinctions as pointless, instead maintaining that "the meaning of a constitutional provision is its implementation"—nothing less and nothing more.[233] Conceptual disagreements aside,[234] however, the critical point remains: Remedy-based variations in substantive doctrine need not create tension with the unitary nature of the enactments from which they derive.

So much for *constitutional* enactments; what about their nonconstitutional counterparts? Here, the conceptual argument against cross-remedial variation might pack a bigger punch. With modern-day statutes, as opposed to ancient constitutional provisions, one can more easily resort to the claim that if "Congress intends distinctions between different forms of enforcement under a hybrid statute, it can simply write them into the statutory text."[235] And the proponent of uniformity can often wield alluring *expressio unius* arguments as well. In some hybrid statutes, Congress has specified that particular substantive norms ought to apply differently depending on the remedial setting in which they operate.[236] From these statutes, one might infer that Congress considered—and rejected—the possibility of permitting cross-remedial variations other than those directly manifested by the text itself.[237] It is no surprise then that the Supreme Court recently characterized as "novel" and "dangerous" the idea that "judges can give the same statutory text different meanings in different cases."[238]

Even with respect to statutes, however, it is far from clear that the conceptual claim for uniformity supports a categorical prohibition on substantive variation across remedies. To begin

233. Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2006) (alteration in original), *available at* http://www.harvardlawreview.org/media/pdf/hills.pdf.

234. We can put this conceptual disagreement to the side, I believe, because the pragmatist position that constitutional meaning is always equivalent to constitutional implementation is not likely to accompany the affirmatively non-pragmatist belief that constitutional meaning, so defined, must maintain formal uniformity across remedial boundaries.

235. Sachs, *supra* note 73, at 1031.

236. *See id.* at 1032 (explaining that the Exchange Act possesses "an intent requirement for criminal actions that does not apply to civil actions").

237. *Id.* at 1031.

238. Clark v. Martinez, 543 U.S. 371, 378, 386 (2005).

with, as Professor Jonathan Siegel has shown, the Court's recent admonitions about the "novelty" and "dangerousness" of varying the scope of statutory commands from one context to another are belied by many of its earlier pronouncements, which have attached "multiple meanings" to "a single term or phrase in a single statutory provision" depending on the factual or remedial setting in which it is applied.[239] In addition, notwithstanding the tendency of courts and commentators to associate statutory cases with "interpretative" problems, the "decision rules" insight seems no less applicable to statutory rules than to constitutional rules. With statutes, as with the Constitution, we need not discern any and all variations in the substantive doctrine as registering multiple "interpretations" or "meanings" of a single textual provision; rather, we may characterize them as registering multiple implementation strategies for a provision whose semantic content—or "operative proposition"—remains fixed.[240] And finally, arguments of the "if they'd meant it, they'd have said it" variety have a question-begging quality to them. Congress can just as easily *prohibit* non-uniform enforcement of hybrid statutes as it can *permit* such enforcement, so why should we infer anything at all from the absence of express guidance one way or the other? Rather than speculate as to what Congress did or did not mean to communicate via its failure to articulate how a single statutory provision should apply across remedial boundaries, courts might simply try their best to forge practical doctrinal responses to questions that were in reality unaddressed in the drafting process.

Return to the example of *Plaza Health Laboratories*.[241] The Clean Water Act had prescribed a single definition for a term ("point source") with operative effect in civil and criminal cases.[242] In light of the definition's unitary structure, the skeptical reader might ask, can it really be contended that Congress wanted courts to embrace differing definitions of the term according to nature of the remedy being sought? Framed in these

239. *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 341 (2005); *see also* Aaron Greene Liederman, *Agency Polymorphism*, 61 ADMIN. L. REV. 781 (2009) (exploring similar idea in connection with administrative law).

240. *Cf.* Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 533, 562–72 (2013) (applying framework to courts' enforcement of patent claims).

241. *See* discussion *supra* Part III.D.

242. *See* discussion *supra* Part III.D.

terms, the question may seem to demand a negative answer. But there is another way to conceptualize what the Second Circuit did in the case. The court did not choose one definition of "point source" over another; it simply *applied* an uncertain definition in a way that took into account the heightened set of liberty interests presented by the criminal remedies being sought.[243] Where the definitional guidance "ran out," in other words, the Court resolved the case by reference to contextual features specific to the criminal prosecution before it. In so doing, however, the Court took care to prevent its holding from dictating the outcome of separate cases where these same contextual features were lacking (i.e., civil suits under the Clean Water Act). So construed, the Second Circuit's decision in *Plaza Health Laboratories* ought to seem no more strange or controversial than any number of other "minimalist" judicial decisions, which take care to confine the application of their holdings to the particular set of circumstances that justify the holdings themselves.

B. Administrability Concerns

A more significant objection to the disaggregation strategy sounds in worries about complexity and administrability. On a simplified model of the status quo regime, courts enforce a finite number of rights by way of a finite number of remedies. To evaluate a given claim for relief, they refer first to a discrete body of substantive law, whose content does not formally depend on the remedy being sought, and then to a discrete body of remedial law, whose content does not formally depend on the right being invoked. Adjudicating matters in this way produces substantial informational shortcuts for judges and litigants alike. If the law contains N different rights and M different remedies, courts can handle N x M right-remedy combinations by reference to $N + M$ bodies of law. That is, courts and litigants can sequentially employ a small number of substantive and remedial doctrines (e.g., First Amendment law, Second Amendment law, the law of injunctions, the law of damages) to resolve a much larger number of potential right-remedy requests (e.g., a demand for injunctions as redress for a Second Amendment violation, a demand for damages as a redress for a First Amendment violation, a demand for exclusion as a redress for a Fourth Amendment violation, and so on). If we have

243. *See* Plaza Health Lab., Inc. v. Villegas, 3 F.3d 643, 649 (1993).

ten different substantive rules, enforceable via five different remedial rules, then fifteen bodies of doctrine provide all the guidance we need. In contrast, a fully disaggregated regime could produce as many as fifty different "right-remedy" bodies of law to govern the same set of cases.

At its endmost extreme, my call for disaggregated substantive law would substantially increase the number of different doctrines that judges must create and lawyers must learn. No longer could a request for damages under the First Amendment be resolved by reference to a single cross-remedial rule of First Amendment doctrine and a single transsubstantive rule of § 1983 doctrine. Courts would instead consult a specialized, self-contained area of "First Amendment damages" doctrine, which would exist alongside thousands of other self-contained bodies of "right-remedy" law. It takes no great leap of imagination to envision the confusion, complexity, and frustration that such an arrangement might yield. Is that a price worth paying for the sole sake of mitigating spillover?

Probably not. But we need not frame the issue as presenting an all-or-nothing choice. Instead of asking whether we should permit total disaggregation of the substantive law or no disaggregation at all, we should simply ask whether judges might *sometimes* adapt substantive rules to particular remedial contexts as a means of attacking spillover. The relevant inquiry, in other words, involves the extent to which judges should vary substantive requirements according to remedial demands, rather than the propriety or non-propriety of their doing so on an unrestrained, wholesale basis. Indeed, one of the great virtues of the disaggregation strategy is its ability to accommodate a substantial amount of fine-tuning. One can, for example, disaggregate First Amendment prior restraint law from First Amendment subsequent punishment law, while still ensuring that most key substantive principles of free speech doctrine remain constant across each. And one can tolerate some amount of variance between higher and lower courts in the application of "structural" trial rights, while still adhering to a core set of requirements that both lower courts and higher courts must enforce. Much more so than the "non-disaggregation" strategies discussed in Part II, the disaggregation strategy permits judges to tailor the degree and character of their disaggregating solutions according to the degree and character of the spillover problems they confront. Rather than "missiles to kill mice," the disaggregation strategy offers mousetraps.

The question then becomes how much disaggregation we should tolerate. At its core, this question presents yet another variant on the rules-standards tradeoff.[244] Cross-remedial uniformity in the substantive law promotes simplicity, predictability, low decision costs, and so forth; cross-remedial variation promotes adaptability, nuance, and fewer distortions in the law. How far we want to take the disaggregation strategy depends largely on where we fall on the rules/standards spectrum. The more we like rules, the less we will want to disaggregate; the more we like standards, the more we will look to do so.

My goal here is not to prescribe the optimal degree of disaggregation that the spillover problem demands. Such a prescription—in addition to implicating the deep divides of the rules/standards dilemma—would likely depend on a host of contextual factors that will vary according to the particular rights being disaggregated and the particular remedies across which the disaggregation occurs. That said, fears of chaotic complexity need not compel a complete rejection of disaggregation as an anti-spillover strategy. This is not to say that concerns about elaborateness and unworkability do not matter. No doubt, they reflect an important consideration that any response to the spillover problem must take into account. But these fears are not reasons in themselves to eschew disaggregation altogether.

C. RULE-OF-LAW CONCERNS

A related objection to this project might charge that the disaggregation of substantive norms puts judges on a slippery slope toward the eventual abandonment of important rule-of-law values. Law, it is said, succeeds as a fair and just means of governance when its commands are generally applicable,[245] thus satisfying what Lon Fuller called the "first desideratum of

244. On the omnipresence of rules/standards problems, see generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

245. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 46–48 (1964) (identifying generality as an essential feature of a legal system); Kent Greenawalt, *The Rule of Law and the Exemption Strategy*, 30 CARDOZO L. REV. 1513, 1514 (2009) ("[R]ules must be general, not directed at specific cases . . . ."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) ("[T]he establishment of broadly applicable rules is an essential component of the judicial process . . . .").

a system for subjecting human conduct to the governance of rules."[246] In addition to keeping doctrine administrable and comprehensible, the law's generality helps to ensure that "like parties get treated alike" and that cases get resolved (and evaluated) by reference to objective and non-manipulable criteria, rather than the idiosyncrasies of individual judges. Disaggregating the law, by definition, makes the law's articulation more nuanced, less general, and more context-dependent. As a result, disaggregation might seem unfaithful to the project of having a legal system in the first place.

No one, I suspect, would argue that all forms of cross-remedial disaggregation pose an existential challenge to our legal order. Employing one set of substantive rules for criminal cases and another for civil cases, for example, would reduce the generality of substantive doctrine, but not in a way that would provoke anxieties about the rule of law's collapse. (Criminal and civil cases, after all, have for hundreds of years employed different standards of proof and different *mens rea* rules without the sky falling down.) But "remedies" and "remedial environments" can be defined at higher and lower levels of detail, and the higher the levels of detail become, the less law-like cross-remedial distinctions may begin to look. Simple distinctions across, say, "criminal" and "civil" remedies, or "monetary" and "injunctive" remedies, would inject differentiation into the substantive law without undermining its law-like character. But as the distinctions are defined with greater specificity, the threat to rule-of-law values intensifies. Judges, we might all agree, can safeguard generality while varying the substantive law across cases involving damage awards and cases involving injunctive relief. But what about varying it across cases involving "high" damage awards and cases involving "low" damage awards? Across cases involving "high damage awards sought against poor defendants" and cases involving "high damage awards sought against rich defendants"? Across cases involving "high damage awards sought against poor defendants with insurance" and cases involving "high damage awards sought against poor defendants without insurance"? We could continue this exercise ad nauseam until the operative "remedial environment" of a given case boiled down to little more than its unique set of facts. At that point, judges would no longer be applying "law" in any meaningful sense. Rather, they would be

246. FULLER, *supra* note 245, at 46.

resolving individual cases in accordance with whatever they perceived justice to demand.

The takeaway from this point is not that we give up on the project of alleviating cross-remedial spillover. Rather, it is that courts must recognize some cut-off point to the level of detail at which they distinguish remedies from one another. I cannot say precisely where on the spectrum that cut-off point lies, but it seems to me that we are not yet there. The substantive doctrine of today—which, as we have seen, tends to apply uniformly across even broadly-defined remedial categories—seems capable of absorbing significantly more differentiation across remedies while still maintaining its law-like character. Courts may therefore continue to employ disaggregation strategies in response to the spillover problem without giving rule-of-law proponents much cause for concern.

That being said, the rule-of-law objection does provide reason to temper our expectations about what disaggregation can achieve. Spillover in one form or another will inevitably occur as a consequence of developing generally applicable rules via case-specific adjudication. We can isolate holdings and differentiate across remedial variables so as to limit potential cross-remedial spillover effects. But even when we have done this, the factual particularities of one case might still yield substantive rules that "spill over" into other factual contexts that would not have otherwise produced them. If an especially winsome defendant raises a borderline Fourth Amendment claim, his especially winsome nature might compel a court to vindicate his claim and thereby create a precedent that dictates the outcome of cases against less winsome defendants. An unusually complicated request for injunctive relief might prompt judges to deny recognition of a substantive claim and thereby create precedent governing cases involving simpler injunctive requests.[247] We can keep on trying to cabin the results of these cases to the particular factual settings that produced them, but at some point we will have to resist these urges lest we throw in the towel on maintaining generally applicable rules of law.[248]

247. *Cf.* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 900–05 (2006) (noting ways in which the idiosyncratic features of a single case influence holdings that then govern a wider range of cases).

248. For example, the Court's stipulation in *Bush v. Gore* that its analysis was "limited to the present circumstances," 531 U.S. 98, 109 (2000), has rightly struck many observers as unfaithful to rule-of-law values. *See, e.g.*, Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1380 (2010) (noting that this

This Article, however, has neither promised nor advocated spillover's total eradication. Rather, it has sought to identify a particular form of spillover—spillover across remedies—whose *reduction* seems feasible and worth pursuing. Generality is a good thing. But even in good things we can partake too much. Just because the virtues of generality preclude us from achieving total success in the battle against spillover does not mean that we should give up on achieving any such success at all. To the contrary, as I hope this Article has shown, substantial—though not total—success in the battle against spillover lies within our reach.

D. The Special Problem of Vertical Spillover

Some forms of spillover occur across remedial settings at different levels of the judicial hierarchy. I have suggested, for instance, that trial judges who conduct suppression hearings may be less inclined to invalidate a search *ex post* than magistrate judges would be to prohibit the same search *ex ante*.[249] Similarly, I have suggested that appellate judges may be more reluctant to sustain post-trial allegations of structural error than trial judges confronting such errors as they arise.[250] These forms of "vertical spillover" can be met with disaggregating responses. Courts might invoke exceptions to "higher-level" judicial remedies, such as by denying exclusionary relief to the victims of unlawful searches that are conducted in good faith while making clear that magistrate judges should have never issued a warrant for such searches in the first place. Or they can disaggregate the law more subtly, such as by defining rights in open-ended terms and then emphasizing deference to the substantive determinations of their lower-court counterparts. Either way, courts can confront the risk of vertical spillover by fashioning substantive holdings with limited precedential effects on lower-court adjudication.

But disaggregation in response to vertical spillover presents a special problem. Higher-level courts are supposed to supervise the work of their lower-level counterparts, and vertical disaggregation will undermine their ability to exercise oversight. The more often that higher courts combine loosely defined substantive standards with principles of deference on

language "conveys an impression that the Court's equal-protection analysis rested on partisan preferences rather than neutral principles").

249. *See* discussion *supra* Part I.E.

250. *See* discussion *supra* Part I.D.

review, the more free the rein that lower courts receive to craft and apply the law as they see fit. And, while this free rein has the virtue of reducing spillover across remedies, it also has the vice of inhibiting higher courts' abilities to monitor for erroneous applications of the law below. (The *Gates* standard, for instance, may help to prevent rights-constricting forces of suppression hearings from affecting the law that warrant-issuing magistrates apply, but it also means that magistrates need not worry too much about a reversal of their judgments in subsequent criminal proceedings.)[251] Vertical disaggregation thus implicates a deep and inexorable tension between two conflicting interests: (a) the interest in preventing remedy-based influences unique to higher-court review from constricting the substantive rules that lower courts apply, and (b) the interest in ensuring that lower courts' application of the law is subject to meaningful supervision.

How to balance these two conflicting interests is a difficult question. Its answer sometimes depends on empirical uncertainties. For example, to what extent do trial and appellate judges *actually* suffer from hindsight bias when resolving Fourth Amendment claims? Recent empirical research suggests that judges may be more resistant to the bias than has generally been supposed,[252] in which case the *Gates* standard may require too much deference to magistrate-level probable cause determinations. And, even if we could resolve all the empirical unknowns, the tradeoff may involve areas of deep normative disagreement: For instance, reducing appellate courts' control over trial court-level review of structural errors disaggregates the law not just across the appellate-court/trial-court divide, but also *among* the many different trial courts within an appellate court's jurisdiction. Similar litigants may receive varied judicial treatment, as different trial judges—lacking specific dictates from above—will end up applying different versions of the same substantive protections. The degree to which this outcome strikes us as problematic—and hence, vertical disaggregation as undesirable—will depend on nothing less fundamental than our sense of what it means to receive fair and equal treatment under the law.

Consequently, the case for disaggregation is more tentative as applied to vertical spillover than as applied to horizontal

251. *See* Illinois v. Gates, 462 U.S. 213, 236 (1983) (holding that magistrate determinations "should be paid great deference").

252. *See* sources cited *supra* note 119.

spillover. Happily, though, the sensibility of the vertical disaggregation strategy is a question that may itself be disaggregated. We need not decide, once and for all, whether the costs of vertical disaggregation exceed its benefits. Rather, we may evaluate the strategy on a case-by-case basis, with due attention to the particular substantive norm at issue, as well as the particular remedial environments across which the disaggregation might occur. My hope is that the foregoing discussion, while not rendering a definitive verdict on the vertical disaggregation strategy itself, at least identifies the criteria we should consult when determining whether to disaggregate across vertically situated remedies.

CONCLUSION

The analysis I have offered may strike some readers as beginning from a theoretically dubious premise. On a pragmatic conception of the law, there simply is no meaningful difference between rights and remedies—a right, in other words, counts for no more (and no less) than the bundle of remedies it allows one to invoke, and a remedy counts for no more (and no less) than the bundle of rights that it allows one to enforce.[253] At the end of the day, there are just litigants and judicial actors, and the law is nothing more than a means by which the former get the latter to do things on their behalf. What ultimately matters is the question of how the law—whether articulated in terms of "rights," "remedies," or both—permits courts to flex their muscle against the outside world. Understood in this light, the entire project of trying to respond to cross-remedial spillover within the substantive law might seem doomed from the start. For the project engages with a set of categories that are conceptually empty to begin with.

I take seriously the pragmatists' notion that the right/remedy distinction may not be able to withstand serious theoretical scrutiny. For purposes of this project, however, the conceptual soundness of the right-remedy distinction is beside the point. Whatever its validity, the right-remedy distinction is one around which our doctrinal universe has been organized, and that organizational choice carries important real-world

253. *See* Hills, *supra* note 233, at 179 ("Pragmatism maintains that there is no constitutional meaning apart from the actions that the relevant institution takes to enforce the Constitution."); Levinson, *supra* note 8, at 858 ("There is no such thing as a constitutional right, at least not in the sense that courts and constitutional theorists often assume.").

consequences for the actual content of the law. The pragmatist may be correct, in other words, to suggest that a well-functioning body of law *need* not base itself around formally independent categories such as "rights" and "remedies," and there may well exist more sensible ways of arranging and expressing the rules that govern the resolution of individual cases. But when the law organizes itself around these categories, we must think carefully about the ways in which the arrangement frustrates and facilitates the achievement of desirable judicial outcomes. Attending to the problem of spillover across remedies provides a means of doing just that.