COLUMBIA LAW REVIEW
SIDEBAR

VOL. 109 **AUGUST 18, 2009** **PAGES 82–91**

MELENDEZ-DIAZ V. MASSACHUSETTS, *RODRIGUEZ V. CITY OF HOUSTON*, AND REMEDIAL RATIONING

Jennifer E. Laurin[*]

On June 25, 2009, the civil rights case of *Rodriguez v. City of Houston* concluded with a historic verdict in the Southern District of Texas, finding that pervasive deficiencies in the City's police crime laboratory had caused George Rodriguez to be wrongly convicted on the basis of fabricated scientific evidence.[1] That same day, the Supreme Court held in *Melendez-Diaz v. Massachusetts* that the Sixth Amendment prohibits the prosecution in a criminal case from placing crime laboratory reports into evidence in lieu of live testimony by the crime lab analyst.[2]

Though litigated in the distinctive realms of civil and criminal adjudication, both cases directly engaged current policy debates surrounding the use and misuse of forensic science in criminal investigations. Justice Scalia's opinion for the Court in *Melendez-Diaz* observed: "'[B]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.'"[3] This account of scientific testimony's systemic vulnerability to fraud echoed the very theory of liability considered by the *Rodriguez* jury, summarized in the plaintiff's closing statements:

> [Y]ou are trying to work on this crushing caseload . . . your technical skills are not what they're supposed to be. You're messing up on your proficiency tests, and you're not being

* Assistant Professor, The University of Texas School of Law. From 2006 to June 2009 I was an associate at Cochran Neufeld & Scheck, LLP, and one of the attorneys representing Mr. Rodriguez.

1. See generally Special Verdict Form, Rodriguez v. City of Houston, No. H 06-2650 (S.D. Tex. June 25, 2009), 2009 WL 1978620. The five million dollar verdict against the City of Houston was, to the author's knowledge, the first ever finding of municipal liability for constitutional violations attributable to forensic misconduct.

2. 129 S. Ct. 2527, 2532 (2009), available at http://www.supremecourtus.gov/opinions/08pdf/07-591.pdf (on file with the *Columbia Law Review*).

3. Id. at 2536 (quoting Nat'l Research Council of the Nat'l Acads., Strengthening Forensic Science in the United States: A Path Forward 23–24 (2009)).

> trained in a [sic] better, faster more accurate serology techniques used to do your job. And then, one of the detectives, or maybe one of the prosecutors, "I need your results. We got . . . Rodriguez in custody." And you look at your work and you realize that maybe the serology doesn't implicate the suspect, but there's all that other evidence your fellow police colleagues have developed. You could redo the work—there's another month of waiting at least or you can fudge—you can tailor the results. What's the real harm? He's guilty anyway, isn't he?[4]

The decisions emerge from different remedial contexts—*Rodriguez* a civil damages action, *Melendez-Diaz* a criminal appeal—but both have the potential to generate systemic incentives for law enforcement in the use of forensic science.[5] Increasingly, the Supreme Court has recognized this dual role of both criminal and civil remedies in vindicating criminal procedure rights and, in turn, regulating law enforcement practices. At the same time, however, the Court's harnessing of constitutional criminal procedure's regulatory effects has been stilted by what I call "remedial rationing," in which enforcement of a given criminal procedure right is committed *either* to the criminal *or* the civil realm. This Essay posits that remedial rationing is misguided both in underestimating the structural limitations of criminal and civil litigation to achieve regulatory goals, and in disregarding potential synergies that may be generated by recursive criminal procedure remedies. Part I of this Essay briefly describes remedial rationing. Parts II and III reflect on both the potential and the limitations of the *Melendez-Diaz* and *Rodriguez* decisions for prospectively shaping law enforcement conduct in the specific area of forensic science. The discussion demonstrates that systemic consequences of criminal or civil adjudication of criminal procedure rights are uncertain but potentially coordinate. Part IV concludes with a preliminary critique of remedial rationing in light of the lessons of *Melendez-Diaz* and *Rodriguez*.

I. REMEDIAL RATIONING IN CRIMINAL PROCEDURE

Two interrelated trends can be gleaned from the Supreme Court's recent criminal procedure jurisprudence. One is an increased recognition that enforcement of criminal procedure rights is effectuated both by defendants in criminal proceedings as well as by plaintiffs in civil

4. Transcript of Record at 6-1410, *Rodriguez*, No. H 06-2650 (on file with the *Columbia Law Review*).

5. See, e.g., Pamela S. Karlan, The Paradoxical Structure of Constitutional Litigation, 75 Fordham L. Rev. 1913, 1915–16 (2007) (describing constitutional litigation in defense of criminal prosecution and through affirmative civil claims as dual mechanisms for setting conduct incentives for government actors); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 22–53 (1997) (discussing structural interplay among criminal procedure rights, substantive criminal law, and behavior of criminal justice actors).

actions under federal remedial schemes—chiefly, 42 U.S.C. § 1983.[6] Yet this recognition of multiple mechanisms for enforcing criminal procedure rights has been accompanied by a move to cabin enforcement within one remedial context or another—an approach I call "remedial rationing."

The logic of remedial rationing has been most prominently deployed in the context of Fourth Amendment claims, where restrictions on remedies in criminal litigation is increasingly justified by the purported availability of civil suits under § 1983. Thus, *Hudson v. Michigan* held that the exclusionary rule was not a constitutionally required remedy for violations of the Fourth Amendment "knock-and-announce" rule; the asserted availability of federal civil rights suits was, in the Court's view, an adequate mechanism to deter unconstitutional police entry.[7] More subtly, the Court has also refashioned remedial doctrine to make the burdens of proof for criminal defendants and civil rights plaintiffs essentially identical, thus effectively streamlining two potential remedial routes into one. This approach was highlighted this term in *Herring v. United States*, which collapsed the criteria for invoking the exclusionary rule in a criminal trial into the burden of proof for civil rights claims against localities or police departments: In both instances a "widespread pattern of violations" must be shown in the jurisdiction.[8]

But remedial rationing is not limited to Fourth Amendment litigation. In *Polk v. Dodson*, the Court held that public defenders may not be sued for Sixth Amendment deprivations as "state actors" under 42 U.S.C. § 1983, noting the availability of alternate remedies for ineffective assistance of counsel: either state malpractice claims or habeas relief.[9] Justice Kennedy's partial concurrence in *Chavez v. Martinez*, which rejected an arrestee's § 1983 claim for his interrogators' failure to administer *Miranda* warnings, reasoned that "[t]he exclusion

6. See Pearson v. Callahan, 129 S. Ct. 808, 821–22 (2009) (noting most constitutional issues raised in § 1983 cases are also raised in criminal cases). This term the Court decided five civil rights cases stemming from criminal investigations or prosecutions. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009); Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009); Pearson v. Callahan, 129 S. Ct. 808 (2009). Only one such case was heard in the 2007 term. Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008). Three were decided in the 2006 term. Los Angeles County v. Rettele, 550 U.S. 609 (2007); Scott v. Harris, 550 U.S. 372 (2007); Wallace v. Kato, 549 U.S. 384 (2007).

7. 547 U.S. 586, 596–99 (2006); see also Nix v. Williams, 467 U.S. 431, 446 (1984) (following similar rationale to preclude application of exclusionary rule to Sixth Amendment counsel violations); Guzman v. City of Chicago, 565 F.3d 393 (7th Cir. 2009) (observing that "in some ways it is easier to protect Fourth Amendment rights through civil actions, rather than through" the exclusionary rule).

8. Compare Herring v. United States, 129 S. Ct. 695, 704 (2009) (holding that denial of motion to suppress was correct where no systemic errors in warrant system were shown), with Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 407–08 (1997) (noting that "a pattern of tortious conduct" may establish deliberate indifference necessary for finding of municipal liability).

9. 454 U.S. 312, 325 & n.18 (1981).

of unwarned statements . . . is a complete and sufficient remedy."[10]

Thus a trend emerges: Where criminal and civil litigation both afford mechanisms for enforcing criminal procedure rights, the Court is likely to channel enforcement into one regime or the other. Moreover, the Court appears to embrace remedial rationing in full cognizance of the regulatory implications of criminal procedure rights, viewing alternative rather than recursive remedies as generally adequate to deter undesirable law enforcement conduct.

A number of factors may explain this dynamic. Raw realism suggests that remedial rationing reflects a fundamental hostility toward enforcement of criminal procedure rights that has pervaded the post-Warren Court. A more charitable reading of the Court's decisions might identify legitimate institutional cost concerns driving the rationing approach. The Fourth Amendment provides the classic example: The exclusionary rule's detractors, focused on the cost of lost opportunities to prosecute blameworthy individuals, have employed rationing to cabin the criminal remedy while still purporting to achieve deterrent effects through civil enforcement.[11] Whatever the rationale—a question warranting fuller assessment than this brief Essay affords—remedial rationing overstates the regulatory promise of criminal and civil remedies in isolation, and underappreciates the advantages of a recursive remedial regime. This is illustrated by the *Melendez-Diaz* and *Rodriguez* cases.

II. *MELENDEZ-DIAZ*

The right of confrontation announced in *Melendez-Diaz* will surely have a range of varied and mutually-reinforcing systemic consequences.[12] Here let us evaluate only the claim that the right to confront crime laboratory analysts, enforced by the threat of a lost prosecution, will systemically deter bad practices in forensic science.

Borrowing criminal law terminology, the arguments in favor of this position sound in "specific deterrence" and "general deterrence." Specific deterrence operates at the level of individual prosecutions: The right of confrontation might deter prosecutors from introducing weak or faulty evidence at any given trial; threat of cross-examination may deter a given analyst's impetus to falsity or even negligence.[13] General

10. 538 U.S. 760, 790 (2005) (Kennedy, J., concurring in part and dissenting in part).

11. See, e.g., *Nix*, 467 U.S. at 445 (noting exclusionary rule would "wholly fail[] to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice").

12. See generally Stuntz, supra note 5 (describing effects of judicial intervention in criminal procedure).

13. See, e.g., Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 10, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (No. 07-591), 2008 WL 2550612 [hereinafter NACDL Amicus] (advocating confrontation right as creating "ex ante incentive" for prosecutors to "look preemptively" for problematic scientific evidence); Brief for the National Innocence Network as Amicus

deterrence concerns the impact of the confrontation right beyond a specific criminal case: Prosecutors anticipating cross-examination might increase their vetting of forensic science evidence and witnesses; discredited forensic methodologies vulnerable to cross-examination (for example, bullet-lead analysis[14]) might fall into disuse.

But deterrence of any sort depends upon enforcement's *adequacy* and *effectiveness*. The right of confrontation must be invoked frequently enough to affect incentives, and the enforcement mechanism—cross-examination, or loss of a prosecution—must effectively expose poor science or spur better forensic science practices. The ability of criminal adjudication to deter bad forensic science practice is hampered on both scores.

As for adequacy, confrontation can only occur at trial—an increasingly rare occurrence.[15] In addition, the right will not always be invoked—either for tactical considerations by the defense[16] or as a symptom of poor or underfunded defense advocacy.[17] Some deterrent effects might nevertheless be generated. Prosecutors want to win those cases that are tried, and the lack of ability to predict ex ante when confrontation rights will be invoked might prompt wholesale efforts to improve analytical and testimonial practices. Or the defense bar, armed with the confrontation right, might devote more attention to training or information sharing on cross-examination of forensic scientists.[18] Perhaps. But perhaps more likely is that, instead of investing time and

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Curiae Supporting Petitioner at 17, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2008 WL 2550614 [hereinafter Innocence Network Amicus] ("[E]xaminers who realize there is a possibility their work—or lack thereof—will be subjected to adversarial scrutiny can be expected to think twice before making up results and tests from scratch").

14. See Innocence Network Amicus, supra note 13, at 10 (describing report finding that "courtroom testimony claiming bullet fragments could be matched to a particular box of ammunition was so overstated that it was misleading under the rules of evidence").

15. Only about five percent of all criminal convictions result from a trial. See Bureau of Justice Statistics, U.S. Dep't of Justice, Compendium of Federal Justice Statistics 59 (2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0404.pdf (on file with the *Columbia Law Review*) (stating that in 2004 ninety-six percent of federal felony convictions arose from pleas); Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Online, tbl. 5.46.2004 (2004), available at http://www.albany.edu/sourcebook/pdf/t5462004.pdf (on file with the *Columbia Law Review*) (reporting that in 2004 ninety-five percent of state felony convictions were obtained through pleas).

16. See Innocence Network Amicus, supra note 13, at 31 ("[T]he accused will often choose to forego confrontation entirely, rather than drive home in front of the fact-finder the accuracy and reliability of the scientific evidence against him"); see also *Melendez-Diaz*, 129 S. Ct. at 2540 & n.10 (noting assumption that "every defendant will . . . demand the appearance of the analyst" is "wildly unrealistic").

17. See Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 10–11, 89–90 (2009) (noting lack of cross-examination by defense attorneys and lack of funding for defense experts as factors in forensic science fraud in criminal prosecutions).

18. Professional organizations such as the National Association for Criminal Defense Lawyers, and well-respected public defender organizations such as D.C.'s Public Defender Service offer such training programs.

political capital in greater oversight of crime laboratory practices and testimony, police and prosecutors will simply reduce reliance on scientific evidence altogether. In a universe of more crime than there is time to investigate and prosecute, law enforcement might swap low-science (think property crimes) for high-science (think DUI) cases. Prosecutors might also sweeten plea deals in drug cases to avoid trials. Whether such responses would be "good" or "bad" is debatable. But certainly, they thwart *Melendez-Diaz*'s potential to generate systemic incentives for improved forensic science.

These substitution effects also, of course, hamper "effectiveness" to the extent that the right of cross-examination triggers work-arounds rather than changes in forensic science practice. Additionally, where cross-examination does occur, its actual utility as a mechanism for exposing flaws in forensic science is suspect. Consider the anecdotal data. The *Melendez-Diaz* dissent pointed to six jurisdictions that already required "confrontation of the results of routine scientific tests or observations."[19] Two, Texas and Mississippi,[20] have seen some of the most serious instances of forensic science fraud. In Texas, Houston's police crime lab suffered decades-long deficiencies which were finally uncovered in an independent investigation commissioned by the city in 2005, long after the Texas Court of Criminal Appeals mandated confrontation.[21] And in Mississippi the controversial "bite mark" opinions of the forensic dentist Michael West were given subject to the scrutiny of cross-examination.[22]

Further permutations of potential systemic consequences of *Melendez-Diaz* could be posed. But these examples suffice to illustrate that, while some adjustments will surely occur in the aftermath of *Melendez-Diaz*, a systemic realignment of incentives in support of improved forensic science practices is far from assured.

III. *RODRIGUEZ*

For George Rodriguez, neither the constitutional prohibition

19. *Melendez-Diaz*, 129 S. Ct. at 2560 app. B (Kennedy, J., dissenting) (listing Idaho, Mississippi, South Carolina, Texas, Utah, and Wisconsin as states taking "minority view" that "state hearsay rules . . . require confrontation of the results of routine scientific tests or observations of medical personnel").

20. Id.

21. See Cole v. State, 839 S.W.2d 798, 806 (Tex. Crim. App. 1990) (holding report of crime lab analyst was inadmissible hearsay in criminal trial); Roma Khanna & Steve McVicker, Doubt Cast on Hundreds More Cases From HPD Lab, Houston Chron., June 14, 2007, at 1.

22. See Spears v. State, 241 So. 2d 148, 149 (Miss. 1970) (holding doctors' hearsay testimony concerning lab analysts' results in criminal trial violated right of confrontation); Radley Balko, Indeed, and Without a Doubt, Reason Online, Aug. 2, 2007, at http://www.reason.com/news/show/121671.html (on file with the *Columbia Law Review*) (discussing unreliability of forensic odontology generally and allegations concerning fraudulent testimony of West, who claims to link bite marks to teeth of criminal defendants).

against fabricated evidence nor cross-examination at trial deterred or uncovered the false scientific testimony that led to his conviction.[23] His verdict may remediate the damages he personally suffered through prosecution and imprisonment, but will it deter poor or fraudulent forensic science practices in the future?

Supporters of the notion that civil rights suits may be mechanisms for systemic change assert that damages actions "can induce the government to change its policies to avoid further liability."[24] To be sure, a variety of factors call into question the operation of "specific deterrence" as the term is defined above. For example, significant time lags between the rights violation and the civil suit—a factor in *Rodriguez* and other actions by former defendants who must obtain vacatur of their convictions before bringing suit—limit the effect of a verdict on those actually responsible for the flawed practices or policies at issue. Nevertheless, general deterrence may be possible. As a consequence of the *Rodriguez* verdict, Houston is on notice that inadequacies in oversight of its crime laboratory may trigger significant monetary outlays as well as negative political exposure.[25] Notably, Houston is currently debating a proposal to establish a regional crime lab that is independent from law enforcement control, and there has been significant wrangling over the City's commitment to continue to support the crime lab reforms that were recommended by its independent investigator.[26] Costs are undoubtedly at the forefront of these debates, and the *Rodriguez* verdict might add decisive fiscal and political heft to the reform side of the balance sheet.

But, as with criminal litigation, civil rights actions are vulnerable to scrutiny on grounds of both adequacy and effectiveness. From the standpoint of adequacy, suits like Mr. Rodriguez's are difficult to bring and difficult to win. Government officials enjoy an array of immunities from suit, with special consequences in the arena of criminal justice: Not only do police, like all officials, possess "qualified" immunity for "reasonably" inflicted constitutional deprivations, but prosecutors and judges are absolutely immune from liability for essentially all trial-based constitutional harm.[27] Proving municipal liability is an equally daunting

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23. See supra note 1 and accompanying text.

24. See Karlan, supra note 5, at 1918.

25. Indeed, principles of collateral estoppel might permit the *Rodriguez* judgment, or at least portions of the jury's findings, to be used offensively by other individuals who suffered constitutional violations as a result of crime laboratory findings or testimony.

26. Laurie Johnson, Houston Longs for Regional Crime Lab, KUHF-Houston Public Radio News, June 17, 2009, at http://app1.kuhf.org/houston_public_radio-news-display.php?articles_id=1245274030 (on file with the *Columbia Law Review*); Khanna & McVicker, supra note 21.

27. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding government officials performing discretionary functions are not liable for civil damages if their conduct does not violate clearly established rights of which reasonable person would have known); Imbler v. Pachtman, 424 U.S. 409, 418–19 & n.12, 431 (1976) (noting common law absolute immunity of judges was preserved under § 1983 and holding prosecutors enjoy absolute immunity under § 1983 in initiating and presenting state's case).

task. A plaintiff must establish not only a constitutional deprivation, but also, generally, that the violation was deliberate *and* that the municipality caused or deliberately failed to act to prevent the violation.[28] These standards are high, the burden of meeting them requires extensive and expensive discovery, and plaintiffs rarely prevail.[29] Moreover, many "victims" of bad forensic science in the criminal justice system will simply be unsuitable plaintiffs: Those who remain convicted are unable to bring suit;[30] and those whose convictions were vacated for procedural violations but who cannot establish innocence will not have provable damages for their incarceration. The small pool of available "private attorney[s] general"[31] and low odds of success mean that suits like Mr. Rodriguez's, standing alone, cannot be relied upon to deter poor forensic science practice.

Where viable civil rights claims exist, however, their *effectiveness* may be questioned. Some have challenged the assertion that municipalities respond to civil rights verdicts like private rational actors, enacting reforms that are less costly than adverse judgments.[32] The *Rodriguez* case highlights certain aspects of this critique. For example, what size civil verdict is necessary to prompt Houston to take proactive measures in regard to its use of forensic science in criminal investigations? It is difficult, perhaps impossible, to know whether Houston's policymakers view Rodriguez's five million dollar verdict as a cost worth avoiding or one they are willing to budget—particularly upon comparing the political palatability of a court-ordered payment to an innocent man with expenditures on reform proposals aimed, in some measure, to benefit criminal defendants.

Additional factors no doubt affect the ability of lawsuits like *Rodriguez* to generate incentives for law enforcement's use of forensic science. The above points begin to illustrate, however, that while civil rights litigation may fare better than criminal adjudication in the category of "general deterrence," civil suits standing alone are far from predictable mechanisms for shaping law enforcement conduct.

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28. See, e.g., City of Canton v. Harris, 489 U.S. 378, 388–91 (1989) (announcing "deliberate indifference" standard for municipal liability); Daniels v. Williams, 474 U.S. 327, 335–36 (1986) (holding due process clause does not afford remedy for negligent conduct of city official).

29. See Karlan, supra note 5, at 1920 (describing burden of proving municipal liability).

30. See Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (holding § 1983 plaintiff challenging conviction or imprisonment must show conviction or sentence was reversed, expunged, declared invalid, or called into question by issuance of writ of habeas corpus).

31. City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) ("Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit 'does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest importance.'" (quoting H.R. Rep. No. 94-1558, at 2 (1976)) (additional internal quotation marks and citation omitted)).

32. See, e.g., Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. Chi. L. Rev. 345, 347 (2000) (arguing "government actors respond to political, not market, incentives").

IV. ASSESSING REMEDIAL RATIONING

The above-discussed prospects for the *Melendez-Diaz* and *Rodriguez* cases, though necessarily preliminary, form the foundation for a critique of the Court's remedial rationing approach to criminal procedure rights. Let us lay to one side the interest of individual litigants in remedies for constitutional violations (exclusion or reversal in the criminal context, damages on the civil side), and consider only the consequences of remedial rationing for regulating law enforcement. I conclude that rationing overlooks the structural limitations of each remedy for generating systemic incentives in isolation, and that it diminishes the potential for positive synergistic effects between the criminal and civil remedial realms.

The first point has been amply illustrated by the above discussion of the variety of ways in which criminal and civil enforcement of criminal procedure rights might fall short of deterring undesirable law enforcement conduct. The claim that the two remedies together might have synergistic effects warrants further comment. The above discussion suggests that criminal litigation, while perhaps unlikely to generate predictable *general* deterrence, possesses comparative advantages over civil litigation in the realm of *specific* deterrence: Constitutional violations are remedied relatively contemporaneously, and the consequences of the remedy are fairly likely to fall directly on the actors most immediately involved in the deprivation. Additionally, in the aggregate, criminal adjudication of criminal procedure guarantees is a relatively cheap mechanism for generating data about law enforcement conduct in a given jurisdiction.

On the flip side, we might plausibly suppose that civil litigation provides a superior mechanism for *general* deterrence. Even setting aside questions about the economic incentives actually created by civil damages,[33] civil rights suits have the capacity to generate *political* incentives for prospective reform. Significant verdicts or settlements have the potential to generate media and public interest; the fact that the litigant is a civil plaintiff with a plausible claim to victimization rather than a criminal defendant obtaining relief on a "technicality" only enhances the comparative advantage of civil rights litigation in resonating with popular sentiment. The process of litigation often generates public data, sheds public light on government practices, or, as illustrated by the previously quoted *Rodriguez* closing statements,[34] generates a roadmap for reform. Indeed, even the threat of litigation may be seen as a political pressure point: Municipalities subject to suit might proactively address questionable practices in the aftermath of alleged misconduct in order to recapture a moral high ground or prevent current policymakers from exacerbating liability through

33. See, e.g., id. at 361–62 (arguing accuracy of private firm logic of cost-benefit analysis as applied to municipalities is speculative at best).

34. See supra note 4 and accompanying text.

ongoing "deliberate indifference" to constitutional violations.[35]

Thus criminal and civil remedies potentially generate coordinate advantages. But they are also *interdependent* in critical respects that are defeated by remedial rationing. For example, the Court advanced the view in *Herring* that application of the exclusionary rule might be limited to instances where a pattern of Fourth Amendment violations could be shown—a standard that tracks the showing required for municipal liability under § 1983.[36] Yet in the absence of any criminal *remedy* for the assertion of a Fourth Amendment violation, there is no incentive for defendants to litigate the issue; lack of adjudication of the right in the criminal context curtails the data collection that is required ever to meet the "pattern of violations" standard in the civil context.

In short, *both* remedial opportunities are systemically important in generating ex ante norms and incentives for law enforcement actors, and in deterring policymaker inaction, particularly in regard to constitutional protections that primarily benefit those without political leverage, i.e., criminal defendants. The choice between developing and enforcing criminal procedure rights *either* in criminal adjudication *or* in civil rights actions would likely create a suboptimal quantity and quality of legal development and enforcement.

CONCLUSION

This brief tour has not touched on institutional and constitutional issues raised by the Court's cabining of congressionally created civil rights remedies, nor has it considered what principles, if any, *should* guide a court in limiting adjudication to one or another remedial regime. These and other aspects of remedial rationing warrant further inquiry, including beyond the substantive arena of criminal procedure. Nevertheless, preliminary conclusions are borne out by the foregoing analysis. The prospects for the *Rodriguez* and *Melendez-Diaz* cases to generate positive systemic incentives for law enforcement are fundamentally intertwined—a dynamic which, I assert, pertains to criminal procedure remedies more generally. The Court's current trend toward remedial rationing in criminal procedure would decouple that regulatory dynamic. Such a parsimonious regime of constitutional litigation is misguided.

Preferred Citation: Jennifer E. Laurin, Melendez-Diaz v. Massachusetts, Rodriguez v. City of Houston, *and Remedial Rationing*, 109 COLUM. L. REV. SIDEBAR 82 (2009), http://www.columbialawreview.org/Sidebar/volume/109/82_Laurin.pdf.

35. See, e.g., Larez v. City of Los Angeles, 946 F.2d 630, 645 (9th Cir. 1990) (holding policymaker's inadequate response to constitutional violation may provide basis for finding of deliberate indifference and collecting other cases so holding).

36. See supra note 8 and accompanying text.